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(2022)05ILR A9
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 30.05.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Appeal No. 36 of 2009

Israfeel ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
J.N. Singh, Avdhesh Kumar Singh Yadav, Manendra Nath Rai, Shraddha Tripathi, Vijay Prakash Srivastava

Counsel for the Opposite Party:
G.A.

A. Criminal Law -Code of Criminal Procedure,1973-Section 374(2) - Indian Penal Code,1860-Sections 364, 302 & 201-challenge to-conviction-broad day light murder-strong motive to commit the murder-appellant has done to death the deceased in a brutal manner, by stabbing him with bodkin (sooja) on his neck-as per medical report injuries could be attributable by bodkin (sooja)-statements of eye-witnesses, PW1, PW2 & PW3 fully supported the prosecution story-there was previous enmity between the appellant and the deceased about which an FIR was lodged earlier, it shows clear motive on the part of the appellant to commit the murder of the deceased-the order passed by trial court convicting the appellant for offence in question is upheld.(Para 1 to 55)

B. It is a settled principle of law that the evidence tendered by the related or interested witness cannot be discarded on that ground alone. However, as a rule of prudence, the Court may scrutinize the evidence of such related or interested witness more carefully. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one. (Para 43)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Namdeo Vs St. of Mah. (2007) 14 SCC 150 : (2009) 1 SCC (Cri) 773,

2. Ilangovan Vs St. of T.N. (2020) 10 SCC 533

3. Sudhakar Vs St. (2018) 5 SCC 435

4. C.Muniappan Vs St. of T.N. (2010) 9 SCC 567

5. Bhagwan Singh Vs The St. of Har.(1976)AIR SC 202

6. Rabindra Kumar Dey Vs St. of Ori. (1977) AIR SC 170

7. Syad Akbar Vs St. of Karn. (1979) AIR SC 1848

8. Khujji @ Surendra Tiwari Vs St. of M.P. (1991) AIR SC 1853

9. St. of U.P. Vs Ramesh Prasad Misra & anr.. (1996) AIR SC 2766

10. Balu Sonba Shinde Vs St. of Mah. (2002) 7 SCC 543

11. Gagan Kanojia & anr.. Vs St. of Punj. (2006) 13 SCC 516

12. Radha Mohan Singh @ Lal Saheb & ors.. Vs St. of U.P.(2006) AIR SC 951

13. Sarvesh Naraian Shukla Vs Daroga Singh & ors. (2008) AIR SC 320 Subbu Singh Vs St. (2009) 6 SCC 462

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

1. The appellant- **Israfeel** and co-accused Kamil and Manjoor were tried by Additional Sessions Judge/ Fast Track Court No.2, Bahraich in Sessions Trial No. 58 of 2001 : *State Vs. Israfeel and Ors.*, arising out of Case Crime No. 115 of 2000, under Sections 364, 302, 201 I.P.C., police station Baundi, District Bahraich.

2. Vide judgment and order dated 18.11.2008 passed in Sessions Trial No. 58 of 2001, the Additional Sessions Judge/ Fast Track Court No.2, Bahraich, acquitted the co-accused persons, Kamil and Manjoor, giving benefit of doubt, for the offence punishable under Section 364/34, 302/34, 201 I.P.C. but convicted and sentenced the convict/ appellant- Israfeel in the manner as stated herein below :-

"i. Under Section 302 I.P.C. to undergo imprisonment for life with fine of Rs.2,000/- and in default of payment of fine to further undergo one year of additional simple imprisonment;

ii. Under Section 364 I.P.C. to undergo rigorous imprisonment of ten years with a fine of Rs.1,000/- and in default of payment of fine to further undergo six months of additional simple imprisonment; and

iii. Under Section 201 I.P.C. to undergo rigorous imprisonment of five years with a fine of Rs.1,000/- and in default of payment of fine to further undergo six months of additional simple imprisonment."

All the sentences were directed to run concurrently.

3. Feeling aggrieved by his conviction and sentence vide aforesaid judgment and order dated 18.11.2008, convict/ appellant, **Israfeel,** preferred the above-captioned appeal before this Court.

4. It is pertinent to mention that State of U.P. has not filed any appeal against acquittal of co-accused persons, Kamil and Manjoor, for the offence punishable under Section 364/34, 302/34, 201 I.P.C.

5. As per the prosecution case, the informant Ibrahim (P.W.1), who is the brother of deceased Rashid, had lodged F.I.R., presenting written report (Ext. Ka.1) on 17.11.2000 at police station Fakarpur, district Bahraich, alleging therein that on 17.11.2000, at around 1:30 p.m., when he had gone for *Namaz* at Dhakerwa Mosque, Rahmulla (P.W.3), son of Gulam, resident of his village, came at Dhakerwa Mosque and informed him that his brother Rashid (deceased) was caught hold by Israfeel (convict/appellant) and two other persons accompanied with Israfeel (convict/ appellant), pierced bodkin (*sooja*) in the throat of his brother (deceased Rashid) and also took away his brother (deceased) on a bicycle. The said incident was also witnessed by one Lalta, (brother of C.W.1 Samwali Prasad), son of Saktu and his brother Naseem (P.W.2), son of Kallu, resident of Natthupur Mauja Dhakerwa, and many other people of the village. After *Namaz* when *Imam* (priest) got up, he immediately went to village Nandval and from P.C.O. of one Ramesh Gupta, he telephonically informed about the aforesaid incident to police station Baundi and police station Fakarpur and also asked for help. Thereafter, he sent his men all around the area in search of his brother (deceased Rashid). However, when he reached village Fakarpur after chasing he saw that Israfeel (appellant) had run away, after throwing his brother Rashid (deceased) in a pond near Ramleela ground. The dead body of his brother Rashid (deceased) was lying in the pond.

6. The written report (Ext Ka.1) was got scribed by informant Ibrahim (P.W.1) by a person outside the police station Fakarpur and after affixing his signature

thereon, reached the police station Fakarpur and lodged F.I.R.

7. The evidence of P.W. 5-Constable Moharrir Sudhir Kumar Tiwari shows that on 17.11.2000, he was posted as Constable Moharrir at police station Fakarpur. On the said date, at around 4:30 p.m., on the basis of written report (Ext. Ka.1) submitted by Ibrahim (P.W.1) at police station Fakarpur, he registered Case Crime No. Nil/2000 under Section 302 I.P.C at police station Baundi. He proved the chik F.I.R. (Ext. Ka.3) and G.D. (Ext. Ka.4).

8. The evidence of P.W.6- S.S.I. Shri Malkhe Dixit shows that the investigation of the case was conducted by Sri Virendra Singh Yadav, who subsequently died. In his examination-in-chief, P.W.6 had deposed before the trial Court that on the date of the incident, i.e. 17.11.2000, he was posted as Sub-Inspector at police station Fakarpur and on the said date, at 4:30 p.m., he conducted "Panchayatnama' of dead body of the deceased Rashid. He sent the dead body of the deceased for post-mortem in a sealed condition. He proved the "Panchayatnama' (Ext. Ka.5). He seized the weapon of assault, i.e. iron bodkin (*sooja*), under a recovery memo (Ext. Ka.7). He further deposed that he was acquainted with the handwriting and signature of the Investigating Officer of the case, Sri Virendra Singh Yadav, who died. The recovery memo (Ext. Ka. 8) pertaining to blood soaked soil and plain soil was in the handwriting and signature of the Investigating Officer of the case, Virendra Singh Yadav. He proved the photo lash (Ext. Ka.9), site plan (Ext. Ka. 10, Ext. Ka. 11, Ext. Ka.12), and charge-sheet Nos. 96/2000 (Ext. Ka.13) and 96-A of 2000 (Ext. Ka. 14) prepared by the Investigating Officer Sri Virendra Singh Yadav.

P.W.6 had further deposed that he sent the letter to C.M.O. for post-mortem (Ext. Ka. 15), Form No.33 (Ext. Ka. 16), letter to R.I. (Ext. Ka.17), specimen seal (Ext. Ka.18, Ext. Ka.19) under his handwriting and signature. He also proved the weapon of assault, i.e. blood stained bodkin (*sooja*) (Ext. Ka. 3) as well as blood stained pants of the appellant- Israfeel (Ext.-4).

In his cross-examination, P.W.6 had deposed before the trial Court that in the year 2000, he was posted at police station Fakarpur. F.I.R. related to deceased Rashid was registered at his police station Fakarpur. The information about the death of deceased Rashid came to his knowledge from the written report submitted by Ibrahim (P.W.1). In the written report of Ibrahim (P.W.1) it was also mentioned that dead body of deceased Rashid was thrown by appellant Israfeel in the pond situated in Ramleela ground (Fakarpur Market). When he reached at the spot (near the dead body), he did not find accused/appellant Israfeel there.

P.W.6 had further deposed that accused Israfeel was found on the way before he reached near the dead body. The appellant was arrested and sent to police station. The blood stained bodkin (*sooja*) was recovered on the spot. A lot of blood was present on the body of the convict/appellant when he was arrested. At first glance, appellant Israfeel seemed to be as an accused. On being asked, he (appellant) told his name as Israfeel. He recovered bodkin (*sooja*) from the right hand of accused/ appellant Israfeel in midway and he prepared memo (Ext. Ka. 6) of the recovered bodkin (*sooja*), on the spot of recovery. He admitted the fact that in the recovery memo of bodkin (*sooja*) (Ext. Ka-6), which was in his handwriting and signature, the place of recovery of bodkin

(*sooja*) and place of arrest of the accused/appellant has not been mentioned. The first witness of the memo was Subhash Chandra Verma, resident of village Dhakerwa, whereas second witness of memo was Sanwali Prasad (C.W.1), resident of Saktupur, police station Baundi. There were no witnesses of this memo belonging to Fakarpur market, as he made the people as witness whom he met on the spot. The deceased Rashid was resident of village Dhakerwa and was real brother of informant Ibrahim (P.W.1). There was no signature of any Constable on the recovery memo of bodkin (*sooja*), however, on the memo of bodkin (*sooja*) (Ext. Ka-6), his signature was there (P.W.6), Subhash Chandra and Sanwali (C.W.1). He denied the suggestion that he prepared recovery memo Ext. Ka-6 at the instance of the informant and other witnesses.

P.W.6 had further deposed that in the memo of clothes (Ext. Ka-7), there were signatures of witnesses Uttam Kumar and Ali Hasan, residents of village Natthupur police station Baundi, however, there was no signature of any constable on it. There were different witnesses of the memo of bodkin (*sooja*) dated 17.11.2000 and memo of clothes dated 17.11.2000. The witnesses were resident of police station Baundi. He further deposed that though he prepared memos Ext. Ka-6 and Ext. Ka-7 but when he prepared Ext. Ka-6, no crime number was marked on the F.I.R relating to the incident.

P.W.6 had further deposed that "Panchayatnama' (Ext. Ka-5) was in his handwriting but case crime number was not mentioned on it. All the witnesses of "Panchayatnama' were residents of village Natthupur, Dhakerwa, police station Baundi. The "Panchayatnama' was prepared on the spot.

9. The post-mortem of dead body of Rashid (deceased) was conducted on 18.11.2000 at 03:15 p.m., in District Hospital, Bahraich, by Dr. R.C. Singh (P.W.4), who found the following ante-mortem injuries on the dead body of Rashid :-

"Ante-mortem injuries of deceased Rashid :

1. Multiple punctured wounds in the front of the neck in an area of 12 cm X 12 cm, of varying sizes 1 cm X 0.5 cm to 1.5 cm X .70 cm, of varying depth. Underlying muscles, trachea, blood vessels and oesophagus found punctured and lacerated.

2. Multiple punctured wounds on back of neck, in an area of 9 cm X 3 cm, of muscle deep, situated 2 cm below occipital prominence, 6 cm behind Rt. Ear, 5 cm behind Lt. Ear.

The cause of death spelt out in the post-mortem report by P.W.4 Dr. R.C. Singh was shock and hemorrhage as a result of ante-mortem injuries sustained by the deceased.

10. P.W. 4-Dr. R.C. Singh, in his examination-in-chief, had reiterated the aforesaid cause of death of the deceased and deposed before the trial Court that on 18.11.2000, he was posted as Medical Officer at District Hospital, Bahraich. On the said date, he conducted the post-mortem of dead body of deceased Rashid, which was brought in sealed condition by Constable Ram Prakash Singh and Rajendra Nath. He further deposed that deceased Rashid was aged about 23 years; rigor mortis was present in both lower limbs and upper limbs; eyes were closed; mouth was half opened; and he died a day ago. He proved the post-mortem report (Ext. Ka-2). On internal examination, he

found that urinary bladder was empty; faecal matter and foul smelling gases were filled in large intestine; oesophagus was found lacerated; blood vessels of the neck was found lacerated; and food pipe was also found punctured. He further deposed that deceased Rashid possibly died on 17.11.2000 at 01:30 p.m. and both the ante-mortem injuries could be inflicted on the person of the deceased at the place of occurence by iron bodkin (*sooja*).

In his cross-examination, P.W.4 had deposed before the trial Court that injuries inflicted on the neck of the deceased could not be caused by falling on any sharp edged object and such injuries could not even be inflicted by fall.

11. The case was committed to the Court of Sessions by the Chief Judicial Magistrate, Bahraich vide order dated 20.04.2000 and the trial Court framed charges against accused persons including convict/appellant for the offence punishable under Sections 302, 201, 364/34 I.P.C. They pleaded not guilty to the charges and claimed to be tried. Their defense was of denial.

12. During trial, the prosecution in support of its case examined six witnesses, namely, P.W.1- Ibrahim, who is the informant and brother of the deceased; P.W.2- Naseem, who is the brother of P.W.1 and eye-witness of the incident; P.W.3- Rahmulla, who is independent witness; P.W.4- Dr. R.C. Singh, who conducted post-mortem examination of the corpse of the deceased Rashid; P.W.5- Constable Moharrir Sudheer Kumar Tiwari, who lodged FIR on the basis of written report submitted by informant Ibrahim; and P.W.6-SSI Shri Malkhe Dixit, who conducted the "Panchayatnama' of the dead body of the deceased Rashid and sent it for post-mortem. The trial Court had also examined Sanwali Prasad as C.W.1; Raeesh as C.W.2 and Maksood as C.W.3.

13. Reverting to the testimony of the witnesses of fact, P.W. 1-Ibrahim, in his examination-in-chief, had deposed before the trial Court that his brother's name was Rashid (deceased). He and his brother Rashid (deceased) used to work in Delhi and appellant Israfeel also worked in Delhi. From Delhi, they got acquainted with each other, on account of which, Israfeel (convict/appellant) used to visit his village.

P.W.1 had further deposed that about 1½-2 months ahead of the incident, some altercation took place between him (P.W.1), his brother (deceased- Rashid) and Israfeel (convict/appellant) on the issue of money transactions. His brother Rashid (deceased) gave money to Israfeel (appellant). At that time, convict/ appellant Israfeel (appellant) told his brother Rashid that "ऐसा करोगे तो मैं तुम्हें मार दूंगा", to which his brother (Rashid) told to Israfeel (convict/appellant) that "तुम क्या मारोगे".

After about four years of this incident, he went to Dhakerwa mosque for *Namaz* at around 1:15 p.m. During the course of "*Namaz*', he heard the voice of Rahmulla (P.W.3) of his village that Israfeel and his two companions caught his brother (deceased Rashid) and assaulted him. After offering "*Namaz*', he asked everyone for help. Thereafter, he went to Haar near Mahua tree situated in the outskirts of Dhakerwa village where Israfeel (appellant) and his two companions were said to have caught his brother (deceased Rashid), but he did not find anyone there. However, the people present there told him (P.W.1) that Israfeel (appellant) and his two companions took away his brother (Rashid-

deceased) towards eastern side on a bicycle. From there, he rushed towards Gupta P.C.O. at Nandval, from where he telephonically informed about the incident to police station Baundi-Kaiserganj as well as at police station Fakarpur. After that he came to Dhakerwa village and from there, he went towards Fakarpur village to search his brother. When he was about to reach Fakarpur, he saw that many people had gathered near Fakarpur culvert *(puliya)*. The people present there told him (P.W.1) that accused persons (including convict/ appellants), after killing his brother (Rashid -deceased), took him on bicycle and went towards the Fakarpur market just now. He, thereafter, immediately rushed towards Fakarpur market.

P.W.1 had further deposed that on the culvert *(puliya)*, where the people were gathered and told him that his brother Rashid (deceased) was killed there, he saw stains of blood there. When he reached Fakarpur market, then, the people present there told him that accused persons went towards Ramleela Ground from Fakarpur Market and when he reached 30 steps before the pond of Ramleela ground, he saw that Israfeel (convict/appellant) had thrown his brother (Rashid- deceased) into the pond from the culvert *(puliya)* near the pond and ran towards Ramleela ground. He, thereafter, reached near his brother and saw that his brother was dead. On account of fear, he could not dare to chase the accused persons and the accused persons fled away. He further deposed that he did not see two assailants who accompanied convict/appellant Israfeel as they had run away from Fakarpur market. He proved written report (Ext. Ka-1).

P.W.1 had further deposed that the Investigating Officer had inspected the place where Israfeel (convict/appellant) killed his brother and the place where his dead body was thrown.

In cross-examination, P.W.1 had deposed before the trial Court that he was not an eye-witness of the incident and got the report scribed on the basis of what people told him. P.W.1 did not see anyone killing his brother. The bodkin (*sooja*) with which Israfeel killed his brother was recovered from the possession of Israfeel (convict/appellant).

P.W.1 had further deposed in his cross-examination that Lalta and Naseem (P.W.2) accompanied him when he was searching for his brother. There was blood near culvert in Fakarpur. The people present near the culvert, when his brother was thrown, narrated him (P.W.1) the incident and they were from Fakarpur area and all of them told him (P.W.1) that Kamil and Manjoor were also there with Israfeel (appellant) but despite that, the witness wrote report only against Israfeel (appellant). There was no enmity of co-accused Manjoor with his brother Rashid (deceased) nor did he knew him before the incident.

P.W.1 had further deposed that when he reached Fakarpur police station for lodging F.I.R., Israfeel (appellant) was in lock up at Fakarpur police station and in his presence, Inspector Dixit asked Israfeel (appellant) about the incident. He got his report scribed from some person outside the police station. He further deposed that when he reached police station Fakarpur, the Inspector and Constable asked him the reason for his arrival at police station, to which he told him that he had come to lodge report of the murder of his brother but he did not tell that his brother was killed by three persons. He stayed at police station at about 1-2 hours. The "Panchayatnama' of the dead body of this brother (Rashid) was conducted in the courtyard of police station. At that time, his

relatives and other people of the village were present there.

P.W.1 had further deposed that he came to know the telephone numbers of all the three police station from Gupta P.C.O. When he informed about the incident to three police stations, he only told the name of Israfeel (appellant) and did not tell names of the rest of the accused persons. None of his relatives told about the incident that they had also seen the incident. He denied the suggestion that he didn't see any incident and that the report of the incident was written by him at police station.

14. P.W. 2- Naseem had deposed that deceased Rashid was his brother. Before the incident, he, deceased Rashid and convict/appellant Israfeel used to work in Delhi. Israfeel (convict/appellant) knew him and also got acquainted with him and his brother Rashid from Delhi itself. Before the incident Israfeel (appellant) visited his village. The policemen had earlier arrested Israfeel (appellant) in some other incident. At that time, Israfeel (appellant) was enlarged on bail on the surety of father of the witness and Israfeel (appellant) had no suspicion at that time that he was implicated by them. There was enmity between Rashid (deceased) and Israfeel (convict/ appellant) with regard to transaction of money only.

P.W.2 further deposed that incident was of 4-4½ years ago. His brother Rashid was going for "*Namaz*'. At that time, he was near brick kiln (*bhatta*). From brick kiln (*bhatta*), he saw that Israfeel (appellant) had caught hold his brother Rashid near Mahua tree. On his hue and cry, Rahmulla (P.W.3) rushed to his brother Ibrahim (P.W.1) at Mosque and told him the incident. He saw that Israfeel (convict/appellant) stabbed in throat of his brother Rashid (deceased) with bodkin (*sooja*) and two other men were also present with Israfeel (appellant) but he did not knew other two men, who were armed with *"addhi'* (small gun) and *"katta'* (country made pistol), prior to the incident. When Rahmulla (P.W.3) informed about the incident to his brother Ibrahim (P.W.1), then Ibrahim (P.W.1) went to Gupta PCO, where from his brother Ibrahim (P.W.1) telephonically informed police stations Fakarpur Baundi and Kaiserganj about the incident. After "*Namaz*' was over, they chased the accused persons. Israfeel (appellant) carried his brother Rashid (deceased) on bicycle; killed him (deceased Rashid) on the culvert near Fakarpur; and threw him in the pond. Thereafter, his brother Ibrahim (P.W.1) went to police station and lodged a report. On the same day Fakarpur police had arrested Israfeel (appellant), however, his other two companions ran away from Fakarpur market itself.

In his cross-examination, P.W.2 deposed that he did not know accused Manjoor and Kamil prior to the incident. He had neither ever seen them before the incident nor did he knew their relation with the convict/ appellant. He never told anyone till date that in the said incident Israfeel (appellant) was accompanied with Manjoor and Kamil because he did not know Manjoor and Kamil. The Investigating Officer interrogated him about the said incident. The two companions who accompanied Israfeel had covered their faces with towel (*angaucha*) because of which he could not identify them.

15. P.W. 3- Rahmulla, in his deposition before the trial Court, deposed that he knew deceased Rashid. The deceased Rashid was murdered around five

years ago on Friday (*jumma*). At the time of incident, he was going to Dhakerwa Mosque for *Namaz* and when he reached near brick kiln (*bhatta*), he saw that two-three men took away Rashid (deceased) and amongst them, he only identified Israfeel (convict/appellant). He told this incident to P.W.1 Ibrahim (brother of deceased-Rashid) at the mosque. Ibrahim (P.W.1) was standing in the congregation of prayers and the congregation had already stood up, therefore, they did not go in search of deceased Rashid and started offering *Namaz*. After offering *Namaz*, he did not go in search of Rashid (deceased) but he went to Samda market. After that, he did not know whether these people killed Rashid (deceased) or what they did, because he went from Samda market to his old house at Belhari. The witness was declared hostile by the prosecution.

In his cross-examination by Additional District Government Counsel, his statement recorded by the police under Section 161 Cr.P.C. was read over to P.W.3 but he denied to give such statement to the police that when he reached near the brick kiln of Qazmi, Rashid (deceased) shouted and thereafter Israfeel stabbed in the throat of Rashid with bodkin (*sooja*). He deposed that he told the Investigating Officer that Rashid (deceased) was taken away on a bicycle. He saw the altercation between convict/appellant and the deceased but he did not see Israfeel (appellant) assaulting the deceased. Thereafter, he deposed that Israfeel (appellant) was assaulting Rashid (deceased). He denied the suggestion that he gave false statement due to fear of accused Israfeel (appellant) and other accused persons.

16. C.W. 1- Sanwali Prasad had deposed before the trial Court that Ibrahim (P.W.1) was a resident of his village. Convict/appellant Israfeel knew him. When the Investigating Officer had recovered the bodkin (*sooja*) from the possession of Israfeel (appellant), Subhash was also present there. The recovered bodkin (*sooja*) was stained with blood. The Investigating Officer had sealed the recovered bodkin (*sooja*) in a cloth and after documentation got his signatures on it. He had never seen Israfeel (appellant) killing anyone with bodkin (*sooja*). His house was 9 kms away from Fakarpur police station. Appellant Israfeel was arrested near Fakarpur police station. He was not there when Israfeel (appellant) was arrested. He came there after half an hour of arrest of Israfeel (appellant) and then the police told him that bodkin (*sooja*) was recovered from Israfeel's (appellant) possession. There was blood on bodkin (*sooja*). After that it was sealed by keeping it in a cloth. Based on what the policemen told, he came to know that bodkin (*sooja*) was recovered from Israfeel's possession.

In his cross-examination, he deposed that bodkin (*sooja*) was recovered from the possession of Israfeel (appellant) in front of him by the Investigating Officer. Subhash was also with him at that time. On being questioned by the trial Court about his contradictory statement he told that on asking of Advocate of Israfeel he stated that he knew about the recovery of bodkin from the possession of Israfeel, whereas on asking of Public Prosecutor, he stated that the bodkin was recovered by the Inspector in his presence. C.W.1 had deposed that bodkin (*sooja*) was recovered in front of him by the Investigating Officer.

17. C.W. 2- Raeesh had deposed before the trial Court that Ibrahim (P.W.1) did not know him. He had no knowledge

about the murder of Ibrahim's brother. Around 8 years ago, dead body of a man was found from a pond located near Ramleela ground near Fakarpur town. He did not know his name because he was not present on the spot at that time but had gone to one relative in Huzurpur on his death ceremony. He heard about the said dead body. The police did not record his statement. However, his statement under Section 161 Cr.P.C. was read over to him, he told that he had not given any such statement. The Inspector did not interrogate him. The Investigating Officer took his thumb impression on a plain paper, in which nothing was written, nor was anything read over to him. The Investigating Officer did not collect blood soaked soil and plain soil from the spot in his presence.

In his cross-examination, C.W.2 deposed before the trial Court that Munna Lal, son of Pyare Lal, is resident of his own village. Ibrahim (P.W.1), son of Noormohammed, is also resident of his village. The blood stained soil and plain soil was not collected from Wazirganj-Fakarpur road at a distance of about half kilometers nor was it sealed by keeping it in a cloth. He denied the suggestion that the Investigating Officer collected blood soaked soil and plain soil in containers and sealed before him. He deposed that he did not see Israfeel (appellant) killing Rashid (deceased) with a bodkin (*sooja*).

18. C.W.3- Maksood has deposed before the trial Court that Ibrahim (P.W.1), resident of village Natthupur police station Baundi, was his brother-in-law's brother. He went to the funeral of deceased Rashid. He did not know how Rashid (deceased) died. He didn't even ask anyone whether Rashid (deceased) was killed by someone or died himself. He has not seen Rashid (deceased) being killed by Israfeel with bodkin (*sooja*). He didn't even hear that the dead body of Rashid (deceased) was found in a pond near Ramleela ground near Fakarpur town because at that time he had gone to Lucknow to do *palledari* (hostage work). The Investigating Officer neither took his statement nor did any inquiry from him.

In his cross-examination, C.W.3 deposed that he did not know Israfeel (appellant). He deposed that he did not gave statement to Investigating Officer that Israfeel, son of Akbar Ali, along with his two companions had caught Rashid (deceased) between Natthupur-Dhakherwa. He denied to know anything about the incident. He did not know how Rashid (deceased) died. The Investigating Officer did not record his statement.

19. In the statement recorded under Section 313 Cr.P.C., the convict/appellant had stated that he lodged a case under section 308 I.P.C. at Police Station Jama Masjid, Delhi against Ibrahim (P.W.1) and Rashid (deceased) stating that he was assaulted by Ibrahim (P.W.1) and deceased (Rashid) at Delhi. On account of this enmity, he was falsely implicated in the instant case by the informant Ibrahim (P.W.1).

20. The learned trial Judge believed the evidences, prosecution witnesses, as well as C.W.1-Sanwali Prasad, and found appellant Israfeel guilty for the offences punishable under Sections 364, 302 and 201 I.P.C. and, accordingly, while acquitting two accused persons Kamil and Manjoor, convicted and sentenced the appellant Israfeel in the manner stated herein-above in paragraph-2.

21. Hence the instant appeal.

22. Heard Shri Manendra Nath Rai assisted by Ms. Shraddha Tripathi, learned counsel for the convict/appellant and Shri Dhananjay Kumar Singh, learned A.G.A. for the State/ respondent.

23. Learned Counsel for the appellant has argued that admittedly, P.W. 1-Ibrahim, who is the real brother of deceased, is not an eye-witness of the occurrence because he was informed about the incident by P.W.3-Rahmulla, when P.W.1-Ibrahim was offering "*Namaz*', to the effect that the deceased was done to death by the convict/appellant Israfeel and two of his companions at village Natthupur Mauja Dhakerwa on 17.11.2000 at 1:30 pm and after offering *Namaz*, P.W.1- Ibrahim went to village Nandval to Gupta P.C.O. from where P.W.1 informed at police station Fakarpur about the said incident and thereafter he (P.W.1) along with other persons in the village started searching for his brother and while searching he reached Fakarpur and saw that his brother's body was thrown in a pond by appellant Israfeel who had fled from there. He argued that P.W.3- Rahmulla, who has seen the incident and informed P.W.1- Ibrahim about the incident, has not supported the prosecution case and has turned hostile, thus, the prosecution case does not deserve to be believed.

24. It has further been argued by learned counsel for the appellant that P.W.2-Naseem, who is the brother of the deceased, is also not an eye-witness of the incident as he had not seen the appellant committing the murder of the deceased, hence his testimony is also under the clouds of doubt. Thus, he argued that P.W.1-Ibrahim and P.W.2-Naseem being the brothers of the deceased are highly interested and partisan witnesses and their presence at the place of incident also appears to be doubtful, hence, their testimony cannot be said trustworthy.

25. Elaborating his submissions, learned Counsel for the appellant has further argued that though the testimony of P.W.2 was not a reliable one, but even then the trial Court on the basis of the evidence of P.W.2- Naseem has recorded the finding of guilt of appellant by means of impugned order, hence, the findings recorded by the trial Court are erroneous.

26. The next argument of the learned Counsel for the appellant is that on account of paucity of money, the convict/appellant could not engage an Advocate for contesting the case on his behalf before the trial Court, thus, *amicus curiae* was appointed by the trial Court, and when the examination-in-chief of P.W.1- Ibrahim, P.W.2- Naseem and P.W.3-Rahmulla were recorded by trial Court, no opportunity for cross-examination of these witnesses was afforded to the convict/appellant by the trial Court. Thus, the testimonies of P.W.1, P.W.2 and P.W.3 remain unrebutted.

27. It has further been argued by learned counsel for the appellant that co-accused Kamil and Manjoor have been acquitted by the trial Court on the ground that the prosecution has failed to prove its case beyond reasonable doubt against the said two co-accused persons but the trial Court erred in convicting the convict/appellant on wrong pretext.

28. Learned Counsel for the appellant has further argued that recovery of the blood stained bodkin (*sooja*), which is said to have been recovered from possession of

the appellant, is a false one, as the witness of recovery, namely, Sanwali Prasad, was summoned as C.W.1, who stated before the trial Court that he had not seen the convict/appellant causing injuries by bodkin (*sooja*) to deceased (Rashid). He argued that it is apparent from the cross-examination of C.W.1- Sanwali Prasad that he was told by police personnel that a bodkin (*sooja*) has been recovered from the possession of appellant Israfeel. C.W.1 further stated that when the appellant was arrested, many people were gathered there at that time and thereafter he reached there. He submitted that other witnesses of the recovery namely, Subhash has not been cross-examined by the prosecution. Thus the recovery of weapon of assault, which is said to be recovered from the possession of appellant, is not reliable.

29. It has also been argued by the learned counsel for appellant that the F.I.R. is an anti-timed document, as in the recovery memo and the "Panchayatnama', no case crime number and details of the present case have been mentioned. Thus, the prosecution case is liable to be thrown out on this ground alone.

30. Lastly, learned Counsel for the appellant argued that the appellant is in jail for the last 17 years. He argued that P.W.1- Ibrahim and his brother Rashid (deceased) had assaulted him in Delhi and he had lodged the case under Section 308 IPC against them at police station Jama Masjid in Delhi and because of this enmity, the appellant has been falsely-roped in, in the present case. He argued that the trial Court misread the evidence on record and erred in convicting the appellant in the present case, hence, the impugned judgment is liable to be set aside and appellant be acquitted.

31. Per contra, learned AGA for the State has vehemently rebutted the arguments of learned counsel for the appellant and submitted that the incident took place in broad daylight at 1:30 p.m. in village Natthupur Mauja Dhakerwa. The incident was witnessed by Naseem (P.W.2), the real brother of deceased (Rashid), along with Rahmulla (P.W.3). Soon after the incident Rahmulla (P.W.3) went to mosque where Ibrahim (P.W.1) was offering *Namaz* and informed him about the incident and stated that Rashid (deceased) was assaulted by appellant Israfeel with bodkin (*sooja*). Thereafter, Ibrahim (P.W.1) immediately informed the police station about the incident from the P.C.O. of one Ramesh Gupta from village Nandval and went to place of occurrence searching for his brother along with other persons of the village and saw the appellant throwing the dead body of deceased in a pond which was in village Fakarpur near Ramleela ground. He further argued that informant P.W.1-Ibrahim, immediately after the incident, lodged a prompt F.I.R. at police station Fakarpur on the same day at 16:30 hours against the appellant Israfeel and two unknown persons.

32. Learned AGA further argued that P.W.2- Naseem had witnessed the incident in which his brother Rashid (deceased) was murdered by appellant Israfeel with bodkin (*sooja*). The deceased Rashid sustained multiple punctured wounds on his neck and ocular testimony of P.W. 2- Naseem fully corroborates the post-mortem report of deceased Rashid.

33. It is further argued by learned AGA that P.W.3- Rahmulla, who is an independent eye-witness of the occurrence, has informed the informant P.W.1-Ibrahim about the incident. P.W.3, in his

examination-in-chief and cross-examination, admitted the fact that he knew deceased Rashid, who was taken away by two-three persons, out of whom he identified the appellant only and he informed about the said fact to P.W. 1-Ibrahim, who was offering *Namaz* at mosque, though he has not stated that it was the appellant who had committed the murder of the deceased Rashid. He submitted that P.W. 3- Rahmulla has been declared hostile. Thus, P.W.3 has not supported the prosecution case. He submitted that simply because P.W. 3-Rahmulla became hostile, his testimony cannot be discarded by this Court on this ground alone as the Court has to consider the evidence of the hostile witness to that extent to which it corroborate the prosecution case.

34. It was further submitted by learned A.G.A. that appellant Israfeel was given several opportunities by the trial Court to cross examine P.W.1- Ibrahim, P.W.2- Naseem and P.W.3-Rahmulla and he was also afforded the services of *Amicus Curiae* by the trial Court and further he engaged a counsel of his choice, but they failed to appear and did not cross-examine P.W.1- Ibrahim, P.W.2- Naseem and P.W.3-Rahmulla, hence the opportunity to cross-examine P.W.1- Ibrahim and P.W.2-Naseem was closed by the trial Court as is evident from the order sheet of the trial Court. He submitted that Ibrahim (P.W.1) and Naseem (P.W.2) were not deliberately cross-examined by the appellant's counsel before the trial Court, though, the formal witnesses who have appeared thereafter before the trial Court, were cross-examined by the appellant, which otherwise speaks about the conduct of the appellant and his Counsel for not cross-examining Ibrahim (P.W.1) and Naseem (P.W.2) for the appellant Israfeel, for which no one can be put to fault except the convict/appellant (Israfeel) himself and his Counsel.

35. Learned AGA has further argued that blood stained bodkin (*sooja*) (Ext. Ka-6) was recovered from the possession of appellant Israfeel and the deceased was also assaulted by the appellant Israfeel on the date of incident and he was arrested on the date itself. At the time of arrest, the clothes of convict/ appellant were also found stained with blood, for which a recovery memo (Ext.Ka.7) was prepared and further blood soaked soil was recovered from place of occurrence, which was proved as Ext. Ka-8. Thus, the prosecution has been able to prove its case beyond reasonable doubt against the appellant Israfeel and the trial Court has rightly convicted and sentenced the appellant. The appeal is devoid of merits and is liable to be dismissed.

36. We have examined the rival contentions advanced by the learned Counsel for the parties along with the impugned judgment and order passed by the trial Court and also perused the lower Court record.

37. It transpires that informant P.W.1-Ibrahim, who is the brother of deceased Rashid, had lodged the First Information Report against convict/appellant Israfeel and two unknown persons on the date of the incident itself, i.e. 17.11.2000 at 04:30 p.m. at police station Fakarpur, district Barabanki, for committing the murder of his brother Rashid (deceased) on 17.11.2000 at 01:30 p.m. in the outskirt of Dhakherwa village.

38. P.W.1-Ibrahim had deposed before the trial Court that on the date of the

incident, i.e. 17.11.2000, at 01:15 p.m., he had gone to perform "*Namaz*' at Dhakerwa mosque. During the course of "*Namaz*', P.W.3-Rahmulla came at Dhakerwa mosque and informed him (P.W.1) that Israfeel (convict/appellant) and his two companions caught his brother Rashid (deceased) and assaulted him. After offering "*Namaz*', he (P.W.1) immediately rushed to the place where his brother Rashid was said to be assaulted by Israfeel (convict/appellant) and his two companions, but he did not find any one there, however, the people gathered there informed P.W.1 that his brother Rashid (deceased) was taken away by Israfeel (convict/appellant) and his two companions towards eastern direction on a bicycle. On this information, he went to Gupta P.C.O. at Nandval, from where he telephonically informed about the incident at police station Baundi, Kaiserganj and Fakarpur.

After that he (P.W.1) returned to village Dhakerwa and from there he moved towards Fakarpur. When he was about to reach Fakarpur, he saw that many people were gathered near Fakarpur culvert *(puliya)* and stains of blood were present there and he was informed by the said people that accused persons (including convict/appellant), after killing his brother Rashid (deceased) went towards Fakarpur market just now on a bicycle. Immediately thereafter, he (P.W.1) rushed towards Fakarpur market, where the people informed him that the accused persons went towards Ramleela ground. Thereafter, he rushed towards Ramleela ground and he reached 30 steps ahead of the pond of Ramleela ground, he saw that Israfeel (convict/ appellant) had thrown his brother into the pond from the culvert (pulia) and ran away towards Ramleela Ground. He, thereafter, reached near his brother and saw that his brother was dead. After that, he went to police station Fakarpur, district Barabanki and lodged the F.I.R.

39. Close scrutiny of testimony of PW.1-Ibrahim shows that the F.I.R. of the incident was lodged promptly. There was no delay in lodging the F.I.R. P.W.1 is not the eye-witness of the incident but he only witnessed the convict/ appellant Israfeel throwing his brother Rashid (deceased) into the pond from the culvert *(puliya)* and ran towards Ramleela ground. P.W.1 has established his presence near the culvert when his brother Rashid was thrown by Israfeel (convict/appellant) in the pond.

40. P.W.2-Naseem, who is the brother of the deceased Rashid and P.W.1-Ibrahim, had also supported the testimony of the informant P.W.1 and deposed before the trial Court that on the date of the incident i.e. 17.11.2000, when his brother Rashid was going to offer *Namaz*, he was near brick kiln and from there he saw that Israfeel (convict/appellant) caught his brother Rashid and stabbed on his neck in front of him with bodkin (*sooja*). On his hue and cry, Rahmulla (P.W.3) went and informed his brother Ibrahim (P.W.1) in the mosque about the incident.

41. The evidence of P.W.2-Naseem shows that he is the eye-witness of the incident. He saw the convict/appellant Israfeel stabbing his brother Rashid (deceased) with bodkin (*sooja*).

42. Learned Counsel for the appellants contended that the testimonies of P.W.1 and P.W.2 are not reliable and trustworthy as they are the brothers of the deceased Rashid, hence they are related and interested witnesses.

43. It is a settled principle of law that the evidence tendered by the related or interested witness cannot be discarded on that ground alone. However, as a rule of prudence, the Court may scrutinize the evidence of such related or interested witness more carefully. In **Namdeo v. State of Maharashtra** : (2007) 14 SCC 150 : (2009) 1 SCC (Cri) 773, the Apex Court, after observing previous precedents on the issue of related and interested witnesses, has summarized the law in the following manner:-

"38. it is clear that a close relative cannot be characterised as an "interested" witness. He is a "natural" witness. His evidence, however, must be scrutinised carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the "sole" testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one."

44. The Apex Court in **Ilangovan v. State of T.N.** : (2020) 10 SCC 533 has held that :-

"7. With respect to the first submission of the counsel for the appellant, regarding the testimonies of related witnesses, it is settled law that the testimony of a related or an interested witness can be taken into consideration, with the additional burden on the Court in such cases to carefully scrutinise such evidence (see **Sudhakar v. State**, (2018) 5 SCC 435). As such, the mere submission of the counsel for the appellant, that the testimonies of the witnesses in the case should be disregarded because they were related, without bringing to the attention of the Court any reason to disbelieve the same, cannot be countenanced."

45. In the instant case, the learned counsel for the appellant, despite his best efforts, could not persuade this Court that the evidence of P.W.1 and P.W.2 was unreliable. The trial Court has specifically recorded the finding of reliability of evidence of P.W.1 and P.W.2. The submission of the learned counsel for the appellant that the evidence of P.W.1 and P.W.2 is unreliable, because they are the brothers of the deceased, cannot be countenanced. P.W.1-Ibrahim has established his presence at the place from where convict/ appellant had thrown his brother Rashid into the pond, whereas P.W.2-Naseem had established his presence at the place, where the convict/appellant had stabbed on the neck of his brother in front of him with bodkin (*sooja*). Thus, the evidence of P.W.1 and P.W.2 fully established the case that it was the convict/appellant who committed the murder of their brother Rashid.

46. The next contention of the learned Counsel for the appellant is that as P.W.3-Rahmulla, who is the independent witness, was declared hostile by the trial Court, hence the presence of P.W.2-Naseem at the place where his brother Rashid was said to stabbed with bodkin (*sooja*) is doubtful and on this ground, the entire prosecution case is doubtful.

47. In **C. Muniappan v. State of T.N.** : (2010) 9 SCC 567, the Apex Court, while dealing with the testimony of a witness over an issue, has held as under :

"69. It is settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because

the prosecution chose to treat him as hostile and cross examine 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 that their version is found to be dependable on a careful scrutiny thereof. (vide Bhagwan Singh v. The State of Haryana, AIR 1976 SC 202; Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170; Syad Akbar v. State of Karnataka, AIR 1979 SC 1848; and Khujji @ Surendra Tiwari v. State of Madhya Pradesh, AIR 1991 SC 1853).

70. In State of U.P. v. Ramesh Prasad Misra & Anr., AIR 1996 SC 2766, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra, (2002) 7 SCC 543; Gagan Kanojia & Anr. v. State of Punjab, (2006) 13 SCC 516; Radha Mohan Singh @ Lal Saheb & Ors. v. State of U.P., AIR 2006 SC 951; Sarvesh Naraian Shukla v. Daroga Singh & Ors., AIR 2008 SC 320; and Subbu Singh v. State, (2009) 6 SCC 462.

Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence.

In the instant case, some of the material witnesses i.e. B. Kamal (PW.86); and R. Maruthu (PW.51) turned hostile. Their evidence has been taken into consideration by the courts below strictly in accordance with law.

Some omissions, improvements in the evidence of the PWs have been pointed out by the learned counsel for the appellants, but we find them to be very trivial in nature.

71. It is settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witness. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of the incident, minor discrepancies are bound to occur in the statements of witnesses."

48. In the instant case, reading the evidence in entirety, the evidence of P.W.3-Rahmulla cannot be brushed aside. His evidence shows that the statement of P.W.3-Rahmulla was recorded almost around five years from the date of the incident by the trial Court i.e. on 12.07.2005. In his examination-in-chief, P.W.3 had deposed that on the date of the incident, he was going to offer "*Namaz*' and when he reached near brick kiln, then, he saw that 2-3 persons were taking away Rashid (deceased) while doing altercations with him and this fact was informed to Ibrahim (P.W.1) by him in the Mosque, where the brother of the deceased- Rashid was offering "*Namaz*'. At that time, Ibrahim (P.W.1) was standing in the congregation of prayers and the congregation had already stood up, therefore, they did not go in search of deceased Rashid and started

offering "*Namaz*'. After offering "*Namaz*', he did not go to search Rashid (deceased) as he went to Samda market. In his cross-examination, he deposed that he told the Inspector that Rashid (deceased) was taken away on a bicycle and he also saw as well as heard the altercations between the convict/appellant and the deceased Rashid, however, he at one place stated that he did not see Israfeel assaulting the deceased, at another place, he deposed that Israfeel was assaulting the deceased Rashid.

49. On reading the testimonies of the P.W.2-Naseem and P.W. 3- Rahmulla, it has been categorically established that they were the eye-witnesses of the incident and their evidence fully establishes that it was appellant-Israfeel who committed the murder of Rashid (deceased).

50. So far as the submission of the learned Counsel for the appellant that one Lalta, son of Saktu, was the alleged eye-witness of the prosecution case but the prosecution did not produce him for examination before the trial Court, is concerned, it is apparent to mention here that as stated herein-above, the prosecution witnesses, P.W.1-Ibrahim, P.W.2-Naseem and P.W.3-Rahmulla, have fully supported the prosecution case and they are found to be trustworthy and reliable. More so, it is normally found that when such incident of murder takes place, it is very rare that all the witnesses, who saw the incident, appear to support the same because of fear and other reasons, hence, the non-production of any other independent witnesses who were present at the place of incident hardly prove fatal to the prosecution case.

51. So far as the motive is concerned, it is apparent from the depositions of P.W.1 and P.W.2 that there was enmity between the convict/appellant and deceased Rashid in connection with money transactions. While living in Delhi, convict/appellant had also lodged an FIR under Section 308 for fracas (marpeet), at police station Jama Maszid, New Delhi. Thus, from the facts and circumstances of the case, it cannot be said that there was no motive on the part of the convict/appellant to commit the murder of the deceased Rashid.

52. In regard to the medical evidence, it transpires from perusal of the post-mortem report of the deceased Rashid that the deceased Rashid received two ante-mortem injuries; (i) *multiple punctured wounds in the front of the neck in an area of 12 cm X 12 cm, of varying sizes 1 cm X 0.5 cm to 1.5 cm X .70 cm of varying depth;* (ii) *multiple punctured wounds on back of neck in an area of 9 cm X 3 cm of muscle deep, situated 2 cm below occipital prominence, 6 cm behind Rt. Ear, 5 cm behind Lt. Ear.* P.W. 4-Dr. R.C. Singh, in his deposition, had deposed that aforesaid ante-mortem injuries on the dead body of the deceased could be attributable by bodkin (*sooja*). Thus, the post-mortem report clearly supported the testimonies of the prosecution witnesses.

53. So far as submission of learned counsel for the appellant that an *Amicus Curiae* has been appointed by the trial Court after completion of examination-in-chief of Ibrahim (P.W.1), Naseem (P.W.2) and Rahmulla (P.W.3), but the appellant was not afforded opportunity to cross examine Ibrahim (P.W.1), Naseem (P.W.2) and Rahmulla (P.W.3), is concerned, this Court finds from perusal of the impugned judgment that in paragraph 23, the trial Court has recorded a specific finding that on the application of the appellant, witnesses were summoned for recording

their statement, and the witnesses were present on various dates fixed in the case, but their cross-examination was not done by the counsel for the appellant before the trial Court. Hence, the plea of the appellant that no opportunity has been afforded to the appellant to cross-examine Ibrahim (P.W.1), Naseem (P.W.2) and Rahmulla (P.W.3) is contrary to the record and is rejected accordingly.

54. In view of the foregoing discussions, it is clear that the prosecution has proved its case beyond reasonable doubt against the appellant, as instant case is relating to the murder of the deceased in a broad daylight; appellant had strong motive to commit the murder of the deceased; appellant has done to death the deceased in a brutal manner, by stabbing him with bodkin (*sooja*) on his neck, as a consequence of which the deceased succumbed to his injuries; statements of three eye-witnesses, P.W.1-Ibrahim, P.W.2-Naseem and P.W.3-Rahmulla, which were relied upon by trial Court, had fully supported the prosecution case.

55. Thus, the impugned judgment and order passed by trial Court convicting and sentencing the appellant for offence in question is hereby upheld and the same does not require any interference by this Court in the instant appeal.

56. The instant appeal lacks merit and is, accordingly, **dismissed**. The appellant is in jail. He shall serve the sentence as ordered by the trial Court vide impugned judgment and order dated 19.11.2008.

57. Let a certified copy of this order as well as lower Court record be transmitted to the Court concerned for necessary information and necessary compliance, forthwith.

(2022)05ILR A25
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.03.2022

BEFORE

THE HON'BLE MOHD. ASLAM, J.

Jail Appeal No. 374 of 2018

Sugam ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Ms. Divya Ojha, Sri Yogesh Kumar Srivastava, Sri Noor Mohammad

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

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 374(2)/383 - Indian Penal Code, 1860-Sections 498-A, 304-B, 302 - Dowry Prohibition Act, 1961 - Section 3/4 - Challenge to-conviction-the deceased died on account of hanging after beating her and she met with homicidal death- the deceased was subjected to cruelty or harassment soon before her death regarding dowry-deceased met with unnatural death within 7 years of marriage-accused was demanding motorcycle and Rs. 50,000/- cash-post-mortem report and statement of PW3 (Doctor) proved that the deceased met with homicidal death and not by suicidal death-As per site plan proved by PW5 no broken door was found-The court below rightly sentenced the accused/appellant. (Para 1 to 27)

B. Criminal Law - Indian Penal Code, 1860 - Section 304-B - read together with Section 113-B of the Evidence Act, a comprehensive picture emerges that if a married woman dies under unnatural circumstances at her matrimonial home within 7 years from her marriage and there are allegations of cruelty or

harassment upon such married woman for or in connection with demand of dowry by the husband or relatives of the husband, the case would squarely come under "dowry death" and there shall be a presumption against the husband and the relatives.(Para 20, 21, 22)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Baldev Singh Vs St. of Punj. (2008) 13 SCC 233

2. Bachni Devi & anr.. Vs St. of Har. thru Secy. of Home Deptt. (2011) 2 ACC 3 SC

(Delivered by Hon'ble Mohd. Aslam, J.)

1. Heard Sri Noor Mohammad, Advocate holding brief of Sri Yogesh Kumar Srivastava, learned counsel for the accused-appellant, Sri Sanjay Sharma, learned A.G.A. for the State-respondent and perused the record.

2. This appeal is preferred by the accused-appellant through Jail Superintendent, Jhansi under Section 374 (2) read with Section 383 Cr.P.C. against the impugned judgment of conviction dated 03.02.2018 and order of sentence dated 09.02.2018 passed by learned Additional Sessions Judge/Fast Track Court No.1, Jhansi in Session Trial No. 337 of 2014 'State of U.P. vs. Sugam' (arising out of Case Crime No. 326 of 2014, under Sections 498-A, 304-B, 302 I.P.C. and Section 3/4 of Dowry Prohibition Act, Police Station- Gursaray, District- Jhansi), whereby the accused-appellant has been convicted and sentenced to undergo rigorous imprisonment for 10 years under Section 304-B I.P.C., to undergo rigorous imprisonment for three years and a fine of Rs.5000/-, in default to undergo further imprisonment for two months under Section 498-A I.P.C. and to undergo rigorous imprisonment for two years and a fine of Rs.10,000/-, in default to undergo further imprisonment for three months under Section 4 of Dowry Prohibition Act. It was further directed that 80% of the fine amount shall be paid to the legal representative of the deceased. All the sentences were directed to run concurrently.

3. In brief, prosecution case is that informant Mani Ram has lodged the first information report on the basis of written complaint on 07.06.2014 at 00.15 A.M. alleging therein that he married his daughter Lalita aged about 21 years two years ago with accused-appellant Sugam. The accused-appellant and his family members were demanding a motorcycle and Rs.50,000/- as dowry for the last two years and were harassing his daughter for its non-fulfillment. His daughter told this fact to him but due to his weak financial condition he could not meet the demand of dowry. It is further alleged that on 06.06.2014, the accused-appellant and his family members murdered his daughter by hanging her. The information regarding death of his daughter Lalita Devi was conveyed to him by the accused-appellant. On the information, he went to the house of in-laws' of his daughter and saw the dead body of his daughter was laying on the ground and all the family members of her in-laws have absconded.

4. Ct. Laxmikant PW7 has drawn the Chek Report (Ex.Ka.11) on 07.06.2014 at 00.15 A.M. on the basis of written complaint (Ex.Ka.1) and by making necessary entry in GD (Ex.Ka.12) vide Rapat No. 3 on 07.06.2014 at 00.15 A.M. and registered the Case Crime No.326 of 2014, under Sections 498-A, 304-B I.P.C.

and Section 3/4 of Dowry Prohibition Act against accused persons namely Sugam (appellant), Nand Ram, Niraj, Sonu and Ram Kishore. The investigation of the case was undertaken by C.O. Subodh Gautam (PW5). On 07.06.2014, he copied the written complaint and GD in the CD and also recorded the statements of Ct. Laxmikant Tripathi, informant Mani Ram. On the same day, he visited the place of occurrence along with informant and prepared site-plan (Ex.Ka.6). In the site-plan he has shown the place where dead body of the deceased was found on cot and the place of the wood plank in the roof from which rope was hanging and also shown the other things present in the house. The inquest of the dead body was conducted by Tahsildar Gulab Singh (PW6) on 07.06.2014. He appointed Mani Ram, Sita Sharan, Kamlesh Kumar, Shivram Singh and Rajjan as Panch and completed the inquest at 9:30 AM. The Panch has opined that the deceased died due to hanging and to ascertain the real cause of death postmortem is needed. PW6 Gulab Singh Tehsildar prepared Panchayatnama (Ex.Ka.2), Photo Nash (Ex.Ka.7), letter to Medical Officer (Ex.Ka.8), Challan Nash (Ex.Ka.9), sealed the dead body and prepared sample Seal (Ex.Ka.10) and sent the dead body for postmortem through Ct. Sriram Verma and Home Guard Amar Singh along with police papers.

5. The autopsy of the dead body of the deceased was conducted by a team of doctors consisting Dr. Udai Srivastava (PW3) and Dr. Bal Govind. At the time of postmortem age of the deceased was found about 21 years. Rigor mortis was found present all over the body. Foul smell was coming out from the body. Mouth was open with protruded tongue. Serosanguinous discharge was coming out from mouth and nostrils. Following antemortem injuries were found on the body of the deceased:-

(i) Abrasion (4 x 6) cm on the back of left shoulder.

(ii) Ligature mark (28 x 1.5) cm around the neck between chin and thyroid cartilage. Base of mark was hard and parchment like. Mark was directed upward & backward obliquelly not completely encircled the neck leaving about a gap of 6 cm in left side of the neck.

(iii) Abrasion (2 X 7) cm on the right cheek, clotted blood present.

6. On internal examination, membrane of the brain and brain were found congested. Mouth, tongue and pharynx were found congested. Muscles of larynx and vocal cords were found damaged. Trachea hyoid bone was found fractured. Pleura and preicardial sac were found congested. The heart was found filled with blood. Lung was found congested and stomach was found empty. Semi-digested food was found in small intestine. Faecal matter was found in large intestine. Lever, spleen, pancreas, kidneys were found congested. Urenary bladder was found empty. The doctor has opined that the deceased has died about 18 hours before the postmortem due to asphyxia as a result of antemortem hanging. Dr. Udal Srivastava prepared the postmortem report (Ex.Ka.5) in his own handwriting on which Dr. Bal Govind Sankhwar endorsed his agreement.

7. On 12.06.2014, the Investigating Officer has recorded the statement of Sita Sharan and Brij Kishore, both brothers of the deceased. On 19.06.2014, he also recorded the statement of Smt. Phool Kunwar, mother of the deceased. The accused-appellant was arrested on

21.06.2014 at 5 A.M. in front of the door of his house. Thereafter, statement of the accused-appellant was recorded wherein he has denied the occurrence. Thereafter, he recorded the statements of witnesses of the *Punchnama*, Dr. Udal Srivastava and also the statements of persons who have given affidavit regarding non-involvement of other accused. He also collected the marriage card of accused-appellant and deceased (Ex.Ka.3) and prepared memo in this respect (Ex.Ka.5). Thereafter, investigation of the case was transferred to Avinash Kumar Gautam (PW8) who after completing the investigation submitted the charge-sheet (Ex.Ka.13) against accused-appellant under Sections 498-A, 304-B I.P.C. and Sections 3/4 of Dowry Prohibition Act and the cognizance was taken on 18.09.2014 and after complying the provisions of the Section 207 Cr.P.C. the case was committed to the Court of Sessions vide order dated 18.9.2014 for trial.

8. After hearing the prosecution and learned counsel for the accused-appellant, the charges of offence punishable under Section 304-B, 498-A I.P.C. and Section 3/4 of Dowry Prohibition Act in alternative charge of Section 302 I.P.C. were framed against the accused-appellant. The accused-appellant has pleaded not guilty and claimed to be tried.

9. In order to prove its case, prosecution has examined informant Mani Ram (father of the deceased) as PW1, Sita Sharan (brother of the deceased) as PW2 and Brij Kishore (brother of the deceased) as PW4 as witnesses of the fact. Prosecution has examined formal witnesses Dr. Udal Srivastava as PW3 to prove the postmortem report (Ex.Ka.5) and the cause of death of the deceased. Investigating Officer CO Subodh Gautam was examined as PW5 to prove the steps taken in investigation and the site-plan (Ex.Ka.6). Gulab Singh Tehsildar was examined as PW6 to prove panchayatnama (Ex.Ka.2), Photo Nash (Ex.Ka.7), letter to Medical Officer (Ex.Ka.8), Challan Nash (Ex.Ka.9), sample seal by which dead body of the deceased was sealed (Ex.Ka.10). Prosecution also examined Ct. Laxmikant as PW7 to prove the check report (Ex.Ka.11) and GD Rapat No. 3 dated 07.06.2014 at 00.15 A.M. (Ex.Ka.12). Investigating Officer CO Avinash Kumar Gautam was examined as PW8 to prove the charge sheet (Ex.Ka.13).

10. Learner lower court has considered the arguments raised by learned Additional Government Counsel and learned counsel for the accused-appellant and after appreciating the evidence available on record and the statements of PW1 Mani Ram, father of the deceased, PW2 Sita Sharan, brother of the deceased, PW4 Brij Kishore, brother of the deceased, has held that the prosecution has proved that the marriage of the deceased has taken place two years before her death i.e. within seven years of marriage and the prosecution has proved beyond reasonable doubt that a motorcycle and Rs.50,000/- were being demanded as dowry by the accused-appellant soon after the marriage and till the death of the deceased. Learned lower court has also held that the deceased has died on account of hanging after beating her and she met with homicidal death. Therefore, learned court below has held that the charges against appellant-accused for offence punishable under Section 498-A, 304-B I.P.C. and Section 4 of Dowry Prohibition Act are proved beyond reasonable doubt, and accordingly, convicted and sentenced him to undergo

rigorous imprisonment for 10 years under Section 304-B I.P.C., to undergo rigorous imprisonment for three years and a fine of Rs.5000/-, in default to undergo further imprisonment for two months under Section 498-A I.P.C. and to undergo rigorous imprisonment for two years and a fine of Rs.10,000/-, in default to undergo further imprisonment for three months under Section 4 of Dowry Prohibition Act.

11. It has been submitted by learned counsel for the accused-appellant that learned lower court has misinterpreted the evidence adduced by the prosecution and has not considered the evidence adduced by the defence and illegally held that the accused was demanding a motorcycle and Rs.50,000/- as dowry. It is further submitted that no complaint was ever made by the deceased or her parents to the police or higher authorities regarding demand of dowry and consequent harassment. There is no evidence on record to show that any Panchayat was called regarding dispute of demand of dowry and consequent harassment upon the deceased. Learned lower court has not considered the evidence of the defence witnesses DW1 Smt. Gulab Rani and DW2 Munna Lal. It is further submitted that deceased has committed suicide by bolting the door from inside the room and her dead body was taken out from the room after breaking the door. The above circumstance rules out that the deceased met with homicidal death. It is further submitted that PW1 Mani Ram has admitted in his cross-examination that his daughter has returned to his house after about one and a half months after marriage. He has also admitted that his daughter went to her in-law's house on second time and thereafter she did not returned to his house. PW2 Sita Sharan has stated in his deposition that he was not present when his sister had complained to family members regarding demand of a motorcycle and Rs.50,000/- as dowry. It is further submitted by learned counsel for the accused-appellant that PW2 has admitted that after persuasion, his sister was happily sent to her in-law's house. It is proved from the statement on oath of DW1 Gulab Rani that accused-appellant was not present in the house at the time of occurrence and had returned to the house at about 6 P.M. then he came to know about the occurrence. There is no connection between the suicide of the deceased and demand of dowry and harassment. The deceased has suspicion that accused-appellant is having illicit relationship with some other women on account of which she used to quarrel with her husband and committed suicide.

12. Learned counsel for the accused-appellant has further submitted that learned lower court has illegally held the accused-appellant guilty and has illegally sentenced him for the offence punishable under Sections 498-A, 304-B I.P.C. and Section 4 of Dowry Prohibition Act, which is liable to be set-aside and accused-appellant is liable to be acquitted.

13. Per contra, learned A.G.A. has vehemently opposed the submissions advanced by learned counsel for the accused-appellant and submitted that from the evidence of PW1 Mani Ram (father of the deceased), PW2 Sita Sharan (brother of the deceased) and PW4 Brij Kishore (brother of the deceased), it is proved beyond reasonable doubt that the marriage of the accused-appellant with deceased has taken place just before two years of her death. It is also proved beyond reasonable doubt that after some time of marriage the accused-appellant was demanding a motorcycle and Rs.50,000/- as dowry and

harassing the deceased on account of its non-fulfillment. From their statements it is also proved that after one and a half months of marriage the deceased had visited her parental house and told her parents and family members regarding demand of dowry and consequent torture being committed by the accused-appellant. From their deposition it is also proved that they had persuaded the deceased to go her in-law's house after scolding her husband Sugam. It is also proved from the statement on oath that the information regarding death was given by accused-appellant and thereafter all the family members of accused-appellant escaped from their house which establishes that accused-appellant has committed some wrong deed. Lower court after appraisal of evidence in detail and invoking the presumption of Section 113-B of Evidence Act has rightly held the accused-appellant guilty for offence punishable under Sections 498-A, 304-B I.P.C. and Section 4 of Dowry Prohibition Act. It is further contended that learned court below keeping in view the injury found in the postmortem report has legally awarded appropriate sentence which cannot said to be disproportionate. He has submitted that the appeal is devoid of merits and the same is liable to be dismissed.

14. Firstly, I would like to discuss the testimony of witnesses of the fact. In this case informant PW1 Mani Ram (father of the deceased), PW2 Sita Sharan and PW4 Brij Kishore, both brothers of the deceased) are witnesses of the fact. PW1 informant Mani Ram has stated on oath that the deceased Lalita Devi is his daughter. At the time of her death she was aged about 21 years. The marriage of the deceased was solemnized with the accused-appellant about two years before the occurrence as per Hindu rites and ceremonies. After some time of marriage, the accused-appellant and his family members started demanding a motorcycle and Rs.50,000/- as dowry. His daughter had told him several times regarding the demand of motorcycle and Rs.50,000 as dowry but due to his bad financial condition he could not meet the demand of dowry. On the day of occurrence, the accused-appellant along with his family members had killed her daughter by hanging. Accused-appellant had informed him over phone regarding the death of his daughter. Thereupon, he along with his family members reached the village Aasta where they found the dead body of his daughter lying on a cot and the accused-appellant and his family members had absconded from their house. At the time of her death, the child of the deceased was about 6-7 months old. He has further stated that he got the written complaint (Ex.Ka.1) written by Kamlesh who read the same to him thereafter he signed on it and lodged the first information report. Thereafter, inquest of the dead body of his daughter was conducted in presence of Shiv Ram Singh, Rajjan, Sita Sharan, Kamlesh and he also signed on inquest report (Ex.Ka.2). In cross-examination, he clarified that he had received the information regarding death of his daughter at about 08:00 P.M. over phone, thereafter, he told his wife Smt. Phool Kunwar and his son Sita Sharan. He had proceeded to village Aasta from his house at 10 P.M. and when they reached there, they found the grandmother of accused-appellant sitting at the door of the house having the child of the deceased in her lap. The accused-appellant and other family members have absconded. He denied the suggestion that there was any division between accused-appellant and Nandram and they were living separately. He further clarified that

the dead body of his daughter was lying on a cot. He had gone to police station to lodge the report in the morning at 8 AM. He further stated that he had called Kamlesh by phone for ascribing the written complaint who came to him at 10:30 AM at village Aasta. He further stated that 10-15 persons had gone to village Aasta along with him. The police had arrived at about 10:00 A.M. at the place of occurrence and inquired from him and other persons present there. He has further stated that the marriage of his daughter has taken place happily and after farewell in the marriage his daughter returned to his house after about 15-20 days and remained in his house for about one month. Thereafter, she went to her in-law's house. After about one and a half months of the marriage when his daughter returned to his house, she had complained him regarding demand of dowry and consequent torture committed by the accused-appellant. Thereafter, he persuaded his daughter to go to her in-law's house and she had gone to her in-law's house happily. He further stated that his daughter was taunted by the accused-appellate that her parents had not given dowry. Perusal of examination-in-chief and cross-examination of informant Mani Ram (PW1) reveals that there is no contradiction regarding demand of motorcycle and Rs.50,000/- as dowry and consequent torture committed upon the deceased. Therefore, the statement of PW1 Mani Ram wholly inspires confidence and is reliable. So far as the argument of learned counsel for the accused-appellant that marriage has taken place happily is concerned, it is of no consequence because the demand of motorcycle and Rs.50,000/- was made by the accused-appellant after few days of the marriage. From the statement of PW1, it is also proved that he had persuaded the accused-appellant for not demanding the dowry and had also scolded him. It is also proved that marriage of the deceased with the accused-appellant has taken place just before two years from the appraisal of the evidence of PW1 Mani Ram.

15. It is proved that the deceased met with unnatural death within seven years of marriage and the accused-appellate was demanding dowry after few days of the marriage and continued till death of the deceased.

16. PW2 Sita Sharan is the brother of the deceased who has deposed that the marriage of his sister was solemnized with accused-appellant on 24.06.2012. The marriage card (Ex.Ka.3) is on record which also corroborates his statement. He has also stated that after marriage the accused-appellant started demanding motorcycle and Rs.50,000/- as dowry and he used to assault the deceased on account of its non-fulfillment. He has further stated that whenever his sister came to her parental house she used to tell that accused-appellant was demanding motorcycle and Rs.50,000/- as dowry. He has also corroborated the version of PW1 Mani Ram that he along with his family members persuaded the accused-appellant not to demand dowry but he kept on demanding the dowry. He had received information on phone that his sister has died due to hanging. Thereafter, he reached the village Aasta and found the dead body of his sister lying on a cot and the family members of the accused-appellant have absconded from their house. The proceedings of Panchayatnama had taken place before him. He has further stated that he reached at village Aasta at 10:30 PM and informed the police orally about 11 P.M. At that time police had not registered the case and had returned after seeing the dead body and

again came at 8 A.M. on the next day. He has further stated that his father had not gone to lodge the case in the night. He has further stated that in the morning two police personnel had come and got conducted the inquest on the dead body of the deceased. In the inquest report (Ex.Ka.2) it also finds mention that police had received information on 07.06.2014 at 00:15 A.M. and reached at the place of occurrence for Panchayatnama at about 8 A.M. PW6 Gulab Singh, Tehsildar has proved that he had conducted the Panchnama (Ex.Ka.7) on 07.06.2014 and completed it at 9:30 A.M. Thus, the statement of PW2 gets corroboration that police had reached at about 8 A.M. on the next day and conducted the Panchayatnama. He has further stated that he has complained to Nandram at Aasta regarding demand of dowry by the accused-appellant but he had not complained it to police authorities. From the perusal of whole statement of PW2, there is no contradiction on material point and his statement is consistent and he has given the details of persuading the accused-appellant for not demanding motorcycle and Rs.50,000/- as dowry and not to harass the deceased. From his statement, it is also proved that marriage of the deceased was solemnized with the accused appellant on 24.06.2012 and the deceased met with unnatural death on 06.06.2014, meaning thereby, the deceased has died within two years of marriage and demand of dowry and consequent torture was being made by the accused-appellant after few days of marriage which continued till death of the deceased.

17. PW4 Brij Kishore, brother of the deceased, is witness of the fact and he has deposed that marriage of his sister had taken place in the year 2012. From the marriage card and from the statement of PW2 Sita Sharan, it is proved that marriage of the deceased was solemnized with the accused-appellant on 24.06.2012 but due to pressure of the court atmosphere PW4 has stated in examination-in-chief that marriage had taken place on 24.02.2012 which is insignificant contradiction. From the perusal of his statement, it appears that he is illiterate person and has put his thumb impression on his statement as PW4. Therefore, such minor contradiction is of no consequence. He has further stated that whenever his sister came to her parental house she used to tell that accused-appellant is demanding a motorcycle and Rs.50,000/- as dowry and after persuasion he has sent his sister to her in-law's house. He has further stated that his sister died on 06.06.2014 and the information regarding which was given to his brother Sita Sharan (PW2) over phone. He has further deposed that other persons also came to know that his sister died due to hanging and thereafter he along with several persons had gone to her in-law's house where his sister was found lying. He has also deposed that when they reached the in-law's house of his sister, the family members of accused-appellant had absconded. He has further stated that Daroga Ji had taken the marriage card of his sister and prepared memo (Ex.Ka.4). He has also identified his thumb impression on the memo by which marriage card of the deceased was taken in possession by the police. In cross-examination, he has stated that the accused-appellant is financially poor. He has further stated that whenever his sister came to her parental house, every time they used to persuade his sister and sent to her in-law's house. Perusal of the evidence of PW4 reveals that there is no material contradiction which makes his statement unreliable. The statement of PW4 is consistent and inspire confidence. It is

proved from his statement that the deceased has died within two years of marriage due to unnatural death.

18. PW3 Dr. Udal Srivastava has proved the postmortem report (Ex.Ka.5) and has opined that the deceased died due to asphyxia as a result of hanging. In cross-examination, this witness has stated that injury nos. 1 & 3 may be caused due to friction by hard object. He has further stated that there is least chance of injury no.2 as a result of suicidal hanging. From the perusal of internal examination, it is proved that hyoid bone was found fractured and the muscles of the neck was damaged. Dr. Udal Srivastava (PW3) has stated that the ligature mark found in the neck of the deceased is rarely found in case of suicidal death.

19. In above circumstance, keeping in view the whole evidence I am of the opinion that the deceased met with homicidal death. The defence of the accused-appellant under Section 313 Cr.P.C. is that his wife has suspicion that he has illicit relationship with some other women on account of which she used to quarrel with him and committed suicide by hanging, but from the perusal of postmortem report and the statement of PW3 Dr. Udal Srivastava it is proved that the deceased has met with homicidal death and not by suicidal death. From the perusal of site-plan which is proved by PW5 Circle Officer Subodh Guatam, it is proved that he has not found broken door at the time of preparation of site-plan which rules out the theory of the suicidal death, moreover, no evidence has been given by the defence regarding name of any women with whom the deceased has suspected that her husband was having illicit relation and the prosecution witnesses have also not been cross-examined on this point. Therefore, in above circumstance, the statement of the accused-appellant under Section 313 Cr.P.C. that his wife has committed suicide on account of suspicion that her husband has illicit relation with other women is nothing but a cock and bull story. In view of the evidence as analyzed above, it is proved that the deceased has met with homicidal death on account of demand of dowry which comes within the definition of unnatural death within seven years of marriage. Therefore, it is proved that there is proximity between the demand of dowry and homicidal death of the deceased. The other circumstance which is proved beyond reasonable doubt that accused-appellant and his family members have absconded after the occurrence which also corroborates that offence was committed by the accused-appellant with the help of his family members.

20. Here is relevant to reproduce the Section 304-B I.P.C. which reads as under:-

"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.

21. Section 113-B of the Indian Evidence Act reads as under :-

"113-B. ***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 304-B of the Indian Penal Code (45 of 1860).

22. The conjoint effect of the provisions contained in Section 304-B IPC and Section 113-B of Indian Evidence Act is that if the prosecution seeks conviction of a person for the offence of dowry death, it is obliged to prove as to the following facts :-

(a) The death :

(i) is of a married woman;

(ii) has occurred within the seven years of marriage of the victim;

(iii) is caused by burns or bodily injury, or has occurred otherwise than under normal circumstances; and

(b) Cruelty or harassment was meted out to the victim:

(i) by her husband or any of his relatives;

(ii) for or in connection with any demand for dowry; and

(iii) soon before her death.

23. The Hon'ble Supreme Court dealing with the case of dowry death in the case of ***Baldev Singh vs. State of Punjab [****reported in* ***(2008) 13 SCC 233]****,* has held that "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 or indirect. It is further held that agreement of dowry is not always necessary even demand of dowry and other ingredients being satisfied."

24. In the case of ***Bachni Devi and another vs. State of Haryana through Secretary of Home Department*** [reported in ***2011 (2) ACC 3 SC]****,* the Hon'ble Apex Court has held that where it is proved by evidence that the deceased met with unnatural death (suicidal or homicidal) within seven years of marriage and it is shown that accused were demanding dowry then it will be presumed that accused has committed the dowry death.

25. In above circumstances, from the evidence on record following facts are proved beyond reasonable doubt:-

(i) That the deceased met with homicidal death because of hyoid bone being fractured, muscles of neck and cartrid artery was also found damaged and injury was found on the face.

(ii) That the deceased met with unnatural death within seven years of marriage.

(iii) That the accused-appellant was demanding motorcycle and Rs.50,000/- just after the marriage which continued till death of the deceased.

26. In above circumstances, ingredients of Section 304-B I.P.C. is satisfied and the presumption against accused shall arise that he has committed the dowry death of the deceased. So far as

the evidence of DW1 Gulab Rani, grandmother of the accused-appellant, is concerned, she has not given any evidence regarding suspicion of deceased that accused-appellant has illicit relationship with other women. She has only stated that accused-appellant was not present at the time of occurrence. She has also admitted that at the time of death of the deceased, the deceased has a child of about 6-7 months old. She has admitted that the deceased was not suffering from any illness. Likewise, DW2 Munna Lal has also stated that deceased has committed suicide by bolting the door from inside the room, but no such thing like broken door has been found by the Circle Officer Subodh Gautam (PW5) at the time of preparation of site-plan, therefore, in above circumstance the defence witnesses are unreliable and no reliance can be placed on their evidence.

27. I am in agreement with the finding recorded by the court below that accused-appellant is guilty for offence punishable under Sections 304-B, 498-A I.P.C. and Section 4 of Dowry Prohibition Act. I am also in agreement with the finding of the court below that from the evidence on record it is also proved that the deceased met with homicidal death and the court below has rightly sentenced the accused-appellant to undergo rigorous imprisonment for 10 years under Section 304-B I.P.C., to undergo rigorous imprisonment for three years and a fine of Rs.5000/-, in default to undergo further imprisonment for two months under Section 498-A I.P.C. and to undergo rigorous imprisonment for two years and a fine of Rs.10,000/-, in default to undergo further imprisonment for three months under Section 4 of Dowry Prohibition Act, which cannot be said to be disproportionate.

28. For the foregoing reasons, I find no merit in the appeal and it is ***dismissed,*** accordingly. Consequently, the impugned judgment of conviction dated 03.02.2018 and order of sentence dated 09.02.2018 passed by learned Additional Sessions Judge/Fast Track Court No.1, Jhansi against the accused-appellant is, hereby, confirmed and maintained.

29. Let a copy of this order along with the lower court record be transmitted forthwith to the learned trial court for compliance.

(2022)05ILR A35
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.05.2022

BEFORE

THE HON'BLE SUNITA AGARWAL, J.
THE HON'BLE OM PRAKASH TRIPATHI, J.

Criminal Appeal No. 558 of 1996

Chhunna ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri S.C. Dwivedi, Sri Deepak Singh, Sri Rahul Kumar Singh

Counsel for the Opposite Party:
Govt. Advocate

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Section 302-challenge to –conviction-accused committed murder of the deceased by fatal blow of knife-PW-2 is the sole eye-witness of the occurrence, who is the son of the deceased-evidence of PW-2 is corroborated by PW-6 who had recovered blood stained knife on the pointing out of the accused-PW-2 had no animus to implicate accused falsely-on the basis of solitary witness PW-2,

although, witness is related by blood with the deceased, conviction can be corroborated, if the testimony is reliable and trustworthy-Trial court committed no error in recording the conviction of the accused-assailant inflicted fatal blow on scrotum, inguinal region, this shows that he had every intention and knowledge that injury caused by him would result in the death of the deceased-It is a murder made with cool mind in a planned way four hours after altercation on the same day-It is not a case of grave and sudden provocation. (Para 1 to 47)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Pratap Singh & ors. Vs St. of U.P. (2021) SCC Online All 686

2. Abu Thaker Vs St. of T.N. (2010) 5 SCC 91

3. Bipin Kumar Mondal Vs St. of W.B. (2010) 12 SCC 91

4. Bishwanath Dhuley Vs St. of Mah. (1997) SCC Crl. 1075

5. Kailash Vs St. of U.P. (1998) SCC Crl. 1980

(Delivered by Hon'ble Om Prakash Tripathi, J.)

1. Heard Sri Rahul Kumar Singh, learned counsel for the appellant and Sri Roopak Chaubey, learned A.G.A. for the State-respondent and perused the material on record.

2. The appellant has preferred the present criminal appeal aggrieved by the judgment and orders dated 12.03.1996 and 13.03.1996, passed by the District and Sessions Judge, Kanpur Dehat in Sessions Trial No.173 of 1995 "State vs. Chhunna and others" Police Station Sheorajpur, District Kanpur Dehat, convicting and sentencing the appellant to undergo life imprisonment under Section 302 of IPC with a fine of Rs.3,000/-, in default thereof, to undergo one year rigorous additional imprisonment.

3. The prosecution case is as follows:

4. Subhash Chandra Mishra, the complainant, s/o late Sunderlal Mishra, r/o Village Dubiana, P.S. Sheorajpur, District Kanpur Dehat lodged the first information report on 23.03.1995 alleging that the deceased Sunder Lal r/o village Dubiana, Police Station Sheorajpur, District Kanpur Dehat, had his flour mill towards east of his house at a distance of about 1-1/2 furlong near G.T. Road. On 22.03.1995 at about 8:00 PM, Sunder Lal deceased, his son Subhash Chandra and Rakesh were busy in grinding flour. One Amit resident of village Baharmapur came to the said flour mill for grinding his wheat. Accused Chunna and Dinesh, who were relatives of Amit, were also with him. The accused wanted to get their wheat grinded first, breaking the number of other customers, Subhash Chandra and his brother Rakesh asked them to get the wheat grinded on their turn. On that, accused Chunna and Dinesh threatened them to see. Thereafter Amit went to his house after getting his wheat grinded.

5. On the said night of 22.03.1995, Sunder Lal deceased, was sleeping inside the premises of flour mill on a Takhat. His son Rakesh P.W.2 and Suresh Kumar, brother-in-law (Sala) of Subhash Chandra P.W.1 were sleeping on another Charpai near the Takhat of the deceased. A lighted lantern was hanging inside the premises. At about 11:45 PM. Sunder Lal deceased raised cries. Hearing his cries, Rakesh P.W.2 and Suresh Kumar woke up and

observed that Chhunna- accused was inflicting knife blows on the deceased. On the challenge given by Rakesh P.W.2 and Suresh, Chhunna accused fled away. Both Rakesh and Suresh chased Chhunna and observed that accused Dinesh was standing on the gate of flour mill. Both accused fled away taking benefit of darkness. Hearing alarm, the other persons of the village also came to the spot.

6. Sunder Lal deceased had fallen down on the ground and had profused bleeding from the injuries he sustained. Injured was taken to the P.H.C. Sheorajpur at about 3:00 AM. He was attended there by the Pharmacist P.W.3 as the Doctor was not present. After providing first aid, he was referred to L.L.R. Hospital, Kanpur City. But before being shifted to L.L.R. Hospital, the deceased succumbed to his injuries at 5:10 AM. Sri Udai Narain Yadav, P.W.3 sent information of the death of the deceased Sunder Lal,vide memo Ext.Ka-4 to the Police Station Sheorajpur.

7. After the death of the deceased, Subhash Chandra P.W.1 prepared report of the occurrence Ext.Ka-1 in the Hospital and came to the Police Station Sheorajpur, where he lodged the report at 6:50 AM on 23.03.1995. The Chick FIR Ext.Ka-19 was prepared by the then Head Constable who made an endorsement of the same at G.D. report Ext.Ka-20 and registered a case under Section 302 IPC against the accused.

8. The investigation of the case was taken up by Sri Vijay Narain Pandey, I.O., P.W.6. He interrogated the witness of the fact, Subhash Chandra P.W.1 and proceeded to P.H.C., Sheorajpur, where he appointed Panches and conducted inquest of dead body of Sunder Lal and got prepared inquest report Ext.Ka-7, diagram corpse, challan corpse, letter to C.M.O. and R.I. Exts. Ka.-9 to Ka-12 through S.I. Sri Lalluji Dubey. He got the dead body sealed and prepared sample of seal Ext. Ka-8 and handed over to the Constable Sri Shyam Babu P.W.5 and Home Guard Sri Suresh Chandra Pandey for taking it for post mortem. The Investigating Officer thereafter visited the place of occurrence and prepared site-plan Ext. Ka-13 on the pointing of complainant. He also took into possession the blood-stained and plain earth Ext.2/1 and 2/2, sealed it in different containers and prepared recovery memo Ext.Ka-15. He also took into possession blood-stained "Dhoti' of the deceased, sealed it and prepared recovery memo Ext.Ka-14.

9. The autopsy on the dead body of Sunder Lal deceased was conducted on 24.03.1995 by Dr.L.K. Tiwari P.W.4 who found stitched wound on the scrotum, inguinal region and contusions on the left side of chest and head and cause of death was opined due to shock and haemorrhage as a result of antemortem injuries. He prepared post mortem report Ext. Ka-6.

10. On 24.03.1995, the Investigating Officer interrogated Rakesh P.W.2 and Suresh Pandey. He apprehended accused Chhunna and Dinesh. On the pointing of Chhunna accused, I.O. recovered blood-stained knife Ext.1, the weapon of assault, sealed it and prepared recovery memo Ext.Ka-16. On 28.03.1995, he inspected the place of recovery of knife and prepared site-plan Ext.Ka-17 and interrogated the witnesses of recovery and on completion of investigation, he submitted the charge sheet Ext.Ka-18 against the accused under Section 302 IPC on 04.04.1995.

11. The cognizance of the offence had been taken by the Chief Judicial Magistrate, Kanpur Dehat, who committed

the case to the Court of Sessions for trial on 5.7.1995.

12. Accused Chhunna was charged with the offence punishable under Section 302 IPC while accused Dinesh was charged with the offence punishable under Section 302/34 IPC. The accused pleaded not guilty and contended that they being workers of Bahujan Samaj Party were falsely implicated on account of enmity and Party-Bandi.

13. The prosecution, in support of its case, examined Subhash Chandra P.W.1, Rakesh P.W.2, Udai Narain Yadav P.W.3, Dr. L.K. Tiwari P.W.4, Constable Sri Shyam Babu P.W.5, Sri Vijay Narain Pandey, I.O. P.W.6 and S.I. Sri Amarpal Singh P.W.7.

14. Rakesh P.W.2 is a witness of fact while evidence of other witnesses are formal in nature. Besides documents referred to above, the prosecution has also tendered in evidence the report of Joint Director, Forensic Science Laboratory, Lucknow, Ext. Ka-19.

15. According to prosecution, Sunder Lal deceased died on account of knife injuries. The accused have not disputed identity, death and cause of the death of deceased Sunder Lal.

16. So far as the FIR of this case is concerned, the occurrence took place in the night of 22.03.1995 at about 11:45 PM inside the flour mill premises of the deceased, situated in Village Dubiana, Police Station Dheorajpur, District Kanpur Dehat. Thereafter the deceased was taken to the P.H.C. by Khatola (small cot) at about 3:00 AM. Doctor was not present therefore, the Pharmacist had attended the patient and after primary treatment, referred the injured to L.L.R. Hospital, Kanpur City. But before being shifted to L.L.R. Hospital, the deceased Sunder Lal expired at 5:10 AM and thereafter complainant prepared a written report and on the basis of written report, FIR against the accused was lodged at about 6:50 a.m.on 23.03.1995, i.e., after one hour and 40 minutes after death. It is also proved that due to serious injuries, complainant was busy in treatment to save life of his father, after death, information was given to the police station. FIR of the case has been lodged promptly without unnecessary delay and without any legal consult.

17. So far as the motive of the incident is concerned, learned counsel for the appellant submitted that the appellant has weak motive to cause the incident. The appellant has been falsely implicated in this case, being member of BSP.

18. It is a case of eye-witness account of those who had seen the occurrence and in case of eye-witness, direct evidence, motive becomes immaterial.

19. In support of above contentions, learned A.G.A. placed reliance on following decisions :

20. In **Pratap Singh and others vs. State of UP 2021, SCC Online All 686,** the Court held that :

"Motive is not very relevant in a case of direct evidence, where it dependable ocular version is available. Once, there is evidence forthcoming on the basis of an eye witness account that is consistently narrated by multiple witnesses motive is hardly relevant. "

In **Abu Thaker Vs. State of Tamil Nadu, (2010) 5 SCC 91**, the Court held that :

"It is settled legal proposition that even if the absence of motive and if allowed is accepted that is of no consequence and pales into insignificance when direct evidence establishes the crime, therefore, in case, there is direct, trustworthy evidence of witnesses as to commission of an offence, the motive part uses its significance. Therefore, if the genesis of motive of occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only by reason of absence of motive, if otherwise the evidence is worthy of reliance."

In **Bipin Kumar Mondal Vs. State of West Bengal, (2010) 12 SCC 91**, the Court held that :

"Motive is of no consequence and pales into insignificance when direct evidence establishes the crime. Motive is a thing which is primarily known to the accused himself and it may not be possible for the prosecution to explain it. Ocular testimony of the witnesses if reliable cannot be discarded only by the reason of the absence of motive."

21. Thus, from the evidence, it is proved that accused Chhunna and Dinesh threatened the deceased Sunder Lal to see at about 8:00 PM and committed the gruesome murder of the deceased Sunder Lal within four hours in the midnight, in the presence of eye-witness.

22. On the basis of law laid down as above, the presence of ocular evidence, the motive becomes immaterial and further the prosecution has also proved the motive for causing the incident by the appellant.

23. Dr. L.K. Tiwari, P.W.4 who conduced the autopsy on the dead body of the deceased on 24.03.1995 at 2:15 PM found following facts :-

" The deceased was aged about 60 years and had died before 1-1/2 day. He had average built body. Rigor mortis passed of from both extremities. Eye and mouth closed. Post mortem staining present on the whole of the back buttock and thighs. Abodmen distended. Blisters present. Skin peeled off at places."

24. The Doctor found following ante-mortem injuries on the dead body of the deceased Sunder Lal.

"1. Contused swelling 8 Cm. x 4 Cm. on left lateral side of hand just above left ear.

2. Contusion 6 Cm. x 4 Cm. on the left lateral aspect of lower part of chest and upper part of abdomen.

3. Stitched wound 8 Cm. long with 9 stitches present on right side of scrotum.

4. Stitched wound 3 Cm. long with 3 stitches present on right side of inguinal region on medial side

Scrotum was swollen."

25. On internal examination, both lungs were pale. Both chambers of heart were empty. 1-1/2 Litre blood was present in abdominal cavity. Watery fluid was present in the stomach. Semi solid fluid was present in the small intestines and gases and faecal matters were present in the large intestines. Gallbladder, pancreas, spleen and both kidneys were pale. In the opinion of Doctor, death was caused due to haemorrhage and shock as a result of ante-mortem injuries.

26. Dr. L.K. Tiwari, P.W.4 further opined that injuries further clarified that stitched wounds were not lacerated as oozing of blood is not possible from lacerated wound. However, he stated that he had not opened the stitched wounds.

27. It is true that the Pharmacist, who examined the injuries of the deceased, had not mentioned the nature of injures but considering the internal condition of the dead body and bleeding nature of injuries, Sri Udai Narain Yadav, P.W.3 has stated that injuries were caused by some sharp edged weapon. Dr. L.K. Tiwari, P.W.4 also stated that a huge amount of blood had come out from stitched wounds (injuries nos. 3 and 4). Thus it is clear from the medical evidence is that injuries nos. 3 and 4 were not lacerated or stab wounds but incised wound.

28. Regarding injuries Nos. 1 and 2, Dr. L.K. Tiwari P.W.4 has opined that these injuries could be caused by fall on the ground. It has been clarified by Rakesh P.W.2 that after sustaining knife injuries, the deceased raised cries and fell down on the ground from Takhat, on which he was sleeping. Therefore, there is explanation regarding injuries nos. 1 and 2, which could be caused by the fall.

29. It is clear from the above medical evidence that the deceased died on account of injuries on his scrotum and inguinal region. Thus, the prosecution has successfully proved identity, death and cause of death of Sunder Lal, deceased.

30. The main question before us is that whether the appellant Chhunna had committed the murder of Sunder Lal deceased by inflicting knife injuries.

31. P.W.1 Subhash Chandra was admittedly at his house in the night of occurrence and had not seen the occurrence. This evidence is hearsay so his evidence is not material for proving the manner of occurrence and complicity of accused.

32. P.W.2 Rakesh is only witness, who stated about the manner of occurrence and complicity of accused. According to his evidence, in the night of occurrence, the deceased, he and his relative Suresh were sleeping in the flour mill premises. The deceased was sleeping on the Takhat while he and Suresh were sleeping on a Charpai. Lighted lantern was hanging near the Thakat of deceased and his Charpai. At about quarter to mid-night, he heard the shrieks of his father. He and Suresh woke up and saw that accused Chhunna was inflicting knife blows on the deceased. He and Suresh raised alarm and chased him. The other accused Dinesh was standing on the gate of flour mill. The accused started running. He and Suresh chased the accused but they ran away.

33. In his cross-examination, he clarified that he came to the flour mill on the night of occurrence at about 10:00 pm alongwith Suresh. His father, the deceased came to the flour mill at 9:00 pm when the operation of flour mill was closed. Subhash Chandra P.W.1 stated that he has his residential house and in the night of occurrence, he, his wife and children of Rakesh were sleeping inside the house and Rakesh was sleeping inside the flour mill premises. Rakesh P.W.2 has denied the suggestion of accused that he was sleeping in his house in the night of occurrence. There is no evidence otherwise on record to prove that the witness (P.W.-2) was sleeping inside his house on the night of

occurrence. The deceased was aged man of about 60 years, therefore, other member of his family required to sleep in the flour mill premises. There is nothing in the cross-examination of Rakesh P.W.2 to doubt his presence on the spot in the night of occurrence.

34. Rakesh further clarified that he had seen Chhunna accused inflicting one knife blow. It is clear from the evidence of the witness that he woke up on hearing the shrieks of the deceased. This shows that the first blow was inflicted on the deceased before his shrieks and therefore, it was natural for Rakesh P.W.2 to observe only one knife blow on the deceased. Regarding identity of accused Chhunna and Dinesh, Rakesh P.W.2 stated that he was knowing Chhunna accused prior to the incident but was not knowing Dinesh accused before. He also stated that he had seen Chhunna accused twice prior to the occurrence in the market but did not talk to him. Subhash Chandra P.W.1 stated that he knew Chhunna and Dinesh prior to the incident but he was not knowing their parentage. On the day of occurrence, when altercation took place between him and the accused, he enquired parentage and residence of accused Chhunna and Dinesh from their relative Amit who told them the details. It was on the basis of above information, he mentioned the name, parentage and residence of the accused in the FIR. The evidence of Rakesh P.W.2 that he knew Chhunna accused prior to the incident, and met him twice prior to the occurrence in the market, had not been challenged, and therefore, there is ample evidence on record to prove that Rakesh P.W.2 knew Chhunna accused prior to the incident.

35. No direct enmity, ill-will or grudge of witness with the accused or any member of his family had been suggested or proved. The accused contended in their statement under Section 313 Cr.P.C. that they were active members of Bahujan Samaj Party and, therefore, were falsely implicated. What grudge Rakesh P.W.2 had with the accused, had not been specified. Assuming that the accused were members of Bahujan Samaj Party, it was no ground for Rakesh P.W.2 to be enimical with him. Therefore, the alleged enmity suggested by the accused has no weight.

36. Beside the ocular evidence of Rakesh P.W.2, there is evidence of I.O. Sri Vijay Narain Pandey P.W.6, who stated that he apprehended accused Chhunna on 24.03.1995 and on his pointing out recovered blood stained knife Ext.1. The recovery memo Ext.Ka-16 shows that accused had taken the Investigating Officer and the witnesses at a lonely place besides broken boundary of the old hospital and took out blood stained knife from the heap of bricks and handed over to him. The above knife Ext.1 was sealed on the spot and was sent to Forensic Science Laboratory for analysis and report. The report of the Joint Director Forensic Science Laboratory U.P. Lucknow, Ext.Ka-19 shows that item no.3 (knife) contained human blood. There is nothing in the cross-examination of the I.O. to disbelieve him on the issue of recovery of knife on the pointing out of the accused Chhunna. Length of knife is 8 angul, i.e., about 8 cm and injury no.3 was also 8 cm in length with nine stitches, which also reflects that the recovered knife was one, which had been used in causing fatal injury on the person of the deceased. In this way, the evidence of Rakesh P.W.2 finds corroboration from the recovery of human blood-stained knife on the pointing out of Chhunna accused. Apart from this, human

blood was found on plain and blood-stained earth, dhoti, shirt, half sweater, vest and towel of the deceased.

37. Learned counsel for the appellant submitted that P.W.2 is the near relative of the deceased and due to this reason, his evidence should not be considered reliable.

38. Per contra, learned A.G.A. submitted that evidence of related witnesses is reliable but must be scrutinized with care and caution. On this point, learned A.G.A. relied upon the judgment of the Apex Court in **Bishwanath Dhuley vs. State of Maharastha, 1997, SCC Criminal 1075,** wherein it has been held that : "mere relationship does not qualify the witness even if independent witness in spite of being available not produced related witness to be the competent witness. However, their evidence must be scrutinized with car and caution".

39. Learned A.G.A. has also relied upon another judgment of Apex Court in **Kailash vs. State of Uttar Pradesh, 1998 SCC Criminal 1980,** wherein it has been held that: "absence of any material on record to show that prosecution witness has any enmity with the accused, his evidence cannot be brushed aside merely on the ground of relationship, generally relations of victim are interested in bringing the book the real culprits".

40. It is evident that the accused and the deceased belong to different castes and had no reason of enmity. Witness P.W.2 was not an interested witness and his presence on the spot at the time of occurrence, can not be disputed. It is not expected that in the mid-night, in the premises of flour mill, presence of independent witness, was not probable. In such circumstances, P.W.2 who was sleeping on the Takhat nearby the deceased, was the best, appropriate and natural witness of the occurrence and his evidence is fully reliable. Thus, mere relationship of the witness with the deceased is no ground to disbelieve his testimony.

41. It is submitted by the learned counsel for the appellant that P.W.2 is the son of the deceased and he is the interested sole witness and in this situation, evidence of P.W.2 is not reliable as it has no corroboration.

42. It is settled that the testimony of single eye witness can be acted upon if otherwise reliable and corroboration required only when his evidence is open to doubt and suspicious. A close relative who is a natural witness, cannot be recorded as an interested witness. The term "interested' postulates that the person concerned must have some direct interest in seeing that the accused person is somehow or the other convicted either because some animus with accused for some other reason. Testimony of solitary witness has to be examined with great care and circumspection. In the present case, P.W.2 is the sole eye witness of the occurrence, who is the son of the deceased. He has no animus to implicate accused falsely. In the long cross-examination, nothing in his evidence contrary to the case of the prosecution could come out. In fact, P.W.2 is solitary, sterling eye witness, whose testimony is wholly, reliable and does not need any sort of corroboration. Besides this, evidence of P.W.2 is corroborated by the Investigating Officer P.W.6, who had recovered blood stained knife on the pointing out of the applicant. Thus, on the basis of solitary evidence of P.W.2, although, witness is related by blood with the deceased,

conviction can be recorded. The trial Court has not committed any error much less manifest error in recording the conviction of the accused appellant Chhunna.

43. On the basis of above discussion, it is clear that the prosecution has successfully proved the manner of occurrence that accused Chhunna was real assailant who inflicted the fatal blow on scrotum, inguinal region of the deceased. The nature of ante-mortem injuries of the deceased were such that it could cause his death in all probabilities. This shows that accused Chhunna had every intention and knowledge that injury caused by him would result in the death of the deceased. Therefore, the prosecution has successfully proved the guilt of accused Chhunna for the offence punishable under Section 302 IPC. It is a murder made with cool mind in a planned way four hours after altercation on the same day. It is not a case of grave and sudden provocation.

44. Co-accused Dinesh was not found guilty by the trial Court and was acquitted for the charge under under Section 302/34 IPC. The State of Uttar Pradesh had not filed any appeal against the acquittal of co-accused Dinesh and no such appeal has been brought before us.

45. On the basis of above discussion, we are of the view that the judgment and orders of the trial court dated 12.03.1996 and 13.03.1996 passed by the District and Sessions Judge, Kanpur Dehat in Sessions Trial No.173 of 1995 "State vs. Chhunna and others", Police Station Sheorajpur, District Kanpur Dehat, convicting and sentencing the accused appellant Chhunna to undergo life imprisonment under Section 302 IPC with fine of Rs.3,000/-, in default thereof, to undergo one year rigorous additional imprisonment, is hereby confirmed.

46. During trial, the accused appellant Chhunna was on bail. During appeal, the appellant Chhunna was on bail. The appellant was arrested on 21.01.2020 in execution of the non-bailable-warrant and is detained in the District Jail, Mati, Kanpur Dehat at present. The accused appellant Chhunna is directed to serve out the remaining period of his sentence. The bail bonds filed by the appellant are forfeited and sureties are discharged.

47. The appeal is devoid of merits and liable to be dismissed. The appeal is accordingly, **dismissed.**

48. Certify this judgment to the Court below immediately for compliance. The compliance report be submitted through the Registrar General, High Court, Allahabad.

(2022)05ILR A43
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.05.2022

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE DINESH KUMAR SINGH, J.

Criminal Appeal No. 674 of 1982

Ram Khelawan & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Ram Chandra, Akhilesh Kumar Srivastava, Girish Kumar Pande, Pawan Kumar Tiwari, Rajesh Kumar Dwivedi (A.C.)

Counsel for the Resondent:
Govt. Advocate

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 374(2) - Indian Penal Code, 1860-Sections 302, 302/34 & 324-challenge to –conviction-all the three accused participated in commission of the offence as two of them caught hold of the deceased and one gave fatal blow with knife on neck, as a result, deceased died-as per doctor opinion injury no. 1 on neck was sufficient in ordinary course to cause death-no hard and fast rule that in case of single injury, provisions of section 302 IPC would not be attracted- it depends upon the facts and circumstances of each case-the essence of section 34 IPC is consensus of minds of persons participating in a criminal action to bring about a particular result-It does not create any distinct offence but lays down the principle of constructive criminal liability-The case has been proved beyond all reasonable doubts by the statements of prosecution witnesses.(Para 1 to 25)

B. The nature of injury, the part of the body where it is caused, the weapon used in causing such injury are the indicators. of the fact whether the accused caused death with an intention of causing death or not. It cannot be laid down as a rule of universal application that whenever the death occurs on account of a single blow, Section 302 IPC is ruled out.(Para 24)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Jasdeep Singh @ Jassu Vs St. of Punj. (2022) 2 SCC 545

2. Stalin Vs St. Rprtd. by the Inspr of Police (2020) 9 SCC 524

3. Virsa Singh Vs St. of Punj. (1958) AIR SC 465

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

1. This criminal appeal under Section 374(2) CrPC arises out of judgment and order dated 31st August, 1982 passed by the IVth Additional Sessions Judge, Lucknow in Sessions Trial No.170 of 1981, convicting accused, Ram Khelawan (appellant no. 1) under Section 302 IPC and accused Budhu and Ram Dutt (appellant no. 2) under Section 302/34 IPC and sentenced them to undergo life imprisonment. Accused, Ram Khelwan (appellant no. 1) had been further convicted under Section 324 IPC and accused, Budhu and Ram Dutt (appellant No. 2) had been convicted under Section 324/34 IPC and sentenced to undergo two years rigorous imprisonment.

2. Appeal filed by accused, Budhu, being Criminal Appeal No.685 of 1982, who was also convicted and sentenced, as noted above, has been dismissed by this Court vide judgment and order dated 06.04.2018. While dismissing the said criminal appeal, this Court had observed as under:-

"We find that there are consistent statements of prosecution witnesses on record which are also corroborated by the injury reports as well as the opinion of the doctor with regard to receiving fatal blow by the deceased as well as the injuries received by Ketar. The case of the prosecution that Buddhoo had come armed with knife giving challenge that he would not allow Ram Beti to be married in Village Kharika and then Ram Khelawan took knife from Buddhoo and gave knife blow at the left hand of Ketar and thereafter Ram Dutt and Buddhoo caught hold of Ram Deen by his hands and Ram Khelawan gave him knife blow near his neck, go to establish that all the accused have common intention of committing the offence of murder. Therefore, they are liable to be convicted, having the common intention of committing

the offence, as has been proved beyond all reasonable doubts by the statements of the prosecution witnesses."

3. As per prosecution case, Ramdin (deceased) his brother Ketar (injured), accused, complainant and witnesses belong to 'Mangta Community'. All these persons were living in their huts, near Banthara Market.

4. Ramdin and Ketar were having sister, Sarjoo, whose husband died and, she was living in a nearby hut. Her elder daughter, Samrata was married to Budhu. Marriage of her younger daughter, Rambeti was arranged and settled by Ramdin and Ketar in village, Kharika. On the date of incident, *Barat* was to come as marriage was scheduled. At around, 8.30 p.m., when music was being played, two petromaxes were burning and arrangements were being made of food etc., for the guests etc., accused Budhu, followed by present appellants, came there having an open knife in his hand. He challenged that he would not allow Rambeti to get married in village Kharika from where Barat was coming.

5. It is said that when deceased, Ramdin and his brother, injured, Ketar tried to caution and make him understand not to make any disturbance/turbulence in marriage, Ram Khelawan snatched the knife from Budhu and gave knife blow on left hand of Ketar. Ramdin intervened to save his brother and apprehend, accused, Ram Khelawan, Budhu and Ram Dutt caught hood of his hands and Ram Khelawan gave knife blow on neck of Ramdin, who instantly fell down. All the accused fled away from the place of occurrence towards Banthara Market.

6. FIR of the incident was lodged on same day at Banthara Police Station.

7. Injured Ramdin and Ketar were sent to Sarojini Nagar Primary Heath Center for medical aid. Since Ramdin's condition was serious, he was referred to Balrampur Hospital where he died next morning i.e. on 29.11.1980. After investigating the offence, charge-sheet was filed. The accused denied charges and demanded for trial.

8. Deceased, Ramdin was initially medically examined at 9.30 p.m. and Doctor found incised wound 3/4"x1/4" into muscle deep on the lower part of front of middle of neck with bleeding.

9. Injured, Ketar was medically examined at 12.30 a.m. on intervening night of 27/28.11.1980, and the Doctor found him to have suffered incised wound 1"x1/4" into muscle deep on the dorsal surface of left hand and one abrasion 1/4"x1/8" on the tip of left middle finger.

10. During the course of postmortem examination of deceased, Ramdin, which was conducted on 29.11.1980, following antemortem injures were noticed on his body:-

1. Stitched wound 2 cm. long with one stiph on the base of the neck left side 0.5 cm. Left to the supra esternal notch.

2. Multiple abraded contusion in an area of 5 cm. X 2.5 cm. On the back of left elbow.

3. Abraded contusion 1.5 cm. X 0.5 cm. on the front of right leg 26 cm. below right knee.

11. As per opinion given by the Doctor, the death was caused as a result of shock and hemorrhage due to injury no. 1, which was sufficient in ordinary course of nature to cause death.

12. Prosecution, to prove its case, examined injured, Ketar as PW-1 and Prabhudin as PW-2, Dr. S.H.A. Rizvi, the then Medical Officer, who was posted at PHC, Sarojini Nagar, who initially examined Ketar and Ramdin on 27.11.1980, as PW-3, Dr. V.P. Singh, Medical Officer, posted at Civil Hospital, Lucknow, who conducted postmortem examination of deceased, Ramdin, as PW-4, Mr. Ram Singh, Head Constable, who was posted as Head Mohrir at Police Station Banthara on 27.11.1980 and prepared chick report, Exhibit Ka-1, as PW-5, and Mr. Sukh Dev Pandey, Sub-Inspector, who conducted inquest, as PW-6. Mr. Biraj Shyam Mishra, the Investigating Officer who completed investigation, as PW-7.

13. After the prosecution evidence got concluded, statements of accused were recorded under Section 313 CrPC.

14. Since one of the appellants, Ram Khelawan was absconding, the present appeal filed by him and Ram Dutt was disconnected from Criminal Appeal No.685 of 1982 filed by Budhu.

15. This Court has already discussed the evidence in the judgment and order dated 06.04.2018 passed in Criminal Appeal No. 685 of 1982 and, therefore, no useful purpose would be served by extracting the evidence on hereunder. It would be suffice to note that the place of incident, manner in which the incident was caused, presence of the accused and role played by them in furtherance of common intention is fully established by injured witness and independent witness and the evidence of two doctors, who initially conducted the medical examination of the injured and postmortem examination of the deceased respectively.

16. The prosecution story gets corroborated by the medical evidence as well. There is direct evidence of injured and eye-witness, who have fully supported the prosecution case.

17. Mr. Rajesh Kumar Dwivedi, learned Amicus, however, has submitted that the judgment and order dated 06.04.2018 passed in Criminal Appeal No. 685 of 1982 preferred by co-accused, Budhu would not be binding on the present accused-appellants. This Court should examine their case irrespective of finding recorded in the said judgment and order. It has been further submitted that no motive is coming forth for committing the offence by the appellants, Ram Khelawan and Ram Dutt. As per the prosecution case, it was Budhu, who was aggrieved by settling of marriage of Rambeti, his sister-in-law, in village Kharika and, he came with knife. It has been further submitted that it does not appeal to reason that Ram Khelawan would snatch knife from Budhu and give fatal blow on deceased, Ramdin and injure Ketar. It has been further submitted that accused, Ram Dutt has been assigned role of catching hold of the deceased and there is no reason to believe that the accused, Ram Khelawan, and Ram Dutt would have common intention of committing murder of Ramdin. There is nothing on record to suggest that the accused had come prepared to commit the offence or there was premeditation/prior meeting of minds of the accused for commission of offence. He has

submitted that it would not be proper to convict appellant, Ram Dutt with aid of Section 34 IPC for offence under Section 302 IPC as role assigned to him of catching hold of the hand of the deceased only single blow was given on deceased, Ramdin and that too by appellant, Ram Khelawan. Except for role of catching hold of appellant, Ram Dutt, no other role has been assigned to him. Therefore, it has been submitted that since there was single injury which was caused to deceased, Ramdin by accused Ram Khelawan and Ramdin died on next day, it is a fit case where appellant, Ram Khelawan and Ram Dutt should be convicted under Section 304 IPC and not under Section 302 IPC, even if the prosecution story is believed.

18. On the other hand, Mr. Umesh Verma, learned A.G.A., has submitted that this Court, while analyzing the evidence on record, has specifically held that the prosecution case was fully proved by evidence on record. This Court also held that all the three accused had common intention for committing murder and, therefore, this Court cannot review the judgment in which specific finding that all the three accused had common intention for committing murder has been recorded. This Court is neither sitting in appeal nor in review against the judgment and order dated 06.04.2018 and, therefore, the findings recorded in judgment and order dated 06.04.2018 passed in Criminal Appeal No.685 of 1982 are binding in the present appeal, and a different view cannot be taken. Mr. Verma has further submitted that even otherwise, when the prosecution has established the role of giving knife blow by Ram Khelawan and catching hold by Budhu and Ram Dutt, it cannot be said that all the three accused did not have common intention to cause death of Ramdin. It is submitted that common intention could develop instantly. Ram Khelawan assaulted Ketar after snatching knife from Budhu and when Ramdin tried to save him, accused Ram Dutt and Budhu caught hold of Ramdin and accused, Ram Khelawan gave fatal blow as a result thereof, he died. It has been further submitted that the Doctor had opined that injury no. 1 suffered by deceased, Ramdin was sufficient in ordinary course of nature to cause death. It has been further submitted that there is no ground to interfere with the conviction and sentence of the accused-appellants by the trial Court and the appeal is liable to be dismissed.

19. We have considered the submissions advanced by the learned amicus and learned Government Counsel.

20. Section 34 of the IPC creates a deeming fiction by infusing and importing a criminal act constituting an offence committed by one into others. It is for the prosecution to prove the common intention to the satisfaction of the Court.

21. This Court in its judgment and order dated 06.04.2018 passed in Criminal Appeal No.685 of 1982, after analyzing the evidence in detail, has held that all the three accused had common intention to commit murder of the deceased.

22. The Supreme Court in recent judgment **(2022) 2 SCC 545 (Jasdeep Singh alias Jassu Vs. State of Punjab)** has held that common intention to commit an offence is a team effort akin to a game of football involving several positions manned by many. It would be apt to extract few paragraphs from the said judgment hereunder:-

"22. It is a team effort akin to a game of football involving several positions manned by many, such as defender, mid-fielder, striker, and a keeper. A striker may hit the target, while a keeper may stop an attack. The consequence of the match, either a win or a loss, is borne by all the players, though they may have their distinct roles. A goal scored or saved may be the final act, but the result is what matters. As against the specific individuals who had impacted more, the result is shared between the players. The same logic is the foundation of Section 34 IPC which creates shared liability on those who shared the common intention to commit the crime.

23. The intendment of Section 34 IPC is to remove the difficulties in distinguishing the acts of individual members of a party, acting in furtherance of a common intention. There has to be a simultaneous conscious mind of the persons participating in the criminal action of bringing about a particular result. A common intention qua its existence is a question of fact and also requires an act "in furtherance of the said intention". One need not search for a concrete evidence, as it is for the court to come to a conclusion on a cumulative assessment. It is only a rule of evidence and thus does not create any substantive offence.

24. Normally, in an offence committed physically, the presence of an accused charged under Section 34 IPC is required, especially in a case where the act attributed to the accused is one of instigation/exhortation. However, there are exceptions, in particular, when an offence consists of diverse acts done at different times and places. Therefore, it has to be seen on a case-to-case basis.

25. The word "furtherance" indicates the existence of aid or assistance in producing an effect in future. Thus, it has to be construed as an advancement or promotion.

26. There may be cases where all acts, in general, would not come under the purview of Section 34 IPC, but only those done in furtherance of the common intention having adequate connectivity. When we speak of intention it has to be one of criminality with adequacy of knowledge of any existing fact necessary for the proposed offence. Such an intention is meant to assist, encourage, promote and facilitate the commission of a crime with the requisite knowledge as aforesaid.

27. The existence of common intention is obviously the duty of the prosecution to prove. However, a court has to analyse and assess the evidence before implicating a person under Section 34 IPC. A mere common intention per se may not attract Section 34 IPC, sans an action in furtherance. There may also be cases where a person despite being an active participant in forming a common intention to commit a crime, may actually withdraw from it later. Of course, this is also one of the facts for the consideration of the court. Further, the fact that all accused charged with an offence read with Section 34 IPC are present at the commission of the crime, without dissuading themselves or others might well be a relevant circumstance, provided a prior common intention is duly proved. Once again, this is an aspect which is required to be looked into by the court on the evidence placed before it. It may not be required on the part of the defence to specifically raise such a plea in a case where adequate evidence is available before the court."

23. The essence of Section 34 IPC is consensus of minds of the persons participating in a criminal action to bring about a particular result. It does not create

any distinct offence but lays down the principle of constructive criminal liability. The facts of this case would disclose that all the three accused had participated in commission of the offence inasmuch as two of them caught hold of the deceased and one gave fatal blow on neck as a result thereof deceased, Ramdin died. According to Doctor, who conducted autopsy on dead-body of the deceased, the injury caused on neck of Ramdin was sufficient in ordinary course to cause death. There is no hard and fast rule that in case of single injury, provisions of Section 302 IPC would not be attracted. It would depend upon facts of each case, nature of injury, part of body where injury is caused, weapon used in causing such injury to ascertain intention of causing death. Therefore, the submission of learned Amicus that since single injury was caused on neck of the deceased, the accused did not have intention to cause death does not appeal to us.

24. The Supreme Court in **(2020) 9 SCC 524 (Stalin Vs. State Represented by the Inspector of Police)** noted down on this issue, the observations in **AIR 1958 SC 465 (Virsa Singh Vs. State of Punjab)** and held in paragraph 7.2 as under:-

"7.2 From the above stated decisions, it emerges that there is no hard and fast rule that in a case of single injury Section 302 IPC would not be attracted. It depends upon the facts and circumstances of each case. The nature of injury, the part of the body where it is caused, the weapon used in causing such injury are the indicators of the fact whether the accused caused the death of the deceased with an intention of causing death or not. It cannot be laid down as a rule of universal application that whenever the death occurs on account of a single blow, Section 302 IPC is ruled out. The fact situation has to be considered in each case, more particularly, under the circumstances narrated hereinabove, the events which precede will also have a bearing on the issue whether the act by which the death was caused was done with an intention of causing death or knowledge that it is likely to cause death, but without intention to cause death. It is the totality of the circumstances which will decide the nature of offence."

25. Accused, Ram Khelawan had given knife blow on neck of the deceased which resulted into death of deceased on next day. Considering the opinion of the Doctor, weapon used in committing offence and body part where knife blow was given, this Court is of the view that the accused had intention to cause death while the deceased was caught hold by two other co-accused. In view thereof, this Court does not find any ground to take a different view than the view which has been taken in Criminal Appeal No.685 of 1982. In the result, this appeal also fails and is hereby **dismissed**. However, considering the fact that the incident took place in the year 1980. The appellants are in their advance age and, therefore, the State Government should consider their case for remission expeditiously, taking into consideration their advance age and their conduct in jail etc. in accordance with law.

26. We appreciate valuable assistance rendered by Mr. Rajesh Kumar Dwivedi, learned Amicus and Mr. Umesh Verma, learned A.G.A. during the course of hearing of this appeal.

27. We fix Rs.11,000/- to be paid to learned Amicus as fee, for assisting the Court.

(2022)05ILR A50
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.05.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Criminal Appeal No. 1007 of 1996

Kali Prasad ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri V.S. Kushwaha, Sri Dhirendra Kumar, Sri Mohd. Kalim, Sri Ulajhan Singh Bind, Ms. Mary Punch (Sheeba Jose)

Counsel for the Respondent:
Govt. Advocate

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 374(2) - Indian Penal Code, 1860 - Sections 302-challenge to –conviction-modification of sentence-murder-altercation between two truck drivers over on a trivial issue-the accused and the deceased were strangers-statements of eye-witnesses PW-2 and PW-3 are consistent-both were entangled in the fight while being in their respective trucks, the appellant gave a blow of knife to the deceased-appellant had committed the offence without any pre-meditation in a sudden fight in the state of anger-oral altercation took an ugly turn-death caused due to head injury by the butt of the knife on account of which the deceased went into coma and died-the act of the appellant was clearly with the intent to cause bodily injury which could result in the death-Thus, the appellant is not guilty of murder u/s 302 of the Code but the offence would fall under Section 304 Part I of the IPC.(Para 1 to 38)

B. While answering the question of modification of sentence, the principle of exclusion could be applied. 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 of Section 304. On the other hand if before the application 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, therefore, that the appellant could be convicted only under Part II of Section 304 and not Part I.(Para 24)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. St. Tr. P.S. Lodhi Colony, New Delhi Vs Sanjeev Nanda(2012) AIR SC 3104

2. Rampal Singh Vs St. of U.P. (2012) 8 SCC 289

3. Vineet Kumar Chauhan Vs St. of U.P. (2007) 14 SCC 660

4. St. of A. P. Vs S Rayavarapu Punnayya & anr.(1976) 4 SCC 382

5. Virsa Singh Vs St. of Punj.(1958) AIR SC 465

6. Rajwant Singh Vs St. of Ker.(1966) AIR SC 1874

7. Aradadi Ramudu @ Aggiramudu Vs St. thru Inspr. of Police, Yanam(2012) 5 SCC 249

8. St. of U.P. Vs Indrajeet (2000) 7 SCC 249

9. Statish Narayan Sawant Vs St. of Goa (2009) 17 SCC 724

10. Arun Raj Vs UOI (2010) 6 SCC 457

11. Phulia Tudu Vs St. of Bih.(2007) 14 SCC 588

12. Mohinder Pal Jolly Vs St. of Punj.(1979) 3 SCC 30

(Delivered by Hon'ble Mrs. Sunita Agarwal J.)

1. Heard Ms. Mary Punch (Sheeba Jose) and Mohd. Kalim learned counsels for the appellant and Sri Patanjali Mishra learned A.G.A. for the State-respondent.

2. This appeal is directed against the judgment and order dated 18.4.1996 passed by the VIIth Additional Sessions Judge, Allahabad whereby appellant Kali Prasad has been convicted of the offence under Section 302 IPC and sentenced for life imprisonment.

3. The first information report regarding the incident occurred on 29.6.1994 at about 11:30 AM, at the Phaphamau Railway Crossing, was lodged by Sri Ram Prakash Singh (PW-5) with the thumb impressions of the eye-witnesses PW-2 Ashok Kumar and PW-3 Ramesh Kumar Sharma. As per the eye-witness account as narrated in the written report, on the fateful day, i.e. on 29.6.1994, deceased Ram Aasre Bhartiya was driving a Truck No. UP70 9822 when he reached at the Phaphamau Railway Crossing at about 11:30 AM, the crossing gate was closed to pass a train. As soon as the gate was opened when the train crossed over, deceased Ram Aasre Bhartiya moved his vehicle (truck) to cross the railway track. At the same time, one Truck No.UP65 B8551 also moved forward from the opposite direction (Eastern side) to cross the railway track. By chance, both the trucks came side by side and got stuck in the middle of the railway track. The drivers of the trucks started arguing as to who would take his truck back. Getting angry, out of rage, the driver of Truck No. UP65 B8551 attacked in the neck of deceased Ram Aasre by knife. The Khalasis of the truck namely Ashok and Ramesh got down while making hue and cry and with the help of the public (crowd) present at the spot, they had succeeded in catching hold of the assailant driver. In the meantime, the Khalasi of the said truck had succeeded in running away from the spot of the incident. The truck driver Ram Aasre had died on the spot. Looking to the crowd, the Railway Police reached at the spot and the assailant driver namely the appellant herein was caught. The assailant driver disclosed his name as Kali Prasad son of Lochan Kumhar, resident of Mohalla Golachhani, Police Station Sasaram, District Rohtas (Bihar).

4. The Check FIR was lodged at about 13:30 PM on the same day, i.e. 29.6.1994, at the Chauki G.R.P. Prayag, Sadar, District Allahabad.

As per the version in the first information report, the offence of murder was committed during the course of altercation between two truck drivers on a trivial issue which took an ugly turn on the spot.

5. The recovery memo of the blood stained and plain earth made from near the railway track had been proved as 'Exhibit Ka-16'. The pieces of mirror and glass collected and seized from the Truck No. UP70 9822 were entered in the recovery memo proved as 'Exhibit Ka-17'. The memo of search 'Exhibit Ka-18' indicates that no incriminating material such as knife

was recovered from the truck being driven by the accused appellant.

The Ante-mortem injuries indicated in the postmortem report are:-

"(1) Contusion in an area of 2.0" diameter of left Cheek.

(2) Contusion in an area of 2.0" diameter on left temporal region.

(3) Incised wound 5½" x 1½" x muscle deep front of neck below the lower jaw.

(4) Abrasions over both chest & Abdomen except lower 1/3 on the front side."

On internal examination, left temporal bone was found fractured, Subdural & Arachnoid Haemorrhage was present in the brain membranes, Brain was congested. The cause of death as indicated in the postmortem report is "Death in Coma as a result of Ante-mortem injuries".

6. The proximate time of death as opined by the doctor (PW-7) was about 1-1/2 day. The inquest was made on 29.6.1994 and commenced at about 12:35 PM. In the column of information about the crime in the inquest report, it is noted that the deceased was killed during an altercation out of rage. After completion of the inquest, at about 16:30 Hours, the body was sent for postmortem to ascertain the exact cause of death. As per the doctor examined as PW-7, the postmortem report was prepared in his handwriting and bears his signature, it was marked as 'Exhibit Ka-6'. In the examination-in-chief, while narrating the injuries of the deceased, PW-7 had narrated the cause of death as "Coma due to ante-mortem injuries" and stated that the Injury Nos. 1 and 2 could occur from a blunt object whereas injury no. 4 could also be caused by a blunt object. Injury no. 3 was muscle deep and was possibly caused by a sharp edged weapon.

PW-7, in cross, had clarified that width of the weapon used had no concern with the size of injury no. 3 and stated that there may be variation of six hours on both sides in the estimated time of the death.

7. PW-6, Constable Moharir posted at the Prayag G.R.P. Chauki, Allahabad proved that he was on duty when a written memo was given to him by the porter namely Vijay Bahadur of the Railway Station Prayag, Northern Railway, related to the collusion of two trucks at the railway track and traffic jam situation on the spot as also the death of one truck driver. The said memo was entered in the General Diary at Rapat No. 50, Time 12:20 Hours on 29.6.1994. The carbon copy of G.D. prepared in the same process was proved with the original as 'Exhibit Ka-3' being in the handwriting and signature of PW-6.

It is stated by PW-6 that on receipt of the information of the incident through the said memo, two Constables were sent along with the Inquest Form to the spot. On the same day, one written report was also given by Ram Prakash Singh (PW-5) and the case was registered at Rapat No. 17 at about 11:30 AM. The carbon copy of the GD prepared by PW-6 in his hand writing and signature was proved as 'Exhibit Ka-4'. The check report being in the handwriting and signature of PW-7 had been proved as 'Exhibit Ka-5'. PW-6 had denied the suggestion of the report being Ante-time.

8. PW-5, Ram Prakash Singh, the scribe of the first information report stated in the examination-in-chief that he wrote the report on the dictation of two eye-witnesses namely Ashok Bhartiya and Ramesh. After the report was scribed, he read over the same to the witnesses and

then put his signature, the witnesses also put their signatures and thumb impressions on the same. The accused Kali Prasad was nabbed by the crowd on the spot and the written report was presented in the Phaphamau Chauki. After he lodged the report, the Investigation Officer recorded his statement. PW-5 had denied the suggestion that the report was dictated by the Investigating Officer and categorically stated that the Investigating Officer instructed the eye-witnesses to give the report in writing when they narrated the incident to him.

9. PW-8 is the Investigating Officer who had identified the memo (Paper No. 17-Ka/7) which was received at the Chauki with regard to the incident and the signature of the officer concerned on the same, which was proved as Exhibit Ka-7. He stated that after receipt of the said memo, he alongwith two Constables carrying the relevant papers, went to the railway crossing where lot of crowd was collected and traffic was jammed. Lots of blood was found at the railway line no. 4 towards East. Almost half of the body of the deceased was hanging from the window of Truck No. UP70 9822 and blood was oozing out in large quantity. The second truck was standing towards the West.

He further stated that in the meantime, Ram Prakash Singh (PW-5) handed over a written report signed by three witnesses. The assailant/appellant herein was caught by the crowd and was handed over to the Investigating Officer. The trucks were sent to the Chauki Phaphamau and the first informant alongwith the written report was sent to Chauki Prayag for lodging of the FIR. The criminal case was registered under Section 304 IPC at the P.S. Prayag. A copy of the FIR was received by the Investigating Officer (PW-8) on the spot and then he proceeded to prepare the relevant papers such as inquest and other related documents. The statements of eye-witnesses were recorded on completion of the inquest and the dead body was sealed and sent for postmortem to Swaroop Rani Hospital, Allahabad. The inquest was proved by PW-8 being in his handwriting and signature as 'Exhibit Ka-1'. Other related documents were proved as 'Exhibit Ka-8' to 'Exhibit Ka-15'. The recovery memos of plain and blood stained earth collected from the railway track and the pieces of broken glass found in the truck of the deceased were also proved by PW-8 as Exhibit Ka-16 and Ka-17. The site plan prepared in the handwriting and signature of PW-8 was proved as Exhibit Ka-19. The weapon of assault namely knife could not be found in the truck and it was intimated that Khalasi of the Truck No. UP65 B8551 (being driven by the assailant/appellant) ran away with the knife. The statements of the eye-witnesses namely PW-2 and PW-3 were recorded on the same day and after completion of the investigation, the charge sheet was submitted on 22.8.1994 as Exhibit Ka-20.

In cross, PW-8 stated that he had reached at the place of incident at about 12:35 PM and when he reached, the body of the deceased was inside the truck, the neck and half of the dead body was hanging outside the window of the truck. The assailant/appellant who was caught by the crowd was complaining pain in his waist, hands and body but there was no visible injury on his person. The Khalasi of the truck was not implicated as an accused as he ran away from the spot. On a suggestion, PW-8 stated that lots of blood was present on the head, face and ears of the deceased and hence the head injury

could not be noticed by him. He made inspection of the truck and found several pieces of glass and one rear-mirror. The suggestion that the entire report was prepared at the police station was categorically denied.

10. The formal witnesses had, thus, proved the reports prepared by them during the course of the proceedings beginning from the lodging of the report till the submission of the charge sheet. No apparent contradiction or any inconsistency could be pointed out by the learned counsels for the appellants from the statements of the formal witnesses and the documentary evidences on record as proved by them. No flaw in the investigation made by PW-8, the Investigating Officer, could be brought before the Court.

11. Amongst the witnesses of fact, PW-1 Pyare Lal is the father of the deceased and is a witness of the inquest. He proved his signature on the inquest report which was marked as 'Exhibit Ka-1'. PW-1 denied the suggestion that he was not present on the spot at the time of the preparation of the inquest. PW-4 Indra Bahadur is owner of the Truck No. UP70 9822 which was being driven by the deceased Ram Aasre Bhartiya at the time of the incident. He proved his signatures on the inquest report and, thus, being one amongst the Panch witnesses. PW-4 stated that the information of the incident was given by Khalasi of the truck namely Ramesh (PW-3), while he was present in his Brick Kiln.

12. PW-2 and PW-3 are the eye-witnesses of the occurrence. They both narrated the occurrence of the incident in the same manner as asserted in the written report and also proved their signatures on the inquest. PW-2 Ashok Kumar stated that the Investigating Officer recorded his statement on the spot and he had also identified the appellant Kali Prasad in the Court. PW-2 stated that he went to the market alongwith PW-3 Ramesh at about 8:00 AM and when they came near the railway line, they sat on a tea stall. By the time, Truck No. UP70 9822 came at the crossing and while the other truck being driven by the appellant namely UP65 B8551 was crossing the railway track from the opposite side, an oral altercation started between two drivers as to who would take back his truck. The appellant hit the deceased with the knife. PW-2 stated that when the first knife blow was given by the assailant/appellant, he got down from the truck and could not remember as to how many blows were given by the appellant. Further that at the point of time, when the deceased was given the blow of knife by the appellant, the deceased was holding the collar of the assailant/appellant. He stated that apart from the injury on the neck of the deceased, there was no other injury. It was stated by PW-2 that during oral altercation, the deceased and the appellant started fighting physically and after giving the blow of knife, the appellant moved his truck ahead but the crowd stopped him. At the time of the incident, there was no Khalasi in the truck of the deceased. He further stated that PW-3 Ramesh was also sitting in the truck alongwith him but he was not the Khalasi of the truck.

On confrontation, PW-2 Ashok Kumar categorically stated that both the trucks were standing side by side when the incident had occurred and when the police came, the truck of the deceased was at the same location whereas the truck of the assailant/appellant was at some distance. After the assailant was caught, PW-2 went

to the house of the deceased to give information about the incident and the family members of the deceased had reached the spot. PW-3 after narrating the incident in the same manner as mentioned in the written report, stated that he alongwith PW-2 Ashok was sitting at a tea stall at the railway crossing. When deceased Ram Aasre reached in his Truck No. UP70 9822, he alongwith Ashok PW-2 sat inside the truck. After the railway crossing was opened, the truck moved forward and at the same time, another truck coming from the opposite side came side by side to the truck being driven by the deceased and the incident had occurred in the manner as had been narrated by them, namely the PW-2 and PW-3 in the written report.

PW-3 had identified his signature both on the written report as 'Exhibit Ka-2' and the inquest. In cross, PW-3 stated that both the truck drivers were fighting while they were inside their truck and no one came down. The assailant driver (appellant) tried to run away by moving his truck after the incident but he was caught by the public. The information of the incident was given by the Gate-man to the police. The suggestion that the deceased had sustained injuries in an accident with the truck being driven by the appellant, had been categorically denied by PW-3, who stated that there was no apparent injury on the head and face of the deceased and that he did not see any other injury apart from one on the neck of the deceased. The information of the incident to the truck owner was given by him and the report of the incident was written by one person present on the spot on their dictation of the whole occurrence. PW-3 stated that they sat on the truck near the crossing and only rear-mirror of the truck was broken. The suggestion that the broken mirrors/glass caused injuries to the deceased resulting in his death had been categorically denied by PW-3. The suggestion of friendship of PW-3 with the deceased was admitted but it was denied that on account of the friendship, false testimony had been given by him.

13. The appellant Kali Prasad, in his statement under Section 313 Cr.P.C., admitted his presence on the spot by stating that his truck was standing at about 10 to 15 paces away from the railway crossing while his Khalasi went to bring the water, who when came back, informed him that one person was hanging on the truck and in the meantime, the crowd came and started questioning the Khalasi and caught hold of him (the appellant) as the Khalasi ran away in the meantime.

14. In light of above noted evidence, the counsels for the appellant argued that there are material contradictions in the statements of PW-2 and PW-3 who were present in the truck of the deceased at the time of the accident. The truck owner examined as PW-4 categorically stated that PW-3 Ramesh Kumar Sharma was Khalasi of the truck whereas for the reasons best known to PW-3, he had denied the said fact. The story created by PW-2 and PW-3 (eye-witnesses) that they were sitting at a tea stall near the railway crossing and sat in the truck immediately before the incident, is unbelievable. It is not understandable as to why these two persons would deny the factum of travelling in the truck along with the deceased. Moreover, they (PW-2 & PW3) themselves stated that the murder had been caused in a fit of rage during the course of oral and physical altercation between the appellant and the deceased. It, therefore, cannot be a case of murder so as to fall within the meaning of Section 302 IPC from any angle, even if, the entire case

of the defence is rejected. The trial court has illegally convicted the appellant for the offence under Section 302 IPC completely ignoring the manner in which the incident had occurred.

It is argued that only one blow of knife that too muscle deep wound was found on the person of the deceased but there is no recovery of alleged weapon/knife. The doctor (PW-7), on the other hand, stated in the examination-in-chief that the death was caused due to Coma on account of head injury which was Subdural & Arachnoid Haemorrhage due to broken bones on the left side of the head. Neither it can be found in the statement of the doctor nor it can be said that the injury no. 3, the incised wound, muscle deep on the neck below the lower jaw, was the cause of the death.

15. For the aforesaid, 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. The contention is that the conviction of the appellant under Section 302 IPC is a result of misappreciation of the evidence on record. The appellant, at the worst, can be convicted and punished for the offence under Section 304 Part II, maximum sentence for which is 10 years. The appellant has already suffered incarceration for a period of about 9 years as he was lodged in jail in the year 2019 in execution of a non-bailable warrant issued by this Court vide order dated 3.12.2019 and remained in jail uptill the year 1999 when he was granted bail by this Court.

16. According to the learned counsels for the appellant, the total period of incarceration of the appellant is about 9 years. The judgment of the Apex Court in **State Tr. P.S. Lodhi Colony, New Delhi vs. Sanjeev Nanda1** was relied to assert that this case would fall within the meaning of 'Death by negligent Act' and can only fall under Section 304 Part II. The sentencing policy approved and adopted by the Courts that the punishment must be appropriate and proportional to the gravity of the offence committed must guide the Court to determine that the offender should be adequately punished for the crime. The punishment of life imprisonment in the facts and circumstances of the case is grave and disproportionate to the offence committed. The factors necessary to be considered while imposing the sentence such as; the nature and circumstance of the offence; the need for the sentence imposed to reflect the seriousness of the offence; to afford adequate deterrence to the conduct and to protect the public from such crime, have been completely ignored by the trial court while convicting the appellant under Section 302 and awarding sentence of life imprisonment.

17. Learned A.G.A., on the other hand, defended the judgment of the trial court with the assertion that with the proven fact that the appellant was caught red handed on the spot, it is established that he had committed the murder with full knowledge and intention as the blow of knife was given by him to cause death of the person who was attacked. 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 the light of the oral testimony of the prosecution witnesses (PW-2 and PW-3) and the promptness of the FIR, the arrest of the accused appellant from the spot, there is

no scope of interference in the judgment of conviction and sentence passed by the trial court.

18. Having heard learned counsels for the parties and perused the record, 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 the eye-witnesses (PW-2 and PW-3) on the spot cannot be doubted as they both are witnesses of the written report which was promptly lodged by PW-5, the scribe of the report. It is proved that PW-5 wrote the report, narrating the occurrence, on the dictation of the eye-witnesses (PW-2 and PW-3), after the police reached the spot of the occurrence. The first information of the incident by a memo paper no. 17-Ka/7 (Exhibit Ka-7) was given by the porter Vijay Bahadur of the Railway Station Prayag, Northern Railway, at the GRP Chauki Prayag, Allahabad entry of which was made in the General Diary by PW-6 at about 12:20 Hours on 29.6.1994. Whereas after receipt of the written report, the first information report under Section 154 Cr.P.C. was registered at about 13:30 hours with the preparation of the Check report which fact is proved.

It was proved by PW-8 that on receipt of the memo Exhibit Ka-7, after its entry in the General Diary, he moved to the place of the incident carrying all relevant papers and when he reached at the crossing, lots of crowd was collected and the appellant was handed over to him by the crowd. On narration of the incident by the eye-witnesses, he directed them to write the report. The scribe of the report PW-5 proved that though he wrote the report on the instructions of the Investigating Officer but at the time when the report was scribed on the dictation of the eye-witnesses (PW-2 and PW-3), the Investigating Officer was not present and denied the suggestion that the report was prepared on the dictation of the Investigating Officer. The occurrence of the incident resulting in the homicidal death of deceased Ram Aasre Bhartiya at the railway crossing, inside the truck being driven by him, is proved. It is also proved that the appellant herein namely Kali Prasad is the perpetrator of the crime and the death was caused during an altercation between the appellant and the deceased. All the suggestions given by the defence 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.

19. In the said situation, 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'.

20. 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.

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'.

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'.

21. 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.

22. 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 **Vineet Kumar Chauhan vs. State of Uttar Pradesh3** considered its earlier decision in the **State of Andhra Pradesh Vs. Rayavarapu Punnayya and Another4,** 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 Punjab5 and Rajwant Singh Vs. State of Kerala6**. 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.

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.

23. In **Aradadi Ramudu alias Aggiramudu vs. State through Inspector of Police, Yanam7,** 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. Indrajeet8; Satish Narayan Sawant vs. State of Goa9 and Arun Raj vs. Union of India**10 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]**

Noticing the above noted decisions, in **Rampal Singh** (supra) 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."

The guidelines laid down in its earlier decision in **Phulia Tudu vs. State of Bihar11** 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."

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.

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)

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.

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.

24. Referring to an earlier decision in **Mohinder Pal Jolly vs. State of**

Punjab12, 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, therefore, that the appellant could be convicted only under Part II of Section 304 and not Part I."

As a guideline as to how the classification of an offence into either Part of Section 304 would be made, it was held in paragraph '25' as under:-

"25. .....xxxxxxxxxxxx.....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....."

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."

25. Keeping in mind the 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".

26. To return a finding on the issue, we have to determine as to whether the act by which the death is caused would fall in any of the four Clauses detailed in Section 300 of the Code.

27. Proceeding in this way in the facts of the instant case, it may be noted that both the accused and the deceased were strangers. There is no whisper in the entire evidence that they were known to each other. They were crossing the railway track while driving their respective trucks when they reached at the middle of the track. The categorical statement of eye-witnesses (PW-2 and PW-3) is that both the trucks were coming from opposite directions and stopped in front of each other and the drivers started arguing as to who would take his truck back.

28. In the examination-in-chief of PW-2, it has come that while holding collars of each other, the appellant and the deceased were abusing each other taking their heads out of the window of the truck. It has also come that they were entangled in physical altercation as well. The statements of the eye-witnesses are consistent to the effect that when the deceased asked the appellant to take his truck back, the appellant replied that he would not take his truck back and that had led to the oral as well as physical altercation between them. When they both were entangled in the fight while being in their respective trucks, the appellant gave a blow of knife to the deceased Ram Aasre in his neck. After giving the knife blow, the appellant tried to flee from the spot and moved his truck forward but because of the speed breaker, the crowd could catch hold of the appellant. PW-2 while giving the description of the knife stated that its butt was of iron and not wood and when the first blow of knife was given, while blood was oozing out, he came down from the truck. It has also come in the evidence of the prosecution witnesses that the deceased was profusely bleeding after getting the knife blow and his neck was hanging from the window of the door of the truck, when the Investigating Officer reached the spot. The doctor who conducted the postmortem had given the cause of death due to Coma as a result of injuries on the head of the deceased which could be found only on the internal examination of the body. The left temporal bone of the head was found broken and Subdural & Arachnoid Haemorrhage was found present in the brain membranes. One knife blow on the neck of the deceased was muscle deep but as per the opinion of the doctor, the said injury itself could not result in the death of the victim.

The Investigating Officer has categorically stated that no apparent injuries were found on the person of the appellant and he was only complaining of pain in various parts of his body, and that as lots of blood was present on the head, face and ear of the deceased, the head injury could not be noticed by him.

29. From the analysis of the above statements of the witnesses, it is clear that there was a heated exchange of words between the deceased and the appellant, the deceased caught hold of the appellant with his collar and they both were entangled in physical altercation when the appellant gave the knife blows. The evidence when examined in its entirety, establish that the appellant had committed the offence without any pre-meditation 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 the appellant and the deceased took an ugly

turn when they both caught hold of the collars of each other and the fight between them became physical. The evidence is that while the deceased caught hold of the appellant by his collar, the appellant took out the knife and gave one blow on the neck of the deceased. It also seems most probable that the appellant also hit the head of the deceased with the butt of the knife (of iron) which caused the fracture of the left temporal bone, which had resulted in the death in Coma. The doctor categorically opined that the death in Coma was caused due to the head injury.

30. In the above circumstances, the act of the appellant of 'culpable homicide' causing the death of the other person who gave the provocation, was committed whilst the appellant was deprived of the power of self-control by grave and sudden provocation but the death cannot be said to have been caused by mistake or accident or without the offender having taken undue advantage.

31. Furthermore none of the clauses of Section 300 of the Code are attracted as intention of the appellant to cause death or such bodily injury which he knew would cause the death of the other person or sufficient in the ordinary course of nature to cause death, is not proved.

32. 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.

33. A further question then would be whether the appellant is guilty under Part I or Part II of Section 304.

34. As is evident from the record, the appellant gave two blows of knife one on the neck and other on the head of the deceased by butt of the knife during the course of altercation whereas there was no weapon in the hands of the deceased. It, therefore, cannot be said that the death caused by mistake or accident and without the offender having taken undue advantage. The knife with sharp edges is a dangerous weapon and it is obvious that the appellant was aware that the use of such a weapon could cause death. It, thus, proved that there was knowledge on the part of the appellant that if blows of knife that too on the neck and head of the deceased were given, the possibility of the deceased being killed could not be ruled out. But this itself is not necessarily conclusive of the fact that there was an intention on the part of the appellant to kill the deceased. The intention probably was to merely cause bodily injury. This inference has been drawn by the Court looking to the injuries on the head of the deceased which in all probability had been caused by the butt of the knife as also the neck injury which was not fatal but only muscle deep, and that these injuries were caused by the appellant without premeditation in a sudden fight in the heat of passion upon a sudden quarrel with the deceased, and also the medical opinion that the death had resulted not because of the neck injury but due to the head injury which caused Subdural & Arachnoid Haemorrhage on account of which the deceased went into Coma and died.

35. Considering the weapon used and the place and nature of the injuries, though it is found that the appellant committed the offence without any premeditation in a sudden fight in the heat of passion upon a sudden quarrel but the same cannot be said to have been done by mistake or accident. The act of the appellant was clearly with the intent to cause bodily injury which could result in the death of the deceased.

It is a case where 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.

36. In view of the above discussion, though we find that the appellant is not guilty of murder under Section 302 of the Code but he is guilty of committing an offence which is punishable 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.

37. We, therefore, do not agree with the contentions of the learned counsels for the appellant that the offence committed by the appellant would fall in the Second part (Part II) of Section 304 IPC. Having held that the appellant is guilty of the offence under Section 304 Part I, we partially accept this appeal and alter the offence from that of Section 302 of the Code to one under Section 304 Part I of the Indian Penal Code.

Further, giving due consideration to the facts and circumstances of the present case, we find that the sentence of 10 years rigorous imprisonment would be adequate for the offence of which the appellant has been held guilty.

We, therefore, award a sentence of 10 years rigorous imprisonment to the appellant. The judgment under appeal is modified in the above terms.

38. The appellant is in jail. The appellant has been granted bail on 15.4.1999. However, pursuant to the order dated 3.12.2019, in execution of the non-bailable warrant, the appellant was lodged in jail. The bail application filed by appellant on 3.1.2020 has been rejected by this Court vide order dated 19.12.2019. According to the learned counsels for the appellant, the appellant has remained in jail for about a period of nine years.

Be that as it may, the appellant shall serve out the sentence awarded above.

The appeal is allowed in part.

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 within one month.

(2022)05ILR A64
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.05.2022

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Appeal No. 1255 of 2016

Bablu @ Nand Kumar ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Rehan Ahmad Siddiqui

Counsel for the Respondent:
Shri Chandra Shekhar Pandey, Additional Government Advocate

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Sections 498-A, 304-B, 323, 326 - Section 4 of D.P. Act-challenge to –conviction-modification of sentence-dying declaration-deceased got burnt in her matrimonial home and died in hospital during treatment-PW-6 recorded the dying declaration in which deceased stated her husband set her ablaze after pouring kerosene oil and nobody was present there-argument about overwriting of time has no force-conviction can be based on dying declaration alone without corroboration if it is trustworthy and genuine-no evidence of demand of dowry as the witness turned hostile-sentence u/s 302 IPC is confirmed.(Para 2 to 29)

B. It is well settled that, as a matter of law, a dying declaration can be acted upon without corroboration. There is not even a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated. The primary effort of the court has to be find out whether the dying declaration is true. If it is, no question of corroboration arises. it is only if the circumstances surrounding the dying declaration are not clear or convincing that the court may, for its assurance, look for corroboration to the dying declaration. (Para 18)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Jayamma & anr. Vs St. of Kar. (2021) 6 SCC 213

2. Hem Chand Vs St. of Har. (1994) 6 SCC 727

3. G.V. Siddaramesh Vs St. Kar. (2010) 3 SCC 152

4. Govind Singh Vs St. of Chattishgarh (2019) 17 SCC 812

5. Amrish Kumar Kashyap Vs St. of U.P. CRLA NO.s 303 & 316

6. Ashadeen & ors. Vs St. of U.P. (2018) 102 ACC 807

7. Mahesh Vs St. of U.P. (2017) 6 ALJ 75

8. Pravin Khimji Chauhan Vs St. of Mah. CRLA No. 978 of 2012

9. Shyam Shankar Kankariya Vs St. of Mah. (2006) 13 SCC 165

10. St. of U.P. Vs Ram Sagar Yadav & ors. (1985) 1 SCC 552

11. Sundar Singh & ors. Vs St. of U.P. (1964) SCC Online Alld. 30 FB

(Delivered by Hon'ble Mrs. Saroj Yadav J.)

1. This criminal appeal has been filed by the appellant/convict Bablu @ Nand Kumar against the judgement and order dated 14.7.2016 passed by learned Additional Sessions Judge/Court No.VIII, District Faizabad in Sessions Trial No.57 of 2015 convicting and sentencing the appellant under Section 304-B of Indian Penal Code, 1860 (in short '***I.P.C.***') with life-imprisonment, under Section 323 I.P.C. with six months' imprisonment and fine of Rs.500/-and in default of fine, one month's additional simple imprisonment, under Section 326 I.P.C. with seven years' imprisonment and fine of Rs.10,000/- and in default of fine, six months' additional simple imprisonment, under Section 498-A I.P.C. with two years' imprisonment and fine of Rs.5,000/- and in default of fine, three months' additional simple imprisonment, under Section 4 of the Dowry Prohibition Act with one year's imprisonment and fine of Rs.1,000/- and in

default of fine, two months' additional simple imprisonment.

The main grounds of challenge in memo of appeal are that the impugned judgement and order is not sustainable in the eye of law and deserves to be quashed because the trial court has awarded maximum punishment provided under Section 304-B I.P.C. Prosecution witnesses have not supported the prosecution story. The statement-in-chief and cross-examination of the prosecution witnesses are contradictory but this aspect has not been considered by the learned trial court. The offences under Section 498-A, 304-B, 323 and 326 I.P.C. and Section 4 of the Dowry Prohibition Act (in short ***'D.P.Act.'***) are not made out against the appellant. The statements of prosecution witnesses are highly doubtful. The learned trial court has not considered the arguments of the appellant and evidence on record, in the right perspective. Learned trial court has failed to apply its judicial mind while passing the conviction order. No independent witness was examined by the prosecution. The learned trial court has committed illegality in disbelieving the defence version. There is no eye-witness of the crime. The appellant is innocent and has committed no crime. The trial court has wrongly disbelieved the evidence of appellant and the fact that he himself got burnt while trying to save the life of his wife, the deceased.

2. The facts necessary for disposal of this appeal in short are as under :-

An F.I.R. was registered at Case Crime No.592/2014 on the basis of written report dated 5.11.2014 submitted by the complainant Raghuveer at Police Station Kotwali Ayodhya, Faizabad. it was mentioned in the written report that daughter of the complainant named Saloni aged about 24 years was married to Bablu @ Nand Kumar about 4 years' back according to Hindu customs and rites. The appellant and other family members used to harass her for extra dowry and asked for motorcycle and Rs.20,000/- in cash and other goods. Deceased Saloni used to tell about this to her mother and the complainant whenever she came to her parental home. Bablu @ Nand Kumar told her that he will go on 1.11.2014 to the parental house of the deceased and if the demands were not fulfilled, then he will beat and burn the deceased after pouring kerosene oil. The complainant tried to fulfil the demands of the appellant and his family members but on 2.11.2014, Bablu set ablaze the daughter of the complainant after pouring kerosene oil. His daughter was being treated in burn-ward of Faizabad Hospital.

3. After investigation, chargesheet was submitted against the appellant/convict only, under Sections 323, 326, 498-A, 304-B I.P.C. and Section 3/4 of the D.P. Act. The concerned magistrate took cognizance and committed the case to the court of Sessions for trial. The Sessions Court framed charge under Section 304-B I.P.C. and in alternative, charge under Section 302 I.P.C. The charges under sections 498-A, 323, 326 of I.P.C. and under Section 4 of the D.P.Act were also framed.

4. The prosecution in order to prove its case, examined seven witnesses in toto. These witnesses are P.W.-1 Raghuveer the complainant, P.W.-2 Renu the sister of the deceased, P.W.-3 Smt. Kunta Devi mother of the deceased, P.W.-4 Rajendra Kumar Nishad a witness of the vicinity, P.W.-5 Dr. Vipin Kumar who conducted the post

mortem on the cadaver of the deceased, P.W.-6 Shri Vinit Kumar Naib Tehsildar who recorded the dying declaration of the deceased and P.W.-7 Shri Dinesh Kumar Dwivedi, Circle Officer who investigated the case. Apart from oral evidence, documents, Exhibit Ka-1 to Exhibit Ka-10 were also proved. The genuineness of chargesheet Exhibit Ka-7, carbon copy of concerned G.D. Exhibit Ka-9, Specimen seal Exhibit Ka-11, information of death by medical officer Exhibit Ka-12, Memo regarding death of the victim Exhibit Ka-13, Police Papers Exhibit Ka-16 and Exhiit Ka-17, Exhibit Ka-14, Exhibit Ka-15 and Exhibit Ka-18 were not disputed by the counsel of the appellant and made endorsement on these documents to that effect. Thereafter, the statement of the appellant/ convict was recorded under Section 313 of the Code of Criminal Procedure,1973 (in short ***'Cr.P.C.'***) firstly on 2.1.2016 wherein the convict denied the fact of torturing the deceased for non fulfilment of demand of dowry and the unnatural death of his wife. He also stated that the witnesses had deposed falsely and refused to adduce any evidence in defence. He also stated that he is innocent, and also that he got burnt while trying to save his wife and remained hospitalised for nine days and was still not well completely. The additional statement of appellant/ convict under Section 313 Cr.P.C. was recorded on 25.3.2016 wherein he was asked specifically about dying declaration of the deceased and he stated that dying declaration was recorded illegally. The certificate from the doctor appears to be taken afterwards and there is over-writing on timing. The deceased has given no statement against him and the statement was recorded of someone else maliciously. He has also stated that investigating officer has submitted the chargesheet without any basis. The complainant and other witnesses of facts have stated nothing against him and all have stated that the appellant is innocent. The dying declaration is forged and witnesses P.W.-6 and P.W.-7 have given false evidence against law. He also stated that he wanted to adduce evidence in defence. He got examined D.W.-1 Dr. Hari Om Srivastava in defence.

5. After hearing the arguments of both the sides, on the basis of evidence available on record, the trial court came to the conclusion that the delay in lodging the F.I.R. has been explained by the father of the deceased who is complainant of the case. It is also proved that the deceased died an unnatural death i.e. due to burn injuries which have been proved by the doctor P.W.-5. who conducted the *post mortem* on the cadaver of the deceased. It is also proved that the incident took place within seven years of marriage of the deceased with the appellant/convict. As far as the demand of dowry and act of cruelty in that regard soon before the death is concerned, the father of the deceased who has been examined as P.W.-1 has proved very well all these facts in his examination-in-chief though in his cross examination, he has not supported what he has stated in the examination-in-chief but has proved Exhibit Ka-1 his written report, lodged by him. Other witnesses of facts examined as P.W.-2, P.W.-3 and P.W.-4 have turned hostile but there is no contradiction on the point that the deceased Saloni was married to Bablu @ Nand Kumar and her parents gave dowry according to their capacity. There is no dispute that the deceased died of burn-injuries. The accused has nowhere stated in his statement under Section 313 Cr.P.C. that he never demanded any dowry and his wife Saloni got burnt herself or was set-ablaze by someone else or accidentally,

he has only stated that he is innocent and he also got burnt while trying to save his wife. The incident took place in the matrimonial home of the deceased so the persons living in the matrimonial home should have explained the real cause of burn i.e. how she got burnt but nothing has been stated by the appellant/convict in his statement under Section 313 Cr.P.C. explaining or disclosing the fact how the deceased got burnt. The deceased in her dying declaration has stated that the appellant/convict poured kerosene-oil over her and set her ablaze. When the deceased was asked, that did anybody else torture or harass her, she denied and categorically answered that only Bablu her husband, was there and he burnt her after dousing with kerosene oil. The learned trial court has further concluded that the dying declaration has been proved by P.W.-6 Shri Vinit Kumar, Naib Tehsidar and it is also proved that dying declaration was recorded after following required formalities. The deceased has also told P.W.-6 that appellant/convict used to beat her everyday after consuming liquor. The deceased has not implicated anybody else except her husband. The trial court relied upon the dying declaration of deceased as well as on examination-in-chief of the P.W.-1 the complainant and also the medical witness P.W.-5 who conducted the post-mortem and appellant has been convicted under Sections 304-B, 323, 326, 498-A of I.P.C. and also under Section 4 of the D.P.Act.

6. Being aggrieved of his conviction, this appeal has been preferred.

7. Heard Shri Rehan Ahmad Siddiqui assisted by Mohd. Ehsan and Shri Chandra Shekhar Pandey, learned Additional Government Advocate for the respondent State.

8. Learned counsel for the appellant/convict during arguments, emphasised on the point that the extreme punishment has been awarded by the trial court under Section 304-B I.P.C. and it is not a case deserving the extreme punishment. The minimum punishment under Section 304-B is seven years and the appellant/ convict has already undergone a period of nine and a half years, so his sentence i.e. imprisonment for life under Section 304-B, be converted into the period undergone by him.

9. Learned counsel for the appellant/convict also submitted that P.W.-2 Renu, sister of the deceased, P.W.-3 Kunta, mother of the deceased who are witnesses of facts have turned hostile. Even P.W.-1 Raghuveer, the complainant, father of the deceased has given contradictory statement, to what What he has stated in his examination-in -chief and written in written report Exhibit ka-1 on the basis of which F.I.R. was registered.

10. Learned counsel also assailed the dying declaration of the deceased by arguing that dying declaration was not recorded after following all due formalities. The deceased was burnt upto 95%, so she was not in a position to give a dying declaration, hence the sentence should be modified to that effect.

11. Learned counsel for the appellant/convict relied upon the following case laws :-

(a). Jayamma and another Vs. State of Karnataka reported in (2021) 6 SCC 213

(b). Hem Chand Vs. State of Haryana reported in (1994) 6 SCC 727.

(c). G.V. Siddaramesh Vs. State of Karnataka.

reported in (2010) 3 SCC 152.

(d) Govind Singh Vs. State of Chattishgarh

(2019) 17 SCC 812.

(e). Amrish Kumar Kashyap Vs. State of U.P. reported in Criminal Appeal Nos.303 and 316 of 2016 decided on 4.5.2016.

(f). Ashadeen and others Vs. State of U.P

reported in 2018 (102) ACC 807.

(g). Mahesh Vs. State of U.P. reported

in 2017(6) ALJ 75.

(h). Pravin Khimji Chauhan Vs. The State of Maharashtra reported in Criminal Appeal NO.978 of 2012 decided on 15.2.2022.

12. To the contrary, learned A.G.A. Shri Chandra Shekhar Pandey submitted that there is evidence that the appellant set ablaze the deceased after dousing with kerosene oil, so it is a case of murder and appellant/convict should have been punished under Section 302 I.P.C. instead of under Section 304-B I.P.C. He also argued that dying declaration of the deceased was recorded promptly by authorised executive magistrate i.e. Naib Tehsildar after observing all due formalities. He took certificate of the doctor before recording the dying declaration and also at completion. The dying declaration is genuine, as the deceased very genuinely stated that the appellant/convict set her ablaze after dousing her with kerosene oil. She had not named any other family member of the convict, hence the appeal should be dismissed as minimum punishment under Section 302 I.P.C. is life imprisonment.

12. Considered the rival submissions of the learned counsel of the parties and perused the original record.

13. Evidence available on record reveals that there is no dispute about the fact that the deceased was married with appellant/convict about 4 years back of the incident and she got burnt in her matrimonial home on 2.11.2014 at the time mentioned in the F.I.R. and subsequently died of burn injuries on 9.11.2014 in hospital during treatment. Only fact remains how she got burnt or who burnt her. In this regard, P.W.-1, the complainant father of the deceased has proved in his examination-in-chief that he solemenised marriage of his daughter with the appellant/convict after giving dowry according to his status/capacity but the appellant/convict demanded extra dowry after marriage and started torturing and harassing the deceased and continuously harassed and tortured her for dowry and ultimately set her ablaze after dousing her with kerosene oil. He has proved his written report Exhibit Ka-1 and also proved his signature on it. He has explained the reason for delay in lodging the F.I.R. that he remained busy in treatment of her daughter so could not lodge the F.I.R. promptly. It is proved that deceased was admitted in the hospital after she got burnt, on the same night. The hospital authority informed the executive authority for recording her dying declaration. P.W.-6 Naib Tehsildar reached the hospital to record the same on the same night. He recorded the dying declaration after taking fitness certificate from the doctor and he got it certified after completion of dying declaration that the deceased was fit for giving the statement. The thumb impression of the deceased put on the Dying declaration is not in shape which shows that it was in burnt condition. On behghalf of the appellant/convict, no suggestion has been made to P.W.-6 Naib Tehsildar that the thumb impression is not of the deceased

rather it has been suggested that the thumb impression of the patient was taken afterwards, after getting the dying declaration prepared somewhere else. Perusal of dying declaration Exhibit Ka-6 shows that it is in question answer form and very precise. The deceased has categorically stated that her husband Bablu set her ablaze after pouring kerosene oil. She has also stated that nobody else was present there. She has not implicated any other person or family member of the appellant/convict. On being asked, she has answered that she has two children, one daughter and one son. The daughter is elder and the son is younger. On being asked, she has also stated that the appellant/convict used to abuse her and beat her daily after consuming liquor. Again, upon being asked, she has stated that none else used to torture her. The dying declaration has been duly proved by P.W.-6 though there is an over writing on time but P.W.-6 has explained it and denied the suggestion that dying declaration was written at the house of the witness. The certificate of the doctor shows the time of starting as 11.35 P.M. and 11.50 P.M. as time of completion. In such a situation, this argument about over writing of time has no force.

15. It is settled law that the conviction can be based on dying declaration alone without corroboration if the court finds the dying declaration trusthworthy and genuine.

16. In ***Jayamma and another Vs. State of Karnataka*** (supra), the Hon'ble Apex Court after quoting the principles regarding dying declaration, summarised by the Apex Court in ***Shyam Shanker Kankariya Vs. State of Maharashthra (2006) 13 SCC 165*** has observed that *"it goes without saying that when the dying declaration has been recorded in accordance with law, and it gives a cogent and plausible explanation of the occurrence, the court can rely upon it as the solitary piece of evidence to convict the accused."*

17. In ***Shyam Shanker's case*** (supra), Hon'ble Apex Court has summarised the principles governing dying declaration as follows :-

"11. .... (i). There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.

(ii). If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration.

(iii). The court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. the deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration.

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

(v). Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected.

(vi). A dying declaration which suffers from infirmity cannot form the basis of conviction.

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

(viii). Equally, merely because it is brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.

(ix). Normally the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness has said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail.

(x). Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon.

(xi). Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted."

18. In ***State of U.P. Vs. Ram Sagar Yadav and others : 1985(1) SCC 552***, the Hon'ble Apex Court has held as under :-

"13. It is well-settled that, as a matter of law, a dying declaration can be acted upon without corroboration. There is not even a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated. The primary effort of the court has to be to find out whether the dying declaration is true. If it is, no question of corroboration arises. It is only if the circumstances surrounding the dying declaration are not clear or convincing that the court may, for its assurance, look for corroboration to the dying declaration."

19. In the present matter, as noted above, dying declaration Exhibit Ka-6 has been duly proved by the executive magistrate who recorded the same and certificate of fitness has been obtained before starting and after completion. This dying declaration was recorded at the time when even F.I.R. was not lodged by the father or any other kith and kin of the deceased. She was admitted in a burnt state in the hospital and hospital authority sent information to the executive authority for recording the same. So there remains no possibility that dying declaration was recorded at the behest of the kith and kin of the deceased or after tutoring by any kith and kin of the deceased. The dying declaration is in question answer form and a very genuine dying declaration wherein deceased has implicated only the culprit and none else. This dying declaration is worthy of credence and it raises confidence of the court that it is genuine and is not a result of tutoring.

20. The case laws ***Jayamma and another Vs. State of Karnataka*** (supra) cited by the learned counsel for the appellant/convict is of no help to appellant/convict because in Jayamma's case (supra), the Hon'ble Apex Court found that direct or indirect dominance of the police officer appears to have influenced the answers only in one direction. The narration of events were so accurate that even a witness in the normal state of mind cannot be expected to narrate. The person making statement was very old to narrate the incident with precision as what was made. There was sufficient evidence that the victim was under the effect of sedative pain killers. The dying declaration was recorded by a police officer and not by an executive or judicial magistrate. There were contradictions in the statement of the doctor and the police officer recording the statement. The thumb impression of the victim allegedly put on the dying declaration was very natural. There was no sign of burnt on the thumb impression. The police officer did not take the certificate of

witnesses before recording the dying declaration. Judicial or executive magistrate was not called for recording of dying declaration though there was opportunity. In the present matter, dying declaration was recorded by executive magistrate and after taking fitness certificate, before starting recording of dying declaration and also after completion of the dying declaration. The deceased was a young lady married with appellant/convict just 3-4 years ahead of the incident.

21. ***Hem Chand's*** case(supra) is also of no help to the appellant/ conviction because in that case, the accused was held guilty on the basis of presumption raised under Section 113-B of the Indian Evidence Act, therefore the Hon'ble Apex Court converted the sentence of life imprisonment into 10 years' imprisonment but in the present case, the evidence on record is there that the deceased was set ablaze by the appellant/convict. The dying declaration is a genuine one, having won confidence of the court.

22. In ***Govind Vs. State of Chattishgarh*** (supra), during the verbal quarrel, accused threw chimni lamp on the deceased resulting in burn injury to the deceased. Since the incident took place at the spur of moment, so the apex court converted the sentence awarded under Section 302 I.PC. to Section 304(2) of I.P.C. The situation in the present case is altogether different. There is evidence on record that the appellant/ convict used to beat and abuse the deceased everyday after consuming liquor.

23. Similarly, rest of the case laws cited on behalf of the appellant/convict are of no help due to the difference in facts and circumstances of the present case.

24. In the matter at hand, dying declaration was recorded by the executive magistrate upon the information received from hospital authorities. the dying declaration is a genuine and trustworthy and inspires confidence in the court. It was a fit case where the Sessions Judge ought to have convicted the appellant/convict under Section 302 I.P.C. i.e. for the alternative charge already framed instead of convicting under Section 304-B I.P.C. However, the Sessions Judge has awarded maximum punishment provided under Section 304-B I.P.C. i.e. sentence for life imprisonment, that is very well warranted considering the facts and circumstances and evidence available on record.

25. Now considering all the facts and circumstances of the case, analysed as above, we deem it fit to modify the finding of the trial court to the effect that the appellant/ convict is guilty of offence punishable under Section 302 I.P.C. for alternative charge already framed and the punishment awarded by the trial court for life imprisonment to the appellant is confirmed under Section 302 I.P.C.instead of under Section 304-B I.P.C. for the reasons that, there is evidence on record which indicates that the deceased was burnt alive by the appellant and appellant alone. The dying declaration of the deceased noted and analysed above has established beyond reasonable doubt, the guilt of the appellant. The dying declaration is trustworthy and genuine. There is nothing on the record to doubt the credibility of the dying declaration made by the deceased. Here we made it clear that it is not an enhancement of punishment as the trial

court has already awarded sentence of imprisonment for life.

26. However, the sentences awarded under Section 323, 326, 498-A I.P.C. and under Section 4 of the D.P. Act are not sustainable. The appellant cannot be convicted under Section 323 and 326 I.P.C. for inflicting simple and grievous injuries on the person of the deceased if he is being punished under Section 302 I.P.C. for causing death.

27. In ***Sundar Singh and others Vs. State of U.P 1954 SCC Online Allahabad 30 (FB)***, the Full Bench of this Court has observed as under :-

"23. Every offence, i.e., a separate offence, has a distinct, punishment prescribed for it. There are, however, certain exceptions whereby a series of successive offences have to be treated as "one offence" for the purposes of punishment; apart from this rule, or exception, a man is answerable & punishable for each offence that he commits. A man who sets upon another with a lathi and beats him with it by delivering successive blows is, strictly speaking, guilty of so many separate offences as the blows that he delivers.

"24. If a man causes simple hurt by one blow and grievous hurt by another, then he can be convicted but not punished both under Sections 323 and 325, I.P.C. Section 235, Criminal P.C., makes provision for the trial of a person for more offences than one when such offences are committed during the course of the "same transaction", though at the same time a man may be tried for acts constituting one offence as also constituting another offence when combined together. Sub-section (4) of this section, however, says : "Nothing contained in this section shall affect the Indian Penal Code, 1860, Section 71."

25. Section 71 of the Penal Code, is in these words :

"Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any Law in force for the time being by which offences are defined or punished, or

Where several acts of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the court which tries him could award for any one of such offences."

26. This section provides two illustrations. Illustration (a) is worded thus :

"A gives Z fifty strokes with a stick. Here A may have committed the offence of voluntarily causing hurt to Z by the whole beating, and also by each of the blows which make up the whole beating. If A were liable to punishment for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating."

27. This illustration, to my mind, clearly indicates the scope and the true meaning of the first part of Section 71. The meaning of the important word in that section, namely, the word "parts" has got to be understood in the light of this illustration, otherwise, there is likely to be, as unfortunately there has been, a complete misunderstanding of the meaning which the Legislature intended for that word, or the

sense in which that word was used by the Legislature in that section.

28. The second illustration, namely, illustration (b) is in these words :

"But if, while A is beating Z, Y interferes, and A intentionally strikes Y, here, as the blow given to Y is no part of the act whereby A voluntarily causes hurt to Z, A is liable to one punishment for voluntarily causing hurt to Z, and to another for the blow given to Y."

29. This illustration further clarifies the position, for it makes it clear that when an offence is committed by an individual as against two separate persons, though, broadly speaking, both the offences may have been committed during the course of one transaction, he is made liable for the assault on both the individuals. It is Important to note that the first part of Section 71, I.P.C., really deals with a case in which the whole of the act is punishable under the same section or under allied sections, namely, where a series of offences partake of the same nature. This part of the section, to my mind, does not deal with a case where a part of man's action constitutes one kind of offence and another part of his action, though committed in a sequence in the course of one transaction, falls under another section, not allied.

30. The second part of Section 71 of the Code makes provision for a contingency when the same act constitutes more offences than one."

28. There is no evidence of demand of dowry as the witnesses produced to establish the fact have turned hostile. hence, the conviction under Section 4 of The Dowry Prohibition Act is also set aside.

29. To sum up, the appellant is held guilty for the offence punishable under Section 302 I.P.C., for alternative charge already framed and the sentence of life imprisonment awarded by the trial court is hereby confirmed but under Section 302 I.P.C. instead of under Section 304-B I.P.C. The conviction of the appellant/convict U/S 323, 326 and 498-A I.P.C. and U/s 4 of The Dowry Prohibition Act is hereby set aside.

29. The appeal is partly ***allowed***, accordingly.

30. Since the the appellant/ convict is already in jail, he shall serve his sentence in jail, confirmed hereinabove.

31. Let copy of this judgement alongwith original record of trial court be sent to the trial court concerned for information and necessary action.

(2022)05ILR A74
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 30.05.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Appeal No. 1314 of 2005
connected with
Criminal Appeal No. 1529 of 2005

Sri Kant & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Anurag Shukla

Counsel for the Respondent:
Sri Umesh Chandra Verma, Additional Govt. Advocate

A. Criminal Law -Code of Criminal Procedure, 1973-Section 374(2) - Indian

Penal Code, 1860-Sections 302/34 & 323/34-Challenge to-conviction-motive-PW-2 the complainant hearing the noise of altercation over thorny bushes reached the spot where the accused persons were beating the deceased with lathi-danda, meanwhile the other two accused fired upon the deceased of which he died-one appellant was not aware of the fact that the co-appellants will cause death by firing upon the deceased-Hence, this appellant deserves the benefit of doubt and held liable only for the offence under 323 IPC for causing simple injuries to the complainant-While the other co-convicts have rightly been found guilty and punished u/s 302 r/w 34 IPC-The sentence awarded to them by the trial court is hereby affirmed.(Para 1 to 44)

B. The intendment of Section 34 IPC is to remove the difficulties in distinguishing the acts of individual members of a party, acting in furtherance of a common intention. There has to be a simultaneous conscious mind of the persons participating in the criminal action of bringing about a particular result. A common intention qua its existence is a question of fact and also requires an act " in furtherance of the said intention". One need not search for a concrete evidence, as it is for the court to come to a conclusion on a cumulative assessment. It is only a rule of evidence and thus does not create any substantive offence.(Para 35 to 37)

The appeals are partly allowed. (E-6)

List of Cases cited:

1. Marudanal Augusti Vs St. of Ker. (1980) SCC (Cri) 985

2. Lakshmi Singh & ors. etc. Vs St. of Bih. (1976) AIR SC 2263

3. Nawazish Ali & ors. Vs St. (2000) 41 ACC 181 (Alld. H.C. D.B.)

4. Mohar Singh Vs St. of M.P. (2007) 4 MPLJ 39

5. Sardar Singh Rawat Vs St. of M.P. (2006) Supreme MP 579

6. Kalu Ram Vs St. of Raj. (2000) AIR SC 3630

7. Kanwarlal & anr.. Vs St. of M.P (2002) 7 SCC 152

8. Jasdeep Singh @ jassu Vs St. of Punj. (2022) SCC ONLINE SC 20.

9. Ramesh @ Dapinder Singh Vs St. of H.P. (2021) SCC Online SC 243

10. Bishu Sarkar & ors. Vs St. of W.B. (2017) 11 SCC 105; 2017 (2) JIC 163 SC

11. Bhikhari Vs St. of U.P (1965) 3 SCR 194

12. Dayanand Vs St. of Har. (2008) 15 SCC 717

13. Ramesh Krishna Madhusudan Nayar Vs St. of Mah. (2008) 14 SCC 491

14. Sukhlal Sarkar Vs UOI & ors. (2012) 5 SCC 703

15. St. of H.P. Vs Trilok Chand & anr. (2018) 2 SCC 342

16. Kartik Malhar Vs St. of Bih. (1996) 1 SCC 614

17. Kunju @ Bala Chandran Vs St. of T.N. (2008) 2 SCC 151

18. Jayanti Lal Verma Vs St. of M.P (Now Chattisgarh) (2020) SCC Online SC 944

19. Bimla Devi Vs Rajesh Singh & anr.. (2016) 15 SCC 448

20. Narsingh Pal Vs St. of U.P (2020) 14 SCC 281

21. Ombir Singh Vs St. of U.P. (2020) 6 SCC 378

22. Ramaswami Ayyanger & ors. Vs St. of T.N. (1976) SCC (Cri. 518

23. Ramesh Singh @ Photti Vs St. of A.P. (2004) SCC (Cri) Supp. 70

24. Jasdeep Singh @ Jassu Vs St. of Punj. (2022) SCC Online SC 20

(Delivered by Hon'ble Saroj Yadav, J.)

1. The Criminal Appeal No.1314 of 2005 has been filed by the appellants/ convicts Sri Kant and Ram Lakhan and the Criminal Appeal No.1529 of 2005 by appellants/ convicts Kamla Kant and Sunil Kant, being aggrieved of the judgement and order dated 30.9.2005 passed by the Additional Sessions Judge/ F.T.C. No.1, Hardoi in Sessions Trial No.257 of 2002 and 252 of 2003 jointly, whereby the appellants/ convicts have been awarded a sentence for life imprisonment under Section 302/34 of the Indian Penal Code (in short ***'I.P.C.'***) and imprisonment of six months under Section 323/34 I.P.C.

2. Since appellant Ram Lakhan died during pendency of the appeal, appeal filed by him stood abated vide order dated 22.7.2019 passed by this court.

3. The facts necessary for disposal of these appeals, shorn of unnecessary details are as under :-

4. A First Information Report (in short ***'F.I.R.'***) was registered at Case Crime No.128 of 2001 under Section 302/323/504 I.P.C. against the appellants/ convicts at Police Station Harpalpur, District Hardoi on the basis of a written report submitted by the complainant Ram Babu Shukla. It was stated in the written report that Anoop Kumar son of Natthu belonging to the family of complainant, put some thorny bushes at the boundary of own paddy-field. Due to this, a way was created through the field of Hari Babu so his cousin Hari Babu during day time at about 1.00 P.M. went to the field to remove thorny bushes on the boundary of the field. As soon as he started removing the thorny bushes, Sri Kant, Kamla Kant and Sunil Kant son of Ram Chandra and Ram Lakhan son of Devi Sahai reached there and started abusing and beating Hari Babu with sticks (lathis). Hearing the noise, he, Natthu Singh and Ram Avtaar resident of same village, reached the spot. As soon as he reached on the spot Ram Lakhan and Sri kant started beating him also, with sticks and Sunil Kant and Kamla Kant fired on Hari Babu with country made pistols. Hari Babu sustained injuries on his stomach and on left side of the head. As soon as fire hit Hari Babu, he ran to save himself towards the grove of Babu Singh, he fell down and died there. Thereafter all the above four miscreants went away towards their own house and the dead body was lying in the grove.

5. After investigation, chargesheet no.96/2001 was submitted in the court against Kamla Kant, Sunil Kant and Sri Kant under Section 302, 323/34 I.P.C.; and chargesheet No.96-A/2001 against Ram Lakhan.

6. After taking cognizance, concerned Magistrate committed both the cases to Sessions court for trial where the case against Sri Kant, Kamla and Sunil Kant was registered as Sessions Trial No.257 of 2002 and against Ram Lakhan, Sessions Trial No.292/2002. Both the sessions trials were consolidated and tried together. Charges were framed against appellants/ convicts. They denied the charges and claimed to be tried.

7. In order to prove the charges levelled against the appellants/ convicts, the prosecution examined seven witnesses in toto. These seven witnesses are :-

(i). P.W.-1 Natthu Lal, alleged eye witness.

(ii). P.W.-2 Ram Babu Shukla, the complainant and the injured eye witness.

(iii). P.W.-3 Dr. V.V. Tripathi, Autopsy Surgeon who conducted postmortem on the cadaver of the deceased.

(iv). P.W.-4 Raja Ram Singh, the third investigating officer who investigated the case partially.

(v). P.W.-5 Har Narain Singh, second investigating officer who investigated the case partially.

(vi). P.W.-6 Suresh Pal, first investigating officer who did investigation, initially.

(vii). P.W.-7 Dr. C.P.Rawat who medically examined the injured.

8. Apart from the above oral evidences, relevant documents were also proved and exhibited as under :-

(i). Exhibit Ka-1- Written report.

(ii). Exhibit Ka-2 - Post Mortem Report.

(iii). Exhibit Ka-3- Chargesheet No.96 of 2001 submitted against Kamla Kant, Sunil Kant and Sri Kant.

(iv). Exhibit Ka-4- Chargesheet No.96A/2001 against appellant/convict. Ram Lakhan.

(v). Exhibit Ka-5 - F.I.R.

(vi). Exhibit Ka-6 - Copy of the relevant G.D. of registration of F.I.R.

(vii). Exhibit Ka-7 - Inquest report.

(viii). Exhibit Ka-8- 'Photo Nash'.

(ix). Exhibit Ka-9 letter to R.I.

(x). Exhibit Ka-10 - Letter to C.M.O. for conducting autopsy.

(xi). Exhibit Ka-11- Police form No.13 containing the information regarding the case, while sending the dead-body for post mortem.

(xii). Exhibit Ka -12 - Challan 'Laash'.

(xiii). Exhibit Ka-13 - Site-plan of the spot.

(xiv). Exhibit Ka-14-recovery-memo of collection

of blood soaked soil and plain soil from the spot.

(xv). Exhibit Ka-15 - Injury report of Ram Babu Shukla, the complainant.

(xvi). Exhibit Ka-16 report of forensic science lab of examination of blood soaked soil and plain soil collected from the spot.

9. After completion of the prosecution evidence, the statements of appellants/ convicts were recorded under Section 313 of the Code of Criminal Procedure, 1973 (in short ***'Cr.P.C.'***) wherein they denied the crime and submitted that witnesses have deposed falsely.

10. Appellant/convict Sri Kant submitted that the case was registered due to enmity and refused to give any evidence in defence. Appellant Sunil Kant and Kamla Kant also stated that the case was lodged due to enmity. Appellant Kamla Kant also refused to give any evidence in defence but Sunil Kant stated that he wants to produce evidence in defence. Appellant/ convict Ram Lakhan also stated that the case was lodged due to enmity and he was not at the spot. He was in the temple at the relevant time and he has been implicated falsely. He also wished to produce evidence in defence.

11. No witness was produced in defence by either of the appellants/ convicts, though opportunity was given. The learned trial court after hearing the arguments of both the sides on the basis of the evidence available on record came to

the conclusion that the evidence of P.W.-1 Ram Babu Shukla who is an injured witness and also the complainant is trustworthy. He did not name the other two brothers of the appellants/ convicts Sri Kant, Kamla Kant and Sunil Kant. Only those were named who caused the incident. No motive of false implication could be established by the appellants/ convicts. The challan under Section 107/116 of the Cr.P.C. which has been filed by the appellants/ convicts was subsequent to the present F.I.R. hence have no importance. The witnesses should not be counted but the evidence should be weighed. If the sole witness gives a truthful account of the incident, he should be believed. Hence the trial court held the appellants/ convicts guilty under Section 302 and 323 readwith *Section 34* I.P.C. and punished them accordingly.

12. Being aggrieved of this judgement and order, these criminal appeals have been filed. The appellants/ convicts have challenged the impugned judgement in the memo of appeals mainly on the ground that the learned lower court has passed the entire judgement on the sole testimony of P.W.-1 Ram Babu Shukla whereas considering in totality this evidence, in the light of factual scenario of the case, it is manifest that he (P.W.-1) was not present at the place of the occurrence and he was not an eye-witness of the case. P.W.-1 Natthu Lal, the independent witness did not support the happening of the alleged occurrence. The alleged eye witness Ram Avtar was not produced in the court. In the post-mortem-report, a single firearm injury was found on the dead body of the deceased Hari Babu and no injury of 'lathi' or 'danda' was found. P.W.-2 Ram Babu Shukla himself made superficial injury on his person, as his medical-examination was conducted after four days of the alleged incident. The appellants/ convicts were implicated due to the enmity and the judgement and order is based on conjectures and surmises, and should be set aside.

13. Heard Shri R.K.Dwivedi, learned Amicus Curiae on behalf of the appellant no.1/Kamla Kant and appellant no.2 /Sunil Kant in Criminal Appeal No.1529 of 2005, Shri Anurag Shukla, learned counsel for the appellant no.1/Sri Kant in Criminal appeal no.1314 of 2005 and Shri Umesh Chandra Verma, learned Additional Government Advocate for the respondent/ State.

14. The learned Amicus Curiae on behalf of the appellant Kamla Kant and Sunil Kant submitted that the F.I.R. was lodged after an inordinate delay and the same was ante-time. The F.I.R. was not forwarded to the concerned Magistrate forthwith. Pramod, Kumar Bajpai, scribe of the written report was not produced in the witness-box by the prosecution. The process of inquest was made with inordinate delay. Constable clerk Shakti Deen, scribe of the chik F.I.R. was not produced in the witness box by the prosecution. The witnesses of the recovery of the blood stain soil and plain soil have not been produced in the witness-box by the prosecution. The medical evidence belies the ocular testimony. According to the post-mortem-report, Exhibit Ka-2 as well as the testimony of P.W.-3 Autopsy Surgeon, no injuries of 'lathi'-danda' were found on the person of the deceased while the complainant has stated that the appellants/convicts beat the deceased with lathis and dandas also. In the injury report of injured Ram Babu Shukla, the doctor P.W.-7 has only indicated colour of the injury no.1 and 4 and he has not indicated colour of other injuries which creates a serious doubt about the existence of said

injuries on the person of the injured. There are major contradictions in the testimonies of P.W.-2, P.W.-3, P.W.-6 and P.W.-7. There are major contradictions in the testimony of P.W.-2 itself. No independent witness has supported the prosecution case. P.W.-2 Ram Babu Shukla, is a related and interested witness. His presence on the spot is doubtful. No blood stain on 'Makka', 'Chari' or 'paddy' crops were found. No paddy crop was found by the investigating-officer P.W.-6 in any of the fields near the spot as alleged by P.W.-2. No weapon of assault was recovered by the investigating-officer either from the possession of the appellants/ convicts or on their pointing out. No blood was found on the spot over which the dead body of the deceased was lying. In the site-plan, Exhibit Ka-13 no tree has been shown by the investigating-officer in the grove of Babu Singh where the deceased allegedly fell down and died. It indicates that the site-plan was not prepared by the investigating-officer on the spot at the pointing out of the complainant P.W.-2 and a concocted story has been hatched after the recovery of the dead-body of the deceased who was murdered at some lonely place in the night by some unknown miscreants in the dark hours and the assailants fled away from the spot and the appellants/ convicts were implicated falsely on account of village party-bandi and enmity.

15. Shri Rajesh Kumar Dwivedi, learned Amicus Curiae relied upon the following case laws :-

i). Marudanal Augusti Vs. State of Kerala : 1980 SCC (Cri) 985.

ii). Lakshmi Singh and others etc. Vs. State of Bihar : AIR 1976 SC 2263.

iii). Nawazish Ali and others Vs. The State : 2000(41) ACC 181 (Alld. H.C. D.B.)

16. Shri Anurag Shukla, learned counsel for the appellant/ convict submitted that the appellant/ convict has not been assigned the role of firing upon the deceased. He has been assigned the role of beating with lathi and danda. According to the post-mortem report, the deceased died of firearm injury and no injury of lathi or danda was found on the cadaver of deceased. The injuries found on the body of the complainant Ram Babu Shukla are simple in nature hence the appellant Sri Kant cannot be held guilty and punished for the offence punishable under Section 302 I.P.C. with the help of *Section 34* I.P.C. So he should be acquitted of the offence punishable under Section 302 readwith *Section 34* of I.P.C. He relied upon the following case laws :-

i). Mohar Singh Vs. State of M.P.
: 2007 (4) MPLJ 39.
ii). Sardar Singh Rawat Vs. State of M.P.
: 2006 Supreme MP 579.
iii). Kalu Ram Vs. State of Rajasthan
: 2000 AIR SC 3630.
iv). Kanwarlal & another Vs. State of M.P.
: 2002 (7) SCC 152.
v). Jasdeep Singh @ Jassu Vs. State of Punjab
: 2022 SCC ONLINE SC 20.
vi). Ramesh @ Dapinder Singh Vs. State of Himanchal Pradesh
: 2021 SCC Online SC 243
vii). Bishu Sarkar and others Vs. State of West Bengal
: 2017 (11) SCC 105 ; 2017 (2) JIC 163 SC.
viii). Bhikhari Vs. State of U.P.
: 1965 (3) SCR 194.
ix). Dayanand Vs. State of Haryana
: 2008 (15) SCC 717.

x). Ramesh Krishna Madhusudan Nayar Vs. State of Maharasthra.

: 2008 (14) SCC 491.

xi). Sukhlal Sarkar Vs. Union of India and others

: 2012(5) SCC 703.

xii). State of H.P. Vs. Trilok Chand and another

: 2018 (2) SCC 342.

17. Contrary to it, learned A.G.A. Shri Umesh Chandra Verma countered the above submissions by submitting that testimony of injured witness P.W.-2 Ram Babu Shukla cannot be doubted because his injuries have been proved by the doctor P.W.-7 who examined his injuries and prepared the medico-legal- report. The P.W.-7 has clearly stated that the injuries found on the body of the injured Ram Babu Shukla cannot be created. There is no dent in the evidence of Ram Babu Shukla and his testimony is trustworthy and reliable so learned trial court has rightly relied upon his sole-testimony and held guilty the appellants/ convicts and punished them. He further submitted that the G.D. has been proved as Exhibit Ka-6, F.I.R. was lodged promptly and there is no delay in lodging of the F.I.R. and F.I.R. cannot be even termed as ante-timed. 'Panchnama' was also filled within reasonable time. All the accused persons went on the spot armed with lathis, dandas and fire-arms. There was prior concert in minds of the appellants/ convicts. So the appellants Sri Kant cannot be absolved of his liability for the offence punishable under Section 302 I.P.C. and he has rightly been held guilty and punished under Section 302 and 323 read with *Section 34* of the I.P.C. Hence both the appeals should be dismissed.

18. Considered the rival submissions and perused the record of the present appeal as well as of the learned trial court and gone through the case laws cited above.

19. According to the F.I.R., all the four accused persons abused and assaulted the deceased with lathis/dandas and when the complainant P.W.-2 reached there after hearing the noise alongwith others, accused Sri Kant and Ram Lakhan (now dead) assaulted him with lathis/dandas. As Sri Kant and Ram Lakhan assaulted the complainant, so the complainant could not help the deceased, meanwhile Kamla Kant and Sunil Kant fired upon the deceased of which he died. The complainant Ram Babu Shukla, who is an injured witness has proved what he has written in the first information report while being examined in the court as P.W.-2. In cross-examination also, this witness has stood the test of veracity except some minor contradictions. The injuries of this witness have been proved by P.W.-7 Dr. C.P.Rawat, who examined the injured and prepared the medico-legal report exhibit Ka-15. This witness P.W.-7 has denied the suggestion put forward by the defense counsel that these injuries found on the person of the injured Ram Babu Shukla could be self-created. Eight injuries were found on the person of the complainant P.W.-2 and all were simple in nature caused by hard and blunt object. Duration was found about 4 days' old. It is noteworthy that the incident occurred on 3.8.2001 and the injured was examined on 6.8.2001. The time coincides with the time when the incident occurred and the injured received the injuries. The testimony of an injured witness carries a special weight. The presence of this witness at the time of occurrence is also natural because as per the evidence available on record, he resides near to the place of occurrence and he reached at the spot after

hearing the noise which was ensuing due to the assault made by accused persons on the deceased Hari Babu. Though P.W.-1 who was mentioned in the F.I.R. as an eye witness has turned hostile and did not support the prosecution case, another eye witness Ram Avtar mentioned in the F.I.R. was not produced by the prosecution, yet the evidence of P.W.-2 is sufficient enough with a ring of truth to prove the incident and also what has been written in the F.I.R. by him. No major contradiction could be brought by the defence in the cross examination of this witness. No reason of false implication could be brought forward by the appellants by this witness i.e. complainant, though they tried to put forward that due to some challan under Section 107/116 of Cr.P.C., the complainant was annoyed, so he implicated them falsely but this is not believable because the challan is subsequent to the incident of this case and this defence was rightly disbelieved by the trial court. Much emphasis has been given by the counsel of appellants that the conviction has been based on the testimony of a single witness which is not proper. This argument of the counsel for the appellants is of no importance because it is a settled law that a conviction can be based on a sole testimony of a witness if the court finds the testimony of that witness creditworthy.

20. In ***Kartik Malhar Vs. State of Bihar : (1996) 1 SCC 614,*** the Hon'ble Apex Court has held as under (relevant paragraphs 2, 3, 4, 6 and 7) :-

"2. The well-known maxim that "Evidence has to be weighed and not counted" has been given statutory placement in section 134 of the Evidence Act which provides us under :

"134. No particular number of witness shall in any case be required for the proof of any fact."

3. This section marks a departure from the English law where a number of statutes still prohibit convictions for certain categories of offences on the testimony of a single witness. This-difference was noticed by the Privy Council in Mahamed Sugal Esa Mamasah Rer Alalah v. The King, *A.I.R. (1946) P.C, 3 .....*

4. The Privy Council decision was considered by this Court in Vadivelu Thevar v. The State of Madras, A.I.R. (1957) S.C. 614 in which it was observed as under : -

"On a consideration of the relevant authorities and the provisions of the Evidence Act. *the following propositions may be safely stated as firmly established :*

(1) As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outways the testimony of a number of other witnesses of indifferent character.

(2) Unless corroboration is insisted upon by statute, courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon for example, in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an analogus character.

(3) Whether corroboration of the testimony of a single witness is or is not necessary, must depend upon facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the Judge before whom the case comes.

In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the Court should insist upon plurality of witnesses, is much too broadly stated. Section 134 *of the Indian Evidence Act, has categorically laid it down that 'no particular number of witnesses shall, in any case, be required for the proof of any fact'. The Legislature determined, as long ago as 1872 presumably after due consideration of the pros and cons. that, it shall not be necessary for proof or disproof of a fact, to call any particular number of witnesses."*

This Court further observed as under :

"It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished.....

5. xxxxx.

6. Some other cases of this Court in which the question of sole witness constituting the basis of conviction or otherwise has been considered are State of Haryana v. Manoj Kumar, [1994] 1 SCC 495;Brij Basi Lal v. State of M.P., [1991] Suppl. 1 SCC 200; Jai Prakash v. State(Delhi Administration), [1991] 2 SCC 379; Peodireddi Subbareddi v. State of Andhra Pradesh, AIR (1991) SC 1356; Java Ram Shiva Tagore v. State of Maharashtra, [1991] Suppl. 2 SCC 677 AIR (1991) SC 1735; Anil Pukhan v. State of Assam, AIR (1993) SC 1462 and Ram Kumar v. State of U.P., AIR (1992) SC 1602.

7. On a conspectus of these decisions, it clearly comes out that there has been no departure from the principles laid down in Vadivelyu Thevar's case (supra) and, therefore, conviction can be recorded on the basis of the statement of single eye witness provided his credibility is not shaken by any adverse circumstance appearing on the record against him and the Court, at the same time, is convinced that he is a truthful witness. The Court will not then insist on corroboration by any other eye witness particularly as the incident might have occurred at a time or place when there was no possibility of any other eye witness being present. Indeed, the Courts insist on the quality, and, not on the quantity of evidence."

21. In ***Kunju @ Bala Chandran Vs. State of Tamilnadu : 2008 (2) SCC 151,*** the Hon'ble Apex court has also held that the conviction can be based on the sole testimony of a witness who is found reliable. It is not the number of witness but the quality of evidence which is important.

22. In ***Jayanti Lal Verma Vs. State of M.P. (Now Chattisgarh) 2020 SCC Online SC 944,*** the Hon'ble Apex Court has laid down the similar view.

23. In the present matter, though another eye witness mentioned in the F.I.R., Natthu Lal has turned hostile but the evidence of P.W.-2 who is also an injured witness, has in a very natural manner step by step, narrated the story before the court and what has been written by him in his written report on the basis of which the F.I.R. was registered. No reason could be evinced to disbelieve the testimony of this witness.

24. The counsel for the appellants also stated that this witness is a relative witness as the deceased was the cousin of this witness, so his testimony should not be believed. This argument also of the appellants carries no force because testimony of a witness cannot be discredited only for the reason of his being a relative of the deceased if the court otherwise finds his testimony creditworthy and reliable.

25. In ***Kartik Malhar's case (supra)***, the Hon'ble Apex Court has held as under (para 18) :-

"18. 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 be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth."

26. In the present case, the incident is of day light and there is no reason on the record to disbelieve the testimony of P.W.-2, the complainant and also an injured. The learned counsel for appellants Kamla Kant and Sunil Kant also emphasised much on the arguments that the site of the crime has not been proved by prosecution, as no witness of the recovery of blood soaked soil and plain soil from the spot, has been examined and it could not be established that the incident occurred at the place mentioned in the F.I.R. Though no witness of recovery of blood soaked soil and plain soil from the spot has been examined but that has very well been proved by the concerned investigating officer and Exhibit Ka-16 a report of forensic Science Laboratory, Lucknow which depicts that both the soils i.e. blood soaked soil and plain soil were similar. Hence, there remains no reason to doubt the place of occurrence, furthermore the place of occurrence has very well been proved by the P.W.-2 and also by the Investigating

Officer P.W.-6. The post mortem report of the deceased Exhibit Ka-2 shows that the deceased sustained multiple firearm wounds of entries present on left side front of chest and left arm, average measuring 0.3 cm X 0.3 muscle to chest cavity deep."

27. 11 Pellets were also recovered from the left arm chest cavity and left lung of the deceased, as has been noted in the post-mortem-report by the autopsy surgeon. The cause of death has been shown as shock and hemorrhage as a result of ante-mortem injuries. This medical evidence is in support of evidence of eye witness P.W.-2 the complainant. However, the learned counsel for the appellants have argued that P.W.-2 has stated that the deceased was beaten by the appellants by 'lathis/dandas' also but no injury of 'lathi-danda' was found, so the evidence of P.W.-2 is not in consonance with the medical evidence. This argument also on behalf of the appellants has no force because mere absence of injuries of 'lathi'-'danda' cannot convince us to drop the conclusion that the deceased was not fired upon by the appellants Kamla Kant and Sunil Kant as has been stated by P.W.-2 in his statement and also written in the F.I.R. The injuries noted in the Post-mortem-report supports the version of P.W.-2 as far as firearm injuries are concerned. So only for the fact that no injury of 'lathi-danda' was found, the statement of P.W.-2 cannot be disbelieved.

28. The learned counsel for the appellants Kamla Kant and Sunil Kant also argued that the F.I.R. is a delayed one and also ante-timed because the same was not sent to the concerned Magistrate at the earliest. This argument also carries no weight in the light of recent pronouncements of Hon'ble Apex Court.

29. The Hon'ble Supreme Court in ***Bimla Devi Vs. Rajesh Singh and another : (2016) 15 SCC 448*** has held that "although it is true that delay in sending the F.I.R. to the concerned Magistrate can vitiate the investigation, but it is settled position that a cogent reasoning can override this procedural lacuna. It is an accepted fact that there was a delay of one day in sending the F.I.R., however, no motive in manipulating with the F.I.R. was proved. The prosecution case is strongly backed by testimonies of the six eye witnesses who have testified the incident in almost similar terms. A procedural lapse in not sending the F.I.R. promptly did not prejudice the present case."

30. The Hon'ble Apex Court in ***Narsingh Pal Vs. State of U.P. : (2020) 14 SCC 281*** has held that "the F.I.R. was lodged promptly at 00.30 A.M. on 24.6.2005 by P.W.-1 naming the appellant, promptly accusation was not the result of any consultation but the immediate confirmation of the appellant being the assailant. The fact that there may have been some delay in sending it to the Magistrate, is therefore, inconsequential and has caused no prejudice to the appellant."

31. Recently in ***Ombir Singh Vs. State of Uttar Pradesh : (2020) 6 SCC 378,*** the Hon'ble Apex Court has held that the delay in compliance with section 157 of the Cr.P.C. cannot in itself be a ground for acquittal of the accused. The Apex Court has also held that in cases where the date and time of the lodging the F.I.R. is questioned, the report becomes more relevant. But mere delay in sending the report itself cannot lead to a conclusion that the trial is vitiated or the accused is entitled to be acquitted on this ground.

32. In the matter in hand, the incident allegedly occurred at 1.00 P.M. and the F.I.R.

was lodged on the same day at 5.25 P.M. The distance of the place of occurrence was 14 kilometers from the concerned police station. The person who went to lodge the F.I.R. was also got injured in the incident. In such circumstances, the F.I.R. cannot be deemed to be a delayed F.I.R. or ante-timed F.I.R. and had rightly been so concluded by the trial court. Thus, the delay in sending the F.I.R. to the concerned Magistrate is of no importance. Hence, there appears no reason to interfere with the conclusions arrived at by the trial court in holding guilty the appellants Kamla Kant and Sunil Kant for the offence punishable under Section 302 read with *Section 34* I.P.C. for causing the murder of the deceased Hari Babu.

33. Now comes the case of another appellant Sri Kant who has filed Criminal Appeal No.1314 of 2005. The counsel for the appellant Sri Kant argued that he has been assigned the role of assaulting the injured witness Ram Babu Shukla and he did not cause any injury to the deceased with 'lathi-danda' as there was no injury on the person of the deceased of 'lathi-danda'. He played no role in causing the death of the deceased, hence he can, at the most be held liable for the offence punishable under Section 323 readwith *Section 34* I.P.C.

34. Learned A.G.A. opposed the above arguments of the counsel for Sri Kant and submitted that this appellant also played an active role in the murder of the deceased as he also came alongwith other accused persons at the spot with the intention to commit the murder of the deceased. So he is also liable for the offence punishable under Section 302 readwith *Section 34* I.P.C.

35. Learned A.G.A. relied upon paragraph 12 of the case ***Ramaswami Ayyanger and others Vs. State of Tamilnadu : 1976 SCC (Cri.) 518*** wherein Hon'ble Apex Court has held as under :-

"12. .....Section 34 is to be read along with the preceding Section 33 which makes it clear that the "act" spoken of in Section 34 includes a series of acts as a single act. It follows that the words "when a criminal act is done by several persons" in Section 34, may be construed to mean "when criminal acts are done by several persons". The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise, for instance, one may only stand guard to prevent any person coming to the relief of the victim, or may otherwise facilitate the execution of the common design. Such a person also commits an "act" as much as his co-participants actually committing the planned crime. In the case of an offence involving physical violence, however, it is essential for the application of Section 34 that the person who instigates or aids the commission of the crime 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....."

36. Learned A.G.A. has also relied upon paragraph 12 of the case ***Ramesh***

Singh @ Photti Vs. State Andhra Pradesh : 2004 SCC (Cri) Supp. 70, which runs as under (relevant para 12) :-

"12. To appreciate the arguments advanced on behalf of the appellants it is necessary to understand the object of incorporating Section 34 in the Indian Penal Code. *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. Common intention essentially being a state of mind it is very difficult to procure direct evidence to prove such intention. Therefore, in most cases it has to be inferred from the act like, the conduct of the accused or other relevant circumstances of the case. The inference can be gathered from the manner in which the accused arrived at the scene and mounted the attack, the determination and concert with which the attack was made, and 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. In this regard even an illegal omission on the part of such accused can indicate the sharing of common intention. In other words, the totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the common intention to commit an offence of which they could be convicted. (See Noor Mohammad Yusuf Momin Vs. State of Maharashtra AIR 1971 SC 855)."*

37. In ***Jasdeep Singh @ Jassu Vs. State of Punjab : 2022 SCC Online SC 20 (supra)*** cited by learned counsel for the appellant Sri Kant, the Hon'ble Apex Court has held as under (para 21 to 28) :-

21.Section 34 IPC creates a deeming fiction by infusing and importing a criminal act constituting an offence committed by one, into others, in pursuance to a common intention. Onus is on the prosecution to prove the common intention to the satisfaction of the court. The quality of evidence will have to be substantial, concrete, definite and clear. When a part of evidence produced by the prosecution to bring the accused within the fold of Section 34 IPC is disbelieved, the remaining part will have to be examined with adequate care and caution, as we are dealing with a case of vicarious liability fastened on the accused by treating him at par with the one who actually committed the offence.

22. What is required is the proof of common intention. Thus, there may be an offence without common intention, in which case Section 34 IPC does not get attracted.

23.It is a team effort akin to a game of football involving several positions manned by many, such as defender, mid-fielder, striker, and a keeper. A striker may hit the target, while a keeper may stop an attack. The consequence of the match, either a win or a loss, is borne by all the players, though they may have their distinct

roles. A goal scored or saved may be the final act, but the result is what matters. As against the specific individuals who had impacted more, the result is shared between the players. The same logic is the foundation of Section 34 IPC which creates shared liability on those who shared the common intention to commit the crime.

24.The intendment of Section 34 IPC is to remove the difficulties in distinguishing the acts of individual members of a party, acting in furtherance of a common intention. There has to be a simultaneous conscious mind of the persons participating in the criminal action of bringing about a particular result. A common intention qua its existence is a question of fact and also requires an act "in furtherance of the said intention". One need not search for a concrete evidence, as it is for the court to come to a conclusion on a cumulative assessment. It is only a rule of evidence and thus does not create any substantive offense.

25.Normally, in an offense committed physically, the presence of an accused charged under Section 34 IPC is required, especially in a case where the act attributed to the accused is one of instigation/ exhortation. However, there are exceptions, in particular, when an offence consists of diverse acts done at different times and places. Therefore, it has to be seen on a case to case basis.

26.The word "furtherance" indicates the existence of aid or assistance in producing an effect in future. Thus, it has to be construed as an advancement or promotion.

27.There may be cases where all acts, in general, would not come under the purview of Section 34 IPC, but only those done in furtherance of the common intention having adequate connectivity. When we speak of intention it has to be one of criminality with adequacy of knowledge of any existing fact necessary for the proposed offense. Such an intention is meant to assist, encourage, promote and facilitate the commission of a crime with the requisite knowledge as aforesaid.

28.The existence of common intention is obviously the duty of the prosecution to prove. However, a court has to analyse and assess the evidence before implicating a person under Section 34 IPC. A mere common intention per se may not attract Section 34 IPC, sans an action in furtherance. There may also be cases where a person despite being an active participant in forming a common intention to commit a crime, may actually withdraw from it later. Of course, this is also one of the facts for the consideration of the court. Further, the fact that all accused charged with an offence read with Section 34 IPC are present at the commission of the crime, without dissuading themselves or others might well be a relevant circumstance, provided a prior common intention is duly proved. Once again, this is an aspect which is required to be looked into by the court on the evidence placed before it. It may not be required on the part of the defence to specifically raise such a plea in a case where adequate evidence is available before the court."

38. In the present matter, it is discernible from the evidence available on record that when P.W.-2 the complainant hearing the noise reached the spot where the accused persons were allegedly beating Hari Babu, the deceased, this appellant/convict (Sri Kant) alongwith Ram Lakhan (now dead) started beating the complainant with lathi-danda. Meanwhile, the other two accused appellants/ convicts Kamla Kant and Sunil Kant fired upon the deceased of which he died.

39. Here, on the record, there is no evidence to establish that appellant/ convict Srikant had intention to kill the deceased and had reached at the spot alongwith co-convicts to kill Hari Babu with prior meeting of minds with co-convicts as the complainant has written in his written report that when the deceased started to remove the thorny bushes from the boundary of the field, the appellants/ convicts reached there at the spot and started abusing and beating the deceased with 'lathis-dandas' and when he reached the spot after hearing the noise, Sri Kant and Ram Lakhan started beating him and meanwhile appellants/ convicts Sri Kamla Kant and Sunil Kant fired upon the deceased. These circumstances show that there is possibility that the appellant Sri Kant may not be aware of the fact that the co-appellants/co-convicts will cause the death of the deceased Hari Babu by firing upon him. Hence this appellant/ convict deserves the benefit of doubt to be given to him and he may be held liable only for the offence under Section 323 I.P.C. for causing simple injuries to the complainant Ram Babu Shukla.

40. To sum up, the appellants/ convicts Kamla Kant and Sunil Kant have rightly been found guilty and punished for the offence punishable under Sections 302 readwith *Section 34* I.P.C. and the sentence awarded to them by the trial court is hereby affirmed.

However, the conviction and sentence awarded to them Under Section 323/34 is hereby set aside.

41. As far as the appellant/convict Sri Kant is concerned, his conviction under Section 302 readwith *Section 34* I.P.C. is set aside and his conviction under Section 323 I.P.C. is hereby affirmed.

42. The appellants/ convicts Kamla Kant and Sunil Kant are already in jail. They shall serve out the sentence awarded to them under Section 302 read with *Section 34* I.P.C.

43. The appellant/ convict Sri Kant is on bail. He shall surrender before the concerned trial court to serve out the sentence awarded to him under Section 323 I.P.C. awarded by the trial court, if not served already.

44. These appeals are partly ***allowed.***

45. Let a copy of this order alongwith original record be transmitted to the trial court concerned forthwith for information and necessary action.

46. Shri R.K. Dwivedi, Amicus Curaie shall be paid remuneration as per Rules.

(2022)05ILR A88
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 05.05.2022

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Appeal No. 1825 of 2016

Ishwar Lal Roka ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Vishwa Nath Singh, Manoj Kumar Singh, Piyush Kumar Singh

Counsel for the Respondents:

G.A.

A. Criminal Law -Code of Criminal Procedure, 1973-Section 374(2) - Narcotic Drugs and Psychotropic Substance Act, 1985-Sections 8/20-appellant being poor was not able to pay the fine of Rs. one lac-appellant had already undergone the sentence of 10 years as awarded by the trial court-In default of fine, the trial court awarded 10 months simple imprisonment instead 2 years and 6 months-appellant had already spent 5 months in jail, in default of payment of fine-appellant be released forthwith.(Para 2 to 16)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Shanti Lal Vs St. of M.P.

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

1. This appeal has been filed against the judgement and order dated 20.10.2016 passed by the A.S.J., court no. 5 Bahraich in S.T. No. 14/2012 arsing out of case crime no. 645 of 2011, under Sections 8/20 NDPS Act, whereby the trial court convicted and sentenced the appellant u/s 20 NDPS Act for 10 years' rigorous imprisonment with a fine of Rs. 1 lakh and in default of payment of fine, ten months additional simple imprisonment.

2. Brief fact of the case emerges as such that on 5.12.2011 at 15.00 hours, the informer informed to the police that one Nepali person carrying charas will arrive India via Nepalganj Rupaidiha main highway from Nepal. On receiving this information, Abhinav Kashyap, Assistant Commander made Special Checking Squad comprising SSBL personnel. The special checking squad along with the informant reached the check post which was situated at Nepalganj Rupaidiha highway and started waiting for accused-appellant. At 17.00 hours on pointing out of informer, the suspected accused was intercepted for checking. Even as the accused opened the bag, he started fleeing from the spot. But the special checking squad immediately nabbed him and on asking his name and address and the reason for fleeing, he told that there is charas in his bag and further told his name Ishwar Lal Roka, S/o Jam Bahadur Roka, R/o Nagarpalika Police Station Chowki Ghorahi Ward no. 10 District Dang Western Nepal, aged 41 years. On asking the reason for bringing or taking the alleged charas, the accused told that one week ago, at Weston Hospital, Nepalganj one unknown person met him and offered Indian Rs. 15,000/- for delivering a bag containing Charas to Roadways Bus stop Rupaidiha. On spot contraband article was tested by Drug Testing Kit and prima facie, the recovered contraband article was found to be charas, therefore, the accused-appellant was immediately arrested. The accused was given choice to get the recovered article checked by any officer or Magistrate. The appellant however opted his search by the cheeking squad himself. Accordingly, search was conducted on the spot and consent letter was signed by the accused-appellant. Bag of the accused was searched. It was found that a box containing charas, Indian Rs. 2,500/- and a Samsung Mobile. Then, the information regarding arrest of the accused-appellant was given by the police authority to his wife Lal Kumari. On weighing by the scale available there, the recovered charas was 5kg and 238gms. Out of which, 25-25 gms charas was separately sealed for sample and the remaining charas was sealed in another packet. The accused was brought to the police station- Rupaidiha, where the case under section 8/20 of NDPS Act was registered as case crime no. 645 of 2011.

3. After investigation, charge-sheet was submitted against the accused-appellant before sessions court, Bahraich. This case was transferred to the Special Judge, court no. 4, Bahraich, where the charge was framed. The accused-appellant pleaded not guilty of the charges levelled against him and he contended that he was falsely implicated in this case and claimed to be tried.

4. In order to prove its case, the prosecution examined PW 1 Sonam; PW 2 Abhinav Kashyap, complainant; PW 3 Umesh Kumar Bhardwaj.

5. The trial court on the basis of evidence adduced by the prosecution held that the prosecution succeeded to prove the charge against the appellant. It was also held that all the procedural technicalities were complied with. Thus, the trial court convicted the appellant for possessing the contraband article Charas weighing 5kg and 238gms from his possession and sentenced the appellant as aforesaid.

6. Being aggrieved and dissatisfied with the aforesaid order, the appellant preferred this appeal before this Court.

7. I have heard learned counsel for the parties and perused the record.

8. Submission of the counsel for the appellant is that the finding given by the trial court is perverse and bad in the eye of law. There are major contradictions in the statement of the witness. He has also submitted that there is no independent witness examined by the prosecution. All the witnesses shown in the recovery memo is false and concocted and there was non-compliance of the mandatory provision of NDPS Act at the time of search and seizure. It was not told to the appellant that he has right to be searched before the Gazetted officer or magistrate. Thus, there was also non-compliance of Sections 50, 56 and 57 of NDPS Act.

9. The counsel for the appellant further argued that the appellant was neither in possession of any narcotics nor any incriminating article recovered from his possession.

10. Lastly, the counsel for the appellant submits that the appellant has no previous criminal history and he is languishing in jail since 5.12.2011. The appellant has already undergone the sentence of 10 years as awarded by the trial court. Since he is not able to pay the fine of Rs. 1 lakh as aforesaid. So, in default of the same, the appellant shall undergo for 10 months' additional simple imprisonment as awarded by the trial court. Therefore, the counsel submits that liberal view may be taken against the appellant and the appellant be released forthwith as he already remained in incarceration about 10 years and 5 months.

11. Learned AGA opposed and submitted that all the procedure literally complied by the arresting officer at the time of search. He further contended that provision of CrPC makes it clear that the court of law can award imprisonment in default of payment of fine, one fourth of the term of the imprisonment which the court is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine. Thus, in this case, in default of payment of fine, the court is competent to award 2 years and 6 months in addition to substantive sentence. However, the trial court already taking liberal view awarded

10 months' additional simple imprisonment in default of payment of fine, which could not be said to be unlawful or otherwise illegal. Thus, the appeal deserves to be dismissed.

12. Insofar as conviction recorded by the trial court is concerned, there is no illegality, irregularity or perversity in the impugned order passed by the trial court. The appellant has already undergone substantial part of sentence of 10 years rigorous imprisonment and in default of payment of fine, he has already spent 5 months in jail.

13. The counsel for appellant has relied upon the judgement of the Apex Court in ***Shanti Lal vs. State of M.P. decided on 8.10.2007.*** The relevant portion of which is reproduced hereunder:

"36. We are mindful and conscious that the present case is under the NDPS Act Section 18 quoted above provides penalty for certain offences in relation to opium poppy and opium. Minimum fine contemplated by the said provision is rupees one lakh [fine which shall not be less than one lakh rupees]. It is also true that the appellant has been ordered to undergo substantive sentence of rigorous imprisonment for ten years which is minimum. It is equally true that maximum sentence imposable on the appellant is twenty years. The learned counsel for the State again is right in submitting that clause (b) of sub-section (1) of Section 30, CrPC authorizes the Court to award imprisonment in default of payment of fine up to one-fourth term of imprisonment which the Court is competent to inflict as punishment for the offence. But considering the circumstances placed before us on behalf of the appellant-accused that he is very poor; he is merely a carrier; he has to maintain his family; it was his first offence; because of his poverty, he could not pay the heavy amount of fine (rupees one lakh) and if he is ordered to remain in jail even after the period of substantive sentence is over only because of his inability to pay fine, serious prejudice will be caused not only to him, but also to his family members who are innocent. We are, therefore, of the view that though an amount of payment of fine of rupees one lakh which is minimum as specified in Section 18 of the Act cannot be reduced in view of the legislative mandate, ends of justice would be met if we retain that part of the direction, but order that in default of payment of fine of rupees one lakh, the appellant shall undergo rigorous imprisonment for six months instead of three years as ordered by the trial court and confirmed by the High Court.

37. For the reasons aforesaid, the appeal is partly allowed, conviction recorded and sentence imposed on the appellant to undergo rigorous imprisonment for ten years is confirmed. An order of payment of fine of rupees one lakh is also upheld. But an order that in default of payment of fine, the appellant shall undergo rigorous imprisonment for three years is reduced to rigorous imprisonment for six months. To that extent, the appeal filed by the appellant is allowed. If the appellant has undergone substantive sentence of rigorous imprisonment for ten years as also rigorous imprisonment for six months as modified by us in default of payment of fine, the appellant shall be set at liberty forthwith unless he is required in any other offence. If the appellant has not completed the said period, he will be released after the period indicated hereinabove is over. The appeal is accordingly disposed of."

14. Considering the aforesaid and the law propounded by the apex court, I am of the view that 10 months' additional simple imprisonment is reduced to 5 months' simple imprisionment. Thus, the appeal is ***partly allowed.***

15. If the appellant has undergone substantive sentence of rigorous imprisonment for ten years as also simple imprisonment of five months as modified by this Court in default of payment of fine, the appellant be set at liberty forthwith unless he is required in any other offence.

16. **Thus, the appeal is dismissed on the point of conviction and partly allowed on the point of sentence.**

17. Office is directed to communicate this order to the court concerned and send back the lower court record, if already received.

(2022)05ILR A92
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.04.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Criminal Appeal No. 1834 of 2008

Jaswant Singh & Anr. ...Appellants
Versus
State of U.P. ...Respondents

Counsel for the Appellants:
Sri Rajeev Sisodia, Sri Ajay Kumar Barnwal, Sri Atul Sisodia, Sri C.V.S. Raghuvanshi, Sri J.P.S. Chauhan, Sri R.K. Shukla, Sri Ramesh Kumar Shukla, Sri S.A., Sri V. Singh, Sri Kamal Krishna (Senior Adv.), Sri Gaurav Singh

Counsel for the Respondents:
A.G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Section 302/34-challenge to-conviction-A dispute related to land property was going on between four brothers-on account of the said dispute, informant's wife was burnt alive by the appellants-as per statement of PW-2, deceased was admitted in hospital in burnt state and died-PW-3, however, turned hostile but he stated that she was admitted into the hospital but he did not know how she got burnt-the statement of PW-4, a child witness, the daughter of the deceased has been found credit worthy, as no inconsistency, improbability and embellishment could be found therein-PW-6 doctor opined that she was deep burnt and appearance was pugilistic-evidence led by the prosecution add weight to the prosecution story.(Para 1 to 52)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Janardan Dube & ors. Vs St. of U.P. (2019) 4 ADJ 307

2. Gura Singh Vs St. of Raj. (2001) 2 SCC 205

3. Bhagwan Singh Vs St. of Har. (1976) AIR 202

4. Ramesh Harijan Vs St. of U.P. (2012) 5 SCC 777

5. Haradhan Das Vs St. of W.B. (2013) 2 SCC 197

6. Lahu Kamlakar Patil & anr.. Vs St. of Mah. (2013) 6 SCC 417

7. Maheshwar Tigga Vs St. of Jharkand (2020) 10 SCC 108

8. Naval Kishore Vs St. of Bih.(2004) 7 SCC 502

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

1. Heard Sri Kamal Krishna learned Senior Advocate assisted by Sri Ramesh Kumar Shukla learned counsel for the appellants and learned A.G.A. for the State-respondents.

2. This appeal is directed against the judgment and order dated 29.02.2008 passed by the Additional Sessions Judge, Court no.6 Bijnor whereby two appellants herein namely Jaswant Singh and Resham Singh have been convicted for the offence under Section 302 read with Section 34 IPC and sentenced for imprisonment for life and fine of Rs.15,000/- each. The default punishment is one year rigorous imprisonment for each appellant. The appellant no.1-Jaswant Singh had died. Only surviving appellant Resham Singh is represented by the learned senior counsel.

3. The first information report of the incident occurred on 01.08.2006 at about 11.30 a.m was lodged by Charan Singh S/o Jagir Singh, husband of deceased Chhindra Pal Kaur on 01.08.2008, at about 8.30 p.m. The assertion in the written report given by Charan Singh (P.W-1) is that the first informant was four brothers. Out of whom, the eldest one Bagshish Singh was living in Punjab. The entire landed property (agricultural field) of the father of the first informant was given to his two elder brothers namely Jaswant Singh and Resham Singh. The first informant stated that he did not get any share in the property of his father and was doing Majduri (labour work) to feed his family. A dispute related to the landed property was going on between him and his two brothers Jaswant and Resham (the appellants herein). A case under Section 107/116 Cr.P.C was pending before the S.D.M., Dhampur. On account of the said dispute, his wife Chhindra Pal Kaur was burnt to death by pouring kerosene on her by the appellants at about 11.30 a.m on the fateful day. At that point of time, the first informant was out of his house as he went to bring fodder for his cattle. The deceased was admitted in the Government Hospital by the Gram Pradhan Sri Chatar Singh s/o Sri Aidal Singh and other villagers and died at about 4.00 p.m in the hospital. After getting information, the first informant also went to the hospital and brought home the dead body of his wife with the help of villagers. While keeping the body at his house, he went to lodge the first information report.

4. On presentation of the written report, check FIR and G.D entry were made, which were copied in the case diary by the Investigating Officer, who had entered in the witness box as P.W-7. The Investigating Officer stated that he was posted at the police station-Afjalgarh as S.H.O on 01.08.2006. The investigation was accepted by him on the information received from the hospital. He had reached at the house of the first informant prior to lodging of the FIR. The Head constable Bhagwan Sharan Pandey handed over the copy of the check report, and the written report on the spot and the investigation was then commenced. The statement of the first informant Charan Singh was recorded on the spot. The inquest of the body of the deceased kept on a cot in the Varandah of the house of first informant Charan Singh was conducted on 02.08.2006 and the body was sealed and sent for post-mortem alongwith relevant papers. The site plan on inspection of the site of the incident was prepared, which was proved as Exhibit-Ka-

5. From the place of the incident, the burnt clothes of deceased Chhindra Pal were collected and a memo was prepared, which was proved as Exhibit-Ka-6. P.W-7 gave the details of the clothes collected in the memo of recovery. The statement of other witness and that of Gram Pradhan Chatar Singh were recorded and the appellant Resham Singh was arrested. On 05.08.2006, the statement of other witnesses were recorded. The appellant Jaswant Singh was arrested on 07.08.2006.

5. On completion of the investigation, chargesheet was filed in the Court which was proved as Exhibit Ka-'7' being in hand writing and signature of P.W-7. P.W-8, the constable clerk had proved the inquest as Exhibit Ka-'8' being in the handwriting of Constable Ramji lal carrying his signature and that of another police personnel. He stated that the body was sealed and sent with relevant police papers and handed over in the Mortuary. After post mortem, body was brought from the Mortuary and handed over to the relatives of the deceased. P.W-8 stated that no one had touched the dead body from the place of the inquest till it was kept safe in the Mortuary. In cross, P.W-8 stated that the body was straightway taken to the Mortuary and they left the place of the incident at about 8.00 a.m and reached at the Mortuary in about two hours. The inquest was done in his presence and his signature also finds place therein. Total eight papers were given to the Chief Medical Officer including inquest report, photo lash etc.

6. P.W-5, doctor-Shamim Ahmad Ansari was posted in the P.H.C Kadrabad District-Bijnor as Medical Officer. On 01.08.2006, the date of the incident, he stated that deceased Chhindra Kaur was brought to the hospital at about 1.00 p.m in the burnt state upto 60-70%. She was brought by Gram Pradhan-Chatar Singh and the admission in emergency register was made by the pharmacist. After examination of the deceased, it was found that her general condition was poor and pulse rate was feeble, i.e very slow. Blood pressure of the patient could not be recorded as her hands were burnt. The first aid was given to the deceased at the hospital and at that point of time Chatar Singh, Baldev Singh and the pharmacist was present. In the presence of these persons, deceased Chhindra Kaur told that she was burnt by pouring kerosene by two brothers of her husband, namely Jaswant Singh and Resham Singh. The said fact was noted by the doctor (P.W-5) in the emergency register of the hospital. The entry of the said statement bears signature of P.W-5, Chatar Singh and Baldev Singh present there. P.W-5 stated that he had transcribed whatever was stated by the deceased. The original register was brought in the Court to prove the said fact. The attested photocopy of the said register was given to the police which was available on record. The signatures on the attestation had been proved by P.W-5 being his own and being correct as per the original register. The photocopy of the extract of emergency register was exhibited as Exhibit Ka-2. P.W-5 kept on to tell that looking to the critical condition of the patient she was referred to a higher centre.

Besides that a letter was sent to the Station House Officer Afjalgarh that Smt Chhindar Kaur w/o Charan Singh was brought to PHC in 60-70% burnt state by Gram Pradhan Chatar Singh and she had been referred to higher centre after first aid. The original copy of the said letter was sent to the police station whereas the carbon

copy was pasted on the emergency register which was prepared in the same process. The receipt of the report from the police station in the carbon copy, at about 16.00 hours on 01.08.2006, was proved by P.W-5 with his signature on the carbon copy and by filing a certified copy of the same in the Court, as Exhibit Ka-3. It was stated by P.W-5 that after some time he came to know the deceased Chhindra Pal could not be taken to higher centre and she had died in the hospital itself and her family members took her home. The name of the person who brought the deceased to the hospital was mentioned in the register as Sri Chatar Singh, Pradhan.

7. It was reiterated by P.W-5 in the examination in chief that the deceased had told her name as Chhindra Kaur and narrated the incident on his asking and the said details were entered in the emergency register. In cross, he stated that he did not prepare any medico legal report of the deceased as she was critical and he referred her to a higher centre for treatment. He further stated that he did not talk to other people who brought the deceased to the hospital and only Gram Pradhan-Baldev was present in his chamber with whom he talked. It was reiterated by P.W-5, in cross, that he transcribed the statement of the deceased as was told to him. No certificate was given by him to certify the condition of the deceased that she was fit to make the statement and stated that the statement was written by him personally. He did not consult any other doctor. A suggestion that the deceased was not in the condition to make the statement was emphatically denied by P.W-5 who had reiterated that she was fit enough to make the statement. P.W-5 categorically stated that the deceased had narrated the whole story herself. However, the register on which the statement was written, the thumb impression of the deceased was not taken. The smell of kerosene oil was not coming from the body of the deceased.

8. On a suggestion, P.W-5 stated that after getting 95% of burnt injuries a patient would not be in a condition to speak. As per his own assessment, the deceased was burnt to the extent of 60-70%. Lastly, P.W-5 denied that he did not record the statement of the deceased and it was written on the narration of other people accompanying her.

9. P.W-6 is the doctor who had proved the post-mortem report as Exhibit Ka-'4' being in his signature and handwriting. The external and internal condition of the dead body as described in the post-mortem are:-

"External examination- average body built female, ***pugilistic appearance, redness present,*** *eyes closed, mouth closed.*

Ante time injuries-

Superficial to deep burn all over the body except both soles, Perineum and some part of right leg skin peeled off at places, scorched hair. Burnt area about 95%.

Internal examination-

Brain congested, Trachea coAnte time injuries- ngested with carbon particles, both lungs congested, right heart full, left empty (100 gm), stomach empty, gall bladder congested, spleen congested, both kidney congested, bladder empty.

The estimated time of death was about one day."

10. In the opinion of the doctor, death was caused due to shock on account of burnt injuries and the proximate time of death was one day ago. P.W-6 stated that he had given two sealed envelop, postmortem

report, papers of inquest and a sealed bundle of clothes to Constable CP 1257 Tejpal Singh, P.S-Afjalgarh. The appearance of the body mentioned as 'pugilistic' with redness was explained by P.W-6 to be a condition on the body which occur when some one is burnt alive. On a suggestion, P.W-6 stated that even on getting such burnt injuries it was possible that the deceased was not unconscious, she, however, could be unconscious also. Most of the part of the body including neck was burnt and it was possible to have difficulty in talking clearly. He further stated that he did not write in the report that the smell of kerosene oil was coming from the body. In cross, P.W-6 stated that it was possible that the deceased had suffered burn injuries at about 9.00 p.m on 01.08.2006.

11. The recovery memo dated 02.08.2006 (Exhibit Ka-6) describes the burnt clothes of the deceased as: (i) one shirt yellow colour having designs in green etc (in the burnt state); (ii) slip ((baniyan) colour faded (in burnt state); and (iii) one underwear (kachha) grey colour in burnt state, which were siezed from the spot. They were kept in a blue colour polythene and sealed.

12. The post-mortem contains description of clothes and jewellery found on the dead body sealed and sent for postmortem, which is as follows:

1. Salwar -one
2. Dupatta-four
3. broken pieces of glass bangles
4. one metal kada
5. one metal nose pin
6. one braid

(total six items)

All these items were sealed in a cloth bundle and stamped as noted above. The sealed bundle of clothes of the deceased recovered from the place of the incident was opened in the Court and P.W-7, the Investigating Officer had identified them which were marked as Material Exhibit-'1' to '4'.

13. Amongst the witnesses of fact (three witnesses) Charan Singh, P.W-1, the first informant, the husband of the deceased, had been declared hostile as he did not support the prosecution version about the involvement of the accused persons. He, however, proved his signatures on the written report which was exhibited as Exhibit Ka-1. As to the contents of the written report, P.W-1 stated that whatever was written in the said report was not in his knowledge. He further stated that the scribe of the written report was known to him being his neighbour. In cross by the prosecution he stated that he did not know as to how it was written in the report that his brother had killed his wife by burning her. The other contents of the report had also been denied not being in his knowledge. P.W-1 had denied his statement under Section 161 Cr.P.C by saying that the Investigating Officer did not record his statement and when the said statement was put to him he replied that he did not know as to how it was written. He had denied the enmity between him and his brother about the landed property as also the proceedings under Section 107/116 Cr.P.C. In cross, on a suggestion by the prosecution, P.W-1 admitted that a compromise had been arrived with his brothers. But the suggestion that he was making a wrong statement on account of the said compromise was denied by P.W-1. He also denied that the written report was got scribed by him in his senses. In cross for defence, P.W-1 stated that his two daughters Balvindra Kaur and Rajvindra

Kaur were not at home and they were at the house of their maternal grand father. His wife before becoming unconscious told him that she caught fire while cooking food. Lastly, P.W-1, though admitted that his wife was not unconscious during treatment but in the same breath stated that she was unconscious and died in that state.

14. Another hostile witness is P.W-2 who was an acquaintance of the deceased. In her examination in chief she had denied the involvement of the accused persons in the occurrence and stated that she went to the hospital and the deceased was unconscious and she did not name anyone as accused. In cross by the prosecution, P.W-2 reiterated that when she reached the hospital, the deceased was unconscious. She had denied any relationship with the accused person or the first informant Charan Singh and further retracted from her previous statement recorded under Section 161 Cr.P.C. In cross for the prosecution, P.W-2 again stated that the deceased was unconscious before she died and was referred by the doctor to the Government Hospital while she was in unconscious state.

15. P.W-3 Chatar Singh (a hostile witness) stated that he got information on 01.08.2006 that Chhindra Pal Kaur (deceased) got burnt. The said information was given in the police station by him. He denied having gone to the house of the deceased and witnessing her in the burnt state therein but admitted that he brought the deceased to the Government Hospital, Kadrabad and got her admitted therein. He then stated that Chhindra Pal was taking names of her brothers-in-law. On the asking, he stated that the deceased had two brothers-in-law and he did not remember as to whose name was mentioned by her. P.W-3, further stated that Chhindra Pal was saying that her brothers-in-law had burnt her but he did not know as to how it happened. P.W-3 further stated that Amarjeet Kaur (P.W-2) and one Seema were present when statement was made by Chhindra Pal Kaur and then he stated that she did not take name of any of the accused. In cross by the prosecution, P.W-3 stated that the Investigating Officer had recorded his statement in the hospital but he could not tell the time when it was recorded. He had denied his previous version in the statement under Section 161 Cr.P.C saying that it was wrong and further stated that the deceased was alive for about 2-3 hours in the hospital and doctors made all efforts to save her. When doctor referred her to Bijnor, he went to arrange a vehicle and in the meantime she died. In cross for the defence, P.W-3 stated that the deceased was repeating the word "jeth" as if she was calling her jeth. Two daughters of the deceased were in the village and he did not know as to whether they were present at the time of the incident. He stated that when deceased Chhindra Pal was admitted in the hospital she was unconscious and was not in a condition to speak. No paper work was made by the doctor in the hospital in his presence.

16. P.W-4 is an important witness of fact, who is daughter of the deceased. She was aged about thirteen years on the date when her statement was recorded. Before recording her statement, the Court had satisfied itself that she was in a position to understand and give reasonable answers to the questions put to her. In her examination in chief, P.W-4 stated that on the fateful day, her younger sister Balvindra Kaur and her mother Chhindra Pal Kaur were in the house. Her mother was cooking food and her father Charan Singh went to jungle to

bring fodder. Her two Uncles Jaswant and Resham and Aunt started quarreling (oral) with her mother. Her uncle Jaswant and Resham (appellants) then stated that "this bitch used to quarrel daily, let her finish today." Jaswant then brought kerosene Can (kantari) from his room and poured kerosene on her mother. Her another Uncle Resham lit the fire through a match stick in the clothes of the deceased. Her mother started burning and when both the sisters tried to save her, her uncles frowned that they should also be burnt. Out of fear they kept mum. P.W-4 stated that they had seen that their mother was turning over and over. The incident had occurred in the kitchen outside the Varandah while the deceased was cooking food and the deceased kept on turning over and over in the empty place at the Varandah. Both the sisters went out of the house out of fear and later when lots of people were collected, they came back to the house. Before they came back, the villagers took their mother to the hospital and in the evening she was brought back dead. The police came in the night and took away the body for postmortem. Their father came back to the house in the night and they met him and told him everything truthfully. P.W-4 further stated that their uncles had killed their mother because of the land dispute and now they were residing with their maternal grand father as they still had fear for life from their uncles.

17. In cross, P.W-4 reiterated that she was residing with her maternal grand father and came to the Court alongwith him. The topography of the place of the incident has been narrated by P.W-4 stating that there was one varandah in front of two rooms and there was no construction in front of the Varandah. She then stated that she had no idea of the directions, but stated that there was no boundary wall around the house and no Main gate was also there. Her mother was cooking food in the Sehan and they were using wood stove to cook food. The incident had occurred at around 11.00 a.m to 12.00 noon. Her Aunt was present in the house and arguments between her mother and her Aunt were going on since morning. When her father went to jungle her uncles were present in the house. P.W-4 then stated that they were not beaten by their uncles and when they were threatened orally they went out of the house and came back after sometime. P.W-4 had specified her relationship with appellants-Jaswant and Resham by saying that they were her uncles. On a suggestion by the defence, P.W-4 stated that their neighbours did not reach at the place of the incident when quarrel was going on and they came later. Her mother was wearing salwar-kurta. She had denied the suggestion that her mother became unconscious and stated that she was screaming, before her mother was taken to the hospital, they went out of the house. When the deceased was taken to the hospital she was speaking and that fact was told to her by other people.

18. P.W-4 further goes on to say that the dead body of her mother reached home from the hospital at around 4.00-5.00 p.m on the same day and the police reached at around 8.00-9.00 p.m. Her statement was not recorded by the police on the same day, rather it was taken after 4-5 days of the incident. She had denied the suggestion of giving false testimony under the pressure of her maternal grand father with whom she was residing and stated that it was wrong to say that the incident did not occur in the manner in which it was described by her and that her mother caught fire while cooking food and her uncle did not put her to fire. She has also denied the suggestion that her uncles were not at home and that

on the date of the incident she was in the house of her maternal grand father and did not watch the incident.

19. Placing the testimony of the three hostile witnesses and the statement of the doctors (P.W-5 and P.W-6), it was argued by the learned counsel for the appellant that it was an accident and in view of admission of P.W-4 that the deceased was cooking food, it is established that the occurrence was in fact an accident. The deceased caught fire while cooking food through her clothes and for this reason, smell of kerosene could not be found by two doctors namely P.W-5 and P.W-6, who had treated the victim and conducted post mortem of the dead body; respectively.

20. It is vehemently argued that considering the pungent nature of smell of kerosene, it is impossible that smell of it could not be found from the body of the deceased. Both the doctors namely P.W-5 and P.W-6, in cross, categorically stated that they could not smell kerosene from the person of the deceased. The Investigating Officer who collected clothes of the deceased from the spot marked as Exhibit ka-6, also stated that no smell of kerosene was coming from the burnt clothes of the deceased. He also admitted that the 'Can' of kerosene Oil was not confiscated as it could not be found on the spot. Moreover, the clothes of the deceased were not sent for FSL examination to ascertain whether the kerosene was poured on the deceased. Looking to the prosecution story, it is a case of accidental fire and conviction of the appellants is unjustified. Reference has been made to the decision in case of ***Janardan Dube and ors vs State of Uttar Pradesh*** reported in ***2019 (4) ADJ 307.***

21. Learned A.G.A in rebuttal, argued that PW-3-Chatar Singh though had turned hostile but proved that he brought the deceased to the hospital in the burnt state and admitted her for treatment. He also proved that the deceased was taking names of his brothers-in-law and was saying that they had set her on fire. In the examination-in-chief P.W-3 had turned hostile but this part of his testimony cannot be discarded. Moreover, presence of P.W-4, daughter of the deceased is corroborated by the statement of P.W-3. There is no reason for P.W-4, a girl of 13 years, to falsely implicate her two uncles/appellants in the crime. The evidence of P.W-4 cannot be discarded. The doctor P.W-5 who had examined the deceased on her admission in the hospital proved that the deceased was brought by Chatar Singh (P.W-3) in 60-70% burnt state and she was conscious when brought to the hospital. The statement of the deceased giving description of the incident had been recorded in the register by him. The version of the prosecution witnesses corroborate with the medical evidence wherein superficial burn all over the body of the deceased was found except the sole (undersurface of the foot) and her bronchea was found congested with the presence of carbon particles therein. It is, thus, argued that in the totality of facts and circumstances of the case, the prosecution evidence cannot be discarded for the mere fact that three witnesses had turned hostile and the fourth witness of the prosecution is a child witness. The prosecution has proved its case beyond all reasonable doubt and appeal deserves dismissal.

22. In rejoinder, it is submitted that appellant Resham Singh is 63 years old and he is in jail for more than 16 years. His remission may be recommended by the

Court, in case, it reaches at the conclusion of the guilt of the appellant.

23. Having heard learned counsel for the parties and perused the record.

24. At the outset, it may be noted that appellant no.1-Jaswant Singh had died on 16.01.2021 while lodged in the Central Jail, Bareilly. The report in this regard has been sent by the Senior Superintendent, Central Jail, Bareilly vide letter dated 20.01.2021. The present appeal, therefore, stands abated in so far as the appellant no.1-Jaswant Singh is concerned. Only surviving appellant before us is appellant no.2-Resham Singh. Coming to the prosecution evidence, we may first consider the statements of the hostile witnesses to find out as to whether their statements in any manner are consistent with the case of the prosecution or the defence version. It may be noted that it is well settled principle for appreciation of evidence of a hostile witness that the evidence of such a witness must be subjected to close scrutiny. Merely because a witness is declared hostile, his entire testimony cannot be excluded from consideration.

25. Any portion of evidence consistent with the case of the prosecution or defence version can be relied upon. The statement particularly examination-in-chief in so far as it supports the case of the prosecution is admissible and can be relied upon by the Court. ***Reference: Gura Singh vs State of Rajasthan*** reported in ***(2001) 2 SCC 205 ; Bhagwan Singh vs State of Haryana*** reported in ***1976 AIR 202; Ramesh Harijan vs State of Uttar Pradesh*** reported in ***(2012) 5 SCC 777***; ***Haradhan Das vs State of West Bengal reported in (2013) 2 SCC 197; Lahu Kamlakar Patil and another vs State of Maharashtra*** reported in ***(2013) 6 SCC 417;***

26. Keeping in mind the above position of law, we proceed to examine the statement of three hostile witnesses so as to find as to what extent they support the prosecution case or their testimony is in favour of defence. P.W-1, husband of the deceased is real brother of the appellants Jaswant Singh and Resham Singh. This witness though supported the defence that the appellants did not pour kerosene or set his wife on fire and stated that when he returned from the fields, he found his wife badly burnt, he took her to the hospital and she was unconscious at that time. She died during treatment in the hospital. In his testimony P.W-1, however, proved the written report which was marked as Exhibit-Ka-1 having been lodged by him. He also identified his signature on the said report and stated that scribe of report was his neighbour and acquaintance. He, however, had denied the contents of the written report by saying that he was not in his senses and did not know as to what was written therein. P.W-1 had also denied his previous version under Section 161 Cr.P.C and disputed the presence of his two daughters Balvindra Kaur and Rajvindra Kaur in the house at the time of the incident. From the statement of P.W-1, thus two facts are proved: firstly the lodging of the first information report by submitting a written report under his signature and, secondly that the said report was scribed by Harish Kumar s/o Kuvar Singh, his neighbour. P.W-1 had also proved that the deceased was found in a burnt state in her house and she was admitted in Kadrabad hospital and died there.

27. P.W-2, Amarjeet Kaur was an acquaintance of the family of the deceased. She did not support the prosecution case that the deceased had disclosed names of the appellants as assailants by saying that

she was unconscious throughout. P.W-2 also denied having knowledge as to who had admitted the deceased in the hospital. Nothing much could be elicited from the statement of P.W-2 in favour of the defence except that according to her the deceased was unconscious when she reached the hospital. It is, however, proved by P.W-2 that the deceased was admitted in the hospital and died there and that the doctor at Kadrabad hospital had referred the deceased to the Government hospital Bijnor for treatment.

28. P.W-3-Chatar Singh is an important prosecution witness who though had turned hostile but has supported the prosecution case to the extent that the deceased was admitted in the hospital namely the Government hospital Kadrabad by him in the burnt state and she was treated therein. In the examination in chief, P.W-3 also admitted that deceased namely Chhindra Pal was taking the names of his brothers-in-law and saying that her brothers-in-law had set her on fire. It is, thus, proved that the deceased was conscious when admitted in the hospital. P.W-3, however, had denied as to how she was set at fire was not known and further that the deceased did not take the names of any of the accused appellants. In cross, P.W-3 had admitted that there were only two brothers-in-law of the deceased who were the appellants namely Jaswant and Resham. He also admitted that the deceased was repeating "Jeth-Jeth". P.W-3 though tried to explain this version by saying that while deceased was saying "jeth-jeth", it seemed to him that she was calling her brothers-in-law for help. P.W-2 also admitted that two daughters of deceased Chhindra Pal were in the village but he did not know as to whether they were present at the time of the incident. It is also proved by P.W-3 that the deceased was referred to Bijnor and she died in the hospital before she could be taken to Bijnor. He was confronted with his previous statement under Section 161 Cr.P.C that the appellants Jaswant and Resham poured kerosene on the deceased and set her on fire which he refuted. He admitted that the deceased was alive for 2-3 hours but stated that when she was admitted in the hospital she was unconscious and was not in a position to speak. The doctor did not make any paper work in his presence. From the statement of P.W-3, it is established that the deceased was talking when she was admitted in the hospital by P.W-3, who was the then Gram Pradhan of the village. She was taking names of her brothers-in-law. It is also admitted that the appellants were only brothers-in-law of the deceased.

29. The version of P.W-3 that the daughters of the deceased were present in the village also supports the prosecution case, though whether they were present at the time of the incident may not be known to him. It has come in the examination of P.W-1 that a compromise had been arrived between he and his two brothers. It seems that P.W-1 had turned hostile in order to save his brothers from the clutches of law after getting his share in the landed property with respect to which dispute was earlier going on between them.

30. Having considered the evidence of hostile witnesses, the testimony of the last witness of fact, P.W-4 is also to be considered as an important piece of evidence. P.W-4 Jasvindar Kaur @ Rajvindra Kaur is daughter of the deceased and P.W-1. She was aged about 13 years at the time of her deposition in the Court. The Court had satisfied itself about the competence of this witness looking to her

age. P.W-4 categorically stated in the examination in chief that she and her younger sister Balvindra Kaur and deceased Chhindra Pal Kaur were at home. Her mother was cooking food and her father went to collect the fodder. Her two uncles namely Jaswant and Resham (the appellants) and her aunt, were arguing with her mother and during the said argument, the appellants Jaswant and Resham exhorted each other to kill her. Jaswant then brought kerosene from his room and poured on her mother. Resham had set her on fire. In the statement of P.W-4, it has come that the deceased had tried to save herself and in that effort she was turning over and over on the floor of the Varandah after she caught fire. She also stated that when she and her sister tried to save their mother, her uncles had threatened them. It was repeatedly stated by P.W-4 that her mother was turning over and over in the Varandah in an empty place, which seems to us was an effort to save herself from the fire. However, on account of threat given by their uncles both the sisters went out of their house. In cross, P.W-4 categorically stated that she was present in the house at the time of the incident and since after the incident both the sisters were residing with their maternal grand father as they had a threat of their life from her uncles. There is a categorical denial of P.W-4 to the suggestion that her mother caught fire while cooking food and her uncles did not set her on fire. The suggestion that both her uncles were not present in the house was also denied being false. It was categorically denied that she did not witness the incident or was in the house of her maternal grand father at the time of incident.

31. From a careful reading of the statement of P.W-4, no inconsistency or infirmity could be found. Her presence in the house at the time of the incident is proved by the prosecution. The statement of P.W-4 that while her mother was burning she made all efforts to save her by turning over and over in the empty place at Varandah is to be considered in the context of Exhibit-Ka-6 which is the recovery memo of burnt clothes of the deceased. A perusal of Exhibit Ka-6 shows that even underclothes (underwear) of the deceased was collected in the burnt state from the site of the incident, which was the house of the deceased.

32. A further perusal of the post mortem report indicates that four dupattas and one salwar was kept in the bundle by the doctor but none of those clothes were mentioned being in the burnt state. The joint reading of the statement of P.W-4, Exhibit Ka-6, the recovery memo of clothes of the deceased and the postmortem report indicates that in an effort to save herself, the deceased had taken out her clothes while burning and in the process she became naked. The deceased was brought to the hospital by P.W-3 who was the Gram Pradhan. The clothes found on the dead body during the postmortem were four dupattas and one salwar which again show that she was covered by the people who brought her to the hospital.

33. This takes us to the argument of the learned counsel for the appellant that smell of kerosene oil was not found from the clothes of the deceased and neither the autopsy surgeon had noticed the smell of kerosene oil nor the doctor P.W-5 who treated her. As noticed above it is evident from the record that the clothes on which kerosene oil was poured when the deceased was burnt were removed by her in an effort to save herself from the fire and they were collected by the Investigating Officer. The

statement of P.W-4 that her mother was turning over and over in the varandah, in an empty place, is a proof of the said fact. Further the clothes of the deceased found on the spots were not burnt completely, as she had taken them out, though her body was burnt to the extent of 95% as per the postmortem doctor and 60-70% as per P.W-5, the doctor who treated her first. In the situation like this, if smell of kerosene oil could not be noticed by the P.W-6, postmortem doctor on the body of the deceased, nothing would turn in favour of the defence, in as much as, once the skin were burnt to the above extent in all likelihood, there was no possibility of presence of smell of kerosene on the naked body.

34. At the cost of repetition, it may be noted that the clothes noted in the postmortem report four Dupattas and shalwar were used to cover the naked body of the deceased and, as such, there was no question of finding smell of kerosene on them.

35. As regards, clothes seized and noticed in Exhibit Ka-6 (Recovery memo) and the statement of the Investigating Officer that he did not find smell of kerosene oil in the clothes or did not seize any such article which could prove that kerosene oil was poured on the deceased, would not be of any help to the defence, in as much as, for any slackness on the part of the Investigating Officer the defence would not be benefited. It has also come in the evidence that the burnt clothes (though not completely) were not sent to the forensic laboratory. The statement of the Investigating Officer that the smell of kerosene oil was not present in the clothes, therefore, cannot be given undue weightage and cannot be read in favour of the defence. As the said fact had neither been noted in the seizure memo (Exhibit Ka-6) nor there is any report of the FSL, it cannot be accepted that the Investigating Officer, who was not vigilant enough to send the clothes to the forensic laboratory, would remember at the time of his deposition that whether the smell of kerosene was coming from the burnt clothes or not.

36. In all the facts and circumstances brought before us, the prosecution has proved by an eye-witness account of P.W-4, the manner in which the crime was committed by the appellant Resham Singh along with his brother. It is also proved by P.W-4 that an oral altercation was going on between the deceased on the one hand and her two brothers-in-law and a sister-in-law on the other side, since morning and they both got angry during the altercation, and poured kerosene oil on the deceased and set her on fire. There is no reason to doubt or discard the statement of P.W-4, the daughter of the deceased, who is found to be a wholly reliable witness.

37. Moreover, appellant Resham Singh was a normal resident of the house and his presence in the house at the time of the incident was proved by P.W-4. In his explanation under Section 313 Cr.P.C, the accused-appellant Resham did not take plea of alibi rather his version in reply to question no.7, to give his explanation, was that clothes of the deceased caught fire while she was cooking food and she had died due to burnt injuries immediately. The appellant Resham Singh then stated that the case against him was false and was pursued at the instance of the father of the deceased who wanted that the landed property be given to his grand daughters. From this explanation of the accused appellant, atleast, his presence in the house at the time

of the incident is proved. As regards the false case lodged at the instance of the father of the deceased, suffice it to note that the first information report of the crime was given by the husband of the deceased namely P.W-1, the father of the deceased was nowhere in picture when the report was lodged, the case was investigated and even till the chargesheet was submitted. He did not even enter in the witness box to depose against the accused. By mere fact that two daughters of the deceased started residing with their maternal grand father after this ghastly incident, it cannot be said that their grandfather cooked up the case.

38. Having found that the prosecution had proved occurrence by the statement of eye-witness (P.W-4), the last question which remains to be considered is whether the statement of the deceased noted by the doctor, P.W-5 in the emergency register can be relied as "dying declaration" in aid of the case of the prosecution. In this regard, it is pointed out by the learned counsel for the appellant Resham that the said statement though was exhibited as Exhibit Ka-'2' but was not put specifically to the accused Resham during his examination under Section 313 Cr.P.C.

39. The question no.5 has been placed before us to submit that it was perfunctory and in absence of a categorical question putting Exhibit Ka-'2' to the accused, the said document cannot be read in evidence as it would cause serious prejudice to the accused as he would be deprived of giving his explanation to the said version.

40. To consider the said submission, we may extract question no.'5' of the statement under Section 313 of the accused appellant-Resham Singh as under:

"प्रश्न नं०5: अभियोजन द्वारा प्रस्तुत की गई अभिलेखीय साक्ष्य तहरीर प्रदर्श क-1, इलाज से सम्बन्धित कागज की फोटो कापी प्रदर्श क-2, पी०एम०रिपोर्ट प्रदर्श क-4, नक्शा नजरी प्रदर्श क-5, फर्द कब्जे लेने कपड़े मृतका प्रदर्श क-6, आरोप पत्र प्रदर्श क-7, पंचायत-नामा प्रदर्श क-8, चालान लाश प्रदर्श क-9, फोटो लाश प्रदर्श क-10, चिट्ठी आर.आई.प्रदर्श क-11, चिट्ठी सी०एम०ओ० प्रदर्श क-12, प्रथम सूचना रिपोर्ट प्रदर्श क-13 आदि के सम्बन्ध में आपको क्या कहना है?

उत्तर नं०5: जी गलत है।"

41. A bare persual of the examination of the accused under Section 313 Cr.P.C reveals it to be perfunctory in nature. The statement of the deceased noted in the emergency register marked as Exhibit-Ka-'2' had been put to the accused as "इलाज से सम्बन्धित कागज की फोटो कापी प्रदर्श क-2". The incriminating circumstances reflecting in the documentary evidence (Exhibit Ka-'2') were not put to the accused. The substance of the accusation was not brought to the knowledge of the accused to enable the accused to explain the circumstances appearing in the evidence against him.

42. In a recent decision, the Apex Court in ***Maheshwar Tigga vs State of Jharkhand*** reported in ***(2020) 10 SCC 108*** has held that the circumstances not put to an accused under Section 313 Cr.P.C cannot be used against him and must be excluded from consideration. Considering the importance of putting all relevant questions to the accused under Section 313 Cr.P.C., it was held therein to be an essential part of fair trial, basic to the principles of natural justice.

43. The observations in para-'8' of the decision are relevant to be noted herein under:

"It stands well settled that circumstances not put to an accused under Section 313 Cr.P.C. cannot be used against him, and must be excluded from consideration. In a criminal trial, the importance of the questions put to an accused are basic to the principles of natural justice as it provides him the opportunity not only to furnish his defence, but also to explain the incriminating circumstances against him. A probable defence raised by an accused is sufficient to rebut the accusation without the requirement of proof beyond reasonable doubt."

44. In para-'9' of the said decision, the Apex Court has emphasized the relevance of Section 313 Cr.P.C as noted in a previous decision in ***Naval Kishore vs State of Bihar*** reported in ***(2004) 7 SCC 502***. In Naval Kishore (supra) the Apex Court had deprecated the practice of putting entire evidence against the accused in a single question. It was held in para-'5' that:

".....Under Section 313 Cr.P.C. the accused should have been given opportunity to explain any of the circumstances appearing in the evidence against him. At least, the various items of evidence, which had been produced by the prosecution, should have been put to the accused in the form of question and he should have been given opportunity to give his explanation. No such opportunity was given to the accused in the instant case. We deprecate the practice of putting the entire evidence against the accused put together in a single question and giving an opportunity to explain the same, as the accused may not be in a position to give a rational and intelligent explanation. The trial judge should have kept in mind the importance of giving an opportunity to the accused to explain the adverse circumstances in the evidence and the Section 313 examination shall not be carried out as an empty formality. It is only after the entire evidence is unfurled the accused would be in a position to articulate his defence and to give explanation to the circumstances appearing in evidence against him. Such an opportunity being given to the accused is part of a fair trial and if it is done in slipshop manner, it may result in imperfect appreciation of evidence....."

45. Having considered the above legal position, we must consider in the facts of the present case as to whether, having regard to the question put to the accused, it can be said that the question no.5 was such as to transmit the knowledge of the incriminating circumstance against the accused clearly so as to give his defence.

46. A perusal of the question no.5 framed by the trial court indicates that all exhibited documentary evidence from Exhibit-Ka-'1' to Ka-'13' were put together to him in one question. Exhibit Ka-'2' the statement of the deceased noted by the doctor during her treatment is one of them. This documentary evidence has been put to the accused only with the detail that it was a paper relating to the treatment of the deceased together with all other papers of the prosecution. The substance of the said letter was neither extracted in the question nor it was put to the accused to the effect that the deceased recorded her last statement implicating the accused persons as perpetrators of the crime.

47. In the said scenario, the Court must eschew the incriminating circumstances which had not been clearly put to the accused, appearing in the evidence, from consideration. The answer to the last question posed by us, therefore, is in 'Negative'. Excluding the statement of the deceased Exhibit-Ka-'2', from consideration, the decision has to be taken on the basis of the remaining evidence.

48. As discussed above, the statement of P.W-4, a child witness, the daughter of the deceased has been found credit worthy, as no inconsistency, improbability and embelishement could be found therein. It cannot be said that the child witness was a tutored one and the sugggestion with regard to her absence at the place of the incident is found unworthy of acceptance. As regards the hostile witnesses, it has come in their evidence that the first information report of the incident was lodged on the same date i.e 01.08.2006 at about 20-30 hours, after the deceased had succumbed to her injuries at about 4.00 p.m. Two accused persons herein were named in the written report submitted in the police station by P.W-1, the husband of the deceased.

49. From the statement of P.W-2, it is proved that the deceased was admitted in the hospital in burnt state and she had died therein.

50. From the statement of P.W-3, the Gram Pradhan, it is proved that he took the deceased to the hospital in a burnt state and got her admitted therein. The deceased was talking while she was admitted in the hospital and was taking names of her brothers-in-law saying that they had set her on fire. It is further proved from the statement of the doctor namely P.W-5 that when the deceased was admitted in the hospital she was in a fit mental state to talk. From the statement of P.W-6 (autopsy surgeon), it is proved that the injuries found on the person of deceased was superficial to deep burn and as per the opinion of the doctor, the external condition of the body was "pugilistic" appearance and redness which appear when a person is burnt alive. From the recovery memo (Exhibit Ka-6) and the bundle of clothes prepared by the post mortem doctors, it seems that the deceased had removed all her clothes in an effort to save her from burning while she was turning over and over in the open place in the Varandah of the house. The appellant Resham Singh was a normal resident of the house alongwith another appellant (who had died during the pendency of the appeal). No plausible explanation is forthcoming from the appellant Resham Singh as to what had actually happened in the house on the fateful day. The burden laid on the appellants under Section 106 of the Evidence Act in view of the prosecution evidence had not been discharged by them.

51. In addition to the evidence led by the prosecution, this circumstance add weight to the prosecution story. In the totality of the facts and circumstances of the present case, it cannot be said that the prosecution has not been able to prove its case beyond all reasonable doubt.

52. No infirmity could be found in the decision of the trial court.

53. The judgment and order dated 29.02.2008 passed by the Additional Sessions Judge, Bijnor in Sessions Trial no.500 of 2006 (State vs Jaswant Singh and others) arising out of Case Crime no.674 of

2006 under Section 302/34 I.P.C. P.S-Afjalgarh, District-Bijnor for conviction and sentence of appellant no.2-Resham Singh is hereby affirmed.

54. The appeal is found devoid of merit and hence dismissed.

55. The appellant no.2-Resham Singh is in jail.

56. Certify this judgment to the court below immediately for necessary action.

57. The trial court record be sent back immediately.

(2022)05ILR A107
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 09.05.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE BRIJ RAJ SINGH, J.

Criminal Appeal No. 2228 of 2008

Guddu Pal ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Balram Singh, Amrendra Kumar, Anand Mohan, Anil Pratap Singh, Jayant Singh Tomar, LK Gupta, Manjusha Kapil, O.P. Tiwari

Counsel for the Respondents:
G.A.

A. Criminal Law -Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Section 302/34 - Challenge to-conviction-murder-outraging the modesty of informant's wife-she gone to her field to weed out the peppermint crop-accused tried to rape her-they caused injury to her with Banka and knife-when she made alarm PW-1 and PW-2 reached on the spot-as per site plan body was found one of the accused field and the incident took place the same place as mentioned by the witnesses-the entire recovery process was done in the presence of independent witness-recovery of banka has been shown at the pointing out of the one accused-crime was committed with the respective weapons as mentioned in the FIR-Hence, no illegality or infirmity in the judgment and order of the trial court.(Para 1 to 22)

B. The court has to examine whether evidence read as a whole appears to have a ring of truth. Once the 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 evidence given by the witnesses and whether the earlier evaluation of the evidence is shaken, as to render it unworthy of belief.Every such improvement, not directly related to the occurrence, is not a ground to doubt the testimony of a witness. (Para 18 to 20)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Rohtash Kumar Vs St. of Har. (2013) 14 SCC 434

2. Kuriya & anr.. Vs St. of Raj. (2012) 10 SCC 433

3. Kathi Bharat Vajsur Vs St. of Guj.(2012) 5 SCC 724

4. Naryana Chetanr.am Chaudhary Vs St. of Mah. (2000) 8 SCC 457

5. Gura Singh Vs St. of Raj. (2001) 2 SCC 205

6. Sukhchain Singh Vs St. of Har. (2002) 5 SCC 100

7. Ref. Sunil Kumar Vs St. (Govt. of NCT of Delhi) (2003) 11 SCC 367

8. Ashok Kumar Vs St. of Har. (2010) 12 SCC 350

9. Shivlal Vs St. of Chhatisgarh (2011) 9 SCC 561

10. Shyamlal Ghosh Vs St. of W. B.(2012) 7 SCC 646

(Delivered by Hon'ble Brij Raj Singh, J.)

1. The present appeal has been preferred against the judgment and order dated 05.09.2008 passed by the Additional Session Judge, Court No. 5, Sitapur in Session Trial No. 602 of 2006 (State Vs. Guddu Pal and Another) in Case Crime No. 168 of 2006, under Section 302 read with Section 34 I.P.C., Police Station - Ataria, District Sitapur thereby convicting and sentencing the appellants, under the aforesaid sections for life imprisonment and fine of Rs. 10,000/- each and in case of default of payment of fine additional six months rigorous imprisonment.

2. The First Information Report was lodged on 13.07.2006 by Pappu Pal at 12:30. The complainant stated in the F.I.R. that his wife Gudda had gone to her field on 13.07.2016 to weed out the peppermint crop and he was present in his house. At about 10:30 a.m., Guddu S/o Sohanpal, Lala @ Lalji S/o Gokaran Pal of his own village and another person came to the place of incident and they outraged the modesty of his wife and tried to commit rape with her. His wife made protest and ran away from the field while making alarm. All the three accused caught her and thereafter Guddu armed with *Banka* and Lalji with knife caused injury to her. On alarm being raised by his wife, he and his brother Ram Singh, Prakash Pasi S/o Lekhai and Raju S/o Mahesh Pasi and other witnesses came to the place of incident. Accused Guddu and Lalji along with a third unknown person ran away from the place of incident towards the west side of the village.

3. On the said application Case Crime No. 168 of 2006, under Section 302 I.P.C., Police Station Atariya, District Sitapur, was registered. The inquest was prepared and the Investigating Officer sent the dead body for *post mortem*. The Investigating Officer investigated the case and a charge sheet was filed under Section 302 I.P.C. against the accused after collecting the evidences. The case was committed on 26.08.2006 before the Sessions Court by the Chief Judicial Magistrate, Sitapur and thereafter the charges were framed under Section 302/34 I.P.C., which was denied by the accused. The post mortem report indicates three ante mortem injuries on the body of the deceased which follows as under:

"(i) Incised wound 8cm X 3 cm X abdominal cavity deep on the right side of upper abdomen obliquely placed, underlying liver cut.

(ii) Incised wound 1.5 cm X 0.5 cm X deep abdominal cavity depth present on the *illegible* of abdomen. Right side *illegible* with underlying liver cut, plenty of clotted blood on the back of abdominal cavity, discending *arte cut.*

(iii) Incised wound 2 cm X 0.5 cm X abdominal cavity deep. On the left side of upper abdomen 12 cm below to right nipple underlying. stomach cut."

4. The doctor has opined the cause of death is due to shock and hemorrhage due to ante mortem injuries sustained.

5. Prosecution had produced six witnesses, namely, who were examined. (1) Pappu Pal, the complainant, (2) Sri Ram Singh, the eye witness, (3) P.W. -3 Sriram,

who proved the recovery of *Banka*, (4) P.W. -4 Mukesh Kumar Chaturvedi, the constable who lodged the F.I.R., (5) P.W. -5 S.I. Harilal Kardam and P.W. -6 Dr. B.R. Jaiswal who conducted the *post mortem.*

6. The accused-appellants were afforded opportunity under Section 313 Cr.P.C. The accused Guddu Pal stated that he was falsely implicated due to enmity of elections of *Gram Pradhan* and he stated that he was caught from his house and false recovery has been shown against him. Accused Lala @ Lalji in his statement under Section 313 Cr.P.C. stated that he too was implicated due to election of *Gram Pradhan* and stated that the witnesses have given false statements.

7. After adducing the evidences on record, the trial court passed judgment on 05.09.2008 and the accused have been convicted under Section 302/34 I.P.C. and sentenced with life imprisonment. Hence the present appeal.

8. We have heard Ms. Manjusha Kapil, learned Counsel for the appellant and Shri Pankaj Tewari, learned A.G.A. for the State-respondents and perused the record.

9. P.W. -1 was examined before the court and he stated in examination in chief that the incident took place prior to nine months at 10:30 a.m. He was present in his house and his wife had gone to weed out the peppermint crop in her field. The field was 70-80 steps away from his house. When he heard the alarm raised by his wife, he reached to the field and saw that accused Lala armed with knife, Guddu armed with *Banka* were assaulting and causing injury to his wife and there was another man assisting the accused in commission of offence. He has further stated in examination in chief that in the meantime his elder brother Ram Singh, Raju and Prakash and other witnesses of the village came to the place of incident. The accused ran way from the place of incident after causing the injuries. He saw that his wife was dead. He orally stated the fact to Jagdev Prasad who wrote the *tehreer.* Whatever, he stated before the scriber of the written report, the same was heard by him and then he made his signature thereon. The said report was submitted to *Munshi* of Police Station who lodged the report.

In the cross examination, P.W. -1 stated before the court that he has no relation with accused Guddu. Gokaran is father of accused Lala and Lala has got another brother, namely, Chhotanne and prior to two years from the date of incident, the election of *Gram Pradhan* took place. In the said election Chhotanne, Vijaivir and others were contesting candidates. He further stated in the cross examination that there was no occasion to falsely implicate accused Lala out of grudge of election of *Gram Pradhan*. Chhotanne was doing business of dairy/milk and he saw Chhotanne at 5 p.m. in the village. He further admitted that Chhotanne used to go Lucknow for selling milk. The P.W. -1 further suggested in the cross examination that there was no occasion to falsely implicate Lala at the place of Chhotanne. In the cross examination, it has been stated by the P.W. -1 that boundary of Ram Sewak is situated towards the eastern side of peppermint field and there was no other adjoining field towards the eastern side. There lies a field related to Guddu son of Sohan towards the northern side of peppermint field. It is further admitted in the cross examination that he and his

brother Ram Singh were witness of inquest and the body of the deceased was not found in the field of Guddu. He further suggested in the cross examination that he was unable to suggest as to why the dead body was shown in the field of Guddu. He stated that his wife had gone for weeding out the peppermint in the field at 10 O' Clock in the morning and after half an hour, she was killed. She had eaten paratha and kheer. He further denied the suggestion that he was not present in his house at the time of incident. He further denied that the deceased was killed in the morning when she had gone to ease out herself.

He further deposed before the court that *Khurpa* was lying in the peppermint field when he reached there. After lodging the report police reached to the spot. The spot was inspected by the police but the *Khurpa* was not present at the time of spot inspection. He further stated that his brother Ram Singh and his mother were present. He admitted that he could not point out the presence of *Khurpa* at the time of spot inspection. He did not ask his brother Ram Singh and his mother regarding *Khurpa*. He admitted that he had seen the entire incidence and accused were assaulting his wife at the eastern side of the peppermint field. When he raised an alarm, the accused ran away from the place of occurrence. Ram Singh had also reached to the place of occurrence. He further admitted that firstly, he reached to the place of occurrence and thereafter the villagers reached there. The accused ran away towards the western side of the village. He further admitted that he told *Darogaji* that accused ran away towards the southern side. He further deposed that he saw the knife used by the accused and he saw that the knife had sharpness at one side. He denied the charges of the defence side that he was not eye witness. He went to the police station through bicycle and reached within twenty minutes. The hand-written tahreer was given to the police station. The report was handed over to *Munshiji* in the police station who handed over the same to the *Darogaji*. The report was read before him by *Moharrir.*

10. P.W. -2 Ram Singh was also examined and in his examination in chief he also supported the prosecution case as stated by his brother i.e. P.W. -1. P.W. -2 Ram Singh stated before the court that he was real brother of complainant - P.W.- 1 and deceased was wife of the P.W. - 1. he deposed that as soon as he started ploughing his field, he heard the alarm raised by wife of the complainant and reached to the spot. He saw that accused Guddu Pal armed with *Banka* and accused Lala armed with knife, were assaulting his brother's wife. He could not recognize the third person who caught hold of the deceased. He and his brother Pappu tried to catch the accused but they fled away towards Nayagaon. He further stated that as soon as he reached to deceased he saw that she was dead. He further admitted that inquest was prepared in front of him and he signed on the same and his statement was recorded.

11. P.W. -3, Sriram was also examined before the court and he stated that the *Banka* was recovered in his presence which was found in the flooded field of Moolchand, under the water. The recovery memo was signed by him. P.W. -3, Sriram deposed that on the date of the occurrence he was present in the outside of his village at 7:30 a.m. The Inspector (*Darogaji*) Ataria met him and asked him to accompany him to recover *Banka* which was pointed out by accused Guddu. He and Ranjeet went to the place of recovery by

police jeep . The jeep was stopped at the road side of Nayagaon. Accused Guddu reached to the field of Moolchand which was flooded with water. He brought out *Banka* from the field of Moolchand and confessed that he killed deceased Gudda with that *Banka*. *Darogaji* sealed the *Banka* and thumb impression of P.W. -3, Sriram was obtained on the same. The memo was written in torch light. The bundle was opened before the court and *Banka* was shown to P.W. -3, Sriram who admitted that it was the same *Banka* which was sealed by the police at the time of recovery.

12. P.W. -4 Mukesh Kumar Chaturvedi stated that he was posted as *Moharrir* in Police Station Atariya and chick report -66 of 2006 was prepared and he proved the said F.I.R. whichwas entered at G.D. Rapat No. 18 at 12:30 p.m. Mukesh kumar stated before the court that he was posted as *Moharrir* at Polie Station Ataria on 13.07.2006. He also admitted that Pappu Pal had come to the police station at 12:30 along with a written report. He further admitted that on he basis of the said report, he prepared Chik Report No. 66/2006 in his own handwriting. He proved Exhibit :- Ka-2, which was lodged at GD Rapat No. 18, timing 12:30 hours.

13. P.W. -5, S.I. Harilal Kardam is the Investigating Officer and he stated before the Court in his examination in chief that the said case was registered in his presence at the police station. He investigated the case and thereafter he recorded the statement of Pappu Pal and Ram Singh under Section 161 Cr.P.C. He further admitted that he had gone to the place of occurrence and the inquest was prepared and thereafter the fard was prepared and the body was sent for *post mortem*. He also stated before the Court that accused Guddu was arrested on 18.07.2006 and his statement was recorded who confessed the guilt. He further stated that he recovered the *Banka* at the pointing out of Guddu Pal, the accused.

14. P.W. -6, Dr B.R. Jaiswal was also examined before the Court and he has deposed that post mortem of the deceased was conducted by him and three injuries were found on the body of the deceased and all the three injuries were cut wound injuries. He also admitted that 100 ml. Liquid was found in the stomach of the deceased. The liver was torn, kidneys were pale. The doctor has opined the cause of death as shock and hemorrhage due to ante mortem injuries.

15. The accused has made following submissions in his defence.

(i) It has been argued by the counsel for the appellant that after taking the meal the deceased was killed just after half an hour and thus 100 ml. Liquid could not have been found because she had taken food just prior to half and hour. It is further argued by the counsel for the appellant that the deceased was not killed at 10:30 a.m. rather she was killed in the early hours of morning and thus the prosecution was doubtful.

(ii) Counsel for the accused appellant has submitted that the investigation is faulty and there is no recovery of knife. It has been further submitted that there are contradictions in the statement of the Investigating Officer and the witnesses.

(iii) The defence has taken plea that there was no recovery of knife from accused Lala @ Lalji. It has been further submitted that the knife was quarter to two inches wide as per the statement of the

witness but there was punctured wound found on the body of the deceased. As per the post mortem report, the injury has been shown as incised wound but the same is punctured wound. There is no evidence of outraging the modesty of the victim. It is further submitted that when P.W. -1 stated that he and his brother reached to the place of occurrence where as P.W. -2 has said that he was in his field and reached to the spot and further stated that his brother P.W. -1 came from the house; thus it has been submitted that there are contradictions in the statement of P.W. -1 and P.W. -2. The argument has been advanced that the witnesses are interested witnesses and there is no independent witness.

(iv) The accused has further argued that as per the inquest report the dead body of the deceased was found at different place whereas the dead body has been shown at different place as per the F.I.R. The inquest prepared by the I.O. indicates that prosecution case is highly doubtful.

(v) The accused has further submitted that the recovery against Guddu is not in accordance with law. The witness of recovery Sriram is resident of 3 k.m. away. Neither soil nor grass was found on the dead body and the recovery at the pointing out of Guddu is also not admissible in the evidence.

(vi) Counsel for the appellant has further submitted that the appellants are in jail for the last fifteen years, therefore they may be given benefit of undergone period of imprisonment and case may be commuted.

16. We proceed to consider the aforesaid submissions of the counsel for the accused appellants as well as to discuss the case in light of the statement made by the counsel for the appellant one by one.

(i) Pappu Pal has specifically mentioned that his wife Smt. Guddu had gone for weeding out the peppermint crop in the field and the accused outraged her modesty on which she raised alarm. After hearing her alarm, P.W. 1 reached to the place of occurrence which was just 70-80 steps away from his house. He saw accused Lala @ Lalji was armed with knife and Guddu with *Banka* and they were assaulting his wife. Ram Singh, Raju and Prakash reached to the spot. P.W. -2, Ram Singh has also supported the prosecution case mentioning that at 10:30 a.m. he was ploughing his field and heard the alarm raised by Gudda, thereafter he reached to the place of occurrence and saw the accused were making assault on her. P.W. 1 has admitted in the cross examination that the deceased had taken meal i.e. two paratha and 250 gms. Kheer. There was no cross examination to the extent as to when the deceased had taken the meal. In the rural areas normally, it is found that people used to take break fast in between 6-7 O' clock in the morning because they have to leave for their work. It is thus clear that there is no doubt regarding the time of incident and she was assaulted at 10:30 for which already the examination of the witnesses have taken place and they are consistent that the incident took place at 10:30. The doctor was examined who has admitted that 100 ml. liquid was found in the intestine of the deceased and he admitted that the digestion activities of the body organs stops functioning after death. The decomposition process continues after death. Doctor further admitted that after taking meal the food stored in the large intestine passes through to small intestine slowly slowly after one and half hours. It is thus clear that no adverse inference can be drawn sofar as the date and time of occurrence is concerned.

(ii) The second argument placed by the counsel for the appellant is also not sustainable. It is pointed out that P.W. -1, Pappu Pal and P.W. -2 Sriram have specifically stated the fact of the prosecution case and there is no contradiction. The recovery of *Banka* has also been proved by P.W. -3 who is an independent witness. The Investigating Officer has not committed any fault while doing investigation. The defence side was unable to point out any major discrepancy in the investigation or lapses on the part of the Investigating Officer. The accused Guddu was arrested on 18.07.2006 and thereafter he confessed the guilt and he admitted that *Banka* was used in committing the murder of Smt. Gudda. On the pointing out of Guddu, *Banka* was recovered and the recovery was made in presence of P.W. -3, Sriram. The blood stain was found on the *Banka* which was proved in the report of F.S.L. dated 01.08.2006. It is thus clear that the investigation conducted by the I.O. is not faulty.

(iii) It is evident that the knife was not recovered but the opinion of the doctor clearly indicates that the injuries could have been caused by *Banka* and knife. The injuries were not punctured wound rather they were incised wound. It is also evident that the modesty of the deceased was outraged that is why she made alarm upon which P.W. -1 and P.W. -2 reached to the place of the incident. Insofar as the witness Raju Pal and Prakash are concerned, though they are independent witnesses and they filed discharge application did not come forward before the court for giving evidence but P.W. -1 and P..W.-2 have given a consistent statement before the court against the appellant and there is no reason to disbelieve their testimony. The place of occurrence was just 70-80 steps from the house of the P.W. -1 and he was able to reach to the spot on the alarm raised by the wife within short span of time. The doctor has also given opinion that the deceased received three incised wound. The doctor had not admitted that any injury out of three was caused by any other weapon because the injuries were incised wound and no injury was punctured wound. The place of occurrence has been proved as per site plan and the same cannot be doubted.

(iv) The inquest was prepared in the presence of witnesses by S.I. Ramlal on 13.07.2006 as Exhibit Ka - 4. It is mentioned in the inquest report that body of the deceased was found in the vacant field of Guddu S/o Sohan. The I.O. has prepared the site plan (Exhibit Ka -10) which was prepared on 13.07.2006 itself. In the site plan the field of Ram Avatar has been shown and room of boring is shown in dilapidated condition and the dot line is shown. The field of peppermint crop of Pappu has been shown towards south side of the field of the Ram Avtar where place (A) is shown. Place (D) is towards south of the Place (A) which is field of Mulla whereas the accused has been shown from where they reached to the place of deceased. Place (B) is shown where the deceased was caught by the accused. The deceased has been shown running from Place (C). P.W. -1 has already stated that the accused made assault in the field of peppermint and the incident was seen by the witnesses. The site plan is matching with the statement of the witnesses. In the inquest report, it is mentioned that the body of the deceased was found in the field of Guddu son of Sohan. In the site plant Exhibit - 10, there is no field of Guddu Pal mentioned by the I.O. It is thus clear that the site plan proves the prosecution and there is no fault in the investigation while

Investigating Officer has prepared the site plan. The entire description as mentioned in the site plan is corroborative to the prosecution case and it is held that the incident took place at the place mentioned by the witnesses.

(v) The recovery of *Banka* has been shown at the pointing out of the accused Guddu Pal. The recovery was made on 18.07.2006 in the presence of independent witness Sriram. The accused confessed that he committed the crime along with the other co-accused with the help of *Banka* and knife. The I.O. took him into custody on 18.07.2006 and on his pointing out he went to the field of Moolchand which was flooded with water and on the pointing out of the accused, *Banka* was recovered. The entire recovery process was done in the presence of independent witness Sriram. The *Banka* was recovered from the field of Moolchand at the pointing out of the appellant himself and he confessed that the said *Banka* was used for commission of crime. The *Banka* was sealed in cover and the same was signed with thumb impression by the accused and other witnesses including Sriram. It is thus clear that there is no iota of doubt that the crime was committed by the accused-appellant with the respective weapons as mentioned in the F.I.R. The recovery of *Banka* was proved before the trial court.

(vi) Counsel for the appellant argued that the appellants have undergone for about fifteen years of imprisonment in jail and they are entitled to be released. The prosecution case is intact and we are of the opinion that the judgment of the trial court needs no interference. Once the appeal is dismissed there is no argument left for the appellants that they may be released or their sentence may be commuted on the basis of fifteen years of imprisonment. The appellants have to undergo the period of sentence because they have been awarded punishment for life imprisonment.

17. The Apex Court in catena of cases categorically held that the Court is not supposed to give undue importance to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution witnesses.

18. The Supreme Court, in **Rohtash Kumar v. State of Haryana**, **[(2013) 14 SCC 434]** held:-

"24. ... The court has to examine whether evidence 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 witnesses and whether the earlier evaluation of the evidence is shaken, as to render it unworthy of belief. Thus, the court is not supposed to give undue importance to omissions, contradictions and discrepancies which do not go to the heart of the matter, and shake the basic version of the prosecution witness..."

19. In **Kuriya and Anr. v. State of Rajasthan, [(2012) 10 SCC 433]**, the Supreme Court held:

"30. This Court has repeatedly taken the view that the discrepancies or improvements which do not materially affect the case of the prosecution and are insignificant cannot be made the basis for doubting the case of the prosecution. The

courts may not concentrate too much on such discrepancies or improvements. The purpose is to primarily and clearly sift the chaff from the grain and find out the truth from the testimony of the witnesses. Where it does not affect the core of the prosecution case, such discrepancy should not be attached undue significance. The normal course of human conduct would be that while narrating a particular incident, there may occur minor discrepancies. Such discrepancies may even in law render credential to the depositions. The improvements or variations must essentially relate to the material particulars of the prosecution case. The alleged improvements and variations must be shown with respect to material particulars of the case and the occurrence. Every such improvement, not directly related to the occurrence, is not a ground to doubt the testimony of a witness. The credibility of a definite circumstance of the prosecution case cannot be weakened with reference to such minor or insignificant improvements. Reference in this regard can be made to the judgments of this Court in **Kathi Bharat Vajsur v. State of Gujarat, [(2012) 5 SCC 724; Narayan Chetanram Chaudhary v. State of Maharashtra, [(2000) 8 SCC 457]; Gura Singh v. State of Rajasthan, [(2001) 2 SCC 205] and Sukhchain Singh v. State of Haryana, [(2002) 5 SCC 100].**

31. What is to be seen next is whether the version presented in the Court was substantially similar to what was said during the investigation. It is only when exaggeration fundamentally changes the nature of the case, the Court has to consider whether the witness was stating the truth or not. **[(Ref. Sunil Kumar v. State (Govt. of NCT of Delhi)], [(2003) 11 SCC 367].**

32. These are variations which would not amount to any serious consequences. The Court has to accept the normal conduct of a person. The witness who is watching the murder of a person being brutally beaten by 15 persons can hardly be expected to a state a minute by minute description of the event. Everybody, and more particularly a person who is known to or is related to the deceased, would give all his attention to take steps to prevent the assault on the victim and then to make every effort to provide him with the medical aid and inform the police. The statements which are recorded immediately upon the incident would have to be given a little leeway with regard to the statements being made and recorded with utmost exactitude. It is a settled principle of law that every improvement or variation cannot be treated as an attempt to falsely implicate the accused by the witness. The approach of the court has to be reasonable and practicable. Reference in this regard can be made to **Ashok Kumar v. State of Haryana, [(2010) 12 SCC 350] and Shivlal v. State of Chhattisgarh, [(2011) 9 SCC 561]."**

20. In **Shyamlal Ghosh v. State of West Bengal, [(2012) 7 SCC 646],** the Supreme Court held:

"46. Then, it was argued that there are certain discrepancies and contradictions in the statement of the prosecution witnesses inasmuch as these witnesses have given different timing as to when they had seen the scuffling and strangulation of the deceased by the accused. ..... Undoubtedly, some minor discrepancies or variations are traceable in the statements of these witnesses. But what the Court has to see is whether these variations are material and affect the case of the prosecution substantially. Every variation may not be enough to adversely affect the case of the prosecution.

49. It is a settled principle of law that the court should examine the statement of a witness in its entirety and read the said statement along with the statement of other witnesses in order to arrive at a rational conclusion. No statement of a witness can be read in part and/or in isolation. We are unable to see any material or serious contradiction in the statement of these witnesses which may give any advantage to the accused."

21. We do not find any infirmity, illegality or perversity in the judgment and order of the trial court and are unable to persuade ourselves to take an opinion other than that of the trial court.

22. Consequently, the appeal lacks merit and is accordingly **dismissed.**

23. The appellant is in jail, he shall serve out the sentence awarded by the trial court.

24. Let a copy of this order along with lower court record be transmitted to trial court concerned for necessary information and follow up action.

(2022)05ILR A116
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.05.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE MRS. SADHNA RANI (THAKUR), J.

Criminal Appeal No. 3798 of 2007
&
Other connected cases

Jay Prakash @ Bhure & Anr. ...Appellants
Versus
State of U.P. ...Respondents

Counsel for the Appellants:
Sri R.S. Chaudhary, Sri M.C. Chaturvedi, Sri P.K. Singh, Sri P.V. Singh, Sri Prashant Kumar, Sri R.P. Kanoujiya, Sri Rajesh Kumar Dubey, Sri S.K. Rathore, Sri Vijay Singh Sengar, Sri Vinod Kumar Sahu, Sri Vishnu Shanker Gupta, Sri Vishnu Kumar Sahu

Counsel for the Respondents:
Govt. Advocate

A. Criminal Law -Code of Criminal Procedure, 1973- Section 374(2) - Indian Penal Code, 1860-Sections 364-A & 377-believing the statement of PW-2 Victim the trial court convicted three accused but there is no medical evidence as to commission of offence u/s 377 IPC-contradiction in statement of victim and Investigating Officer as to how information about commission of offence received and lodged FIR-Even doctor examined the victim generally-no medical of the victim as to ascertain whether the offence u/s 377 IPC was committed with him-On the mere oral testimony of the victim, it is difficult to hold that the accused persons had committed the offence-prosecution failed to prove its case of abduction for ransom u/s 364-A IPC-The prosecution suppressed the genesis and origin of the occurrence and thus not presented the true version.(Para 1 to 73)

The appeals are allowed. (E-6)

List of Cases cited:

1. Malleshi Vs St. of Karn. (2004) 8 SCC 95

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

1. Heard Sri Vishnu Kumar Sahu, learned counsel for the appellants Jay Prakash @ Bhure and Virendra, Sri Vishnu

Shanker Gupta, learned counsel for the appellants Munnilal Prajapati and Lajja Ram, Sri Rajesh Kumar Mishra, learned counsel for the appellants Shrikant and Sarvesh @ Macchar and Sri Rupak Chaubey, learned A.G.A. for the State.

2. These appeals are directed against the judgments and orders dated 13.04.2007 and 28.4.2007 passed by the Additional Sessions Judge/ Fast Track Court no.2, Kanpur Dehat in S.T no.204 of 2006 arising out of Case Crime no.17 of 2002 under Section 364A IPC, P.S-Sikandra, District-Kanpur Dehat.

3. The appellants herein (six in number) have been convicted under Section 364A IPC and sentenced for life imprisonment with fine of Rs.10,000/- The default punishment is five years additional simple imprisonment for each of the appellants. Four appellants Lajjaram, Shrikant, Jay Prakash @ Bhure and Munnilal Prajapati have also been convicted under Section 377 IPC for seven years rigorous imprisonment and fine of Rs.2000/- with the default punishment of one year simple imprisonment. All the sentences are to run concurrently.

Introduction:-

4. The first information report of the incident, occurred on 20.01.2002 at about 7-7:30 p.m, was lodged on 21.01.2002 at 6.15 am by Shripal @ Pappu s/o Ramsewak Pal reporting therein that his brother Yashpal Singh aged about 29 years had been abducted in order to commit his murder by some miscreants while he and his brother Yashpal (victim) were coming to their house in village Maheshpur from the Government Parag Dairy, Village-Hariharpur. It was averred therein that near the Hariharpur wali bambi ki puliya on the western side, 5-6 persons were standing, the first informant and his brother were on two cycles and his brother (victim) was fifteen paces ahead of him. Three-four unknown persons caught his brother and started beating him. He and his brother had seen the miscreants in the torch light clearly and they all were wearing pant, shirt and sweater. The miscreants first caught his brother, beaten him by kicks and fists and when the first informant intervened he was also beaten. His brother then told him to run away and the informant ran away from the place of the incident to save his life. His brother Yashpal, however, had been abducted by the unknown miscreants and the first informant had an apprehension that they might kill his brother out of enmity. The first informant further states that he alongwith villagers made all possible efforts to search his brother but his whereabouts could not be known. In the written report, the first informant stated that he could identify the miscreants if they were brought before him.

5. On the basis of the written report, P.W-3, Ram Chandra the Head Moharrir posted at the police station concerned registered the first information report and proved that the Check report was prepared in his handwriting and bears his signature, it was exhibited as Exhibit Ka-1. The G.D entry at Rapat no.7 dated 21.01.2002, at 6.15 a.m, was also proved by P.W-3 from the original GD brought in the Court and filing of the carbon copy thereof, marked as Exhibit Ka-2.

6. On a suggestion to this witnesses, he categorically stated that before submission of the written report no oral or telephonic information about the incident was recieved in the police station and no

police personnel went to the spot prior to the lodging of the first information report. The Investigating Officer Mahipal Singh Tomar (P.W-6) was present in the police station when the report was lodged.

7. The Investigating Officer P.W-6 stated that the investigation was received by him on 21.01.2002 and after copying the Check report, G.D, the statements of the first informant and other witnesses were recorded. The inspection of the site was made on the pointing out of the first informant and the site plan had been proved as Exhibit Ka-5, being in his handwriting and signature. After recording the statements of other witnesses on 22.1.2002, the search for the victim was conducted from 24.01.2002 for several days. On 05.03.2002, a letter of ransom which was received by the first informant Shripal through the post, was entered in the case diary at parcha no.8. On 06.03.2002, accused-appellant Sarvesh Kumar s/o Ram Bharose was arrested, he was interrogated in the police station. On the information of accused Sarvesh, search was made in the house of Mistri @ Virendra and search for other accused persons was also made. On 8.3.2002, a wireless message was received that the victim Yashpal was present in the Police Station-Bhare in District Etawah. On getting the said information, P.W-6 reached at the police station concerned, interrogated the victim and recorded his statement. The victim named other accused persons in the offence of his abduction. The Investigating Officer states that the victim told him that the accused persons used to visit the house of Lajjaram in the village prior to the incident. They took him to the jungle and used to beat him. Two accused persons namely Munni lal and Shrikant made Anal sex with him and accused Virendra and Bhure threatened him for ransom while he was in their custody. They also forced him to write 2-3 letters to raise the demand for ransom.

8. On 10.03.2002, P.W-6 received a message that appellants Munni lal Prajapati and Jay Prakash @ Bhure had been arrested in some other case in District Auraiya. Their statements were recorded in the police station Ajitmal, they also took the names of Laljjaram, Shrikant, Sarvesh @ Machchar, Virendra @ Tiwari and Lambu as co-accused.

9. The victim was produced before the CJM for recording his statement under Section 164 Cr.P.C. At G.D Rapat no.5 dated 9.3.2002, the offence under Section 364A IPC was added and the carbon copy of the said GD had been proved and exhibited as Exhibit Ka-'7'. Photo copy of an inland letter with envelop received by the first informant, entered in the CD, was produced and proved as Exhibit Ka-'8' and Ka-'9'. After the investigation was completed, the chargesheet was submitted. In cross, when the statement of victim Yashpal was put to P.W-6, he admitted that the victim told him that apart from one accused named as Lambu, all other four miscreants used to come to the house of Lajjaram in the village for playing cards and that is why the victim knew all of them. The appellant Lajjaram was resident of the same village as that of the victim. P.W-6 stated that after receipt of the information of the incident, he reached at the spot of the incident at about 10-10.30 hours. P.W-6 denied any knowledge of there being any enmity between Lajjaram and the first informant and also denied the suggestion that a false case was lodged due to enmity.

10. P.W-6 proved that he recorded statement of the first informant on the date of the incident and made inspection of the site on the same day. He stated that the first

informant did not mention name of any of the accused in his first statement nor expressed any suspicion on any of them. P.W-6 proved that the victim, in his first statement, told that he knew accused Shrikant before the incident as Shrikant used to come to the house of Lajjaram in the village Maheshpur and knew his name as well. A suggestion of enmity between Shrikant and the first informant was given to P.W-6 which he had denied. In cross for appellant Lajjaram, P.W-6 stated that the victim had taken the names of Munni lal and Shrikant while making allegations of commission of Anal sex with him. It was admitted that the place of the incident falls within the jurisdiction of the police station Sikandra, whereas the first informant was the resident of village Maheshpur.

11. The doctor P.W-5 who had examined the victim on 08.03.2002 at the District hospital, Etawah proved that the victim was brought by the police personnel of the concerned police station in the District Etawah. During the examination, the victim complained of pain on his both shoulders, right leg and chest but there were no visible injuries and as such no definite opinion could be formed about the cause of pain. The doctor, however, stated that such pain may occur due to beating by kicks and fists or because of some old injury. The medico legal report of the victim was proved by P.W-5, as Exhibit Ka-4, being in his hand writing and signature and bearing thumb impression and identification mark of the victim. In cross, P.W-5, again stated that the victim told him during the examination that he was experiencing pain but there was no visible injury or swelling and further that the victim did not make complaint of any pain in his Anus. No proximate time could be estimated as there was no visible injury.

12. The formal witnesses, thus, proved the documents prepared by them during the course of the investigation and the medical examination of the victim. The charge under Section 364 A and 377 IPC framed against the accused appellants had been denied by all of them.

Prosecution Case:-

13. Three witnesses of fact were produced by the prosecution, amongst whom, P.W-1 is the cousin of the victim and the first informant; P.W-2 is the victim Yashpal; P.W-4 is the first informant Shripal @ Pappu. P.W-1 Shivbalak s/o Jorawar Singh, resident of Maheshpur stated that he met the first informant in the field near his house, one kilometre towards the east from the place of the incident. He stated that after hearing the cries he went to the place of the incident at around 7 to 7.15 p.m, Shripal told him that he (Shripal) was also beaten by the miscreants and he had left his cycle at the place of the incident. He came running to the field where P.W-1 was met. The statement of this witness is hearsay so far as the incident of abduction is concerned and nothing much could be elicited from his testimony, in favour of the prosecution.

14. The star witnesses of the prosecution are two brothers P.W-2, the victim and P.W-4, the first informant whose testimony will decide the fate of the case.

15. Coming to the statement of P.W-4, the first informant Shripal @ Pappu, it is to be noted that in his deposition in the Court, he described the incident in the same manner as narrated in the FIR. In his examination in chief, P.W-4 stated that he believed that the accused had abducted the victim due to enmity and they would either kill him or

release him on ransom. The report of the incident was dictated to Videsh Singh and after the report was read over to him, it was signed, the written report is Exhibit Ka-3. P.W-4 further stated that he clearly saw the accused persons namely Virendra, Lajjaram, Sarvesh @ Machchar, Jay Prakash in the torch light. But the names of these persons, were disclosed by his brother (P.W-2) when he returned back. At the time when the report was lodged, he (P.W-4) did not know the names of the accused persons. P.W-4 admitted that no examination of his alleged injuries was conducted and the Investigating Officer recorded his statement.

16. In cross, P.W-4 narrated a different story that the miscreants had muffled their faces and he could not identify any of them as it was dark and for that reason, he did not mention the names of the accused persons in the first information report and it was lodged against unknown persons. P.W-4 further stated that he was beaten by the miscreants by lathi and danda and the act of beating continued for about 2-3 minutes. The miscreants had given a blow of danda on his head. He left his cycle on the spot and it was brought to the village by one Nandram. He then stated that the police had reached at the spot before lodging of the first information report and it seemed to him that someone had intimated the police. He then stated that he did not give information to the police. The suggestion given to this witness that his brother was not abducted and the story was created as his brother had fallen in a bad company, was denied by him. He then stated that he went to the spot of the incident along with the police and they made searches in the torch light. The cycle was lying at the roadside and the police picked it up.

17. P.W-4 further stated for lodging the first information report he left to the police station at about 06.15 am by motorcycle and he went alone. In the same breath he says that he could not drive the motorcycle and did not remember the name of the person who drove the motorcycle.

18. With regard to the identity of the accused, P.W-4 admitted in the cross examination that accused Lajjaram was resident of his village and the fields of Lajjaram were nearby his field. A suggestion was given to P.W-4 of previous enmity due to Nali (drain) in their field which he denied. P.W-4 also denied that Lajjaram and Munnilal were friends and that the accused Munnilal used to come to the house of Lajjaram in his village and he had falsely implicated both of them. P.W-4 also admitted that he knew Shrikant prior to the incident but denied any enmity with him because of the betel shop (kiosk). The suggestion that the report was lodged intentionally against unnamed persons and the accused were falsely implicated later after deliberations with his brother (P.W-2) was denied by P.W-4.

19. P.W-2 is the victim namely Yashpal who was aged about 29 years on the date of his deposition. He stated that the incident had occurred at about 7.30 pm when he was coming from Hariharpur after delivering milk. 5-6 persons gheroed him near bambi ki puliya and when his brother Shripal flashed his torch, he had seen that they were carrying guns, country made pistol, lathi and danda. The miscreants caught him though his brother could escape. The miscreants took him to the jungle while covering his eyes but he could slightly see that they used to change places. On the third day of the incident they had beaten him and while beating they asked him as to how much gold and silver and cash he had in his account. One letter was got written by the miscreants for ransom

around 14-15th February. The said letter was stamped and addressed to his brother. The contents of the letter had been narrated by P.W-2 in his testimony to emphasize that the ransom of Rs.5,51,101/-, as offerings to Maa Durge, was demanded.

20. P.W-2 admitted that amongst the miscreants, Lajjaram was the resident of his village and also narrated the details of residences of other accused except one unknown miscreant named Lambu; and then stated that he could identify that person if he was brought before him. P.W-2 further stated that except Lambu he knew everyone prior to the incident as they used to come to the house of accused Lajjaram in the village and they all played cards together and since then he knew their names as well. P.W-2 then stated that the miscreants used to beat him and tortured him to do all their daily works such as making of food and fetching the water. They also committed Anal sex with him against his wishes and Shrikant, Munnilal Prajapati and Lajjaram were amongst those who had sex with him. On 20.02.2002, the co-accused Sarvesh @ Machchar alongwith others took him to his village Maheshpur and detained him in his field; they were getting food from the house of accused Sarvesh @ Machchar and stayed there for one week. On 28.04.2002, he was beaten by the accused while they were asking the place of residence of his brother Shiv Balak in District Auraiya.

21. On 04.03.2002, accused Sarvesh @ Machchar went to his house and on 06.03.2002, the police arrested Sarvesh @ Machchar and then there was a lot of chaos amongst the miscreants and they took him to the 'Behad' (deep jungle) of the Yamuna river. There was one more abducted person with them. On 08.03.2002, while the accused persons were sleeping having been tired near the Yamuna river in the field of the jungle and another kidnapped person was sitting, P.W-2 states, that he escaped and reached at the police station Bhare in District Etawah. His medical examination was done at Etawah and the Investigating Officer of the police station Sikandara reached there at about 2.00-2.30 p.m. After interrogation by the Investigating Officer he was taken to the Court for recording his statement under Section 164 Cr.P.C.

22. He further stated that the letter for ransom was given by his brother to the Investigating Officer. In cross for the accused Virendra, Sarvesh and Jay Prakash, P.W-2 reiterated the incident as narrated in his examination in chief but categorically stated that the miscreants were not covering their faces when they pounced from the field at the place of the incident. He further stated that they also hit him by the butt of the gun and all miscreants had beaten him. On being confronted, P.W-2 stated that he knew everyone in the village and population of his village was about 2000. He narrated the place of residence of the accused persons, namely Shrikant, Virendra, Sarvesh and Jay Prakash, and stated that Sarvesh was a relative of Lajjaram and used to come to his village. P.W-2 further stated that he knew names and addresses of the accused persons as they used to play cards in the house of Lajjaram and their addresses were not told to him by anyone else. The accused Lajjaram was resident of his village and the accused Shrikant, Munnilal, Jay Prakash and Virendra were coming to the house of the Lajjaram for about 1½ years prior to the incident and he also used to go there to play cards with them. P.W-2 then stated that his brother knew the accused Shrikant and Lajjaram and no one else.

23. P.W-2 further disclosed that he had partnership with Lajjaram for the crop of sugarcane and there was one more partner with them named as Radhakishan. The partnership was alive at the time of the incident and it was ended only because of the first information report lodged by P.W-2 against the accused persons. P.W-2 however, stated that in relation to the partnership with Lajjaram, no dispute had arisen nor there was any dispute relating to the cost of the crop. At the time when he was with the accused, crop was harvested and the share of Lajjaram had been sent to his house and his own share came to his house. When he came back, though Lajjaram was sent to jail but all accounting of the crop was done by his family members. P.W-2 then denied that a false report was lodged by him because of the dispute relating to the partnership and also denied that any dispute had arisen between them on account of playing of cards together.

24. P.W-2 further stated that the accused persons used to keep him at different places and a ransom of Rs.5,51,101/- was demanded. He was also beaten by the accused persons. P.W-2 repeated many times in his deposition that he knew the accused persons prior to the incident though denied that it was wrong to say that no such incident took place or the accused persons had not beaten him or not demanded ransom. It was stated that the letter for ransom was written by him on the instructions of the miscreants and the signatures of all the accused persons were present thereon which also bears his signature. He stated that he was released from the custody of the accused after 20-22 days of writing of the said letter. The accused persons namely Munnilal and Shrikant used to commit Anal sex with him. P.W-2 stated that the site plan of the site of the incident was prepared at his instance. P.W-2 again admitted that Lajjaram was the resident of his village and their fields were adjacent and the drain of their fields was common though he denied that any dispute had occured between them on account of the common drain.

25. In cross for the accused Shrikant, P.W-2 stated that his brother was not used to going to the house of Lajjaram and that he (P.W-2) could not identify the miscreants when they first met him. The name of the village of the accused Shrikant was disclosed by P.W-2 but he denied any dispute with Shrikant because of the betel kiosk. He stated that when miscreants were taking him with them he did not raise any alarm.

26. P.W-2 stated that the letter for ransom was written in the name of his brother Shripal and the original letter was not brought in the Court on the date of his deposition but kept at his home. PW-2 was recalled and crossed for the accused Shrikant wherein he stated that his brother Shripal knew the accused Shrikant and Lajjaram prior to the incident because of the fact that Lajjaram was resident of his village and Shrikant used to go to the house of Lajjaram and further that Shrikant was also resident of a nearby village. P.W-2 stated that his brother identified two of the miscreants but the reason for lodging the report against unknown persons could not be explained by him. He then stated that he could identify the miscreants when they were at a distance of one feet. P.W-2 stated that he told the doctor to examine his injuries; and to the Investigating Officer that the accused had committed Anal sex with him.

Arguments of the counsels for the appellants:-

27. Placing the above noted statements of the prosecution witnesses and the documentary evidences on record, it is argued by the learned counsel for the appellants that 5-6 persons were implicated for the offence under Sections 364-A and Section 377 IPC at the instance of P.W-2, the alleged victim of the occurence. The first informant/P.W-4 lodged the report of the incident allegedly occurred on 20.01.2002 at about 7.30 p.m., on the next morning, ie 21.01.2002 at about 6.00 a.m. No reason for delay in lodging of the first information report could be furnished by P.W-4. According to P.W-2, the victim, he had escaped from the custody of the accused persons and reached to the police station at Etawah. He was then examined by the doctor and he told the doctor as also the Investigating Officer that the offence under Section 377 IPC was committed with him.

28. It is urged that the victim, in so many words had admitted that he knew the accused persons prior to the incident except one Lambu. He also admitted that his brother, the first informant namely P.W-4 also knew two of the accused persons namely Lajjaram & Shrikant. No explanation could be offered by the prosecution as to why the written report was lodged against unnamed persons. The explanation offered by P.W-4 that he though identified the miscreants but did not know their names and hence the first information report was lodged against unnamed persons is belied by the version of the P.W-2, victim, in his deposition both in chief and cross. There are material inconsistencies in the statements of two prosecution witnesses who are real brothers and their testimonies are full of embelishments and exaggerations. The statement of P.W-4 that the accused persons were covering their faces and, as such, he could not identify them is in complete contradiction to the statement of P.W-2, the victim and his own version in the FIR. This statement is nothing but a material improvement in the testimony of P.W-4 when he was confronted as to why he did not name the accused persons whom he knew well since before the incident. The scribe of the FIR, Videsh Singh was resident of a different village. There is no injury report for the alleged assault on the first informant (P.W-4). Other contradictions in the statement of P.W-4, the first informant and the Investigating Officer about visiting the spot of the incident even after lodging of the first information report have been pointed out by the learned counsels for the appellants to assert that none of the prosecution witnesses are credible, their testimonies are liable to be thrown at the very threshold.

29. It was argued that the victim P.W-2 admitted that the fields of one of the accused Lajjaram and his field were adjacent to each other and his brother P.W-4 knew him very well. The act of P.W-4 in making the written report against unknown persons itself demolishes the entire prosecution story.

30. Moreover, the letter for ransom was not proved by production of original in the Court by both the prosecution witnesses ie P.W-2, (the victim) and P.W-4 (his brother) though P.W-2 deposed that the original letter was kept at his home. P.W-2 though narrated the contents of the letter but did not prove the document in the Court. The proof of photocopy of the letter for ransom in the deposition of the Investigating Officer is of no relevance. P.W-2, the victim though stated that the letter for ransom was written by him and

signed by all the accused persons but no forensic report to tally the writing and signature of the accused persons was obtained to testify the genuineness of the said document. It is thus argued that as the demand of ransom could not be proved by the prosecution, the conviction for the offence under Section 364A IPC of the appellants cannot be sustained.

31. Further, there is no medical report to support the allegations of commission of offence under Section 377 IPC. The conviction under the said provision, therefore, has to be set aside. Further, no bodily injury could be found on the person of the victim to support his version that he was beaten by the accused persons. The medical evidence, thus, shatters the occular version of the victim, P.W-2, that he was threatened to death or the conduct of the accused persons gave rise to an apprehension in his mind that he might be put to death. The ingredients of Section 364A, thus, could not be proved by the prosecution.

32. It is argued that the present is a case of false implication of the accused persons at the hands of P.W-2 who projected himself as a victim. It seems that the alleged victim himself went with the appellants and later on the brother of the victim implicated all his acquaintence falsely for the reasons best known to the complainant and the victim. The testimony of P.W-4 is liable to be discarded as a whole as this witness has been proved to be a liar.

Arguments of the State:-

33. Learned AGA, in rebuttal, argued that the best witness in a case of kidnapping is the victim himself. The fact that an unnamed FIR was lodged rather proves that the prosecution is truthful is not making a case of false implication. No contradictory suggestion was given to P.W-2 when he stated that he was taken to different places by the accused persons. The names of all accused persons were disclosed by the victim in his first statement under Section 161 Cr.P.C. No contrary suggestion had been given to the victim for false implication of the accused persons by him. The statement of the victim (P.W-2) is that all the accused persons demanded ransom and used to ask him as to how much money, gold and silver he owned and that they also asked about the financial status of his brother Shiv Balak and the place of his residence, proved the demand for ransom.

34. As regards the submission of the learned counsels for the appellants that P.W-2 went on his own with the accused persons, it was argued by the learned A.G.A that there was no suggestion to P.W-2 in that regard during his cross examination. The victim had given a vivid description of the entire occurence. It is evident that the accused persons were caught one by one and then only the victim could escape from their custody, who straightway went to the police station and his medical examination was conducted which also proved that he was beaten by the accused persons. In any case, the statement of P.W-4 cannot be discarded as no motive of making a false report regarding abduction could be assigned to him. He cannot be said to be an untrustworthy witness. The demand for ransom coupled with the threat given to P.W-2 was proved by him in his oral testimony. The fact that the original of the letter for ransom was not produced or the writing and signatures were not tallied would not make any difference in so far as

the offence under Section 364A is concerned.

35. It is argued by the learned AGA that contradictions in the testimony of prosecution witnesses are not such that their testimony as a whole, can be discarded. Each and every statement of the prosecution witnesses cannot be read in piecemeal to discard the prosecution witnesses. The fact that P.W-4 did not disclose the names of two of the accused persons who were known to him rather supports the prosecution case and dispels the defence theory that it was a case for false implication, as in that case it was very easy for the first informant to name the accused persons at the very beginning. The submission of the learned counsels for the appellants that there was no medical report to support the version of the victim about commission of the offence under Section 377 IPC, by the accused persons, however, could not be contradicted by making any submissions.

36. In rejoinder, it was reiterated by the learned counsels for the appellants that in this case, the demand for ransom could be proved by the original letter to compare the letter (photocopy) produced by the Investigating Officer but since the original of the said letter was not brought before the Court, the allegations of demand for ransom could not be said to be proved by the prosecution. Further, there is absolutely no evidence that the victim had faced threat of his death. As per his own version the victim was well known to the appellants and he remained in their company for about 1½ months. The entire story put forth by P.W-2 projecting himself as a victim is concocted one. The appeal, thus, deserves to be dismissed.

Analysis:-

37. Having heard learned counsels for the parties, we find it fit to go through the provisions of Section 364A to understand as to what would be the circumstances required in a case, to attract the provisions of Section 364A of the Indian Penal Code.

38. Section 364A of the Code deals with kidnapping for ransom. The Section reads as under:-

*"**[364A. Kidnapping for ransom, etc.**--Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or [any foreign State or international inter-governmental organisation or any other person] to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine.]"*

This Section refers to both kidnapping and abduction.

39. Section 359 defines kidnapping and as per the definition therein the offence of kidnapping is not attracted in the present case.

40. Abduction is defined in Section 362 as under:

"362. Abduction.--Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.

Abduction is distinguished from kidnapping. It is well known that the

ingredients of the two offences-'kidnapping' and 'abduction' are entirely different. These are two distinct offences;" The ingredients of two offences namely of kidnapping and abduction, are entirely different. These are two distinct offences as noted above. The offence of kidnapping is not made out in the instant case.

41. The provision which defines abduction envisages two types of abductions, ie (i) by force or by compulsion; and/or (ii) inducement by deceitful means. The object of such compulsion or inducement must be the going of the victim from any place.

To "Induce" means "to lead into". 'Deceit' according to its plain dictionary meaning signifies anything intended to mislead another. It is a matter of intention, if the case falls in the second category. The case at hand, however, falls in the first category.

42. It is held by the Apex Court in ***Malleshi vs State of Karnataka*** reported in ***(2004) 8 SCC 95*** that the offence of abduction is a continuing a offence. Section 364A provides punishment for kidnapping, arrest, abduction or detaining for ransom. To attract the provisions of Section 364A, what is required to be proved is:-

(1) that the accused kidnapped or abducted the person; and

(2) kept him under detention after such kidnapping and abduction; and

(3) that the kidnapping or abduction was for ransom;

43. The question as to what would amount to pay ransom had further been deliberated by the Apex Court in the aforesaid decision while referring to the dictionary meaning of the words "to pay a ransom" and "demand".

Relevant paragraph-'13' of the decision is to be quoted as under:-

"13.To pay a ransom as per Black's Law Dictionary means "to pay price or demand for ransom". The word "demand" means "to claim as one's due;" "to require"; "to ask relief"; "to summon"; "to call in Court"; "An imperative request preferred by one person to another requiring the latter to do or yield something or to abstain from some act;" An asking with authority, claiming." The definition as pointed out above would show that the demand has to be communicated. It is an imperative request or a claim made. "

It was noted in paragraph-'13' that the essence of abduction is causing to stay a person in isolation and demand for ransom. It cannot be laid down as a straight jacket formula that the demand for payment has to be made to a person who ultimately pays. It has to be established in the facts of the case that the object of abduction was for ransom. In the facts of that case it was held that the demand of ransom was clearly conveyed to the victim and he was even conveyed the amount to be paid. The victim was told that, for his release his family members would have to pay a certain amount of money. It was held that if after making the demand to the kidnapped or abducted person merely because the demand could not be conveyed to some other persons, as an accused is arrested in the meantime, does not take away the offence outside the purview of Section 364 A. <u>It has to be seen in such a case as to what was the object of kidnapping or abduction.</u> It was held in the facts of that case that since the demand had already been made therein by conveying it to the victim, the conviction of the accused under

Section 364A could not be said to suffer from any infirmity. It was lastly noted that who pays the ransom is not the determinative fact.

44. Considering the observations in the judgment of the Apex Court in ***Malleshi*** (supra), it is clear that the provisions of Section 364A can be said to be attracted in a case where both the ingredients are proved:-

(i) that the accused abducted the person and kept him under detention after abduction;

(ii) the object was for ransom, i.e detention of the victim is with the intention to demand for ransom;

45. Whether the demand could be conveyed to the person or the family members who were to pay for his release is immaterial. It has to be seen by the Court that the object for abduction was for ransom and the demand was conveyed to the victim.

46. In the light of the said discussion, it has to be seen as to whether in the facts of the present case, the prosecution has been able to prove the ingredients of Section 364A IPC.

47. Coming to the facts of the present case, from the evidence of P.W-2 and P.W-4 as noted above, it is established that admittedly the victim P.W-2 knew all the accused persons before hand except one named as Lambu as he used to play cards with them when they came to the house of accused Lajjaram, who was resident of the same village. The accused Lajjaram and the victim had a partnership in relation to a crop of sugarcane at the time of the incident. The fields of the accused Lajjaram and the victim P.W-2 were adjacent. As per the version of P.W-4, the first informant in the written report as also his deposition in the Court, he had seen the accused persons clearly in the torch light when they caught hold of his brother (victim P.W-2) and beaten him.

48. In the said scenario, it is impossible to believe that P.W-4 could not identify Lajjaram who was his next door neighbour and was well acquainted with both of them, i.e. P.W-4 and his brother (the victim herein). It is also difficult to believe that the first informant (P.W-4) could not identify another accused Shrikant whom he knew well as per his own version. From the testimony of both P.W-4 and P.W-2, thus, it is proved that the accused Lajjaram was resident of the same village and the field of Lajjaram was adjacent to their field and that they both knew Shrikant as well. In the said scenario, it is not acceptable that P.W-4 could not identify the accused persons, at least two of them namely, Lajjaram and Shrikant.

49. The explanation offered by P.W-4 for lodging the unnamed FIR that the accused persons had muffled their faces was contradicted by the victim P.W-2. Moreover, the said version is a material improvement as it is in complete contradiction to the first version of P.W-4 in the FIR and his examination-in-chief, wherein he stated that he had seen the accused persons clearly in the torch light and could identify them if they were brought before him and is liable to be discarded as such.

50. Further, the version of P.W-4, in chief, that he had seen miscreants clearly in the torch light and then in the cross that he could not identify any of them as they had

muffled their faces and that is why unnamed report was lodged is self contradictory. As regards the rest of the testimony of P.W-4 we can only say that he has proved the written report having been lodged by him, which is exhibited as Exhibit-Ka-3. The contents of the written report had also been proved by P.W-4 in his testimony in the examination in chief.

51. The star witness of the prosecution, the victim, who had entered in the witness box as P.W-2, stayed with the accused persons for about 1½ months and stated that he was detained by them and they moved to different places. There is not even a whisper in the testimony of P.W-2 as to how he was detained by the accused persons who were very well known to him rather who were his friends, with whom he used to play cards and one of them was a neighbour with whom he had partnership for the crop of sugarcane. Mere assertion in the statement of P.W-2, the victim, that the accused persons were 5-6 in number and they took him to the jungle and forced him to cook their food and fetch water for them would not be sufficient to hold that the victim was kept under detention. It is admitted by the victim P.W-2 in his testimony, that he never raised alarm while he was going from one place to another with the accused persons. The mode as to how they travelled from one place to another is completely missing from the testimony of P.W-2. It is difficult to assess as to whether the victim did not have a chance to raise any alarm at any point of time during his stay with the accused persons for about 1½ months which for some time was also in the village of accused Sarvesh @ Machchar. It is noted that the victim P.W-2 very conveniently projected himself as a person in detention and then state that while the accused persons were sleeping, he escaped and straightaway reached to the police station at District-Etawah. In the statement of P.W-2, it has also come that one more abducted person was in his company.

52. Further the object of abduction as projected by P.W-2 was for ransom. The demand of ransom was sought to be proved by producing an inland letter allegedly received through post, photostat copy of which was given to the Investigating Officer who proved it in the Court as Exhibit Ka-8 and Ka-9, the documents having been entered in the case diary by him. How much reliance can be placed on the photocopy of the alleged letter for the demand of ransom has to be seen in the light of the statement of P.W-2, the victim who stated that the letter for demand of ransom was written by him on the instructions of the accused around 14-15th February and this letter was addressed to his brother Shivpal Singh (P.W-4) whose address mentioned in Exhibit-Ka-8 had been proved by P.W-2. P.W-2 stated that the stamp of Rs.1.00/- was pasted therein and the demand of Rs.5,00,000/- was made. The photocopy of this letter though was entered by the Investigating Officer in his case diary and produced in the Court but the original copy had not been produced by the witnesses specifically P.W-2, who deposed that the original letter was in his possession but was not brought in the Court. The best evidence in possession of P.W-2, the victim, has been suppressed by the prosecution.

53. Further, there is no proof of writing of P.W-2 on the said letter for ransom, ie Exhibit Ka-8 and Ka-9, P.W-2 did not prove the letter or his writing on the same in his deposition. No forensic report has been obtained in this regard. Further

the statement of P.W-2 is that the letter for ransom (Exhibit Ka-9) contained signatures of all the accused persons with their writing on the letter which were not tallied. The person to whom the said letter was addressed, i.e brother of the victim namely Shiv Pal Singh had not proved that he had received the said letter through post. There is no proof of dispatch of the said letter by post. From the case diary, only this much can be shown that at CD Rapat no.8 dated 05.03.2002, there is an entry that one letter in an envelop was given by the first informant to the Investigating Officer, the content of which was extracted in the case diary and after enclosing the photostat copy of the letter therein, the original was handed over to the first informant with the instructions that it had to be kept preserved and produced in the Court or before the police whenever summoned.

54. From the above entry, only this much can be said that the first informant gave a letter to the Investigating Officer stating that the demand for ransom was made by the accused persons but as to how the said letter was received and who had received the same was not proved. P.W-4, the first informant is completely silent about the letter for ransom given to the Investigating Officer and the scribe of the letter namely P.W-2 who is the victim himself did not prove his writing on the said letter. No inquiry in this regard had been made by the trial court and the original letter was not produced in the Court. These facts are sufficient to conclude that the prosecution had failed to prove the demand for ransom on the basis of the letter for ransom exhibited as Exhibit-Ka-9.

55. As to the rule of proof of a fact by the documentary evidence, it is settled principle that so long as the original exist and is available, it being the best evidence, must be produced. As per the Section 62 of the Evidence Act, the existence of primary evidence generally excludes secondary evidence. Secondary evidence of contents of written instruments cannot be given unless there is some legal excuse for non production of the original. The general rule is that secondary evidence is not admissible until non production of the primary evidence is satisfactorily proved.

56. In view of Section 64, contents of document must be proved by production of the original document and secondary evidence of it is not generally admissible. Section 65 admits secondary evidence only of the existence or the contents of a document which is lost or otherwise unavailable. Section 67 of the Evidence Act provides that mere production of the document in evidence is not proof of genuineness of the document. The genuineness and execution of the document, therefore, has to be proved by the signature or the handwriting of the signatory or the author.

Section 67 enjoins that before the document can be looked into it has to be proved. The provision though does not prescribed any particular mode of proof, the execution or authorship of document being question of fact it can be proved like any other fact by direct or circumstantial evidence. The opinion of a person who is acquainted with the handwriting of a particular person is a relevant fact to prove the handwriting.

57. Similarly, opinion of handwriting expert is also relevant fact for identifying any handwriting. Exhibit Ka-'9' brought by the prosecution as a proof of the document

for ransom has not been proved in accordance with the provision of Evidence Act and therefore, has to be rejected.

58. The document proved by the Investigating Officer as Exhibit Ka-9 is, thus, a waste piece of paper and cannot be relied upon to hold that it was a proof of demand for ransom on the part of the accused persons.

59. As regards the contention of the learned A.G.A that since the demand for ransom was conveyed to the victim and he was kept under threat that his release would be subject to the payment of ransom, it is sufficient to hold that the object of keeping the victim under detention was for ransom. This submission of the learned AGA is liable to be rejected at the threshold, inasmuch as, the first ingredient of Section 364A of keeping the victim under detention could not be proved by the prosecution.

60. The fact that the accused persons were well known to the victim and he used to play cards with them raises a serious doubt about the truth of the whole prosecution story. It seems to us that the scene of abduction of the victim and demand for ransom was created by two brothers with some oblique motive. The complete picture of abduction and demand for ransom is hazy and seems to be based on a concocted story. Not going further in this direction, at least, it can be said that the prosecution has not been able to prove the abduction of the victim for demand of ransom.

61. Dealing with the contention of the learned AGA that since the demand was conveyed to the victim and he was put under threat that his release would be subject to the fulfillment of the demand, the second ingredients of Section 364A that the abduction for ransom was fulfilled, it may be noted that this argument is based on the decision of the Apex Court in Malleshi (supra). In **Malleshi's case,** (supra) the accused persons had abducted a student of first year B.Sc, when he came out of the college along with his classmates. As per the sequence of events therein, the accused called the victim by taking his name and when he turned, he saw that the person wearing white shirt and pant. The victim was told that the accused knew his father. The accused then inquired about the fees and expenses of the college course stating that he wanted to admit his son and took the victim to the jeep parked nearby on the pretext that his son was therein. When the victim went near the vehicle, he was asked to sit in the jeep. Three other persons came and sat in the jeep alongwith the accused by the side of the victim. The door of the jeep was closed and it was driven towards the Highway. The victim was threatened not to raise any voice otherwise, he would be murdered. After they covered some distance, the accused inquired phone number of the father of the victim and told him that they want Rs.2,00,000/- to release him. However, while the victim was permitted to meet the call of nature and the vehicle stopped near a village, the victim ran away. In that factual background, it was held by the Apex Court that since the demand, in that case, had already been made by conveying it to the victim, the offence under Section 364-A was made out.

62. The factual position is different in the present case. As noted above, in the instant case, we are unable to accept the testimony of the victim namely P.W-2 that he was abducted and detained by his own friends and acquaintances with whom he was playing cards frequently and that the

demand for ransom of Rs.5,00,000/- was conveyed to his brother. The testimony of both the brothers (P.W-2 & P.W-4) who have created the scene of abduction with the object of demand for ransom is found unreliable. Lots of embellishments, material improvements and unexplained stories are found in the testimonies of P.W-2 who projected himself as the victim and P.W-4 his brother who lodged the first information report. It seems that the prosecution has projected a different story from what had actually happened. The genesis of the occurrence has been suppressed by the prosecution. The fact that the accused persons had criminal antecedents and they were well acquaintance of the victim raises a serious doubt about the story projected by the victim, P.W-2 and his brother P.W-4. The fact that the victim was having a partnership with one of the accused Lajjaram, his neighbour, also indicates that the prosecution is not telling the truth.

63. It has also come in the evidence of P.W-6, the Investigating Officer that he had received the information of abduction of a person named as Yashpal through wireless before the first information report was lodged and the said information was given to him by Head Moharir Ram Chandra at about 9.15 p.m. On getting the said information within 20-25 minutes he reached at the spot. P.W-6 further denied that the first information report was lodged after he reached the spot. P.W-3 Head Moharir, however, stated that no oral or telephonic information was received by him about the incident prior to lodging of the first information report. It has also come in the evidence of P.W-4 that the police reached the spot prior to the lodging of the first information report and according to P.W-4 some acquaintance of his brother might have called the police. The police had reached after about 1¼ hours of the incident and P.W-4 kept on searching for his brother alongwith the police, when his brother was not found he went to the police station to lodge the report along with the police.

64. From the statement of P.W-4 and the Investigating Officer, at least, it is established that the information of abduction of the victim P.W-2 was given to the Investigating Officer within 1¼ hours of the incident and the police also searched for the victim along with the first informant on the spot. The time of the incident as narrated by the prosecution witnesses is 7.30 p.m. The first informant stated that they kept on searching for the victim alongwith the police and when they could not find him he went to the police station to lodge the report along with the police. The Investigating Officer further stated that he reached at the place of the incident at about 10-10.30 p.m directly from another place where he was on duty on receiving a wireless message. He kept on searching of the victim for the whole night and also on the next day of the incident and returned back to the police station at about 3.20 a.m only on 22.01.2002. The entry of his return at the police station was recorded in the case diary. The report of the incident occurred on 20.01.2002 at about 7.30 p.m., however, was lodged on 21.01.2002 at about 6.12 a.m., when according to the Investigating Officer he kept on searching for the victim even for the whole day of 21.01.2002 along with the first informant.

65. We may also note the statement of P.W-3, Head Moharir, at this juncture, when he stated that the Investigating Officer Mahipal Singh was present in the police station when the first information

report was lodged and the said report was lodged on his oral orders. The first informant, Shripal (P.W-4) and one Shivpal came to the police station to lodge the report and both the said persons were interrogated by the Investigating Officer (SO Mahipal Singh), whereas the Investigating Officer stated that the report was not lodged on his instructions whether the oral or written and that he was not present in the police station when the report was lodged.

66. This inconsistency in the testimony of P.W-3, P.W-4 and P.W-6, in the light of the circumstances of the present case noted above, also creates doubt about the time of lodging of the first information report and the genesis of the incident. This opinion further finds support from another circumstance brought by the prosecution of the allegation of commission of the offence under Section 377 IPC to implicate four accused persons namely Lajjaram, Shrikant, Munnilal Prajapati and Jay Prakash @ Bhure. The statement of the victim in this regard is at variance in his entire testimony. At one point of time, he stated that all the accused persons committed Anal sex with him almost in a gap of 2-3 days, and that had started after 3-4 days of abduction and then that this offence was firstly committed by Munnilal. The previous statement under Section 161 Cr.P.C, was put to the victim (P.W-2) to confront that only the names of Munnilal and Shrikant was mentioned therein for the alleged offence under Section 377 IPC, he stated that it was wrong and all the accused persons had committed offence under Section 377 with him. The statement under Section 164 Cr.P.C of the appellant could not be found on the record and the said statement was not even put to any of the witnesses during the cross examination.

67. On another occasion, P.W-2 stated that accused Shrikant had also committed the Anal sex and explained as to how all the accused persons used to gang rape him. P.W-2, however, excluded only Virendra @ Tiwari and Sarvesh @ Machchar in his version in the cross for the accused Shrikant when he was recalled.

68. Believing this statement of P.W-2-the victim, the trial court had convicted three accused namely Lajjaram, Shrikant and Jay Prakash @ Bhure under Section 377 IPC, but it had lost sight of fact that there is no medical evidence of commission of the offence under Section 377 IPC. The victim, as per his version, had escaped from the custody of the accused persons and straightaway went to the police station in District-Etawah. The Investigating Officer stated that on 08.03.2002 as soon as he received the message through wireless that the victim was present in the police station at District-Etawah, he reached there and recorded statement of the victim at CD parcha no.10. Referring to the statement of the victim, it was deposed by the Investigating Officer that the victim had told him that the accused persons used to beat him and also committed Anal sex with him. The medical examination of the victim was also done on 08.03.2002 at about 08.05 p.m. After examination, the doctor had opined that the victim was complaining of pain on some parts of his body, i.e shoulder, right leg and chest but there were no apparent injuries or swelling. No complaint was made by the victim about any pain in his Anus. The doctor further stated that he examined the victim on the complaint of pain made by him. It is, thus, evident that the doctor was not communicated either by P.W-2 or the Investigating Officer that he was supposed to examine the victim to ascertain as to whether the offence under

Section 377 IPC was committed with him. No supplementary medical examination of the victim was got conducted by the Investigating Officer after interrogating him. On the mere oral testimony of the victim, (P.W-2) in view of the surrounding circumstances of the case, it is difficult to hold that the accused persons had committed the offence under Section 377 IPC. Thus, the allegations of the commission of offence under Section 377 IPC against the appellants could not be proved by the prosecution beyond all reasonable doubt.

69. Lastly, in the statement of P.W-4 one startling fact has been noted by the trial court that during his deposition, this witness was carrying a paper on which he made certain notes related to the incident and he was giving answers while looking to the said paper, the said paper was confiscated by the Court. The deposition of this witness, therefore, cannot be said to be natural and truthful.

Conclusion:-

70. Having regard to the entire evidence discussed above on careful consideration of the relevant attending circumstance, it seems that the prosecution has suppressed the genesis and origin of the occurrence and has thus not presented the true version. The suppression on material facts in the prosecution version creates a deep dent in its story.

71. It is a case where the prosecution has not been able to prove its case of abduction for ransom under Section 364A IPC and commission of offence of Anal sex with the victim under Section 377 IPC by placing cogent evidence to prove the implication of the appellants for the alleged offences beyond reasonable doubt.

72. In view of the above discussion, the judgment and orders of conviction and sentence of the appellants dated 13.04.2007 and 28.04.2007 are hereby set aside.

73. The appeals are **allowed.**

74. The appellants namely Jay Prakash @ Bhure, Munnilal Prajapati, Shrikant, Virendra, Lajja Ram and Sarvesh Kumar @ Machchar Singh are in jail.

75. All the appellants shall be released from jail forthwith, unless they are wanted in any other case.

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

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

(2022)05ILR A133
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.05.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE VIKRAM D. CHAUHAN, J.

Jail Appeal No. 4325 of 2009

Manvir ...Appellant

Versus

State ...Respondent

Counsel for the Appellant:
From Jail, Ms. Abida Syed(A.C.)

Counsel for the Respondents:
A.G.A.

A. Criminal Law -Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Sections 37 & 302-Challenge to-Conviction-accused committed rape and killed 80 years old mother-no eyewitness-circumstantial evidence-site plan was duly proved by the PW-8-testimony of witnesses were consistent and reliable-testimony of the close relatives/interested witnesses cannot be discarded-in private house, the incident occurred in normal circumstances an independent witnesses may not be available-It is well known that the close relatives are most reluctant to spare the real assailant and falsely involve another person in place of the assailant-the contradiction will not demolish the prosecution case when there is other cogent and trustworthy evidence pointing towards the guilt of the accused-Hence, prosecution has proved its case beyond reasonable doubt.(Para 1 to 52)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Anant Chintaman Lagu Vs St. of Bombay (1960) AIR SC 500

2. Kartik Malhar Vs St. of Bih. (1996) 1 SCC 614

3. St. of U.P. Vs Samman Dass (1972) 3 SCC 201

4. Khurshid Ahmed Vs St. of J&K (2018) 7 SCC 429

(Delivered by Hon'ble Vikram D. Chauhan, J.)

1. Heard Ms. Abida Syed, learned Amicus Curiae for the appellant and learned A.G.A. for the State.

2. The present jail appeal is filed by appellant through Senior Jail Superintendent, Agra against the judgment dated 5 December, 2007 and sentence dated 6 December, 2007 passed by IInd Additional Sessions Judge, Gautambudh Nagar in Sessions Trial No. 497 of 2006 (State Vs. Manvir) arising out of Case Crime No. 136 of 2006 under Sections 376 and 302 of the Indian Penal Code, Police Station Sector-49, NOIDA. Appellant - Manvir has been convicted under Sections 376 and 302 of the Indian Penal Code. Appellant is sentenced to 10 years rigorous imprisonment under Section 376 I.P.C. and a fine of Rs. 5,000/- and under Section 302 I.P.C., life imprisonment has been awarded to appellant - Manvir and a fine of Rs. 5,000/- is awarded.

3. As per the legal proviso to Section 228A I.P.C., it is not expedient to disclose the name of the victim in this case; she is being referred as victim in the judgment.

4. On 2 July, 2006 at 6:15 a.m., a First Information Report was lodged by Sunil Singh, son of late Kailash Singh at Police Station, Sector 49, Gautambudh Nagar against appellant - Manvir under Sections 376 and 302 of Indian Penal Code.

5. The prosecution case as per First Information Report is that the informant - Sunil Singh is tenant of Sri Rajendra Singh and was residing along with her wife and mother; mother of the informant is aged about 80 years; in the intervening night of 1 / 2 July, 2006, mother of the informant as usual was sleeping in the open space, adjacent to the room of the informant; informant along with his other family members was sleeping at the terrace; at about 12:00 in the night his neighbour Manvir, son of Ram Prasad (who was living in the same house), was walking near the place where the mother of the informant

was sleeping; informant and his family members went to sleep at terrace; at about 5:00 a.m. when the informant and his family members (wife Renu Devi and son Deepak) came down, they saw Manvir was washing the blood stains with water and the door could not be opened. Thereafter, the son of the informant, namely, Deepak crossed the boundary wall and opened the door. Manvir on seeing the informant and his family members ran away from the house; informant and his family members found that his 80 years old mother was blood stained and her petticoat was up to the knee level; wife of the informant also informed that blood was coming out from the private part of his mother; Manvir committed rape and killed his mother.

6. On the basis of above mentioned First Information Report dated 2 July, 2006, a case was registered being Case Crime No. 136 of 2006 under Sections 376 and 302 of the Indian Penal Code against appellant - Manvir.

7. In pursuance of the First Information Report, investigation was carried out. Investigating Officer prepared recovery memo dated 2 July, 2006 (Ex. Ka-7) for recovery of the pillow, three bedsheets and broom (Jharu). The aforesaid recovery was witnessed by Naresh Mahto, son of Ram Chandra and Sushil Kumar Singh, son of Thakur Maheshwar Singh. Recovery memo was prepared by Investigating Officer - Matadeen Verma (P.W. - 5).

8. Investigating Officer on 2 July, 2006 recovered the underwear of accused Manvir in presence of Naresh Mahto, son of Ram Chandra and Sushil Kumar Singh. Recovery memo was prepared by Investigating Officer - Matadeen Verma (P.W. - 5). Recovery memo also recorded that the aforesaid undergarment was having blood stains. The recovery memo was marked as Ex. Ka-8 before the trial court.

9. Inquest of the deceased was conducted on 2 July, 2006 by Investigating Officer - Matadeen Verma (P.W. - 5) on the direction of S.H.O - Vishwajeet Singh. The inquest report was marked as Ex. Ka-2 before the trial court. The inquest report noted following injuries on the deceased :-

"चोटे शवः- मृतिका के शरीर को उलट पलट कर देखा व हया शर्म का ख्याल रखते हुये वादी की पत्नी श्रीमती रेनू से दिखवाया गया तो जिस्म पर निम्न जखात पायी गयी-

1. दाहिने एवं बांये गाल पर दांत से काटे के निशान बने पाये गये है।

2. गर्दन में खुरसठ एवं नीलगू निशान चोट खून आलूद

3. बाँये एवं दाहिने हाथ की कोहनी में चोट खरास एवं जाबजा नीलगू निशान 4. वादी की पत्नी से गुप्तांग को दिखवाया गया तो गुप्तांग पर (पेशाब के रास्ते) चोट खून आलूदा"

10. Thereafter, S.H.O - Vishwajeet Singh (P.W. - 8) on 2 July, 2006 prepared a site plan of the place of occurrence.

11. The postmortem of the deceased was conducted on 2 July, 2006 at 4:30 p.m. by Dr. Madan Lal (P.W.-7). The following injuries were recorded in the postmortem report dated 2 July, 2006 :-

1. Blackening over an area of 7 x 7 cm on right side eye and face.

2. Bleeding and laceration present all around vagina over an area of 20 x 20 cm.

3. Bite marks present on front of neck on left side over an area of 6 x 2 cm.

12. After investigation, charge sheet was submitted against accused-Manvir. The charge under Sections 376 and 302 I.P.C. was framed by the IInd Additional Sessions Judge, Gautambudh Nagar on 6 November, 2006.

13. Prosecution in support of its case examined nine witnesses, namely, (PW-1) Sunil Singh (Informant), (PW-2) Smt. Renu Devi, (PW-3) Master Deepak, (PW-4) Anil, (PW-5) S.I. Matadeen Verma, (PW-6) S.I. R.B. Kaul, (PW-7) Dr. Madan Lal, (PW-8) Vishwajeet Singh and (PW-9) Head Constable Intazar Ahmad.

14. The prosecution also produced documentary evidence in support of the prosecution case i.e. Written Report (Ex. Ka-1), Panchayatnama (Ex. Ka-2), Medical Form (Ex. Ka-3 and Ka-4), Specimen Seal (Ex. Ka-5), Letter to C.M.O (Ex. Ka-6), Recovery Memo (Ex. Ka-7 and Ka-8), Charge Sheet (Ex. Ka-9), Postmortem Report (Ex. Ka-10), Site Plan (Ex. Ka-11) and F.I.R. (Ex. Ka-12).

15. Prosecution Witness-1 : Sunil Singh, who is the informant of the First Information Report dated 2 July, 2006 has proved the First Information Report as Ex. Ka-1. He has stated that the occurrence is of 9 months earlier; he was living in a tenanted accommodation in the house of Rajendra Singh along with his family; along with Sunil Singh his wife Renu Devi and mother, the victim, was also residing; on the date of occurrence as usual his mother (the victim) was sleeping in the Veranda outside his room; the informant and his wife were sleeping on the terrace; at 12:00 in the night his neighbour Manvir was seen walking near the place where the mother of the informant was sleeping; informant and his wife went to sleep; when the informant and Renu Devi and his son Deepak woke up at 5:00 in the morning and came down to room, his neighbour accused - Manvir was washing all the blood stains from the floor of his room; when he tried to look into the room of Manvir, he closed the door and did not allow him to see the blood stains; when the informant, his wife and his son saw the victim, she was dead and her petticoat was torned and blood was coming out from the private part of the deceased; Manvir tried to run away from the house however he was caught by the informant; mother of the informant was subjected to rape and murdered by the accused Manvir; mother was murdered between 12:00 in the night and 5:00 in the morning. He has also stated that the informant has lodged First Information Report at Police Station, Sector 49, NOIDA and the scribe of the First Information Report was his son Tinku who has written the First Information Report on his verbal instructions. The said witness has lodged First Information Report at the Police Station on 2 July, 2006.

16. Prosecution has further produced Smt. Renu Devi, wife of Sunil Singh, as Prosecution Witness-2. She has stated that she was residing at Village Agdhapur at a tenanted accommodation of Rajendra Singh along with his husband and family; her mother-in-law was resident of Bihar; about one month prior to the incident her husband brought the deceased to Agdhapur; since then she is residing with them; in the night of 1 / 2 July, 2006, she and her husband Sunil and children were sleeping on the terrace and her mother-in-law was sleeping in the Veranda on the ground floor; at 12:00 in the night neighbour Manvir was walking around the place where her mother-in-law was sleeping; at about 12:00 in the night she and the family members had gone to

sleep and woke up at 5:00 in the morning; when she came down in the morning she found blood on the floor at the place where her mother-in-law was sleeping and Manvir was washing the blood stains from the floor; Manvir on seeing her and other family members coming down left the cleaning of the floor and went into his room; her mother-in-law was lying dead with blood; blood was oozing out from the private part; there was bite injury on the cheeks of the deceased; on seeing deceased she was under impression that she was subjected to rape; she has also stated that at that time Manvir was in his room and he had locked his room from inside; when his son Deepak knocked the door of the room of Manvir, he opened and tried to run away but was caught and was handed over to the police.

17. Prosecution examined Master Deepak, son of Sunil Singh, as Prosecution Witness-3. He has testified that deceased is his grandmother and she was murdered on 2 July, 2006; body of the deceased was sealed before him; inquest report was also filled before him; the inquest report was also signed by him. The witness has identified his signature on the inquest report.

18. Prosecution examined Anil, son of Rajendra Singh, as Prosecution Witness-4. He has stated that the incident is of 2 July, 2006 and he has seen the body of the deceased; police had sealed the body of the victim in his presence; the inquest report was filled in his presence and he has signed the inquest report. The said witness has identified his signature on the inquest report.

19. Prosecution has examined S.I. Matadeen Verma, as Prosecution Witness-5. He has stated that on 2 July, 2006 he was posted at Police Station, Sector 49, NOIDA as Sub Inspector; on the relevant date on the direction of the Station House Officer Sri Vishwajeet Singh, he had filled the Panchayatnama of deceased; he had prepared the inquest report at the tenanted accommodation of the informant; he has identified his signature and handwriting on the Panchayatnama and the signature of the Panch witnesses on the inquest report. The inquest report was marked as Ex. Ka-2. He has also testified that the Police Form No.13 Photo Laash, Namuna Mohar and Chitthi C.M.O. was prepared by him and the same was marked as Exhibits Ka-3 to Ka-6. The said witness has also recovered pillow on which there were blood stains from the place of occurrence and three pieces of Bedsheet (Chaddar) which was also blood stained and one broom (Jharu) which was also blood stained; Naresh Mahto and Sunil Kumar Singh are witnesses to the aforesaid recovery; recovered articles were sealed and the recovery memo was prepared; he has identified his handwriting and signature on the recovery memo and the same was marked as Ex. Ka-7 before the trial court; on 2 July, 2006 after arrest of accused Manvir, recovered the underwear of the accused in the presence of witnesses Naresh Mahto and Sushil Kumar Singh and the same was sealed by him; he had prepared the recovery memo and has identified his handwriting and signature on the recovery memo and signature of the Naresh Mahto and Sushil Kumar Singh. The recovery memo of the underwear is marked as Ex. Ka-8 before the trial court. The material exhibits of the recovery were identified by the aforesaid witness. He has also stated that on the place of occurrence he sealed the dead body of the deceased and sent the same for postmortem through Constable Manjeet Singh.

20. The next prosecution witness produced is Sri R.B. Kaul, Sub Inspector, Thana Dadri, District Gautambudh Nagar, as Prosecution Witness-6. He had stated that on 2 July, 2006, he was posted as Station House Officer, Police Station Sector 49, NOIDA; on 3 July, 2006 he had received the pathology report of deceased; on 8 August, 2006 he had recorded the statements of Sub Inspector Matadeen Verma, Constable Manik Chand and Constable Manjeet Singh in the Case Diary; on 8 August, 2006, he had submitted charge sheet against the accused Manvir. The aforesaid witness has identified the handwriting and his signature on the charge sheet and the charge sheet was marked as Ex. Ka-9.

21. Prosecution examined Dr. Madan Lal, as Prosecution Witness-7. He has stated that on 2 July, 2006, he was posted at District Hospital, NOIDA, Gautambudh Nagar as Eye Surgeon; conducted the postmortem of deceased, aged about 80 years; postmortem was held on 2 July, 2006 at about 4:30 p.m.; the dead body of the deceased was brought by Sipahi C.P. No. 777 Manik Chandra and C.P. No. 917 Manjeet Singh, Police Station, Sector 49, NOIDA. He has also testified the following injuries:-

"वाह्य परीक्षणः- शरीर पर अकड़न मौजूद थी आंखे बन्द थी।

मृत्यु पूर्व चोटेंः-

1- 7 X 7 से०मी० के आकार की कालिक दाहिनी आंख के चारो तरफ तथा चेहरे पर मौजूद थी।

2- रक्त स्त्राव तथा कटे फटे घाव महिला के आन्तरिक जननअंग [Vagina] चारों तरफ 20 X 20 से०मी० आकार का घाव मौजूद था।

3- दांत के निशान गर्दन के सामने तथा बायी तरफ 6 X 2 सेमी के एरिया पर मौजूद थे।"

22. He has stated that the injuries were one day old and the death was as a result of shock due to ante mortem injuries. The said witness has identified his handwriting and signature on the postmortem report and the postmortem report was marked as Ex. Ka-10.

23. Prosecution examined Vishwajeet Singh, as Prosecution Witness-8. He has deposed that on 2 July, 2006 he has taken statements of F.I.R. Lekhak H.C. Intazar Ahmad, informant Sunil Singh and recorded the same in the case diary; on his direction the inquest report was prepared by S.I. Sri Matadeen and the body was sealed for sending the same for postmortem; he has identified the inquest report and has stated that the inquest report was prepared on his direction and the inquest report contains his signature; inquest report was exhibited as Ex. Ka-2; he had visited the place of occurrence and prepared the site plan of the place of occurrence; identified his handwriting on the site plan and the same was marked as Ex. Ka-11; on 2 July, 2006 he arrested Manvir and recorded his statement in the case diary; the underwear of the accused Manvir was also recovered and the recovery memo was prepared; the underwear of the accused Manvir was having blood stains; recorded statements of Smt. Renu Devi and Deepak and witness Tinku in the case diary; on 6 July, 2006 recorded the statements of Anil Kumar, Satveer Singh, Rajvir, Deepak, Naresh Mahto and Sushil Kumar in the case diary; on 10 July, 2007 sent the slide for examination and the articles recovered

from place of occurrence was sent for forensic examination.

24. Prosecution has examined H.C. 49 Intazar Ahmad, Police Station Sector 49, District Gautambudh Nagar, as Prosecution Witness-9 who has stated that on 2 July, 2006 on the information of Sunil Kumar, son of Kailash Singh, he has prepared the Chik No. F.I.R. No. 105/06 in Case Crime No. 136/06 under Sections 376 and 302 I.P.C,. and had registered the same; he has also identified the GD entry and stated that the same is in his handwriting and under his signature and same was marked as Ex. Ka-12.

25. In the present case, there are no eye witness of the occurrence and the incident is of night, outside the room of the informant. The occurrence is based on the circumstantial evidence. The PW-1 (Sunil Singh) and PW-2 (Smt. Renu Devi) had testified before the trial court that the deceased on the night of occurrence was sleeping outside the room of the informant and the room of the accused Manvir was nearby; when the informant and his family members (who were sleeping on the terrace) came down in the morning they saw that accused Manvir was cleaning the blood stains on the floor with the broom. Aforesaid witnesses further stated that on seeing the said witnesses, the accused Manvir went inside the room and locked his room.

26. It is to be noted that under Section 8 of the Indian Evidence Act, 1872 the conduct of the accused is relevant if such conduct is influenced by any fact in issue or relevant fact and whether it was previous or subsequent thereto. Section 8 of the Evidence Act is reproduced hereinbelow :-

"8. Motive, preparation and previous or subsequent conduct.--Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto."

27. This section embodies the rule that the testimony of resgestae is allowable when it goes to the root of the matter concerning the commission of the crime. The conduct of a person involved in crime becomes relevant if his conduct is related to the incident that happened. Where a crime has been committed, the court has to take into account both the previous and subsequent conduct of the accused pertaining to the commission of the crime. In certain cases, the previous conduct of the accused throws light on whether the accused is innocent or guilty whereas in some cases it is the subsequent conduct that becomes very important in determining the innocence or guilt of the accused. The Apex Court in the case of **Anant Chintaman Lagu Vs. State of Bombay, AIR 1960 SC 500** observes thus :-

"(15)... A criminal trial, of course, is not an enquiry into the conduct of an accused for any purpose other than to determine whether he is guilty of the offence charged. In this connection, that piece of conduct can be held to be incriminatory which has no reasonable

explanation except on the hypothesis that he is guilty. Conduct which destroys the presumption of innocence can alone be considered as material..."

28. In the present case, deceased was found in the morning near the room of the accused. Deceased had gone to sleep at night in front of the room of the informant who is his son and the informant and his family members were sleeping on the terrace of the room. When the informant and his family members came down in the morning they found that the accused was cleaning the blood stains with the broom and on seeing the informant and family members, the accused went into his room and locked his room. The said facts have been duly testified by the witnesses produced by the prosecution. The said facts are relevant under Section 8 of the Evidence Act and indicates towards the fact that the accused is guilty of the offence.

29. It is to be noted that the broom used by the accused has been recovered by the Investigating Officer and the recovery memo dated 2 July, 2006 was prepared. The recovery memo is marked as Ex. Ka-7. A perusal of the said recovery memo would further indicate that the broom was stained with blood. P.W. 5 - S.I. Matadeen Verma has proved the recovery memo dated 2 July, 2006 and has stated that the broom was recovered by him from the place of occurrence and the broom was having blood stains.

30. Investigating Officer S.I. Matadeen Verma (P.W. 5) has further recovered pillow from the place of occurrence. The pillow was blood stained. The recovery memo dated 2 July, 2006 was prepared by the Investigating Officer in respect of recovery of the pillow from the place of occurrence and the same was marked as Ex. Ka - 7. The said witness in his testimony proved the recovery memo and stated that the pillow was blood stained. He has further stated that the blood stained pillow was recovered from the place where the body of the deceased was lying.

31. The Investigating Officer S.I. Matadeen Verma (P.W. 5) has further recovered three bedsheets from the place of occurrence. Bedsheets were blood stained. Recovery memo dated 2 July, 2006 was prepared by the Investigating Officer in respect of recovery of three bedsheets from the place of occurrence and the same was marked as Ex. Ka-7. The said witness in his testimony proved the recovery memo and has stated that the bedsheets were blood stained. He further stated that the blood stained bedsheets were recovered from the place where the body of the deceased was lying.

32. The body of the deceased was sent by the Investigating Officer for post-mortem examination. The post-mortem examination of the deceased was held on 2 July, 2006 at 4:30 p.m. by Dr. Madan Lal (P.W.-7) who was posted at District Government Hospital, Noida, Gautam Budh Nagar. The said witness has identified the post mortem report and the same was marked as Ex. Ka-10.

33. The nature of the injuries suffered by the deceased indicates that the death of the deceased was not natural. In the opinion of the doctor who conducted the post-mortem examination, the deceased died as a result of shock due to anti-mortem injury.

34. The Investigating Officer also prepared an inquest report of the deceased

on 2 July, 2006. The inquest was held on 2 July, 2006 at 7:15 a.m. The inquest report is marked as Ex. Ka-2. Inquest report was prepared by S.I. Matadeen Verma (P.W. 5). The said witness has proved the inquest report dated 2 July, 2006. He has stated that the inquest report was prepared by him and was in his handwriting. He also stated that the inquest report has been signed by him. The object of inquest proceedings is to ascertain whether a person has died under unnatural circumstances or unnatural death and if so, what is the cause of the death.

35. As per the opinion of the Panch witnesses, the death of the deceased was unnatural and was a result of injury sustained after rape. The Investigating Officer conquered with the opinion of the Panch witnesses. In view thereof, the death of the deceased was unnatural and injuries were sustained by the deceased and blood was seen in the private part of the deceased. The witnesses P.W.-1 and P.W.-2 had also described the injury sustained by the deceased in their statements.

36. P.W.-1 (Sunil Singh) in his statement before the trial court has stated as follows:-

"मैंने तथा मेरी पत्नि व मेरे लड़के ने अपनी मां दरबी देवी को देखा तो वह मरी पड़ी थी तथा उसका पेटीकोट फटा पड़ा था तथा उसके गुप्तांग से खून जा रहा था।

मैंने अपनी मां का शव देखा था। उसके दोनों गालों पर दातों से काटने के निशान थे। गले पर नाखूनों के खरोंचों के निशान साइड से थे। बायें तरफ थे। जाँध पर छुरा मारा हुआ था दाहिनी जाँध में कमर से सट कर। इसके अलावा मां का खून से कपड़ा भीगा था।"

37. P.W.-2 (Smt. Renu Devi) in her statement before the trial court has stated as follows:-

"मैंने अपनी सास को देखा तो वह मरी पड़ी थी तथा खून से लथपथ थी। मैंने उसका पेटीकोट उठाकर देखा था तो उसके गुप्तांग से खून आ रहा था तथा उसके गाल पर भी काट रखा था।"

38. The prosecution has brought on record the circumstantial evidence and medical evidence including the conduct of the accused immediately after the alleged occurrence which points towards the guilt of the accused and as such, the prosecution has proved its case beyond reasonable doubt.

39. Learned counsel for the appellant has submitted that there are no independent witness of the alleged crime and the witnesses P.W.-1 and P.W.-2 are relative of the deceased and as such, the testimony of P.W.-1 and P.W.-2 cannot be relied upon.

40. 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 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. 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 Apex Court in **Kartik Malhar Vs. State of Bihar, (1996) 1 SCC 614** 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.

41. Merely because the witnesses are family members their evidence cannot *per se* be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. 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. There is no bar in law on examining family members as witness. Evidence of a related witness can be relied upon provided it is trustworthy.

42. The Supreme Court in **State of Uttar Pradesh Vs. Samman Dass, (1972) 3 SCC 201** observed as under:-

"23...It is well known that the close relatives of a murdered person are most reluctant to spare the real assailant and falsely involve another person in place of the assailant..."

43. In **Khurshid Ahmed Vs. State of Jammu and Kashmir (2018) 7 SCC 429**, the Supreme Court on the issue of evidence of a related witness observed as under :-

"31. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused."

44. The prosecution case is that the incident is of night and of a place where the informant along with his family members and the accused were residing as tenants and as such, the incident has occurred inside the house and at night. The incident has occurred at a place which is not ordinarily accessible by the public at large or the incident is of the private house, under normal circumstances an independent witness may not be available and the related witnesses may be natural witness. Further circumstantial evidence plays a vital role in finding the truth of the occurrence.

45. In the instant matter, we find the testimony of the witnesses to be consistent and reliable, and therefore reject the contention of the appellant that the testimony of the witnesses must be disbelieved because they are close relatives of the deceased and hence interested witnesses.

46. Counsel for the appellant has urged that there is difference in the injuries stated by the prosecution witness and the medical evidence. In the present case, there is no eyewitness to the alleged occurrence and the prosecution case rests on the circumstantial evidence. The injuries noted by the Prosecution Witness No. 1 and Prosecution Witness No. 2 are based on the observation made by them when they reached the place of occurrence. The inquest report was prepared in the presence of Prosecution Witness No. 3 and Prosecution Witness No. 4. The observations made by the witnesses (who are related to the deceased or who are independent witnesses) having no medical

expertise their observation may not be as accurate as the observation of a doctor who is conducting the post-mortem examination. The injuries which are common in the witness account and the medical examination are that the deceased suffered bite injury on her cheeks; injury in the private part of the deceased. The argument of the learned counsel for the appellant has no force as the injuries indicate that the deceased was subjected to rape prior to her death. It is further to be noted that although the medical evidence of the doctor has not indicated in his post-mortem report with regard to the allegations of rape however the nature of injury sustained by the deceased itself indicate that the deceased was subjected to rape prior to her death. It is also to be noted that the defence has not given any suggestion to the doctor who conducted the post-mortem that the deceased was not subjected to rape.

47. It is argued by the learned counsel for the appellant that the First Information Report has been lodged on the dictation of the Station House Officer and the time for scribe of the First Information Report has been stated as 6:15 a.m. whereas the witness has stated that the First Information Report was scribed at 9:00 a.m. As per the First Information Report dated 2 July, 2006 (Ex. Ka-12), information was received at 6:15 a.m. First Information Report has been lodged by Sunil Singh (P.W.-1). Said witness in his cross-examination has stated that the report was scribed by Tinku on the questioning of the Station House Officer; Station House Officer on the narration of the incident by Sunil Singh has got the report scribed by Tinku; report was taken by the Station House Officer at 9:00 a.m. It is on the aforesaid basis that the learned counsel for the appellant states that there is a contradiction in the time of lodging of the First Information Report and the manner in which the First Information Report was lodged. The statement of the Prosecution Witness No. 1 - Sunil Singh confirms the fact that the First Information Report was lodged on the basis of the information provided by the informant-Sunil Singh. The statement also indicates that information stated in the report dated 2 July, 2006 is based on the facts provided by the informant which was described on the directions of the Station House Officer. An ordinary citizen who has suffered grief in family member or who is not well educated may not be in a position to provide information in a proper manner and in such a situation if the police officer has assisted the informant in lodging the First Information Report in proper manner, the same would not in any manner dislodge the prosecution case. It is to be noted that the officer concerned was not having the knowledge of the facts stated in the First Information Report and as such, he could not have in any manner changed the circumstances stated in the First Information Report. Insofar as the time when the First Information Report was lodged is concerned, as per the First Information Report, it was lodged at 6:15 a.m. whereas as per the statement of Prosecution Witness No. 1, the information was lodged at 9:00 a.m. The Prosecution Witness No. 1 has proved the First Information Report. It is to be noted that the witness was examined on 4 April, 2007 and the cross-examination was extended to 23 July, 2007. A person who is subjected to long cross-examination may not be able to describe the incident and the time as accurately by lapse of time and the same will not in any manner dislodge the prosecution case.

48. It is submitted by counsel for the appellant that at the time of preparation of

the inquest report, the first information report was not in existence. The inquest of the deceased was conducted on 2 July, 2006 at 7:15 a.m. The inquest report was marked as Ex. Ka-2 before the trial court. The inquest report specifies the case crime number of the first information report and the date and time when the information was received at the police station. The object of the inquest proceedings under Section 174 Cr.P.C is to ascertain whether a person had died under unnatural circumstances or unnatural death and if so what is the cause of death. The question regarding the details as to how the deceased was assaulted or who assaulted her or under what circumstances she was assaulted is foreign to the ambit and scope of the proceedings under Section 174 Cr.P.C. Mention of the name of accused and the eyewitness in the inquest report is not necessary. Due to non mentioning of the name of the accused in the inquest report, it cannot be inferred that First Information Report was not in existence at the time of inquest proceedings.

49. It is urged on behalf of the appellant that in the pathological report no spermatozoa was found and as such the prosecution story is not reliable. In the present case the circumstantial evidence as stated hereinabove points towards the guilt of the accused. It is further to be seen that in all cases the spermatozoa may not be traced. At times it happens that the accused is not able to commit the crime completely and in such a situation the spermatozoa may not be found. In a case where the slide is sent for examination with delay there are chances that the spermatozoa may not be found. In the present case Prosecution Witness No. 8 has stated that he had sent the slide for examination on 10 July, 2007 to the Forensic Science Laboratory. Under the circumstances, if the spermatozoa is not found the same would not affect the prosecution case.

50. It is further submitted on behalf of the appellant that the blood stained soil was not recovered by the Investigating Officer and as such the prosecution case is not trustworthy. Bloodstained soil is recovered from the place of occurrence in order to establish/prove the place of occurrence. Accused has not stated that the place of occurrence is somewhere else. The accused has not given suggestion to any of the witnesses that the occurrence took place at some other place. It is further to be seen that the Investigating Officer has prepared the site plan of the place of occurrence and the same was marked as Ex. Ka-11 before the trial court. The site plan was duly proved by the P.W.-8. Site plan was prepared on 2 July, 2006. Further, the witnesses of fact have also given detailed account of the place of occurrence and the circumstances which prove towards the guilt of the accused.

51. It is submitted on behalf of the appellant that the informant and other witnesses of fact have stated that the accused was caught on the place of occurrence and was handed to the police whereas the Investigating Officer has arrested the accused from petrol pump. The contradiction pointed out by counsel for the appellant with regard to the place and manner of arrest of the accused is without any force. In this respect, it is to be seen that the police tries to show the arrest of the accused in order to enhance their service record. The contradiction pointed out will not demolish the prosecution case when there is other cogent and trustworthy evidence pointing towards the guilt of the accused.

52. On the basis of the aforesaid facts and circumstances, the prosecution has proved its case beyond reasonable doubt. The allegations against the accused - appellant under Sections 376 and 302 of the Indian Penal Code stands proved by the prosecution.

53. We do not find any infirmity in the impugned judgement dated 5 December, 2007 and sentence dated 6 December, 2007 passed by the trial court convicting the accused - appellant for offence under Sections 376 and 302 of the Indian Penal Code. The sentence awarded by the trial court is in accordance with law and needs no interference.

54. As a result, the present appeal lacks merit and is dismissed.

55. Registrar General of this Court is directed to pay an honorarium of Rs. 20,000/- to Ms. Abida Syed, learned Amicus Curiae for rendering effective assistance in the matter.

56. Let the lower court record be transmitted back to court below along with a copy of this order.

(2022)05ILR A145
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.04.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
HON'BLE SUBHASH CHANDRA SHARMA, J.

Criminal Appeal No. 5107 of 2003
&
Criminal Appeal No. 5642 of 2007
&
Criminal Appeal No. 4990 of 2003

Phool Singh & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri N.K. Mishra, Sri Apul Misra, Shilpa Ahuja

Counsel for the Resondent:
Govt. Advocate, Sri Mahesh Chandra Dwivedi

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 374(2) - Indian Penal Code, 1860-Sections 302/149, 324/149, 148-challenge to –conviction-modification of sentence- offence of murder-five appellants convicted-Fires opened by the appellants hit the head, back, chest, hands and face of the victim who fell down at the door of the house and died-one child also sustained pellet injuries-deceased was the witness in one criminal case-appellants were having ill will against the deceased on account of his evidence-appellant served 20 to 21 years in jail-It is not permissible for the Court to fix the period of life sentence to certain years-period of life sentence is commuted by appropriate Government in terms of section 55 IPC and 433, 433-A of Cr.P.C.-It is within the discretion of the State Government to grant remission to life convict after he has served minimum 14 years of sentence in jail-Apex Court while commuting the death sentence to life had fixed a cap so that the convicted accused would not be entitled to seek remission prior to expiry of said period.(Para 1 to 66)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Brajendra Singh Vs St. of U.P.(2012) 4 SCC 289

2. Ashok Debbarma @ Achak Debbarma Vs St. of Tripura(2014) 4 SCC 747

3. Sarat Chandra Rabha & ors.. Vs Khagendranath & ors.. (1961) AIR SC 334

4. Gopal Vinayak Godse Vs St. of Mah. & ors. (1961) AIR SC 600

5. Maru Ram Vs UOI (1980) AIR SC 2147

6. Swamy Shraddananda (2) Vs St. of Kar. (2008) 13 SCC 767

7. Sahib Hussain @Sahib Jan Vs St. of Raj.(2013) 9 SCC 778

8. Gurvail Singh@ Gala Vs St. of Punj. (2013) 10 SCC 631

9. UOI Vs V. Sriharan @ Murugan & ors. (2016) 7 SCC 1

10. Vikas Yadav Vs St. of U.P & ors. (2016) 9 SCC 541

11. Jitendra @ Kalla Vs St. of Govt of NCT of Delhi (2018) AIR SC 5253

12. Reference: Shankarlal Gyarasilal Dixit (1981) 2 SCC 35

13. Reference: Raju @ Balachandran & ors. Vs St. of T.N. (2012) 12 SCC 701

14. St. of M.P. Vs Ratan Singh (1976) 3 SCC 470

15. Bhagirath Vs Delhi Admin.(1985) 2 SCC 580

16. Duryadhan Rout Vs St. of Ori.(2015) 2 SCC 783

17. Naib Singh Vs St. of Punj.(1983) 2 SCC 454

18. Askok Kumar Vs UOI (1991) 3 SCC 498

19. Subhas Chander Vs Krishan Lal (2001) 4 SCC 458

20. Mohd Munna Vs UOI (2005) 7 SCC 417

21. Raj Kumar Vs St. of U.P. (2019) 9 SCC 427

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

1. Heard Sri Apul Mishra learned Advocate on behalf of appellants Phool Singh, Hari @ Harish Chandra and Charan, Sri Vinod Kumar learned Advocate on behalf of appellant Kallu and Sri Roopak Chaubey learned A.G.A for the State.

2. These three connected appeals are directed against the judgment and order dated 30.9.2003 passed by the Sessions Judge, Mahoba in Sessions Trial no.55 of 1998 arising out of Case Crime no.219 of 1997 P.S-Kulpahad District-Mahoba whereby five appellants namely Kallu, Phool Singh, Hari @ Harish Chandra, Charan and Jogendra have been convicted for the offence under Section 302/149 I.P.C and sentence for life imprisonment; under Section 324/149 I.P.C they were sentenced for rigorous imprisonment for three years as also for the offence under Section 148 I.P.C. punishment for which is two years rigorous imprisonment. All the punishment are to run concurrently.

These three connected appeals are filed by five accused persons, amongst them one appellant Jogendra had died and the appeal on his behalf has been abated.

3. The prosecution story unfolds with a first information report lodged on 19.11.1997 at about 17.00 hours which was on a written report given by Ratan Singh s/o Karore Yadav resident of Kulpahad, Mahoba. As per the written report, the brother of the first informant namely Jai Singh while going to his fields at about 3.00 p.m on 19.11.1997 was attacked by Kallu and Phool Singh by their 12 bore gun and rifle. At that point of time, the victim was near the house of Tikka Ram and was heading towards "Arjun Bandh" from his house. The fires opened by Kallu and Phool Singh hit at the hands of Jai Singh and he ran towards his house. At that time appellants Jogendra, Hari and Charan came out of the house of the Kallu carrying

12 bore guns and started firing at the victim Jai Singh. These persons also fired at the back of the victim Jai Singh. As per the version of the first informant in the written report, the fires opened by the appellants hit the head, back, chest, hands and face of the victim who fell down at the door of his house and died. In the course of firing, one child Sunil s/o Kallu Teli aged about four years had also sustained pellet injuries in his Torso. The motive of committing the crime had been assigned to appellant Charan and Jogendra who were accused in criminal case wherein the deceased was a witness. It was stated that the appellants were having ill will against the deceased on account of his evidence. The incident was witnessed by the younger brother of the deceased namely Todan and one person named Bhaiyan s/o Amar Singh Yadav resident Ragauli P.S-Srinagar and Mohan Singh s/o Balkhandi Sela.

4. Based on the written report, check F.I.R was prepared by the Constable Moharrir P.S-Kulpahad examined as P.W-3. This witness had proved the check report as Exhibit Ka-2 and the G.D entry no.25 dated 19.11.1997 at 17:00 hours as Exhibit Ka-3. In cross, P.W-3 had proved that the written report bears thumb impression of the first informant and the copy of the check was handed over to the Investigating Officer before he proceeded to the spot. The suggestion that the written report was scribed and the check FIR was lodged after the Investigating Officer had returned from the spot had been categorically denied.

5. The papers prepared during the course of investigation had been proved by the Investigating Officer examined as P.W-7, who has deposed that he was posted as Station House Officer in P.S-Kulpahad on the date of the incident and the FIR was lodged in his presence. The investigation was received by him and he proceeded to the place of the incident where the statements of the first informant and other witnesses were recorded. However, as by that time, the night had set in and there was no sufficient light, the dead body and other incriminating material relating to the incident were kept preserved by the police officials posted there. On the next date, i.e 20.11.1997, the inspection of the site of the incident was made and the site plan was prepared which was exhibited as Exhibit-Ka-
6. The blood stained and plain earth collected from the spot was exhibited as Exhibit Ka-7 and six empty cartridges recovered from different places of the incident were noted in a recovery memo which is Exhibit-Ka-8. The inquest of the body was made between 7.30 a.m to 8.30 a.m and the body was sealed and sent for post mortem through two constables after preparation of other related papers. The inquest and other related papers were exhibited as Exhibit-Ka-9 to Exhibit Ka-13. On 24.11.1997, the accused Kallu, Charan and Jogendra were arrested and their statements were recorded. The accused Phool Singh was arrested on 29.11.1997 and his statement was recorded and the statement of accused Hari was noted on 12.12.1997. After recording statements of other material witnesses, chargesheet was prepared and filed as Exhibit-Ka-14. The blood stained, plain earth and shoes of the two deceased were exhibited as material Exhibit-1, 2 and 3; respectively. P.W-7 had deposed that the case property was sent to the forensic laboratory.

6. The doctor conducted post mortem had been examined as P.W-6. He had proved injuries on the person of the deceased as under:

"(1) Fire arm wound of entry 2.5 cm x 2.0 cm over left temporal region 8 cm above left tragus of ear, Shape oval, margin

abraded, Clean cut with fracture of left temporal bone directing above and forward toward right side, cork four one plastic tikli recovered from right side cerebral cortics and 19 pellets also.

(2). Fire arm would of entry 2 cm x 2 cm size over left lower jaw, 1 cm below left angle mouth, circular in shape, margin inverted. Left side mandible bone fractured in multiple pieces, directed forward and upward to left side.

(2B). Fire arm wound of entry 3 cm x 5 cm in size over left side of cheek 2 cm...to left tragus of ear margin....oval in shape.

(3). Contusion 7 cm x 4 cm right side of maxillary prominence with fracture of right side maxilla bone.

(4 a). Firearm would of entry 8 cm x 4.5 cm, gutter shape over left mid part of upper area...lateral aspect of clavicle 12 cm below tip of left shoulder joint margins inverted, direction upward and forward anterior and posterior.

(4 b). Fire arm wound of exit 12 cm x 8 cm in size irregular shape left upper arm 10 cm shoulder joint, margins outward.

(5) Multiple abrasions of 2.5 cm x 2.5 cm in size, circular in shape 9 cm x 7 cm size area over left lateral aspect of chest below posterior auxillary fold 13 in number minimum aspect 7 cm above skin deep.

(6 a) Firearm wound of entry of 2 cm x 5 cm size over sternum 17 cm below supra sternal notch margin inverted circular in size direction anterior to posterior.

(6 b). Firearm wound of entry 2.5 x 2.5 cm right side of back heart punctured through and through right side of back of chest 9 cm below right scapula bone, heart punctured through and through.

On internal examination, it was found that brain lining was punctured pericardium punctured, heart empty, one litre pasty food was present in the stomach, gases in small intestine and gases and faecal matter in large intestine. Liver and spleen were congested.

7. The cause of death was indicated as shock and hemorrhage due to ante mortem injuries. The proximate time of death was one day. As per the observation of the doctor on the internal examination of the body, it was found that pericardium and brain lining were broken. Heart was empty. One litre food was present in the stomach. Gases in small intestine and gaseous and feacal matter was present in the large intestine. The rigour mortis had passed on from the neck and present in the upper and lower limbs. P.W-6 had opined that the proximate time of death could be 3.00 p.m on 19.11.1997. He has proved the post mortem being in his handwriting and signature, which is Exhibit Ka-5.

8. P.W-4, doctor Bhram Dutt Dwivedi had proved the injury report of the child Sunil wherein age of the injured has been mentioned about 5 years. It was deposed that the injured was brought to him by the Constable of the Police Station-Kulpahad. The injuries found on the person of the child are:-

"(1). Six small wounds of gun short measuring 0.2 cm x 0.2 cm x muscle deep over an area of 12 cm x 9 cm over the left side of the abdomen, blackening present over the wound, advised X-ray AP and lateral.

(2) 2 small wounds of gunshot measuring 0.2 cm x 0.2 cm x muscle deep 4 cm apart from each other over the medial aspect of the left foot 3 cm below the medial..., blackening present over the wound, advised X-ray AP and lateral.

The doctor has opined that both the injuries had been caused by some fire arm and had been kept under observation and referred to Superintendent CHC for radiological examination to determine the nature of injury and management.

The injury report contains left thumb impression of the injured Sunil and had been attested by the doctor concerned."

9. The two injuries found on the injured were fire arm injuries according to the doctor P.W-4. The nature of injuries though could not be determined by him because of the absence of X-Ray but P.W-4 stated that the injuries were fresh and the possibility of them occurring on 19.11.1997 at about 3.00 p.m was very much there. The injury report had been proved being in the writing and signature of P.W-4 as Exhibit Ka-'4'. He also proved that the injury report contained identification mark and the thumb impression of the injured.

10. Thus, formal witnesses had proved the documents prepared by them related to the case.

11. The forensic science laboratory report is Exhibit-Ka-'15' wherein it is mentioned that in large portion of the clothes, shoes and ring of the deceased blood was found and most of the blood was in the item nos.1, 2 and 5 which were sadri, safi and shoes of the deceased. The blood found in these items was human blood. The blood group of blood of item nos.1, 2, 4 and 5 was identified as Group-'O' and on item no.3 and 7 the blood was found disintegrated as such its blood group could not be determined.

Amongst the witnesses of fact, P.W-1 is the brother of the deceased; P.W-2 Todan Singh is another brother of the deceased; P.W-5 Bhaiyan is also an eye witnesses.

12. This is a case of eye witness account of the incident which had occurred during day hours. Challenging the order of conviction passed by the trial court, it is vehemently argued by Sri Apul Mishra learned Advocate for the appellant that as per own case of the prosecution, P.W-1 was not an eyewitness. His testimony is a hearsay evidence. Further, the presence of P.W-2, another brother of the deceased is found doubtful for various contradictions in his version and improbabilities of the circumstances put forth by him. P.W-5 Bhaiyan, a relative of the deceased is a chance witness as he was resident of a different village and the reason given by him for his presence at the spot is not convincing. One injured, boy of five years, was a passerby who had received only pellet injuries. As per own statement of the prosecution witnesses, there was enmity between the deceased and accused persons, their false implication therefore, cannot be ruled out. The whole prosecution story is manufactured and it was not possible for the witness to see entire incident from the place of their presence indicated in the site plan. The presence of P.W-1 is nowhere indicated in the site plan and he had not seen the incident.

13. From the statement of P.W-1, it is pointed out by the learned counsel for the appellants that this witness in the course of deposition could not even remember the name of an eyewitness and stated that the eyewitness was a resident of Gram Ragauli. P.W-1, in his examination in chief, deposed that the incident was witnessed by three persons namely Todan and Mohan and one relative and that the entire details of the

incident was described to him by the eyewitness. At the time of the incident, he was in his field and reached the spot hearing the sounds of fire. Mohan did not enter in the witness box. Two witnesses namely Todan and Bhaiyan were closely related to the deceased and the possibility is that the P.W-1 concocting the whole story on the description given by the alleged eyewitness had lodged the FIR. It is urged that the motive assigned by P.W-1 was that the deceased was a witness in a case of marpeet against the accused person.

14. On a suggestion that the statement of the deceased was already recorded and the accused persons had been acquitted was denied by the prosecution witnesses in a vague manner. It was admitted by P.W-1 that in the case of the murder of father of one of the appellant namely Jogender, P.W-2 Todan, his father and other brothers were named accused and the case was pending in the Court.

15. Pointing out the above facts, it was vehemently submitted by the learned counsel for the appellants that it is a case of false implication of appellant Jogendra and his acquaintance on account of the fact that the deceased and his family members were arraigned as accused in a criminal case for murder of father of Jogendra. P.W-1 had admitted that he was present in his field at the time of the incident and by the time he reached at his house, his brother was already dead and his body was inside the house. The statement of P.W-1 is that when he came besides the dead body of his brother Jai Singh, other witnesses met him there and after staying for about 20-25 minutes besides the dead body he went to the police station alongwith some villagers and injured Sunil. It took them about 1½ hours to reach the police station. P.W-5 stated that the scribe of the written report namely Lakhan Singh met him at Gondi Chauraha, 200 paces from the police station Kulpahad. After the report was scribed at that place they both went to the police station to lodge the same. The scribe of the written report had not entered in the witness box. In fact, the FIR is antetimed as it was prepared by the Investigating Officer for implication of accused persons after deliberation. And for this the first informant had given a vague statement as to how he met Lakhan Singh near the police station by chance and got the report scribed by him.

16. It is contended that noticeable is that the scribe did not enter in the witness box to explain as to how and when he had written the report and lodged it with the first informant P.W-1. Another circumstance which makes the FIR ante time is that the inquest was conducted on the next day in the morning and the explanation offered by the Investigating Officer for delay in the inquest is not convincing, inasmuch as, the body was found in the house of the deceased. It is nobody's case that electrification of the village was not done, so the reason given by the Investigating Officer that it was dark and because of insufficient light inquest was conducted in the morning is not acceptable. This fact itself shows the murder had occurred in the dead of night and no one had seen the occurrence. In fact the police had filled the blanks and the correct sequence of investigation was not followed. The above explanation offered by the Investigating Officer is nothing but an effort to present the FIR as a truthful document.

17. It is argued that the version of P.W-1 itself negates the presence of other

two eyewitness at the spot. It is vehemently contended that from the deposition of P.W-1 as also the written report and the statement of P.W-2-Todan Singh, the presence of P.W-2 at the spot is found doubtful, inasmuch as, in his deposition, this witness stated that he had witnessed the entire incident while standing at the Chabutra of the house of Bhagwan Das and two other witnesses namely Mohan Singh and Bhaiyan, who were introduced by the first informant (P.W-1) and P.W-2, were also present with him. These three persons, according to the prosecution had witnessed the entire incident while standing at the said place; whereas P.W-2 in his statement under Section 161 Cr.P.C., had stated that he witnessed the incident while standing at the door of his house and other two witnesses were also present with him. This contradiction in the statement of P.W-2 clearly prove that the place of incident was not the same as narrated by the prosecution witnesses; otherwise, there was no reason to shift the place of witnessing the entire scene. In all probability, the deceased was killed while he was sitting at the door of his house and some unknown assailants had killed him. As per P.W-1, he reached the spot hearing the sounds of the fire and the body of the deceased was inside the house. It is urged that in view of this version of P.W-1, when P.W-2 could not explain his position ie his presence at the door of his house while making deposition in the Court in consonance with his statement under Section 161 Cr.P.C., he had shifted his position conveniently. This shift in the statement of P.W-2 is a material improvement and impeach the credibility of this witnesses.

18. P.W-2 also proved enimity between the deceased and the accused persons, false implication of the accused in a blind murder, therefore, cannot be ruled out.

19. It is further contended that P.W-1, the first informant, in the written report and in his examination in chief, had assigned rifle in the hands of accused Phool Singh whereas P.W-2 who was projected as an eyewitness had assigned gun in the hands of Phool Singh. This contradiction in the statement of P.W-2 is material improvement in the prosecution case, inasmuch as, the prosecution had changed its version as no injury on the person of deceased could be related to rifle.

20. Further, it was argued that P.W-5 had been introduced by the prosecution on deliberation. This witness is brother-in-law of son of the deceased and a resident of Village Ragauli which was at a distance of 5-6 Kose from the village of the deceased. P.W-5 stated that he came to the house of the deceased to meet him without any reason, whereas P.W-2 on a question put to him stated that Bhaiyan (P.W-5) came to the village to bring his sister. In fact, P.W-2 admitted that there was no reason for P.W-5 to be at the spot. Further, P.W-1, the first informant, could not even recollect the name of this witness (P.W-5) while making his deposition, in the examination in chief. In cross of P.W-5, it has come that the body was sent for post mortem on the date of incident on 19.11.1997 as he stated that the body was taken by the Investigating Officer within one hour of going at the spot, after completion of necessary formalities and the day on which this process was completed was the day of the incident. From the inquest report and the deposition of the Investigating Officer, it is evident that the inquest was done on the next day i.e 20.11.1997. The falsity in the statement of P.W-5 is proved from the circumstances

reflected from the record and was sufficient to discard his presence at the spot. Further, P.W-5 even denied his statement under Section 161 Cr.P.C by saying that the Investigating Officer did not interrogate him nor recorded his statement. This denial also prove that P.W-5 was not an eye witness and had been introduced by brothers of the deceased in order to project a so called independent witness in a case of false implication of the accused persons.

21. With the above facts, it was further argued that as per the case of the prosecution witness firing had started in front of the house of Tika Ram which has been shown in the site plan as place (B). Eye witness (P.W-2 and P.W-5) had fixed their presence at place marked as (E). The distance between these two places as is evident from the description in the site plan is about 100 paces. P.W-5, in cross, admitted that the distance between the house of Tika Ram at place (B) (where firing had started) and house of Bhagwan Das (E) was 100 paces and all the witnesses had witnessed the incident sitting at the door of Bhagwan Das. It is argued that the place where allegedly the firing had started was quite far from the place where the witnesses were allegedly present. It, therefore, cannot be accepted that the witnesses could have seen the incident so accurately as described in the FIR.

22. It is contended that a further perusal of the site plan indicates that the deceased ran for his life from place (B) to (A) and he had received first shot at place (B). The distance between (A) and (B) as indicated in the site plan is 88 paces. The injury no.5 on the person of the deceased was such a large injury which makes it impossible to believe that the deceased could have run for such a long distance. Further, the injury nos.4A, 4B as also injury nos.6A and 6B are on such places that the deceased could not have run after getting those shots. The story narrated by the prosecution witnesses, thus, that the firing had started by the accused persons at place (D) while the deceased was at place (B) and he ran from the place (B) to (A) when other accused persons joined in firing at place (F) and he finally fell down and died at place (A), is highly improbable. The prosecution has not been able to furnish any explanation of the above query. Further, no blood was found between place (B) to (A), i.e on the road where the deceased was first hit and ran for his life which also dispels the manner of the incident as per the narration of the prosecution witnesses. More and highly probable version of the defence that the deceased was hit by someone else while he was sitting at the door of his house is worthy of acceptance.

23. Further, though rifle had been allocated to one of the accused there is no shot of rifle typically. Injury no.3 seems to have been caused by a blunt object. The witnesses projected by the prosecution are not natural witnesses. No one had seen the incident. The motive for false implication is proved from the version of the prosecution witnesses itself. The massive discrepancies in the statement of prosecution witnesses and documentary evidence, placed by the police show that the prosecution had suppressed the true version of the incident.

24. Lastly it is argued that there is no explanation for 12 hours delay in conducting the inquest when the body was found in the house of the deceased. This show that the family members of the deceased were not sure as to who were the assailants and they bought time with the aid

of police to introduce the accused persons and the place of the incidents. It is, thus, argued that the entire prosecution story is cooked up and is full of contradictions, deliberations and apparent inconsistencies. In the totality of the facts and circumstances of the case the conviction of the appellants cannot be sustained.

25. Sri Apul Mishra learned counsel on behalf of the appellant Hari further submits that this appellant had taken a categorical plea of alibi in his statement under Section 313 Cr.P.C by saying that he was in the Court of Civil Judge/J.D for recording his evidence and was not present at the spot. This plea was illegally rejected by the trial court by saying that looking to the distance of the place of incident from the District Court Mahoba, the presence of the accused appellant Hari at the spot cannot be discarded.

26. Sri Vinod Kumar learned Advocate for the appellant Kallu submits that no motive had been assigned to appellant Kallu by any of the eyewitnesses. Only suggestion of enmity with appellant Kallu as has come up in the cross of P.W-2 relates to an incident of murder of grand father of Kallu that too in the year 1965 wherein father of P.W-2 was an accused. Looking to the remoteness of the motive suggested for appellant Kallu, his involvement in the crime is false. While adopting all other argument placed by Sri Apul Mishra, Sri Vinod Kumar learned Advocate appearing for the appellant Kallu submitted that appellant Kallu is in jail for more than 20-21 years. Section 57 I.P.C prescribes that imprisonment of life is to be reckoned as equivalent to imprisonment for 20 years. The period of incarceration of appellant Kallu, therefore, is sufficient for his release from jail, even in case his conviction is upheld. While arguing on the issue of sentence, it is submitted by the learned counsel for the appellant Kallu that in view of the decision of this Court in *Criminal Appeal no.2135 of 2013 (Savir vs State of U.P)* dated 5.2.2021, the life sentence of the appellant has to be reckoned to 20 years, as in that case, this Court had fixed the term of life as 14 year and six months. In similar circumstance, the Apex Court in *Criminal Appeal no.1044 of 2012 (Shekhar vs State of M.P.)* ; Criminal Appeal no.1563-1564 of 2018 had commuted life sentence to 15 and 18 years of the period undergone by the appellants therein. The judgment of the Apex court in ***Brajendra Singh vs State of U.P1*** has been placed before us to assert that the Apex Court while commuting the death sentence had fixed the term of life imprisonment as 21 years. In ***Ashok Debbarma alias Achak Debbarma vs State of Tripura2*** in the case of Armed Extremists death was commuted to 20 years of life imprisonment. The submission, thus, is that the High Court is empowered to put a cap/ceiling of keeping the accused behind the bar and commute the life sentence to a fixed term. In view of the circumstance of the case, keeping the accused Kallu in jail further is against the spirit of the decisions of the Apex Court.

27. Learned A.G.A, in rebuttal, submits that there is no suggestion to P.W-1, first informant with regard to the FIR being ante time. P.W-3 is a natural witness. There is no suggestion of enmity with this witnesses. The injured was examined on the date of the incident itself and it was proved that he was brought to the doctor by a police constable with Majrubi Chitthi. It was a broad day light murder and sequence of events established by the prosecution witnesses gives details of the occurrence. In the FIR if some details are not provided,

that would not lead to an inference that the prosecution had presented a concocted story. The eye witnesses of the occurrence are natural witnesses. Minor contradictions in their version rather prove their truthfulness as they did not bother about corroborating their evidence while narrating the occurrence. The reason why blood was not found between the place (B) and (A) is explained from the manner in which the deceased was shot. The entire occurrence between two points could have been completed within 15-20 seconds and further the inquest report and the forensic report indicate that large amount of blood was found on the clothes and shoes of the deceased. It was winter time and dress like Sadri could soak a lot of blood. The blood found in the shoes of the deceased further supports the prosecution case that the deceased ran for his life from place (B). In the FSL report also human blood was found on the clothes, shoes and other articles.

28. It is further argued that the version of P.W-1 also shows the truthfulness of the prosecution story discarding all hypothesis of false implication. Had P.W-1 concocted the story he could have very conveniently included himself as an eyewitness. The contention that P.W-5 was a chance witnesses is not acceptable rather he was a natural witness who had proved his presence in the house of the deceased from about 2-3 days prior to the date of incident. The reason given by P.W-5 to come to the house of the deceased could not be successfully disputed by the defence. However, even if P.W-5 is taken as a chance witness as per the version of the defence, his testimony cannot be discarded as a whole by the mere fact of him being a chance witnesses. The settled law is that if a witness is found to be present on the place of the incident by chance, his testimony has to be carefully scrutinized by the Court with due care and circumspection and not that it must be discarded. The contradictions shown in the statements of P.W-1 and P.W-5 were not put to P.W-5. The arguments of the learned counsel for the appellants, therefore, cannot be accepted.

29. It is further argued by learned A.G.A that it was a prompt report of the occurrence and the statements of the witness under Section 161 Cr.P.C. were recorded on the same day. P.W-1, P.W-2 and P.W-5 fixed their presence at the time of the incident in their first version before the Investigating Officer. P.W-5 had no personal enmity with the accused persons. Other two witnesses namely P.W-1 and P.W-2 though are related but cannot be said to be inimical. Their testimony is natural. The motive that the deceased was a witness against Jogendra, a named accused, in a criminal case had been proved from the statement of the prosecution witnesses. Further, when the accused had fired together at the deceased, only inference that can be drawn is that they had prosecuted the common intention of the unlawful assembly. The medical evidence on record corroborates the occular version and the injuries. No witness had stated that the deceased was shot from close range and none of the injuries suggest otherwise. Injury no.3 had been explained by the doctor by saying that it could occur due to fall. In the ocular evidence it has come that the deceased fell down at the door of his house having received injuries between point (B) to point (A). The pieces of stones collected from place 'A' were found stained in the FSL report with human blood. Injury 4A is a gutter shaped wound which could have been caused due to rifle. All the discrepancies pointed out by the learned

counsel for the appellant, therefore, stood explained and in the light of the evidence on record, it is evident that two eyewitnesses were present from the beginning of the incident and promptness of the first information report show that there was no scope of deliberation. The conviction of the appellant, therefore, cannot be set aside.

30. On the submission of Sri Vinod Kumar learned Advocate for appellant Kallu for fixing the period of sentence of imprisonment for life, it is argued that the submissions of the learned counsel for the appellant Kallu is based on misinterpretation of the judgment. In all the decisions of the Apex Court relied upon by him, the situation was that while commuting sentence of death to life, the Apex Court put a ceiling fixing the minimum term for which the accused therein had to remain in confinement without remission. The idea was that the accused therein may not get remission prior to the tenure fixed by the Apex Court as after 14 years of life sentence, an accused may be granted remission by the State Government as per its policy. In none of the cases, the Apex Court has held that the High Court is empowered to fix an upper ceiling or cap on the period of life imprisonment. The sentence of imprisonment of life as held by the Apex Court is till the natural life of the accused which cannot be fixed in years by this Court.

31. Reliance has been placed on the judgments of the Apex Court in ***Sarat Chandra Rabha and others vs Khagendranath and others3, Gopal Vinayak Godse vs State of Maharastra and others4 Maru Ram vs Union of India5, Swamy Shraddananda (2) vs State of Karanataka6, Sahib Hussain Alias Sahib Jan vs State of Rajasthan7, Gurvail Singh Alias Gala vs State of Punjab8, Union of India vs V.Sriharan Alias Murugan and others9, Vikas Yadav vs State of U.P and others10 and Jitendra alias Kalla vs State of Govt, of NCT of Delhi11.***

32. Having heard learned counsel for the parties and perused the record, noticing that the police papers and the report prepared by the doctors were proved with the deposition of the relevant witnesses, it is pertinent to record at the inception that this is a case of eyewitness account and the murder was committed in the broad day light. The P.W-2, an eyewitness said to have seen the whole occurrence from the beginning of the firing till the deceased had succumbed to his injuries. The ocular version of P.W-2, the manner in which the deceased was assaulted, is supported from the injuries found in the medical examination. As per the statement of P.W-2 when first fire was opened on the deceased by the accused Kallu and Phool Singh, he ran for his life towards his house. In between point '(B)', (where the deceased was first hit at point) and '(A)', (the house of the deceased), at place '(F)' house of Kallu has been shown in the site plan which is undisputed. As per the version of P.W-1, other three accused persons namely Jogendra, Charan Singh and Hari pounced from place '(F)' (house of Kallu) and started firing at the deceased who finally fell at the door of his house but the accused persons continued to fire at him. This version is corroborated from the number and nature of injuries sustained by the deceased. P.W-2 is the natural occupant of the house where the deceased was residing. He fixed his presence at place '(E)' which is in front of the house of Bhagwan Das, near the house

of the deceased. The presence of P.W-2 at place (E) cannot be discarded by the mere fact that in his statement under Section 161 Cr.P.C, it was recorded that he was present at the door of his house. The said statement of this witnesses was recorded on 19.11.1997 whereas site plan was prepared on 20.11.1997 at the instance of P.W-2 who had fixed his presence at place (E). The distance between place (A) and (E) indicated in the site plan is 18 paces only. The version of P.W-2 in his statement under Section 161 Cr.P.C that he was present at the door of his house and in his cross examination that he was sitting at the Chabutra in front of the house of Bhagwan Das cannot be said to be contradictory.

33. Moreso, the statement of P.W-2 was recorded on the date of the incident itself soon after the Investigating Officer had reached the spot after registration of the FIR, we cannot loose sight of the fact that when the statement under Section 161 Cr.P.C of P.W-2 was recorded, he was overwhelmed by the manner in which his brother was assaulted, chased by the accused and then brought to death at the door of his house.

34. A witness of the incident like this where murder of his own brother had been caused by five persons in such a daring manner, cannot be expected to give each and every detail on the same day. However, it can be seen that on the very next day when the site plan was prepared by the Investigating Officer on the pointing of this witness, P.W-2 had clearly fixed his place at (E) which is in corroboration with his oral testimony in the Court. We may also take notice of the fact that looking to the distance between two places (A) and (E), if P.W-2 stated that he was at the door of his house, he cannot be said to have given any contradictory statements, inasmuch as, in common parlance a person standing outside his house or near a place outside his house, would normally say that he was at the door of his house (घर के दरवाजे पर था). This version of P.W-2 in his statement under Section 161 Cr.P.C cannot be taken literally to mean that he was standing at the door of his house and could not be at the place (E) as indicated by him in the site plan and also stated in his examination-in-chief. The presence of P.W-2 at the site of the incident, thus, cannot be doubted. The house of the witness being nearby the place where witnesses were present, the submission of the learned counsel for the appellant that there is material shift in the version of P.W-2 with regard to the place of his presence at the time of incident, is liable to be rejected.

35. P.W-5 is a witness who was related to the deceased but he was not in a direct relationship either with P.W-1 or P.W-2, brothers of the deceased. P.W-5 is the brother-in-law of son of the deceased. It is, thus, not surprising that P.W-1 could not remember his name while making his deposition in the Court. P.W-1, however, clarified that this witness (P.W-5) was a relative and resident of village of Ragauli which is correct. As regards the submission of P.W-5 being a chance witness, we do not find substance in the same for the categorical statement made by P.W-5 that he came to the house of the deceased about two or three days prior to the incident to see his sister or to bring her with him. His presence in the house of the deceased prior to the incident cannot be doubted for the minor contradictions pointed out in his testimony. In fact, there is no material contradiction in the testimony of P.W-2 and P.W-5 who both had seen the incident together from one place (E). The presence

of P.W-5 at the place (E), where another eyewitness P.W-2 was present at the time of the incident, cannot be discarded.

36. The question now is as to whether it was possible for the witnesses to see the first incident occurred at place '(B)', the distance of which was 88 paces from the place (E) (where the witnesses were present). To answer this, we may look at the site plan which is undisputed. The road on which the incident had occurred is a straight road and two assailants had opened fires at the deceased from place (D) and chased the deceased, other three assailants pounced from the house of Kallu which was located at the same road on the opposite side of the house of the deceased. It was, therefore, possible for the witnesses to identify the accused persons clearly and also the weapons carried by them. The assertion of P.W-2 that the assailants Kallu and Phool Singh had opened fire at his brother from place (D) cannot be doubted only because of the distance from the place (E) where witnesses were present. From the site plan, it can be clearly seen that the deceased was at the place '(B)' when firing had started, from there it was natural for him to run towards his house to save his life as the assailants at place '(D)' were on the other side. However, three other assailants joined at place '(F)' and they also shot the deceased resulting in his death. All the injuries on the person of the deceased are fire arm injuries and injury no.3 can be explained from the fact that the deceased fell down on the stone floor at the entrance of his house and died. No discrepancy could be found in the version of the prosecution witnesses.

37. With regard to the timing of the incident and the suggestion that it was a night incident for the reason that the inquest was conducted on the next day, we may note that the prosecution witness had proved that the first information report was lodged within two hours of the incident where the distance of the Police Station was 7 kms. The Investigating Officer had reached the spot by 6-6.30 p.m. and recorded the statements of the witnesses which fact could not be disputed.

38. The reason given by the Investigating Officer is that there was no sufficient arrangement for light and as such he made arrangements for safety of the body and other incriminating material and went back and again in the next morning he came to make inquest. This seems to be a wise decision of a prudent man as the inquest would require minute details of the position of the dead body, clothes worn by it and the details of the injuries, which may not be possible to note even in the electric light. Further, the incident had occurred in the month of November and at that point of time, the place may not be lit up sufficiently. Moreover, there is no suggestion of any enmity of the accused persons with the Investigating Officer. There is no reason before us to doubt the decision of the Investigating Officer not to make inquest in the late evening hours.

39. Further to deal with the submission that no blood was found between place (B) to (A) and, therefore, the prosecution story that the deceased ran after being hit at place (B) is false, suffice it to say that the inquest report as well as FSL report indicate that large amount of blood was found in clothes one of which was Sadri (winter clothes) and shoes of the deceased. The fact that blood was found in the shoes of the deceased itself supports the prosecution story that the deceased ran after being hit at place (B). Had the

deceased been sitting at the door of his house while being shot, as per the suggestion of the learned counsel for the appellants, there was no question of large amount of blood being found in his shoes. It is further pertinent to note that blood stained and plain pieces of stones were collected from the spot (A), the door of the house of deceased, where he fell down in the end. The FSL report indicates that human blood was found on the said articles.

40. Further inconsistency pointed out in the statement of the prosecution witnesses are minor and do not shake the prosecution version. It is settled that the errors due to lapse of memory or perception of individual should not be given undue importance. Even minor embellishment in the version of prosecution witnesses perhaps for the fear of their testimony being rejected by the Court are liable to be ignored.

41. On the question of false implication, it is to be noted that motive assigned to the accused persons or causing the murder had been proved by the witnesses P.W-1 and P.W-2 in the course of the cross examination. It is an admitted fact that the deceased was a witness in a case against one of the accused Jogendra and the suggestion of the defence that his testimony was already recorded has not been proved by any cogent evidence. On the date of the incident, the case was going on. In the said scenario, the prosecution has established the motive for the commission of the crime by definite statement. The presence of motive, if established, provides a foundation material to connect the accused with the crime. However, in a case of ocular direct evidence, even absence of motive is insignificant. As to the suggestion of false implication, we may only note that as the motive operates on the minds of different persons, it is not possible for the Court to find out motive of false implication of accused persons. It may be a strong reason to commit the crime or for false implication. ***Reference: Shankarlal Gyarasilal Dixit12.***

42. Lastly, the eyewitness are found to be natural witness whose presence on the spot could not be successfully disputed by the learned counsel for the appellants. The fact that the witnesses are related to the deceased would not be sufficient to discard their testimony as a close relative of the deceased does not, per se, become an interested witness. In law, an interested witnesses is one who is interested in securing the conviction of a person out of vengeance or enmity or due to a dispute and deposes before the Court only with that intention and not to further the cause of justice. ***Reference: Raju alias Balachandran and others vs State of Tamil Nadu.13***

43. In the instant case, the related witnesses to the deceased are two brothers and one brother-in-law of his son. The deceased was himself a witness in a criminal case against one of the accused Jogendra. There is no suggestion of enmity of the witnesses with that of the accused. The first informant, brother of the deceased had truthfully deposed he was not an eyewitness of the incident and the narration in the FIR or in his examination in chief was based on the information passed on by other two witnesses namely P.W-2 and P.W-5, who were present at the spot. P.W-5 is a distant relative, no enmity with the appellants could be attributed to him. As regards P.W-2 he is closely related witness and carefully scrutinizing his testimony, we

find that his evidence is cogent, credible and trustworthy. This witnesses can be placed in the category of wholly reliable witness.

44. In the totality of facts and circumstances of the case, it can be seen that the prosecution had proved each and every circumstance leading to the homicidal death of deceased Jai Singh from cogent and trustworthy evidence. Both ocular and medical evidence corroborate each other. No infirmity, therefore, could be found in the judgment of conviction of the trial Court. The sentence provided by the trial Court is minimum.

45. On the question of remission, Sri Vinod Kumar learned Advocate has placed reliance on two decisions of the Division Bench of this Court in *Criminal Appeal no.2135 of 2013 (Savir vs State of U.P)* and in Criminal Appeal no.1839 of 2004 (Veersen vs State of U.P) to submit that this Court is competent to fix the term of life imprisonment and direct for release of the appellant after 20 years of incarceration. The period of 14 years, according to him, has been fixed as tenure of life imprisonment under Section 57 of the Indian Penal Code.

46. Dealing with this submission of the learned counsel for the appellant Kallu, seeking his release from jail on completion of 20 years incarceration treating it as a sentence for life, we may note that the Division Bench of this Court in both the above noted decisions had relied upon the judgment of the Apex Court in ***Vikas Yadav*** *(supra)* and also referred to a decision in ***Maru Ram vs Union of India*** *(supra)* while proceeding to hold that the period of incarceration of a life convict in both the cases being more than 14 years would be just and proper while upholding the judgments of their conviction. We, therefore, first have to go through the decision of the Apex Court in ***Maru Ram*** *(supra)* wherein the challenge was to the vires of Section 433-A of the Criminal Procedure Code. While dealing with the said question, the Apex Court in ***Maru Ram*** *(supra)* in paragraph '25' had considered the Constitution Bench judgment in ***Gopal Vinayak Godse vs State of Maharastra and others*** *(supra)* wherein the concept of the nature of life sentence has been highlighted. It was noted that the Constitution Bench took the view that a sentence of imprisonment for life was nothing less and nothing else than an imprisonment which lasted till the last breath.

47. Another decision of the Constitution Bench in ***Sarat Chandra Rabha and others vs Khagendranath and others*** *(supra)* was relied therein to note that the order of remission does not wipe out the offence, it also does not wipe out the conviction. It does have an effect only on the execution of the sentence, as on remission, a convict person need not to serve that part of the sentence which has been ordered to be remitted. An order of remission, thus, does not in any way interfere with the order of the Court; and it affects only the execution of the sentence passed by the Court. The power to grant remission is executive power and cannot have the effect which the order of appellate and revisional Court would have of reducing the sentence passed by the trial Court and substituting in the decision adjudged by the appellate or revisional Court.

48. It was also noted in ***Maru Ram*** *(supra)* that the nature of life sentence is

incarceration until death, a life convict cannot be released as such until there is a release order by the appropriate Government in accordance with the Criminal Procedure Code or a clemency order in exercise of power under Article 72 or 161 of the Constitution of India. It was noted that the Constitution Bench judgment in ***Godse's case*** *(supra)* is authority for the proposition that a sentence for imprisonment of life "imprisonment of the whole remaining period of the convicted persons natural life". The relevant observations of the Constitution Bench in ***Godse's Case*** *(supra)* has been quoted therein as under:

"Unless the said sentence is commuted or remitted by appropriate authority under the relevant provisions of the Indian Penal Code or the Code of Criminal Procedure, a prisoner sentenced to life imprisonment is bound in law to serve the life, term in prison. The rules framed under the Prisons Act enable such a prisoner to earn remissions- ordinary, special and State-and the said remissions will be given credit towards his term of imprisonment. For the purpose of working out the remissions the sentence of transportation for life is ordinarily equated with a definite period, but it is only for that particular purpose and not for any other purpose. As the sentence of transportation for life or its prison equivalent, the life imprisonment, is one of indefinite duration, the remissions so earned do not in practice help such a convict as it is not possible to predicate the time of his death. That is why the rules provide for a procedure to enable the appro- priate Government to remit the sentence under s. 401 of the Code of Criminal Procedure on a consideration of the relevant factors, including the period of remissions earned. The question of remission is exclusively within the province of the appropriate Government; and in this case it is admitted that, though the appropriate Government made certain remissions under s. 401 of the Code of Criminal Procedure, it did not remit the entire sentence. We, therefore, hold that the petitioner has not yet acquired any right to release."

It was also held by the Constitution Bench in Godse's *(supra)* case that Section 57 IPC does not in any way limit the punishment for imprisonment of life to a term of 20 years. It is only for calculating fractions in terms of punishment.

49. In ***Vikas Yadav*** *(supra)*, the question was as to whether the statutory power of the State under Section 433-A Cr.P.C cannot be curtailed by the Court by prescribing a sentence for life imposing a fix term curtailing the power of remission after 14 years as envisaged under Section 433-A Cr.P.C. In ***Vikas Yadav*** *(supra)* the trial Court sentenced the appellant to life imprisonment with fine whereas the High Court while affirming the conviction and sentence had awarded sentence to appellant ***Vikas Yadav*** of life imprisonment which shall be 25 years of actual imprisonment without consideration of remission. It is in this circumstance, the aspect of legal impermissibility for imposition of the said sentence was examined by the Apex Court. It was argued therein that the Court imposed a third category of sentence by an experience directing for non granting the remission as provided under Section 433-A after expiry of 14 years which is legally not permissible, inasmuch as, the Court cannot direct the statutory provision to be kept in abeyance as a mode of sentencing structure. The challenge, thus, was that the High Court had fallen in grave error by imposing

"fix term sentence", curtailing the power for remission after 14 years, which was beyond its jurisdiction. It was also argued that in respect of the offence under Section 302 IPC, life is the minimum and the maximum is the death sentence and, therefore, the Court has a choice between the two and is not entitled to follow any other path, for that would be violative of sanctity of Article 21 of the Constitution which clearly stipulates that no person shall be deprived of his life or personal liberty except according to the procedure established by law. With that it was argued that imposition of sentence for a fix term was contrary to the procedure established by law and hence impermissible.

50. This question was answered by the Apex Court with the aid of the Constitution Bench judgment in ***Union of India vs V. Sriharan*** (supra) wherein out of several questions raised, two questions relevant for our purposes, are to be noted as under:-

"2.2 (i) Whether imprisonment for life means for the rest of one's life with any right to claim remission?

(ii) Whether as held in Shraddananda case (2), a special category of sentence; instead of death; for a term exceeding 14 years and put that category beyond application of remission can be imposed?"

51. By majority decision, the Constitution Bench after referring to its earlier decisions in ***Maaru Ram*** *(supra)*, ***Gopal Vinayak Godse*** *(supra)* and ***State of M.P vs Ratan Singh14*** opined that the legal position is quite settled that the life imprisonment only means the entirely of the life unless it is curtailed by remissions validly granted under the Criminal Procedure Code by the appropriate Government or under Article 72 and 161 of the Constitution by the Executive Head; viz, the President or the Governor of the State; respectively.

52. The decision of the Apex court in ***Bhagirath vs Delhi Administration15*** was noted in paragraph '59' of the Constitution Bench in ***Union of India vs V. Sriharan*** as under:

" Coming next to the question of set off under Section 428 of the Code, this Court held:

"11.....The question of setting off the period of detention undergone by an accused as an undertrial prisoner against the sentence of life imprisonment can arise only if an order is passed by the appropriate authority under Section 432 or Section 433 of the Code. In the absence of such order, passed generally or specially, and apart from the provisions, if any, of the relevant Jail Manual, imprisonment for life would mean, according to the rule in ***Gopal Vinayak Godse****, imprisonment for the remainder of life."*

53. In paragraph-'61', having noted the Constitution Bench judgment in ***Godse's*** and ***Maru*** *(supra)*, it was observed that:-

"61.....The first part of the first question can be conveniently answered to the effect that imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code only means imprisonment for rest of the life of the prisoner subject, however, to the right to claim remission, etc. as provided under Articles 72 and 161 of the Constitution to be exercisable by the President and the Governor of the State and

also as provided under Section 432 of the Criminal Procedure Code."

54. Further, considering the principles propounded in ***Swamy Shraddananda (2) vs State of Karanataka*** *(supra)*, it was observed in ***Union of India vs V. Sriharan****(supra)* that the said decision was a well thought out one. The special category of sentence to be considered in substitute of death penalty by imposing life sentence, ie, the entirety of life of a term of imprisonment which can be less than full life time but more that 14 years and put that category beyond application of remission, has been propounded by the Court which is the third category of sentencing for a murder convict.

55. Reverting to ***Vikas Yadav*** *(supra)*, it was concluded therein that the situation that has been projected in ***Swamy Shraddananda (2)*** *(supra)* and approved in ***Union of India vs V.Sriharan*** *(supra)* speaks eloquently of judicial experience and the fix term sentence cannot be said to be unauthorised in law. It was concluded in para-'45' that:

"Section 302 IPC authorizes imposition of death sentence. The minimum sentence is imprisonment for life which means till the entire period of natural life of the convict is over. The courts cannot embark upon the power to be exercised by the Executive Heads of the State under Article 71 and Article 161 of the Constitution. That remains in a different sphere and it has its independent legal sanctity. The court while imposing the sentence of life makes it clear that it means in law whole of life. The executive has been granted power by the legislature to grant remission after expiry of certain period. The court could have imposed the death sentence. However, in a case where the court does not intend to impose a death sentence because of certain factors, it may impose fixed term sentence keeping in view the public concept with regard to deterrent punishment. It really adopts the view of "expanded option", lesser than the maximum and within the expanded option of the minimum, for grant of remission does not come in after expiry of 14 years. It strikes a balance regard being had to the gravity of the offence."

56. It is in the above context that the Apex Court in ***Vikas Yadav*** *(supra)* has quoted in para '104' the Constitution Bench in ***Union of India vs V.Sriharan*** *(supra)* to note that the High Court while modifying punishment of a life convict may provide for any specific term of incarceration or till the end of convict's life as an alternate to death penalty.

57. As noted above in ***Vikas Yadav (supra),*** the trial Court had imposed the life sentence and the High Court while declaring to enhance the sentence for imprisonment for life to death had imposed fix term sentence curtailing the power of remission after 14 years as envisaged under Section 433-A Cr.P.C, which has been affirmed by the Apex Court while disposing of the appeal.

58. The ratio of the decision of the Apex Court in ***Swamy Shraddananda(2) Alias Murali Manohar Mishra*** *(supra)* as approved in ***Union of India vs V. Sriharan*** *(supra)* and considered in ***Vikas Yadav*** *(supra)* is that the power to impose the modified punishment providing for any specified term of incarceration or till the end of convict's life, as an alternate to death penalty, can be exercised only by the High Court and the Apex Court and not by any

other inferior Court. However, the ratio of the Constitution Bench in ***Godse's Case*** *(supra),* i.e. the fundamental principle that a sentence of imprisonment for life is an imprisonment which last till the last breath of the convict has been consistently approved. We also note that the question in ***Godse's case*** for consideration was whether there is any provision of law whereunder a sentence for life without any formal remission can be treated as one for the definite period by the Court and it was answered in negative. It is, thus, clear that the special category created in ***Swamy Shraddananda (2) Alias Murali Manohar Mishra*** *(supra)* where the death penalty might be substituted by the punishment of imprisonment for life of imprisonment for a term in excess of 14 years and to put that category beyond the application of remission was approved in the later decisions of the Apex Court. [(In ***Vikas Yadav*** *(supra)*].

59. Further, Section 28 of the Criminal Procedure Code empowers the Court to impose sentence authorised by law. Section 302 IPC authorises the Court to either award life imprisonment or death. The minimum sentence is life imprisonment and maximum is death. The Court cannot curtail the minimum sentence as authorised by the statute. It, therefore, cannot curtail the sentence for life and fix a period of incarceration of a life convict. Life imprisonment as held in ***Godse's Case*** *(supra)* means the whole of the period of convict's natural life which is subject to the power of the appropriate government to grant remission under Section 432 of the Criminal Procedure Code read with section 433-A.

60. In a recent decision in ***Duryodhan Rout vs State of Orissa16*** on a question of interpretation of Section 31 Cr.P.C, it was observed by the Apex Court that imprisonment for life is not confined to 14 years of imprisonment. In view of Section 55 of IPC and Section 433 and 433-A Cr.P.C, only appropriate Government can commute the sentence of imprisonment for life for a term not exceeding 14 years or accedes to the release of such persons unless he has served atleast 14 years of imprisonment. Section 57 of the Indian Penal Code merely relates to calculating fractions of term of punishment by providing numerical value of 20 years to life imprisonment. It was thus held that a person sentenced to life imprisonment is bound to serve the remainder of his life in life imprisonment unless the sentence is commuted by the appropriate Government in terms of Section 55, 433 ad 433-A of the Code of Criminal Procedure.

61. Reliance is placed on the decisions of the Apex Court in ***Gopal Vinayak Godse*** *(supra)* and ***State of M.P. vs Ratan Singh*** *(supra)* as also other decisions in ***Naib Singh vs State of Punjab17; Ashok Kumar vs Union of India18; Subhash Chander vs Krishan lal19; Mohd Munna vs Union of India20*** to hold that :

"26. This Court reiterated that life imprisonment was not equivalent to imprisonment for 14 years or 20 years in Mohd Munna vs Union of India. The Court held that the life imprisonment means imprisonment for whole of the remaining period of the convicted person's natural life. There is no provision either in the Penal Code or in the Criminal Procedure Code, whereby life imprisonment could be treated as either 14 years or 20 years without there being of formal remission by the appropriate Government. "

62. In ***Raj Kumar vs State of Uttar Pradesh21***, it was held that :

"14. A bare perusal of Section 433 of Cr.PC shows that the powers under Section 433 can only be exercised by the appropriate Government. These powers cannot be exercised by any court including this Court. At best, the court can recommend to the State Government that such power may be exercised but the power of the appropriate Government cannot be usurped by the courts and the Government cannot be directed to pass "formal compliance order'. We are, therefore, not inclined to pass a similar order because that is beyond the jurisdiction of this Court."

63. With due respect to the Bench, the Division Bench of this Court in *Criminal appeal no.2135 of 2013 (Savir vs State of U.P)* and Criminal appeal no.1839 of 2004 (Veersen vs State of U.P) has wrongly interpretted the decisions of the Apex Court in ***Maru Ram (supra)*** and ***Vikas Yadav (supra)*** to fix a term of life imprisonment to 14.6 years and 15 years; under Section 302 IPC, depending upon the period of incarceration of the appellants in those cases. The conclusion drawn by it is a result of misreading of the said decisions of the Apex Court and ignorance of law. Both the above noted judgments of the Division Bench of this Court are held 'Per incuriam'.

64. Thus, to deal with the submissions of Sri Vinod learned Advocate for the appellant on the issue that since the appellant Kallu has remained in jail for about 20-21 years, his sentence for life imprisonment has to be commuted to the period undergone by him and that he is entitled to be released from jail, we may record that it is not permissible for the Court to fix the period of life sentence to certain years, in as much as, the legal position is that the period of life sentence is natural life of a person. However, as per law of remission, it is within the discretion of the State Government to grant remission to life convict after he has served minimum 14 years of sentence in jail. In the cases relied upon by learned counsel for the appellants, the position as emerges is that the Apex Court while commuting the death sentence to life had fixed a cap so that the convicted accused would not be entitled to seek remission prior to expiry of the said period which was 15 to 21 years in the cases relied by the counsel for the appellant. However, in none of the cases, the decision can be read in the manner as submitted by the learned counsel for the appellant that the High Court is empowered to fix the period of life sentence in a particular case with regard to a particular accused. The submission in this regard are, thus, liable to be rejected.

65. However, noticing that the appellant Kallu remained in jail for 20-21 years, it is open for the jail authorities to assess the condition of his release from jail on remission of his sentence and recommend the same to the State Authorities, if the case of the appellant falls within the four corners of the policy framed by the State Government in the matter of remission of life convict. It is clarified that our observation herein shall not be treated as direction of the Court and the authorities concerned are free to take independent decision in that regard.

66. In view of the above, the appeals stand **dismissed.**

67. The appellant Phool Singh is in jail in execution of non bailable warrant and appellant Kallu is also in jail.

68. The appellants Hari @ Harish Chandra and Charan are on bail. Their bail bonds are cancelled and sureties are discharged.

69. The Court concerned is directed to take the appellants namely Hari @ Harish Chandra and Charan in custody and send them to jail to serve out the remaining sentence.

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

71. Certify this judgment to the court below immediately for necessary action.

(2022)05ILR A165
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 27.04.2022

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Criminal Misc. Bail Application No. 1464 of 2022

Vivek Verma ...Applicant
Versus
The U.O.I. ...Opposite Party

Counsel for the Applicant:
Atul Verma, Akhilendra Pratap Singh

Counsel for the Opposite Party:
Anurag Kumar Singh

Code of Criminal Procedure, 1973- Section 438- Bail- Third Bail Application - Principle of Parity - As to whether after rejection of bail application of any accused person, the other co-accused persons having similar role or lesser role if granted bail, can be considered as a new ground for considering the subsequent bail application - Two co-accused persons, namely, Aman Singh and Faisal have been granted bail subsequent to rejection of first bail application of the present applicant and role of those co-accused persons and the present applicant is more or less similar as considered above, rather, is having lesser gravity- Out of 101 prosecution witnesses, only 25 prosecution witnesses have been examined by now, therefore, there is no possibility to conclude the trial in near future and the period of incarceration of the present applicant which is more than five years and two months.

Settled law that where the similarly situated co-accused have been enlarged on bail subsequently then consistency requires that the present accused should also be enlarged on bail more so in view of the fact that the accused has undergone a substantial period of incarceration without any likelihood of early conclusion of the trial. (Para 25, 26)

Bail Application accordingly allowed. (E-3)

Judgements/ Case law relied upon:-

1. Nanha S/o Nabhan Kha Vs St. of U.P.,1993 Cri.LJ 938

2. U.O.I Vs K.A. Najeeb AIR 2021 SC 712

3. Paras Ram Vishnoi Vs The Director, CBI , Crl. Appeal No.693 of 2021 (Arising out of SLP (Crl) 3610 of 2020)

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

1. Heard Sri Atul Verma, learned counsel for the applicant and Sri Anurag Kumar Singh, learned counsel for the Central Bureau of Investigation (C.B.I.).

2. As per learned counsel for the applicant, the present applicant is languishing in jail since 15.02.2017 in Case Crime No.52 of 2017, R.C. No.4 (S) /2017, under Sections 302, 120-B and 201 I.P.C., Police Station-C.B.I/SCB, Lucknow, District-Lucknow. He has submitted that the present applicant has been falsely implicated in this case as he has not committed any offence as alleged in the prosecution story.

3. This is the third bail application. The first bail application bearing Bail Case No.5860 (B) of 2017 was rejected on 21.01.2020 by Hon'ble Mr. Justice Chandra Dhari Singh, who has been transferred from this Court to another High Court. The second bail application bearing Bail Case No.3464 (B) of 2020 was dismissed as withdrawn on 08.11.2021 by Hon'ble Mr. Justice Salil Kumar Rai, who is sitting at Allahabad.

4. Since Hon'ble Mr. Justice Chandra Dhari Singh has been transferred to another High Court and Hon'ble Mr. Justice Salil Kumar Rai is sitting at Allahabad, therefore, in view of the order of Hon'ble the Chief Justice dated 13.11.2018 the present bail application has been listed before the regular Court.

5. At the very outset, Sri Atul Verma, learned counsel for the applicant has submitted that he is cautious about the legal position that he cannot take any fresh ground to argue the third bail application which could have been taken at the time of rejection of first or second bail applications.

6. Sri Verma has submitted that he is only pressing this bail application on the ground that the present applicant is in jail since 15.02.2017 and out of total 101 prosecution witnesses only 25 prosecution witnesses have been examined. Therefore, there is no possibility to conclude the trial in near future, so the present applicant may be enlarged on bail. He has further submitted that after rejection of first bail application on merits on 21.01.2020 the bail of the other co-accused persons, namely Aman Singh and Faisal, who have been implicated invoking the provisions of Section 120-B I.P.C. in a same manner the present applicant has been implicated invoking Section 120-B I.P.C., inasmuch as the present applicant has not been attributed the role of main assailant. Even the present applicant was not present on the spot, however, co-accused persons, namely, Aman Singh and Faisal have been attributed the role that they were on Motorbike near the place where incident in question has taken place and the Motorbike which was being used at that point of time by the co-accused was of the present applicant.

7. Sri Verma has also submitted that however before rejection of first bail application of the present applicant on 21.01.2020 the bail of one co-accused, Ajay Patel who was also implicated invoking Section 120-B I.P.C., has been granted bail on 07.11.2019 but he shall not take such ground for the reason that such ground was available to the present applicant at the time of rejection of his first bail application. However, the fact remains that so far as the implication of co-accused persons, namely, Ajay Patel, Aman Singh and Faisal is concerned, all accused persons have been implicated invoking Section 120-B I.P.C., therefore on that score, the present applicant is having parity with all the co-accused persons. Hence, on the aforesaid ground the present applicant may be enlarged on bail.

8. On the other hand, Sri Anurag Kumar Singh, learned counsel for the

C.B.I. has submitted that he has provided copy of the counter affidavit to the learned counsel for the applicant, however, he could not file the hard copy thereof whereas copy of the said counter affidavit has been shown to the Court for perusal.

9. Therefore, Sri Singh is directed to file and upload the counter affidavit forthwith and as soon as the said counter affidavit is filed and uploaded, the same shall be processed by the office at the earliest. Even though I am deciding the present bail application on the basis of material available on record but for the purposes of record of the bail application, the same shall be filed and uploaded in view of the aforesaid order.

10. In view of the above, the question before this court for consideration is as to whether after rejection of bail application of any accused person, the other co-accused persons having similar role or lesser role if granted bail, can be considered as a new ground for considering the subsequent bail application. This question has been cropped up before the Division Bench of this Court in re: Nanha S/o Nabhan Kha vs. State of U.P., reported in 1993 Cri.LJ 938, and the Division Bench has formulated the question in para-1 of the judgement, which reads as under:-

"1. In the third bail application moved by the petitioner for bail in case Crime No. 53 of 1989 under Section 302, IPC of P.S. Ganj, district Rampur Hon'ble N.L. Ganguli, J. has referred the following question to a larger Bench for an authoritative pronouncement:--

Whether an accused is entitled to be released on bail on the ground of parity by moving a second or third bail application in a circumstance that at a later date a co-accused of the same criminal case with a similar role was granted bail by the another Hon'ble Judge before whom without disclosing the fact that the bail application of another co- accused with similar role had already been rejected, by another Bench, bail was granted."

11. While considering the aforesaid question, the Division Bench has observed in paras-53 & 58 of the case in re: ***Nanha*** (supra) as under:-

"53. There are large number of cases of this Court in which the question of parity in the matters of bail has been considered earlier and the weight of judicial authority is in favour of the principle of parity being followed. In the case of Hadi v. State, 1986 Allahabad Criminal Cases 390 Hon'ble Parmeshwari Dayal, J. bailed out the accused on the ground that co-accused had been bailed out earlier. In another case of Sanwal Das Gupta v. State of U.P., 1986 Allahabad Criminal Cases 79, D.N. Jha, J. observed that where bail was granted to a co-accused then even the Magistrate can admit co-accused to maintain parity. In the case of Ram Roop Vs. State of U.P. 1987 Criminal Rulings 30, this Court observed that a co-accused having similar role having been granted bail another co-accused should also be granted bail. In the case of Ali Hussain v. State of U.P., 1990 U.P. Criminal Rulings 93, Hon'ble S.K. Dhaon, J. placed reliance on the Supreme Court's case of Kallu (supra) and granted bail on the ground of parity. In a unreported decision of this Court in Criminal Misc. Bail Application No. 1360 of 1987 Rai Munna v. State of U.P. Hon'ble G.P. Mathur, J. granted bail on the ground of parity though the Hon'ble Judge clearly observed that he was still of the opinion

that the applicant was not entitled to bail on merits, but, however, as his case was not distinguishable from the case of co-accused the bail was granted on the ground of parity. In his judgment in Sobha Ram's case (supra) Hon'ble V.N. Mehrotra, J. has considered some more unreported decisions of this Court in which bail has been granted on the ground of parity. I respectfully agree with the view of Hon'ble V.N. Mehrotra, J.

58. The word 'parity' means the state or condition being equal or on a level; equality; equality of rank or status (See Shorter Oxford English Dictionary 1936 Ed.). In other words it means being placed at the same footing. All the accused of a case always do not stand on the same footing. While considering bail of different accused the court has to find out whether they stand on the same footing or not. Even if role assigned to various accused is same yet they may stand on different footing. The case of Cap. Jagjeet Singh (supra) is an illustration wherein the Supreme Court distinguished the case of Capt. Jagjeet Singh on the ground that he was in touch with foreign agency and leaking out secrets. The Supreme Court in the case of Gur Charan Singh v. Delhi Administration, AIR 1978 SC 179 : (1978 Cri LJ 129) laid down that the considerations for grant of bail are inter alia the position and status of the accused with reference to the victim and the witnesses; likelihood of the accused; fleeing from justice; of repeating offence; of jeopardising his own life, being faced with grim prospect of possible conviction in the case; of tampering with witnesses; and the like. These are additional factors which are to be judged in the case of individual accused and it may make the cases of different accused distinguishable from each accused. At the same time if there is no real distinction between the individual case of accused the principle of parity comes into play and if bail is granted to one accused it should also be granted to the other accused whose case stands on identical footing."

12. While answering the aforesaid question, the Division Bench has opined in para-61 of the case in re: ***Nanha*** *(supra)* as under:-

"61. My answer to the points referred to is that if on examination of a given case it transpires that the case of the applicant before court is identical, similar to the accused, on facts and circumstances who has been bailed out, then the desirability of consistency will require that such an accused should also be released on bail. (Exceptional cases as discussed above apart). As regards the second part of the question, answer is that it is not at all necessary for an accused to state in his bail application that the bail application of a co-accused has been rejected previously."

13. So as to demonstrate the role of the present applicant, the attention has been drawn by Sri Verma towards the prosecution story wherein the present applicant has been attributed the role of providing the Motorbike to the accused persons who have killed the victim.

14. Sri Verma has further submitted that from the statement of all 25 prosecution witnesses who have been examined and cross-examined, none of them have alleged anything against the present applicant to the effect that the present applicant has committed the crime in question or he was present on the spot. As a matter of fact, the present applicant has been implicated invoking the provisions of Section 120-B I.P.C. in a same manner as the other co-accused, namely, Ajay Patel, Aman Singh and

Faisal have been implicated. Even as per the prosecution, the Aman Singh and Faisal were on the Motorbike near the place of incident putting the Helmet on their head but the present applicant was not even present at the place of incident. Therefore, the case of the present applicant is on better footing than the case of other co-accused persons who have been granted bail. Further, Aman Singh and Faisal have been granted bail by this Court on 29.10.2021 and 15.12.2021, subsequent to rejection of first bail application of the present applicant on 21.01.2020. Therefore, the case of the present applicant may be considered in the light of the decision rendered in re: ***Nanha*** *(supra).*

15. On the basis of aforesaid contention, Sri Verma has submitted that the present applicant may be enlarged on bail and he has given undertaking on his behalf that he shall co-operate with the trial proceedings, shall not misuse the liberty of bail and shall not influence any of the witnesses.

16. Sri Verma has submitted with vehemence that the present applicant is having no criminal history of any kind whatsoever and this fact has not been controverted anyway in the counter affidavit.

17. Per contra, Sri Anurag Kumar Singh, learned counsel for the C.B.I. has vehemently opposed the prayer for bail by submitting that since the first bail application has been rejected and the applicant has got his second bail application dismissed as not pressed on 08.11.2021, therefore, the grounds so taken by Sri Atul Verma as a new ground may not be considered as a new ground so the present bail application may be rejected.

18. However, on being confronted on the point at to whether co-accused persons Ajay Patel, Aman Singh and Faisal have been implicated invoking the provisions of Section 120-B I.P.C. in a same manner as the present applicant has been implicated, Sri Singh has submitted that those co-accused persons have been implicated invoking the provisions of Section 120-B I.P.C.

19. On being further confronted as to whether the present applicant was present at the place of incident in a same manner as the co-accused persons, Aman Singh and Faisal, were present putting on Helmet while driving the Motorbike, Sri Singh has submitted that on the basis of material available on record the present applicant was not present at the place of incident, however, he was actually involved as a conspirator.

20. So far as the criminal history of the present applicant is concerned, Sri Singh has submitted that the prosecution/ C.B.I. could not lay his hands on any of the criminal antecedent of the present applicant.

21. Heard learned counsel for the parties and perused the material available on record.

22. Without entering into merits of the issue, considering the fact that after rejection of the first bail application on merits on 21.01.2020, co-accused persons Aman Singh and Faisal have been granted bail on 29.10.2021 and 15.11.2021. Both the co-accused persons have been implicated invoking the provisions of Section 120-B I.P.C. in a same manner as the present applicant has been implicated. As per the prosecution story, Aman Singh and Faisal were present on the spot on their Motorbikes putting the Helmet on their head whereas the present applicant was not present at the place of incident. The Motorbike of the present applicant has allegedly been utilized by the accused persons.

23. Notably, out of 101 prosecution witnesses, only 25 prosecution witnesses have been examined by now, therefore, there is no possibility to conclude the trial in near future and the period of incarceration of the present applicant which is more than five years and two months may be considered in view of the dictum of Apex Court in re: ***Union of India vs. K.A. Najeeb*** reported in ***AIR 2021 Supreme Court 712.*** Para-16 of the judgment is being reproduced here-in-below:-

"This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India, it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, Courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, Courts would ordinarily be obligated to enlarge them on bail."

24. The Apex Court in the case in re: ***Paras Ram Vishnoi vs. The Director, Central Bureau of Investigation*** passed in ***Criminal Appeal No.693 of 2021 (Arising out of SLP (Crl) 3610 of 2020)*** has observed as under:-

"On consideration of the matter, we are of the view that pending the trial we cannot keep a person in custody for an indefinite period of time and taking into consideration the period of custody and that the other accused are yet to lead defence evidence while the appellant has already stated he does not propose to lead any evidence, we are inclined to grant bail to the appellant on terms and conditions to the satisfaction of the trial court."

25. In the aforesaid cases, the Apex Court has held that if there is no possibility to conclude the trial in near future and the accused applicant is in ail for a substantial long period then a period of incarceration may be considered as a fresh ground.

26. Since two co-accused persons, namely, Aman Singh and Faisal have been granted bail subsequent to rejection of first bail application of the present applicant and role of those co-accused persons and the present applicant is more or less similar as considered above, rather, is having lesser gravity, therefore, in view of the decision of the Division Bench of this Court rendered in re: ***Nanha*** *(supra),* wherein the Division Bench of this Court has considered various decisions of Apex Court and the case of the present applicant is squarely covered from that judgment, so the benefit of that judgment may be extended to the present applicant.

27. It is made clear that if after releasing from jail after getting bail the present applicant misuses the liberty of bail or influence any witnesses or evidences, the prosecution may file an appropriate application for cancellation of bail which may be considered at the earliest.

28. In view of the above, the present application for bail is allowed.

29. Let the applicant-Vivek Verma, be released on bail in the aforesaid case crime number on his furnishing a personal bond and two 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 fail 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.

(v) The applicant shall not leave the country without prior permission of the Court.

30. Before parting with, it is expected that the trial shall be concluded with expedition in terms of Section 309 Cr.P.C. Further, the learned trial court may take all coercive measures as per law if either of the parties do not co-operate in the trial properly.

(2022)05ILR A171
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.04.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Bail Application No. 1831 of 2022

Roop Singh Yadav ...Applicant
Versus
Directorate of Enforcement Lucknow ...Opposite Party

Counsel for the Applicant:
Purnendu Chakravarty, Anuuj Taandon

Counsel for the Opposite Party:
A.S.G., Shiv P. Shukla

Code of Criminal Procedure, 1973 - Section 439- Bail- Prevention of Money Laundering Act, 2002 (PML Act)- Sections ¾- The matter pertains to a large scam of Rs. 1500 crores and it was an admitted fact that the applicant was the then Executive Engineer in the department and it was his responsibility to deposit the said "centage charges"- The applicant has clearly misused the power entrusted to him and he does not deserve any leniency.

Where the matter pertains to corruption involving a huge amount by the accused who misused his official position for embezzlement of public money and money laundering, then no

case for grant of bail is made out. (Para 19, 23)

Bail Application rejected. (E-3)

Judgements/ Case law (cited):-

1. Tofan Singh Vs St. of T.N. (2021)4SCC1.

2. Nikesh Tara Chand Shah Vs U.O.I.(2018)11SCC 1

(Delivered by Hon'ble Krishan Pahal, J.)

1. Heard Sri Purnendu Chakravarty, learned counsel for the applicant and Sri Shiv P. Shukla, learned counsel for the Directorate of Enforcement, Lucknow.

2. By means of the present application, the applicant seeks bail in Complaint Case No. 1003 of 2021, arising out of ECIR/1/LKZO/2018, under Sections 3/4 of Prevention of Money Laundering Act, 2002 (PML Act), Police Station-Directorate of Enforcement, District-Lucknow, during the pendency of trial.

PROSECUTION STORY

3. An Enforcement Case Information Report (ECIR) has been registered on the basis of scheduled offence comprising of First Information Report dated 19.6.2017 registered as Case Crime No.831 of 2017, u/s 409, 420, 467, 468, 471, 34 of IPC and Sections 7 & 13 of Prevention of Corruption Act, 1988 (PC Act) against the accused persons. Thereafter, investigation was transferred to Central Bureau of Investigation (CBI) and it was found that a huge amount was embezzled in the project of Gomti River Front. The State Government took cognizance of this project and ordered judicial enquiry headed by Hon'ble Mr. (Retd.) Justice Alok Kumar Singh. After conducting a thorough enquiry, a comprehensive report was submitted to the State Government on 16.5.2017 and on that basis, the FIR was lodged against the erring officials of the concerned department for further proceedings.

4. CBI registered the case as Case Crime No.RC0062017A0026 on 30.11.2017 for further investigation of Gomti River Channelization Project and Gomti River Front Development. After investigation, the charge-sheet was filed by the CBI on 15/16.02.2021, u/s 120-B read with 420, 467, 468, 471 IPC and Section 13(2) read with 13(1)(d) of PC Act against the applicant and other co-accused persons.

5. On the basis of predicate offence investigated by the CBI, the Directorate of Enforcement investigated the matter u/s 3/4 of PML Act and vide Provisional Attachment Order No.04/2019 dated 29.6.2019, the property of the applicant's wife Shyama Devi worth Rs.30 lakhs was attached. The Special Court took cognizance of the complaint filed by the Directorate of Enforcement on 15.7.2021 u/s 3/4 of PML Act.

RIVAL CONTENTIONS

6. Sri Purnendu Chakravarty, learned counsel for the applicant has submitted that as per the complaint, an amount of Rs.98.89 lakhs is alleged to have been acquired by the accused persons as proceeds of crime. The allegation levelled against the applicant pertains to embezzlement of Rs.30 lakhs in respect of taking possession and acquisition of property as proceeds of crime. The alleged property was purchased in the name of applicant's wife on 10.9.2013 and the same has wrongly been attached by the Directorate of Enforcement as the date of purchase of the alleged property is almost

three years prior to the date of allegation i.e. during June, 2016. The Directorate of Enforcement has acted mechanically and has failed to extract the money trail and have wrongly attached the said property. There is no reason or explanation provided by the department which depicts that the attached property reflects the proceeds of crime and is involved in the act of money laundering.

7. Learned counsel for the applicant has further submitted that the Directorate of Enforcement has not undertaken any independent investigation and their complaint is in verbatim to the narration of the FIR lodged by the CBI. The applicant has also denied of having received any illegal amount from one Amit Yadav, Proprietor of M/s. Crossland Engineering and Infra Developers Private Limited. He was not responsible for the allotment of contract to the said company and the alleged contracts were executed on the directions of Chief Engineer as he could not pass the tenders for an amount of Rs.1 crore or more.

8. Learned counsel for the applicant has further stated that the applicant has cooperated in the investigation and his statement u/s 50 of PML Act has been recorded by the Directorate of Enforcement on 31.5.2018, 24.8.2018, 28.8.2018, 25.6.2019, 26.6.2019 and 26.8.2020. The statement of Amit Yadav has been recorded by Directorate of Enforcement on 29.1.2019 and 5.2.2019 after recording the fourth statement of the applicant i.e. on 25.6.2019. The applicant has never been confronted with the statements given by Amit Yadav on 25.6.2019, 26.6.2019 & 26.8.2019. He has further submitted that the maximum sentence provided to the offence referred in the charge-sheet is seven years and the applicant is in jail since 22.9.2021. The trial has not proceeded any further. No offence u/s 3/4 of PML Act is made out against him.

9. Learned counsel for the applicant has further referred relied upon the judgement of Supreme Court in the case of ***Tofan Singh Vs. State of Tamil Nadu1*** wherein it has been held that officers, who are invested with powers u/s 53 of NDPS Act, are "police officers" within the meaning of Section 25 of the Evidence Act and, therefore, any confessional statement made before them would attract the bar of Section 25 of the Evidence Act and cannot be taken into account to convict an accused.

10. Learned counsel for the applicant has further stated that the investigative procedure especially in the Statute of PML Act is pari materia to that under NDPS Act. He has further relied upon the judgement of Supreme Court in the case of ***Nikesh Tara Chand Shah Vs. Union of India2*** and the relevant para of the said judgement is reproduced hereunder:-

"Regard being had to the above, we declare Section 45(1) of the Prevention of Money Laundering Act, 2002, insofar as it imposes two further conditions for release on bail, to be unconstitutional as it violates Articles 14 and 21 of the Constitution of India."

11. Learned counsel for the applicant has also stated that the bail of the present case falls in the category of less than one crore and there is a provision introduced in Section 45(ii) of PML Act inserted vide Act No.13 of 2018 by way of amendment dated 19.4.2018 to release the person on bail if the case falls within one crore.

12. The 'Authority' or 'Court' word used in Section 24(a) or (b) would mean and only mean the Authority constituted under the Act and Courts. Otherwise, expression would defeat the object of Section 24 of PML Act. The investigation conducted by the CBI, ED or any other police agency would not fall within the category of proceedings. He has further stated that the applicant was not arrested during investigation and has retired on 31.12.2016. The complaint was filed on 2.12.2020 before the Special Judge, PMLA, Lucknow. The sole allegation against the applicant is that one Amit Yadav had withdrawn an amount of Rs. 30 lakhs vide two cheques dated 5.9.2016 and 9.6.2016 which were handed over to applicant in cash. The applicant has no criminal history. He is in jail since 20.11.2020 in predicate case and since 22.9.2021 in this case. There is no likelihood of early disposal of the trial. The applicant undertakes that if he is released on bail, he will never misuse the liberty and will cooperate in trial.

13. Per contra, Sri Shiv P. Shukla, learned counsel for the Directorate of Enforcement has vehemently opposed the bail prayer of the applicant by contending that rigors of Section 45 of PML Act are applicable to the present case. As per Section 24, the burden of proof lies upon the accused pertaining to the alleged amount of Rs. 30 lakhs. The total scam is of Rs.1500 crores. He has further relied upon the report dated 16.5.2017 prepared by Hon'ble Mr. (Retd.) Justice Alok Kumar Singh after conducting a thorough inquiry in the matter in which it has come on record that there was illegal money gratification paid to certain accused engineers in cash and through banking transactions which were nothing but the properties involved in money laundering.

14. Sri Shukla has further stated that as per the Rules, an amount of "centage charge" was to be deposited in the appropriate account head of the concerned department through Treasury Challan or through electronic payment. In the instant project, centage charge to the tune of Rs. 71 crores was not deposited for the period of March, 2015 to December, 2015. During this period, the applicant was the Executive Engineer of the concerned department and on being questioned referring the deposition of the said centage charge, he could not provide any documentary evidence of having deposited it.

15. On this count, learned counsel for the applicant has stated that a request was moved by the department for the waiver of said centage charge and, therefore, centage charges were not deposited.

16. Sri Shukla has also referred to the statement of one Siddh Narain Sharma, who has stated that it was the sole responsibility of the Executive Engineer to deposit the "centage charges" and he has also stated that he was not aware as to whether the said "centage charges" were deposited or not. Learned counsel has further stated that the applicant while working as Executive Engineer in the Gomti River Front, did not follow the financial rules whereas the amount due for centage charges were used elsewhere without any approval of the authority. Thus, the applicant did not discharge his official responsibility but indulged in misappropriation and diversion of funds without any approval. Learned counsel has lastly submitted that the applicant is not on bail in the predicate offence.

17. It is also stated that the applicant did not pay due diligence in the

construction on RCC Diaphragm Wall and misused his official position. The applicant is stated to have signed an agreement for work of "Intercepting Drain" without any financial sanction. The applicant is stated to have used the financial details and profile of his wife Shyama Devi to channelize, place, layer and project i.e. launder the illegitimate properties involved in money laundering derived and obtained by him through illegal monetary gratifications in Gomti River Front Project.

18. Learned counsel for the applicant has further stated that investigation is still going on and as per the current stage, the liability of applicant is Rs. 30 lakhs, that of the co-accused Anil Yadav is Rs. 53.89 lakhs and that of S.N. Sharma is of Rs. 15 lakhs only.

CONCLUSION

19. The matter pertains to a large scam of Rs. 1500 crores and it was an admitted fact that the applicant was the then Executive Engineer in the department and it was his responsibility to deposit the said "centage charges".

20. Corruption is a form of dishonesty which is undertaken by a person or persons or organization, which is entrusted with a position of authority, in order to acquire illicit benefits or abuse of power for one's personal gain.

21. Of late, we have seen a steep surge in the said means of corruption by those who are in power. Power which may be muscular, administrative or monetary if misused has deletarious effect on others i.e. society as a whole.

22. Lala Hardayal in his book "Hints for Self Culture" has stated as under:-

"Take heed lest you grasp the shadow and miss the substance. You may coin your Brain into money, but then you are abusing and misusing this rare gift of Nature. Intellect should be employed chiefly as an instrument of growth and social service. It must not be a tool for exploiting your fellow-citizens....."

23. The applicant has clearly misused the power entrusted to him and he does not deserve any leniency.

24. Considering the facts and circumstances of the case, the nature of offence, embezzlement of huge amount, complicity of accused as well as the rival submissions advanced by the learned counsel for the parties and without expressing any opinion on the merits of the case, I am not inclined to release the applicant on bail.

25. Accordingly, the bail application of the applicant is **rejected.**

26. However, it is directed that every endeavor shall be made by the trial court to conclude the trial expeditiously, if there is no other legal impediment, within a period of one year from the date of production of a certified copy of this order.

27. It is clarified that the observations made herein are limited to the facts brought in by the parties pertaining to the disposal of bail application and the said observations shall have no bearing on the merits of the case during trial.

(2022)05ILR A176
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.05.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Bail Application No. 4109 of 2021

Akhilesh Kumar @ A.K. Rajiv ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Ram Chandra Singh, Arun Sinha, Atul Mishra, Ayodhya Prasad Mishra, Siddhartha Sinha

Counsel for the Opposite Party:
G.A., Romit Seth, Varsha Sharma

Criminal Law- Code of Criminal Procedure, 1973 - Section 439- Bail - Indian Penal Code, 1860- Sections 406, 419, 420, 467, 468, 471 & 120-B IPC & Prevention of Corruption Act- Section 7ka/8(1)(1) - The Informant is said to have been defrauded to the tune of Rs.9,72,12,000/- It prima-facie appears that the applicant was also involved in the commissioning of said offence and no reason was found to falsely implicate him in the present case. This is a high profile fraud committed by the high profile criminals having long reach with higher echelons of the society. This is a white collar crime and such offences are on the rise in the prevalent social conditions. There is a recovery of a suitcase at the pointing out of the applicant. The CDR also confirms the complicity of the applicant as he was in regular touch to co-accused through his mobile.

Where the offence is a serious fraud involving high profile criminals and there is prima-facie evidence against the accused then no case for bail is made out under such facts and circumstances. (Para 15)

Bail Application rejected. (E-3)

(Delivered by Hon'ble Krishan Pahal, J.)

1. Heard Sri Arun Sinha and Sri Ayodhya Prasad Mishra, learned counsels for the applicant and Sri Vinod Kumar Shahi, learned Additional Advocate General assisted by Sri Santosh Kumar Mishra, learned AGA-I for the State of U.P.

2. By means of the present bail application, the applicant seeks bail in Case Crime No.160 of 2020, under Sections 406, 419, 420, 467, 468, 471, 120-B IPC & Section 7ka/8(1)(1) of Prevention of Corruption Act, Police Station- Hazratganj, District- Lucknow, during the pendency of trial.

BRIEF FACTS OF THE CASE

3. As per prosecution story, two persons, namely, Vaibhav Shukla and his friend Santosh Sharma are said to have met the Informant, Manjeet Singh Bhatia @ Rinku at his residence at Indore, Madhya Pradesh in the month of April, 2018. They are stated to have enquired from Informant whether he has flour mill and also about annual turnover of his business. Vaibhav Shukla belonged to a very respectable family and is a closed friend of the Informant. The said two persons, Vaibhav Shukla and Santosh Sharma are said to have taken documents of Informant's company pertaining to previous financial years and also the profile of Informant's company. They again visited the office of Informant and informed him that one S.K. Mittal who is stated to be the Deputy Director of Department of Animal Husbandry, Uttar Pradesh, had met them and he is very close to the Minister and they want to get him a supply order for

supply of wheat, sugar, flour and pulses to the tune of Rs.292.14 crores with the condition that a commission of 3% of the total amount of the supply order is to be provided in advance. The Informant asked them to get the time period extended as the supply order was too big for him. Santosh Sharma is stated to have assured him to get the time extended. The aforesaid two persons are said to have informed the Informant that they would also have their share in the profit and running the said business. On said promise and assurance of Vaibhav Shukla and Santosh Sharma, the Informant has paid huge amount to them which was to be provided to Secretary S.K. Mittal.

4. Thereafter, the Informant was called to Lucknow and is stated to have visited various places along with Vaibhav Shukla and Santosh Sharma and was even stated to have met the said Secretary S.K. Mittal at the Secretariat, Lucknow. The Informant is said to have informed S.K. Mittal that he shall require a godown to keep the said items for which Mittal had asked him to pay Rs.72 lakhs to M/s R.K. Traders, U.P. as a rent for the said godown which was deposited in the bank account of M/s R.K. Traders by the Informant.

5. When Informant checked the online status of the Tender, nothing was found there only then he came to know about the fraud committed to him of Rs.9,72,12,000/-. The Informant enquired from Vaibhav Shukla and Santosh Sharma about the said absence of Tender details on website whereupon they informed him that on 22.11.2018, they have to go to the office of CBCID as there have been some complaints with regard to the said Tender and an enquiry is being conducted. The Informant went to the office by CBCID, Lucknow where his entry was noted on a register and one constable took him to the S.P., CBCID who made certain queries from him regarding the Tender and even asked him to write on a paper that he had already supplied the said material for which he has got the order. On coming out of the gate of CBCID office, the said S.K. Mittal was found waiting outside and on being asked him, the Informant told him about the events at the CBCID office. At this, the said S.K. Mittal had asked him to go back to his home and also asked that he shall be informed further details through Vaibhav Shukla and Santosh Sharma.

6. On 26.12.2018, the Informant again met S.K. Mittal with Vaibhav Shukla and Santosh Sharma and then he asked the present applicant to provide him with a copy of the original work order, an undated bill book and also an affidavit of some supply and only then the said supply shall be started. All the documents as asked by S.K. Mittal, were sent by the Informant through his employee Lavendra. On 11.1.2019, S.K. Mittal is stated to have retained those documents with him and sent Lavendra and Santosh Sharma to the S.P. of CBCID. The Informant was called several times to Lucknow as he insisted for the work after having paid such a heavy amount. On 30.3.2019, the Informant was called to Lucknow and he had stayed in Oyo room behind Piccadily hotel and from where they kept on calling S.K. Mittal for the said amount who assured him that the said money shall be transferred to his account through RTGS. On 31.3.2019 at about 06:00 PM, the Informant was asked to reach in front of Phoenix Mall, Lucknow. The Informant along with Vaibhav Shukla, Santosh Sharma and his friend Rakesh Porwal reached there from where they were forcibly abducted by

police men in three vehicles including one constable Dilbahar Singh and were threatened that if they raised any alarm, they shall be put to death. Thereafter, they were taken to police station Naka Hindola, Lucknow where they were threatened by police personnel and are said to have retained their ID proofs also. They were released by the police personnel after threatening them that if they were seen again, they will be killed in an encounter.

7. The Informant came to know later on that the person who had met him as S.K. Mittal is actually Ashish Rai an imposter, who runs an entertainment office at Mumbai and there are several police and media personnel connected to him including Monti Gurjar, Roopak Rai, Santosh Mishra, A.K. Rajiv (present applicant), Amit Mishra, Uma Shankar Tewari, Rajnish Dixit, Anil Rai. The two D.B. Singh and Arun Rai are stated to be the hardcore criminal. Anil Rai, Editor of reputed channel along with Dheeraj Kumar, Private Secretary, Department of Animal Husbandry and Umesh Mishra from the office of State Minister, Animal Husbandry and others were also involved in the commissioning of aforesaid offence. The Informant is said to have been defrauded to the tune of Rs.9,72,12,000/-.

RIVAL CONTENTIONS

8. Learned counsel for the applicant stated that the applicant, who is a permanent resident of Lucknow, has been falsely implicated in the present case. He has not committed any offence as alleged by the prosecution. Although the applicant is named in the FIR but no specific allegations have been levelled against him by the Informant as well as the main witnesses Santosh Sharma and Vaibhav Shukla. Learned counsel has argued that the police arrested the main accused Ashish Rai in connection with the present case and at his pointing out, the police is stated to have gone to the house of the applicant on 14.6.2020 at Nehru Enclave, Gomti Nagar, Lucknow and when the applicant had opened the door of his house, he was identified by Ashish Rai as A.K. Rajiv. The name of the applicant A.K. Rajiv @ Akhilesh Kumar was revealed there. The police is stated to have enquired about some documents connected with the present case on which the applicant is said to have procured a suitcase from a room adjoining to his house. The said suitcase was sealed and seized at the spot and the arrest/recovery memo was also prepared by the police.

9. Learned counsel for the applicant has also relied upon the statement of his Saving Bank Account, State Bank Branch, Jawahar Bhawan, Lucknow wherein an amount of Rs.1,60,000/- is said to have been transferred through three transactions on 27.7.2018, 3.8.2018 and 24.1.2019. There is no evidence of the source of the amount transferred in the said transactions. No cash has been recovered from the possession of the applicant though recovery of Rs.28 lakhs have been made from the house of co-accused Ashish Rai. There is no allegation that the first Informant directly or indirectly paid any amount to the applicant.

10. Learned counsel for the applicant has further argued that no case under the Prevention of Corruption Act is made out against him as he is a private person and has nothing to do with it. The money transferred to the account of the applicant by co-accused Ashish Rai was the payment of a loan which he had taken from him. The

amount transferred to his account was not a share of the amount usurped by co-accused Ashish Rai. The applicant is a respectable person and a renowned journalist of the locality. He being a social person meet several persons daily and had no inkling of any offence having been committed by Ashish Rai. The allegations levelled against the applicant have come up in the concluding part of the FIR and not in the main body. The applicant has not forged any document or used it as a genuine one. As a matter of fact, nothing incriminating has been recovered either from the possession of the applicant or at his pointing out. False recovery has been shown from his possession by the police only to show good work. There is no evidence against him except the confessional statement of the co-accused persons which is not admissible under the Indian Evidence Act. The applicant has not given any confessional statement to the police and if any confessional statement has been recorded by it, is false. There is no criminal history of the applicant.

11. Learned counsel for the applicant has further submitted that the applicant had the possession of the documents kept in a suitcase were already in the knowledge of the police before the said recovery as it is said to have been revealed by the co-accused Ashish Rai. So the fact already discovered has been re-discovered by them. The said recovery does not fall within the ambit of Section 27 of the Evidence Act.

12. Learned counsel for the applicant has further contended that the co-accused Monti Gurjar against whom identical allegations have been levelled, has already been enlarged on bail by the trial court vide order dated 18.12.2020. The co-accused Sachin Verma has also been released on short-term bail by this Court vide order dated 22.4.2022 passed in Criminal Misc. Bail Application No.1456 of 2021. The applicant is ready to deposit the amount of Rs.10,00,000/- immediately after his release within a stipulated period fixed by the Court. The charge-sheet has been filed against the applicant. There is nothing on record to suggest that there is any conversation of the applicant either to the Informant or the co-accused persons. The allegation against the applicant is that he had introduced the Constable Dilbahar Yadav to the first Informant, although if it is so, introducing a person to somebody else does not constitute any offence. There is no likelihood of applicant tampering with evidence and he is ready to cooperate with trial.

13. Per contra, Sri Vinod Kumar Shahi, learned AAG assisted by Sri Santosh Kumar Mishra, learned AGA-I have vehemently opposed the bail prayer of the applicant on the ground that none of the accused persons have been granted bail in the present subject matter. The first Informant has been victimized and traumatized by the applicant and other co-accused persons and has even been illegally threatened and beaten up in police custody by the officials of police at CBCID office and P.S. Naka Hindola, Lucknow. The Informant could not bear the trauma and as such took the refuge of the then Speaker of Lok Sabha and on whose directions, the instant FIR has been lodged.

14. Sri Shahi, has further argued that the alleged offence was executed in a well planned and orchestrated manner in connivance with the Personal Assistant and Peon of the Minister along with other named co-accused persons. The said sealed suitcase recovered from his possession was

opened in the presence of Magistrate concerned in which a large amount of documents was found which pertain to the said offence which substantiates the allegations of complicity of applicant. The documents relating to the Department of Animal Husbandry were also recovered and the same have been annexed as Annexure-5 to the counter affidavit. He has further placed reliance upon the details of the CDR of the mobile numbers of the applicant indicating that he was in constant touch with the co-accused person Ashish Rai and Dilbahar Yadav from his mobile number 9415907020. The CDR is also a part of the Annexure-5 to the counter affidavit.

CONCLUSION

15. It would be inappropriate to discuss the evidence in depth at this stage because it is likely to influence the trial court but from the perusal of the evidence collected during investigation so far, it prima-facie appears that the applicant was also involved in the commissioning of said offence and no reason was found to falsely implicate him in the present case. This is a high profile fraud committed by the high profile criminals having long reach with higher echelons of the society. This is a white collar crime and such offences are on the rise in the prevalent social conditions. There is a recovery of a suitcase at the pointing out of the applicant. The CDR also confirms the complicity of the applicant as he was in regular touch to co-accused Ashish Rai and Dilbahar Yadav through his mobile.

16. Considering the facts and circumstances of the case, the nature of offence, complicity of accused, fraud of huge amount, involvement of high echelons as well as the rival submissions advanced by the learned counsel for the parties and without expressing any opinion on the merits of the case, I am not inclined to release the applicant on bail.

17. Accordingly, the bail application of the applicant is **rejected.**

18. It is clarified that the observations made herein are limited to the facts brought in by the parties pertaining to the disposal of bail application and the said observations shall have no bearing on the merits of the case during trial.

19. However, it is directed that every endeavor shall be made by the trial court to conclude the trial expeditiously, if there is no other legal impediment.

(2022)05ILR A180
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.04.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Bail Application No. 4319 of 2021

Rajkumar Yadav ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Pranjal Krishna

Counsel for the Opposite Party:
Anurag Kumar Singh

Criminal Law- Code of Criminal Procedure, 1973- Section 439- Bail- Indian Penal Code, 1860- Sections 120-B r/w 420, 467, 468, 471 of IPC- Prevention oif Corruption Act, 1988- Section 13(2) r/w 13(1)(d) - Financial irregularities committed with criminal intent in the work of "Gomti River

Channelization Project" and "Gomti River Front Development" by the Irrigation Department- The matter pertains to a large scam of Rs.1500/- crores. During the relevant period, the applicant was the Junior Assistant/Clerk of the department and prima-facie, it is found that he was also the part and parcel of the chain of corruption having been committed causing a heavy loss to the State Exchequer.

Where the offence pertains to a serious fraud in Government projects resulting in heavy loss to the state exchequer and there is evidence showing prima facie involvement of the applicant in the commission of the offence then in view of the gravity of the offence and evidence against the accused, bail cannot be granted. (Para 15, 16)

Bail Application rejected. (E-3)

Judgements/ Case law (cited):-

1. Yashwant Sinha & ors v. CBI, (2020) 2 SCC 338

2. Sanjay Chandra Vs CBI (2012) 1 SCC 40

3. Dataram Singh Vs St. of U.P. & anr. (2018) 3 SCC 22

4. Y.S. Jagan Mohan Reddy Vs CBI, (2013) 7 SCC 439

5. CBI Vs A. Raja & ors., (2002) 3 SUPREME 207

6. St. of Bih. Vs Amit Kumar (2017) 13 SCC 751

(Delivered by Hon'ble Krishan Pahal, J.)

1. Heard Sri Nandit Kumar Srivastava, learned Senior Counsel assisted by Sri Pranjal Krishna, Sri Prashan Ranjan and Sri Aviraj Raj Singh, learned counsels for the applicant and Sri Anurag Kumar Singh, learned counsel for the Central Bureau of Investigation (CBI).

2. By means of the present application, the applicant seeks bail in Criminal Misc. Case No.2079 of 2021 (CBI Vs. Roop Singh Yadav & Others), under Sections 120-B r/w 420, 467, 468, 471 of IPC and Section 13(2) r/w 13(1)(d) of Prevention of Corruption Act, 1988 with substantive offences thereof arisen out of Crime No. RC0062017A0026, registered with CBI, Anti Corruption Branch, Lucknow and pending before the learned Special Judge, Anti Corruption CBI, West, Lucknow.

PROSECUTION STORY

3. In the instant case, the FIR was registered by the CBI on the basis of order dated 17.7.2017 of the Government of U.P. pertaining to the financial irregularities committed with criminal intent in the work of "Gomti River Channelization Project" and "Gomti River Front Development" by the Irrigation Department. The State Government asked for further investigation by the CBI in Case Crime No.831 of 2017, u/s 409, 420, 467, 468, 471, 34 IPC and Sections 7 & 13 of Prevention of Corruption Act, 1988 (PC Act) against the accused persons. It has also been alleged that on the written complaint of one Ambuj Dwivedi, an FIR was registered by the local police and later on a Judicial Commission headed by Hon'ble Mr. (Retd.) Justice Alok Kumar Singh was ordered to conduct an enquiry under the Commission of Inquiry Act. A comprehensive enquiry report has been submitted to the State Government on 16.5.2017 leading to the present FIR.

4. After investigation, charge-sheet was filed by the CBI on 16.02.2021, u/s 120-B read with 420, 467, 468, 471 IPC and Section 13(2) read with 13(1)(d) of PC

Act against the applicant and other co-accused persons and further investigation is still pending pertaining to other development works in the aforesaid project.

RIVAL CONTENTIONS

5. Sri Nandit Srivastava, learned Senior Counsel appearing on behalf of the applicant has submitted that the applicant is the junior most employee in the chain and had simply followed the orders of higher authorities. He was only the Junior Assistant/Clerk in the Irrigation Department. He was arrested on 19.11.2020 and the charge-sheet has been filed on 16.2.2021. Till date cognizance has not been taken in the matter. Learned Senior Counsel has further submitted that charge-sheet was filed without obtaining sanction for prosecution of the applicant as he is a government servant. Compliance of mandatory provisions of Section 17A of the PC Act has not been carried out by the CBI before initiating the criminal prosecution against the applicant in the present case. Sanction for prosecution has been filed in the Court on 15.7.2021 which is after a delay of about five months from the filing of the charge-sheet. There is no allegation of tampering with the evidence against the applicant. The alleged charge-sheet has been filed only to deprive the applicant statutory rights of default bail provided u/s 167 Cr.P.C.. There is no prima-facie offence made out against him of being a party in the criminal conspiracy with the main accused, Roop Singh Yadav. The applicant is not named in the FIR.

6. Learned Senior Counsel has relied upon the judgement of Apex Court in the case of ***Yashwant Sinha & Others v. Central Bureau of Investigation1***, wherein it has been held that no Police Officer is permitted to conduct any enquiry or investigation into any offence committed by a public servant where the offence alleged is relatable to any recommendation made or decision taken by the public servant in discharge of his public functions without previous approval, inter alia, of the authority competent to remove the public servant from his Office at the time when the offence was alleged to have been committed.

7. Learned Senior Counsel for the applicant has also submitted that the applicant was not in a position to do any favour or any dis-favour to any of the Contractor as he was only the Junior Assistant having no authority to do anything worthwhile. He has also placed much reliance on the judgement of Apex Court passed in ***Sanjay Chandra Vs. CBI2,*** wherein it has been opined that the object of bail is neither punitive nor preventative. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

8. Learned Senior Counsel for the applicant has also submitted that the eligibility and non-eligibility of the firms/companies in the tender process was to be decided at a later stage by the concerned authorities and the applicant had no role in it. He has then placed much reliance upon the judgement of Apex Court in ***Dataram Singh Vs. State of U.P. and another3.*** Learned Senior Counsel has further stated that there is no likelihood of the applicant for tampering with the evidence or influencing any witnesses who are all public servant.

9. Per contra, Sri Anurag Kumar Singh, learned counsel for the CBI has vehemently opposed the bail prayer of the applicant by contending that the work of "Intercepting

Trunk Drain" was awarded to M/s K K Spun Pipe Pvt. Ltd., New Delhi despite not meeting out the technical qualification criteria of annual turnover and also did not submit the mandatory certificates on financial fitness to be issued by the District Collector. The bank guarantee used by the L-2 firm M/s Brand Eagles Longian JV was made from the account of L-1 firm M/s K K Spun Pipe Pvt. Ltd.. The third party M/s Patel Engineering has categorically denied to have taken part in the tender process. The L-2 firm has entered into agreement with M/s K K Spun Pipe Pvt. Ltd. for participating in tender procedure as such bank guarantee was prepared from the account of M/s K K Spun Pipe Pvt. Ltd. but later on when the manufacturers unauthorizedly allowed taking part in the tender procedure had submitted its separate bid without informing M/s Brand Eagles Longian JV. As such there was a cartel between M/s K K Spun Pipe Pvt. Ltd. and M/s Brand Eagle Longian JV in pursuance of which the bank guarantee of Rs.4.6 crores of the L-2 firm M/s Brand Eagle Longian JV was made from the bank account of L-1 firm M/s K K Spun Pipe Pvt. Ltd. The using of bank guarantee of one firm by another proves that the entire Tender process was a sham.

10. Sri Singh has further stated that after investigation, charge-sheet has been filed against the main accused Roop Singh Yadav, Executive Engineer, Raj Kumar Yadav, Junior Assistant (present applicant), Himanshu Gupta, Director of M/s K K Spun Pipe Pvt. Ltd., Kavish Gupta, Director of M/s K K Spun Pipe Pvt. Ltd. and Badri Shrestha, Senior Advisor of M/s Brand Eagles Longjian JV. Further investigation is also going on in respect to other allegations in the instant matter coupled with 11 remaining works.

11. Sri Singh has also submitted that the applicant had involved in the said corruption and he had exclusive knowledge of the offence. His name has come up during the course of investigation as he was involved in criminal conspiracy with other co-accused persons. The applicant himself has written under his signature that tender documents have been sold by him to M/s Patel Engineering Limited. However, M/s Patel Engineering Limited denied to have purchased the said tender documents. M/s Patel Engineering Limited had not deposited any earnest money which further confirmed the fact that the company had not submitted the tender documents and its forged documents were used by the applicant in the criminal conspiracy with co-accused Roop Singh Yadav with an intention to pool the tender in favour of the co-accused private persons. The applicant has wrongly shown the sale of tender documents to M/s Patel Engineering Limited and had arranged the photocopy of the documents of M/s Patel Engineering Limited which was submitted for the work of Diaphragm Wall. He has further stated that in the present case, tender of Rs.258.69 crore has been given to ineligible company/person which was later on extended to Rs.333 crores.

12. Sri Singh has also placed much reliance on the judgement of Apex Court in ***Y.S. Jagan Mohan Reddy Vs. CBI4,*** wherein it has been held that economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offence having deep rooted conspiracies and involving huge loss of public funds needs to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing

serious threat to the financial health of the country.

13. So far as the non-compliance of Section 17A of the PC Act is concerned, Sri Singh has stated that though the applicant was not named in the FIR but his role has surfaced on 10.1.2018 before the amendment made in the PC Act, 1988 in the year 2018 which is effective from 26.7.2018. Investigation against the applicant started well before the said amendment in the PC Act. The said amendment do not have retrospective effect as such there is no need of permission u/s 17A of PC Act (as amended in 2018) against the applicant. In support of his contention, he has placed reliance upon the judgement of Delhi High Court in the case of ***Central Bureau of Investigation Vs. A. Raja & Others5*** wherein it has been observed as under:-

"61. In view of the Hon'ble Apex Court decision in State of Telangana (supra) and decision of Coordinate Bench of this Court in Madhu Koda (Supra), this Court is of the opinion that amending Act does not apply to the offences which have already taken place under the PC Act, 1988 and moreover, Prevention of Corruption (Amendment) Act, 2018 does not reveal any intention of destroying the earlier provisions and there is no intention to obliterate the earlier law, therefore, this Court is of the opinion that there is no impediment in hearing the criminal leave to appeal, since the offences in question are alleged to have been committed prior to the coming into force of Prevention of Corruption (Amendment) Act, 2018."

14. Sri Singh has also relied upon the jugement of Apex Court in the case of ***State of Bihar Vs. Amit Kumar6,*** wherein it has been held that while considering the bail involving socio-economic offences stringent parameters should be applied.

CONCLUSION

15. The matter pertains to a large scam of Rs.1500/- crores. During the relevant period, the applicant was the Junior Assistant/Clerk of the department and prima-facie, it is found that he was also the part and parcel of the chain of corruption having been committed causing a heavy loss to the State Exchequer.

16. Considering the facts and circumstances of the case, the nature of offence, embezzlement of huge amount, complicity of accused as well as the rival submissions advanced by the learned counsel for the parties and without expressing any opinion on the merits of the case, I am not inclined to release the applicant on bail.

17. Accordingly, the bail application of the applicant is rejected.

18. However, it is directed that every endeavor shall be made by the trial court to conclude the trial expeditiously, if there is no other legal impediment, within a period of one year from the date of production of a certified copy of this order.

19. It is clarified that the observations made herein are limited to the facts brought in by the parties pertaining to the disposal of bail application and the said

observations shall have no bearing on the merits of the case during trial.

(2022)05ILR A185
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.05.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Bail Application No. 5491 of 2019

Gulam Sarvar ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Mohemmed Amir Naqvi, Amjad Siddiqui, Bal Keshwar Srivastava, Kapil Mishra, M. Usman Siddiqui

Counsel for the Opposite Party:
G.A., ASG, SB Pandey

Criminal Law- Code of Criminal Procedure, 1973- Section 439- Bail- Relevant considerations- It would be inappropriate to discuss the evidence in depth at this stage because it is likely to influence the trial court but from the perusal of the evidence collected during investigation and the charge-sheet, it appears that the complicity of the applicant is well established by the statements of the Informant - In the changing social circumstances, it has now become obvious that nobody dares to depose against the dreaded and hardened criminals out of fear. The Informant, who himself is a victim could garner some courage as some point of time to depose against such high profile criminals. The crime seems to have been committed after a well orchestrated plan to deprive the Informant/victim of his valuable assets and the culpability of applicant cannot be ruled out from the evidence adduced- It is quite clear that an order of bail cannot be granted in an arbitrary or fanciful manner. A ratio decidendi of the judgement of the Apex Court in *Anil Kumar Yadav Vs. State (N.C.T.) of Delhi and another2,* has stated that in serious crimes, the mere fact that the accused is in custody for more than one year, may not be a relevant consideration to release the accused on bail.

Where there is prima facie evidence against the accused showing his involvement in the commission of the offence and he is a member of a dreaded and organised criminal gang, then merely because the oral evidence came belatedly or that the accused is under incarceration for more than one year, would in itself not be a ground to enlarge him on bail. (Para 15, 16, 17)

Bail Application rejected. (E-3)

Judgements/ Case law relied upon:-

Anil Kumar Yadav Vs State (N.C.T.) of Delhi & anr., (2018) 12 SCC 129

(Delivered by Hon'ble Krishan Pahal, J.)

1. Heard Sri Jyotindra Mishra, learned Senior Counsel assisted by Sri Kapil Mishra, learned counsel for the applicant and Sri Anurag Kumar Singh, learned counsel for the CBI and also perused the material available on record.

2. By means of the present bail application, the applicant seeks bail in Case Crime No.810 of 2018, under Sections 147, 149, 386, 329, 420, 467, 468, 471, 394, 506, 120-B, 364-A IPC, Police Station- Krishna Nagar, District- Lucknow, during the pendency of trial.

BRIEF FACTS OF THE CASE

3. Facts in brief giving rise to the present application are that the Informant/victim is a resident of

Alambagh, Lucknow and engaged in the real estate business having his office at Gomti Nagar, Lucknow. At the time of the offence, the accused Atique Ahmad, Ex-Member of Parliament, Phulpur, Allahabad was detained in Deoria Jail and he had tried to pressurize the Informant for extortion of money for about two years and out of fear, the Informant had also given him some amount as such. The two henchmen of Atique Ahmad, namely, Mohd. Farooq and Jaki Ahmad had been trying to extort money from the Informant for about several months. The said two accused persons had also taken possession of the office of the Informant forcibly and got their names inducted in the board of the company and procured digital signatures of the Informant and his sister Aarti Jaiswal. Even after that the Informant did not transfer any shares of the company to them. On 26.12.2018, another goon of Atique Ahmad took the Informant to Deoria Jail where Atique Ahmad along with his son Umar and 10-12 other persons were found present. The two accomplices of Atique Ahmad, namely, Jafarullah and Gulam Sarvar (the present applicant) had beaten the Informant mercilessly thereby breaking his fingers and causing him several external and internal injuries. The accused Atique Ahmad in the jail premises itself got the companies M.J. Infra Housing Private Limited, M.J. Infra Green Private Limited, M.J. Infra Land L.L.P. Private Limited and M.J. Infra State Private Limited transferred forcibly in the name of his associates Mohd. Farooq and Jaki Ahmad. The accused Atique Ahmad has even retained the Fortuner Car of the Informant bearing No. UP-32 JR 1804 with him. It has also been alleged in the FIR that the accused Atique Ahmad had obtained signatures of the Informant on blank letter heads including his resignation letters and also pressurized the Informant to make forged signatures of his sister on the blank papers. The accused Atique Ahmad and his associates forcibly obtained the digital signatures of the Informant and his sister and thereby got the names of their associates inducted in all the aforesaid companies.

4. The instant FIR has been lodged at Police Station- Krishna Nagar, Lucknow. The Supreme Court of India vide its order dated 23.4.2019 passed in Writ Petition (Civil) No.699 of 2016 in the matter of Ashwani Kumar Upadhyay and Others Vs. Union of India and Others transferred the investigation of the case to Central Bureau of Investigation (CBI) and was also directed to submit quarterly status report of the investigation to the Court. The main accused Atique Ahmad was then shifted to Ahmedabad Jail, Gujarat.

RIVAL CONTENTIONS

5. Sri Jyotindra Mishra, learned Senior Counsel appearing on behalf of the applicant has stated that the applicant is being maliciously prosecuted in the present case. The jurisdiction of the case falls within the Police Station- Gomti Nagar, Lucknow and not Krishna Nagar where the instant FIR has been initially lodged. Learned Senior Counsel has further argued that the statement of the Informant has been recorded four times by the I.O. and in each of the subsequent statement, he has improvised from the previous one. Initially, the two statements were recorded by the local police and the subsequent two have been recorded by the CBI. Absolutely vague allegation has been made in the statement of the Informant that the

applicant was present in Deoria Jail with Jafarullah and had even beaten him up thereby causing grievous hurt to him.

6. As per the prosecution allegation, one goon of accused Atique Ahmad had taken Informant forcibly to Deoria Jail by a Fortuner Car No. UP-32 JR 1804, though it is impossible that a single unarmed person would forcibly pickup the Informant at Lucknow and take him to Deoria Jail and during such a long distance from Lucknow to Deoria Jail, the Informant did not raise any alarm while he had ample opportunity to do so and resist. The allegation against the applicant is that his black car was following the said Fortuner car no. UP-32 JR 1804 of the Informant from Lucknow to Deoria Jail. He has dropped the Informant back 100 metres before his house by his car as the alleged Fortuner of the Informant was forcibly retained by co-accused Atique Ahmad. On the way to Deoria Jail, there are six toll booths and surprisingly, there is no CCTV footage to indicate that the applicant had followed the said Fortuner car of the Informant. There is nothing on record to suggest that the applicant was in Deoria jail in connivance with the jail authorities.

7. Learned Senior Counsel has also pointed out several contradictions in the two supplementary statements of the Informant/victim recorded by the I.O. regarding the complicity of the applicant. The prosecution version is doubtful, suspicious and cannot be relied upon.

8. Learned Senior Counsel for the applicant has next contended that the charge-sheet has already been filed in the matter and the trial is not going forward and not even the charge has been framed against the applicant. The CBI is also not interested in getting the trial concluded expeditiously as on the last three occasions, the public prosecutor of the CBI was not present in the Court and the case was adjourned only on this ground.

9. Learned Senior Counsel for the applicant has also relied upon the judgement of Supreme Court passed in the case of ***Union of India versus K.A. Najeeb1,*** and the relevant para-16 reads as under:-

"16. This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India, it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, Courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, Courts would ordinarily be obligated to enlarge them on bail."

10. Learned Senior Counsel for the applicant has also submitted that the four co-accused persons, namely, Irfan, Nitesh Mishra, Mahendra Kumar Singh and Pawan Kumar Singh, have already been enlarged on bail by the court concerned

passed in Bail Application Nos. 7363 of 2019, 12768 of 2021, 14713 of 2021 and 1786 of 2021, vide orders dated 30.11.2021, 10.12.2021 and 15.12.2021, respectively. The applicant is languishing in jail since 18.2.2019 having no criminal history to his credit, deserves to be released on bail. In case, the applicant is released on bail, he will not misuse the liberty of bail and shall cooperate with the trial.

11. Per contra, Sri Anurag Kumar Singh, learned counsel for the CBI has vehemently opposed the bail prayer of the applicant on the ground that it was the applicant who had beaten the Informant in jail premises along with one Jafarullah. After retaining the alleged Fortuner car by Atique Ahmad, the Informant was sent back to his house in the car of applicant being kidnapped by the co-accused Gulam Moinuddeen Siddiqui. The applicant is named in the FIR and his name has also come up in every statement of the victim. There is no contradiction or discrepancy in the statement of the Informant with regard to the applicant.

12. Learned counsel for the CBI has further argued that the applicant and the co-accused persons are dreaded criminals of the area and out of their fear, the Informant could not dare to depose against them. Several witnesses have been put under Witness Protection Programme. He has further argued that looking at the seriousness and gravity of the subject matter, the investigation was entrusted to CBI by the order of Supreme Court and also the main accused Atique Ahmad has been shifted to Ahmedabad Jail, Gujarat. The local police had also filed charge-sheet against the applicant. The applicant along with other co-accused persons had also forced the Informant to put his sister's forged signature on blank papers/letterheads.

13. Learned counsel for the CBI has further submitted that the case of the applicant is not at par with the other co-accused persons who have been enlarged on bail. The trial could not proceed further owing to Covid-19. The offence is not against a particular person, but against the society as a whole. Investigation is pending against the jail officials involved in the said offence.

14. Learned counsel has fairly conceded the fact that there is no criminal history of the applicant but has stated that he is the main associate of co-accused Atique Ahmad who had been five times M.L.A., once an M.P. and a notorious criminal, against whom 106 cases are pending trial including the heinous offences and out of his fear, the FIR has been lodged after a delay. There is every likelihood that he shall misuse the liberty of bail as he is an influential person and the main associate of Atique Ahmad, therefore, he does not deserve any indulgence. In case, the applicant is released on bail, he will misuse the liberty of bail by extending threat and intimidation to the prosecution witnesses.

CONCLUSION

15. It would be inappropriate to discuss the evidence in depth at this stage because it is likely to influence the trial court but from the perusal of the evidence collected during investigation and the charge-sheet, it appears that the complicity of the applicant is well established by the statements of the Informant. The applicant had followed the alleged Fortuner car of the Informant to Deoria Jail and beaten him up in jail premises coercing him to sign the

papers and had dropped him back near his house.

16. In the changing social circumstances, it has now become obvious that nobody dares to depose against the dreaded and hardened criminals out of fear. The Informant, who himself is a victim could garner some courage as some point of time to depose against such high profile criminals. The crime seems to have been committed after a well orchestrated plan to deprive the Informant/victim of his valuable assets and the culpability of applicant cannot be ruled out from the evidence adduced.

17. It is quite clear that an order of bail cannot be granted in an arbitrary or fanciful manner. A ratio decidendi of the judgement of the Apex Court in ***Anil Kumar Yadav Vs. State (N.C.T.) of Delhi and another2,*** has stated that in serious crimes, the mere fact that the accused is in custody for more than one year, may not be a relevant consideration to release the accused on bail.

18. Considering the facts and circumstances of the case, the nature of offence, severity of offence, threat perception of the witnesses, complicity of accused, involvement of higher echelons of society as well as the rival submissions advanced by the learned counsel for the parties and without expressing any opinion on the merits of the case, I am not inclined to release the applicant on bail.

19. Accordingly, the bail application of the applicant is **rejected.**

20. It is clarified that the observations made herein are limited to the facts brought in by the parties pertaining to the disposal of bail application and the said observations shall have no bearing on the merits of the case during trial.

21. However, it is directed that every endeavor shall be made by the trial court to conclude the trial expeditiously, if there is no other legal impediment.

(2022)05ILR A189
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.04.2022

BEFORE

THE HON'BLE KRISHAN PAHAL, J.

Criminal Misc. Bail Application No. 6298 of 2020
&
Criminal Misc. Bail Application No. 1347 of 2022

Chhotey Lal ...Applicant
Versus
U.O.I. N.C.B. ...Opposite Party

Counsel for the Applicant:
Mohd. Salman, Anuj Dayal, Awadhesh Mishra, Manish Srivastava, Nasreen Bano, Pramod Kumar

Counsel for the Opposite Party:
A.S.G., Akhilesh Awasthi, Sikha Sinha

Criminal Law - Code of Criminal Procedure, 1973- Section 439- Bail - Narcotic Drug and Psychotropic Substances Act, 1985- Sections 8(C)/18/29- Section 52(1) - Standing Order 1/89 dated 13.06.1989 - out of seven samples received, there is a difference of weight in three samples- two samples were found less than the minimum quantity of 24 grams- The recovered contraband is heavy in quantity - There is compliance of the mandatory provision of N.D.P.S. Act - The presence of applicants far away from their usual place of residence further casts shadow on his defence - The sample has been taken

before the concerned Magistrate, which negates the theory of any kind of adulteration - There is nothing on record to suggest that there is any animosity of the accused to the officials of the N.C.B - The Standing Order No. 1/88 has been complied with. The call details further corroborate the prosecution story- Minor discrepancy in the weight of the sample sent at the Forensic Laboratory cannot shake the roots of the prosecution case.

Where the recovered contraband is heavy in quantity, the mandatory provisions of the NDPS Act have been complied with and no reason for false implication of the accused is apparent from the record , then merely minor differences in weight of the samples will not be sufficient to render the case of the prosecution doubtful. (Para 15, 16)

Bail Application rejected. (E-3)

Judgements/ Case law (cited):-

1. Rajesh Jagdamba Avasthi Vs St. of Goa, (2005) 9 SCC 773

2. Crl. Appeal No.1821 of 1998 (Jai Pal & anr. Vs St. of U.P.) dec. on 23.01.2018

3. Crl. Misc. Bail Appl. No.9660 of 2021 (Om Prakash Verma Vs St. of U.P.) dec. on 11.03.2022

4. Than Kunwar Vs St. of Har., (2020) 5 SCC 260

5. Ramesh Rana Vs St. of U.P, 2019 SCC Online All 4374

6. U.O.I Through N.C.B. Vs Md. Nawaz Khan, AIR 2021 SC 4476

7. U.O.I Vs Mohanlal & anr, (2012) 7 SCC 712

8. St. of Ker. Vs Rajesh, AIR 2020 SC 721

9. St. of Punj. Vs Baljinder Singh, (2019) 10 SCC 473

10. Sumit Tomar Vs St. of Punj., AIR 2012 SC 728

11. U.O.I Vs Ram Samujh & anr. (1999) 9 SCC 429

12. Satpal Singh Vs St. of Punj., (2018) 13 SCC 813

13. Khet Singh Vs U.O.I, 2002 Cr.LJ 1832

14. Dehal Singh Vs St. of H.P. AIR 2010 SC 3594

15. U.O.I Vs Mohanlal & anr., (2012) 7 SCC 712

(Delivered by Hon'ble Krishan Pahal, J.)

1. Since the above two bail applications of the accused-applicants pertain to common recovery, therefore, I am deciding these bail applications by a common judgment.

2. Heard Sri Anuj Dayal, learned counsel for applicants and Sri Akhilesh Kumar Awasthi, learned counsel for the N.C.B. and perused the record.

3. Applicants seek bail in Case Crime No.03 of 2020, under Sections 8(C)/18/29 of Narcotic of Drug and Psychotropic Substances Act, 1985, Police Station N.C.B., District Lucknow, during the pendency of trial.

Facts in Brief:-

4. As per prosecution story, on the secret information received by N.C.B. from a squealer on 20.02.2020, a team was constituted for arresting the accused-persons, namely, Chhotey Lal and Kavinder Kumar, from general bogey of Train No.12237 Begumpura Express. The N.C.B. team intercepted the said accused-persons from the said general bogey on 20.02.2020 at 16.15 pm. Thereafter, apprehended accused-persons were taken at platform

no.7 and 4 Kg and 3 Kg Opium was recovered respectively from Chhotey Lal and Kavinder Kumar being contained in their bags. The sample of 25 grams was taken from each packet and sealed. The sample of the said contraband was sent for forensic analysis on 23.02.2020 and was received in the Central Revenue Control Laboratory on 24.02.2020 and the report was prepared on 26.02.2020.

Rival Contentions:-

5. Learned counsel for the applicants has stated that out of seven samples received, there is a difference of weight in three samples, out of which, sample P2S1 and P6S1 are found to be of 22.2 grams and 21.6 grams respectively. Thus, they are found deficient of the requisite weight by 2.8 grams and 3.4 grams respectively.

6. On this count, learned counsel for the applicants has placed much reliance on the judgment of Supreme Court passed in case of ***Rajesh Jagdamba Avasthi vs. State of Goa1***. Relevant part of the judgment is quoted hereinasunder:-

"14. We do not find it possible to uphold this finding of the High Court. The appellant was charged of having been found in possession of charas weighing 180.70 gm. The charas recovered from him was packed and sealed in two envelopes. When the said envelopes were opened in the laboratory by the Junior Scientific Officer, PW 1, he found the quantity to be different. While in one envelope the difference was only minimal, in the other the difference in weight was significant. The High Court itself found that it could not be described as a mere minor discrepancy. Learned counsel rightly submitted before us that the High Court was not justified in upholding the conviction of the appellant on the basis of what was recovered only from envelope A ignoring the quantity of charas found in envelope B. This is because there was only one search and seizure, and whatever was recovered from the appellant was packed in two envelopes. The credibility of the recovery proceeding is considerably eroded if it is found that the quantity actually found by PW 1 was less than the quantity sealed and sent to him. As he rightly emphasised, the question was not how much was seized, but whether there was an actual seizure, and whether what was seized was really sent for chemical analysis to PW 1. The prosecution has not been able to explain this discrepancy and, therefore, it renders the case of the prosecution doubtful."

7. Learned counsel for the applicants has further stated that as the quantity of each sample for chemical analysis should not be less than 24 grams in the case of Opium. The requisite directions provided in Standing Order 1/89 dated 13.06.1989 have not been followed and the applicants are entitled for bail on this ground only. As in the present case, two samples were found less than the minimum quantity of 24 grams.

8. Learned counsel for the applicants has placed reliance on the judgment of this Court passed in ***Criminal Appeal No.1821 of 1998 (Jai Pal and Another vs. State of U.P.) decided on 23.01.2018.*** Relevant part of the judgment is quoted hereinasunder:-

"13. Firstly, it has to be seen whether it was necessary for prosecution to take weight of the recovered contraband substance and its sample or not. In this regard, learned counsel for the appellant

has relied upon the Standing Order No. 1/89 para 2.3 of which provides as follows:

"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 case of opium, ganja and charas (hashish) where 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."

15. This Court is of the opinion that the view of the learned A.G.A. is not tenable because under the Standing Instructions 1/88 issued by the Narcotics Drugs Bureau on 15.3.1988 , though after the recovery made in the present case, provided for the mode to be adopted to take sample of the contraband, which prescribed the certain quantity to be taken out of the contraband. The Standing Order 1 of 89 dated 13.6.1989 issued by Government of India (supra) also prescribes that in case of opium not less than 24 Grams would be taken as sample from the recovered contraband. These Standing Orders and Instructions do indicate that from out of the recovered substance, the sample which was required to be taken must be weighed and the same is required to be collected on the spot as early as possible unless there were such circumstances when it was not possible to collect the sample on the spot. It may also be taken into consideration that under the Old Act, Section 27 of the Act provided lesser punishment for illegal possession of small quantity of any Narcotic Drugs and Psychotropic Substance for personal consumption which would require weighing of the contraband substance. Under the provisions of the old Act the small quantity of opium was prescribed to be 5 grams. as per notification No. S.O. 827 (E) dated 4.11.1985 published in the Gazetted of India (Extra), Part 2 Section 3 (ii) dated 14.11.1985, pp. 2-3 issued by Ministry of Finance, Department of Revenue. Hence it will be supposed that the prosecution was duty bound to weigh the contraband substance allegedly recovered from the accused to know whether the recovered substance was small quantity or above that for determining whether he would be entitled for the benefit of small quantity for personal consumption. The record reveals that in recovery memo 75 grams. opium is alleged to have been found from the accused but no mention is made as to how the same was assessed to be 75 grams. as no weighing machine is recorded to have been called for, for its weighing nor the quantity of its sample is recorded therein. In this regard, P.W.1 has stated the same facts which have been mentioned in the recovery memo. In cross-examination this witness admitted that the weight of opium was recorded to be 75 gram on the basis of conjecture. Similarly P.W.2 has also repeated the same statement as is mentioned in the recovery memo, in examination-in-chief but even he has not disclosed as to how the same was weighed to be 75 grams. Both these witnesses have also not stated about weighing of the sample of the contraband also. It would also be pertinent to mention here that in the F.S.L. report also the quantity received of opium for being tested has not been recorded, hence, it cannot be held that the required minimum quantity of 24 gram was sent to them for being analysed which would also make the correctness of the said report to be doubtful."

9. Learned counsel for the applicants has also placed much reliance on the judgment of this Court passed in ***Criminal Misc. Bail Application No.9660 of 2021 (Om Prakash Verma vs. State of U.P.) decided on 11.03.2022,*** wherein it has been

opined that the Standing Order and the other guidelines issued by the Authority having legal sanction are required to be complied by the Arresting Authorities. He has further submitted that the recovered contraband is slightly above on the side of commercial quantity as the commercial quantity of Opium is 2.5 Kg. He has also submitted that there are no criminal history of the applicants.

10. Learned counsel for N.C.B., Sri Akhilesh Kumar Awasthi has vehemently opposed the bail application on the ground that the applicants are the perpetrator of the crime and a total of 7 Kg illegal Opium has been recovered from the conscious and constructive possession of the applicants, which is much more than commercial quantity. He has further stated that the mandatory provisions of Sections 50 and 57 have been religiously followed and after completing the investigation, a complaint was filed by the N.C.B. before the competent authority. He has further stated that the applicants are the residents of Jharkhand and were arrested from Charbagh Railway Station, Lucknow. He has further submitted that there are two independent witnesses of the recovery, namely, Rakesh Joshi and Sachin Kumar and the recovery has been undertaken in the present of Gazetted Officer Sujit Kumar Singh. Thus, the mandatory provision of Section 50 N.D.P.S. Act has been complied with. He has further stated that at the spot, test were conducted by D.D.T. Kit and it was found positive for Opium. He has further stated that C.D.R. analysis clearly shows the connection of the accused-applicants. He has further stated that the samples were taken and sent for chemical analysis on 23.02.2020 and was received at the F.S.L. on 24.02.2020 and the test was conducted on 16.03.2020 and the report was prepared on 26.05.2020, which is on record. There is complete compliance of the Standing Order 1/89 of the N.C.B. The minor difference in weight of two samples out of seven does not falsify the prosecution story.

11. Learned counsel has further stated that the case law referred to by learned counsel for applicant are not applicable to the present subject matter at this point of time, adjudication is for the purpose of bail only and we are not dealing with the order of conviction or acquittal. The recovered contraband is commercial in quantity. The accused persons are the residents of Jharkhand and there is nothing on record to suggest that they have been falsely implicated by the N.C.B. and there is nothing on record to suggest as to what animosity the N.C.B. had with the applicants and the another accused person. The applicants are the resident of Jharkhand. There is no reason for their false implication, that too regarding a recovery of this magnitude.

12. Learned counsel for N.C.B. has placed reliance on the following judgments :-

1. Than Kunwar vs. State of Haryana2

2. Ramesh Rana vs. State of U.P. 3

3. Union of India Through N.C.B. vs. Md. Nawaz Khan4

4. Union of India vs. Mohanlal and another5

5. State of Kerala vs. Rajesh6

6. State of Punjab vs. Baljinder Singh7

7. Sumit Tomar vs. State of Punjab8

8. Union of India vs. Ram Samujh And another9

9. Satpal Singh vs. State of Punjab10

10. Khet Singh vs. Union of India11

11. Dehal Singh vs. State of H.P.12

13. It is also provided in Section 52(1) of NDPS Act, wherein it is provided that the sample from the contraband should be taken before a Magistrate. The sample in the present case has been taken before the concerned Magistrate and the same law has been settled by the Apex Court. The taking of the sample before a Magistrate rules out any kind of adulteration or interpolation in the collection of the sample.

14. The relevant portions of the judgment rendered by the Apex Court in ***Union of India vs. Mohanlal and another13*** are as follows :-

"12. Section 52A as amended by Act 16 of 2014, deals with disposal of seized drugs and psychotropic substances. It reads:

Section 52A: Disposal of seized narcotic drugs and psychotropic substances.

(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered Under Section 53, the officer referred to in Sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in Sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) When an application is made Under Sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled

substances or conveyances] and any list of samples drawn Under Sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.]

13. It is manifest from Section 52A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered Under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with Sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction."

Conclusion:-

15. The recovered contraband is heavy in quantity. There is compliance of the mandatory provision of N.D.P.S. Act. The presence of applicants far away from their usual place of residence further casts shadow on his defence. The sample has been taken before the concerned Magistrate, which negates the theory of any kind of adulteration. There is nothing on record to suggest that there is any animosity of the accused to the officials of the N.C.B. The Standing Order No. 1/88 has been complied with. The call details further corroborate the prosecution story.

16. Minor discrepancy in the weight of the sample sent at the Forensic

Laboratory cannot shake the roots of the prosecution case.

17. Considering the facts and circumstances of the case, submissions advanced by learned counsel for the parties, nature of offence, evidence on record, pending investigation and considering the complicity of accused, severity of punishment, at this stage, without commenting any opinion on the merits of the case, this Court is not inclined to release the applicants on bail.

18. Both the bail applications are, accordingly, ***rejected.***

19. However, it is directed that the court below may proceed with the trial and reach at the logical conclusion expeditiously, if there is no legal impediment, within a period of one year from the date of production of a certified copy of this order.

20. It is clarified that the observations made herein are limited to the facts brought in by the parties pertaining to the disposal of bail application and the said observations shall have no bearing on the merits of the case during trial.

(2022)05ILR A196
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 09.05.2022

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Criminal Misc. Bail Application No. 8991 of 2021

Ajay Kumar Pal & Anr. ...Applicants
Versus
The State ...Opposite Party

Counsel for the Applicants:
Vijay Kishor Mishra, Sachchidanand, Sanjay Parmar

Counsel for the Opposite Party:
Anurag Kumar Singh, Ajai Kumar, Vivek Kumar Rai

Criminal Law- Code of Criminal Procedure, 1973- Section 439- Bail- Long period of incarceration- In the present case, more than nine years and one month's period have passed since the present applicants are in jail and despite the specific direction being issued by this Court on 09.08.2016 to conclude the trial expeditiously by fixing day-to-day dates taking recourse of Section 309 Cr.P.C. even the trial has not been completed half the way inasmuch as out of 81 prosecution witnesses, only 21 prosecution witnesses have been examined by now, therefore, the aforesaid fact may convince the Court to consider the present bail application for releasing the applicants on bail.

Prolonged or indefinite incarceration of the accused violates the Right to a fair and speedy trial which is one of the fundamental rights guaranteed under the Constitution of India and therefore the bleak possibility of early conclusion of the trial may be one of the considerations for enlarging the accused on bail. (Para 22)

Bail Application allowed. (E-3)

Judgements/ Case law relied upon:-

1. U.O.I Vs K.A. Najeeb AIR 2021 Supreme Court 712

2. Paras Ram Vishnoi Vs The Director, CBI passed in Crl. Appeal No.693 of 2021 (Arising out of SLP (Crl.) 3610 of 2020

3. In re:Ashim @ Asim Kumar Haranath Bhattacharya @ Asim Harinath Bhattacharya @ Aseem Kumar Bhattacharya Vs N.I.A (2022) 1 SCC (Cri.) 442

4. Crl. Appeal No.308 of 2022, @ SLP (Crl.) No.4633 of 2021; Saudan Singh Vs The St. of U.P vide order dated 25.02.2022

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

1. Heard Sri Vijay Kishor Mishra, learned counsel for the applicants, Sri Anurag Kumar Singh, learned counsel for the Central Bureau of Investigation (in short C.B.I.) and Sri Vivek Kumar Rai, learned counsel for the complainant/ informant.

2. This Court has passed the order dated 26.04.2022 as under:-

"Heard Mr. Vijay Kishor Mishra, learned counsel for the applicants, Mr. Anurag Kumar Singh, learned counsel appearing on behalf of the Central Bureau of Investigation and Mr. Vivek Kumar Rai, learned counsel for the informant/complainant/victim.

It has been contended that the present applicants are in jail since 7.4.2013 in Sessions Trial No.830 of 2013, R.C. No.1 (S)/2013/C.B.I./SC-1 New Delhi, under Sections 120 I.P.C. read with Section 302 I.P.C. & Section 25 (i)(b)(a)/26/27 Arms Act, Police Station C.B.I./SC-1 New Delhi.

It has been further contended that there are 81 prosecution witnesses, out of them identity of 11 material witnesses have not been disclosed. Therefore, those 11 witnesses have not been examined.

So far as the examination of other prosecution witnesses are concerned, till date 18 prosecution witnesses have been examined as per the information so given by learned trial court dated 20.04.2021. However, as per learned counsel for the applicants one more witness has been examined.

Learned counsel for the applicants has drawn attention of this court towards Annexure No.28 which is the bail order of co-accused Rajiv Pratap Singh @ Raju Singh, wherein this court in paras 3 and 6 has observed that the trial court has not taken appropriate steps as per Section 309 Cr.P.C. to conclude the trial.

Learned counsel for the applicants has further submitted that during investigation no statement under Section 164 Cr.P.C. has been recorded by the prosecution.

On being confronted on such averment, Mr. Anurag Kumar Singh, learned counsel for the Central Bureau of Investigation prays for and is granted a week's time to apprise the court as to whether the statement under Section 164 Cr.P.C. of any witness has been recorded or not.

Mr. Rai, learned counsel appearing on behalf of the complainant/informant has also submitted that despite the fact that the relevant material/fact witnesses on his side are ready to be examined, but till date they have not been examined.

Learned counsel for the applicants as well as learned counsel for the informant, both have said that while examining the prosecution witnesses the Central Bureau of Investigation adopts pick and chose policy.

Be that as it may, this is a case wherein the present applicants are in jail for more than 9 years and there is no possibility to conclude the trial in near future, therefore, the aforesaid aspect may be considered on the next date in the light of dictum of Hon'ble Apex Court in the cases of ***Union of India Vs. K.A. Najeeb; AIR 2021 SC 712 and Paras Ram Vishnoi Vs. The Director, Central Bureau of Investigation,*** *passed in* ***Criminal Appeal***

No.693 of 2021 [Arising out of SLP (Crl.) No.3610 of 2020].

Further, in a recent judgment of the Apex Court in ***Criminal Appeal No.308 of 2022, @ SLP (Crl.) No.4633 of 2021; Saudan Singh Vs. The State of Uttar Pradesh*** *vide order dated 25.02.2022, it has been observed that if any accused person is in custody for more than eight or ten years and his/her appeal is pending consideration before learned appellate court, his/her bail application may be considered.*

List this case on 9th May, 2022.

This case shall be taken up immediately after fresh cases.

In the meantime, Mr. Anurag Kumar Singh, learned counsel for the Central Bureau of Investigation may seek specific written instructions on the point as to whether the statement of witnesses have been recorded under Section 164 Cr.P.C. or not. He shall also seek written instructions on the point as to why material witnesses have not been called for examination when this court while granting the bail to co-accused Rajiv Pratap Singh @ Raju Singh has observed that learned trial court should adopt the procedure as prescribed under Section 309 Cr.P.C. conducting trial on day-to-day basis."

3. In compliance of the aforesaid order, Sri Anurag Kumar Singh, learned counsel for the C.B.I. has apprised the Court that during investigation the statement of two material witnesses have been recorded under Section 164 Cr.P.C., therefore, the submission of the learned counsel for the applicants that the statement of any person has not been recorded under Section 164 Cr.P.C., is absolutely incorrect.

4. Sri Singh has further submitted that after order dated 26.04.2022 being passed one more witness has been examined. He has further submitted that examination of other fact/ relevant witnesses has been started and he is hopeful that the examination of other fact witnesses would be concluded at the earliest taking recourse of Section 309 Cr.P.C.

5. Sri Vivek Kumar Rai, learned counsel for the complainant/ informant has also submitted that unless and until all fact/ relevant witnesses are examined, the present applicants who are the main assailants may not be released on bail otherwise they shall influence the remaining witnesses. He has further submitted on the basis of instructions that the applicants have threatened from jail that as soon as they come out from jail they shall see as to who are giving statement against them. Therefore, on the basis of aforesaid facts the bail application of the present applicants may be rejected.

6. At this stage, both counsel for the C.B.I. and counsel for the private opposite party have been confronted on the point as to whether the present applicants are having any criminal history or they are having any prior criminal antecedent, Sri Rai has submitted that he has no information on that point. However, Sri Anurag Kumar Singh, learned counsel for the C.B.I. has submitted on the basis of information and instructions so received that both the applicants have got no prior criminal antecedent.

7. Sri Anurag Kumar Singh has however submitted that in some dates the delay to conclude the trial was on account of no proper co-operation from the side of the applicant, however, no such information has been shown on the basis of records. He has also submitted that when one relevant

witness was being examined on 06.05.2022, after completion of his chief-examination the defence was called upon for cross-examination of such witness, the defence cross-examined such witness on 06.05.2022 and sought further time to conclude the cross-examination on 07.05.2022 and such cross-examination was concluded on 07.05.2022.

8. On the aforesaid contention, I observe that if after completion of the chief-examination of such witnesses on 06.05.2022 the defence cross-examined such witnesses on 06.05.2022 partially and it was concluded on 07.05.2022 so it would not be any deliberate delay on the part of the defence.

9. Sri Anurag Kumar Singh, learned counsel for the C.B.I. as well as Sri Vivek Kumar Rai, learned counsel for the private opposite party have again vehemently opposed the plea for bail of the present applicants by reiterating that the present applicants are the main assailants and are key pin of the crime in question, therefore, they should not be released on bail as they shall tamper the evidences and shall also influence the material witnesses and shall delay the trial proceedings.

10. Heard learned counsel for the parties and perused the material available on record.

11. In the present case, as per learned counsel for the applicants, the applicants are in jail with effect from 07.04.2013 i.e. more than nine years period has passed since they are in jail in Sessions Trial No.830 of 2013, R.C. No.1 (S)/2013/C.B.I./SC-1 New Delhi, under Sections 120 I.P.C. read with Section 302 I.P.C. & Section 25 (i)(b)(a)/26/27 Arms Act, Police Station-C.B.I./SC-1 New Delhi.

12. It would be also opt to indicate here that Annexure No.28 of the bail application is the bail order of co-accused, Rajiv Pratap Singh, dated 25.01.2022 passed in Bail Case No.8364 of 2017 (Rajiv Pratap Singh (Raju Singh) (Third Bail) to quote para-3 thereof, which reads as under:-

"3. The first bail application of applicant has already been rejected on merits vide order dated 23.07.2015. The second bail application was thereafter rejected vide order dated 09.08.2016 directing the trial court to finally dispose of the Sessions Trial expeditiously without granting any unnecessary adjournments and to conduct the trial in accordance with Section 309 Cr.P.C., on a day to day basis."

13. The perusal of para-3 reveals that this Court vide order dated 09.08.2016 directed the learned trial court to conclude the trial expeditiously without granting any unnecessary adjournment taking recourse of Section 309 Cr.P.C. conducting the trial on day-to-day basis. Undisputedly, despite the aforesaid specific direction being issued by this Court on 09.08.2016, about six years period have passed but what to say about the conclusion of trial even the trial has not been completed half the way as out of 81 witnesses only 21 witnesses have been examined by now.

14. Therefore, I am constraint to observe that the aforesaid careless and unwarranted approach of the learned trial court may not be appreciated whereby the specific direction of this Court dated 09.08.2016 has not been followed in its

letter and spirit and such direction went in vein.

15. The Hon'ble Apex Court in catena of cases has observed that the right of under trial enshrined under Article 21 of the Constitution of India may be considered and protected inasmuch as they should not be compelled to serve maximum punishing waiting the outcome of trial. The Hon'ble Apex Court in the case of ***Union of India vs. K.A. Najeeb AIR 2021 Supreme Court 712 and Paras Ram Vishnoi vs. The Director, Central Bureau of Investigation*** passed in ***Criminal Appeal No.693 of 2021 (Arising out of SLP (Crl.) 3610 of 2020*** granting bail to those accused persons on the ground that there is no possibility to conclude the trial in near future and there is a long incarceration of that accused, therefore, they were entitled for bail. Para-16 of the case K.A.Najeeb (supra) is being reproduced here-in-below:-

"This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India, it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, Courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, Courts would ordinarily be obligated to enlarge them on bail."

16. The Apex Court in the case in re: ***Paras Ram Vishnoi*** *(supra)* has observed as under:-

"On consideration of the matter, we are of the view that pending the trial we cannot keep a person in custody for an indefinite period of time and taking into consideration the period of custody and that the other accused are yet to lead defence evidence while the appellant has already stated he does not propose to lead any evidence, we are inclined to grant bail to the appellant on terms and conditions to the satisfaction of the trial court."

17. Recently the Hon'ble Apex Court in the case in re:***Ashim alias Asim Kumar Haranath Bhattacharya alias Asim Harinath Bhattacharya alias Aseem Kumar Bhattacharya vs. National Investigation Agency reported in (2022) 1 SCC (Cri.) 442*** *has observed in paras-9, 10 & 11 as under:-*

"9. We have to balance the nature of crime in reference to which the appellant is facing a trial. At the same time, the period of incarceration which has been suffered and the likely period within which the trial can be expected to be completed, as is informed to this Court that the statement of PW1/defacto complainant has still not been completed and there are 298 prosecution witnesses in the calendar of witness although the respondent has stated in its counter-affidavit that it may examine only 100 to 105 witnesses but indeed may take its own time to conclude the trial. This fact certainly cannot be ignored that the

appellant is in custody since 6-7-2012 and has completed nine-and-half years of incarceration as an undertrial prisoner.

10. This Court has consistently observed in its numerous judgments that the liberty guaranteed in Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial is imperative and the undertrials cannot indefinitely be detained pending trial. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, the Courts would ordinarily be obligated to enlarge him on bail.

11. Deprivation of personal liberty without ensuring speedy trial is not consistent with Article 21 of the Constitution of India. While deprivation of personal liberty for some period may not be avoidable, period of deprivation pending trial/appeal cannot be unduly long. At the same time, timely delivery of justice is part of human rights and denial of speedy justice is a threat to public confidence in the administration of justice."

18. In para-12 of the judgment of Hon'ble Apex Court in re: ***Ashim*** (supra), the dictum of the case of ***K.A. Najeeb*** *(supra)* has been considered.

19. The Hon'ble Apex Court in the case in re: ***Saudan Singh*** (supra) has held that if any accused person is in custody for more than eight or ten years and his/her appeal is pending consideration before learned appellate court, his/her bail application may be considered.

20. Further, on the submission of Sri Anurag Kumar Singh and Sri Vivek Kumar Rai, learned counsel for the complainant/ informant to the effect that if the present applicants are released on bail, they shall influence the witnesses by giving threats for the dire consequences and shall delay the trial proceedings, it is needless to say that this is solemn duty and responsibility of the prosecution to protect and produce its witnesses before the trial court. Their security is solemn duty and responsibility of the police agencies/ prosecution. However, I direct the police agency/ prosecution to protect all the witnesses, particularly the prime and relevant witnesses, providing them the required security, if the need be, and to produce them before the learned trial court safely so that they could be examined without any fear or apprehension.

21. It is always open for the prosecution or counsel for the complainant/ informant to file the application for cancellation of bail if any fact emerges to the effect that the applicants after being released from jail are affecting the trial or influencing the relevant witnesses or threatening them or assaulting them in any manner whatsoever.

22. In the present case, more than nine years and one month's period have passed since the present applicants are in jail and despite the specific direction being issued by this Court on 09.08.2016 to conclude the trial expeditiously by fixing day-to-day dates taking recourse of Section 309 Cr.P.C. even the trial has not been completed half the way inasmuch as out of 81 prosecution witnesses, only 21 prosecution witnesses have been examined by now, therefore, the aforesaid fact may convince the Court to consider the present bail application for releasing the applicants on bail.

23. Accordingly, the bail application is allowed.

24. Let the applicants-Ajay Kumar Pal and Vijay Kumar Pal, be released on bail in the aforesaid case crime number on their furnishing personal bond of Rs.1,00,000/- each and two sureties of Rs.50,000/- each by both the applicants to the satisfaction of the court concerned with the following conditions:-

(i) The applicants shall file an undertaking to the effect that they 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 applicants shall remain present before the trial court on each date fixed, either personally or through their counsel. In case of their absence, without sufficient cause, the trial court may proceed against them under Section 229-A of the Indian Penal Code.

(iii) In case, the applicants misuse the liberty of bail during trial and in order to secure their presence proclamation under Section 82 Cr.P.C. is issued and the applicants fail to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against them, in accordance with law, under Section 174-A of the Indian Penal Code.

(iv) The applicants 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 applicants 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 them in accordance with law.

(v) The present applicants shall not leave the country without prior permission of the Court.

25. Before parting with, it is expected that the trial shall be concluded with expedition in terms of Section 309 Cr.P.C. Further, the learned trial court may take all coercive measures, as per law, if either of the parties does not co-operate in the trial properly.

(2022)05ILR A202
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.05.2022

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Criminal Misc. Bail Application No. 11033 of 2018

Shiv Sagar @ Pankaj Mishra ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Arun Kumar Tripathi, A P Mishra

Counsel for the Opposite Party:
G.A., Ashok Kr. Sravastav

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 439 - Bail - Indian Penal Code, 1860 - Sections 147, 148, 149, 302, 307, 404, 120-B & 34 - 'the bail is a right and denial is an exception' - does not mean that the bail should be granted in every case - at the time of considering the bail application of an accused - necessary for the Judge to consider whether the accused is a first-time offender or has been accused of other offences - if so, nature of such offences and his or her general conduct. (Para - 27)

After getting bail in first criminal case - applicant committed several offences - misused the liberty of bail granted by the competent court of law. (**Para - 24)**

HELD:-Repeated offender who repeats any crime while he/she is on bail in earlier case/cases should not be granted bail as he/she may again misuse the liberty of bail therefore instead of granting bail, the direction to expedite the trial should be issued. **(Para - 26)**

Bail application rejected. (E-7)

List of Cases cited:-

1. Ramesh Bhavan Rathod Vs Vishanbhai Hirabhai Makwana Makwana (Koli) & anr., AIR 2021 SC 2011

2. Rishipal @ Rishipal Singh Solanki Vs Raju & anr., Criminal Appeal No. 541 of 2022

3. Dataram Singh Vs St. of U.P. & anr. , (2018) 3 SCC 22

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

1. Heard Mr. A.P. Mishra, learned counsel for the applicant, Mr. Rupendra Kumar Singh, learned Additional Government Advocate appearing on behalf of the State and Mr. Ashok Kumar Srivastava, learned counsel for the complainant/informant.

2. As per Mr. Mishra, the present applicant is in jail since 26.09.2018, in Case Crime No.302 of 2016, under Sections 147, 148, 149, 302, 307, 404, 120-B & 34 I.P.C. Police Station- Baaghrai, District-Pratapgarh. Learned counsel for the applicant has submitted that the present applicant has been falsely implicated in the case as he has not committed any offence as alleged.

3. As per the prosecution case, in the mid night of 11.12.2016 the complainant along with his brother Rajesh Singh, Dheeraj Singh, Sonu Singh, Poonam Singh, wife of Rajesh Singh, Harshvardhan Singh son of Rajesh Singh were returning to his home after attending an invitation in Tiwari Mahamadpur. When they reached at Kamsin Tiraha then the accused persons armed with fire arms and bombs attacked on them. It is further mentioned in the first information report that due to the firing Rajesh Singh died on spot and Dheeraj Singh and Sonu Singh received grievous injuries. It is also alleged in the first information report that during commission of crime the accused persons also looted a licensed pistol and cash of Rs.1,50,000/- and some papers of the deceased.

4. Learned counsel for the applicant has submitted that on the complaint submitted by informant/complainant as many as 18 persons including the present applicant has been arrested.

5. Learned counsel for the applicant has submitted that an unexplained delay of more than 14 hours in lodging of first information report renders the prosecution story wholly unreliable particularly when the informant alleges himself to be eye witness.

6. It has been submitted on behalf of the applicant that the complainant, deceased Rajesh Singh and alleged injured Dheeraj Singh are notorious criminals and there is long criminal history to their credits. The aforesaid persons are also history-sheeters and due to their criminal activities, the deceased and alleged injured persons have been caused injuries by some unknown persons in dark hours of winter night and no one could identify the actual assailants. It is also submitted that the complainant was not accompanied with the

deceased and alleged injured persons at the time of alleged incident and when he came to know about the aforesaid incident then he lodged a false first information report against those persons, with whom he is on inimical terms, leveling therein totally false and fabricated allegations, just to settle the score of enmity.

7. It is also submitted that neither the complainant nor the wife and son of the deceased have received any type of injury in the alleged incident. This fact itself creates doubt on their presence at the place of incident at the time of alleged incident. The alleged injured Sonu Singh has also denied the presence of complainant and the wife and son of deceased at the place of incident at the time of alleged incident. From perusal of the statements of alleged injured persons namely Dheeraj Singh and Sonu Singh, it is clear that the alleged incident took place in foggy winter night and due to the darkness and fog the accused persons could not be identified by them. From perusal of the statements of alleged injured persons, it is clear that their statements have been recorded after about one month of the alleged incident when they were medically fit.

8. It is also submitted that the injury reports of the alleged injured persons reveal that they were brought by Sanjay Singh and Kamlesh Pratap Singh for their medical examination not by the complainant, Poonam Singh and Harsh Vardhan Singh, who have claimed themselves to be the eye witnesses of the alleged incident. This fact itself creates doubt C21HE692on the presence of complainant, Poonam Singh and Harsh Vardhan Singh at the place of incident at the time of alleged incident.

9. From perusal of the first information report as well as the statement of the complainant, recorded U/S-161 Cr.P.C., it is clear that no specific role has been assigned to the applicant and only general role has been assigned to all the alleged accused persons. From perusal of the post mortem report of deceased, it is clear that the deceased had received only two injuries on his person and he died because of the injury no.1, which is a fire arm injury, and the prosecution is silent on this point that who is author of said injury. It has also been submitted that on 28.03.2017, the wife of deceased namely Smt. Poonam Singh had given an application before the Deputy Inspector General of Police, Allahabad Range, Allahabad, mentioning therein that the statements, U/S-161 Cr.P.C. of the witnesses, including her, have not been recorded correctly, that's why she as well as the other witnesses are giving their statements on affidavit, alongwith the application.

10. Learned counsel for the applicant has submitted that the applicant has a criminal history of four cased, details of which have been given in paragraph no.22 of the bail application.

11. Learned counsel for the applicant has submitted that this Court has granted bail to the co-accused Santosh Vaish in Bail No.7415 of 2017 and Rohit Singh in Bail No.8679 of 2017 vide order dated 5.2.2018. The complainant/informant has challenged the bail order of co-accused Rohit Singh before Hon'ble Apex Court by filing Special Leave to Appeal (Criminal) No.5018 of 2018 contending that the said accused while on bail in the present case has committed two more serious offences. Therefore the Hon'ble Apex Court has observed vide order dated 6.9.2019 that the Investigating Officer should immediately

move for cancellation of bail against the said accused before the High Court and if such application is filed, same shall be decided on merits.

12. Pursuant to the aforesaid direction of the Hon'ble Apex Court the application for cancellation of bail was filed before this Court bearing Bail No.9677 of 2019 and this Court vide order dated 27.01.2020 cancelled the bail of co-accused Rohit Singh.

13. Learned counsel for the applicant further submitted that the bail of co-accused Santosh Vaish was not assailed and such order is still maintained. He has further submitted that this Court has also granted bail to other co-accused persons namely Pankaj Pasi @ Pankaj Saroj in Bail No.1030 of 2018 vide order dated 9.2.2018 and to Jwala Singh @ Kuldeep Singh in Bail No.973 of 2018 vide order dated 8.2.2018. One more co-accused Pramod Kumar Singh has been granted bail vide order dated 16.2.2018, passed in Bail No.1169 of 2018, however, an application for cancellation of his bail is pending consideration. It has also been informed that this Court vide recent order dated 8.4.2022 rejected the bail application of one of the co-accsued Sunil Kumar Gupta @ Bachcha in Criminal Misc. Bail Application No.10805 of 2019, vide order dated 4.1.2022.

14. To summarize, learned counsel for the applicant has submitted that the bail orders of the co-accused Santosh Vaish, Pakka Pasi @ Pankaj Saroj, Jwala Singh @ Kuldeep Singh are still intact, whereas the bail of Rohit Singh, Sunil Kumar Gupta @ Bachcha has been cancelled. He has further submitted that there may not be any parity in rejection of the bail order as the parity is considered for the bail orders granted in favour of the co-accused persons.

15. Therefore, on the basis of the aforesaid facts and considering the period of incarceration of the present applicant, he may be released on bail giving parity with the aforesaid co-accused persons who have been enlarged on bail by this Court. He has also submitted that there is no possibility to conclude the trial in near future, therefore, the present applicant may not be compelled for pre-trial detention as the same shall be violative of Article 21 of the Constitution of India.

16. Learned A.G.A. as well as Mr. Ashok Kumar Srivastava, learned counsel for the complainant/informant have vehemently opposed the aforesaid bail application.

17. Mr. Srivastava has submitted that the applicant is a hardened and habitual criminal. He is having a criminal history of ten cases including the present one.

18. Mr. Srivastava, learned counsel for the informant has submitted that eye-witness has fully supported the prosecution version. He has drawn attention of this Court towards the statement of Manoj Kumar Singh informant/complainant and Smt. Poonam Singh wife of the deceased, wherein the name of the present applicant has been taken. Further, the injured witnesses namely Sonu Singh and Dheeraj Singh also supported the prosecution case. He has also submitted that in similar circumstances the bail of co-accused Sunil Kumar Gupta @ Bachcha (Criminal Misc. Bail Application No.10805 of 2019) has been canceled by this Court and said co-accused was having similar role as the present applicant, therefore, the bail

application of the present applicant may be rejected.

19. Mr. Srivastava, learned counsel for the complainant has drawn attention of this Court towards paragraph no.22 of the bail application, wherein the applicant has disclosed that he is having a criminal history of four cases, whereas the present applicant is having a criminal history of ten cases as indicated in paragraph no.17 of the counter affidavit of the complainant/informant. No rejoinder affidavit to that counter affidavit has been filed, therefore, Mr. Srivastava has submitted that the present applicant has concealed the entire criminal history.

20. Mr. Srivastava, learned counsel for the complainant has place reliance on the dictum of Hon'ble Apex Court in the case of ***Ramesh Bhavan Rathod Vs. Vishanbhai Hirabhai Makwana Makwana (Koli) and another;*** reported in ***AIR 2021 SC 2011*** to contend that while considering the bail application of the accused, particularly considering the principle of parity, the gravity of the offence, nature of offence and general conduct of the accused should be perused carefully.

21. He has also drawn attention of this Court towards decision rendered by Hon'ble Apex Court dated 1.4.2022 in the case of ***Rishipal @ Rishipal Singh Solanki Vs. Raju and another; Criminal Appeal No.541 of 2022*** arising out of Special Leave Petition (Criminal) No.1743 of 2022 to contend that when the bail application of the co-accused is dismissed, factors which led to such dismissal must be considered while deciding the bail application of the other co-accused persons.

22. I have considered the submissions of learned counsel for parties and perused the material available on record.

23. At the very outset, I must observe that the applicant has disclosed his criminal history of as many as four cases which he has explained in para no.22 of his bail application. The learned counsel for the complainant has however submitted in para-17 of the counter affidavit that he is a hardened criminal having a long criminal history of ten cases which has not been disclosed and explained in the bail application or in the supplementary affidavits, the details of which are as under:

"1. Case Crime No. 142 of 2007, under sections 325 & 323 IPC, Police Station-Baghrai, District- Pratapgarh.

2. Case Crime No. 10 of 2013, under sections 395 & 412 IPC, Police Station- Soraun, District- Allahabad.

3. Case Crime No. 31 of 2016, under sections 448, 506 IPC and 3/5 of Damage to the Public Property Act, Police Station Baghrai, District- Pratapgarh.

4. Case Crime No. 82 of 2016, under sections 110 Cr.P.C. Police Station- Baghrai, District- Pratapgarh. The case is under trial.

5. Case Crime No. 91 of 2016, under section 3 (1) U.P. Gangster Act, Police Station- Baghrai, District- Pratapgarh.

6. Case Crime No. 143 of 2016, under sections 376-G, 506 IPC and 3 (2)(V) SC/ST Act, Police Station- Baghrai, District Pratapgarh.

7. Case Crime No. 197 of 2016, under sections 379 IPC and 3/4 of Damage to the Public Property Act. Police Station Baghrai, District- Pratapgarh.

8. N.C.R. No. 221 of 2015, under sections 323, 504, 506 IPC, Police Station- Baghrai, District- Pratapgarh.

9. Case Crime No. 227 of 2016, under sections 307 IPC, Police Station- Baghrai, District- Pratapgarh.

10. Case Crime No. 302 of 2016, under sections 147, 148, 149, 302, 307, 404, 120-B, 34 IPC, Police Station- Baghrai, District Pratapgarh. (This is the present case)."

24. Therefore, it is clear that after getting bail in first criminal case the present applicant has committed several offences, so it would be appropriate to observe here that he has misused the liberty of bail granted by the competent court of law.

25. When any accused person is released on bail in his/her first criminal case, he/she gives his/her undertaking before the competent court concerned that he/she shall not misuse the liberty of bail. During period of bail if he/she again commits any offence and was arrested, he/she files the next bail application in such crime case making specific and categorical submission and undertaking that he/she shall not misuse the liberty of bail then, the competent court considering the aforesaid undertaking grants bail. Again during the period of bail such accused person commits another offence and obtains bail, it would mean that he/she has got no respect towards the order of the Court whereby he/she has been granted bail and at the same time he/she does not care about his/her undertaking that he/she shall not misuse the liberty of bail.

26. In nutshell, the repeated offender who repeats any crime while he/she is on bail in earlier case/cases should not be granted bail as he/she may again misuse the liberty of bail therefore instead of granting bail, to me, the direction to expedite the trial should be issued.

27. The Hon'ble Apex Court in the case of ***Dataram Singh Vs. State of U.P. and another*** reported in ***(2018) 3 SCC 22*** has observed that 'the bail is a right and denial is an exception' but it does not mean that the bail should be granted in every case. Further, at the time of considering the bail application of an accused it is also necessary for the Judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct.

28. The Hon'ble Apex Court in a recent judgment of ***Ramesh Bhavan Rathod (supra)*** has observed in paragraphs 22 and 32 as under:

"22. We are constrained to observe that the orders passed by the High Court granting bail fail to pass muster under the law. They are oblivious to, and innocent of, the nature and gravity of the alleged offences and to the severity of the punishment in the event of conviction. In Neeru Yadav Vs. State of U.P. MANU/SC/1208/2014 : (2014) 16 SCC 508, this Court has held that while applying the principle of parity, the High Court cannot exercise its powers in a capricious manner and has to consider the totality of circumstances before granting bail. This Court observed:

17. Coming to the case at hand, it is found that when a stand was taken that the 2nd Respondent was a history sheeter, it was imperative on the part of the High Court to scrutinize every aspect and not capriciously record that the 2nd Respondent is entitled to be admitted to

bail on the ground of parity. It can be stated with absolute certitude that it was not a case of parity and, therefore, the impugned order clearly exposes the non-application of mind. That apart, as a matter of fact it has been brought on record that the 2nd Respondent has been charge sheeted in respect of number of other heinous offences. The High Court has failed to take note of the same. Therefore, the order has to pave the path of extinction, for its approval by this Court would tantamount to travesty of justice, and accordingly we set it aside.

32. Our analysis above would therefore lead to the conclusion that there has been a manifest failure of the High Court to advert to material circumstances, especially the narration of the incident as it appears in the cross FIR which was lodged on 13 May 2020. Above all, the High Court has completely ignored the gravity and seriousness of the offence which resulted in five homicidal deaths. This is clearly a case where the orders passed by the High Court suffered from a clear perversity."

(emphasis supplied)

29. Notably, the bail of the co-accused Sunil Kumar Gupta @ Bachcha in Criminal Misc. Bail Application No.10805 of 2019 has been rejected by this Court vide order dated 4.1.2022 considering the gravity of offence and the statement of eye witnesses and the injured persons.

30. Besides, the bail of another co-accused Rohit Singh has been cancelled by this Court pursuant to the directions of Hon'ble Apex Court considering the gravity of the offence, statements of eye witnesses and the injured persons as well as the fact that such co-accused persons have misused the liberty of bail granted by this Court.

31. Therefore, without entering into the merits of the issue and going through the material available on record, the statements of eye witnesses and injured persons recorded under Section 161 Cr.P.C., checkered criminal history of the present applicant, I do not find any good ground to grant bail to the present applicant as no case for bail is made out.

32. Accordingly, bail application is ***rejected.***

33. Further, I am not convinced to grant parity to the present applicant with those co-accused persons who have been granted bail by this court inasmuch as the present applicant has got a long criminal history and such history has not been disclosed or explained in his bail application or subsequent affidavits, so this fact alone disentitles him to get parity.

34. Before parting with, it is expected that the trial shall be concluded with expedition, say, within a period of one year. Further, the learned trial court may take all coercive measures as per law if either of the parties do not co-operate in the trial properly. The learned trial court shall fix short dates to ensure that trial is concluded within a period of nine months in terms of Section 309 Cr.P.C..

(2022)05ILR A208
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.04.2022

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Criminal Misc. Bail Application No. 12587 of 2021

Ashok Kumar ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Ashish Kumar Rastogi, Anita Singh

Counsel for the Opposite Party:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 439 - Bail - Indian Penal Code, 1860 - Sections 302, 307 & 323 - The Code of Criminal Procedure, 1973 - Sections 161 & 164 - No individual should be forcibly subjected to any of the technique in question whether in the context of investigation in criminal case or otherwise and if such technique is adopted, the outcome thereof would have no evidentiary value.(Para - 7)

F.I.R. against the four unknown persons - statement of informant / wife of deceased - statement of eye witness u/s 161 Cr.P.C. - transferred to crime branch for further investigation - Polygraph test - leading question asked from eye witness - whether present applicant has committed crime in question - affirmative rreply **-** such question could not have been asked while conducting the polygraph test - disapproved by Hon'ble Apex Court. **Para -3,4,15)**

HELD:-when eye witness and the informant who is wife of deceased had not alleged anything against the present applicant while recording their statement u/s 161 Cr.P.C. whereas the present applicant was close relative of the informant then the statement of eye witness taken while conducting polygraph test would have no evidentiary value in view of the dictum of Hon'ble Court in re: ***Selvi and others.*****(Para -16)**

Bail application allowed. (E-7)

List of Cases cited:-
Selvi & ors. Vs St. of Karn. , (2010) 7 SCC 263

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

1. Heard Sri Ashish Kumar Rastogi, learned counsel for the applicant and Sri Rao Narendra Singh, learned AGA for the State.

2. The present applicant is in jail Since 18.6.2021 in Case Crime No. 314 of 2018 u/s 302, 307, 323 IPC, P.S. Gosaiganj, District Lucknow. He has further submitted that the present applicant has been falsely implicated in this case as he has not committed any offence as alleged in the prosecution story.

3. Attention has been drawn towards the impugned F.I.R. which is against the four unknown persons who were beating up the husband of the informant mercilessly through sharp edged weapon and batons on 29.5.2018. As per the informant she has seen those persons through the light of torch as the incident is a night occurrence of 9.30 P.M.

4. The police recorded the statement of informant / wife of the deceased on 31.5.2018. Further, the police recorded the statement of eye witness Guddu s/o Guru Prasad u/s 161 Cr.P.C. on 12.1.2019. When the local police could not investigate the matter as no reliable evidences could be collected, matter was transferred to crime branch for further investigation. The crime branch again recorded the statement of eye witness Guddu on 22.5.2020 where he repeated his earlier version recorded under section 161 Cr.P.C. The crime branch conducted the Polygraph test of Guddu s/o Guru Prasad on 15.3.2021. During polygraph test the leading question has been asked from Guddu as to whether the present applicant has committed crime in question, he replied in affirmative. As per learned counsel for the applicant the leading question could have not been asked during investigation. However, on the basis of aforesaid statement of eye witness

Guddu the police arrested the applicant and send him jail on 18.6.2021 without intimating any reason to the applicant or his family members regarding the offence he has committed for that he is being arrested. Thereafter, the police filed charge-sheet on 18.7.2021 implicating the present applicant on the basis of polygraph test.

5. Learned counsel for the applicant has drawn attention of this Court towards para 15 of the bail application wherein it has been categorically indicated that the present applicant is son-in-law of the informant. Therefore, it is beyond any comprehension that if the informant was able to recognize the assailants on the date of incident she could not recognize her close relative. To be more precise, as per learned counsel for the applicant had the offence in question been committed by the present applicant the informant would have recognized him being a close relative but since nothing has been alleged against the present applicant by the informant or other witnesses from 29.5.2018, the date of incident till 5.3.2021 when the polygraph test of Guddu s/o Guru Prasad was conducted, therefore, on the basis of polygraph test the present applicant may not be implicated.

6. Learned counsel for the applicant has drawn attention of this Court towards the dictum of Apex Court in re: ***Selvi and others vs. State of Karnataka (2010) 7 Supreme Court Cases 263*** referring para 240, 242 and 264 which reads as under :

"240. We must also contemplate situations where a threat given by the investigators to conduct any of the impugned tests could prompt a person to make incriminatory statements or to undergo some mental trauma. Especially in cases of individuals from weaker sections of society who are unaware of their fundamental rights and unable to afford legal advice, the moth apprehension of undergoing scientific tests that supposedly reveal the truth the act is threatening to administer the impugned tests could also elicit testimony. It is also quite conceivable that an individual may give his/her consent to undergo the said tests on account of threats, false promises or deception by her investigators. For example, a person may be convinced to give his/her consent after being promised that this would lead to an early release from custody or dropping of charges. However, after the administration of the tests the investigators may renege on such promises. In such a case the relevant inquiry is not confined to the apparent voluntariness of the act of undergoing the tests, but also includes an examination of the totality of circumstances.

242. We can also contemplate a possibility that even when an individual freely consents to undergo the tests in question, the resulting testimony cannot be readily characterised as voluntary in nature. This is attributable to the differences between the manner in which the impugned tests are conducted and an ordinary interrogation. In an ordinary interrogation, the investigator asks questions one by one and the subject has the choice of remaining silent or answering each of these questions. This choice is repeatedly exercised after each question is asked and the subject decides the nature and content of each testimonial response. On account of the continuous exercise of such a choice, the subject's verbal responses can be described as voluntary in nature. However, in the context of the impugned techniques the

test subject does not exercise such a choice in a continuous control over the subsequent responses given during the test in case of the narcoanalysis technique, the subject speaks in a drug-induced state and is clearly not aware of his/her own responses at the time. In the context of polygraph examination and the BEAP tests, the subject cannot anticipate the contents of the "relevant questions" that will be asked or the "probes" that will be shown. Furthermore, the results are derived from the measurement of physiological responses and hence the subject cannot exercise an effective choice between remaining silent and imparting personal knowledge. In light of these facts, it was contended that a presumption cannot be made about the voluntariness of the test results even if the subject had given prior consent.

264. In light of these conclusions, we hold that no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty. However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice provided that certain safeguards are in place. Even when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted in accordance with Section 27 of the Evidence Act, 1872." Emphasis Supplied

7. In the aforesaid judgment the Hon'ble Apex Court has held that no individual should be forcibly subjected to any of the technique in question whether in the context of investigation in criminal case or otherwise and if such technique is adopted, the outcome thereof would have no evidentiary value.

8. Learned counsel for the applicant has submitted that during the aforesaid polygraph test the investigating officer has asked pin pointed question that 'as to whether the present applicant has committed this offence', this witness has given reply in affirmative. As per Sri Rastogi such type of questions are known as 'leading questions' and those questions may not be asked during investigation. Even such leading question may not be asked during examination-in-chief or re-examination during trial except with the permission of the Court, however, during cross-examination such type of questions may be asked.

9. He has further submitted that except the aforesaid statement of eye-witness Guddu during polygraph test no other evidence or material is available with the prosecution to suggest that the present applicant has committed offence in question. Since the charge-sheet has been filed, therefore, there is no apprehension of absconding or tampering of evidence / witness by the applicant.

10. The learned counsel for the applicant has given an undertaking on behalf of applicant that the applicant shall not misuse the liberty of bail and shall cooperate with the trial proceedings and shall abide by all terms and conditions of bail, if granted.

11. Sri Rao Narendra Singh, learned AGA has, however, opposed the prayer of

bail but could not dispute the aforesaid submissions so raised by the learned counsel for the applicant. He could also not dispute the proposition of law in re: ***Selvi (supra).***

12. Heard learned counsel for the parties and perused the material available on record and also perused the dictum of Hon'ble Apex Court in re: ***Selvi (supra).***

13. Without entering into the merits of the issue and considering the contents of F.I.R., statement of informant, of eye witness and polygraph test dated 5.3.2021 (Annexure no. 8), I find that this is a fit case of bail.

14. The perusal of polygraph test dated 5.3.2021 (Annexure no. 8) reveals that the investigating officer has asked a pin-point question vide question no. 1 from eye witness Guddu s/o late Guru Prasad that " as to *whether Sarhu Ram Prakash and Damad Ashok had assaulted on the victim"*. The said eye-witness replied *"Yes"*.

15. To me instead of asking leading question from the eye-witness Guddu s/o late Guru Prasad the prosecution should have asked as to who were those persons who have attacked on him and victim. However, even such question could not have been asked while conducting the polygraph test inasmuch as such test has been disapproved by the Hon'ble Apex Court in re: ***Selvi and others*** (supra).

16. I am constrained to observe here that when such eye witness Guddu s/o late Guru Prasad and the informant who is wife of deceased had not alleged anything against the present applicant while recording their statement u/s 161 Cr.P.C. on 12.1.2019 and 31.5.2018 respectively whereas the present applicant was close relative of the informant then the statement of eye witness Guddu s/o late Guru Prasad taken while conducting polygraph test would have no evidentiary value in view of the dictum of Hon'ble Court in re: ***Selvi (supra).*** Therefore, when such statement of the eye witness in question has got no evidentiary value in the eyes of law, the implication of the present applicant in such case would not be proper subject to other circumstantial evidence and corroborative material which would be seen during trial. In other words, any observation of this Court in this order would not effect the trial proceedings in any manner whatsoever and the trial would be conducted and concluded strictly in accordance with law. Whether the present applicant is guilty or not in the charges framed against him, will be decided by the trial court on its own merit after analyzing the evidences that surfaces on record during the trial.

17. Therefore, In view of the above the present bail application is ***allowed.***

18. Let the applicant Ashok Kumar, involved in aforesaid 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 with the following conditions which are being imposed in the interest of justice:-

(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.

(v) The applicant shall not leave the country without permission of the Court concerned.

19. Before parting with it is expected that the trial shall be concluded with expedition. Further, the learned trial court may take all coercive measures as per law if either of the parties do not co-operate in the trial properly. The learned trial court shall fix short dates to ensure that trial is concluded at the earliest.

(2022)05ILR A213
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.05.2022

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Criminal Misc. Bail Application No. 40580 of 2021

Mohammad Azam Khan ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Mohammad Khalid, Sri Syed Safdar Ali Kazmi, Sri Qamrul Hasan Siddiqui, Sri Imran Ullah

Counsel for the Opposite Party:
G.A., Sri Prasoon Kumar, Sri Sharad Sharma, Sri Syed Ahmad Faizan, Sri Zaheer Asghar, Sri Taqi Abidi, Ms. Anjum Fatima, Sri Syed Farman Ahmad Naqvi (Senior Adv.)

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 439 - Bail - Indian Penal Code, 1860 - Sections 420, 467, 468, 471, 447, 201 & 120-B - The Prevention of Damage to Public Property Act, 1984 - Section 3 - The Administration of Evacuee Property Act, 1950 - Section 8 - Enemy Property Act, 1968 - *Se*ction 5 - The *Waqf* Act, 1995 - Section 36 and 37 - Proviso to Section 36(2) of the *Waqf* Act - Evacuee Property - "Custodian' of the State - '*Waqf* Property' - 'conflict of interest' - "Religion is regarded by the common people as true, by the wise as false, and by rulers as useful" - "power corrupts a man and absolute power corrupts absolutely" - Bail is a right of any accused and jail is exception. (Para - 38,39,)

Bail application after rejection of second bail - land in dispute - declared as Enemy Property swindled by applicant - property surrendered in the name of religion **"ONCE A *WAQF* PROPERTY IS ALWAYS A *WAQF* PROPERTY"** as an ultimate weapon - applicant to grab the land unlawfully - ashramite himself under the umbrella of religion - "the *Waqf* property is the property of Almighty' - applicant, intoxicated on the throne of the power and position - misused his authority in a most indecent manner - "If absolute power

corrupts absolutely, where does that leave God?" - **(Para - 6,20,38)**

HELD:-On the humanitarian ground , keeping in view the applicant's deteriorating health, old age and the period undergone in jail, bail granted to applicant by imposing conditions.**(Para - 39)**

Bail application allowed. (E-7)

List of Cases cited:-

1. Satendra Kumar Antil Vs C.B.I. , 2021 SCC Online SC 922

2. Naveen Singh Vs St. of U.P., 2021 6 SCC 191

3. St. of Maha. Vs Sitaram Popat Vital, AIR 2004 SC 4258

4. Ram Govind Upadhyay Vs Sudarshan Singh & ors., AIR 2002 SC 1475

5. Prahalad Singh Bhati Vs N.C.T. Delhi & ors, AIR 2001 SC 1444

6. Sanjay Chandra Vs C.B.I., (2012) 1 SCC 49

7. Manoranjana Sinh @ Gupta Vs C.B.I., 2017 (5) SCC 218

8. Sanjay Chandra Vs C.B.I. , (2012) 1 SCC 40

9. Prashanta Kumar Sarkar Vs Ashis Chatterjee & anr., (2010) 14 SCC 496

(Delivered by Hon'ble Rahul Chaturvedi, J.)

1. Heard Sri Imran Ullah, assisted by Sri Mohd. Khalid, Sri Qamrul Hasan Siddiqui, Sri Safdar Ali Qazmi, learned counsel for the applicant; Sri Syed Farman Ahmad Naqvi, learned Senior Advocate assisted by Sri Syed Ahmad Faizan, Sri Zaheer Asghar, Sri Taqi Abidi, Sri Sharad Sharma and Ms. Anjum Fatima, learned counsel appearing for the informant and Sri M.C. Chaturvedi, learned Additional Advocate General, assisted by Sri Jai Narain Varshney, Sri Patanjali Mishra, Sri Abhijeet Mukherjee, learned Additional Government Advocates appearing for the State. Perused the record.

2. The pleadings have been exchanged between the parties, the matter was heard at length on previous occasion and the order was reserved to be dictated in the Chamber, meanwhile, learned A.G.A. on 28/29th April, 2022 made a mention in the Court, in the presence of learned counsel for the applicant, that on account of certain recent developments, touching the core issue, have cropped up during intervening period, and thus, requested to bring on record those fresh developments by filing a supplementary affidavit. With the consent of learned counsels of the applicant, the matter was reopened and after the exchange of affidavits, on 5.5.2022, heard *marathon* arguments advanced to the satisfaction of counsels of both the sides and after having the written submissions from the contesting parties, judgement was reserved to be pronounced in the second week of May, 2022.

3. This bail application has been filed on behalf of Mohammad Azam Khan, the applicant after his second bail application was rejected by learned Special Judge (M.P./M.L.A.)/Additional Sessions Judge, Court No.4, Rampur vide order dated 4.8.2021.

4. The applicant Mohd. Azam Khan, who deserves no introduction, at one point of time was a political heavyweight of the then ruling party of the State of U.P., presently Member of Parliament from Rampur Loksabha constituency and Chancellor of Mohammad Ali Jauhar University (established by U.P. Act No.19

of 2006), is facing a prosecution in Case Crime No.312 of 2019, u/s 420, 467, 468, 471, 447, 201, 120-B I.P.C. and Section 3 of the Prevention of Damage to Public Property Act, 1984, Police Station-Azeem Nagar, District-Rampur. He is behind the bars in connection with aforesaid offence since 26.02.2020 and seeking bail during trial.

STORY AS NARRATED IN FIR

5. Coming to the merits of the case, which ignites from lodging of the F.I.R. by one Sri Allama Zamir Naqvi, a self proclaimed public spirited person, by moving an application addressed to the D.G.P., Luckow on 29.7.2019, and as such, the present F.I.R. came into existence against nine named accused persons including the applicant, his wife Tanzim Fatima and son Abdullah Azam along with six others on 19.8.2019.

6. I have keenly perused the contents of the F.I.R. and for the sake of brevity the bulky F.I.R. is reduced to following points:

(a) The land in dispute relates to one Mr. Imamuddin Quereshi s/o late Badruddeen Qureshi, permanent resident of Lucknow. This gentleman belonged to "Sunni Sect' of Muslim religion (Backward Class), Kasai/Qureshi community, who after the partition, relinquished the citizenship of India and migrated to Pakistan during 1947-49 and since then turned a citizen of Pakistan. As per the provisions of Section -8 of "The Administration of Evacuee Property Act, 1950" the property left by Imamuddin Qureshi was declared as Evacuee Property and deemed to have been vested with the "Custodian' of the State, as per legal implication.

(b) The property left by Imamuddin Qureshi contains one room and an *Imambara* situated at Village -Singhan Khera, Pargana and Tehsil Sadar, Rampur, having *pucca Raqba 86 beegha*, *2 biswa* and as per notification issued by the Government of India 1962 and 1971, in all 45 *gatas*, ad-measuring area 13.842 hectares of agricultural land got endorsed and vested with the government, as *per Se*ction 5 of Enemy Property Act, 1968.

(c) In fact, this landed property ad-measuring area 13.842 hectares situated at Village Singhan Khera, Pargana and Tehsil Sadar, District Rampur is the focul issue of the entire controversy of the present bail application.

(d) It is further alleged in the F.I.R. that despite of the fact that the aforesaid property in dispute i.e. 13.842 hectares is under the custody of Custodian, Enemy Property, Ministry of Home, Government of India. The applicant belonging to the City of Rampur and pursuing his dream project "Mohammad Ali Jauhar University" have an evil eye over the land in dispute and in order to digest a valuable piece of land without paying any sale consideration or any authority or title recognized under the law, won over the then Chairman, Sri Syed Waseem Rizvi who was at the relevant time adorning the chair of U.P. Shia Central *Waqf* Board. Not only Mr. Syed Waseem Rizvi, but rest of the Board of members, namely Mazhar Ali Khan @ Bhukkal Nawab of Lucknow and other members and Inspector, have fabricated certain forged papers and documents. These members and other office bearers of Shia Central *Waqf* Board virtually started dancing on the tune of their political boss the Applicant and the Chairman. After hatching a conspiracy, making those forged and crafted documents have used them as a genuine one, got the

aforesaid land belonging to person of Sunni Sect of Kasai community, showing him as a permanent resident of Asharfabad Deen Dayal Road, Kotwali Saadatganj, Lucknow got the property in question converted into a "*Waqf* Property' by preparing a forged *Waqf* Deed, whose alleged settler was late Imamuddin Qureshi. Interestingly a person who has already migrated to Pakistan in 1947-1949, his alleged *Waqf* was got registered as "I-78' at U.P. Shia Central *Waqf* Board, Lucknow in 2003. This by itself *per se* throws ample light on the modus operandi of applicant, who was the then Cabinet Minister and his close friend Syed Waseem Rizvi. Alleged *waqf* deed is nothing but a tissue of utter falsehood, a tailored document with ulterior motive and purpose just to digest that 13.842 hectares of the land left by Imamuddin Qureshi during partition days. This land was eventually encircled within the University premises, without paying single penny as its consideration or without any authority or title over the land in question.

(e) It is further alleged in the F.I.R., that when in the year 1942 U.P. Shia Central *Waqf* Board and Sunni Central *Waqf* Board were established, all *waqf* properties in the State were measured and identified on a district level. In this regard it was alleged, that during that period Imamuddin Qureshi Trust was registered or not, is a pivotal question? who was its *Mutwalli* since its establishment? Without having any certificate applied it seems that Mohd. Azam Khan misusing his powers as Cabinet Minister along with his close ally Sri Syed Wazim Rizvi without having any inquiry managed to get said *Waqf* Deed of Imamuddin Qureshi registered by the then Administrative officer of Shia Central *Waqf* Board, Sri Syed Gulamus Syedden, in furtherance of common intention of all. The alleged legal formalities are simply eye-wash or a hoax after grossly misusing applicant's power and position at relevant time.

(f) It is also alleged in paragraph-5 of the F.I.R. that as to who are the decedents of alleged settler Imamuddin Qureshi and whether they are residing in Lucknow or Rampur or all of them have migrated to Pakistan are not known, because as mentioned above Imamuddin belonged to Sunni Sec and as to how his trust/*waqf* property was registered as Shia *Waqf* Board. By way of repetition it has been alleged that the applicant Mohd. Azam Khan after conniving with the then Chairman, Shia Central *Waqf* Board Mr. Syed Waseem Rizvi and other Members of Board have swindled the property in question just to benefit Azam Khan's dream project "Mohammad Ali Jauhar University' without any sale consideration or passing any title over the land. By this action the applicant and other co-accused have caused a consideration financial dent to the Government of U.P. as well as Government of India in an organized way.

(g) Interestingly almost after 12 years of its alleged registration with U.P. Shia Central *Waqf* Board on 2.4.2015 one Masood Khan was appointed as its *Mutwalli* in a slip short way. It is alleged that *Mutwalli* Masood Khan was appointed its *Mutwalli* after 12 years of its registration, is a puppet as "Yes Man' of the applicant. He requested the District Magistrate, Rampur to hand over the aforesaid property as a *waqf* property. In response to the same, A.D.M., Rampur vide its letter dated 15.4.2015 informed that the land in question ad-measuring 13.842 hectares is an Enemy Property and would remain till such time the Government of India does not release it.

(h) In this long F.I.R. a direct allegation has been made against the

applicant for misusing his power as a Cabinet Minister and hushing up the landed property belonging to the Custodian, Evacuee Property, Mumbai, who migrated to Pakistan during partition. In the Revenue Records of 1359 Fasli there is a clear endorsement that land belongs to Imamuddin Qureshi managed by the "Custodian'. Thus right from the day of partition the land is named in the custody of Custodian, Evacuee Property, Mumbai.

(i) After receiving this complaint, the Central *Waqf* Council Government of India, New Delhi has constituted a nine members team, headed by Dr. Syed Aizaz Naqvi, Advocate, Supreme Court Delhi, who had given a detailed inquiry report on 6.1.2017, and thus, it was prayed that 45 *gatas* of land belonging to Imamuddin Qureshi, who left Pakistan and accepted the citizenship of that nation, ad-measuring area 13.842 hectares of village Singhan Khera, Pargana Tehsil Rampur it has been declared as "Enemy Property' after fabricating documents in a forged way with intention to cheat and play fraud, causing a huge loss to the Government of U.P. as well as Government of India. It is Mohd. Azam Khan, his wife Tanzim Fatima, his son Abdulla Azam, his friend Syed Waseem Rizvi and others who after concealing the material facts and forging the documents have succeeded to encircle the aforesaid land in dispute within the campus of Mohammad Ali Jauhar Ali University (hereinafter referred to as "University').

Hence this F.I.R. relying upon the report given by the Probe Committee.

7. **Thus, for the purpose of present bail application the focal issue of the land is total 45 *gatas* ad-measuring 13.842 hectares of land situated at Village- Singhan Khera, Pargana and Tehsil Sadar, District Rampur, which has been declared as Enemy Property swindled by Mohd. Azam Khan, the then Cabinet Minister of Govt. of U.P. later on become Chancellor of the University named above.**

SUBMISSIONS ADVANCED BY LEARNED COUNSEL FOR THE APPLICANT

8. Sri Imran Ullah, learned Advocate appearing for the applicant raised his submissions touching the various issues, which for the sake of convenience are being formulated herein below :

(i) The applicant has fully cooperated with the investigation, never misused or terrorized any of the witnesses, in which after investigation the police submitted a report u/s 173(2) Cr.P.C. on 27.5.2020. It is contended that the trial has yet not been commenced, thus, now no useful purpose would be served to keep the applicant behind the bars during trial. He is already facing incarceration since 26.2.2020.

(ii) After change in the establishment in the State of U.P. in the year 2017 in the State of U.P., there is volley of criminal cases, one after the other within a span of 2-3 months. Out of 89 cases lodged against the applicant, he has attained bail in 88 cases and thus, present is only case left for the consideration of this Court.

(iii) Since the applicant is languishing in jail since 26.2.2020 and as per the ratio laid down by Hon'ble Apex Court in the case of **Satendra Kumar Antil vs C.B.I. reported in 2021 SCC Online SC 922** the applicant deserves to be bailed out in the present case too.

(iv) It is next contended by learned counsel for the applicant that the

applicant is a person of 72 years of age, though powerful and influential political giant of the State of U.P., is in jail for almost two and half years. Last year during Covid pandemic he was nearly saved on account of Providence. He was severely fallen sick, his cardiac and renal organs were severely adversely affected and he is still on medication. It would be indeed cruel and inhuman if he would die in harness without any proper treatment.

(v) It is further contended by Sri Imran Ullah, that no doubt the applicant was a Cabinet Minister twice in the Government of Uttar Pradesh, first in 2003 and thereafter in 2012. On both occasions, the applicant was second in command of the Ministry, a virtual political giant. As soon as he came into power on both the occasions, without wasting much of the time after exploiting his position as a Cabinet Minister, managed to get the alleged Imamuddin Trust registered, and thereafter, managed to get the land in question leased out to the University on 31.5.2007, but soon after change in the Government of State of U.P., the said lease deed was cancelled by the same authority on 26.6.2007. As mentioned above, the foundation stone was laid in the year 2005 and the University became a legal entity after establishing the U.P. Act No.19 of 2006. The said Act was passed by the Assembly of the State of U.P. The applicant Mohd. Azam Khan being the perpetual Trustee of Maulana Mohd. Ali Jauhar Trust was declared as a Chancellor of the University for all times to come. This, in fact, the University was his fiefdom of the applicant.

(vi) It is contended by learned counsel Sri Imran Ullah that the applicant has worked for the University constantly, relentlessly for the betterment and upliftment of the citizen, specially the youth of Rohilkhand area. Being a social activist and educationalist he was deeply concerned about the social as well as social upliftment of his area and believes that widespread education is the only way to enlightening masses. He plays the major role for the socio-economic development of the weaker and underprivileged classe in that area. It is further argued that the applicant has dedicated his entire career for the promotion of education in the State of U.P., especially the Districts of Rohilkhand area.

(vii) Learned counsel for applicant fairly conceded that there is no genuine document or any deed with the University/Trust, establishing its good title over the property in dispute i.e. 13.842 hectares village Singhan Khera, Sadar, Rampur. On making query by the Court, as to how and under what circumstances the property in question was encircled within the University premises, Sri Imran Ullah fairly conceded that since the adjacent properties were purchased by the University/Trust, and thus this is the only reason for encircling the Enemy Property within the University campus without any authority of land or good title over the land in question.

This, in fact is startling revelation, whereby it has been conceded by the counsel that in no uncertain terms the modus operandi of ''encircling the Enemy Property' in most abnormal and surreptitious way. This in fact a new jurisprudence by which a disputed landed property could be grabbed, without even semblance of good title.

9. In addition to this, in his rejoinder affidavit, during argument, Sri Imran Ullah, learned counsel for the applicant, categorically submitted that "the land in dispute is still lying idle and vacant, though

within the boundaries of aforesaid University and not a single brick has been kept over it." In this regard para-8 of the rejoinder affidavit is quoted herein below :

"8. .....Moreover the land in question is still lying as it is, with absolutely no construction/hindrance/obstacle on the same. However, as per the report of District Magistrate dated 4.9.2017 as well as the site plan also on the land in question no construction has been raised. It has wrongly been alleged that the same is encroached through boundary wall, which is evident from the perusal of the bird's eye view as contained in Google Map, annexed along with bail application as annexure no.28. It may be pointed out that merely by purchasing the land adjacent and around the land in question, it cannot be said that the University/Trust has been encroached upon the said land. There is also a road adjacent to the land in question (Enemy Property) by which the same can be access. It is only for the reasons, best known to the authority concerned, the same has not been used till date by the Administration. Further it is wrongly stated in para under reply that applicant appointed Masood Khan as Mutawalli of the trust Imamuddin, it is specifically mentioned at this stage that applicant has nothing to do with the trust Imamuddin or its mutwalli Masood Khan, neither at any point of time was having any power or control over the trust Imamuddin, hence no question was arise with the appointment of any mutawalli of the said trust."

Similarly, in the written argument submitted on behalf of applicant, there is identical reiteration of the aforesaid fact in para s 24 & 25, which are being reproduced thus :

"24. On 13.5.2020 the Investigating Officer visited the alleged site and prepared ***Site map*** *which is contained in parcha No.33 of the case diary (RA-1 Page 42 of Rejoinder Affidavit) It shows the land in dispute is surrounded by the University land but there is an approach two way road which can be used to access the alleged land in dispute. The land in dispute I..e the land which has been declared as Enemy Property in the year 2006 and has been given to the custody of District Magistrate, Rampur is still* ***lying as it is with absolutely no construction/hindrance/obstacle on the same though surrounded by the land of university from three sides.*** *However, as per the report of District Magistrate dated 4.9.2017 as well as the site plan also on the land in question no construction has been raised, though in the year 2007 when a demand was made to give the property in question to the University/Trust, the Trust intended that in case, the said land will be given to the University, the same will be changed into a play ground. As per the allegation of the Investigating Officer, the entire disputed land is surrounded by the land purchased by the Trust/University. It has wrongly been alleged that the same is encroached through boundary wall the land in question is clear from all hindrance, obstacle, and construction till date. As evident from google map (page 440) further as evident from the site plan itself, the approach road to the land in dispute is also through the road which is being used for going towards University. Not only this, there is another road from behind which can be used as approach road of the aforesaid disputed property and as such it is wrongly being alleged that the land is being encroached by the University.*

25. That in case the land is declared to be enemy land in future the same can be taken possession by the custodian any time as the same is still lying

vacant without any hindrance having approach road from two sides."

10. On a conjoint reading of the contents of paragraph mentioned above, which is reproduction from the affidavit on behalf of applicant, the Court has gathered an impression that the land in question is lying vacant, though within the University campus and not even single brick is kept over the land in dispute, then the question arises as to how and under whose authority or title the land in dispute has been encircled within the boundaries of University. Interestingly in Para-25, it has been mentioned that in the event the land in question to be Enemy land in future, the same can be taken possession by the Custodian any time as the same is still lying vacant without any hindrance or having approach road from two sides. Indeed, this is the novel and crooked way of usurping the property from the days of partition. It is the custodian who is having right, title over the property in question. The applicant, being a Chancellor of the University, is a rank trespasser, without any authority of law or license encircled the property in question within the University campus and there seems that now the applicant is "obliging" the government of India/the Administration/Custodian of Evacuee Property, Mumbai to approach the court concerned and get a decree of eviction, then only University would release the property. It is simply amusing whereby rank trespasser, a usurper is justifying its possession over the land in dispute. This is no justification to encircle 13 hectares and odd land in dispute, within the boundaries of the University. Moreover, it has been mentioned that there is proper access to the land given by the University. This is unheard of a novel way of justifying the possession over the property for which neither the Chancellor nor the University has ever authority to encircle the same.

11. **From the above averments, it seems that the applicant now wants to distance and disassociate himself in his personal capacity as well as the Chancellor of University over that land in question as well as Imamuddin Qureshi Trust. Under the circumstances, and relying upon his own averment/submissions, let the land in dispute be reverted to the Administrator, Evacuee Property or the District Magistrate, Rampur, being its representative.**

12. The applicant in some way or the other, is trying to impress upon the Court that he is doing a pious duty to educate the youth by raising the University but while going through the entire case, this Court is puzzled to seek pious objective and motto to raise any educational institution and that too a dream University in the name of one of our ancestors, Mohammad Ali Jauhar University, in a trading smug manner.

13. Thus, if taking the above averments, submissions and the pleadings of the affidavits, it is well established that the applicant Mohd. Azam Khan was out and out for anyhow grab the property which is already earmarked as Enemy Property by exploiting his position as a Cabinet Minister. He has not having any semblance of any document which could even indicate a good title over the property in question. It is simply amusing and surprising that a Cabinet Minister is stooping down to take away the Enemy Property by applying all foul means and tricks and now trying to delink and disassociate himself from the property in dispute for the reason best known to him.

From the aforesaid fact it is clear, that in order to achieve and thrive his dream project shook his hands with Sri Syed Waseem Rizvi, who has manufactured a sham and a parallel claim by Imamuddin Qureshi *Waqf* allegedly registered as Shia Central *Waqf* Board in the year 2003.

SUBMISSIONS ADVANCED BY LEARNED COUNSEL FOR THE STATE

14. Per contra, Sri M.C. Chaturvedi, learned Additional Advocate General for the State and Sri Farman Ali Naqvi, learned Senior Advocate have spearheaded the submissions for the State of U.P. as well as for the informant. At the outset, attention of the Court has been drawn to the Section 36 and 37 of The *Waqf* Act, 1995 (Chapter - V), Registration of [AUQAF], which is quoted herein below :

"36. Registration.--

(1) Every [waqf], whether created before or after the commencement of this Act, shall be registered at the office of the Board.

(2) Application for registration shall be made by the mutawalli:

Provided that such applications may be [made by the wakf] or his descendants or a beneficiary of the [waqf] or any Muslim belonging to the sect to which the [waqf] belongs.

(3) An application for registration shall be made in such form and manner and at such place as the Board may by regulation provide and shall contain following particulars:--

(a) a description of the [waqf] properties sufficient for the identification thereof;

(b) the gross annual income from such properties;

(c) the amount of land revenue, cesses, rates and taxes annually payable in respect of the [waqf] properties;

(d) an estimate of the expenses annually incurred in the realisation of the income of the [waqf] properties;

(e) the amount set apart under the [waqf] for--

(i) the salary of the mutawalli and allowances to the individuals;

(ii) purely religious purposes;

(iii) charitable purposes; and

(iv) any other purposes;

(f) any other particulars provided by the Board by regulations.

(4) Every such application shall be accompanied by a copy of the [waqf] deed or if no such deed has been executed or a copy thereof cannot be obtained, shall contain full particulars, as far as they are known to the applicant, of the origin, nature and objects of the [waqf].

(5) Every application made under sub-section (2) shall be signed and verified by the applicant in the manner provided in the Code of Civil Procedure, 1908 (5 of 1908) for the signing and verification of pleadings.

(6) The Board may require the applicant to supply any further particulars or information that it may consider necessary.

(7) On receipt of an application for registration, the Board may, before the registration of the [waqf] make such inquiries as it thinks fit in respect of the genuineness and validity of the application and correctness of any particulars therein and when the application is made by any person other than the person administering the [waqf] property, the Board shall, before registering the [waqf], give notice of the application to the person administering the [waqf] property and shall hear him if he desires to be heard.

(8) In the case of [auqaf] created before the commencement of this Act, every application for registration shall be made, within three months from such commencement and in the case of [auqaf] created after such commencement, within three months from the date of the creation of the [waqf]:

Provided that where there is no board at the time of creation of a [waqf], such application will be made within three months from the date of establishment of the Board.

***37. Register of [auqaf].**--The Board shall maintain a register of [auqaf] which shall contain in respect of each [waqf] copies of the [waqf] deeds, when available and the following particulars, namely:--*

(a) the class of the [waqf];

(b) the name of the mutawalli;

(c) the rule of succession to the office of mutawalli under the [waqf] deed or by custom or by usage;

(d) particulars of all [waqf] properties and all title deeds and documents relating thereto;

(e) particulars of the scheme of administration and the scheme of expenditure at the time of registration;

(f) such other particulars as may be provided by regulations.

(2) The Board shall forward the details of the properties entered in the register of auqaf to the concerned land record office having jurisdiction of the waqf property.]

[(3) On receipt of the details as mentioned in sub-section (2), the land record office shall, according to established procedure, either make necessary entries in the land record or communicate, within a period of six months from the date of registration of waqf property under section 36, its objections to the Board.]

15. Sri Chaturvedi, learned Additional Advocate General at the outset has drawn attention of the Court to the Proviso to Section 36(2) of the *Waqf* Act by making a mention that the registration shall be made by *mutwalli* provided that such application may be made by the *waqf* board or his descendants or a beneficiary of the *waqf* or any Muslim belonging to the "SECT" to which *waqf* belongs. Thus, it has been argued that the property once owned by Imamuddin Qureshi admittedly a person belonging to "Sunni Sect' of the Muslims community, now, it is the applicant who has to explain as to how and under what circumstances he managed to get the same registered in U.P. Shia Central *Waqf* Board, when its alleged settler was Sunni.

16. It is canvassed by learned Additional Advocate General that the original *waqf* deed by the alleged settler of Imamuddin Qureshi was never made available while making its registration which is mandatory. It is further contended that as mentioned above that for registration of document has to be routed through by the *mutwalli* of the *Waqf*. The *mutwalli* "Masood Khan' of this *Waqf* was appointed on 20.3.2015. Thus, this is an apparent anomaly, wherein a *mutwalli* is being appointed in the year 2015 and the aforesaid *waqf* has already been registered in the year 2003. In addition to this it is argued that the creation of *waqf* and the migration of its Waqif of that *Waqf* in question to Pakistan, does not grant any right to anyone to usurp the *waqf* property or for that matter of fact, an enemy property. Said action with regard to either status of *waqf* or the status of evacuee property has to be decided by the authorities concerned of the respective departments in accordance with law and no other person whosoever the higher

authority may be utilize or use his position to manipulate government record. It is urged that the person of a rank of Cabinet Minister of the Govt. of U.P. i.e. the applicant, has got a greater responsibility to act in a more sensible, responsible and diligent way, which is not expected from a person of his stature. It is just for his personal gain to fulfill his dream in the shape of University. Moreover, taking to be true on the face value, that the *waqf* was created in 1943 remained abandoned uptil 2003, that is to say about 70 years, and all of a sudden a rank stranger Masood Khan, stooge of the applicant, sought appointment as *mutwalli*, woke up from slumber and got the appointment on the basis of an application dated 16.3.2015. The appointment of *mutwalli* in the year 2015 is simply an eye-wash and just within one day without holding any inquiry about him he was appointed as *mutwalli* just to serve the aim and objective of his master i.e. Mohd. Azam Khan, a cabinet minister.

17. It is further submitted by learned counsel for the State that as per revenue record of 1359 Fasli is shown as a land in dispute in the name of "Waqif Imamuddin Qureshi" with a remark that the land in dispute is under the management of "Custodian" and since then the status of property in question remained as such.

18. Sri S.F.A. Naqvi, learned counsel further pointed certain glaring abnormalities which touches the core issue that, when the *waqf* property has been declared as a evacuee property then aforesaid correspondences were made to the competent authorities to bring disputed plots within the area of so called *Waqf* of Imamuddin Qureshi. All the issues raised by Sri Naqvi has already been pointed out by Sri MC Chaturvedi, learned AAG and it would be simply reiteration of the arguments.

19. All the acts, referred to above, were maneuvered and conducted in a well planned and settled way, just to grab the disputed property by creating a "sham and parallel dispute' regarding the title and ownership of the Enemy property left by Imamuddin Qureshi from the year 2003 itself. Audacity of the officers, who were dancing to the tunes of the then Cabinet Minister Mohammad Azam Khan, started playing unnaturally by appointing a *Mutwalli* of the *Waqf* in question vide its resolution dated 17.3.2015. Even in the year 2015, again a representation was made by the *Mutwalli* before the District Magistrate/Additional Survey Commissioner of *Waqf*, Rampur for carrying out necessary correction in the name of *Waqf* in the relevant revenue record. In response to the same, the Additional District Magistrate/Additional Survey Commissioner *Waqf*, Rampur vide letter dated 15.4.2015 informed that the property in dispute, measuring 13.842 hectares and 2 biswas, has been declared as "enemy property' vide notification dated 18.7.2006, out of which 9.111 hectares of the land has been leased out to the Border Security Force, remaining land has been recorded as Chak Road Naveen Parti and in the name of other persons. Thus the land in issue, for the purposes of this bail application, is land admeasuring area 13.842 hectare over *Gata* No.45 surrounded by University from three sides and there is approach road for the fourth side at village Singhan Khera.

20. After miserably failing to establish any good title or its genuine source over the property in dispute i.e. 13.842 hectares Village Singhan Khera,

Sadar, Rampur, as a last resort, learned counsel for the applicant has floated a legal fantasy in order to snatch the property and staking claim over the said land by a legal fantasy and fiction by making a mention that the property surrendered in the name of religion "ONCE A *WAQF* PROPERTY IS ALWAYS A *WAQF* PROPERTY" as an ultimate weapon. It has been mentioned that way back in the year 1943 when the settler has himself created Imamuddin *Waqf* toards the said property since then the said property belongs to Almighty "Allah" and thus it cannot be declared as Enemy Property, despite of the fact that its waqif/settler has already been migrated to Pakistan and relinquished the citizenship of India.

21. It is further alleged that the applicant cleverly tailored a sham and a parallel claim against custodian of Enemy Property left by ex-citizen of India who migrated to Pakistan. Of late, getting the said Imamuddin Qureshi *Waqf* registered under U.P. Shia Central *Waqf* Board over the land in question the applicant Azam Khan, at a relevant point of time i.e. 2003, crookedly and deceitfully, created a parallel religious body in the name of Imamuddin Qureshi *Waqf* in connivance of the said Syed Waseem Rizvi, to stake claim over the property in question vis-a-vis Administrator, Enemy Property, Mumbai, who was managing the same and finds place its name since the days of partition. This is a naked attempt of misusing the power and his position by the applicant as a cabinet minister who wants that let these bodies may fight for their respective claim over the property in dispute and taking the advantage of their "shadow fighting" he would enjoy the land in question, without any authority of law.

At this juncture, Sri S.F.A. Naqvi, learned counsel has advanced his submission by making a mention that applicant was working in twin capacity, as a Chancellor of the University as well as a Cabinet Minister of the State Government. There is clear cut case of "conflict of interest' whereby in order to fulfill his dream project he has compromised his position as a Cabinet Minister and now is distancing and disassociating himself from the land in question as well as from the Imamuddin Qureshi *Waqf* as well as its registration process.

22. As mentioned above, Sri Imran Ullah in no uncertain terms has admitted the very fact that Maulana Ali Jauhar Trust or the University has got no title even for the namesake over the property in dispute. He admits that the University as well as Trust without any title or authority but by virtue of fact that the University has purchased the adjacent lands, unauthorizedly encircled its right over the property in dispute. Neither any authority nor the custodian of the enemy property has ever allotted any property in question in favour of University except in the year 2006, a lease was granted, though within a month of its issuance, withdrawn by the custodian/administrator. As mentioned above this is a novel way to trespass/usurp the land and use it for the purposes of University.

23. This Court is delighted to refer that **the consensus of the Muslims, Allaah says (interpretation of the meaning) that** *Ghasb (to seize something wrongfully)* is *Haraam*, and according to *Fiqh* terminology, taking the property of others wrongfully, is *Haraam*.

Furthermore, **the Prophet (peace and blessings of Allaah be upon him) said: "Whoever seizes a handspan of land unlawfully, will surround him to the depth of seven earths."**

Therefore, the perception that *"once waqf property is always waqf property, it vests in Almighty and the same cannot be declared as enemy property, merely on the ground that Waqif/settler has migrated to Pakistan after partition"*, is completely misconceived according to the Muslim dogma itself.

24. Interestingly, in paragraph 29 of the affidavit of bail application the applicant Mohammad Azam Khan has contended that Mohammad Ali Jauhar University, at no point of time, has got any concern with regard to alleged dispute regarding title over the land in dispute between the Shia Central *Waqf* Board on one hand and the Custodian of the Enemy Property on the other hand. An automatic question cropped up to be answered by the applicant, as to who is the *Mutwalli* of the Trust and when he was appointed? From where and which source the applicant is staking his claim over the disputed property? It is also true that the legality, veracity, validity and the authenticity of the said trust i.e. Trust Imamuddin, which was allegedly registered with U.P. Shia Central *Waqf* Board in the year 2003 has not been unseated by any Court of law. Playing on the anomalous situation, the applicant being main author of the said University, encircled the property-in-question, in the University campus. Maulana Ali Jauhar Trust/University has to explain the source and their good title of the land from which they acquired and encircled it within the precinct of the University?

25. In paragraph 37 of the affidavit of bail application, it has been mentioned that the *Waqf* deed dated 23.8.1943 as well as the entries made in the *Waqf* Board's register, still hold good and has not been challenged before any of the competent authority/court of law/ tribunal, neither the same has been declared as null and void till date. There is no order of any Tribunal/Court of competent authority whereby the *Waqf* deed dated 23.8.1943 has been termed as forged or invalid or void document. It is alleged that during the investigation, the authenticity, veracity and validity of the said deed was questioned and unanimously has been declared as a forged document. There is no handwriting expert opinion before any court of law/competent authority/tribunal by which the aforesaid *Waqf* deed as well as the entries made in the *Waqf* Board register in the year 2003, was declared as forged and fabricated.

26. On that other hand, it has been contended by learned counsel for the applicant that apart from these factual issues, the applicant is a septuagenarian, suffering from various old age related serious ailments, was recently critically ill and was admitted in a hospital, who anyhow could save his life, but still in a pathetic health condition. He is a law abiding citizen and has been targeted by different rival political parties, the sky has fallen on him on account of political vendetta.

27. Per contra, Sri Syed Farman Ahmad Naqvi, learned Senior Advocate and other counsels appearing for opposite parties have filed their respective written arguments, by which they have refuted the submissions advanced by the defence tooth and nail by hammering the authenticity and legality of alleged *Waqf* Deed constituted by Imamuddin Qureshi. In para-4 of the counter affidavit filed by Devendra Kumar,

S.I., P.S.-Azeemnagar, District -Rampur, it is mentioned that vide notification No.12/02/65 dated 18.12.1977 SO No. 5511 and in the revenue record, name of Imamuddin Qureshi was recorded with possession as custodian since 1359 Fasli. It is alleged that the applicants named above, for the purposes of attaining their objective and fulfill their dream project "Mohammad Ali Jauhar University" with only design to usurp the landed property ad-measuring area 13.842 hectare over 45 *Gata*. Mohd. Azam Khan, the applicant was having an evil eye over this land from very inception and he wanted to grab the property by any means, by hook or crook. In order to achieve his target and to oblige the applicant who at the relevant point of time was powerful Minister of Urban Planning & Development, has colluded with Mr. Syed Wasim Rizvi, the then Chairman of Shia Central *Waqf* Board. The applicant and Sri Syed Wasim Rizvi exerted pressure upon the concerned officials/officers after getting a green signal from the higher ministry and the Chairman of *Waqf* Board, the junior officers started dancing to their tunes. It has been argued by Sri Syed Farman Ahmad Naqvi, learned Senior Counsel that it was an intentional creation of a dispute of title of the land in dispute by Shia Central *Waqf* Board by creating a parallel claim over the land. Admittedly after the enactment of Evacuee Property Act, 1950, the property left by a Muslim gentleman, who surrenders the citizenship of India and migrated to Pakistan, his property by legal implication would be turned into Enemy/Evacuee Property and the same is being administered by the provisions of the Administration of Evacuee Property Act, 1950. Learned Senior Counsel in no uncertain terms, in his submissions, has blasted the very genesis of alleged *Waqf* Deed of Imamuddin Qureshi settled by him in 1943, over which the entire castle of argument was raised by Sri Imran Ullah, learned counsel for the applicant, who tried to justify the alleged possession of the landed property in dispute by the applicant. In paras 5, 6 and 7 of the counter affidavit filed on behalf of State, it has been mentioned that the alleged "*Waqf* Deed' of 1943, whose settler was Mr. Imamuddin Qureshi dated 23.6.1943, the address is shown as "Imamuddin Qureshi son of Badrauddin, Sakin Asharfabad Deendayal Road, Lucknow". It was pointed out that at that relevant point of time i.e. in year 1943 there was no road in existence, namely, "Deen Dayal Road, Lucknow' and on this it was indicated by learned counsel for the opposite party, that this itself clearly indicates that the deed-in-question is, *per se*, a tissue of utter falsehood, a frivolous document and forgery committed on the record. In addition to this, number of other falsity over the alleged deed were pointed out. The Court does not wish to express its opinion about the authenticity and legality of above deed in question either ways at this juncture of adjudicating the bail application.

28. In para-15 of the counter affidavit it has been mentioned that the applicant was bent upon to fulfill his dream project in the name and style of "Mohammad Ali Jauhar University" made all efforts to illegally use of "Enemy Property' of *Gata* No.45 having area 13.842 hectare, just to extend the boundary of Jauhar University with the help of the Shia Central *Waqf* Board, Lucknow and with their collusion the Photostat of the forged document of *Waqf* Deed of 1943 and got it registered without producing its original record, and thereafter, exerting his influence he got appointed his close associate, Masood Khan as a *Mutwalli* of aforesaid *Waqf*s. Sri

Syed Farman Ahmad Naqvi, learned counsel for opposite party strenuously argued that this is a naked and blanket effort of misuse of power and position just to create an unwarranted controversy by inserting and branding the land in dispute *Gata* No.45 having total area 13.842 hectare as a *Waqf* property. For this, as mentioned above, it was argued that the applicant cleverly used the old dictum of Muslim Personal Law *"once a property of Waqf, is always the property of Waqf"*. It is further contended by learned Senior Counsel that creation of this *Waqf* and its registration is nothing a camouflage and hoaks by the applicant, just to create a parallel claim with regard to an "Enemy Property' and thereafter snatched the property for its own purpose.

29. Interestingly, it is also evident that after creating this parallel claim or rather disputing the title over the property. Till date the ownership and the title over the property has not been judicially acknowledged by any competent court of law. Taking advantage of this void, there rises a million dollar question as to who and under what circumstances the property in question was encircled within the boundary of Mohammad Ali Jauhar University.

LEGAL DISCUSSION

30. After hearing the rival submissions at length to the satisfaction of respective counsels, the Court has to adjudicate the allegations and the material collected during investigation to substantiate those allegations and the defence.

31. Sri M.C. Chaturvedi, learned AAG has relied upon the judgement of Hon'ble Apex Court in the case of **Naveen Singh vs State of U.P. 2021 6 SCC 191.**

"12.3. However, the High Court has not at all considered that the accused is charged for the offences under Sections 420, 467, 468, 471, 120B IPC and the maximum punishment for offence under Section 467IPC is 10 years and fine/imprisonment for life and even for the offence under Section 471 IPC the similar punishment. Apart from that forging and/or manipulating the court record and getting benefit of such forged/manipulated court record is a very serious offence. If the Court record is manipulated and/or forged, it will hamper the administration of justice. Forging/manipulating the Court record and taking the benefit of the same stands on altogether a different footing than forging/manipulating other documents between two individuals. Therefore, the High Court ought to have been more cautious/serious in granting the bail to a person who is alleged to have forged/manipulated the court record and taken the benefit of such manipulated and forged court record more particularly when he has been chargesheeted having found prima facie case and the charge has been framed."

32. Deriving the strength from aforesaid judgment of Hon'ble Apex Court, it is urged by learned A.A.G. that forging and manipulating the court record and getting the benefit of such forged/manipulated record is a very serious offence and it will hamper the administration of justice and it was urged that High Court has been more conscious while granting bail to a person who has forged document and has churned the benefits out of those forged and manipulated document.

33. In reply to it, Sri Imran Ullah learned counsel for the applicant upon taking into various factors such as seriousness of offence, the character of the evidence, the circumstances which are the peculiar to the accused, reasonable apprehension of witnesses being tampered with, larger interest of the public or the State and similar other factors. It is the solemn duty of the Court to decide the bail applicant by a reasoned order, based on bonafides of the applicant in the light of prevailing facts and circumstances. In this regard the Hon'ble Apex Court has pronounced catena of judgments and to start with, ***State of Maharashtra vs. Sitaram Popat Vital, AIR 2004 SC 4258; Ram Govind Upadhyay vs. Sudarshan Singh and Ors, AIR 2002 SC 1475; Prahalad Singh Bhati vs. N.C.T. Delhi and Ors, AIR 2001 SC 1444;*** deserve special attention while deciding the present bail application. Cumulatively, if the applicant is being given liberty the factors which are to be taken into consideration while considering and deciding bail application are :

(i) The nature of accusation and severity of punishment in case of convictin and the nature of supporting evidence,

(ii) Reasonable apprehension of tempering of the witness or apprehension of threat to the complainant,

(iv) Prima facie satisfaction of the Court in support of charge,

(v) Court has to take into account whether there is or is not a reasonable ground for believing that the applicant has committed the offence alleged against him,

(vi) Character, means, standing and status of applicant,

(vii) The likelihood of the offence being continued or repeated on the assumption that the accused is a guilty of having committed the offence in past.

34. In the recent judgment of Hon'ble Apex Court in the case of ***Sanjay Chandra vs Central Bureau of Investigation (2012) 1 SCC 49,*** has held :

"The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, `necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for

the purpose of giving him a taste of imprisonment as a lesson."

In ***Manoranjana Sinh Alias Gupta vs CBI, 2017 (5) SCC 218,*** *the Hon'ble Apex Court has held as under :*

"This Court in Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

The Hon'ble Apex Court in ***Prashanta Kumar Sarkar v. Ashis Chatterjee and another (2010) 14 SCC 496*** *has laid down the following principles to be kept in mind while deciding bail applications :*

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail."

35. Now commensurating with the guidelines as settled by the Hon'ble Supreme Court, no doubt that applicant at the relevant point of time was a powerful minister and an uncrowned monarch of the State of Uttar Pradesh during the past regime. He was enjoying number two position in the State hierarchy after the Chief Minister. It is canvassed by the learned counsel that after change of establishment in the State of U.P. in the year 2017 on account of political vendetta, volley of criminal cases of different varieties have been pasted against him.

36. The applicant is an old man of 72 years, a senior citizen, suffering from number of age related ailments; like hyper tension and other severe problems. The

Court is aware that recently in Covid pandemic he remained in the hospital for almost a month and his kidneys and other vital organs were got adversely affected. Charge sheet has already been submitted in the matter and it is also given to understand that in most of the cases in which the prosecution were initiated against him, he has been bailed out.

37. The Court is failing to express its view that the applicant is somewhere or the other is trying to impress upon the court that he has left no stone unturned in establishing an University to spread the quality education among the youth in the state of Uttar Pradesh especially Rohilkhand area. No doubt, the object is laudable one but it is expected from a minister who claims himself to be a visionary while establishing the University, but while going through the entire case, the Court is at loss, puzzled and wonder that to thrive his dream project in the name of Mohammad Ali Jauhar University the applicant is trading in a smug manner. It is not only the object which has to be pious one but its means, ways and paths too should be aboveboard and transparent. If a person of a cabinet minister uses a guileful practice or does any act in a slip short and shabby way or connive with deceitful means, then it erodes the confidence of public and the very pious object of the said dream project got spoiled and vitiated.

38. While surfing the motto to raise any educational University, this Court visited Winston Churchil's opinion, which refers as under:

"The first duty of a University is to teach wisdom, not trade, character, not technicalities"

Herein, there seems that the applicant in disguise of raising University is trading and usurping technicalities to grab an evacuee property by oblique means.

Our father of the nation, Mahatma Gandhi, also categorically stated in strong words about achieving higher goals adopting reprehensible means that "I will not let anyone walk through my mind with their dirty feet."

The applicant to grab the land unlawfully has ashramite himself under the umbrella of religion, wherein he pleads that "the *Waqf* property is the property of Almighty'.

Whereas according to the great thinker and philosopher *Seneca* **"Religion is regarded by the common people as true, by the wise as false, and by rulers as useful."**

The applicant, intoxicated on the throne of the power and position misused his authority in a most indecent manner, that's why it is said that" "If absolute power corrupts absolutely, where does that leave God?"

39. There is yet another aspect of the issue i.e. an old saying "power corrupts a man and absolute power corrupts absolutely." An observation that a person's sense of morality lessens as his power increases. This statement has been made by Lord Acton, a British Historian in the late 19th and early 20th century. This doctrine still holds good. Absolute power morally destroys the nature of a person and fills him with destructive pride. If a person save himself from abuse of power, he is humble a person. Explaining further that those who are in power often do not have a people best interest in mind. They are primarily focused on their own benefits and they may

abuse their position or power to help themselves.

In the instant case too the applicant being a cabinet minister all powerful person dreamt to establish a University of which he was a perpetual Chancellor like a personal fiefdom and for this he went to any extent adopting all legal, illegal, fair and foul means.

Being a public figure, the applicant has a bundle of responsibility over his shoulder and he cannot afford to shut his eyes towards those means which he has adopted just to achieve his objective, which falls within the realm and ambit of an offence.

However, as bail is a right of any accused and jail is exception, therefore, on the humanitarian ground this Court keeping in view the applicant's deteriorating health, old age and the period undergone in jail, is considering the application of bail be allowed by imposing following conditions.

(i) **As mentioned above, the applicant himself has distanced and delinked with the property in dispute though at present lying in the campus of University whose reference is given in paragraphs 8 (vii), 9, 10 and 11 of this judgment, the District Magistrate, Rampur being a representative of Custodian/Administrator of Evacuee/Enemy Property is directed to hold a measurement of the landed property in dispute which is center dispute of this issue admesuring area 13.842 hectares village Singhan Khera, Pargana and Tehsil-Sadar, District Rampur and thereafter raise a boundary wall and barbed wire around it and take the actual physical possession of the property in dispute on behalf of Administrator of Evacuee Property Mumbai latest by 30.6.2022.**

In this exercise the the local Revenue authorities, University authorities would fully cooperate and shall not cause any hindrance or obstacle while carrying out aforesaid direction. Since the applicant *Mohd. Azam Khan* is already in jail for almost two and half years, he shall be released on interim bail during this exercise in aforesaid case crime by furnishing a personal bond of Rs.1 lac and two sureties of the like amount to the satisfaction of the court concerned. After completion of aforesaid exercise to the satisfaction of the District Magistrate, Rampur and after taking his final nod in the aforesaid drill, then only his interim bail would be converted into regular bail on the same terms and conditions and on the same bonds as furnished earlier. It is expected that the applicant would also render his desired cooperation in completing this object during his release on interim bail. The Custodian Evacuee Property Mumbai is requested to hand over the property in dispute to some para military forces for their training purposes, as already done in the year 2014. The interim bail/regular bail shall be subject to the following further conditions:

(i) THE APPLICANT SHALL SURRENDER HIS PASSPORT ON THE DAY OF HIS RELEASE BEFORE CONCERNED COURT AND ITS FATE AND FUTURE WOULD BE DECIDED AT THE END OF TRIAL.

(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.

(vi) THE TRIAL COURT MAY MAKE ALL POSSIBLE EFFORTS/ENDEAVOUR AND TRY TO CONCLUDE THE TRIAL WITHIN A PERIOD OF ONE YEAR AFTER THE RELEASE OF THE APPLICANT.

In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

40. The present order in this bail application may sound like a decree of the civil court dealing and deciding the title over the property, if not done so, the Court is failing in its duty or seems like providing a shelter and patronage to a rank trespasser and usurper over the property in dispute as per own admission.

41. It is made clear that observations made in granting interim bail/regular bail to the applicant shall not in any way affect the learned trial Judge in forming his own independent opinion based on the testimony of the witnesses and decide the issue objectively.

Trial Court is requested to hear the matter on top most priority and decide the same latest by within one year from the date of production of certified copy of the order without granting any adjournment to either of the parties.

42. Since the bail application has been decided under extra-ordinary circumstances, thus in the interest of justice following additional conditions are being imposed just to facilitate the applicant to be released on bail forthwith. Needless to mention that these additional conditions are imposed to cope with emergent condition-:

1. The applicant shall be enlarged on bail on execution of personal bond without sureties till normal functioning of the courts is restored. The accused will furnish sureties to the satisfaction of the court below within a

month after normal functioning of the courts are restored.

2. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

3. The computer generated copy of such order shall be self attested by the counsel of the party concerned.

4. 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.

43. However, it is made clear that any wilful violation of above conditions by the applicant, shall have serious repercussion on his/her bail so granted by this Court and the trial court is at liberty to cancel the bail, after recording the reasons for doing so, in the given case of any of the condition mentioned above.

(2022)05ILR A233
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.03.2022

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Criminal Misc. Bail Application No. 50880 of 2021

Hargovind ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri P.K. Singh, Sri Vijay Kumar Mishra

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Sections 161 & 164 - Bail - Indian Penal Code, 1860 - Section 376-D, 342, 323 & 120B - The Protection of Children From Sexual Offences Act, 2012 - Section 3/4 -*'parity' - the state or condition being equal or on a level; equality; equality of rank or status* - 'Law on bail' - 'Reasoned Order' - 'desirability of consistency'-*"cessante ratione legis cessat ipsa lex" - "reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself"* - to assign reasons to an order is not only essential but is a safeguard that discretion is exercised in a judicious manner - parity of an unreasoned order which is against various judgments, could not an order not supported by adequate reasons could not be weighed over an order passed with certain reasons after considering rival submissions and considering 'Law on bail'.(Para -10,11, 13)

Victim going to field along with her animals - co-accused and present applicant met her and took her to a room at their tubewell - Applicant locked room from outside and remained there to guard - co-accused committed rape inside the room - asked co-accused to complete act of rape quickly - After act of rape, applicant and co-accused left room, locked from outside - Later on, room was opened by father of applicant - Specific role of Applicant - First bail application of applicant (student) rejected - by a reasoned order on facts as well as on Law - Second bail . **(Para -3, 14)**

HELD:-Considering the *law on bail* as mentioned in the order passed in first bail application as well as judgments passed by the Supreme Court in regard to *reasoned order* as well as law on *parity* and *desirability of consistency* and also considering specific role of applicant in commission of the offence and keeping in view the ingredients of Section 376(D) IPC and offence under Section POCSO Act, no case for bail is made out to allow second bail application.**(Para -16)**

Bail application rejected. (E-7)

List of Cases cited:-

1. Nanha s/o Nabhan Khan Vs St. of U.P. , 1992 LawSuit (All) 219

2. Ramesh Bhawan Rathod Vs Vishanbhai Hirabhai Makwana (Koli) & anr., 2021 6 SCC 230

3. Bhupendra Singh Vs St. of Raj. & anr. ,Criminal Appeal No.1279 of 2021

4. Mahipal Vs Rajesh Kumar, 2020 (2) SCC 118

5. Manoj Kumar Khokhar Vs St. of Raj. & anr. , 2022 SCC Online 30

6. Sabir Vs Bhoora @ Nadeem & anr. , Criminal Appeal No.227 of 2022

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

1. Heard Shri P.K. Singh, learned counsel for applicant and Shri Om Prakash, learned Additional Government Advocate for State.

2. Applicant - Hargovind has preferred second bail application, who is facing trial in connection with Case Crime No.07 of 2019, under Section 376-D, 342, 323, 120B of Indian Penal Code and Section 3/4 of POCSO Act, Police Station - Nibohara, District - Agra.

3. The first bail application was rejected by a reasoned order on facts as well as on Law. The operative portion of order dated 13.7.2021 is reproduced hereinafter :-

"8. The allegations against the applicant are consistent in FIR, statement of victim recorded u/s 161 Cr.P.C. and 164 Cr.P.C. that during entire occurrence of rape he remained at the place of occurrence. He not only locked the room from outside but repeatedly told co-accused to do it fast. Co-accused Veeru also joined him. Section 376 (D) IPC states that "Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape".

9. Considering the gravity of offence, no case of bail is made out. Accordingly, the bail application is rejected."

4. Shri P.K. Singh, learned counsel for applicant has vehemently argued that while considering first bail application, certain material aspects of the case were not considered such as similarly situated co-accused Veeru @ Virendra was granted bail by a co-ordinate Bench of this Court in Criminal Misc. Bail Application No.30684 of 2019, vide order dated 7.8.2019, prior to the order passed in first bail application of applicant.

5. Learned counsel further submits that applicant is a student and presently, he is pursing M.Phil. The allegation that he has closed the door from outside and remained there, is not only improbable as victim has no opportunity to identify from inside the room. Therefore, applicant is also entitled for bail on the ground of parity.

6. Learned counsel for applicant also relied upon a judgment passed by the Division Bench of this Court in the case of Nanha **s/o Nabhan Khan vs. State of U.P; 1992 LawSuit (All) 219** wherein, the Division Bench has decided two questions referred to the Bench and in support of his submission, he read out paragraph Nos. 58, 59 and 61, which are mentioned hereinafter :-

"58. The word 'parity' means the state or condition being equal or on a

level; equality; equality of rank or status (See Shorter Oxford English Dictionary 1936 Ed.). In other words it means being placed at the same footing. All the accused of a case always do not stand on the same footing. While considering bail of different accused the court has to find out whether they stand on the same footing or not. Even if role assigned to various accused is same yet they may stand on different footing. The case of Cap. Jagjeet Singh (supra) is an illustration wherein the Supreme Court distinguished the case of Capt. Jagjeet Singh on the ground that he was in touch with foreign agency and leaking out secrets. The Supreme Court in the case of Gur Charan Singh vs. Delhi Administration, AIR 1978 SC 179 : (1978 Cri LJ 129) laid down that the considerations for grant of bail are inter alia the position and status of the accused with reference to the victim and the witnesses; likelihood of the accused; fleeing from justice; of repeating offence; of jeopardising his own life, being faced with grim prospect of possible conviction in the case; of tampering with witnesses; and the like. These are additional factors which are to be judged in the case of individual accused and it may make the cases of different accused distinguishable from each accused. At the same time if there is no real distinction between the individual case of accused the principle of parity comes into play and if bail is granted to one accused it should also be granted to the other accused whose case stands on identical footing.

59. None the less the principle of grant of bail on parity cannot be allowed to be carried to an absurd or illogical conclusion so as to put a judge in a tight and straight jacket to grant bail automatically. There may be case which may require an exception; where a judge may not simply take a different view from the judge who granted bail earlier to a co-accused but where the conscience of the judge revolts in granting bail. In such a situation the judge may choose to depart from the rule recording his reasons. However, such cases would be very few.

61. My answer to the points referred to is that if on examination of a given case it transpires that the case of the applicant before court is identical, similar to the accused, on facts and circumstances who has been bailed out, then the desirability of consistency will require that such an accused should also be released on bail. (Exceptional cases as discussed above apart). As regards the second part of the question, answer is that it is not at all necessary for an accused to state in his bail application that the bail application of a co-accused has been rejected previously.

7. Learned Additional Government Advocate has opposed the submission of bail and submits that while rejecting first bail application, this Court has considered all the relevant factors as well as 'Law on bail' and while taking into consideration, statements recorded under Section 161 and 164 Cr.P.C. and that applicant has actively participated in offence by locking the room from outside as well as repeatedly asked the applicant to do the act of rape quickly. The Court has also taken note of Section 376(D) of Indian Penal Code and accordingly, dismissed the first bail application. He further submits that bail order, whereby, co-accused Veeru @ Virendra is granted bail is bereft of reasoning, therefore, it cannot be relied upon as well as parity alone is not a ground to grant bail and there is no subsequent event brought on record before this Court to allow the second bail application.

8. Shri P.K. Singh, learned counsel for applicant has argued the first bail

application as well as present bail application. The arguments of learned counsel for applicant are noted in paragraph no.5 of order dated 13.7.2021, which are mentioned hereinafter :-

"5. Learned counsels for the applicant submitted that the age of the victim is determined to be 16 years as per radiology medical report. It is further submitted that during medical examination no injury was found on private part of the victim. Victim has narrated a different story in her statement recorded u/s 161 Cr.P.C. He further submitted that there is no allegation of rape on the applicant. Therefore, applicant is liable to be released on bail."

9. The arguments of learned counsel for applicant in support of prayer, made in second bail application are of two folds. Firstly, he argued that co-accused Veeru @ Virendra was granted bail by this Court on 7.8.2019 i.e. even before first bail application of applicant was rejected, however, the same was not brought on record of first bail application and secondly, he relied upon concept of 'desirability of consistency' as held in Nanha Singh (Supra). In this regard, it is essential to consider the reasons given by the co-ordinate Bench, while granting bail to co-accused Veeru @ Virendra that :-

"After considering the rival submissions noted hereinabove and the material brought on record, without expressing any opinion on the merits of the case and considering the facts and circumstances of the case, I am of the opinion that the applicant is entitled to be released on bail."

10. The Apex Court in a recent judgment passed in the case of **Manoj Kumar Khokhar vs. State of Rajasthan and Another; 2022 SCC Online 30,** has retreated the 'Law on bail' as well as requirement of 'Reasoned Order' while rejecting or accepting the bail application. The Apex Court has followed the judgments passed in **Ramesh Bhawan Rathod vs. Vishanbhai Hirabhai Makwana (Koli) & Another; 2021 6 SCC 230; Bhupendra Singh vs. State of Rajasthan and Another (Criminal Appeal No.1279 of 2021); Mahipal vs. Rajesh Kumar; 2020 (2) SCC 118;** and held that:-

"18. (l) The most recent judgment of this Court on the aspect of application of mind and requirement of judicious exercise of discretion in arriving at an order granting bail to the accused is in the case of Brijmani Devi vs. Pappu Kumar and Anr. - Criminal Appeal No. 1663/2021 disposed of on 17th December, 2021, wherein a three Judge Bench of this Court, while setting aside an unreasoned and casual order of the High Court granting bail to the accused, observed as follows:

"While we are conscious of the fact that liberty of an individual is an invaluable right, at the same time while considering an application for bail Courts cannot lose sight of the serious nature of the accusations against an accused and the facts that have a bearing in the case, particularly, when the accusations may not be false, frivolous or vexatious in nature but are supported by adequate material brought on record so as to enable a Court to arrive at a prima facie conclusion. While considering an application for grant of bail a prima facie conclusion must be supported by reasons and must be arrived at after having regard to the vital facts of the case brought on record. Due consideration must be given to facts suggestive of the nature of crime, the criminal antecedents of the

accused, if any, and the nature of punishment that would follow a conviction vis-a-vis the offence/s alleged against an accused."

19. On the aspect of the duty to accord reasons for a decision arrived at by a court, or for that matter, even a quasi judicial authority, it would be useful to refer to a judgment of this Court in Kranti Associates Private Limited & Anr. vs. Masood Ahmed Khan & Ors. - (2010) 9 SCC 496, wherein after referring to a number of judgments this Court summarised at paragraph 47 the law on the point. The relevant principles for the purpose of this case are extracted as under:

"(a) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(b) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi judicial or even administrative power.

(c) Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.

(d) Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi judicial and even by administrative bodies.

(e) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision making justifying the principle that reason is the soul of justice.

(f) Judicial or even quasi judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(g) Insistence on reason is a requirement for both judicial accountability and transparency.

(h) If a judge or a quasi judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(i) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber stamp reasons" is not to be equated with a valid decision making process.

(j) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor [(1987) 100 Harvard Law Review 731- 37)

(k) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "due process".

20. Though the aforesaid judgment was rendered in the context of a dismissal of a revision petition by a cryptic order by the National Consumer Disputes Redressal Commission, reliance could be placed on the said judgment on the need to give reasons while deciding a matter.

21. The Latin maxim "cessante ratione legis cessat ipsa lex" meaning "reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself", is also apposite.

22. We have extracted the relevant portions of the impugned order above. At the outset, we observe that the extracted portions are the only portions forming part of the "reasoning" of the High court while granting bail. As noted from the aforecited judgments, it is not necessary for a Court to give elaborate reasons while granting bail particularly when the case is at the initial stage and the allegations of the offences by the accused would not have been crystalised as such. There cannot be elaborate details recorded to give an impression that the case is one that would result in a conviction or, by contrast, in an acquittal while passing an order on an application for grant of bail. However, the Court deciding a bail application cannot completely divorce its decision from material aspects of the case such as the allegations made against the accused; severity of the punishment if the allegations are proved beyond reasonable doubt and would result in a conviction; reasonable apprehension of the witnesses being influenced by the accused; tampering of the evidence; the frivolity in the case of the prosecution; criminal antecedents of the accused; and a prima facie satisfaction of the Court in support of the charge against the accused.

23. Ultimately, the Court considering an application for bail has to exercise discretion in a judicious manner and in accordance with the settled principles of law having regard to the crime alleged to be committed by the accused on the one hand and ensuring purity of the trial of the case on the other.

24. Thus, while elaborate reasons may not be assigned for grant of bail or an extensive discussion of the merits of the case may not be undertaken by the court considering a bail application, an order de hors reasoning or bereft of the relevant reasons cannot result in grant of bail. In such a case the prosecution or the informant has a right to assail the order before a higher forum. As noted in Gurucharan Singh vs. State (Delhi Admn.) 1978 CriLJ 129, when bail has been granted to an accused, the State may, if new circumstances have arisen following the grant of such bail, approach the High Court seeking cancellation of bail under Section 439 (2) of the Cr.P.C. However, if no new circumstances have cropped up since the grant of bail, the State may prefer an appeal against the order granting bail, on the ground that the same is perverse or illegal or has been arrived at by ignoring material aspects which establish a prima facie case against the accused."

11. Fall out of above judgments is that to assign reasons to an order is not only essential but is a safeguard that discretion is exercised in a judicious manner.

12. It is also relevant to mention here a short judgment passed by the Supreme Court in the case of **Sabir vs. Bhoora @ Nadeem and Another; Criminal Appeal No.227 of 2022,** decided on 15.2.2022 wherein similarly worded order as passed on bail application of co-accused, was set aside considering it to be an unreasoned order. For reference, the order is mentioned hereinafter :-

"On perusal of the impugned orders, what is noteworthy is that in the impugned orders passed by the High Court no reason has been given for grant of bail. In the case of murder (under Section 302 IPC), it is expected that at least some

reason would be given while reversing the order of the Trial Court, which had rejected the bail application by a reasoned order. What we notice is that in the impugned orders the High Court, while granting bail, has only stated that "Keeping in view the nature of offence, evidence, complicity of the accused, severity of the punishment, submissions of learned counsel for the parties and without expressing any opinion on the merits of the case, this Court is of the view that the applicant is entitled to be enlarged on bail during the pendency of the trial". In the present case, the nature of the offence is very grave i.e. murder under Section 302 IPC and if such reasons are to be accepted for granting bail, then probably in all cases bail would be granted.

Since we find that no reasons have been given in substance and there is only narration of facts in the orders impugned, we are of the opinion that the orders impugned deserve to be set aside. "

13. In the light of above judgments even considering the "desirability of consistency" as held in **Nanha (Supra),** the parity of an unreasoned order which is against various judgments, as referred above, passed by the Apex Court, could not an order not supported by adequate reasons could not be weighed over an order passed with certain reasons after considering rival submissions and considering 'Law on bail'. While rejecting the first bail application for the sake of repeat, reasons given by this Court are mentioned hereinafter :-

"8. The allegations against the applicant are consistent in FIR, statement of victim recorded u/s 161 Cr.P.C. and 164 Cr.P.C. that during entire occurrence of rape he remained at the place of occurrence. He not only locked the room from outside but repeatedly told co-accused to do it fast. Co-accused Veeru also joined him. Section 376 (D) IPC states that "Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape".

14. In order to consider the submissions of learned counsel for applicant on merit, I have gone through the material on record and again perused it carefully. The role of applicant was specifically mentioned in the statement of victim recorded under Section 164 Cr.P.C. that on fateful day, when victim was going to field along with her animals, Jai chand (co-accused) and Hargovind (present applicant) met her and took her to a room at their tubewell. Applicant - Hargovind locked the room from outside and remained there to guard. Meanwhile, co-accused - Jai Chand committed rape inside the room and specifically asked co-accused to complete the act of rape quickly. After the act of rape, applicant and co-accused left the room, locked from outside. Later on, room was opened by father of the applicant.

15. From the statements recorded under Section 164 Cr.P.C., the active role of applicant in commission of offence is apparent. He not only actively participated in abduction but remained with co-accused Jai Chand from starting to conclusion of act and helped co-accused Jai Chand by locking the door from outside and remained there to guard abroad to complete the offence quickly.

16. Considering the law on bail as mentioned in the order passed in first bail application as well as judgments passed by the Supreme Court (referred above) in

regard to reasoned order as well as law on parity and desirability of consistency and also considering specific role of applicant in commission of the offence and keeping in view the ingredients of Section 376(D) IPC and offence under Section POCSO Act, no case for bail is made out to allow this second bail application.

17. Accordingly, the present bail application is ***rejected.***

(2022)05ILR A240
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.03.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Revision No. 97 of 1994

Lalaie @ Chandra Prakash ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Dileep Kumar, Sri Jitendra Kumar, Sri Purushottam Dixit

Counsel for the Opposite Parties:
A.G.A., Sri Vinay Saran

Criminal Law- Code of Criminal Procedure, 1973- Section 319- Summoning order- The impugned order passed by the court below under Section 319 CrPC was without considering the material on record. The Investigating Officer has not found any material against the revisionist nor his involvement in the instant case was proved, therefore his name was dropped in the charge sheet. This Court further finds that earlier on the application of the prosecution, the revisionist was ordered to be summoned by the court under Section 319 CrPC by order dated 29.5.1991, but this Court vide order dated 8.10.1991 passed in Criminal Revision No.1014 of 1991 quashed the said order of summoning and as such the revisionist cannot again be summoned on the application of the prosecution. Thereafter, the opposite party no.2, informant filed an application 48-Kha under Section 319 CrPC before the learned Sessions Judge, Etawah, who without going through the legal provisions contained under Section 319 CrPC summoned the revisionist and others for facing the trial vide impugned order dated 22.12.1993. The power under Section 319 Cr.P.C. is a discretionary and extraordinary power, which should be sparingly used only in those cases where the circumstances of the case so warrant as held by the Hon'ble Apex Court.

Settled law that the power under section 319 of the CrPc is to be exercised sparingly and not in a routine manner and after considering the material collected during the course of investigation as well as the testimony of the witnesses during trial. (Para 14)

Criminal Revision allowed. (E-3)

Judgements / Case law relied upon:-

1. Hardeep Singh Vs St. of Punj & ors, (2014) 3 SCC 92

2. Labhuji Amratji Thakor & ors. Vs The St. of Guj. & anr, 2018 (0) Supreme (SC) 1147

3. Brijendra Singh & ors Vs St. of Raj., (2017) 7 SCC 706

4. Periyasami & ors. Vs S. Nallasamy, (2019) 4 SCC 342

(Delivered by Hon'ble Shamim Ahmed, J.)

1. This criminal revision has been filed by the revisionist Lalia @ Chandra Prakash against the judgment and order dated 22.12.1993 passed by Sessions Judge, Etawah summoning the revisionist under Section 319 CrPC for facing the trial in ST No.435 of 1990 under Section 307

IPC and further issuing non bailable warrant against the revisionist for his appearance before the court below.

2. Heard Sri Purushottam Dixit, learned counsel for the revisionist, learned A.G.A. for the State and perused the record.

3. Brief facts of the case are that on 14.5.1990 an FIR was lodged by the informant Ved Prakash that accused Surendra and others had injured his brother Chandra Prakash by opening fire upon him.

4. Learned counsel for the revisionist submits that after investigation the police has submitted the police report against two accused persons namely Surendra son of Baburam and Babu Ram son of Charan Lal only. However, as against the revisionist no police report was filed and the investigation against him was pending. He further submits that thereafter the learned Sessions Judge without perusing the papers on record and without considering the fact of pendency of investigation against the applicant issued the process in exercise of power under Section 319 CrPC and summoned the revisionist.

5. Learned counsel for the revisionist further submits that the Investigating Officer has not found any material against the revisionist nor found his involvement in the instant case was proved. Therefore, his name was dropped in the charge sheet.

6. Learned counsel for the revisionist further submits that earlier on an application of the prosecution, the revisionist was ordered to be summoned by the court below under Section 319 CrPC by order dated 29.5.1991 and the same was challenged before this Court. This Court vide order dated 8.10.1991 passed in Criminal Revision No.1014 of 1991 quashed the said order of summoning and as such the revisionist cannot again be summoned on the application of the prosecution.

7. Learned counsel for the revisionist further submits that the opposite party no.2, informant filed an application 48-Kha under Section 319 CrPC before the learned Sessions Judge, Etawah, who without going through the legal provisions contained under Section 319 CrPC summoned the revisionist and others for facing the trial vide impugned order dated 22.12.1993.

8. Learned counsel for the revisionist further submits that power under Section 319 Cr.P.C. is a discretionary and extraordinary power, which should be sparingly used only in those cases where the circumstances of the case so warrant. In support of his argument, learned counsel for the revisionist has placed reliance on paragraph 105 and 106 of the Constitution Bench judgment of the Hon'ble Apex Court in the case of **Hardeep Singh Vs. State of Punjab & others, (2014) 3 SCC 92.** Paragraph 105 and 106 of the aforesaid judgment is quoted as under:-

"105. Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 319 CrPC the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words "for which such person could be tried together with the accused". The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion as to the guilt of the accused."

9. Learned counsel for the revisionist further submits that the above Constitution Bench judgment was duly considered by the Hon'ble Apex Court in the case of **Labhuji Amratji Thakor & others Vs. The State of Gujarat and another, 2018 (0) Supreme (SC) 1147** and has placed reliance on paragraph 9 of the aforesaid judgment which is quoted as under:-

"9. The Constitution Bench has given a caution that power under Section 319 Cr.P.C. is a discretionary and extraordinary power, which should be exercised sparingly and only in those cases where the circumstances of the case so warrant. The crucial test, which has been laid down as noted above is "the test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction." The present is a case, where the trial court had rejected the application filed by the prosecution under Section 319 Cr.P.C. Further, in the present case, the complainant in the F.I.R. has not taken the names of the appellants and after investigation in which the statement of victim was also recorded, the names of the appellants did not figure. After carrying investigation, the Charge Sheet was submitted in which the appellants names were also not mentioned as accused. In the statement recorded before the Police, the victim has named only Natuji with whom she admitted having physical relations and who took her and with whom she went out of the house in the night and lived with him on several places. The mother of victim in her statement before the Court herself has stated that victim girl returned to the house after one and a half months. In the statement, before the Court, victim has narrated the entire sequence of events. She has stated in her statement that accused Natuji used to visit her Uncle's house Vishnuji, where she met Natuji. She, however, stated that it was Natuji, who had given her mobile phone. Her parents came to know about she having been given mobile phone by Natuji, then they went to the house of Natuji and threatened Natuji."

10. Learned counsel for the revisionist has further placed reliance on paragraph 13 and 15 of the judgment of the Hon'ble Apex Court in the case of **Brijendra Singh and others vs. State of Rajasthan, (2017) 7 SCC 706**, which is quoted as under:-

"13. In order to answer the question, some of the principles enunciated

in Hardeep Singh?s case may be recapitulated:

Power under Section 319 Cr.P.C. can be exercised by the trial court at any stage during the trial, i.e., before the conclusion of trial, to summon any person as an accused and face the trial in the ongoing case, once the trial court finds that there is some evidence against such a person on the basis of which evidence it can be gathered that he appears to be guilty of offence. The evidence herein means the material that is brought before the Court during trial. Insofar as the material/evidence collected by the IO at the stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 Cr.P.C. No doubt, such evidence that has surfaced in examination-in-chief, without cross-examination of witnesses, can also be taken into consideration. However, since it is a discretionary power given to the Court under Section 319 Cr.P.C. and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrants. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom chargesheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the Court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity.

xx xx xx

15. This record was before the trial court. Notwithstanding the same, the trial court went by the deposition of complainant and some other persons in their examination-in-chief, with no other material to support their so- called verbal/ocular version. Thus, the ?evidence? recorded during trial was nothing more than the statements which was already there under Section 161 Cr.P.C. recorded at the time of investigation of the case. No doubt, the trial court would be competent to exercise its power even on the basis of such statements recorded before it in examination-in-chief. However, in a case like the present where plethora of evidence was collected by the IO during investigation which suggested otherwise, the trial court was at least duty bound to look into the same while forming prima facie opinion and to see as to whether ?much stronger evidence than mere possibility of their (i.e. appellants) complicity has come on record. There is no satisfaction of this nature. Even if we presume that the trial court was not apprised of the same at the time when it passed the order (as the appellants were not on the scene at that time), what is more troubling is that even when this material on record was specifically brought to the notice of the High Court in the Revision Petition filed by the appellants, the High Court too blissfully ignored the said material. Except reproducing the discussion contained in the order of the trial court and expressing agreement therewith, nothing more has been done. Such orders cannot stand judicial scrutiny."

11. Learned counsel for the revisionist has further placed reliance on paragraph 14 and 15 of the judgment passed by the Hon'ble Apex Court in the case of **Periyasami and others vs. S. Nallasamy, (2019) 4 SCC 342** and has submitted that the earlier judgment, referred above, was

duly considered in the present case. Paragraph 14 and 15 of the aforesaid judgment is quoted as under:-

"14. In the First Information Report or in the statements recorded under Section 161 of the Code, the names of the appellants or any other description have not been given so as to identify them. The allegations in the FIR are vague and can be used any time to include any person in the absence of description in the First Information Report to identify such person. There is no assertion in respect of the villages to which the additional accused belong. Therefore, there is no strong or cogent evidence to make the appellants stand the trial for the offences under Sections 147, 448, 294(b) and 506 of IPC in view of the judgment in Hardeep Singh case (supra). The additional accused cannot be summoned under Section 319 of the Code in casual and cavalier manner in the absence of strong and cogent evidence. Under Section 319 of the Code additional accused can be summoned only if there is more than prima facie case as is required at the time of framing of charge but which is less than the satisfaction required at the time of conclusion of the trial convicting the accused.

15. The High Court has set aside the order passed by the learned Magistrate only on the basis of the statements of some of the witnesses examined by the Complainant. Mere disclosing the names of the appellants cannot be said to be strong and cogent evidence to make them to stand trial for the offence under Section 319 of the Code, especially when the Complainant is a husband and has initiated criminal proceedings against family of his in-laws and when their names or other identity were not disclosed at the first opportunity."

12. Learned counsel for the revisionist has submitted that in view of the law laid down by the Hon'ble Apex Court and the facts and circumstances, as narrated above, and from the perusal of the record, the impugned judgment and order dated 22.12.1993 passed by Sessions Judge, Etawah summoning the revisionist under Section 319 CrPC, is against the spirit and directions issued by the Hon'ble Apex Court.

13. Learned AGA has opposed the argument raised by the learned counsel for the revisionist and has submitted that the impugned order dated 22.12.1993, summoning the revisionist under Section 319 CrPC, was rightly passed.

14. Having heard learned counsel for the parties and after perusal of material on record, this Court is of the opinion that the impugned order passed by the court below under Section 319 CrPC was without considering the material on record. The Investigating Officer has not found any material against the revisionist nor his involvement in the instant case was proved, therefore his name was dropped in the charge sheet. This Court further finds that earlier on the application of the prosecution, the revisionist was ordered to be summoned by the court under Section 319 CrPC by order dated 29.5.1991, but this Court vide order dated 8.10.1991 passed in Criminal Revision No.1014 of 1991 quashed the said order of summoning and as such the revisionist cannot again be summoned on the application of the prosecution. Thereafter, the opposite party no.2, informant filed an application 48-Kha under Section 319 CrPC before the learned Sessions Judge, Etawah, who without going through the legal provisions contained under Section 319 CrPC summoned the

revisionist and others for facing the trial vide impugned order dated 22.12.1993. The power under Section 319 Cr.P.C. is a discretionary and extraordinary power, which should be sparingly used only in those cases where the circumstances of the case so warrant as held by the Hon'ble Apex Court in the cases of *Hardeep Singh, Labhuji Amratji Thakor, Brijendra Singh and Periyasami* (supra).

15. Accordingly, the revision is allowed. The impugned order dated 22.12.1993 passed by Sessions Judge, Etawah summoning the revisionist under Section 319 CrPC for facing the trial in ST No.435 of 1990 under Section 307 IPC, is hereby set aside.

(2022)05ILR A245
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.04.2022

BEFORE

THE HON'BLE SHAMIM AHMED J.

Criminal Revision No. 351 of 1996

Dod Ram ...Revisionist
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionist:
Sri Vivek Varma, Sri Durvesh Kumar, Sri Murli Dhar Mishra, Sri Shekhar Dwivedi

Counsel for the Opposite Parties:
G.A.

Criminal Law- Indian Penal Code , 1860- Section 326- Conviction – Question of Sentence- Maximum sentence provided to the revisionist is three years for offence under Sections 326 I.P.C- The impugned judgment do not suffer from any illegality, perversity or jurisdictional error which may call for any interference by this Court, hence the conviction and sentence of the revisionists is hereby upheld. But taking in account of the fact that revisionist has already undergone sufficient period in jail as under trial and after conviction by the lower appellate court, his rest of the sentence be converted into a fine- Revisionist is directed to pay and deposit fine of Rs. 50,000/- in the court of C.J.M. concerned out of which Rs. 40,000/- shall be paid to the informant-Tara Chand P.W. 1 and 10,000/- shall go to the State.

Where the accused has undergone a substantial part of the sentence, the remaining part of the sentence can be converted into fine. (Para 6,7)

Criminal Appeal partly allowed. (E-3)

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Sri Shekhar Dwivedi, Advocate holding brief of Sri Durvesh Kumar, learned counsel for the revisionist and Sri Vinod Kant, learned Additional Advocate General assisted by Sri Vinay Prakash Shahu, learned counsel for the opposite party.

2. The present criminal revision has been preferred against the judgment and order dated 26.02.1996 passed by Ist Additional Sessions Judge Bareilly in Criminal Appeal No. 202 of 1995: Dod Ram Vs. State of U.P.,confirming the order dated 17.08.1995 passed by the Judicial Magistrate Ist, Bareilly in Criminal Case No. 288/94 State Vs. Dod Ram and Parmeshwari (Parmeshwari having died case against him had abated) arising out of Crime No. 173/89, under Section 326 I.P.C., Police Station Cantt, District Bareilly convicting and sentencing the revisionist under Section 326 I.P.C. and sentence for 3 years rigorous imprisonment with fine of Rs. 500/-, in default of payment of fine further rigorous

imprisonment for six months has been imposed.

3. With the consent of learned counsel for the parties, the present revision is being decided on the question of sentence only.

4. Learned counsel for the revisionist submits that maximum sentence provided to the revisionist is three years for offence under Sections 326 I.P.C. The rest of the sentence of the revisionist be converted into fine and the same shall not be treated as enhancement of the sentence. Learned counsel for the revisionist further submits that the revisionist has undergone a substantial period of punishment and now the revisionist is on parole.

5. Learned A.G.A. opposed the prayer for quashing of the impugned order and has submitted that the lower appellate court has rightly passed the impugned judgment and order after considering the evidence before it, hence no interference is called for by this Court and the revision is liable to be dismissed.

6. I have perused the impugned judgment and orders as well as record and in my opinion the same do not suffer from any illegality, perversity or jurisdictional error which may call for any interference by this Court, hence the conviction and sentence of the revisionists is hereby upheld. But taking in account of the fact that revisionist has already undergone sufficient period in jail as under trial and after conviction by the lower appellate court, his rest of the sentence be converted into a fine.

7. Accordingly, revisionist is directed to pay and deposit fine of Rs. 50,000/- in the court of C.J.M. concerned out of which Rs. 40,000/- shall be paid to the informant-Tara Chand P.W. 1 and 10,000/- shall go to the State. If the revisionist deposits the aforesaid amount of fine, he shall be released forthwith, if not already released and further if not wanted in any other case.

8. In default of the fine as directed above, the revisionist shall serve out the sentence as awarded by the courts below.

9. In view of the above, the revision is **partly allowed.**

10. Office is directed to send a certified copy of this order to C.J.M., concerned for its compliance.

11. Learned counsel for the revisionist submits that there is Second Bail Application No. 5 of 2021 filed on behalf of the revisionist-Dod Ram is pending, which may be dismissed as not pressed.

12. Accordingly, the aforesaid second bail application is dismissed as not pressed.

(2022)05ILR A246
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.03.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Government (Criminal) Revision No. 486 of 2002

State of U.P. ...Revisionist
Versus
Swami Sachchidanand Har Sakchi & Ors. ...Opposite Parties

Counsel for the Revisionist:
Govt. Advocate

Counsel for the Opposite Parties:

Criminal Law- Code of Criminal Procedure, 1973- Section 227- Discharge of Accused- Revision against- From the perusal of record there is no evidence of kidnapping, loot or rape found against the accused persons, consequently the accused persons were discharged from the allegation made against them by the trial court and a reasoned and speaking order was passed after considering the material available on record- No illegality or infirmity in the impugned order passed by the trial court, therefore, the order under challenge needs no interference as there is no illegality or infirmity in the order under challenge and the present revision is liable to be dismissed.

Where no evidence has been found showing the commission of the alleged offence and the order has been passed considering the factual and legal position by due application of mind by the learned court below, then no interference warranted by the High Court under its revisory powers. (Para 9, 10)

Criminal Revision rejected. (E-3)

(Delivered by Hon'ble Shamim Ahmed, J.)

1. List revised.

2. As per the office report, the Chief Judicial Magistrate, Mainpuri vide its report dated 30.01.2020 informed that the opposite party No. 4-HC/Harish, S/o Lala Ram, has expired ten years back.

3. Heard Shri Abhishek Shukla, the learned A.G.A.-I for the State.

4. This revision has been filed on behalf of State challenging the order dated 26.11.2001 passed by learned Special Judge (D.A.A.), Etah in S. S. T. No. 64 of 2001, State Vs. Swami Sachchidanand Har Sakshi and Others, arising out of Case Crime No. 481 of 2000, Police Station Kotwali Nagar, District Etah, discharging the opposite parties from the charge under Sections 395, 397, 342, 376, 412, 506 I.P.C.

5. Learned A.G.A.-I submits that the informant-Km. Durga Bharti lodged an F.I.R. on 31.07.2000 at Police Station Kotwali Nagar, District Etah which was registered as Case Crime No. 481 of 2000, under Sections 395, 397, 342, 376, 412, 506 I.P.C. with the allegation that on 31.07.2000 at about 6:00 p.m. she was going to Agra with one Jagatveer in Mahindra Jeep, when their vehicle reached at Bus stand at Agra Road, then three vehicles, i.e., Armada Grand Jeep, Gypsy and Commander Jeep belongs to Shishpul Yadav, M.L.A. intercepted the vehicle of informant and from these vehicles Swami Sachchidanand Har Sakshi having rifle in his hand, Inspector Harishchandra, Inspector Ram Prakash, Ganesh Lodhi, who were in security of Swami Sachchidanand Har Sakshi, having rifles and A.K.-47 in their hands, came out and dragged away the informant from her vehicle and Swami Sachchidanand Har Sakshi by abusing and assaulting the informant put his rifle on her chest and taken her to Armada Grand Jeep and, thereafter, taken her to his Ashram at Shikohabad. The accused persons also snatched her bag containing Rs. 12,000/-, revolver and papers of vehicle belongings to the informant. The informant was raped by Swami Sachchidanand Har Sakshi, Padam Singh and Ram Singh several times in the Ashram of Swami Sachchidanand Har Sakshi. After investigation the police has submitted its charge sheet against all the accused persons, the opposite parties herein. The accused opposite parties filed an application No. 51-A with the prayer that they may be discharged from the charge framed against them as no case is made out against them.

6. Learned A.G.A.-I further submits that on the aforesaid application moved on behalf of accused opposite parties, the learned trial court after hearing D.G.C.(Criminal) and the learned counsel for the accused opposite parties, has discharged the accused opposite parties by passing the impugned order, which is under challenge before this Court in the present revision.

7. Learned A.G.A.-I further submits that while passing the impugned order the learned trial court has committed error by not considering the evidence adduced by the victim. The learned trial court has also committed error of law by not considering the statements of the victim recorded under Section 161 and 164 Cr.P.C.

8. After considering the arguments advanced by Shri Abhishek Shukla, the learned A.G.A.-I on behalf of State, and after having gone through the impugned order dated 26.11.2001 passed by the trial court and also after perusal of record of the court below, this Court is of the opinion that the learned trial court in its judgment has observed that during investigation there was no evidence found regarding robbery of vehicle, bag, revolver, twelve thousand rupees and papers of vehicle of the informant. Regarding loot of vehicle on the date of incident as alleged by the prosecution, the learned trial court found that the informant could not produce papers of the vehicle relating to its ownership and in inquiry it was found that the same was belonged to one Vijay Swaroop, who produced the papers of the vehicle claiming its ownership and was handed over to him. The loot of revolver, of which the informant was claiming its ownership, was also not found her during investigation.

9. The learned trial court further gave finding that regarding allegation of assault and rape made by the informant allegedly committed by the accused persons on 31.07.2000, the informant was medically examined on 01.08.2000 and the concerned doctor has opined that there was no external or internal injury found on the person of the informant or on her private parts. The witnesses of the alleged kidnapping, who were produced by the police as eye witnesses, have not named the accused opposite parties.

10. The learned trial court further recorded finding that from the perusal of record there is no evidence of kidnapping, loot or rape found against the accused persons, consequently the accused persons were discharged from the allegation made against them by the trial court and a reasoned and speaking order was passed after considering the material available on record.

11. In view of above, there appears no illegality or infirmity in the impugned order dated 26.11.2001 passed by the trial court, therefore, the order under challenge needs no interference as there is no illegality or infirmity in the order under challenge and the present revision is liable to be dismissed.

12. Accordingly, the present revision is dismissed.

13. Interim order, if any, stands vacated.

14. Let a copy of this order be sent to the concerned District and Sessions Judge for its onwards transmission to the concerned court.

15. Let the lower court record, if any, be returned back to the court concerned.

16. The file is consigned to record.

(2022)05ILR A249
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.04.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Revision No. 751 of 2022

Wasif ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Sushil Shukla, Sri Aditya Prakash Singh

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

Criminal Law - Juvenile Justice (Care and Protection of Children) Act, 2015-Sections 18 & 94- Cancelation of interim bail by Juvenile Justice Board- The enquiry on the point of juvenility has nothing to do with the enquiry as contemplated under other legislations- 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. 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 rebuttable on the evidence lead by the aggrieved parties.

The inquiry as provided under the Act 2015 is different from that under other laws since the Act 2015 is a special beneficial enactment providing a specific mode for conducting an inquiry for the determination of age of a juvenile in conflict with law however the presumption under Section 94 is rebuttable by either of the parties.

Criminal Law - Juvenile Justice (Care and Protection of Children) Act, 2015- Section 94- Even assuming without admitting that the revisionist had failed to appear on the date fixed before the Juvenile Justice Board during enquiry under Section 94 of the Act, 2015, then at most it would have rejected the claim of juvenility. The Board had failed to perform its obligatory duty provided under the provisions of the Act, 2015 in not deciding the claim of juvenility of revisionist for the last five years. Both the Board as well as the appellate court failed to notice that there is no provision for cancellation of bail once granted to any delinquent juvenile under the Act, 2015.

Where the Act 2015 does not provide for the cancelation of bail once granted to a juvenile, then cancellation of bail by either the Board or the Appellate court would be illegal and arbitrary.

Criminal Law - Juvenile Justice (Care and Protection of Children) Act, 2015- Section 94- Once the educational documents filed by the revisionist mention his date of birth consistently on all levels, which was supported by the birth certificate issued by the concerned Registrar and there appears no contrary evidence before the Board, the Board ought to have decide the issue of juvenility of the revisionist, and not deciding his claim of juvenility the Board has caused great prejudice to the revisionist who was made to face trial with the other co-accused persons before the trial court for the last more than five years.

The determination of age of a juvenile in conflict with law should be done within a reasonable time by the Board, otherwise the delay in deciding the same will result in the trial of the

juvenile with other co-accused, which violates the spirit, and intent of the Act.(Para 22, 25, 27, 28)

Criminal Revision allowed. (E-3)

Judgements/ Case law relied upon:-

1. Ashwani Kumar Saxena Vs St. of M.P. in Crl. Appeal No. 1403 of 2021 (dec. on 13.09.2012),

2. Sanat Kumar Yadav Vs St. of M.P. in Crl. Rev. No. 3049 of 2016 (dec.on 02.01.2017)

3. Rishipal Singh Solanki Vs St. of U.P. in Crl. Appeal No. 1240 of 2021 (dec. on 18.11.2021),

(Delivered by Hon'ble Shamim Ahmed, J.)

1. This Court vide order 25.03.2022 issued notice to the opposite party No. 2. Office report dated 11.04.2022 indicates that notice has already been served upon the opposite party No. 2 through legal heirs as per the report of the Chief Judicial Magistrate, Bulandshahar dated 08.04.2022. Thereafter, the case was again taken up on 11.04.2022. Today when the case is being taken up in the revised call, even no one has put in appearance on behalf of opposite party No. 2, nor any counter affidavit has been filed on his behalf. It appears that opposite party No. 2 is not interested to contest the case.

2. Counter affidavit filed on behalf of State is on the record.

3. Learned counsel for the revisionist denied the averments made in the counter affidavit filed on behalf of State.

4. In view of the aforesaid, the Court proceeds to decide the matter finally.

5. Heard Shri Sushil Shukla, Advocate, assisted by Shri Aditya Prakash Singh, the learned counsel for the revisionist and Shri Vinay Prakash Sahu, the learned A.G.A. for the State.

6. This revision is directed against the order dated 27.02.2020 passed by the court of Juvenile Justice Board, Bulandshahar in Criminal Misc. Case No. 97 of 2016, arising out of Case Crime No. 483 of 2016, under Sections 420, 457, 471, 120-B I.P.C., P.S. Khurja Nagar, District Bulandshahar, by which the Juvenile Justice Board had cancelled the interim bail granted to the accused-revisionist by the learned Sessions Judge, Bulandshahar. Aggrieved from the order dated 27.02.2020 the revisionist challenged the same before the court of learned Additional Sessions Judge/ Special Judge (POCSO Act), Bulandshahar in Criminal Appeal No. 9 of 2022, which was dismissed by the learned appellate court vide order dated 29.01.2022, affirming the order dated 27.02.2020 passed by the Juvenile Justice Board. Against the aforesaid orders the present revision is being preferred before this Court.

7. Learned counsel for the revisionist submits that the only legal question involved in this case is whether Juvenile Justice Board who is only competent to determine age of revisionist as to whether he was juvenile on the date of incident or not, can cancel the interim bail granted by the court of Session Judge, Bulandshahar, and whether the Board has vested with its jurisdiction or has exceeded its jurisdiction.

8. Learned counsel for the revisionist further submits that the Juvenile Justice Board has exceeded its jurisdiction and no power is vested to the Board to cancel interim bail granted by the court of Session Judge, Bulandshahar.

9. Learned counsel for the revisionist further submits that the facts in brief which arise the present issue is that an F.I.R. bearing Case Crime No. 483 of 2016, under Sections 419, 420, 467, 468, 471 I.P.C., P.S. Khurja Nagar, District Bulandshahar was lodged by the infomant-opposite party No. 2 against unknown person. During investigation eight persons were found involved. The revisionist along with his father (co-accused) and two other persons who were also made co-accused in the case, were arrested on 24.07.2016 and from their joint possession Rs.5,50,000/- were recovered. After being arrested on 24.07.2016 the revisionist moved his regular Bail Application No. 2578 of 2016 before the court of learned Sessions Judge, Bulandshahar, claiming therein that he was juvenile on the date of incident. In support of his claim for declaring him juvenile the revisionist rests upon his High School certificate of the year, 2017, issued by the Central Board of Secondary Education, the certificate issued by the Principal of Hilman Public School, Agra, certifying his study in Class-Xth, and copy of certificate issued by Principal, Yugshakti Gayatri School, Agra, certifying his education in Class-VIIIth.

10. Learned counsel for the revisionist further submits that in all the abovementioned documents the date of birth of revisionist was consistent as 17.09.1999. It has further been argued that apart from the aforesaid educational certificates, a birth certificate issued by Registrar, (Birth & Death), Agra, was also appended with the aforesaid bail application in which same date of birth of the revisionist is mentioned.

11. Learned counsel for the revisionist further submits that while hearing the bail application and taking note of the claim of juvenility of the revisionist the learned Sessions Judge has referred the matter for his age determination to the Juvenile Justice Board with the finding that the Board shall necessarily determine and return the finding about the age of the revisionist within 15 days.

12. Learned counsel for the revisionist further submits that due to non functioning of the Board no such age determination could be made in next two months, thereafter, the revisionist claimed interim bail before the court of learned Sessions Judge, who after considering the case of the revisionist, vide its order dated 19.10.2016 granted interim bail to the revisionist till the Board becomes functional.

13. Learned counsel for the revisionist further submits that before Juvenile Justice Board, Bulandshahar, the enquiry in terms of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as, "the Act, 2015') began and has been registered as Misc. Case No. 97 of 2016, and statement of mother of the revisionist and the statements of Principals of Schools were also recorded, and nothing was remained to give finding by the Board regarding age determination of the revisionist, the said enquiry has been remained pending for the last five years, whereas the entire documentary evidence was produced by the revisionist before the Board for determining his age and to declare him as juvenile.

14. Learned counsel for the revisionist further submits that despite the revisionist had been attending enquiry regularly for the last five years except some adjournments on few dates sought by him,

surprisingly on 27.02.2020 the Board had cancelled the interim bail granted by the court of learned Sessions Judge, only on the ground of absence of the accused revisionist on that date and issued non bailable warrant against him.

15. Learned counsel for the revisionist further submits that cancelling the interim bail by the Juvenile Justice Board, which was granted by the court of learned Sessions Judge, is completely without jurisdiction vested in the Board under the provisions of Act, 2015.

16. Learned counsel for the revisionist further submits that the interim bail cancellation order was challenged by the revisionist before the court of learned Additional Sessions Judge/ Special Judge, (POCSO) Act, Bulandshahar in appeal, which was also dismissed vide order dated 29.01.2022. Both the orders dated 27.02.2020 and 29.01.2022 are impugned in this revision.

17. Learned counsel for the revisionist further submits that the Juvenile Justice Board as well as the appellate Court had passed the impugned order in a mechanical manner without considering the evidence on record, and the Juvenile Justice Board has exceeded its jurisdiction while cancelling the interim bail order, and, therefore, issuing non bailable warrant against the revisionist, which is without jurisdiction. The Juvenile Justice Board has failed to discharge its duty as contemplated under the law and delayed the proceeding pending before them for deciding the issue of question of declaration of juvenility of the revisionist.

18. Learned A.G.A. has opposed the submissions of the revisionist and submits that the impugned order was rightly passed by both the courts below.

19. I have considered the arguments advanced by learned counsel for the parties and perused 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 **Sanat 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 Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as 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 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.

26. 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.

27. In view of the above facts and submissions and considering the argument as advanced on behalf of revisionist that even assuming without admitting that the revisionist had failed to appear on the date fixed before the Juvenile Justice Board during enquiry under Section 94 of the Act, 2015, then at most it would have rejected the claim of juvenility. The Board had failed to perform its obligatory duty provided under the provisions of the Act, 2015 in not deciding the claim of juvenility of revisionist for the last five years. Both the Board as well as the appellate court failed to notice that there is no provision for cancellation of bail once granted to any delinquent juvenile under the Act, 2015.

28. There appears force in the arguments of the learned counsel for the revisionist that the lower appellate court has erred in recording the finding that it was the accused-revisionist, who is creating hurdles in the on going enquiry before the Board regarding his age determination. The said finding is perverse in as much as the record of proceedings before the Board reveals that all the evidence has been collected by the Board in the year, 2016 itself, and therefore, there was no legal impediment in deciding the issue of determination of age of the revisionist and the Board has waisted its time for appearance of informant and the said proceedings of enquiry had remained pending over more than five years without any fault of the revisionist and that too in violation of the provisions of Act, 2015. Moreover, once the educational documents filed by the revisionist mention his date of birth as 17.09.1999 consistently on all levels, which was supported by the birth certificate issued by the concerned Registrar and there appears no contrary evidence before the Board, the Board ought to have decide the issue of juvenility of the revisionist, and not deciding his claim of juvenility the Board has caused great prejudice to the revisionist who was made to face trial with the other co-accused persons before the trial court for the last more than five years.

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 27.02.2020 passed by Juvenile Justice Board, Bulandshahar in Criminal Misc. Case No. 97 of 2016, arising out of Case Crime No. 483 of 2016, under Sections 419, 420, 467, 471, 120-B I.P.C., Police Station Khurja Nagar, District Bulandshahar and the impugned judgment and order dated 29.01.2022 passed by learned Additional Sessions Judge/ Special Judge (POCSO Act), Bulandshahar in Criminal Appeal No. 9 of 2022 are hereby **set aside** and **reversed.**

30. It is further observed that the Juvenile Justice Board has yet not decided the claim of juvenility of the revisionist for the last five years, being a peculiar case the Juvenile Justice Board, Bulandshahar is directed to decide the question of juvenility of revisionist within a period of two months from the date of production of certified copy of this order, without granting any unnecessary adjournments to either of the parties and the case may be decided in accordance with law.

31. It is also made clear that this Court has not stayed the proceedings of the trial and the trial court is at liberty to proceed further with the case and decide the same in accordance with law.

(2022)05ILR A256
REVISIONAL JURISDICTION

CRIMINAL SIDE
DATED: LUCKNOW 13.05.2022

BEFORE

THE HON'BLE BRIJ RAJ SINGH, J.

Criminal Revision No. 763 of 2018

Arshiya Rizvi & Anr. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Nadeem Murtaza, Mohd. Mohsin

Counsel for the Opposite Parties:
Govt. Advocate, Purnendu Chakravarty

Criminal Law - Code of Criminal Procedure, 1973- Section 125 Cr.P.C. - The Muslim Women (Protection of Rights on Divorce) Act, 1986- Talaq (Divorce)- Validity of- Right to Maintenance- The proceeding under Section 125 Cr.P.C. is available to revisionist once she had taken resort to proceeding under Section 125 Cr.P.C. - It is admitted fact that revisionist no.1 and opposite party no.2 are wife and husband and they were married which is uncontroverted. The revisionist no.1 was divorced but as per the judgment of Hon'ble Supreme Court passed in the case of Shayara Bano Vs Union of India and others (Ministry of Women and Child Development Secretary and others), (2017) 9 SCC 1 wherein it has been pronounced that if the divorce is declared in one go and the Fatava is issued, the same cannot be legal divorce and it has no legal force. The divorce given by opposite party no.2 was not in accordance with the Quoran therefore, the divorce given by the opposite party no.2 was not in accordance with law. Quoran is the only source in which the voice of Allah, Mohammad Sahab have been recited in Aayats. The divorce can be given in accordance with the "verses" which are envisaged in Quoran.

Where the divorce is not given according to the provisions of the Quran, it has no legal force

and therefore the right of a Muslim woman to seek maintenance u/s 125 of the Cr.Pc is fully maintenable.

Criminal Law - Code of Criminal Procedure, 1973- Sections 125 & 397 - The court below passed the order that opposite party no.2 had not deserted her, rather, the revisionist no.1 had left the house on her own will. It has been further recorded by the court below that in absence of physical assault as stated by revisionist no.1, it cannot be interfered that any cruelty was done by the husband. The finding recorded by the court below is wrong. Section 125 Cr.P.C. is to be read in harmonious construction and only on the basis of Section 125 (4) Cr.P.C. the court came to the conclusion that the revisionist no.1 was deserted because she could not produce the evidence of physical assault and cruelty. The court has not considered the fact that specific averment of dowry demand as well as cruelty has been made by revisionist no.1 in her statement as well as in her application.

Merely because the wife has failed to produce evidence of cruelty, inspite of making a specific pleading to the said effect, her claim for interim maintenance cannot be defeated as the same would defeat the very purpose of section 125 Cr.P.c .

Criminal Law - Code of Criminal Procedure, 1973- Section 397 - The court below has overlooked all the factual aspects and has considered the irrelevant facts to defeat the purpose of section 125 Cr.P.C. - The wife-revisionist is entitled for maintenance under Section 125 Cr.P.C. The High Court has ample power to see the illegality, perversity and error committed by the court below.

Where any order or finding has been recorded by the lower court which is based on irrelevant considerations and is wrong or illegal, the High Court can always interfere with the said order or finding under its revisional jurisdiction. (Para 15, 19, 20, 21, 25, 27)

Criminal Revision Allowed. (E-3)

Judgements/ Case law relied upon:-

1. Danial Latifi & anr. Vs U.O.I, MANU/SC/0595/2001 : 2001 CrLJ 4660

2. Iqbal Bano Vs St. of U.P. & ors. (2007) 6 SCC 785

3. Shayara Bano Vs U.O.I & ors. (Min. of Women & Child Dev. Secy. & ors), (2017) 9 SCC 1.

4. Sunita Kachwaha & ors. Vs Anil Kachwaha, (2014) 16 SCC 715.

5. Shamima Farooqui Vs Shahid Khan, [(2015) 5 SCC 705]

6. Smt. Kiran Singh Vs St. of U.P. & anr. [Crl. Rev. No. 896 of 2019, dec. on 26.04.2022].

(Delivered by Hon'ble Brij Raj Singh, J.)

The present revision has been preferred with a prayer to quash the judgment and order dated 22.05.2018, passed by the Principal Judge/A.D.J., Family Court, Lucknow in Criminal Case No.360/2007 (Baby Sukaina @ Zahra Rizvi and another Vs. Shri Adil Rizvi), so far as it relates to the rejection of the application under Section 125 Cr.P.C. in respect of revisionist no.1 and also enhance the amount of maintenance awarded to the revisionist no.2.

2. Revisionist no.1-wife and revisionist no.2-daughter of opposite party no.2, filed application under Section 125 Cr.P.C. stating therein that revisionist no.1 was married to opposite party no.2 on 15.01.2003 at Lucknow according to Muslim religion (Siya) rites. After marriage, revisionist no.1 - wife came to the house of opposite party no.2 - Shri Adil Rizvi and led her marital obligation. Out of the wedlock of revisionist no.1 and opposite party no.2, a girl child was born on 07.07.2004. It has been further

mentioned in the application that parents of revisionist no.1 - wife had given dowry as per their financial condition like golden and silver jewelary, clothes, colour television, C.D. player, washing machine, fridge, A.C. and furniture etc. Rs.40,000/- and a motorcycle was demanded by the father of opposite party no.2. His father asked the revisionist no.1 to bring the aforesaid amount and motorcycle from her parents. The mother of opposite party no.2, Smt. Khurshid Zamal @ Rani asked revisionist no.1 to bring one Maruti Car, one Generator as dowry as her father promised to give the same. The application further indicates that after sometime of marriage, the relation between revisionist no.1 - wife and opposite party no.2 - husband started getting strange disposition and they created pressure to bring dowry as mentioned aforesaid. When the dowry demand could not be fulfilled by revisionist no.1, opposite party no.2 and his family members beaten her on 15.09.2003. When the said fact was known to parents of revisionist no.1, they complained in police and on his complain, opposite party no.2 and his family members requested to pardon them and made promise that they would not do any act of harassment against her. The revisionist no.1 was again beaten by opposite party no.2 and his mother on 05.05.2004 and they threw-out her from their house. She reached her parents' house and she was hospitalized in Vardan Nursing Home, where a girl child Sukaina @ Zahra Rizvi was born. The opposite party no.2 was not providing any maintenance, therefore, she filed an application under Section 125 Cr.P.C. for maintenance.

3. The opposite party no.2 filed objection before the court below and denied the incident dated 26.11.2003 and stated that she has not produced any evidence regarding that incident. He further stated that he had borne the expenditure of Nursing Home at the time of birth of his daughter. He further stated that the revisionist no.1 is graduate and earning Rs.4,000/- per month from tuition. He further stated that the father of revisionist no.1 is a gazetted officer and he is receiving salary at Rs.40,000/- and her mother is also a teacher in primary school and her salary is Rs.22,000/- per month. It was also stated that the financial position of revisionist no.1 is strong, therefore, there is no occasion to provide her maintenance as she can maintain herself.

4. After hearing both parties, the judgment has been passed on 22.05.2018 and the application for maintenance under Section 125 Cr.P.C. filed by revisionist no.1, has been dismissed. However, the application in respect of revisionist no.2 has been allowed and Rs.5,000/- per month has been awarded as interim maintenance. Hence, the present revision has been filed by the revisionists.

5. Heard Sri Nadeem Murtaza, learned counsel for the revisionists, Sri Diwakar Singh, learned A.G.A. for the State and Sri Purnendu Chakravarty, learned counsel for opposite party no.2.

6. Learned counsel for the revisionists has submitted that the court below has recorded incorrect finding wherein it has been observed that it is the revisionist no.1 who has left the house of opposite party no.2. He has further advanced submission that the court below has given erroneous finding wherein it is held that revisionist no.1 was not able to show any injury regarding physical assault made by her in-laws. It has been further argued that it was binding upon the court below that once it

settled that revisionist no.1 is wife, she is entitled for maintenance. The court below also misread the judgment passed in the case of **Sunita Kachwaha and others Vs. Anil Kachwaha, (2014) 16 SCC 715**. The cruelty done by her in-laws, has not been considered and court below passed the order on the presumption that the revisionist has deserted the husband, therefore, she is not entitled for maintenance.

7. Learned counsel for the revisionists has placed reliance on the following judgments:-

(i) **Sunita Kachwaha and others Vs. Anil Kachwaha, (2014) 16 SCC 715.**

(ii) **Shamima Farooqui Vs. Shahid Khan, (2015) 5 SCC 705.**

(iii) **Shayara Bano Vs. Union of India and others (Ministry of Women and Child Development Secretary and others), (2017) 9 SCC 1.**

(iv) **Iqbal Bano Vs. State of U.P. and others, (2007) 6 SCC 785.**

(v) **Smt. Kiran Singh Vs. State of U.P. and another passed in Criminal Revision No.896 of 2019.**

8. Learned counsel for the revisionists has further submitted that the court below has passed the judgment against the record and considered the income of the opposite party no.2 as Rs.30,000/- but in the statement and cross examination before the court below the opposite party no.2 has admitted that he was getting Rs.47,000/- salary; thus the maintenance awarded in favour of revisionist no.2 at Rs.5,000/- is not sufficient as the salary of opposite party no.2 was Rs.47,000/- and calculation which was done Rs.30,000/-, is totally perverse and illegal.

9. Sri Purnendu Chakravarty, learned counsel for opposite party no.2 has submitted that in the revisional jurisdiction under Section 397 Cr.P.C. the court has limited scope to appreciate the fact for which finding has already been recorded by the court below. He has further submitted that the court below has passed the order in letter and spirit of under Section 125 (4) Cr.P.C. because it is the revisionist no.1 who had refused to live in the house of opposite party no.2; therefore, she is not entitled for maintenance. He has next submitted that arrears for enhancement in respect of the maintenance of child i.e. the revisionist no.2 cannot be looked into in the revisional jurisdiction because the court below had considered the income and salary of the opposite party no.2 and has passed the order accordingly which cannot be interfered in the revisional jurisdiction.

10. Sri Chakravarty has further submitted that there is no perversity, illegality in the order passed by the court below, therefore, this Court cannot interfere in the case. It has been further submitted that the facts considered by the court below are not contrary to the law and the court below has not recorded finding against the record and evidence. The order passed by the court below is justified and needs no interference.

11. It has been further argued that as per Muslim Personal Law the revisionist no.1 is divorced Muslim wife, therefore, she has to pursue the maintenance case before the Muslim Women (Protection of Rights on Divorce) Act, 1986 (here-in-after referred to as the "Act, 1986"). He has vehemently argued that after divorce she is not entitled for maintenance.

12. The argument of Sri Chakravarty, learned counsel for opposite party no.2, is that the revisionist is entitled to seek remedy as provided in Act, 1986, is not sustainable in the eyes of law.

13. The issue in the case of the present controversy of **Danial Latifi and another Vs. Union of India, MANU/SC/0595/2001 : 2001 Criminal Law Journal 4660** came up and in para 36, the Act 1986 is considered, which is reproduced below:-

"36. While upholding the validity of the Act, we may sum up our conclusions:

(1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3 (i) (a) of the Act.

(2) Liability of the Muslim husband to his divorced wife arising under Section 3 (i) (a) of the Act to pay maintenance is not confined to the iddat period.

(3) A divorced Muslim woman who is not remarried and who is not able to maintain herself after the iddat period can proceed as provided under Section 4 of the Act against her relative who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law for such divorced woman including her children and parents. If any of her relative being unable to pay maintenance, the Magistrate may direct the State Waqf Board established under the Act to pay maintenance.

(4) The provisions of the Act do not offend Article 14, 15 and 21 of the Indian Constitution."

14. In the Case of ***Iqbal Bano Vs. State of U.P. and others, (2007) 6 SCC 785.*** The Hon'ble Supreme Court had observed that proceedings under Section 125 Cr.P.C. are civil in nature even if the Court notices that the divorced women in the case in question, it is always open to court to treat it as an petition under the Act considering the beneficial nature of the legislation. Paragraph no.9 of the ***Iqbal Bano (supra)*** is quoted below:-

"9. *Proceedings under Section 125 Cr.P.C. are civil in nature. Even if the Court notices that there was a divorced woman in the case in question, it was open to him to treat it as a petition under the Act considering the beneficial nature of the legislation. Proceedings under Section 125 Cr.P.C. and claims made under the Act are tried by the same Court. In Vijay Kumar Prasad v. State of Bihar and ors. [(2004) 5 SCC 196], it was held that proceedings under Section 125 Cr.P.C. are civil in nature. It was noted as follows:*

"14. The basic distinction between Section 488 of the old Code and Section 126 of the Code is that Section 126 has essentially enlarged the venue of proceedings for maintenance so as to move the place where the wife may be residing on the date of application. The change was thought necessary because of certain observations by the Law Commission, taking note of the fact that often deserted wives are compelled to live with their relatives far away from the place where the husband and wife last resided together. As noted by this Court in several cases, proceedings under Section 125 of the Code are of civil nature. Unlike clauses (b) and (c) of Section 126 (1) an application by the father or the mother claiming maintenance has to be filed where the person from whom maintenance is claimed lives."

15. In my opinion the proceeding under Section 125 Cr.P.C. is available to revisionist once she had taken resort to proceeding under Section 125 Cr.P.C. The argument of Sri Chakravarty regarding the alternative remedy provided under the Act, 1986 has no force.

16. Sri Chakravarty has submitted that the revisionist has been divorced by the husband and after divorce she is not entitled for maintenance. This question has come up before Hon'ble the Supreme Court in the case of **Shayara Bano Vs. Union of India and others (Ministry of Women and Child Development Secretary and others), (2017) 9 SCC 1.** The Supreme Court has dealt the issue of maintenance under Section 125 Cr.P.C. pronounced that divorced woman is also entitled for maintenance to succor her need. Reference of Verses 224 to 228 contained in Section 28 of Sura II of the Quran are extracted below:-

*"**224.** And make not*
God's (name) an excuse
In your oaths against
Doing good, or acting rightly,
Or making peace
Between persons;
For God is one
Who heareth and knoweth
All things.
***225.** God will not*
Call you to account
For thoughtlessness
In your oaths,
But for the intention
In your hearts;
And He is
Oft-forgiving
Most Forbearing.
***226.** For those who take*
An oath for abstention
From their wives,
A waiting for four months
Is ordained;
If then they return,
God is Oft-forgiving,
Most Merciful.
***227.** But if their intention*
Is firm for divorce,
God heareth
And knoweth all things.
***228.** Divorced women*
Shall wait concerning themselves
For three monthly periods.
Nor is it lawful for them
To hide what God
Hath created in their wombs,
If they have faith
In God and the Last Day.
And their husbands
Have the better right
To take them back
In that period, if
They wish for reconciliation.
And women shall have rights
Similar to the rights
Against them, according
To what is equitable;
But men have a degree
(Of advantage) over them
And God is Exalted in Power
Wise."

17. Verses from 229 to 231 contained in Section 29 of Sura II, and Verses 232 and 233 included in Section 30 of Sura II, as also Verse 237 contained in Section 31 in Sura II, are relevant on the issue of divorce, which are extracted below:-

*"**229.** A divorce is only*
Permissible twice: after that,
The parties should either hold
Together on equitable terms,
Or separate with kindness.
It is not lawful for you,

(Men), to take back
Any of your gifts (from your wives),
Except when both parties
Fear that they would be
Unable to keep the limits
Ordained by God.
If ye (judges) do indeed
Fear that they would be
Unable to keep the limits
Ordained by God,
There is no blame on either
Of them if she give
Something for her freedom.
These are the limits
Ordained by God;
So do not transgress them
If any do transgress
The limits ordained by God,
Such persons wrong
(Themselves as well as others).
230.*So if a husband*
Divorces his wife (irrevocably),
He cannot, after that,
Re-marry her until
After she has married
Another husband and
He has divorced her.
In that case there is
No blame on either of them
If they re-unite, provided
They feel that they
Can keep the limits
Ordained by God.
Such are the limits
Ordained by God,
Which He makes plain
To those who understand.
231.*When ye divorce*
Women, and they fulfil
The term of their (''Iddat')
Either taken them back
On equitable terms
Or set them free
On equitable terms;
But do not take them back
To injure them, (or) to take
Undue advantage;
If any one does that,
He wrongs his own soul.
Do not treat God's Signs
As a jest,
But solemnly rehearse
God's favours on you,
And the fact that He
Send down to you
The Book
And Wisdom,
For your instruction.
And fear God,
And know that God
Is well-acquainted
With all things."

18. The Hon'ble Supreme Court has considered the issue of divorce in Muslim community in the case of **Shayara Bano (supra)**. Paragraph nos. 134, 135, 137, 392 and 393 of the said judgment, are quoted below:-

*"**134.** The "verses" referred to above need to be understood along with Verses 232 and 233, contained in Section 20 of Sura II of the Quran. The above two "verses" are extracted below:-*

232. *When ye divorce*
Women, and they fulfil
The term of their (''Iddat'),
Do not prevent them
From marrying
Their (former) husbands,
If they mutually agree
On equitable terms.
This instruction
Is for all amongst you,
Who believe in God
And the Last Day.
That is (the course Making for) more virtue

And purity amongst you,
And God knows,
And ye know not.
233. *The mothers shall give suck*
To their offspring
For two whole years,
If the father desires
To complete the term.
But he shall bear the cost
Of their food and clothing
On equitable terms.
No soul shall have
A burden laid on it
Greater than it can bear.
No mother shall be
Treated unfairly
On account of his child,
An heir shall be chargeable
In the same way.
If they both decide
On weaning,
By mutual consent,
And after due consultation,
There is no blame on them.
If ye decide
On a foster-mother
For your offspring,
There is no blame on you,
Provided ye pay (the mother)
What ye offered,
On equitable terms.
But fear God and know
That God sees well
What ye do."

135. *A perusal of the above "verses' reveals, that the termination of the contract of marriage, is treated as a serious matter for family and social life. And as such, every lawful advice, which can bring back those who had lived together earlier, provided there is mutual love and they can live with each other on honourable terms, is commended. After following the above parameters, the Quran ordains, that it is not right for outsiders to prevent the reunion of the husband and wife. "Verse' 233 is in the midst of the regulations on divorce. It applies primarily to cases of divorce, where some definite rule is necessary, as the father and mother would not, on account of divorce, probably be on good terms, and the interest of children must be safeguarded. Since the language of "verse' 233 is general, the edict contained therein is interpreted, as applying equally to the father and mother, inasmuch as, each must fulfil his or her part, in the fostering of children.*

137. *Reference is also necessary to verses'34 and 35, contained in Section 6, as well as, verse 128 contained in "Section 19, of Sura IV. All the above verses are extracted below:*

"34. *Men are the protectors*
And maintainers of women,
Because God has given
The one more (strength)
Than the other, and because
They support them
From their means.
Therefore the righteous women
Are devoutly obedient, and guard
In (the husband's) absence
What God would have them
guard.
As to those women
On whose part ye fear
Disloyalty and ill-conduct,
Admonish them (first),
(Next), refuse to share their beds,
(And last) beat them (lightly);
But if they return to obedience,
Seek not against them
Means (of annoyance):
For God is Most High,
Great (above you all).
35. *If ye fear a breach*
Between them twain,
Appoint (two) arbiters,
One from his family,

And the other from hers;
If they wish for peace,
God will cause
Their reconciliation:
For God hath full knowledge,
And is acquainted
With all things."
Section 19, Sura IV
*"**128.** If a wife fears*
Cruelty or desertion
On her husband's part,
There is no blame on them,
If they arrange
An amicable settlement
Between themselves;
And such settlement is best;
Even though men's souls
Are swayed by greed.
But if ye do good
And practice self-restraint
God is well-acquainted
With all that ye do."

392. *In view of the position expressed above, we are satisfied, that this is a case which presents a situation where this Court should exercise its discretion to issue appropriate directions under Article 142 of the Constitution. We therefore hereby direct, the Union of India to consider appropriate legislation, particularly with reference to "talaq-e-biddat'. We hope and expect, that the contemplated legislation will also take into consideration advances in Muslim Personal Law - "Shariat", as have been corrected by legislation the world over, even by theocratic Islamic States. When the British Rulers in India provided succour to Muslims by legislation, and when remedial measures have been adopted by the Muslim world, we find no reason, for an independent India, to lag behind. Measures have been adopted for other religious denominations (see Part IX - Reforms to Personal Law in India, above), even in India, but not for the Muslims. We would, therefore, implore the legislature, to bestow its thoughtful consideration, to this issue of paramount importance. We would also beseech different political parties to keep their individual political gains apart, while considering the necessary measures requiring legislation.*

393. *Till such time as legislation in the matter is considered, we are satisfied in injuncting Muslim husbands, from pronouncing "talaq-e-biddat" as a means for severing their matrimonial relationship. The instant injunction, shall in the first instance, be operative for a period of six months. If the legislative process commences before the expiry of the period of six months, and a positive decision emerges towards redefining "talaq-e-biddat" (three pronouncements of "talaq", at one and the same time), as one, or alternatively, if it is decided that the practice of "talaq-e-biddat" be done away with altogether, the injunction would continue, till legislation is finally enacted. Failing which, the injunction shall cease to operate."*

19. It is admitted fact that revisionist no.1 and opposite party no.2 are wife and husband and they were married on 15.01.2003 which is uncontroverted. The revisionist no.1 was divorced but as per the judgment of Hon'ble Supreme Court passed in the case of **Shayara Bano Vs. Union of India and others (Ministry of Women and Child Development Secretary and others), (2017) 9 SCC 1** wherein it has been pronounced that if the divorce is declared in one go and the Fatava is issued, the same cannot be legal divorce and it has no legal force. The divorce given by opposite party no.2 was not in accordance with the Quoran therefore, the divorce given by the opposite party no.2 was not in

accordance with law. Quoran is the only source in which the voice of Allah, Mohammad Sahab have been recited in Aayats. The divorce can be given in accordance with the "verses" which are envisaged in Quoran. The said fact can be seen in Sure Bakar, Sura No.II Aayat No.228, Sure Nisha, Sure No.4, Aayat No.3, 19, 35 and 128 and Sure Talaq Sure No.65, Aayat No.1 and 2. It is thus clear that Talaq given on 05.04.2005 was not in accordance with law, therefore, in view of the judgment of Hon'ble the Supreme Court passed in the case of **Iqbal Bano Vs. State of U.P. and others, (2007) 6 SCC 785**, it was not accordance with law and the opposite party no.2 could not prove the divorce as per law.

20. The court has given finding that the revisionist no.1 was not examined by the doctor and there is no medical report to that effect; therefore, the fact narrated by her regarding the physical assault is erroneous. The court below passed the order that opposite party no.2 had not deserted her, rather, the revisionist no.1 had left the house on her own will. It has been further recorded by the court below that in absence of physical assault as stated by revisionist no.1, it cannot be interfered that any cruelty was done by the husband.

21. The finding recorded by the court below is wrong. Section 125 Cr.P.C. is to be read in harmonious construction and only on the basis of Section 125 (4) Cr.P.C. the court came to the conclusion that the revisionist no.1 was deserted because she could not produce the evidence of physical assault and cruelty. The court has not considered the fact that specific averment of dowry demand as well as cruelty has been made by revisionist no.1 in her statement as well as in her application. She deposed the fact before the court below that she was harassed and forced to leave the house of her husband. She stated that her in-laws had mentally tortured and thrown her from house, therefore, she was living in her parents' house. It is surprising to note the fact that the court below has overlooked all the factual aspects and has considered the irrelevant facts to defeat the purpose of section 125 Cr.P.C. which has been explained in various judgments of Hon'ble Supreme Court. The court below has mentioned judgment of **Sunita Kachwaha (supra)** but while applying the same he totally overlooked the judgment of Hon'ble Supreme Court. Para 6, 7, 8, 9 of **Sunita Kachwaha (supra)** supports the case of revisionist no.1, which are quoted below:

"6. The proceeding under Section 125 Cr.P.C. is summary in nature. In a proceeding under Section 125 Cr.P.C., it is not necessary for the court to ascertain as to who was in wrong and the minute details of the matrimonial dispute between the husband and wife need not be gone into. While so, the High Court was not right in going into the intricacies of dispute between the appellant-wife and the respondent and observing that the appellant-wife on her own left the matrimonial house and therefore she was not entitled to maintenance. Such observation by the High Court overlooks the evidence of appellant-wife and the factual findings, as recorded by the Family Court.

7. Inability to maintain herself is the precondition for grant of maintenance to the wife. The wife must positively aver and prove that she is unable to maintain herself, in addition to the fact that her husband has sufficient means to maintain her and that he has neglected to maintain her. In her evidence, the appellant-wife has

stated that only due to help of her retired parents and brothers, she is able to maintain herself and her daughters. Where the wife states that she has great hardships in maintaining herself and the daughters, while her husband's economic condition is quite good, the wife would be entitled to maintenance.

8. The learned counsel for the respondent submitted that the appellant-wife is well qualified, having post graduate degree in Geography and working as a teacher in Jabalpur and also working in Health Department. Therefore, she has income of her own and needs no financial support from the respondent. In our considered view, merely because the appellant-wife is a qualified post graduate, it would not be sufficient to hold that she is in a position to maintain herself. Insofar as her employment as a teacher in Jabalpur, nothing was placed on record before the Family Court or in the High Court to prove her employment and her earnings. In any event, merely because the wife was earning something, it would not be a ground to reject her claim for maintenance.

9. The Family Court had in extenso referred to the respondent's salary and his economic condition. The respondent is stated to be an Engineer in PHE, Kota. He is in Government service and according to the pay certificate then produced before the Family Court, he was getting salary of Rs.20,268/- per month. In her evidence, the appellant wife has also stated that the respondent owns a very big house of his own in which he is said to have opened a hostel for boys and girls and is earning a substantial income. She has also stated that the respondent owns another house at Talmandi Sabji Kota, Rajasthan and is receiving rental income of Rs.4,500/- per month. Having regard to the salary and economic condition of the respondent, the Family Court has awarded maintenance of Rs.3,000/- to the wife and Rs.2,500/- to each of the daughters, in total Rs.8,000/- per month. It is stated that the maintenance amount awarded to the daughters has been subsequently enhanced to Rs.10,000/- per month. The maintenance amount of Rs.3,000/- per month awarded to the wife appears to be minimal and in our view, the High Court ought not to have set aside the award of maintenance. The learned counsel for the appellants prayed for enhancement of the quantum of maintenance to the appellant-wife. We are not inclined to go into the said submission, but liberty is reserved to the appellant wife to seek remedy before the appropriate court".

22. Sri Nadeem Murtaza, learned counsel for the revisionists has further relied upon the judgment in the case of **Shamima Farooqui Vs. Shahid Khan, [(2015) 5 SCC 705].** Relevant paragraph no.14 of the said judgment is quoted below:-

"14. Coming to the reduction of quantum by the High Court, it is noticed that the High Court has shown immense sympathy to the husband by reducing the amount after his retirement. It has come on record that the husband was getting a monthly salary of Rs.17,654/-. The High Court, without indicating any reason, has reduced the monthly maintenance allowance to Rs.2,000/-. In today's world, it is extremely difficult to conceive that a woman of her status would be in a position to manage within Rs.2,000/- per month. It can never be forgotten that the inherent and fundamental principle behind Section 125 CrPC is for amelioration of the financial state of affairs as well as mental agony and anguish that woman suffers when she is compelled to leave her matrimonial home.

The statute commands there has to be some acceptable arrangements so that she can sustain herself. The principle of sustenance gets more heightened when the children are with her. Be it clarified that sustenance does not mean and can never allow to mean a mere survival. A woman, who is constrained to leave the marital home, should not be allowed to feel that she has fallen from grace and move hither and thither arranging for sustenance. As per law, she is entitled to lead a life in the similar manner as she would have lived in the house of her husband. And that is where the status and strata of the husband comes into play and that is where the legal obligation of the husband becomes a prominent one. As long as the wife is held entitled to grant of maintenance within the parameters of Section 125 CrPC, it has to be adequate so that she can live with dignity as she would have lived in her matrimonial home. She cannot be compelled to become a destitute or a beggar. There can be no shadow of doubt that an order under Section 125 CrPC can be passed if a person despite having sufficient means neglects or refuses to maintain the wife. Sometimes, a plea is advanced by the husband that he does not have the means to pay, for he does not have a job or his business is not doing well. These are only bald excuses and, in fact, they have no acceptability in law. If the husband is healthy, able- bodied and is in a position to support himself, he is under the legal obligation to support his wife, for wife's right to receive maintenance under Section 125 CrPC, unless disqualified, is an absolute right."

23. Similarly, Sri Murtaza has also relied upon a judgment passed by this Court in the case of **Smt. Kiran Singh Vs. State of U.P. and another [Criminal Revision No. 896 of 2019, decided on 26.04.2022].** Paragraphs 9 and 10 of the said judgment which are relevant, are quoted below:-

"9. Admittedly, there is no bar under Section 125 Cr.P.C. to grant maintenance to wife, even against whom, a decree for restitution of conjugal rights has been passed. It would be very harsh to refuse maintenance on the ground of a decree of restitution of conjugal rights passed in favour of husband. It is also settled law that even after divorce wife is entitled for maintenance and since the revisionist is legally wedded wife of opposite party no.2, he has to maintain her. It is admitted on record that wife is residing with her parents and has no source of income. Therefore, award for mainteance cannot be denied.

10. Section 125(1) Cr.P.C clearly points out that 'wife' includes a woman, who has been divorced or has obtained a divorce from her husband and has not re-married. The claim of maintenance can only be refused if she has received some compensation from her husband and the decree of the restitution of conjugal rights does not put bar in providing the maintenance."

24. Hon'ble Supreme Court in the case of **Sunita Kachwaha (supra)** has observed that High Court was not right in going into the intricacies of dispute between the appellant-wife and the respondent and observing that the appellant wife on her own left the matrimonial house and therefore she was not entitled to maintenance. The Supreme Court has recorded the finding that the wife must positively aver and prove that she is unable to maintain herself. However, where the wife states that she has great hardships in

maintaining herself and daughters, while her husband's economic condition is quite good, wife would be entitled to maintenance.

25. In view of the aforesaid discussion, I over-rule the argument advanced by Sri Chakravarty, learned counsel for opposite party no.2 and I hold that the wife-revisionist is entitled for maintenance under Section 125 Cr.P.C.

26. The other point is very important to note that the court below has considered the income of the opposite party no.2 as Rs.30,000/- per month whereas the cross examination of D.W.-1 (opposite party no.2) indicates that he has admitted on record that his salary is Rs.47,000/-, thus, the finding in respect of income of the opposite party no.2 is running contrary to the records available.

27. In the submission of Sri Chakravarty, learned counsel for the opposite party no.2, has no legal force wherein he has submitted that under Section 397 Cr.P.C., which is revisional jurisdiction, the court has no power to re-appreciate the evidence. The High Court has ample power to see the illegality, perversity and error committed by the court below. In the present case, the issue of divorce under Section 125 Cr.P.C. has been decided and revisionist has been refused the maintenance. In the present case, the finding runs against the record and not in accordance with law. The Court has ample power to correct the order and take appropriate steps under the revisional jurisdiction; thus, the argument of Sri Chakravarty has no force.

28. In my opinion, once it is admitted on record that the salary of opposite party no.2 is Rs.47,000/-, the court below passed erroneous order by considering the income of opposite party no.2 as Rs.30,000/- only.

29. In view of the aforesaid factual and legal aspect, I am of the view that the order impugned dated 22.05.2018 is erroneous and cannot survive in the eyes of law, therefore, I set aside the impugned order for the aforesaid reasons.

30. The application for maintenance filed by revisionist no.1 is **allowed** and it is observed that she will be entitled for Rs.7,000/- per month as maintenance. She will be given maintenance Rs.1,500/- from 11.05.2007 to January, 2010; Rs.2,000/- from February 2010 to December 2014; Rs.4,000/- from January 2015 to May 2018 and Rs.7,000/- from January 2018 onwards.

31. Insofar as the prayer for enhancement of maintenance in favour of opposite party no.2 is concerned, I am not inclined to pass any order for the reason that I have awarded Rs.7,000/- per month to the revisionist no.1 reckoning the total salary of the opposite party No. 2 as Rs.47,000/-; thus total Rs.7,000 (in favour of revisionist no.1) + Rs.5,000 (in favour of revisionist no.2) = Rs.12,000/- of total salary of Rs.47,000/-, is justified. The order impugned dated 22.05.2018 is set aside in part and it is modified according to the observation made above.

(2022)05ILR A268
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.04.2022

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Criminal Revision No. 1066 of 2022

Chaman Mangla ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Ms. Somya Chaturvedi, Sri Gopal Swarup Chaturvedi (Senior Adv.), Sri Man Singh Yadav

Counsel for the Opposite Parties:
G.A., Sri Harsh Vardhan Deshwar

Criminal Law- Code of Criminal Procedure, 1973- Section 227 - Application for discharge rejected - Indisputably, it is open to this Court to quash the charges framed by the trial court and discharge the accused revisionist but the same cannot be done by weighing the correctness, sufficiency of the evidence. The principle to be adopted in such cases should be that if the entire evidence produced by the prosecution is to be believed would it constitute the offence or not. It is only at the stage of the trial that truthfulness, sufficiency and acceptability of the evidence can be adjudged. Therefore, it will not be proper to truncate or snip the proceeding at the stage of framing of charges against the revisionist when perusal of the statement of victim said to have been recorded under Section 161 & 164 Cr.P.C. clearly reveals that the revisionist made sexual intercourse with the complainant for a continuous period of two years on false pretext of marriage.

Settled law that at the stage of Section 227/ 228 of the Cr.P.c the court cannot hold a mini trial and sift through the entire evidence but has only to see as to whether on the basis of the evidence offence is made out against the accused or not and only where no offence is made out even from the entire evidence, then the accused can be discharged.

Criminal Revision rejected. (Para 13) (E-3)

Judgements/ Case law relied upon:-

1. St. Vs S. Selvi, (2018) 13 SCC 455

2. Sajjan Kumar Vs CBI, (2010) 9 SCC 368

3. Tarun Jit Tejpal Vs St. of Goa & ors.: 2019 SCC OnLine SC 1053

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. Heard Mr Gopal Swarup Chaturvedi, learned Senior Counsel assisted by Ms Somya Chaturvedi, learned counsel for the revisionist, Mr Harsh Vardhan Deshwar, learned counsel for the opposite party no. 2 and Mr L. M. Singh, learned AGA for the State and perused the record.

2. This Criminal Revision is directed against the order dated 15.02.2022 passed by learned Addl. District and Sessions Judge, FTC-I Mathura, whereby the application for discharge under Sections 498-A, 504, 506, 376 IPC and Section 3/4 of Dowry Prohibition Act moved by the revisionist u/s 227 Cr.P.C. in Sessions Case No. 287 of 2021 (State Vs Chaman Mangla) arising out of Case Crime No. 771 of 2020, has been rejected.

3. Initially an FIR vide Case Crime No. 771 of 2020 was registered against the revisionist and his father and mother by the complainant/opposite party no. 2 on 08.11.2020, under Sections 498-A, 504, 506, 376 IPC and Section ¾ of Dowry Prohibition Act.

4. Prosecution story as narrated in the FIR is that the revisionist was to open a cloth-showroom and thereafter he would marry the complainant within a year of opening of showroom. Revisionist is said to have called the complainant at his residence and introduced her with his parents. Seeing her, his parents also said

that they liked her and as soon as the showroom is opened they would marry complainant with his son (revisionist). It is further averred that revisionist always called the complainant at his residence in presence of his parents and used to treat the complainant as his wife and had also made sexual relationship on that pretext; and when two years had elapsed, neither the showroom was opened nor the revisionist solemnized marriage with complainant, thereafter, the complainant is said to have asked the parents of the revisionist to get their marriage solemnized upon which the parents of the revisionist said that opposite party no. 2 used to visit their house as their daughter-in-law and soon they would get the marriage of opposite party no. 2 solemnized with revisionist. It is further averred that in the month of October, complainant again asked the revisionist and his parents to solemnize the marriage as the revisionist is harassing her mentally and physically for almost two years and in case the marriage is not solemnized within a month, the complainant would take legal action against them. It is further alleged that thereafter, parents of the revisionist demanded Rs. 25 Lacs for marriage and also said that if the parents of the complainant is able to meet the demand of revisionist, they would get their marriage solemnized, failing which the marriage would not be finalized. It is further alleged that when the complainant asked the parents of the revisionist that the revisionist is making physical relationship with her for the last two years, thereupon she was abused in filthy words, threatened and also driven out.

5. After registration of the FIR, Investigating Officer recorded the statement of complainant and other material witnesses under Section 161 Cr.P.C. and the victim was also medically examined at CHC Kosi Kalan, District Mathura on 8.11.2020 from where she was referred to District Women Hospital, Mathura, where the complainant/victim has refused for her internal medial examination.

6. The statement of the victim under Section 164 Cr. P. C. was also recorded before the Magistrate. The extract of statement is as under:-

"पीड़िता ने सशपथ बयान किया कि मेरी उम्र 22 वर्ष है। मै बी0ए0 कर रही हूं। मै चमन पुत्र चेतराम को पिछले दो साल से जानती हूं। मैं जहां ट्यूसन पढ़ाने जाती थी, वहीं चमन मुझे रास्ते में मिलता था। चमन और मै दोनों फेसबुक पर दोस्त बने। हमारे बीच में बातचीत हुई और बाद मे घर आना जाना शुरू हो गया। चमन के घर असके पिता चेतराम व माता शोभना थी। चमन उनकी उपस्थिति में मुझे घर लाता था। वो लोग मुझसे खाने की फरमाईश करते थे जो वो कहते थे, मै बनाती थी। चमन के माता पिता को भी मैं पसंद थी। और वो अपने बेटे की शादी मुझसे करवाने को राजी थी। चमन के मां बाप मुझसे कहते थे कि जैसे ही चमन का शोरूम खुलेगा, हम तुम दोनों की शादी करवा देंगे। इस आड़ में चमन मुझसे कई बार शारीरिक संबंध बनाये। कई बार होटल व फ्लैट में लेकर गया। दो वर्ष बीत जाने के बाद जब न शोरूम खुला और न शादी की बात आगे बढ़ी तो मैनें चमन के माता पिता से बात की। तो चमन के माता पिता बोले कि अपने घर वालों से बोलो की 25 लाख का इंतजाम कर लें। हमारे बेटे के लिए अच्छे रिश्ते आ रहे है। तब मैनें उनको बताया कि मैं गरीब घर से हूं पिताजी जीवित नहीं है हम 3–4 लाख ही खर्च कर सकते है तो सके मां बाप ने शादी करने से मना कर दिया। मुझे रंडी जैसे शब्दों से संबोधित किया। मैनें अपने भाइ कृष्णा को जब ये बात बताई तो वह भी चमन के माता पिता के पास रिश्ता लेकर गया तो उन्होंने कोई जवाब नहीं दिया जब मैनें चमन को एक दिन बाद काल किया तो उसने मुझे अपनी दुकान पर बुलाया और मुझे बदनाम करने की धमकी देने लगा। उसके पास मेरी कुछ फोटोज है जिसे वायरल करने की धमकी देने लगा। इसके अलावा चमन ने मुझे कुछ नशीली गोली देकर कहने लगा इन्हें खा ले और मर जा मगर मुझे भूल जा। मैनें वो नशीली गोलियां घर आकर खा ली जिससे मै बेहोश हो गई। मैनें अगले दिन अपने भाई व मां के साथ पुलिस में रिर्पोट दर्ज करवायी। चमन और उसके पिता चेतराम व माता शोभना

ने मेरे साथ मानसिक व शारीरिक प्रताड़ना की है मै चाहती हू कि चमन को या तो सजा मिले या फिर मुझसे शादी करे।"

7. After concluding the investigation, the Investigating Officer submitted the charge sheet on 25.11.2020 only against the revisionist under Sections 498-A, 504, 506, 376 IPC and Section 3/4 of D. P. Act, upon which cognizance was taken by the court below vide order dated 23.12.2020. Thereafter, revisionist is said to have moved an application for discharge on 7.9.2021, which was objected by the complainant/opposite party no. 2 by filing her objection on 30.09.2021. The court below after taking into account the entire material available on record rejected the discharge application filed by the revisionist vide impugned order dated 15.2.2022 and fixed the next date for framing of charge against the revisionist under Section 376, 504, 506 IPC and Section 4 of the D.P. Act. It is this order which is subject matter of challenge before this Court.

8. It is contended by learned counsel for the revisionist that the trial court has rejected the discharge application without considering the fact that the victim is major and allegation of physical relation between the revisionist and O.P. No. 2 was a consensual physical relationship, therefore, no offence under Section 376 IPC is made out. It is further contended by learned counsel for the revisionist that the impugned order has been passed without considering the material on record and while passing the order impugned court below has not applied it's judicial mind. He further submits that the impugned order rejecting the application for discharge is wholly illegal, capricious and against weight of evidence on record. It is further submitted that there are several contradictions between the version of the FIR and the statements of the informant said to have been recorded under Section 161 and 164 Cr.P.C. and the order has been passed illegally in a routine manner and without application of judicial mind, and therefore, the same is liable to be quashed.

9. On the other hand, learned counsel appearing for Opposite Party No. 2 as well as learned A.G.A. appearing for the State submitted that record reveals that the revisionist had established physical relationship with the complainant on false promise of marriage and when he refused to marry present prosecution has been initiated against the revisionist. Material available on record reveals that O.P. No.2/complainant had entered into physical relationship with the revisionist on misconception of fact and the said consent cannot be considered as a voluntary consent under Section 90 of the Indian Penal Code; that presumption can be drawn under Section 114 A of the Indian Evidence Act that the revisionist had sexual intercourse on false assurance of marriage and the charge sheet has rightly been submitted under Sections 376 IPC along with other sections of IPC.

10. The principles for framing of charge and discharge under Sections 227, 228 and 239 Cr.P.C. have been summarized by the Hon'ble Apex Court in its judgment, **State Vs S. Selvi, (2018) 13 SCC 455** wherein it has been held that if on the basis of material on record, the Court prima facie forms an opinion that the accused may have committed the offence, it can frame charges. At the time of framing of charge, the Court is required to proceed on presumption that the material produced by the prosecution is true. At that stage, the

Court is not expected to go deep into the matter and hold that the material produced does not warrant conviction.

11. In **Sajjan Kumar Vs CBI, (2010) 9 SCC 368**, Hon'ble Apex Court on consideration of the various decisions about the scope of Section 227 and 228, laid down the following principles:

"(I) The Judge while considering the question of framing the charges under Section 227 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 Section 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 disclose 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."

12. Hon'ble the Apex Court in the case of **Tarun Jit Tejpal Vs State of Goa and other: 2019 SCC OnLine SC 1053** has taken note of case law in detail while explaining the powers under Section 227/228 Cr.P.C. and reiterated the principle as enumerated in State Vs Selvi (supra) and Sajjan Kumar versus C.B.I., (2010) 9 SCC 368. In para 32 it has been held as under:-

"32. Applying the law laid down by this Court in the aforesaid decisions and considering the scope of enquiry at the stage of framing of the charge under Section 227/228 Cr.P.C., we are of the opinion that the submissions made by the learned Counsel appearing on behalf of the appellant on merits, at this stage, are not required to be considered. Whatever

submissions are made by the learned Counsel appearing on behalf of the appellant are on merits are required to be dealt with and considered at an appropriate stage during the course of the trial. Some of the submissions may be considered to be the defence of the accused. Some of the submissions made by the learned Counsel appearing on behalf of the appellant on the conduct of the victim/prosecutrix are required to be dealt with and considered at an appropriate stage during the trial. The same are not required to be considered at this stage of framing of the charge. On considering the material on record, we are of the opinion that there is more than a prima facie case against the accused for which he is required to be tried. There is sufficient ample material against the accused and therefore the learned Trial Court has rightly framed the charge against the accused and the same is rightly confirmed by the High Court. No interference of this Court is called for."

13. Indisputably, it is open to this Court to quash the charges framed by the trial court and discharge the accused revisionist but the same cannot be done by weighing the correctness, sufficiency of the evidence. The principle to be adopted in such cases should be that if the entire evidence produced by the prosecution is to be believed would it constitute the offence or not. It is only at the stage of the trial that truthfulness, sufficiency and acceptability of the evidence can be adjudged. Therefore, it will not be proper to truncate or snip the proceeding at the stage of framing of charges against the revisionist when perusal of the statement of victim said to have been recorded under Section 161 & 164 Cr.P.C. clearly reveals that the revisionist made sexual intercourse with the complainant for a continuous period of two years on false pretext of marriage.

14. Thus, in view of the law as has been explained in several decisions and, the fact that the trial Court having considered the record of the case and evidence brought by the prosecution has formed an opinion prima facie of involvement of the revisionist in commission of offence, the court below has rightly dismissed the argument for discharge of revisionist. There is no illegality, perversity or impropriety in the impugned order. There is no jurisdictional error in the impugned order. The revision is not sustainable and is hereby dismissed.

Office is directed to certify the copy of this order to the court below through learned Sessions Judge, concerned.

(2022)05ILR A273
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.05.2022

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Criminal Revision No. 1198 of 2022

Ram Sahai Singh ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Rajiv Dwivedi

Counsel for the Opposite Parties:
G.A., Sri Manish Tandon

Civil Law - Code of Criminal Procedure, 1973- Sections 177, 178 & 179- The normal rule is that the offence shall ordinarily be inquired into and tried by a

court within whose local jurisdiction it was committed. However, when it is uncertain in which of several local areas an offence was committed or where an offence is committed partly in one local area and partly in another or where an offence is a continuing one, and continues to be committed in more than one local area and takes place in different local areas as per Section 178 Cr.P.C. the Court having jurisdiction over any of such local areas is competent to inquire into and try the offence. Section 179 Cr.P.C. makes it clear that if anything happened as a consequence of the offence, the same may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued- The offence in this case is said to have been committed in more local areas and one of the local areas being Chitrakoot, the court below at Chitrakoot has jurisdiction to proceed with the criminal case instituted therein.

Where a continuing offence is committed partly in one area or where the consequences of commission of any offence have ensued, then the court within whose jurisdiction the offence has been partly committed or any of the consequences of an offence has ensued, can take cognizance of the said offence. (Para 9, 10)

Criminal Revision rejected. (E-3)

Judgements/ Case law cited:-

1. Y. Abraham Ajith & ors Vs Inspr. of Police, Chennai & anr, 2004 (6) Supreme 207

2. Dharmendra Kumar Tiwari Vs St. of U.P. & anr, 2020 LawSuit (All) 459.

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. Heard Mr. Rajiv Dwivedi, learned counsel for the revisionist, learned AGA for the State and Mr. Manish Tandon, learned counsel for opposite party no.2.

2. The instant revision has been preferred against the impugned judgment and order dated 16.03.2022 passed by learned Additional Sessions Judge/Special Judge (POCSO Act), Chitrakoot in Special Session Trial No.36 of 2018 (State of U.P. vs. Ram Sahai Singh) arising out of Case Crime No.225 of 2018, under Sections 366, 328, 376 (2) (n), 294, 323, 504, 506 IPC, Section 66-E of Information Technology Act, 2000 and Section 6 of Protection of Children From Sexual Offence Act, Police Station Karvi, District Chitrakoot whereby the application under section 177 Cr.P.C. has been rejected.

3. The prosecution version as adumbrated in the first information report lodged by the prosecutrix Pratibha Singh on 05.04.2018 regarding an alleged incident of rape by the revisionist on her on 13.08.2013 at about 01.00 P.M. In the F.I.R. it is alleged that the victim came in touch with the revisionist in the year 2012 and the revisionist had helped her in getting a laptop in government scheme in the year 2012 and since then the revisionist has been stalking her and used to pass obscene remarks. It is further alleged that on 13.08.2013 at about 01.00 P.M. when she was waiting for Auto outside the college, the revisionist came and offered her for lift in his Bolero Car and made her sit by his side. The revisionist then offered her cold drink and after consuming it, she became unconscious and when she became out of conscious she found herself in a Jungle where the revisionist raped her. It is further alleged that the revisionist also prepared video clippings and clicked some photographs and also extended threats of making it viral and continuously kept on sexually exploiting her.

4. After investigation, the Investigating Officer has submitted charge

sheet against the revisionist on 31.05.2018 and the learned Magistrate while taking cognizance committed the case as Sessions Trial No.36 of 2018 vide order dated 25.06.2018. Feeling aggrieved, the revisionist has preferred an application under Section 177 Cr.P.C. before the court of learned Special Judge (POCSO Act), Karvi, Chitrakoot on 14.03.2022, who vide order dated 14.03.2022 rejected the application filed by the revisionist, hence, this revision.

5. Mr. Rajiv Dwivedi, learned counsel for the revisionist has submitted that the impugned FIR has been lodged against the revisionist as a counterblast to the FIR lodged by the revisionist against the father of the prosecutrix at Police Station Kotwali Karvi Nagar, District Chitrakoot in Case Crime No.41 of 2018, under Sections 419, 420, 406 IPC. He has further submitted that the as per FIR the incident alleged to have taken place at Gramoday University, Chitrakoot, Satna (M.P.) while the FIR has been lodged at Police Station Karvi, Chitrakoot (U.P.). He has further submitted that the charge sheet has been submitted against the revisionist is also without jurisdiction. The impugned order passed by the trial court is illegal, erroneous and arbitrary and also against the provisions of law, hence, the same is liable to be set aside. In support of his submission, learned counsel for the revisionist has relied upon Section 179 of the Act as well as judgment of Hon'ble Apex Court in the case of ***Y. Abraham Ajith and others vs. Inspector of Police, Chennai and another, 2004 (6) Supreme 207.***

6. On the other hand, supporting the impugned judgment, Mr. Manish Tandon, learned counsel for opposite party no.2 has submitted that the victim in her statement recorded under Sections 161 & 164 Cr.P.C. has assigned specific role of committing rape at various places by the revisionist for the past several years, which exists within the jurisdiction of Uttar Pradesh, thus, in view of Section 178 Cr.P.C., the trial is well maintainable in the eyes of law. The revisionist is a man of criminal propensities involved in several cases. During trial, the prosecutrix was also attacked by the revisionist for which an FIR has also been lodged against the revisionist. He has further submitted that trial court has rightly rejected the application on legal grounds holding that the application moved under Chapter XIII, which provides ordinary place of inquiry and trial and reliance has been placed upon Section 178 Cr.P.C. which deals with place of inquiry or trial. The trial court has clearly held that though the cause of action shown in the FIR are said to have happened at different places and the investigation is conducted within the jurisdiction of commission of crime, which is said to be committed at Chitrakoot, Uttar Pradesh. He has further submitted that Section 178 Cr.P.C. clearly deals with the situation and held that where several acts done in different local areas, it may be inquired into or tried by a court having its jurisdiction, therefore, the trial court has rightly and legally rejected the application under Section 177 Cr.P.C. In support of his submission, he has relied upon the judgment of of this Court in the case of ***Dharmendra Kumar Tiwari vs. State of U.P. and another, 2020 LawSuit (All) 459.***

7. I have considered the rival submissions advanced by learned counsel for the parties and perused the material available on record.

8. Chapter XIII of the Code of Criminal Procedure, 1973 (in short "Code") deals with jurisdiction of the criminal

courts in inquiries and trials. Sections 177 to 179 Cr.P.C. are quoted as under:-

"177. Ordinary place of inquiry and trial-. Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed.

178. Place of inquiry or trial. (a) When it is uncertain in which of several local areas an offence was committed, or (b) where an offence is committed partly in one local area and partly in another, or (c) where an offence is a continuing one, and continues to be committed in more local areas than one, or (d) where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

179. Offence triable where act is done or consequence ensues. When an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued.

9. From the above provisions, it is clear that the normal rule is that the offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed. However, when it is uncertain in which of several local areas an offence was committed or where an offence is committed partly in one local area and partly in another or where an offence is a continuing one, and continues to be committed in more than one local area and takes place in different local areas as per Section 178 Cr.P.C. the Court having jurisdiction over any of such local areas is competent to inquire into and try the offence. Section 179 Cr.P.C. makes it clear that if anything happened as a consequence of the offence, the same may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued.

10. In the light of the above, this Court has critically examined the allegations levelled in the complaint as well as the statement of victim No. 2 recorded by the police under Section 161 Cr.P.C. and also the statement under Section 164 Cr.P.C. and found that the offence in this case is said to have been committed in more local areas and one of the local areas being Chitrakoot, the court below at Chitrakoot has jurisdiction to proceed with the criminal case instituted therein.

11. In such circumstances, this Court does not find any illegality in the order impugned passed by the court below. Hence, there is no force in this criminal revision and the same is hereby dismissed.

12. No order as to costs.

(2022)05ILR A276
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.05.2022

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Criminal Revision No. 3547 of 2021

Yunus & Ors. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Amit Kumar Srivastava, Sri Prem Shankar Mishra

Counsel for the Opposite Parties:
G.A., Sri Bhuvnesh Kumar Singh

Criminal Law- Code of Criminal Procedure, 1973- Section 190(1) (b) – Application by first informant - Addition of offence by Magistrate to the offences mentioned in the Police Report under section 173(2) of the CrPc at pre-cognizance stage- This is a pre-cognizance stage, where the Magistrate has not taken the cognizance of the offence. Charge-sheet/police report u/s 173(2) of Cr.P.C. is nothing which is simply an opinion of the Investigating Officer based on the material collected during investigation and it is not binding or mandatory upon the Magistrate. The Magistrate may or may not agree with the opinion of the Investigating Officer. The Magistrate has every right to defer his opinion from the opinion of the Investigating Officer, on the basis of material on record by passing a speaking order - The order impugned reflects judicial application of mind by the learned Magistrate - Learned Magistrate after assessing the entire material collected during investigation found that Investigating Officer has wrongly submitted charge sheet u/s 323, 324, 325, 504, 506 I.P.C., which was not in consonance with the gravity of offences made out on the basis of material collected during investigation.

At the pre- cognizance stage the Magistrate is not bound by the police report and can also add offences not mentioned in the Police Report on the basis of the material collected during the course of the investigation. (Para 7, 9, 10)

Criminal Revision rejected. (E-3)

Case law / Judgements (cited):-

St. of Guj. vs Girish Radhakrishnan Varde in Criminal Appeal No.1996 of 2013(SC).

(Delivered by Hon'ble Rahul Chaturvedi, J.)

1. Heard Shri Prem Shankar Mishra, learned counsel for the revisionists; Shri Bhuvnesh Kumar Singh, learned counsel for opposite party no.2 and learned A.G.A. for the State. Perused the record.

2. The instant criminal revision is being filed by the revisionists Yunus, Kamil and Alim, assailing the legality and validity of impugned order dated 01.02.2021 passed by the Judicial Magistrate, Chandpur, Bijnor in Criminal Case No.391 of 2019 (State vs. Kamil and others), arising out of Case Crime No.223 of 2018, u/s 323, 324, 325, 504, 506 I.P.C., P.S.-Shivala Kala, District-Bijnor, whereby learned Magistrate has taken cognizance against the revisionists for the offence u/s 323, 324, 326, 504, 506 I.P.C., while responding to the application dated 31.5.2019 filed by the prosecution at pre-cognizance stage.

3. Long and short of the submissions advanced by learned counsel for the revisionists is that on 21.11.2018 a F.I.R. was got registered for the incident said to have taken place on 9.9.2018 by Mohd. Akram u/s 307, 323, 504, 506 I.P.C. against Kamil, Alim and one unknown person. This F.I.R. was registered routed through an Application u/s 156(3) of Cr.P.C. with the allegation that the contesting parties were political opponents and on this score they were nurturing an inimical relationship. On 9.9.2018 around 06.30 in the evening when the informant was coming to his home, in the way, near a culvert, he was ambushed by Kamil, Alim and one unknown armed with tabbal and knife. They started hurling filthy abuses and thereafter assaulted upon him. Alim was armed with tabbal, who had given a deadly blow over his head, whereas Kamil had assaulted by knife over his head and unknown person had brutally assaulted with lathi-danda. This incident was witnessed by co-villagers and on making challenge by them, the assailants ran away giving threatening to kill the informant.

Mohd. Akram who is the informant, is the main injured and he was put for medical examination. From the medical examination report it transpires that the injured has sustained six injured over his person, including the incised wounds and contused swelling. The injured was referred for X-Ray of skull and chest. Supplementary report indicates that there is head injury over the injured and C.T. scan of the head was advised. C.T. scan report dated 10.9.2018 shows (i) multiple depressed fractures of frontal bone on left side, (ii) fractures of left zygomatic and left orbit and (iii) multiple small hemorrhagic contusions at left frontal lobe. In the opinion of doctor, head injuries are grievous in nature and in the X-Ray report also multiple depression of fracture is observed. After recording the statements of the injured and the doctor, the Investigating Officer of the case, it appears that in order to oblige the accused, changed the texture of the case by dropping Section 307 of I.P.C. from the array of sections mentioned in the F.I.R. and submitted charge-sheet dated 13.2.2019 against the revisionists u/s 323, 324, 325, 504, 506 of I.P.C.

4. Stunned and dissatisfied by this report u/s 173(2) Cr.P.C. submitted by the I.O., the informant moved an application on 31.5.2019 challenging the opinion of the I.O. that keeping in view the gravity, seat and nature of injuries, instead of Sections 323, 324, 325, 504, 506 of I.P.C., the I.O. of the case ought to have submitted charge sheet inserting Sections 307, 308 of I.P.C. among other sections as per prosecution case. It is not out of place to mention here that the application on behalf of prosecution was instituted at pre-cognizace stage.

5. At the stage of taking cognizance, learned Magistrate after taking into account the material collected by the I.O. during investigation and the objection raised by the informant vide application dated 31.5.2019, have passed the present impugned order dated 01.2.2021 (cognizance order) whereby he has taken cognizance of the offences u/s 323, 324, 326, 504, 506 I.P.C.

6. Learned counsel for the revisionists seriously disputed the impugned order passed by the learned Magistrate by making a mention that this is not a stage where the Magistrate can change the texture of the case by inserting the additional sections or replacing the same by more grievous sections of the I.P.C. Learned counsel for the revisionist in this regard has relied upon the judgement of Hon'ble Apex Court in ***State of Gujarat vs Girish Radhakrishnan Varde*** in ***Criminal Appeal No.1996 of 2013*** decided on 25.11.2013. Learned counsel for the revisionists has emphasized on paragraphs 11 and 19 of the said judgement, which read thus :

"11. While analysing the controversy raised in this appeal, it is clearly obvious that the entire dispute revolves around the procedural wrangle and the correct course to be adopted by the trial court while taking cognizance but in the entire process it appears that the distinction between a case lodged by way of a complaint before the magistrate commonly referred to as complaint case under Section 190 of the Cr.P.C. and a case registered on the basis of a first information report under Section 154 of the Cr.P.C. before the police, seems to have been missed out, meaning thereby that the distinction between the procedure prescribed under Chapter XII of the Cr.P.C. to be adopted in a case based on police

report and the procedure prescribed under Chapter XIV and Chapter XV for cases based on a complaint case lodged before the magistrate has clearly been overlooked or lost sight of. It may be relevant to record at this stage that the term 'complaint' has been defined in the Cr.P.C. and it means the allegations made orally or in writing to a magistrate, with a view to taking action under the Code due to the fact that some person, whether known or unknown, has committed an offence but does not include a police report lodged under Section 154 Cr.P.C. Section 190(1) of the Cr.P.C. contains the provision for cognizance of offences by the Magistrates and it provides three ways by which such cognizance can be taken which are reproduced hereunder:-

(a) Upon receiving a complaint of facts which constitute such offence;

(b) upon a police report in writing of such facts--that is, facts constituting the offence--made by any police officer;

(c) upon information received from any person other than a police officer or upon the Magistrate's own knowledge or suspicion that such offence has been committed.

An examination of these provisions makes it clear that when a Magistrate takes cognizance of an offence upon receiving a complaint of facts which constitute such offence, a case is instituted in the Magistrate's Court and such a case is one instituted on a complaint. Again, when a Magistrate takes cognizance of any offence upon a report in writing of such. facts made by any police officer it is a case instituted in the Magistrate's court on a police report. The scheme underlying Cr.P.C. *clearly reveals that anyone who wants to give information of an offence may either approach the Magistrate or the officer in charge of a Police Station. If the offence complained of is a non-cognizable one, the Police Officer can either direct the complainant to approach the Magistrate or he may obtain permission of the Magistrate and investigate the offence. Similarly anyone can approach the Magistrate with a complaint and even if the offence disclosed is a serious one, the Magistrate is competent to take cognizance of the offence and initiate proceedings. It is open to the Magistrate but not obligatory upon him to direct investigation by police. Thus two agencies have been set up for taking offences to the court."*

7. I have carefully gone through the order impugned as well as the facts and circumstances of the case. It is apparent on the face of record from the perusal of material evidence collected during investigation, that there is explicit incompatibility between the offences/sections mentioned in the charge sheet submitted by the Investigating Officer and the offences made out from the material collected during investigation. As mentioned above, in the instant case the police on 13.2.2019 have submitted a charge sheet u/s 323, 324, 325, 504, 506 of I.P.C. against Kamil, Alim and Yunus.

8. Aggrieved by the changing of colour and texture of the case, an application was moved by the injured-informant himself on 31.5.2019 (Annexure No.4 to the petition) whereby detailed allegation has been levelled that *Tabbal*, knife and lathi-danda were used while making assault and injured sustained grievous injuries corresponding to the said weapons over the vital parts i.e. skull and chest. Not only this, there are depressed fractures over the frontal bone and there is a hemorrhage inside the brain of the injured and as per the supplementary medical

report, the injuries sustained by the injured are grievous in nature.

9. This is a pre-cognizance stage, where the Magistrate has not taken the cognizance of the offence. Charge-sheet/police report u/s 173(2) of Cr.P.C. is nothing which is simply an opinion of the Investigating Officer based on the material collected during investigation and it is not binding or mandatory upon the Magistrate. The Magistrate may or may not agree with the opinion of the Investigating Officer. It is clear that the cognizance of the offence was taken on 01.2.2021, responding to the application moved by the informant dated 31.5.2019. Prior to this, there was no cognizance order on record. The Magistrate has every right to defer his opinion from the opinion of the Investigating Officer, on the basis of material on record by passing a speaking order.

10. I have perused the order impugned, which reflects judicial application of mind by the learned Magistrate. Learned Magistrate after assessing the entire material collected during investigation found that Investigating Officer has wrongly submitted charge sheet u/s 323, 324, 325, 504, 506 I.P.C., which was not in consonance with the gravity of offences made out on the basis of material collected during investigation.

11. After appreciated the material on record and the application, learned Magistrate was not in agreement with the opinion formed by the Investigating Officer of the case and has dropped Section 325 I.P.C. and replaced it by Section 326 of I.P.C., in addition to Sections 323, 324, 504, 506 I.P.C. I do not find any illegality or infirmity in the impugned order. Taking into account the totality of circumstances, I am not inclined to upset the order impugned or substitute the discretion exercised by the learned Magistrate.

12. However, it is given to understand that the revisionists Kamil and Alim have got themselves bailed out in Sections 323, 324, 326, 504, 506 I.P.C., except Yunus, as such, revisionist Yunus is directed to surrender before the court concerned by 15.6.2022 and apply for bail in added Section 326 I.P.C., which shall be heard and decided by the concerned court below on the same day.

13. It is open for the revisionists that after getting themselves bailed out, they may take recourse of the appropriate provisions of the Code of Criminal Procedure at appropriate stage for seeking discharge, if so advised.

14. With the above observation this revision stands disposed off.

(2022)05ILR A280
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.04.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Revision No. 3618 of 2021

Mohd. Danish ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Bibhuti Narayan Singh

Counsel for the Opposite Parties:

A.G.A.

Criminal Law- Code of Criminal Procedure, 1973- Sections 451 & 457- U.P. Pradesh Prevention of Cow Slaughter Act, 1955 (in short "Act of 1955")- Section 3/5A/8 -- Release Application before the Chief Judicial Magistrate, Chandauli rejected- It is not disputed that the power under Section 451 of Cr.P.C. is not properly and widely used by the court below while passing the orders. The power conferred under Section 451 of Cr.P.C. be exercised by the court below with judicious mind and without any unnecessarily delay, so that the litigant may not suffer. Merely keeping the article in the custody of the police in the open yard will not fulfill any purpose and ultimately it result the damage of the said property. The owner of the property be allowed to enjoy the fruits of the said property for the remaining period for which the property is being made.

Keeping in custody the seized vehicle because it was allegedly used in the commission of the alleged offence would not serve any purpose and it is incumbent upon the courts to release the same by exercising the power u/s 451 of the CrPc.

Criminal Law - Code of Criminal Procedure, 1973- Section 457- U.P. Pradesh Prevention of Cow Slaughter Act, 1955 (in short "Act of 1955"), Prevention of Cruelty of Animals Act, 1960 – Section 11- As per the amendment made in Section 5 (A) of the Act, 1955 in year 2020, now the power lies with the District Magistrate to seize or release the vehicle. It would be tried by the competent court and thereby taking note of Section 7 and 5A of Act of 1955, the seized vehicle can be released by the court which would try the case by exercising powers, as exist under section 457 Cr.P.C.- Undisputedly the revisionist is the registered owner of the seized vehicle and the ownership of the vehicle is not in dispute, neither the State or any other person has claimed their ownership over the vehicle, therefore, no useful purpose will be served in keeping the vehicle stationed at the police station in the open yard for a long period allowing it to be damaged with the passage of time.

Where the ownership of the seized vehicle is not in dispute the same can also be released by the District Magistrate who may exercise the powers u/s 457 of the CrPc while also taking note of Section 7 and 5A of the Act 1955, as the vehicle is liable to suffer damage while being stationed under custody and the same will not serve any purpose.

Criminal Revision accordingly allowed. (E-3)

Judgements/ Case law relied upon:-

1. Sunderbhai Ambalal Desai & C.M. Mudaliar Vs St. of Guj, AIR 2003 SC 638.

2. Nand Vs St. of U.P., 1996 Law Suit (All) 423

3. Kamaljeet Singh Vs St. of U.P., 1986 U.P. Cri. Ruling 50 (Alld),

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard learned counsel for the revisionist, learned A.G.A. for the opposite party and perused the record.

2. This criminal revision has been filed by the revisionist against the judgment and order dated 30.10.2021 passed by the Chief Judicial Magistrate, Chandauli in Vehicle Release Application No. 479 of 2021 (State of U.P.Vs. Mustafa and others) and release the vehicle of the the revisionist bearing registration no. U.P. 21CN-2082 Truck (closed body) within time specify by this Hon'ble Court.

3. Learned counsel for the revisionist has submitted that the revisionist is the registered owner of Truck bearing

registration No. U.P. 21CN-2082 and the said vehicle is having National Permit and also was insured with the New Indian Assuarance Company Limited and also having certificate of pollution and fitness.

4. Learned counsel for the revisionist further submits that an the opposite party no.3 lodged an F.I.R. bearing F.I.R. No. 0095 of 2021 under Section 3/5A/8 U.P. Pradesh Prevention of Cow Slaughter Act, 1955 (in short "Act of 1955"), under Section 11 of the Prevention of Cruelty of Animals Act, 1960 and under Section 379, 411 I.P.C. Police Station, Ali Nager, District Chandauli against one Mustafa and two others namely Mohd. Sohrab and Washir Ali in which vehicle of the revisionist alleged to have been involved.

5. Learned counsel for the revisionist further submits that the revisionist was also made an accused being owner of the vehicle and he has been released on bail and further submits that the revisionist has moved a release application before the Chief Judicial Magistrate, Chandauli.

6. Learned counsel for the revisionist further submits that the release application of the revisionist was rejected by the Chief Judicial Magistrate, Chandauli on 30.10.2021 on the ground that the District Magistrate will have power to do all proceedings of confiscation and released of the vehicle.

7. Learned counsel for the revisionist has submitted that the vehicle is standing in open yard in the police station since long and with the passage of time ultimately it will become junk and after sometime it is not useful for any purpose. Reliance has been placed on the law laid down by the Hon'ble Apex Court in the case of **Sunderbhai Ambalal Desai and C.M. Mudaliar Vs. State of Gujrat, AIR 2003 SC 638.**

8. Learned counsel for the revisionist has further drawn the attention of the Court regarding the provisions of Sections 451 and 457 of Cr.P.C., which is quoted as under:-

"451. Order for custody and disposal of property pending trial in certain cases. When any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

Explanation.- For the purposes of this section," property" includes-

(a) property of any kind or document which is produced before the Court or which is in its custody,

(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence.

457. Procedure by police upon seizure of property.

(1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and

production of such property.(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation."

9. Learned counsel for the revisionist has further submitted that the revisionist is ready to comply with all the conditions, which the lower court will impose while releasing the vehicle. Undisputedly, revisionist is the rightful owner of the vehicle, therefore, the vehicle be released in his favour and the impugned order be quashed.

10. Learned A.G.A. has opposed the prayer and detailed counter affidavit has been filed. In the counter affidavit it has been stated that the said vehicle of the revisionist has been involved in Case Crime No.95 of 2021 and if the said vehicle is released, there would be possibility to use the said vehicle in another crime in future and therefore, the vehicle cannot be released in favour of the revisionist.

11. In the rejoinder affidavit filed by the revisionist, it has been stated by the learned counsel for the revisionist that revisionist is an innocent person and has been falsely implicated in the case and the vehicle has nothing do with the alleged offence, therefore, the entire proceedings is against the process of law and is liable to be quashed.

12. After having heard the learned counsel for the parties, I have carefully gone through the relevant legal provisions and the judgments rendered by the Hon'ble Apex Court in the case of **Sunderbhai Ambalal Desai (supra).**

13. The Hon'ble Apex Court in the case of **Sunderbhai Ambalal Desai, AIR 2003 SC 638** (supra) in para 17 and 21 has been pleased to hold as under:-

"17. In our view, whatever be the situation, it is of no use to keep such seized vehicles at the police stations for a long period. It is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicles, if required at any point of time. This can be done pending hearing of application for return of such vehicles.

21. However these powers are to be exercised by the concerned Magistrate. We hope and trust that the concerned Magistrate would take immediate action for seeing that powers under Section 451 Cr.P.C. Are properly and promptly exercised and articles are not kept for a long time at the police station, in any case, for not more than fifteen days to one month. This Object can also be achieved if there is proper supervision by the Registry of the concerned High Court in seeing that the rules framed by the High Court with regard to such articles are implemented properly."

14. In **Nand Vs. State of U.P., 1996 Law Suit (All) 423** this Court has observed that pendency of the confiscation proceedings under Section 72 of the U. P. Excise Act is not a bar for release of the vehicle which is required for the trial under Section 60 of the U. P. Excise Act. It has

been clearly observed by this Court in para 7 that:-

"I think it is not proper to allow the truck to be damaged by remaining stationed at police station. Admittedly, the ownership of the truck is not disputed. The State of Uttar Pradesh does not claim its ownership. Therefore, I think it will be proper and in the larger interest of public as well as the revisionist that the revisionist gives a Bank guarantee of Rs. 2 lakhs before the C.J.M., Kanpur Dehat and files a bond that he shall be producing the truck as and when needed by the criminal courts or the District Magistrate, Kanpur Dehat, and he shall not make any changes nor any variation in the truck."

This Court further has held in the case of Jai Prakash Vs. State of U.P., 1992 AWC 1744 that mere pendency of confiscation proceedings before the Collector is no bar to release the vehicle.

15. In **Kamaljeet Singh Vs. State of U.P., 1986 U.P. Cri. Ruling 50 (Alld),** the same view was taken by this court that pendency of confiscation proceedings shall not operate as bar against the release of vehicle seized u/s 60 of Excise Act.

16. In the opinion of this Court, it is not disputed that the power under Section 451 of Cr.P.C. is not properly and widely used by the court below while passing the orders. The power conferred under Section 451 of Cr.P.C. be exercised by the court below with judicious mind and without any unnecessarily delay, so that the litigant may not suffer. Merely keeping the article in the custody of the police in the open yard will not fulfill any purpose and ultimately it result the damage of the said property. The owner of the property be allowed to enjoy the fruits of the said property for the remaining period for which the property is being made.

17. It is further observed that as per the amendment made in Section 5 (A) of the Act, 1955 in year 2020, now the power lies with the District Magistrate to seize or release the vehicle. The facts on record show that a case has been registered against one Mustafa and two others namely Mohd. Sohrab and Washir Ali in which vehicle of the revisionist alleged to have been involved bearing F.I.R. No. 95 of 2021 under Section 3/5A/8 U.P. Pradesh Prevention of Cow Slaughter Act, 1955 (in short "Act of 1955"), under Section 11 of the Prevention of Cruelty of Animals Act, 1960 and under Section 379, 411 I.P.C. Police Station, Ali Nager, District Chandauli. It would be tried by the competent court and thereby taking note of Section 7 and 5A of Act of 1955, the seized vehicle can be released by the court which would try the case by exercising powers, as exist under section 457 Cr.P.C.

18. No purpose remains to keep the vehicle stationery during the period of trial and therefore release of vehicle can be permitted in a given case by the court trying the case.

19. Further in the opinion of this Court, the procedure as contemplated under Section 457 of Cr.P.C. be also followed promptly, so that the concerned Magistrate may take prompt decision for disposal of such properties and be released in favour of the entitled person of the said property. Keeping the said property in the custody will not solve any purpose and that gives a mental and financial torture to the owner of the said property which is also against the law and against the principles of natural justice.

20. As per the legal propositions mentioned above and keeping in view this fact that undisputedly the revisionist is the registered owner of the seized vehicle and the ownership of the vehicle is not in dispute, neither the State or any other person has claimed their ownership over the vehicle, therefore, no useful purpose will be served in keeping the vehicle stationed at the police station in the open yard for a long period allowing it to be damaged with the passage of time.

21. In view of the above facts and circumstances of the case, the impugned order is not sustainable in the eyes of law and require interference by this court.

22. Accordingly, the criminal revision is allowed and the impugned order dated 30.10.2021 passed by Chief Judicial Magistrate, Chandauli is set aside and the case is remitted back to the concerned court to pass a fresh speaking and reasoned order keeping in view of the settled law laid down by **Hon'ble Apex Court in the case of Sunderbhai Ambalal Desai, AIR 2003 SC 638** within a period of two months from the date of production of certified copy of this order in accordance with law.

(2022)05ILR A285
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.03.2022

BEFORE

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

First Appeal From Order No. 276 of 2013

Smt. Ghyanti & Anr. ...Appellants
Versus
H.D.F.C. General Insurance Company Ltd. Kanat Place, New Delhi & Anr. ...Respondents

Counsel for the Appellants:
Sri Ram Singh, Sri Daya Ram Yadav

Counsel for the Resondents:
Sri Pranjal Mehrotra

A. Motor Accident Claim – Compensation – Term 'Negligence' – Meaning – Negligence means failure to exercise required degree of care 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. (Para 6)

B. Motor Accident Cases – Hit and run cases – Frequent use of vehicle on road – Principle of liability – Rule of res-ipsa loquitor – Applicability – Held, 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's* case – 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown – 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. (Para 9 and 10)

C. Motor Accident Claim – Cause of accident – Reasonable care – Burden of proof, on whom lie – Held, the burden of

proof would ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle driven by the driver was being driven with reasonable care or it is proved that there is equal negligence on the part the other side in causing the accident – As far as beneficial piece of legislation is concerned, the strict rules of Civil Procedure Code and Evidence Act are no required to adhered to. (Para 12 and 19)

D. Motor Accident claim – Contributory compensation – In accident, truck driver dashed the motorcyclist from behind – Tribunal held that both drivers have equally contributed to the accident – Validity challenged – Held, the driver of the truck to be 80% negligent, the reason being he is not stepped into the witness box. The vehicle while taking a turn whether the indicators were on the evidence is to the contrary as given by the witnesses for the claimants. However, considering the facts that accident occurred in the cross turning whether held the deceased 20% negligence – High Court re-computed compensation. (Para 13 and 15)

E. Civil Law - Income Tax Act, 1961 – Section 194A (3) (ix) – Withdraw of amount of interest – Certificate of Income Tax authority, when required – Held, if the interest payable to any claimant for any financial year exceeds Rs. 50,000/-, insurance Co./owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 – If the amount of interest does not exceeds Rs. 50,000/- in any financial year, registry of this Tribunal is directed to allow the claimants to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. (Para 23)

Appeal partly allowed (E-1)

List of Cases cited:-

1. Rylands Vs Fletcher; (1868) 3 HL (LR) 330

2. Jacob Mathew Vs St. of Pun.; 2005 0 ACJ(SC) 1840

3. Archit Saini & anr. Vs Oriental Insurance Co. Ltd., AIR 2018 SC 1143.

4. F.A.F.O. No.16 of 2001 United India Insurance Co. Ltd., Gorakhpur Vs Smt. Neera Singh & ors.

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

6. United India, Insurance Co. Ltd. Gorakhpur Vs Smt. Neeraj Singh & ors., 2017 (1) AWC 636.

7. Saead Bashir Ahmad Vs Md. Zamil 2009 (1) TAC 794

8. Vimla Devi & ors. Vs National Insurance Co. Ltd. & anr.; (2019) 2 SCC 186

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

10. Vimal Kanwar & ors. Vs Kishore Dan & ors. AIR 2013 SC 3830

11. Sarla Verma Vs Delhi Transport Corp.; (2009) 6 SCC 121

12. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Co. Ltd.; 2007(2) GLH 291

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

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

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

1. Heard Sri Ram Singh, learned counsel for the appellants; Shri Pranjal Mehrotra, learned counsel for the respondent; and perused the record.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 20.10.2012 passed by Motor Accident Claims Tribunal/ District Judge, Court No.6, Ghaziabad (hereinafter

referred to as 'Tribunal') in Motor Accident Claim Petition No.322 of 2011 awarding a sum of Rs.4,95,200/- with interest at the rate of 7% as compensation.

3. The accident and involvement of vehicle are not in dispute. The accidental injuries caused death is also not in dispute. The issue of negligence decided by the Tribunal is in dispute. The respondent concerned has not challenged the liability imposed on them. The issues to be decided are negligence and the quantum of compensation awarded. The judgment is therefore not stuffed with narration of all facts except for deciding negligence and compensation.

4. We are unable to subscribe to the submission of Shri Ram Singh, learned counsel for appellants that the the deceased has not contributed to the accident on our reasonings given later on.

5. In view of the submission made by both the counsels as far as negligence is concerned this court will have to decide the issue of negligence. It would be relevant to discuss the principles for deciding negligence and to decide whether it is a case of composite / contributory negligence which will also have to be looked into and the principles enunciated for considering the same in a motor accident claim will be sifted and discussed finding on negligence.

6. Negligence means failure to exercise required degree of care 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 and likely to cause 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.

7. 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 it is the duty of a fast moving vehicle to slow down and if driver did not slow down at, but continued to proceed at a high speed without caring to notice that another vehicle was either or going ahead crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently and the driver can be held to be the author of the unforseen incident.

8. 10th Schedule appended to Motor Vehicle Act,1988 contains 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 must 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 tries to overtake of the vehicle on road, particularly when he could have easily seen, that the vehicle in or over which deceased was riding, was being played.

9. 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.

10. In the light of the above discussion, 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 **(refer Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840).**

11. 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 v. Oriental Insurance Company Limited, AIR 2018 SC 1143.***

12. The burden of proof would ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle driven by the driver was being driven with reasonable care or it is proved that there is equal negligence on the part the other side in causing the accident.

13. The driver of both the vehicles have been held to be negligent by the tribunal and the tribunal has held that both drivers have equally contributed to the accident having taken place. The fact that the truck hit the vehicle in which the deceased was traveling from behind, is an admitted position of fact that the truck hit the motorcyclist from behind.

14. Learned counsel for the appellant has relied on the decision of this Court in ***F.A.F.O. No.16 of 2001 United India Insurance Co. Ltd., Gorakhpur v. Smt. Neera Singh and others.***

15. The reasonings given for holding the driver of the motorcycle 50% negligence, when a driver driving bigger vehicle has to be more cautious. The driver of the truck even events of the site plan that the truck driver tried to take a turn, the motorcyclist also tried to take turn that is how the truck driver dashed with the motorcyclist. It is an admitted position of fact that the truck driver dashed the motorcycle from behind even as per the site plan, the documentary evidence goes to show that the accident occurred and died at 7 p.m.. We, therefore, held the driver of the truck to be 80% negligent, the reason being he is not stepped into the witness box. The vehicle while taking a turn whether the

indicators were on the evidence is to the contrary as given by the witnesses for the claimants. However, considering the facts that accident occurred in the cross turning whether held the deceased 20% negligence.

Compensation

16. It is submitted by learned counsel for the appellants that the 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 granted and the interest awarded by the Tribunal are on the lower side and require enhancement. Learned counsel for appellants/claimants submitted that deceased was Labour Supply Contractor by profession and was earning Rs.9000/- per month. It is also submitted by learned counsel for appellants that as the deceased was survived by his wife and major son and hence the deduction towards personal expenses of the deceased as 1/3 is not disputed by appellants. The multiplier has to be as per age of deceased and tribunal has granted multiplier of 11 which is not disputed by either side. The tribunal has not assessed the future prospects loss of income, it is submitted that should be 25% instead of 20% as per decision of Pranay Sethi (supra) and U.P. M.V. Rules, 2011. Learned counsel for the appellants has relied on the judgment of the Apex Court titled ***United India, Insurance Co. Ltd. Gorakhpur v. Smt. Neeraj Singh and others, 2017 (1) AWC 636.***

17. Learned counsel for the respondents, has vehemently submitted that the contentions raised by the learned counsel for the appellants are unsubstantiated, learned counsel has submitted that the compensation awarded by the Tribunal is just and proper and does not call for any enhancement. It is further submitted that the accident and decision of tribunal is based on the decision of Sarla Verma (Supra) where it is held further loss of income can't be granted to a person who is self employed. The deduction is just and proper as deceased is considered to have equally contributed in causing the accident.

18. Having heard learned counsels for the parties and considered the factual data, this Court finds that the accident occurred on 11.04.2011 causing death of Prabhu Nath Singh who was 50 years of age and left behind him, wife and a major son. The Tribunal has assessed the income of the deceased to be Rs.9000/- per month. The deceased was Labour Supply Contractor by profession. The Tribunal has relied on the judgment of **Saead Bashir Ahmad v. Md. Zamil 2009 (1) TAC 794** and decided that the deceased was earning Rs.9000/- p.m.. The evidence of the witnesses has not been accepted. The Apex Court in ***Vimla Devi and others Vs. National Insurance Company Limited and another, (2019) 2 SCC 186,*** has held strict rules of Civil Procedure may not be applied. The deceased died due to the accidental injuries is not in dispute. The judgment of the Apex Court in **Anita Sharma v. New India Assurance Co. Ltd. (2021), 1 SCC 171** would also apply to the facts of this case.

19. As far as beneficial piece of legislation is concerned, the strict rules of Civil Procedure Code and Evidence Act are no required to adhered to.

20. In view of the judgment of **Vimal Kanwar and others v. Kishore Dan and**

others, AIR 2013 SC 3830 except income Tax, if payable, no amount could have been deducted by the tribunal in the year of question, i.e., 2011, the income of deceased was below taxable income. The income of Rs.9000/- per month of the deceased as considered by tribunal is maintained. The deceased was in age bracket of 40 - 50 years as Labour supply contractor in light of Pranay Sethi (Supra) 25% of the income will have to be added as future prospects in view of the decision of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050.**

21. In this backdrop we evaluate the compensation 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.9000/- p.m.

ii. Percentage towards future prospects : 25% namely Rs.2250/-

iii. Total income : Rs. 9000 + 2250= Rs.11,250/-

iv. Income after deduction of 1/3 : Rs.7500/-

v. Annual income : Rs.7500 x 12 = Rs.90,000/-

vi. Multiplier applicable : 11 (as the deceased was in the age bracket of 51-55 years)

vii. Loss of dependency: Rs.90000 x 11 = Rs.9,90,000/-

viii. Amount under non pecuniary heads (Rs.70,000+30,000) = 1,00,000/-

ix. Total compensation : Rs.10,90,000/-.

x. Amount admissible to the Claimants after deduction of negligence to the tune of 20% on the part of the deceased = **Rs.8,72,000/-**

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 6 (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. 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."

26. 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 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.

27. We are thankful to learned counsels for the parties for ably assisted the Court.

28. Record be sent back to court below forthwith, if any.

(2022)05ILR A291
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.04.2022

BEFORE

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

First Appeal From Order No. 311 of 2022

Ompal Singh Sharma & Ors. ...Appellants
Versus
National Insurance Company Ltd. & Ors. ...Respondents

Counsel for the Appellants:
Sri Dinesh Kumar Bhaskar

Counsel for the Resondents:
Sri Krishna Shanker Chaudhary

A. Motor Accident Claim – Act of God or *vis major* – Meaning – Rylands' rule – Applicability – Coming of blue bull on the road before a vehicle, Trubunal held it as an Act of God – Validity challenged – Held, only those acts, which can be traced to natural forces and which have nothing to do with the intervention of human agency, can be said to be Acts of God – Act of God or *vis major* are the forces which no human foresight can provide most and of which human prudence is not bound to recognize the possibility – Held further, if the driver of the vehicle would have taken proper care and caution while plying the vehicle at normal speed, the accident could have been avoided because it is not the case that the car hit the blue bull directly but in order to save the blue bull, it rammed into a tree and overturn in a ditch – High Court applied Rylands' rule and declared the finding of the Tribunal holding the accident to be the result of 'No

Negligence' not sustainable in eye of law. (Para 18, 20, 22 23 and 24)

B. Civil Law - Motor Accident Act, 1988 – Section 169 – Claim – Documentary evidence – Standard of proof – Salary certificate of the deceased, duly issued by the authority with official stamp was produced – Tribunal disbelieved it only on the basis that PW-1, the father of the deceased did not deposed even a single word in his testimony to prove it – Held, Tribunal has lost site of the provision of Section 169, under which it can summon any witness to prove a particular document – Moreover, the standard of proof in the motor accident claim petition is not as strict as in civil or criminal law – In order to award just compensation, there is no requirement of law to prove the matter or document beyond reasonable doubt – High Court re-computed compensation by determining Rs. 9,870/- as the income of deceased and adding 50% future loss and multiplier of 18 and awarded 7.5% interest. (Para 27, 28, 30, 33 and 35)

C. Civil Law - Income Tax Act, 1961 – Section 194A (3) (ix) – Withdraw of amount of interest – Certificate of Income Tax authority, when required – Held, if the interest payable to any claimant for any financial year exceeds Rs. 50,000/-, insurance Co./owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 – If the amount of interest does not exceeds Rs. 50,000/- in any financial year, registry of this Tribunal is directed to allow the claimants to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. (Para 38)

Appeal partly allowed (E-1)

List of Cases cited:-

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

2. Parmeshwari Vs Amir Chand; (2011) 11 SCC 635

3. C.MA. No. 1482 of 2017; Reliance General Insurance Co. Ltd. Vs Subbulakshmi & ors.

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

5. Bimla Devi & ors. Vs Himachal RTC; 2009 (13) SCC 530

6. Nugent Vs Smith; (1876-1 CPD 423)

7. Rylands Vs Fletcher; 1868 Law Reports (3) HL 330,

8. Bithika Mazumdar & anr. Vs Sagar Pal & ors. (2017) 2 SCC 748

9. F.A.F.O. No. 1999 of 2007; Oriental Insurance Co. Ltd. Vs Smt. Ummida Begum & ors.

10. F.A.F.O. No. 1404 of 1999; Smt. Ragini Devi & ors. Vs United India Insurance Co. Ltd. & anr. decided on 17.04.2019

11. National Insurance Co. Vs Pranay Sethi; 2014 (4) TAC 637 (SC)

12. Smt.Sarla Verma Vs Delhi Transport Corp.; 2009 (2) TAC 677 (SC)

13. Munna Lal Jain & Anr. Vs Vipin Kumar Sharma & ors.; 2015 (6) SCALE 552

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

15. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Co. Ltd.; 2007(2) GLH 291

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

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

18. Bajaj Allianz General Insurance Co. Pvt. Ltd. Vs Union of India & ors. decided by Apex Court on 27.01.2022

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

1. This appeal has been preferred by the claimants-appellants against the judgment & award dated 30.9.2013 passed by learned Motor Accident Claims Tribunal/ District Judge, District Bijnor in Motor Accident Claim Petition No.43 of 2012 (Ompal Singh Sharma and others Vs National Insurance Company Ltd. and others), whereby the learned Tribunal has denied the compensation for the death of Prince Sharma in a road accident, holding the accident to be the result of "Act of God', and awarded Rs.50,000/- under no fault liability under Section 140 of Motor Vehicles Act, 1988 (hereinafter referred to as 'Act, 1988').

2. The claimants-appellants have preferred this appeal for grant of quantum of compensation under Section 166 of Act, 1988.

3. The brief facts of the case are that claimants-appellants filed a Motor Accident Claim Petition before the Tribunal for seeking compensation under Motor Vehicles Act, 1988 for the death of Prince Sharma (deceased) who lost his life in a road accident. As per averments made in claim petition, on 30.7.2011, the deceased - Prince Sharma was traveling in a Wagon-R Car No. U.P.-21 S-1101 with Mohd. Arif Jameel, Assistant Excise Commissioner, Bijnor, after performing their duties from Bijnor to Moradabad. The car was driven by driver- Jameel Ahmad- respondent no. 3. At about 2:30 p.m., when the car reached a little ahead of Gol Bag Tiraha within the jurisdiction of Police Station, Haldaur, suddenly a wild animal Maha (Blue bull / Neelgay), came in front of car, the driver of Car had lost his control over the Car and dashed against the tree and fell down in a ditch. In this accident, Prince Sharma and Mohd. Jameel Ahmad sustained serious injuries and Prince Sharma (deceased) died on the spot.

4. It is also averred that the age of the deceased was 23 years and he was posted as constable in Excise Department, Bijnor was receiving salary of Rs.12,000/- per month.

5. Aggrieved mainly with the non grant of compensation under Section 166 of Motor Vehicles Act awarded, the appellants have preferred this appeal.

6. Heard learned counsel for the appellants-claimants and learned counsel for the respondents. Perused the record.

7. Learned counsel for the appellants-claimants has submitted that impugned judgment and award is against the law. Learned Tribunal has held that the driver of the car was not negligent but this finding is erroneous because if the vehicle would have been driven with proper care and caution, the accident could have been avoided. Learned Tribunal has adopted incorrect approach, because the vehicle was not being driven at a normal speed. In fact, the driver lost the control on staring and the vehicle dashed into the tree.

8. Per contra, learned counsel for the Insurance Company has vehemently objected the submissions of learned counsel for the appellants-claimants and submitted that it is established on record that a blue bull appeared in front of car, tired his best to save the accident but the car dashed into a tree. Hence, in this accident, the car driver was not negligent. It is next submitted by by learned counsel that the father of the deceased is produced before the Tribunal as PW-1 and a so called eye witness Brijesh Sharma is produced as PW-

2. Both these witnesses have deposed in their testimony that in the said accident, the car driver was not negligent and the accident had taken place due to sudden appears of blue bull. Hence, the appellants have failed to prove that the car driver was negligent under Section 166 of Motor Vehicle Act, 1988, the claim petition can succeeds if the negligence of the driver is proved.

9. Learned counsel for the insurance company has submitted that the information of the accident was reported to police station of which entry is made in General Diary (GD). This GD entry also says that the accident took place due to sudden appears of blue bull. Hence, learned Tribunal has rightly concluded that in the aforesaid accident, the car driver was not negligent and rightly dismissed the claim petition by awarding a sum of Rs.50,000/-, under No Fault Liability , hence there is no illegality in the impugned order which calls for interference by this Court.

10. In addition to the aforesaid submissions, learned counsel for Insurance Company has vehemently submitted that the accident took place as blue bull came on the road all of sudden which was beyond the control of driver of the car and in order to save the blue bull caused the accident. Hence, there was no negligence and the accident in question was result of 'Act of God'.

11. The question which arises is whether the accident was the result only because the blue bull came on the road as held by Tribunal or it was 'human negligence'. While deciding the claim petition, learned Tribunal has not kept in mind the standard of proof required in Motor Accident Claim Petition.

12. In ***Anita Sharma and Others Vs. The New India Assurance Co. Ltd. and Another, (2021) 1 SCC 171,*** the Full Bench of Hon'ble Apex Court reiterated the view taken in ***Parmeshwari Vs. Amir Chand, (2011) 11 SCC 635***, that it is very difficult to trace the witnesses and collecting information for an accident which took place many hundreds of kilometers away and further it is held by Hon'ble Apex Court in ***Anita Sharma and Others*** (Supra) that in a situation of this nature, the Tribunal has to take a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular vehicle in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability.

13. The Division Bench of Madras High Court also held in ***Reliance General Insurance Co. Ltd. Vs. Subbulakshmi and Others,*** passed in C.MA. No. 1482 of 2017 [C.M.P. No. 7919 of 2017. (CMA Sr. No. 76893 of 2016)] has referred the case of ***Puspabai Purshottam Udeshi Vs. Ranjit Ginning and Pressing Co., 1977ACJ 343 (SC),*** in which it is observed that the normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of ***res ipsa loquitur***. The general purport of the words ***res ipsa loquitur*** is that the accident 'speaks for itself or tells its own story. There are cases in which the accident speaks for itself so

that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence. Where the maxim is applied the burden is on the defendant to show either that in fact he was not negligent or that the accident might more probably have happened in a manner which did not connote negligence on his part. For the application of the principle it must be shown that the car was under the management of the defendant and that the accident is such as in ordinary course of things does not happen if those who had the management used proper care.

14. In ***Bimla Devi and Others VS. Himachal RTC reported in 2009 (13) SCC 530,*** the Hon'ble Supreme Court held that it was necessary to be borne in mind that strict proof of an accident caused by a particular vehicle in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied.

15. In our case, the deceased was traveling in the car, with Assistant Excise Commissioner, Bijnor and Mohd Arif Jameel and the car was being driven by driver Jameel Ahmad- respondent no.3. The deceased died on the spot. The driver of the car has not stepped into the witness box while he was the best witness to depose and prove the manner in which the accident took place. It is not disputed that the accident had taken place due to coming of blue bull on the road but the evidence has been misread by the learned Tribunal.

16. It is the version of appellants-claimants as well as respondents and learned Tribunal also reached to the conclusion that accident took place in order to save the vehicle from blue bull which came on the road all of sudden. Now here comes the question, if the blue bull came on the road before a vehicle whether it can be held that negligence was not proved.

17. While considering the question of inevitable accident, it will be useful to reproduce a passage from celebrated treaties on the Law of Torts, by Justice G. P. Singh.

"All causes of inevitable accidents may be divided into two classes.

(1) Those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause; and

(2) Those which have their origin either in the whole or in part in the agency of man, whether in acts of commission or omission, non-feasance or mis-feasance or in any other causes independent of the agency of natural forces. The term 'act of God' is applicable to the former class."

18. Act of God is one arising from natural causes. Some of the well-known instances of "Act of God" are the storms, the tides and the volcanic eruptions. They are, in a sense, inevitable accidents beyond the control of man. What is urged in this case is that all inevitable accidents must be taken as acts of God. Matters which are not within the power of any party to prevent are to be considered as acts of God as per the Insurance Company. We are unable to concur with the aforesaid argument of learned counsel for the Insurance Company. In our view, the accident may happen by reason of the play of natural forces or by intervention of human agency or by both. It may be that in either of these cases

accidents may be inevitable. But it is only those acts which can be traced to natural forces and which have nothing to do with the intervention of human agency that could be said to be Acts of God. Cockburn C. J.. in the leading case in ***Nugent v. Smith. (1876-1 CPD 423)*** said.

"It is at once obvious, as was pointed out by Lord Mansfield in Forward v. Pittard, that all causes of inevitable accident--" "fortuitus" -- may be divided into two classes -- those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause, and those which have their origin either in the whole or in part in the agency of man, whether in acts of commission or omission, of nonfeasance or of misfeasance, or in any other cause independent of the agency of natural forces. It is obvious that it would be altogether incongruous to apply the term "act of God" to the latter class of inevitable accident. It is equally clear that storm and tempest belong to the class to which the term "act of God" is properly applicable."

19. In Halsbury's Laws of England, Vol. 8, 3rd Edition, page 183, this question is dealt with as under:

"An act of God. In the legal sense of the term, may be defined as an extraordinary occurrence or circumstance which could not have been foreseen and which could not have been guarded against; or. more accurately, as an accident due to natural causes, directly and exclusively without human intervention, and which could not have been avoided by any amount of foresight and pains and care reasonably to be expected of the person sought to be made liable for it or who seeks to excuse himself on the around of it. The occurrence need not be unique, nor need it be one that happens for the first time; it is enough that it is extraordinary, and such as could not reasonably be anticipated. The mere fact that a phenomenon has happened once, when it does not carry with it or import any probability of a recurrence (when, in other words, if does not imply any law from which its recurrence can be inferred) does not prevent that phenomenon from being an act of God. It must, however, be something overwhelming and not merely an ordinary accidental circumstance, and it must not arise from the act of man."

20. Coming of blue bull on the road before a vehicle, as in the case on hand, cannot be termed to hold that claimant did not prove negligence. It is admitted fact that the car, in which, the deceased was traveling dashed into the tree even if it is believed that it was while saving the blue bull and overturned in a big pit. The driver could not control his vehicle and lost control and dashed with tree. This is not the case that vehicle dashed into blue bull but it dashed into tree, when the driver tried to save the blue bull from hitting the car, which goes to show that the car was being plied at a high speed, had the car being driven at normal speed, the accident could have been avoided or its impact could be minimized. This fact itself shows the negligence of the driver, who was driving the vehicle at an excessive speed. The Rule propounded in ***Rylands Vs. Fletcher, 1868 Law Reports (3) HL 330,*** can apply to accidents of vehicles in such cases and in motor accident cases.

21. The above Rule eventually gained approval in a large number of decisions rendered by Courts in England and abroad. Winfield on Torts has brought out even a Chapter on the "Rule in ***Rylands Vs.***

Fletcher. At page 543 of the 15th Edn. Of the calibrated work the learned author has pointed out that "over the years ***Rylands Vs. Fletcher*** has been applied to a remarkable variety of things; fire gas, explosions, electricity, oil, noxious, fumes, colliery spoil, rusty wire from a decayed fence, vibrations, poisonous vegetation.

22. Act of God or *vis major* are the forces which no human foresight can provide most and of which human prudence is not bound to recognize the possibility. We are, therefore, of the opinion that even apart from Section 140 of Motor Vehicles Act, a victim in an accident which occurred while using motor vehicle is entitled to get compensation from the Tribunal, unless any exception applies.

23. We are of the considered opinion that if the driver of the vehicle would have taken proper care and caution while plying the vehicle at normal speed, the accident could have been avoided because it is not the case that the car hit the blue bull directly but in order to save the blue bull, it rammed into a tree and overturn in a ditch.

24. Hence, the finding of learned Tribunal holding the accident to be the result of ' No Negligence' is not sustainable in eye of law and we hold that the accident had taken place due to the negligence of the driver of car **involved in the accident.**

25. The policy being in vogue and though orally submitted by counsel for respondents that there is breach of policy and the insurance company did not challenge the award as the amount awarded was under Section 140 M.V. Act, if this Court decides not to relegate the appellants to Tribunal. The oral objection be heard. We have perused the record, there is no breach of policy proved which can either exonerate the Insurance Company or permit this Court to grant recovery rights to Insurance Company. The finding of fact that the driver of the vehicle had proper driving licence is concurred with us. The finding that the vehicle was insured on the date of accident is also answered against insurance company.

26. The quantum of compensation payable to the appellants-claimants will have to be decided as record is before this Court and accident is decade old. We first thought that the matter can be relegated to the learned Tribunal for fixation of the quantum of compensation but we are mindful of the fact that this is a case in which the accident happened more than 10 years ago. Hence, we incline to fix the quantum of compensation here itself in view of the judgment of ***Bithika Mazumdar and another Vs. Sagar Pal and Others, (2017) 2 SCC 748*** and of this Court in ***F.A.F.O. No. 1999 of 2007 (Oriental Insurance Company Ltd. Vs. Smt. Ummida Begum and others) and also in F.A.F.O. No. 1404 of 1999 (Smt. Ragini Devi and others Vs. United India Insurance Company Ltd. and another)*** decided on 17.04.2019 wherein it has been held that if the record is with the appellate Court, it can decide the compensation instead of relegating the parties to the Tribunal.

27. We find it very strange that the learned Tribunal has opined that the claimants - appellants have failed to prove that the deceased was an employee in the police department as per finding of issue no. 5, **while on this issue the learned Tribunal has perused the salary certificate of the deceased which is duly issued by the excise department holds**

that the same is not proved. Learned Tribunal has disbelieved this salary certificate only on the basis that the father of the deceased PW-1 Om Pal Singh Sharma has not deposed even a single word in his testimony to prove the alleged salary certificate. If it is so then also, in our opinion the learned Tribunal has lost site of the provision of Section 169 of Act, 1988. The learned Tribunal has all the powers of Civil Procedure Code, 1908 with regard to summon any witness to prove a particular document who award just compensation to the claimants, learned Tribunal in suo moto summoned the concerned employee of Excise Department as a witness to prove the salary certificate of the deceased but the Tribunal has failed to do so.

28. Moreover, the salary certificate is on record which is duly issued by Assistant Excise Commissioner, Bijnor under his signature and official stamp. Moreover, the standard of proof in the motor accident claim petition is not as strict as in civil or criminal law. Proving any document in order to award just compensation, there is no requirement of law to prove the matter or document beyond reasonable doubt.

29. In this case, the father of the deceased, PW-1 has specifically deposed in his cross examination that ' esjs yM+ds dh ukSdjh izkscslu ij Fkh'. Moreover, in his examination-in-chief, he has disclosed the salary of his deceased son at Rs.12,000/- per month. This testimony of PW-1 is fully corroborated with the copy of salary certificate issued by Excise Department which is not proved otherwise but even then the learned Tribunal did not take any pain to summon the concerned employee / accountant of the department with regard to salary certificate. Hence, it can be said that the learned Tribunal did not award just compensation to the claimants and has lost sight of beneficial legislative intention.

30. Keeping in view the oral and documentary evidence on record, we are of the considered opinion that the deceased was a constable in excise department although he was on probation. Copy of his last salary certificate shows his gross salary at Rs.9,947/- per month, wash allowance at the rate of Rs.29/- and cycle allowance at the rate of Rs.48/- will not be admissible for the purpose of computation of salary. Hence, we take the income of the deceased at Rs.9,870/- per month.

31. Since the age of the deceased was below 40 years and he was just 23 years old and he was in permanent job, 50% would be added towards future loss of income as held by Hon'ble Apex Court in ***National Insurance Company vs. Pranay Sethi [2014 (4) TAC 637 (SC)].*** Keeping in view the 23 years of age of the deceased, multiplier of 18 would be applied in the light of the judgment of *Hon'ble Apex Court* in the case of ***Smt.Sarla Verma vs. Delhi Transport Corporation [2009 (2) TAC 677 (SC)].*** The deceased is survived by his parents but the appellant nos. 3 and 4 are brother of the deceased and both are major, hence, it cannot be assumed that they would have been dependant on the deceased. Hence, as per the judgment of Apex Court in ***Munna Lal Jain & Anr. Vs. Vipin Kumar Sharma & Ors. 2015 (6) SCALE 552,*** ½ half would be deducted for the personal expenses.

32. In the light of judgment of ***Pranay Sethi (Supra),*** appellant shall be entitled to get Rs.15,000/- for loss of estate and Rs.15,000/- for funeral expenses. The father and mother of the deceased will also get Rs.40,000/- each for loss of love and

affection as they had lost their young son in the road accident.

33. Hence, the total amount of compensation, in view of the above discussions, payable to the appellants is being computed herein below:

1.	Annual income i.e. Rs.9,870/- (per month) X 12	Rs.1,18,440/- P/A
2.	Percentage towards future prospect : 50%	Rs.59,220/-
3.	Total income : Rs.1,18,440/- + Rs.59,220/- =	Rs.1,77,660/-
4.	Income after deduction of ½ half : Rs.1,77,660/- - Rs.88,830/-	Rs.88,830/-
5.	Multiplier applicable : 18 :- Rs.88,830/- X 18	Rs.15,98,940/-
6.	Amount under non pecuniary head : Rs.15,000 + Rs.15,000 + Rs.40,000/- + Rs.40,000 + 10 % upward revision of every three years.	Rs.1,10,000/-
7.	Total compensation: Rs.15,98,940/- + Rs.1,10,000/-	Rs. 17,10,000/- (rounded up)
8.	Amount after deduction of no fault liability : Rs.17,10,000/- - Rs.50,000/-	Rs.16,60,000/-.

34. It is pointed out by learned counsel for the Insurance Company that the appeal is delayed by 1263 days and the interest of the aforesaid period would not be paid to the appellants-claimants.

35. It is rightly pointed out by the learned counsel for the Insurance Company that appeal is delayed by 1263 days, hence, interest of one year should be deducted. 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."

36. We fix the rate of interest as 7.5% per annum till the date of judgment by the learned Tribunal. No interest would be paid for one year after the judgment of learned Tribunal and 6% per annum rate of interest would be paid thereafter.

37. 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 as discussed above 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.

38. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of ***Smt. Hansagori P. Ladhani vs. The Oriental Insurance Company Ltd., [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.

39. The Tribunal shall follow the guidelines issued by the Hon'ble Apex Court in ***Bajaj Allianz General Insurance Company Pvt. Ltd. Vs. Union of India and Others,*** vide order dated 27.01.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. Since long time has elapsed, the amount be deposited in the Saving Bank Account of claimant(s) in a nationalized Bank without F.D.R.

(2022)05ILR A300
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. 1302 of 2021

Union of India & Anr. ...Appellants
Versus
Smt. Alka Tyagi & Ors. ...Respondents

Counsel for the Appellants:
Sri Satish Kumar Rai, Sri Chandra Prakash Yadav, Sri Shashi Prakash Singh

Counsel for the Resondents:
Sri Rahul Pandey

A. Civil Law - Motor Accident Act, 1988 – UP Motor Vehicle Rules, 1998 – Compensation – Finding of fact, scope of interference – Earlier High Court remanded the matter on the issue of quantum of compensation and Tribunal decided it – Contention raised by appellant/Union of India that question of contributory negligence was not decided by the Tribunal – Permissibility – Held, the grounds, which are taken by the appellants except the ground of quantum, cannot be now agitated after a period of 15 years – High Court deprecated the practice of Union of India for agitating a ground which has attained finality under the guise that the Tribunal has committed error in not deciding the issue of negligence – High Court awarded litigation fee of Rs. 10,000/- to the claimant for protracted litigation. (Para 9, 10 and 11).

Appeal dismissed (E-1)

List of Cases cited:-

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

2. Smt. Sarla Verma & ors. Vs Delhi Transport Corp. & anr.; 2009 ACJ 1298

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

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

5. Bajaj Allianz General Insurance Co. Pvt. Ltd. Vs U.O.I. & ors. decided by the Apex Court on 27.1.2022

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

1. Heard Sri Shashi Prakash Singh, assisted by Sri Satish Kumar Rai, learned counsel for the appellant and Sri Rahul Pandey, learned counsel for the respondents-claimants.

2. This appeal challenges the order dated 12.9.2019 which was passed in M.A.C.P. No.787 of 2002 by the Motor Accident Claims Tribunal, Ghaziabad, wherein the Tribunal, after the remand by this Court, has decided the matter on the issue of quantum of compensation as directed by this Court in F.A.F.O. No.1087 of 2007 which was preferred by the claimants (quorum : Hon.Mr.Justice Sudhir Agrawal and Hon.Mr.Justice Brijesh Kumar Srivastava-II).

3. The award was for grant of compensation for the death of the bread winner of whom the respondents are the legal heirs. The respondents had challenged the award passed by Motor Accident Claims Tribunal dated 12.9.2019. First Appeal From Order No.1087 of 2007. No appeal was preferred by the Union of India. The Union of India had not challenged nor had filed any cross-objection in the said appeal. After a period of about 8 years more particularly on 15.7.2015, the matter was remitted back to the Tribunal and paragraph no.11 of the said judgement reads as follows:-

"11. The appeal is accordingly partly allowed. The matter is remanded to the Tribunal to decide the matter afresh on the question of quantum of compensation only. The Tribunal shall not be prejudiced by any of the observations made by us in the body of the judgment. Since the matter is old, it shall be decided by Tribunal expeditiously, keeping its own roster in mind."

4. The matter came to be remanded only on the short point as stated above. We do not find any illegality in quantum fixed by Tribunal. In this appeal, grounds of negligence are urged. Counsel for Union of India has contended that the question of contributory negligence was not decided by the Tribunal. The facts of the case rather there is a categorical challenge in paragraph nos. (vii) and (viii). The question now arises whether after a period of 14 years when the Union of India sat silent, can they now be permitted to raise the following grounds:-

"(vii) Because, the Hon'ble Apex Court in case of Bijoy Kumar Dugar Vs. Bidyadhar Dutta and others, reported in (2006) 3 SCC 242, has laid down the law that the drivers of both the vehicles should be held responsible equally in case of head on collision and as such in the present case learned Claims Tribunal had erred in holding the negligence of Bus driver and fixing the entire liability upon the appellant/defendant CRPF Tata Bus.

(viii) Because, the driver of the Bus Shri Ratan Kumar Dutta appeared in the witness box as DW-2 and stated on oath that the deceased was driving his car and coming from the opposite direction. At the time of accident, he was overtaking the three wheeler and in order to crossing the three wheeler, he lost his control and dashed in the offending bus resulting died on the spot."

5. The Tribunal on remand has very categorically mentioned that the parties were heard only for quantum. With this prelude, this appeal preferred by the Union of India and Commandant 48 Vahini, 138 Battalion, C.R.P.F. Group Centre, Durgapur West Bengal (Owner of Vehicle No.HR-68/0104) requires to be decided. In

UPSRTC Vs. Km. Mamta and others, reported in AIR 2016 SC 948, the Apex Court has held that all the grounds raised in appeal must be decided by the appellate court but at the outset a question would arise can after a period of 15 years, a decided controversy which was already decided and in which the appellant herein had not agitated can be agitated for the first time in challenging the subsequent award. The grounds of challenge is to the order dated 12.9.2019 contending that the said is based on perverse findings of fact and contrary to law. The next ground is urged in paragraph no.8 as narrated herein above. This ground cannot be re-agitated and cannot be re-decided when the Union of India had not agitated this ground in the year 2007. Now raising these grounds for the first time after 15 years while challenging the award of 2019 which had to deal only with compensations cannot be permitted.

6. The submissions that the Insurance company of Maruti Car is necessary party and be impleaded cannot be accepted at this belated stage. It is submitted that the Tribunal has shown unplaced sympathy in calculating the compensation. It is submitted that the quantum granted is highly excessive. It would, therefore, be necessary to evaluate the quantum granted.

7. It is a decided fact that the deceased was salaried person. He was M.Sc. in Organic Chemistry and has done his Ph.D. He was Director with Dr. Tyagi Lab Pvt. Ltd. for which he used to get salary of Rs. 1,80,000/- per annum. The income-tax return have been also considered and it was on the basis of the income-tax return that his income was considered by this High Court while remanding the matter as well as the Tribunal. The Tribunal considered his income to be Rs.6,27,121/- per annum and added only 10% whereas the U.P. Motor Vehicles Rules, 1998 amended in 2011 obliged to add 20% for future loss of income. 1/4th has been deducted as personal expenses looking to the legal heirs of deceased. The Tribunal granted multiplier of 11. Unfortunately, only Rs. 15,000 + Rs. 15,000 + Rs. 40,000/- as non-pecuniary damages as per judgment of ***Smt. Sarla Verma and others Vs. Delhi Transport Corporation and another, reported in 2009 ACJ 1298.*** We are, therefore, unable to accept the submission of the Counsel for the Union of India that compensation granted is exorbitant rather the Tribunal has not decided compensation as directed by High Court in F.A.F.O. No.1087 of 2007 decided on 15.7.2015.

8. This takes us to the grounds raised, the Tribunal has not directed that the amount earlier deposited be deducted. It goes without saying that the amount earlier paid has to be adjusted and for that no separate order or direction was necessary. We need not to pass any fresh direction on the ground that the interest @ 7% is highly excessive and without jurisdiction. It is not countenanced by us. The Rule 220 of the Uttar Pradesh Motor Vehicles Rules also mentions that 7% rate of interest has to be granted and it is just and proper, infact, 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.).*** The compensation which has been awarded is on the basis of the facts and circumstances and observation of this Court in appeal preferred by respondents-claimants and we do not find any reason to interfere in the same.

9. The grounds, which are taken by the appellants except the ground of quantum, cannot be now agitated after a period of 15 years. The said grounds were available to the appellants where the Tribunal decided the lis between the parties namely in the year 2007. Up to 15.7.2015, the appellants herein did not even raise oral objection to the said award where the Tribunal had awarded a meagre sum of Rs. 2,76,500/- whereas this Court deprecated the same by reasoned order on the basis of the income-tax return. The Tribunal fixed notional income was a finding of fact and as narrated above, even in the later part of this second round of litigation, the Tribunal has though considered the judgment of Pranay Sethi (supra). The respondents may have been now tired as 20 years of elapsed from the date they lost their bread-winner. The minors have become major and, therefore, may be the respondents might not have filed what is known as cross-objection or oral cross-objection.

10. The appeal fails and is dismissed. We deprecate the practice of Union of India agitating a ground which has attained finality under the guise that the Tribunal has committed error in not deciding the issue of negligence. It is stated by the appellant that the entire amount has been deposited. We request the registry of the Tribunal to disburse the said amount in view of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442.** The record be sent back to the Tribunal.

11. 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 in F.D.R. 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. We should have dismissed this appeal with costs as it is an after thought to challenge the award on grounds which had attained finality and there is a delay of considerable time but as claimants have not filed cross-objection, but we award litigation fees of Rs. 10,000/- to the claimants for this protracted litigation.

12. We are thankful to both the counsels for getting this matter disposed of.

13. Records be sent back to the Tribunal.

(2022)05ILR A303
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. 2019 of 2021

Akhilesh Kumar Anand ...Appellant
Versus
Rahul Mishra & Anr. ...Respondents

Counsel for the Appellant:
Sri Pradip Kumar Shukla

Counsel for the Resondents:
Sri Ajay Singh

A. Civil Law - Motor Accident Act, 1988 – Power of Claim Tribunal – Documentary evidence – Standard of Proof – Deceased was a teacher – Salary certificate and salary payment register filed, yet the Tribunal has not relied on this documentary evidence merely on the

ground that no concern employee was called by the claimant to prove the salary certificate of the deceased – Permissibility – Held, Tribunal has taken hyper technical view which was not required because the compensation to be awarded under Motor Vehicles Act, 1988 has to be assessed by taking holistic approach as the Act is a benevolent piece of legislation – While deciding the claim petition under the aforesaid act, the Tribunal should not take hyper technical view because the standard of proof is not equated with that of civil litigation or criminal law – High Court re-computed the compensation by adding 50% future prospect and applying multiplier of 17 and awarded 7.5% interest. (Para 9, 10, 16 and 17)

B. Civil Law - Income Tax Act, 1961 – Section 194A (3) (ix) – Withdraw of amount of interest – Certificate of Income Tax authority, when required – Held, if the interest payable to claimant for any financial year exceeds Rs. 50,000/-, insurance Co./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 – Smt. Hansagori P. Ladhani's case relied upon. (Para 20)

Appeal partly allowed. (E-1)

List of Cases cited:-

1. Sarla Verma Vs Delhi Transport Corp.; (2009) 6 SCC 121

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

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

4. Vimla Devi & ors. Vs National Insurance Co. Ltd. & anr.; (2019) 2 SCC 186

5. CMA No. 1482 of 2017; Reliance General Insurance Co. Ltd. Vs Subbulakhmi & ors. decided by Madhya Pradesh High Court

6. Bimla Devi & ors. Vs Himachal Road Transport Corp. & ors. 2009 (2013) SCC 530

7. Lakshmi Devi Devi Vs Mohd. Tabbar & ors. 2008 (2) TAC 394 (SC)

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

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

1. This appeal challenges the judgement and award dated 10.01.2019 passed by Motor Accident Claim Tribunal/Additional District Judge, Court No.11, Kanpur Nagar in MACP No.370 of 2014 (Akhilesh Kumar Anand Vs. Rahul Mishra and others), whereby the learned Tribunal has awarded Rs.6,82,000/- as compensation on account of death of the wife of the claimant/appellant in a road accident with rate of interest 7% per annum.

2. Heard Shri Pradip Kumar Shukla, learned counsel for the appellant and Shri Ajay Singh, learned counsel appearing on behalf of respondents.

3. Brief facts of the case are that a claim petition was filed by appellant on account of death of his wife in a road accident before the learned Tribunal, in which averments are made that on 04.11.2011 at about 10:30 am the deceased was standing besides road near bus stop within the jurisdiction of police station-Kotwali, District- Fatehpur. All of sudden a Tata Safari bearing No.UP 78 BH 2707 came from behind, which was being driven rashly and negligently by its driver. The aforesaid vehicle hit the deceased from behind and the deceased sustained serious

injuries. She died on 10.11.2011 during treatment in hospital.

4. The owner and insurance company of the offending vehicle filed their respective statements, in which they denied the accident. Learned Tribunal held that driver of the offending vehicle was negligent and responsible for the accident and awarded the said compensation.

5. In this appeal, the accident is not in dispute. The liability of the insurance company to pay the compensation is also not in dispute. The issue of negligence has attained finality. Now there remains only issue of quantum of compensation to be decided in this appeal.

6. Learned counsel for the appellant has submitted that the learned Tribunal has not awarded just compensation. The age of the deceased was 30 years and she was teacher in Rajkiya Balika Ucchatar Madhyamik Vidyalal, Fatehpur. Her salary was Rs.28,381 per month but the learned Tribunal has not relied on the documentary evidence with regard to the salary of the deceased nor the oral evidence is believed and consequently learned Tribunal has assumed the income of the deceased at Rs.3,000/- per month only. It is also submitted that the appellant has filed salary certificate which is duly attested by District Inspector of Schools yet it is not believed by learned Tribunal on the ground that the aforesaid certificate is not proved by calling the concerned employee of the school.

7. Learned counsel for the insurance company vehemently objected the submissions made by the appellant and submitted that merely the filing of salary certificate is not enough unless it is got proved by summoning the concerned employee of the school with record. Hence, the appellant is failed to prove the income of the deceased and the learned Tribunal has rightly assessed the income of the deceased at Rs.3,000/- per month. There is no illegality or infirmity in the impugned judgement which calls for any interference by this Court.

8. With regard to the quantum of compensation, is in relation with the income of the deceased who admittedly was an educated and highly qualified person was a teacher and not laborer the learned Tribunal has added 50% of income for calculating future loss of income and has deducted 1/3 for personal expenses of the deceased. Learned Tribunal has rightly applied the multiplier of 17 as envisaged in the judgement of Hon'ble Apex Court in ***Smt.Sarla Verma vs. Delhi Transport Corporation*** [2009 (2) TAC 677 (SC)] . Learned Tribunal has also awarded non-pecuniary damages at Rs.70,000/- as per judgement of Apex Court in ***National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050.*** Learned Tribunal has granted the rate of interest 7% per annum. It is submitted by learned counsel for the appellant that rate of interest should be enhanced.

9. As far as income of the deceased is concerned, the learned Tribunal has altogether disbelieved the documentary as well as oral evidence in this regard. Although, the salary certificate and the copy of salary payment register are on the record yet the Tribunal has not relied on this documentary evidence merely on the ground that no concerned employee was called by the claimant to prove the salary certificate of the deceased. Hence, it was

held that the same cannot be read in evidence and was totally discarded.

10. In our view the learned Tribunal has taken hyper technical view which was not required because the compensation to be awarded under Motor Vehicles Act, 1988 has to be assessed by taking holistic approach as the Act is a benevolent piece of legislation. While deciding the claim petition under the aforesaid act, the Tribunal should not take hyper technical view because the standard of proof is not equated with that of civil litigation or criminal law.

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. Himachal 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 Vehicles 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'.

15. In the case on hand, the appellant has filed the salary certificate of the deceased, which is issued by the Principal of the concerned school, in which the deceased was working as a teacher. In the said certificate the monthly salary of the deceased is shown at Rs.28,581/-. It is also pertinent to mention that District Inspector of School, Fatehpur has sent to the Tribunal a copy of salary payment register, pertaining to the deceased, under his own signature vide letter No.4895 dated 27.11.2018. The copy of salary payment register is also attested by District Inspector of School. Even though, the learned Tribunal has not believed this evidence, which is not the correct appreciation the evidence. Learned Tribunal has itself mentioned in impugned judgement that the salary certificate is filed in original. There is no contention of insurance company that the salary certificate and payment register are fake. The fact that the deceased was working as a teacher is established on record, yet the learned Tribunal has committed an error in equating the deceased with the laborer by assuming the

income of the deceased at Rs.3,000/- per month. Learned Tribunal has relied on the judgement of Hon'ble Apex Court in **Lakshmi Devi Devi Vs. Mohd. Tabbar and others 2008 (2) TAC 394 (SC)** but this decision cannot be applied to the facts of the case in hand because in our case this fact is established on record that deceased was a teacher and was earning and not a laborer. Hence, we are of the considered view that learned Tribunal has fallen in error by equating the deceased with the laborer. The salary certificate shows the salary of the deceased at Rs.28,381/- per month which is confirmed by the copy of payment register, which also shows the payment of salary of the deceased at Rs.28,381/- per month. There is no other dispute except the rate of interest.

16. Hence, the total compensation, in view of the above discussions, payable to the appellants-claimants is being computed herein below:

i.	Income of the deceased		Rs.28,381/-
ii.	Percentage towards Future-Prospects (50%)	Rs.28,381/- + 50%	Rs.14,190/-
iii.	Total Income	Rs.28,381/-+ Rs.14,190/-	Rs.42,571/-
iv.	Income after 1/3 deduction for personal expenses	Rs.42,571/- - Rs.14,190/-	Rs.28,381/-
v.	Annual income	Rs.28,381/- x 12	Rs.3,40,572/-
vi.	Multiplier applicable	17	
vii.	Loss of dependency	Rs.3,40,572/- x 17	Rs.57,89,724/-
viii.	Amount under Non-pecuniary Heads		Rs.70,000/-
ix	**Total Compensation**	Rs.57,89,724/- +Rs.70,000/-	**Rs.58,59,724/-**

17. 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."

18. 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.

19. 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 insurance company shall deposit the amount within a period of 8 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

20. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of ***Smt. Hansagori P. Ladhani vs. The Oriental Insurance Company Ltd.,*** [2007(2) GLH 291] and this High Court in total amount of interest, accrued on the

principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimants to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 ***(Smt. Sudesna and others Vs. Hari Singh and another)*** and in First Appeal From Order No.2871 of 2016 ***(Tej Kumari Sharma v. Chola Mandlam M.S. General Insurance Co. Ltd.)*** decided on 19.3.2021 while disbursing the amount.

21. The Tribunal shall follow the guidelines issued by the Hon'ble Apex Court in ***Bajaj Allianz General Insurance Company Privae Ltd. vs. 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. Since long time has elapsed, the amount be deposited in the Saving Bank Account of claimant(s) in a nationalized Bank without F.D.R.

(2022)05ILR A308
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.03.2022

BEFORE

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

THE HON'BLE AJAI TYAGI, J.

First Appeal From Order No. 2386 of 2013
&
First Appeal From Order No. 2391 of 2013

Panchratni & Ors. ...Appellants
Versus
Smt. Manju Singh & Ors. ...Respondents

Counsel for the Appellants:
Sri Rishi Kant Rai, Sri S.K. Sharma, Sri Shailendra Sharma

Counsel for the Resondents:
Sri Nishant Mehrotra, Sri S.N. Yadav, Sri Sanjay K. Singh, Sri Sanjay Kumar

A. Civil Law - Motor Accident Act, 1988 – Section 169 – Claim – Compensation – Documentary evidence – Proof – 42 years old person died in accident, was Head Master – Tribunal has brushed aside the document on basis that it is not a public document and cannot be taken in evidence and hence considers the income of deceased as that of a labourer – Validity challenged – Held, the document may not be public document, if the tribunal had doubt, it could invoke procedure u/s 169 and could suo moto summoned the officer who had issued the certificate but without any rebuttal evidence by owner or insurance Co. could not have discarded the document and decided that deceased who was a person in vocation was equated with labourer – High Court re-computed compensation by determining the income of deceased Rs. 27,000/- and adding 30% future prospects and multiplier of 14 and awarded 7.5% interest. (Para 18, 20 and 22)

B. Motor Accident Claim – Rash and negligent driving – Term 'Negligence' – Meaning – Principle of '*res ipsa loquitur*', when it can be applied – 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 though it is normally accidental – 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. (Para 9)

C. Motor Accident Claim – Principle of contributory negligence – Scope and meaning – A person who either contributes or is co author of the accident would be liable for his contribution to the accident having taken place. (Para 10)

D. Motor Accident Claim – Contributory negligence and composite negligence – Difference – 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 – It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. (Para 13)

E. Civil Law - Income Tax Act, 1961 – Section 194A (3) (ix) – Withdraw of amount of interest – Certificate of Income Tax authority, when required – Held, if the interest payable to any claimant for any financial year exceeds Rs. 50,000/-, insurance Co./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. (Para 24)

Appeal of Insurance Co. dismissed and of claimants partly allowed (E-1)

List of Cases cited:-

1. U.P.S.R.T.C. Vs Km. Mamta AIR 2016 (SC) 948

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

3. Sudhir Bhuiya Vs National Insurance Co. Ltd. & anr., 2005(1) TAC 66 (Cal.)

4. First Appeal From Order No. 1818 of 2012; Bajaj Allianz General Insurance Co. Ltd. Vs Smt. Renu Singh & ors. decided on 19.7.2016

5. Khenyei Vs New India Assurance Co. Ltd. & ors. 2015 LawSuit (SC) 469

6. Renu Rani Shrivastava Vs New India Assurance Co. Ltd, AIR 2019 SC 5719

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

8. Vimla Devi & ors. Vs National Insurance Co. Ltd. & anr.; (2019) 2 SCC 186

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

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

11. Sarla Verma Vs Delhi Transport Corp.; (2009) 6 SCC 121

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

13. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Co. Ltd.; 2007(2) GLH 291

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

15. Bajaj Allianz General Insurance Co. Pvt. Ltd. Vs U.O.I. & ors. decided by Apex Court on 27.1.2022

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

1. Heard Shri Rishi Kant Rai, learned counsel appearing for the original

claimants; Shri Nishant Mehrotra, learned counsel for the Insurance company; none appeared for the owner. Perused the record

2. These appeals are preferred both by claimants and also by Insurance company, F.A.F.O. No.2356 of 2013 is at the behest of the claimants, challenges the judgment and decree dated 14.05.2013 passed by Motor Accident Claims Tribunal/District Judge, Mau (hereinafter referred to as 'Tribunal') in Motor Accident Claim Petition No.195 of 2010 awarding a sum of Rs.4,64,500/- with interest at the rate of 6% as compensation.

3. F.A.F.O. No.2391 of 2013 is preferred by Insurance company challenging the award on following grounds;

(a) It is challenged that the award is bad as the tribunal has erred on facts. It is alleged that the accident did not involve, the vehicle insured namely Tata Mazic bearing Registration No. UP 54 D 2561.

(b) It is further submitted that the death of Subhash Chandra was not due to the accidental injuries and the driver of Tata Magic was not driving the vehicle negligently;

(c) It is submitted that the driver driving, Tata Magic was not having proper driving licence.

(d) It is further alleged that the accident occurred due to sole negligence on the part of the driver of the motorcycle on which the deceased was allegedly travelling at the time of the alleged accident.

(e) It is further submitted that the deceased was not a third party and, therefore, there was no liability which was cast on the insurance company;

(f) It is further averred that there is liability to pay compensation could not be fastened on the appellate side.

(g) It is further submitted that presence of PW 2 and PW 3 was completely doubtful at the place and time of the alleged accident and their evidence were completely untrustworthy.

(h) It is alleged that there was a major unexplained delay in lodging the FIR. It is further alleged that learned Tribunal failed to appreciate the evidence in right perspective.

(i) It is submitted by learned counsel for Insurance Company that the findings recorded by the learned tribunal on issue no.1 was erroneous, perverse and based on assumptions and irrelevant considerations.

(j) It is further submitted that it was not established from the evidence on record that the driver of the motorcycle on which deceased was allegedly travelling at the time of alleged accident was having a valid and effective driving licence at the time of the alleged accident

(k) It is further submitted that the alleged photo copy of the driving licence of the driver of the vehicle Tata Magic in question was inadmissible in evidence.

(l) It is submitted that the tribunal failed to consider the said aspect and acted illegally in considering the said alleged photo copy of the driving licence in question while deciding issue no.3; it is also stated that it was not established from the evidence on record that the vehicle in question was having a valid and effective fitness certificate and a valid permit at the time of the alleged accident; it is submitted that the findings recorded by the Tribunal on issue no.3 are illegal, perverse and based on irrelevant considerations.

(m) It is further submitted that the employment and the income of the deceased is doubtfull. The Tribunal acted illegally in not appreciating the said aspect of the matter, and in assuming the income of the deceased at Rs.3000/- per month.

(n) It is further submitted that tribunal acted illegally in deducing only 1/4th of the alleged income of the deceased towards personal expenses.

(o) It is alleged that tribunal acted illegally in awarding interest of 6% per annum to the claimants/respondents.

(p) It is averred that the multiplier adopted by the learned tribunal was on higher side and was erroneous.

(q) It is submitted that the learned tribunal acted illegally on assumptions and in a perverse manner in awarding Rs.9,500 for non pecuniary damages.

4. The Apex Court in ***UPSRTC Vs. Km. Mamta and others, reported in AIR 2016 SC 948,*** has held that all the issues raised in the memo of appeal are required to be addressed and decided by the first appellate court.

5. In F.A.F.O. No. 2386 of 2013, it is submitted by learned counsel for the claimants that the 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 granted and the interest awarded by the Tribunal are on the lower side and requires enhancement. Learned counsel submitted that deceased was Headmaster in Govt. Primary School and was getting Rs.28,232/- per month as per salary slip. It is also submitted that as the deceased was survived by his wife and five minor children and hence the deduction towards personal expenses of ¼ made by tribunal is not in dipspute. The multiplier has to be as per age of deceased should have been granted 14 instead of 15. The tribunal has not granted future loss of income which should be 30% of income of deceased as per Pranay Sethi's judgment. It is further submitted that the Legal heirs of Subhash Chandra would be entitled to compensation as Subhas Chandra was not a author or co-author of the accident having taken place. It was a case of negligence of Tata Magic and, therefore, liability has been rightly fastened on the insurance company. Just because there was delay in FIR cannot be held that the petition should have been dismissed on the said grounds.

6. Learned counsel for the Insurance company has submitted that claimants have not proved the income of deceased. The tribunal has, therefore, rightly considered the income at minimum scale and the multiplier should have been 14 and not 15. The tribunal could not have granted any amount under the head of future loss of income as the judgment in Sarla Verma (infra) did not specify that people not in service, should be granted future loss of income. It is further submitted that rate of interest granted is just and proper, it does not require any enhancement. It is further submitted that tribunal has committed an error in considering the income of the deceased. Learned counsel for the Insurance company has contended that the multiplier is on higher side. Learned counsel for the Insurance has also heavily relied on the decision of the Calcutta High Court in ***Sudhir Bhuiya v. National Insurance Company Ltd. and another, 2005(1) TAC 66 (Cal.)*** so as to contend that the tribunal could not have considered the document which was not public document

and could not have considered the income of the deceased.

7. F.A.F.O. No.2391 of 2013:- Question of involvement of vehicle and negligence are decided by these findings.

8. The question of involvement has been raised by the appellant and has contended that deceased was not a third party as to the vehicle in question. While going through the record, it is very clear that the vehicle was involved in the accident. The finding of facts in issue no. 1 is that the vehicle being Tata Magic was mentioned in the FIR. The finding is very clear that the FIR was lodged on 18.8.2010. PW-1, PW-2, and PW-3 have stated in their ocular version that vehicle being Tata Magic driver drove the vehicle rashly and negligently. The vehicle in question was involved is also proved by the fact that the driver of the vehicle did not step into the witness box. The charge sheet was laid against the driver of Tata Magic. Hence, the submission that vehicle was not involved is unsustainable. The release order also lends credence to our finding that vehicle was involved in the accident.

9. 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.

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

11. 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."

12. As we are concerned as to whether qua the death of pillion rider if we hold the driver to be contributor to accident whether deduction would be proper or not reference to case titled ***Khenyei Vs. New India Assurance Company Limited & Others, 2015 LawSuit (SC) 469,*** is necessary wherein the Apex Court 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.

13. 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. 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."

14. The recent judgment of the Apex Court reported in ***Renu Rani Shrivastava v. New India Assurance Co. Ltd, AIR 2019 SC 5719*** will not permit us to accept the submission of counsel for the Insurance company that the Tata Magic driver did not drive the vehicle in rashly and negligently manner. The factual data which emerges that the Tata Magic dashed with the motorcyclist causing injuries to the deceased who succumbed to the said injuries.

15. As far as issue no.1 is concerned, it goes to show that vehicle was being driven rashly and negligently by driven of Tata Magic. The accident occurred at 9.00 p.m. The vehicle was being driven, as per the evidence of the witness, rashly and negligently by the driver of the Tata Magic. OPW-Balwant Kumar has stepped into the witness box. As far as issue no.11 is concerned, the driver Balwant Singh was arrested on the spot and, therefore, the vehicles involved is established. The witnesses also deposed on oath that the driver of Tata Magic was driving the vehicle rashly and negligently manner. The charge sheet was led against the driver of the Tata Magic and, therefore, the site plan also goes to show that the motorcyclist was driving the motorcycle on his correct side and the accident occurred solely due to the negligence of the driver of the Tata Magic.

16. As far as liability is concerned, the issue nos. 2 and 3 categorically establish that the vehicle was insured with the insurance company nothing has been proved to buttress the submission that the vehicle was not insured and that there was breach of policy condition. The driver had valid driving licence. The vehicle was insured from 30.7.2010 to 29.07.2011, no evidence is led. Hence, the submission made herein will not permit us to take a different view that then taken by the tribunal, just because a driver of Tata Magic was not made a party.

17. Driver of the Tata Magic in his cross examination and in his oral testimony has denied the fact that vehicle being involved in the accident. The F.I.R., Panchnama, charge sheet, post mortem report, site plan and the release order of Tata Magic will not permit us to accept the submission of counsel that negligence was of driver of motorcycle and vehicle was not insured, nor involved in accident.

Compensation:-

18. Having heard learned counsel for the parties and considered the factual data, this Court finds that the accident occurred on 13.08.2010 causing death of Subhash Chandra Sharma who was 42 years of age and left behind him, wife and five children.

The Tribunal has assessed the income of the deceased to be Rs.3,000/- per month. The deceased was a head master, the documentary evidence at exhibit 45 is produced. The tribunal has brushed aside the said document on basis that it is not a public document and cannot be taken in evidence and hence considers the income of deceased as that of a labourer and decides that the deceased can be said to be getting Rs.100/- which is equated to labourer even in 2010 the minimum wages were not Rs.100/- per day. The document may not be public document if the tribunal had doubt in could invoke procedure under Section 169 of Motor Vehicles Act, 1988 and could *suo moto* summoned the officer who had issued the certificate but without any rebuttal evidence by owner or insurance company could not have discarded the document and decided that deceased who was a person in vocation was equated with labourer. The tribunal has relied on the certificate for deciding age of deceased but income discards the same this could not have been done. The tribunal has not discussed why future loss is not granted despite the law as to the same was crystallised by Apex Court in ***General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Susamma Thomas and others, AIR 1994 SC 1631***. The tribunal has committed grave error in not considering that the appellants had proved the income of the deceased by leading oral evidence. The Tribunal has held that deceased may be earning Rs.3000/- p.m.. This is again fallacious as the evidence on record is there. The contention of insurance company that claimants failed to substantiate income of the deceased without proving the same by leading oral evidence and Tribunal has to take notional income of the deceased. The evidence of the witnesses has not been accepted which is against the mandate of the Apex Court in (a) **Vimla Devi and others Vs. National Insurance Company Limited and another, (2019) 2 SCC 186** and (b) in **Anita Sharma v. New India Assurance Co. Ltd. (2021), 1 SCC 171** which would also apply to the facts of this case.

19. The income of deceased has to be considered to be Rs.27,000/- per month, would be the income of the deceased. The deceased was in age bracket of 40 to 50 years was having a permanent job, hence 30% of the income will have to be added as future prospects.

20. 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.27,000 - Rs.2000 = Rs.25,000/- p.m. (Income tax and other deductable lump sum amount)

ii. Percentage towards future prospects : 30% namely Rs.7500/-

iii. Total income : Rs. 25000 + Rs.7500= Rs.32,500/-

iv. Income after deduction of 1/4 : Rs.24,375/-

v. Annual income : Rs. 24,375 x 12 = Rs.2,92,500/-

vi. Multiplier applicable : 14 (as the deceased was in the age bracket of 41-45 years)

vii. Loss of dependency: Rs. 2,92,500 x 14 = Rs.40,95,000/-

viii. Amount under non pecuniary heads (Rs.70,000+30,000) = 1,00,000/-

ix. Total compensation : **Rs.41,95,000/-.**

21. The principles of C.P. Code Evidence Act are not to be strictly followed by the tribunal which has been done by the tribunal excepting the validity of the licence. It is not proved that the vehicle did not have illness certificate.

22. 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."

23. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH 6 (SC), 442, the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

24. 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.

25. 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.

26. The appeal of the Insurance Company is **dismissed.**

27. In view of the above, the appeal of the claimants is **partly allowed.** Award and decree 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.

28. 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.

29. We are thankful to learned counsels for the parties for ably assisting the Court.

30. Record be sent back to court below forthwith, if any.

(2022)05ILR A318
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.05.2022

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.

First Appeal From Order No. 2427 of 2010

Shyamu & Ors. ...Appellants
Versus
Rashid Ahamad & Ors. ...Respondents

Counsel for the Appellants:
Sri Sanjay Singh, Sri Amrendra Nath Rai

Counsel for the Resondents:
Sri Ajai Singh

A. Civil Law - Motor Accident Act, 1988 – Section 166(2) – Territorial jurisdiction – Office of the Insurance Co. is situated at District Shahjahanpur and the Co. has its business at Shahjahanpur – Held, the Tribunal at Shahjahanpur had the jurisdiction to entertain the claim petition. The Tribunal has clearly erred in holding that the claim petition was not maintainable in Shahjahanpur – *Malati Sardar's case* of Supreme Court relied upon. (Para 14 and 16)

B. Motor Accident Claim – Determination of compensation – Notional income – Deceased was working as household help – No documentary proof of income of deceased produced – Held, it would be just and proper to determine compensation on the notional income of the deceased which would be the minimum wages payable to a daily wager in 2004, i.e., at the rate of Rs. 100/- per day or Rs. 3,000/- per month – J.K. Trivedi's case relied upon – High Court computed the compensation by adding 40% future prospect and applying multiplier of 16 and further adding Rs. 40,000 as towards the loss of spousal consortium and parental consortium – 7% rate of interest was also awarded. (Para 21, 22, 24, 26, 27 and 28)

Appeal allowed (E-1)

List of Cases cited:-

1. Mantoo Sarkar Vs Oriental Insurance Co. Ltd.; 2009(2) SCC 244

2. Malati Sardar Vs National Insurance Co. Ltd. & ors. 2016 (3) SCC 43

3. Jitendra Khimshankar Trivedi Vs Kasam Daud Kumbhar & ors. 2015 (4) SCC 237

4. Sarla Verma (Smt) & Others Vs Delhi Transport Corp. & anr.; 2009 (6) SCC 121

5. National Insurance Co. Ltd. Vs Pranay Sethi & ors. (2017) 16 SCC 680

6. Magma General Insurance Co. Ltd. Vs Nanu Ram, (2018) SCC OnLine SC 1546

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

1. This is a claimants' appeal filed under Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as, 'Act, 1988') against the judgment and order dated 6.3.2010 passed by the Motor Accident Claims Tribunal, Court No. 1, Shahjahanpur (hereinafter referred to as, 'Tribunal') in Motor Accident Claim Petition No. 9 of 2005 (Shyamu & Others Vs. Rashid Ahamad & Others).

2. In view of the office report dated 2.1.2019 service of notice on the defendants-respondents is deemed sufficient. Nobody has appeared for opposite party Nos. 1 and 2. Shri Ajai Singh, Advocate, appeared for opposite party No. 3 and was heard in opposition to the present appeal.

3. The appellants instituted Motor Accident Claim Petition No. 9 of 2005 claiming compensation of Rs. 8,48,000/- from the defendants-opposite parties for death of Smt. Rama Devi. The claim petition was filed in December, 2004. Appellant No. 1 is the husband of Smt. Rama Devi and appellant Nos. 2 to 7 are the sons and daughters of Smt. Rama Devi. Appellant Nos. 2 to 7 were minor at the time of death of Smt. Rama Devi. It is alleged in the claim petition that on 11.10.2004, Smt. Rama Devi was going with Radhey Shyam (brother of appellant No. 1) to purchase medicine for her son-appellant No. 7. Smt. Rama Devi was sitting on the back-carrier of the bicycle of Radhey Shyam. It is alleged that a truck bearing Registration No. U.P. 31 E 0242 (hereinafter referred to as, 'offending vehicle') hit the bicycle, as a result of which Smt. Rama Devi fell down and suffered injuries causing her death. It is alleged that the accident occurred due to rash and negligent driving of the offending vehicle by its driver. In the claim petition the age of the deceased is stated to be 32 years. It is stated in the claim petition that the deceased was working as a household helper and earned Rs. 6,000/- per month. It is stated that the vehicle was insured with the National Insurance Company Limited, Divisional Office Sadar Bazar, Shahjahanpur, i.e., opposite party No. 3. Opposite party Nos. 1 and 2 are the owner and the driver of the offending vehicle.

4. The opposite party Nos. 1 and 2 did not appear in the Tribunal and did not file their written statement, therefore, proceedings were held *ex-parte* against them. Opposite party No. 3 filed its written statement denying the accident as well as the negligence of the driver of the vehicle in causing the accident and also contested the amount of compensation sought by the claimants-appellants. It appears from the records, that the Insurance Company also filed an application under Section 170 of the Act, 1988 praying for permission to contest the claim on grounds available against the owner and driver of the vehicle.

5. It is relevant to note that a First Information Report registering Case Crime No. 1240 of 2004, under Sections 279, 338 and 304A I.P.C. was registered against opposite party No. 2, the driver of the vehicle, at the instance of Ramu, brother of appellant No. 1. In the aforesaid Case Crime No. 1240 of 2004, charge-sheet was filed against opposite party No. 2. Radhey Shyam, referred above, has been named as a prosecution witness in the charge-sheet.

6. The Tribunal framed four issues. Issue No. 1 was as to whether the accident which took place on 10.11.2004 killing

Smt. Rama Devi was because of the rash and negligent driving of the offending vehicle by its driver. Issue No. 2 was as to whether the offending vehicle was insured with opposite party No. 3. Issue No. 3 was as to whether at the time of accident, the driver of the vehicle had a valid driving license. Issue No. 4 was as to whether the claimants were entitled to any compensation and the defendant liable to pay compensation.

7. Before the Tribunal, the claimants filed a copy of the first information report, the postmortem report of Smt. Rama Devi, copy of the charge-sheet, inquest report, the policy cover note of the offending vehicle and a copy of the driving license of opposite party No. 2.

8. In the Tribunal, the appellant No. 1 appeared as A.P.W.1., Ramu who is the brother of the appellant No. 1 and lodged the first information report appeared as A.P.W. 2 and Radhey Shyam, who was with the deceased at the time of accident appeared as A.P.W. 3 to prove the case of the claimants. The defendants, which included the Insurance Company, did not produce any documentary or oral evidence in the case.

9. The Tribunal after considering the testimony of A.P.W. 3, who is an eye-witness of the accident, and also after taking note that in Case Crime No. 1240 of 2004 a charge-sheet had been filed against opposite party No. 2, i.e., the driver of the vehicle decided issue No. 1 in favour of the claimants and held that Smt. Rama Devi died on 10.11.2004 in the accident caused due to rash and negligent driving of the offending vehicle. While deciding Issue No. 1 in favour of the claimants, the Tribunal also considered the postmortem report of the deceased which indicated that death was due to antimortem injuries caused in the accident. Issue Nos. 2 and 3 were decided in favour of the owner of the offending vehicle and it was held that the offending vehicle was insured with opposite party No. 3 and at the time of accident, the driver of the offending vehicle had a valid driving license. However, on issue No. 4, the Tribunal held that the claim petition was not maintainable before the Tribunal, i.e., Motor Accident Claims Tribunal, Shahjahanpur, as the accident took place in District-Lakhimpur Kheri and the claimants as well as the owner and driver of the offending vehicle were also residents of District-Lakhimpur Kheri.

10. In the Claims Tribunal the claimants had filed, a residence certificate dated 29.7.2009 issued by the Senior Block Pramukh, Bhawalkheda, District-Shahjahanpur, marked as Paper No. 65Ga, certifying that the claimants were residing in District-Shahjahanpur for the last almost four and half years. The Claims Tribunal held that the aforesaid residence certificate only proved that the claimants were residents of District-Shahjahanpur from January 2005 and were not residents of District-Shahjahanpur in December, 2004 when the claim petition was filed. On the aforesaid ground, the Claims Tribunal rejected the claim petition. Hence, the present appeal.

11. It was argued by the counsel for the appellant that under Section 166(2) of the Act, 1988, the claim petition was maintainable before the Motor Accident Claims Tribunal, Shahjahanpur because the Office of the Insurance Company was situated in District-Shahjahanpur. It was argued that, even otherwise, the residence certificate produced by the claimants-

appellants indicated that the claimant-appellants were residents of District-Shahjahanpur and the Tribunal has misread Paper No. 65Ga, i.e., the residence certificate issued by the Senior Block Pramukh, Bhawalkheda, District-Shahjahanpur. It was argued that in light of the aforesaid, the claim petition was maintainable before the Tribunal at Shahjahanpur and in light of the findings recorded by the Tribunal on other issues, the claimants were entitled to compensation. It was argued that for the aforesaid reasons, the appeal is to be allowed, the order dated 6.3.2010 passed by the Motor Accident Claims Tribunal, Court No. 1, Shahjahanpur is liable to be set aside and the claimants-appellants may be awarded compensation. In support of his contention, the counsel for the appellant has relied on the following judgements of the Supreme Court :-

(a) **Mantoo Sarkar Vs. Oriental Insurance Co. Ltd., 2009 (2) SCC 244**

(b) **Malati Sardar Vs. National Insurance Company Limited & Others, 2016 (3) SCC 43**

12. Rebutting the argument of the counsel for the appellants, Shri Ajai Singh, Advocate, representing opposite party No. 3 has supported the award of the Tribunal and the reasons given in the same. The counsel for the opposite party No. 3 has argued that because the owner and the driver of the offending vehicle as well as the claimants were residents of District-Lakhimpur Kheri and the accident also occurred in District-Lakhimpur Kheri, therefore, the claim petition was not maintainable before the Motor Accident Claims Tribunal, Shahjahanpur and the Motor Accident Claims Tribunal rightly dismissed the aforesaid claim petition. It was argued that for the aforesaid reasons, the appeal is liable to be dismissed.

13. I have considered the submissions of the counsel for the parties and have also perused the lower court records.

14. So far as the issue regarding jurisdiction of the Tribunal at Shahjahanpur is concerned, Section 166(2) of the Act, 1988 provides as follows :-

"[(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction **the defendant resides**, and shall be in such form and contain such particulars as may be prescribed:

Provided that where no claim for compensation under section 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.]"

(Emphasis added)

15. In ***Malati Sardar*** *(Supra)*, the accident took place at Hoogly and the claimant also resided at Hoogly, but the claim petition was filed at Kolkata. The Principal Office of the Insurance Company, which was held liable to pay compensation, was situated at Kolkata. The Tribunal at Kolkata awarded compensation, but in appeal the said award was set aside on jurisdictional ground. It was argued before the Supreme Court that the residence of a juristic person included its Principal Office and, therefore the claim petition was

maintainable before the Tribunal in Kolkata. The Supreme Court held that under the Act, 1988 there was no bar to a claim petition being filed under Section 166 of the Act, 1988 at a place where the insurance company, which is the main contesting parties in such cases, has its business. The observations of the Supreme Court in paragraph Nos. 12 and 14 of its judgement are reproduced below :-

"12. We are thus of the view that in the face of judgment of this Court in Mantoo Sarkar (supra), the High Court was not justified in setting aside the award of the Tribunal in absence of any failure of justice even if there was merit in the plea of lack of territorial jurisdiction. **Moreover, the fact remained that the insurance company which was the main contesting respondent had its business at Kolkata.**

...

...

...

14. The provision in question, in the present case, is a benevolent provision for the victims of accidents of negligent driving. **The provision for territorial jurisdiction has to be interpreted consistent with the object of facilitating remedies for the victims of accidents.** Hyper technical approach in such matters can hardly be appreciated. **There is no bar to a claim petition being filed at a place where the insurance company, which is the main contesting parties in such cases, has its business.** In such cases, there is no prejudice to any party. There is no failure of justice. Moreover, in view of categorical decision of this Court in Mantoo Sarkar (supra), contrary view taken by the High Court cannot be sustained. The High Court failed to notice the provision of Section 21 CPC.

(Emphasis added)

16. In the present case, it is not disputed that the office of the Insurance Company-opposite party No. 3, is situated at District-Shahjahanpur and the Company has its business at Shahjahanpur. Thus, in light of the observations of the Supreme Court in ***Malati Sardar (Supra),*** the Tribunal at Shahjahanpur had the jurisdiction to entertain the claim petition. The Tribunal has clearly erred in holding that the claim petition was not maintainable in Shahjahanpur. The findings of the Tribunal on Issue No. 4 are contrary to law and are hereby set aside and it is held that the claim petition was maintainable before the Motor Accident Claims Tribunal, District-Shahjahanpur.

17. The claim petition was contested by the Insurance Company-opposite party No. 3 and the claimants had led their evidence before the Tribunal. The Tribunal has recorded its findings on the other issues framed by it. The records are before this Court and, therefore, it would serve no purpose to remand back the matter to the Tribunal to only quantify the compensation payable to the claimants. In view of the aforesaid, this Court has perused the lower court records to examine the findings of the Tribunal on other issues, i.e., Issue Nos. 1, 2 and 3.

18. Radhey Shyam, A.P.W. 3 was an eye-witness of the accident and has proved the accident. In his testimony, A.P.W. 3 has stated that the deceased, Smt. Rama Devi was with him on his bicycle when the offending vehicle, which was being driven at a high speed, hit the bicycle from behind as a result of which Rama Devi fell down and was crushed by the offending vehicle. In his testimony A.P.W. 3 has stated that the bicycle was on the left side of the road when the offending vehicle hit it. The

witness has withstood the cross-examination of opposite party No. 3. There is nothing to discredit the testimony of the witness. The witness proves the claimants' case that the accident took place due to rash and negligent driving of the offending vehicle and Smt. Rama Devi suffered injuries in the accident causing her death. The records of the court below also show that Case Crime No. 1240 of 2004 was registered at the instance of Ramu, the brother of appellant No. 2, who was also examined as A.P.W. 2 before the Claims Tribunal. In Case Crime No. 1240 of 2004 a charge-sheet has been submitted against the opposite party No. 2, i.e., the driver of the vehicle. The inquest report and the postmortem report of the deceased also show that death occurred due to antimortem injuries. In view of the aforesaid, the findings of the Tribunal on Issue No. 1, i.e., Smt. Rama Devi died because of the injuries suffered in the accident which took place due to rash and negligent driving of the offending vehicle, is affirmed.

19. So far as the findings of the Tribunal on issue Nos. 2 and 3 are concerned the same were not seriously contested by the Insurance Company. The policy cover note and copy of the driving license filed in the Tribunal have not been denied by the Insurance Company. Thus the findings of the Tribunal on issue Nos. 2 and 3 are also confirmed and it is held that the Insurance Company, i.e., the opposite party No. 3, is liable to indemnify the opposite party No. 1, the owner of the vehicle, for the compensation payable to the appellant.

20. So far as compensation to the claimants for the death of Smt. Rama Devi is concerned, it may be noted that in the claim petition, the age of the deceased is stated to be 32 years. The postmortem report records the age of the deceased as 29 years. However, as the claimants-appellants have themselves stated in the claim petition the age of the deceased to be 32 years, the age of the deceased for determining compensation is held to be 32 years.

21. It was stated in the claim petition and in the testimony of A.P.W. 1 that the deceased was earning Rs. 6,000/- per month. A perusal of the testimony of A.P.W. 2 shows that A.P.W. 2 himsef earned only Rs. 1,500/- per month at the time his testimony was being recorded by the Tribunal. In his testimony A.P.W. 3 has stated that the deceased used to earn Rs. 5,000/- per month. There is no documentary evidence proving the income of the deceased and there are inconsistencies in the testimony of different witnesses produced by the claimants to prove the income of the deceased. However, all the witnesses have testified that the deceased was working as household help.

22. The Supreme Court in **Jitendra Khimshankar Trivedi Vs. Kasam Daud Kumbhar & Others, 2015 (4) SCC 237** decided compensation for the death of a housewife on the notional ncome of Rs. 3000/- per month. In the circumstances, it would be just and proper to determine compensation in the present case on the notional income of the deceased which would be the minimum wages payable to a daily wager in 2004, i.e., at the rate of Rs. 100/- per day or Rs. 3,000/- per month.

23. The appellant No. 1 is the husband of the deceased and his testimony shows that he was not dependent on the deceased and was himself an earning member. Thus, the appellant No. 1 is not be

considered as a dependent of the deceased while deciding the deductions to be made for personal expenses of the deceased. Appellant Nos. 2 to 7 are the sons and daughters of the deceased. In light of the judgement of the Supreme Court in ***Sarla Verma (Smt) & Others Vs. Delhi Transport Corporation & Another, 2009 (6) SCC 121,*** 1/4 is to be deducted towards the personal and living expenses of the deceased.

24. It has already been held that the deceased was 32 years old. The deceased was self-employed. The accident took place in 2004, therefore in light of the judgement of the Supreme Court in ***National Insurance Company Ltd. Vs. Pranay Sethi & Others, (2017) 16 SCC 680,*** 40% shall be added as future prospects to the income of the deceased while determining the multiplicand and in light of the judgement of the Supreme Court in ***Sarla Verma (Supra),*** a multiplier of 16 is to be applied while quantifying the total pecuniary damages payable to the claimants.

25. In addition to the aforesaid, in light of the judgement of the Supreme Court in ***Pranay Sethi (Supra)*** and ***Magma General Insurance Company Ltd. vs. Nanu Ram, (2018) SCC OnLine SC 1546,*** the claimants are also entitled to compensation for loss of estate and for funeral expenses as well as separate compensation for loss of consortium, i.e., the appellant No. 1 is entitled to loss of spousal consortium and appellant Nos. 2 to 7 are entitled to loss of parental consortium.

26. In light of the aforesaid principles, the compensation payable to the claimants is computed as below :-

(a) Notional Income of the deceased Rs. 3,000/- per month, i.e., Rs. 36,000/- per annum.

(b) Deductions towards personal expenses of the deceased (1/4 of her income) = Rs. 9,000/-.

(c) The income of the deceased for determining compensation= Rs. 27,000/-.

(Rs. 36,000 - Rs. 9,000 = Rs. 27,000/-)

(d) Addition of 40% future prospects to the income of the deceased :- Rs. 27,000÷100 x 40 = Rs. 10,800/-.

(e) Thus, the multiplicand= Rs. 27,000+10,800= Rs. 37,800/-.

(f) Applying a multiplier of 16, the total amount of pecuniary damages = Rs. 37,800 x 16 = Rs. 6,04,800/-.

(g) Loss of spousal consortium to appellant No. 1= Rs. 40,000/-.

(h) Loss of parental consortium to appellant Nos. 2 to 7=

Rs. 40,000 x 6 = 2,40,000/- (Rs. 40,000/- each to appellant Nos. 2 to 7)

(i) Funeral Expenses = Rs. 15,000/-

(j) Loss of Estate = Rs. 15,000/-

Thus, the total compensation payable to the appellant= **Rs. 9,14,800/- .(f+g+h+i+j).**

The aforesaid compensation shall bear interest at the rate of 7% per annum from the date of filing the claim petition till the date of actual payment by the Insurance Company.

27. Thus, it is held that the claimants are entitled to a compensation of **Rs. 9,14,800/-** with 7% simple interest per annum from the date of filing the petition till the date of actual payment by the Insurance Company.

28. The appellant No. 1 would be paid the compensation awarded for Funeral Expenses, Loss of Estate and Loss of Spousal Consortium with the interest accruing on the same. Appellant Nos. 2 to 7 would be paid compensation awarded to them for Loss of Parental Consortium with the interest accruing on the same. Pecuniary damages of Rs. 6,04,800/- quantified above alongwith the interest accruing on the same shall be divided equally between the appellant Nos. 2 to 7.

29. The opposite party No. 3, i.e., National Insurance Company Limited, Shahjahanpur shall deposit the awarded amount (including the interest) in the Motor Accident Claims Tribunal, Shahjahanpur within three months from today. The amount so deposited by the National Insurance Company Limited, Shahjahanpur shall be deposited by the Motor Accident Claims Tribunal, Shahjahanpur 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 appellants 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 appellants. The concerned bank or post office shall not permit any loan or advance against the fixed deposits made in favour of the appellants. 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 opposite party No. 3 fails to deposit the awarded amount within three months from today, the Tribunal shall recover the same in accordance with law.

30. With the aforesaid directions and observations, the appeal is **allowed.** Parties shall bear their own cost.

31. Office shall transmit the records of the case to the Tribunal, at the earliest.

(2022)05ILR A325
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.05.2022

BEFORE

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

First Appeal From Order No. 3139 of 2016

Amit Srivastava ...Appellant
Versus
Managing Director U.P.S.R.T.C. & Ors. ...Respondents

Counsel for the Appellants:
Sri Adil Jamal

Counsel for the Resondents:
Sri Vivek Saran

A. Civil Law - Motor Accident Act, 1988 – Claim – Determination of compensation – Claimant's leg got shortened and he became 80% disabled due to grievous injuries in his leg received in the accident – Admittedly the claimant was a MBA student and he had potential to earn good amount of money after getting his course completed – High Court held the income of the claimant at least Rs. 10,000 per month and accordingly re-computed the compensation applying multiplier of 18 and awarded 7.5% interest – Basanti Devi's case and Mannat Johal's case relied upon. (Para 10, 15 and 19)

B. Civil Law - Income Tax Act, 1961 – Section 194A (3) (ix) – Withdraw of

amount of interest – Certificate of Income Tax authority, when required – Held, if the interest payable to any claimant for any financial year exceeds Rs. 50,000/-, insurance Co./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. (Para 17)

Appeal partly allowed. (E-1)

List of Cases cited:-

1. Syed Sadiq etc Vs Divisional Manager, United India Insurance Co.; 2014 Law Suit (SC) 27

2. Jithendran Vs New India Assurance Co. Ltd. & anr.; 2021 0 Supreme (SC) 644

3. Pradeep Kumar Tripathi Vs Satish Kumar & ors. 2017 0 Supreme (All) 1661

4. Gangu Ram Vs Rishi Pal & anr., 2018 LawSuit (All) 3762

5. Oriental Insurence Co. Ltd. Vs Meena Variyal & ors. 2007(2) T.A.C. 417 (SC)

6. Meena Pawaia & ors. Vs Ashraf Ali & ors, 2021; Law Suit (SC) 743

7. Civil Appeal Nos. 7435-7436 of 2021; Basanti Devi & anr. Vs Divisional Manager, The New India Assurance Co. Ltd. & ors.

8. Kajal Vs Jagdish Chand; 2020 (0) AIJEL-SC 65725

9. Raj Kumar Vs Ajay Kumar; (2011) 1 SCC 343

10. Sanjay Kumar Vs Ashok Kumar & anr.; (2014) 5 SCC 330

11. Syed Sadiq & ors. Vs Divisional Manager, United India Insurance Co. Ltd.; (2014) 2 SCC 735

12. V. Mekela Vs M. Malathi & anr.; (2014) 11 SCC 178

13. Har Babu Vs Amrit Lal & ors. 2019 (2) T.A.C. 718 (AI)

14. A.V.Padma Vs Venugopal; 2012 (1) GLH 6 (SC), 442

15. Smt. Hansaguri P. Ladhani Vs The Oriental Insurance Co. Ltd.; 2007(2) GLH 291

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

(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 respondent.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 06.07.2016 passed by Motor Accident Claims Tribunal/II Additional District Judge, Banda (hereinafter referred to as 'Tribunal') in Motor Accident Claim Petition No.210 of 2014 awarding a sum of Rs.2,80,000/- with interest at the rate of 7% p.a. as compensation.

3. The brief facts as culled out from the record are that on 29/30.6.2011 at around 01:50 A.M., the petitioner was travelling in Bus No. UP 11 T 2707 from Haridwar to Delhi, when the bus reached near Engineering College at Haridwar, Roorkee Road, being driven rashly and negligently by its driver dashed into a stationary truck. In this accident, the petitioner/appellant sustained grievous injuries due to which he became disabled to the tune of 80%. The appellant was a student of MBA and earning Rs.25,000/- p.m.

4. Aggrieved by the impugned judgment appellants has preferred this appeal.

5. The accident is not in dispute. It is also not in dispute that at the time of accident the offending bus was owned by U.P.S.R.T.C. and the driver of the bus was having a valid and effecting driving licence. It is also not in dispute that the bus was being plied on the road with all necessary documents. Hence only the issue of quantum of compensation is to be decided by this Court.

6. Learned counsel for appellant submitted that a very meagre amount is awarded by learned tribunal. Learned counsel submitted that at the time of accident, the appellant was studying in MBA Course. In this accident, due to grievous injuries in his leg, the leg got shortened and the appellant became 80% disabled as per the medical certificate. Learned counsel submitted that if it would not have happened then the appellant could earn at least Rs.25,000/- per month, after completing his study. But learned tribunal did not consider this fact and assumed his income only Rs.3,000/- per month. The appellant is a student of B.Com (Pass) and was doing MBA from a reputed Institution in Dehradun. It is next submitted by learned counsel that due to shortening of leg, appellant is not able to walk freely and he is not able to do his daily routine works properly and his career prospective are also adversely affected due to disability. Learned counsel did not consider all this facts. It is vehemently submitted that the medical board has issued disability certificate to the tune of 80% but the learned tribunal has considered the disability to the tune of 40% only which is not just and proper. Learned counsel for the appellant has relied on the decisions in (i) ***Syed Sadiq etc v. Divisional Manager, United India Insurance Co. 2014 LawSuit (SC) 27; (ii) Jithendran v. New India Assurance Co. Ltd. and anr., 2021 0 Supreme (SC) 644; (iii) Pradeep Kumar Tripathi v. Satish Kumar and others, 2017 0 Supreme (All) 1661; and (iv) Gangu Ram v. Rishi Pal & Another, 2018 LawSuit (All) 3762,*** to contend that the tribunal has not granted just compensation. The calculation given by the tribunal is not fathomed by this Court as two how for reduction of 1 inch of lower limb the tribunal has awarded such meagre compensation is granted by the tribunal. The appellant sustained serious injuries which has caused not only physical impairment but lot of mental trauma.

7. Learned counsel for the Insurance Company objected to the submissions made by appellant and submitted that at the time of accident, he was a student, there is no evidence on record that he was earning any amount. Hence, in absence of any evidence to earnings, the learned tribunal has rightly assessed the income of the appellant at Rs.3,000/- per month. It is also submitted that future loss of income has to be considered by the tribunal and grant of multiplier of 18 does not require alteration. It is submitted that there is no illegality and infirmity in the impugned judgment which calls for any interference by this Court.

8. It is an admitted fact that at the time of accident, the appellant was a student of MBA Course and he was also a Commerce Graduate. The educational qualification of the appellant goes to show that he had potential to earn good amount of money after getting his course completed. It is averred in claim petition that the appellant was doing MBA Course from an Institute in Dehradun.

9. This above fact is not controverted by the insurance company. Keeping in view

the judgment of the Apex Court recently in ***Oriental Insurence Company Limited Versus Meena Variyal and others, 2007(2) T.A.C. 417 (SC)*** and as per judgment in ***Meena Pawaia & ors. Vs. Ashraf Ali & ors, 2021 LawSuit (SC) 743*** it is held that potentiality to earn should be kept in mind by the tribunal at the time of assessing the income of the injured/deceased.

10. The educational qualifications and family background have also to be taken into consideration. The Apex Court in ***Basanti Devi and another v. Divisional Manager, The New India Assurance Company Ltd. and others., Civil Appeal Nos.7435-7436 of 2021*** has held this. Hence with regard to the educational qualifications and potentiality of the appellant to earn after getting the course of MBA completed, we hold the income of the appellant would be at least Rs.10,000/- per month in the year of accident. Appellant sustained grievous injuries in the accident. Hon'ble Apex Court in case titled ***Kajal Vs. Jagdish Chand reported in 2020 (0) AIJEL-SC 65725*** has quoted the law laid down in ***Raj Kumar v. Ajay Kumar (2011) 1 SCC 343*** in which it is held as below:-

"16. In Raj Kumar v. Ajay Kumar and Others7, *this Court laid down the heads under which compensation is to be awarded for personal injuries.*

"6. The heads under which compensation is awarded in personal injury cases are the following:

Pecuniary damages (Special damages)

(i)Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Nonpecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii) (a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life."

11. It is also submitted that the amount under the non-pecuniary heads and the interest awarded are also on the lower side and requires to be enhanced in view of the following authoritative pronouncements:

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

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

(iii) ***V. Mekela v. M. Malathi and another, (2014) 11 SCC 178; and***

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

(v) ***Har Babu v. Amrit Lal and others, 2019 (2) T.A.C. 718 (AI),*** *these judgments will also strengthen our view that 25% should be add as future loss of income.*

12. Appellant sustained severe injuries in lower part of his right leg and the leg got shortened. Medical board under Chief Medical Officer, Banda had issued disability certificate to the tune of 80% for particular part of body. Appellant was the student of MBA, he was not doing such type of work so as to affect his functional disability to the tune of 80%. The learned Tribunal has assessed his functional disability to the tune of 40% which is just and proper, hence we maintain it being his whole body functional disability.

13. As far as the medical bills of the appellant are concerned, only the photocopies of medical bills are filed on record and it is fairly submitted by learned counsel for appellant before the tribunal that original medical bills were submitted in U.P. Gram Panchayat for that he has received the payment from the Bank. Hence, the learned Tribunal has rightly refused to make the payment of medical bills.

14. The tribunal has awarded Rs.10,000/- for pain and suffering which are on the lower side, hence the appellant shall be entitled to Rs.50,000/- for pain, shock and suffering. Learned tribunal has awarded Rs.10,000/- for special diet and transportation which we maintain. The tribunal has not awarded any sum for loss of amenities. When the appellant has got his right leg shortened and sustained 40% functional disability, he would have certainly lost some amenities in life for which we grant Rs.50,000/-

15. On the basis of above discussions, the amount of compensation payable to the appellant is computed herein-below.

i. Annual Income : Rs.1,20,000/-

ii. Percentage towards future prospects : 40% which would be Rs.48,000/-

iii. Total income (i+ii) : Rs.1,68,000/-

iv. Multiplier applicable : 18

v. Loss of dependency: (Rs.168,000 x 18)=Rs.30,24,000/-

vi. Permanent disability at the rate of 40% = Rs.12,09,600/-

vii. For pain, shock and suffering : Rs.50,000/-

viii. For Special diet : Rs.10,000/-

ix. For loss of amenities : Rs.50,000/-

x. For all other non pecuniary damages : Rs.80,000/-

xi. Total compensation (vi+vii+viii+ix+x) : **Rs.14,00,000/-** (in rounded figure)

16. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of ***A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH 6 (SC), 442,*** the order of investment is not passed because applicants /claimants are neither illiterate nor rustic villagers.

17. 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.

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 judgment of **A.V. Padma (supra).** The same is to be applied looking to the facts of each case.

19. 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."

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-UPSRTC 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.

21. 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.

22. 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.

23. We are thankful to learned counsels for the parties for ably assisting this court in getting this old appeal disposed of.

24. Record be sent back to tribunal below forthwith.

(2022)05ILR A331
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.04.2022

BEFORE

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

First Appeal From Order No. 3806 of 2007

Smt. Seema Devi & Ors. ...Appellants
Versus
Haribansh & Ors. ...Respondents

Counsel for the Appellants:
Sri Hari Pratap Gupta

Counsel for the Resondents:
Sri Ankur Mehrotra

A. Civil Law - Motor Accident Act, 1988 – Compensation – Rash and negligent driving – 24 years old deceased was an electrician – Tribunal applied the multiplier of 17 – Validity challenged – High Court re-computed the compensation by adding 40% future prospect and applying multiplier of 18 – Pranay Sethi's case relied upon. (Para 7 and 10)

B. Civil Law - Income Tax Act, 1961 – Section 194A (3) (ix) – Withdraw of amount of interest – Certificate of Income Tax authority, when required – Held, if the interest payable to any claimant for any financial year exceeds Rs. 50,000/-, insurance Co./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 – But 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. (Para 12)

Appeal partly allowed (E-1)

List of Cases cited:-

1. Smt. Meena Pawaia & ors. Vs Ashraf Ali & ors. 2021 0 Supreme (SC) 694

2. Sarla Verma Vs Delhi Transport Corp.; (2009) 6 SCC 121

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

4. Kurvan Ansari @ Kurvan Ali & anr. Vs Shyam Kishore Murmu & anr.; 2021 (4) TAC 673

5. Smt. Meena Pawaia & ors. Vs Ashraf Ali & ors. 2021 0 Supreme (SC) 694, Basanti Devi and Kurvan

6. Ansari @ Kurvan Ali & anr. Vs Shyam Kishore Murmu & anr.; 2021 (4) TAC 673

7. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Co. Ltd. [2007(2) GLH 291]

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

9. First Appeal From Order No. 2871 of 2016; Tej Kumari Sharma VsChola Mandlam M.S. General Insurance Co. Ltd. decided on 19.3.2021

10. Bajaj Allianz General Insurance Co. Pvt. Ltd. Vs U.O.I. & ors. decided by the Apex Court on 27.1.2022

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

1. This appeal has been preferred by the claimants-appellants against the judgement and award passed by Motor Accident Claims Tribunal/ Additional

District Judge, Court No.5 Gorakhpur dated 15.09.2007 in MACP No.729 of 2016 (Smt. Seema and others Vs. Haribansh and others), by which the Tribunal has awarded compensation Rs.1,89,500/- with interest at the rate of 6% per annum.

2. The brief facts of the case are that claimants-appellants filed a claim petition before the Tribunal seeking compensation under Motor Vehicle Act, 1988 for the death of Ajit Kumar (deceased) in a road accident with the averments that on 7.10.2005 at about 6:30 pm, the deceased was travelling from Gorakhpur Shahar to his house Semuapar in tempo bearing No.UP 53 L 9090. The driver of the aforesaid tempo was driving the vehicle very rashly and negligently and at a very high speed, all of sudden, a vehicle came on the way. The driver had lost his control over the steering of the vehicle and dashed with the tree. In this accident, the deceased sustained serious injuries and died on 08.10.2005.

3. Heard Shri Hari Pratap Gupta, learned counsel for the appellants and Shri Ankur Melhotra, learned counsel for the Insurance Company. However, none is present for respondent owner and driver.

4. The owner's presence is not necessary as the Insurance Company has already deposited the amount awarded by the Tribunal. They have acquiesced to the award. Which means that they have accepted that accident took place on 07.10.2005 and Ajeet Kumar, who was 24 years of age, died out of vehicular injuries. The claimants filed claim petition claiming that the deceased was a trained electrician, who left behind his widow of 22 years and parents who were totally dependent on him of age 52 and 48 years.

5. It is submitted that in the year 2005, deceased was trained electrician, the Tribunal took the income as mentioned for notional income under the second schedule, which according to learned counsel for the appellant could not have been done. That the accident occurred in the year 2005 and the decision was prior to the judgement of ***Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121,*** no amount towards future loss of income was granted. The Tribunal has deducted 1/3 for personal expenses of the deceased. The Tribunal granted multiplier of 17 and as the deceased did not die on the same day and was hospitalized, granted a sum of Rs.10,000/- for medical expenses and granted Rs.9,500/- under the non pecuniary damages. This amount of Rs.1,89,500/- was to be paid by the respondents jointly and severally with 6% interest. It is this compensation which has aggrieved the appellants.

6. It is submitted by learned counsel for the appellants that the Apex Court in **Smt. Meena Pawaia & others Vs. Ashraf Ali and others 2021 0 Supreme (SC) 694** has held that the Tribunals are supposed to consider the potential of a person to earn and a recent judgement of the Apex Court under Section 163A for the death of child of seven years in the year 2004 has held that his notional income should be Rs.25,000/- per annum. In our case, the deceased was a trained electrician and was running his business as a vocation of electrician and, therefore, we consider his income to be Rs.3000/- per month. It is requested that the amount be considered to be Rs.3000/- per month. It is submitted by learned counsel for the appellants that even in the year of accident the Apex Court had held that future loss of income would be

admissible, therefore, he claims as 40% of said amount.

7. As far as deduction for personal expenses is concerned, there is no dispute between the parties. As far as the multiplier of 17 is concerned, there is a dispute and it should be 18 according to the learned counsel for the appellants as the Tribunal has applied multiplier as per for the schedule, the schedule, according to the counsel, is now re-visited in ***Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121*** Judgement and hence, according to him, the multiplier should be 18. It is submitted that the medical expenses as granted may not be enhanced as there are no vouchers, which show that the amount granted Rs.10,000/- was paid. As far as non pecuniary damages are concerned, it is submitted that this Court may consider the judgement of **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050 and Kurvan Ansari @ Kurvan Ali and another Vs. Shyam Kishore Murmu and another, 2021 (4) TAC 673** (Supreme Court).

8. As against this, learned counsel Shri Ankur Mehrotra, appearing for insurance company has submitted that the Tribunal in the year 2005 has rightly considered the annual income to Rs.15,000/- per annum as there is no documentary evidence was produced. The evidence of PWs-1 & 2 also did not lay down any foundation that income was more than Rs.15,000/- per annum. It is further submitted that in the year of accident the prospective income were not to be considered as Uttar Pradesh Motor Vehicle rules, 1998 was silent and amended them in the year 2011. They cannot be retrospectively made effective and as far as multiplier is concerned, the learned counsel states that as per the judgement in Sarla Verma (supra). As far as rate of interest is concerned, learned counsel states that the matter is remain pending before this Court may consider grant of interest as per the repo rates.

9. We have heard learned counsel for the parties in view of the three latest decision of the Apex Court mentioned herein above namely, **Smt. Meena Pawaia & others Vs. Ashraf Ali and others 2021 0 Supreme (SC) 694, Basanti Devi and Kurvan Ansari @ Kurvan Ali and another Vs. Shyam Kishore Murmu and another, 2021 (4) TAC 673** (Supreme Court) case wherein the Apex Court has considered the notional income of a minor of seven years in the year 2004 to be Rs.25,000/- per annum. We consider the income of Rs.36,000/- per annum plus 40%. We are relying on the judgement of Pranay Sethi (supra) that it is made applicable retrospectively also and 1/3 would be deducted. The multiplier would be 18. We grant lump-sum Rs.70,000/- as per Pranay Sethi (supra) judgement plus as five years have elapsed the income 10% for every three year. Hence, we round up Rs.30,000/-. As it has been rightly pointed out by the learned counsel for the insurance company that they have conciliated therefore, rate of interest is not enhanced, should be also 6%. rate of interest.

10. Hence, the total compensation, in view of the above discussions, payable to the appellants-claimants is being computed herein below:

i.	Annual Income	Rs.3,000/- x 12	Rs.36,000/-
ii.	Percenta	Rs.36,000 /- x	Rs.14,400/

	ge towards Future-Prospects (40%)	40%	-
iii.	Total Income	Rs. 36,000 /- + Rs.14,400/-	Rs.50,400/-
iv.	Income after deduction of 1/3	Rs.50,400/- - Rs.16,800/-	Rs.33,600/-
v.	Multiplier applicable	18	
vi.	Loss of dependency	Rs.33,600/- x 18	Rs.6,04,800/-
vii.	Amount under Non-pecuniary Heads	Rs.30,000/- +Rs.70,000/-	Rs.1,00,000/-
ix.	**Total Compensation**	Rs.6,04,800/- +Rs.1,00,000/-	**Rs.7,04,000/-**

11. 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 insurance company shall deposit the additional amount within a period of 12 weeks from today with interest at the rate of 6% 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.

12. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of ***Smt. Hansagori P. Ladhani vs. The Oriental Insurance Company Ltd.,*** *[2007(2) GLH 291]* and this High Court if 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 any 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 but 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.

13. The Tribunal shall follow the guidelines issued by the Hon'ble Apex Court in ***Bajaj Allianz General Insurance Company Privae Ltd. vs. 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. Since long time has elapsed, the amount be deposited in the Saving Bank Account of claimant(s) in a nationalized Bank.

(2022)05ILR A335
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.03.2022

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Civil Misc. Writ Petition (PIL) No. 97 of 2019

Shailesh Kumar Mishra ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Jai Shanker Misra, Sri Vijai Shanker Shukla

Counsel for the Respondents:
C.S.C.

(A) Land Law - The U.P. Revenue Code, 2006 - Section 234(3) - U.P. Land Record Manual - manner and procedure to maintain the land records - in force on the date of commencement of the Revenue Code, 2006 - shall continue to remain in force - to the extent they are not inconsistent with the provisions of the Revenue Code, 2006 until amended rescinded or repealed by any regulations made under this Section - The Revenue Code Rules, 2016 - only a person who has suffered from some legal injury can challenge the Act/orders/Rules etc. in a Court of law - rule of locus standi in PIL - no rigid litmus test - Courts are empowered to examine the case on settled parameters - dominant object of PIL - to ensure the observance of the provisions of the Constitution or the Law, which can be best achieved to advance the cause of a community or disadvantaged groups. (Para -9,19)

(B) PIL- "Public Interest" - Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected - does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question - Interest shared by citizens generally in affairs of local, State or national Government. (Para -10,11)

(C) PIL - Public interest litigation is a weapon - to be used with great care and circumspection - judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking - used as an effective weapon in the armory of law for delivering social justice to the citizens - aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta.(Para - 14,15)

Petition filed - declaring the U.P. Land Record Manual as ultra-vires the U.P. Revenue Code, 2006, and the Revenue Code Rules, 2016

HELD:-Petition non maintainabe in view of the fact that Section 234(3) of the U.P. Revenue Code, 2006, itself takes care of the inconsistency of the Land Record Manual and upholds it only to the extent it is not inconsistent with the provisions of the Revenue Code, 2006.**(Para -20)**

Petition dismissed. (E-7)

List of Cases cited:-

1. Janata Dal Vs H.S. Chowdhary & ors., (1992) 4 SCC 305

2. Ashok Kumar Pandey Vs St. of W.B., 2004 (3) SCC 349

3. BALCO Employees Union (Regd) Vs U.O.I. & rs., (2002) 2 SCC 333

4. Guruvayoor Devaswom Managing Committee & anr. Vs C.K. Rajan & ors. ,(2003) 7 SCC 546

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

1. This writ petition styled as a PIL has been filed for declaring the U.P. Land Record Manual as untra-vires the U.P. Revenue Code, 2006, and the Revenue Code Rules, 2016. Although the prayer made in the writ (PIL) is not so specific but from the tenor of the petition it is borne out that the petitioner seeks the aforesaid relief. We however quote the reliefs claimed in the petition which are as under:-

"1. Issue a writ order or direction in the nature of Certiorari declaring U.P. Land Record Manual as ultra-virus (deliberately misspelt to reproduce as it appears in the petition)

issue a writ order or direction in the nature of Mandamus commanding the respondents to make new U.P. Land Record Manual as per provisions of the U.P. Revenue Code 2006 or amend Para ka-124 of U.P. Land Record Manual in accordance with the class of the tenure as defined in U.P. Revenue Code 2006.

issue any other writ order or direction which the Hon'ble Court may deem fit and proper under the facts and circumstances of the case."

2. It is contended on behalf of the petitioner that he is a social worker and farmer and takes active part in the social work and espouses the cause of poor villagers and farmers and has no personal interest in filing the present PIL petition which is being filed for the benefit of the villagers and public at large. It is contended that the instant petition raises the issue for the general interest of the public as U.P. Land Record Manual is an old Manual and is not according to U.P. Revenue Code, 2006.

3. Before dealing with the plea as raised in the writ PIL, it would be apposite to briefly state about the U.P. Land Record Manual and the U.P. Revenue Code, 2006 as also the Revenue Code Rules, 2016 framed thereunder.

4. The U.P. Land Record Manual is a collection of Rules framed under Section 234 of the Land Revenue Act, 1901 as well as instructions issued by the State Government in relation to various matters. Chapter -V of Part-I of the Manual relates to the map and *Khasra*, Chapter VIII deals with the *Khatauni*. The preface to the Manual shows that Chapters III to XI of Part-I of the Manual have been framed under Clause (d) of Section 234 of the Land Revenue Act, 1901. Thus the rules contained in Chapter V and VIII of the Manual are statutory Rules made under Section 234. Chapter-V dealing, inter alia, with *Khasra* consists of paras 55 to 102. Chapter VIII relates to *Khatauni* and consists of paras 121 to 160. Para 60 provides that *Khasra* shall be prepared in Form No. P-3. Form No. P-3 consists of 21 columns. Column- 5 is meant for the name of the cultivator. In Column No.6 are to be entered the names of sub-tenants or tenants of sir, or tenants of permanent tenure-holders, or rent free grantees, or grantees at a favourable rate of rent or occupier of land without the consent of the persons entitled to admit such sub-tenants. Column No.21 is the remark column. Para 71 provides for the entry in Column No.5. It is not only the name of the cultivator but also the "nature of his rights' i.e. the class of his tenure and where necessary, the term of cultivation, have to be entered. These entries are to be made in accordance with paras 72 to 86, 124 and 124-A and 126 to 129 as the case may be. Paras 124 to 129 are in Chapter VIII dealing with *Khatauni*. In substance the U.P. Land Record Manual provides the rules and procedures for preparation and maintenance of Land Records.

5. The U.P. Revenue Code, 2006 (U.P. Act No.8 of 2012) has been promulgated to consolidate and amend the law relating to land tenures and land revenue in the State of Uttar Pradesh and to provide for matters connected therewith and incidental thereto. There were as many as 39 Acts relating to revenue law enforced in the State of U.P. Out of these Acts, the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 and the U.P. Land Revenue Act, 1901, are the most prominent. The aforesaid Acts have been amalgamated in the U.P. Revenue Code after repealing them. In the First Schedule 32 Acts have been mentioned which have been repealed. Other repealed Acts are such which have either lost their efficacy or were operating in small areas of the State. Most of the provisions of the U.P. Zamindari Abolition and Land Reforms Act, 1950 and U.P. Land Revenue Act, 1901 have been re-enacted in the Code. Section 234(3) of the U.P. Revenue Code, 2006, provides that the Revenue Court Manual and the Land Record Manual in force on the date of commencement of the Code shall continue to remain in force until amended, rescinded or repealed by any regulations made under the section.

6. Now comes the question as to whether the constitutional validity of the provisions of the U.P Land Record Manual can be questioned in a writ petition styled as a Public Interest Litigation.

7. The counsel for the respondents in opposition to the petition contends that the vires of the U.P. Land Record Manual cannot be challenged/questioned in a writ petition styled as Public Interest Litigation. A counter affidavit has been filed on behalf of respondents No. 1 & 2 sworn by Sri Vishram s/o Raja Ram posted as OSD, Board of Revenue, U.P., Allahabad wherein a categorical stand has been taken that the provisions of an enactment can be struck down as ultra-vires only on two grounds (i) due to lack of legislative competence; or (ii) violation of any of the fundamental rights of any other constitutional provision. The petitioner has failed to establish that the relevant provisions which the petitioner is alleging to be ultra-vires are actually violative to any fundamental rights as envisaged under Article-14 of the Constitution of India or there is lack of legislative competence. Reliance is also placed upon Article 372 of the Constitution of India.

8. It is for the petitioner to satisfy the Court about the maintainability of the petition which is styled as a PIL. The petitioner in the instant case is not espousing his own cause, but is seeking a relief for declaring U.P. Land Record Manual as ultra-vires the U.P. Revenue Code, 2006. In the entire petition we do not find a single word which could convey that the petitioner is a person who is directly aggrieved. The maintainability of the petition requires close examination though it is styled as a Public Interest Litigation.

9. We are of the opinion that only a person who has suffered from some legal injury can challenge the Act/orders/Rules etc. in a Court of law. Writ petition under Article 226 of the Constitution of India is maintainable for the purpose of enforcing a statutory or legal right, where there is a complaint of breach of statutory duty on the part of the Authorities. The rule of locus standi in PIL requires no rigid litmus test but Courts are empowered to examine the case on settled parameters. The dominant object of PIL is to ensure the observance of the provisions of the Constitution or the

Law, which can be best achieved to advance the cause of a community or disadvantaged groups.

10. In Stroud's Judicial Dictionary (fifth Edition) "Public Interest' is defined as "A matter of public or general interest" does not mean that which is interesting as gratifying curiosity or a love of information or amusement; but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected...."

11. In Black's Law Dictionary (6th Edition) "Public Interest" is defined as "Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, State or national Government."

12. The concept of PIL initially surfaced in the year 1976 in our Country. After germination of the seeds of concept of PIL in the soil of our judicial system this Rule of PIL was nourished, nurtured and developed by the Apex Court in series of decisions. The traditional syntax of law in regard to locus standi for a specific judicial redress, has been relaxed to achieve the avowed purpose. The recognition for departing with the strict rule of locus standi was to echo the voice of downtrodden or poor who are unable to approach the Court for one reason or the other. Gradually, the Courts have perceived, misuse of Public Interest Litigation, hence, examination of the bonafides of petitioner has become an order of the day.

13. The Supreme Court in the case of **Janata Dal vs. H.S. Chowdhary and others,** reported in **(1992) 4 SCC 305** observed as under:-

*"**98.** While this Court has laid down a chain of notable decisions with all emphasis at their command about the importance and significance of this newly-developed doctrine of PIL, it has also hastened to sound a red alert and a note of severe warning that courts should not allow its process to be abused by a mere busybody or a meddlesome interloper or wayfarer or officious intervener without any interest or concern except for personal gain or private profit or other oblique consideration."*

14. Undisputedly, PIL is a weapon which has to be used with great care and circumspection and Courts have to be extremely careful to see that behind a beautiful veil of Public Interest, whether any private malice, vested interest or publicity stunt is lurking. Basically, PIL should be aimed at redressal of public wrong or public injury. The approach of court is to make differentia in between bonafide cause raised for the benefit of public or it is nothing but for oblique consideration. The Court must not allow its process to be abused for oblique consequences. In such proceedings voluminous time of the Court is consumed which time otherwise could have been spent for the disposal of cases in genuine litigation.

15. It would not be out of place to quote the observation of the Supreme Court in the case of **Ashok Kumar Pandey Vs. State of West Bengal**, reported in **2004 (3) SCC 349** which is as under:-

"12. Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fide and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.

14.....In such case, however, the Court cannot afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature. The Court has to act ruthlessly while dealing with imposters and busy bodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of Pro Bono Publico, though they have no interest of the public or even of their own to protect."

16. Further, the Hon'ble Supreme Court in case of **BALCO Employees Union (Regd) Vs. Union of India and others,** reported in **(2002) 2 SCC 333**, observed as under:-

"78. While PIL initially was invoked mostly in cases connected with the relief to the people and the weaker sections of the society and in areas where there was violation of human rights under Article 21, but with the passage of time, petitions have been entertained in other spheres. Prof. S.B. Sathe has summarised the extent of the jurisdiction which has now been exercised in following words :-

"PIL may, therefore, be described as satisfying one or more of the following parameters. These are not exclusive but merely descriptive:

Where the concerns underlying a petition are not individualist but are shared widely by a large number of people (bonded labour, undertrial prisoners, prison inmates).

Where the affected persons belong to the disadvantaged sections of society (women, children, bonded labour, unorganised labour etc.).

Where judicial law making is necessary to avoid exploitation (inter-country adoption, the education of the children of the prostitutes).

Where judicial intervention is necessary for the protection of the sanctity of democratic institutions(independence of the judiciary, existence of grievances redressal forums).

Where administrative decisions related to development are harmful to the environment and jeopardize people's to natural resources such as air or water".

79. There is, in recent years, a feeling which is not without any foundation that Public Interest Litigation is now tending to become publicity interest litigation or private interest litigation and has a tendency to be counter-productive.

80. PIL is not a pill or a panacea for all wrongs. It was essentially meant to protect basic human rights of the weak and the disadvantaged and was a procedure which was innovated where a public spirited person files a petition in effect on behalf of such persons who on account of poverty, helplessness or economic and social disabilities could not approach the Court for relief. There have been, in recent times, increasingly instances of abuse of PIL. Therefore, there is a need to re-emphasize the parameters within which PIL can be resorted to by a Petitioner and entertained by the Court. This aspect has come up for consideration before this Court and all we need to do is to recapitulate and re-emphasize the same."

17. Again in the case of **Janata Dal (supra)** the Hon'ble Supreme Court opined as under:-

"109. It is thus clear that only a person acting bona fide and having sufficient interest in the proceeding of PIL will alone have a locus standi and can approach the Court to wipe out the tears of the poor and needy, suffering from violation of their fundamental rights, but not a person for personal gain or private profit or political motive or any oblique consideration. Similarly, a vexatious petition under the colour of PIL brought before the court for vindicating any personal grievance, deserves rejection at the threshold."

18. The Hon'ble Supreme Court, in the case of **Guruvayoor Devaswom Managing Committee and another Vs. C.K. Rajan and others** reported in **(2003) 7 SCC 546,** took survey of various decisions in the filed and summarized the position in Para 50 of the judgment. One of the principles which the Hon'ble Supreme Court noted, is reproduced here in below:-

" 50*(i)*. *The Court in exercise of powers under Article 32 and Article 226 of the Constitution of India can entertain a petition filed by any interested person in the welfare of the people who is in a disadvantaged position and, thus, not in a position to knock the doors of the Court.*

The Court is constitutionally bound to protect the fundamental rights of such disadvantaged people so as to direct the State to fulfill its constitutional promises. (See S.P. Gupta Vs. Union of India [1981 (supp) SCC 87], People's Union for Democratic Rights and Others Vs. Union of India (1982) 2 SCC 494, Bandhua Mukti Morcha Vs. Union of India and Others (1984) 3 SCC 161 and Janata Dal Vs. H.S. Chowdhary and Others (1992) 4 SCC 305)

(ii) Issues of public importance, enforcement of fundamental rights of large number of public vis-Ã -vis the constitutional duties and functions of the State, if raised, the Court treat a letter or a telegram as a public interest litigation upon relaxing procedural laws as also the law relating to pleadings. (See Charles Sobraj Vs. Supdt. Central Jail, Tihar, New Delhi (1978) 4 SCC 104 and Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar (1980) 1 SCC 81).

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(xi) ordinarily, the High Court should not entertain a writ petition by way

of public interest litigation questioning the constitutionality or validity of a statute or a Statutory Rule."

19. In the case at hand, we find that the U.P. Land Record Manual merely provides the manner and procedure to maintain the land records. Section 234(3) of the U.P. Revenue Code, 2006 provides that the Land Record Manual in force on the date of commencement of the Revenue Code, 2006, shall continue to remain in force, to the extent they are not inconsistent with the provisions of the Revenue Code, 2006 until amended rescinded or repealed by any regulations made under this Section.

20. In the wake of the above, we are not inclined to entertain the petition styled as PIL particularly in view of the fact that Section 234(3) of the U.P. Revenue Code, 2006, itself takes care of the inconsistency of the Land Record Manual and upholds it only to the extent it is not inconsistent with the provisions of the Revenue Code, 2006. We are of the opinion that this is not a fit case where PIL jurisdiction should be invoked or exercised.

21. Accordingly, we **dismiss** the petition on account of non maintainability by imposing cost assessed at Rs. 10,000/- to be deposited with the High Court Legal Services Committee, High Court, Allahabad, within 45 days from today, failing which the same shall be recovered from the petitioner as arrears of land revenue.

(2022)05ILR A341
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.05.2022

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ Tax No. 161 of 2013

M/s Indo Gulf Fertilisers Lucknow ...Revisionist

Versus

Commissioner of Commercial Taxes U.P. Lucknow ...Opposite Party

Counsel for the Revisionist:
Mudit Agarwal

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

A. Tax Law - The controversy in the present case pertains only to enhanced rate of nitrogen component in DAP as distinguished from enhanced rate of tax on nitrogen component. The Agriculture department has enhanced only the rate of nitrogen for the purpose of levying tax and did not bring any change in the rate of tax. However, the revisionist had collected the enhanced rate of DAP and consequently is lible tp pay tax on the enhanced rates which was so collected by him. (Para 15)

Revision Rejected. (E-10)

List of Cases cited:

M/s Ganesh International & anr. Vs Assistant Commissioner & ors. 2001 (18) NTN DX 43 *(distinguished)*

(Delivered by Hon'ble Alok Mathur, J.)

1. The controversy in the present revision is with regard to the rate of Trade Tax under the U. P. Trade Tax Act applicable for the Nitrogen component in the Chemical Fertilizer DAP (Di Ammonium Phosphate). The impugned Judgment of the Commercial Tax Tribunal, Lucknow Bench while rejecting the appeal preferred by the Revisionist held that the Nitrogen content in the DAP was rightly charged at the rate of Rs.1494.80 rather than Rs.1381.30 per metric ton in light of

the fact that the Government of India had enhanced the rates of DAP with effect from 29/01/1999, which would be the relevant date for implementation of the enhanced rate of Trade Tax.

2. The revisionist is engaged in the business of manufacturing of Chemical Fertilizer at its unit at Jagdishpur.

3. During the financial year 1999 - 2000 the assessment of the revisionist was carried out and the Assessing Authority assessed the Tax on sale of DAP on the value of Nitrogen content at the rate of Rs. 1490.80 per metric ton, calculated the Tax @6.5% there on.

4. The Revisionist being aggrieved by the said assessment preferred an appeal before the Deputy Commissioner (Appeal), Trade Tax, Lucknow which was dismissed by order dated 29/09/2001, and similar was the fate of the second appeal at the hands of the Commercial Tax Tribunal, Lucknow.

5. The Assessing authority, 1st Appellate Authority as well as the Commercial Tax Tribunal came to a concurrent finding that the Trade Tax levied upon the component of Nitrogen in DAP would be assessed treating the value of Nitrogen at Rs.1381.30 per metric ton was applicable with effect from 27/05/1998 but as soon as the rate of DAP was enhanced by the Government of India with effect from 29/01/1999 the revised/enhanced rates of Tax would be deemed to have come into force and the Nitrogen component in DAP would be valued at Rs. 1 494.80 per metric ton, and hence did not agree with the submissions of the revisionist.

6. The question which arises for determination in the present revision is :-

Whether the revision in the rate of Nitrogen content in DAP would be applicable from the date of enhancement of the rate of DAP by the Government of India with effect from 29 January, 1999 or from 26 February, 2000 when the same was notified by the State Government ?

7. To address the aforesaid proposition it is necessary to go into the various notifications governing the field with regard to levying of Trade Tax on the Fertilizer where Nitrogen is one of the components. According to the notification dated 27th May, 1998 passed in exercise of Clause [a] of Section 4 read with Section 25 of the Uttar Pradesh Trade Tax Act 1948 it was provided that no Tax under the said Act shall be payable on the sale of Potash and Phosphatic component of the Chemical Fertilizers during the period 1st April, 1998 to 31st March, 2000. It was also provided that the percentage of the different components of the Chemical Fertilizers shall be determined according to the guidelines issued by Department of Agriculture, Uttar Pradesh from time to time. In the same notification it is mentioned that the Department of Agriculture has determined the value of the Nitrogen component in DAP to be Rs.1381.30 per metric ton.

8. Further, the above notification also provided that the value of Nitrogen in DAP is liable to be taxed and the value of Nitrogen will be determined by the Agriculture Department which according to the notification dated 27.5.1988 was determined to be Rs.1381.30 per metric ton. It is noticed that the value of Nitrogen is also notified by the Trade Tax Department and taxed @ 6.5 per cent. The value of Nitrogen is also notified by the Trade Tax Department on the

recommendation of Agriculture Department, at par with their duty to determine the rate of Tax.

9. The revisionist started collecting Tax on the Nitrogen component of the DAP treating the value to be Rs.1381.30 and during the assessment years 1998-99, 1999-2000 and continued to charge and deposit the Tax at the said value. It is the proceedings for assessment for the assessment year 1999-2000 that the authority objected to the said determination and sought to assess the Nitrogen component @ Rs.1494.80 per metric ton.

10. The circular dated 26/02/2000 issued by the Commissioner Trade Tax referred the order dated 14/10/99 issued by the State Government stating that as per the notification of the Commissioner of Trade Tax dated 6 May, 1998, the Director (Agriculture) vide his letter dated 19/08/1999 has informed that the value of the Nitrogen component has changed and, therefore, the revised rates of the Nitrogen component in the Potash and Phosphate fertilizers are enhanced to Rs.1494.80 per metric ton.

11. There is no dispute with regard to facts in issue inasmuch as vide notification dated 27th May, 1998 the value of Nitrogen component in DAP was fixed at ₹1381.30. Subsequently the value of DAP was enhanced by the Union of India on 29/1/1999. The notification of the Commissioner, Trade Tax dated 26/02/2000 referred to the said enhancement of rate of DAP and consequent enhancement of value of the Nitrogen component in the DAP vide circular issued by the Department of Agriculture which was given wide circulation. There is no dispute that prior to notification dated 26/02/2000 the notification dated 27th May, 1998 was in existence.

12. It has been contended by the counsel for the revisionist that the notification dated 27.5.1998 held field till it was amended/modified by the subsequent notification related 26.02.2000. It is, therefore, contended that in absence of any valid law / notification there was no occasion for the opposite parties to deduct trade Tax at the enhanced rate of Rs.1494.80, and in case the Tax is deemed to have enhanced with effect from 14/10/1999 i.e. is the date of enhancement of the rates of DAP, the Tax could not have been enhanced retrospectively and consequently submitted that the assessment order, the order passed in first appeal as well as the impugned order of the Commercial Tax Tribunal are illegal and arbitrary and deserve to be set aside.

13. The Revenue, on the other hand, has submitted that once the rate of DAP was enhanced by the Government of India and the revisionist having recovered the enhanced rate of DAP, was bound to pay Tax at the enhanced rate and should have himself found out about the enhanced rate of Nitrogen component in DAP and has, therefore, supported by orders of the authorities below.

14. The notification dated 6th May, 1998 itself provided the percentage of different components of the Chemical Fertilizer shall be determined according to the guidelines issued by the Department of Agriculture from time to time and the Department of Agriculture had informed the Commercial Tax Department vide letter dated 08/05/1998 that value of the Nitrogen component in DAP would be ₹1381.30. In the meanwhile, the rate of the DAP was

enhanced by the Government of India by means of order dated 14/10/1999 but no order/notification was issued by the Commercial Tax Department or the Agricultural Department enhancing the rate of the Nitrogen component in DAP. The first appellate court as well as Commercial Tax Tribunal have both while disallowing the claim of the revisionist have held that at the moment the rate of DAP were enhanced by the Central Government vide its order dated 29.1.1999, the revisionist started collecting the enhanced rate.

15. It is also noticed that the controversy in the present case pertains only to enhanced rate of nitrogen component in DAP as distinguished from enhanced rate of tax on Nitrogen component which remained at 6.5 percent. It is not a case where there was any change in the rate of tax but only rate of nitrogen for the purpose of levying Trade Tax was enhanced by the Agriculture Department. Admittedly, the revisionist had collected the enhanced rate of DAP and consequently is liable to pay Tax on the enhanced rates which was so collected by him. The entire argument of the revisionist stating that the rate of tax would not have retrospective effect and relied upon the judgment of this Court in the case of ***M/S Ganesh International and Another vs Assistant Commissioner and others, 2001 (18) NTN DX 43.*** The said judgment would not be applicable to the facts of the present case as in the present case there was no change or enhancement in the rate of tax but only change in value of taxable goods.

16. No material has been placed by the revisionist before this Court to upset the concurrent finding of facts recorded by both the authorities below that the revisionist had collected the enhanced rate of DAP from the date of notification issued by Government of India. It is also noticed that vide its order dated 26.2.2000 the Commissioner, Trade Tax had circulated the letter of Government of India dated 14.10.1999 which fact was already within the knowledge of the revisionist, who is a dealer of DAP and the contention of the revisionist in this regard has not been accepted by the first appellate court as well as Commercial Tax Tribunal.

17. The revisionist having realized enhanced rate of DAP from 1999 when the rate was enhanced by the Government of India, he would be liable to pay Trade Tax at the enhanced rate of Nitrogen content in DAP. This finding recorded by the Tribunal has not been assailed by the revisionist. In case, the revisionist is allowed to pay Trade Tax the earlier rate of nitrogen component in DAP, it would amount to unjust enrichment and, therefore, even in this view of the matter the revision fails.

18. This Court in consideration of the aforesaid facts is of the considered opinion that no interference is required with the judgment of the Commercial Tax Tribunal that enhanced rate of nitrogen would be effective from 1999 itself rather than 26.2.2000. The question is answered in favour of the revenue as against the revisionist. Consequently, the revision is dismissed.

(2022)05ILR A344
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.04.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ Tax No. 420 of 2022

M/s UP Pipe Fitting Supplier, Chippitola, Agra U.P. ...Petitioner
Versus
G.S.T. Network & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rahul Agarwal

Counsel for the Respondents:
A.S.G.I., Sri Gaurav Mahajan, Sri Gopal Verma

A. Practice & Procedure - The Court asked the GST authorities to be sensitive with respect to the genuine problems of the dealers and directed to circulate the Registration Advisory for "Restoration of Cancelled Registration". (Para 11)

Writ Disposed of. (E-10)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Jayant Banerji, J.)

1. Heard Sri Rahul Agarwal, learned counsel for the petitioner and Sri Sashi Prakash Singh, learned Additional Solicitor General assisted by Sri Gopal Verma and Sri Gaurav Mahajan, learned counsel for the respondents.

2. This writ petition has been filed praying for the following reliefs :-

(i) Issue a writ, order or direction in the nature of Mandamus directing the respondents to act in accordance with the order dated 22.10.2021 (Annexure-5 to the writ petition) revoking the cancellation of the GST registration of the petitioner and restore the GST registration of the petitioner on the GST portal.

(ii) issue a writ, order or direction in the nature of Mandamus directing the respondents not to levy any late fees/penalty for late filing of returns by the petitioner for the months of August 2021 to March 2022.

3. Supplementary counter affidavit filed on behalf of respondent nos. 2, 3 & 4 is taken on record.

4. On 12.04.2022, this Court passed the following order :-

"1. Heard Sri Rahul Agarwal, learned counsel for the petitioner and Sri Gaurav Mahajan, learned Senior Standing Counsel for the Income Tax Department.

2. On the request of learned counsel for the petitioner, Goods and Service Tax Council, New Delhi through its Member Secretary is allowed to be impleaded as respondent no.5.

3. Notice on behalf of the respondent no.1 was accepted by learned Additional Solicitor General of General of India.

4. Notice on behalf of the newly impleaded respondent no.5 has been accepted by Sri Gopal Verma, learned Senior Standing Counsel for the Central Government who shall communicate this order to learned Additional Solicitor General of General of India.

5. On 28.03.2022 this Court passed the following order:-

"Heard Sri Rahul Agarwal, learned counsel for the petitioner and Sri Gaurav Mahajan, learned counsel for the respondent nos. 2,3, and 4. None appears for the respondent no.1.

The only issue involved in the present writ petition is restoration of the GST registration of the petitioner on portal. Prima facie, it appears that the respondents are acting arbitrarily and in defiance of their statutory duties.

Learned counsel for the respondent nos. 2,3, and 4 states that the server is at Chennai under the control of the respondent no.1 and despite writing letters, nothing has been done so far by the

respondent no.1. The submission so made also prima facie, reflects dereliction in duties by the respondents and harassment of the petitioner by them.

Let a counter affidavit be filed by the respondent nos.1,2,3 and 4 within two weeks', failing which this Court may consider to impose cost, inasmuch as, due to the alleged non restoration of the GST registration on portal, the petitioner is neither able to carry on his business nor able to make statutory compliances.

Put up as a fresh case before the appropriate bench on 12.04.202"

6. In compliance to the aforesaid order, the respondent nos. 2,3 and 4 filed today counter affidavit dated 11.04.2022 and in paragraph nos. 2, 8 and 9 they have stated as under:-

(2) That the deponent at the very outset craves leave of the Hon'ble Court to bring on record certain important facts, background and material which are already part of record and also flow from the statute book and which will have a material bearing on the outcome of the writ petition. The said facts are as follows:-

(a) The petitioner was a partnership firm consisting of 2 partners namely Satendra Kumar Jain and Narendra Kumar Jain.

(b) On 24.03.2021 Narendra Kumar Jain expired/passed away and the Partnership came to an end and as such the remaining partner submitted an online request through portal for cancellation of their registration vide ARNAA090721101216N dated 22.07.2021 The request for cancellation of their GSTIN 09AAAFU3379A1ZA was approved by the competent authority through the portal vide Reference No. ZA090721586918R dated 23.07.2021. Thus the registration of the petitioner stood cancelled.

(c) On 29.07.2021 a new Deed of Partnership was made/executed between 2 partners namely Satendra Kumar Jain and Siddesh Jain.

(d) Subsequently the new partners filed an appeal before the Commissioner (Appeals) for restoration of its cancelled registration. The appeal was allowed vide order dated 22.10.2021.

(e) Thereafter the petitioner filed an application before the Respondent no.4 along with certified copy of the order dated 22.10.2021 passed by the Commissioner (Appeals) for revocation of its cancelled GST registration/restoration of its GST registration.

(f) Just as the process for cancellation of Registration is through online mode, same is the process of revocation of cancellation of registration is also fully online through portal. In this process, the applicant files revocation online and the same is disposed off online accordingly.

Therefore there is no option to initiate the revocation of cancelled registration by the Respondent Nos. 2,3 and 4. In terms of advisory dated 16.06.2021 on the subject "Difficulty in restoration of cancelled registration-Advisory" issued by the DG (Systems), Chennai, the request of the petitioner dated 28.10.2021 was forwarded to DG (Systems) Chennai along with duly filled prescribed format singed by the Commissioner, Central Goods and Service Tax and Central Excise, Agra for the needful at their end through email dated 23.11.2021. A photo copy of the email dated 23.11.2021 is enclosed herewith and marked as Annexure No. CA-1).

(8) That in reply to the contents of paragraph nos. 12 of the writ petition in the manner as stated therein it is respectfully submitted that acting upon petitioner's letter dated 08.12.2021 for revocation of their cancellation of registration. The request was again forwarded to the D.G. (Systems),

Chennai through email dated 07.01.2022 in continuation of email dated 23.11.2021. A photo copy of the email dated 07.01.2022 is enclosed herewith and marked as Annexure No. CA-2.

(9) That in reply to the contents of paragraph no.13 of the writ petition in the manner as stated therein it is respectfully submitted that acting upon petitioner's letter dated 21.01.2022, this request has also been forwarded vide email dated 28.01.2022 to the DG (Systems), Chennai in continuation of email dated 23.11.2021 and 07.01.2022. A photocopy of the email dated 28.01.2022 is enclosed herewith and marked as Annexure No. CA-3.

7. From the afore-quoted averments made in the counter affidavit by the respondent nos. 2,3 and 4, it is evident that there is total lack of coordination between the authorities and for that reason the Director General (Systems), Chennai is not taking any action and is not giving effect to the order of the appellate authority dated 22.10.2021, despite letters written by the authority as referred in the afore-quoted paragraphs. The policy of the Government is "ease of doing business" but the policy is not properly being executed by own officer of the Government and thus, people are being obstructed to carry on business which is in breach of fundamental rights guaranteed under Article 19(1) of the Constitution of India.

8. Respondent nos. 1 and 5 may file short counter affidavit within a week, by means of their personal affidavit clearly giving response on the prevailing situation and shall also come out an appropriate circular and guidelines as well as appropriate action in the matter so that such thing may not be repeated and the dealers may not be harassed.

9. Put up as a fresh case before the appropriate bench on 21.04.2022 at 10.00 A.M. for further hearing."

5. Today, a short counter affidavit on behalf of respondent nos. 1 & 5 has been filed by Sri Lalan Kumar, Commissioner CGST and CX Agra.

6. In the aforesaid short counter affidavit it has been states as under :-

"10. That the deponent most respectfully submits that during the pendency of the present Writ Petition the registration of the petitioner has been restored on 19.04.2022 and restoration of the registration was also communicated to the petitioner by GSTN Legal, New Delhi through email dated 20.04.2022 containing 1 attachment. A photocopy of the email dated 20.04.2022 and its attachment are enclosed herewith and marked as ***Annexure No.SCA-4.***

11. That at this juncture it is necessary to place on record a Registration Advisory No. 07 of 2022 dated 23.03.2022 the subject of which is "Introduction of Restoration of Cancelled Registration based on Appellate Order - Reg' issued by the Pr. Additional Director General of Systems and Data Management, Chennai. The Registration Advisory was issued on the basis of inputs/communications received from field formations. A photocopy of the Registration Advisory No. 07 of 2022 dated 23.03.2022 is enclosed herewith and marked as Annexure No. SCA-5.

12. That the deponent most respectfully submits that the Registration Advisony No. 7 of 2022 dated 23.03.2022 has put in place a suitable mechanism in the form of a functionality in the name of "Restoration of Cancelled Registration" and has been developed and deployed w.e.f. 23.03.2022 to facilitate the jurisdictional Range Officers to restore the registration in pursuance of judicial/appellate orders and necessary permission to operate this

functionality has been enabled for the jurisdictional Range Officers."

7. **Annexure SCA - 4** reflects the effective date of registration as 01.07.2017. Thus, the relief no. (i) as sought by the petitioner stands granted and the grievance of the petitioner in this regard now stands redressed.

8. So far as the relief No.(ii) is concerned, we hope that in view of the restoration of registration with retrospective effect on 20.04.2022, the authorities shall see that petitioner may not face any hurdle in filing his returns for the months of August 2021 to March 2022.

9. From the records, it appears that as per own case of the respondents a temporary mechanism to restore cancelled registration was created in the back end and an advisory vide e-mail dated 16.06.2021 was issued in this regard to restore registrations cancelled on the request of the dealers or pursuant to the orders passed by appellate authorities/High Court, but a permanent mechanism could not be developed until the aforesaid advisory dated 23.03.2022 (Annexure No.SCA No.5).

10. But now it developed and deployed a functionality in the name of "Restoration of Cancelled Registration" with effect from 23.03.2022 to facilitate the jurisdictional Range Officers to restore the registration in pursuance of judicial/appellate orders. The aforesaid Registration Advisory No.07/2022, dated 23.03.2022 is reproduced below :

"Date: 23.03.2022

Registration Advisory No. 07/2022

Sub: *Introduction of Restoration of Cancelled Registration based on Appellate order - reg.*

***

Communications have been received from field formations about passing judicial / appeal orders against cancellation orders, passed suo motu by the Range officers u/s 29 of the CGST Act, 2017. It has also come to notice that taxpayers in certain cases, had obtained orders from High Courts / appellate authorities to restore registrations cancelled on their own request. Since the functionality to implement the orders online was not ready, a temporary mechanism to restore cancelled registrations was created in the back-end and an advisory vide e-mail dated 16th June '2021 (copy enclosed), was issued in this regard.

2. Now, a functionality in the name of ''Restoration of Cancelled Registration' has been developed and deployed w.e.f. 23.03.2022, to facilitate the jurisdictional Range officers to restore the registrations in pursuance of judicial / appellate orders.

3. This functionality would cover both the cancellations viz.. ordered suo motu by Range officers against which appeal orders were obtained without applying for revocation through form REG-21, and cancelled on the request from the taxpayers. *A step by step guide along with indicative screens is annexed herewith* ***(Annexure ''A')*** *for guidance of the officers using the functionality.*

4. Necessary permission to operate this functionality is being enabled for the Jurisdictional Range Officers.

5. As per the contractual obligations, the vendor (Wipro) is required to rectify the defects/ errors/ bugs noticed, if any, in the functionality within 30 days of its deployment to production. It is,

*therefore, requested that **this advisory may be circulated among all the concerned officers for their guidance,** and issues, if any, in performance of the functionality may immediately be reported to cbicmitra.helpdesk@icegate.gov.in for necessary resolution. Copy of the communication with ticket details may also be forwarded to this office at dgschennai@icegate.gov.in for further follow up.*

(K.V.S. Singh)
Pr. Additional Director General"

11. We hope and trust that the GST Council and authorities under the Central Goods and Service Tax Act/States Goods and Service Tax Act 2017 shall be sensitive enough to address genuine problems of the dealers including the problems being faced in giving effect to the orders of appellate authority, Tribunal and courts. We also direct that the aforesaid Registration Advisory No.07/2022, dated 23.3.2022 shall be circulated forthwith by the GST Council amongst officers under the Act, 2017 as well as amongst association of traders and industries and amongst Tax Bar Associations at the district level in the state of Uttar Pradesh.

12. With the aforesaid observations, the writ petition is **disposed of .**

(2022)05ILR A349
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.05.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ Tax No. 626 of 2022

M/s Zasha Electrowaste Recycling Pvt. Ltd. Meerut U.P. ...Petitioner

Versus

U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nishant Mishra, Sri Yashonidhi Shukla

Counsel for the Respondents:
A.S.G.I., Sri Dileep Chandra Mathur

A. Civil Law - Practice & Procedure - Affidavit - Allahabad High Court Rules - Rule 12 of Chapter IV - Civil Procedure Code, 1908 - Order XIX Rule 9 - An affidavit which does not comply with the provisions of the Allahabad High Court Rules/CPC, has no probative value and is liable to be rejected. (Para 8) (E-10)

List of Cases cited:

1. Bharat Singh & ors. Vs St. of Har. AIR 1988 SC 2181

2. St. of Bombay Vs Purushottam Jog Naik AIR 1952 SC 317

3. Smt. Savithramma Vs Cicil Naronha & anr. AIR 1988 SC 1987 (Para 2)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Jayant Banerji, J.)

1. Heard learned counsel for the petitioner and the learned standing counsel.

2. **Personal affidavit dated 25.02.2022** of Sri Pradyumn Tripathi, Additional Director General, DGGI, Meerut Zonal Unit, Meerut has been filed today, which contains 12 paragraphs and **all the 12 paragraphs have been sworn as under :**

"I, the deponent above named, do hereby swear that the contents of

paragraphs nos. 1-12 of this affidavit are true to my personal knowledge and are based on perusal of records; which all I believe to be true that no part of it is false and nothing material has been concealed in it."

3. Rule 12 of Chapter IV of the Allahabad High Court Rules provides that how an affidavit shall be sworn by the deponent. For ready reference Rule 12 of Chapter IV of the Allahabad High Court Rules, is reproduced below :

*"**12. Facts to be within the deponent's knowledge or source to be stated-** Except on interlocutory applications, an affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove.*

On an interlocutory application when a particular fact is not within the deponent's own knowledge, but is based on his belief or information received from others which he believes to be true, the deponent shall use the expression" I am informed and verily believe such information to be true", or words to that effect and shall sufficiently describe for the purpose of identification, the person or persons from whom his information was received.

When any fact is stated on the basis of information derived from a document, full particulars of the document shall be stated and the deponent shall verify that he believes such information to be true."

4. Order XIX Rule 3 of the Civil Procedure Code, 1908 and Order XIX Rule 9 of the Civil Procedure Code, 1908, as inserted by High Court amendment, are reproduced below :

*"**Order XIX Rule 3***

***Matters to which affidavits shall be confined** - (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted, provided that the grounds thereof are stated.*

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same.

Order XIX Rule 9

"Except in interlocutory proceedings, affidavits shall strictly be confined to such facts as the declarant is able of his own knowledge to prove. In interlocutory proceedings, when the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant shall use the expression "I am in formed", and, if such be the case, "and verily believe it to be true", and shall state the name and address of, and sufficiently describe for the purposes of identification, the person or persons from whom he received such information. When the application or the opposition thereto rests on facts disclosed in documents or copies of documents produced from any Court of Justice or other source, the declarant shall state what is the source from which they were produced, and his information and belief as to the truth of the facts disclosed in such documents. (22-5-1915)."

5. The aforesaid affidavit dated 25.02.2022 filed by Sri Pradyumn Tripathi, Additional Director General, DGGI, Meerut Zonal Unit, Meerut, does not comply with the requirements of a valid

affidavit as provided in Rule 12 of Chapter IV of the Allahabad High Court Rules/Order XIX Rule 9 C.P.C.

6. As noticed in paragraph 2 above, the deponent of the aforesaid personal affidavit dated 25.02.2022 has not verified/sworn paragraphs either on personal knowledge or on the basis of information received from others or on the basis of information derived from the documents.

7. Affidavit is a mode of placing evidence before the Court. Party may prove a fact or facts by means of affidavit before this Court but such affidavit should be in accordance Rules. The Rules enable the Court to find out as to whether it would be safe to act on such evidence and to enable the court to know as to what facts are based in the affidavits on the basis of personal knowledge, information and belief as this is relevant for the purpose of appreciating the evidence placed before the Court, in the form of affidavit.

8. It is only on the basis of verification, it is possible to decide the genuineness and authenticity of the allegations and the deponent can be held responsible for the allegations made in the affidavit. It is, therefore, necessary that the person making averments in the affidavit must disclose as to what facts are true to his personal knowledge, what facts are true on the basis of information received from others which he believed to be true and what facts are based on information derived from documents. Full particulars of the document needs to be stated and the deponent has to verify that the information is believed to be true. An affidavit which does not comply with the aforesaid provisions of the Allahabad High Court Rules/CPC, has no probative value and is liable to be rejected.

9. In the case of **Bharat Singh and others Vs. State of Haryana AIR 1988 SC 2181,** Hon'ble Supreme Court laid down the law that how in Writ Petition or in Counter Affidavit the facts need to be pleaded and proved. The relevant portion of the judgment of Hon'ble Supreme Court in the case of **Bharat Singh(supra)** is reproduced below :-

"In our opinion, when a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter-affidavit. ***If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter, affidavit, as the case may be, the court will not entertain the point.*** *In this context, it will not be out of place to point out that in this regard there is a distinction between a pleading under the Code of Civil Procedure and a writ petition or a counter-affidavit. While in a pleading, that is, a plaint or a written statement, the facts and not evidence are required to be pleaded,* ***in a writ petition or in the counter-affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it."*** *(Emphasis supplied by us)*

10. In the case of State of **Bombay Vs. Purushottam Jog Naik AIR 1952 SC 317** a Constitution Bench considering the importance of verification of an affidavit observed (at p.319 of AIR) :

"We wish, however, to observe that the verification of the affidavits

produced here is defective. The body of the affidavit discloses that certain matters were known to the Secretary who made the affidavit personally. ***The verification however states that everything was true to the best of his information and belief. We point this out as slipshod verification of this type might well in a given case lead to a rejection of the affidavit. Verification should invariably be modelled on the lines of Order XIX, Rule 3, of the Civil Procedure Code, whether the Code applies in terms or not. And when the matter deposed to is not based on personal knowledge the sources of information should be clearly disclosed."***

11. In the case of **Smt. Savithramma Vs. Cicil Naronha & Anr. AIR 1988 SC 1987 (para 2)** Hon'ble Supreme Court considered the importance of verification of affidavit and rejection of affidavit in the absence of proper verification and held as under :-

".....Affidavit is a mode of placing evidence before the Court. A party may prove a fact or facts by means of affidavit before this Court but such affidavit should be in accordance with Order XI Rules 5 and 13 of the Supreme Court Rules. The purpose underlying Rules 5 and 13 of Order XI of the Supreme Court Rules is to enable the Court to find out as to whether it would be safe to act on such evidence and to enable the court to know as to what facts are based in the affidavit on the basis of personal knowledge, information and belief as this is relevant for the purpose of appreciating the evidence placed before the Court, in the form of affidavit. ***The importance of verification has to be judged by the purpose for which it is required. It is only on the basis or verification, it is possible to decide the genuineness and authenticity of the allegations and the deponent can be held responsible for the allegations made in the affidavit. In this Court evidence in support of the statements contained in writ petition, special leave petitions, applications and other miscellaneous matters, is accepted in the form of affidavit filed by the parties concerned. It is therefore necessary that the party stating facts must disclose as to what facts are true to his personal knowledge, information or belief. If the statement of fact is based on information the source of information must be disclosed in the affidavit. An affidavit which does not comply with the provisions of Order XT of the Supreme Court Rules, has no probative value and it is liable to be rejected.*** *In a matter where allegations of mala fides or disobedience of the Court's order are made against a person or party it is all the more necessary that the person filing affidavit in this regard must take care to verify the facts stated in the affidavit strictly in accordance with the Rules 5 and 13 of Order XI of the Supreme Court Rules. "*

12. Since the aforesaid personal affidavit filed on behalf of respondent no.2 by Sri Pradyumn Tripathi, Additional Director General, DGGI, Meerut Zonal Unit, Meerut, does not apply with the provisions of Rule 12 of Chapter IV of the Allahabad High Court Rules/Order XIX Rule 9 C.P.C., therefore, it is liable to be rejected and accordingly it is rejected. However, we grant one more opportunity to the respondent no.2 to file a proper affidavit within three days stating true and correct facts.

13. **Put up as a fresh case on 30.05.2022 at 10 A.M.**

(2022)05ILR A353
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.05.2022

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ C No. 1262 of 2020

R.S. Filling Station Indian Oil Corp. Ltd.
...Petitioner
Versus
Dispute Resolution Panel C/O I.O.C. & Ors.
...Respondents

Counsel for the Petitioner:
Tushar Hirwani, Amrendra Singh, Ashok Kumar Singh

Counsel for the Respondents:
Manish Jauhari

(A) Administrative Law - in the administrative and the quasi-judicial decision making process - any decision taken upon misreading of a document - in ignorance of a document and without recording reasons - would clearly qualified as arbitrary, perverse and hit by wednesbury arbitrariness - denial of opportunity of hearing also makes the order as violative of principles of natural justice. (Para - 37,38)

(B) Administrative Law - alternative remedy is not an absolute bar - administrative/quasi-judicial authorities are obliged to record reasons - show - cause notice issued with a premeditation would entitle the petitioner to approach this Court in exercise of power under Article 226 of the Constitution of India. (Para - 26)

Contract as well as dealership of petitioner (retail out dealer) cancelled – basis of termination - report- suspicion expressed with regard to two pulsar cards - report of OEM MIDCO - allegation with regard to loss of reputation of corporation in view of wide reporting in print and electronic media - impugned order passed on a clear misreading of inspection report - clear misreading of report of MIDCO - non-consideration of vital piece of evidence - improper invocation of deeming provision under clause 5.1.4 of MDG .**(Para - 1,29,38)**

HELD:- Writ petition would lie against an order, which is perverse and which cannot satisfy the test of Article 14 of the Constitution of India. Impugned order cannot be sustained and is set aside with directions to the respondent - corporation to permit the petitioner to run the retail outlet forthwith subject to the petitioner complying with the other requirements for dispensing the petroleum products as are required under the Act and the Rules. **(Para - 30,38)**

Writ Petition allowed. (E-7)

List of Cases cited:-

1. Whirlpool Corporation Vs Registrar of Trademarks, Mumbai & ors. , (1998) 8 SCC 1

2. Maharashtra Chess Association Vs U.O.I.,2019 SCC OnLine SC 932

3. J. Ashoka Vs University of Agricultural Sciences , (2017) 2 SCC 609

4. Ahmad Ullah Vs U.O.I. & ors. , Writ C No.25502 of 2019

5. Allahabad Bank & ors. Vs Krishna Narayan Tewari , (2017) 2 SCC 308

6. Rakesh Kumar Pandey Vs St. of U.P. & ors. ,2019 SCC Online All 4004

7. Gour Chandra Dutta Vs U.O.I. & ors. , 2015 SCC OnLine Bom 4883

8. Siemens Ltd. Vs St. of Mah. & ors. , (2006) 12 SCC 33

9. M/s. Laltu Fillings Station Vs U.O.I. & ors. , 2016 SCC OnLine Cal 626

10. Oryx Fisheries Pvt. Ltd. Vs U.O.I. & ors. , (2010) 13 SCC 427

11. Savitri Devi & ors. Vs U.O.I.& ors. , Writ C No.29859 of 2017

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

1. The present petition has been filed challenging the order dated 15.10.2019 passed by Dispute Resolution Panel (in short "DRP") whereby the appellate forum had remanded the matter for adjudication before respondent no.4 as well as the order dated 19.10.2020 passed by respondent no.3 whereby the contract of the petitioner has been cancelled and his dealership also stands cancelled consequently.

2. This Court during the course of hearing had summoned the records of Writ - C No.21992 of 2020 for the purpose of perusal.

3. Heard Shri Prashant Chandra, learned Senior Advocate assisted by Ms. Radhika Singh, learned counsel appearing for the petitioner and Shri Dipak Seth, Shri Manish Jauhari and Ms. Shruti Sahu, learned counsel(s) appearing on behalf of respondent nos.1 to 4.

4. The facts, in brief, are that the petitioner was appointed as a retail outlet dealer by Indian Oil Corporation (for short "corporation') by means of an appointment letter dated 02.12.2015 for running a retail outlet at Bariha Taranpur, District Lakhimpur Kheri, which was being run by the petitioner in the name and style of M/S R.S. Filling Station. An agreement was executed in between the parties on 01.04.2006. It is also common ground that the dealership granted to the petitioner is governed by the agreement executed in between the parties and the Marketing Discipline Guidelines (hereinafter referred as "MDG") issued from time to time. In the month of April, 2017 in pursuance to the directions given by the State Government, inspections were carried out by the authorities as specified in the Government Order across various petrol and diesel outlets and an inspection was also carried out on the petitioner's outlet on 31.05.2017 by a team of three persons. An inspection report was prepared, which is annexed as Annexure - 4 to the writ petition. It is also relevant to note that detailed instructions were issued by the Chief Secretary, State of U.P. vide communication dated 15.06.2017 constituting a team of 5 persons for carrying out the inspections. In the inspection report as prepared and contained in Annexure - 4, it was recorded that an inspection was carried out and the machines were checked. At the time of inspection, four dispensing units (8 nozzles) were found, out of which 6 nozzles were found in working conditions. From each nozzle, 15 ltrs. each of petrol and diesel were taken out and after inspection, the same were found to be giving proper delivery. 2 nozzles were found to be not in the working conditions. On inspection of pulsar cards of the nozzles, 2 pulsar cards appeared to be suspicious, which were seized and taken into custody and a plastic seal was fixed thereupon.

5. Based upon the inspection report dated 31.05.2017, the respondent - corporation issued a letter dated 31.05.2017 calling for the response from the petitioner. The said letter, which is contained in Annexure - 8, was termed as "fact finding letter". It was mentioned that during the inspection following observations were made and the petitioner was called upon to

submit his explanation within a period of 15 days as to why action should not be taken as per the MDG/dealership agreement to protect the marketing interest of the corporation:

"2 Pulsar card were found with impression of tempering, due to which 3 Nozzles (2 MS AND 1 HSD) were affected by these 2 Pulsar card."

6. The petitioner submitted a reply on 15.06.2017 denying the allegations and submitted that no extra chips were found in the machines, the seals of machines were found intact, measurements checked were found in order and the calibration of the machines was done by the Weights and Measurement Officer and a certificate was issued by them, thus, no fault could be attributed to the petitioner. Subsequently, a show - cause notice was issued to the petitioner on 30.08.2018 (Annexure - 10). In the said show - cause notice, first charge alleged was that during the inspection following irregularities were found at the retail outlet:

"2 Pulsar card were found with impression of tempering, due to which 3 Nozzles (2 MS AND 1 HSD) were affected by these 2 Pulsar card."

A copy of the said inspection report was attached with the show - cause notice. It was also mentioned that the fact finding letter was issued to which the petitioner had replied. It was also noticed that in the reply of the petitioner he had requested not to take any action till the time test report of the pulsar card is received. It was also noticed that the District Supply Officer had suspended the diesel selling license of the petitioner. It was indicated in the said show - cause notice that MIDCO Company had released/sent a test report vide its letter dated 15.06.2018 with the following remarks:

"(I) R1 resistor is found missing on pulsar PCB.

(II) Additional Solder marks are observed on C8 capacitorlead.

(III) Additional solder marks are observed on L4 location of pulsar PCB."

A copy of the report was attached alongwith the show - cause notice. It was further recorded that after going through the reply dated 15.06.2017, the same appeared to the respondent to be not satisfactory/convincing and the attention of the petitioner was drawn to the Clause Nos. 16, 44, 58(m) and Clause No.5.1.4 of MDG2012 as amended, which attracts penal action under Clause 8.2 IV - Critical Irregularities: Termination of the first instance. Extract of the report submitted by the MIDCO is as under:

TEST REPORT

Received	**Item No.1 - Midco SureFill Pulsar card for nozzle No.1**

PCB Design Reference Number	Item No.1 - MID03323B201003

Tests/Parameter	**Result**	**Remarks**
Visual Inspection Note: Visual inspection has been done without providing Power to the received materials under test.	NOT OK (Refer Remarks)	**Item No.1** (I) R1 resistor is found missing on pulsar PCB. (II) Additional Solder marks are observed on C8 capacitor lead. (III) Additional Solder marks are observed on L4 location of pulsar PCB.
Delivery Test:	NOT TESTED (Refer Remark)	Not tested due to non conformance to

		Midco design.

Result:	**Pulsar card is not found in conformance with Midco standard design as per visual inspection test.**

Note:	Tests have been carried out as per Midco norms only.

7. The second charge was that the irregularity has also been widely reported in the print and electronic media, which has caused prejudiced in the mind of the general public and the customers and as such has tarnished the good image and reputation of the corporation and the same was against the marketing interest of the corporation.

8. The petitioner was called upon to file his reply within a period of 15 days. It is stated that the petitioner submitted a detailed reply to the said show - cause notice on 05.10.2018, which is contained in Annexure - 13. It is also on record that in the intervening period, the license of the petitioner, which was cancelled by the State, was restored on 31.09.2017. It is on record that the 2 pulsar cards, which were taken into custody by the inspecting team on 31.05.2017 were handed over to the District Supply Officer, however, subsequently, the same were taken by the corporation from the District Supply Officer and one of the pulsar cards was handed over to the Original Equipment Manufacturer (OEM) MIDCO for testing on 15.12.2017 and the other card was handed over to the other OEM Dreser Wayne on 08.12.2017 for testing at NOIDA. The said two reports given by the two OEMs are on record as Annexures - 11 & 12.

9. The report of MIDCO has already been reproduced hereinabove. In the report of the other OEM Dreser Wayne, no signs of damage were found. The said report also observed that although soldiering signs impression have been observed in the pulsar PCB circuitry, however, during testing all operations were found normal. The petitioner in his defense relied upon the report of the Dreser Wayne also to impress that merely by eye estimation, it cannot be presumed that anything wrong was done, which stood confirmed by the OEM while recording that although impressions of soldiering were found on the pulsar PCB, however, during testing all operations were found normal. The report of the other OEM Dreser Wayne was submitted by the petitioner alongwith supplementary reply dated 27.11.2018.

10. It is on record that after the inspection, an FIR was also lodged against the petitioner under Section 3/7 of Essential Commodities Act, however, subsequently, a final report was submitted by the Investigating Officer on 26.12.2018, which was also accepted by the trial Court. It is on record that subsequent to the FIR coming to an end and the supply license being restored by the District Supply Officer on 13.09.2017, the sale of petrol etc., was supplied by the respondents and the operation continued from 01.07.2017 uninterrupted and the supply of HSD was resumed w.e.f 13.09.2017.

11. On 14.03.2019 the respondent - corporation passed an order terminating the retail outlet dealership of the petitioner. A copy of the said termination order is contained in Annexure - 19.

12. Aggrieved against the termination order dated 14.03.2019, the petitioner preferred a writ petition being Writ Petition No.9062 (MB) of 2019 (R.S. Filling Station

v. Indian Oil Corporation & Ors.) before this Court wherein this Court granted an interim indulgence by staying the implementation of the termination order till the disposal of the application for interim relief by the appellate forum and the petitioner was relegated for filing an appeal before the Disputes Resolution Panel. The petitioner preferred an appeal challenging the termination order dated 14.03.2019. The said appeal was disposed off vide order dated 15.10.2019 whereby the appellate authority noticing the contention of the petitioner remanded the matter solely on the ground that the petitioner was denied an opportunity of hearing before passing of the order dated 14.03.2019 with a direction to proceed with the matter from the stage of granting of personal hearing as provided under Clause 8.6 of MDG. The order dated 14.03.2019 was set aside.

13. The said order of the appellate Court was challenged by the petitioner by filing a writ petition being Writ - C No.21992 of 2020, however, during the course of pendency of the said writ petition, a personal hearing letter was issued to the petitioner by respondent no.4 fixing 02.01.2020 for grant of personal hearing in terms of the remand order dated 15.10.2019. The petitioner vide his letter dated 27.12.2019 requested for an adjournment in view of the fact that petitioner could not contact his legal adviser on account of winter vacations, however, an order came to be passed on 19.10.2020 once again cancelling the dealership agreement of the petitioner. The said termination order was made subject to the final outcome of Writ Petition No.1262 (MS) of 2020, which was pending.

14. As the order was passed during the pendency of the writ petition, an amendment application was filed which was allowed permitting the petitioner to amend the writ petition and it is also noticeable that earlier Writ - C No.21992 of 2020 was withdrawn by the petitioner in view of the subsequent developments.

15. Learned counsel for the petitioner has placed heavy reliance on the judgment of this Court passed in Writ Petition No.27043 (MB) of 2018 (M/s Chaudhary Filling Point, Kazipur & Anr. v. State of U.P. & Ors.) to argue that in similar circumstances this Court had allowed the writ petition filed by a similarly placed dealer and the said order has attained finality. I shall revert to the same in the latter part of the judgment.

16. Learned counsel for the petitioner also places reliance on a certificate issued by Professor and Head of Electronics Department, National Institute of Technology, Karnataka, who has expressed his opinion that an ordinary laboratory will find it difficult to detect and prove the tampering, which requires specialized instruments and cannot be detected by a visual inspection alone.

17. In the backdrop of the facts as narrated hereinabove, Shri Prashant Chandra, learned Senior Advocate argues that the entire exercise initiated and which has resulted in cancellation of the dealership, was premeditated which is reflected from the show - cause notice and the fact finding letter issued, which clearly is a case of misreading of the report of the inspection team dated 31.05.2017. He further argues that any proceedings which are an outcome of a premeditated mind are clearly arbitrary and are liable to be quashed. He further argues that in inspection report dated 31.05.2017, it was

observed that the seals in the dispensing unit were intact, delivery was correct and mere suspicion was noticed in the inspection report, which was clearly misinterpreted while issuing the fact finding letter as well as the show - cause notice wherein it was recorded that inspection team in respect of pulsar cards found an impression of tampering.

18. Learned Senior Advocate further argues that the report of MIDCO which was the basis for issuance of a show - cause notice is based upon visual inspection alone and does not record any conclusion with regard to any material, which can lead to a conclusion that there was any tampering done. He argues that the report of the MIDCO only recorded that *"pulsar card is not found in conformance with Midco standard design as per visual inspection test."*, which according to the petitioner is not enough to form an opinion that there was any tampering and as also opined by the Professor of NIT, Karnataka. He further argues that in the show - cause notice while levelling second charge it was mentioned that in view of matter being reported widely in the print and medical electronic image, a prejudice has been caused and the good reputation of the corporation is tarnished whereas no material in support of the said allegation contained in the show - cause notice either exists or was ever given to the petitioner. He further argues that the entire exercise was an arbitrary exercise of administrative powers conferred upon the respondent authority, which is subject to judicial review and cannot stand the test of Article 14 of the Constitution of India.

19. Learned Senior Advocate argues that the specific defense of the petitioner as taken in the two replies filed in response of the show - cause notice reliance was placed upon the other report sent by other OEM Dreser Wayne, which clearly demonstrated that there was nothing wrong with the pulsar card and that report ought to have been considered while passing the order only to ascertain that the petitioner was guilty of any malpractices or not. He further argues that the order impugned clearly reveals that no opportunity of hearing has been granted. He argues that the order calling upon the petitioner for personal hearing could not be adhered to in view of the prevalent Covid - 19 Pandemic situation and as such, the directions given by DRP for grant of personal hearing have not been complied with. He further argues that even if the personal hearing was not granted, it was incumbent upon the authority to have considered the replies submitted by the petitioner before forming an opinion leading to termination of the dealership. He again draws my attention to the impugned termination order wherein the authority concerned recorded the findings as were passed in the earlier order dated 08.10.2018, thereafter it records the directions given by the DRP and thereafter it records that despite various opportunities, the opportunity of personal hearing has not been availed by the petitioner, as such, the same was closed. While taking a decision it merely mentions that "in the absence of any new fact, it is concluded that "you have failed to discharge your responsibility as custodian of the outfits and to ensure that no acts are committed by you or your servants or agents, which is prejudicial to the interests or good name of the corporation or its product and in view of large scale reporting in media, the image of the corporation is tarnished", and thus, proceeded to terminate the retail outlet dealership in consonance with Clause 16, 44, 58(m) of the dealership agreement dated 01.04.2006 and clause no.5.1.4 of

MDG-2012 as amended and Clause 8.2 IV of the said MDG. This manner of decision making, according to the counsel for the petitioner, is an arbitrary exercise of powers as the appellate order had clearly quashed the earlier termination order dated 14.03.2019 and thus, it is incumbent to have recorded fresh findings taking into consideration the written submissions made by the petitioner.

20. Learned Senior Advocate argues that if the petitioner was granted an effective personal hearing, the petitioner could have demonstrated that in view of the report of the other OEM Dreser Wayne and the opinion of the Professor of NIT, Karnataka, the report of MIDCO could be shown to be no report at all warranting such a severe action. In the light of the said, he argues that the writ petition be allowed.

21. Shri Dipak Seth, learned counsel for the respondent argues that the petition is not maintainable in view of the alternative remedy of appeal, which is provided for in the MDG guideline. He further argues that despite granting ample opportunities, the petitioner failed to avail an opportunity of personal hearing and thus, cannot find fault with the process of decision. He argues that the show - cause notice as issued to the petitioner was not premeditated as the corporation has no bias against the petitioner. In any case, there is no material to argue that there was any personal or institutional bias. He further justifies the order in terms of the MDG, especially Clause 5.1.4, the following is provided:

"5.1.4 ADDITIONAL / UNAUTHORISED FITTINGS / GEARS FOUND IN DISPENSING UNITS /TAMPERING WITH DISPENSING UNIT

Any mechanism / fittings / gear found fitted in the dispensing unit which is likely to manipulate the delivery.

Addition, Removal, replacement or manipulation of any part of the Dispensing Unit including any mechanism, gear, microprocessor chip / electronic parts/ OEM software will be deemed as tampering of the dispensing unit.

In such cases, views and independent opinion of the original equipment manufacturer would be obtained and suitable decision taken.

In case of this irregularity, sales from the concerned dispensing unit to be suspended, DU sealed. Samples to be drawn of all the products and sent to lab for testing."

22. Learned counsel for the respondent further argues that the irregularities as classified under MDG are classified as "critical irregularities' and in terms of Clause - 8.2 (iv), the allegation against the petitioner would fall as "critical irregularity', consequence whereof is provided under MDG itself. He further argues from the report of MIDCO, that perusal of the report itself clearly reveals that the same would fall within mischief of Clause 5.1.4 and thus, no wrong has been committed by the corporation. In the light of the said, he argues that the writ petition is liable to be dismissed.

23. Shri Dipak Seth, counsel for the respondent, was confronted with the specific query of this Court as to whether any material was given to the petitioner in support of the second allegation that in view of large scale media reporting, the image of the company tarnished to which he fairly submits that no such material was given to the petitioner nor is it contained in the show cause notice.

24. Shri Prashant Chandra, learned Senior Advocate in rejoinder argues that the alternative remedy would not be an efficacious one in view of the fact that the writ petition is already pending and the termination order has been made subject to the outcome of the writ petition. Furthermore, relegating the petitioner to the alternative remedy would violate the rights of the petitioner under Article 21 of the Constitution of India and further as the retail outlet was admittedly running from 2017, relegating the petitioner to the alternative remedy would cause undue hardship to the petitioner as the retail outlet of the petitioner would not start during the pendency of the appellate proceedings and lastly he argues that any order, which is passed contrary to the principles of natural justice, ex-facie, perverse and based upon no material should not be relegated to the alternative remedy and the writ petition would lie in terms of the judgment of the Hon'ble Supreme Court in the case of ***Whirlpool Corporation v. Registrar of Trademarks, Mumbai & Ors. - (1998) 8 SCC 1.***

25. Learned counsel for the petitioner has relied upon the following judgments:

"1. Maharashtra Chess Association v. Union of India - 2019 SCC OnLine SC 932

2. J. Ashoka v. University of Agricultural Sciences - (2017) 2 SCC 609

3. Ahmad Ullah v. Union of India & Ors. - Writ C No.25502 of 2019 decided on 13.09.2019

4. Allahabad Bank and Ors. v. Krishna Narayan Tewari - (2017) 2 SCC 308

5. Rakesh Kumar Pandey v. State of U.P. & Ors. - 2019 SCC Online All 4004

6. Gour Chandra Dutta v. Union of India and Ors. - 2015 SCC OnLine Bom 4883

7. Siemens Ltd. v. State of Maharshtra & Ors. - (2006) 12 SCC 33

8. M/s. Laltu Fillings Station v. Union of India & Ors. - 2016 SCC OnLine Cal 626

9. Oryx Fisheries Private Limited v. Union of India and Ors. - (2010) 13 SCC 427"

26. The said judgments referred to above were to canvass the point that alternative remedy is not an absolute bar, the administrative/quasi-judicial authorities are obliged to record reasons and that show - cause notice issued with a premeditation would entitle the petitioner to approach this Court in exercise of power under Article 226 of the Constitution of India.

27. Learned counsel for the respondent on the other hand relies upon a judgment of this Court in the case of ***Savitri Devi and Ors. v. Union of India and Ors. - Writ C No.29859 of 2017*** decided on ***13.07.2017.***

28. In the light of the argument raised at the bar and the pleadings exchanged, this Court is to decide: (i) whether the writ petition would lie before this Court bypassing an appellate remedy provided under the MDG? and;

(ii) whether the action of the respondent in terminating the retail outlet by the petitioner was justified or not?

29. It is undisputed and on record that the basis for passing of the order terminating the dealership was the report dated 31.05.2017 wherein a suspicion was expressed with regard to two pulsar cards,

the report of OEM MIDCO and the third allegation with regard to loss of reputation of the corporation in view of wide reporting in print and electronic media.

30. Although a remedy of appeal lies, however, the fact remains that during the period 13.09.2017 till the passing of the termination order dated 19.10.2020, the petitioner was continuing to operate the retail outlet and no fault was found during the said period and the manner of passing the order, which shall be dealt with while deciding the second issue, I have no hesitation in holding that the writ petition would lie against an order, which is perverse and which cannot satisfy the test of Article 14 of the Constitution of India.

31. Referring to the second question, what emanates from the facts is that an inspection was carried out on 31.05.2017 wherein it was expressed that two pulsar cards appeared to be suspicious, the corporation clearly misreading the said inspection report *prima - facie* formed an opinion that the two pulsar cards were found with impression of tampering. In terms of the inspection report dated 31.05.2017, clearly the said impression formed by the corporation on the reading of the report of the inspection team was a clear misreading and misunderstanding of what was expressed by the inspection team. In the fact finding letter and the subsequent show - cause notice after receiving of the report of MIDCO was the only material available for passing of the order terminating the dealership. The report of the MIDCO on its plain reading did not specifically conclude that there was any tampering or had contained anything to demonstrate that the discrepancies as observed by MIDCO from their ocular inspection could be attributed to the petitioner.

32. It is common ground and not disputed that all the seals were found intact, the quantity of the product dispensed by the dispensing unit were found to be alright. Mere presence of soldiering marks over the pulsar cards, which was the basis of the passing of the order does not make it clear as to how the said discrepancy observed could be attributed to the petitioner, more so, in the light of the report of the OEM Dreser Wayne, which was also given the similar pulsar cards with similar discrepancies, however, after testing, they found that there was nothing wrong with the operations which were effected through the pulsar cards despite their being soldiering marks on them.

33. A very vital piece of evidence given by the petitioner being the report of the Professor of NIT was not even considered. There is further nothing on record to demonstrate as to whether MIDCO had any facility for testing or they were qualified to carry out the testing. That being the case, the entire order is based upon misreading of the inspection report and the report of the MIDCO, which cannot be termed as conclusive so as to establish anything which can be attributed to the petitioner. This aspect was elaborately considered by this Court while delivering the judgment in the case of *M/s Chaudhary Filling Point (supra)* while dealing with the contentions pertaining to irregularities in the pulsar card, which was almost similar to the allegations contained against the petitioner. It is relevant to quote the relevant extracts from the case of *M/s Chaudhary Filling Point (supra)*, which are as under:

"....."

As seen from the reading of the impugned order, the only reason assigned for being not satisfied with the explanation offered by the petitioner was that there was tampering in the DU and pulsar card contains certain soldering marks. However, what was not considered by the competent authority was that at what point of time this unauthorized tampering/soldering was done in the dispensing unit and how the dealer is manipulating the distribution of fuel. No material, much less credible one has been brought on record by the respondents to disclose the unauthorized access to the equipment by the petitioner. It was specific stand of the petitioner that periodically the Weights and Measurements Department officials inspected the seals and they were found to be intact. Further more, what is the impact on tampering/soldering in delivery unit is not disclosed. How the dealer can manipulate delivery of fuel by inserting such unit is not explained. The only objective of a dealer to tamper with dispensing unit is to manipulate delivery of fuel. In this case, the delivery of fuel was found to be accurate prior to checking of unit and after the checking. Furthermore, the defence of the petitioner that it is possible that the supplier himself might have done soldering while repairing for proper functioning of the unit by supplier himself cannot be brushed aside.

In view of the above, merely on assumptions that the tampering/soldering was found in the delivery unit of the dealer premises, the petitioner dealer cannot be visited with severe consequence of termination of dealership and that too when the OEM report does not support or corroborate the version of the respondents. Thus, the action of the respondent-Corporation, in the facts of this case, in terminating the dealership of the petitioner no.1 on the sole ground that soldering/tampering was found in the Dispensing Units is illegal, unreasonable, excessive and made in arbitrary exercise of power and hence unsustainable, more particularly when performance of the petitioner-dealer all along has been appreciated."

34. The submission of Shri Dipak Seth that soldering marks over the pulsar card would be deemed to be tampering in view of Part II of Clause 5.1.4. of the MDG does not merit acceptance for the following reasons:

"5.1.4 ADDITIONAL / UNAUTHORISED FITTINGS / GEARS FOUND IN DISPENSING UNITS /TAMPERING WITH DISPENSING UNIT

Any mechanism / fittings / gear found fitted in the dispensing unit which is likely to manipulate the delivery.

Addition, Removal, replacement or manipulation of any part of the Dispensing Unit including any mechanism, gear, microprocessor chip / electronic parts/ OEM software will be deemed as tampering of the dispensing unit.

In such cases, views and independent opinion of the original equipment manufacturer would be obtained and suitable decision taken.

In case of this irregularity, sales from the concerned dispensing unit to be suspended, DU sealed. Samples to be drawn of all the products and sent to lab for testing."

On a plain reading, Clause 5.1.4 as quoted above deals with the effect of manipulation/modification of the machinery, the said clause has to be read as a whole and cannot be read in parts as

argued by Shri Dipak Seth. On its composite reading, it is clear that any addition, removal, replacement or any manipulation of any part of the dispensing unit should be read with Part 1 and necessarily has to correlate with the manipulation of delivery.

To further clarify, the words "addition', "removal', "replacement' or "manipulation' have to be interpreted to be the acts which are done by any person by a conscious act with an intent to manipulate delivery to gain unfair advantage. The deeming fiction can be applied only when it can be concluded that the addition or manipulation has been done with a view to gain any unfair advantage. It is also inconceivable that any dealer would do any manipulation with no consequential gains or benefits. The report of "MIDCO' is silent on this aspect as also the inspection report dated 31.05.2017 and that of OEM Dreser Wayne suggests otherwise. Thus, no material on record exists so as to attract the deeming fiction of clause 5.1.4. of MDG.

35. The judgment of this Court in the case of *Savitri Devi (supra)* as cited by Shri Dipak Seth did refer to Clause 5.1.4. of the MDG, however, the Court did not interfere for the simple reason that in the said case there was a specific allegation of tampering and also allegation of compromise with the quality and quantity of the petroleum products. The said case also recorded that in the said case, the petitioners did not deny tampering of the dispensing unit in their reply and furthermore on the examination, two external yellow wires were found. These facts are clearly absent in the present case, thus, the said judgment would have no applicability to the facts of the present case.

36. The second allegation levelled against the petitioner with regard to tarnishing of the image of the corporation in view of the large scale reporting, it is an admitted ground that no material existed either before the authority or was confronted to the petitioner to enable the authority to come to a conclusion that the image of the corporation was tarnished and the same could be attributed to the petitioner.

37. It is well settled law that in the administrative and the quasi-judicial decision making process, any decision taken upon misreading of a document, in ignorance of a document and without recording reasons would clearly qualified as arbitrary, perverse and hit by wednesbury arbitrariness. The order impugned, which has been passed merely records the earlier order, the directions given by the appellate forum and the absence of the petitioner for personal hearing and abruptly records that "it is concluded that the petitioner had failed to discharge its responsibilities as custodian of the outfits" clearly there is no application of mind by the authority concerned, the defense as taken by the petitioner in his reply and the supplementary reply have not even been referred to, although the same were also canvassed when the first order of termination was passed and as recorded in the order dated 19.10.2020.

38. The denial of opportunity of hearing also makes the order as violative of principles of natural justice. Although the order records that despite opportunity, the petitioner did not avail the opportunity of hearing, however, the fact remains that during the period from which the dates were fixed for hearing, Covid - 19 Pandemic was prevalent in the country and no reason has been shown as to why the corporation acted in hot haste and closed the right of hearing of the petitioner. Thus,

following the judgment of this Court in the case of *M/s Chaudhary Filling Point (supra)* and observing that the impugned order has been passed on a clear misreading of the inspection report, a clear misreading of the report of MIDCO, non-consideration of vital piece of evidence in the form of report of the other OEM Dreser Wayne as well as the report of the Professor of NIT and improper invocation of deeming provision under clause 5.1.4 of MDG, the impugned order dated 19.10.2020 (Annexure RA - 8) cannot be sustained and is set aside with directions to the respondent - corporation to permit the petitioner to run the retail outlet forthwith subject to the petitioner complying with the other requirements for dispensing the petroleum products as are required under the Act and the Rules.

39. The writ petition stands ***allowed*** in terms of the aforesaid directions.

(2022)05ILR A364
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.05.2022

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ C No. 2059 of 2022

Santosh Kumar Chaurasia ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Roopani Mishra, Manoj Kumar Dubey

Counsel for the Respondent:
C.S.C.

(A) Detention of vehicle - The Indian Forest Act, 1927 - Section 52 - power of detention of vehicle after recording *'reasons to believe'* - Section 52(3) - after making a seizure report, the same shall be sent to the magistrate concerned, Section 52-A - power conferred upon Divisional Forest Officer to take action for confiscation only on being satisfied that a *'forest offence'* is believed to have been committed in respect of any forest produce, which is the property of the State Government, Section 52-B - appeal - an order passed cannot be supplemented by giving any reasons which are absent in the orders passed and impugned herein - 'Reasons to believe' as prescribed under section 52 are necessary to be recorded as the order of detention/seizure is expropriatory in nature and intends to deprive the owner of his property - prior to the passing of the confiscating order, it is essential to come to a conclusion that a 'forest offence' is believed to have been committed.(Para -7,8,9,11,14)

Petitioner claims to be owner of Truck - hire for transporting goods - truck of petitioner seized - transporting 45 logs of Sagwan - forest officer view - goods were illegally transported - order of seizure - detention order – does not disclose any 'reasons to believe' - to implicate the Truck in question with offence alleged against owner of goods - proceedings with regard to allegation of 'forest offence' not adjudicated - appeal- dismissed – Hence present petition. **(Para -4,9)**

HELD:- Finding is erroneous as the question of offence committed is yet to be established. Direction to release forthwith, the truck in question, which is in custody, on furnishing proof of ownership and giving an undertaking to produce the truck as and when required and with condition that the petitioner shall not sell the truck in question without obtaining adequate permission from the divisional forest officer in accordance with law. Question of confiscation shall be considered by the concerned officer only after the 'forest offence' in question is decided by the competent court after trial. **(Para - 13,16)**

Writ Petition allowed. (E-7)

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

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

2. In terms of the order passed by this court dated 11.04.2022, the instructions have been filed, the same are taken on record.

3. The present petition challenges the order dated 25.08.2021 whereby the order of confiscation was passed against the petitioner in respect of his vehicle being Truck No. UP75 M-9306 as well as the order dated 21.02.2022 whereby the appeal preferred under section 52(B) of the Indian Forest Act was dismissed.

4. The facts, in brief, are that the petitioner claims to be the owner of the Truck bearing No.UP 75 M-9306, which was purchased by the petitioner after availing a loan. The petitioner gives his truck on hire for transporting the goods from one place to another. On 05.06.2021, the truck of the petitioner was seized while it was transporting 45 logs of Sagwan. As the forest officer was of the view that the goods being transported on the vehicle were illegally transported and an order of seizure came to be passed on 05.06.2021 (Annexure no.4).

5. A perusal of the said seizure report given to the Magistrate indicates that on 05.06.2021 at about 3.00 am while checking, 45 logs of Sagwan wood were being transported illegally by loading the same on the vehicle in question. It was also recorded that the inquiry is going on. The said seizure report was also sent to the authorized officer under section 52-A of the Indian Forest Act. It is also informed at the bar that a case of criminal prosecution under the provisions of the Forest Act is pending before the magistrate and the same is not proceeding any further. The petitioner moved an application stating that he was a mere transporter and nothing was recorded as against the petitioner so as to implicate him in the offence in question, as such he requested that the Truck in question be released in his favour. On the said application, an order came to be passed on 25.02.2021 whereby the authorized officer exercising his power under section 52-A of the Indian Forest Act (as amended in the State of U.P.) proceeded to confiscate the truck in question. The petitioner preferred an appeal under section 52-B of the Indian Forest Act (as amended in the State of U.P.), which too has been dismissed. The said orders are under challenge in the present writ petition.

6. Section 52 of the Indian Forest Act, as amended in the State of U.P., confers the power on the forest officer or a police officer to stop and detain any vehicle and section 52(3) provides that after making a seizure report, the same shall be sent to the magistrate concerned. Section 52 is quoted herein below:

Section 52 :

(i) in sub-section (1), for the words "vehicles or cattle", substitute the words "vehicles, cattle, ropes, chains or other articles";

(ii) for sub-section (2), substitute the following sub-section, namely:?

"(2) Any Forest-officer or Police-officer may, if he has reason to believe that a boat or vehicle of which a forest-offence has been, or is being, committed, require the driver or other person in charge of such boat or vehicle to stop it, and he may detain such boat or vehicle for such reasonable time as is necessary to examine the contents in such boat or vehicle and to

inspect the records relating to the goods transported so as to ascertain the claims, if any, of the driver or other person in charge of such boat or vehicle regarding the ownership and legal origin of the forest-produce in question.

(3) Every officer seizing any property under this section shall place on such property a mark indicating that the same has been so seized and shall, as soon as may be, make a report of such seizure to the Magistrate having jurisdiction to try the offence on account of which the seizure has been made, and if the seizure is in respect of forest-produce which is the property of the State Government, shall also make a report to the authorized officer."

Section 52-A of the Act prescribes the procedure after seizure and is as under :

***"52A. Procedure on seizure**-(1) Notwithstanding anything contained in this Act or any other law for the time being in force where a forest-offence is believed to have been committed in respect of any forest-produce, which is the property of the State Government, the officer seizing the property under sub-section (1) of section 52 shall without unreasonable delay, produce it together with all the tools, boats, vehicles, cattle, ropes, chains and other articles used in committing the offence, before an officer, not below the rank of a Divisional Forest Officer, authorized by the State Government in this behalf, who may, for reasons to be recorded, make an order in writing with regard to custody, possession, delivery, disposal or distribution of such property, and in case of tools, boats, vehicles, cattle, ropes, chains and other articles, may also confiscate them.*

(2) The authorized officer shall, without any undue delay, forward a copy of the order made under sub-section (1) to his official superior.

(3) Where the authorized officer passing an order under sub-section (1) is of the opinion that the property is subject to speedy and natural decay he may order the property or any part thereof to be sold by public auction and may deal with the proceeds as he would have dealt with such property if it had not been sold and shall report about every such sale to his official superior.

(4) No order under sub-section (1) shall be made without giving notice, in writing, to the person from whom the property is seized, and to any other person who may appear to the authorized officer to have some interest in such property:

Provided that in an order confiscating a vehicle, when the offender is not traceable, a notice in writing to the registered owner thereof and considering his objections if any will suffice.

(5) No order of confiscation of any tool, boat, vehicle, cattle, rope, chain or other article shall be made if any person referred to in sub-section (4) proves to the satisfaction of the authorized officer that any such tool, boat, vehicle, cattle, rope, chain or other article was used without his knowledge or connivance or without the knowledge or connivance of his servant or agent, as the case may be, and that all reasonable precautions had been taken against use of the objects aforesaid for the commission of the forest offence.

7. Section 52-B provides for an appeal against the order passed under section 52-A of the Act.

8. I have perused the order passed under section 52 of the Act, which is

contained in Annexure 4, which confers the power of detention of a vehicle after recording the 'reasons to believe' and for such time as is necessary to examine the contents as contained in the vehicle and to ascertain the ownership of the vehicle and legal origin of the forest produce in question. The action under section 52-A is specified after the valid order of the detention is passed.

9. In the present case, as is clear from the perusal of the Annexure no.4, which is the detention order, the same does not disclose any 'reasons to believe' recorded so as to implicate the Truck in question with the offence alleged against the owner of the goods. The same merely mentions that the goods being 45 logs of Sagwan were being transported and were apprehended. The 'Reasons to believe' as prescribed under section 52 are necessary to be recorded as the order of detention/seizure is expropriatory in nature and intends to deprive the owner of his property.

10. Section 52-A of the Act provides for steps to be taken after the order of seizure and for producing the sized goods before the Divisional Forest Officer, who is authorized to pass an order after recording the reasons with regard to the custody, possession, delivery, disposal or distribution of such property and further authorizes the concerned officer in case of vehicles to confiscate them.

11. A plain reading of the Section 52-A makes it clear that the power conferred upon the Divisional Forest Officer to take action for confiscation only on being satisfied that a 'forest offence' is believed to have been committed in respect of any forest produce, which is the property of the State Government. The said condition precedent prescribes that prior to the passing of the confiscating order, it is essential to come to a conclusion that a 'forest offence' is believed to have been committed.

12. Admittedly, proceedings with regard to the allegation of 'forest offence' have not been adjudicated so far. The petitioner had specifically raised a plea that he had given the vehicle in question for hire and had no concern with the goods being transported therein. The order of the authorized officer confiscating the goods does not record that the vehicle in question was used in the 'forest offence', which according to the prescribed authority was being committed in respect of a forest produce. The order merely records that the goods in question, being transported, were the government property. He further erred in disbelieving the version of the petitioner that he had given the truck on hire merely because the petitioner did not disclose as to who had booked the truck in question.

13. Considering the order passed under section 52-A of the Act confiscating the Truck coupled with the fact that the proceedings for adjudicating the 'forest offence' have not culminated so far, clearly the divisional forest officer has erred in passing the order of confiscation. The divisional forest officer in terms of the mandate of section 52-A of the Act was clearly empowered to make an order with regard to the custody, possession, delivery and disposal of such property in addition or in alternate to the power of confiscation. No reasons have been recorded as to why the divisional forest officer considered it necessary to confiscate the goods when the trial regarding 'forest offence' is yet to have started. The appellate authority is equally silent as to why the order of confiscation

came to be passed when the proceedings for establishing 'forest offence' are pending. The appellate authority has in fact recorded that the appellant failed to establish that he was not involved in the offence. The said finding clearly is erroneous inasmuch as the question of the offence having been committed is yet to be established.

14. The instructions given by the Standing Counsel provide for the manner in which the orders are supposed to be passed. In any event of the matter, it is well established that an order passed cannot be supplemented by giving any reasons which are absent in the orders passed and impugned herein.

15. Thus, in totality and for the reasons recorded, I am of the view that the order impugned dated 25.08.2021 and the order dated 21.02.2022 are liable to be set aside.

16. Accordingly, the orders dated 25.08.2021 are set aside. It is directed that the truck in question, which is in the custody, being the Truck No.UP75 M-9306 shall be released forthwith to the petitioner on his furnishing proof of ownership and giving an undertaking to produce the truck as and when required and with condition that the petitioner shall not sell the truck in question without obtaining adequate permission from the divisional forest officer in accordance with law. The question of confiscation shall be considered by the concerned officer only after the 'forest offence' in question is decided by the competent court after trial.

17. The writ petition stands **allowed.**

(2022)05ILR A368
ORIGINAL JURISDICTION

CIVIL SIDE
DATED: LUCKNOW 26.04.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Writ C No. 4687 of 2022

The Oriental Insurance Co. Ltd., M.G. Marg Allahabad ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Kuldeep Shanker Amist

Counsel for the Respondent:
C.S.C.

(A) Judicial review - Court is not obligated to correct each and every error of law or fact - decline to offer any interference under Article 226 of the Constitution on a technical ground raised - that the order should have been passed by the Committee and not the District Magistrate, in her individual capacity *(Writ- C No. 5090 of 2022 (The Oriental Insurance Company Limited And 2 Others Vs. State of U.P. And 133 Others))* - Under the scheme, if for any reason, the Insurance Company finds that the claim is not acceptable or it has reservation in accepting the claim - proper remedy is to refer the matter to the District Level Committee - headed by District Magistrate - decision of said Committee would be final. (Para -3,5)

Claim of petitioner - for grant of benefit under Mukhyamantri Kisaan Avam Sarvahit Beema Yojana - rejected by Insurance Company - on a technical ground - challenge before high court under writ – disposed of with liberty to raise grievance before District Magistrate – DM allowed claim - granting compensation of Rs. 5 lakhs – no fault of claimant – order challenged on two grounds - DM himself decided case whereas claim was to be decided by District Level Committee - income certificate must have

been issued within 45 days but same issued after 45 days that cannot be accepted. **(Para - 3,4,5)**

HELD:- The identical grounds have been considered in the final judgment *(The Oriental Insurance Company Limited And 2 Others Vs. State of U.P. And 133 Others)* already rendered by coordinate Bench of this Court, no good ground to take a different view of the matter.**(Para -7)**

Petition dismissed. (E-7)

List of Cases cited:-

Sohni Shankwar Vs St. of U.P. & ors. , Writ-C No. 563 of 2020

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Vikas Budhwar, J.)

1. Heard Sri Kuldip Shanker Amist, learned counsel for the petitioner and Sri Sharad Chandra Srivastava, learned Standing Counsel appearing for respondent nos. 1 and 2.

2. The present petition has been filed for seeking the following reliefs :-

"i. Issue a writ, order or direction in the nature of certiorari quashing the impugned award dated 12.04.2021, passed by the District Magistrate, Etawah, allowing the Claim No. 272800/48/2019/030794 of the respondent no. 3, (Annexure-7 to the writ petition).

ii. Issue a writ, order and direction dismissing the claim of the Respondent No. 3.

iii. Issue any other and further writ, order or direction which the Hon'ble Court may deem fit and just in the circumstances and facts of the case.

iv. Award cost to the petitioner."

3. By the rejection order, the Insurance Company has repudiated the claim of respondent no. 3 which was made under the *Mukhyamantri Kisan Evam Sarvahit Beema Yojana*, on the ground that the income certificate was not produced by the claimant within 45 days of the death of the deceased husband. Challenging the same, the petitioner approached this Court by filing Writ-C No. 563 of 2020 (Sohni Shankwar Vs. State of U.P. And 2 Others), which was disposed of vide order dated 14.01.2020. The aforesaid order is quoted as under:-

"Heard learned counsel for the petitioner and learned Standing Counsel.

The claim of the petitioner for grant of benefit under the Mukhyamantri Kisaan Avam Sarvahit Beema Yojana has been rejected by the Insurance Company on a technical ground.

The submission of learned counsel for the petitioner is that the Insurance Company has no authority of law to reject the claim.

It is acceptable to the parties that under the scheme, if for any reason, the Insurance Company finds that the claim is not acceptable or it has reservation in accepting the claim, the proper remedy is to refer the matter to the District Level Committee, headed by the District Magistrate and the decision of the said Committee would be final.

In view of the above, we dispose of the writ petition with liberty to the petitioner to raise his grievance before the District Magistrate. In case, any such representation is made within a period of two weeks from today, the District Magistrate shall call for the records of the claim submitted by the petitioner and after due verification and examination, get it considered by the District Level Committee

in accordance with law, most expeditiously, preferably within a period of two months of submission of representation.

The writ petition stands disposed of, accordingly."

4. Pursuant to the aforesaid order, the impugned order was passed by District Magistrate, Etawah on 12.04.2021 holding that since the *Samajwadi Kisan Evam Sarvahit Bima* Care Card was liable to be issued free of cost by the Company which was not issued, therefore, it cannot be said that there is any fault on the part of the claimant in getting the income certificate within 45 days of the death of her husband. Accordingly, the claim was allowed granting the compensation of Rs. 5 lakhs.

5. The order is being challenged on two grounds, firstly that the District Magistrate himself has decided the case whereas the claim was to be decided by the District Level Committee and secondly, that the income certificate must have been issued within 45 days but the same was issued after 45 days that cannot be accepted. The identical grounds have been considered by this Court in Writ- C No. 5090 of 2022 (The Oriental Insurance Company Limited And 2 Others Vs. State of U.P. And 133 Others) wherein both the arguments were considered by this Court and relevant paragraphs whereof are quoted as under:-

"The first submission advanced by the learned counsel for the petitioner is found to be wholly misconceived. In the context of the group insurance policy taken out by the State Government, the claimant-respondent became entitled to claim the insured amount on the occurrence of the accidental death of Pushpendra Kumar during the currency of the group insurance policy. The claim itself was made within time. There is no dispute as to these facts. The further fact that the income certificate was issued beyond a period of 45 days did not set up any inherent infirmity in that claim made as period of 45 days mentioned in amended Clause 2 was only directory, that too for the purpose of making the payment only. It was not necessary to determine the liability of the petitioner that arose on the occurrence of death of the insured during the currency of the insurance policy. The claim itself was made within time. No consequence has been shown provided or existing in the insurance policy clauses as may lead to the inference that the insurance claim would become invalid if the income certificate was produced after 45 days. It only affected the release of payment by the petitioner. In any case, the beneficiaries had no control over the time taken in preparation of the said income certificate, by government functionaries.

The delay if any (of 23 days) is mainly as may have been caused while making procedural compliances. It is neither inordinate nor such as may give rise to any doubt as to the genuineness of the claim. Here it may also be noted that the income certificate and its contents are wholly undisputed. It reflects that the income of the deceased was Rs. 36,000/- per annum at the time of his death. Therefore, the claimant-respondents were wholly eligible to receive the insurance money.

In view of the above, the claim made by the claimant-respondent was wholly genuine and valid. The petitioner-insurer had wrongly repudiated that claim.

As to the second submission we are equally unimpressed. In the exercise of judicial review, the Court is not obligated to correct each and every error of law or

fact. Since it cannot be disputed that the claimant is entitled to the insured amount, we decline to offer any interference under Article 226 of the Constitution on a technical ground raised by learned counsel for the petitioner that the order should have been passed by the Committee and not the District Magistrate, in her individual capacity. The claimant-respondent being eligible to receive Rs. 5,00,000/- from the petitioner against the insurance policy, no real prejudice has been caused to the petitioner, by the impugned order."

6. The learned counsel for the petitioner could not dispute the same.

7. In view of the final judgment already rendered by coordinate Bench of this Court, we do not find any good ground to take a different view of the matter.

8. Accordingly, the petition stands **dismissed.**

(2022)05ILR A371
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.05.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ C No. 6529 of 2022

Asset Reconstruction Co., India Ltd.(Arcil) ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Krishna Mohan Asthana

Counsel for the Respondent:
C.S.C.

(A) Civil Law - Possession of secured asset - The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - Section 14(1) - provide a machinery for empowering banks, financial institutions and reconstruction company - power to take possession of secured assets and to sell or manage it - proviso to Section 14(1) of SARFAESI Act, 2002 - on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be - shall after satisfying with the contents of the affidavit - pass suitable orders for the purpose of taking possession of the secured asset - within a period of thirty days from the date of application - if no order is passed within the said stipulated period of thirty days for reasons beyond his control - he may, after recording reasons in writing for the same, pass order within such further period -not exceeding in aggregate sixty days - inability to take possession within the prescribed time-limit does not render the District Magistrate Functus Officio. (Para -8)

Petitioner is secured creditor – order passed under secion 14(1) of SARFAESI Act - State-respondents not given physical possession of secured asset in question to petitioner – order not complied with - dismissed by DRT - respondent Nos.2 and 3 shift their responsibility upon respondent No.4 - not taking any action despite Government Order.**(Para -3,4,5,)**

HELD:- Direction to respondents Nos.1 and 4 to give physical possession of secured asset in question to petitioner-bank within one month & also direction to the Chief Secretary of the State to issue clear directions to all the concerned authorities in the State to comply strictly the provisions of Section 14 of the SARFAESI Act, 2002 and handover physical possession of the secured asset to the concerned bank/ financial institutions/ reconstruction company within the prescribed time, if there is no legal impediment.**(Para - 11,12)**

Writ Petition allowed. (E-7)

List of Cases cited:-

1. B.O.B. Vs D.M. Maharajganj & ors. , Writ-C No.1755 of 2022

2. C. Bright Vs The District Collector & ors. , AIR 2020 SC 5747 (para-20)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Jayant Banerji, J.)

1. Heard Sri K.M. Asthana, learned counsel for the petitioner and Sri B.P. Singh Kachhwah, learned standing counsel for the State-respondents.

2. On 31.03.2022, this Court passed the following order:

"Heard Shri Krishna Mohan Asthana, learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

This writ petition has been filed praying for the following relief:

"i) issue an appropriate writ order or direction of suitable nature, commanding the respondent Authority, the Additional District Magistrate (Fin and Rev), Gautam Budh Nagar and the Sub Divisional Magistrate Sadar, Gautam Budh Nagar to complete the process of physical possession of the immovable secured asset to the petitioner situated at House No. C-50, Sector 20, Noida, District Gautam Budh Nagar UP 201001 as per the provisions under Section 14(2) of the SARFAESI Act 2002 in compliance of the order dated 07.10.2016 passed under Section 14(1) of the Act, 2002 by the Competent Authority under the Act 2002.

ii) Issue an appropriate writ order or direction of suitable nature, commanding the respondent no. 2, 3 & 4 to ensure actual physical possession of the immovable mortgaged property/secured asset to the petitioner under the provisions of Section 14(2) of the SARFAESI Act, 2002 without requiring to deposit amount for providing police force within a period to be specified by this Hon'ble Court.

iii) Issue a writ order or direction of suitable nature commanding the respondent authorities to extent all administrative/police assistance in completing the process of physical possession of the immovable property/ secured assets to the petitioner under Section 14 of the SARFAESI Act, 2002."

Learned counsel for the petitioner submits that more than five years have been passed since the order under Section 14(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was passed yet the respondent nos. 1 to 4 have not yet given physical possession of the mortgaged property.

Learned Standing Counsel prays for and is granted 10 days' time to a counter affidavit.

Petitioner shall have three days, thereafter, to file a rejoinder affidavit.

Put up as a fresh case before the appropriate Bench on 15.4.2022."

3. Undisputed facts of the present case are that the petitioner is the secured creditor. An order dated 07.10.2016 under Section 14(1) of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act, 2002') was passed by the respondent No.2. Despite repeated request of the petitioner,

the State-respondents have not given physical possession of the secured asset in question to the petitioner. A counter affidavit has been filed on behalf of the respondent Nos.2 and 3. In paragraphs 12 and 17 of the counter affidavit, the **respondents No.2 and 3, i.e. the Additional District Magistrate** and the Sub-Divisional Magistrate, have stated as under:

"12. That in reply to the contents of paragraph Nos. 22 and 23 of the writ petition it is stated that the ***Respondent No. 5 challenged the order dated 07.10.2016 before the Debt Recovery Tribunal in SA No. 662 of 2016.*** *The aforesaid* ***SA was dismissed*** *by the Debt Recovery Tribunal vide order dated 03.01.2022. It is further submitted that the* ***necessary action for handing over the possession has to be taken at the level of the Respondent no.4.*** *It is respectfully submitted that as per the procedure the petitioner had to coordinate with the Respondent No. 4 for the compliance of order dated 07.10.2016 passed by the answering Respondent No. 2. From the pleading it is evident that the petitioner at no point of time informed the answering respondents that the order dated 07.10.2016 has not been complied with.* ***It is also relevant to state that as per the pleading itself, the matter remained pending before DRT till 03.01.2022, hence, therefore, the possession could not have been handed over to the petitioner till the decision of the Debt Recovery Tribunal.***

17. That in reply to the contents of paragraph Nos. 31, 32 and 33 of the writ petition it is stated that the answering respondents have already passed the order for handing over the physical possession of the mortgaged property to the petitioner and further action has to be taken by the police department."

4. From the aforequoted paragraphs No.2 and 3 of the counter affidavit filed by the respondents No.2 and 3, it is evident that the order dated 07.10.2016 passed by the respondent No.2 under Section 14 of the SARFAESI Act, 2002, was not complied with even after the S.A. No.662 of 2016 filed by the respondent No.5/ borrower was dismissed by the DRT on 03.01.2022. From the aforequoted paragraphs of the counter affidavit, it is also evident that the respondent Nos.2 and 3 have attempted to shift their responsibility upon the respondent No.4, i.e. the Police Commissioner, Varanasi Zone, Varanasi, who is not taking any action despite the Government Order dated 14.02.2022.

5. In the judgment dated 18.02.2022 passed in Writ-C No.1755 of 2022 (Bank of Baroda vs. District Magistrate Maharajganj and 4 others), this Court quoted the Government Order dated 13.09.2021 whereby the State Government has issued certain directions to all the District Magistrate of the State of Uttar Pradesh. In the aforesaid judgment in the case of Bank of Baroda (supra), this Court observed in paragraphs-7 to 12, as under:-

"7. The enclosures to the personal affidavit of the Chief Secretary reveal that a Government Order dated 13.09.2021 was issued by the Secretary, Government of Uttar Pradesh directing all the District Magistrates of Uttar Pradesh to decide all the pending cases under Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short

'SARFAESI Act') within 30 days (in case there is no legal impediment to the same) pursuant to the judgment dated 24.08.2021 passed by this Court. Further, the second enclosure is another Government Order issued by the Special Secretary to the Government of U.P. dated 11.02.2022 to all the District Magistrates directing strict compliance of the Government Order dated 13.09.2021 issued pursuant to the judgment and order dated 24.08.2021 passed in Writ-C No.7126 of 2021.

8. The judgment of this Court dated 24.08.2021 has already been quoted above. A specific direction has been issued to all the District Magistrates of the State ***to keep a record/register of all the pending applications filed under Section 14 of the SARFAESI Act that may clearly disclose to the District Magistrate (on a fortnightly basis) details of all institutions of such applications made in that district and their disposal within time.*** *Further directions in the judgment are as follows:-*

"The said register may be duly inspected by the District Magistrate from time to time and also countersigned by him. Based on the entries recorded in such register, a quarterly report of all institution of applications filed under Section 14 of the Act together with the length of pendency of each application be sent to the Registrar General of this Court in the tabular form that may indicate the requirement of the Act is being fulfilled, in letter and spirit, who shall place the same before the appropriate Committee dealing with the functioning of the Debt Recovery Tribunals and Debt Recovery Appellate Tribunals."

9. There is nothing on record to demonstrate that the District Magistrates are maintaining record/registers and are monitoring the disposal of applications filed under Section 14 of the SARFAESI Act. The counter affidavit filed on behalf of the District Magistrate in the case in hand reflects that by an order dated 22.05.2017, this Court in Writ-C No.22486 of 2017 directed further proceedings against the respondent no.2 to be kept in abeyance with liberty to deposit the demanded amount with up-to-date interest with four equal installments with the last installment to be paid by 30.06.2018. It has nowhere been stated in the counter affidavit that the application under Section 14 of the SARFAESI Act could not be disposed of by the authority concerned for want of information regarding non-compliance of the aforesaid judgment and order dated 22.05.2017 passed by this Court in Writ- C No.22486 of 2017. Rather, it has been stated that due to COVID-19, the judicial work was suspended in the last years.

10. Such a conduct by the authority, charged with deciding/disposing of the applications filed under Section 14 of the SARFAESI Act, cannot but be said to be action taken pursuant to the order dated 10.02.2022 passed by this Court in the present writ petition. It is evident that the Government Order dated 13.09.2021, that has been enclosed as Annexure-1 to the personal affidavit filed by the Chief Secretary has been neglected by the respondent-authority/the authority seized of the case under Section 14 of the SARFAESI Act.

11. This Court is dealing with several writ petitions every week being filed by secured creditors seeking directions to the District Magistrate for deciding applications under Section 14 of the SARFAESI Act.

12. Under the circumstances, it is for the Chief Secretary of the State to take a serious look at the state of affairs and ensure compliance of the judgment and order dated 24.08.2021 passed by this

Court as well as the Government Orders issued by the Government itself and take suitable action for violation of the same. We also direct the Chief Secretary of State of Uttar Pradesh to also ensure compliance of those directions in the judgment dated 24.08.2021 which are highlighted in bold letters above."

6. Legislative Mandate of Section 14 of the SARFAESI Act, 2002 is to the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction the secured asset or other documents relating thereto may be situated or found, and the aforesaid two officers are statutorily bound to take possession thereof, and even the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, on the request being made to him, are statutorily bound to take possession of such asset and documents relating thereto and to forward the such asset and documents to the secured creditors provided an application is submitted by the secured creditor accompanied by an affidavit containing averments as provided in Section 14 of the Act.

7. In the case of **C.Bright vs. The District Collector & Ors. AIR 2020 SC 5747** (para-20), Hon'ble Supreme Court held as under:-

"20. The Act was enacted to provide a machinery for empowering banks and financial institutions, so that they may have the power to take possession of secured assets and to sell them. The DRT Act was first enacted to streamline the recovery of public dues but the proceedings under the said Act have not given desirous results. Therefore, the Act in question was enacted. This Court in Mardia Chemical, Transcore and Hindon Forge Private Limited has held that the purpose of the Act pertains to the speedy recovery of dues, by banks and financial institutions. The true intention of the Legislature is a determining factor herein. Keeping the objective of the Act in mind, the time limit to take action by the District Magistrate has been fixed to impress upon the authority to take possession of the secured assets. However, inability to take possession within time limit does not render the District Magistrate Functus Officio. The secured creditor has no control over the District Magistrate who is exercising jurisdiction under Section 14 of the Act for public good to facilitate recovery of public dues. Therefore, Section 14 of the Act is not to be interpreted literally without considering the object and purpose of the Act. If any other interpretation is placed upon the language of Section 14, it would be contrary to the purpose of the Act. The time limit is to instill a confidence in creditors that the District Magistrate will make an at- tempt to deliver possession as well as to impose a duty on the Dis- trict Magistrate to make an earnest effort to comply with the man- date of the statute to deliver the possession within 30 days and for reasons to be recorded within 60 days. In this light, the remedy under Section 14 of the Act is not rendered redundant if the Dis- trict Magistrate is unable to handover the possession. The District Magistrate will still be enjoined upon, the duty to facilitate delivery of possession at the earliest."

8. Thus, the law stands settled that the SARFAESI Act, 2002 has been enacted to provide a machinery for empowering banks, financial institutions and reconstruction company, so that they may have the power to take possession of secured assets and to sell or manage it. The purpose of the SARFAESI Act, 2002

pertains to the speedy recovery of dues by banks, financial institutions and reconstruction company. The second proviso to Section 14(1) of the SARFAESI Act, 2002 itself mandates that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying with the contents of the affidavit, **pass suitable orders for the purpose of taking possession of the secured asset within a period of thirty days from the date of application and if no order is passed within the said stipulated period of thirty days for reasons beyond his control, he may, after recording reasons in writing for the same, pass order within such further period but not exceeding in aggregate sixty days.** However, **inability to take possession within the prescribed time-limit does not render the District Magistrate Functus Officio.** The District Magistrate or the Chief Metropolitan Magistrate, as the case may be, is under statutory obligation. Section 14 of the SARFAESI Act, 2002 itself creates statutory obligation upon the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, for public good to facilitate recovery of public dues, to instil a confidence in creditors that the District Magistrate will make an attempt to deliver possession as well as imposes a duty on the District Magistrate to make an earnest effort to comply with the mandate of the statute to deliver the possession within the prescribed time. Even if the prescribed time limit has passed over and the District Magistrate could not handover possession of the secured asset, still the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, will be enjoined upon the duty to facilitate the delivery of possession at the earliest. In the light of the these settled position and a clear statutory mandate, the stand taken by the respondents in the counter affidavit is nothing but prima facie a disobedience of the legislative mandate of the Government Orders as well the judgments of Hon'ble Supreme Court and this Court.

9. That apart, it appears that pursuant to order dated 24.08.2021 passed in Writ-C No.7126 of 2021, the State Government has issued a Government Order No.117fjV@6&iq0&11&22&15fjV@2022 dated 14.02.2022, which is reproduced below:

"ई- मेल/ कोर्टकेस/ अत्यन्त महत्वपूर्ण

संख्या- 117 रिट/ 6 - पु० - 11 - 22 - 15रिट/2022

प्रेषक,

अवनीश कुमार अवस्थी,
अपर मुख्य सचिव,
उत्तर प्रदेश शासन।

सेवा में,

1- **पुलिस आयुक्त,**

लखनऊ/ कानपुर/ वाराणसी/ गौतमबुद्धनगर।

2- **समस्त वरिष्ठ पुलिस अधीक्ष / पुलिस अधीक्षक,**

उत्तर प्रदेश।

गृह (पुलिस) अनुभाग-11 लखनऊः

दिनांक 14 फरवरी, 2022

विषयः- सिक्योरिटाइजेशन एंड रिकन्स्ट्रक्शन आफ फाइनेंशियल एसेट्स एंड एनफोर्समेंट आफ सिक्योरिटी इंटरेस्ट एक्ट (सरफेसी अधिनियम- 2002) की धारा - 14 के अन्तर्गत कार्यवाही किये जाने के सम्बन्ध में।

महोदय,

उपर्युक्त विषयक श्री बीपी सिंह कछवाह, स्थायी अधिवक्ता मा० उच्च न्यायालय, इलाहाबाद के पत्र दिनांक 13.01.2022 (छायाप्रति संलग्न) का कृपया संदर्भ ग्रहण करने का कष्ट करें।

2- उल्लेखनीय है कि सिक्योरिटाइजेशन एंड रिकन्स्ट्रक्शन आफ फाइनेंशियल एसेट्स एंड एनफोर्समेंट आफ सिक्योरिटी इंटरेस्ट एक्ट (सरफेसी अधिनियम- 2002) की **धारा -14 के अन्तर्गत दायर सभी लम्बित प्रकरणों को निस्तारित करने के दौरान जिलाधिकारियों द्वारा यथावश्यकता मांग करने पर नियमानुसार आवश्यक पुलिस बल** (यदि किसी प्रकार की कोई कानूनी/ विधिक बाधा न हो तो) **उपलब्ध कराये जाने का प्राविधान है।**

3- इस सम्बन्ध में वित्त विभाग के वित्त (संस्थागत) अनुभाग- 35 के शासनादेश संख्या- 533 बी/ वि० (सं०) अनु०- 35- 2021, दिनांक 13.09.2021 की प्रति संलग्न कर प्रेषित करते हुये मुझे यह कहने का निदेश हुआ है कि उपरोक्त निर्देशो का कड़ाई के साथ अनुपालन सुनिश्चित किया जाय। यदि इन निर्देशो के अनुपालन मे शिथिलता हेतु किसी अधिकारी/ कर्मचारी को उत्तरदायी पाया जाता है, तो उसके विरूद्ध संगत नियमों के अन्तर्गत दण्डात्मक कार्यवाही की जायेगी।

संलग्नकः यथोपरि।

भवदीय,
(अवनीश कुमार अवस्थी)
अपर मुख्य सचिव।

संख्य एवं दिनांक तदैव।

प्रतिलिपि निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषितः-

1- पुलिस महानिदेशक, उत्तर प्रदेश, लखनऊ।

2- अपर पुलिस महानिदेशक (कानून एवं व्यवस्था), उत्तर प्रदेश, लखनऊ।

3- अपर पुलिस महानिदेशक, प्रयागराज जोन, प्रयागराज।

4- गार्ड फाइल।

आज्ञा से,
(राकेश कुमार मालपाणी)
विशेष सचिव।"

10. Counter affidavit filed by the respondent Nos.2 and 3 is apparently in defiance of judgments of this Court as well as the direction issued by the State Government from time to time particularly the aforequoted G.O. dated 14.02.2022. Thus, the facts as stated leaves no manner of doubt that there is failure on the part of the respondent Nos.1 to 4 to discharge their duty under Section 14 of the SARFAESI Act, 2002.

11. For all the reasons aforestated, **the writ petition is allowed.** The respondent Nos.1 and 4 are directed to give physical possession of the secured asset in question to the petitioner-bank within one month, if there is no legal impediment.

12. We also direct the Chief Secretary of the State of Uttar Pradesh to issue clear directions to all the concerned authorities in the State of Uattar Pradesh to comply strictly the provisions of Section 14 of the SARFAESI Act, 2002 and handover physical possession of the secured asset to the concerned bank/ financial institutions/ reconstruction company within the prescribed time, if there is no legal impediment. Such direction shall be issued by the Chief Secretary within two weeks from today.

13. Let a copy of this order be sent by the Registrar General of this Court to the Chief Secretary of the Government of Uttar Pradesh within three days, for compliance.

(2022)05ILR A378
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.04.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Writ C No. 7603 of 2022

M/s CALSTAR STEEL LTD. & Anr.
...Petitioners
Versus
NORTH EASTERN RAILWAY & Ors.
...Respondents

Counsel for the Petitioners:
Sri Ravi Kant, Sri Uday Gupta, Sri Adarsh Bhushan

Counsel for the Respondents:
A.S.G.I., Sri Krishna Agarwal

(A) Arbitration Law - Arbitration and Conciliation Act, 1996 - Sections 7,9 & 17 - Interim measures ordered by arbitral tribunal - arbitration is an important alternative dispute redressal process which needs to be encouraged - availability of alternative remedy does not preclude the High Court from entertaining a writ petition in appropriate case - Court while entertaining a writ petition has to bear-in-mind the fact as to whether the dispute so raised does not involve factual issues which comprise complex questions of fact. (Para -24,27)

(B) Writ Jurisdiction - High Court should not exercise its extraordinary writ jurisdiction when an efficacious alternative remedy is available - is a Rule of prudence and not a Rule of law - Rule of alternative remedy is a Rule of discretion and not a Rule of jurisdiction - Merely because the Court may not exercise its discretion, is not a ground to hold that it has no jurisdiction- it will be for the High Court to decide in the peculiar facts and circumstances of each case whether it should exercise its extraordinary writ jurisdiction or not. (Para -28)

Certain dispute arose with respect to land allotted to petitioners - manufacturing BG PSC sleepers - excess possession of the land beyond the land allotted to them - entailed to correspondence being exchanged from time to time - contract in writing executed between respondents and petitioners - arbitration clause - petitioners signatories to the agreement - issue in question itself arbitrable - within the scope of arbitration clause which can be entertained and adjudicated by the arbitrator.**(Para -6,7,25)**

HELD:- Dispute raised by parties centers around factual issues wherein complex questions of facts are involved whose determination requires oral evidence. Court under Article 226 of the Constitution of India cannot make any enquiry into disputed questions of fact while taking evidence. writ petition not maintainable on the ground of alternative efficacious remedy as provided under Clause 23 of the agreement, leaving it open to the petitioners to seek remedy as available under Section 23 of the Act of 1996. **(Para -30)**

Writ Petition dismissed. (E-7)

List of Cases cited:-

1. St. of J & K & anr. Vs Dev Dutt Pandit , (1999) 7 SCC

2. U.O.I. Vs Varindera Constructions Ltd. & ors., (2018) 7 SCC 794

3. U.P.P.T.C. Ltd. & anr. Vs CG Power & Industrial Solutions Ltd. anr. , AIR Online 2021 SC 243

4. Bal Krishna Ram Vs U.O.I. & anr. , 2020 (2) SCC 442

5. P.N.B. & ors. Vs Atmanand Singh & ors., (2020) 6 SCC 256

(Delivered by Hon'ble Vivek Kumar Birla, J.

&

Hon'ble Vikas Budhwar, J.)

1. This is a petition under Article 226 of the Constitution of India seeking following reliefs:-

(a) Issue a writ, order or direction/declaration in the nature of mandamus or any other appropriate writ, order or direction for call of the records of the present case from the Respondents; and

(b) Issue a writ, order or direction/declaration in the nature of mandamus or any other appropriate writ, order or direction directing that the Impugned Order dated 30.12.2021 [ANNEXURE NO.XXXIII] is wholly arbitrary, illegal and contrary to well established legal principles and being so also amount to a serious violation of the Fundamental Rights of the Petitioner No.2 and further direct the Respondents to forthwith amend the Agreement dated 05.09.2014 [ANNEXURE No.XV] to include with effect from the year 2016, land admeasuring 1122.59 sq. mtrs. in addition to 5414.40 sq. mtrs. Already allotted in terms of the Joint Inspection Report dated 04.04.2016 [ANNEXURE No.XX]; and

(c) Issue a writ, order or direction in the nature of certiorari or any other appropriate writ, order or direction quashing the Impugned Order dated 30.12.2021 [ANNEXURE No.XXXIII] being wholly arbitrary, illegal and contrary to well established legal principles and amount to a serious violation of the Fundamental Rights of the Petitioner No.2; and

(d) Award costs of the petition and Counsel's fee of the Petitioners.

Perusal of the reliefs as sought in the present writ petition reveals that the petitioners are insisting for writ order or direction/declaration in nature of mandamus or any other appropriate writ order or declaring the order dated 30.12.2021 arbitrary, illegal as well as contrary well established legal principles and in violation of the fundamental rights of the petitioner no. 2 and to further direct the respondents herein to forthwith amend the agreement dated 5.9.2014 so as to include it w.e.f. the year 2016 ad-measuring 1122.59 square meters in addition to 5414.40 square meters already allotted in terms of Joint Inspector Report dated 4.4.2016.

2. As per the pleadings so set forth in the writ petition the petitioner no.1 claims itself to be a company engaged in manufacturing of PSC Sleepers for railways and registered with Government of India, Ministry of Micro, Small and Medium Enterprises as a MSME.

3. Petitioners have further pleaded that for the purposes of manufacturing Brand Gauge Monoblock Concrete Sleepers contract was executed on 27.4.1998 between the Railway Board on one hand and the petitioner no.1 on the other hand. It has further been pleaded that from time to time fresh contracts have been entered into on 31.12.2002, 14.12.2009 and 11.6.2019.

4. Agreements were also executed between the respondents herein and the petitioners from time to time including the agreement dated 5.9.2014 which finds place at page 278 of the paper book containing Clause 23 at page 281.

"23. पक्षकारों के बीच करारनामों मे दिए गए नीलामी नोटिस मे पक्षों के अधिकारो और दायित्वों अथवा प्रस्तुत इसके किन्ही

धाराओं या शर्तों के उद्देश्य तथा आशय के संबंध मे कोई विवाद या मतभेद उत्पन्न होने पर,(ऐसी मामले को छोड़कर जिनके सम्बन्ध में इस करार में विशेष रूप से व्यवस्था है।) तत्कालीन महाप्रबन्धक, पूर्वोत्तर रेलवे द्वारा किसी राजपत्रित रेल अधिकारी को नियुक्ति विवाचक (आर्बीट्रेटर) को एक मात्र विवाचक को संदर्भित कर दिए जायेगे और उसका निर्णय पक्षकारों के लिए अंतिम निर्णायक एवं आबद्धकर होगा। इस करार के संबंध में महाप्रबन्धक से पूर्वोत्तर रेलवे प्रशासन का प्रधान अभिप्रेत होगा।"

5. Heard Sri Uday Gupta through online mode assisted by Sri Ravi Kant and Sri Adarsh Bhushan, learned counsels for the petitioners and Sri Krishna Agarwal learned counsel for the respondents.

6. Learned counsels for the petitioners have argued that certain dispute arose with respect to the land so allotted to them for manufacturing BG PSC sleepers and excess possession of the land beyond the land allotted to them entailed to correspondence being exchanged from time to time.

7. As per learned counsels for the petitioners, a contract in writing had been executed between the respondents and the petitioners on 27.4.1998 with respect to execution of the contractuals/obligations wherein the area of the land so allotted to the petitioner no.1 by the respondents was 5414.40 square meters and the petitioners on the basis of the same enjoyed the benefits of the said land for manufacturing purposes and paid annual licence fee of Rs.5,02,103/-. Subsequently, as per the provisions contained in the contract dated 27.4.1998, there was an increase of payment of annual licence fee 10% annually which swell to Rs.27,40,119/-. It has further been argued by the learned counsel for the petitioners that by virtue of the communication dated 3.11.2006, the petitioners were informed that petitioners were in possession of 964.34 square meters of additional land and steps were to be undertaken to get the said additional land included in the contract. It has further been argued that the same was disputed by the petitioners on 10.2.2007 and on 27.2.2007 another communication was issued to the petitioners mentioning that an amount of Rs.6,75,423/- has been deducted from the bill so raised by the petitioners on the pretext that the petitioners were in possession of extra land. Various correspondences were also extended by the petitioners, one of the same being dated 24.10.2007 admitting the fact that the petitioners are possessing 144 square meters of additional land.

8. Eventually a fresh formal agreement was executed renewing the parent contract wherein the licenced land was shown to be 5414.40 sq. mtrs. It has also been argued that the petitioners disputed the said fact regarding possession of the land being 5414.40 sq. mtrs vide letter dated 15.1.2006 and thereafter a joint inspection team was constituted compromising of the representative of the petitioner company and the authorised officers of the railways which conducted joint spot inspection on 4.4.2016 wherein it was found that the petitioners were in possession of 1122.59 square meters of extra land. Even it has also come on record that a letter was written by the petitioners to the railways on 16.5.2016 to regularise 1122.59 square meters on extra land and on 27.1.2018, petitioners vide covering letter remitted licence fee for extra land treating 1122.59 square meters for the year 2016-17 and 2017-18. It has also been placed on record that the petitioners company also

made request for allotment of said extra part of land in their favour.

9. On 15.10.2019 Chief Engineer of the railways sent a communication to the Senior Divisional Engineer Coordination Eastern Railways, Lucknow clearly setting out the fact that in joint inspection 1122.59 Sq. mtrs. of extra land was found in possession of the petitioners. Further the petitioner company also requested for allotment of the said land and also submitted lay out plan which mentioned that the extra land would be 1863.34 sq. mtrs. Thereafter, on 18.2.2021 an order was passed demanding licence fee from the petitioners treating extra land as 4156.87 sq. mtrs. since 2006-07.

10. Being aggrieved against the same, petitioners herein instituted Writ Petition No.17230 of 2021 M/s Calstar Steel Ltd. & another Vs. North Eastern Railway seeking following reliefs:-

a) Call for the records of the present case from the Respondent-North Eastern Railway; and

b) Issue a writ, order or direction/declaration in the nature of mandamus or any other appropriate writ, order or direction directing that the impugned communication dated 18.02.2021 and 15.06.2021 are wholly arbitrary, illegal and contrary to well established legal principles and being so also amount to a serious violation of the Fundamental Rights of the Petitioner No.2 and further direct the Respondent-North Eastern Railway to forthwith amend the Agreement dated 05.09.2014 to include with effect from the year 2016, land admeasuring 1122.59 sq. mtrs. In addition to 5414.40 sq. mtrs. already allotted in terms of the Joint Inspector Report dated 04.04.2016 ; and

c) Issue a writ, order or direction in the nature of certiorari or any other appropriate writ, order or direction quashing the impugned communication dated 18.02.2021 and 15.06.2021 being wholly arbitrary, illegal and contrary to well established legal principles and amount to a serious violation of the Fundamental Rights of the Petitioner No.2; and

d) Award costs of the petition and Counsel's fee of the Petitioners.

11. On 7.10.2021 this Court proceeded to pass the following order and relevant extract is quoted below:

"It is not in dispute that extra land was in possession of the Company over and above 5414.40 sq. meters in relation to which contract was executed in its favour. The main dispute is regarding the extent of extra land in possession of the Company. It is evident that initially the respondent alleged that the extra area was 964.34 sq. meters as mentioned in the communication dated 03.04.2006 addressed to the Company. The Company disputed the same. At a later point of time, in October, 2015, the respondent claimed that the extra area is 4165.87 sq. meters. Again the Company disputed the same by raising a written protest. Thereafter, a joint inspection was carried out on 04.04.2016, in which it transpired that extra land in possession of the Company is 1122.59 sq. meters. Thereafter, the Company requested for including the said area in the agreement. It is also evident that the respondent renewed the licence on 05.09.2014 for an area 5414.40 sq. meters without settling the issue relating to extra land used by the Company. In due course of time, the Company started paying licence fee by treating the additional area as

1122.59 sq. meters as was found in joint inspection and also made request for allotment of 1863.34 sq. meters of extra land over and above the area licensed under the contract. While the said request remained pending, the impugned demand has been raised in which the finding of the joint inspection report dated 04.04.2016 has not been noted nor considered nor even the stand of the petitioner which was there before the respondent in shape of several protest letters and representations.

At this stage, Sri Rajnish Kumar Rai on query made by the Court as to whether the respondent is ready to pass a fresh order after considering the joint inspection report and other relevant material submitted that the respondent shall pass a speaking order in this regard within such time as may be directed by this Court.

Accordingly and having regard to the stand taken by learned counsel for the respondent before this Court, we dispose off the writ petition as follows:

(a) The Company shall file a fresh representation along with supporting material and true attested copy of the instant order before the respondent within two weeks from today.

(b) On receipt of the representation, the competent authority shall examine the representation, the joint inspection report and other relevant evidence and, thereafter, pass a speaking order within a further period of four weeks.

(c) The impugned demand shall abide by the decision that shall be taken on the representation. In case, the Company defaults in making representation within two weeks, as stipulated above, the instant order shall stand discharged and the writ petition would be treated to be dismissed."

12. Thereafter, it appears that the petitioners preferred representation before the railways and the same has been rejected by virtue of the order dated 30.12.2021 holding as under:-

*पैरा (xviii) आपके अनुरोध पर दिनांक **08.11.2021** को व्यक्तिगत सुनवाई की जा चुकी है।*

पैरा (xix) आपके द्वारा प्रस्तुत किये गये साक्ष्य, व्यक्तिगत सुनवाई में दिये गये तर्क एवं सभी उपलब्ध कागजातो का गहन अध्ययन करके माननीय उच्च न्यायालय के द्वारा रिट सं०- 17230/2021 मे पारित आदेश दिनांक 07.10.2021 के अनुपालन में निम्न निर्णय दिया जाता है-

(I) फर्म द्वारा 2006 से ही कूलिंग टैंक का निर्माण करके मैटेरियल एवं स्लीपर रखने हेतु अतिरिक्त भूमि पर अतिक्रमण किया गया है। परन्तु उक्त भूमि का सही माप, सभी पक्षो के साथ संयुक्त निरीक्षण न होने के कारण, वर्तमान में प्रमाणित नहीं किया जा सकता। अतः 432 वर्गमीटर के अतिक्रमण (फर्म द्वारा स्वीकार्य) को 01.06.2006 से (रेलवे द्वारा उक्त मद के सम्बन्ध मे प्रथम पत्र की तिथि) 2014 तक (करारनामें के नवीनीकरण तक) लिया जाना उचित है, परन्तु वर्ष 2006-07 से 2016 तक 432 वर्गमीटर भूमि पर टैंक का बनाना स्वीकार किया गया है जबकि 432 वर्गमीटर 3 टैंको का आन्तरिक क्षेत्रफल 3 x 9 x 16 है। जबकि वास्तविक रूप में इन टैंको को बनाने के लिए 28.40 x 16.62=472 वर्गमीटर की भूमि का इस्तेमाल किया गया है। अतः 472 वर्गमीटर भूमि का लाइसेन्स शुल्क तथा लिक्विडेटेड डैमेज देय होगा।

(ii) वर्ष 2014 मे पुराने लाइसेन्स के करारनामें (5414.40 वर्गमी०) का नवीनीकरण किया गया था, जिस करारनामें में अतिरिक्त भूमि अतिक्रमित होने का कोई वर्णन नहीं है। माननीय उच्च न्यायालय ने भी उक्त पर टिप्पणी की है। परन्तु मौजूद साक्ष्यों एवं आपके पत्र

दिनांक 10.02.2007 के आधार पर यह स्पष्ट होता है कि आपके द्वारा 472 वर्ग मी० अतिरिक्त भूमि वर्ष 2006 से उपयोग मे थी।

(iii) दिनांक 04.04.2016 के संयुक्त जांच रिपोर्ट में पाये गये अतिक्रमण एरिया 1122.59 वर्गमी० यह सिद्ध करता है कि फर्म द्वारा पूर्व रेलवे भूमि पर अतिक्रमण किया गया था। उक्त 1122.59 वर्गमीटर अतिरिक्त भूमि का लाइसेन्स शुल्क वर्ष 2016 से फर्म द्वारा जमा किया जा रहा है।

(iv) वर्ष 2006-07 से 2016 तक 432 वर्गमीटर भूमि पर टैंक का बनाना स्वीकार किया गया है जबकि 432 वर्गमीटर 3 टैंको का आन्तरिक क्षेत्रफल 3 x 9 x 16 है। जबकि वास्तविक रूप में इन टैंको को बनाने के लिए 28.40 x 16.62 =472 वर्गमीटर की भूमि का इस्तेमाल किया गया है। अतः दिनांक ***10.02.2007*** *से* ***04.04.2016*** *तक* ***472*** *वर्गमीटर भूमि का लाइसेन्स शुल्क तथा लिक्विडेटेड डैमेज देय होगा।*

13. Challenging the order now the petitioners are before this Court.

14. Learned counsels for the petitioners have argued that that the order under challenge is perverse contrary to material on record and even in fact is in violation of principles of natural justice.

15. According to learned counsel for the petitioners reliance and reference so made by the respondents upon R.D.S.O. letter dated 15.7.2005 without confronting the same with petitioners and making as one of the basis for passing of the order in challenge vitiates the entire proceedings.

16. In nutshell argument of learned counsel for the petitioners is to the effect that the order under challenge is liable to be set aside and matter be remanded back to the railways to decide a fresh after furnishing the necessary documents which were made the basis of passing the order which is under challenge.

17. Sri Krishna Agarwal learned counsel for the respondents has at the very outset argued that the present writ petition is not maintainable as the petitioners has an alternative efficacious remedy of taking recourse to arbitration as contemplated in Clause 23 of the agreement dated 15.5.2014. According to him disputed question of facts are involved in the present petition which are of complex nature and requires production of documentary evidence which cannot be resorted to in the present proceedings.

18. On being confronted with the said position learned counsel for the petitioners could not dispute the existence of alternative efficacious remedy by means of arbitration. However, according to the learned counsel for the petitioners, the petitioners can though take recourse to arbitration but as the respondents are insisting for the payment of annual licence fees for the excess land so shown to be occupied by the petitioners being 1050 sq. mtrs. for the period from 15.7.2005 to 23.6.2014, thus, according to them arbitration may not be efficacious remedy.

19. We have heard the arguments of the learned counsel for the petitioners, learned counsel for the respondents and perused the record.

20. The Parliament in exercise of powers as conferred therein enacted an Act by the name in the nomenclature of Arbitration and Conciliation Act, 1996 (In short Act of 1996) in order to consolidate and amend the law relating to domestic

arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for the matters connected therewith or incidental thereto.

21. For the kind perusal of this Court Sections **7, 9 and 17** of the Act of 1996 are being quoted below-

7. Arbitration agreement.--(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in--

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication 1 [including communication through electronic means] which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

9. Interim measures, etc., by Court.--3 [(1)] A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court--

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:--

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days

from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.]

17. Interim measures ordered by arbitral tribunal.--(1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to the arbitral tribunal--

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:--

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.]

22. The Hon. Supreme Court in the case of **State of J & K and another Vs. Dev Dutt Pandit (1999) 7 SCC page 339** in para 23 has observed as under:-

"23. Arbitration is considered to be an important Alternative Disputes Redressal process which is to be encouraged because of high pendency of cases in the courts and cost of litigation. Arbitration has to be looked up to with all earnest so that litigant public has faith in the speedy process of resolving their disputes by this process. "

23. Following the said judgments the Hon. Apex Court in the case of **Union of India Vs. Varindera Constructions Ltd. and others (2018) 7 SCC 794** in para 12 has observed as under:-

"The primary object of the arbitration is to reach a final disposition in a speedy, effective, inexpensive and expeditious manner. In order to regulate the law regarding arbitration, legislature came up with legislation which is known as Arbitration and Conciliation Act, 1996. In order to make arbitration process more effective, legislature restricted the role of courts in case where matter is subject to the

arbitration. Section 5 of the Act specifically restricted the interference of the courts to some extent. In other words, it is only in exceptional circumstances, as provided by this Act, the court is entitled to intervene in the dispute which is subject matter of arbitration. Such intervention may be before, at or after the arbitration proceeding, as the case may be. In short, court shall not intervene with the subject matter of arbitration unless injustice is caused to either of the parties."

24. Hon. Supreme Court in the above noted judgments have consistently held that arbitration is an important alternative dispute redressal process which needs to be encouraged.

25. Here in the present case, learned counsel for the petitioners have not disputed the fact that their exists an arbitration clause and further they are signatories to the agreement which contains arbitration clause and the issue in question itself is also arbitrable and within the scope of arbitration clause which can be entertained and adjudicated by the arbitrator.

26. Learned counsels for the petitioners have placed reliance upon the judgment of **Uttar Pradesh Power Transmission Corporation Ltd. and another Vs. CG Power and Industrial Solutions Ltd. another AIR Online 2021 SC 243** so as to contend while referring to paragraph 67 which reads as under:-

It is well settled that availability of an alternative remedy does not prohibit the High Court from entertaining a writ petition in an appropriate case. The High Court may entertain a writ petition, notwithstanding the availability of an alternative remedy, particularly (1) where the writ petition seeks enforcement of a fundamental right; (ii) where there is failure of principles of natural justice or (iii) where the impugned orders or proceedings are wholly without jurisidiction or (iv) the vires of an Act is under challenge. Reference may be made to Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and others reported in AIR 1999 SC 22 and Pimpri Chindhwad Municipal Corporation and Ors. V. Gayatri Construction Company and Ors. V. Gayatri Construction Company and Ors. reported in (2008) 8 SCC 172 : (AIR 2008 SC (Supp) 211) cited on behalf of Respondent No.1.

27. Undisputably availability of alternative remedy does not preclude the High Court from entertaining a writ petition in appropriate case. However, this Court while entertaining a writ petition has to bear-in-mind the fact as to whether the dispute so raised does not involve factual issues which comprise complex questions of fact whose determination requires oral evidence or not.

28. In the case of ***Bal Krishna Ram Vs. Union of India and another 2020 (2) SCC 442*** the Hon. Apex Court in paragraph 14 has observed as under:-

"14. It would be pertinent to add that the principle that the High Court should not exercise its extraordinary writ jurisdiction when an efficacious alternative remedy is available, is a Rule of prudence and not a Rule of law. The writ courts normally refrain from exercising their extraordinary power if the Petitioner has an alternative efficacious remedy. The existence of such remedy however does not mean that the jurisdiction of the High Court is ousted. At the same time, it is a

well settled principle that such jurisdiction should not be exercised when there is an alternative remedy available3. The Rule of alternative remedy is a Rule of discretion and not a Rule of jurisdiction. Merely because the Court may not exercise its discretion, is not a ground to hold that it has no jurisdiction. There may be cases where the High Court would be justified in exercising its writ jurisdiction because of some glaring illegality committed by the AFT. One must also remember that the alternative remedy must be efficacious and in case of a Non-Commissioned Officer (NCO), or a Junior Commissioned Officer (JCO); to expect such a person to approach the Supreme Court in every case may not be justified. It is extremely difficult and beyond the monetary reach of an ordinary litigant to approach the Supreme Court. Therefore, it will be for the High Court to decide in the peculiar facts and circumstances of each case whether it should exercise its extraordinary writ jurisdiction or not. There cannot be a blanket ban on the exercise of such jurisdiction because that would effectively mean that the writ court is denuded of its jurisdiction to entertain such writ petitions which is not the law laid down in L. Chandra Kumar (supra). "

29. Further in the case of **Punjab National Bank and others Vs. Atmanand Singh and others** reported in **(2020) 6 SCC 256** the Hon. Apex Court in paragraphs no. 22, 23, 24, 25 held as under:-

22. We restate the above position that when the petition raises questions of fact of complex nature, such as in the present case, which may for their determination require oral and documentary evidence to be produced and proved by the concerned party and also because the relief sought is merely for ordering a refund of money, the High Court should be loath in entertaining such writ petition and instead must relegate the parties to remedy of a civil suit. Had it been a case where material facts referred to in the writ petition are admitted facts or indisputable facts, the High Court may be justified in examining the claim of the writ Petitioner on its own merits in accordance with law.

23. In the next reported decision relied upon by the Respondent No. 1 in Babubhai (supra), no doubt this Court opined that if need be, it would be open to the High Court to cross-examine the affiants. We may usefully refer to paragraph 10 of the said decision, which reads thus:

10. It is not necessary for this case to express an opinion on the point as to whether the various provisions of the Code of Civil Procedure apply to petitions Under Article 226 of the Constitution. Section 141 of the Code, to which reference has been made, makes it clear that the provisions of the Code in regard to suits shall be followed in all proceedings in any court of civil jurisdiction as far as it can be made applicable. The words "as far as it can be made applicable" make it clear that, in applying the various provisions of the Code to proceedings other than those of a suit, the court must take into account the nature of those proceedings and the relief sought. The object of Article 226 is to provide a quick and inexpensive remedy to aggrieved parties. Power has consequently been vested in the High Courts to issue to any person or authority, including in appropriate cases any government, within the jurisdiction of the High Court, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition,

quo warranto and certiorari. It is plain that if the procedure of a suit had also to be adhered to in the case of writ petitions, the entire purpose of having a quick and inexpensive remedy would be defeated. A writ petition Under Article 226, it needs to be emphasised, is essentially different from a suit and it would be incorrect to assimilate and incorporate the procedure of a suit into the proceedings of a petition Under Article 226. The High Court is not deprived of its jurisdiction to entertain a petition Under Article 226 merely because in considering the Petitioner's right of relief, questions of fact may fall to be determined. In a petition Under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is no doubt discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises complex questions of fact, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute should not appropriately be tried in a writ petition, the High Court may decline to try a petition (see Gunwant Kaur v. Bhatinda Municipality [MANU/SC/0397/1969 : (1969) 3 SCC 769]. If, however, on consideration of the nature of the controversy, the High Court decides, as in the present case, that it should go into a disputed question of fact and the discretion exercised by the High Court appears to be sound and in conformity with judicial principles, this Court would not interfere in appeal with the order made by the High Court in this respect.

This decision has noticed Smt. Gunwant Kaur (supra), which had unmistakably held that when the petition raises complex questions of facts, the High Court may decline to try a petition. It is further observed that if on consideration of the nature of the controversy, the High Court decides to go into the disputed questions of fact, it would be free to do so on sound judicial principles. Despite the factual matrix in the present case, the High Court not only ventured to entertain the writ petition, but dealt with the same in a casual manner without adjudicating the disputed questions of fact by taking into account all aspects of the matter. The manner in which the Court disposed of the writ petition, by no stretch of imagination, can qualify the test of discretion having been exercised on sound judicial principles.

24. In Hyderabad Commercials (supra), on which reliance has been placed, it is clear from paragraph 4 of the said decision that the Bank had admitted its mistake and liability, but took a specious plea about the manner in which the transfer was effected. On that stand, the Court proceeded to grant relief to the Appellant therein, the account holder. In the present case, however, the concerned officials of the Bank have denied of being party to the stated agreement and have expressly asserted that the said document is forged and fabricated. It is neither a case of admitted liability nor to proceed against the Appellant Bank on the basis of indisputable facts.

25. Even the decision in ABL International Ltd. (supra) will be of no avail to the Respondent No. 1. This decision has referred to all the earlier decisions and in paragraph 28, the Court observed as follows:

28. However, while entertaining an objection as to the maintainability of a writ petition Under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs Under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the

Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See Whirlpool Corporation v. Registrar of Trade Marks [MANU/SC/0664/1998 : (1998) 8 SCC 1]) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction.

30. Applying the said judgements in the facts of the present case, the Court finds that the dispute so raised by the parties centers around factual issues wherein complex questions of facts are involved whose determination requires oral evidence. This Court in the present proceedings under Article 226 of the Constitution of India cannot make any enquiry into disputed questions of fact while taking evidence.

31. Even otherwise once there exist arbitration clause in the agreement dated 5.9.2014 so executed between the respondents one hand and the petitioners on the other hand and the petitioners being signatories of the same and are further not disputing it and also admitting that the dispute itself is clearly arbitrable then while applying the principles of law as culled out as Hon. Apex Court, this Court finds its inability to entertain the present writ petition as the petitioners have adequate efficacious remedy of arbitration as provided in Clause 23 of the agreement dated 5.9.2014.

32. Nonetheless Arbitration and Conciliation Act, 1996 is self contained code wherein not only necessary safeguards have been provided but also jurisdiction has been vested with the competent court under Section 9 of the Arbitration and Conciliation Act, 1996 and under Section 17 of the same so as to warrant interim protection in suitable cases which are filed or pending before it. Thus, the apprehension of the petitioners that this Court in the present proceedings can only be grant interim protection is out of context as specific remedy as discussed above is available to the petitioners under Arbitration and Conciliation Act, 1996.

33. Resultantly, the present writ petition is **dismissed** as not maintainable on the ground of alternative efficacious remedy as provided under Clause 23 of the agreement dated 5.9.2014 leaving it open to the petitioners to seek remedy as available under Section 23 of the Act of 1996.

Needless to say that any of the observations made in the present judgment may not be construed to the expression that this Court has adjudicated the matter on merits.

(2022)05ILR A389
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.04.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Writ C No. 9000 of 2022

Om Prakash ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner
Sri Shashi Kumar Mishra, Ms. Prachi Shukla

Counsel for the Respondents:
C.S.C.

(A) Civil Law - Disaster Management - Grant of compensation - The Disaster Management Act, 2005 - provide for effective management of disasters and for matters connected therewith or incidental thereto – Notification - policy decision/clarification - providing for the modalities with respect to funds for expenditure to be incurred from State Disaster Response Fund (SDRF). (Para - 10,11)

Petitioner being father of deceased - entitled to Rs.4,00,000/- as compensation - on account of death of his daughter due to snake bite - Claim of petitioner kept pending for last several years - ground - viscera report has not been received - viscera report was returned by FSL Mumbai - ground - viscera from outside the State are not being tested there - same sent back to the concerned police station - same is still pending. **(Para - 4,8)**

HELD:-Petitioner shall prefer a representation before the respondent no.2, District Magistrate within a period of one month , who shall decide the claim of the petitioner within a further period of one month for grant of compensation/ex-gratia payment to the tune of Rs.4,00,000/- without insisting for the requirement of viscera report in the light of the observation.**(Para - 21)**

Writ Petition allowed. (E-7)

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Vikas Budhwar, J.)

1. Set of documents three in number running to four pages produced by learned Standing Counsel is taken on record.

2. Ms. Prachi Shukla, holding brief of Sri Shashi Kumar Mishra, learned counsel for the petitioner and Sri Sharad Srivastava, learned Standing Counsel, who appears for respondents no.1 to 3.

3. This is a petition filed by the father of the deceased being Neetu seeking following reliefs:-

"a. to issue a writ, order or direction in the nature of mandamus directing the respondent no.2 to pay Rs.4 lakhs to the petitioner immediately which has been sanctioned by the respondent no.3 on 06.09.2018 (Annexure No.1);

b. to issue a writ, order or direction as this Hon'ble Court may deem fit and proper under the circumstances of the case;

c. to award cost of the petition to the petitioner."

4. Factual matrix as worded in the present writ petition are that the daughter of the petitioner herein namely, Neetu, aged about 18 years, expired due to snake bite on 21.08.2018 at about 1:00 P.M. (Noon). As per the records it reveals that the Tehsildar, Etah conducted an enquiry and tendered his enquiry report on 21.08.2018, wherein the death of the daughter of the petitioner due to snake bite was confirmed. Records further reveal that on 06.09.2018 the respondent no.3, Sub Divisional Magistrate, Etah issued an office order according its approval for grant of Rs.4,00,000/- as compensation. On 15.04.2019 a communication was issued by the respondent no.3 mentioning therein that the petitioner being the father of the deceased was entitled to be paid Rs.4,00,000/- as compensation on account of the death of his daughter due to snake bite.

5. As the amount of Rs.4,00,000/- which was to be paid as a compensation on account of death of the daughter of the petitioner was not extended so proceedings purported to be under the Right to Information Act, 2005 was put to motion by the petitioner and when the same was also not acceded to then an appeal was also preferred by the petitioner and the respondent no.2 by virtue of his letter dated 04.04.2019 directed for the disposal of the application purported to be under the Right to Information Act, 2005.

6. Eventually, Kanoongo (Finance) supplied the information to the wife of the petitioner being the mother of the deceased that the payment of an amount of Rs.4,00,000/- was deferred and was made subject to receipt of the viscera report.

7. This Court finds that there is a report at page 20 (Annexure-4) of the paper book dated 13.01.2019, wherein Senior Sub Inspector, Police Station Mirhachi, District Etah has issued a communication addressed to Senior Senior Superintendent of Police, District Etah mentioning therein that the samples so drawn from the deceased were sent for its testing to Forensic Scientific Laboratory, Agra, however, the same could not be processed by the Forensic Scientific Laboratory, Agra on the pretext that the sample can not be tested at Agra and the only Forensic Scientific Laboratory is at Mumbai can do the necessary test. Subsequently, on 02.02.2020 the viscera report was sent to Forensic Scientific Laboratory, Maharashtra at Mumbai through one of the constable so posted therein, a copy thereof has been filed as Annexure-5 to the paper book. Forensic Scientific Laboratory, Maharashtra at Mumbai has shown its inability to conduct testing of the viscera as according to it has no jurisdiction to conduct test of the samples which are outside the territorial jurisdiction of Maharashtra.

8. As the petitioner herein has not been paid the amount of Rs.4,00,000/- which had already been sanctioned by the respondents, thus he has filed the present writ petition.

On 06.04.2022 this Court proceeded to pass the following order:-

"Heard learned counsel for the petitioner and Sri Sharad Chandra Srivastava, learned Standing Counsel for the respondents.

Learned counsel for the petitioner has filed this writ petition for following reliefs:-

"a. to issue a writ, order or direction in the nature of mandamus directing the respondent no.2 to pay Rs.4 lakhs to the petitioner immediately which has been sanctioned by the respondent no.3 on 06.09.2018 (Annexure No.1);

b. to issue a writ, order or direction as this Hon'ble Court may deem fit and proper under the circumstances of the case;

c. to award cost of the petition to the petitioner."

While drawing attention towards annexure-3 to this petition, it is submitted that the claim of the petitioner is being kept pending for last several years on the ground that viscera report has not been received. Attention was also drawn to annexure-6 to the petition to point out that viscera report was returned by FSL Mumbai on the ground that viscera from outside the State are not being tested there and the same has been sent back to the concerned police station. It is submitted that the same is still pending.

This Court fails to understand the ground for keeping the matter pending

indefinitely. In case even if the sample has been returned by FSL Mumbai on the ground that outside samples are not tested in Mumbai lab, this cannot be a ground for keeping the claim pending for indefinite period. The State authority should have made arrangement to get the viscera report from other FSL where such samples within the State of U.P. or outside the State of U.P. are tested.

Learned Standing Counsel is directed to seek instructions from the respondent no.2 under his signature within a period of three weeks. The respondent no.2 is at liberty to do the needful in the meantime.

Put up this case on 21.4.2022 as fresh."

9. Today, when the matter was taken up, Sri Sharad Srivastava, learned Standing Counsel has made a submission at bar that he has complete instructions in the matter and he does not propose to file any counter affidavit and the writ petition be disposed of at the admission stage without calling for the response.

10. The Central Government in exercise of power as conferred therein has enacted an act by the nomenclature of the Disaster Management Act, 2005 in order to provide for the effective management of disasters and for matters connected therewith or incidental thereto.

11. In order to give ends to the aims and the objects of creation of the Disaster Management Act, 2005, on 27.06.2016 respondent no.1 issued a Notification bearing No.303/1-11-2016-4(G)/16 providing for the modalities with respect to funds for expenditure to be incurred from State Disaster Response Fund (SDRF). The Notification dated 27.06.2016 issued by the respondent no.1 is being quoted hereinunder:-

"उत्तर प्रदेश शासन
राजस्व अनुभाग-11
संख्या-303/1-11-2016-4(जी)/16
लखनऊः दिनांकः 27 जून, 2016

अधिसूचना

भारत सरकार द्वारा राज्य आपदा मोचक निधि और राष्ट्रीय आपदा मोचक निधि (2015-20) से व्यय के सम्बन्ध में मानक एवं दरों को निर्धारित करते हुये पत्र संख्या-32-7/2014- एन०डी०एम०-1 दिनाँक 08.04.2015 के बिन्दु संख्या-13 में निम्न व्यवस्था दी गयी हैः-

13	State specific disaster within the local context in the State, which are not included in the notified list of disaster eligible for assistance from SDRF/NDRF, can be met from SDRF within the limit of 10% of the annual funds allocation of the SDRF.	. Expenditure is to be incurred from SDRF only (and not from NDRF), as assessed by the State Executive Committee (SEC). . The norm for various items will be the same as application to other notified natural disaster, as listed above, or . In these cases, the scale of relief assistance against each item for 'local disaster' should not exceed the norms of SDRF. . The Flexibility is to be applicable only

		after the State has formally listed the disaster for inclusion and notified transparent norms and guidclines with a clear procdure for identification of the beneficiaries for disaster relief for such local disaster; with the approval of SEC.

2. राज्य में बेमौसम भारी बारिश, आंधी/तूफान, आकाशीय बिजली एवं लू-प्रकोप से प्रत्येक वर्ष बड़ी संख्या में जन-धन की हानि होती है। अतः भारत सरकार द्वारा दी गयी उक्त व्यवस्था के दृष्टिगत शासनादेश संख्या-249/1-11-2015-4(जी)/2015, दिनांक 15.04.2015 (यथा संशोधित दिनांक 16.04.2015) को निरस्त करते हुये श्री राज्यपाल महोदय बेमौसम भारी बारिश, आंधी/तूफान, आकाशीय बिजली एवं लू-प्रकोप को राज्य आपदा घोषित किये जाने की सहर्ष स्वीकृति प्रदान करते हैं।

3. उक्त राज्य आपदा से प्रभावित व्यक्तियों / परिवारों को भारत सरकार द्वारा राज्य आपदा मोचक निधि के लिये निर्धारित मानक एवं दरों के अनुसार राहत प्रदान की जायेगी।

4. उक्त राज्य आपदाओं के सम्बन्ध में होने वाला व्यय अनुदान संख्या-51 के अन्तर्गत लेखाशीर्षक "2245-प्राकृतिक विपत्ति के कारण राहत-05-स्टेट डिजास्टर रिस्पांस फण्ड-800-अन्य व्यय-06-स्टेट डिजास्टर रिस्पांस फण्ड से व्यय-09-राज्य सरकार द्वारा घोषित अन्य आपदाओं हेतु डिजास्टर रिस्पांस फण्ड से व्यय-42 अन्य व्यय" से वहन किया जायेगा।

5. प्रदेश सरकार द्वारा लिये गये उपरोक्त निर्णय के अनुसार कार्यवाही सुनिश्चित की जाय।

ह०
(सुरेश चन्द्रा)
प्रमुख सचिव।"

12. Subsequently, on 02.08.2018, the respondent no.1 issued another Notification which reads as under:-

11.

"उत्तर प्रदेश शासन
राजस्व अनुभाग-11
संख्या- यू०ओ० 30/ 1-11-2018-4(जी)/2015
लखनऊ : दिनांक :: 02 अगस्त, 2018

<u>अधिसूचना</u>

भारत सरकार द्वारा राज्य आपदा मोचक निधि और राष्ट्रीय आपदा मोचक निधि (2015-20) से व्यय के संबंध में मानक एवं दरों को निर्धारित करते हुये पत्र संख्या 32-7/2014- एनडीएम-प्रथम, दिनांक 08.04.2015 के बिन्दु संख्या-13 में निम्न व्यवस्था दी गयी है:-

Item	Norms of Assistance
State specific disaster within the local context in the State, which are not included in the notified list of disaster eligible for assistance from SDRF/NDRF, can be met	. Expenditure is to be incurred from SDRF only (and not from NDRF), as assessed by the State Executive Committee (SEC). . The norm for various items

from SDRF within the limit of 10% of the annual funds allocation of the SDRF.	will be the same as application to other notified natural disaster, as listed above, or . In these cases, the scale of relief assistance against each item for 'local disaster' should not exceed the norms of SDRF. . The Flexibility is to be applicable only after the State has formally listed the disaster for inclusion and notified transparent norms and guidclines with a clear procdure for identification of the beneficiaries for disaster relief for such local disaster; with the approval of SEC.

2. भारत सरकार द्वारा की गयी उक्त व्यवस्था के क्रम में अधिसूचना संख्या-303/ 1-11-2016-4 (जी)/2015, दिनांक 27.06.2016 द्वारा बेमौसम भारी वर्षा, आकाशीय विद्युत, आंधी तूफान एवं लू-प्रकोप को राज्य आपदा घोषित किया गया है।

3. शासन की उपर्युक्त अधिसूचना दिनॉक 27.06.2016 द्वारा घोषित आपदाओं-बेमौसम भारी वर्षा, आकाशीय विद्युत, आंधी तूफान एवं लू-प्रकोप के साथ ही प्रदेश में नाव दुर्घटना, सर्पदंश, सीवर सफाई एवं गैस रिसाव तथा बोरबेल में गिरने से होने वाली दुर्घटना को राज्य आपदा घोषित किये जाने की श्री राज्यपाल महोदय सहर्ष स्वीकृति प्रदान करते हैं।

4. मानव वन्य-जीव द्वन्द्व (Man-Animal Conflict) को भी राज्य आपदा घोषित किये जाने पर सैद्धान्तिक सहमति हुई है। इस संबंध में विस्तृत दिशा निर्देश पृथक से निर्गत किए जायेंगे।

5. उक्त घोषित राज्य आपदाओं के संबंध में होने वाला व्यय अनुदान संख्या-51 के अन्तर्गत लेखाशीर्षक " 2245-प्राकृतिक विपत्ति के कारण राहत-05-स्टेट डिजास्टर रिस्पांस फण्ड-800-अन्य व्यय-06-स्टेट डिजास्टर रिस्पांस फण्ड से व्यय-09-राज्य सरकार द्वारा घोषित अन्य आपदाओं हेतु डिजास्टर रिस्पांस फण्ड से व्यय-42-अन्य व्यय" से वहन किया जायेगा।

(रेणुका कुमार)
अपर मुख्य सचिव।"

13. As certain clarifications were required with respect to those contingencies wherein whereat the deceased died on account of snake bite (venom) and the claim so preferred were being rejected on the pretext that the viscera report was not available so the respondent no.1 issued a letter dated 08.07.2021 addressed to all the District Magistrates throughout the State of U.P. clearly providing as under:-

"अति महत्वपूर्ण
संख्या-157/एक-11-2020-04(जी)/2015-टी०सी
प्रेषक,
मनोज कुमार सिंह,
अपर मुख्य सचिव,
उत्तर प्रदेश शासन।
सेवा में,
समस्त जिलाधिकारी,
उत्तर प्रदेश।

राजस्व अनुभाग-11

लखनऊ : दिनांक : 08 जुलाई, 2021

विषय :- सर्पदंश से हुयी मृत्यु में मृतक के आश्रितों को अहेतुक सहायता प्रदान किये जाने के सम्बन्ध में।

महोदय,

1. उपर्युक्त विषयक शासनादेश संख्या-यू०ओ०-20/एक-11-2018-

4(जी)/2015 दिनांक 02.08.2018 में सर्पदंश को राज्य आपदा घोषित करते हुए सर्पदंश से मृत्यु की दशा में प्रत्येक मृतक के आश्रितों को रू० 04.00 लाख की अहेतुक सहायता दिया जाना प्राविधानित है।

2. शासन के संज्ञान में आया है कि सर्पदंश से मृत्यु को प्रमाणित करने के लिए मृतक की विसरा जांच हेतु फारेंसिक लैब भेजी जाती है और मृतक की विसरा जांच रिपोर्ट की प्रतीक्षा में मृतक के आश्रितों को अहेतुक सहायता समय से उपलब्ध नहीं करायी जाती है। फारेंसिक स्टेट लीगल सेल के अनुसार सर्पदंश के प्रकरणों में विसरा रिपोर्ट को प्रिजर्व करने का कोई औचित्य नहीं है तथा उनके द्वारा अवगत कराया गया है कि विसरा जॉच रिपोर्ट से सर्पदंश से मृत्यु प्रमाणित भी नहीं होता है।

3. स्टेट मेडिको लीगल सेल के परामर्श के क्रम में सर्पदंश से मृत्यु की दशा में विसरा जांच रिपोर्ट की कोई प्रासंगिकता न होने के कारण सम्यक विचारोपरान्त सर्पदंश से मृतक के आश्रितों को अहेतुक सहायता उपलब्ध कराये जाने हेतु निम्न वर्णित प्रक्रिया का पालन किया जायः-

(1) मृतक का पंचनामा कराया जाय।

(2) मृतक का पोस्टमार्टम कराया जाय।

(3) पोस्टमार्टम के पश्चात मृतक की विसरा रिपोर्ट प्रिजर्व करने की आवश्यकता नहीं है।

(4) सर्पदंश से मृत्यु की दशा में मृतक के आश्रितों को अधिकतम 07 दिन के अन्दर अहेतुक सहायता उपलब्ध करायी जाय।

4. अतः इस सम्बन्ध में मुझे यह कहने का निदेश हुआ है कि सर्पदंश से मृत्यु के प्रकरणों में उपरोक्त प्रक्रिया का पालन करते हुए मृतक के आश्रितों को अहेतुक सहायता उपलब्ध कराने सम्बन्धी प्रकरणों को 07 दिन के अन्दर निस्तारित करने का कष्ट करें।

भवदीय
(मनोज कुमार सिंह)
अपर मुख्य सचिव।"

14. Perusal of the letter in the shape of clarification dated 08.07.2021 issued by the respondent no.1 addressed to all the District Magistrates throughout the State of U.P. will clearly reveal as under:

(a) Panchnama of the deceased is to be conducted.

(b) Post mortem of the deceased is mandatory.

(c) After post mortem there is no need to preserve the viscera report.

(d) compensation to be paid within a period of 7 days from the date of death of the deceased, who dies on account of snake bite.

(e) Viscera report does not certify that the deceased died of snake bite (venom).

15. Learned counsel for the petitioner has sought to argue that the entire stand so taken by the respondents in withholding the payment of an amount of Rs.4,00,000/- as an ex-gratia compensation pursuant to the death of the daughter of the petitioner on account of snake bite due to unavailability of viscera report is thoroughly unjustified as once on 08.07.2021 the State of Uttar Pradesh has come up with a policy decision there is no need to await for obtaining

viscera report for the grant of compensation then obviously the petitioner was entitled to be conferred with the benefit of ex-gratia compensation within a period of 7 days.

16. In order to buttress his submission, learned counsel for the petitioner has further argued that once in the policy decision dated 08.07.2021 of the State Government it has come on record that viscera report does not certify the death on account of snake bite (venom) then in these circumstances withholding of monitory compensation in shape of ex-gratia payment is illegal.

17. Countering the said submission, Sri Sharad Srivastava, learned Standing Counsel, who appears for the State has argued that in the case in question though the samples were drawn from the daughter of the petitioner were sent for testing at Agra at first instance and thereafter to the Forensic Scientific Laboratory, Maharashtra at Mumbai but the same was not tested on account that the Forensic Scientific Laboratory, Maharashtra at Mumbai does not conduct testing as according to it has no jurisdiction to conduct test of the samples which are outside the territorial jurisdiction of Maharashtra and thereafter the samples were sent to Forensic Scientific Laboratory at Agra whereat on 20.04.2022 viscera report has been obtained according to which the following has been observed:-

"**विधि विज्ञान प्रयोगशाला, उ.प्र., आगरा**

प्रेषक,

2455

संयुक्त निदेशक,

विधि विज्ञान प्रयोगशाला उ०प्र०,

15 ताज रोड, आगरा-282001

सेवा में,

क्षेत्राधिकारी,सदर

एटा।

पत्रांकः- 1437/TOX1/2022

जी.डी.नं. 42. दि. 21.08.2018

राज्य बनाम.....।

धाराः-.....

मृतिका का नाम कु० नीतू।

थानाः- मिरहची।

आपके पत्र सं.-

दिनांक. 18.04.2022

विसरा/विषाक्त वस्तु के प्रेषण अधिकारीः-

प्रेषण संदर्भः-

दिनांक.------

उपर्युक्त माममले से सम्बन्धित प्रदर्श प्रयोगशाला में दिनांक 18.04.2022 को विशेष वाहक द्वारा प्राप्त हुये।

पार्सल एवं सील का विवरण

पाँच समुदित प्लास्टिक जार व दो समुदित प्लास्टिक डिब्बी जिन पर विशेष (CIVIL SURGEONS OFFICE ETAH) मुद्रा की छाप नमूनानुसार अक्षत थी।

प्रदर्शो का विवरण

1. स्टमक का टुकड़ा मय कन्टेन्ट्स । एक समुद्रित प्लास्टिक जार में।

2. आँत का टुकड़ा । एक समुद्रित प्लास्टिक जार में।

3. लिवर का टुकड़ा । एक समुद्रित प्लास्टिक जार में।

4. किडनी का टुकड़ा । एक समुद्रित प्लास्टिक जार में।

5. स्पलीन का टुकड़ा । एक समुद्रित प्लास्टिक जार में।

6. रक्त का नमूना । एक समुद्रित प्लास्टिक डिब्बी में।

7. यूरीन का नमूना । एक समुद्रित प्लास्टिक डिब्बी में।

परीक्षण परिणाम

विसरा के भागों (1-5) व वस्तु (6) एवं (7) में कोई रासायनिक विष नहीं पाया गया।"

18. According to learned Standing Counsel the testing of the viscera report itself shows that the venom which was found in the blood of the deceased was chemical poison only.

19. Learned Standing Counsel when confronted with the policy decision/clarification dated 08.07.2021 as referred to above could not dispute the same and had made a submission at bar that now in view of the policy decision dated 08.07.2021 the requirement of obtaining viscera report for the grant of monitory compensation/ex-gratia payment referable to death on account of snake bite stands dispensed with and what is to be seen is the fact that the panchnama as well as post mortem has been conducted or not.

20. Sri Sharad Srivastava, learned Standing Counsel has thus argued that in view of the letter of the Kanoongo addressed to the petitioner now the petitioner's claim will be processed and the same will not be denied or the benefits would not be denuded on the ground that the viscera report is either not available or not in favour of the petitioner.

21. Be that as it may be, in view of the arguments so sought to be advanced by the rival parties and further the fact that the learned Standing Counsel has not disputed the existence and the applications of the policy decision/clarification dated 08.07.2021 that the requirement of obtaining viscera report stands dispensed with, the present writ petition is being **allowed** in the following terms:-

(A) Petitioner within a period of one month from today shall prefer a representation before the respondent no.2, District Magistrate, Etah alongwith the certified copy of the order so passed today annexing with complete documents in support of his claim.

(B) The respondent no.2, District Magistrate, Etah, on receipt of the representation so preferred by the petitioner, shall decide the claim of the petitioner within a further period of one month for grant of compensation/ex-gratia payment to the tune of Rs.4,00,000/- without insisting for the requirement of viscera report in the light of the observation made herein above.

(2022)05ILR A397
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.04.2022

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 15344 of 2019

Mita India Pvt. Ltd., Ghaziabad
...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Diptiman Singh

Counsel for the Respondents:
C.S.C., Sri Alok Kumar Srivastava

(A) Labour Law - principles of natural justice in labour jurisprudence - applied to ensure transparency and fairness in the employer and employee dealings which in turn promote industrial peace - Distinction between - abandonment of service & misconduct of unauthorized absence from duty - abandonment of

service and termination of service – standing order. (Para - 18,19,27)

Employee long absent - not interested in rejoining his duties - Petitioner employer made an offer to workman - join on an equivalent post at its unit in Devas - workman abandoned his service – finding of labour court – services of respondent workman were terminated - without holding a disciplinary enquiry. **(Para - 2,29,32)**

HELD:- Material before employer was credible and conclusions of employer were reasonable . Employer adopted a just and lawful procedure before ending the employer employee relationship on grounds of abandonment of service. labour court neglected to consider the adherence of the employer to Standing Order No.21 . No requirement of a regular domestic enquiry. Non application of mind by labour court. Findings of labour court are perverse and illegal. Award liable to be set aside and is set aside. **(Para - 28,30,31)**

Writ Petition allowed. (E-7)

List of Cases cited:-

1. H.P.C. Vs Purnendu Chakrobarty , 1996 (11) SCC 404

2. Syndicate Bank Vs General Secretary, Syndicate Bank Staff Association & anr. , (2000) 5 SCC 765

3. Viveka Nand Sethi Vs Chairman, J & K Bank Ltd. & ors. , 2005 (5) SCC 337

4. Buckingham & Carnatic C. Ltd. Vs Venkatiah , 1964 AIR SC 1272

5. Moti Vs St. of U.P , 2019 (9) ADJ 24

(Delivered by Hon'ble Ajay Bhanot, J.)

1. By the impugned award dated 16.01.2019 the labour court has allowed the industrial reference in favour of the workman by holding that the termination of the respondent workman's services on 08.09.2011 were illegal. Consequential reliefs of reinstatement with full backwages have also been granted.

2. The labour court in the impugned award has found that the services of respondent workman were terminated without holding a disciplinary enquiry. Various communications sent by the employer to the workman to rejoin duties were disbelieved on the foot that they do not reflect a bona fide intent to recall the workman to duty.

3. Sri Diptiman Singh, learned counsel for the petitioner submits that the evidence in the record established that the workman was given ample opportunity to rejoin his duties but he failed to do so. The workman had abandoned his service. Petitioner had rightly invoked the applicable standing order holding the field which was not considered by the labour court. No departmental enquiry was liable to held in the facts of this case and the relevant standing orders. The labour court returned perverse findings on the evidence lead by the petitioner.

4. Sri Alok Kumar Srivastava, learned counsel for respondent workman contends that the services of the workman were terminated without enquiry. The respondent workman had not abandoned his service. He made several efforts to rejoin his duties but was not allowed to do so by the employer. The termination of the respondent workman was in violation of principles of natural justice was rightly set aside by the court below.

5. Heard learned counsel for the parties.

6. Briefly put the facts are these. The respondent workman had stopped attending

office after an incident in the establishment. The employer sent communications asking the workman to rejoin duties, but to no avail. The petitioner employer inferred abandonment of duties by the workman and after invoking the relevant standing order struck him off the roles of employees.

7. The questions which arise for consideration are:

(a) What constitutes abandonment of service by a workman?

(b) Whether abandonment of service can be established against a workman only after holding a regular domestic enquiry?

8. Abandonment of service is an act where the employer finds that a workman by prolonged and unauthorized absence from duty has abandoned his service. The employer employee relationship stands severed since the workman has failed to rejoin duties despite communications by the employer to do so. The inference of the employer regarding abandonment of duty by the employee has to be deduced from the conduct of the employee and requires to be supported by credible materials in the record.

9. The prerequisite conditions for drawing an inference that the workman has abandoned his duties are these. The workman is continuously and unauthorizedly absent from duties. The period of continuous absence may vary from case to case. However it cannot be an inordinately short period. The period of such absence may also be prescribed in the standing order. Secondly the employer should recall the workman and give him an opportunity to resume his duties. Even after receipt of such communications the workman fails to rejoin duties. Thirdly, continuance of such employee on the rolls would not be in the best interest of the establishment. Upon satisfaction of the said conditions precedent the employer may conclude that the employee has abandoned his duties. The employer can then strike the employee off the roles of the establishment and sever the employer employee relationship. In such cases a regular domestic enquiry is not required. However, there is no abandonment of duties if the workman was prevented by the employer from joining his duties.

10. It needs to be seen whether in the facts of this case the aforesaid ingredients are established or not.

11. It is admitted between the parties that on 07.09.2011 the workman had an altercation with another employee one Ganesh Yadav and had allegedly assaulted the latter. The said Ganesh Yadav had also registered FIR against the workman. Thereafter w.e.f. 08.09.2011 the workman did not attend his duties and continuously remained absent. The employer sent various communications to the workman on 29.03.2012 and 25.04.2012 asking him to rejoin his duties. The aforesaid communications have been marked as exhibits and were proved by the petitioner before the labour court. The workman had received the said communications. The aforesaid letters clearly disclose the efforts of employer to recall the workman and enable him to rejoin his duties. But the same were disbelieved by the labour court solely on the foot that they do not reflect bona fide intent. I am afraid the finding is perverse. The contents of the aforesaid letters duly proved before the labour court establish the bonafide intention of an overindulgent employer recalling the long

absent employee and notice him to rejoin duties. Admittedly the respondent workman did not respond to the aforesaid communications and failed to rejoin his duties despite notice. He was not prevented by the employer from joining his duty. The conduct of the employer cannot be faulted.

12. Several other corroborative evidences support the conclusion of the employer in regard to the abandonment by the workman and the decision made to strike the workman off the rolls. The incident on 07.09.2011 is admitted between the parties. The respondent workman had also tendered a resignation letter after the incident. The resignation letter was disbelieved by the labour court in a perverse manner. The labour court ought to have examined and compared the signatures of the workman on contemporaneous documents with that on the resignation letter. It failed to do so. It is well established that the workman was continuously absent from duty from 08.09.2011 till the standing order was invoked against him in the aftermath of the communication dated 25.04.2012.

13. The workman had on his part submitted that he had made various attempts to rejoin duties but was denied entry by the employer. The pleadings and evidences tendered by the workman do not support his case. The workman on his own admission made the first communication to rejoin duties highly belatedly on 27.03.2012.

14. The said communication of the workman only demonstrates that the absence of the workman for prolonged period with effect from 08.09.2011 was completely unjustified. The communication dated 27.03.2012 of the workman and his statement before the labour court are self-serving and devoid of bonafide intentions. They are an afterthought and only intended to post fact justify the indefensible conduct of the workman. The witness introduced by the workman in his support was his real brother who merely reiterated the stand of the respondent workman. The witness does not improve the credit of the workman's case. No material in the record has been brought to the notice of the Court that the workman had made genuine efforts to rejoin his duties but was prevented by the employer.

15. The conditions precedent for inferring of abandonment of service were thus fully satisfied.

16. In light of the above facts the employer lawfully invoked clause 21 of the certified standing order against the workman and legitimately inferred that the workman had abandoned his service. The standing order are extracted hereunder:

"21) ABANDONMENT OF EMPLOYMENT

In the event of a workman remaining absent from duty without permission, continuously for a period of 8 days including weekly holidays & other holidays during the period, he shall be deemed to have voluntary abandoned his service and accordingly his name shall be struck off from the Muster Rolls of the company"

17. The services of the workman were terminated in adherence to the standing order.

18. There is a distinction between the abandonment of services and unauthorized absence from duty which is a misconduct.

In the latter case the employee/workman is charged with unauthorised absence from duty and the employer has to hold a domestic enquiry. However when the conditions prerequisite for finding that the workman had abandoned his service are established no such enquiry is necessary. Principles of natural justice cannot be cast in a straight jacket formula and vary from case to case. The principles of natural justice in labour jurisprudence are applied to ensure transparency and fairness in the employer and employee dealings which in turn promote industrial peace.

19. The labour court erred in law by failing to observe the distinction between abandonment of service and the misconduct of unauthorised absence from duty. The labour court in the impugned award illegally found for the workman of the solely on footing that no domestic enquiry was held. This was case of abandonment of service and did not warrant a regular domestic enquiry.

20. At this stage it would be apposite to fortify the narrative with authorities in point.

21. The clause in service conditions which provided for loss of lien of an employee on his post for remaining unauthorizedly absent for more than 8 days arose for consideration before the Supreme Court in **Hindustan Paper Corporation Vs. Purnendu Chakrobarty 1** and others. In the facts of the aforesaid case the workman remained absent unauthorizedly for more than 8 consecutive days.

22. The application for grant of medical leave submitted by the workman were not supported by medical certificate and hence his leave was not sanctioned. The workman was noticed as to why the period be not treated as one unauthorized absence. The reply of the workman was found to be bald and Rule 23 (vi) E was invoked out against him.

23. Negating the argument that the notice by the employer did not fulfil the requirements of natural justice, it was held in ***Hindustan Paper Corporation (supra)*** as under :

"15. We have extracted Rule 23 in full. The explanation to the Rule specifically states that certain items enumerated thereunder shall not be treated as a penalty at all within the meaning of Rule 23. For our case the relevant sub-clause is (vi) (E) which says that proceeding on leave without prior sanction and remaining unauthorizedly absent for more than 8 consecutive days; and/ or subsequently extended for more than 8 consecutive days; and/ or overstaying his sanctioned leave beyond the period originally granted or subsequently extended for more than 8 consecutive days would result in loss of lien of the appointment of the employee. In this case we have seen that the first respondent had proceeded on leave without prior sanction and remained unauthorisedly absent for more than 6 months consecutively which obliged the appellant-Corporation to issue communication tot he first respondent calling upon him to explain. Unfortunately, the first respondent, for reasons best known to him, has not availed himself of the opportunity as seen earlier but replied in half-hearted way which resulted in the impugned order. Therefore, under the circumstances, it cannot be said that the principles of natural justice have not been complied with or the circumstances

required any enquiry as contemplated under Rule 25."

24. The requirement of holding regular departmental enquiry in case of a workman who had absented himself from duties for a period of more than 30 days and failed to give sufficient explanation despite being noticed was examined in ***Syndicate Bank Vs. General Secretary, Syndicate Bank Staff Association and another2.*** Upholding the validity of the action of the Bank in applying the clause 16 of the bipartite statement by noticing the employee and not holding regular departmental enquiry, the position of law was propounded thus:

"14. In the present case action was taken by the Bank under Clause 16 of the Bipartite Settlement. It is not disputed that Dayananda absented himself from the work for a period of 90 or more consecutive days. It was thereafter that the Bank served a notice on him calling upon to report for duty within 30 days of the notice standing therein the grounds for the Bank to come to the conclusion that Dayananda had no intention of joining duties. Dayananda did not respond to the notice at all. On the expiry of the notice period Bank passed orders that Dayananda had voluntarily retired from the service of the Bank.

17. Bank has followed the requirements of Clause 16 of the Bipartite Settlement. It rightly held that Dayananda has voluntarily retired from the service of the Bank. Under these circumstances it was not necessary for the bank to hold any inquiry before passing the order. An inquiry would have been necessary if Dayananda had submitted his explanation which was not acceptable to the Bank or contended that he did not report for duty but was not allowed to join by the Bank. Nothing of the like has happened here. Assuming for a moment that inquiry was necessitated, evidence led before the Tribunal clearly showed that notice was given to Dayananda and it is he who defaulted and offered no explanation of his absence from duty and did not report for duty within 30 days of the notice as required in Clause 16 of the Bipartite Settlement.

25. Application of the bipartite settlement of the Bank when a workman absented himself from duty was in issue in ***Viveka Nand Sethi Vs. Chairman, J & K Bank Ltd and Others3.*** The need for a full-fledged departmental enquiry was waived, in the wake of service of notice and inadequate reply of the workman by holding:

"14. The bipartite settlement is clear and unambiguous. It should be given a literal meaning. A bare perusal of the said settlement would show that on receipt of a notice contemplated thereunder, the workman must either: (1) report for duties within thirty days;(2) given his explanation for hi absence satisfying the management that he has not taken any employment or avocation; and (3) show that he has no intention of not joining the duties. It is, thus, only when the workman concerned does not join his duties within thirty days or fails to file a satisfactory explanation, as referred to hereinbefore, the legal fiction shall come into force. In the instant case except for asking for grant of medical leave, he did not submit any explanation for his absence satisfying the management that he has not taken up any other employment or avocation and that he has not intention of not joining his duties.

17. Mere sending of an application for grant of leave much after

the period of leave was over as also the date of resuming duties cannot be said to be a bonafide act on the part of workman. The Bank, as noticed hereinbefore, in response to the lawyer's notice categorically stated that the workman had been carrying on some business elsewhere.

18. We cannot accept the submission of Mr. Mathur that only because on a later date an application for grant of medical leave was filed, the same ipso facto would put an embargo on the exercise of the jurisdiction of the bank from invoking clause (2) of the bipartite settlement.

19. It may be true that in a case of this nature, the principles of natural justice where required to be complied wit but the same would not mean that a full-fledged departmental proceeding was required to be initiated. A limited enquiry as to whether the employee concerned had sufficient explanation for not reporting to duties after the period of leave had expired or failure on his part on being asked to do so, in our considered view, amounts to sufficient compliance of the requirement of the principles of natural justice."

26. A similarly worded standing order regarding abandonment of service and need for holding a domestic enquiry was interpreted by the Supreme Court in ***Buckingham and Carnatic C. Ltd Vs. Venkatiah4:***

"5. .....Let us first examine Standing Order No. 8(ii) before proceeding any further. The said Standing Order reads thus:

"Absent without Leave : Any employee who absents himself for eight consecutive working days without leave shall be deemed to have left the Company's service without notice thereby terminating his contract of service. If he gives an explanation to the satisfaction of the management, the absence shall be converted into leave without pay or dearness allowance.

Any employee leaving the Company's service in this manner shall have no claim for re-employment in the Mills.

But if the absence is proved to the satisfaction of the Management to be one due to sickness, then such absence shall be converted into medical leave for each period as the employee is eligible with the permissible allowances."

This Standing Order is a part of the certified Standing Order with had been revised by an arbitration award between the parties in 1957. The relevant clause clearly means that if an employee falls within the mischief of its first part, it follows that the defaulting employee has terminated his contract of service. The first provision in clause (ii) proceeds on the basis that absence for eight consecutive days without leave will lead to the inference that the absentee workman intended to terminate his contract of service. The certified Standing Orders represent the relevant terms and conditions of service in a statutory form and they are binding on the parties at least as much, if not more, as private contracts embodying similar terms and conditions of service. It is true that under common law an inference that an employee has abandoned or relinquished service is not easily drawn unless from the length of absence and from other surrounding circumstances an inference to that effect can be legitimately drawn and it can be assumed that the employee intended to abandon service. Abandonment or relinquishment of service is always a question of intention, and, normally such an intention cannot be attributed to an

employee without adequate evidence in that behalf. But where parties agree upon the terms and conditions of service and they are included in certified Standing Orders, the doctrines of common law or considerations of equity would not be relevant. It is then a matter of construing the relevant term itself. Therefore, the first part of Standing Order 8(ii) inevitably leads to the conclusion that if an employee is absent for eight consecutive days without leave, he is deemed to have terminated his contract of service and thus relinquished or abandoned his employment.

6. The latter part of this clause, however, provides that the employee can offer an explanation as to his absence and if his explanation is found to be satisfactory by the management, his absence will be converted into leave without pay or dearness allowance. Now, this clause is, in substance a proviso to its first part. Before effect is given to the inference of relinquishment of service which arises from the first part of the clause, an opportunity is given to the employee to offer an explanation and if the said explanation is treated as satisfactory by the management, the inference of termination of contract of service is rebutted and the leave in question is treated as leave without pay or dearness allowance. This latter clause obviously postulates that if the explanation offered by the employee is not found to be satisfactory by the management, the inference arising from the first part prevails and the employee shall be deemed to have terminated his contract of service with the result that the relationship of master and servant between the parties would be held to have come to an end. With the remaining part of the said Standing Order we are not concerned in this appeal.

7. It is true that absence without leave for eight consecutive days is also treated as misconduct under clause 13 (f) of the Standing Orders. The said clause refers to be said absence and habitual absence without leave. In other words, the position under the Standing orders appears to be that absence without leave for more than eight consecutive days can give rise to the termination of the contract of service either under Standing Order 8(ii) or may lead to be penalties awardable for misconduct after due enquiry is held as required by the relevant Standing Order. The fact that the same conduct is dealt with in two different Standing Order cannot affect the applicability of SO 8(ii) to the present case. It is not as if the appellant is bound to treat Venkatiah's absence as constituting misconduct under SO 13 (f) and proceeed to hold an enquiry against him before terminating his services. Dismissal for misconduct as defined under SO 13 may perhaps have different and more serious consequences from the termination of service resulting from SO 8(ii). However that may be, if SO 8(ii) is applicable, it would be no answer to the appellant's case under SO 8(ii) to say that SO 13 (f) is attracted. The position is not seriously in dispute."

27. This Court in ***Moti Vs. State of U.P5*** construed the distinction between abandonment of service and termination of service by holdings:

"14. The submission of the learned counsel for the petitioner lacks merit, Fundamental Rule 18 is applicable in the facts of the instant case. It is not the case of the petitioner that petitioner came to be removed from **service** for overstayal of leave until his retirement on attaining the age of superannuation. No order was passed by the respondent under Fundamental Rule 18 dispensing with the

services of the petitioner. In the instant case, the petitioner **abandoned** his **service** on his own in 1985 and thereafter, never returned or approached the authorities to resume duty.

15. The act of **abandonment** of **service** was voluntary on the part of the petitioner. The respondents had not terminated the **service** of the petitioner under the Rules, for his prolonged absence, rather, the petitioner ceased to be in **service** on his own choice in terms of Fundamental Rule 18 and not due to any punitive action by the employer."

28. The material before the employer was credible and the conclusions of the employer were reasonable. The employer adopted a just and lawful procedure before ending the employer employee relationship on grounds of abandonment of service by the latter. The labour court neglected to consider the adherence of the employer to Standing Order No.21, which was applicable to the facts of this case. There was no requirement of a regular domestic enquiry. Non application of mind by the labour court on these critical aspects vitiate the impugned order. Findings of the labour court on relevant facts are perverse as seen earlier.

29. The employee long absent and not interested in rejoining his duties. Indefinite continuance of such an employee on the rolls of the establishment will only instigate industrial unrest and not foster industrial peace.

30. In the wake of preceding discussion the findings of the labour court in the impugned award are perverse and illegal.

31. The award dated 16.01.2019 is liable to be set aside and is set aside.

32. Before parting one fact needs to be recorded. The petitioner employer to show his fairness had made an offer to the workman to join on an equivalent post at its unit in Devas. The post which the respondent workman was working before he abandoned is not vacant. Learned counsel for the workman Shri Alok Kumar Srivastava, on the basis of instructions submits that the workman has declined the aforesaid offer.

33. The writ petition is allowed.

(2022)05ILR A405
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.05.2022

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Writ C No. 21188 of 2021

Smt. Roopam @ Jyoti Sharma & Anr.
...Petitioners
Versus
District Magistrate Lucknow & Ors.
...Respondents

Counsel for the Petitioners:
Vineet Kumar Chaurasia, Suresh Kumar

Counsel for the Respondents:
C.S.C.

(A) Civil Law - The U.P. Maintenance and Welfare of Parents and Senior Citizens Act, 2007 - Section 5 – application for maintenance , Section 16 – appeal, Indian Penal Code, 1860 - Sections 498-A/ 323/504/506 , Dowry prohibition Act,1961 - Section ¾.

(B) Interpretation of statute - rule of casus omissus - if there is a clear necessity of any provision - that has been omitted, then that is out of purview of the doctrine of casus omissus - non mentioning of the words in Section 16(1) is not a casus omissus, but it seems an accidental omission - rule of purposive interpretation - law is such a thing which has to be applied as a pragmatic instrument for social order - interpretative effort must be inherent with the statutory purpose - judge can iron the fabrics but cannot change the texture of statute. (Para - 36,37,38,39)

(C) Interpretation of statute - The U.P. Maintenance and Welfare of Parents and Senior Citizens Act, 2007 - Section 5(2)(8) - enlarges certain obligations/liabilities over the children, relative or any other person and, as such, on the other word, they can be said to be a person aggrieved - no such intent of the legislature so as to exclude the right of appeal to such persons upon whom the liability has been fastened - If Section 5(2) as well as Section 5(8) and Section 16(1) are read with each other - right of filing an appeal always remain available to the person other than senior citizen and parents also. (Para - 35)

FIR lodged by petitioner against respondent and other family members - demand of dowry - compromise between petitioner no.1 and opposite party no.3 - violation of terms and conditions of compromise deed - respondent no. 3 submitted an application under section 5 before SDM - evicting petitioners from House - appeal filed before DM under section 16 - order of eviction was passed - order passed in an arbitrary and erroneous manner on ground of maintainability - petitioners had no right to file an appeal under Section 16 of the Act, 2007 - accidental omission while enactment of the statute namely Act, 2007 - under Section 16(1), the right to appeal has only been given to the parents and the senior citizens not to the children, relative or other person. **(Para -2 to 10, 36)**

HELD:-Section 16(1) of the said Act is valid, but must be read to provide for the right of appeal to any of the affected parties. Right to appeal to other parties has accidentally been omitted. Order passed by respondent no.1 is set aside. Liberty granted to the petitioners to file an appeal before the Appellate Court under Section 16 of the Act, 2007 afresh.**(Para - 19,40,43)**

Writ Petition partly allowed. (E-7)

List of Cases cited:-

1. Akhilesh Kumar & anr. Vs St. of U.P. & ors.., 2019 (8) ADJ 731 (D.B.)

2. Balamurugan Vs Rukmani (C.R.P.(PD)(MD) No. 437 of 2015 & M.P.(MD)

3. Paramjeet Kumar Saroya Vs U.O.I. & anr., AIR 2014 Punjab & Haryana 121

4. Carew & Co. Ltd. Vs U.O.I., (SCC 1.802, para 21)

5. Gujarat Urja Vikas Nigam Ltd. Vs Essar Power Ltd., (2008) 4 SCC 755

6. Surjeet Singh Kalra Vs U.O.I. & anr., 1991 (2) SCC 87

7. Hameedia Hardware Stores Vs B. Mohan Lal Sowcar, (1988) 2 SCC 513

8. Gurudevdatta Vksss Maryadit & ors.. Vs St. of Mah. & ors.. , Appeal (Civil) No. 2298 of 2001

9. Nasiruddin & ors.. Vs Sita Ram Agarwal, Appeal (Civil) No. 5077 of 1998

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. Heard Sri Vineet Kumar Chaurasiya, learned counsel for the petitioners, Sri Shailendra Kumar Singh, learned Chief Standing Counsel-III assisted by Sri Kuldeep Singh and Sri Y.K. Awasthi,

learned Standing Counsel for the State and perused the record.

2. By means of the instant writ petition, the petitioners have assailed the judgment and order dated 24.02.2020 passed by Chairman, Appellate Authority/District Magistrate, Lucknow in Appeal No.20231 of 2019, under Section 16 of the U.P. Maintenance and Welfare of Parents and Senior Citizens Act, 2007 *(hereinafter referred to as the "Act, 2007")* (Re: Indrajeet Sharma Vs. Uma Shankar Sharma), by means of which, the appeal filed by the petitioners have been dismissed by respondent no.1 on the ground of maintainability. He has further assailed the judgment and order dated 6th June, 2019 passed by the Sub-Divisional Magistrate, Tehsil-Sadar, District-Lucknow in Case Crime No.38 of 2018, under Section 5 of U.P. Maintenance and Welfare of Parents and Senior Citizens Act, 2007, whereby the petitioners were directed to evict the premises of Plot No.46, Seemant Nagar, Yashbagh Tum, Kalyanpur, Lucknow.

3. Learned counsel appearing for the petitioners submits that factual matrix of the case is that, the petitioner no.1 was being continuously harassed by the respondent no.3 even for food and lodging, and FIR bearing Case Crime No.0124 of 2016, under Sections 498-A/ 323/504/506 IPC and 3/4 of D.P. Act was lodged by petitioner no.1 against the respondent Nos.3 and 6 and other family members. Since the petitioner no.1 was being tortured for demand of dowry and, as such, under the compelling circumstances, the aforesaid FIR was lodged against the respondent no.1, who is the father-in-law of the petitioner no.1.

4. After the aforesaid FIR, a compromise was done between the petitioner no.1 and opposite party no.3 on 08.11.2016 and it was settled in the compromise that opposite party no.3 along with his family will reside in the house No.82, Sector-N, Aliganj and the petitioner was given a ground floor portion situated at Plot No.46, Seemant Nagar, Yashbagh Tum, Kalyanpur, Lucknow, which is about 600 square ft.

5. Since a compromise was entered in between the petitioner no.1 and respondent no.3, as such, the Investigating Officer, who was investigating the matter in Case Crime No.0124 of 2016, submitted a final report on 12.11.2016 before the Additional Chief Judicial Magistrate, Court No.11, Lucknow and, later on, it was accepted vide order dated 17th September, 2017.

6. Learned counsel appearing for the petitioners further added that respondent no.3 is a retired Constable from the Police Department and is getting regular pension and has also got other post retiral dues, but despite the above, the opposite party no.3 had intentionally started to torture and harass the petitioners, while violating the terms and conditions mentioned in the compromise deed dated 08.11.2016. The respondent no.3 submitted an application under Section 5 of the Act, 2007 before the Sub-Divisional Magistrate, Tehsil-Sadar for evicting the petitioners from the House No.46 situated at Seemant Nagar, Yashbagh Tum, Lucknow and he did not bother that petitioners are his son and daughter-in-law and even the legal successors of his property, and they have no any other house or place for living.

7. After the aforesaid application instituted before the Opposite Party No.2, the notices were issued for calling explanation/written statement in the case pending before respondent no.2 and it has

also been mentioned that prior to the notice, several other notices were issued, though petitioners submitted that the same were not served upon them.

8. Petitioner no.1 had also submitted an application before the District Magistrate, Lucknow on 22nd May, 2019, wherein, it was prayed that case pending before the Sub-Divisional Magistrate may be transferred before any other competent authority, but it was neither heard nor any action has been taken. He further submits that without hearing the side of the petitioners, the Sub-Divisional Magistrate passed the order in Case No.38 of 2018 (Uma Shanker Sharma Vs. Indrajeet Sharma and others) on 6th June, 2019, wherein, they were directed to evict the house of the petitioner no.2, having its No.46 at Seemant Nagar, Yashbagh Tum, Kalyanpur, Lucknow.

9. After the aforesaid order passed by the Sub-Divisional Magistrate under Section 5 of the Act, 2007, the petitioners approached the District Magistrate, Lucknow while instituting a Case No.20231 of 2019 (Indrajeet Sharma Vs. Uma Shanker Sharma) under Section 16 of the Act, 2007. The aforesaid appeal was filed against the order dated 6th June, 2019 passed by the Sub-Divisional Magistrate and order of eviction was passed thereof.

10. Learned District Magistrate, who is the Appellate Authority as per Section 16 of the Act, 2007, has passed the order in an arbitrary and erroneous manner on 24th February, 2020 on the ground of maintainability. As per his verdict, the petitioners had no right to file an appeal under Section 16 of the Act, 2007.

11. Being aggrieved with the order aforesaid, petitioners filed a writ petition bearing No.19104 of 2021 (Misc. Single); Rupam Sharma @ Jyoti Sharma and another Vs. District Magistrate, Lucknow, before this Court and the same was dismissed on 2nd September, 2021 on the ground of maintainability. He submits that, in fact, the aforesaid writ was filed in hurriedly manner and the order dated 24.02.2020 passed by the Appellate Authority i.e. District Magistrate was not appended/challenged in the aforesaid writ petition and, as such, the Hon'ble Court, while passing the order on 2nd September, 2021, dismissed the writ petition and accorded liberty to the petitioners to file a fresh petition.

12. Learned counsel appearing for the petitioners has argued that, in fact, the compromise was entered in between the petitioner no.1 and respondent no.3 on 08.11.2016 and in pursuance of the same, petitioners were residing on the ground floor of Plot No.46 at Seemant Nagar, Yashbagh Tum, Kalyanpur, Lucknow. Further, since a final report was submitted by the Investigating Officer only on the premise of a compromise entered in between the petitioner No.1 and the respondent no.3 and as soon as the final report was submitted, the respondent no.3 has again started harassing and torturing the petitioners for no reasons.

13. Learned counsel for the petitioners further argued that since the petitioners themselves is getting the pension regularly and has also got the service benefits and as such, they are able to maintain themselves and, thus, the aforesaid proceedings before the Sub-Divisional Magistrate and the Appellate Authority/District Magistrate is nothing, but an eyewash. He further added that, in fact, the conduct and behaviour of the

respondent no.3 is unbridlled and unguided and he is without any reason torturing the petitioners by way of instituting the aforesaid proceedings.

14. Learned counsel for the petitioners has also added that due to aforesaid action of the respondent no.3, petitioners are compelled to live in the little parental house, and respondent no.3 has become merciless as the petitioner no.1 was pregnant and also in the high-time of Covid-19 Pandemic, the petitioners were forcefully evicted/thrown out from their house. He also added that order dated 6th June, 2019 has been passed without paying heed on the contention of the petitioners and further the same is also in violation of the intent of the Section 5 of the Act, 2007. The orders dated 6th June, 2019 and 24th February, 2020 are highly illegal, unconstitutional and arbitrary. The orders are without reason and are against the intent of the legislature. He submits that if this Hon'ble Court will not quash the orders passed by the respondent Nos.1 and 2, they shall suffer irreparable loss and injury, which could not be compensated by any means.

15. Finally, learned counsel for the petitioners has also drawn attention that the order dated 24th February, 2020 has been passed against the settled proposition of law as plea of the petitioners has been rejected on the ground that right to appeal against any order passed on the Application Under Section 5 of the Act, 2007 is available to the Senior Citizens and the Parents only which is overt and evident from the bare perusal of Section 16 of the Act, 2007. The provision of Section 16 of the Act, 2007 is being extracted as follows:-

Section 16 (Appeals).

"(1) Any senior citizen or a parent, as the case may be, aggrieved by an order of a Tribunal may, within sixty days from the date of the order, prefer an appeal to the Appellate Tribunal:

Provided that on appeal, the children or relative who is required to pay any amount in terms of such maintenance order shall continue to pay to such parent the amount so ordered, in the manner directed by the Appellate Tribunal:

Provided further that the Appellate Tribunal may, entertain the appeal after the expiry of the said period of sixty days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

(2) On receipt of an appeal, the Appellate Tribunal shall, cause a notice to be served upon the respondent.

(3) The Appellate Tribunal may call for the record of proceedings from the Tribunal against whose order the appeal is preferred.

(4) The Appellate Tribunal may, after examining the appeal and the records called for either allow or reject the appeal.

(5) The Appellate Tribunal shall, adjudicate and decide upon the appeal filed against the order of the Tribunal and the order of the Appellate Tribunal shall be final:

Provided that no appeal shall be rejected unless an opportunity has been given to both the parties of being heard in person or through a duly authorised representative.

(6) The Appellate Tribunal shall make an endeavour to pronounce its order in writing within one month of the receipt of an appeal.

(7) A copy of every order made under sub-section (5) shall be sent to both the parties free of cost."

16. While corroborating his arguments, he has placed reliance on the case reported in 2019 (8) ADJ 731 (D.B.) (Akhilesh Kumar and another Vs. State of U.P. and others) and has referred para 7 of the aforesaid judgment, which is extracted as under:-

7. However, learned standing counsel has referred to a decision in Paramjit Kumar Saroya : Amanpreet v. Union of India, (2014 AIR (P&H) 121 wherein the Division Bench of the Punjab and Haryana High Court has held that a purposive interpretation should be given to Section 16(1) of the Act, 2007 and the only interpretation is that the right of appeal is conferred on both sides. The Court was of the view that it may be a case of an accidental omission and not of conscious exclusion and in order to give a complete and effective meaning to the statutory provision, the Court should read the words into it and the ultimate conclusion being that an appeal from both sides is envisaged under section 16(1) of the Act, 2007. Paragraph Nos. 19, 20, 23 and 27 of the said judgment reads as under:

"19. The petitioners assailed the provisions of sub section (1) of Section 16 of the said Act on the ground that there cannot be a right to appeal only to one of the affected parties, as anomalous situation would be created against the same order with which both the parties may be aggrieved.

17. In a similar controversy the Madras High Court in Balamurugan v. Rukmani (C.R.P.(PD)(MD) No. 437 of 2015 & M.P.(MD) Nos. 1 & 2 of 2015 decided on 29 April 2015) in agreement with the view taken in Paramjit Kumar Saroya (AIR 2014 Punjab and Haryana 121) has held that an appeal under section 16 of the Act, 2007 would be maintainable on the behest of both the parties, i.e. at the instance of the aggrieved party for the reason that where the Tribunal decides a case in favour of the senior citizens or parents, the children or dependent or relatives against whom the order is passed and against whom it can be enforced under section 11 of the Act, 2007 would be the aggrieved person and have a right to file an appeal.

18. He further placed reliance on the case reported in AIR 2014 Punjab and Haryana 121 (Paramjeet Kumar Saroya Vs. Union of India and another) and judgment rendered in case of Carew and Co. Ltd. v. Union of India: (SCC 1.802, para 21), wherein, it has been held the "The law is not "a brooding omnipotence in the sky" but a pragmatic instrument of social order. It is an operational art controlling economic life, and interpretative effort must be imbued with the statutory purpose. No doubt, grammar is a good guide to meaning but a bad master to dictate. Notwithstanding the traditional view that grammatical construction is the golden rule, Justice Frankfurter used words of practical wisdom when he observed#: (US p. 138):

"There is no surer way to misread a document than to read it literally."

19. We are thus of the view that Section 16(1) of the said Act is valid, but must be read to provide for the right of appeal to any of the affected parties.

20. He has further submitted that in our old customary laws, there was traditional principle of law of interpretation, which later on evolved and took the form of new law of interpretation.

Quoting the aforesaid, he has referred the case of Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd., (2008) 4 SCC 755. The Hon'ble Supreme Court in aid of interpreting a statute pressed into service the traditional Mimansa system. These principles are the traditional principles of interpretation laid down by Jaimini and are stated to have been used regularly by great jurists who authored the Mitakshara and Dayabhaga laws. The principles were created for religious purpose, but they are stated to be so rational and logical that they began to be used in law, grammar, logic, philosophy and, thus, became of universal application. The three ways of dealing with the conflicts under the Mimansa system have been crystallized as under:--

"(1) Where two texts which are apparently conflicting are capable of being reconciled, then by the principle of harmonious construction (which is called the samanjasya principle in Mimansa) they should be reconciled.

(2) The second situation is a conflict where it is impossible to reconcile the two conflicting texts despite all efforts. In this situation the Vikalpa principle applies, which says that whichever law is more in consonance with reason and justice should be preferred. However, conflict should not be readily assumed and every effort should be made to reconcile conflicting texts. It is only when all efforts of reconciliation fail that the Vikalpa principle is to be resorted to.

(3) There is a third situation of a conflict Sharma Amodh and this is where there are two conflicting 2014.05.31 11 : 40 I attest to the accuracy and integrity of this document chandigarh CWP-12340-2010 (O&M) irreconcilable texts but one overrides the other because of its greater force. This is called a Badha in the Mimansa system (similar to the doctrine of ultra vires)." It is in the aforesaid context that the Hon'ble Supreme Court observed as under:--

"52. No doubt ordinarily the literal rule of interpretation should be followed, and hence the Court should neither add nor delete words in a statute. However, in exceptional cases this can be done where not doing so would deprive certain existing words in a statute of all meaning, or some part of the statute may become absurd."

21. He further placed reliance on the case reported in (2008) 4 SCC 755 (Gujarat Urja Vkas Nigam Ltd. Vs. Essar Power Ltd.) and has referred paras 52 and 53 of the aforesaid judgment, which are extracted as under:-

52. No doubt ordinarily the literal rule of interpretation should be followed, and hence the Court should neither add nor delete words in a statute. However, in exceptional cases this can be done where not doing so would deprive certain existing words in a statute of all meaning, or some part of the statute may become absurd.

53. In the chapter on `Exceptional Construction' in his book on `Interpretation of Statutes' Maxwell writes : "Where the language of a statute, in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, by altering their collocation, by

rejecting them altogether, or by interpolating other words, under the influence, no doubt, of an irresistible conviction that the legislature could not possibly have intended what the words signify, and that the modifications thus made are mere corrections of careless language and really give the true meaning."

22. He further placed reliance on the case reported in 1991 (2) SCC 87 (Surjeet Singh Kalra Vs. Union of INdia and another) and has referred para 19 of the aforesaid judgment, which is extracted as under:-

19. True it is not permissible to read words in a statute which are not there, but "where the alternative lies between either supplying by implication words which appear to have been accidentally omitted, or adopting a construction which deprives certain existing words of all meanings, it is permissible to supply the words". Having regard to the context in which a provision appears and, the object of the statute in which the said provision is enacted, the court should construe it in a harmonious way to make it meaningful. An attempt must always be made so to reconcile the relevant provisions as to advance the remedy intended by the statute. [378E-G] Craies Statute Law, 7th Edition, P. 109; Hameedia Hardware Stores V. B. Mohan Lal Sowcar, [1988] 2 SCC 513 at 524-25, and Sirajul Haq Khan & Ors. v. The Sunni Central Board of Waqf,

23. Learned counsel for the petitioner further placed reliance on the case of Hameedia Hardware Stores v. B. Mohan Lal Sowcar, (1988) 2 SCC 513 where it was observed that the court construing a provision should not easily read into words which have not been expressly enacted but having regard to the context in which a provision appears and the object of the statute in which the said provision is enacted. The court should construe it in a harmonious way to make it meaningful. An attempt must always be made so as to reconcile the relevant provisions to advance the remedy intended by the statute.

24. He further placed reliance on the case reported in 1988 (2) SCC 513 (Hamedia Hardware Stores Vs. B. Mohal Lal Sowcar), wherein, it has been held by the Apex Court that object of an statute is a primary goal and, as such, making it meaningful, a harmonious interpretation could be done.

25. He further placed reliance on the case reported in S.C.R (Supreme Court Reports) (Sirjul Haq Khan & Others Vs. The Sunni Central Board of Waqf, U.P. and others). The relevant parts of the aforesaid order read as under:-

It is well settled that in construing the provisions of a statute courts should be slow to adopt a construction which tends to make any part of the statute meaningless or ineffective; an attempt must always be made so to reconcile the relevant provisions as to advance the remedy intended by the statute.

26. On the other hand, countering the aforesaid, Sri Shailendra Kumar Singh learned Chief Standing Counsel-III has very vehemently opposed the contention as has been made by the petitioners in preceding paragraphs. He denied the factual matrix of the case as averred by the petitioners. He submits that overtly there is no mention of the parties to the appeal other than the senior citizen as well as

parents as Section 16(1) of the Act, 2007 is evident and, therefore, nothing can be added against the intent of the legislature.

27. Learned Chief Standing Counsel for the State submits that, in fact, it is settled proposition of law that while interpreting the statutes or Acts, there can be iron on the fabric, but cannot change the texture. He submits that, in fact, in the given situation/instant matter, the legislature did not put the word in appeal, which could reveal that the right to appeal is extended to the children, relatives or any other person aggrieved by the order passed under Section 5 of the Act, 2007. He submits that, in fact, had there been any intention of the legislature to accord the right of appeal to such a person other than the senior citizen as well as the parents, there would have been the specific wordings in the appeal itself and, as such, the interpretation of the statute cannot be done by putting a word which has cautiously not been added in the provisions. Adding such a word in Section 16(1) of the Act, 2007 would amount to make a legislation by the Court which was not warranted as to the intent of the legislature.

28. Strengthening his arguments, he has placed reliance on a judgment in Appeal (Civil) No. 2298 of 2001 (Gurudevdatta Vksss Maryadit and others Vs. State of Maharashtra and others), wherein, while passing the order, the Apex Court has specifically held that when the expression/ words of legislative provision are capable to construct the purpose of the provision, a court cannot ignore it and further cannot substitute a different construction as the same would affect the object of the legislation. The relevant paragraph of the aforesaid judgment is quoted hereinunder:-

"Moreover, as the extrinsic material reveals, s.40(3) was intended to be remedial. As far as practicable, s.40(1) and (3) should be construed to promote the objects of the Act. Nevertheless, as I pointed out in Kingston v. Keprose Pty Ltd. [1987 (11) NSWLR 404 at 423], in applying a purposive construction, the function of the court remains one of construction and not legislation. When the express words of a legislative provision are reasonably capable of only one construction and neither the purpose of the provision nor any other provision in the legislation throws doubt on that construction, a court cannot ignore it and substitute a different construction because it furthers the objects of the legislation."

29. Learned counsel has further placed reliance on a case bearing Appeal (Civil) No. 5077 of 1998 (Nasiruddin and others Vs. Sita Ram Agarwal) and has referred the relevant paragraph of the aforesaid judgment, which is extracted as follows:-

The court's jurisdiction to interpret a statute can be invoked when the same is ambiguous. It is well known that in a given case the Court can iron out the fabric but it cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of provision is plain and unambiguous. It cannot add or subtract words to a statute or read something into it which is not there. It cannot re-write or recast legislation. It is also necessary to determine that there exists a presumption that the legislature has not used any superfluous words. It is well-settled that the real intention of the legislation must be gathered from the language used. It may be true that use of

the expression 'shall or may' is not decisive for arriving at a finding as to whether statute is directory or mandatory. But the intention of the legislature must be found out from the scheme of the Act. It is also equally well-settled that when negative words are used the courts will presume that the intention of the legislature was that the provisions are mandatory in character.

30. Referring the aforesaid judgments, he submits that, in fact, it is settled proposition of law that the 'words', which should have been, but was not provided in the statute cannot be settled by Courts as, by doing so, the same would be otherwise adopting the method of legislation and not a construction.

31. Having heard learned counsel for the parties and going through the record, it emerges that right to appeal under the Act, 2007 is only attributed to the senior citizen and the parents though, as per the provisions of Section 5 of Act, 2007, the order may be passed against the children, relatives or any other person also. Section 5(2)(8) is reiterated as under:-

"(2) The Tribunal may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this section, order such children or relative to make a monthly allowance for the interim maintenance of such senior citizen including parent and to pay the same to such senior citizen including parent as the Tribunal may from time to time direct."

"(8) If, children or relative so ordered fail, without sufficient cause to comply with the order, any such Tribunal may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person for the whole, or any part of each month's allowance for the maintenance and expenses of proceeding, as the case be, remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made whichever is earlier: Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Tribunal to levy such amount within a period of three months from the date on which it became due."

32. Question arises that whether there can be an iota of intent of any legislature to leave an aggrieved person remediless, which is wholly against the principle of natural justice and procedure established by law.

33. The interpretation of a statutory enactment is not a mechanical task. It is also not based on mathematical formula. While interpreting an statute, the intent of the legislature is to be discovered. The words used/imbibed in the statute are the foremost reliable source of the meaning and intent of any writing. In fact, the finest guide of the meaning of the 'words' in the matured jurisprudence does not lie only in the dictionary, but the purpose and object of the statute has an impact over there.

34. Though, it is a well settled proposition of law that if the language is plain and unambigous, the same cannot be enlarged or added by way of interpretation of statute. The words in a statute neither can be substracted nor can be added, but even then the intent of legislature is the supreme goal to be achieved/interpreted.

35. So far as the parliamentary debates while enactment of Act, 2007 is

concerned, there has been no debate qua Section 16(1) of the Act, 2007. The Section 5(2)(8) specifically enlarges certain obligations/liabilities over the children, relative or any other person and, as such, on the other word, they can be said to be a person aggrieved. There can be no such intent of the legislature so as to exclude the right of appeal to such persons upon whom the liability has been fastened. If Section 5(2) as well as Section 5(8) and Section 16(1) are read with each other, it emerges that as per the aforesaid Section 16(1) right of filing an appeal always remain available to the person other than senior citizen and parents also.

36. In view of the aforesaid discussions, there seems to be an accidental omission while enactment of the statute namely Act, 2007, where under Section 16(1), the right to appeal has only been given to the parents and the senior citizens not to the children, relative or other person. In any legislature of the world, there can be no such discussion or intent to exclude a person, who is aggrieved under the same Act, to file an appeal or to extend any remedy therein. So far as the rule of casus omissus is concerned, it is also a vice-versa as if there is a clear necessity of any provision and that has been omitted, then that is out of purview of the doctrine of casus omissus.

37. Objective of any statute is always to provide more effective provisions so that there could remain no ambiguity. The provisions for the maintenance are for welfare of the parents and the senior citizen and was promulgated for better care of them but, there is another side of the story. Because the maintenance has to be given by some person or institute or a juristic person and if such a maintenance is been granted, some person must be affected and thus, the non mentioning of the words in Section 16(1) is not a casus omissus, but it seems an accidental omission.

38. The rule of purposive interpretation also indicates and establishes that the law is such a thing which has to be applied as a pragmatic instrument for social order. The interpretative effort must be inherent with the statutory purpose.

39. There is a well settled principle that the judge can iron the fabrics but cannot change the texture of statute. There is another aspect of this rule that if texture is itself defective due to accidental omission, then that becomes inefficacious and ineffective, and thus, the role of the courts comes into picture. Many times, in case of accidental omission, the Court by way of applying the rule of purposive interpretation has improved the texture, though, did not change the same.

40. Further, it is also important that there is no provision in the Act denying the right of appeal to the other parties. From perusal of the other provisions of the Act and various sub sections discussed aforesaid indicates that the right to appeal to other parties has accidentally been omitted. Only exception to this course of action is the initial words of sub section (1) of Section 16 of the said Act which need to be supplanted to give a meaning to the intent of the statutes.

41. The identical issue was also dealt with by the Punjab and Haryana High Court in case of **Paramjeet Kumar Saroya (supra)** as well as in case of **Balamurugan (supra)** by the Madras High Court and it has been held that if the right to appeal is not been accorded to the

children, relatives or any other person then the purpose of the Act, 2007 would be frustrated and rather this would be a denial of right to appeal to the person aggrieved.

42. Thus, this Court is also in agreement with the aforesaid orders and find that the right to appeal to any affected parties is available so far as the purpose of the Act, 2007 is concerned.

43. Therefore, this writ petition is hereby **partly allowed.** The order dated 24.02.2020 passed by respondent no.1 is set aside. The liberty is granted to the petitioners to file an appeal before the Appellate Court under Section 16 of the Act, 2007 afresh, within a period of 15 days from the date of this order and if such an appeal is filed, the Appellate Authority shall take decision on appeal within a further period of four months after calling objections and affording an opportunity of hearing to the parties concerned.

44. No order as to costs.

(2022)05ILR A416
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.05.2022

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ C No. 22991 of 2021

Ms. Saumya Singh ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Surya Prakash Singh, Anupama Bhadauria, Ashok Kumar Yadava, Shalini Upadhyaya

Counsel for the Respondents:
A.S.G., Hemant Kumar Pandey

(A) Civil Law - Rights of Persons with Disabilities - Sympathetic consideration - The Rights of Persons with Disabilities Act, 2016 - Section 2 (s),2 (zc),16(vii),56,57,58,59 - "Psychosis" - not defined under the Act, 2016 - a mental disorder in which there is severe loss of contact with reality, evidenced by delusions, hallucinations, disorganized speech patterns, and bizarre or catatonic behaviors. (Para -17)

Petitioner (student of M.A English) could not join third semester and appear in third semester examinations on account of her medical condition (Psychosis) - admission of petitioner stood cancelled on account of Clause 15 (b) of the Ordinance - request of petitioner for her re-registration rejected by University - ground - no provision for re-registration of any semester of any course - perusal of ordinance prima facie indicate - specific provision in Clause 15 (c) - provides that students whose admission is cancelled , are required to re-register for the programme - re-registration can be permitted subject to certain conditions - respondents while issuing impugned order have not considered Clause 15 (c) of the ordinance. (Para -3)

HELD:- Petitioner to submit a fresh representation indicating her grievance along with certified copy of order to the Chancellor of the University, i.e respondent no. 2. The Chancellor of the University shall consider the re-registration of petitioner and her continuance in M.A (English) course keeping in view the observations made, sympathetically. (Para -24)

Writ petition disposed of. (E-7)

List of Cases cited:-

1. In Re Contagion of Covid 19 Virus in Children Protection Homes , 2021 SCC Online SC 3178

2. Court on its own motion Vs U.O.I. & ors. , (2021) SCC Online Bom 790

3. Rahul Sharma Vs St. of Guj. , 2020 SCC Online Guj. 2641

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

1. Heard Ms. Anupama Bhadauria, learned counsel for the petitioner and Sri Hemant Kumar Pandey, learned counsel appearing for the respondents no. 3 to 5.

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

(i) Issue a writ, order or direction in the nature of Certioari or any other Writ, order or direction of like nature setting aside the impugned order dated 23.08.2021 issued by the Respondent as contained in Annexure No. 1 to this writ petition.

(ii) Issue a writ, order or direction in the nature of mandamus or any other writ, order or direction of like nature directing the Respondent to permit the petitioner to join the IIIrd Semester of the M.A English Programme along with Batch of 2020-22 at Lucknow campus, which is running since 08.09.2021.

3. The facts of the case have already been indicated by this Court while passing a detailed order on 05.04.2022 which for the sake of convenience is reproduced below:-

1.Heard.

2. Instant petition has been filed challenging the order dated 23.08.2021 passed by the respondent-University whereby the petitioner has been informed that as per the University ordinance there is no provision for re-registration of any semester of any course.

3. The case set forth by the petitioner is that she had taken admission in the M.A (English) course in the session 2019-21. However, on account of the COVID-19 pandemic which came in India in the year 2020 the petitioner suffered from Psychosis which has resulted in she being unable to appear for the examination in the third semester which was held from August, 2020 to December, 2020. In March, 2021 the petitioner applied to join the third semester of M.A (English) programme which has been turned down by the impugned order dated 23.08.2021, a copy of which is annexure 1 to the writ petition by indicating that as per the University ordinance there is no provision of re-registration of any semester of any course.

4. Learned counsel for the petitioner contends that once as per her medical condition which is duly certified by the doctor concerned she could not appear in the third semester, as such there cannot be any reason for not permitting the petitioner to join the third semester and appear for the examinations. In this regard, he has placed reliance on Clause XV (c) of the Ordinances Governing Academic and Administrative Matters (Based on UGC Model Ordinances-2012) of the English and Foreign Languages University, Hyderabad which specifically provides that the students whose admission is cancelled are required to re-register for the programme which can be permitted subject to certain conditions.

5. Learned counsel for the petitioner contends that once there is specific provision under the ordinance for re-registration of the students and her inability to join the third semester and appear in the third semester examination was on account of circumstances beyond her control rather on account of her medical conditions which duly finds support from the medical certificate issued by the competent doctor, as such the respondent-University be directed to re-register her for the third semester and to permit her to join the third semester and appear in the said examination.

6. On the other hand, Sri Hemant Kumar Pandey, learned counsel appearing for the University contends that as per Clause 15 (b) of the Ordinance, students who fail in two (50%) courses of a semester will not be promoted to the next semester and their admission stands cancelled. Placing reliance on the averments contained in the counter affidavit, Sri Pandey argues that once admittedly the petitioner did not appear in the third semester examinations which were conducted from August, 2020 to December, 2020 and thereafter the students who did not appear in the said examination were also given a chance to appear again in the examination in January, 2021 and the petitioner not having appeared and taking the said chance, her admission has been cancelled and there would not be any occasion for her re-registration.

7. Having heard the learned counsel appearing for the contesting parties and having perused the records what is prima facie apparent is that the petitioner could not join the third semester and appear in the third semester examinations on account of her medical condition. The admission of the petitioner stood cancelled on account of Clause 15 (b) of the Ordinance. The request of the petitioner for her re-registration has also been rejected by the University through the impugned order dated 23.08.2021 on the ground that there is no provision for re-registration of any semester of any course. However, a perusal of the ordinance would prima facie indicate that there is specific provision in Clause 15 (c) which provides that the students whose admission is cancelled, are required to re-register for the programme and the re-registration can be permitted subject to certain conditions. It is thus apparent that the respondents while issuing the impugned order have not considered Clause 15 (c) of the ordinance.

8. Sri Hemant Kumar Pandey, learned counsel appearing for the University prays for and is granted a week's to seek instructions as to whether the case of the petitioner can be considered under Clause 15 (c) of the Ordinance.

9. As the matter pertains to a student, list this case in the next week for further hearing.

4. Subsequent to the order dated 05.04.2022, Sri Hemant Kumar Pandey had pointed out to the Court that this Court had considered the provision of Clause 15 (b) of the ordinance which pertains to M.A distance education while for the petitioner it is Clause VI (d) of Ordinance 10 of Ordinances Governing Academic and Administrative Matters (hereinafter referred to as "Ordinances") which is applicable which in turn is governed by Clause 10.7 of the 10th Ordinance. This statement was recorded by this Court vide order dated 12.04.2022 which for the sake of convenience is reproduced below:-

"Heard.

At the very outset, Shri Hemant Kumar Pandey, learned counsel appearing for the University contends that inadvertently on the previous date i.e. on 05.04.2022 he had argued the matter on the basis of a wrong provision of the Ordinance in as much as Clause XV (b) of the Ordinance pertains to M.A. (English), Distance Mode while the petitioner was a student of regular mode two years (four semester) course and hence the said clause XV (b) of the Ordinance was not applicable.

The aforesaid statement is recorded.

Shri Pandey contends that the case of the petitioner is governed by clause VI (d) of the Ordinance which does not provide for any re-admission.

However in all fairness, Shri Pandey submits that he may be granted two weeks' time to seek instructions as to whether any sympathetic consideration can be extended to the petitioner by the University so as to save the educational career of the petitioner.

List this case in the week commencing 02.05.2022."

5. Thereafter, the Court had required learned counsel appearing for the respondents to seek instructions as to whether any sympathetic consideration can be extended by the University to the petitioner and in pursuance thereof, Sri Hemant Kumar Pandey, learned counsel appearing for the respondents no. 3 to 5 informs that as the University is a five star rated institution, as such, in case any relaxation is extended to the petitioner, the same would result in dilution of the academic standards of the University and may also be cited as a precedent by other students and accordingly, no sympathetic consideration can be extended by the University to the petitioner. Sri Pandey also submits that considering Clause 10.7 of the 10th Ordinance, a student should not have a backlog of more than two courses/ papers at the beginning of any given semester and that students who accumulate backlog of more than two courses/papers at any point of time will have to exit the programme. He contends that as the petitioner was having a backlog of all the papers, as such considering Clause 10.7 of 10th Ordinance, it is deemed that the petitioner has exited from the programme.

6. On the other hand, learned counsel for the petitioner contends that the situation which rendered the petitioner unable to appear in any of the semester examination for the M.A IIIrd semester was occasioned on account of the unprecedented COVID-19 pandemic which was faced by both, the world at large as well as India. She also contends that a complete lock down had been imposed in the country in March, 2020. It is also contended that on account of the COVID-19 pandemic and resultant stress, the petitioner suffered from Psychosis and was under continuous medical treatment of the doctor concerned from 02.07.2020 till March, 2021 as would be apparent from a perusal of the certificate issued by the doctor, a copy of which has been filed as annexure 7 to the writ petition. She thus contends that even if something adverse is contained in the Ordinance of the University the same does not conceptualize the peculiar situation faced by the students at large and the petitioner in particular and in view of the peculiar situation which prevailed during the COVID-19 pandemic and the medical condition of the petitioner duly certified by the medical doctor, she is entitled for sympathetic consideration by the University.

7. Placing reliance on Section 2 (s) and 2 (zc) of the Rights of Persons with Disabilities Act, 2016 (hereinafter referred to as "Act, 2016") along with Section 16 (vii) of the Act, 2016 and the Schedule, learned counsel for the petitioner argues that "Psychosis", which the petitioner was suffering from, is indicated as a disability under the provisions of the Act, 2016 and the University ordinance, which are of a date prior to the Act, 2016, could not have obviously considered the Act, 2016 when the Ordinance were framed in the year 2012 as the Act, 2016 itself has come in the year 2016 and thus the provisions of the

Act, 2016 which is a special act, are to be read in the Ordinance also.

8. Learned counsel for the petitioner also argues that once the University ordinance contain a specific provision for the M.A (English) Distance Mode and the students who are undergoing M.A (English) Distance Mode are eligible for certain relaxation, as such the said relaxation may also be extended to the petitioner taking into consideration the aforesaid circumstances.

9. Having heard the learned counsel appearing for the contesting parties and having perused the records what is apparent is that the petitioner was a student of M.A English for the Session 2019-21 who regularly appeared in semesters I &II of her course. The semester III examinations were scheduled between August, 2020 to December, 2020 but though the petitioner wanted to participate in the same, she could not participate on account of her medical condition of "Psychosis" as certified by a registered medical practitioner as per the certificate annexed with the petition. As per the said certificate, the treatment of the petitioner was continuing even on the date of issuance of the certificate i.e till March, 2021 meaning thereby that during the period the examinations were scheduled, the petitioner was suffering from "Psychosis".

10. Whether the Act, 2016 is applicable on the medical condition of the petitioner is to be seen initially by the Court.

11. Section 2 (s) of the Act, 2016 reads as under:-

"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".

12. Section 2 (zc) of the Act, 2016 reads as under:-

"specified disability" means the disabilities as specified in the Schedule"

13. Chapter X of the Act, 2016 provides as under:-

"56. Guidelines for assessment of specified disabilities:- *The Central Government shall notify guidelines for the purpose of assessing the extent of specified disability in a person.*

57. Designation of certifying authorities:- *(1) The appropriate Government shall designate persons, having requisite qualifications and experience, as certifying authorities, who shall be competent to issue the certificate of disability.(2) The appropriate Government shall also notify the jurisdiction within which and the terms and conditions subject to which, the certifying authority shall perform its certification functions.*

58. Procedure for certification:- *(1) Any person with specified disability, may apply, in such manner as may be prescribed by the Central Government, to a certifying authority having jurisdiction, for issuing of a certificate of disability.*

(2) On receipt of an application under sub-section (1), the certifying authority shall assess the disability of the concerned person in

accordance with relevant guidelines notified under section 56, and shall, after such assessment, as the case may be,--

(a) issue a certificate of disability to such person, in such form as may be prescribed by the Central Government;

(b) inform him in writing that he has no specified disability.

(3) The certificate of disability issued under this section shall be valid across the country.

59. Appeal against a decision of certifying authority:-*(1) Any person aggrieved with decision of the certifying authority, may appeal against such decision, within such time and in such manner as may be prescribed by the State Government, to such appellate authority as the State Government may designate for the purpose. (2) On receipt of an appeal, the appellate authority shall decide the appeal in such manner as may be prescribed by the State Government."*

14. The schedule to the Act, 2016 so far as it pertains to mental behavior provides as under:-

"3. Mental behaviour,--

"mental illness" means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, but does not include retardation which is a conditon of arrested or incomplete development of mind of a person, specially characterised by subnormality of intelligence."

15. A persual of the aforesaid provisions of the Act, 2016 would indicate that "Psychosis" is not defined under the Act, 2016.

16. For understanding the disease of "Psychosis" with which the petitioner was suffering, the Court has referred to the meaning of "Psychosis" as given in Taber Cyclopedic Medical Dictionary, 19th Edition which read as under:-

"A mental disorder in which there is severe loss of contact with reality, evidenced by delusions, hallucinations, disorganized speech patterns, and bizarre or catatonic behavior. Psychotic disorders are common features of schizophrenia, bipolar disorders, and some affective disorders. They can also result from substance abuse (e.f. the use of hallucinogens), substance withdrawal (e.g delirium tremens), or side effects of some prescription drugs"

17. As per the definition, it is apparent that "Psychosis" is a mental disorder in which there is severe loss of contact with reality, evidenced by delusions, hallucinations, disorganized speech patterns, and bizarre or catatonic behaviors.

18. Section 2 (s) of the Act, 2016 only defines a person with disability as a person with **long term** physical/ mental or sensory impairment which in interaction with barriers, hinders his full and effective participation in the society meaning thereby that a person with disability would have to have long term illness for the purpose to come under the ambit of Act, 2016. From the medical condition annexed by the petitioner it can be seen that the petitioner was not having any long term mental impairment. However, it was an impairment which precluded and restrained her from appearing in the examination for M.A IIIrd semester which was scheduled from August, 2020 to December, 2020. The said illness is said to have been occasioned

on account of COVID-19 pandemic situation.

19. The Courts in India including Hon'ble Supreme Court have considered the effect of COVID-19 pandemic situation by issuing various directions from time to time as would be apparent from a perusal of the judgment of the Apex Court in the case of **In Re Contagion of Covid 19 Virus in Children Protection Homes reported in 2021 SCC Online SC 3178** wherein the Supreme Court was considering the effect of Pandemic on the children in protection homes.

20. Likewise the Bombay High Court in the case of **Court on its own motion Vs. Union of India and Ors** reported in **(2021) SCC Online Bom 790** has considered the effect of Pandemic with regard to reimbursement of college fees of the student who could not deposit the same on account of Pandemic and economic loss suffered during the said period. The Division Bench of Gujrat High Court in the case of **Rahul Sharma Vs. State of Gujrat** reported in **2020 SCC Online Guj 2641** has considered the modalities to be adopted for conduct of University examination for academic session 2019-20 which could not be held on account of Pandemic.

21. Likewise, keeping in view the COVID-19 pandemic situation, the University Grant Commission issued academic guidelines in July, 2021 of Examination and Academic Calender wherein it has been provided that in view of the financial hardships being faced by parents due to lockdowns and related factors, a full refund of fees should be made on account of cancellations/migrations of students up to 31.10.2021 as a special case in higher education institutions.

22. Though, none of the aforesaid judgments or Universities Grant Commission guidelines have any direct bearing on the issue yet this Court has indicated about the aforesaid judgments in order to demonstrate that the COVID-19 Pandemic situation and the subsequent lockdown resulted in chaos on a large scale which has affected the population at large including students & their parents, both economically, mentally and otherwise.

23. Though Chapter 10 of the Act, 2016 provides certification of specified disabilities and in the present case, no certificate has been issued yet the fact of the matter would remain that considering the illness of "Psychosis" with which the petitioner was suffering during the relevant period i.e the period in which third semester examinations were scheduled, she could not appear in the examination. The intent of the petitioner is to study further and to complete her M.A English course. The respondents themselves in the Ordinance more particularly Ordinance 9 Clause XV (c) have provided that students of distance education course whose admissions are cancelled are required to re-register for the programme and the re-registration shall be permitted subject to certain conditions. No such provision has been given for regular course students. In the peculiar circumstances as have been spelt out by the petitioner and as have been indicated above by this Court namely the unprecedented COVID-19 pandemic situation along with the medical condition of the petitioner i.e "Psychosis" it would be in the fitness of things that the respondents-University consider the extension of re-

registration to the petitioner keeping in view the fact that Ordinance 9 which though pertains to M.A English Distance Mode, provides for a re-registration in certain circumstances.

24. Accordingly, the present petition is disposed of leaving it open to the petitioner to submit a fresh representation indicating her grievance along with certified copy of this order to the Chancellor of the University, i.e respondent no. 2. In case, such a representation is made then the Chancellor of the University shall consider the re-registration of the petitioner and her continuance in M.A (English) course keeping in view the observations made above, sympathetically.

25. Let such a consideration be done within a period of four weeks from the date of receipt of a certified copy of this order.

26. It is also provided that as this order has been passed in the peculiar facts of this case as such, it shall not be treated as a precedent.

(2022)05ILR A423
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.05.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Writ C No. 23323 of 2019

Jigyasa Tiwari (Minor) ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Amrendra Pratap Singh, Sri Swapnil Kumar, Sri Sudhanshu Kumar, Ms. Shalu Singh

Counsel for the Respondents:
C.S.C., Sri Mahendra Pratap

(A) Education Law - Courts in rarest of rare case can grant interim protection in admission matters - when they are convinced that no injustice would be meted to the other party - petitioner, who has approached the Court for grant of interim protection in admission matter has an cast iron case – in the admission matters misplaced sympathy is totally unwarranted - Court cannot include any qualification by a judicial fiat, as the same is task, which is to be conducted by the rule making authorities and not by the courts of law - mere continuance of any interim order does not create any right or benefit, particularly, in the matter of admission, wherein the issue relates to the MBBS Course, whereat merit is of the paramount consideration. (Para - 46,55)

(B) Education Law - Court cannot travel beyond the jurisdiction so conferred upon it, while granting a relief to an applicant, merely because certain inconvenience is sought to be meted to him/her - academic qualifications and eligibility cannot be always tailored to suit a particular candidate - mere continuance on the basis of interim order does not create any right in favour of the petitioner, particularly, when admittedly she did not possess the necessary required eligibility for being included in the zone of consideration for grant of horizontal reservation being 1% of NCC Cadets (Para - 49,50)

Beseeching bizarre persecution a medical intern - petitioned before Court - seeking judicial avowal of the eligibility deficiency opportune to admission in M.B.B.S. course - perpetuation of the same on makeshift arrangement - Controversy relates to admission in M.B.B.S. course - referable to National Eligibility Cum Entrance Test (NEET) U.G. Counseling-2019 - governed by a Government Order - setting out conditions, criteria and parameters for counseling/admission in M.B.B.S. and B.D.S. courses - Horizontal Reservation - controversy revolves around 1% reservation pertaining to

NCC ''C' Certificate with ''BEE' Grading - which qualifies and makes the petitioner entitled for 1% reservation for NCC Cadets - petitioner continuing to pursue her MBBS course - on the strength of interim order - allowing her to continue her study in MBBS course. **(Para - 2,16,37)**

HELD:-(i) Petitioner not possessed with NCC ''C' Certificate with ''BEE' Grade is neither eligible nor has desired qualification for being considered under 1% quota of NCC category as earmarked in the Government Order and the National Eligibility cum Entrance Test (NEET) U.G. Counseling.

(ii) Prescription of qualification if essentially and primarily a role reserved for the employer and rule enacting authority and it is not for this Court while exercising its jurisdiction under Article 226 of the Constitution to arrogate the said function.

(iii) Mere continuance on the basis of interim order while pursuing the MBBS Course does not create an equity or sympathy in favour of the petitioner

(iv) Petitioner not entitled to any relief in view of the fact that the petitioner blew hot and cold and approbated and reprobated at the same time. **(Para - 57)**

Writ Petition dismissed. (E-7)

List of Cases cited:-

1. J. Rangaswamy Vs Govt. of A.P., (1990) 1 SCC 288

2. D.P.R.M.P. Vs Director of Health, Delhi Admn. Services & ors., (1997) 11 SCC 687

3. St. of Raj. & ors. Vs Lata Arun, (2002) 6 SCC 252

4. P.U. Joshi & ors.. Vs U.O.I. & ors., (2003) 2 SCC 632

5. Sanjay Kumar Manjul Vs Chairman, UPSC & ors., (2006) 8 SCC 42

6. Maharashtra Public Service Commission Vs Sandeep Shriram Warade & ors., (2019) 6 SCC 362

7. P.N.B. Vs Anit Kumar Das, 2020 SCC Online SC 897

8. Zahoor Ahmad Rather & ors. Vs Sheikh Imtiyaz Ahmad & ors., (2019)2 SCC 404

9. Kaloji Narayana Rao University of Health Sciences v. Srikeerti Reddi Pingle & ors., AIR 2021 SC 1031

10. Amit Tiwari Vs St. of U.P, Special Appeal (D) No. 122 of 2015,

11. Deepak Singh & ors. Vs St. of U.P. & ors., (2020) AllLJ 596

12. Anand Bihari Vs St. of U.P. , Writ-A No. 15873 of 2021

13. P.V. Joshi & ors. Vs A.G., Ahemdabad & ors., 2003 (2) SCC 632

14. Guru Nanak Dev University Vs Parminder Kumar Bansal, (1993) 4 SCC 401

15. St. of Bihar Vs Upendra Narayan Singh, (2009) 5 SCC 65

16. Priya Gupta Vs St. of Chhattisgarh & ors., (2012) 7 SCC 433

17. Asha Vs Pt. B.D. Sharma Univ. of Health Sciences & ors., (2012) 7 SCC 389

18. S Krishna Shradha vs St. of A.P. & ors., (2020) 17 SCC 465

19. A.P. Christians Medical Educational Society Vs Govt. of A.P. & anr., (1986) 2 SCC 667

20. V.K. Sood Vs Secy., Civil Aviation & ors., AIR 1993 SC 2285

21. R.N. Gosain Vs Yashpal Dhir, (1992) 4 SCC 683

22. Shyam Telelink Ltd. Vs U.O.I., (2010) 10 SCC 165

23. Cauvery Coffee Traders, Mangalore Vs Hornor Resources (International) Co. Ltd., (2011) 10 SCC 420

24. Sri Gangai Vinayagar Temple & anr. Vs Meenakshi Ammal & ors., (2015) 3 SCC 624

25. Chandigarh Admin. & anr. Vs Jasmine Kaur & ors., (2014) 10 SCC 521

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Vikas Budhwar, J.)

1. Heard Sri Swapnil Kumar and Sri Amrendra Pratap Singh, learned counsels for the petitioner, Sri Mahendra Pratrap, learned counsel for the respondent no. 2 as well as Sri Sharad Srivastava, learned Standing Counsel.

PRELUDE

2. Beseeching bizarre persecution a medical intern has petitioned before this Court seeking judicial avowal of the eligibility deficiency opportune to admission in M.B.B.S. course and perpetuation of the same on makeshift arrangement.

3. Factual matrix as worded in the writ petition is that on 17.06.2019 a Government Order bearing no. 985/71-4-2019-07-2018 was issued by respondent no. 1 addressed to respondent no. 2 setting out the criteria pertaining to admission in M.B.B.S./B.D.S. courses for the academic session 2019-2020.

4. Thereafter, in continuation of the same, the respondent no. 2 issued National Eligibility Cum Entrance Test (NEET) U.G. Counseling-2019 (Brochure) clearly providing the criteria for the purposes of taking of admission referable to the M.B.B.S. and B.D.S. courses. The relevant extract of the conditions pertaining to eligibility and qualifications as set out in the Government Order and the Brochure is being quoted hereinunder :-

"(1). Eligibility to appear in NEET (UG)- 2019

Eligibility to appear in **NEET (UG)** is as stipulated in **Indian Medical Council Act-1956 and the Dentists Act-1948 as amended in 2018.**

i. He/she has completed age of 17 years at the time to admission or will complete the age on or before 31st December of the year of his/her admission to the 1st year MBBS/BDS Courses.

ii. The upper age limit for **NEET (UG)** is 25 years as on the date of examination with relaxation of 5 years for the candidates belonging to SC/ST/OBC category and persons entitled for reservation under the **Rights of Persons with Disabilities Act, 2016.**

The Age criteria for appearing in NEET (UG)- 2019 is as follows:

For Candidates of Unreserved Category (UR)	**born on or between 05.05.1994 and 31.12.2002**
For Candidates of SC/ST/PwD Category	**born on or between 05.05.1989 and 31.12.2002**

Qualifications and Qualifying Examination Codes

CODE : 01	A candidate who is appearing in the qualifying examination, i.e., 12th Standard in 2019, whose result is awaited, may apply and take up the said test but he/she shall not be eligible for admission to the MBBS or BDS, if, he /she does not pass the qualifying examination with the request pass percentage of marks at the time of first round or Counselling.
OR	

CODE : 2	The Higher/Senior Secondary Examination or the Indian School Certificate Examination which is equivalent to 10+2 Higher/Senior Secondary Examination after a period of 12 years study, the last two years of such study comprising of Physics, Chemistry, Biology/Bio-technology (which shall include practical tests in these subjects) and Mathematics or any other elective subject with English at a level not less that the core course for English as prescribed by the National Council of Education Research and Training after introduction of the 10+2+3 educational structure as recommended by the National Committee on Education. *Candidates who ha passed 10+2 from Open School or as private candidates shall not be eligible to appear for "National Eligibility Cum Entrance Test'. Furthermore, study of Biology Biotechnology as an Additional Subject at 10+2 level also shall not be permissible.* The proviso in italics has been subject matter of challenge before the Hon'ble High Court of Delhi, Hon'ble High Court of Allahabad. Lucknow Bench and Hon'ble High Court of Madhya Pradesh at Jabalpur. The provisions of the regulations disqualifying recognised Open School Board candidates and the candidates who have studied Biology/Biotechnology as an additional Subject has been struck down. *"The Medical Council of India has preferred Special Leave Petitions before the Hon'ble Supreme Court and Appeals in the Hon'ble High Courts. Therefore, the candidatures of candidates of the NEET (UG)-2019 who have passed the qualifying examinations i.e. 10+2 from National Institute of Open Schooling or State Boards; or with Biology Biotechnology as additional subject shall be allowed but subject to the outcome of Special Leave Petitions Appeals filed by the Medical Council of India".*
OR	
CODE : 03	The Intermediate/Pre-degree Examination in Science of an Indian University/Board of other recognized examining body with Physics, Chemistry, Biology/Bio-technology (which shall include practical test in these subjects) and also English as a compulsory subject.
OR	
CODE : 04	The Pre-professional/Pre-medical Examination with Physics, Chemistry Biology/Bio-technology & English after passing either the Higher Secondary Examination or the Pre-University or an equivalent examination. The Pre-professional/Pre-medical examination shall include practical tests in these subjects and also English as a compulsory subject.
OR	
CODE : 05	The first year of the three years' degree course of a recognized University with Physics, Chemistry and Biology/Bio-technology including practical tests in these subjects provided the examination is a University Examination and candidate has passed the earlier qualifying examination with Physics, Chemistry, Biology/ Bio-technology with English at a level not less than a core course.
OR	
CODE : 06	B.Sc Examination of an Indian University provided that he/she has passed the B.Sc. Examination with not less than two of the subjects Physics, Chemistry, Biology (Botany, Zoology)/Bio-technology and further that he/she has passed the earlier qualifying examination with Physics, Chemistry, Biology and English.
OR	
CODE : 07	Any other examination which in scope and standard (Last 02 years of 10+2 Study comprising of Physics, Chemistry and Biology/Bio-technology; which shall include practical test in these subjects) is found to be equivalent to the Intermediate Science Examination of an Indian University/Board, taking Physics, Chemistry and Biology/Bio-technology including practical tests in each of these subjects and English.

Details of Fee and various timelines

EVENTS	DATES
On-line submission of Application Form (Upto 11:50 p.m.) s(including uploading of photograph and signatures)	01.11.2018 to 30.11.2018
Date of successful final transaction of fee	01.11.2018 to 01.12.2018
Through Credit/Debit Card/Net-Banking upto 11:50 p.m. and Through e-challan upto bank hours	01.12.2018

Fee Payable by candidates	Unreserved	Rs. 1400/-
	Other Backward Classes (OBC)	
	SC/ST/PwD/Transgender	Rs. 750/-
	Service/Proceedings charges & GST are to be paid by the candidate, as applicable	
Correction in particulars of Application Form on website only (No correction shall be allowed under any circumstances after this date)	**14.01.2019 to 31.01.2019**	
Printing of Admit Cards from NTA website	**15.04.2019**	
Date of Examination	**05.05.2019**	
Timing of Examination	**02:00 p.m. to 05:00 p.m.**	
Examination Centre	**As indicated on Admit Card**	
Display of recorded responses and Answer Keys for inviting challenges on **NTA** website:www.nta.ac.in,www.ntaneet.nic.in	**Date shall be displayed on the NTA website**	
Declaration of Result on **NTA** website	**By 05.06.2019**	

क्षैतिज आरक्षण (Horizontal Reservation)

1.	स्वतन्त्रता संग्राम सेनानियों के आश्रितों के लिए	02 प्रतिशत
2.	भूतपूर्व सैनिक (युद्ध मे अपंग/ सेवानिवृत्त/ शहीद) के पुत्र/पुत्री के लिए	02 प्रतिशतS
3.	बी ग्रेडिंग सहित "सी" सर्टिफिकेट एन.सी.सी. कैडेट	01प्रतिशत
4.	महिला अभ्यर्थियों के लिए	20 प्रतिशत
5.	दिव्यांग अभ्यर्थियों के लिए	05 प्रतिशत

5. As per the pleadings set forth in the writ petition the petitioner has come up with case that she had passed the Intermediate Examination in the year 2019 conducted by Board of High School and Intermediate Education, Prayagraj and also obtained "B' Certificate of NCC and was awarded "BEE' Grading from the Commandant Officer of NCC on 18.06.2019. Record reveals that the petitioner applied under National Eligibility Cum Entrance Test (NEET) U.G. Counseling-2019 Examination on 05.04.2019 and thereafter, an admit card was an issued in her favour allowing her to participate in the examination so sought to be conducted on 05.05.2019. Perusal of the admit card which is appended at page no. 40 of the writ petition reveals that petitioner applied under unreserved category. In paragraph no. 5 of the writ petition, it has been averred that in the National Eligibility Cum Entrance Test (NEET) U.G. -2019 so conducted on 05.05.2019 the petitioner secured 548 marks out of 720 marks and has been assigned over all rank of 24557 (unreserved category) and the category rank whereof is 14324. The score card of the petitioner in NEET Examinatin-2019 is at page no. 41 of the writ petition wherein the category so assigned to the petitioner is unreserved. The petitioner has further averred in paragraph no. 11 of the writ petition that she got herself registered for counseling in U.P. NEET (U.G.) counseling-2019 and the verification was done and in the Registration Slip of counseling -2019 the category so assigned was unreserved and in the column pertaining to sub category "NCC' was mentioned. At page no. 44 of the petition the document verification card-2019 has been appended wherein the category assigned to the petitioner is unreserved and SUB CATEGORY / PH TYPE it has been mentioned as NA/NA. The petitioner in paragraph no. 4 of the writ petition coupled with the receipt which is at page no. 24 of the writ petition has further come up with stand that the petitioner got admitted in M.B.B.S. course in the Moti

Lal Nehru Medical Collage, Prayagraj on 08.07.2019 in NCC category. However, this Court finds that an e-mail communication was issued from the office of the respondent no. 2 marked to the petitioner on 12.07.2019 requiring the petitioner to furnish the "BEE' Grading certificate along with "C' Certificate of NCC Cadet otherwise the admission of the petitioner will be deemed to be cancelled.

6. Being Aggrieved against the aforesaid communication, the petitioner thereafter, instituted the present petition seeking following reliefs:-

"i. Issue a writ order or direction in the nature of mandamus commanding the respondent no. 3 not to cancel the admission of the petitioner in MBBS Course, 2019 in MLN Medical College, Prayagraj on the ground that the she does not possess "C' certificate in NCC Examination.

i(a). To issue writ, order or direction the nature of mandamus directing the respondent to include NCC Cadets having "B" certificate with "B" grade in 1 % horizontal reservation as provided in brochure of NEET (UG) Counseling 2019 issued by Respondent No. 2 (Annexure No. 9 to the writ petition).

ii. Issue any other writ order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the present case.

iii. Award costs of the writ petition to the petitioner."

7. This Court entertained the present writ petition and on 19.07.2019 proceeded to pass the following order:-

"Petitioner, who is minor has approached this Court through his father seeking following relief :-

"(i) issue a writ order or direction in the nature of mandamus commanding the respondent no.3 to cancel the admission of the petitioner in MBBS Course, 2019 in MLN Medical College, Prayagraj on the ground that she does not possess 'C' certificate in NCC Examination."

Heard learned counsel for the parties and perused the record.

Shri Amrendra Pratap Singh, learned counsel appearing on behalf of the petitioner submits that the petitioner has been granted admission in MBBS course in the Moti Lal Nehru Medical College, Prayagraj on 8.7.2019 under the horizontal reservation of 1% under the category of "B" grading along with the 'C' certificate of NCC as mentioned in the Brochure of National Eligibility cum Entrance Test (NEET) UG Counselling - 2019. Learned counsel further submits that petitioner has approached this Court earlier by way of filing a Civil Misc. Writ Petition No.21919 of 2019, Jigyasa Tiwari (Minor) vs. State of U.P., which was dismissed by a co-ordinate Bench of this Court on 9.7.2019 on the ground that writ petition was rendered infructuous.

The petitioner is now aggrieved by an E-mail dated 12.7.2019 whereby Director General Medical Education and Training, U.P. has communicated to the College that as the petitioner has not been able to submit 'C' certificate of NCC within the prescribed period, therefore, the admission shall be deemed cancelled in case such certificate is not submitted before 19.7.2019. The said communication is impugned in the present writ petition.

It is further submitted that the petitioner is under graduate student and has passed 'B' certificate of NCC Examination - 2019 with "B" grading. He further submits that the petitioner has repeatedly communicated to the authorities

that the eligibility for appearing in "C" certificate of NCC is graduation, and as for, the petitioner has passed only Intermediate Examination and got admission in the MBBS course, she is not eligible for the said "C" certificate of NCC. Therefore, by way of said representation, she has requested to reconsider the issue and permit her to continue the studies of MBBS course in the College.

Learned counsel has also relied upon communication dated 9.5.2013 of the Director General of NCC on the issue of implementation of new TRG Syllabus and NCC an elective subject in order to substantiate his submission that eligibility for 'C' certificate of NCC is graduation.

Matter requires consideration.

Let notice be issued to the respondents.

Steps be taken within a three days.

List this matter on 21.8.2019.

Meanwhile, counter and rejoinder affidavits may be exchanged.

The communication dated 9.5.2013 shall be kept in abeyance till further orders and respondents are directed to allow the petitioner to continue her studies in the MBBS course."

8. The respondents herein being aggrieved against the order dated 19.07.2019 passed in the present writ petition preferred SPECIAL LEAVE PETITION (CIVIL) Diary No(s). 39400/19 before the Hon'ble Apex Court wherein the following order were passed:-

*"**Order Date :*** 25.11.2019

"Delay condoned.

Since the order is interim, we find no ground to interefer with the impugnd order passed by the High court.

However, considering the naturw of the disputes, we request the High Court to decide the matter at an early date, as far as possible within six weeks.

The Special Leave Petition is, accordingly, disposed of.

Pending interlocutory application(s), if any, is/are disposed of."

9. An amendment application has been filed on 09.02.2020 seeking amendment in the prayer clause which came to be allowed on 07.04.2022 wherein the following prayer was added:-

"To issue writ, order or direction the nature of mandamus directing the respondent to include NCC Cadets having "B" certificate with "B" grade in 1 % horizontal reservation as provided in brochure of NEET (UG) Counseling 2019 issued by Respondent No. 2 (Annexure No. 9 to the writ petition)."

10. Counter affidavit has been filed by the respo]
ndent no. 2 to which a rejoinder affidavit has been filed by the petitioner. A compilation of judgments and also of a Government Order and Brochure has been filed by respondent no. 2.

Argument of the Petitioner

11. Sri Swapnil Kumar assisted by Sri Amrendra Pratap Singh, learned counsel for the petitioner has made manifold submissions namely:-

(a). The requirement of "C' certificate of NCC along with "BEE' Grading in order to enjoy the desired eligibility for being considered under 1% Horizontal Reservation and not including

the "BEE' certificate with "B' Grade is illegal besides being in violation of Article 14 of the Constitution of India.

(b). The petitioner herein had applied in National Eligibility Cum Entrance Test (U.G.) 2019 after qualifying Intermediate Examination and in view of the certificate issued by Lieutenant Colonel Officer Commanding 96 U.P. Bn CC, Jaunpur dated 20.06.2019 addressed to respondent no. 2 as per latest policy for certificate exams in NCC a candidate who is Intermediate pass can only hold a "B' Certificate of NCC and "C' Certificate exams are only awarded in the third year of his/her training implying that cadet should be in Degree collage.

(c). There is no logic in not including "B' certificate with "BEE' Grade of NCC while making it admissible for 1% Horizontal reservation.

(d). Once the petitioner has not played fraud then the respondents are estopped from cancelling the candidature of the petitioner as a student in M.B.B.S. course.

(e). Even otherwise once the petitioner has been accorded interim protection by this Court and she is pursuing M.B.B.S. since year 2019 then she should be allowed to continue as a M.B.B.S. student and awarded degree in that regard.

Argument of Respondents

12. Sri Mahendra Pratap, learned counsel who appears for respondent no. 2 has argued that the petitioner is not entitled for grant of any relief particularly in view of the fact that she was thoroughly ineligible to be granted admission as she had played fraud as she while applying in the National Eligibility Cum Entrance Test had shown her category to be unreserved and even in the admit card and score card she was again shown to be under unreserved category and thereafter, in the Registration Slip for counseling the petitioner portrayed herself to be unreserved having sub category of NCC and when she appeared at Nodal Centre, Prayagraj on 26.06.2019 for document verification and produced NCC "B' provisional certificate issued on 18.06.2019. It has further been argued by the counsel for the respondent no. 2 that at the time of the verification it was found that the petitioner did not possess NCC "C' Certificate consequently, the petitioner had made an application on 26.06.2019 that she may be considered in general category instead of sub category NCC. It has further been argued that after submission of the application by the petitioner for changing her category, her category was changed, document verification card was issued which was signed by the petitioner in the presence of Dr. Anoop Jaiswal, who had verified the same and in the said verification card category of the petitioner was mentioned as unreserved and sub category NA/NA (Not Available). Sri Mahendra Yadav who appears for respondent no. 2, has further made a submission that due to technical fault in the NIC the sub category of the petitioner could not be deleted from the system and subsequently, petitioner came for admission on 08.07.2019 along with the Notary Affidavit dated 06.07.2019 that 10 days time be granted for submitting NCC "C' certificate and then the said discrepancy came to the knowledge of the respondents then on 11.07.2019 the respondent no. 3 informed the respondent no. 2 and thereafter, a decision was taken, providing time till 19.07.2019 for submitting NCC "C' Certificate with "BEE' Grading. In nutshell, the argument of Sri Mahendra Yadav, who appears for respondent no. 2 is that the

petitioner has herself committed fraud and concealed material facts and once she was not possessing NCC "C' Certificate with "BEE' Grading then she is not entitled to be considered under the reservation quota pertaining to 1% for NCC Cadet. It has further been emphasised that the communication made by the respondent requiring the petitioner to submit NCC "C' Certificate with "BEE' Grading does not suffer from any illegality and the petitioner does not deserve any sympathy and the writ petition is liable to be dismissed.

13. Sri Sharad Srivastava, learned Standing Counsel who appears for respondent no- 1 has adopted the argument of learned counsel for respondent no. 2, while adding that petitioner is not entitled to reliefs as she is thoroughly ineligible and mere continuance on the basis of interim order will not create any right upon her.

Replication on behalf of petitioner

14. Learned counsel for the petitioner have reiterated the argument which he had made at the first instance while arguing the writ petition, however, the same is not being recited as it is nothing but repetition of the argument made at the time of arguing of the writ petition.

Questions of Determination

(1) Whether the petitioner is eligible and enjoys desirable qualification for being considered under 1% quota earmarked for NCC candidates by mode of Horizontal Reservation?

(2) Whether the High Court in the garb of judicial review can adorn the chair of the rule enacting authority to decide the educational qualifications?

(3) Whether the petitioner is entitled to benefit of the interim order so granted by this Court permitting her to pursue the M.B.B.S. course till its terminal destination?

(4) Issue with regard to the conduct of petitioner.

SYMPOSIUM

15. We have heard the submission of the parties and perused the record.

16. Admittedly, the present controversy relates to admission in M.B.B.S. course referable to National Eligibility Cum Entrance Test (NEET) U.G. Counseling-2019 which is governed by a Government Order dated 17.06.2019 issued by the respondent no. 1 addressed to respondent no. 2 setting out the conditions, criteria and the parameters for counseling/admission in M.B.B.S. and B.D.S. courses. It is not in dispute that not only vertical but horizontal reservation has been provided for admission in M.B.B.S. and B.D.S. courses. So far as, Horizontal Reservation is concerned, the present controversy revolves around 1% reservation pertaining to NCC "C' Certificate with "BEE' Grading which qualifies and makes the petitioner entitled for 1% reservation for NCC Cadets. Here in the present case it is also not in dispute that the petitioner happens to be a literate person who as per the Intermediate certificate so attached with the writ petition reveals that she has sufficient knowledge of not only Hindi vernacular but English also.

17. Apart from the same, the examination was to be conducted on 05.05.2019 and the petitioner herein applied on 05.04.2019 and obtained admit card wherein the category shown was

unreserved and the said admit card not only contained the photograph of the petitioner but also her signature. Even in the score card so issued after the declaration of the result, reveals that the petitioner was shown under the unreserved category. At the time of the counseling, the petitioner got the Registration Slip for counseling prepared wherein she had shown herself to be in the category admissible to unreserved and in the sub category, NCC was mentioned. Thereafter, when the petitioner appeared at Nodal Centre, Prayagraj on 26.06.2019 then she produced NCC "B' provisional certificate issued on 18.06.2019 and when the same was shown to be insufficient to make her entitled for reservation in question then she wrote a letter dated 26.06.2019 which is at page no. 16 of the counter affidavit filed by the respondent no. 2 requesting that her admission may be considered in general category instead of sub category of NCC. In paragraph no. 11 of the counter affidavit it has been alleged that the petitioner's category was changed, document verification card was issued and the petitioner signed on the said card in the presence of Dr. Anoop Jaiswal which was verified, however, due to technical fault in NIC system, the sub category of the petitioner could not be deleted from the system and thereafter, when the petitioner came for admission on 08.07.2019 along with the notary certificate dated 06.07.2019 then the respondent decided to provide her time till 19.07.2019 for submitting NCC "C' Certificate with "BEE' Grading, as the petitioner obviously did not possess the same, thus, she filed the present petition.

18. Now, a question arises as to whether this Court can hold on the insistence of the petitioner that she is eligible to be granted reservation despite the fact that the petitioner does not have NCC "C' Certificate with "BEE' Grading but instead of the same, she is having "B' Certificate with "BEE' grade.

19. The jurisdiction of the Court to either include a qualification which already does not finds place in the statute or to make it equivalent by judicial fiat is a matter which is being discussed later. Nevertheless, the petitioner is not eligible to be considered under NCC category referable to 1% reservation under Horizontal stream as it is not a case wherein the petitioner was not aware about the desirable qualification/eligibility for being considered under 1% reservation for NCC Cadet and further, it is also not a case that the petitioner was not a literate person, however, rather to the contrary the petitioner with her open eyes had filled up the form and thus, any type of excuse is thoroughly unwarranted and the same cannot grant any aid or benefit for the petitioner.

20. Sri Swapnil Kumar, learned counsel for the petitioner has argued that may be the petitioner did not possess NCC "C' Certificate with "BEE' Grading, however, in view of the amendments so sought in the writ petition a mandamus can obviously be issued to the respondents to include the NCC Cadet having "B' Certificate with "BEE' grading for 1% Horizontal Reservation. Elaborating the said submission, learned counsel for the petitioner has drawn the attention of the Court towards the communication dated 20.06.2019 issued under the signature of Lieutenant Colonel Officer Commanding U.P. NCC, Jaunpur to the respondent no. 2 at page no. 38 of the writ petition so as to contend that a student who had passed Intermediate can only get "B' Certificate of NCC and "C' Certificate of NCC is

admissible and is only issued to a student who is pursuing studies in Degree college.

21. We have analysed the argument of the learned counsel for the petitioner, however, we find our inability to subscribe to the same for the simple reason that prescription of a qualification it is essentially and primarily a role reserved for the employer and it is not for the Court while exercising its jurisdiction under Article 226 of the Constitution of India to arrogate to itself that function.

22. Additionally, we may also taken note of the fact that the Government Order dated 17.06.2019 as well as in the Brochure in question the eligibility to appear in National Eligibility Cum Entrance Test (NEET) U.G. Counseling-2019 extends to a larger magnitude wherein the zone of consideration encompasses candidates who not only appear in qualifying standard examination i.e. 12th standard 2019 results are awaited but also to those applicants who have completed their graduation courses from a Degree Collages.

23. Thus, the argument of the petitioner is that mere possession of "B' Certificate of NCC Cadets is sufficient to make her eligible for being granted reservation under NCC quota is patently misconceived as well as misplaced and out of context. Moreover, once a qualification and eligibility is prescribed then until and unless it is said to be arbitrary of violative of any of the provisions contained under the Constitution of India, the same cannot be said to be either ultra-vires or illegal and set aside or made equivalent as sought to be insisted by the petitioner.

24. The Hon'ble Apex Court in the case of ***J. Rangaswamy vs. Government of Andhra Pradesh*** reported in **(1990) 1 SCC 288**, has observed as under:

"6. So far as the second plea is concerned, admittedly, the petitioner does not have, while the respondent has, a doctorate in nuclear physics. The plea of the petitioner is that, for efficient discharge of the duties of the post in question, the diploma in radiological physics (as applied in Medicine) from the Bhabha Atomic Research center (BARC) held by him is more relevant than a doctorate in nuclear physics. It is submitted that in all corresponding posts elsewhere, a diploma in radiological physics is insisted upon and that, even in the State of Andhra Pradesh, all other physicists working in the line, except the respondent, have the diploma of the BARC. It is not for the Court to consider the relevance of qualifications prescribed for various posts. The post in question is that of a Professor and the prescription of a doctorate as a necessary qualification therefor is nothing unusual. Petitioner also stated before us that, to the best of his knowledge, there is no doctorate course anywhere in India in radiological physics. That is perhaps why a doctorate in nuclear physics has been prescribed. There is nothing prima facie preposterous about this requirement. It is not for us to assess the comparative merits of such a doctorate and the BARC diploma held by the petitioner and decide or direct what should be the qualifications to be prescribed for the post in question. It will be open to the petitioner, if so advised, to move the college, university, Government, Indian Medical Council or other appropriate authorities for a review of the prescribed qualifications and we hope that, if a doctorate in nuclear physics is so absolutely irrelevant for the post in question as is sought to be made out by the

petitioner, the authorities concerned will take expeditious steps to revise the necessary qualifications needed for the post appropriately. But, on the qualifications as they stand today, the petitioner is not eligible to the post and cannot legitimately complain against his non-selection."

25. The Hon'ble Apex Court in the case of ***Delhi Pradesh Registered Medical Practitioners vs. Director of Health, Delhi Admn. Services and others, reported in (1997) 11 SCC 687,*** has observed as under:

"5. ... It is not necessary for this Court to consider such submissions because the same remains in the realm of policy decision of other constitutional functionaries. We may also indicate here that what constitutes proper education and requisite expertise for a practitioner in Indian Medicine, must be left to the proper authority having requisite knowledge in the subject. As the decision of the Delhi High Court is justified on the face of legal position flowing from the said Central Act of 1970, we do not think that any interference by this Court is called for. These appals therefore are dismissed without any order as to costs."

26. The Hon'ble Apex Court in the case of ***State of Rajasthan and others vs. Lata Arun,*** reported in **(2002) 6 SCC 252,** has observed as under:

"13. From the ration of the decisions noted above it is clear that the prescribed eligibility qualification for admission to a course or for recruitment to or promotion in service are matters to be considered by the appropriate authority. it is not for courts to decide whether a particular educational qualification should or should not be accepted as equivalent to the qualification prescribed by the authority."

27. The Hon'ble Apex Court in the case of ***P.U. Joshi and others vs. Union of India and others,*** reported in **(2003) 2 SCC 632,** has observed as under:

"10. We have carefully considered the submissions made on behalf of both parties. Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of Policy and within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India and it is not for the Statutory Tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion or impose itself by substituting its views for that of the State. Similarly, it is well open and within the competency of the State to change the rules relating to a service and alter or amend and vary by addition/ substruction the qualifications, eligibility criteria and other conditions of service including avenues of promotion, from time to time, as the administrative exigencies may need or necessitate. Likewise, the State by appropriate rules is entitled to amalgamate departments or bifurcate departments into more and constitute different categories of posts or cadres by undertaking further classification, bifurcation or amalgamation as well as reconstitute and restructure the pattern and cadres/categories of service, as may be required from time to time by abolishing existing cadres/posts and

creating new cadres/posts. There is no right in any employee of the State to claim that rules governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for ensuring or safeguarding rights or benefits already earned, acquired or accrued at a particular point of time, a Government servant has no right to challenge the authority of the State to amend, alter and bring into force new rules relating to even an existing service."

28. The Hon'ble Apex Court in the case of Sanjay Kumar Manjul vs. Chairman, UPSC and others, reported in (2006) 8 SCC 42, has observed as under:

"25. The statutory authority is entitled to frame statutory rules laying down terms and conditions of service as also the qualifications essential for holding a particular post. It is only the authority concerned who can take ultimate decision therefor.

27. It is well-settled that the superior courts while exercising their jurisdiction under Articles 226 or 32 of the Constitution of India ordinarily do not direct an employer to prescribe a qualification for holding a particular post."

29. The Hon'ble Apex Court in the case of ***Maharashtra Public Service Commission vs. Sandeep Shriram Warade and others,*** reported in **(2019) 6 SCC 362**, has observed as under:

"9. The essential qualifications for appointment to a post are for the employer to decide. The employer may prescribe additional or desirable qualifications, including any grant of preference. It is the employer who is best suited to decide the requirements a candidate must possess according to the needs of the employer and the nature of work. The court cannot lay down the conditions of eligibility, much less can it delve into the issue with regard to desirable qualifications being at par with the essential eligibility by an interpretive re-writing of the advertisement. Questions of equivalence will also fall outside the domain of judicial review. If the language of the advertisement and the rules are clear, the Court cannot sit in judgment over the same. If there is an ambiguity in the advertisement or it is contrary to any rules or law the matter has to go back to the appointing authority after appropriate orders, to proceed in accordance with law. In no case can the Court, in the garb of judicial review, sit in the chair of the appointing authority to decide what is best for the employer and interpret the conditions of the advertisement contrary to the plain language of the same."

30. The Hon'ble Apex Court in the case of ***Punjab National Bank Vs. Anit Kumar Das, 2020 SCC Online SC 897*** has observed as under:

"21. Thus, as held by this Court in the aforesaid decisions, it is for the employer to determine and decide the relevancy and suitability of the qualifications for any post and it is not for the Courts to consider and assess. A greater latitude is permitted by the Courts for the employer to prescribe qualifications for any post. There is a rationale behind it. Qualifications are prescribed keeping in view the need and interest of an Institution or an Industry or an establishment as the case may be. The Courts are not fit instruments to assess expediency or advisability or utility of such prescription of qualifications....."

(Emphasis supplied by us) "

31. Even the Hon'ble Apex Court has gone to the extent that equivalence of qualification is also not the subject matter or scope of judicial interference. In the case of ***Zahoor Ahmad Rather and others vs. Sheikh Imtiyaz Ahmad and others,*** reported in **(2019)2 SCC 404,** the Hon'ble Apex Court has observed as under:

"26. ... The prescription of qualifications for a post is a matter of recruitment policy. The state as the employer is entitled to prescribe the qualifications as a condition of eligibility. It is no part of the role or function of judicial review to expand upon the ambit of the prescribed qualifications. Similarly, equivalence of a qualification is not a matter which can be determined in exercise of the power of judicial review. Whether a particular qualification should or should not be regarded as equivalent is a matter for the state, as the recruiting authority, to determine. The decision in Jyoti KK turned on a specific statutory rule under which the holding of a higher qualification could pre-suppose the acquisition of a lower qualification. The absence of such a rule in the present case makes a crucial difference to the ultimate outcome. In this view of the matter, the Division Bench of the High Court was justified in reversing the judgment of the learned Single Judge and in coming to the 10 id at page 177 conclusion that the appellants did not meet the prescribed qualifications. We find no error in the decision of the Division Bench.

27. While prescribing the qualifications for a post, the State, as employer, may legitimately bear in mind several features including the nature of the job, the aptitudes requisite for the efficient discharge of duties, the functionality of a qualification and the content of the course of studies which leads up to the acquisition of a qualification. The state is entrusted with the authority to assess the needs of its public services. Exigencies of administration, it is trite law, fall within the domain of administrative decision making. The state as a public employer may well take into account social perspectives that require the creation of job opportunities across the societal structure. All these are essentially matters of policy. Judicial review must tread warily. That is why the decision in Jyoti KK must be understood in the context of a specific statutory rule under which the holding of a higher qualification which presupposes the acquisition of a lower qualification was considered to be sufficient for the post. It was in the context of specific rule that the decision in Jyoti KK turned."

32. Yet in one of the recent decisions, the Supreme Court in ***Kaloji Narayana Rao University of Health Sciences v. Srikeerti Reddi Pingle and others,*** **AIR 2021 SC 1031** has held as under:

"14. A careful reading of the said provision discloses that the MCI emphasized that the candidate should have undergone study at the 10+2 stage, (or in the intermediate course) in the specified subjects of Physics, Chemistry and Biology/Bio-technology. In this case, the certificate relied upon by the student7 merely clarifies that she undertook a course whilst in the 10th grade. That, by no means, is sufficient to fall within the description of "equivalent" qualification under Regulation 4(2)(f). Nor, in the opinion of this court, can it be deemed adequate having regard to the letter of the Assistant Principal of Conrad High School8 that the AP course in Biological Sciences is of college standard.

15. In the opinion of this court, there is a rationale and compelling logic on the part of the University to say that the candidate should have studied biology or biological sciences (apart from the other two science subjects, along with the further requirement of having studied English) in all the relevant years during the intermediate or at 10+2 level. Further, the reference to having studied in the first year in a degree course, at the college level with the said subject, carries with it, the implication that the student would have necessarily undergone academic study and training in the said three subjects at the 10+2 or intermediate level (without which, admission in a degree course is inconceivable in India). The further emphasis onhaving attended or undertaken practical lessons, (again at that level, in each of the concerned years) clearly signifies that a candidate should have undergone study in those subjects for the last two years at school or intermediate college level. The regulation is further clear that the examination score (marks) in Mathematics shall not be taken into consideration for the purpose of admission to a medical course, in reckoning merit or performance in the qualifying examination.

19. It is apparent that the High Court followed its previous judgment, and did not closely scrutinize the equivalence certificate or the subject stipulations. It also appears to have been largely influenced by the fact that the candidate was in fact admitted by the University. In the opinion of this court, the construction placed on Regulation 4(2), i.e., that each of the sub clauses (a) to (f) prescribes independent qualifications which should be deemed essential, is rather simplistic. That interpretation ignores the fact that each of the sub-clauses insists that certain subjects should have been studied, and practical examinations attempted at the 10+2 or equiv- alent level. Secondly, the college or intermediate examination [or equivalent qualifi- cations under Regulation 4(2)(f)] cannot be read in isolation, having regard to the cir- cumstances. The provision must be read in the context of the requirements for eligi- bility under Regulations 4(2)(a) to (e). The equivalence in qualification is not merely at the level of a 10+2 requirement, i.e., that the candidate should have passed an ex- amination equivalent to the intermediate science examination at an Indian Uni- versity/ Board. Additional to this requirement, Regulation 4(2)(f) requires equiva- lence in "standard and scope' in an examination where the candidate is tested in Phys- ics, Chemistry and Biology including practical testing in these subjects, along with English. These subject matter requirements are consistent across Regulations 4(2)(a) to (e) and (f).

22. For these reasons, this court is of the opinion that the interpretation placed up- on the regulations in both the cited cases, by the Madras High Court, do not reflect the correct position. To be eligible, the candidate should produce clear and categorical material to show that she underwent the necessary years of study in all the stipulated subjects. This court is of the opinion that such stipulations are to be regarded as essential, given that the course in question, i.e., MBBS primarily if not predominantly, involves prior knowledge - both theoretical and practical, of senior secondary level in biology or biological sciences."

33. In **Special Appeal (D) No. 122 of 2015, Amit Tiwari vs. State of U.P** decided on **11.02.2015,** this Court has observed as under:

"We are unable to accept the submission. The ICAR has indicated in a

broad sense the undergraduate degrees in Agriculture. Among them are also included degrees in Forestry, Home Science, Horticulture, Fisheries Science, Food Science, Veterinary Science and Dairy Technology. If the submission of the appellants were to be accepted, all those degrees also would have to be regarded as equivalent to a Bachelor's Degree in Agriculture. That apart, the view expressed by the Govind Ballabh Pant, University of Agriculture and Technology on 5 November 2014 is what it purports to be namely an opinion. A matter of equivalence cannot be concluded on the basis of such an opinion. The essential issue is whether the Commission, after evaluating the syllabus was justified in holding that the degree of B.Tech in Agricultural Engineering is not equivalent to a Bachelor's Degree in Agriculture. We see no reason to fault that decision, particularly having regard to the fact that the matter was already governed by the earlier judgment of the Division Bench rendered on 1 February 2012 as noted above. "

34. A Full Bench decision in ***Deepak Singh and others vs. State of U.P. and others,*** **(2020) AllLJ 596,** this Court has held as under:

"19. The State Government, while prescribing the essential qualifications or desirable qualifications are best suited to decide the requirements for selecting a candidate for nature of work required by the State Government and the courts are precluded from laying down the conditions of eligibility. If the language in the Rules is clear judicial review cannot be used to decide what is best suited for the employer."

35. Recently, in the case of **Anand Bihari vs. State of U.P. being Writ-A No. 15873 of 2021,** decided on 9.11.2021, this Court has held as under:

"13. In the case of ***P.V. Joshi And Others Vs. Accountant General, Ahemdabad And Others 2003 (2) SCC 632*** *the Hon'ble Supreme Court has held as under:-*

"10.We have carefully considered the submissions made on behalf of both parties. Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of Policy and within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India and it is not for the Statutory Tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion or impose itself by substituting its views for that of the State. Similarly, it is well open and within the competency of the State to change the rules relating to a service and alter or amend and vary by addition/substruction the qualifications, eligibility criteria and other conditions of service including avenues of promotion, from time to time, as the administrative exigencies may need or necessitate. Likewise, the State by appropriate rules is entitled to amalgamate departments or bifurcate departments into more and constitute different categories of posts or cadres by undertaking further classification, bifurcation or amalgamation as well as reconstitute and restructure the pattern and cadres/categories of service, as may be required from time to time by abolishing existing cadres/posts and

creating new cadres/posts. There is no right in any employee of the State to claim that rules governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for ensuring or safeguarding rights or benefits already earned, acquired or accrued at a particular point of time, a Government servant has no right to challenge the authority of the State to amend, alter and bring into force new rules relating to even an existing service."

(Emphasis supplied by us)"

36. In view of the proposition of law, so culled out by the Hon'ble Apex Court and this Court in the decisions so referred to above, this Court finds its inability to subscribe to the arguments of the counsel for the petitioner, as this Court cannot usurp the functions of either the rule enacting authority or the employer while substituting its own view while including a qualification, which does not find its presence either in the statute or the rule.

37. Another issue, which need to be addressed and taken note of is the fact that the petitioner is continuing to pursue her MBBS course on the strength of the interim order passed in the present writ petition on 19.7.2019 allowing her to continue her study in MBBS course.

38. According to learned counsel for the petitioner, the petitioner herein has completed approximately three years of her MBBS course and the course itself is of 4 and ½ years and approximately, 1 and ½ years are left and thereafter, the petitioner has to undergo internship for a period of one year, thus she is entitled to be bestowed with the judicial blessings in the shape of equity.

39. Elaborating the said submission, Sri Swapnil Kumar, learned counsel for the petitioner has made submissions that petitioner is a young and a bright student, who is pursuing her MBBS course and in case, onslaught of dismissal is passed on to her, then the same will ruin her academic career and she will be in precarious situation.

40. Sri Mahendra Yadav, as well as the learned Standing Counsel have vehemently opposed the submissions and have argued that in the matter of admission, sympathy is not to be resorted to, as the same partakes to a character being misplaced sympathy and according to learned counsel for the respondents, present writ petition is liable to be dismissed and merely because, the petitioner is pursuing her MBBS course on the basis of interim order, the same will be of no avail to her.

41. The Hon'ble Apex Court in the case of ***Guru Nanak Dev University Vs. Parminder Kumar Bansal,*** reported in **(1993) 4 SCC 401** had an occasion to consider the issue relating to admission to internship course by virtue of interim orders passed by Courts of law and in paragraph 5, 6 and 7, the Hon'ble Apex Court has observed as under: -

"5. Sri Gambhir, learned Counsel for the University says that the very implication of the idea of regularisation contained within it the promise that the initial admission itself was irregular. He submitted that the University was confronted with a fait-accompli by virtue of interlocutory orders. The final order in the writ petition did no more than validate and perpetuate the interlocutory error without any pronouncement on or adjudication of the basic issues of eligibility. Sri Gambhir

aired a serious grievance that this type of orders would introduce an element of indiscipline in academic life and expose the system to ridicule and render any meaningful control of academic work impossible. He relied upon certain pronouncements of this Court to support his contention that in academic matters courts should be vary in directing the admissions to colleges by means of interim directions which would create complications later and expose even the beneficiaries of such orders to, difficulties when the final adjudication goes against them.

6. Learned Counsel for the respondents, however, sought to maintain that the two candidates had now completed the 12 months of their internship and it would be hard on them if their internship is reckoned from the date of the passing the M.B.B.S. examination.

7. Sri Gambhir is right in his submission. We are afraid that this kind of administration of interlocutory remedies, more guided by sympathy quite often wholly misplaced, does no service to anyone. From the series of orders that keep coming before us in academic matters, we find that loose, ill-conceived sympathy masquerades as interlocutory justice exposing judicial discretion to the criticism of degenerating into private benevolence. This is subversive of academic discipline, or whatever is left of it, leading to serious impasse in academic life. Admissions cannot be ordered without regard to the eligibility of the candidates. Decisions on matters relevant to be taken into account at the interlocutory stage cannot be deferred or decided later when serious complications might ensue from the interim order itself. In the present case, the High Court was apparently moved by sympathy for the candidates than by an accurate assessment of even the prima facie legal position. Such orders cannot be allowed to stand. The Courts should not embarrass academic authorities by itself taking over their functions."

42. Nonetheless, the Hon'ble Apex Court in the case of ***State of Bihar vs. Upendra Narayan Singh, (2009) 5 SCC 65,*** in paragraph-51 has observed as under: -

"Notwithstanding the critical observations made in Delhi Development Horticulture Employees Union v. Delhi Administration, Delhi and Ors. (supra) and State of U.P. and Ors. v. U.P. State Law Officers Association and Ors. (supra), illegal employment market continued to grow in the country and those entrusted with the power of making appointment and those who could pull strings in the corridors of power manipulated the system to ensure that their favourites get employment in complete and contemptuous disregard of the equality clause enshrined in Article 16 of the Constitution and Section 4 of the 1959 Act. However, the Courts gradually realized that unwarranted sympathy shown to the progenies of spoil system has eaten into the vitals of service structure of the State and public bodies and this is the reason why relief of reinstatement and/or regularization of service has been denied to illegal appointees/backdoor entrants in large number of cases -- ***Director, Institute of Management Development, U.P. v. Pushpa Srivastava, (1993)ILLJ190SC ; Dr. M.A. Haque and Ors. v. Union of India and Ors, (1993)ILLJ1139SC ; J & K Public Service Commission and Ors. v. Dr. Narinder Mohan and Ors. (1994)ILLJ780SC ; Dr. Arundhati Ajit Pargaonkar v. State of Maharashtra and***

Ors. (1995)ILLJ927SC ; Union of India and Ors. v. : Kishan Gopal Vyas (1996)7SCC134 ; Union of India v. Moti Lal, [1996]2SCR727 ; Hindustan Shipyard Ltd. and Ors. v. Dr. P. Sambasiva Rao and Ors. (1996)IILLJ807SC ; State of H.P. v. Suresh Kumar Verma and Anr. [1996]1SCR972 ; Dr. Surinder Singh Jamwal and Anr. v. State of J&K and Ors. (1996)IILLJ795SC ; E. Ramakrishnan and Ors. v. State of Kerala and Ors, (1997)ILLJ1215SC ; Union of India and Ors. v. Bishambar Dutt, (1997)IILLJ381SC ; Union of India and Ors. v. Mahender Singh and Ors, (1997)IILLJ795SC ; P. Ravindran and Ors. v. Union Territory of Pondicherry and Ors. (1997)1SCC350 ; Ashwani Kumar and Ors. v. State of Bihar and Ors. (1997)IILLJ856SC ; Santosh Kumar Verma and Ors. v. State of Bihar and Ors., (1997)IILLJ78SC ; State of U.P. and Ors. v. Ajay Kumar, (1997)ILLJ1204SC ; Patna University and Anr. v. Dr. Amita Tiwari, AIR1997SC3456 and Madhyamik Shiksha Parishad, U.P. v. Anil Kumar Mishra and Ors. (1994)IILLJ977SC."

43. The Hon'ble Apex Court in the case of ***Priya Gupta Vs. State of Chhattisgarh and others,*** **(2012) 7 SCC 433** has held as under:

"67. The admission of the appellants was cancelled by the State Government which, even under the Rules, is the final competent authority for such purposes. In the present case, the mischief played by the concerned persons came to the notice of the Central Government which directed cancellation of the seats and required the State Government to act in accordance with law.

69. It was also argued with some emphasis that the appellants are not at fault. They had taken the entrance examination and were given seats by the concerned authorities. Even if the authorities have committed some irregularity, the appellants should not be made to suffer at the very end of their professional course. To substantiate this premise, they relied upon the judgments of this Court in the cases of A. Sudha v. University of Mysore & Anr. (1987) 4 SCC 537, Amandeep Jaswal v. State of Punjab (2006) 9 SCC 597, R. Vishwanatha Pillai v. State of Kerala & Ors. (2004) 2 SCC 105 and Chowdhary Navin Hemabhai & Ors. v. The State of Gujarat & Ors. (2011) 3 SCC 617.

70. We have perused the judgments of this Court relied upon by the petitioners. Firstly, they were delivered on their own facts and the Court has not stated any absolute principle of law, which would operate as a valid and binding precedent. Secondly, in all these cases, the Court had returned the finding that other authorities or rule-making bodies concerned were at fault and not the students. In the case of Chowdhary Navin Hemabhai (supra), the Court had noticed that the fault was of the rule making authority in not formulating the State Rules, 2008 in conformity with the Medical Council of India Regulations, while in the case of A. Sudha (supra), the Court found that the Principal of the institute was at fault and he had made incorrect statements in writing, which were acted upon by the students bona fide.

71. In the present case, we have no doubt in our mind that the fault is attributed to all the stakeholders involved in the process of admission, i.e., the concerned Ministry of the Union of India, Directorate of Medical Education in the State of Chhattisgarh, the Dean of the Jagdalpur College and all the three Members of the Committee which granted

admission to both the appellants on 30th September, 2006. But the students are also not innocent. They have certainly taken advantage of being persons of influence. The father of the Appellant No. 2, Akansha Adile was the Director of Medical Education, State of Chhattisgarh at the relevant time and as noticed above, the entire process of admission was handled through the Directorate. The students well knew that the admissions can only be given on the basis of merit in the entrance test and they had not ranked so high that they were entitled to the admission on that basis alone. In fact, they were also aware of the fact that no other candidate had been informed and that no one was present due to non-intimation. Out of favouritism and arbitrariness, they had been given admission by completing the entire admission process within a few hours on 30th September, 2006.

72. Balancing of equities by the Court itself is inequitable. Some party or the other would suffer a set back or adverse consequence from the order of the Court. On the one hand, if admissions are cancelled, the students who have practically completed their MBBS course would lose their professional education as well as nearly five years of their life spent in such education. If their admissions are protected, then the standard of education, the merit of the candidates and the desirability of the persons of higher merit becoming doctors is negated. The best solution to such problems is strict adherence to the time schedule, procedure for selection/admission and strict observance of the Medical Council of India Regulations, by all concerned. Once these factors are adhered to, not only would such situation not arise, but also it will prevent avoidable litigation before the Courts. The persons who violate the time schedule to grant admissions in an arbitrary manner and by colourable exercise of power, who are not adhering to Medical Council of India Regulations and the judgments of this Court, should be dealt with strictly by punishment in accordance with law, to prevent such mischief from repeating. In the present case, we are informed that the students have already sat for their final examination and are about to complete their courses. Even if we have to protect their admissions on the ground of equity, they cannot be granted such relief except on appropriate terms. By their admissions, firstly, other candidates of higher merit have been denied admission in the MBBS course. Secondly, they have taken advantage of a very low professional college fee, as in private or colleges other than the government colleges, the fee payable would be Rs.1,95,000/- per year for general admission and for management quota, the fee payable would be Rs.4,00,000/- per year, but in government colleges, it is Rs.4,000/- per year. So, they have taken a double advantage. As per their merit, they obviously would not have got admission into the Jagdalpur College and would have been given admission in private colleges. The ranks that they obtained in the competitive examination clearly depict this possibility, because there were only 50 seats in the Jagdalpur College and there are hundreds of candidates above the appellants in the order of merit. They have also, arbitrarily and unfairly, benefitted from lower fees charged in the Jagdalpur College.

73. On the peculiar facts and circumstances of the case, though we find no legal or other infirmity in the judgment under appeal, but to do complete justice between the parties within the ambit of Article 142 of the Constitution of India, we would permit the appellants to complete

their professional courses, subject to the condition that each one of them pay a sum of Rs.5 lakhs to the Jagdalpur College, which amount shall be utilized for developing the infrastructure in the Jagdalpur College.

74. We have not and should not be even understood to have stated any precedent for the cases like grant of admission and leave to complete the course like the appellants in the present case.

75. We are imposing heavy costs upon these appellants to ensure that such admissions are neither accepted nor granted leave to complete their medical courses in future.

78.4 With all the humility at our command, we request the High Courts to ensure strict adherence to the prescribed time schedule, process of selection and to the rule of merit. We reiterate what has been stated by this Court earlier, that except in very exceptional cases, the High Court may consider it appropriate to decline interim orders and hear the main petitions finally, subject to convenience of the Court. We may refer the dictum of this Court in the case of ***Medical Council of India v. Rajiv Gandhi University of Health Sciences (2004) 6 SCC 76, para 14*** *in this regard.*

78.5. We have categorically returned a finding that all the relevant stakeholders have failed to perform their duty/obligation in accordance with law. Where the time schedules have not been complied with, and rule of merit has been defeated, there nepotism and manipulation have prevailed. The stands of various authorities are at variance with each other and none admits to fault. Thus, it is imperative for this Court to ensure proper implementation of judgments of this Court and the regulations of the Medical Council of India as well as not to overlook the arbitrary and colourable exercise of power by the authorities/colleges concerned."

44. Yet in the case of ***Asha vs. Pt. B.D. Sharma University of Health Sciences and others,*** reported in **(2012) 7 SCC 389,** the Hon'ble Court has held as under:

"39. With all humility, we reiterate the request that we have made to all the High Courts in Priya Gupta's case (supra) that the courts should avoid giving interim orders where admissions are the matter of dispute before the Court. Even in case where the candidates are permitted to continue with the courses, they should normally be not permitted to take further examinations of the professional courses. The students who pursue the courses under the orders of the Court would not be entitled to claim any equity at the final decision of the case nor should it weigh with the courts of competent jurisdiction."

45. Recently in the case of ***S Krishna Shradha vs State of Andhra Pradesh and others,*** **(2020) 17 SCC 465,** this Court has observed as under: -

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

13.2. Under exceptional circumstances, if the court finds that there is no fault attributable to the candidate and the candidate has pursued his/her legal right expeditiously without any delay and there is fault only on the part of the authorities and/or there is apparent breach

of rules and regulations as well as related principles in the process of grant of admission which would violate the right of equality and equal treatment to the competing candidates and if the time schedule prescribed - 30 th September, is over, to do the complete justice, the Court under exceptional circumstances and in rarest of rare cases direct the admission in the same year by directing to increase the seats, however, it should not be more than one or two seats and such admissions can be ordered within reasonable time, i.e., within one month from 30th September, i.e., cut off date and under no circumstances, the Court shall order any Admission in the same year beyond 30 th October. However, it is observed that such relief can be granted only in exceptional circumstances and in the rarest of rare cases. In case of such an eventuality, the Court may also pass an order cancelling the admission given to a candidate who is at the bottom of the merit list of the category who, if the admission would have been given to a more meritorious candidate who has been denied admission illegally, would not have got the admission, if the Court deems it fit and proper, however, after giving an opportunity of hearing to a student whose admission is sought to be cancelled.

13.3. In case the Court is of the opinion that no relief of admission can be granted to such a candidate in the very academic year and wherever it finds that the action of the authorities has been arbitrary and in breach of the rules and regulations or the prospectus affecting the rights of the students and that a candidate is found to be meritorious and such candidate/student has approached the court at the earliest and without any delay, the court can mould the relief and direct the admission to be granted to such a candidate in the next academic year by issuing appropriate directions by directing to increase in the number of seats as may be considered appropriate in the case and in case of such an eventuality and if it is found that the management was at fault and wrongly denied the admission to the meritorious candidate, in that case, the Court may direct to reduce the number of seats in the management quota of that year, meaning thereby the student/students who was/were denied admission illegally to be accommodated in the next academic year out of the seats allotted in the management quota.

13.4. Grant of the compensation could be an additional remedy but not a substitute for restitutional remedies. Therefore, in an appropriate case the Court may award the compensation to such a meritorious candidate who for no fault of his/her has to lose one full academic year and who could not be granted any relief of admission in the same academic year.

13.5. It is clarified that the aforesaid directions pertain for Admission in MBBS Course only and we have not dealt with Post Graduate Medical Course."

46. Noticing the above mentioned judgment, this Court finds that it is a consistent law right from the very inception that Courts in the rarest of rare case can grant interim protection in the admission matters, when they are convinced that no injustice would be meted to the other party and the petitioner, who has approached the Court for grant of interim protection in admission matter has an cast iron case. In other words, the Hon'ble Apex Court has observed that in the admission matters misplaced sympathy is totally unwarranted.

47. Now another question arises as to whether this Court can issue a direction, which runs contrary to a statute implying

that the respondents are to disobey the statute. The Hon'ble Apex Court in para 10 in the case of ***A.P. Christians Medical Educational Society Vs. Government of Andhra Pradesh and another*** **(1986) 2 SCC 667** has observed as under :-

"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."

48. Further the Hon'ble Apex court in the case of ***V.K. Sood Vs. Secretary, Civil Aviation and others,*** **AIR 1993 SC 2285,** this Court in paragraph-6 and 7 held as under:

"6. Thus it would be clear that, in the exercise of the rule making power, the president or authorised person is entitled to prescribe method of recruitment, qualifications both educational as well as technical for appointment or conditions of service to an office or a post under the State. The rules thus having been made in exercise of' the power under proviso to Art. 309 of the Constitution, being Statutory, cannot he impeached on the ground that the authorities have prescribed tailor made qualifications to suit the stated individuals whose names have been mentioned in the appeal. Suffice to state that it is settled law that no motives can be attributed to the Legislature in making the law. The rules prescribed qualifications for eligibility and the suitability of the appellant would be tested by the Union Public Service Commission.

7. It is next contended that several persons whose names have been copiously mentioned in the appeal were not qualified to hold the post of examiner and they were not capable even to set the test papers to the examiners nor capable to evaluate the papers. We are not called upon to decide the legality of their appointments nor their credentials in this appeal as that question does not arise nor are they before the court. It is next contended by Mr. Yogeshwar Prasad, the learned Senior counsel that on account of inefficiency in the pilots' operational Capability repeatedly air accidents have been occurring endangering the lives of innocent travellers and this Court should regulate the prescription of higher qualifications and strict standard to the navigators or to the pilots be instead on. We are afraid that we cannot enter into nor undertake the responsibility in that behalf'. It is for the expert body and this Court does not have the assistance of experts. Moreover it is for the rule making authority or for the legislature to regulate the method of recruitment, prescribe qualifications etc. It is open to the President or the authorized person to undertake such exercise and that necessary tests should be conducted by U.P.S.C. before giving, the certificates to them. This is not the province of this Court to trench into and prescribe qualifications in particular when the matters are of the technical nature. It is stated in the counter affidavit that due to advancement of technology of the flight aviations the navigators are no longer required and therefore they are not coming in large number. Despite the repeated advertisements no suitable candidate is coming forward, We do not go into fault aspect also and it is not necessary for the purpose of this case. Suffice to state that pursuant to another advertisement made in July 1992, the appellant is stated to have admittedly applied for and appeared before the U.P.S.C. for selection and that he is

awaiting the result thereof. Under these circumstances. we do not find any substance in this appeal. The appeal is accordingly dismissed. No costs."

49. Bearing in mind, the law laid down by the Hon'ble Apex Court in the catena of decisions as extracted hereinabove irresistible conclusion is liable to be drawn that the Court cannot travel beyond the jurisdiction so conferred upon it, while granting a relief to an applicant, merely because certain inconvenience is sought to be meted to him/her. As obviously academic qualifications and eligibility cannot be always tailored to suit a particular candidate.

50. As a matter of fact, mere continuance on the basis of interim order does not create any right in favour of the petitioner, particularly, when admittedly she did not possess the necessary required eligibility for being included in the zone of consideration for grant of horizontal reservation being 1% of NCC Cadets. So far as, the issue relating to grant of relief to the petitioner is concerned, an additional fact need to be noticed that the petitioner was very well aware about the required eligibility and qualification for being considered under Un-Reserved category and reserved category being by virtue of horizontal reservation under NCC Cadets. Further record reveals that the petitioner had blown hot and cold and approbated and reprobated at the same time, as when she got stuck and confronted with the situation that she did not have NCC "C' Certificate having "BEE" Grade that she preferred an application before the respondents and tendered an affidavit on 26.6.2019 for change of her category. The petitioner on one pretext or the other wanted to get herself included in the counselling despite the fact that she was thoroughly ineligible to be conferred the benefit of the reservation as noticed hereinabove.

51. The Hon'ble Apex Court in the case of ***R.N. Gosain vs. Yashpal Dhir*** reported in **(1992) 4 SCC 683** has observed as under:-

"10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid any thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage". [See: Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd., (1921) 2 R.B. 608, at p.612, Scrutton, L.J]. According to Halsbury's Laws of England, 4th Edn.,Vol. 16, "after taking an advantage under an order (for example for the payment of costs) a party may be precluded from saying that it is invalid and asking to set it aside". (para 1508)."

52. The Hon'ble Apex Court in the case of ***Shyam Telelink Limited vs. Union of India,*** reported in **(2010) 10 SCC 165** has observed as under:

"23. The maxim qui approbat non reprobat (one who approbates cannot reprobate) is firmly embodied in English Common Law and often applied by Courts in this country. It is akin to the doctrine of benefits and burdens which at its most basic level provides that a person taking advantage under an instrument which both grants a benefit and imposes a burden cannot take the former without complying

with the latter. A person cannot approbate and reprobate or accept and reject the same instrument."

53. The Hon'ble Apex Court in the case of ***Cauvery Coffee Traders, Mangalore vs. Hornor Resources (International) Company Limited***, reported in **(2011) 10 SCC 420** has held as under:

"34. A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience. (Vide: Nagubai Ammal & Ors. v. B. Shama Rao & Ors., AIR 1956 SC 593; C.I.T. Vs. MR. P. Firm Maur, AIR 1965 SC 1216; Maharashtra State Road Transport Corporation v. Balwant Regular Motor Service, Amravati & Ors., AIR 1969 SC 329; P.R.

Deshpande v. Maruti Balaram Haibatti, AIR 1998 SC 2979; Babu Ram v. Indrapal Singh, AIR 1998 SC 3021; Chairman and MD, NTPC Ltd. v. Reshmi Constructions, Builders & Contractors, AIR 2004 SC 1330; Ramesh Chandra Sankla & Ors. v. Vikram Cement & Ors., AIR 2009 SC 713; and Pradeep Oil Corporation v. Municipal Corporation of Delhi & Anr., (2011) 5 SCC 270).

35. Thus, it is evident that the doctrine of election is based on the rule of estoppel- the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had."

54. The Hon'ble Apex Court in the case of ***Sri Gangai Vinayagar Temple and another vs. Meenakshi Ammal and others***, reported in **(2015) 3 SCC 624** has observed as under:

"16.2. Secondly, on a proper perusal of the plaint, it ought to have been palpably evident that the Plaintiff/Tenant in O.S.5/78 feared dispossession from the demised premises because of what they considered to be an illegal transfer; but since all the Defendants had averred in their Written Statement that they had no intention of doing so, the suit ought not to have been dismissed but ought to have been decreed without more ado solely so far as the prayer of injunction was concerned. But, in the Trial Court the title to the leased land had become the fulcrum of the fight, owing to the pleadings of the Tenant in which it had repeatedly and steadfastly challenged the title of the Trust as well as the Transferees. The Tenant should not be permitted to approbate and reprobate, as per its whim or convenience, by disowning or abandoning a controversy it has sought to have adjudicated."

55. Analyzing the case from every point of angle, this Court finds that the petitioner had been maintaining inconsistent stand right from very inception as at one time, she claims to have applied under unreserved category and also under NCC category, which is under horizontal reservation category. Apart from the same, as already discussed, this Court cannot include any qualification by a judicial fiat,

as the same is task, which is to be conducted by the rule making authorities and not by the courts of law. As already observed, mere continuance of any interim order does not create any right or benefit, particularly, in the matter of admission in the present sets of facts, wherein the issue relates to the MBBS Course, whereat merit is of the paramount consideration.

56. The Hon'ble Apex Court in the case of ***Chandigarh Administration and another vs. Jasmine Kaur and others, (2014) 10 SCC 521*** has observed as under: -

"33.1. The schedule relating to admissions to the professional colleges should be strictly and scrupulously adhered to and shall not be deviated under any circumstance either by the courts or the Board and midstream admission should not be permitted.

33.2. Under exceptional circumstances, if the court finds that there is no fault attributable to the candidate i.e., the candidate has pursued his or her legal right expeditiously without any delay and that there is fault only on the part of the authorities or there is an apparent breach of rules and regulations as well as related principles in the process of grant of admission which would violate the right to equality and equal treatment to the competing candidates and the relief of admission can be directed within the time schedule prescribed, it would be completely just and fair to provide exceptional reliefs to the candidate under such circumstance alone.

33.3. If a candidate is not selected during a particular academic year due to the fault of the Institutions/Authorities and in this process if the seats are filled up and the scope for granting admission is lost due to eclipse of time schedule, then under such circumstances, the candidate should not be victimised for no fault of his/her and the Court may consider grant of appropriate compensation to offset the loss caused, if any.

33.4. When a candidate does not exercise or pursue his/her rights or legal remedies against his/her non-selection expeditiously and promptly, then the Courts cannot grant any relief to the candidate in the form of securing an admission.

33.5. If the candidate takes a calculated risk/chance by subjecting himself/herself to the selection process and after knowing his/her non- selection, he/she cannot subsequently turn around and contend that the process of selection was unfair.

33.6. If it is found that the candidate acquiesces or waives his/her right to claim relief before the Court promptly, then in such cases, the legal maxim vigilantibus non dormientibus aequitas subvenit, which means that equity aids only the vigilant and not the ones who sleep over their rights, will be highly appropriate.

33.7. No relief can be granted even though the prospectus is declared illegal or invalid if the same is not challenged promptly. Once the candidate is aware that he/she does not fulfil the criteria of the prospectus he/she cannot be heard to state that, he/she chose to challenge the same only after preferring the application and after the same is refused on the ground of eligibility.

33.8. There cannot be telescoping of unfilled seats of one year with permitted seats of the subsequent year i.e., carry forward of seats cannot be permitted how much ever meritorious a candidate is and deserved admission. In such circumstances,

the Courts cannot grant any relief to the candidate but it is up to the candidate to re-apply next academic year.

33.9. There cannot be at any point of time a direction given either by the Court or the Board to increase the number of seats which is exclusively in the realm of the Medical Council of India.

33.10. Each of these above mentioned principles should be applied based on the unique and distinguishable facts and circumstances of each case and no two cases can be held to be identical.

43. As time and again such instances of claiming admission into such professional courses are brought before the Court, and on every such occasion, reliance is placed upon the various decisions of this Court for issuing necessary directions for accommodating the students to various courses claiming parity, we feel it appropriate to state that unless such claims of exceptional nature are brought before the Court within the time schedule fixed by this Court, Court or Board should not pass orders for granting admission into any particular course out of time. In this context, it will have to be stated that in whatever earlier decisions of this Court such out of time admissions were granted, the same cannot be quoted as a precedent in any other case, as such directions were issued after due consideration of the peculiar facts involved in those cases. No two cases can be held to be similar in all respects. Therefore, in such of those cases where the Court or Board is not in a position to grant the relief within the time schedule due to the fault attributable to the candidate concerned, like the case on hand, there should be no hesitation to deny the relief as was done by the learned Single Judge. If for any reason, such grant of relief is not possible within the time schedule, due to reasons attributable to other parties, and such reasons are found to be deliberate or mala fide the Court should only consider any other relief other than direction for admission, such as compensation, etc. In such situations, the Court should ensure that those who were at fault are appropriately proceeded against and punished in order to ensure that such deliberate or malicious acts do not recur."

SUMMATION

57. In summation of the discussion made herein above, we hold: -

A. Petitioner having not possessed with NCC "C' Certificate with "BEE' Grade is neither eligible nor has desired qualification for being considered under 1% quota of NCC category as earmarked in the Government Order dated 17.6.2019 and the National Eligibility cum Entrance Test (NEET) U.G. Counseling - 2019 (Brochure).

B. Prescription of qualification if essentially and primarily a role reserved for the employer and rule enacting authority and it is not for this Court while exercising its jurisdiction under Article 226 of the Constitution to arrogate the said function.

C. Mere continuance on the basis of interim order while pursuing the MBBS Course does not create an equity or sympathy in favour of the petitioner.

D. Even otherwise petitioner is not entitled to any relief in view of the fact that the petitioner blew hot and cold and approbated and reprobated at the same time.

CONCLUSION

58. In view of the above discussion the writ petition is devoid of merit and thus liable to be dismissed.

59. Accordingly, dismissed.

60. Interim order, if any, stands vacated.

61. No order as to cost.

(2022)05ILR A450
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.05.2022

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ C No. 30835 of 2021
&
Writ C No. 31573 of 2021

Abhishek Tiwari & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Apoorva Tewari, Dharm Pravartak Mahendra

Counsel for the Respondents:
C.S.C., Dr. LP Misra, Jitendra Singh

(A) Civil Law – Right of eviction -The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 - Sections 3,5,6,7,9,10,11,16,21,22,23 & 32 - Uttar Pradesh *Maintenance & Welfare of Parents & Senior Citizens Rule*-2014 - Rule 21 - Duties and Power of District Magistrate - ensure that life and property of senior citizens of the district are protected and they are able to live with security and dignity - Indian Penal Code, 1860 - section 323, 504 and 506 - 'purposive interpretation' - no power is vested in the Tribunal to direct eviction simplicitor from the property at the instance of senior citizens - Tribunal fully empowered to direct the children /relatives to provide for a residence on an application being filed by a senior citizen - District Magistrate is empowered to pass orders and take such steps as may arise for ensuring that the senior citizen may enjoy the property - such steps may include right to order eviction only as a last recourse - in relation to a specific part of the property which are in joint possession of senior citizens as well as children/relatives.(Para -13, 32)

Certain disputes arisen in between family members **-** petitioner no.1 filed a regular suit - against respondent no.6(mother) and her husband - seeking permanent injunction - against dispossession of petitioner no.1 from the property in question - application moved before SDM was simply that - petitioners (son & daughter - in - law of respondent no.6) herein who were residing on the first floor portion - misbehaved with the parents -thus on that ground alone, an apprehension was expressed - the eviction was sought – SDM directed to vacate the residential house . **(Para -3,30)**

HELD:-SDM did not have any powers to direct eviction .It can only direct the children or relatives to provide for residential needs of parents. Appropriate relief granted to the respondents, in exercise of power under Article 226 of Constitution of India, is to direct the District Magistrate to ensure the safety and well being of the respondent no.6 and her husband and if required to use such measures as may be deemed appropriate by the District Magistrate on a request being made by the respondent no.6.**(Para -31,33)**

Writ petition disposed off. (E-7)

List of Cases cited:-

1. S.C. Ahuja Vs Sneha Ahuja, (2021) 1 SCC 41

2. Deddappa Vs Branch Manager, (2008) 2 SCC 595

3. Teri Oat Estates (P) Ltd. Vs U.T. Chandigarh, (2004) 2 SCC 130

4. St. of Punj. Vs Surinder Kumar, (1992) 1 SCC 489

5. Sunny Paul & anr. Vs St. of NCT Delhi & ors. , W.P. (C) No.10463 of 2015 & LPA No.205 of 2017

6. Subhashini Vs Deputy Collector Kozhikode (F.B.)

7. S. Vanitha Vs Deputy Commissioner & ors., (2020) SCC online SC 1023

8. Simrat Randhawa Vs St. of Punj. , CWP No.4744 of 2018

9. S. Vanitha Vs Deputy Commissioner Bengaluru Urban District & ors., (2020) SCC Online SC 1023

10. Anil Kumar Gupta Vs P.O. Appellate Tribunal/DM Luck. & ors. , W.P. Misc. Single No.19482 of 2019

11. Jyotsana Pawar & ors. Vs Daulat Ram Pawar & ors. , LAP No.155 of 2021

12. Shweta Shetty Vs St. of Mah. , (2021) SCC online Bom 4575 in W.P. (L) No.9374 of 2020

13. Dinubhai Boghabhai Slonaki Vs St. of Guj. & ors. ,(2018) 11 SCC 129.

14. Dwarka Nath Vs I.T.O., Kanpur, AIR 1966 SC 81

15. Guru Datta Sharma Vs St. of Bihar & anr., AIR 1961 SC 1684

16. Jilubhai Nanbhai Khachar Vs St. of Guj. & anr., 1995 Supp (1) SCC 596.

17. Jeetu @ Amit Kumar Rawata & anr. , W.P. No.26686 of 2021

18. Sunny Paul & anr. Vs St. NCT of Delhi & ors. , W.P. (C) No.10463 of 2015

19. C.K. Vasu Vs The Circle Inspector of Police, WP (C) 20850 of 2011

20. Sanjay Walia Vs Sneha Walia, 204 (2013) DLT 618

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

1. Since both the petitions have been preferred challenging the order dated 13.12.2021 hence both the said writ petitions are being decided by means of the present common order.

2. Heard Sri Anil Tiwari, learned Senior Advocate assisted by Sri Apoorva Tiwari, the counsel for the petitioner and Dr. L. P. Mishra, the counsel for the respondents.

3. The facts in brief giving rise to the present petition are that the petitioners, the son and daughter-in-law of respondent no.6 and the parents of respondent no.7 have filed the present petitions challenging the order dated 13.12.2021 passed by the Sub-Divisional Magistrate, Lucknow in exercise of powers under section 5 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 (hereinafter referred to as 'the Act of 2007') whereby directions have been given to vacate the residential house situate at 2/1-F Vishesh Khand, Gomti Nagar, Lucknow within a period of fifteen days from the date of passing of the said order. The second petition is filed by the son of petitioners challenging the same order. It is argued that the respondent no.6 is the absolute owner of the property no.2/1-F, Vishesh Khand Gomti Nagar, Lucknow which he acquired out of her own funds. In the said property, on the ground floor the respondent no.6 who is aged about 75 years is residing with her husband Sri Manmohan Tiwari, the petitioners who are son and the daughter in law along with the respondent no.7 who is the grand son of respondent no.6 and the son of the petitioners no.1 & 2 along with their daughter are residing on the first floor. It appears that on account of certain disputes that have arisen in between the family members, the petitioner no.1 filed a regular suit no.882 of 2019 against the respondent no.6 and Sri Manmohan Tiwari seeking a permanent injunction against the dispossession of the petitioner no.1 from the property in question. In the said suit, it has been asserted that the property has been

purchased out of the sale proceeds of ancestral property of which the petitioner no.1 was also a co-parcener. The said suit is pending consideration.

4. On 30.07.2019, the respondent no.6, the mother filed a first information report under section 323, 504 and 506 IPC at P.S. Vibhuti Khand, Gomti Nagar, Lucknow against the petitioners alleging physical abuse at the hands of the children. On 20.08.2019, the respondent no.6 preferred an application purporting to be under section 21 and 22 of the 'Act of 2007' before the Sub-Divisional Magistrate, which was registered as Case No.59 of 2019. In the said application, which is annexed as Annexure no.8 to the writ petition, it was alleged that the respondent no.6 is the sole owner of the property in question and on 22.07.2019 at about 6.00 am in the morning, the petitioner no.1 along with the petitioner no.2 physically abused the respondent no.6 and tried to cause harm to her physically. With regard to the petitioner no.2, it was also alleged that she had slapped the respondent no.6. In the said application it was further expressed that from 09.05.2019 up to 15.05.2019, the respondent no.6 and her husband were occasioned with the criminal acts for which a written information was given to the Lucknow Police. She, thus, prayed that she be given the possession of the property which is being occupied by the petitioners no. 1 and 2 without her permission. The age of the respondent no.6 in the said application was disclosed as 73 years and that of her husband was disclosed as 75 years.

5. On the basis of the application filed, the Maintenance Tribunal directed the Deputy Collector to submit an inspection report after inspecting the premises in question. He was also directed to obtain the views of the neighbour to ascertain the correct facts. It was also recorded that the inspection along with the statements shall be submitted before the Tribunal on or before 13.09.2021. In terms of the said directions, a report was submitted before the Maintenance Tribunal, however, the contentions of the counsel for the petitioners is that the report was never provided to the petitioner nor were they afforded the opportunity to file the objections against the said report.

6. Considering the application and the report, the Tribunal by means of the impugned order directed the petitioners and the respondent no.7 (the grandson of the respondent no.6) to vacate the property within a period of fifteen days, failing which the Nayab Tehsildar Lucknow and the Inspector In-charge of Police Station Vibhuti Khand were directed to ensure the compliance of the said order. The said order is under challenge.

7. Sri Anil Tiwari, learned Senior Advocate assisted by Sri Apoorva Tiwari the counsel for the petitioner submits that the said order is bad in law and is liable to be set aside for the following reasons : -

(a) that the Maintenance Tribunal constituted under the Act does not have any jurisdiction to pass an order of eviction as has been done in the present case.

(b) that the order has been passed without observing the principles of natural justice. In support thereof, he cites the report which was called upon by the Tribunal and was made the basis of the order but never supplied to the petitioner.

The legal arguments as raised by Sri Tiwari shall be dealt with subsequently. In the light of the said arguments, Sri

Tiwari argues that the order impugned is liable to be set aside.

8. Dr. L. P. Mishra, the counsel appearing on behalf of the respondent no.6 argues that the Tribunal is well within its power to direct the eviction under the Act in question. He further argues that the Act was framed for providing immediate relief to the senior citizens for the purposes mentioned in the Act, which includes the right to property and thus, the Tribunal was well within its rights to direct the eviction as has been done in the impugned order. He further argues that the order has been passed based upon the materials that were available with the Tribunal and the Tribunal being a quasi-judicial body is not expected to meticulously observe the procedures which are observed in a regular suit. He further argues that the dispute in between the petitioners and the respondent no.6 has emanated on various counts and litigation with regard to partition of the ancestral property is also engaging the attention of the courts. He further argues that the respondent no.6 and her husband are the owners of another property which is an ancestral property and is situate at Ganesh Ganj, which the respondent no.6 are ready to offer to the petitioners to buy peace although the respondent no.6 and her husband are under no legal obligation to provide for a residence. He also argues that the petitioners are financially independent and can easily take an accommodation on rent in any locality of the city and they cannot insist on staying in the property in question and thus, do not have any legal right to remain in possession.

9. In view of the arguments as noted above in between the parties, this court is called upon to decide whether under the Maintenance and Welfare of Parents and Senior Citizens Act, 2007, the Tribunal constituted under the Act is empowered to pass an order of eviction particularly keeping in view the Rules of 2014 framed under the State of U.P. and known as Uttar Pradesh Maintenance and Welfare of Parents and Senior Citizens Rules, 2014 and secondly whether the order impugned can be interfered with by exercising the right of judicial review in exercise of the power under Article 226 of the Constitution of India and whether this court can mould the relief keeping in view the exigencies that arise in between the parties.

10. To understand and decide the issues as arise in between the parties, it is essential to understand the Scheme of the Act of 2007. The Act of 2007 was enacted keeping in view the steady rise in the population of the older persons in India and observing that the traditional norms and values of the Indian Society envisage providing care for the aged and keeping in view the recent trends of changes in the society, witnessing a gradual decline of a joint family system resulting into the elder members not being maintained by the children contrary to the social practice that was prevalent in India. The need for enacting was also felt in view of the elders facing emotional neglect and lack of physical and financial support. The Act contains a non - obstantive clause and would thus prevail over the other laws as is clear from the plain reading of the Section 3 of the said Act.

11. Chapter II and Chapter V of the said Act are relevant for the purposes of the present dispute. Chapter II of the said Act provides for manner of grant of 'maintenance to a senior citizens who is unable to maintain himself from his own earning or out of the property owned by

him. The procedure for claiming maintenance is elaborated in Section 5 and 6 of the Act. Section 7 provides for the Constitution of the Maintenance Tribunal and a duty is conferred upon the State Government to constitute a Maintenance Tribunal for each sub-division to be presided over by an officer not below the rank of Sub-Divisional Officer of a State. The Tribunal is empowered to hold an enquiry in a summary manner for giving effect to the purpose of section 5 of the Act. Section 9, 10 and 11 of the Act provide for an order of maintenance, alteration of the order of maintenance and the manner of enforcement of the order of maintenance. The Act also directs the constitution of the Appellate Tribunal, to be presided over by an officer not below the rank of District Magistrate and Section 16 of the Act provides for the appeals against an order.

12. Chapter V of the said act specifically Section 21 directs the State Government to take steps for giving wide publicity to the provisions of the Act and to take steps for sensitization in respect of the issues relating to the Act and for effective coordination in between various departments. Section 22 of the Act empowers the State Government to confer the powers and impose duty on a District Magistrate to ensure that the provisions of the Act are properly carried out and the District Magistrate is further empowered to delegate his powers upon any officer subordinate to him. Section 22 is quoted herein below :-

Section 22. Authorities who may be specified for implementing the provisions of this Act -

(1) The State Government may, confer such powers and impose such duties on a District Magistrate as may be necessary, to ensure that the provisions of this Act are properly carried out and the District Magistrate may specify the officer, subordinate to him, who shall exercise all or any of the powers, and perform all or any of the duties, so conferred or imposed and the local limits within which such powers or duties shall be carried out by the officer as may be prescribed.

(2) The State Government shall prescribe a comprehensive action plan for providing protection of life and property of senior citizens.

Section 23 of the Act provides for a situation where the transfers by the senior citizen in respect of his estate to be void in certain circumstances.

It is also essential to note the definition of 'Maintenance' as defined under section (b) of the Act , which is as under :-

2(b) "maintenance" includes provision for food, clothing, residence and medical attendance and treatment.

13. The State of U.P. in exercise of its powers under section 32 of the Act has framed the Rules of the year 2014 duly published in the U.P. Gazette on 24.02.2014. The said rules provide for steps for conciliation/settlement prior to adjudication and in the event of failure of the same provides for reference of the dispute before the Tribunal. Interestingly, Rule 21 of Chapter V of the said Rules provides for duties and the powers to be exercised by the District Magistrate and the same is quoted herein below :

Chapter V

21. Duties and Power of the District Magistrate -

(1) The District Magistrate shall perform the duties and exercise the powers

mentioned in sub rules (2) and (3) so as to ensure that the provisions of the Act are properly carried out in his district.

(2) It shall be the duty of the District Magistrate to :

i. ensure that life and property of senior citizens of the district are protected and they are able to live with security and dignity;

ii. oversee and monitor the work of Maintenance Tribunals and Maintenance Officers of the district with a view to ensuring timely and fair disposal of applications for maintenance, and execution of Tribunals' orders;

iii. oversee and monitor the working of old age homes in the district so a to ensure that they conform to the standards laid down in these rule and any other guidelines and orders of the Government;

iv. ensure regular and wide publicity of the provisions of the Act, and Central and State Governments, programmes for the welfare of senior citizens;

v. encourage and co-ordinate with panchayats, municipalities, Nehru Yuva Kendras, educational institutions and especially their National Service Scheme Units, Organisations, specialists, experts activists, etc. working in the district so that their resources efforts are effectively pooled for the welfare of senior citizens of district;

vi. ensure provision of timely assistance and relief to senior citizens in the event of natural calamities and other emergencies;

vii. ensure periodic sensitisation of officers of various Departments and Local Bodies concerned with welfare of senior citizens, towards the needs of such citizens, and the duty of the officers towards the latter;

viii. review the progress of investigation and trial of cases relating to senior citizens in the district, except in cities having a Divisional Inspector General of Police.

ix. ensure that adequate number of prescribed application forms for maintenance are available in officers of common contact for citizens like Panchayats, Block Development Offices, Tahsildar Offices, District Social Welfare Offices, Collectorate, Police Station etc.;

x. promote establishment of dedicated helplines for senior citizens at district headquarters, to begin with; and

xi. perform such other functions as the Government, may by order, assign to the District Magistrate in this behalf, from time to time.

(3) With a view to performing the duties mentioned in sub-rule (2), the District Magistrate shall be competent to issue such directions, not inconsistent with the Act; these rules, and general guidelines of the Government, as may be necessary, to any concerned Government or statutory agency or body working in the district, and especially to the following:

(a) Officers of the State Government in the Police, Health and Publicity Departments, and the Department dealing with welfare of senior citizens;

(b) Maintenance Tribunals and Conciliation Officers;

(c) Panchayats and Municipalities; and

(d) Educational Institution.

Certain other obligations are also cast upon the State under the Rules so framed, however, they need not detain this Court for the purposes of this case.

14. Sri Anil Tiwari, Senior Advocate appearing on behalf of the petitioners argues that the scope of Chapter II read

with the definition of 'Maintenance' as defined under section 2(b) of the Act makes it clear that the Maintenance Tribunal constituted can pass an order on appropriate application of the senior citizen, who is unable to maintain himself for giving/providing maintenance and is thus confined to grant the financial benefits to the senior citizens on there being requirement for the same under the Act. He argues that the definition of the word 'maintenance' under section 2(b) includes the provision of food, clothing, residence and medical attendance and treatment and thus in light thereof, he argues that in the event a senior citizen is deprived of the said benefits, the Tribunal in exercise of the power under Chapter II can direct the children or the relatives to provide for the said benefits and no other power has been conferred upon the Tribunal including the direction for vacation of the property. He argues that in the present case, the application filed by the respondent no.6 did not disclose anywhere that the respondent no.6 was deprived of food, clothing, residence, medical attendance and treatment and thus, the application was not maintainable under Chapter II.

15. He next argues that even if, for the sake of arguments, section 22 of the Act is taken into consideration read with Rule 21, the District Magistrate is empowered only to do the acts which are required to be performed under the mandate of the Act and once again no specific power of eviction has been granted upon the District Magistrate also either under the Act or the Rules. He also submitted that the definition clause cannot be pressed into service to enlarge the scope of jurisdiction of the Maintenance Tribunal and the expression 'include' in Section 2(b) of the Act 2007 has to be construed in light of the context of the Act of 2007 particularly Section 9 of the Act 2007 which only provides for payment of maintenance in monetary terms. Lastly, he argues that the District Magistrate and the parties should be permitted to resolve the disputes to prevent any apprehension as expressed in the application. The court can direct the District Magistrate to take such steps to ensure the security of the respondent no.6 as may be deemed appropriate by this Court. He categorically states that the offer of alternate residence situated at old Ganesh Ganj is not acceptable to the petitioner as the same is located in an congested locality and has very steep stairs and the petitioner no.2 suffers from slip disk and the alternative accommodation would not be appropriate for their residence.

16. Sri Tiwari has placed reliance on the judgment of the Supreme Court in the case of ***S. C. Ahuja vs. Sneha Ahuja; (2021) 1 SCC 41*** to argue that a married woman retains her right in the shared household even if the property is not of the joint family or even if the husband has no right in the said property. He also placed reliance on the judgment of the Supreme Court in the case of **Deddappa vs. Branch Manager; (2008) 2 SCC 595** and argues that a beneficial legislation cannot grant a benefit which was not contemplated by the legislature. Similarly in the case of ***Teri Oat Estates (P) Ltd. vs. U.T. Chandigarh; (2004) 2 SCC 130*** the Hon'ble the Apex Court held that sympathy or sentiment cannot by itself be a ground for passing an order in relation whereto the appellants fail to establish a legal right. He also placed reliance on the judgement of the Supreme Court in the case of **State of Punjab vs. Surinder Kumar (1992) 1 SCC 489** to argue that High Court is circumscribed by limitations discussed and declared by

judicial decisions and it cannot transgress those limits. He has also drawn my attention to the judgments of the Delhi High Court in the case of **Sunny Paul and another vs. State of NCT Delhi and others in W.P. (C) No.10463 of 2015 and LPA No.205 of 2017;** the judgment in the Case of **Subhashini vs. Deputy Collector Kozhikode (F.B.)** decided by the Full Bench by the Kerala High Court; the judgment of the Supreme Court in the case of **S. Vanitha vs. Deputy Commissioner and others; (2020) SCC online SC 1023**. He also drawn my attention to the judgment of the Bombay High Court and the Punjab High Court wherein the power of eviction under the Act has been upheld, however, he argues that in view of the rules framed in Delhi and in Punjab, the judgments may be justified, which is not the case in the State of U.P. as the rules are silent. He also refers to the judgment of the Punjab High Court in the case of **Simrat Randhawa vs. State of Punjab decided on 23.01.2020 in CWP No.4744 of 2018**, which according to the petitioners' counsel has held that the Act of 2007 does not empower the Tribunal to pass an order of eviction.

In the light of the said submissions, it is argued that the writ petition is liable to be allowed and the order impugned is liable to be set aside.

17. Dr. L. P. Mishra, the learned counsel appearing on behalf of the respondent no.6, on the other hand, has tried to justify the order by drawing my attention to the definition of 'maintenance' as contained in Section 2(b) of the Act, which includes a residence. He further drawn my attention to section 2(f) of the Act, which define the 'property' to mean property of any kind. He argues that section 3 of the Act gives overriding effect to the provisions of the Act and section 8 of the Act provides for procedure for determination in summary manner. He argues that on the plain reading of the intent of the Act, it is clear that the Act is aimed to give relief to the senior citizens who may face harassment by anyone including the children and the relatives and any interpretation, which does not let the senior citizens enjoy their property would militate against the intent of the Act, which is to ensure pleasant, healthy, secure and peaceful life in the old age.

18. He further argues that in any case, the petitioners do not have any right to reside in the property in question and they are only enjoying the property in permissive occupation rights and they cannot even be termed as a licensee as defined under Section 52 of the Easement Act. He further argues that the respondent no.6, although not under legal obligation has offered the residence to the petitioners at their ancestral house No.9 Ganesh Ganj Lucknow which is very close to the school of the children of the petitioners. He further argues that the said ancestral house is a three storied house and there is no legal or other hindrance in the petitioners' staying there. He further argues that the ground floor of the said ancestral house is vacant and keeping in view the physical condition as highlighted by the counsel for the petitioners, a ground floor portion would be more suitable than the present residence where the petitioners are staying on the first floor in the house in question.

19. Thus, in sum and substance the counsel for the respondent no.6 argues that the Tribunal is duly empowered under the Act to grant all the benefits that are included under section 2(b) of the Act which includes 'residence' also. He has also

argued that the property in the context of the Act is not to be seen as bundle of legal rights and would mean something more than that including the right to stay and enjoy the property in a peaceful and congenial atmosphere which is being deprived in view of the conduct of the petitioners. He places reliance on the following judgments :

I. S. Vanitha vs. Deputy Commissioner Bengaluru Urban District and others (2020) SCC Online SC 1023

II. Anil Kumar Gupta vs. Presiding Officer Appellate Tribunal/DM Lucknow and others in W.P. Misc. Single No.19482 of 2019 decided on 18.07.2019 by this court.

III. Jyotsana Pawar and others vs. Daulat Ram Pawar and others in LAP No.155 of 2021 decided on 03.05.2021 by the Delhi High Court which has been upheld by the Hon'ble Apex Court in Special Leave to Appeal No.7070 of 2021 decided on 28.05.2021.

IV. Shweta Shetty vs. State of Maharashtra (2021) SCC online Bom 4575 in W.P. (L) No.9374 of 2020 decided on 25.11.2021 by the Bombay High Court.

V. Dinubhai Boghabhai Slonaki Vs. State of Gujarat and others (2018) 11 SCC 129.

VI. Dwarka Nath vs. Income Tax Officer, Kanpur; AIR 1966 SC 81

VII. Guru Datta Sharma vs. State of Bihar and another; AIR 1961 SC 1684

VIII. Jilubhai Nanbhai Khachar vs. State of Gujarat and another; 1995 Supp (1) SCC 596.

20. My attention has been drawn on two orders of this Court - one passed in the Case of **Smt. Khushboo Shukla vs. District Magistrate Lucknow decided on 02.11.2021** and the other order passed by me in the case of **Jeetu @ Amit Kumar Rawata and another in W.P. No.26686 of 2021 decided on 14.03.2022.**

21. The cleavage of arguments of learned counsels is clearly visible inasmuch as the arguments of Sri Anil Tewari are that while interpreting the statute in question, this court should be inclined to accept the classical rule of interpretation where Dr. L. P. Mishra has tried to impress that the court should tilt towards the 'purposive interpretation' used for interpretation.

22. The first question to be determined is whether under the Act and the Rules framed, a remedy of eviction can be granted under the Act or not. I first refer to the judgment of the Delhi High Court passed in **W.P. (C) No.10463 of 2015 (Sunny Paul and another vs. State NCT of Delhi and others)** where the court was confronted with the similar issue. The High Court of Delhi noticed the judgment of the High Court of Kerala in the case of **C.K. Vasu vs. The Circle Inspector of Police, WP (C) 20850 of 2011 decided on 25.05.2012** and in para 28, the following has been observed, which reads as under :

28. Ms. Manmeet Arora, learned amicus curiae submitted that the High Courts of Punjab and Haryana and Gujarat had specifically upheld the power of the Maintenance Tribunal to pass eviction orders in exercise of its jurisdiction under Section 23 of the Act, 2007. She fairly stated that a contrary view had been expressed by the High Court of Kerala in C.K. Vasu vs. The Circle Inspector of Police, WP (C) 20850 of 2011 decided on 25th May 2012 and by this Court in the case of Sanjay Walia vs. Sneha Walia (supra).

The Delhi High Court referred to the case of **Sanjay Walia vs. Sneha Walia, 204 (2013) DLT 618** while analysing the provisions of the Act held that the claim for eviction by the senior citizens would be maintainable even though they are not the owners of the property in question. The court further recorded that the Tribunal constituted under the Act was empowered to give directions to remove the children from the property, if it is necessary in certain cases to ensure a normal life of the senior citizens and further recording that no rules as are required to be framed under section 22 of the Act proceeded to hold that subsequently the rules have been framed and under the Rule 22 of the said Rules so framed, the Deputy Commissioner/District Magistrate was empowered for eviction of the son and daughter or legal heirs from self acquired property on account of the non-maintenance and ill treatment and after recording, noticed the judgment of the Punjab High Court, proceeded to hold that under section 23 of the Act of 2007, the Maintenance Tribunal can issue an order of eviction to ensure that Senior Citizens live peacefully in their house without being forced to accommodate a son who physically assault and mentally harass them.

23. In the appeal preferred against the said judgment of the Delhi High Court in LPA 205 of 2017, the Division Bench once again considered the power of the Tribunal to order eviction and noticing rules framed in Delhi, upheld the judgment of the learned Single Judge.

24. The Bombay High Court in the case of **Shweta Shetty vs. State of Maharashtra (supra)** was also confronted with the similar issue and after noticing the various provisions of the Act and particularity the Division Bench Judgment of the Delhi High Court in the case of **Sunny Paul (supra)** agreed with the said view and endorsed the view of the learned Single Judge who had followed the judgment of the Delhi High Court in the case of **Sunny Paul (supra)** held that the eviction could be directed in terms of the Act. The Bombay High Court specifically considered the arguments of the parties to the effect that the Rules as framed in Delhi were not framed in Maharashtra which argument was repelled in para 23 as under :

23. We entirely endorse the views of the learned Single Judge and accept them as our own. We are also fully in agreement with the views of the Division Bench of the Delhi High Court in Sunny Paul v. State of NCT of Delhi, a most careful and elaborate judgment that includes what appears to us to be a comprehensive overview of the jurisprudence. That decision dismissed an appeal from an order of a learned single Judge upholding the decision of the tribunal. Mr. Thorat's efforts to contend that this result was only because there are special rules in Delhi that permit eviction does not commend itself to us at all. The Rules cannot, axiomatically, confer a power that does not extend in the statute itself. At best, the Rules may provide a procedure or may clarify, but cannot confer a substantive legal right beyond that which the Act contemplates. Therefore, the argument defeats itself : if the Delhi rules provide for eviction of a person with no right in the property to protect the interests and welfare of a senior citizen, this necessarily means that the right to order a removal of a claimant exists in the statute itself."

25. Thus the, Delhi High Court and the Bombay High Court have interpreted the Act on doctrine of 'purposive interpretation'.

26. The Supreme Court in the case of **S. Vanitha vs. Deputy Commissioner (supra)** considered the scope of Senior Citizens Act 2007 vis-a-vis the rights enshrined in favour of the daughter in law under the prevention of PWDV Act of 2005 and interplay in between the said statutes when it relates to the right of woman under the Domestic Violence Act, 2005. However, no finding or judgment was given with regard to the rights to direct eviction under the Senior Citizens Act 2007. In the said case, the Supreme Court mainly dealt with the scope of Section 23 of the Senior Citizens Act and thus the said judgment does not in any way decide the issue as has arisen before the Court.

27. So far so good, in the light of the judgment of the Delhi High Court and the Bombay Court, the right of eviction is implicit under the Senior Citizens Act of 2007, however, the problem arising in the present case is that the Tribunal constituted under the Act is manned by a Sub-Divisional Magistrate and not by the District Magistrate. The Rules framed in the State of U.P. are silent and do not confer any specific power upon the S.D.M. to direct eviction in the event of a contingency arising in between the parties.

28. Even if I accept the purposive interpretation, as argued by Dr. Misra, it is difficult to stretch the interpretation so much to hold that it confers the jurisdiction on a Tribunal which is not expressly even implicitly conferred under Chapter II of the statute.

29. This court in the case of Smt. Khushboo Shukla vs. District Magistrate Lucknow decided on 02.11.2021 specifically held that under the provisions of the Act of 2007, in the absence of any specific power of eviction, recourse cannot be taken for summary eviction under the Act. This court while delivering the judgment in the case of Jeetu @ Amit Kumar Rawat and another vs. Sub Divisional Magistrate, Sadar Lucknow held that the District Magistrate was empowered to pass orders taking into account the mandate of Rule 21 of the Rules and also taken into consideration the fact that the alternative accommodation was offered by the parents to the children in the said case. While delivering the judgment in the said case, the court was not apprised of all the judgments, which have been referred above, which led to passing of the order dated 14.03.2022.

30. Coming to the facts of the present case, there was no mention in the application filed by the respondents that they are being deprived of their property and the directions should be issued for eviction of the children so that the parents may be able to get the property as defined under section 2(b) of the Act, the application was simply that the petitioners herein who were residing on the first floor portion had misbehaved with the parents and thus on that ground alone, an apprehension was expressed and the eviction was sought.

31. Considering the judgments of various High Courts and the difference in the rules framed in the State of Delhi and in the State of U.P., I have no hesitation in holding that the SDM did not have any powers to direct eviction and the SDM can only direct the children or relatives to provide for residential needs of parents if such an application is moved and the Tribunal finds it appropriate to order so. However, the District Magistrate who could have exercised such powers under Rule 21

that too if the conditions were satisfied to come to a conclusion that the senior citizens are being prohibited from enjoying the property and are being deprived of the same at the hands of the children or relatives which, I fear, is not existing in the present case.

32. **Conclusions :**

On interpretation and analysis of the Act, my conclusion is that under Chapter II, no power is vested in the Tribunal to direct eviction simplicitor from the property at the instance of senior citizens. However, the Tribunal is fully empowered to direct the children/relatives (as the case may be) to provide for a residence on an application being filed under Chapter II by a senior citizen.

The District Magistrate is empowered under Chapter V to pass orders and take such steps as may arise for ensuring that the senior citizen may enjoy the property, such steps may include right to order eviction only as a last recourse and in relation to a specific part of the property which are in joint possession of senior citizens as well as children/relatives.

33. Coming to the relief that can be moulded/granted in the present case, the allegation of the senior citizens was that the daughter in law, the petitioner no.2 had slapped the respondent no. 6 and on several occasions had issued threats and thus, there was apprehension and fear lurking in the minds of the respondent no.6 and her husband, the appropriate relief that can be granted to the respondents in the present case, in exercise of the power under Article 226 of the Constitution of India, is to direct the District Magistrate to ensure the safety and well being of the respondent no.6 and her husband and if required to use such measures as may be deemed appropriate by the District Magistrate on a request being made by the respondent no.6.

I also deem it appropriate to injunct the petitioners herein not to go to the ground floor portion of the house and not to do any acts to cause any inconvenience to the respondent no.6 and her husband. Any violation of this directions shall be dealt with by the concerned police station, on respondent no.6 or her husband approaching them.

34. I have not gone into the second question raised by the counsel for the petitioners that the order passed is in violation of the principles of natural justice as I have already held that the Tribunal did not have the jurisdiction to direct the eviction under the Scheme of the Act.

35. In view of the directions, as given above, both the writ petitions stand disposed off.

(2022)05ILR A461
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.01.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE PIYUSH AGRAWAL, J.

Writ C No. 32846 of 2021

Vinay Kumar & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri M.D. Singh Shekhar (Senior Advocate), Sri Vaibhav Goswami, Sri Ram Dayal Tiwari (Senior Adv.)

Counsel for the Respondents:
Sri A.P. Paul

(A) Civil Law - Seeking higher compensation - Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 - party can be denied relief, if he sleeps over the matter - repeated representations made will not keep the issues alive - law leans in favour of those who are alert and vigilant - Even equality has to be claimed at the right juncture and not on expiry of reasonable time - Even if there is no period prescribed for filing the writ petition under Article 226 of the Constitution of India, yet it should be filed within a reasonable time - dead cause of action cannot rise like a phoenix. (Para - 4,5,19)

(B) Delay and laches - doctrine of acquiescence - doctrine of delay and laches should not be lightly brushed aside - delay comes in the way of equity - Delay reflects inactivity and inaction on the part of a litigant "procrastination is the greatest thief of time" - law does not permit one to sleep and rise like a phoenix - court is not expected to give indulgence to such indolent persons- who compete with `Kumbhakarna' or for that matter 'Rip Van Winkle' - right not exercised for a long time is non-existent even if there is no limitation period prescribed. (Para - 7,12)

sale deeds - registered by the petitioners - way back in the year 2013 - on different dates - after receiving the amount of consideration - No issue raised till such time representation dated December 31, 2020 was filed - seeking higher compensation referring to the provisions of the Act and also the Government Order dated March 19, 2015 - order passed Court in Writ-C No. 19518 of 2017 - direction was issued to the Committee constituted in terms of Clause 3(1) of the Government Order dated March 19, 2015 - for reassessment of the compensation – contention - land of petitioners taken for construction of road on Indo-Nepal Border - should not be discriminated for payment of compensation.**(Para -2,3)**

HELD:- Writ petition filed in Court about eight years after the sale deeds were registered. Any subsequent event will not re-open the issue, which already stood settled. Petition deserves to be dismissed on this ground alone. **(Para - 3)**

Writ Petition dismissed. (E-7)

List of Cases cited:-

1. Basudeo & ors. Vs St. of U.P. & ors., Writ-C No. 19518 of 2017

2. St. of Uttaranchal & anr. Vs Sri Shiv Charan Singh Bhandari & ors., (2013)12 SCC 179

3. U.O.I. & ors. Vs M. K. Sarkar, (2010) 2 SCC 59

4. Karnataka Power Corp. Ltd. through its C.M.D. Vs K. Thangappan & anr., (2006) 4 SCC 322

5. St. of Orissa Vs Pyarimohan Samantaray, (1977) 3 SCC 396

6. St. of Orissa Vs Arun Kumar Patnaik, (1976) 3 SCC 579

7. B.S.N.L. Vs Ghanshyam Dass (2) & ors., (2011) 4 SCC 374

8. Jagdish Lal Vs St. of Haryana, (1977) 6 SCC 538

9. St. of T. N. Vs Seshachalam, (2007) 10 SCC 137

10. Ghulam Rasool Lone Vs St. of J & K & anr., (2009) 15 SCC 321

11. NDMC Vs Pan Singh & ors., (2007) 9 SCC 278

12. P. S. Sadasivasway Vs St. of T.N., (1975) 1 SCC 152

13. U.O.I. & ors. Vs Chaman Rana, (2018)5 SCC 798

14. U.O.I. & ors. Vs C. Girija & ors. , 2019(3) SCALE 527

15. Chennai Metropolitan Water Supply & Sewerage Board & ors. Vs T. T. Murali Babu , (2014) 4 SCC 108

16. St. of Mah. Vs Digambar , (1995) 4 SCC 683

17. St. of M.P. & ors. etc. Vs Nandlal Jaiswal & ors. etc., AIR 1987 SC 251

18. Mah. St. R.T.C. Vs Balwant Regular Motor Service, Amravati & ors., AIR 1969 SC 329

19. Lindsay Petroleum Co. Vs Prosper Armstrong Hurd, Abram Farewall, & John Kemp, (1874) 5 PC 221

20. St. of Mah. Vs Digambar, (1995) 4 SCC 683

21. St. of M.P. & ors. etc. Vs Nandlal Jaiswal & ors. etc. , AIR 1987 SC 251

22. Bal Krishan Vs St. of Punj. & ors., 2013(2) Recent Service Judgments 18, (P&H)

23. U.O.I.& ors. Vs M.K. Sarkar, (2010)2 SCC 59

24. Vijay Kumar Kaul & ors. Vs U.O.I. & ors., (2012)7 SCC 610

25. Prabhakar Vs Joint Director Sericulture Department & anr., (2015)15 SCC 1

26. St. of J & K Vs R.K. Zalpuri & ors., (2015)15 SCC 602

27. U.O.I. & ors. Vs Chaman Rana, (2018)5 SCC 798

28. Senior Divisional Manager, L.I.C. Vs Shree Lal Meena, (2019)4 SCC 479

29. B.C.C.L. & ors. Vs Shyam Kishore Singh, (2020)2 Supreme Today 189

30. Kapilaben Ambalal Patel & ors. Vs St. of Guj. & anr., 2020 SCC OnLine SC 439

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

1. The present writ petition has been filed seeking direction to the respondents to pay compensation to the petitioners in terms of the provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as 'the Act'). Further, direction has been sought for a decision on the representation dated December 31, 2020 filed by the petitioners seeking the aforesaid claim. Reference has been made to two sale deeds (Annexures-2 and 3) in which the landowners therein were granted compensation four times to the circle rate.

2. The learned Senior Counsel appearing for the petitioners submitted that in view of the Government Order dated March 19, 2015, the petitioners are entitled to receive compensation on the principles as laid down in the Act and the same have even been followed by the State in the cases of other landowners whose sale deeds were registered on July 7, 2017 (Annexure-3) and December 2, 2020 (Annexure-2). He did not dispute the fact that the sale deeds in the case of the petitioners were registered way back in the year 2013 on different dates, much prior to the issuance of the Government Order dated March 19, 2015. He also referred to an order passed by this Court in **Writ-C No. 19518 of 2017, titled as Basudeo and others** vs. State of U.P. and others in which a direction was issued to the Committee constituted in terms of Clause 3(1) of the Government Order dated March 19, 2015 for reassessment of the compensation. The argument is that the land of the petitioners having been taken for construction of road

on Indo-Nepal Border, they should not be discriminated for payment of compensation.

3. After hearing learned Senior Counsel for the petitioners, we do not find any merit in the present petition. The same deserves to be dismissed firstly on the ground of delay and laches. The sale deeds were got registered by the petitioners way back in the year 2013 on different dates after receiving the amount of consideration mentioned therein. No issue was raised by them till such time representation dated December 31, 2020 was filed seeking higher compensation referring to the provisions of the Act and also the Government Order dated March 19, 2015. The writ petition was filed in this Court about eight years after the sale deeds were registered. Any subsequent event will not re-open the issue, which already stood settled. The writ petition deserves to be dismissed on this ground alone.

4. Different facets of issue regarding delay and laches in filing the petition had been subject matter of consideration before Hon'ble the Supreme Court on number of occasions, wherein it has been consistently opined that the party can be denied relief, if he sleeps over the matter.

5. In **State of Uttaranchal and another v. Sri Shiv Charan Singh Bhandari and others, (2013)12 SCC 179,** Hon'ble the Supreme Court, while considering the issue regarding delay and laches and referring to earlier judgments on the issue, opined that repeated representations made will not keep the issues alive. A stale or a dead issue/dispute cannot be got revived even if such a representation has either been decided by the authority or got decided by getting a direction from the court as the issue regarding delay and laches is to be decided with reference to original cause of action and not with reference to any such order passed. Delay and laches on the part of a government servant may even deprive him of the benefit which had been given to others. Article 14 of the Constitution of India, in a situation of that nature, will not be attracted as it is well known that law leans in favour of those who are alert and vigilant. Even equality has to be claimed at the right juncture and not on expiry of reasonable time. Even if there is no period prescribed for filing the writ petition under Article 226 of the Constitution of India, yet it should be filed within a reasonable time. Such an order promoting a junior should normally be challenged within a period of six months or at the most in a year of such promotion. Though it is not a strict rule, the courts can always interfere even subsequent thereto, but relief to a person, who allows things to happen and then approach the court and puts forward a stale claim and try to unsettle settled matters, can certainly be refused relief on account of delay and laches. Anyone who sleeps over his rights is bound to suffer. An employee who sleeps like Rip Van Winkle and got up from slumber at his own leisure, deserves to be denied the relief on account of delay and laches. Relevant paragraphs from the aforesaid judgment are extracted below:-

"16. We have no trace of doubt that the respondents could have challenged the ad hoc promotion conferred on the junior employee at the relevant time. They chose not to do so for six years and the junior employee held the promotional post for six years till regular promotion took place. The submission of the learned counsel for the respondents is that they had given representations at the relevant time

but the same fell in deaf ears. It is interesting to note that when the regular selection took place, they accepted the position solely because the seniority was maintained and, thereafter, they knocked at the doors of the tribunal only in 2003. It is clear as noon day that the cause of action had arisen for assailing the order when the junior employee was promoted on ad hoc basis on 15.11.1983. In C. Jacob v. Director of Geology and Mining and another, (2008) 10 SCC 115, a two-Judge Bench was dealing with the concept of representations and the directions issued by the court or tribunal to consider the representations and the challenge to the said rejection thereafter. In that context, the court has expressed thus:-

"10. Every representation to the Government for relief, may not be replied on merits. Representations relating to matters which have become stale or barred by limitation, can be rejected on that ground alone, without examining the merits of the claim. In regard to representations unrelated to the Department, the reply may be only to inform that the matter did not concern the Department or to inform the appropriate Department. Representations with incomplete particulars may be replied by seeking relevant particulars. The replies to such representations, cannot furnish a fresh cause of action or revive a stale or dead claim."

18. In Union of India and others v. M. K. Sarkar, (2010) 2 SCC 59, this Court, after referring to C. Jacob (supra) has ruled that:

15. When a belated representation in regard to a "stale" or "dead" issue/dispute is considered and decided, in compliance with a direction by the court/tribunal to do so, the date of such decision cannot be considered as furnishing a fresh cause of action for reviving the "dead" issue or time- barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a Court's direction. Neither a court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches.

19. From the aforesaid authorities it is clear as crystal that even if the court or tribunal directs for consideration of representations relating to a stale claim or dead grievance it does not give rise to a fresh cause of action. The dead cause of action cannot rise like a phoenix. Similarly, a mere submission of representation to the competent authority does not arrest time.

20. In Karnataka Power Corpn. Ltd. through its Chairman & Managing Director v. K. Thangappan and another, (2006) 4 SCC 322, the Court took note of the factual position and laid down that when nearly for two decades the respondent-workmen therein had remained silent mere making of representations could not justify a belated approach.

21. In State of Orissa v. Pyarimohan Samantaray, (1977) 3 SCC 396, it has been opined that making of repeated representations is not a satisfactory explanation of delay. The said principle was reiterated in State of Orissa v. Arun Kumar Patnaik, (1976) 3 SCC 579.

22. In Bharat Sanchar Nigam Limited v. Ghanshyam Dass (2) and others, (2011) 4 SCC 374, a three-Judge Bench of this Court reiterated the principle stated in Jagdish Lal v. State of Haryana, (1977) 6 SCC 538 and proceeded to observe that as the respondents therein preferred to sleep over their rights and approached the

tribunal in 1997, they would not get the benefit of the order dated 7.7.1992.

23. In State of T. N. v. Seshachalam, (2007) 10 SCC 137, this Court, testing the equality clause on the bedrock of delay and laches pertaining to grant of service benefit, has ruled thus:-

"16. ... filing of representations alone would not save the period of limitation. Delay or laches is a relevant factor for a court of law to determine the question as to whether the claim made by an applicant deserves consideration. Delay and/or laches on the part of a government servant may deprive him of the benefit which had been given to others. Article 14 of the Constitution of India would not, in a situation of that nature, be attracted as it is well known that law leans in favour of those who are alert and vigilant."

24. There can be no cavil over the fact that the claim of promotion is based on the concept of equality and equitability, but the said relief has to be claimed within a reasonable time. The said principle has been stated in Ghulam Rasool Lone v. State of Jammu and Kashmir and another, (2009) 15 SCC 321.

25. In NDMC v. Pan Singh and others, (2007) 9 SCC 278, the Court has opined that though there is no period of limitation provided for filing a writ petition under Article 226 of the Constitution of India, yet ordinarily a writ petition should be filed within a reasonable time. In the said case the respondents had filed the writ petition after seventeen years and the court, as stated earlier, took note of the delay and laches as relevant factors and set aside the order passed by the High Court which had exercised the discretionary jurisdiction.

26. Presently, sitting in a time machine, we may refer to a two Judge Bench decision in P. S. Sadasivasway v. State of Tamil Nadu, (1975) 1 SCC 152, wherein it has been laid down that:

"2. ... A person aggrieved by an order of promoting a junior over his head should approach the court at least within six months or at the most a year of such promotion. It is not that there is any period of limitation for the Courts to exercise their powers under Article 226 nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time, but it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for the relief and who stand by and allow things to happen and then approach the court to put forward stale claims and try to unsettle settled matters."

27. We are absolutely conscious that in the case at hand the seniority has not been disturbed in the promotional cadre and no promotions may be unsettled. There may not be unsettlement of the settled position but, a pregnant one, the respondents chose to sleep like Rip Van Winkle and got up from their slumber at their own leisure, for some reason which is fathomable to them only. But such fathoming of reasons by oneself is not countenanced in law. Anyone who sleeps over his right is bound to suffer. As we perceive neither the tribunal nor the High Court has appreciated these aspects in proper perspective and proceeded on the base that a junior was promoted and, therefore, the seniors cannot be denied the promotion.

28. Remaining oblivious to the factum of delay and laches and granting relief is contrary to all settled principles and even would not remotely attract the concept of discretion. We may hasten to add that the same may not be applicable in all circumstances where certain categories

of fundamental rights are infringed. But, a stale claim of getting promotional benefits definitely should not have been entertained by the tribunal and accepted by the High Court.

29. True it is, notional promotional benefits have been granted but the same is likely to affect the State exchequer regard being had to the fixation of pay and the pension. These aspects have not been taken into consideration. What is urged before us by the learned counsel for the respondents is that they should have been equally treated with Madhav Singh Tadagi. But equality has to be claimed at the right juncture and not after expiry of two decades. Not for nothing, it has been said that everything may stop but not the time, for all are in a way slaves of time. There may not be any provision providing for limitation but a grievance relating to promotion cannot be given a new lease of life at any point of time."

6. The aforesaid view was followed by Hon'ble the Supreme Court in **Union of India and others v. Chaman Rana, (2018)5 SCC 798** and **Union of India and others v. C. Girija and others 2019(3) SCALE 527.**

7. In **Chennai Metropolitan Water Supply and Sewerage Board and others v. T. T. Murali Babu, (2014)4 SCC 108,** Hon'ble the Supreme Court opined as under:-

"13. First, we shall deal with the facet of delay. In Maharashtra State Road Transport Corporation v. Balwant Regular Motor Service, Amravati and others, AIR 1969 SC 329, the Court referred to the principle that has been stated by Sir Barnes Peacock in Lindsay Petroleum Co. v. Prosper Armstrong Hurd, Abram Farewall, and John Kemp, (1874) 5 PC 221, which is as follows:-

"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

14. In State of Mahrashtra v. Digambar, (1995) 4 SCC 683, while dealing with exercise of power of the High Court under Article 226 of the Constitution, the Court observed that power of the High Court to be exercised under Article 226 of the Constitution, if is discretionary, its exercise must be judicious and reasonable, admits of no controversy. It is for that reason, a person's entitlement for relief from a High Court under Article 226 of the Constitution, be it against the State or anybody else, even if is founded on the allegation of infringement of his legal right, has to necessarily depend upon unblameworthy conduct of the person

seeking relief, and the court refuses to grant the discretionary relief to such person in exercise of such power, when he approaches it with unclean hands or blameworthy conduct.

15. In State of M. P. and others etc. etc. vs. Nandlal Jaiswal and others etc. etc., AIR 1987 SC 251, the Court observed that it is well settled that power of the High Court to issue an appropriate writ under Article 226 of the Constitution is discretionary and the High Court in exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. It has been further stated therein that if there is inordinate delay on the part of the petitioner in filing a petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction. Emphasis was laid on the principle of delay and laches stating that resort to the extraordinary remedy under the writ jurisdiction at a belated stage is likely to cause confusion and public inconvenience and bring in injustice.

16. Thus, the doctrine of delay and laches should not be lightly brushed aside. A writ court is required to weigh the explanation offered and the acceptability of the same. The court should bear in mind that it is exercising an extraordinary and equitable jurisdiction. As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure, the court would be under legal obligation to scrutinize whether the lis at a belated stage should be entertained or not. Be it noted, delay comes in the way of equity. In certain circumstances delay and laches may not be fatal but in most circumstances inordinate delay would only invite disaster for the litigant who knocks at the doors of the court. Delay reflects inactivity and inaction on the part of a litigant "a litigant who has forgotten the basic norms, namely, "procrastination is the greatest thief of time" and second, law does not permit one to sleep and rise like a phoenix. Delay does bring in hazard and causes injury to the lis. In the case at hand, though there has been four years' delay in approaching the court, yet the writ court chose not to address the same. It is the duty of the court to scrutinize whether such enormous delay is to be ignored without any justification. That apart, in the present case, such belated approach gains more significance as the respondent employee being absolutely careless to his duty and nurturing a lackadaisical attitude to the responsibility had remained unauthorisedly absent on the pretext of some kind of ill health. We repeat at the cost of repetition that remaining innocuously oblivious to such delay does not foster the cause of justice. On the contrary, it brings in injustice, for it is likely to affect others. Such delay may have impact on others' ripened rights and may unnecessarily drag others into litigation which in acceptable realm of probability, may have been treated to have attained finality. A court is not expected to give indulgence to such indolent persons- who compete with `Kumbhakarna' or for that matter 'Rip Van Winkle'. In our considered opinion, such delay does not deserve any indulgence and on the said ground alone the writ court should have thrown the petition overboard at the very threshold."

8. In **Bal Krishan v. State of Punjab and others, 2013(2) Recent Service Judgments 18, (P&H)** wherein the petitioner, after rendering about 34 years of

service, sought refixation of his pay from the date he joined service by filing a petition more than three years after his retirement, the High Court of Punjab & Haryana dismissed the writ petition on account of delay and laches only.

9. The issue regarding decision of a claim on a direction by the Court on the representation filed by a writ petitioner was also considered in **Union of India and others v. M.K. Sarkar, (2010)2 SCC 59** wherein it was held that the issue of limitation or delay and laches is to be considered with reference to original cause of action and not with reference to an order passed in compliance to Court's direction. The Court's direction to consider representation or a decision given in compliance thereof, will not extend the limitation or erase the delay and laches.

10. In **Vijay Kumar Kaul and others v. Union of India and others, (2012)7 SCC 610,** Hon'ble the Supreme Court declined relief to the petitioners who were fence sitters as they had approached the Court after the issues raised by other employees were decided. Relief was declined on account of delay and laches.

11. Facts of the case in hand are also similar as writ petition was filed referring to other cases.

12. The issue was further examined in **Prabhakar v. Joint Director Sericulture Department and another, (2015)15 SCC 1**. It was a case under the Industrial Disputes Act. In the aforesaid case the matter in dispute was regarding delay in raising the industrial dispute. The opinion expressed by the Court was that right not exercised for a long time is non-existent even if there is no limitation period prescribed. The litigant was non-suited on the doctrine of delay and laches as well as doctrine of acquiescence. Paragraph 38 of the judgment is extracted below:-

"38. Likewise, if a party having a right stands by and sees another acting in a manner inconsistent with that right and makes no objection while the act is in progress he cannot afterwards complain. This principle is based on the doctrine of acquiescence implying that in such a case party who did not make any objection acquiesced into the alleged wrongful act of the other party and, therefore, has no right to complain against that alleged wrong."

13. The Halsbury's Laws of England explains delay, latches and acquiescence as under:

"In determining whether there has been such delay as to amount to laches, the chief points to be considered are:

(i) acquiescence on the claimant's part; and

(ii) any change of position that has occurred on the defendant's part.

Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches."

14. In **State of Jammu & Kashmir v. R. K. Zalpuri and others, (2015)15 SCC 602** Hon'ble the Supreme Court considered the issue regarding delay and laches in raising the dispute before the Court. It was opined that the issue sought to be raised by the petitioners therein was not required to be addressed on merits on account of delay and laches. The relevant paras thereof are extracted below:-

"27. The grievance agitated by the respondent did not deserve to be addressed on merits, for doctrine of delay and laches had already visited his claim like the chill of death which does not spare anyone even the one who fosters the idea and nurtures the attitude that he can sleep to avoid death and eventually proclaim "Deo gratias - thanks to God".

28. Another aspect needs to be stated. A writ court while deciding a writ petition is required to remain alive to the nature of the claim and the unexplained delay on the part of the writ petitioner. Stale claims are not to be adjudicated unless non-interference would cause grave injustice. The present case, need less to emphasise, did not justify adjudication. It deserves to be thrown overboard at the very threshold, for the writ petitioner had accepted the order of dismissal for half a decade and cultivated the feeling that he could freeze time and forever remain in the realm of constant present."

15. The aforesaid view was followed by Hon'ble the Supreme Court in **Union of India and others v. Chaman Rana, (2018)5 SCC 798.**

16. Subsequently, a Constitution Bench of Hon'ble the Supreme Court in **Senior Divisional Manager, Life Insurance Corporation v. Shree Lal Meena, (2019)4 SCC 479,** considering the principle of delay and laches, opined as under:-

"36. We may also find that the appellant remained silent for years together and that this Court, taking a particular view subsequently, in Sheel Kumar Jain v. New India Assurance Company Limited, (2011)12 SCC 197 would not entitle stale claims to be raised on this behalf, like that of the appellant. In fact the appellant slept over the matter for almost a little over two years even after the pronouncement of the judgment.

37. Thus, the endeavour of the appellant, to approach this Court seeking the relief, as prayed for, is clearly a misadventure, which is liable to be rejected, and the appeal is dismissed."

17. In **Bharat Coking Coal Ltd. and others v. Shyam Kishore Singh, (2020)2 Supreme Today 189,** the issue regarding the delay and laches, was considered by Hon'ble the Supreme Court and a petition filed belatedly, seeking change in the date of birth in the service record, was dismissed.

18. Recently, Hon'ble the Supreme Court in **Kapilaben Ambalal Patel and others v. State of Gujarat and another, 2020 SCC OnLine SC 439,** while agreeing with the conclusion recorded by the Division Bench of the High Court that the writ petition filed in the year 2001 questioning the Possession Panchanama dated March 20, 1986, suffered from laches, held as under:-

"23. ... However, it is not necessary for us to dilate on these aspects having agreed with the conclusion recorded by the Division Bench of the High Court

that the writ petition filed in the year 2001 by the appellants with limited relief of questioning the Possession Panchanama dated 20.3.1986, suffered from laches. The Division Bench of the High Court noted that the learned single Judge completely glossed over this crucial aspect of the matter, and we find no reason to depart from that conclusion.

24. In view of the above, it is not necessary for us to dilate on other contentions raised by the appellants or by the respondent-State on merits.

25. Having said thus, it must follow that the present appeal is devoid of merits and the impugned decision of the Division Bench of the High Court ought to be upheld on the threshold ground of writ petition being barred by laches."

19. So far as the sale deeds (Annexures-2 and 3), to which reference has been made by learned Senior Counsel, are concerned, the same were registered after issuance of Government Order dated March 19, 2015. Further in **Basudeo's case (supra)**, the sale deed was registered in the year 2015, after the Government Order dated March 19, 2015 came into force. In the case in hand, the sale deeds were registered in the year 2013 on different dates, much prior to the Government Order dated March 19, 2015.

20. For the reasons mentioned above, we do not find any case is made out for interference in the present case. The same is accordingly, dismissed.

(2022)05ILR A471

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 03.03.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.

THE HON'BLE PIYUSH AGRAWAL, J.

Writ C No. 33025 of 2021

Ram Bharose ...Petitioner

Versus

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

Counsel for the Petitioner:

Sri Jai Singh

Counsel for the Respondents:

C.S.C., Sri Nipun Singh, Ms. Meenakshi Singh, Sri Sunil Kumar Misra

(A) Civil Law - Payment of compensation - Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 - Section 64 - any land owner aggrieved by the assessment of amount of compensation on account of acquisition of land - remedy to file representation before the Collector within six weeks from the date of award . (Para -7)

Appropriate compensation not paid to petitioner (poor land owner) - acquisition of his land - notifications under Sections 4 and 6 of 1894 Act - award not announced immediately - announced after a period of 36 years - by Additional District Magistrate (Land Acquisition) – grievance raised - filing appeal to Commissioner within six weeks from the date of award - sent through registered-post - rejected as not maintainable - could not get any relief, as wrong forum was invoked - objection not filed under Section 64 of 2013 Act **. (Para - 6,7)**

HELD:- Be that as it may, it is a case of a poor land owner, whose land was acquired and immediately thereafter he raised the issue regarding amount of compensation though filing an appeal to the Commissioner, same should be considered as objection filed in terms of Section 64 of the 2013 Act, so that petitioner is not deprived of assessment of fair compensation on account of acquisition of his land. **(Para - 8)**

Petition allowed. (E-7**)**

List of Cases cited:-

Krishna Autar & ors. Vs St. of U.P. & ors. , Writ-C No. 44720 of 2016

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

1. The grievance raised by the petitioner in the present petition is that appropriate compensation has not been paid to him on account of acquisition of his land. The prayer in the present petition is for quashing the order dated November 11, 2020 passed by respondent no. 3 vide which his claim was rejected. Prayer has also been made for quashing the award dated August 17, 2016 passed by Additional District Magistrate (Land Acquisition), Kanpur Nagar. Prayer has been made for payment of compensation in terms of provisions of Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as "2013 Act").

2. Learned counsel for the petitioner submitted that the land of the petitioner was proposed to be acquired by issuing notifications under Section 28 of the U.P. Avas Evam Vikas Parishad Act, 1965 (hereinafter referred to as "1965 Act") read with Section 4 of Land Acquisition Act, 1894 (hereinafter referred to as "1894 Act") on March 10, 1973. As the provisions of 1894 Act are applicable for acquisition of land under 1965 Act, notification under Section 6 was issued on August 27, 1980. The award was announced on August 17, 2016 in terms of the provisions of the 2013 Act. However, assessment of the compensation was not appropriately made. Immediately thereafter on September 6, 2016, the petitioner was advised to file appeal against the award to the Commissioner, Kanpur Division, Kanpur. As the same was not being decided, Writ-C No. 12744 of 2020 (Ram Bharose Vs. State of U.P. and others) was filed in this Court. The same was disposed of on September 8, 2020 with a direction for disposal of the appeal filed by the petitioner. The impugned order dated November 11, 2020 has been passed thereon.

3. Referring to the judgment of this Court in Writ-C No. 44720 of 2016 (Krishna Autar and others Vs. State of U.P. and others), prayer is that the compensation payable to the petitioner deserves to be assessed in terms thereof.

4. On the other hand, learned counsel for the respondents submitted that the award having been announced, in the case in hand, after the 2013 Act came into force, applying the procedure laid down therein, petitioner, if aggrieved, has remedy to file objection under Section 64 thereof. The same having not been filed, the award should not be permitted to be challenged by filing writ petition in this Court. No appeal was maintainable against the award before the Commissioner. That remedy was wrongly availed of by him. No relief can be granted to him at this stage.

5. Heard learned counsel for the parties and perused the paper-book.

6. Some of the basic facts, which are not in dispute in the present petition, are that for acquisition of land of the petitioner, notifications under Sections 4 and 6 of the 1894 Act were issued on March 10, 1973 and August 27, 1980. The award was not announced immediately thereafter. It was after a period of 36 years, that on August 17, 2016, the award was announced by the

Additional District Magistrate (Land Acquisition), Kanpur Nagar. Feeling aggrieved, the petitioner, as may have been advised at that time, instead of filing objection under Section 64 of the 2013 Act, preferred appeal to the Commissioner, Kanpur Division, Kanpur. The same was rejected as not maintainable.

7. In terms of Section 64 of the 2013 Act, if any land owner is aggrieved by the assessment of amount of compensation on account of acquisition of land, he has remedy to file representation before the Collector within six weeks from the date of award. What we find in the case in hand is that grievance was raised by the petitioner by filing appeal to the Commissioner within six weeks from the date of the award. The same was sent by him through registered-post. After filing the appeal, petitioner had been pursuing his appeal but could not get any relief, as wrong forum was invoked.

8. Be that as it may, it is a case of a poor land owner, whose land was acquired and immediately thereafter he has raised the issue regarding amount of compensation though filing an appeal to the Commissioner, but, in our opinion, the same should be considered as objection filed in terms of Section 64 of the 2013 Act, so that the petitioner is not deprived of assessment of fair compensation on account of acquisition of his land. The aforesaid objection, which was sent by him through registered post to the Commissioner, Kanpur Division, Kanpur and copy whereof is annexed as Annexure-4, be dealt with by Collector concerned in terms of provisions of Section 64 of the 2013 Act. Needful shall be done within a period of three months from the date of receipt of copy of this order.

9. The petition stands allowed in aforesaid terms.

(2022)05ILR A473
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.05.2022

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ C No. 1002174 of 2015
&
Writ C No. 1002173 of 2015

Surendra Pratap & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Shiva Nand Pandey

Counsel for the Respondents:
C.S.C., Mohd. Murtaza Khan, Prashant Arora, Vashu Deo Mishra

(A) Tort Law - liability under tort – Quantum of compensation - Indian Penal Code, 1860 - Section 304 A - The Public Liability Insurance Act, 1991 (PLI Act) - Section 3, 6,7,8 - 'just compensation' - under Section 6 of the PLI Act - Collector is bound to determine and pay the compensation which is a 'just compensation' - courts/ tribunals are not only expected to grant 'just compensation', it is the duty of the court to grant 'just compensation' especially when the claim arises out of the socio-economic legislation – determination of compensation - parameters be established - age , income & number of the dependents of deceased - claim of compensation on both pecuniary and non-pecuniary heads. (Para - 22,23)

(B) Tort Law - The Public Liability Insurance Act, 1991 - Section 3 - provides for grant of compensation on the principles of 'No fault' - confines to the

quantum of compensation to the extent indicated in the Schedule, Section 6 - provides for compensation other than under 'No fault' - empowers the grant of compensation as specified in Section 7 of the PLI Act - liability under a tort in respect of the public undertaking would arise on establishing the legal wrong/ tort - in the case where liability is claimed against public undertaking which is amenable to writ jurisdiction, the power under Article 226 can be exercised for grant of just and proper compensation. (Para -16,20,)

Death occurred on account of electrocution - improper maintenance of electricity lines by respondent Corporation - negligence of respondent Corporation - petitioners made several applications for grant of compensation - no compensation paid - FIR registered against officers of electricity department - claim petition filed under Section 6 of PLI Act before District Magistrate - amount of compensation awarded is arbitrary and cannot be termed as 'just compensation' - merely followed a Government Order by awarding Rs.1,00,000/- (Rupees one lac) as compensation - which is neither provided under Act nor under Rules - amount awarded be enhanced - petitioner be paid just compensation for which he is entitled in accordance with law. **(Para -2,3,4,5,13)**

HELD:- Petitioners entitled for payment of compensation along with interest @ 6% from the date of accident up to actual payment/ realization.**(Para – 27,29)**

Writ petition disposed off. (E-7)

List of Cases cited:-

1. Bheem Sen Vs St. of U.P. & ors.., 2019 (6) ADJ 586

2. Yas Pal Singh (Minor) & anr. Vs St. of U.P. & ors.., 2017 (5) ADJ 696

3. U.P.P.C.L. & ors.. Vs D.M./ Collection, Sultanpur & ors.. , Writ Petition No.42 (MS) of 2005

4. Nilabati Behera Vs St. of Orissa, (1993) 2 SCC 746

5. St. of M.P. Vs Shyamsunder Trivedi, (1995) 4 SCC 262

6. People's Union for Civil Liberties Vs U.O.I., (1997) 3 SCC 433

7. Kaushalya Vs St. of Punj., (1999) 6 SCC 754

8. Supreme Court Legal Aid Committee Vs St. of Bihar, (1991) 3 SCC 482

9. Jacob George (Dr.) Vs St. of Kerala, (1994) 3 SCC 430

10. Paschim Banga Khet Mazdoor Samity Vs St. of W.B., (1996) 4 SCC 37

11. Manju Bhatia Vs New Delhi Municipal Council, (1997) 6 SCC 370

12. National Insurance Company Limited Vs Pranay Sethi & ors.., (2017) 16 SCC 680

13. Sarla Verma (Smt.) & ors.. Vs D.T.C. & anr., (2009) 6 SCC 121

14. General Manager, Kerala St. R.T.C. Vs. Susamma Thomas, 1994 (2) SCC 176

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

1. Heard learned Counsel for the petitioners as well as Sri Indrajeet Shukla, learned Additional Chief Standing Counsel appearing on behalf of the State and Sri Vasudeo Mishra, who appears on behalf of the respondents no.3 and 4.

2. The facts that emerged from Writ-C No.1002174 of 2015 are that one Sri Amit Kumar Pandey died on account of coming into contact with live wire on 12.10.2011 at 08:45 AM due to electric shock. It is also on record that with regard to the incident, an FIR was registered as Case Crime No.358 of 2011, under Section 304A of the IPC against the officers of the electricity department on account of the death of Sri Amit Kumar Pandey. The petitioners made

several applications for grant of compensation but the same was not done. It is specifically pleaded in para 8 of the writ petition that with regard to the live wires, a complaint was also made to the electricity department and apprehension was also expressed that the improper laying of electricity lines and that too fraudulently can lead to an accident anytime which can result in loss of life and property.

3. As no compensation was paid by the electricity department, an application was filed under the Public Liability Insurance Act, 1991 (in short ' the PLI Act') before the District Magistrate wherein it was stated that at the time of accident, the age of the deceased Amit Kumar Pandey was 23 years and was earned Rs.9,000/- per month. It was also stated that Amit Kumar Pandey was survived by his father, mother, wife and two minor children. It was also stated that on the date of incident i.e. 12.10.2011 at about 08:45 AM, the deceased was working along with his uncle Brijesh Pandey. While going to the field, the uncle of the deceased came in contact with the electricity and when the deceased tried to save him, he got electrocuted and died. It is also recorded that after the death of Amit Kumar Pandey, postmortem was also conducted. The cause of death as shown in the postmortem report is shock as a result of electrocution.

4. The facts that emerge from Writ-C No.1002173 of 2015 are that as per the allegations one Brijesh Pandey died in the same incident in which Amit Kumar Pandey also died arising out of electrocution, as such, a claim petition was filed under Section 6 of the PLI Act before the District Magistrate alleging that the claimants i.e. father and mother were entitled for compensation on account of death of Brijesh Pandey. It is stated that he also died in the incident which took place on 12.10.2011 in which Amit Kumar Pandey died. An FIR was lodged and a postmortem was conducted over the body of Brijesh Pandey which discloses the cause of death as shock as a result of electrocution. It was alleged that late Brijesh Pandey was aged about 28 years and was earning Rs.9000/- per month and on the application of the claimants petitioners herein, the District Magistrate granted compensation of Rs.1,00,000/- (Rupees One Lac) vide order dated 13.03.2015 on the same reasoning as contained in the award passed in the case of Amit Kumar Pandey.

5. The Counsel for the petitioners argues that the amount of compensation as awarded by the District Magistrate amounting to Rs.1,00,000/- (Rupees one lac) is arbitrary and cannot be termed as 'just compensation'. He argues that in terms of the mandate of Section 6 of the PLI Act, it was incumbent upon the authority to award 'just compensation' after an inquiry which the District Magistrate has failed to do. He argues that the District Magistrate has merely followed a Government Order by awarding Rs.1,00,000/- (Rupees one lac) as compensation which is neither provided under the Act nor under the Rules and thus, it is prayed that the amount as awarded on 13.03.2015 be enhanced and the petitioner be paid just compensation for which he is entitled in accordance with law.

6. In support of the said submissions, the petitioner places reliance on the judgment of this Court in the case of ***Bheem Sen vs State of U.P. and others; 2019 (6) ADJ 586*** whereby this Court after considering the two earlier judgments of the High Court as well as the judgment of

the Hon'ble Supreme Court had proceeded to award the compensation of Rs.40,00,000/- (Rupees forty lac). He also places reliance on another judgment of this Court in the case of ***Yas Pal Singh (Minor) and another vs State of U.P. and others; 2017 (5) ADJ 696.*** He also drawn my attention to the judgment of the Hon'ble Supreme Court wherein considering the provisions of Motor Vehicle Act, the Hon'ble Supreme Court was of the view that it is incumbent upon all the courts to ensure just compensation irrespective of the fact that whether the same is claimed or not.

7. The Counsel for the respondent, on the other hand, argues that as no finding of fault has been recorded, the maximum compensation that could have been paid is provided under Section 3 of the Act and in terms of the Schedule of the said Act. The petitioners could be paid only Rs.25,000/- (Rupees Twenty Five Thousand), however, in terms of the Government Order issued by the concerned Department, an amount of Rs.1,00,000/- (Rupees one lac) has been paid, thus, the order of the District Magistrate cannot be termed as arbitrary. He further argues that in any case, no inquiry to the quantum of compensation has been done by the District Magistrate.

8. The Counsel for the respondent places reliance on the judgment of this Court passed in the case of ***U.P. Power Corporation Limited and others vs District Magistrate/ Collection, Sultanpur and others*** decided on 07.09.2021 in Writ Petition No.42 (MS) of 2005.

9. In the light of the arguments as raised between the parties, this Court is to consider whether the amount of compensation awarded can be termed as 'just' and whether the court while exercise the power under Article 226 of the Constitution of India can enhance the compensation from the face of pleadings exchanged between the parties?

10. Considering the claim of the petitioners that the incident occurred on account of the negligence of the department, specific pleadings in this regard has been made in para 8 of the writ petition wherein it has been stated that admittedly complaints were made with regard to the improper keeping of the electricity wire and an apprehension had also expressed that the negligent act of the department in not maintaining the electricity can cause accident and loss of life and of property. Annexure-5 of the writ petition is an application moved on 23.11.2006.

11. To elaborate further paragraph 8 of the writ petition and its reply as contained in para 7 of the counter affidavit are quoted hereinbelow:

"8. That in support of his claim, the petitioners have also filed the copy of several applications which were filed by the uncle of the deceased at the time of forceful electric connection over the land of petitioner upon which junior Engineer Electric has been directed to visit the spot and insure no danger took place, but inspite of repeated directions given by the Sub-Divisional Magistrate and Executive Engineer and District Magistrate, Sultanpur nothing has been ensured by Junior engineer Electric and as such due to grass and negligent act of electricity department an incident took place in which the son of petitioner nos. 1 and 2 and husband of the petitioner no.3 and father of the petitioner nos. 4 and 5 died. The copies

of the applications moved by the uncle of the deceased before the opposite parties are being annexed herewith collectively as Annexure No.5 to this writ petition.

7. That the contents of paragraph 8 of the writ petition as stated is not correct hence denied."

12. A perusal of the award itself indicates that the stand of the electricity department before the District Magistrate was that one of the residents of the village Ram Samhar had extracted the electricity by extending a cable without the permission of the department in an illegal manner and on receiving the information of the accident, the electricity department had taken steps to stop current flow from the cable. It was also the stand of the department before the District Magistrate that the death had occurred on account of the electrocution, however, it could not be termed as fault of the department. In view of there being specific pleadings, supported by Annexure-5 and there being no specific denial to the said pleadings coupled with the stand taken by the department before the District Magistrate, it can be safely presumed that the department was negligent in not checking unauthorized use of electricity by extension of cables over the area in question.

13. Considering the submissions made at the bar, it is clear that the death occurred on account of electrocution and improper maintenance of the electricity lines by the respondent Corporation which fact has been admitted by the respondents in the stand taken before the District Magistrate, as such, the negligence of the respondent Corporation stands established.

14. The next issue is to decide 'what would be the just compensation'. Specific pleadings in this regard in the form of the petition before the District Magistrate with regard to the age of the deceased, his dependants and his income which according to the petitioners was Rs.9,000/- per month was made.

15. The Counsel for the respondents places heavy reliance on the judgment of this Court in the case of *U.P. Power Corporation Limited and others vs District Magistrate/ Collection, Sultanpur and others (supra)* wherein this Court after considering the mandate of Sections 3, 7 and 8 of the PLI Act came to the conclusion that the petitioner while filing the claim petition under the Public Liability Insurance Act can be entitled to claim only the compensation as specified in the Schedule as referred to in Section 3 of the PLI Act and claiming compensation of higher amount, the PLI Act, 1991 can be of no avail. It was further held that in the PLI Act, there is no mechanism by which it can be said that the principles for awarding compensation in the case of Motor Vehicles Acts can be applied for computing the compensation under the PLI Act.

16. I have gone through the said judgment and with respect, I differ with it for the reason that from the plain reading of the PLI Act, it is clear that the compensation can be claimed under the said Act under two provisions, firstly under Section 3, which provides for grant of compensation on the principles of 'No fault' and confines to the quantum of compensation to the extent indicated in the Schedule as appended to the Act, however, Section 6 of the Act provides for compensation other than under 'No fault' and empowers the grant of compensation as specified in Section 7 of the PLI Act.

17. In the judgment passed in the case of *U.P. Power Corporation Limited and others vs District Magistrate/ Collection, Sultanpur and others (supra),* the mandate of Section 6 was not brought to the notice of the Court concerned and as such, the judgment was passed under an impression that the claim can be made and awarded only under Section 3 which is qualified by Sections 7 and 8 of the said Act whereas Section 6 provides for an application other than an application which is prescribed under Section 3 of the PLI Act and in fact, the plain reading of Section 7 makes it clear that the same refers to the application filed under Section 6(1) of the Act.

18. For perusal of Sections 3, 6, 7 and 8 of the PLI Act are quoted below:

*"**3. Liability to give relief in certain cases on principle of no fault.**--(1) Where death or injury to any person (other than a workman) or damage to any property has resulted from an accident, the owner shall be liable to give such relief as is specified in the Schedule for such death, injury or damage.*

(2) In any claim for relief under sub-section (1) (hereinafter referred to in this Act as claim for relief), the claimant shall not be required to plead and establish that the death, injury or damage in respect of which the claim has been made was due to any wrongful act, neglect or default of any person.

Explanation.--For the purposes of this section,--

(i) "workman" has the meaning assigned to it in the Workmen's Compensation Act, 1923 (8 of 1923);

(ii) "injury" includes permanent total or permanent partial disability or sickness resulting out of an accident.

***6. Application for claim for relief.** (1) An application for claim for relief may be made -*

(a) by the person who has sustained the injury;

(b) by the owner of the property to which the damage has been caused;

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorised by such person or owner of such property 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 relief, 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.

(2) Every application under sub-section (1) shall be made to the Collector and shall be in such form, contain such particulars and shall be accompanied by such documents as may be prescribed.

(3) No application for relief shall be entertained unless it is made within five years of the occurrence of the accident.

***7. Award of relief.**--(1) On receipt of an application under sub-section (1) of section 6, the Collector shall, after giving notice of the application to the owner and after giving the parties an opportunity of being heard, hold an inquiry into the claim or, each of the claims, and may make an award determining the amount of relief which appears to him to be just and specifying the person or persons to whom such amount of relief shall be paid.*

(2) The Collector shall arrange to deliver copies of the award to the parties concerned expeditiously and in any case

within a period of fifteen days from the date of the award.

(3) When an award is made under this section -

(a) the insurer, who is required to pay any amount in terms of such award and to the extent specified in sub-section (2B) of section 4, shall, within a period of thirty days of the date of announcement of the award, deposit that amount in such manner as the Collector may direct;

(b) the Collector shall arrange to pay from the Relief Fund, in terms of such award and in accordance with the scheme under section 7A, to the person or persons referred to in sub-section (1) such amount as may be specified in that scheme;

(c) the owner shall, within such period, deposit such amount in such manner as the Collector may direct.]

(4) In holding any inquiry under sub-section (1), the Collector may, subject to any rules made in this behalf, follow such summary procedure as he thinks fit.

(5) The Collector 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 Collector 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).

(6) Where the insurer or the owner against whom the award is made under sub-section (1) fails to deposit the amount of such award within the period specified under sub-section (3), such amount shall be recoverable from the owner, or as the case may be, the insurer as arrears of land revenue or of public demand.

(7) A claim for relief in respect of death of, or injury to, any person or damage to any property shall be disposed of as expeditiously as possible and every endeavour shall be made to dispose of such claim within three months of the receipt of the application for relief under sub-section (1) of section 6.

(8) Where an owner is likely to remove or dispose of his property with the object of evading payment by him of any amount of the award, the Collector may, in accordance with the provisions of rules 1 to 4 of Order XXXIX of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908), grant a temporary injunction to restrain such act.]

8. Provisions as to other right to claim compensation for death, etc.--(1) *The right to claim relief under sub-section (1) of section 3 in respect of death of, or injury to, any person or damage to any property shall be in addition to any other right to claim compensation in respect thereof under any other law for the time being in force.*

(2) Notwithstanding anything contained in sub-section (1), where in respect of death of, or injury to, any person or damage to any property, the owner, liable to give claim for relief, is also liable to pay compensation under any other law, the amount of such compensation shall be reduced by the amount of relief paid under this Act."

19. For the reasons recorded above and the fact that the application in the present case was filed under Section 6 and not under Section 3 of the PLI Act, I do not see any reason to accept the contention of the Counsel for the respondent based upon the judgment passed by this Court in the case of *U.P. Power Corporation Limited*

and others vs District Magistrate/ Collection, Sultanpur and others (supra).

20. Now coming to the quantum of compensation that can be awarded by this Court in the judgment passed in the case of Bheem Sen (Supra) noticed that the liability under a tort in respect of the public undertaking would arise on establishing the legal wrong/ tort. The Court also noticed that for payment of tort compensation besides the remedy of suit, as is available under the common law, various statutes have been enacted for payment of tortious liability such a Motor Vehicles Act (for claims arising out of motor vehicle accidents), Employees Compensation Act (for claiming compensation by employees), PLI Act, Fatal Accidents Act, Consumer Protection Act, to name a few and in the case where liability is claimed against public undertaking which is amenable to writ jurisdiction, the power under Article 226 can be exercised for grant of just and proper compensation. All the forums provided in the above referred Acts basically have been enacted for laying procedures for expeditiously claiming a tortious liability.

21. The Court also noticed the lines of decision where the compensation was granted in the cases of medical negligence and custodial deaths in ***Nilabati Behera vs State of Orissa; (1993) 2 SCC 746, State of M.P. vs Shyamsunder Trivedi; (1995) 4 SCC 262, People's Union for Civil Liberties vs Union of India; (1997) 3 SCC 433, and Kaushalya vs State of Punjab; (1999) 6 SCC 754, Supreme Court Legal Aid Committee vs State of Bihar; (1991) 3 SCC 482, Jacob George (Dr.) vs State of Kerala; (1994) 3 SCC 430; Paschim Banga Khet Mazdoor Samity vs State of West Bengal; (1996) 4 SCC 37 and Manju Bhatia vs New Delhi Municipal Council; (1997) 6 SCC 370.***

22. Although it is true that the principles for grant of compensation under the Motor Vehicles Act have not been made specifically applicable to the grant of compensation under the PLI Act, however, the facts remain that under Section 6 of the PLI Act, the Collector is bound to determine and pay the compensation which is a 'just compensation'. The concept of 'just compensation' has been emphasized from time to time by the courts holding that courts/ tribunals are not only expected to grant 'just compensation', it is the duty of the court to grant 'just compensation' especially when the claim arises out of the socio-economic legislation.

23. In view thereof, I am of the view that the manner of determining the compensation as provided under the Motor Vehicles Act can be taken as a cue to determine and grant compensation in the present case also. The principle of quantum of compensation have been explained in details taken in the context of Motor Vehicles Act by the Hon'ble Supreme Court in the case of ***National Insurance Company Limited vs Pranay Sethi and others; (2017) 16 SCC 680,*** wherein the Hon'ble Supreme Court held that for determining compensation, it is required that the following parameters be established, the age of the deceased, the income of the deceased and the number of the dependents. The Hon'ble Supreme Court has further given directions with regard to the claim of compensation on both pecuniary and non-pecuniary heads and specific directions in that regard are contained in para 59 of the said judgment, which reads as under:

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

59.1. 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.

59.2. 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.

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.

59.5. 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.

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

59.7. The age of the deceased should be the basis for applying the multiplier.

59.8. 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."

24. In the light of the judgment of the Hon'ble Supreme Court in the case of ***Sarla Verma (Smt.) and others vs Delhi Transport Corporation and another; (2009) 6 SCC 121*** as followed in the case of Pranay Sethi (supra), I proceed to determine the compensation payable to the petitioner on account of death of Amit Kumar Pandey and Brijesh Pandey.

25. In the claim petition, it was alleged by the claimants that Brijesh Pandey was aged about 28 years and was unmarried. The mother and the father were dependants on the said Brijesh Pandey. It was also alleged that he earned Rs.9000/- (Rupees nine thousand per month), although, there is no evidence with regard to the earning on record.

26. From the perusal of the documents especially the postmortem conducted on the body of the deceased Brijesh Pandey, which is on record, the age of the deceased has been shown to be 30 years and thus I accept the said age as the age on which the deceased Brijesh Pandey

died. As no income proof has been attached, I presume the minimum wages to be earned by the deceased Brijesh Pandey assessed as Rs.4500/- per month. The deceased Brijesh Pandey is unmarried and only the mother and the father were dependent, an addition of 40% is to be made in the income of the deceased in terms of the judgment of the *Pranay Sethi's case (Supra)* towards future prospects. At the time of death, the age of the victim is 30 years, thus multiplier '17' is applied. The deceased was unmarried, therefore, 50% will be deducted towards personal expenses in view of the judgnent of the Hon'ble Supreme Court in the case of ***General Manager, Kerala State Road Transport Corporation Vs. Susamma Thomas; 1994 (2) SCC 176.*** The dependents of Brijesh Pandey are entitled for compensation as per the calculation made hereinunder:

Sl. No.	**Head**	**Amount**
1	Monthly Income of the deceased	**Rs.4500/-** per month
2	Adding 40% towards future prospect	Rs.4500+1800 = **Rs.6300/-**
3	Net yearly income	Rs.6300 x 12 = **Rs.75600/-**
4	Deducting 50%	Rs.75600 x 50% = **Rs.37800/-**
5	Applying multiplier of '17' at the age between 26 to 30 as per Sarla Verma's case	Rs.37800 x 17 = **Rs.6,42,600/-**
6	Amount under the conventional heads [loss of estate Rs.16,500/-, loss of consortium Rs.45,000/- (each of dependents); Rs.45,000 x 2 = Rs.90,000/- and funeral expenses Rs.16,500/-) as per Pranay Sethi (Supra)]	Rs.16,500 + Rs.90,000 + Rs.16,500 =Rs.1,23,000/-
7	Total amount of compensation payable to the dependents of the deceased	Rs.6,42,600+Rs.1,23,000 = **Rs.7,65,600/-**

27. Thus, in Writ-C No.1002173 of 2015, the petitioners are entitled for payment of compensation of Rs.7,65,600/- along with interest @ 6% from the date of accident i.e. 12.10.2011 up to actual payment/ realization.

28. In the case of Amit Kumar Pandey, the age as disclosed in the postmortem report is 28 years. The income although alleged to Rs.9000/- per month has not been established by evidence, as such, I presume the minimum wages to be earned by the deceased was Rs.4500/- on which enhancement of 40% is permissible as future prospect. The petitioner is survived by his wife, two minor children, mother and father, hence, the deduction of 1/4th of his income is permissible in view of law laid down in *Pranay Sethi (Supra).* At the time of death, the age of the victim is 28 years, thus multiplier '17' is applied. The dependents of Amit Kumar Pandey are entitled for compensation as per the calculation made hereinunder:

Sl. No.	**Head**	**Amount**
1	Monthly Income of the deceased	Rs.4500/- per month
2	Adding 40% towards future prospect	Rs.4500+1800 = Rs.6300/-
3	Net yearly income	Rs.6300 x 12 = 75600/-

4	Deducting 1/4th towards personal expenses	Rs.75600 x 25% = **Rs.18900/-** ***After deduction*** **Rs.75600-Rs.18900 = Rs.56700/-**
5	Applying multiplier of '17' at the age between 26 to 30 as per Sarla Verma's case	Rs.56700 x 17= **Rs.9,63,900/-**
6	Amount under the conventional heads [loss of estate Rs.16,500/-, loss of consortium Rs.45,000/- (each of dependents); Rs.45,000 x 5 = Rs.2,25,000/- and funeral expenses Rs.16,500/-) as per Pranay Sethi (Supra)]	Rs.16,500 + Rs.2,25,000 + Rs.16,500 =Rs.2,58,000/-
7	Total amount of compensation payable to the dependents of the deceased	Rs.9,63,900 + Rs.2,58,000/- = **Rs.12,21,900/-**

29. Thus, in Writ-C No.1002174 of 2015, the petitioners are entitled for payment of compensation of Rs.12,21,900/- along with interest @ 6% from the date of accident i.e. 12.10.2011 up to actual payment/ realization.

30. For the reasons recorded above, both the writ petitions are ***disposed off.***

(2022)05ILR A483
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.05.2022

BEFORE

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

FAFO No. 143 of 2016

Deepak Sharma ...Appellant
Versus
Shri Jitendra Singh & Ors. ...Respondents

Counsel for the Appellant:
Sri Jagdish Prasad Tripathi, Sri A.D. Saunders

Counsel for the Respondents:
Sri Ankur Tandon

A. Civil Law - Motor Accident Act, 1988 – Claim – Obligation of vehicle at the inter junction, where two road crossing each other – Tribunal found the deceased sole negligent and car driver not negligent – Validity challenged – Held, the law is well settled that at interception or inter junction, it is the duty of the vehicle, coming on the highway from intercepting road to slow down the vehicle and to see on all sides more particularly, his right and left side to ensure whether any vehicle is coming on the highway – High Court overruled the finding of Tribunal and held both drivers of the car and motorcycle, were co-authors of the accident and have contributed to the accident – High Court re-computed the compensation by adding 15% future loss and applying multiplier of 9 and awarded 7.5% interest. (Para 12, 13, 20 and 21)

B. Motor Accident Claim – Rash and negligent driving – Term 'Negligence' – Meaning – Principle of '*res ipsa loquitur*', when it can be applied – 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 though it is normally accidental – 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. (Para 8)

C. Motor Accident Claim – Principle of contributory negligence – Scope and meaning – A person who either contributes or is co author of the accident would be liable for his contribution to the accident having taken place. (Para 9)

D. Civil Law - Income Tax Act, 1961 – Section 194A (3) (ix) – Withdraw of amount of interest – Certificate of Income Tax authority, when required – Held, if the interest payable to any claimant for any financial year exceeds Rs. 50,000/-, insurance Co./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 – But 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. (Para 25)

Appeal partly allowed. (E-1)

List of Cases cited:-

1. Smt. Meenakshi Srivastava Vs Dheeraj Pandey & ors. 2022 0 Supreme (All) 318 decided on 11.03.2022

2. First Appeal From Order No. 1818 of 2012; Bajaj Allianz General Insurance Co. Ltd. Vs Smt. Renu Singh & ors. decided by Allahabad High Court on 19.7.2016

3. Archit Saini & anr. Vs Oriental Insurance Co. Ltd.; AIR 2018 SC 1143

4. Bithika Mazumdar & anr. Vs Sagar Pal & ors. (2017) 2 SCC 748

5. Vimla Devi & ors. Vs National Insurance Co. Ltd. & anr.; (2019) 2 SCC 186

6. F.A.F.O. No. 1999 of 2007; Oriental Insurance Co. Ltd. Vs Smt. Ummida Begum & ors.

7. F.A.F.O. No. 1404 of 1999; Smt. Ragini Devi & ors. Vs United India Insurance Co. Ltd. & anr. decided on 17.4.2019

8. Vimal Kanwar & ors. Vs Kishore Dan & ors. 2013 (3) TAC, 6 (SC)

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

10. Smt. Manjuri Beri Vs Oriental Insurance Co. Ltd.; AIR 2007 SC 1474

11. Sarla Verma & ors. Vs Delhi Transport Corp. & anr.; 2009 (2) TAC 677 (SC)

12. A.VsPadma Vs Venugopal; 2012 (1) GLH (SC) 442

13. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Co. Ltd.; 2007(2) GLH 291

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

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

16. Bajaj Allianz General Insurance Co. Pvt. Ltd. Vs U.O.I. & ors. decided by Apex Court on 27.1.2022

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

(Oral Judgment by Hon'ble Ajai Tyagi, J.)

1. This appeal challenges the judgement and order of MACT/Special Judge E.C. Act, Meerut dated 13.10.2015 in MACP No.1276 of 2012 (Deepak Sharma Vs. Jitendra Singh and others), by which the claim petition filed by appellant was dismissed.

2. Heard learned counsel for the appellant and learned counsel appearing on behalf of respondents.

3. Brief facts of the case are that a claim petition was filed by appellant before the learned Tribunal on account of death of

father of the appellant Brahm Swarup Sharma in a road accident. As per averments in the petition, on 05.08.2012 at about 3:00 pm, the deceased was going from Meerut to Sardhna by his motorcycle bearing No.UP 15 Q 5760. When he reached by pass road Khirwa crossing, a car bearing No.DL 7 CC 2323 which was coming from the side of Haridwar and was being driven rashly and negligently by its driver dashed into the motorcycle of the deceased. In this accident, the deceased sustained fatal injuries and died. The age of the deceased was 58 years. The deceased was serving in Custom and Central Excise Department and was also getting pension due to being an ex-army man.

4. Learned counsel for the appellant submitted that learned Tribunal held that in the aforesaid accident the deceased was himself 100% negligent and the car driver was not negligent at all. Learned counsel submitted that there is crossing on the spot of the accident. The car driver was driving the car at a very high speed while the deceased was standing on his motorcycle on the side of the road. The car driver hit the motorcycle because he was driving rashly and negligently. Learned counsel attracted our attention towards the testimony of PW2, who is eye-witness of the accident and submitted that the eye-witness PW-2 has also stated that the deceased was standing on his motorcycle on the side of the road and the car driver dashed into the motorcycle due to high speed. In this way, the car driver was sole negligent but the learned Tribunal did not appreciate the evidence in right perspective. Learned counsel for the appellant relied on the judgement of this Court, penned by one of us, **Smt. Meenakshi Srivastava Vs. Dheeraj Pandey and others 2022 0 Supreme (All)** 318 decided on 11.03.2022.

5. It is next submitted by the learned counsel for the appellant that the deceased was in service in Central Excise Department, Meerut from where he was getting salary of Rs.20,000/- per month. The deceased was ex-army man and he was getting pension also nearly Rs.7,000/- per month. The age of the deceased was 58 years as per his service book record.

6. Learned insurance company vehemently opposed the submissions made by the appellant and submitted that at the time of accident the deceased came from the side road, which was crossing the highway, hence, it was duty of the deceased to see right and left side of the highway to make sure that no vehicle is coming from either side and after taking aforesaid precaution, he should have crossed the highway but he did not take such precaution. It is also submitted that eye-witness PW2 has given false evidence that the deceased was standing on motorcycle on the side of the road but as per the site-plan, the place of the accident is shown in middle of the road. Moreover, there was no indicating board or red light at the crossing, which could caution the vehicle running on the highway. Hence, the learned Tribunal has rightly held that the car driver was not negligent and the deceased was sole author of the accident. Hence, there is no illegality or infirmity in the impugned judgement which calls for any interference by this Court.

7. Having heard the learned counsel for the parties, let us consider the negligence from the perspective of the law laid down.

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

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

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

(Emphasis added)

11. We have perused the judgement of the Hon'ble Apex Court in **Archit Saini & another Vs. Oriental Insurance Co. Ltd. AIR 2018 SC 1143** but we have to appreciate entire evidence on record, documentary evidence as well as oral. There are discrepancies between the site-plan and oral evidence of PW2. As per the testimony of PW2, at the time of accident the deceased was not driving the vehicle in the middle of road but was standing on his motorcycle on the side of the road. While, the spot/place of impact of the accident is shown to be in the middle of the road in the site-plan.

12. It is an admitted fact that the offending car was running on the highway and the deceased was crossing or about to cross the highway from the intercepting road. This law is well settled that at interception or inter junction namely, where two roads cross each other, it is the duty of the vehicle, coming on the highway from intercepting road to slow down the

vehicle and to see on all sides more particularly, his right and left side to ensure whether any vehicle is coming on the highway or leaving the other road and entering the intersection so as to cross the road from either side which could endanger either of them. The case on hand, it seems that the deceased did not take aforesaid precaution because at the time of accident, the deceased was in the middle of the road while crossing the highway. Although, the deceased should have been more cautious, it was equally the duty of the car driver who was driving a bigger vehicle to slow down his vehicle when he was approaching the cross road, because any vehicle or pedestrian could come from either side of the intercepting road. Hence, in such a situation, duty is cast on the drivers of the both the vehicles but the degree of caution is higher on the part of the person approaching on the highway from intercepting road in comparison to the person, driving on the highway because vehicles generally move at higher speed on the highways. Hence, merely because the driver of the car was driving on the left side of the road would not absolve him from his responsibility to slow down the car when he was approaching the interception of the roads. We do not concur with the submissions of learned counsel for the insurance company that there was no indicating board or red light at the crossing, because the driver of the car could easily see from a distance that there is intercepting road ahead of him. Hence, he was also duty bound to slow down the car, but he did not take such precautions. It is also pertinent to mention that the car driver, who is the best witness, has not stepped into the witness box to explain the accident.

13. In view of the above, we cannot concur with the learned judge of the Tribunal that the deceased was solely negligent and car driver was not rash and negligent. We are of the considered opinion that drivers of the car and motorcycle, both were co-authors of the accident and have contributed to the accident and there is negligence on part of both the drivers. We hold the deceased to be equally negligent namely 50% negligent and the driver of the car to be 50% negligent as the deceased was coming from the smaller road and required to be cautious while entering the inter junction of roads, deceased also was negligent though it is opined by PW2 to have stopped at interjection but the speed shows that he was also eqaully careless.

14. The next issue which arises is regarding compensation and liability of the respondents and liability to compensate the appellant. While pondering over the matter the question is should the matter be sent to tribunal for deciding quantum as for liability the tribunal has returned the finding that there is no breach of policy nor is there anything proved by insurance company to prove to the contrary the fact that the matter has remained pending for long, namely 7 years, the record and proceedings are before this Court and the matter whether be remanded to the Tribunal or decided here? The answer is in the affirmative. We place reliance on the judgments of the Apex Court in **Bithika Mazumdar and another Vs. Sagar Pal and others, (2017) 2 SCC 748, Vimla Devi and others Vs. National Insurance Company Limited and another, (2019) 2 SCC 186** and of this Court in F.A.F.O. No. 1999 of 2007 (Oriental Insurance Company Limited vs. Smt. Ummida Begum and others) and in F.A.F.O. No. 1404 of 1999 (Smt. Ragini Devi and others Vs. United India Insurance Company Limited and another) decided on 17.4.2019 wherein it

has been held that if the record is with the appellate Court, it can decide compensation instead of relegating the parties to the Tribunal.

15. Hence, as far as quantum is concerned, after hearing the learned counsel for both the parties and perusal of the record, we find that the deceased was in service in Central Excise Department in Meerut. It is also on record that the deceased was ex-army man and he was getting pension also. The pay slip of the deceased is issued by Assistant Chief Accountant of Customs and Central Excise Department, Meerut, which is paper No.25 Ga/2. Although, no concerned employee/accountant of the department has appeared before learned Tribunal with salary record, yet the salary slip cannot be disbelieved because it is filed in record by the Commissioner, Central Excise Meerut-I in response to the information, sought under Right to Information Act. The net amount of the salary was Rs.15,169/- in which the component of provident fund Rs.8,500/- would be added as per judgement of **Vimal Kanwar and others Vs. Kishore Dan and others, 2013 (3) TAC, 6 (SC)**. Hence, the total payable salary comes Rs.15,169+ Rs.8,500 = Rs.23,669/-. It is pertinent to mention that this pay slip pertains to the last full month salary of the deceased prior to accident which the deceased received. Apart from salary slip, the pass book of the deceased paper No.23 Ga/5 is also on record, which is said to be pension pass book or the pass book in which the pension of the deceased was being credited. The perusal of this pass book shows that he has received Rs.6934 as last pension. Hence, total income of the deceased by way of salary and pension comes to Rs.23,669+Rs.6,934=Rs.30,603/- per month which is rounded up at Rs.30,000/- per month.

16. As per the judgement of Hon'ble the Apex Court in ***National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050*** the deceased was a salaried person and within the age bracket of 50-60 years, hence, 15% would be added to his salaried income only, because the aforesaid judgement of Pranay Sethi (supra) provides for future prospects to the tune of 15% for the persons who are in the permanent job or are self-employed. The deceased was receiving pension but as the son is married and daughters are married and his wife has predeceased him the amount of pension would have been spent by him and the amount would not increase as it would stop with his demise, hence, on the component of pension, no future loss of income can be calculated or granted.

17. When we scanned through the record, we noted that the appellant/claimant has deposed as PW1 and in his cross-examination, he has deposed that the deceased is survived by three daughters and the appellant but the appellant has not made the daughters as party to the claim petition and the learned Tribunal has also lost sight to this fact. Hence, we take it to ourselves to take care of the compensation payable to the sisters of the appellant would be entitled to compensation also in view of the Judgement of Apex court reported in **Smt. Manjuri Beri Vs. Oriental Insurance Co. Ltd. AIR 2007 SC 1474** as they are legal representative of deceased.

18. As far as the deduction towards personal expenses of the deceased

are concerned, as per the testimony of appellant PW1, his mother has predeceased his father. Appellant has also deposed that he is in service and getting salary at Rs.15,000/- per month. He has three sisters and all of them are married. Hence it can safely be assumed that the sisters were not dependent on father. In such a situation, we consider it appropriate to deduct ½ for personal expenses of the deceased and the amount of pension would be spent on himself we cannot deduct ¾ as submitted by learned counsel for respondent.

19. The copy of the service book shows the date of birth of the deceased as 01.07.1954. Hence, at the time of accident, the deceased was of 58 years old. Hence, as per the judgement of ***Smt. Sarla Verma vs. Delhi Transport Corporation*** *[2009 (2) TAC 677 (SC)]* multiplier of 9 would be applied.

20. Hence, the total compensation, in view of the above discussions, payable to the appellant-claimant is being computed herein below:

i.	Total income (salary + pension)		Rs.30,000/-
ii.	Percentage towards Future-Prospects (on income from salary Rs.23,669/- only) 15%		Rs.3,550/-
iii.	Total Income	Rs.30,000/-	Rs.33,550/-
		+Rs.3,550/-	
iv.	Income after 1/2 deduction for personal expenses	Rs.33,500/- - Rs.16,775/-	Rs.16,775/-
v.	Annual income	Rs.16,775/- x 12	Rs.2,01,300/-
vi.	Multiplier applicable	9	
vii.	Loss of dependency	Rs.2,01,300/- x 9	Rs.18,11,700/-
viii.	Payable amount after deduction of 50% for contributory negligence	Rs.18,11,700- Rs.9,05,850	**Rs.9,05,850/-**

21. The three daughters of the deceased, who are married as per testimony of the appellant, would get Rs.50,000/- each and the rest amount of compensation would be paid to the appellant with interest, which would be 7.5% per annum from the date of filing of the claim petition till the date of depositing the amount by the Insurance Company respondent No.2. Insurance Company shall deposit the amount of compensation within 12 weeks from today.

22. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma Vs. Venugopal** reported in **2012 (1) GLH (SC) 442**, the order of investment is not passed because applicants/claimants are neither illiterate nor rustic villagers.

23. In view of the above, the appeal is **partly allowed**.

24. Fresh award be drawn accordingly by the Tribunal as per modification made herein.

20. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of ***Smt. Hansagori P. Ladhani vs. The Oriental Insurance Company Ltd.***, *[2007(2) GLH 291]* and this High Court in total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimants to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 ***(Smt. Sudesna and others Vs. Hari Singh and another)*** and in First Appeal From Order No.2871 of 2016 ***(Tej Kumari Sharma v. Chola Mandlam M.S. General Insurance Co. Ltd.)*** decided on 19.3.2021 while disbursing the amount.

21. The Tribunal shall follow the guidelines issued by the Hon'ble Apex Court in ***Bajaj Allianz General Insurance Company Privae Ltd. vs. 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. Since long time has elapsed, the amount be deposited in the Saving Bank Account of claimant(s) in a nationalized Bank without F.D.R.

(2022)05ILR A491
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.04.2022

BEFORE

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

FAFO No. 432 of 1993

Employees State Insurance Corporation ...Appellant

Versus

Mohd. Raza (Ins. 21/1153432) ...Respondent

Counsel for the Appellant:
Sri Rajesh Tiwari

Counsel for the Respondent:
Sri Neeraj Agarwal, Sri R.K. Mishra

Civil Law - Employees' State Insurance Act, 1948 - Medical Board issued a certificate awarding Nil loss of earning capacity to the injured-claimant - injured suffered employment injuries on his left eye - Judge, Employees Insurance Court in Appeal allowed the appeal upturning the decision of the medical board - Held - finding of fact is that the injured was an employee who had sustained employment injury and was incapacitated to the tune of 30%, percentage of injury was decided by the Commissioner - Court cannot

interfere unless there is a question of law involved – substantial questions of law framed by the Insurance Company are the questions of fact – Appeal Dismissed (Para 4, 7, 8)

Dismissed. (E-5)

List of Cases cited:

1. Golla Rajanna Etc. Vs Divisional Manager & anr., 2017 (1) TAC 259 (SC)

2. North East Karnataka Road Transport Corporation Vs Smt. Sujatha Civil Appeal No.7470 of 2009 decided on 2.11.2018

3 E.S.I.C. Vs S. Prasad) . F.A.F.O. 1070 of 1993 decided on 26.10.2017

4. Mayan Vs Mustafa & anr., 2022 ACJ 524

5. Salim Vs New India Assurance Co.Ltd. & anr., 2022 ACJ 526

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

Order On Civil Misc. Restoration Application

For the reasons disclosed in the affidavit filed in support of the restoration application, cause shown constitutes sufficient cause, consequently, restoration application is allowed. Order dated 5.1.2012, dismissing the appeal is recalled and the appeal is restored to its original number.

Order On Appeal

1. Appeal is restored to its original number.

2. This appeal, at the behest of the Employees State Insurance Corporation, challenges the judgment and order dated 22.2.1993 passed by Judge, Employees Insurance Court, Kanpur in Appeal No.250 of 1992 whereby the Court below had allowed the appeal upturning the decision of the medical board.

3. Brief facts are that the Medical Board issued a certificate awarding Nil loss of earning capacity to the injured-claimant. The injured suffered employment injuries on his left eye. The employment injury was not in dispute. What is in dispute is the grant of compensation considering his employment injury to 30%. Can this be considered to be bad and perverse finding and question of law? The answer is no as it is a finding of fact and not law.

4. The undersigned is fortified in the aforesaid view as the appeal under Workmen Compensation Act/Employees State Insurance Act has to be viewed very seriously in view of the judgment in Golla Rajanna Etc. Etc. Vs. Divisional Manager and Another, 2017 (1) TAC 259 (SC). The finding of fact is that the injured was an employee who had sustained employment injury and was incapacitated to the tune of 30%.

5. This Court is further supported in its view by the decision of the Apex Court in Civil Appeal No.7470 of 2009 North East Karnataka Road Transport Corporation Vs. Smt. Sujatha decided on 2.11.2018 wherein it has been held by the Court as under:

"15. Such appeal is then heard on the question of admission with a view to find out as to whether it involves any substantial question of law or not. Whether the appeal involves a substantial question of law or not depends upon the facts of each case and needs an examination by the

High Court. If the substantial question of law arises, the High Court would admit the appeal for final hearing on merit else would dismiss in limini with reasons that it does not involve any substantial question/s of law.

16. Now coming to the facts of this case, we find that the appeal before the High Court did not involve any substantial question of law on the material questions set out above. In other words, in our view, the Commissioner decided all the material questions arising in the case properly on the basis of evidence adduced by the parties and rightly determined the compensation payable to the respondent. It was, therefore, rightly affirmed by the High Court on facts.

17. In this view of the matter, the findings being concurrent findings of fact of the two courts below are binding on this Court. Even otherwise, we find no good ground to call for any interference on any of the factual findings. None of the factual findings are found to be either perverse or arbitrary or based on no evidence or against any provision of law. We accordingly uphold these findings."

6. This Court, recently in F.A.F.O. 1070 of 1993 (E.S.I.C. Vs. S. Prasad) decided on 26.10.2017 has followed the decision in Golla Rajana (Supra) and has held as follows:

"The grounds urged before this Court are in the realm of finding of facts and not a question of law. As far as question of law is concerned, the aforesaid judgment in Golla Rajanna Etc. Etc. Versus Divisional Manager and another (supra) in paragraph 8 holds as follows "the Workman Compensation Commissioner is the last authority on facts. The Parliament has thought it fit to restrict the scope of the appeal only to substantial questions of law, being a welfare legislation. Unfortunately, the High Court has missed this crucial question of limited jurisdiction and has ventured to re-appreciate the evidence and recorded its own findings on percentage of disability for which also there is no basis."

7. A recent decision of the Apex Court in the case of Mayan Vs. Mustafa and another, 2022 ACJ 524 also holds that the Court cannot interfere unless there is a question of law involved and finding of fact is sought to be assailed. In our case the injury was during the course of employment. The percentage of injury was decided by the Commissioner. The judgment of Apex Court in Salim Versus New India Assurance Co.Ltd. and another, 2022 ACJ 526 will also not permit this Court to interfere in the well reasoned judgment of the Commissioner.

8. In view of the above, the appeal fails and is dismissed. The so called questions of law framed by the Insurance Company are answered against it. In fact the substantial questions of law raised are the questions of fact.

9. Interim relief, if any, shall stand vacated forthwith.

10. As this is an appeal of the year 1993, all the amounts kept in fixed deposit, will be transmitted to the account of claimant- M. Raza who shall give his bank account.

(2022)05ILR A494
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.04.2022

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Special Appeal No. 310 of 2022
with
Special Appeal No. 296 of 2022

Registrar General, Hon'ble High Court, Allahabad & Anr. ...Appellants
Versus
Devendra Pal Singh & Ors. ...Respondents

Counsel for the Appellants:
Sri Chandan Sharma, Sri Samir Sharma (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Shivendru Ojha, Sri R.K. Ojha (Senior Advocate)

A. Service Law – Promotion - Allahabad High Court Officers and Staff (Conditions of Service and Conduct) Rules, 1976 - Clause (ii) of Rule 8(a)(i) - The eligibility of a candidate is to be reckoned on the fixed date indicated in the advertisement/notification inviting applications. In the absence of a date fixed, the requisite eligibility is to be judged on the last date for making the applications and not on any date subsequent to that date. (Para 11)

The proposition that where applications are called for prescribing a particular date as the last date for filing the applications, the eligibility of the candidates shall have to be judged with reference to that date and that date alone, is a well-established one. A person who acquires the prescribed qualification subsequent to such prescribed date cannot be considered at all. **An advertisement or notification issued/published calling for applications constitutes a representation to the public and the authority issuing it is bound by such representation. It cannot act contrary to it.** (Para 13)

In the present case, the learned Single Judge erred in law in permitting the writ petitioners/respondents who admittedly did not possess the minimum educational qualifications as prescribed u/Rule 8(a)(i)(ii) of the Allahabad High Court Officers and Staff (Conditions of Service and Conduct) Rules, 1976 as it stood on the date of the notice inviting applications to appear in the examination and also declare their results. Since the writ petitioners/respondents have already appeared in the examination held on 10.04.2022, we deem it appropriate to modify the order of the learned Single Judge by directing that the results of the writ petitioner/respondents and all other candidates who have been permitted to take the examination dated 10.04.2022 pursuant to the order of the learned Single Judge dated 08.04.2022 shall not be declared and shall abide by the outcome of the writ petition. The results of all other candidates may be declared by the High Court, if it so desires, however, the results so declared shall also abide by the outcome of the writ petition. (Para 10, 14)

Special appeals disposed off. (E-4)

Precedent followed:

1. Rekha Chaturvedi (Smt.) Vs University of Rajasthan & ors., 1993 Supp (3) SCC 168 (Para 11)

2. Ashok Kumar Sharma & anr. Vs Chander Shekher & anr., 1993 Supp (2) SCC 611 (Para 12)

3. Ashok Kumar Sharma & ors. Vs Chander Shekher & anr., 1997 (4) SCC 18 (Para 13)

Present special appeal challenges the judgment and order dated 08.04.2022, passed by Hon'ble Single Judge in Writ-A No. 4533 of 2022.

(Delivered by Hon'ble Pritinker Diwaker, J.

&

Hon'ble Ashutosh Srivastava, J.)

1. These Intra Court Appeals have been filed questioning the legality, propriety and correctness of the order dated 08.04.2022 passed by the learned Single Judge in Writ-A No.4533 of 2022 (Devendra Pal Singh and 16 others Vs. State of U.P. and 2 others) whereby and whereunder the prayer No. (iii) and (iv) made in the writ petition have been allowed qua the Petitioner Nos.4, 5, 6, 8, 9, 10, 11, 12, 15, 16 & 17 and directions have been issued permitting them to appear in the examination after due verification of their Course on Computer Concepts Certificate (hereinafter referred to as 'CCC Certificate'). The writ petition has been dismissed qua the writ petitioners No. 1, 2, 3, 7, 13 & 14 with liberty to file a fresh writ petition. The writ petition has been further directed to be heard finally on the following question framed:-

"11. In view of this interim order, the prayers no.(iii) and (iv) are allowed and the matter will be heard finally on following issues:-

"Whether considering that addition of a new eligibility qualification by way of amendment (in present case, CCC Certificate), a course of minimum three months in order to participate in a competitive examination for Class IV employees of the High Court for the posts in the cadre of Computer Assistant, requirement to posses all the qualifications including the amended qualification before the date of advertisement could be relaxed up to the date of examination due to the short time-line that amendment was carried out on 13.3.2021, date of advertisement was 28.9.2021 and the examination is scheduled on 10.4.2022 ?"

2. The issue before the learned Single Judge pertains to the recruitment to the 17 posts of Computer Assistant in the Establishment of the High Court by way of promotion by holding a Departmental Examination from amongst eligible Class IV Employees working in the High Court Establishment. The Notice dated 28.09.2021 was issued for inviting applications from Class IV employees who have completed 5 years continuous satisfactory service as on 01.07.2021 and possess the minimum educational qualification as prescribed under the Rules. The relevant Rules which govern the recruitment are "the Allahabad High Court Officers and Staff (Conditions of Service and Conduct) Rules, 1976". The Clause (ii) of Rule 8(a)(i) of the 1976 Rules existing at the time of issuance of the Recruitment Notice is reproduced hereunder:-

"(ii) 40% by promotion on merit through competitive examination from Class IV employees who have completed five years continuous satisfactory service as on 01st July of the year of recruitment and possesses the minimum educational qualification of intermediate along with CCC Certificate/Diploma/Degree in Computer Science from recognized institute established by law in India."

3. The cut off date for submitting the application forms was 19.10.2021. A total of 135 Class-IV candidates are stated to have applied for the Departmental Examination-2021 to be held for the purpose of the aforesaid Recruitment. The application forms of 114 candidates were rejected on the ground that they did not satisfy the condition stipulated in Rule 8(a)(i)(ii) of the 1976 Rules inasmuch as they did not possess the minimum educational qualification of Intermediate

along with CCC Certificate/ Diploma/Degree of Computer Science from recognized institute established by law in India. Accordingly, vide Notice dated 16th March, 2022 the Registrar (J) (S & A/Establishment) informed the eligible 21 Class-IV candidates of the High Court, Allahabad/Lucknow Bench that the Departmental Examination for promotion of Class-IV employees to the post of Computer Assistant is scheduled to be conducted on 10.04.2022 at 11:00 AM in the High Court Premises. The notice also informed that the application forms of the rest of the 114 Class-IV candidates who had applied for the Departmental Examination-2021 for the post of Computer Assistant had been rejected.

4. A set of 17 candidates, whose application forms had been rejected, approached this Court by filing Writ (A) No.4533 of 2022 claiming the following reliefs:-

"(i) Issue a writ, order or direction in the nature of Certiorari quashing the impugned notice dated 16th March 2022 (Annexure No. 9 to the writ petition) by which the candidature of the petitioners has been cancelled.

(ii) Issue a writ, order or direction in the nature of Certiorari quashing the impugned notice dated 28th September 2021 (Annexure No.5 to the writ petition) issued by Registrar General, High Court, Allahabad (Respondent No.2).

(iii) Issue a writ, order or direction in the nature of Mandamus commanding the respondents to permit the petitioners to appear in the examination and also declare their results.

(iv) Issue a writ, order or direction in the nature of Mandamus commanding the Hon'ble High Court to accept the CCC Certificate said to be completed and accept to the candidates who have completed their CCC before the examination for the purpose of minimum qualification.

(v) Issue a writ, order or direction in the nature of Mandamus commanding the respondents Hon'ble High Court to permit some of the petitioners who have not completed their CCC Certificate and grant them sometime to complete the same.

(vi) Issue any other writ, order or direction which this Hon'ble Court may deem fir and proper in the facts and circumstances of the case.

(vii) Award to cost of the petition in favour of the petitioner."

5. The contention of the writ petitioners before the learned Single Judge was that the petitioners No. 4, 5, 6, 8, 9, 10, 11, 12, 14, 15 and 16 have obtained the CCC Certificates subsequent to the Recruitment Notice dated 28.09.2021 but before the date of the scheduled examination i.e. 10.04.2022 and in such view of the matter they be permitted to appear in the examination. It was also contended that initially vide Notification dated 21.12.2020, 17 posts of Computer Assistant were sought to be filled up and the petitioners were eligible as the Rules did not contain the requirement of possessing CCC Certificate/Diploma/Degree of Computer Science but the said notification was cancelled and fresh notice has been issued on 28.09.2021 but in the interregnum the Recruitment Rules have been amended and their application forms have been rejected on the ground of not possessing the qualification of CCC Certificate/ Diploma/ Degree in Computer Science. However, the petitioners No.4, 5, 6, 8, 9, 10, 11, 12, 15,

16 & 17 now possess the requisite certificate by December, 2021 and should not be deprived from appearing in the exam scheduled for 10.04.2022, particularly, in view of the fact that there was a surge of Covid-19 cases and the CCC Certificate Course which requires at lease 3 months could not be perused.

6. The learned Single Judge found favour with the contentions advanced by the petitioners and, accordingly, by the impugned order permitted the petitioners possessed with the CCC Certificates to appear in the examination after due verification of the certificates and allowed the final prayers (iii) & (iv) made in the writ petition while directing that the writ petition would be heard finally on the question framed as reproduced herein above. The Prayers No. iii and iv are quoted hereunder:-

"(iii) Issue a writ, order or direction in the nature of Mandamus commanding the respondents to permit the petitioners to appear in the examination and also declare their results.

(iv) Issue a writ, order or direction in the nature of Mandamus commanding the Hon'ble High Court to accept the CCC Certificate said to be completed and accept to the candidates who have completed their CCC before the examination for the purpose of minimum qualification."

7. Sri Samir Sharma, learned Senior Counsel, assisted by Sri Chandan Sharma, Advocate, representing the appellants in Special Appeal No.310 of 2022 vehemently submits that the impugned order of the learned Single Judge cannot be sustained in as much as the learned Single Judge has granted final relief as prayer Nos.3 & 4 have been finally allowed at the preliminary hearing stage. The learned Single Judge has by the impugned order permitted the petitioners to appear in the examination and at the same time directed for declaration of their result which is patently illegal and impermissible under the law. The learned Single Judge proceeds on equity alone ignoring the settled principle that "Equity follows Law" while granting interim relief contrary to law. The order of the learned Single Judge is self contradictory in as much as on one hand, prayer Nos.3 & 4 in the writ petition have been finally granted and yet the issue has been left open to be decided at the time of final hearing. It is submitted that a candidate for appointment to any particular post must fulfill the minimum eligibility criteria on the date of advertisement or the cut off mentioned. Admittedly, on the date of notice inviting applications for promotion to the posts in question i.e. 28.09.2021 the petitioners did not fulfill the minimum eligibility criteria for promotion to the post and the learned Single Judge by the impugned order has issued directions dehors the Rules itself. Lastly, it is submitted that the writ petitioners did not implead the permitted candidates mentioned in the order dated 16.03.2022 as party respondents in the writ petition while seeking its quashing and above all the writ petition itself at the instance of the writ petitioners who admittedly were not eligible to participate in the recruitment process, was not maintainable and the learned Single Judge manifestly erred in law in entertaining and partly allowing the same.

8. Sri R. K. Ojha, learned Senior Advocate assisted by Sri Shivendu Ojha, learned counsel representing the writ petitioner-respondents, in opposition to the

Special Appeals, submits that the Special Appeals have been filed against an interlocutory/interim order and as such, are not maintainable. The interim order has already taken effect in as much as the writ petitioners have already appeared in the exam which was held on 10.04.2022 and the Special Appeals have thus been rendered infructuous. The Special Appeals are otherwise not maintainable as the appellants themselves pursuant to the impugned order have accepted the interim order and permitted the other similarly circumstanced candidates, besides the writ petitioners to appear in the examination. The 21 candidates mentioned in the list appended to the impugned order dated 16.03.2022 were not required to be impleaded as no relief was being claimed against them. The learned Senior Counsel thus submits that the appeals may be dismissed and the writ petition itself which is pending before the learned Single Judge be decided on its merit.

9. We have heard the learned counsels for the parties and have perused the record.

10. We are conscious of the fact that pursuant to the impugned order of the learned Single Judge, the writ petitioners have been permitted to appear in the examination held on 10.04.2022 and in fact the writ petitioners and similarly circumstanced candidates have also been permitted to appear in the examination held on 10.04.2022. The Special Appeal in our opinion to that extent has been rendered infructuous. However, we find that the learned Single Judge by the impugned order has not only permitted the writ petitioners to take the examination but has also directed for declaration of their results. Such a direction in our opinion was not required. In fact, the direction permitting the writ petitioners to appear in the examination even though they did not possess the requisite qualification prescribed under the relevant Rules governing the field itself is contrary to law.

11. In the opinion of the Court, the eligibility of a candidate is to be reckoned on the fixed date indicated in the advertisement/notification inviting applications. In the absence of a date fixed, the requisite eligibility is to be judged on the last date for making the applications and not on any date subsequent to that date. The Apex Court in the case of ***Rekha Chaturvedi (Smt.) Vs. University of Rajasthan and others***, reported in ***1993 Supp (3) SCC 168*** in para 10 observed as under:-

"10. The contention that the required qualifications of the candidates should be examined with reference to the date of selection and not with reference to the last date for making applications has only to be stated to be rejected. The date of selection is invariably uncertain. In the absence of knowledge of such date the candidates who apply for the posts would be unable to state whether they are qualified for the posts in question or not, if they are yet to acquire the qualifications. Unless the advertisement mentions a fixed date with reference to which the qualifications are to be judged, whether the said date is of selection or otherwise, it would not be possible for the candidates who do not possess the requisite qualifications in praesenti even to make applications for the posts. The uncertainty of the date may also lead to a contrary consequence, viz., even those candidates who do not have the qualifications in praesenti and are likely to acquire them at

an uncertain future date, may apply for the posts thus swelling the number of applications. But a still worse consequence may follow, in that it may leave open a scope for malpractices. The date of selection may be so fixed or manipulated as to entertain some applicants and reject others, arbitrarily. Hence, in the absence of a fixed date indicated in the advertisement/notification inviting applications with reference to which the requisite qualifications should be judged, the only certain date for the scrutiny of the qualifications will be the last date for making the applications. We have, therefore, no hesitation in holding that when the selection Committee in the present case, as argued by Shri Manoj Swarup, took into consideration the requisite qualifications as on the date of selection rather than on the last date of preferring applications, it acted with patent illegality, and on this ground itself the selections in question are liable to be quashed. Reference in this connection may also be made to two recent decisions of this Court in A.P. Public Service Commission, Hyderabad & Anr. v. B. Sarat Chandra & Ors., (1990) 4 SLR 235 and The District Collector & Chairman, Vizianagaram (Social Welfare Residential School Society) Vidanagaran & Anr. v. M. Tripura Sundari Devi, (1990) 4 SLR 237."

12. A similar question as involved in the case at hand arose in the case of ***Ashok Kumar Sharma and another Vs. Chander Shekher and another***, reported in ***1993 Supp (2) SCC 611***. The question involved was as to whether the educational qualifications should be possessed on the date of submission of the application form or on the date of interview. The majority view was that the requirement stood fulfilled if the candidates were possessed of the requisite educational qualifications on the date of the interview even though they admittedly did not possess the same at the time of submission of the application forms. The majority view held that it was in public interest to entertain applications of candidates who did not possess requisite educational qualification on the date of application but possessed it on the date of interview, despite express instructions in the advertisement that such applications would not be entertained.

13. The majority view in Ashok Kumar Sharma's case was however reviewed and not approved by the Apex Court in ***Ashok Kumar Sharma & others Vs. Chander Shekhar and another***, reported in ***1997 (4) SCC 18*** by observing as under:-

"The proposition that where applications are called for prescribing a particular date as the last date for fling the applications, the eligibility of the candidates shall have to be judged with reference to that date and that date alone, is a well-established one. A person who acquires the prescribed qualification subsequent to such prescribed date cannot be considered at all. An advertisement or notification issued/published calling for applications constitutes a representation to the public and the authority issuing it is bound by such representation. It cannot act contrary to it. One reason behind this proposition is that if it were known that persons who obtained the qualifications after the prescribed date but before the date of interview would be allowed to appear for the interview would be allowed to appear for the interview, other similiarly placed persons could also have applied. Just because some of the persons had applied notwithstanding that they had not

acquired the prescribed qualifications by the prescribed date, they could not have been treated on a preferential basis. Their application ought to have been rejected at the inception itself. This proposition is indisputable and in fact was not doubted or disputed in the majority Judgement. This is also the proposition affirmed in Rekha Chaturvedi (Smt.) v. University of Rajasthan and others [1993 Suppl. (3) S.C.C 168]. The reasoning in majority opinion that by allowing the 33 respondents to appear for the interview, the Recruiting Authority was able to get the bests talent available and that such course was in furtherence of public interest is, with respect, an impermissible Justification It is, in our considered opinion, a clear error of low and an error apparent on the face of the record. In our opinion, R.M. Sahai, J. (and the Division Bench of the High Court) was right in holding that the 33 respondents could not have allowed to appear for interview."

14. In view of the above legal position, we are of the opinion that the learned Single Judge erred in law in permitting the writ petitioners/ respondents who admittedly did not possess the minimum educational qualifications as prescribed under Rule 8(a)(i)(ii) of the Allahabad High Court Officers and Staff (Conditions of Service and Conduct) Rules, 1976 as it stood on the date of the notice inviting applications to appear in the examination and also declare their results. Since the writ petitioners/ respondents have already appeared in the examination held on 10.04.2022, we deem it appropriate to modify the order of the learned Single Judge by directing that the results of the writ petitioner/respondents and all other candidates who have been permitted to take the examination dated 10.04.2022 pursuant to the order of the learned Single Judge dated 08.04.2022 shall not be declared and shall abide by the outcome of the writ petition. The results of all other candidates may be declared by the High Court, if it so desires, however, the results so declared shall also abide by the outcome of the writ petition. We have been informed that the counter and rejoinder affidavits have been exchanged between the parties. Accordingly, in the circumstances, we request the learned Single Judge to proceed to decide the writ petition on merits at the earliest.

15. The Special Appeals are ***disposed of*** accordingly.

(2022)05ILR A500
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.05.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Spl. Appeal No. 23 of 2022

Jyoti Sikka ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Lalta Prasad Misra, Naveen Shukla

Counsel for the Respondents:
C.S.C.

A. Practice & Procedure - Joinder/ Non-Joinder of Parties - The appellant does not have any personal interest or concern with the said dispute except that she has been representing the writ petitioner before the learned Single Judge. Thus the Court is of the opinion that the parties in the writ petition are not necessary parties to be

impleaded in this Special Appeal considering the nature of prayer brought before this Court. (Para 8)

B. Special Appeal - The Court observed that the certain remarks contained in the order under appeal passed by the Single Judge are adverse and stigmatic and because of which appellant have to face civil consequences. It is also clear that before passing such an order the appellant was not given any notice or an opportunity of hearing. Therefore, this Court opines that instead of approaching the forum of Special Appeal, the appellant ought to have moved appropriate application before the Single Judge for redressal of her grievances. (Para 32 & 33)

C. The statement of facts as to what transpired at the time of hearing recorded in the judgment or order of a Court are to be treated to be conclusive of the facts so stated and no one can be permitted to contradict such statements by affidavit or other evidence. (Para 26)

The appellant prayed to expunge the remarks contained in specific paragraphs of the order under appeal which allegedly are adverse against and cast aspersions on the appellant. The learned Single Judge also ordered that copy of that said order be forwarded for necessary action to the Principal Secretary and the Additional Chief Secretary, Government of U.P. in the Department of Forest. (Para 17)

Special Appeal Disposed of. (E-10)

List of Cases cited:

1. St. of U.P. Vs Mohammad Naim AIR 1964 SC 703

2. Neeraj Garg Vs Sarita Rani & ors. (2021) 9 SCC 92

3. A.M. Mathur Vs Pramod kumar Gupta & ors. (1990) 2 SCC 533

4. St. of Mah. Vs Ramdas Shrinivas Nayak & anr. (1982) 2 SCC 463

5. Roop kumar Vs Mohan Thedani (2003) 6 SCC 595

6. Commissioner of Customs, Mumbai Vs Bureau Veritas & ors. (2005) 3 SCC 265

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.)

Order on C. M. Application No.1 of 2022

1. Office has reported delay of 18 days in filing the Special Appeal.

2. We have heard the learned counsel for the appellant and learned Chief Standing Counsel representing the sole respondent and have also perused the averments made in the application supported by an affidavit.

3. We are satisfied that the delay has sufficiently been explained.

4. Accordingly, the application is allowed and the delay in preferring the Special Appeal is hereby condoned.

Order on C. M. Application No.3 of 2022

1. Heard learned counsel for the appellant and learned Chief Standing Counsel and perused the averments made in the application with the prayer to grant leave of the Court to file Special Appeal which is supported by an affidavit.

2. Though, the appellant is not a party in the writ petition in which the order dated 02.03.2022 has been passed by the learned Single Judge which is under appeal herein, however, since the prayer in the Special Appeal is confined to set aside only that portion of the order where allegedly

aspersions have been cast and adverse remarks has been made against the appellant, the application is allowed and the leave to appeal is granted.

Order on Special Appeal

1. This case presents somewhat unusual facts before us.

2. The instant intra-court appeal seeks to challenge the order dated 02.03.2022, passed by the learned Single Judge in Writ -C No.6208 of 2021 to the extent the order allegedly casts aspersions and makes adverse remarks against the appellant who is a practicing lawyer of this Court and at the relevant point of time was an Additional Advocate General for State for Uttar Pradesh and has been representing the State in the cases brought before this Court.

3. Learned Chief Standing Counsel has raised certain preliminary objections about the maintainability of the Special Appeal. It has been contended in this regard by the learned Chief Standing Counsel that in terms of the provision contained in Chapter IX Rule 7 of the Rules of the Court, all the parties who are arrayed as either parties in the writ petition wherein the order under appeal has been passed, ought to have been arrayed as respondents in this Appeal. It has also been submitted by the learned Chief Standing Counsel that the writ petition was filed by the State of Uttar Pradesh not through the Legal Remembrancer/Principal Secretary, Department of Law but by the Department of Forest through Divisional Forest Officer, Lucknow. Thus, submission is that in the instant Special Appeal, the State has been arrayed not through the Forest Department; rather through Legal Remembrancer/ Principal Secretary, Department of Law and as such description of the respondent is defective.

4. On the aforesaid grounds, learned Chief Standing Counsel has contended that the Special Appeal suffers from the vice of non-joinder of necessary parties and description of State as respondent is also defective.

5. In reply to the said objections, learned counsel for the appellant has submitted that appellant has no personal concern with the adjudication of the dispute in the writ petition and that she has only been representing the writ petitioner before the learned Single Judge and is aggrieved only by the adverse remarks made by the learned Single Judge, hence parties in the writ petition are not necessary parties. He further states that no relief is being claimed by the appellant against the parties in the writ petition, thus there is no defect in the array of parties in this Special Appeal.

6. Therefore, it has been submitted that the parties to the writ petition pending before the learned Single Judge are not necessary parties so far as the issue raised in this Special Appeal is concerned. It has also been argued that since it is believed by the appellant that on the basis of the order passed by the learned Single Judge, the appellant has been discharged from the office of Additional Advocate General of State for Uttar Pradesh by the Law Department, as such State of U.P. in this appeal has been arrayed as respondent not through Forest Department but through Legal Remembrancer/Principal Secretary, Department of Law.

7. Having considered the submissions made by the learned counsel representing the parties in respect of the preliminary

objections as to the maintainability of the Special Appeal, we are unable to agree with the submissions made by the learned Chief Standing Counsel.

8. It is true that in the writ petition, the dispute is in relation to certain land between the Forest Department of the State and certain individuals. The appellant does not have any personal interest or concern with the said dispute except that she has been representing the writ petitioner before the learned Single Judge. Thus, we are of the considered opinion that the parties in the writ petition are not necessary to be impleaded in this Special Appeal considering the prayer and the nature of issue brought before us. The preliminary objection as to the maintainability of the Special Appeal, therefore, merits rejection, which is hereby rejected.

9. Learned counsel for the appellant in support of the prayer made in this special appeal has argued that the adverse remarks against the appellant in the order passed by the learned Single Judge are capable of visiting the appellant with adverse civil consequences and that the remarks are so serious that the same are capable of resulting in adverse repercussions on the professional carrier of the appellant as an Advocate, which have been made without affording any opportunity of hearing to the appellant and hence the same need to be expunged.

10. It has further been argued on behalf of the appellant that there is no recognized or prescribed procedure, in the functioning of this Court, of taking permission of the Court in case a counsel is not in a position to appear in a case to be called out during course of the day and hence in this view of the matter as well, the observations made by the learned Single Judge in the order under appeal are unwarranted. It has been submitted that on 3rd of March, 2022 when the order under appeal was passed, no substantial proceedings were to be drawn for the reason that in the writ petition the person arrayed as opposite party no.1 had died and only a request for grant of time for making an application seeking substitution of the legal heirs of the deceased-opposite party was to be made and as such presence of the appellant, who was Additional Advocate General of the State, was not required as necessary assistance to the Court could have been provided by the learned Standing Counsel who was assisting her. It has also been stated that the circumstance in which the appellant could not appear in the case before the learned Single Judge on 02.03.2022 was occasioned because of the fact that the appellant had to leave the Court to attend some medical emergency and even otherwise also there was no occasion for the learned Single Judge to insist for her appearance in the case.

11. Unfolding the events and the circumstances in which the order has been passed by the learned Single Judge on 02.03.2022, in his submission learned counsel for the appellant has stated that the writ petition was instituted by the Forest Department of State of Uttar Pradesh through Divisional Forest Officer, Lucknow against one Har Charan Kaur Gill and that the appellant was engaged to argue the writ petition as an Additional Advocate General for the State and on her argument an interim order was passed in favour of the State on 09.03.2021. It has also been stated on behalf of the appellant that the case was listed before the learned Single Judge on 02.03.2022, however, in the evening of March 1, 2022, learned counsel

representing the opposite party no.1 in the writ petition informed the appellant that the said opposite party had died on 27.12.2021 and accordingly the State Counsel assisting the appellant, on the case being called out, requested the learned Single Judge to grant some time to move the application for substitution of the legal heirs of the deceased opposite party, however, the learned Single Judge observed (as informed to the appellant by the learned State Counsel assisting her) that perhaps in the case the appellant as Additional Advocate General was appearing and therefore she be sent for to appear and argue the case. Learned counsel for the appellant further states that after getting the case passed over at about 12.30 p.m. the assisting counsel telephonically informed the appellant that the case was passed over and though he had requested for grant of time in order to enable the State to take steps for bringing an application for substituting the legal heirs of opposite party no.1, however, learned Single Judge desired presence of the appellant before the Court by stating that the case was being conducted by the appellant and enquired about her whereabouts.

12. The appellant thereafter is said to have told the learned State Counsel assisting her that for seeking time for moving application for substitution of the legal heirs of the deceased opposite party, her presence in the Court was not required. In the sequence of events as disclosed in this special appeal on behalf of the appellant, it has further been stated that the appellant also informed the learned State Counsel assisting her that she had left the premises of the Court in order to attend some medical emergency. The case is said to have been called out after lunch recess and as per the appellant, learned counsel assisting her informed the learned Single Judge that the appellant could not appear as she had gone to attend some medical emergency, however, even after this information was furnished to the Court, the order under appeal has been passed by the learned Single Judge.

13. It is also the case of the appellant that after the order under appeal dated 02.03.2022 was passed by the learned Single Judge, State Government has passed an order on 12.04.2022 discharging her from the office of Additional Advocate General and that except the order dated 02.03.2022 passed by the learned Single Judge no other material was available with the State Government which may have resulted in passing of the order discharging the appellant from the office of Additional Advocate General.

14. Stating the aforesaid facts, it has been argued by the learned counsel for the appellant that she was not given any opportunity before passing the order under appeal which contains unwarranted and uncalled for remarks against her. Drawing our attention specially to the observations made in paragraphs 4 and 6 of the order under appeal, it has been argued by the learned counsel representing the appellant that it is not only that the said remarks/observations which adversely affect the appellant were made without giving any opportunity of hearing or even without putting the appellant to notice but also that there is no prescribed procedure which requires any counsel to seek leave of the Court in a matter which is listed during the course of the day, in case the counsel has to leave the Court premises for attending some medical emergency. It has also been submitted that the facts and circumstances of the case did not warrant

the order under appeal to have been sent to the Principal Secretary, Law and the Additional Chief Secretary, Department of Forest for information and "necessary action".

15. Emphasis of the learned counsel for the appellant is that the learned Single Judge ought not to have sent the copy of the said order to the State Government for "necessary action". It has thus, been argued that discharge of the appellant from the office of Additional Advocate General has precipitated for no other reason but because of the fact that the order dated 02.03.2022 was sent to the State Government in the Department of Law as well for "necessary action". The submission, thus, is that the remarks/observations contained in paragraphs 4 and 6 of the order under appeal were not called for not only for the reason that the appellant was neither given any opportunity of hearing, nor was she put to any notice before recording such remarks but also for the reason that the factual background of the case were also not correctly appreciated by the learned Single Judge. The prayer thus is that the order under appeal be set aside except to the extent it fixes a date in the matter.

16. We have considered the submissions made by the learned counsel appearing for the appellant and have also perused the records available before us on this special appeal.

17. In this special appeal we have essentially been called upon to expunge the remarks contained in paragraphs 4 and 6 of the order under appeal which allegedly are adverse against and cast aspersions on the appellant.

18. There are well recognized legal principles which are to be followed while considering a matter where consideration is to be made by a Court of law to the prayer for expunction of such remarks. Hon'ble Supreme Court in the cases of **State of U.P. vs. Mohammad Naim,** reported in **AIR 1964 SC 703** had the occasion to cull out the relevant considerations which should weigh with a court while considering such a matter. The Hon'ble Supreme Court in the said case of Mohammad Naim (supra) had observed as under:

"It has been judicially recognised that in the matter of making disparaging remarks against persons or authorities whose conduct comes into consideration before courts of law in cases to be decided by them, it is relevant to consider (a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself ; (b) whether there is evidence on record bearing on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct. It has also been recognised that judicial pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation and reserve. "

(Emphasis supplied by Court)

19. Thus, the first and foremost question to be considered in such a matter is as to whether the party whose conduct is in question had an opportunity of explaining or defending himself. The other considerations to be made are as to whether there is evidence on record justifying the remarks and as to whether remarks are necessary for decision of a case as an integral part thereof. The Hon'ble Supreme Court while culling out these considerations to be made in such a matter

further goes on to say that judicial pronouncements must be judicial in nature and should not depart from sobriety, moderation and reserve.

20. The judgment in the case of **Mohammad Naim (supra)** has been referred and followed by Hon'ble Supreme Court in the case of **Neeraj Garg vs. Sarita Rani and others**, reported in **(2021) 9 SCC 92**. The case of **Neeraj Garg (supra)** also related to a lawyer practicing in the Hon'ble High Court of Uttarakhand and certain remarks and observations were made by the said Court against the lawyer without putting him to notice or providing opportunity of hearing.

21. In the case of **A. M. Mathur vs. Pramod Kumar Gupta and others,** reported in **(1990) 2 SCC 533**, Hon'ble Supreme Court while considering a matter where certain derogatory remarks were made by Hon'ble Madhya Pradesh High Court against a Senior Advocate and Ex. Advocate General of the State has noticed the significance of avoidance of even the appearances of bitterness which has been held to be important in a judge and which requires a judge not to cast aspersions on the professional conduct of a person.

22. In para 10 of the case of **A. M. Mathur (supra)** the Hon'ble Supreme Court has quoted Justice Benjamin N. Cardozo, the Former Judge of U. S. Supreme Court and author of famous book titled "**The Nature of the Judicial Process**". In this case quoting justice Felix Frankfurter and Justice Cardozo, Hon'ble Supreme Court has observed that judicial restraint and discipline are as important to the administration of justice as they are to the effectiveness of the army. Hon'ble Supreme Court has also observed in the said judgment that the Court has the inherent power to act freely upon its own conviction on any matter coming before it for adjudication but it is a principle of the highest importance for proper administration of justice that derogatory remarks ought not to be made against persons or authorities whose conduct comes into consideration unless the same becomes necessary for decision of the case. We find it appropriate to extract paragraphs 10 to 14 of the judgment in the case of **A.M. Mathur (supra)** which are as under:

"10. Justice Cardozo of course said:

"The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass judges by. We like to figure to ourselves the processes of justice as coldly objective and impersonal. The law, conceived of as a real existence, dwelling apart and alone, speaks, through the voices of priests and ministers, the words which they have no choice except to utter. That is an ideal of objective truth toward which every system of jurisprudence tends.... It has a lofty sound; it is well and finely said; but it can never be more than partly true.

11. Justice Felix Frankfurter, put it with a different emphasis:

"Judges are men, not disembodied spirits. Of course a judge is not free from preferences or, if you will, biases."

12. It is true that the judges are flesh and blood mortals with individual personalities and with normal human traits. Still what remains essential in judging, Justice Felix Frankfurter said:

"First and foremost, humility and an understanding of the range of the problems and (one's) own inadequacy in dealing with them, disinterestedness ... and allegiance to nothing except the effort to find (that) pass through precedent,

through policy, through history, through (one's) own gifts of insights to the best judgment that a poor fallible creature can arrive at in that most difficult of all tasks, the adjudication between man and man, between man and state, through reason called law."

13. Judicial restraint and discipline are as necessary to the orderly administration of justice as they are to the effectiveness of the army. The duty of restraint, this humility of function should be constant theme of our judges. This quality in decision making is as much necessary for judges to command respect as to protect the independence of the judiciary. Judicial restraint in this regard might better be called judicial respect, that is, respect by the judiciary. Respect to those who come before the court as well to other co-ordinate branches of the State, the executive and the legislature. There must be mutual respect. When these qualities fail or when litigants and public believe that the judge has failed in these qualities, it will be neither good for the judge nor for the judicial process. 14. The Judge's Bench is a seat of power. Not only do judges have power to make binding decision, their decisions legitimate the use of power by other officials. The judges have the absolute and unchallengeable control of the court domain. But they cannot misuse their authority by intemperate comments, undignified banter or scathing criticism of counsel, parties or witnesses. We concede that the court has the inherent power to act freely upon its own conviction on any matter coming before it for adjudication, but it is a general principle of the highest importance to the proper administration of justice that derogatory remarks ought not to be made against persons or authorities whose conduct comes into consideration unless it is absolutely necessary for the decision of the case to animadvert on their conduct. "

(Emphasis supplied by Court)

23. Having noticed, the broad legal principles to be followed while considering the matter where the court is called upon to deal with a prayer for expunction of disparaging remarks against the person of authority, as above, when we examine the narration of the facts and circumstances made on behalf of the appellant before us which allegedly led to passing of the order under appeal by Hon'ble Single Judge, what we find is that the version of the facts as noticed in the order under appeal passed by the learned Single Judge is at variance with the one put forth before us on behalf of the appellant in this special appeal. Learned Single Judge only records that the learned State Counsel assisting the appellant put in his appearance and in the first session before lunch it was informed that the appellant would appear in the matter and that the matter may be taken up in the revised call as she was busy in some other court. Learned Single Judge further records that on being asked as to where was the appellant busy at that time, it was told by learned State Counsel assisting her that she was busy in some other Court. Further learned Single Judge records in the order that on a specific query as to which Court the appellant was arguing, the learned State Counsel assisting her did not have any answer. In this background learned Single Judge records that learned assisting Counsel had the courage to tell complete lie in the Court. Learned Single Judge thereafter records that when the case was taken up in the revised call the appellant was not present and on being asked as to where was she busy, it was told by learned State Counsel assisting the appellant that

she had left the Court as she had to attend some urgent work.

24. In the aforesaid background facts, learned Single Judge, thus, has remarked in paragraph 4 of the order under appeal that appellant did not have the courtesy to come and seek permission of the Court for leaving the Court premises despite having accepted the case when the case was kept to be taken up in the revised call. The learned Single Judge, thus, observed that the Court does not approve of the conduct of the appellant and also that of the learned State Counsel assisting her. The learned Single Judge also ordered that copy of the said order be forwarded for information and necessary action to the Principal Secretary, Law and the Additional Chief Secretary, Government of Uttar Pradesh in the Department of Forest.

25. Thus, the facts and events as narrated on behalf of the appellant which we have recorded in this order are in departure with the facts and events which we find recorded in the order under appeal passed by the learned Single Judge.

26. This Court is a Court of record and thus records of the Court, which will necessarily include an order passed by the Court, has to be accorded utmost sanctity. The statement of facts as to what transpired at the time of hearing recorded in the judgment or order of a Court are to be treated to be conclusive of the facts so stated and no one can be permitted to contradict such statements by affidavit or other evidence.

27. Hon'ble Suprerme Court in the case of **State of Maharashtra vs. Ramdas Shrinivas Nayak and another**, reported in **(1982) 2 SCC 463** has noted the aforesaid legal position and has enunciated the principle that the Court cannot launch an enquiry as to what transpired in the Court and further that matters of judicial record are unquestionable. Paragraphs 4 and 8 of the judgment in the case of **Ramdas Shrinivas Nayak (supra)** are relevant to be noted which are extracted herein below:

"4. When we drew the attention of the learned Attorney-General to the concession made before the High Court, Shri A.K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submissions made by him in the High Court. We are afraid that we cannot launch into an enquiry as to what transpired in the High Court. It is simply not done. Public policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation." We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the

happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an appellate court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.

8. So the Judges' record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the Judge himself, but nowhere else."

28. Referring to the judgment in the case of **Ramdas Shrinivas Nayak (supra)**, Hon'ble Supreme Court in yet another case that is, in the case of **Roop Kumar vs. Mohan Thedani**, **reported in (2003) 6 SCC 595** has reiterated the aforesaid legal position. Paragraph 11 of the said judgment is also relevant to be extracted which is as under:

"11. It would be logical to first deal with the plea relating to absence of forum of appeal. It is to be noted that the parties agreed before the High Court that instead of remanding the matter to the trial court, it should consider materials on record and render a verdict. After having done so, it is not open to the appellant to turn around or take a plea that no concession was given. This is clearly a case of sitting on the fence, and is not to be encouraged. If really there was no concession, the only course open to the appellant was to move the High Court in line with what has been said in State of Maharashtra v. Ramdas Shrinivas Nayak. In a recent decision Bhavnagar University v. Palitana Sugar Mill (P) Ltd. the view in the said case was reiterated by observing that statements of fact as to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the judges, to call the attention of the very judges who have made the record. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. It is not open to the appellant to contend before this Court to the contrary."

29. In the case of **Commissioner of Customs, Mumbai vs. Bureau Veritas and others**, reported in **(2005) 3 SCC 265**, Hon'ble Supreme Court again referred to the judgment in the case of **Ramdas Shrinivas Nayak (supra)** and observed that the statements of facts as to what transpired at the time of hearing recorded in the judgment of the Court are conclusive of the facts so stated and that no one can contradict such statements by affidavit. Paragraph 14 of the said judgment is extracted herein below:

"14. After having agreed on some point as recorded, it is not open to the appellant to turn around or take a plea that the position is different. If really there was no agreement, the only course open to

the appellant was to move the Tribunal in line with what has been said in State of Maharashtra v. Ramdas Shrinivas Nayak. In a recent decision Bhavnagar University v. Palitana Sugar Mill (P) Ltd. the view in the said case was reiterated by observing that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the judges, to call the attention of the very judges who have made the record. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. It is not open to the appellant to contend before this Court to the contrary."

30. It is not that in a situation where a party thinks that the happenings in Court have wrongly been recorded in a judgment or order, then the party is remedy-less. As held by Hon'ble Supreme Court in the cases of **Ramdas Shrinivas Nayak (supra)** and Roop Kumar (supra), in such an event the party concerned must move the judge/court calling the attention of that very judge who is said to have recorded the facts relating to his/her conduct. The principle that "judge's record is conclusive" has a purpose and is necessary to be followed for maintaining the sanctity of the records of the Court, specially the Court which is a Court of record.

31. In view of the law laid down by Hon'ble Supreme Court in the aforementioned cases **Ramdas Shrinivas Nayak (supra) and Roop Kumar (supra)**, the appropriate course available to the appellant is to approach the learned Single Judge who has passed the order under appeal and to call his attention that the facts, circumstances and events which led the learned Single Judge to make the alleged offending observations are not correct and that such observations have thus been made in error.

32. From the records available before us what is indisputably clear is that before recording the alleged offending remarks in the order under appeal the appellant was neither put to notice nor was she given any opportunity of hearing. It is also indisputable that certain remarks contained in the order under appeal passed by the learned Single Judge are adverse and stigmatic and thus visit the appellant with adverse civil consequences.

33. For the discussions made and reasons given above, we are of the opinion that instead of approaching the forum of special appeal, the appellant ought to have moved appropriate application before the learned Single Judge apprising him of the facts and circumstances as narrated before us in this special appeal and seek redressal of her grievances.

34. The special appeal is, thus, **disposed of** permitting the appellant to approach the learned Single Judge calling his attention to the facts narrated on her behalf in this special appeal and seek remedy concerning her grievances relating to the aspersions cast and adverse remarks made against her, as stated in this special appeal.

35. We request the learned Single Judge that in case any such application with appropriate prayer is made by the appellant,

the same shall be considered and decided with expedition.

36. In the facts of the case there will be no order as to costs.

(2022)05ILR A511
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.05.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE PIYUSH AGRAWAL, J.

Spl. Appl. D No. 724 of 2021
with
Spl. Appl. 721 of 2021

Bushra Firdaus ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Ashok Khare (Senior Adv.), Sri Siddharth Khare

Counsel for the Respondents:
Mrs. Archana Singh (Addl. C.S.C.)

A. Service Law - The appellant is challenging the transfer order by which she was asked to rejoin at her original place of posting. Appellant had submitted application seeking her transfer which was approved but on verification it was found that incorrect information was furnished for transfer. The order of rejoining at her original place of posting is correct as interchange of cadre was not permissible in the Order dated 2.12.2019. (Para 7)

Appeal Rejected. (E-10)

(Delivered by Hon'ble Piyush Agrawal, J.)

1. The present intra-Court appeals have been preferred assailing the common judgement & order dated August 27, 2021 passed in leading Writ A No. 6418 of 2021, vide which the writ petitions filed by the appellants against their transfer orders have been dismissed.

2. As the issues involved in these appeals are similar arising out of common judgement and order, hence the same are being decided by the common order.

3. The facts of Special Appeal No. 724 of 2021 are taken for the purpose of deciding these two appeals.

4. The appellant applied for intra-State or inter-District transfer on the strength of Government Order dated December 9, 2019, which was accorded. The application was processed and she was transferred at her requested place. Later on, on scrutiny of documents, it revealed that the disclosed information given by the appellant was incorrect and therefore her transfer order was recalled. The appellant preferred writ petition before this Court, which was dismissed by the learned Single Judge by the impugned order.

5. Learned Senior Counsel appearing for the appellant submits that transfer of the appellant had been sanctioned by the Board of Basic Education and on February 2, 2021, the appellant was relieved from her place of posting in district Chitakoot to join at the transferred place i.e. Rampur vide order dated February 02, 2021. But on May 10, 2021, the appellant was directed to re-join at her original place of posting i.e. district Chitakoot. Feeling aggrieved, the appellant preferred writ petition before this Court, which was dismissed by the learned Single Judge vide impugned order holding that incorrect information was given by the appellant for seeking her inter -district transfer. He prays for allowing the appeal.

6. Per contra, learned Standing Counsel supports the impugned order and prays that the present appeals are liable to be dismissed summarily. He submitted that the appellants herein got the benefit of the policy by furnishing wrong information hence, the order was rightly recalled.

7. After hearing learned counsel for the parties and perusing the record, the undisputed fact that emerges is that the appellant was appointed as Assistant Teacher in primary institution. After the issuance of Government Order dated December 2, 2019, appellant submitted application seeking her transfer, which was approved. Subsequently on verification it was revealed that incorrect information was furnished by the appellant for transfer that she belonged to the rural local area cadre while sought her transfer to urban local area cadre. The said inter-change of cadre was not permissible, in the absence of any formal order. Therefore, the appellant was rightly directed to re-join at her original place of posting.

8. The appellant has also failed to bring on record any cogent reason or material to show that her posting was in urban local area cadre instead of rural local area cadre.

9. Learned Senior Counsel, at this juncture, has submitted that the appellant was receiving House Rent Allowance of urban area. Therefore, she should be treated in Urban Local Area Cadre. The appointment letter issued to the appellant is on record, which shows that her appointment was in rural local area cadre. Merely, the residence of appellant for payment of House Rent Allowance for urban local area has no relevance for determining the cadre of the appellant.

10. It is stated at bar that the appellants have joined at their original place of posting.

11. In view of the facts stated above as well as in the absence of any material available on record to show that the appellants belong to urban local area cadre, no case is made out for interference with the order passed by the learned Single Judge.

12. The appeals fail and are accordingly **dismissed.**

13. There shall be no order as to costs.

(2022)05ILR A512
ORIGINAL JURISDICTION
CIVIL SIDE
DATED:LUCKNOW 28.04.2022

BEFORE

THE HON'BLE RAJAN ROY, J.

Writ-A No. 2432 of 2022

Dr. Ram Pujan Srivastava ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sharad Pathak, Piyush Pathak

Counsel for the Respondents:
C.S.C.

A. Service Law - Disciplinary Proceeding - U.P. Government Servant (Discipline & Appeal) Rules, 1999 - Rule 9(4), 10 - The Disciplinary Authority has to consider the entire material on record including the charges, facts of the case, reply submitted by the petitioner to the charge, evidence adduced dring inquiry and then to record his independent and objective opinion as to whether the charge against the petitioner is proved ad why the reply of the petitioner against the charge and his response

to the inquiry report is not accepted by the Disciplinary Authority. In the instant case, the Disciplinary Committee did not apply mind to the relevant aspects of the matter and did not discuss about the charges and evidence followed by his own opinion in respect of each of the charges as to how it is proved against the petitioner and why the reply of the petitioner in this regard against the charge sheet as also against the inquiry report is not acceptable. (Para 3 & 4)

Writ Petition Allowed. (E-10)

List of Cases cited:-

1. Kaptan Singh Vs St. of U.P. & anr. 2014 (4) ALJ 440

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard Shri Sharad Pathak, learned counsel for petitioner and Shri Vivek Shukla, learned Additional Chief Standing Counsel for State.

2. Ordinarily in matters of minor punishment the High Court is loathe to interfere and the petitioner is relegated to the alternative remedy before the U.P. Public Services Tribunal, however, the contention of Shri Sharak Pathak, learned counsel for the petitioner in this case is that there is apparent error on the face of the record as while passing the impugned order the Special Secretary to the Government who has passed the order has merely quoted the Charge, the finding of the Inquiry Officer in respect thereto and response of the petitioner to the show cause notice and the inquiry report. This has been done from internal Page 1 to internal page 6, up to this stage there is absolutely no discussion of the findings by the Inquiry Officer, the reply submitted by the petitioner to the charge sheet, the evidence which may have been collected in the inquiry, independently and objectively by the Disciplinary Authority to arrive at any finding. It is only in Para 3 that the Special Secretary has expressed his opinion. Para 3 reads as under:-

"3- श्री राम पूजन श्रीवास्तव, तत्कालीन अधिशासी अधिकारी, नगर पालिका परिषद, कासगंज सम्बद्ध नगर पंचायत, अमांपुर–कासगंज सम्प्रति अधिशासी अधिकारी, नगर पालिका परिषद, टाण्डा अम्बेडकरनगर के विरुद्ध आरोप संख्या–1 आंशिक रुप से तथा आरोप संख्या–2 पूर्णरुप से सिद्ध पाया गया। श्रीयुत श्रीवास्तव द्वारा अपने पदीय दायित्वों के निर्वहन में लापरवाही बरतने एवं निविदा प्रकाशन में अनियमिततायें बरतने के लिए शासन द्वारा सम्यक विचारोपरान्त उन्हें परिनिन्दा प्रदान करते हुए 02 वेतन वृद्धि अस्थायी रुप से 03 वर्षों के लिए रोके जाने की शास्ति अधिरोपित किये जाने का अनन्तिम निर्णय लिया गया है। शासन के पत्र संख्या–869/नौ–4–21–16ईओ/2019, दिनांक 20.09.2021 द्वारा प्रचलित विभागीय जॉच में प्राप्त जॉच आख्या तथा जॉच आख्या के विरुद्ध उनके अभ्यावेदन के परीक्षणोपरान्त अनन्तिम दण्ड के विनिश्चय पर मा0 लोक सेवा आयोग, उ0प्र0 प्रयागराज की सहमति उपलब्ध कराने का अनुरोध किया गया। उप सचिव, मा0 लोक सेवा आयोग उ0प्र0 प्रयागराज के पत्र संख्या–567/21/12–ए0डी0सी0/एस–10/2021–22, दिनांक 17.11.2021 द्वारा उक्त पर दी गयी सहमति के दृष्टिगत श्री राम पूजन श्रीवास्तव, तत्कालीन अधिशासी अधिकारी, नगर पालिका परिषद, कासगंज सम्बद्ध नगर पंचायत अमांपुर–कासगंज सम्प्रति अधिशासी अधिकारी, नगर पालिका परिषद टाण्डा अम्बेडकरनगर को निम्नलिखित शास्ति प्रदान करते हुए उनके विरुद्ध प्रचलित अनुशासनिक कार्यवाही एतद्द्वारा समाप्त की जाती हैः–

"श्री राम पूजन श्रीवास्तव, तत्कालीन अधिशासी अधिकारी, नगर पालिका परिषद, कासगंज अतिरिक्त प्रभार नगर पंचायत, अमांपुर कासगंज सम्प्रति अधिशासी अधिकारी, नगर पालिका परिषद, टाण्डा अम्बेडकरनगर के विरुद्ध आंशिक रुप से सिद्ध आरोप संख्या–1 तथा पूर्णतया सिद्ध आरोप संख्या–2 हेतु उन्हें परिनिन्दित करते हुए 02 वेतन वृद्धि अस्थायी रुप से 03 वर्षों के लिए रोकी जाती है।"

इस आदेश की एक प्रति श्री राम पूजन श्रीवास्तव की वर्ष 2021–22 की वार्षिक गोपनीय प्रविष्टि के साथ रखी जायेगी।

संजय कुमार सिंह यादव
विशेष सचिव।"

3. The submission is that proceedings were initiated for imposing a major punishment

by issuance of charge sheet. The petitioner had submitted reply to the charge sheet. Thereafter, inquiry was conducted. The Inquiry Officer submitted his findings. The Disciplinary Authority obviously did not differ from the report of the Inquiry Officer, therefore, he served a show cause notice upon the petitioner enclosing therewith the inquiry report asking him to respond whereupon the petitioner has submitted his response. Now, at this stage the Disciplinary Authority was required to independently and objectively consider the entire material on record including the charges, facts of the case, reply submitted by the petitioner to the charge, evidence adduced during inquiry and then to record his independent and objective opinion as to whether the charge against the petitioner is proved and why the reply of the petitioner against the charge and his response to inquiry report is not acceptable to the Disciplinary Authority. A finding of guilt in respect of each charge should have been recorded with such discussion. It can not be a mechanical exercise because the Inquiry Officer has found the charge to be proved, especially as, even thereafter, the petitioner has responded to the show cause notice as against the inquiry report.

4. On a bare perusal of Para 3 of the impugned order the Court finds that there is no due and proper application of mind by the Disciplinary Authority to the relevant aspects of the matter and no discussion of the charges and evidence followed by his own opinion in respect of each of the charge as to how it is proved against the petitioner and why the reply of the petitioner in this regard against the charge sheet as also against the inquiry report is not acceptable. Para 3 merely says that charge no. 1 and 2 have been found to be proved partially and totally respectively and the State Government has decided to impose a punishment of censure entry and withholding of two annual increments. Thereafter, it says that after examining the representation of the petitioner against the show cause notice a tentative punishment was proposed to the Public Service Commission seeking its approval which was granted on 17.11.2021 and thereafter in Para 3 straightway the punishment of censure and withholding of two annual increments for years have been passed. The order is not at all in keeping with the requirements of principle of natural justice. There is no due and proper application of mind as referred hereinabove. There are no reasons given by the Disciplinary Authority discussing the charges and evidence etc.

5. Even if as Shri Vivek Shukla, learned Additional Chief Standing Counsel says that the punishment imposed was a minor one the fact remains that the proceedings were initiated for imposing a major punishment, but, this apart, even while imposing a minor punishment the order of the Disciplinary Authority has to disclose some application of mind which is absent in this case. It is passing of such orders which compel the Courts to interfere in such matters. Merely quoting the charge, findings of the Inquiry Officer, extract of the reply of the petitioner to the show cause notice does not mean due and proper application of mind nor is it in keeping with the principle of natural justice.

6. At this stage Shri Vivek Shukla, learned Additional Chief Standing Counsel relied upon Rule 9(4) of the U.P. Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to as 'the Rules, 1999')which reads as under:-

"9.(4) If the disciplinary authority having regard to its findings on all or any of charges is of the opinion that any penalty specified in Rule 3 should be imposed on the charged Government servant, he shall give a copy of the inquiry report and his findings recorded under sub-rule (2) to the charged Government servant and require him to submit his representation if he so desires, within a reasonable specified time. The disciplinary authority shall, having regard to all the relevant records relating to the inquiry and representation of the charged Government servant, if any, and subject to the provisions of Rule 16 of these rules, pass a reasoned order imposing one or more penalties mentioned in Rule 3 of these rules and communicate the same to the charged Government servant."

7. Even when tested on the anvil of the said Rule the impugned order can not be sustained. By the said rule also, after the charged government servant submits his response to the show cause notice, the Disciplinary Authority is mandated to consider all relevant records relating to the inquiry and representation of the charged government servant, if any, and subject to the provisions of Rule 16 of the Rules, pass a reasoned order imposing one or more penalties mentioned in Rule 3 of the Rules, 1999 and communicate it to the charged government servant. As already stated, there is no 'consideration' by the Disciplinary Authority of all the relevant records relating to the inquiry and representation of the charged government servant. Mere reference or quoting of the reply does not amount to its consideration. The order for the reasons already mentioned can not be stated to be reasoned order also.

8. The Court may in this regard refer to the decision in the case of ***Kaptan Singh Vs. State of U.P. and Anr***. reported in ***2014 (4) ALJ 440*** wherein the law as to how an inquiry is to be conducted and what is the role of the Disciplinary Authority has been discussed, albeit that was a matter pertaining to major punishment but so far as application of mind by the Disciplinary Authority is concerned, the same is somewhat similar whether the punishment to be imposed is major or minor and any order without due and proper application of mind even if imposing minor punishing is against the principle of natural justice as also against the letter and spirit of the Rules, 1999.

9. Even in respect to minor punishment Rule 10 of the Rules, 1999 reads as under:-

"10. Procedure for imposing minor penalties. *- (1) Where the disciplinary authority is satisfied that good and sufficient reasons exist for adopting such a course, it may, subject to the provisions of sub-rule (2) impose one or more of the minor penalties mentioned in Rule 3.*

(2) The Government servant shall be informed of the substance of the imputations against him and called upon to submit his explanation within a reasonable time. ***The disciplinary authority shall after considering the said explanation, if any, and the relevant records, pass such orders as he considers proper and where a penalty is imposed, reason thereof shall be given.*** *The order shall be communicated to the concerned Government servant."*

10. Sub-rule (1) of Rule 10 very categorically provides that where **the disciplinary authority is satisfied that good and sufficient reasons exist for adopting such a course**, it may, subject to the provisions of sub-rule (2) impose one or

more of the minor penalties mentioned in Rule 3.

11. The satisfaction of the Disciplinary Authority has to be based on good and sufficient reasons which obviously implies proper application of mind, the entire material on record including the inquiry report where there is an inquiry report or otherwise the show cause notice. Merely because at the stage of Rule 9 of the Rules, 1999 the Disciplinary Authority has not differred with the inquiry report, does not mean that, ultimately, after considering the response of the chargesheeted government servant to the inquiry report, he does not have to apply his mind and has necessarily to accept the inquiry report and the findings contained therein. This is not the scheme of the Rules, 1999 nor its intent. The requirement of Rules as aforesaid and principal of natural justice are not meant to be an empty formality.

12. Further more, Sub-rule (2) of Rule 10 of the Rules, 1999 also says that **after considering the said explanation of the government servant, if any, and the relevant records, pass such orders as he considers proper and where a penalty is imposed, reason thereof shall be given.** None of these parameters and requirements are satisfied in the impugned order. The Court does not go into the question as to how the Special Secretary has passed the impugned order on behalf of the State Government as ordinarily it is the Principal Secretary or the Additional Chief Secretary who passes such an order which may be communicated by the Special Secretary, but, it does not take this into account for quashing the impugned order and it does so for other reasons already mentioned hereinabove.

13. The State Government, however, shall now proceed to pass a fresh order in the light of what has been stated hereinabove considering the response of the petitioner to the inquiry report etc. and other material on record.

14. The writ petition is **allowed** in the aforesaid terms.

(2022)05ILR A516
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.03.2022

BEFORE

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

Writ-A No. 2592 of 2022

Sonu Bharti ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pravin Kumar Tiwari, Sri Dharmendra Kumar Chaubey

Counsel for the Respondents:
C.S.C.

A. Civil Law - Practice & Procedure - Simultaneous Proceedings - U.P. Police Regulation, 1861: Regulation 492 & 493 - It is a settled principle of law that departmental proceedings and criminal proceedings can proceed simultaneously as the standard of proof in both the cases are different but when if the departmental proceedings and criminal case are based on similar set of facts and charges in criminal case against a delinquent employee is of grave nature which involves complicated question of fact and law, it would be desirable to stay the departmental proceedings till the conclusion of criminal case. (Para 10)

Writ Petition Disposed of. (E-10)

List of Cases cited:

1. Capt. M. Paul Anthony Vs Bharat Coal Mines Ltd. 1999 (3) SCC 679

2. S.B.I. Vs R.B. Sharma 2004 (7) SCC 27

3. Dhirendra kumar Tiwari Vs St. of U.P. & Ors. Writ - A N. 2705 of 2012

4. St. of Har. Vs Rattan Singh (1977) 2 SCC 491

5. St. of Raj. Vs B.K. Meena (1966) 6 SCC 417

6. Krishnakali Tea Estate Vs Akhil Bharatiya Chah Mazdoor Sangh (2004) 8 (SCC) 200

7. Ajit kumar Nag Vs Indian Oil Corp. Ltd. (2005) 7 SCC 764

8. CISF Vs Abrar Ali (2017) 4 SCC 507

9. Karnataka Power Transmission Corporation Ltd. Vs C. Nagaraju

10. Depot Manager, Andhra Pradesh State Road Transport Corp. Vs Mohd Yousuf Miya & ors. AIR 1997 SC 2232

11. Kendriya Vidyalaya Sangathan & ors. Vs T. Srinivas AIR 2004 SC 4127

12. Kedar Nath Yadav Vs St. of U.P. 2005 (3) E. & C 1955

13. Virendra Kumar Sharma Vs St. of U.P. 2002 (3) UPLBEC

14. Ram Nath Singh Vs St. of U.P. 2002 (3) UPLBEC 2463

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

1. Heard Mr. Pravin Kumar Tiwari, learned counsel for the petitioner and Mr. Pranav Ojha, learned Standing Counsel for the State-respondents.

2. This writ petition has been filed interalia for the following reliefs:-

"A) Issue a writ, order or direction in the nature of certiorari quashing the departmental proceedings initiated against the petitioner in pursuance of the departmental charge sheet dated 12.01.2022 issued by the respondent no.4 (Annexure no.3 to the writ petition).

B) issue a writ, order or direction in the nature of mandamus directing the respondents to stay the further departmental disciplinary proceedings initiated against the petitioner in pursuance of the departmental charge sheet dated 12.01.2022."

3. Brief background of the case as is reflected that the petitioner was posted as Constable at Police Chauki-Mehrauli, P.S.-Lar, District-Deoria. First Information Report was lodged on 13.05.2020 against the petitioner and three others, under Sections 389 & 120B IPC and Section 7 of the Prevention of Corruption Act, 1988 and the same was registered as Case Crime No.101 of 2020 at P.S. Lar, District-Deoria with the allegations that the petitioner along with others were demanding and taking money from truck drivers for passing from that area. Charge sheet in the criminal case has been submitted on 18.01.2021.

4. Learned counsel for the petitioner submits that on the basis of charge sheet against the petitioner, the respondent no.4 has passed order dated 12.01.2022 for initiating departmental proceedings against the petitioner and charge sheet/memo has been filed by respondent no.4. Learned counsel for the petitioner further submits that departmental proceedings has been initiated against the petitioner on the same set of facts and evidence as that in the criminal case.

5. Learned counsel for the petitioner further submits that on one hand the petitioner is facing criminal proceedings

and on the other hand departmental proceedings have been initiated against him relying upon the same set of facts and evidence, therefore, the departmental proceedings should be kept in abeyance till the conclusion of criminal case.

6. He further submits that the petitioner has not been convicted in the criminal case, hence without conclusion of the criminal case, the departmental proceedings cannot be initiated for the same set of facts and evidence. The criminal case and departmental proceeding are based on same set of fact and same evidence, as such continuance of departmental inquiry, is not at all justifiable and consequentially directive be issued for withholding departmental proceeding till criminal trial is not over. For this preposition, he has placed reliance on Regulation 492 and 493 of U.P. Police Regulations as well as judgment of Hon'ble Apex Court in the cases of **Capt. M. Paul Anthony vs. Bharat Coal Mines Ltd. Reported in 1999 (3) SCC 679** and **State Bank of India vs. R.B. Sharma reported in 2004 (7) SCC 27** as well as the judgment of this Court in the case of **Dhirendra Kumar Tiwari vs. State of U.P. and Ors. passed in Writ-A No.2705 of 2012 decided on 16.01.2012.**

7. On the other hand, learned Standing counsel contended that there is no bar in simultaneous proceeding i.e. criminal proceeding and departmental proceeding can go on simultaneously as area of both departmental proceeding and criminal prosecution are altogether different and as such there is no occasion for staying departmental proceedings hence such writ petition be dismissed.

8. After hearing the arguments advanced by both the parties, it would be appropriate to analyze the relevant part of the judgments, settled proposition of law as well as the relevant regulations in this regard. In the case of ***Capt. M. Paul Anthony vs. Bharat Coal Mines Ltd. reported in 1999 (3) SCC 679***, the Apex Court after taking into consideration various other judgments has held that after taking into account various earlier judgments has held that departmental proceedings and proceedings in criminal case can proceed simultaneously, as there is no bar in their being conducted simultaneously, though separately. It has been further held that if the departmental proceedings and criminal case are based on similar set of facts and charges in criminal case against delinquent employees is of grave nature which involves complicated questions of fact and law, it would be desirable to stay the departmental proceedings till conclusion of criminal case. Whether complicated questions of fact and law are involved or not will depend upon the nature of the offence, and the case lodged against the employee on the basis of evidence and material collected during the investigation or as reflected in the charge sheet, and these facts are not to be considered in isolation but due regard has to be given to the fact that departmental proceedings cannot be unduly delayed. Thus, if complicated questions of fact and law are involved, and departmental proceedings and criminal case are based on identical and similar set of facts, only then it is desirable to stay the departmental proceedings, but the said facts are not to be considered in isolation. Paragraph 22 of the judgment being relevant is being quoted below:

"22. The conclusions which are deducible from the various decisions of this Court referred to above are:

(i) Departmental proceedings and proceedings in criminal case can proceed simultaneously, as there is no bar in their being conducted, simultaneously, though separately.

(ii) If the departmental proceedings and the criminal case are based on identical and similar set of facts and charge in criminal case against delinquent employees is of a grave nature which involves complicated questions of law and fact, it would be desirable to stay the departmental proceedings till the conclusion of criminal case.

(iii) Whether the nature of a charge in a criminal case is grave and complicated questions of fact and law are involved in that case will depend upon the nature of the offence, the nature of case launched against the employee on the basis of evidence and material collected against him during the investigation or as reflected in the charge sheet.

(iv) The factors mentioned at (ii) and (iii) above cannot be considered in isolation to stay the departmental proceedings but due regard has to be given to the fact that departmental proceedings cannot be unduly delayed. (v) If the criminal case does not proceed or its disposal is being unduly delayed, the departmental proceedings, even if they were stayed on account of pendency of criminal case can be resumed and proceeded with so as to conclude them at an early date, so that if the employee is found not guilty his honour may be vindicated and in case he is found guilty, administration may get rid of him at the earliest."

9. The judgment in the case of ***Capt. M. Paul Anthony (Supra)*** has been followed in the case of **State Bank of India and others Versus R.B. Sharma reported in 2004 (7) SCC 27**. Relevant paragraphs 7,8 and 11 are being quoted below:-

"7. It is a fairly well stetted position in law that on basic principles proceedings in criminal case and departmental proceedings can go on simultaneously, except where departmental proceedings and criminal case are based on the same set of fact and the evidence in both the proceedings is common.

8. The purpose of departmental enquiry and of prosecution are two different and distinct aspects. Criminal prosecution is launched for an offence for violation of a 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 public duty. The departmental enquiry is to maintain discipline in the service and efficiency of public service. It would, therefore, be expedient that the disciplinary proceedings are conducted and completed as expeditiously as possible. It is not, therefore, desirable to lay down any guidelines as inflexible rules in which the departmental proceedings may or may not be stayed pending trial in criminal case against the delinquent officer. Each case requires to be considered in the backdrop of its own facts and circumstances. There would be no bar to proceed simultaneously with departmental enquiry and trial of a criminal case unless the charge in the criminal trial is of grave nature involving complicated question of fact and law. Offense generally implies infringement of public duty, as distinguished from mere private rights punishable under criminal law. When trial for criminal offence is

conducted it should be in accordance with proof of the offence as per the evidence defined under the provisions of the Indian Evidence Act, 1872 (in short " the Evidence Act"). Converse is the case of departmental enquiry. The inquiry in a departmental proceeding relates to conduct or breach of duty of the delinquent officer, to punish him for his misconduct defined under the relevant statutory rules or law. That the strict standard of proof or applicability of the Evidence Act stands excluded is a settled legal position. Under these circumstances, what is required to be seen is whether the departmental enquiry would seriously prejudice the delinquent in his defence at the trial in a criminal case. It is always question of fact to be considered in each case depending on its own facts and circumstances.

11. There can be no straitjacket formula as to in which case the departmental proceedings are to be stayed.

There may be cases where the trial of the case gets prolonged by the dilatory method adopted by the delinquent official. He cannot be permitted to, on one hand, prolong criminal case and at the same time contend that the departmental proceedings should be stayed on the ground that the criminal case is pending."

10. If departmental proceedings and criminal case are based on similar set of facts and charges in criminal case against delinquent employee is of grave nature which involves complicated question of fact and law, it would be desirable to stay the departmental proceedings till conclusion of criminal case. Whether complicated question of fact and law are involved or not will depend upon the nature of the offence, and the case lodged against the employee on the basis of evidence and material collected during the investigation or as reflected in the charge sheet. Thus it is clear that departmental proceeding can proceed, as there is no bar and only when nature of charge in criminal case are grave and complicated question of fact and law are involved, then departmental proceedings can be stayed and further also in contingency when departmental enquiry would seriously prejudice delinquent in his defence at the trial, and even these facts cannot be considered in isolation to stay departmental proceeding but due regard will have to be given to the fact that departmental proceedings cannot be unduly delayed.

11. There is a consensus of judicial opinion on a basic principle that proceedings in a criminal case and departmental proceedings can go on simultaneously, except where departmental proceedings and criminal case are based on the same set of facts and the evidence in both the proceedings is common. Basis for this proposition is that proceedings in a criminal case and the departmental proceedings operate in distinct and different jurisdictional areas. In the departmental proceedings, the factors operating in the mind of the Disciplinary Authority may be many, such as enforcement of discipline, or to investigate the 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 the probabilities, in a criminal case, the charge has to be proved by the prosecution beyond reasonable doubt.

12. The principles which govern a disciplinary enquiry are distinct from those which apply to a criminal trial. In a

prosecution for an offence punishable under the criminal law, the burden lies on the prosecution to establish the ingredients of the offence beyond reasonable doubt. The accused is entitled to a presumption of innocence. The purpose of a disciplinary proceeding by an employer is to enquire into an allegation of misconduct by an employee which results in a violation of the service rules governing the relationship of employment. Unlike a criminal prosecution where the charge has to be established beyond reasonable doubt, in a disciplinary proceeding, a charge of misconduct has to be established on a preponderance of probabilities. The rules of evidence which apply to a criminal trial are distinct from those which govern a disciplinary enquiry.

13. In a judgment of a three judge Bench of the Court in the case of ***State of Haryana vs. Rattan Singh, reported in (1977) 2 SCC 491*** set out the principles which govern a disciplinary proceedings as follows:-

"4. It is well settled that in a domestic enquiry the strict and sophisticated rules of evidence under the Indian Evidence Act may not apply. All materials which are logically probative for a prudent mind are permissible. There is no allergy to hearsay evidence provided it has reasonable nexus and credibility. It is true that departmental authorities and Administrative Tribunals must be careful in evaluating such material and should not glibly swallow what is strictly speaking not relevant under the Indian Evidence Act. For this proposition it is not necessary to cite decisions nor text books, although we have been taken through case-law and other authorities by counsel on both sides. The essence of a judicial approach is objectivity, exclusion of extraneous materials or considerations and observance of rules of natural justice. Of course, fairplay is the basis and if perversity or arbitrariness, bias or surrender of independence of judgment vitiate the conclusions reached, such finding, even though of a domestic tribunal, cannot be held good. However, the courts below misdirected themselves, perhaps, in insisting that passengers who had come in and gone out should be chased and brought before the tribunal before a valid finding could be recorded. The "residuum' rule to which counsel for the respondent referred, based upon certain passages from American Jurisprudence does not go to that extent nor does the passage from Halsbury insist on such rigid requirement. The simple point is, was there some evidence or was there no evidence -- not in the sense of the technical rules governing regular court proceedings but in a fair commonsense way as men of understanding and worldly wisdom will accept. Viewed in this way, sufficiency of evidence in proof of the finding by a domestic tribunal is beyond scrutiny. Absence of any evidence in support of a finding is certainly available for the court to look into because it amounts to an error of law apparent on the record. We find, in this case, that the evidence of Chamanlal, Inspector of the Flying Squad, is some evidence which has relevance to the charge levelled against the respondent. Therefore, we are unable to hold that the order is invalid on that ground."

(emphasis supplied)

14. These principles have been reiterated in subsequent decisions of this Court including ***State of Rajasthan vs. B K Meena reported in (1966) 6 SCC 417; Krishnakali Tea Estate vs. Akhil Bharatiya Chah Mazdoor Sangh reported in (2004) 8 SCC 200; Ajit Kumar Nag vs.***

Indian Oil Corporation Ltd. reported in (2005) 7 SCC 764; and CISF vs. Abrar Ali reported in (2017) 4 SCC 507.

15. In ***Karnataka Power Transmission Corporation Ltd. vs. C. Nagaraju***, this Court has held that the two proceedings, criminal and departmental, are entirely different. They operate in different fields and have different objectives. In the disciplinary proceedings, the question is whether the delinquent employee is guilty of such conduct as would merit his removal from service or a lesser punishment, as the case may be, whereas in the criminal proceedings, the question is whether the offences registered against him are established, and if established, what sentence should be imposed upon him.

16. 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. reported in 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....."

17. 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., reported in 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.

18. A similar view has been reiterated by the Apex Court in the case of ***Kendriya Vidyalaya Sangathan & Ors. Vs. T. Srinivas, reported in AIR 2004 SC 4127***. A Three-Judge Bench of the Hon'ble Supreme Court in the case on ***Krishnakali Tea Estate Vs. Akhil Bhartiya Chah Mazdoor Sangh & Anr. reported in (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.

19. Much reliance has been placed on Regulations 492 and 493 of of U.P. Police Regulations. The two Regulations mentioned are set out below:-

"492. Whenever a police officer has been judicially tried, the Superintendent must await the decision of the judicial appeal, if any, before deciding whether further departmental action is necessary.

493. It will not be permissible for the Superintendent of Police in the course of a departmental proceeding against a Police Officer who has been tried judicially to reexamine the truth of any facts in issue at his judicial trial, and the finding of the Court on these facts must be taken as final.

Thus. (a) if the accused has been convicted and sentenced to rigorous imprisonment,l no departmental trial will be necessary, as the fact that he has been found deserving of rigorous imprisonment must be taken as conclusively providing his unfitness for the discharge of his duty within the meaning of Section 7 of the Police Act. In such cases the Superintendent of Police will without further proceedings ordinarily pass an order of dismissal, obtaining the formal order of the Deputy Inspector General when necessary under paragraph 479 (a). Should be wish to do otherwise he must refer the matter to the Deputy Inspector General of the range for orders.

(b) If the accused has been convicted but sentenced to a punishment less than of rigorous imprisonment a departmental trial will be necessary, if further action is though desirable, but the question in issue at this trial will be merely (1) whether the offence of which the accused has been convicted amounts to an offence under Section 7 of the Police Act .(2) if so, what punishment should be imposed. In such cases the Superintendent of Police will (i) call upon the caused to show cause why any particular penalty should not be inflicted on him (ii) record anything the accused Officers has to urge against such penalty without allowing him to dispute the findings of the Court. and (iii) write a finding and order in the ordinary way

dealing with any plea raised by the accused officers which is relevant to (1) and (2) above..

(c) If the accused has been judicially acquitted or discharged, and the period for filing an appeal has elapsed and/or no appeal has been filed the Superintendent of Police must at once reinstate him if he has been suspended; but should the findings of the Court mot be inconsistent with the view that the accused has been guilty of negligence in, or unfitness for, the discharge of his duty within the meaning of Section 7 of the Police Act, the Superintendent of Police may refer the matter to the Deputy Inspector General and ask for permission to try the accused departmentally for such negligence or unfitness:"

20. Bare perusal of Regulations 492 and 493 would go to show that whenever a police officer has been judicially tried, the Superintendent must await the decision of the judicial appeal, if any, before deciding whether further departmental action is necessary. Regulation 493 mentions that it will not be permissible for the Superintendent of Police in the course of a departmental proceeding against a Police Officer who has been tried judicially to re-examine the truth of any facts in issue at his judicial trial and the finding of the Court on these facts must be taken as final. Division Bench of this Court in the Case of ***Kedar Nath Yadav Vs. State of U.P. reported in 2005(3) E.& C 1955***, while considering these very Regulations, has taken the view, that even after enforcement of 1991 Rules, these two Regulations continue to hold the field. Both these Regulations occupy different field i.e. wherein Police Officer has been judicially tried and after judicial trial is over, and consequently will not come to the rescue of petitioner.

21. Reliance has been placed on the judgment of this Court in the case of ***Virendra Kumar Sharma Vs. State of U.P. 2002(3) UPLBEC***, for the preposition that, when charges are engaging attention of criminal trial or police investigation, departmental enquiry cannot proceed on same charges. Said decision has been rendered, in context of the mandate provided for in Rule 104 of U.P. Rajya Sahkari Bhoomi Vikas Bank Employees, Service Rules, 1976, which specifically prohibits departmental enquiry against a charge which is sub-judice in judicial enquiry or trial.

22. Argument has also been advanced, that disciplinary proceeding in the present case, is in fact second enquiry on same facts and same charges, as such same is legally not permissible. Reliance in this connection has been placed on judgment of this Court, in the case of ***Ram Nath Singh Vs. State of U.P. reported in 2002(3) UPLBEC 2463***. Arguments advanced are clearly devoid of substance, as in the present case, at no point of time any departmental enquiry has been held in the past, wherein petitioner has been exonerated, and too the contrary for the first time, for his alleged misconduct, petitioner is being asked to appear and face enquiry. Judgment cited is totally out of context and will not come to the rescue of petitioner.

23. Thus, there can be no doubt regarding the settled legal proposition that as the standard of proof in both the proceedings is quite different, therefore, no interference is required by this Court in the departmental proceedings being carried out against the petitioner.

24. However, it is open to the disciplinary authority to conclude the departmental proceedings, strictly in accordance with law, at the earliest possible

preferably within a period of three months from the date of production of certified copy of this order before the disciplinary authority.

25. With the aforesaid observations and directions, this writ petition is disposed of.

(2022)05ILR A525
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.05.2022

BEFORE

THE HON'BLE RAJAN ROY, J.

Writ-A No. 2764 of 2022

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

Counsel for the Petitioner:
Anurag Vikram, Kirti Prakash, Prashant Kumar Singh

Counsel for the Respondents:
C.S.C., Ashok Shukla, Raj Kumar Upadhyaya(R.K. Upadhyaya)

A. Practice & Procedure - Through this petition, the Court clarified that when an inquiry has not been concluded within the time which has been fixed by the Court, the employer has the option to seek an extension of time by making an appropriate application to the Court, setting out the reasons for the delay in conclusion of the inquiry. The Court on the other hand, based on the reasons stated, has to consider whether to extend the time or not. Meaning thereby**, it will not be open to the employer to disregard that stipulation and an extension of time must be sought.** The Court further added that mere delay on the part of the employer to conclude a disciplinary proceeding in time did not *ipso facto* nullify the entire proceeding. (Para 8 & 12) (E-10)

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard.

2. The case of the petitioner is that, the Tribunal while deciding the Claim Petition No. 151 of 2011 quashing the earlier order of punishment dated 08.01.2011 and directing the opposite parties before it to conclude the inquiry or the disciplinary proceedings within three months of service of the copy of said judgment, the said judgment was challenged by the State before this Court by means of Writ Petition No. 4147 (SB) of 2017 which was dismissed summarily on 22.02.2017. Therefore, the State was already aware of the judgment dated 31.03.2015 passed in the above mentioned claim petition as it had challenged the same before this Court and its petition was dismissed on 22.02.2017. However, the disciplinary proceedings were not completed within three months as ordered, not even from the date of passing of the judgment in Writ Petition by the High Court. Instead, the inquiry was completed on 17.09.2020, that is, almost five years from the date of judgment of the Tribunal and three years from the date of judgment of the High Court. Thereafter, a show cause notice was issued to the petitioner on 12.10.2020 and the final order for punishment has been passed by the State Government in the name of his Excellency the Governor on 21.04.2022, that is, seven years from the judgment of the Tribunal and five years from the date of judgment of the High Court referred hereinabove.

3. The contention is that, this order is in the teeth of the full Bench decision of this Court in the case of '**Abhishek Prabhakar Awasthi Vs. The New India**

Insurance Company Ltd. and others', Writ Petition No. 7179 (SS) of 2009.

4. The counsel for the State on the other hand says that the Full Bench does not bar the authorities from passing an order of punishment if the time period prescribed by a judgment of the Court or the tribunal has expired.

5. The contention of the State at this stage appears to be apparently erroneous in law.

6. Question no. (a) considered by the full Bench in **Abhishek Prabhakar Awasthi (supra)** reads as under:-

"Whether if an inquiry proceeding is not concluded within a time frame fixed by a court and concluded thereafter, without seeking extension from the Court then on the said ground the entire inquiry proceeding as well as punishment order passed, is vitiated in view of the judgment in the case of P.N. Srivastava."

7. The answer to the said question reads as under:-

"We hold that if an enquiry is not concluded within the time which has been fixed by the Court, it is open to the employer to seek an extension of time by making an appropriate application to the court setting out the reasons for the delay in the conclusion of the enquiry. In such an event, it is for the court to consider whether time should be extended, based on the facts and circumstances of the case. However, where there is a stipulation of time by the Court, it will not be open to the employer to disregard that stipulation and an extension of time must be sought."

8. On the face of it, the answer to question no. (a) is that if inquiry has not concluded within the time which has been fixed by the Court, it is open to the employer to seek an extension of time by making an appropriate application to the Court, setting out the reasons for delay in conclusion of the enquiry. These observations of the Full Bench clearly mean that two course of actions are open, one to drop the proceedings if the same are not concluded within the time prescribed by the Court/Tribunal, the other is to seek extension of time. The Full Bench has further stated that in such an event, that is, where extension of time is sought by the employer, it is for the Court to consider whether time should be extended, based on the facts and circumstances of the case. However, where there is stipulation of time by the Court, **it will not be open to the employer to disregard that stipulation and an extension of time must be sought.** This answer to question no. (a) is mandatory as is evident from the very language used therein. **When the Full Bench says that where there is stipulation of time by the Court it will not be open to the employer to disregard that stipulation and an extension of time must be sought, it means that it cannot proceed further to pass the final order without seeking permission and the same being granted by the Court.**

9. Reliance placed by the counsel for the State on the answer to question no. (b) is misconceived as, if based on the said answer, the contention is accepted that a final order could be passed without seeking permission of the Court and without applying for such permission and the same being granted, then, it will negate the

answer to question no. (a). In fact, it will negate the very judgment of the Full Bench. Nevertheless, for the satisfaction of the State's counsel the Court may refer to question no. (b).

"Whether the law as laid down by a Division 2 Bench of this Court in the case of P.N. Srivastava that if an inquiry proceeding is not concluded within a time frame as fixed by a Court, it stands vitiated is still a good law in view of the judgment rendered by the Supreme Court in the case of Suresh Chandra as well as a judgment dated 27.07.2009 of a Division Bench of this Court in Writ Petition No. 1056 (SB) of 2009 (Union of India and others Vs. Satendra Kumar Sahai and another)."

10. The answer to the said question is as under:-

"The judgment of the Supreme Court in the case of Suresh Chandra (supra) as well as the judgment of the Division Bench of this Court in the case of Satyendra Kumar Sahai (supra) clearly indicate that a mere delay on the part of the employer in concluding a disciplinary enquiry will not ipso facto nullify the entire proceedings in every case. The court which has fixed a stipulation of time has jurisdiction to extend the time and it is open to the court, while exercising that jurisdiction, to consider whether the delay has been satisfactorily explained. The court can suitably extend time for conclusion of the enquiry either in a proceeding instituted by the employee challenging the enquiry on the ground that it was not completed within the stipulated period or even upon an independent application moved by the employer. The court has the inherent jurisdiction to grant an extension of time, the original stipulation of time having been fixed by the court itself. Such an extension of time has to be considered in the interests of justice balancing both the need for expeditious conclusion of the enquiry in the interests of fairness and an honest administration. In an appropriate case, it would be open to the Court to extend time suo motu in order to ensure that a serious charge of misconduct does not go unpunished leading to a serious detriment to the public interest. The court has sufficient powers to grant an extension of time both before and after the period stipulated by the court has come to an end."

11. Nowhere does this answer to question no. (b) says that even if the time stipulated for the Court for completing an inquiry/disciplinary proceeding has expired and no permission for extension of time has been sought nor has it been granted, it is open for the authority to pass the final order without the said eventuality. The argument in fact runs contrary to the answer to question no. (a) as is apparent on the face of the record. Both answers to questions (a) and (b) have to be read, understood and applied harmoniously. What answer to question no. (b) says is that in the event the time has expired and an extension of time is sought by the employer or for that matter the employee approaches the Court challenging the proceedings on the ground that the same have not been completed during the stipulated period as ordered by the Court, this by itself, that is, mere delay on the part of the employer in concluding a disciplinary inquiry will not ipso facto nullify the entire proceeding in every case, meaning thereby, the Court which has fixed a stipulation of time has the jurisdiction to extend the time also. This can be done on an application by the employer or on a challenge being raised by

an employee suo moto. It is for the Court to consider in these circumstances whether the delay has been satisfactorily explained, the Court can suitably extend time for conclusion of the inquiry. The Court has the inherent jurisdiction to grant an extension of time, such an extension of time has to be considered in the interest of justice balancing both the need for expeditious conclusion of the inquiry in the interest of fairness and an honest administration. The purpose behind is that a serious charge of misconduct does not go unpunished leading to serious detriment to the public interest. Nowhere does the answer to question no. (b) permit conclusion of the inquiry and thereafter passing of a final order of punishment by the disciplinary authority even where the time for completing of such enquiry or proceedings has already expired and no extension of time has been sought by the employer nor granted by the Court whether at its behest or in proceedings initiated by the employee. **As already stated earlier, answer to question no. (b) deals with the situation where the time has expired which makes it mandatory for the employer to seek extension of time for completing such enquiry in view of the answer to question no. (a) and in that context the Court has the power to extend the time. The contention of the State's counsel if accepted will nullify, as already stated, the answer to question no. (a).**

12. On a harmonious and conjoint reading of both the answers i.e. to question (a) and (b) by the Full Bench what comes out is that where there is stipulation of time by the court, it will not be open for the employer to disregard that stipulation and an extension of time must be sought. There is no escape from this. If it is sought then the court has power to extend the time and in this context, the observation of the Full Bench that mere delay on the part of employer in concluding a disciplinary inquiry will not ipso facto nullify the entire proceedings has to be understood, meaning thereby, it is not as if once stipulated time has not been adhered, such proceedings have necessarily to be nullified. The Court has jurisdiction in suitable cases to extend the time. But this does not mean that the employer can pass final order in such a proceedings without seeking such extention of time or without the same being granted otherwise in some proceeding by the employee challenging its continuance after expiry of the stipulated time. Where would be the occasion for extension of time for completing the inquiry/ proceedings when a final order has already been passed concluding the proceedings? None. As already stated earlier, if answer to question no.(b) is understood as suggested by the State Counsel then it will render the answer to question no.(a) otiose.

13. In a given case even where such a final order has been passed, even if it is to be quashed, the Court may in its discretion in exercise of his jurisdiction under article 226 of the Constitution of India may grant further time for completing the inquiry proceedings afresh, if the charges are serious enough and as observed by the Full Bench a situation exists where a serious charge of misconduct would go unpunished leading to serious detriment to the public interest merely because of the delay on the part of the employer and/ or where delay is not much, but, that does not appear to be the case here. In this case the punishment which has been imposed is a minor punishment. There are no charges of financial irregularity involved. As already stated, the judgment of the Tribunal is dated 31.03.2015, that is, it was passed

more than seven years ago. The writ petition of the State itself was highly belated having been filed in the year 2017 and the same came to be dismissed on 22.02.2017, that is, more than five years ago. We're now in the year 2022. There is no mention of the factors which led to this delay in the impugned order. The Court also notices the inquiry report, according to which no loss was caused to the Government on account of any action of the petitioner. The only error pointed out on his part was as under:-

"परन्तु गिट्टी की कुटाई के उपरान्त 03 माह के अन्दर लेपन का कार्य सुनिश्ति न कराये जाने के कारण नियंत्रण में शिथिलता हेतु आंशिक दोष होता है I"

14. On admitted facts as mentioned in the impugned order where only a minor punishment of withholding one increment of one year and recovery of the amount of one increment which would otherwise be payable for a year from the petitioner has been ordered. Nevertheless, in the larger interest, the State is granted one opportunity to demonstrate before the Court as to how it seeks to sustain the impugned order in the light of the above. This, of course, is without prejudice to the legal position discussed hereinabove so that this Court may do substantial justice under Article 226 of the Constitution of India.

15. List this case on **23.05.2022** amongst the first ten cases of the day. No further time shall be granted to the opposite parties for filing a counter affidavit.

16. Until further orders, the impugned order is hereby stayed.

17. The name of Sri R.K. Upadhyay shall be printed in the cause list as learned counsel for opposite party no. 2.

(2022)05ILR A529
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.05.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Writ-A No. 9733 of 2018

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

Counsel for the Petitioner:
Umesh Kumar Yadav, Anagh Shukla, Rahul Srivastava

Counsel for the Respondents:
C.S.C.

A. Service Law - The employee can be discharged from service or a prospective employee may be refused employment on the ground of suppression of material information or making false statement in reply to queries relating to prosecution or conviction or acquittal in a criminal offence. (Para 13)

Writ Petition Rejected. (E-10)

List of Cases cited:

1. Jainendra Singh Vs St. of U.P. (2012) 8 SCC 748

2. Rajasthan Rajya Vidyut Prasaran Nigam Ltd. Vs Anil Kanwariya (2021) 10 SCC 136

3. Daya Shankar Yadav Vs U.O.I. (2010) 14 SCC 103

4. St.of Raj. & ors. Vs Chetan Jeff Civil Appeal No. 3116 of 2002

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

1. Heard learned counsel for the petitioner and learned Standing Counsel appearing for the State-respondents.

2. Petitioner applied for the post of Constable (Civil Police) against an advertisement issued in 2013, by the second respondent- U.P. Police Recruitment and Promotion Board, Lucknow. Petitioner was declared successful in physical and medical examination, however, he was not sent for training alongwith similarly situated candidates. On verification of the antecedent of the petitioner, it was informed by the District Magistrate, Ambedkar Nagar, that the following cases are registered against the petitioner:

Sl No.	Case Crime No.	Under Sections	Police Station	District	Status
1	NCR 03/2013	323/504 IPC	Ibrahimpur	Ambedkar Nagar	Pending
2	FIR 25/2013	436/506 IPC	Ibrahimpur	Ambedkar Nagar	Pending
3	NCR 38/2015	352/504 IPC	Ibrahimpur	Ambedkar Nagar	Pending
4	FIR 63/2015	392/411/506 IPC	Aliganj	Ambedkar Nagar	Acquitted on 17.02.2017
5	FIR 73/2015	3/4 Goonda Act	Ibrahimpur	Ambedkar Nagar	Acquitted on 17.03.2018

3. On specific query, learned counsel for the petitioner submits that on the last date for submission of the application form for the post in 2012, admittedly, all the criminal cases against the petitioner was pending and it was in the knowledge of the petitioner, however, the said information was suppressed and not disclosed in the relevant column of the form. The status of the cases is of a later date.

4. By the instant writ petition, petitioner has raised challenge to the orders dated 08.08.2016 and 01.08.2017, passed by the third respondent- District Magistrate, Ambedkar Nagar, whereby, the representation of the petitioner, seeking a direction to the District Magistrate, Ambedkar Nagar, to take steps for submission of the verification report, has been disposed of forwarding the antecedents of the petitioner to the competent authority. A further prayer has been made that a direction be issued to the State-respondents to consider the candidature of the petitioner for training, pursuant to the Government Order dated 28.04.1958.

5. Learned counsel for the petitioner has confined the writ petition to prayer clause-(i) as considerable time has since lapsed and the petitioner, at this stage, cannot be sent for training. In other words petitioner seeks quashing of the antecedents forwarded by the District Magistrate to the employer.

6. It is not being disputed by the learned counsel for the petitioner that he had suppressed the criminal cases pending against him on the last date of submission of the application form for the post. The criminal cases noted herein above are

serious offences and in any case, it is the discretion of the employer as to whether to offer appointment to the petitioner having regard to the pending criminal cases.

7. In the case of **Jainendra Singh v. State of U.P., (2012) 8 SCC 748**, in para 29.4, Supreme Court has observed and held that "a candidate having suppressed material information and/or giving false information cannot claim right to continue in service and the employer, having regard to the nature of employment as well as other aspects, has the discretion to terminate his services. In para 29.6, it is further observed that the person who suppressed the material information and/or gives false information cannot claim any right for appointment or continuity in service. In para 29.7, it is observed and held that "the standard expected of a person intended to serve in uniformed service is quite distinct from other services and, therefore, any deliberate statement or omission regarding a vital information can be seriously viewed and the ultimate decision of the appointing authority cannot be faulted."

8. In the case of ***Rajasthan Rajya Vidyut Prasaran Nigam Limited v. Anil Kanwariya, (2021) 10 SCC 136***, Supreme Court held that:

9. The issue/question may be considered from another angle, from the employer's point of view. The question is not about whether an employee was involved in a dispute of trivial nature and whether he has been subsequently acquitted or not. The question is about the credibility and/or trustworthiness of such an employee who at the initial stage of the employment i.e. while submitting the declaration/verification and/or applying for a post made false declaration and/or not disclosing and/or suppressing material fact of having involved in a criminal case. If the correct facts would have been disclosed, the employer might not have appointed him. Then the question is of TRUST. Therefore, in such a situation, where the employer feels that an employee who at the initial stage itself has made a false statement and/or not disclosed the material facts and/or suppressed the material facts and therefore he cannot be continued in service because such an employee cannot be relied upon even in future, the employer cannot be forced to continue such an employee. The choice/option whether to continue or not to continue such an employee always must be given to the employer. At the cost of repetition, it is observed and as observed hereinabove in catena of decision such an employee cannot claim the appointment and/or continue to be in service as a matter of right."

10. The police force, a disciplined force, even if, the candidate is acquitted or discharged in criminal case, that acquittal or discharge order will have to be examined to assess, whether, the candidate is completely exonerated in the case on merit and whether his appointment poses a threat to the discipline of the police force.

11. The learned counsel for the petitioner submits that petitioner would be satisfied, at this stage, in the event, the impugned communication of the third respondent recording therein the criminal antecedents of the petitioner is set-aside. He further submits that in the event of the communication not being quashed, that would have an adverse impact on future appointment of the petitioner.

12. The submission, in my opinion is misconceived and unfounded. In future

appointments petitioner is bound to disclose all the criminal cases lodged against him, whether, convicted or acquitted. The district authorities are bound to inform the employer about the antecedents of the petitioner, the lodged criminal cases against the petitioner would always be reflected in the report, even upon acquittal. It is upon the employer to consider whether having regard to the criminal cases, even upon acquittal, petitioner is fit for appointment.

In Daya Shankar Yadav v. Union of India, (2010) 14 SCC 103, Supreme Court had an occasion to consider the purpose of seeking the information with respect to antecedents. It is observed and held that the purpose of seeking the information with respect to antecedents is to ascertain the character and antecedents of the candidate so as to assess his suitability for the post. It is further observed that when an employee or a prospective employee declares in a verification form, answers to the queries relating to character and antecedents, the verification thereof can lead to any of the following

consequences: (SCC pp. 11011, para 15)

"15. ... (a) If the declarant has answered the questions in the affirmative and furnished the details of any criminal case (wherein he was convicted or acquitted by giving benefit of doubt for want of evidence), the employer may refuse to offer him employment (or if already employed on probation, discharge him from service), if he is found to be unfit having regard to the nature and gravity of the offence/crime in which he was involved.

(b) On the other hand, if the employer finds that the criminal case disclosed by the declarant related to offences which were technical, or of a nature that would not affect the declarant's fitness for employment, or where the declarant had been honourably acquitted and exonerated, the employer may ignore the fact that the declarant had been prosecuted in a criminal case and proceed to appoint him or continue him in employment.

(c) Where the declarant has answered the questions in the negative and on verification it is found that the answers were false, the employer may refuse to employ the declarant (or discharge him, if already employed), even if the declarant had been cleared of the charges or is acquitted. This is because when there is suppression or nondisclosure of material information bearing on his character, that itself becomes a reason for not employing the declarant.

(d) Where the attestation form or verification form

does not contain proper or adequate queries requiring the declarant to disclose his involvement in any criminal proceedings, or where the candidate was unaware of initiation of criminal proceedings when he gave the declarations in the verification roll/attestation form, then the candidate cannot be found fault with, for not furnishing the relevant information. But if the employer by other means (say police verification or complaints, etc.) learns about the involvement of the declarant, the employer can have recourse to courses (a) or (b) above."

13. Thereafter, it is observed and held that an employee can be discharged from service or a prospective employee may be refused employment on the ground of suppression of material information or making false statement in reply to queries relating to prosecution or conviction for a criminal offence (even if he was ultimately acquitted in the criminal case).

14. In para 13, of the report Supreme Court observed and held as under:

"13. In Avtar Singh [Avtar Singh v. Union of India, (2016) 8 SCC 471, though this Court was principally concerned with the question as to nondisclosure or wrong disclosure of information, it was observed in para 38.5 that even in cases where a truthful disclosure about a concluded case was made, the employer would still have a right to consider antecedents of the candidate and could not be compelled to appoint such candidate."

15. Recently, the Supreme Court in **State of Rajasthan and others vs. Chetan Jeff**, Civil Appeal No.3116 of 2002, decided on 11 May, 2022, upon considering the precedents, affirmed the decision of the authority (employer) in declining appointment on the post of Constable as the candidate had suppressed the information of pending criminal cases. The Court observed and held that acquittal or benefit of Probation of Offenders Act would not be sufficient to appoint the candidate on the post of Constable.

16. Having regard to the facts and circumstances of the case and the proposition of law and precedents, the writ petition being devoid of merit, is accordingly, dismissed.

17. No cost.

(2022)05ILR A533
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.05.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Writ-A No. 14772 of 2020

Vimal Kumar Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Abhishek Kumar Pandey, Apoorva Tewari

Counsel for the Respondents:
C.S.C., Atul Kumar Dwivedi, Dharmendra Kumar Dixit, Kazim Ibrahim, Pravin Singh, S.S. Rajawat

A. Service Law - Temporary government servant as also the government servant appointed on deputation have no right to hold the post, his services are liable to be terminated by giving him one month notice without assigning any reason either as per the terms of the contract or the statutory rules regulating the terms and conditions of the service. In the present case, the Court earlier directed the reinstatement of the petitioner holding the termination/repatriation was arbitrary. But the respondent- State Urban Development Agency released the salary of the petitioner for the remaining period of the contract and declined to renew the contract of appointment further. As observed and held that SUDA was justified in not renewing the contract of appointment of the petitioner being based on an objective assessment of performance and utility of the petitioner, which was as per the terms and conditions governing the appointment of the government servant. (Para 36- 39)

The decision of the respondent to repatriate the petitioner to his parent department and to not to renew the contract of the petitioner further was based on the performance, conduct and disutility of the petitioner, therefore valid and non-arbitrary. (Para 41)

Writ Petition Rejected. (E-10)

List of Cases cited:

1. Ashok kumar Ratilal Patel Vs U.O.I. (2012) 7 SCC 757 *(distinguished)*

2. U.O.I. Vs S.N. Maity (2015) 4 SCC 164 *(distinguished)*

3. U.O.I. Vs Ramakrishnan & ors. (2005) 8 SCC 394

4. Balmer Lawrie & Company & ors. Vs Partha Sarathi Sen Roy & ors. (2013) 8 CC 345

5. West Bengal State Electricity Board & ors. Vs Desh Bandhu Ghosh & ors. (1985) 3 SCC 116

6. Workmen Vs Hindustan Steel Ltd. AIR 1985 SC 251

7. St.of U.P. & ors. Vs Prem Lata Misra (Km) & ors. 1994 (4) SCC 189

8. St. of U.P. Vs Kaushal Kishore Shukla (1991) 1 SCC 691

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

1. Heard Sri Apporva Tewari, learned counsel for the petitioner, Sri Kazim Ibrahim, learned counsel appearing for respondents No. 2 & 3 and learned Standing Counsel for the State-respondents.

2. Petitioner has raised challenge to the order dated 8 July 2020, passed by the second respondent, Director State Urban Development Agency (for short "SUDA'), repatriating the petitioner to his parent department. A further challenge has been raised to the consequential order dated 15 July 2020, whereby, the petitioner has been relieved from the post of Project Officer, District Unnao Development Authority Sultanpur, and order dated 29 July 2020, whereby, the fourth respondent has been posted on the said post.

3. The facts, briefly stated, for the purposes of the present writ petition, is that petitioner came to be appointed in 1987 on the post of Junior Clerk in the Department of Animal Husbandry, Government of U.P. Pursuant to a requisition issued by the State Urban Development Agency on 21 June 2017, petitioner applied for appointment on deputation for the post of Project Officer. The requisition was followed by an advertisement dated 26 June 2017, published in daily Amar Ujala. Petitioner applied for the post of Project Officer through proper channel on 3 July 2017, upon selection, petitioner was issued appointment order dated 27 October 2017. An agreement dated 17 November 2017, setting forth the terms and conditions of appointment was entered between the petitioner and SUDA, wherein, the maximum period of deputation was provided at 5 years, but renewable every year. On accepting the terms and conditions of appointment, petitioner came to be relieved by his parent department on 4 December 2017, thereafter, petitioner submitted his joining before the second respondent on 5 December 2017. Petitioner came to be posted Project Officer, District Urban Development Authority, Sultanpur (for short "DUDA') on 2 January 2018, consequently, petitioner joined the post at Sultanpur on 6 January 2018.

4. Petitioner after putting in two and half years of service, by the impugned order dated 8 July 2020, came to be repatriated to his parent department on administrative ground. Consequently, petitioner came to be relieved by the District Magistrate, Sultanpur, on 15 July 2020. Aggrieved, petitioner instituted the instant writ petition, wherein, an interim order came to be passed on 17 November 2020, staying the effect and operation of the impugned order and a further direction was issued to reinstate the petitioner. It appears that the second respondent declined to reinstate the petitioner, but paid the salary for the remaining period of contract for that year.

5. Learned counsel for the petitioner has made the following submissions while assailing the impugned order:

(i) that the impugned order is unreasoned, non-speaking and arbitrary;

(ii) that no opportunity of hearing was given before passing the impugned order;

(iii) that status of the petitioner on appointment on deputation is distinct from a transferee on deputation;

(iv) that petitioner could not have been removed/reverted during the term of deputation without affording opportunity or show cause;

(v) that no reasons have been assigned in the impugned order.

6. In support of his submission reliance has been placed on the decisions rendered by the Supreme Court in **Ashok Kumar Ratilal Patel vs. Union of India1; Union of India vs. S.N. Maity2; Union of India vs. V. Ramakrishnan and others3 & Balmer Lawrie and Company and others vs. Partha Sarathi Sen Roy and others**4.

7. In rebuttal, in the counter affidavit filed by the second respondent, it has been stated that petitioner failed to discharge his duties satisfactorily with full dedication in the interest of SUDA. The organization is engaged in implementing various schemes of the Central Government and/or State Government for urban poor, consequently, the beneficiaries were deprived of the benefits of the scheme or suffered due to delay in getting the benefits, viz, dwelling houses, and funds for construction of houses. It is further stated that petitioner miserably failed to achieve the targets and in one such scheme 566 dwelling units was sanctioned, but petitioner failed to complete even a single dwelling unit. As against 6180 dwelling units only 2150 i.e. less than 30% was achieved showing lack of interest by the petitioner in the work of SUDA.

8. Further, in National Urban Livelihood Mission (for short "NULM'), financial assistance to the urban poor for setting up establishment for source of livelihood, petitioner miserably failed to achieve the target. The comparative chart with regard to Prime Minister Awas Yojana (Urban) and progress of NULM Scheme has been placed on record along with the counter affidavit at Annexure-CA-1.

9. It is further stated that petitioner was issued notice on 5 December 2019, for meeting the targets under the various schemes, petitioner replied on 24 December 2019, assuring that he shall make an endeavour to achieve the target. It is further stated that petitioner did not show any interest to the work allotted at District Sultanpur, further, petitioner violated Conduct Rules and the transfer policy by invoking political pressure to transfer him to another district of his choice. It is alleged that the wife of the petitioner submitted several applications for his transfer, the office of Deputy Chief Minister was approached for transfer. Further, it is stated that petitioner absented from duty leaving the station headquarter on several occasions without sanctioned leave or information, for which he was issued notice on 29 January 2019 and 19 May 2020.

10. That apart it is further alleged that serious complaints were received against the petitioner demanding bribe at Rs. 50 thousand each from the beneficiaries under the Schemes, and on the said complaint Additional Director SUDA directed the Chairman, DUDA Sultanpur, to conduct an enquiry and submit a report. Petitioner on an earlier occasion was issued notice dated 11 April 2019, by the Director SUDA, to show cause with regard to his poor performance in achieving targets. Despite

notice, petitioner did not show any inclination to improve the targets, rather, applied political pressure demonstrating that petitioner was not interested in the work and lacks the aptitude and positive approach towards implementation of the Schemes for urban poor. Several complaints were received from the beneficiaries alleging demand of bribe for grant of benefits under the Schemes, on which an enquiry was conducted. The authority taking a lenient view repatriated the petitioner to the parent department as per the terms and conditions of the contract of appointment. It is urged that petition lacks merit and is liable to be dismissed.

11. Rival submissions fall for consideration.

12. To ascertain, as to whether, the second respondent had applied his mind independently before passing the impugned order, the learned counsel appearing for the second respondent was directed to produce the records pertaining to the decision taken on the repatriation of the petitioner. Learned counsel produced the record and upon perusal of the record and the order-sheet, with the assistance of the learned counsels, it is noted that complaint was received from Member of the Legislative Assembly, through the office of the Chief Minister, alleging that petitioner lacks knowledge of the work, consequently, the wards inhibited by marginalized sections of society have been deprived of the development work under the Schemes. The beneficiaries have not received benefits of the Schemes, further, the proposed work was also not carried out by the petitioner under the Prime Minister National Awas Yojana and Kashi Ram Shahri Awas Yojana. Further, there is allegation of rampant corruption in allotment of the benefits under the Schemes. The complaint sought transfer of the petitioner. It is further noted that during Covid Pandemic petitioner without information and proper approval of his superior went missing from his duty for which petitioner was called upon to explain vide notice dated 19 May 2020. Further, it is noted that the petitioner for his transfer to another district i.e. DUDA Prayagraj, mounted pressure from the State Government/Central Government which is unbecoming of a government servant. In the aforenoted background, it was requested that petitioner be repatriated to his parent department as per the terms and conditions of appointment, which came to be duly approved by the second respondent on 8 July 2020. The decision of the second respondent is based on the noting endorsed by several officers.

13. Learned counsel for the petitioner was allowed to peruse the original record and the notings therein.

14. In the backdrop of the aforenoted satisfaction recorded by the second respondent pertaining to the performance, conduct and utility of the petitioner, learned counsel for the second respondent submits that the competent authority having regard to the terms and conditions of appointment, repatriated the petitioner. The second respondent in its wisdom did not desire to transfer the petitioner or to proceed departmentally against the petitioner for his incompetence, lack of interest, and/or, on allegations of misconduct/extraneous considerations, instead, passed an order simplicitor repatriating the petitioner to the parent department.

15. It is urged that the motive behind the impugned order rests upon the assessment of the overall work,

performance and conduct of the petitioner. The impugned order is not founded on misconduct perse. The entire record of the petitioner, including, complaints received against him were considered by the second respondent before passing the impugned order.

16. Submission of the learned counsel for the petitioner that since the petitioner's appointment was appointment on deputation and not by way of transfer on deputation, therefore, petitioner was entitled to a show cause notice before petitioner could have been repatriated to the parent department. He submits that there is a distinction between "transfer on deputation' and "appointment on deputation'. Petitioner came to be appointed on deputation after due process of selection against a post with the second respondent.

17. Reliance has been placed on **Ashok Kumar (supra)** wherein, Supreme Court noted that the appellant, therein, came to be selected on the post of Director AICTE for a period of three years. Before the petitioner could join the post, the appointment on deputation came to be cancelled as the grade-pay for the selected post was lower than the revised grade-pay which the petitioner was entitled in his parent department. The respondent withdrew the offered appointment of the appellant on the ground that the deputation from higher post to lower post is not admissible under the rules. The Court in the given facts noted that the appellant was prepared and submitted his willingness to join at the lower grade-pay, in the circumstances, the Court was of the opinion that the action of the authority in withdrawing the appointment of the appellant was arbitrary and in violation of Article 14 of the Constitution. The Court made the following observation.

14. ..... A person, who applies for appointment on deputation has indefeasible right to be treated fairly and equally and once such person is selected and offered with the letter of appointment on deputation, the same cannot be cancelled except on the ground of non- suitability or unsatisfactory work.

15. The present case is not a case of transfer on deputation. It is a case of appointment on deputation for which advertisement was issued and after due selection, the offer of appointment was issued in favour of the appellant. In such circumstances, it was not open for the respondent to argue that the appellant has no right to claim deputation and the respondent cannot refuse to accept the joining of most eligible selected candidate except for ground of unsuitability or unsatisfactory performance.

18. The case would not apply to the facts arising in the instant writ petition. It is not the case of the petitioner that appointment of the petitioner was recalled or cancelled before joining the post on deputation, rather, it is a case where the respondents after assessing the performance and utility of the petitioner declined to extend the contract of appointment and instead repatriated the petitioner to his parent department. The issue, in the facts of the case in hand, is as to whether the petitioner could be repatriated by an order simplicitor in terms of the appointment agreement.

19. In **S.N. Maity** (supra), the writ petitioner (respondent before the Supreme Court) was a Scientist in Central Mining Research Institute. He came to be

appointed on deputation on the post of Controller General of Patents, Designs and Trade Marks. After serving for one year, he was repatriated to his parent department. The order was contested on the ground that principles of natural justice was violated, therefore, being arbitrary and violative of Article 14 of the Constitution. A finding was returned by the Court that the case of the petitioner was not a case of simplicitor deputation but appointment on a deputation, therefore, petitioner could not have been repatriated to his parent department prematurely without disclosing the grounds for repatriation. The Court returned a finding that the tenure of posting of the petitioner/respondent was curtailed without any justifiable reason. The Court, however, declined to reinstate the petitioner/respondent as the tenure had expired but in the interest of justice directed that the petitioner/respondent shall be entitled to salary for the said period at 9% interest.

20. The distinguishing feature of **S.N. Maity (**supra) is that petitioner/respondent came to be appointed after due process on the recommendation of the Union Public Service Commission (UPSC) for a period of five years. The premature repatriation was not backed/supported by the grounds/reasons for repatriation. As against the facts of the case in hand, the contract of appointment incorporates a condition that the deputation could be terminated at any time. Further, the conduct and performance of the petitioner would be assessed every year and upon satisfaction of the competent authority the contract would be renewed on year to year basis. The term of initial appointment would be for three years but not exceeding five years. In other words in the instant case the terms and condition of appointment of the petitioner was not a term appointment, but appointment on year to year basis. The contract of appointment was required to be renewed upon assessment of performance, suitability and conduct of the petitioner. In the event the contract of appointment not being renewed, on the ground of suitability and unsatisfactory performance petitioner could be repatriated. The nature of appointment on deputation was purely temporary.

21. Supreme Court in **Balmer Lawrie** (supra), observed and held that where the actions of an employer bear public character and contain an element of public interest, as regards the offers made by him, including the terms and conditions mentioned in an appropriate table, which invite the public to enter into contract, such a matter does not relegate to a pure and simple private law dispute, without the insignia of any public element whatsoever. Where an unfair and untenable, or an irrational clause in a contract, is also unjust, the same is amenable to judicial review.

22. Reliance was placed by the Court on the decision rendered in **West Bengal State Electricity Board & others vs. Desh Bandhu Ghosh and others**5, Supreme Court considered a case where the respondent-employee was terminated by giving him only three months' notice, and without holding any enquiry or informing him about any actions on his part that were unwarranted. The court, after placing reliance on the judgment in **Workmen vs. Hindustan Steel Ltd**.6, held that where a regulation enables an employer to terminate the services of an employee, in an entirely arbitrary manner and in a manner that confers vicious discrimination, the same must be struck down as being violative of Article 14 of the Constitution.

23. The decision relied upon is of no help to the petitioner as the petitioner has not challenged any terms and conditions of the contract of appointment to urge that respondents could not have terminated the services of the petitioner without assigning any reason. The repatriation of the petitioner rests upon review of his performance and suitability. The non-renewal of contract of appointment of the petitioner is not based on the principle of "hire and fire'. The second respondent has assigned reasons to support the impugned order as reflected from the record.

24. Reliance has been placed on the terms and conditions incorporated in the Government Order dated 26 May 2003, wherein, it has been provided that the government servant appointed on deputation should not be repatriated before three years and in no case the deputation should exceed five years. It is urged that petitioner was entitled to continue for the remaining tenure. The Government Order is not of much assistance to the petitioner as the terms and conditions agreed between the parties, governing the appointment of the petitioner, would be relevant. The service contract clearly provides (Clause-2) that after one year of service, the performance of work and conduct of the petitioner would be reviewed and in the event of a satisfaction being recorded by the authority, the deputation period shall be extended for another year. It further provides that the assessment of performance and suitability would be undertaken, on year to year basis and the deputation period in any case would not exceed beyond five years.

25. Clause 3(i) of the agreement provides that after one year the deputation could be terminated without any notice. Clause 2(ii) provides that SUDA can terminate the service by notice of one calendar month, if the petitioner fails in performance of his duty and efficiency. Clause 13 clearly provides that the services of the petitioner is absolutely temporary and the deputation would automatically terminate on the expiry of the term i.e. one year.

26. Clause 1, 2, 3 and 3(i) and (ii) is extracted for ready reference:

''1. प्रथम पक्ष अपने को अभिकरण के आदेशों के तथा उनके अधिकारियों तथाप्राधिकारियों के अधीन प्रस्तुत करेगा, जिनके अधीन अभिकरण द्वारा उसे समय समयपर रखा जाता है तथा ***प्रथमतः एक वर्ष की अवधि के लिए प्रतिनियुक्ति पर रहेगा*** *जो सन ..... के माह..... के दिनांक ..... से प्रारम्भ होगी और इसमें अंतर्विष्ट उपबन्धोंके अधीन होगी।*

2. यह कि प्रथम पक्ष की प्रतिनियुक्ति प्रथमतः ***एक वर्ष की सेवा की समाप्ति पर उसकेद्वारा किये गये कार्यों एवं आचरण की समीक्षा अभिकरण (दूसरे पक्ष) द्वारा की जायेगीऔर कार्य एवं आचरण में कोई तथ्य अभिकरण के हित मे प्रतिकूल न पाये जाने परउसकी प्रतिनियुक्ति दूसरे पक्ष द्वारा और एक वर्ष के लिए बढाई जायेगी। इसी प्रकारकार्य एवं आचरण की समीक्षा कर प्रतिनियुक्ति अवधि एक–एक वर्ष बढायी जा सकती*** *है किन्तु प्रतिनियुक्ति अवधि पॉच वर्ष से अधिक किसी भी दशा में नही बढाई जायेगी।तथा इसके लिए प्रथम पक्ष सूडा के विरूद्ध कोई वाद नही दाखिल करेगा।*

3. प्रथम पक्ष की सेवा निम्न प्रकार से भी समाप्त की जा सकती है:–

(i) प्रतिनियुक्ति की एक वर्ष की अवधि समाप्त होने पर बिना किसी नोटिस के।

(ii) किसी भी समय अभिकरण द्वारा उसको एक कलेन्डर मास सूचना दिये जाने पर यदि अभिकरण की राय में प्रथम पक्ष इस अनुबन्ध की अवधि में अपने कर्तव्यों एवं दायित्वों को दक्षतापूर्वक पालन करने में अनुपयुक्त सिद्ध होता है।''

27. On specific query, it is not in dispute between the contesting parties that though petitioner during subsistence of his contract came to be repatriated, however,

the second respondent declined to reinstate the petitioner, despite the directions of this Court, but in lieu thereof paid the salary for the remaining period of contract of the year. In other words, the respondent-SUDA declined to take work from the petitioner or renew the contract, instead have taken a decision to repatriate the petitioner to the parent department as per the terms and conditions stipulated in the contract.

28. On specific query, the learned counsel for the petitioner admits that the services of the petitioner would govern as per the terms and conditions of the contract of appointment. The terms, inter alia, provides:

(i) that the appointment on deputation of the petitioner is on yearly basis;

(ii) that the contract of appointment is renewable upon assessment of the suitability, conduct and performance of the petitioner, it is not automatic;

(iii) that the contract of appointment can be terminated by SUDA on one month notice in the event the performance, duty and responsibility being unsatisfactory;

(iv) that as per the Government Order dated 26 May 2003, the minimum tenure of deputation would be three years and not beyond five years.

29. The undisputed facts emerging in the given case is:

(i) that petitioner came to be appointed on deputation after due process against a post;

(ii) that the appointment of the petitioner would stand on a higher pedestal as against appointment on deputation by transfer;

(iii) that petitioner would have a right to the post until three years or five years, upon approval, subject to the terms and conditions of the contract of appointment;

(iv) that the service on deputation of the petitioner came to be terminated/repatriated in midst of the subsisting second year contract;

(v) that admittedly months notice was not given to the petitioner before passing the impugned order;

(vi) that the impugned order does not disclose any ground/reasons for consideration.

30. In the backdrop of admitted facts the question that arises is:

(i) as to whether, repatriation of the petitioner without notice/show cause in midst of the contract is arbitrary exercise of power being violative of Article 14 of the Constitution of India;

(ii) whether, petitioner is entitled to reinstatement for the remaining period of contract.

31. Having regard to the terms and conditions of the contract of appointment the deputation was on year to year basis, subject to being renewed. In other words renewal of the contract of appointment is not automatic but dependent upon a satisfaction being recorded by the competent authority with regard to suitability, conduct and performance. It, therefore, follows that in the event the contract of appointment is not renewed upon assessment, SUDA is not required to give any notice to the incumbent (clause-2). It is not open to the incumbent to insist that he has a right to continue on deputation as a matter of right for the remaining tenure, provided, there is material to support the decision and application of mind by the competent authority thereon. In that event the Court would decline to interfere as it

would tantamount to sitting in appeal over an administrative order.

32. The matter, however, would entirely be different in case the services of the incumbent is being abruptly terminated upon repatriation in midst of the subsisting contract then in that event notice as provided in the contract (clause-3(ii)) was required to be complied. In case the termination of deputation is founded on allegations of misconduct in midst of the subsisting contract then notice followed by enquiry is must. In the given facts, admittedly the contract of service of the petitioner was terminated by SUDA during the contract followed by repatriation. As per terms and conditions of appointment SUDA was bound to put the petitioner to a month's notice (Clause-3(ii)) which was not followed, consequently, this Court directed the second respondent to reinstate the petitioner. The order was not complied instead petitioner was paid full salary for the remaining period of the contract. It was open to SUDA having regard to the materials against the petitioner with regard to his performance, conduct and utility, not to extend/renew the contract of appointment (Clause-2).

33. In the circumstances, petitioner cannot insist that he should be reinstated upon renewing the contract of appointment. The respondent-SUDA cannot be directed to renew the contract, provided the decision of SUDA is not arbitrary and whimsical but founded on valid and reasonable assessment. The record pertaining to the petitioner, as noted earlier, reflects that the second respondent had taken a considered decision upon assessment of the performance, conduct and utility of the petitioner. This Court would not delve upon the sufficiency of the material or the nature of complaints. The decision of the second respondent in the circumstances cannot be said to be arbitrary or whimsical. It is founded on objective consideration of the materials noted in the record. The details, in fact and figure, has been stated in the counter affidavit filed by second respondent. Accordingly, a direction to reinstate the petitioner would primarily tantamount to renewal of the contract of appointment of the petitioner which would, in the circumstances amount to substituting the opinion and order of the second respondent.

34. It is settled law that the court can lift the veil of the innocuous order to find whether it is the foundation or motive to pass the offending order. If misconduct is the foundation to pass the order then an enquiry into misconduct should be conducted then an action according to law should follow. But if it is motive, it is not incumbent upon the competent officer to have the enquiry conducted and the service of a temporary employee could be terminated, in terms of the order of appointment or rules giving one month's notice or pay, salary in lieu thereof. Even if an enquiry was initiated, it could be dropped midway and action could be taken in terms of the rules or order of appointment.

35. Supreme Court in **State of U.P. and others vs. Prem Lata Misra (Km) and others**7, upon noticing the facts arising therein, that the respondent/government servant came to be appointed, thereafter, her work was supervised by the higher officers and two officers have submitted their reports concerning the performance of the duties by the government servant. She was regularly irregular in her duties,

insubordination and left the office during office hours without permission etc. On consideration thereof, the competent authority found that the respondent is not fit to be continued in service as her work and conduct were unsatisfactory. Under these circumstances, the Court held that the termination is for her unsuitability or unfitness but not by way of punishment as a punitive measure and one in terms of the order of appointment and also the Rule. Accordingly, the Supreme Court observed and held that the High Court has gone against settled law in allowing the writ petition. (Refer: State of U.P. vs. Kaushal Kishore Shukla8)

36. Temporary government servant having no right to hold the post, his services are liable to be terminated by giving him one month notice without assigning any reason either under the terms of contract providing for such termination or under the relevant statutory rules regulating the terms and conditions of the temporary government servant.

37. The principle would apply to the government servant appointed on deputation, depending upon the terms and conditions of contract of service.

38. In **S.N. Maity** (supra) upon returning a finding that termination/repatriation was arbitrary and whimsical, directed payments of full salary for the period of contract along with interest but declined reinstatement as the term of the contract of appointment had expired.

39. In the facts in hand, this Court had directed reinstatement of the petitioner, prima facie, holding that termination/repatriation was arbitrary for want of notice passed in midst of the term of contract. It appears that SUDA on being advised released the salary of remaining period of the contract and declined to renew the contract of appointment further. As observed and held earlier SUDA was justified in not renewing the contract of appointment of the petitioner being based on an objective assessment of performance and utility of the petitioner, which was as per the terms and conditions governing the appointment of the government servant.

40. In the facts of the case in hand, petitioner even otherwise upon reinstatement could have been repatriated to the parent department after working for the remaining period of the yearly contract. SUDA was within its right and authority, as per the terms of the contract, to have denied renewal based on the assessment of the performance, conduct and utility of the petitioner. In any case petitioner was only entitled to salary for the remaining period of the contract as petitioner came to be terminated in midst of the contract without notice, which has been duly paid to him.

41. The contention of the learned counsel for the petitioner that petitioner was entitled to notice/disciplinary proceeding on the allegation of misconduct. Having regard to the conditions of service that the appointment of the petitioner was temporary and could be repatriated on notice. It was open to the second respondent to put the petitioner to notice/enquiry or terminate the deputation, and/or, decline further renewal of the contract. SUDA choose not to renew the contract of appointment and drop the idea of enquiry which is as per the terms and condition of contract of appointment, instead, paid the salary for the remaining period of contract realizing that they did

not put the petitioner to notice before repatriating the petitioner during subsistence of the contract. But in any case they assigned reasons, duly noted in the file, for repatriating the petitioner and not renewing the contract of appointment. The decision rests on foundation based on performance, conduct and disutility of the petitioner. The decision of SUDA to repatriate the petitioner cannot, in the circumstances, be said to be arbitrary.

42. The writ petition being devoid of merit is, accordingly, dismissed.

43. No cost.

(2022)05ILR A543
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.05.2022

BEFORE

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

Writ-A No. 18833 of 2021

Abhishek Kumar Yadav ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pankaj Kumar Gupta, Sri Narendra Giri

Counsel for the Respondents:
A.S.G.I., C.S.C., Sri Umesh Chandra Tripathi

A. Service Law - Right to Privacy - Juvenile Justice Board (Care & Protection of Children) Act, 2000: Section 2(k), 2(1), 19, 21 - Juvenile Justice Board (Care & Protection of Children) Act, 2015: Section 24 - Juvenile Justice Board (Care & Protection of Children) Rules, 2007: Chapter II, Rule 3 - Constitution of India, 1950 : Article 226, 21

The Court observed that petitioner was declared as juvenile by the Board at the time when the F.I.R. was lodged against him, therefore, his case was to be dealt taking into consideration the provisions of Juvenile Justice Act, 2000. Disclosure of details of criminal prosecution faced as a juvenile is violative of right to privacy and right to reputation of child guaranteed under Article 226 of the Constitution of India. It also denudes the protection of child sought by the Act. However, it is noteworthy that the petitioner has been acquitted in that instant case and the case lodged against him was trivial in nature and should not be viewed as disqualification for entry in Government service. (Para 28 & 29)

If a juvenile is convicted, same should be obliterated, so that there is no stigma with regard to any crime committed by such a person as a juvenile, as the object of Juvenile Justice Act is to reintegrate juvenile back in the society as a normal person. (Para 25)

The respondent cancelled the appointment of the petitioner on the post of Lower Division Clerk (LCD) on the ground that he had concealed the material facts of the criminal prosecution faced as a juvenile.

Writ Petition Allowed. (E-10)

List of Cases cited:

1. Rajiv Kumar Vs St. of U.P. & anr. 2019 (4) ADJ 316

2. Kishan Paswan Vs U.O.I. & ors. 2020 (11) ADJ 254

3. Upendra Chauhan Vs U.O.I. & 5 ors. 2019 (3) ADJ 613

4. Anuj kumar Vs St. of U.P. & ors. 2021 0 Supreme (All) 404

5. U.O.I. & ors. Vs Ramesh Bishnoi (2019) 19 Supreme Court Cases 710

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

1. Heard Mr. Pankaj Kumar Gupta, learned counsel for the petitioner, Mr. Umesh Chandra Tripathi, learned counsel for respondent nos. 1, 2 & 3 and Mr. Ashim Mukherjee, learned Standing Counsel for the State-respondents.

2. The writ petition has been filed, challenging the impugned order dated 24.11.2021 passed by respondent no.3, AGM(Pers.), Canteen Stores Department (in short "CSD'), Ministry of Defence, Government of India whereby the candidature of the petitioner for selection on the post of Lower Division Clerk (LCD) has been rejected on the ground of suppression of material fact of his involvement in criminal case which was registered against him on 16.04.2010 prior to the submission of application form to the Office of Staff Selection Commission.

3. The facts of the present matter are as follows:-

(I) The Staff Selection Commission, New Delhi issued an advertisement in the year 2017 for 'Combined Higher Secondary Level (10+2) Examination', inviting applications form for direct recruitment on the post of Lower Division Clerk (LCD) in various departments under the Government of India.

(II) The petitioner being qualified and eligible applied for the aforesaid post and after successfully completing written as well as type test, the petitioner was selected on the post of Lower Division Clerk (LCD) in Canteen Stores Department, Ministry of Defence, Government of India.

(III) The concerned department/respondent no.2 issued a letter to the petitioner, offering appointment as Lower Division Clerk in Canteen Stores Department along with attestation form for employment. The petitioner submitted the attestation form along with educational certificates.

(IV) On 03.03.2020, while filling this attestation form, the petitioner himself has disclosed the information regarding pendency of one criminal case against him. On 22.10.2020, the concerned department issued a letter to the petitioner for seeking clarification with regard to the criminal case pending against him and direct the petitioner to forward the copy of F.I.R. and latest Court proceedings/orders for completion of appointment formalities.

(V) In compliance of the aforesaid letter, the petitioner submitted his reply on 06.01.2021 stating therein that the F.I.R. was lodged against him due to family property dispute with his uncle namely, Shyam Lal Yadav, which was registered as Case Crime No. 250 of 2010, under Sections 323, 504, 506, 308 I.P.C. at Police Station Soraon, District Allahabad. It was also mentioned that during investigation the trial Court had released the petitioner on bail. He has also mentioned that the Investigating Officer has submitted a charge sheet against the petitioner under Sections 323, 504, 506 I.P.C. It was also submitted that trial Court after perusing the records, on 23.12.2020 declared the petitioner Juvenile and transfered the matter before Juvenile Justice Board.

(VI) On 26.04.2021, the General Manager, Canteen Stores Department, Ministry of Defence, Govt. of India issued a letter for cancellation of appointment of the petitioner on the post of Lower Division Clerk (LCD) on the ground that he had concealed the material facts with regard to the First Information Report lodged against him.

4. Learned counsel for the petitioner submits that petitioner was juvenile at the

time of alleged incident i.e. on 16.4.2010, he was 17 years 9 months and 13 days old and he was declared juvenile by the concerned Additional Chief Judicial Magistrate.

5. Learned counsel for the petitioner further submits that the respondents have acted arbitrarily in non-suiting the claim of the petitioner, merely, on the basis of pendency of criminal case which is trivial in nature and it cannot be fastened any disqualification as per relevant provisions of Juvenile Justice Board (Care & Protection of Children) Act, 2000. He further submits that the petitioner was acquitted in the aforesaid case, therefore, he gave a representation dated 23.07.2021 before the authorities concerned i.e. respondent no.2 requesting him to consider his claim for appointment on the post of Lower Division Clerk (LCD) in the department but no decision has been taken, hence, the petitioner has approached this Court by means of filing Writ-A No.12811 of 2021 (Abhishek Kumar Yadav Vs. State of U.P. & others) and the Hon'ble Court vide order dated 24.09.2021 directed the respondent no.3 to re-examine the claim of the petitioner for appointment on the said post and decide the same by reasoned and speaking order.

6. In compliance of the order of this Court, the representation of the petitioner was rejected by the impugned order dated 24.11.2021 on the ground that while submitting the attestation form, the petitioner has suppressed the fact with respect to the pendency of criminal case against him.

7. Learned counsel for the petitioner further submits that the impugned order is illegal, arbitrary and bad in the eyes of law as the respondents while passing the aforesaid order did not consider the fact that the petitioner was a minor at the time when the criminal case was lodged against him and was declared so by the Juvenile Justice Board, hence, they ought to have considered the claim of the petitioner taking into consideration the provisions of Juvenile Justice (Care & Protection of Children) Act, 2000.

8. He further submits that the petitioner at the time of lodging the said F.I.R. was a juvenile and a juvenile has been defined in Section 2(k) of the Act, 2000. The same is extracted below:-

"(k)" "juvenile" or "child" means a person who has not completed eighteen year of age."

9. He placed Section 19 of the Act, 2000, which reads as under:-

"19. Removal of disqualification attaching to conviction:- (1) Notwithstanding anything contained in any other law, a juvenile who has committed an offence and has been dealt with under the provisions of this Act shall not suffer disqualification, if any, attaching to a conviction of an offence under such law.

(2) The Board shall make an order directing that the relevant records of such conviction shall be removed after the expiry of the period of appeal or a reasonable period prescribed under the rules, as the case may be."

10. As the petitioner was under the age of 18 years at the time of lodging of the F.I.R, he had to be treated as a juvenile in conflict with law. A "juvenile in conflict with law" has also been defined under Section 2 (1) of the Act, 2000. The same reads as under:-

"(1) "juvenile in conflict with law" means a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence;"

11. Learned counsel for the petitioner submits that Section 19 of the Act of 2000 has been incorporated in order to give a juvenile an opportunity to lead his life with no stigma and to wipe out the circumstances of his past. Thus provides that a juvenile shall not suffer any disqualification attaching to conviction of an offence under such Act. A "juvenile" on the date when the alleged offence has been committed is required to be dealt with under the Juvenile Justice (Care & Protection of Children) Act, 2000 which declares that all criminal cases against individuals who are described as "juvenile in conflict with law" be decided by the authorities constituted under the Act by the Juvenile Justice Board. If a conviction is recorded by the Juvenile Justice Board, Section 19 (1) of the Act of 2000 stipulates that juvenile shall not suffer any disqualification attached to the conviction of an offence under such law. Further Section 19 (2) of the Act of 2000 contemplates that the Board must pass an order directing all the relevant records of such conviction to be removed after expiry of the period of appeal or reasons as prescribed under the rules as the case may be.

12. In the present case, it would not be out of place to mention that the petitioner was a juvenile at the time when the F.I.R. was lodged and was acquitted by the concerned competent Court, hence, the impugned order is not justified as the same has been passed without consideration of the aforesaid provisions of the Act, 2000.

13. Learned counsel for the petitioner has also placed reliance upon Section 21 of the Act, 2000 which prohibits publication of the name of the "juvenile in conflict with law" with the object to protect a juvenile from adverse consequences on account of his conviction for an offence committed as a juvenile. The same reads as follows:-

"21. Prohibition of publication of name, etc., of juvenile involved in any proceeding under the Act.-

(1) No report in any newspaper, magazine, new-sheet or visual media of any inquiry regarding a juvenile in conflict with law under this Act shall disclose the name, address or school or any other particulars calculated to lead to the identification of the juvenile nor shall any picture of any such juvenile be published:

Provided that for reasons to be recorded in writing the authority holding the inquiry may permit such disclosure, if in its opinion such disclosure is in the interest of the juvenile.

(2) Any person contravening the provisions of sub-section (1) shall be punishable with fine, which may extend to one thousand rupees."

14. Learned counsel for the petitioner submits that the sensitivity in matters relating to a juvenile or child or "juvenile in conflict with law" has been dealt with in Chapter II of the Juvenile Justice (Care & Protection of Children) Rules, 2007. Rule 3 therein gives in detail the fundamental principles to be followed in administration of the Rules.

15. The said Act is a beneficial legislation. The principles of such beneficial legislation are to be applied only for the purpose of interpretation of this statutes. The concealment of the pendency

of criminal case against the petitioner was of no consequence. As per the requirement of law a conviction in an offence will not be treated as a disqualification for a juvenile. The records of the case pertaining to his involvement in a criminal matter are to be obliterated after a specified period of time. The intention of the legislature is clear and in so far as juveniles are concerned their criminal records is not to stand in their way in their lives. The cancellation of the candidature of the petitioner is thus bad in the eyes of law. Learned counsel for the petitioner further submits that the respondents failed to appreciate the fact that the petitioner was entitled to the benefits of the provisions of the Act of 2000.

16. In the present case, the petitioner had given the details of the case pending against him at the time of submission of his attestation form, therefore, there was no suppression of any fact by him.

17. Learned counsel for the petitioner submits that the charges which were levelled against the petitioner were trivial in nature and must be passed off and could not be viewed as a disqualification for entry in Government service. It is in that context the following observations as made by the Supreme Court in Avtar Singh are of relevance:-

"(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.

(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."

18. He raised his contention with respect to the provisions of Section 24, which is as follows:-

24. Removal of disqualification on the findings of an offence-

"(1) Notwithstanding anything contained in any other law for the time being in force, a child who has committed an offence and has been dealt with under the provisions of this Act shall not suffer disqualification, if any, attached to a conviction of an offence under such law.

Provided that in case of a child who has completed or is above the age of sixteen years and is found to be in conflict with law by the Children's Court under clause (i) of sub-section (1) of section 19, the provisions of sub-section (1) shall not apply.

(2) The Board shall make an order directing the Police, or by the Children's Court to its own registry that the relevant records of such conviction shall be destroyed after the expiry of the period of appeal or, as the case may be, a reasonable period as may be prescribed.

Provided that in case of a heinous offence where the child is found to be in conflict with law under clause (i) of sub-section (1) of section 19, the relevant records of conviction of such child shall be retained by the Children's Court."

It is evident there from, that even if a juvenile is convicted under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015, the same is not liable to be viewed as a disqualification which may otherwise and ordinarily stand attached upon a person being convicted. Hence, the matter be remanded to the respondents for re-evaluation of the

petitioners claim in light of the legal provision which is adverted to. He, therefore, submits that the impugned orders are unsustainable.

19. In support of his submission, learned counsel for the petitioner has placed reliance the several judgements of this Court. In case of **Rajiv Kumar Vs. State of U.P. and another, reported in 2019 (4) ADJ 316**, the holdings were summed up as follows:-

"157.....The insistence of the State employer on a disclosure of criminal prosecution faced as a child reflected an impersonal attitude and a rote response to child rights. This is not an environment which fosters a healthy development of children and where rights of children flourish.

158. The requirement posed by the respondents to the petitioner to make a declaration disclosing details of criminal prosecution faced by the latter, insofar as it included the criminal prosecution faced by the petitioner as a minor child of 10 years was in violation of the fundamental rights of the petitioner guaranteed byArticle 14 and 21of the Constitution of India and in the teeth of Section 25 of the Juvenile Justice Act, 1986.

159. The details of past prosecution faced by the petitioner as a child was not a valid criteria nor a lawful consideration to judge his suitability for appointment. Such criteria was arbitrary and illegal.

160. The declaration made by the petitioner was not a relevant consideration in the appointment of the petitioner. Hence, even the falsity of the declaration made by the petitioner could not invalidate his appointment.

161. The petitioner in defence of his fundamental rights vested by Article 14 and 21 of the Constitution of India, could hold his silence or decline to disclose details of the prosecution in a criminal trial faced by him as a minor child of 10 years. Such action or declaration of the petitioner cannot be faulted with.

The services of the petitioner cannot be terminated on the foot of such action or declaration." (emphasis supplied)

20. He has placed another judgement of this Court passed in case of **Kishan Paswan Vs. Union of India and others, reported in 2020 (11) ADJ 254**, wherein relying on provisions of Section 24 of Juvenile Justice (Care and Protection of Children) Act, 2015 following has been held:-

"102. The wide consensus of such values helps us in determining the rights of a child. The endeavours of the courts and the legislatures alike is to protect the identity of the child offender, and to shield the child in conflict with law from suffering lasting and traumatic consequences of criminal prosecution. A child who has been prosecuted for criminal offence is entitled to a fresh chance in life. The child has to begin life as an adult on a clean state, as if no such criminal prosecution happened. This is possible when the fact of such criminal prosecution is purged from public discourse and is not a consideration for appointment to an office. The denial of public space and legitimacy to the fact of such criminal prosecution is the sheet anchor of the right to privacy and right to reputation of a child. An employer cannot elicit any information from any candidate or employee regarding the prosecution of the latter in a criminal case as a minor child for non heinous offences. An employer is precluded from seeking a declaration from

a candidate or an employee regarding the prosecution of the latter in a criminal case as a child. (emphasis supplied)."

"112. The criteria of past criminal prosecution for forming an opinion about considering a criminal antecedents of a candidate is a valid one. This criteria which is valid for adults, would be flawed if applied to children. This would amount to treating unequals as equals. A logical sequitor is that fact of a past criminal prosecution of a child is not a relevant consideration for appointment to a public post or office and is violative of Article 14 of the Constitution of India. (emphasis supplied)"

21. He also placed reliance on another judgement of this Court in case of **Shivam Maurya Vs. State of U.P. and others**, reported in **2020 (5) ADJ 5.** The Division Bench of this Court has taken a similar view in the aforesaid case, which is as follows:-

"14. The said Act is a beneficial legislation. The principles of such beneficial legislation are to be applied only for the purpose of interpretation of this statute. The concealment of the pendency of criminal case against the appellant-petitioner was of no consequence. As per the requirement of law a conviction in an offence will not be treated as a disqualification for a juvenile. The records of the case pertaining to his involvement in a criminal matter are to be obliterated after a specified period of time. The intention of the legislature is clear that in so far as juveniles are concerned their criminal records is not to stand in their way in their lives. The cancellation of the candidature of the appellant-petitioner was thus bad. The authority concerned failed to appreciate the fact that the appellant-petitioner was entitled to benefit of the provisions of Act of 2000. The cancellation of the candidature of the petitioner goes contrary to the object sought to be achieved by the Act of 2000. Section 19 of the Act of 2000 protects a juvenile and any stigma attached to his conviction is also removed. The Act of 2000 does not envisage incarceration of a juvenile which clearly shows that the intention and object was not to shut the doors of a disciplined and decent civilised life. It provides him an opportunity to mend his life for the future.

15. We thus hold that the authority concerned fell in complete error in not extending the benefit of Act of 2000 to the appellant-petitioner particularly when there are specific provisions provided therein to take care of a juvenile being implicated, tried and / or convicted in a criminal matter. We thus extend the benefit provided under Section 19 of the Act of 2000 to the appellant-petitioner."

22. In the case of **Upendra Chauhan Vs. Union of India And 5 Others**, reported in **2019 (3) ADJ 613**, the Court has given the following conclusion:-

"It is evident that the respondents have taken contradictory and conflicting stands. While at one place, they admit that due disclosure was made in the attestation form, in the subsequent paragraphs they proceed to note that the suppression regarding the criminal cases was deliberate and with an intent to obtain entry in Government service and not due to any misconception. Not only are these findings incompatible, they evidence a complete non-application of mind. The findings with respect to suppression are not only belied from the recitals appearing in the impugned

order itself but also from the attestation form in which the petitioner had admittedly made the requisite disclosure.

Additionally the Court notes the submission of learned counsel for the petitioner who contended that the charges which were levelled against the petitioner were trivial in nature and must be passed off and attributed to the exuberance and intemperance of youth and clearly could not be viewed as a disqualification for entry in Government service. It is in that context the following observations as made by the Supreme Court in Avtar Singh are of relevance:

"(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.

(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."

The contention lastly raised with respect to the provisions of Section 24 also merits due consideration. In the considered view of the Court and as is evident therefrom, even if a juvenile is convicted under the provisions of the 2015 Act the same is not liable to be viewed as a disqualification which may otherwise and ordinarily stand attached upon a person being convicted. This issue too merits the matter being remanded to the respondents for re-evaluation of the petitioners claim in light of the legal provision which is adverted to. On an overall conspectus of the aforesaid and in the considered view of this Court the impugned orders are rendered unsustainable."

23. After dealing with several relevant provisions related to juvenile and taking into consideration the judgements passed in several cases, the Court has laid down the law as has emerged after considering the settled position of law in the case of **Anuj Kumar Vs. State of U.P. and Others**, reported in **2021 0 Supreme (All) 404**, which is as follows:-

"I. Juveniles and adults form separate classes. Criminal prosecution of an adult is a lawful basis for determination of suitability of a candidate for appointment to public office. However prosecution of juveniles is in a separate class. Using criminal prosecution faced by a candidate as a juvenile to form an opinion about his suitability for appointment, is arbitrary illegal and violative of Article 14 of the Constitution of India.

II. The requirement to disclose details of criminal prosecutions faced as a juvenile is violative of the right to privacy and the right to reputation of a child guaranteed under Article 21 of the Constitution of India. It also denudes the child of the protection assured by the Juvenile Justice Act, 2000 (as amended from time to time). Hence the employer cannot ask any candidate to disclose details of criminal prosecution faced as a juvenile.

III. The candidate can hold his silence or decline to give information about the criminal prosecution faced as a juvenile. Denial of such information by the candidate will not amount to a false declaration or a willful suppression of facts.

IV. The conviction by a Juvenile Justice Board under the Juvenile Justice Act, 2000 of a juvenile is not a disqualification for employment. As a sequitor prosecution faced as a juvenile is not a relevant fact for forming an opinion

about the criminal antecedents and suitability of the candidate for appointment. Such prosecution cannot be made a basis for denial of appointment. Non disclosure of irrelevant facts is not "deliberate" or willful concealment of material facts. Hence non-disclosure of such criminal cases cannot invalidate the appointment of the said person.

V. Clarification:

These holdings shall not apply to cases beyond the ambit of Juvenile Justice Act, 2000 (as amended from time to time) and also in cases of heinous crimes committed by persons in the age group of 16 to 18 years."

24. Learned counsel for the petitioner has lastly relying upon the judgement of Hon'ble Apex Court in case of **Union of India And Others Vs. Ramesh Bishnoi**, reported in **(2019) 19 Supreme Court Cases 710**, reads as follows:-

"It is clear that at the time when the charges were framed against the respondent, on 30.06.2009, the respondent was well under the age of 18 years as his date of birth is 05.09.1991. Firstly, it was not disputed that the charges were never proved against the respondent as the girl and her parents did not depose against the respondent, resulting in his acquittal on 24.11.2011. Even if the allegations were found to be true, then too the respondent could not have been deprived of getting a job on the basis of such charges as the same had been committed while the respondent was juvenile. The thrust of the legislation, i.e. The Juvenile Justice (Care and Protection of Children) Act, 2000 as well as The Juvenile Justice (Care and Protection of Children) Act, 2015 is that even if a juvenile is convicted, the same should be obliterated, so that there is no stigma with regard to any crime committed by such person as a juvenile. This is with the clear object to reintegrate such juvenile back in the society as a normal person, without any stigma. Section 3 of the Juvenile Justice (Care and Protection of Children) Act, 2015 lays down guidelines for the Central Government, State Governments, the Board and other agencies while implementing the provisions of the said Act. In clause (xiv) of Section 3, it is clearly provided as follows:

"3. (xiv) Principle of fresh start: All past records of any child under the Juvenile Justice system should be erased except in special circumstances."

In the present case, it is an admitted fact that the respondent was a minor when the charges had been framed against him of offences under Sections 354, 447 and 509 of IPC. It is also not disputed that he was acquitted of the charges. However, even if he had been convicted, the same could not have been held against him for getting a job, as admittedly he was a minor when the alleged offences were committed and the charges had been framed against him."

25. Thus, even if a juvenile is convicted, same should be obliterated, so that there is no stigma with regard to any crime committed by such a person as a juvenile, as the object of Juvenile Justice Act is to reintegrate juvenile back in society as a normal person.

26. Learned Standing Counsel on the other hand submits that the petitioner at the time of submitting attestation form on 02.03.2020 had revealed the information that a criminal case was pending against him but the aforesaid facts who had been concealed by him at the time of submitting of declaration form during document verification at the office of Staff Selection

Commission (SCC) on 17.09.2019. The declaration given by the petitioner is as follows:-

"I also declare that I do not stand debarred by SSC/UPSC as on date and never been convicted by any court of law, I also declare that no charge sheet is pending against me in any court of law. Further declare that I have never been dismissed or removed from Govt. Service or my service been terminated during probation."

27. He further submits that the conduct of the petitioner in suppressing the fact of his being embroiled in a criminal case, impinges on his integrity whereas in a sensitive department like the Canteen Stores Department, the respondents required a person of the highest integrity and, therefore, even applying law laid down by Hon'ble Apex Court in case of Avtar Singh, the decision of the respondents taken on due application of mind cancelling the appointment of the petitioner on the ground of suppression does not want any interference at the hands of this Hon'ble Court, therefore, the petition is liable to be dismissed.

28. In the facts of the present case, it is admitted position that the petitioner was juvenile as declared by the Board at the time when the F.I.R. was lodged against him, therefore, his case was to be dealt, taking into consideration the provisions of Juvenile Justice (Care & Protection of Children) Act, 2000. Even if it is presume that the petitioner had not disclosed about the pendency of the criminal case, the requirement of disclosed details of criminal prosecution faced as a juvenile is violative of right to privacy and right to reputation of child, guaranteed under Article 226 of the Constitution of India. It also denudes the child of protection sought by the Juvenile Justice Act, 2000, hence, it was not expected from the petitioner to disclose details of criminal prosecution faced as a juvenile.

29. Admittedly, the petitioner has been acquitted in the present case and the case so lodged against him was trivial in nature and should not be viewed as disqualification for entry in Government service.

30. In view of the above discussion, the impugned order is arbitrary, illegal and unsustainable in the eyes of law.

31. The writ petition stands allowed. The impugned order dated 24.11.2021 passed by respondent no.3 is set aside and the mandamus is issued to the respondents to issue appointment letter to the petitioner, in accordance with law as well as in the light of observations made hereinabove.

(2022)05ILR A552
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.04.2022

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.

Writ-A No. 26732 of 2019

Shalu Verma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sunil Kumar, Vikrant Prakash

Counsel for the Respondent:
C.S.C.

A. Service Law - Selection Process - Selection for appointment of a candidate is a valuable right. The right has to be

honored without deviating from the principles of equality and equal treatment. (Para 17)

Once the right of appointment having accrued to the petitioner on equal basis was acted upon in respect of the other OBC category selected candidates, there is no reason as to why the petitioner may not be extended the same benefit with the issuance of appointment in her favour. (Para 20)

Writ Petition Allowed. (E-10)

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

1. Heard learned counsel for the petitioner and Sri Rahul Shukla learned Additional Chief Standing Counsel for the State.

2. The process of recruitment in a level playing field is bound to be tested on the touchstone of equality in every case. This is what Article 14 and 16 of the Constitution of India guarantee to every participating candidate in the selection process.

3. In the present case, the advertisement for filling up the posts of Constable(Female) in the police department U.P. were advertised by the Uttar Pradesh Police Recruitment and Promotion Board on 29.12.2015, pursuant to which, the petitioner applied and her application form having been found complete in all respects was scrutinized and included in the process of selection. The petitioner in the application form had identified her candidature as OBC category candidate on the basis of a validly issued certificate in her favour on 4.2.2016. There is specific mention of the category i.e. OBC relating to the petitioner in her application form. The petitioner was included in the selection process as OBC category candidate. The process of selection for the purposes of evaluation of merit comprised of assessment of marks based on her performance in the high school and intermediate besides in the physical efficiency test. In the final evaluation of marks on the basis of parameters prescribed for selection, the petitioner admittedly has scored 417.9 marks. As per the process of selection all the selected candidates on the basis of their final selection based on merit are subjected to document verification and physical standard test. This is an independent process passing which final select list in the respective categories is drawn. The petitioner having qualified on the basis of merit in OBC category was subjected to the documents verification test and physical standard test on 20.7.2017.

4. This Court having regard to paragraph 14 and 15 of the writ petition read in conjunction with paragraph 8 of the short counter affidavit passed an order on 12.4.2022. The order passed on 12.4.2022 reads as under :-

"Heard learned counsel for the petitioner and learned Standing Counsel for the State.

Denial of appointment to the petitioner though selected appears to be grossly discriminatory.

Let Additional Secretary(Recruitment), Uttar Pradesh Police Recruitment and Promotion Board appear before this Court along with the relevant record of the case tomorrow at 10.30 a.m.

List/put up tomorrow i.e. 13.4.2022 at 10.30 a.m.

Learned Standing Counsel undertakes to communicate a copy of this order to the Principal Secretary(Recruitment), Uttar Pradesh Police Recruitment and Promotion Board during course of the day".

5. Pursuant to the order passed by this Court on 12.4.2022, Sri Sureshwar, Additional Secretary(Recruitment), Uttar Pradesh Police Recruitment and Promotion Board is present in person along with the relevant record. **The photocopies of the relevant record are kept on file.**

6. This Court has taken pain to go through the record emperically.

7. Sri Rahul Shukla, learned Additional Chief Standing Counsel has also elaborated the position ably in the light of the record.

8. The Court would gather that the committee while verifying the documents produced by the petitioner has recorded the details as under :-

UTTAR PRADESH POLICE RECRUITMENT AND PROMOTION BOARD

Direct Recruitment of Constable and Equivalent Posts-2015

DV Report

ROLL NO	00041136	GENDER	Female
NAME	SHALU VERMA	FATHER/HUSBAND NAME	SHIV KUMAR
DOB	20/02/1979	AGE	18 Year(s) 4 Month(s)9 Day(s)
DOMICILE OF U.P.	Yes	GOVT. EMPLOYEE	No
CATEGORY	**GENERAL**	**CATEGORY CERTIFICATE**	**No**
DFF	No	DOEACC-OE	No
HOME-GUARD	No	NCC-B	No
T ARMY	No	TWELFTH MARKS %	77.2
TENTH MARKS %	79.5	QUALIFYING MARKS %	210.17
CALCULATED AS PER RULE 15(b)	233.9	REJECT REMARKS	

Qualified

	ORIGINAL	**MODIFIED AND VERIFIED**
GENDER	Female	Female
NAME	SHALU VERMA	SHALU VERMA
FATHER/HUSBAND NAME	SHIV KUMAR	SHIV KUMAR
D.O.B.	20/02/1997	20/02/1997
AGE	18 Year(s) 4 Month(s) 9 Day(s)	18 Year(s) 4 Month(s) 9 Day(s)
DOMICILE OF U.P.	Yes	Yes
GOVT. EMPLOYEE	No	No
CATEGORY	OBC	GENERAL
DFF	No	No
EX-SERVICEMAN	No	No
HOME-GUARD	No	No

DOEACC-OE	No	No
T ARMY	No	No
NCC-B	No	No
TENTH MARKS%	0	79.5
TWELVTH MARKS%	77.2	77.2
CALCULATED AS PER RULE 15(B)%	154.4	233.9

Sd/-
Candidate Signature : Shalu Verma

Sd/- Member-1 DV/PST DAL Seal with Name and Post	Sd/- Member-1 DV/PST DAL Seal with Name and Post	Sd/- Member-1 DV/PST DAL Seal with Name and Post	Sd/- Member-1 DV/PST DAL Seal with Name and Post

9. The physical standard test was conducted on the date of document verification wherein the petitioner's height was recorded less by one inch which was corrected on her protest and this fact is recorded in the physical standard test. Both the physical standard test reports are extracted below:-

1. UTTAR PRADESH POLICE RECRUITMENT AND PROMOTION BOARD
Direct Recruitment of Constable and Equivalent Posts-2015

PST Report

ROLL NO	00041136	GENDER	Female
NAME	SHALU VERMA	CATEGORY	GENERAL

PHYSICAL STANDARD TEST

HEIGHT(CM)	151	WEIGHT(KG)	42.3
NORMAL CHEST(CM)	NA	EXPANDED CHEST(CM)	NA
CHEST EXPANSION(CM)	NA		

NOT QUALIFIED

Candidate Signature : Shalu Verma

Sd/- Member-1 DV/PST DAL Seal with Name and Post	Sd/- Member-1 DV/PST DAL Seal with Name and Post	Sd/- Member-1 DV/PST DAL Seal with Name and Post	Sd/- Member-1 DV/PST DAL Seal with Name and Post

FOR MALE	FOR FEMALE
FOR GENERAL/OBC/SC Categories. Height must be more than 168 cms. Normal Chest must be more than 79 cms	FOR GENERAL/OBC/SC Categories Height must be more than 152 cms
FOR ST Category Height must be more	FOR ST Category Height must be more than 147 cms.

than 160 cms Normal Chest must be more than 77 cms	
Minimum 5 CM expansion is required	Weight must be more than 40 kgs(All categories)
Weight-NA	Chest-NA

2. **UTTAR PRADESH POLICE RECRUITMENT AND PROMOTION BOARD**

Direct Recruitment of Constable and Equivalent Posts-2015

PST Report

ROLL NO	00041136	GENDER	Female
NAME	SHALU VERMA	CATEGORY	GENERAL

PHYSICAL STANDARD TEST

HEIGHT(CM)	152	WEIGHT(KG)	42.4
NORMAL CHEST(CM)	NA	EXPANDED CHEST(CM)	NA
CHEST EXPANSION(CM)	NA		

QUALIFIED

Sd/-

Candidate Signature : Shalu Verma

Sd/- Member-1 DV/PST DAL Seal with Name and Post	Sd/- Member-1 DV/PST DAL Seal with Name and Post	Sd/- Member-1 DV/PST DAL Seal with Name and Post	Sd/- Member-1 DV/PST DAL Seal with Name and Post

FOR MALE	FOR FEMALE
FOR GENERAL/OBC/SC Categories. Height must be more than 168 cms. Normal Chest must be more than 79 cms	FOR GENERAL/OBC/SC Categories Height must be more than 152 cms
FOR ST Category Height must be more than 160 cms Normal Chest must be more than 77 cms	FOR ST Category Height must be more than 147 cms.
Minimum 5 CM expansion is required	Weight must be more than 40 kgs(All categories)
Weight-NA	Chest-NA

10. Shri Rahul Shukla, learned Additional Chief Standing Counsel for the State while explaining the document verification report has argued that category entry in the chart as 'General' is an implicit consequence of the failure on the part of the petitioner to produce her original category certificate dated 4.2.2016. The report would have treated the petitioner as "OBC' if the original certificate as mentioned in the application form submitted online was produced on the date fixed. The argument put-forth does have force particularly when the petitioner is a signatory to the above report but what is relevant to be noticed is the case pleaded by the petitioner, in response to which, the Court does not find a satisfactory or well supported reply emerging from the original record produced before the Court.

11. In paragraph 14 and 15 of the writ petition, it is a clear case of the petitioner

that she had appeared before the committee for documents verification on 20.7.2017. It is also averred by her that the original certificate submitted along with the online application form was produced by her at the time of document verification. It is further submitted that the previous certificate of category issued to the petitioner was also available with her of which the copy on being demanded by the authorities was duly supplied. The original category certificate of the relevant date i.e. 4.2.2016 has been produced before this Court by the petitioner as well.

12. Paragraphs 14 and 15 of the writ petition being relevant are extracted hereunder :

"14. That on 20.07.2016 petitioner duly appeared in the documents verification and physical standard test at Police Lines, Sultanpur along with her original educational document, caste certificate dated 04.02.2016(Annexure No. 4) and Domicile certificate dated 04.02.2016(Annexure No. 5) and other relevant documents. At the time of document verification petitioner duly submitted photocopies of the same document before the authority concerned. Authority concerned duly verified the photocopies from the original document and accepted the same.

15. That it is also very relevant to mention here that at the time of document verification authority concerned required additional another certificate of category and domicile, which have also available with the petitioner, in bona-fide manner petitioner has also produced as additional documents as required by the authority concerned i.e. Category certificate no. 460631401937 dated 24.8.2014 issued by the competent authority. True copy of the additional Category certificate No. 460631401937 dated 24.8.2014 issued by the competent authority is being filed herewith and marked as annexure no. 7".

13. In paragraph 8 of the short counter affidavit, the following stand was adopted by the State in reply to the case set up by the petitioner :-

"8. That the scrutiny of documents and physical standard test of petitioner Shalu Verma was taken by a committee presided by the Sub-divisional Magistrate in Police Lince, District Sultanpur on 20.7.2016, in which petitioner had submitted OBC caste certificate no. 460631401937 dated 24.8.2014 which was different from that OBC caste certificate no. 466163000425 dated 04.02.2016 as applied in the online application. After submission of the OBC caste certificate of different dated from the originally applied in online application, which is issued before the fixed period(issued on or after 01.04.2015 but issued till the last date 24.02.2016 fixed for registration of this recruitment process), before the Examination Committee, the Examination Committee rejected the certificate and considered the petitioner as a General Category candidate. Members of the Committee as well as petitioner are also agreed and signed on the report of the Examination Committee which is annexed as Annexure No. 2. Petitioner has obtained total 417.9 marks (79.5+154.40+184=417.9) in accordance with Rules. Cut-off marks of last selected candidate of General category(Women) for the post of Police Constables is 418.77. Petitioner is not selected due to lower marks obtained by her in comparison with that of the last selected candidate of general category for the post of Police Constables".

14. On a close scrutiny of the stand spelt out in the short counter affidavit, it is evident that the reason of non-production of category certificate i.e. OBC dated 4.2.2016 does not find mention in the documents verification report reproduced herein-above meaning thereby that the version set out in paragraph 8 of the short counter affidavit has no documentary support from the original record. The entry of details in the DV report unless maintained by the competent committee for cross check cannot be assumed to be a gospel truth. No record to cross check the details in the DV report were maintained by the committee except the signature obtained on the report. Any reason spelt out in the counter affidavit must find support from the original record without which an improbable ground has no legs to stand in the eyes of law. The mere mention of the petitioner's category in the upper part of DV report as 'General' and 'No' in the last column does not reconcile with any reason spelt out by the committee. It is highly improbable that a selected candidate would make no effort to produce the relevant certificate or even if she fails to produce, why would she not seek time for production of an existing document.

15. The question as to whether the petitioner produced the original OBC certificate dated 4.2.2016 or not has to be tested from the original record. There are two aspects relevant for this purpose. Firstly, the authorities must show as to what number of documents were duly received for verification and which documents a candidate failed to produce. In the event of failure, whether a candidate demanded an opportunity or not.

16. This Court fails to understand as to why a candidate who has rightly mentioned the category certificate i.e. OBC of a particular date i.e. 4.2.2016 would firstly submit the irrelevant certificate and secondly may not produce the relevant certificate at the time of documents verification. The petitioner's height was also recorded less by one inch which was corrected on her protest and this fact is recorded in the physical standard test report placed before us. In absence of any plausible justification recorded in the documents verification report except the baseless consequence of failure, the very stand adopted in paragraph 8 of the short counter affidavit is wholly unfounded and unsupported on the basis of any tangible proof. Interestingly the DV report is in two parts. The second part on the top records "Qualified'. It is not spelt out in the first part as to what number of documents were checked and which of those were not produced. There is no clarity of the documents which were checked nor there is any such mention in the fist part of DV report as to what number of documents were verified and which of those were not produced. As to how the modified or verified category was mentioned as "General' instead of OBC, there is no supporting material or a reason available on record. The stand adopted in the short counter affidavit is afterthought, dubious and misleading.

17. This Court would caution the administrative authorities not to swear affidavits on oath adopting a stand untraceable to the original record. This is an unhealthy practice and amounts to an abuse of administrative power. Selection for appointment of a candidate is a valuable right. This right has to be honored without deviating from the principles of equality and equal treatment.

18. In the present case, it is clear that the cut-off marks of general category candidates are shown to be above 418.77 whereas the cut-off marks for OBC stood at 410.6. On the basis of marks obtained by the petitioner while belonging to the OBC category, she has clearly qualified the benchmark and she is thus entitled to be included amongst the selected candidates of OBC category. Once a candidate having 410.6 marks was appointed, as to why a candidate obtaining 417.9 marks may not have a preferential right remains inexplicable by the State. The individual right which had accrued to the petitioner was not open to be frustrated on the strength of any irrelevant document of which the production does not seem to be in the course of prudent behaviour particularly when there is no mention in the original record that the petitioner had failed to produce the original OBC category certificate dated 4.2.2016. The recording of consequence i.e. "General' unless backed by an authentic proof of failure to produce the category certificate, in my humble view, is an arbitrary act falling within the scope of judicial review and the Court would not shut the doors of justice in a case like the one at hand.

19. The record does not support the case of the State which was carefully examined. The Court has extracted the entire details of documents verification and physical standard test reports herein-above.

20. In the result, once the right of appointment having accrued to the petitioner on equal basis was acted upon in respect of the other OBC category selected candidates, there is no reason as to why the petitioner may not be extended the same benefit with the issuance of appointment in her favour.

21. This Court accordingly directs the competent authority to proceed with the benefit of selection including notional seniority as has accrued to the petitioner at par with the other selected candidates having equal merit or less.

22. This exercise shall be carried out not later than a period of six weeks from the date a certified copy of this order is served to the competent authority along with the representation.

23. The writ petition is allowed with no order as to cost.

(2022)05ILR A559
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.05.2022

BEFORE

THE HON'BLE JASPREET SINGH, J.

Writ- B No. 1528 of 1983

Bhagwati Deen ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
M. Sultan, R.R. Dev, Ripu Daman Shahi, Vijai Bahadur Verma

Counsel for the Respondents:
C.S.C., S.P. Shukla, Saryu Prasad Tiwari

(A) Land Law - The Uttar Pradesh Consolidation of Holdings Act, 1953 - Section 9-A (2) , 11 (1) , 30 , 48 - The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 - Section 20 , 20 (b) , 209 , 229-B , 240 , 240 (J) , 240 (A) to 240 (M) , 240 (H) (2) (a) -The U.P. Land Revenue Act, 1901 - Section 28 & 33 - The Uttar Pradesh Consolidation of Holdings, Rules, 1954 - Rule 109 , 109-A - a person who claims adhivasi rights, his name must have been recorded in 1356

fasli in the Khasra or Khatauni which is duly prepared in terms of the provisions of the Land Revenue Act - An entry in the revenue records do raise a presumption but the same is rebuttable in nature - Any entry which is not prepared in accordance with law cannot confer any benefit to a party claiming the same.(Para - 34,43)

Claim over disputed plots - ground - petitioner in occupation of disputed plots in question much prior to the abolition of Zamindari - acquired sirdari rights after abolition of Zamindari - alternate plea - petitioner was recorded as an occupant in 1359 Fasli and was in cultivatory possession - three years prior to abolition of Zamindari - acquired adhivasi rights - later matured into sirdari in 1362 Fasli - continued to be in possession - private respondents - expunged name of petitioner - replaced by their own names - petitioner instituted a suit for declaration of his rights - both SOC as well as DDC meticulously considered submissions and material available on record - finding - merely because of one entry in 1359 fasli which is also not proved nor having been made in accordance with the provisions contained under the Land Revenue Act - no benefit could be granted to the petitioner. **(Para -2,3, 43)**

HELD:- No error committed by the SOC and the DDC which may require any interference of this Court in exercise of powers conferred under Article 226 of the Constitution of India. **(Para - 44)**

Petition dismissed. (E-7)

List of Cases cited:-

1. Avdhesh Singh & anr. Vs. Bikarama Ahir & ors. ,1975 RD 132 (Special Bench)

2. Tauley & ors. Vs. D.D.C. & ors. , 1982 RD 327

3. Smt. Sonawati & ors. Vs. Sri Ram & ors. ,1968 RD 151

4. Bachan & anr. Vs. Kankar & ors. ,1972 RD 219

5. Jagdamba Prasad Vs. Rafiuddin & ors. , 1967 RD 173 (DB)

6. Babu Ali Vs. D.D.C. & ors. , 2021 (8) ADJ 579.

7. Putti & ors. Vs. Asst. D.D.C., Bahraich & ors. , 2006 SCC Online (Alld) 1286

8. Chit Bahal Singh & ors. v. J.D.C. & ors., 29.04.2022

9. Wali Mohd. Vs. Ram Surat & ors., 1991 (9) LCD 79

10. Udai (Dead), Ram Lakhan (Dead), Karedin & ors. Vs. D.D.C., Varanasi & ors. ,1990 (8) LCD 266

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

1. In the instant petition, the dispute relates to Plot Nos. 1838/1, 1823/1, 1816, 1817, 1815, 1824/2 and 1828/1 of Gata No. 306 of Village Lokpur, Pargana, Barsona, Tehsil and District Sultanpur which was recorded in the name of the private respondent nos. 1, 2 and 3 in the basic year Khatauni.

2. The petitioner had filed his objections under Section 9-A (2) of the Uttar Pradesh Consolidation of Holdings Act, 1953 (hereinafter referred to as Act of 1953) staking claim over the disputed plots on the ground that the petitioner was in occupation of the disputed plots in question much prior to the abolition of Zamindari and thus had acquired sirdari rights in the land in dispute after the abolition of Zamindari. An alternate plea was also raised that since the petitioner was recorded as an occupant in 1359 Fasli and was in cultivatory possession. three years prior to the abolition of Zamindari, hence, he acquired adhivasi rights which later matured into sirdari in 1362 Fasli and continued to be in possession.

3. It was also stated that the private respondents were influential persons who

by using their influence got the name of the petitioner expunged and replaced by their own names. On becoming aware of the aforesaid, the petitioner had instituted a suit under Section 229-B of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, (hereinafter referred to as U.P.Z.A. & L.R. Act) for declaration of his rights before the Competent Court, however, with the commencement of Consolidation Operations, the suit of the petitioner abated in light of the order dated 19.07.1975.

4. It was also stated that the petitioner had been conferred with sirdari rights in terms of Section 240 (J) of the U.P.Z.A. & L.R. Act and the private respondents had received compensation in respect of the land, accordingly, all rights of the private respondents got extinguished and they could not claim any right in the disputed plots nor re-agitate the claims.

5. The private respondents contested the objections filed by the petitioner before the Consolidation Officer on the ground that the private respondents were recorded as cultivatory tenants having hereditary rights. They had acquired sirdari rights and continued to be in possession, prior to the abolition of Zamindari and even thereafter. Even during the first consolidation, there was some dispute regarding the rights of the private respondents which was duly adjudicated and the records were corrected and the names of the private respondents continued. It was also stated that the alleged entry in favour of the petitioner was false and fictitious and no benefit of the same could be claimed by the petitioner.

6. It was also stated that the private respondents had not received any compensation and proceedings under Section 240 (J) of the U.P.Z.A. & L.R. Act, if any, were not in accordance with law nor the same had any effect on the rights of the private respondents.

7. The Consolidation Officer, (Area No. 4, Musafikhana), Sultanpur by means of his order dated 07.10.1980 accepted the contentions of the petitioner and after deleting the name of the private respondents incorporated the name of the petitioner in respect of the disputed plots. The private respondents being aggrieved against the order of the Consolidation Officer dated 07.10.1980 preferred an appeal under Section 11 (1) of the U.P.C.H. Act which came to be allowed by the SOC, Sultanpur by means of order dated 30.11.1981.

8. The petitioner being aggrieved against the aforesaid order dated 30.11.1981 passed by the SOC, Sultanpur in appeal preferred a revision under Section 48 of the U.P.C.H. Act, 1953 before the Deputy Director of Consolidation, Sultanpur which was dismissed by means of order dated 30.11.1981 affirming the order passed by the SOC.

9. Being aggrieved against the aforesaid two orders, the petitioner instituted the instant petition wherein this Court by means of order dated 17.03.1983 admitted the petition. During the pendency of the petition, the original petitioner Bhagwan Deen expired and was substituted by his son whereas the private respondent nos. 1, 2 and 3 also expired and are represented by their legal heirs. However, for the sake of convenience, this Court shall be referring to the parties as originally impleaded at the time of institution of this petition. The parties have exchanged their counter and rejoinder affidavits including the supplementary affidavit which is on record.

10. Sri Vijay Bahadur Verma and Sri R.D. Shahi, learned counsel for the petitioner have attacked the order passed by the SOC, Sultanpur and the DDC, Sultanpur primarily on three grounds:-

(i) It is urged that the two courts have erred in misconstruing the provision of Section 20 and Section 240 (J) of the U.P.Z.A. & L.R. Act. It has been submitted that ample evidence was brought on record to establish that the petitioner was recorded in 1359 Fasli as well as 1362 Fasli. In terms of Section 20 of the U.P.Z.A. & L.R. Act, any person in occupation and cultivatory possession acquired adhivasi rights which later in terms of Section 240 (A) to 240 (M) which was introduced by the U.P. Act No. 20 of 1954 by inserting Chapter IX-A in the U.P.Z.A. & L.R. Act conferred sirdari rights. It is also submitted that provisions have been misconstrued, inasmuch as, the petitioner was in possession even prior to the abolition of zamindari and in the document which was brought on record Muddatkasht was shown as two years which would indicate that the possession of the petitioner was even prior to the abolition of Zamindar and in any case his name was recorded in 1359 Fasli and thus there was no legal impediment in the conferment of the sirdari rights which had matured by operation of law, accordingly, this aspect of the matter has been completely misconstrued resulting in sheer miscarriage of justice.

(ii) It is also urged that even otherwise in alternate the petitioner had perfected his rights by adverse possession, inasmuch as, he was recorded in 1359 Fasli and Muddatkasht as indicated above was shown to be two years, thus, at the relevant time for perfecting the rights of adverse possession, three years period was provided which was completed successfully by the petitioner and even on this count he had matured his rights by adverse possession and got adhivasi rights which later matured into Sirdari rights and this aspect of the matter has also been misconstrued by both the SOC, Sultanpur as well as the DDC, Sultanpur.

(iii) The third limb of the arguments of the learned counsel for the petitioner is that with the introduction of Chapter IX-A in the year 1954 in the U.P.Z.A. & L.R. Act, once the petitioner was conferred with the sirdari rights and a scheme was prepared whereunder the private respondents received compensation and a final statement was published in terms of Section 240 (J) of the U.P.Z.A. & L.R. Act, thus, in so far as the private respondents are concerned, all their rights extinguished and after having received the compensation, it is not open for the private respondents to claim the land nor stake any right and this aspect has also not been appropriately appreciated by the two Consolidation Authorities.

11. That the learned counsel for the petitioner has relied upon a Special Bench decision of this Court in the case of ***Avdhesh Singh and Another Vs. Bikarama Ahir and others reported in 1975 RD 132 (Special Bench)*** as well as on ***Tauley and others Vs. DDC and others reported in 1982 RD 327.***

12. Per contra, Sri S.P. Tiwari, learned counsel for the private respondents urged that:

(i) in order to claim sirdari rights in terms of Section 20 of the U.P.Z.A. & L.R. Act, it was necessary for the petitioner to establish that he was an occupant in 1356 Fasli as well as 1359 Fasli. The petitioner was never recorded in 1356 Fasli and a

mere entry which was fraudulent relating to 1359 Fasli, without any basis or backing of an order or not made in accordance with the provisions of the Land Revenue Act cannot confer any benefit on the petitioner. It is also urged that apart from 1359 and 1362 Fasli there is no other document which relates to the entry of the name of the petitioner.

(ii) The contention as raised by the petitioner that he was in possession much prior to the abolition of zamindari is also not substantiated by any material on record. Rather, the name of the answering respondent have throughout being recorded in 1356, 1359, 1362 Fasli. The answering respondent had also filed a Khasra (for 12 years 1366 to 1377 fasli). Even in the first round of consolidation, there was some dispute which was also contested by the answering respondents and the records were corrected incorporating the name of the private respondents. Even at that time the petitioner had raised no objection and this would establish that the answering respondents have been in possession throughout and they had matured their rights of sirdari and consequently they have also been granted bhumidhari rights.

(iii) It is submitted that initially there was an interim order in the instant petition but the petition came to be dismissed for want of prosecution twice and the interim order stood vacated which was never restored and thereafter the answering respondent had made an application under Rule 109-A for implementation of the order passed by the SOC and the DDC which came to be allowed and the names of the answering respondents have been recorded as bhumidhar with transferrable rights in the Khatauni. It has also been pointed out that during the pendency of the petition sometime in the year 2016, the land in question was acquired by the State Government for its Scheme of 6 Lane Purvanchal Expressway. Thus, it is urged that the findings recorded by both the SOC as well as the DDC is based on proper appreciation of the material available on record as well as the law, consequently, the writ petition deserves to be dismissed.

13. The learned counsel for the respondents has relied upon the decision of the Apex Court in the case of ***Smt. Sonawati and others Vs. Sri Ram and others 1968 RD 151; Bachan and Another Vs. Kankar and others 1972 RD 219; Jagdamba Prasad Vs. Rafiuddin and others 1967 RD 173 (DB).***

14. The Court has heard the learned counsel for the parties at length and also carefully perused the material available on record.

15. In order to appreciate the respective contentions, it would be relevant to notice that the claim of the petitioner is primarily based on his possession and as per the petitioner, he was in possession as an occupant prior to the abolition of zamindari and his name is also recorded as evident from the Khatauni of 1359 fasli. Reliance has also been placed upon the Khatauni of Village Lokpur, Pargana, Barsona, Tehsil and District Sultanpur, Khata 1/37 wherein the name of Bhagwati Deen, the petitioner has been shown with muddat kasht two years in Part-II as shikmi. Even in Khatauni Part-II of 1362 Fasli Khata No. 149, name of Bhagwati Deen has been shown as Shikmi and reliance has also been placed on Form 101-ZA to buttress the submissions that the adhivasi rights of the petitioner matured into sirdari. Irrigation receipts had also been filed by the petitioner and his son Dharmraj also examined himself before the

Consolidation Officer reiterating his stand and stated by him that since his father Bhagwan Deen, the petitioner had become old and was not able to see or walk properly, accordingly, in his place Dharmraj led the evidence.

16. On the other hand, the private respondents had filed the Khatauni of 1356 fasli and 1364 to 1369 fasli, Khasra for 12 years, 1366 to 1377 fasli, CH Form-6 and led his evidence before the Consolidation Officer.

17. It is on the basis of the aforesaid documentary and oral evidence led by the parties that the Consolidation Officer found that since the name of the petitioner was recorded in 1359 fasli and with the advent of Section 240 incorporated in Chapter IX of the U.P.Z.A. & L.R. Act, the adhivasi rights matured into sirdari rights and also the evidence relating to possession, especially the irrigation receipts filed by the petitioner were taken to be the basis to record that the petitioner was in possession and had been conferred with the sirdari rights and that the name of the petitioner had been incorrectly deleted and that the petitioner had been conferred with sirdari rights, consequently, the name of the respondents was expunged. These findings were upset by the SOC which had been confirmed by the DDC.

18. Before proceeding any further, it will be relevant to notice certain provisions which have been relied upon by the parties to buttress their respective submissions and at the outset, it will be necessary to first ascertain whether any adhivasi rights have been conferred upon the petitioner. It is only if the adhivasi rights were conferred, then only in terms of Chapter IX-A of the U.P.Z.A. & L.R. Act can the sirdari rights be conferred upon such adhivasis.

19. The submission of learned counsel for the petitioner which commences with the plea of having adhivasi rights and having been conferred with sirdari rights and the alternate plea of adverse possession shall be tested in light of the legal provisions and the decision on the aforesaid point rendered by this Court as well as the Apex Court. Section 20 of the U.P.Z.A. & L.R. Act reads as under:-

"20. ***A tenant of Sir, sub-tenant or an occupant to be an adhivasi.-****[Every person who-(a) on the date immediately preceding the date of vesting was or has been deemed to be in accordance with the provisions of this Act]-*

(i) except as provided in [sub-clause (i) of Clause (b)], a tenant of sir other than a tenant referred to in Clause (ix) of Section 19 or in whose favour hereditary rights accrue in accordance with the provisions of Section 10; or

(ii) except as provided in [sub-clause (i) of Clause (b)], a sub-tenant other than a sub-tenant referred to in proviso to sub-section (3) of Section 27 of the United Provinces Tenancy (Amendment) Act, 1947 (U.P. Act X of 1947), or in sub-section (4) of Section 47 of the United Provinces Tenancy Act, 1939 (U.P. Act XVII of 1939) of any land other than grove land,

(b) was recorded as occupant,-

(i) of any land [other than grove land or land to which Section 16 applies or land referred to in the proviso to sub-section (3) of Section 27 of the U.P. Tenancy (Amendment) Act, 1947] in the khasra or khatauni of 1356-F prepared under Section 28 [33] respectively of the U.P. Land Revenue Act, 1901 (U.P. Act III of 1901),

or who was on the date immediately preceding the date of vesting entitled to regain possession thereof under Clause (c) of sub-section (1) of Section 27 of the United Provinces Tenancy (Amendment) Act, 1947 (U.P. Act X of 1947); or

(ii) of any land to which Section 16 applies, in the [khasra or khatauni of 1356 fasli prepared under Sections 28 and 33 respectively of] the United Provinces Land Revenue Act, 1901 (U.P. Act III of 1901), but who was not in possession in the year 1356-F;

shall, unless he has become a bhumidhar of the land under sub-section (2) of Section 18 or an asami under Clause (h) of Section 21, be called adhivasi of the land and shall, subject to the provisions of this Act, be entitled to take or retain possession thereof."

20. From the perusal of the aforesaid provisions, the part relevant for the instant controversy is Section 20 (b) of the U.P.Z.A. & L.R. Act. The aforesaid provision clearly provides that any person who was recorded as an occupant of any land in the Khasra or Khatauni of 1356 fasli which is prepared under Section 28 and 33 of the U.P. Land Revenue Act, 1901 or who was on the date immediately preceding the date of vesting entitled to regain possession thereof.

21. It is in this light, if the documents filed by the respective parties are seen, it would indicate that the petitioner had filed the Khatauni of 1359 fasli and 1362 fasli. It is not disputed that the petitioner has not filed the Khasra. His case is only on the basis of Khatauni of 1359 and 1362 fasli, thus, in terms of Sub Clause (b) of Section 20, the Khasra and Khatauni of 1356 fasli has not been filed nor is it the basis of the claim of the petitioner. Rather, he has developed his case by summiting that in the Khatauni of 1359 fasli, muddat kasht of 2 years has been shown which necessarily will relate back to 1356 fasli, consequently, he submits that he gets the right of adhivasi in terms of the aforesaid provision.

22. In the said breath, he further urges that since he has been in possession for three years, accordingly, he had even perfected his rights by adverse possession and thus Section 20 (b) which refers to the word ***"any person in occupation would also include a person who has perfected his rights by adverse possession***" hence rights of adhivasi came to be bestowed in terms of the Act and with the advent of Chapter IX-A by operation of law, his rights of adhivasi matured in sirdari rights.

23. At this stage, it will be relevant to notice that in so far as the law of adverse possession in respect of revenue land is concerned it is a little different from the law of adverse possession relating to the buildings and urban properties. In so far as the limitation for perfecting rights by adverse possession as applicable to revenue lands is concerned it was initially a period of continuous possession for two years but later w.e.f. 09.04.1955, the same came to be extended to three years. Later, in the year 1957, this was enhanced to 6 years and in respect of the land belonging to Gram Sabha, it was 12 years. Subsequently, in the year 1971, a further amendment was introduced which enhanced the limit and the period for claiming adverse possession became 12 years and in respect of land belonging to Gram Sabha it was 30 years.

24. In the aforesaid backdrop and the limitation which has been enhanced progressively in terms of Section 209 of the U.P.Z.A. & L.R. Act which relates to

eviction of a person in un-authorized occupation. However, at the relevant time in 1955, it was 3 years which is to be seen for the purposes of the instant case.

25. It is also to be noticed that any person who claims the right of adverse possession must show that he has been in continuous possession over the land in question. His name has been duly incorporated in terms of the record prepared under the Land Record Manual. The Khatauni which is prepared should be in accordance with the provisions of the Land Record Manual and thus the person pleading adverse possession must show not only his possession but the entries have been prepared in accordance with the provisions of the Land Record Manual and the same was also in the knowledge of the true owner who has been served with Form PA-10 and despite the same he did not take any action to seek the eviction of such person in terms of the limitation provided only then the right can be claimed.

26. It is also to be remembered that since the person pleading adverse possession does not have any special equities in his favour, consequently, it is his burden to discharge and show that the entries were prepared in accordance with law and in case if the entries have not been prepared in accordance with the provisions contained in the Land Record Manual then the plea cannot be successfully allowed.

27. In this regard, it will be relevant to notice the decision of this Court in the case of ***Putti and others Vs. Assistant Director of Consolidation, Bahraich and others*** reported in ***2006 SCC Online (Alld) 1286*** which has been considered in a subsequent decision dealing with the law regarding adverse possession in detail in ***Babu Ali Vs. DDC and Others reported in 2021 (8) ADJ 579.***

28. Lately, this Court also had the occasion to consider the aforesaid issue of adverse possession in the case of ***Chit Bahal Singh and others v. Joint Director of Consolidation and others***, decided on **29.04.2022** and by relying upon the decision of **Babu Ali and another v. D.D.C. and others (Supra)** the plea of adverse possession was rejected. The relevant paras explaining the law and the preparation of entries and what ingredients have to be met are being extracted hereinafter:-

"11.The para-89-A, 89-B and 102-B of the Land Records Manual (here-in-after referred as "the manual'), relevant for the purpose, are extracted below:--

"89-A. List of changes.-After each Kharif and rabi portal of a village the Lekhpal shall prepare in triplicate a consolidated list of new and modified entries in the Khasra in the following form:

Form No.P-10

Khasra No. of Plot	*Area*	*Details of entry in the last year*	*Details of entry made in the current year*	*Verification report by the Revenue Inspector*	*Remarks*
1	*2*	*3*	*4*	*5*	*6*

(ii) The Lekhpal shall fill in the first four Columns and hand over a copy of the list to the Chairman of the Land Management Committee. He shall also prepare extract from the list and issue to the person or persons concerned recorded

in Columns 3 and 4 to their heirs, if the person or persons concerned have died, obtaining their signature in the copy of the list retained by him. Another copy shall be sent to the Revenue Inspector.

(iii) The Revenue Inspector shall ensure at the time of his partial of the village the extract have been issued in all the cases and signatures obtained of the recipients.

89-B. Report of changes.- The copy of the list with the Lekhpal containing the signatures of the recipients of the extracts shall be attached to the Khasra concerned and filed with the Registrar (Revenue Inspector) alongwith it on or before 31st July, of the following year (sub-paragraph (iv) of the paragraph 60).

102-B. Entry of possession (Column 22) (Remarks column).- (1) The Lekhpal shall while recording the fact of possession in the remarks Column of the Khasra, write on the same day the fact of possession with the name of the person in possession in his diary also, and the date and the serial number of the dairy in the remarks Column of the Khasra against the entry concerned.

(2) As the list of changes in Form p-10 is prepared after the completion of the patal of village, the serial number of the list of changes shall be noted in red ink below the entry concerned in the remarks column of the Khasra in order to ensure that all such entries have been brought on the list.

(3) If the Lekhpal fails to comply with any of the provisions contained in paragraph 89-A, the entry in the remarks Column of the Khasra will not be deemed to have been made in the discharge of his official duty."

12. Reading of the aforesaid provisions makes it clear that if any entry is made in PA-10, the same shall be communicated to the person or persons concerned recorded in columns 3 and 4 or their heirs and obtain their signatures. Records on being submitted to the Revenue Inspector, he shall ensure at the time of Padtal i.e. verification of the village that it has been issued in all the cases and the signatures obtained by the recipients. Therefore, in case, any entry made on the basis of adverse possession the same was to be communicated to the person concerned and the person claiming is required to prove that it was in accordance with the manual and as to what was nature of possession and when it started in the knowledge of the tenant and the possession was continuous and how long it continued.

13. This Court considered this issue in the case of Mohd. Raza v. Deputy Director of Consolidation, 1997 RD 276 and held that the entries in the revenue papers not prepared by following the procedure prescribed under the Uttar Pradesh Land Records Manual and PA-10 notice was not served on the main tenant, such entries are of no evidentiary value and would not confer any right.

14. This court, in the case of Gurumukh Singh v. Deputy Director of Consolidation, Nainital, (1997) 80 RD 276, has also held that the entries will have no evidentiary value if they are not in accordance with the provisions of Land Records Manual and the burden to prove is on the person who is asserting the possession on the basis of adverse possession. Relevant paragraphs 6 and 7 are extracted below:--

"6. It is clear from Para A-102C of the Land Records Manual that the entries will have no evidentiary value if they are not made in accordance with the provisions of Land Records Manual. There is presumption of correctness of the entries provided it is made in accordance with the relevant provision of Land Records Manual and secondly, in case where a person is

claiming adverse possession against the recorded tenure-holder and he denies that he had not received any P.A. 10 or he had no knowledge of the entries made in the revenue records, the burden of proof is further upon the person claiming adverse possession to prove that the tenure-holder was duly given notice in prescribed Form P.A. 10. Para A-81 itself provides that the notice will be given by the Lekhpal and he will obtain the signature of the Chairman, Land Management Committee as well as from the recorded tenure-holder. It is also otherwise necessary to be provided by the person claiming adverse possession. The law of adverse possession contemplates that there is not only continuity of possession as against the true owner but also that such person had full knowledge that the person in possession was claiming a title and possession hostile to the true owner. If a person comes in possession of the land of another person, he cannot establish his title by adverse possession unless it is further proved by him that the tenure-holder had knowledge of such adverse possession.

7. In Jamuna Prasad v. Deputy Director of Consolidation, Agra, this Court repelled the contention that the burden of proof was upon the person who challenges the correctness of the entries. It was observed:

"Learned counsel for the Petitioner argued that there was a presumption of correctness about the entries in the revenue records and the onus lay upon the Respondent to prove that the entries showing the Petitioner's possession had not been in accordance with law. This contention is untenable Firstly, it is not possible for a party to prove a negative fact. Secondly, the question as to whether the notice in Form P.A. 10 was issued and served upon the Petitioner also is a fact which was within his exclusive knowledge."

"Petitioner's contention that the burden lay on the Respondents to disprove the authenticity and destroy the probative value of the entry of possession cannot be accepted. In my opinion, where possession is asserted by a party who relies mainly on the entry of adverse possession in his favour and such possession is denied by the recorded tenure-holder, the burden is on the former to establish that the entries in regard to his possession was made in accordance with law."

15. This Court, in the case of Sadhu Saran v. Assistant Director of Consolidation, Gorakhpur, (2003) 94 RD 535, has held that it is well settled in law that the illegal entry does not confer title. Therefore even if the entry has been made, it does not confer right title or interest if it is not in accordance with law and the prescribed procedure. This Court and the counsel for the parties also could not get the same in the Lekhpal diary. The provision of PA-24 has come vide notification dated 03.07.1965, therefore it is also of no assistance because entry could not have been made on the basis of PA-24 in Khatauni of 1373 fasli and it is also without number and year.

16. This Court, in the case of Putti v. Assistant Director of Consolidation, Bahraich, (2007) 2 All LJ 43, has held that the court should be slow to declare the right on the basis adverse possession otherwise it may become a weapon in the hands of mighty persons to acquire the property of the weaker sections of society. It has further held that there shall not be presumption of continuous possession to declare right and title on the basis of adverse possession unless year to year entries made in accordance with law in the

Khasra or Khatauni and proved by cogent and trustworthy evidence, the burden to prove which is on the person who claims Sirdari or Bhumidhari rights on the basis of adverse possession. Relevant paragraph-41 is extracted below:--

"41. Right to claim title on the basis of adverse possession is a legacy of British law. Courts should be slow to declare right on the basis of adverse possession. In case liberal approach is adopted to extend right and title on the basis of adverse possession then it may become a weapon in the hands of mighty persons to acquire the property of the weaker sections of the society. Accordingly, it shall always be incumbent upon the Courts to do close scrutiny of the evidence and material on record within the four corners of law as settled by Apex Court, discussed herein above. Even little reasonable doubt on the evidence relied upon by a party to claim right and title on the basis of adverse possession may be sufficient to reject such claim under a particular fact and circumstance. There shall not be presumption on continuous possession to declare right and title on the basis of adverse possession unless year to year entries made in accordance to law in the Khasra or Khatauni are proved by cogent and trust worthy evidence. burden of proof of such entries shall lie, as discussed herein above, on the person who claims Sirdari or bhumidhari right on the basis of adverse possession. In the absence of any such proof, presumption shall be in favour of recorded tenure-holder whose name has been recorded in column-1 of the Khatauni."

17. The Hon'ble Apex Court, in the case of P.T. Munichikkanna Reddy v.Revamma, 2008 (26) LCD 15, has held that in case of adverse possession, communication to the owner and his hostility towards the possession is must. The relevant paragraphs 19 to 23 are extracted below:--

"19. Thus, there must be intention to dispossess. And it needs to be open and hostile enough to bring the same to the knowledge and plaintiff has an opportunity to object. After all adverse possession right is not a substantive right but a result of the waiving (willful) or omission (negligent or otherwise) of right to defend or care for the integrity of property on the part of the paper owner of the land. Adverse possession statutes, like other statutes of limitation, rest on a public policy that do not promote litigation and aims at the repose of conditions that the parties have suffered to remain unquestioned long enough to indicate their acquiescence.

20. While dealing with the aspect of intention in the Adverse possession law, it is important to understand its nuances from varied angles.

21. Intention implies knowledge on the part of adverse possessor. The case of Saroop Singh v. Banto, (2005) 8 SCC 330 in that context held:

"29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendants possession becomes adverse. (See Vasantiben Prahladji Nayak v. Somnath Muljibhai Nayak, (2004) 3 SCC 376).

30. Animus possidendi is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See Mohd Mohd. Ali v. Jagadish Kalita, SCC para 21)"

22. A peaceful, open and continuous possession as engraved in the maxim nec vi, nec clam, nec precario has been noticed by this Court in Karnataka Board of Wakf v. Government of India, (2004) 10 SCC 779 in the following terms:

"Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show : (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession"

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."

29. If the plea of adverse possession of the petitioner is tested in the light of the law as noticed hereinabove, this Court has no hesitation to hold that the plea has not been substantially either pleaded with necessary particulars nor it has been proved as required in law. Needless to state that in order to successfully urge the plea of adverse possession, it has to be specifically pleaded and proved with cogent evidence. The point of time, when the possession begins and when it notably becomes adverse. The entry in the change of possession must be indicated in red ink. Merely an entry of possession is not always adverse to the knowedge of the recorded tenant. Adverse possession is proved not by the period of tenure nor can there be presumption that the adverse possession continues. The limitation is to be counted from the First of July, following the time of un-authorized occupation and the time of possession year to year. Neither there is any material on record to indicate that the petitioner had indicated that the entries recorded in 1359 Fasli were in accordance with law and that Form PA-10 was duly served on the private respondents and despite their knowledge, they failed to take any action seeking eviction apart from the fact that the petitioner has also not been able to establish that his name finds recorded in the Khatauni in Part-II in red ink. Hence, in absence of the essential ingredients of adverse possession not being met, the aforesaid plea fails.

30. Now, in order to test the plea regarding the petitioner having adhivasi rights, the bare Section 20 of the U.P.Z.A. & L.R. Act has already been noticed hereinabove. Now, it will also be apposite to consider certain relevant decisions regarding conferment of adhivasi rights and in this regard the decision of the Apex Court in the case of ***Smt. Sonawati (supra)*** is relevant and the relevant paragraphs of the said decision read as under:-

"4. In order that a person may be regarded as an adhivasi of a piece of land,

Section 20(b) of Act 1 of 1951 requires that his name must be recorded in the khasra or khatauni for 1356 Fasli as an occupant. The Assistant Collector has pointed out that according to para 87 of the Land Records Manual it is necessary for a Patwari to make an enquiry about the status of the occupant, and if he thinks that a claimant is an occupant, he should enter the name in red ink in khsra as -- "Kabiz, sajhi etc." Admittedly Pritam Singh was not shown as kabiz or sajhi nor was the entry posted in red ink.

6. It must therefore be held that relying upon the entry of his name in the "remarks" column in the khasra for 1356 Fasli Pritam Singh could not claim that he had established his rights as an adhivasi of the land under Section 20(b) of the U.P. Zamindari Abolition and Land Reforms Act 1 of 1951.

7. The alternative case under Section 3 of the U.P. Land Reforms (Supplementary) Act 31 of 1952 may now be considered. Section 3 of Act 31 of 1952 provides, insofar as it is material:

"(1) Every person who was in cultivatory possession of any land during the year 1359 Fasli but is not a person who as a consequence of vesting under Section 4 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (U.P. Act 1 of 1951) (hereinafter referred to as the said Act), has become a bhumidar, sirdar, adhivasi or asami under Sections 18 to 21 of the said Act shall be and is hereby declared to be, with effect from the appointed date--

(a) if the bhumidhar or sirdar of the land was, or where the land belongs jointly to two or more bhumidars or sirdars, all of them were, on the appointed date person or persons referred to in item (i) to (vi) of sub-section (2) of Section 10 of the said Act, an asami from year to year, or

(b) if the bhumidhar or sirdar was not such a person, an adhivasi, and shall be entitled to all the rights and be subject to all the liabilities conferred or imposed upon an asami or an adhivasi, as the case may be, by or under the said Act.

Explanation.--A person shall not be deemed to be in cultivatory possession of the land, if he was cultivating it as a mortgagee with possession or a thekedar, or he was merely assisting or participating with a bhumidhar sirdar, adhivasi or asami concerned in the actual performance of agricultural operations."

The section appears to be somewhat involved in its phraseology. But its purport is fairly clear. A person who is not in consequence of the provisions of Sections 18 to 21 of the U.P. Act 1 of 1951 a bhumidhar, sirdar, adhivasi or asami but who is in "cultivatory possession" of land during 1359 Fasli shall be entitled to the rights in respect of that land of an asami from year to year if the bhumidhar or sirdar of the land was on the appointed date a person who is referred to in Items (i) to (vi) of Section 10(2) of the U.P. Act 1 of 1951, and he shall be entitled to the rights of an adhivasi if the bhumidhar or sirdar of the land was not a person referred to in Items (i) to (vi) of Section 10(2). The U.P. Act 31 of 1952 was enacted to grant protection to certain persons who had been in "cultivatory possession" of land in the holdings of bhumidhars or sirdars, and had been or were being forcibly evicted from the land by the tenure holders. The language of the section clearly shows that it was intended to grant the rights of an asami or adhivasi according as the case fell within clause (a) or clause (b) to a person who had been admitted to cultivatory possession and who was in such possession in 1359 Fasli.

9. The scheme of Section 3 of the U.P. Land Reforms (Supplementary) Act, 1952 is different from the scheme of Section 20(b) of the U.P. Zamindari Abolition and Land Reforms Act 1 of 1951. Whereas under Act 1 of 1951 the entry is made evidence without further enquiry as to his right of the status of the person who is recorded as an occupant, under Section 3 of the U.P. Land Reforms (Supplementary) Act, 1952, a person who claims the status of an asami or an adhivasi must establish that he was in "cultivatory possession" of the land during the year 1359 Fasli. The expression cultivatory possession" is not defined in the Act, but the Explanation clearly implies that the claimant must have a lawful right to be in possession of the land, and must not belong to the classes specified in the Explanation. "Cultivatory possession" to be recognized for the purpose of the Act must be lawful, and for the whole year 1359 Fasli. A trespasser who has no right to be in possession by merely entering upon the land forcibly or surreptitiously cannot be said to be a person in "cultivatory possession" within the meaning of Section 3 of U.P. Act 31 of 1952. We are of the view that the Allahabad High Court was right in holding in Ram Krishna v. Bhagwan Baksh Singh that a person who through force inducts himself over and into some land and succeeds in continuing his occupation over it cannot be said to be in cultivatory possession of that land so as to invest him with the rights of an asami or an adhivasi, and we are unable to agree with the subsequent judgment of a Full Bench of the Allahabad High Court in Nanhoo Mal v. Muloo that occupation by a wrongdoer without any right to the land is "cultivatory possession" within the meaning of Section 3 of the U.P. Act 31 of 1952.

10. A person who has no right to occupy land may rely upon his occupation against a third person who has no better title, but he cannot set up that right against the owner of the land. It must be remembered that by Section 3 of U.P. Act 31 of 1952 the legislature conferred rights upon persons in possession of land against the tenure holders, and in the absence of any express provision, we are unable to hold that it was intended by the Act to put a premium upon forcible occupation of land by lawless citizens."

31. In **Bacchan (Supra)** it has been held that if the entries are not genuine, it cannot confer any adhivasi rights and the relevant portion of the said decision reads as under:-

"17.. Section 20 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 speaks of a person recorded as occupant to become adhivasi of the land and will be entitled to take or retain possession as mentioned in the section. One of the principal matters mentioned in the section is that the Khasra or Khatauni of 1356 Fasli is to be prepared under Sections 28 and 33 of the U.P. Land Revenue Act, 1901. The U.P. Land Records Manual in Chapter A-V in para A-55 to A-67 lays down the manner in which the Khasra or the field book showing possession is to be prepared by the Patwari in the areas to which Zamindari Abolition and Land Reforms Act, 1950 applies. There are detailed instructions about the manner in which the enquiry should be carried out about actual possession and change in possession and corrections in the map and field book, the form in which the khasra is to be prepared. The form of khasra is given in para A-80. The form shows that the Lekhpal has to prepare a consolidated list of entries after partial or proper investigation. Again, para A-70 to A-73 to

the U.P. Zamindari Abolition and Land Reforms Act show how entries have to be made in khataunis every year showing the nature of tenure of each holder. The khatauni is meant to be a record of tenure-holders. The manner of changes to be made there is laid down in para A-82 to A-83. Entries are to be checked. Extract has to be sent to the Chairman, Land Management Committee as contemplated in paragraph A-82 (iii). In this context Section 20(b)(i) of the U.P. Zamindari Abolition and Land Reforms Act which speaks of the record "as occupant" in the khasra or khatauni of 1355 Fasli refers to the khasra or khatauni being prepared in accordance with the provisions of the Land Revenue Act, 1961. Khasra is the field book provided for by Section 28 of the Land Revenue Act. Khatauni is an annual register prepared under Section 32 of the Land Revenue Act 1951. It has to be emphasised that the entry under Section 20 (b)(i) of the U.P. Zamindari Abolition and Land Reforms Act, 1950 in order to enable a person to obtain adhivasi rights must be an entry under the provisions of law."

32. Another decision of the Apex Court in ***Wali Mohd. Vs. Ram Surat and Others, 1991 (9) LCD 79*** is also relevant and in paragraphs 4 and 5, it has been held as under:-

"4. The said section deals with the question as to who is entitled to take or retain possession of the land in question. The plain language of the aforesaid clause (i) of sub-section (b) of section 20 of the said Act suggests that this question has to be determined on the basis of the entry in the Khasra or Khatauni of 1356 Fasli Year prepared under sections 28 and 33 respectively of the U.P. Land Revenue Act, 1901. An analysis of the said section shows that under sub-section (b) of section 20 the entry in the Khasra or Khatauni of the Fasli Year 1356 shall determine the question as to the person who is entitled to take or retain possession of the land. It is, of course, true that if the entry is fictitious or is found to have been made surreptitiously then it can have no legal effect as it can be regarded as no entry in law but merely because an entry is made incorrectly that would not lead to the conclusion that it ceases to be an entry. It is possible that the said entry may be set aside in appropriate proceedings but once the entry is in existence in the Khasra or Khatauni of Fasli Year 1356, that would govern the question as to who is entitled to take or retain possession of the land to which the entry relates.

5. It was submitted by learned counsel for the appellants that if the entry was not correct, it could not be regarded as an entry made according to law at all and the right to take or retain possession of the land could not be determined on the basis of an incorrect entry. He placed reliance on the decision of this Court in Bachan and another v. Kankar and others, [1973] 1 SCR 727. In that judgment the nature of the entries in Khasra or Khatauni is discussed and it is also discussed as to how this entry should be made. This Court held that entries which are not genuine cannot confer Adhivasi rights. It has been observed that an entry under section 20(b) of the said Act, in order to enable a person to obtain Adhivasi rights, must be an entry under the provisions of law and entries which are not genuine cannot confer Adhivasi rights. In that judgment it has been stated that the High Court was wrong when it held that though the entry was incorrect, it could not be said to be fictitious. That observation, however, has to be understood in the context of what

follows, namely, that an entry which is incorrectly introduced into the records by reason of iII- will or hostility is not only shorn of authenticity but also becomes utterly useless without any lawful basis. This judgment, in our view, does not lay down that all incorrect entries are fictitious but only lays down that a wrong entry or incorrect entry which has been made by reason of iII-will or hostility cannot confer any right under section 20(b) of the said Act. This decision is clarified by a subsequent judgment of this Court in Vishwa Vijai Bharti v. Fakhrul Hasan and others, [1976] Suppl. SCR 519, where it has been held as follows:

"It is true that the entries in the revenue record ought, generally, to be accepted at their face value and courts should not embark upon an appellate inquiry into their correct- ness. But the presumption of correctness can apply only to genuine, not forged or fraudu- lent, entries. The distinction may be fine but it is real. The distinction is that one cannot challenge the correctness of what the entry in the revenue record states but the entry is open to the attack that it was made fradulently or surreptitiously. Fraud and forgery rob a document of all its legal effect and cannot found a claim to possessory title."

33. Similarly, the decision of the Apex Court in the case of ***Udai (Dead), Ram Lakhan (Dead), Karedin and Others Vs. Deputy Director of Consolidation, Varanasi and Others*** reported in ***1990 (8) LCD 266*** is also relevant and in paragraphs 9, it has been held as under:-

"9.The facts in Amba Prasad v. Abdul Noor Khan [AIR 1965 SC 54 : (1964) 7 SCR 800] were more complicated. But, for our present purposes, it is sufficient to extract the facts as set out in the headnote. Before the coming into operation of the Act, Amba Prasad was the zamindar of the disputed land. The names of the respondents had been recorded in the khasra for 1356 Fasli as persons in possession of the disputed land but they had been dispossessed after 30-6-1949. They claimed adhivasi rights under Section 20 on the strength of the record for 1356 Fasli and were successful in their claim before the Board of Revenue. The Supreme Court dismissed Amba Prasad's appeal. Hidayatullah, J. (as His Lordship then was) analysed the terms of Section 20 and its explanations thus: (SCR pp. 807-808)

"The scheme of the section may now be noticed. The section, speaking generally, says that certain persons ''recorded' as ''occupants' of lands (other than grove lands or lands to which Section 16 applies) shall be known as adhivasis and shall be entitled to retain or to regain possession of them, after the date of vesting which was 1-7-1952. Such persons do not include an intermediary (Explanation IV). Such persons must be recorded as occupants in the khasra or khatauni for 1356 Fasli (1-7-1948 to 30-6-1949). If such a person is in possession he continues in possession. If he is evicted after 30-6-1943 he is to be put back in possession notwithstanding anything in any order or decree. By fiction such persons are deemed to be entitled to regain possession (Explanation I). The emphasis has been laid on the record of khasra or khatauni of 1356 Fasli and 30-6-1948 is the datum line. The importance of an entry in these two documents is further apparent from Explanations II and III. Under the former, if the entry is corrected before the date of vesting (1-7-1952), the corrected entry is to prevail and under the latter the entry is deemed to be corrected (even though not actually corrected, if an

order or decree of a competent court ordering the correction had been made before the date of vesting and the order or decree had become final. There are thus two date lines. They are 30-6-1948 and 1-7-1952, and the title to possession as adhivasi depends on the entries in the khasra or khatauni for the year 1356 Fasli."

(emphasis in original)

His Lordship then observed:

"Before we proceed to decide whether the answering respondents satisfy the above tests we must consider what is meant by the terms ''occupant' and ''recorded'. The word ''occupant' is not defined in the Act. Since khasra records possession and enjoyment the word ''occupant' must mean a person holding the land in possession or actual enjoyment. The khasra, however, may mention the proprietor, the tenant, the subtenant and other person in actual possession, as the case may be. If by occupant is meant the person in actual possession it is clear that between a proprietor and a tenant the tenant, and between a tenant and the subtenant the latter and between him and a person recorded in the remarks column as ''dawedar qabiz' the dawedar qabiz are the occupants. This is the only logical way to interpret the section which does away with all intermediaries. If rights are not to be determined except in the manner laid down by the section, the entries must be construed as explained by the four explanations. Once we find out the right person in the light of the explanations, that person continues as an adhivasi after 1-7-1952, provided he is in possession or was evicted after 30-6-1948. If he was evicted after 30-6-1948 he is entitled to regain possession in spite of any order or decree to the contrary. The word ''occupant' thus signifies occupancy and enjoyment. Mediate possession, (except where the immediate possessor holds on behalf of the mediate possessor), is of no consequence. In this way even persons who got into occupation when lands were abandoned get recognition. The section eliminates inquiries into disputed possession by accepting the records in the khasra or khatauni of 1356 Fasli, or its correction before 1-7-1952. It was perhaps thought that all such disputes would have solved themselves in the four years between 30-6-1948 and 30-6-1952."

(emphasis added)

His Lordship concluded by touching upon the question whether the person claiming rights under Section 20 should prove actual possession in 1356 Fasli and, observing that this question had been left open in the Upper Ganges case [AIR 1961 SC 143 : (1961) 1 SCR 564] , said there was no reason to disturb a long established line of decisions of the Allahabad High Court answering the question in the negative. In the result, Amba Prasad's appeal was dismissed."

34. From the perusal of the aforesaid decision what can be culled out is that a person who claims adhivasi rights, his name must have been recorded in 1356 fasli in the Khasra or Khatauni which is duly prepared in terms of the provisions of the Land Revenue Act. In the instant case, it is not disputed that the petitioner was not recorded in the 1356 fasli. Thus, prima facie, he does not ipso-facto can claim the rights of adhivasi in terms of Section 20 (b) of the U.P.Z.A. & L.R. Act.

35. Now, even if the contention of the petitioner is considered in terms of the plea that his name was recorded in 1359 Fasli muddatkasht two years and therefore he was in possession that also does not

impresses the Court for the reason that in the Khatauni of 1356, the name of the private respondents is recorded. In part-II there is no entry of either the petitioner or any other person shown as Shikmi. It is only in the khatauni of 1359 fasli that the name of the private respondents is recorded in the first part whereas the name of the petitioner Bhagwati Deen is recorded as Shikmi and so also in the Khatauni of 1362 fasli Part-II, however, there is nothing on record to indicate that the name of the private respondents were ever deleted or expunged. The possession of the petitioner has not been established in 1356 fasli and merely an indirect attempt is being made to relate to the possession to 1356 fasli by referring to the entry contained in 1359 fasli with muddat kasht of two years.

36. On the other hand, the name of the private respondents has continuously been recorded in 1356, 1359 and 1362 fasli and even in the Khasra of 12 years from 1366 to 1377 as well as Khataunis of 1364 to 1369 fasli which clearly establishes the clean chain of right and possession of the respondents.

37. Apart from this, another fact which can be noticed, though, the effect of such entries made in the consolidation operations which did not reach the stage of Section 30 of the U.P.C.H. Act would not have any binding effect as held by this Court in the case of **Tauley (supra)** but nevertheless the fact remains that even in the first consolidation where there was a dispute regarding the rights of the private respondents in respect of the disputed property and the private respondents had raised objection in respect of their names which came to be corrected and even thereafter it remained in the name of the respondents only goes on to corroborate the continuity of possession and rights of the respondents. Even though it may not have any binding effect on the petitioner for the purposes of title but nevertheless these are surrounding and accentuating circumstances which amplifies the strength of the plea raised by the respondents and in order to defeat the same, the petitioner ought to have filed strong evidence contradicting or belying the same which unfortunately has not been done. For the reason that the petitioner did not have any other material except the said document of 1359, 1362 fasli and certain statement as prepared under Section 240 of the U.P.Z.A & L.R. Act to indicate that the rights of the respondents had been extinguished. Thus, for the aforesaid reasons, the plea of adhivasi rights of the petitioner also does not convinces this court and is consequently turned down.

38. Now, coming to the effect of the statement made under Section 240 (j) of the U.P.Z.A. & L.R. Act, the learned counsel for the petitioner has placed heavy reliance on the decision of the Special Bench of this Court in the case of **Avdhesh Singh (Supra),** however, before proceeding further, it will be relevant to notice the issues before the Special Bench which were as under:-

"1. Whether the finality of Compensation Statement under Sec. 240-J, U.P. Zamindari Abolition and Land Reforms Act extinguishes the rights and title of the landholder and the landholder is debarred from showing in the subsequent proceedings that the land is not held by Adhivasi?

2. Whether the finality of Compensation Statement under Sec. 240-J

is final between landholder and State only and not between landholder and person claiming Adhivasi rights?

3. Whether the finality amounts to an adjudication of title between the landholder and the person claiming Adhivasi right and the principle of res-judicata or constructive res-judicata applies?

4. Whether the landholder against whom Compensation Statement has become final and who has received compensation has no locus standi to re-agitate his rights in respect of the land in question?

5. What is the nature of proceedings under Sec. 240-D of the U.P. Zamindari Abolition and Land Reforms Act and their effect in a regular title suit or proceeding?

6. What is the meaning of the word "final' used in Sec. 240-J(2) of the U.P. Zamindari Abolition and Land Reforms Act?

Considering the arguments, the Court observed:-

2. During the hearing before us learned counsel representing the parties agreed that the last two questions of the orders of reference either do not arise or the answers to them would be covered by the answers to the first four questions. We consequently do not propose to answer those two questions. The questions that have been referred to us have been the subject-matter of consideration in a bead-string of decisions, many of which have interpreted the Full Bench decision in Maqbool Raza v. Joint Director of Consolidation1 in diverse ways.

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10. I wish to emphasise here, even at the risk of repetition, that the limited object of preparation of the Compensation Statement under Sec. 240-D is to provide a basis for determination of the identity of the land acquired, the assessment of compensation payable therefor and the landholder entitled thereto. As to which individual is the Adhivasi of the land acquired has no impact on decision of either of these three matters. An ex-parte determination by the Compensation Officer of these matters could, not have been countenanced. The legislature consequently has provided by Sec. 240-F that the Compensation Statement prepared under Sec. 240-D shall be published in the manner prescribed and a copy thereof shall be sent to the landholder concerned. While this provision provides that a copy of the Compensation Statement shall be sent to the landholder concerned which necessarily means the landholder mentioned in it, it also requires publication in the manner prescribed. Rules 193-B and 193-C of the Rules framed under the Act provide for various statements that have to be prepared consequent on a notification under Sec. 240-A. Rule 193-E(i) makes provision for publication in the Official Gazette of a notice in Z.A. Form No. 111 after the draft Compensation Statement has been drawn up by the Compensation Officer. Sub-rule (ii) of rule 193-E requires that a copy of the no-notice in Z.A. Form No. 111 along with a certified extract of the draft compensation statement shall be served on the landholder in the manner specified in the Code of Civil Procedure. Though the manner in which the publication has to be made was left to the rule-making authority, the requirement that the Compensation Statement shall be published in itself implies that the, publication must be effective so that all concerned may have notice thereof. The rule has, as noticed, provided for publication of a notice in Z.A. Form No. 111 in the Official Gazette. Publication in

the Official Gazette in this country has always been considered in the eye of law as effective publication.

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12. The question arises as to what is the scope of the words "person interested" for the purposes of Sec. 240-G. Does it include the recorded or unrecorded Adhivasi? To my mind the answer must be in the negative. Since the Compensation Statement prepared under Sec. 240-D and published under Sec. 240-F is prepared expressly for purposes of assessment and payment of compensation for acquisition of rights, title and interest of landholder in the land referred to in Sec. 240-A, the only persons interested in disputing its correctness can be (1) those claiming that they and not the person shown in the Compensation Statement are the landholders entitled to compensation, or that they also along with the landholder mentioned in it are entitled to compensation (2) the landholder shown in the Compensation Statement or any one else claiming to be the landholder who asserts that the land is not of the nature contemplated by Sec. 240-A of the Act and thus has not been acquired and (3) the recorded landholder or any one else claiming to be the landholder disputing the assessment of compensation as disclosed in the Compensation Statement. An Adhivasi recorded or unrecorded in the Compensation Statement can possibly have no interest in supporting or disputing the quantum of compensation assessed or to the identity of the person to whom it is paid or asserting that the land does not belong to the class contemplated by Sec. 240-A and hence in the entire Compensation Statement. No objection consequently, to my mind, is entertainable at the instance of an Adhivasi recorded or unrecorded in the Compensation Statement.

In the very nature of things neither an Adhivasi, if any mentioned in the Compensation Statement, nor any one else claiming to be an Adhivasi can conceivably interested in establishing that the land mentioned in the Compensation Statement is not of the nature referred to in Sub-sec. (1) of Sec. 240-A. In fact, every person claiming to be an Adhivasi of the land in question would be interested in showing that it is land of that nature, otherwise he would not become Sirdar. Only landholders whose rights are claimed to have been acquired by reason of a notification under Sec. 240-A can be interested in asserting that the land mentioned in the Compensation Statement is not land of the nature contemplated by Sec. 240-A and hence in filing an objection of the nature envisaged by Sec. 240-H(2)(a). If, however, in the objection contemplated by Sec. 240-H(2)(a) the Adhivasi recorded or unrecorded is impleaded as a party, he and the landholder both would be bound by the decision arrived at in the consequent proceedings on the principle of res-judicata and it will be open to neither of them to contend in a separate suit that the decision was incorrect. An Adhivasi who is not a party to the proceedings would, however, remain unaffected by the decision. An objection as envisaged by Sec. 240-H(2)(b) can be raised by persons interested in showing that either they alone to the exclusion of the person shown as landholder in the Compensation Statement or along with him are landholders entitled .

And finally, The Court concluded:-

19.For the reasons given above, my conclusion is that the Compensation

Statement prepared under Chapter IX-A of the Act is final as far as the identity of the land acquired, the quantum of compensation assessed, and the identity of the landholder who in lieu of extinction of his rights in the land is entitled to receive the compensation are concerned and for no other purpose.

20.My answer to the first four questions referred to us are as follows:--

(1) Finality of Compensation Statement under Sec. 240-J, U.P. Zamindari Abolition and Land Reforms Act extinguishes the rights and title of the landholder and the landholder is debarred from showing in collateral or separate proceedings that the land is not held by an Adhivasi, except in cases where the provisions of the Act have not been followed or where the Compensation Statement has been prepared in disregard of the fundamental principles of judicial procedureKatikara Chintamani Dora v.Guletreddi Annamanaidu [(1974) 1 SCC 567 : A.I.R. 1974 S.C. 1069.] . If the requirements of the Act have not been complied with or the fundamental principles of judicial procedure have been disregarded, the Compensation Statement signed and sealed by the Compensation Officer under Sec. 240-J(2) of the Act can be assailed in collateral proceedings.

(2) The Compensation Statement signed and sealed under Sec. 204-J(2) of the Act is final between the landholder and the State alone.

(3) The Compensation Statement amounts, to an adjudication of title between the landholder and the person claiming Adhivasi rights and the principle of res-judicata and constructive res-judicata will apply only to an Adhivasi who has been a party to proceedings consequent on an objection of the nature contemplated by Sec. 240-H(2)(a) of the Act.

(4) The landholder against whom Compensation Statement has become final; and who has received compensation has no locus standi to reagitate his rights in respect of the land in question.

39. Noticing the aforesaid, it would indicate that the Special Bench noticed that the statement of compensation as prepared under Chapter IX-A of the U.P.Z.A. & L.R. Act is final as far as the identity of the land acquired, the quantum of compensation assessed and the identity of the land holder who in lieu of extinction of his rights in the land is entitled to receive compensation and for no other purpose. The compensation statement is final between the landholder and the State alone and it amounts to an adjudication of title between the landholder and the person claiming adhivasi rights and the principle of res-judicata and constructive res-judicata will apply only to such adhivasi who had been a party to the proceedings consequent to an objection of the nature contemplated under Section 240 (H) (2) (a) of the Act and then such land holder against whom compensation statement has become final and who has received the compensation has no locus standi to re-agitate his rights of the land in question.

40. Before looking into the applicability of the aforesaid propositions as laid by the Special Bench in ***Avdhesh Singh (Supra)***, it will also be relevant to notice that the respondent herein has categorically filed an affidavit as late as on 01.04.2022 on the specific asking of this Court in its order dated 30.03.2022 as to specifically state whether the respondents have received the compensation in terms of the Section 240 of the U.P.Z.A. & L.R. Act. In the said affidavit, it has been categorically stated that no compensation

has been received by the respondents. There does not appear to be any reason to disbelieve the same for another reason, inasmuch as, the State has also not raised any objections that the respondents could not re-agitate his rights as he has received the compensation in terms of Chapter IX-A of the U.P.Z.A. & L.R. Act.

41. Even otherwise, the petitioner has merely filed certain statements of compensation before this Court along with the rejoinder affidavit dated 11.11.2019 to raise the plea regarding the compensation having been received by the respondent. But the said documents could not be verified. Moreover, a categorical statement has been given by the respondent in his affidavit as noticed above that he has not received any compensation and also that though the said plea was raised by the petitioner even before the two courts but neither the said documents were furnished before the two Courts nor the plea found favour with them as rightly noticed by the DDC that since the right of adhivasi has not been conferred on the petitioner, consequently, he could not further be granted any benefit in terms of Section 240 (J) of the U.P.Z.A & L.R. Act neither the proceedings in terms of Chapter IX-A of the U.P.Z.A. & L.R. Act were in accordance with law.

42. This was a ground upon which the aforesaid plea was rejected by the SOC as well as by the DDC but nothing has been brought on record by the petitioner to controvert the same. There is also nothing on record to show that in the proceedings under Section 240 of the U.P.Z.A. & L.R. Act, the petitioner was a party, thus, if at all the statement at best could be find between the State and the respondent as held by the Special Bench but even there is no confirmation of the same nor controversion by the State in regard to the compensation, thus, the plea of Section 240 (J) of the U.P.Z.A & L.R. Act also does not find favour with this Court.

43. It is equally settled that an entry in the revenue records do raise a presumption but the same is rebuttable in nature. Any entry which is not prepared in accordance with law cannot confer any benefit to a party claiming the same. In the instant case as both the SOC as well as the DDC have meticulously considered the submissions and the material available on record and had arrived at a finding that merely because of one entry in 1359 fasli which is also not proved nor having been made in accordance with the provisions contained under the Land Revenue Act as has been discussed in the preceding paragraphs, no benefit could be granted to the petitioner, thus, the third plea of the petitioner also fails and the Special Bench decision of **Avdhesh Singh (Supra)** also does not come to the rescue of the petitioner. Moreover, it could not be disputed that the respondents were granted bhumidhari rights after the application of the respondents under Rule 109 of the Uttar Pradesh Consolidation of Holdings, Rules, 1954 was allowed.

44. Thus, in light of the detailed discussions and for all the reasons, hereinabove, this Court is satisfied that there is no error committed by the SOC and the DDC which may require any interference of this Court in exercise of powers conferred under Article 226 of the Constitution of India.

45. Accordingly, the petition sans merit is thus dismissed. In the facts and

circumstances, there shall be no order as to costs.

(2022)05ILR A581
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 05.05.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE AJAI KUMAR SRVASTAVA -I, J.

Criminal Appeal No.54 of 1984

Sheo Bux Singh & Ors.
...Appellants (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Kr. Mridul Rakesh, Sri Anuj Dayal, Kr. Mukul Rakesh, Kumwar Mukul Rakesh, Kumwar Sushant Prakash, Rajiv Raman Srivastava

Counsel for the Respondent:
G.A.

A. Criminal Law -Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Sections 148, 436/19, 429/149, 323/149 & 302/149-challenge to-conviction-deceased died in an incident of dacoity-appellant no. 2 was armed with country made firearm, however from the perusal of the postmortem report of deceased, no fire arm injury was reported on the deceased nor her injured son sustained any fire arm injury-the Prosecution examined eleven witnesses-Their testimonies are consistent with the prosecution story-the injury reports of the injured as well as the deceased fully supported and corroborated the prosecution case in respect of manner of commission of crime-PW-5 who is an independent witness, stated in his testimony that the deceased was stabbed by other accused not by appellant no. 2 and the same was supported by the testimony of PW-4-PW-2 and PW-3 also supported the same version that appellant no. 2 neither extended threat to the deceased nor he extended exhortation to inflict injuries to PW-4 (deceased son)-Prosecution witnesses have stated in their testimony that in first leg of incident, accused persons including appellant no. 2 had opened indiscriminate fire-While, in the second leg of incident, despite being armed with fire arm , appellant no. 2 did not use alleged country made fire arm on the deceased-appellant no. 2 did not share common object of unlawful assembly to kill the deceased-Thus, Trial court has committed error in holding the appellant guilty u/s 302/149 IPC-The same being illegal and perverse deserves to be set aside.(Para 1 to 42)

B. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. it may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. it may be modified or altered or abandoned at any stage. The expression " in prosecution of common object" as appearing in Section 149 has to be strictly construed as equivalent to " in order to attain the common object." Each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149 IPC may be different on different members of the same assembly. (Para 37)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Anil Kumar Vs St. of U.P. (2004) 13 SCC 257

2. Chanda Vs St. of U.P. (2004) 5 SCC 141

(Delivered by Hon'ble Ajai Kumar Srivastava-I, J.)

1. We have heard Sri Anuj Dayal, learned counsel for the appellant and Sri Anurag Verma, learned Additional Government Advocate for the State-respondents.

2. Challenge in this appeal is to the judgment and order dated 19.01.1984 rendered by Additional Sessions Judge, Unnao in Sessions Trial No.112/1980 arising out of Crime No.39/1979, under Sections 148, 302/149, 429, 436, 323 Indian Penal Code (hereinafter referred to as I.P.C.), Police Station Ajgain, District Unnao, whereby the appellant No.1, Sheo Bux Singh has been convicted and sentenced to undergo one year's rigorous imprisonment for the offence under Section 147 I.P.C.; one year's rigorous imprisonment for the offence under Section 323 I.P.C.; life imprisonment for the offence under Section 302/149 I.P.C.; ten years' rigorous imprisonment for the offence under Section 436/149 I.P.C.; five years' rigorous imprisonment for the offence under Section 429/149. The appellant no.2, Raj Bahadur Singh, has been convicted and sentenced to undergo two years' rigorous imprisonment for the offence under Section 148 I.P.C.; life imprisonment for the offence under Section 302/149 I.P.C.; ten years' rigorous imprisonment for the offence under Section 436/149 I.P.C.; five years' rigorous imprisonment for the offence under Section 429/149 I.P.C.; one year's rigorous imprisonment for the offence under Section 323/149 I.P.C. The appellant No.3, Nanha Singh has been convicted and sentenced to undergo two years' rigorous imprisonment for the offence under Section 148 I.P.C.; life imprisonment for the offence under Section 302 I.P.C.; ten years' rigorous imprisonment for the offence under Section 436/149 I.P.C.; five years' rigorous imprisonment for the offence under Sections 429/149 I.P.C.; one year's rigorous imprisonment for the offence under Section 323/149 I.P.C. All the sentenc

3. At the outset, it is required to be noted that the charge-sheets, Ex. Ka-7 and Ex. Ka-12 were laid before learned trial Court against six accused persons. The case against accused, Ram Bux Singh and Dev Bux Singh stood abated during trial due to their death. The instant appeal was filed by three appellants, namely, Sheo Bux Singh, Raj Bahadur Singh and Nanha Singh. Due to death of appellant no.1, Sheo Bux Singh and appellant no.3, Nanha Singh, the instant appeal has already been abated, vide order of this Court dated 21.04.2018. Therefore, the present appeal survives only in respect of appellant no.2, Raj Bahadur Singh.

4. The facts as unfolded by the prosecution, in short conspectus, are that a written report, Ex. Ka-2 was given at Police Station Ajgain, District Unnao in the intervening night of 13.02.1979/14.02.1979 at 00:30 hours by the first informant, Vijay Bahadur Singh, P.W.-2 stating therein that on 13.02.1979 at about 9:00 P.M., Ram Bux Singh, Dev Bux Singh armed with fire arms, Sheo Bux Singh armed with lathi along with one of his associate Raj Bahadur Singh, who was armed with country made fire arm and Nanha Singh, who was carrying a knife, came to the house of younger brother of the first informant and pressed his door and opened fire at his door. These accused persons hurled abuses and were also extending threat to kill. On hearing commotion, the first informant came upstairs and raised alarm. The

accused persons opened fire at the first informant who, after taking shelter, started pelting stones etc. at the accused persons. Meanwhile, accused, Dev Bux Singh torched the thatch of Ram Singh and Ram Prakash and thereafter, torched the houses of Kallu Singh, Bhagauti Lodh and the house of the first informant. They also set the stubble ablaze. They were extending threat to shoot anyone who comes to rescue. Due to commotion, Jagan, Chetram, Purvi, Prabhu, Ram Sevak Yadav and some other people came to the spot and also raised alarm. Ram Sevak was hit by Sheo Bux Singh by Lathi when he was trying to take his animals away.

4(a) In this incident of torching thatches etc. two bulls, one buffalo, one cow and one calf belonging to Kallu Singh died due to burn injuries, whereas a buffalo and a goat belonging to Ram Prakash and two buffalo and a calf belonging to Ram Singh also died. Various household articles of Kallu Singh, Ram Prakash and Ram Singh were burnt in this incident. First informant's thatch and a window was also burnt in this incident.

4(b) Thereafter, all accused persons are said to have gone to the house of Ram Prashad and have stabbed his wife, Sarju Devi. The son of Ram Prashad, Gurudin was present there, who raised alarm. He was also beaten by Lathi. When they were challenged by the people, who had reached on the spot, the accused persons retreated towards Village Nanatikur.

4(c) According to prosecution, one of the relative of first informant, Narendra was accused in a case pertaining to murder of Mahendra Singh, which had occurred about two years ago. Due to aforesaid reasons, brothers of deceased, Mahendra Singh, accused, Ram Bux Singh, Sheo Bux Singh and Dev Bux Singh nourished grudge against the first informant and his family members. It is also stated in the written report Ex. Ka-2 that the accused persons nourished grudge against Ram Prakash for the reasons that he stood as a witness against Ram Bux Singh.

5. The aforesaid written report, Ex. Ka-2 was scribed by Ram Sevek. On the basis of said written report, Ex. Ka-2 given by PW-2, Vijay Bahadur, a first information report bearing Case Crime No.39/1979, under Sections 147, 148, 149, 307, 436, 452, 324, 429 I.P.C., Ex. Ka-13 came to be lodged at Police Station Ajgain, District Unnao against Ram Bux Singh @ Munnu Singh, Dev Bux Singh, Sheo Bux Singh, Raj Bahadur and Nanha Singh.

6. On receiving information of death of the injured, Sarju Devi, Section 302 I.P.C. came to be added during investigation vide G.D. No.14 dated 18.03.1979, Ex. Ka-15.

7. During investigation, evidence regarding complicity of one Kaptan Singh was also collected by the Investigating Officer, therefore, upon conclusion of investigation, charge-sheet, Ex. Ka-7 was submitted against Kaptan Singh and Ex. Ka-12 was submitted against Ram Bux Singh @ Munnu Singh, Dev Bux Singh, Sheo Bux Singh Raj Bahadur, Nanha Singh and Kaptan Singh.

8. According to injury report, Ex. Ka-5, following injuries were reported on the body of the deceased, Sarju Devi :-

1. Incised wound 2 cm x .25 cm x skin deep on the mid of forehead. 2.5 cm

above the junction of eye brow tailing upwards.

2. Incised wound 1.5 cm x .5 cm x muscle deep on the middle of Neck 2.5 cm above the supra sternal notch tailing upwards.

3. Incised wound 1.5 cm x .25 cm over the left side of cheek in front left pinna 1.5 cm away x skin deep tailing anteriorly x 3 cm x 3 cm area surrounding to injury is contused.

4. Incised wound 2 cm x .25 cm x muscle deep. Just close to lower border of left pinna which is also separated, partly attached only on the back side tailing upwards.

5. Incised wound 3 cm x .25 cm x muscle deep on the left temporal area tailing anterior.

6. Incised wound 3 cm x .25 cm x muscle deep over the occipital area left side 4 cm away and posteriorly to injury no.5.

7. Incised wound 4 cm x .25 cm x muscle deep on the top of the head and 3 cm anterior to injury no.6 tailing posterior.

8. Incised wound 2 cm x .25 cm x muscle deep just lateral aspect of left elbow joint tailing anteriorly upwards.

9. Incised wound 2 cm x .25 cm x muscle deep on the lateral aspect of chest 12 cm above the illiac crest left side tailing downwards.

10. Incised wound 2 cm x .25 cm x muscle deep on the occipital area 3 cm below the injury no.6 tailing upwards.

9. According to postmortem report of the deceased, Sarju Devi, Ex. Ka-8 the cause of death is stated to be shock and heamorrhage due to antemortem injuries.

10. According to injury report, Ex. Ka-6 following injuries were reported on the person of Gurudin, PW-4, who is son of the deceased Sarju Devi :-

1. Contusion on the left hand over the area of 4 cm x 3 cm area.

2. Incised wound 6.5 cm x .25 cm x muscle deep (just tailing the skull bone) on the top of the head slightly towards the left side and 7 cm above the left eye brow tailing is towards anterior aspect.

11. It is revealed from the perusal of the injury report, Ex. Ka-1 that following injuries were reported on the person of Ram Sevak:-

1. Lacerated wound of 6 cm x 1/2 cm x bone deep over left side of scalp about 10 cms. away from left ear blood clotted over margins.

2. Abrated contusion of 5 cm x 4 cm red color over outer aspect of right hand and area of swelling of 8 cm x 6 cm around it.

12. Dr. R.K. Maheshwari, PW-6 has proved postmortem report of animals as Ex. Ka.3, who are reported to have died due to burn injuries. It is stated in the said postmortem report that the cause of death of animals was shock as a result of burn injuries.

13. The matter was investigated by Sub Inspector, Sripal Tripathi, PW-10, who visited the place of occurrence and

prepared site plan, Ex. Ka-9. He recorded statements of witnesses, under Section 161 Cr.P.C. and collected bloodstainted and plain soil from the spot and prepared memo, Ex. Ka-10 in respect thereof. He has also collected ashes from the spot and prepared memo, Ex. Ka-11. After conclusion of the investigation, charge-sheet was submitted against Ram Bux Singh, Deo Bux Singh, Sheo Bux Singh, Nanha Singh and Raj Bahadur Singh as Ex. Ka-12 by Sub Inspector Sripal Tripathi. Thereafter, he was transferred to other district on 28.04.1979, therefore, the investigation was entrusted to Sub Inspector, Vijay Pal Singh, PW-8 who also submitted charge-sheet Ex. Ka-7 against accused, Kaptan Singh.

14. The accused, Sheo Bux Singh was charged for the offence under Sections 302/149, 429, 436, 147 & 323 I.P.C. Kaptan Singh was charged for the offence under Sections 302/149, 429, 436 & 147 I.P.C. Ram Bux Singh was charged for the offence under Sections 302/149, 429, 436 & 148. Raj Bahadur Singh was charged for the offence under Sections 302/149, 429, 436 & 148 I.P.C. Nanha Singh was charged for the offence under Sections 302/149, 429, 436 & 148 I.P.C. The accused persons denied the charges and stated that they have been falsely implicated. They claimed trial.

15. To bring home the guilt of the appellant to the hilt, the prosecution has examined as many as eleven witnesses. PW-1, Dr. R.K. Khattar, PW-2, Vijay Bahadur, who is the first informant, PW-3, Ram Prakash Singh, PW-4, Gurudeen, who is son of the deceased, PW-5, Sri Jaggan, PW-6, Dr. R.K. Maheshwari, PW-7, Dr. Rama Shankar Shukla, PW-8, Sri Vijay Pal Singh, PW-9, Dr. V.C. Rastogi, PW-10, S.I. Sripal Tripathi, Investigating Officer, PW-11, Sri Shubham karan Singh.

16. The statement of the appellant no.2, Raj Bahadur Singh was recorded under Section 313 Cr.P.C. He denied the charges and stated that he has been falsely implicated due to enmity. He has also stated that the statements of prosecution witnesses were false.

17. After appreciating the prosecution evidence, the learned trial Court vide impugned judgment and order dated 19.01.1984 has convicted the accused, Sheo Bux Singh, Raj Bahadur Singh, Nanha Singh as aforesaid and has also recorded the finding of acquittal of co-accused, Kaptan Singh.

18. It is submitted by learned counsel for the appellant that the first information report is antetimed keeping in view the fact that the distance of Police Station Ajgain, from the place of occurrence is about nine miles. The incident is said to have occurred at about 9:00 P.M. in the night of 13.02.1979, which spanned over two hours. Thereafter, the first informant proceeded to get the first information report lodged, which ultimately came to be lodged at 00:30 hours at Police Station Ajgain.

19. His further submission is that from the perusal of Ex. Ka-22, G.D. No.11 dated 15.02.1979, entered at Police Station Kotwali, Kanpur. It transpires that the deceased, Sarju Devi died in an incident of dacoity. Her husband was also a witness of Panchayatnama, Ex. Ka-18, wherein too, it is mentioned that the deceased, Sarju Devi died in an incident of dacoity. Therefore, he submits that the entire prosecution story implicating the present appellant is false and concocted.

20. He has also submitted that the appellant no.2, Raj Bahadur Singh has been falsely implicated in this case due to his acquaintance with other co-accused, Ram Bux Singh. No specific role in commission of crime has been assigned to him. There is nothing on record to show that he, in any manner, acted in furtherance of common object of unlawful assembly. It is also submitted by learned counsel for the appellant that the appellant no.2, Raj Bahadur Singh has been shown to be armed with country made fire arm, however, it would appear from the perusal of postmortem report of deceased, Ex. Ka-8 that no fire arm injury was reported on the person of the deceased. Even her son, injured Gurudeen, PW-4 has not sustained any fire arm injury. Therefore, he submits that the appellant no.2, Raj Bahadur Singh never shared common object of alleged unlawful assembly. The finding of learned trial Court convicting the appellant no.2, Raj Bahadur with the aid of Section 149 I.P.C. for offence of murder of deceased, Sarju Devi is based on surmises and conjunctures only which are palpably illegal and deserve to be set aside.

21. Learned Additional Government Advocate appearing on behalf of the State, on the other hand, has submitted that the first information report in this case is prompt. In order to prove its case beyond doubt the prosecution has examined as many as eleven prosecution witnesses. Their testimonies are consistent with the prosecution story as contained in written report, Ex. Ka-2. He has also submitted that the injury reports of the injured as well as deceased, Sarju Devi fully support and corroborate the prosecution case in respect of manner of commission of crime. There is nothing on record to show that the appellant no.2, Raj Bahadur Singh was falsely implicated in this case. The finding of conviction of appellant is based on proper appreciation and analysis of prosecution evidence and as a result thereof, the appellant no.2, Raj Bahadur Singh has rightly been convicted under Sections 148, 436/149, 429/149, 323/149 and 302/149 I.P.C. He has, thus, submitted that the instant appeal being devoid of merit deserves to be dismissed.

22. Having heard learned counsel for appellant, learned A.G.A. for the State and upon perusal of the record, we find that according to first informant, Vijay Bahadur, PW-2 the incident started about 9:00 P.M. on 13.02.1979, when accused persons arrived at the house of his younger brother, Ram Singh. The entire incident spanned over two hours. After the incident was over, the first informant got the first information report scribed by Ram Sevak, after half an hour of retreat of accused person from the spot. Police Station Ajgain is situate at a distance of nine miles from the place of occurrence. Therefore, taking into account all the aforesaid facts and circumstances, we do not find the first information report to be antetimed.

23. Hon'ble Supreme Court in the case of **Anil Kumar v. State of U.P., (2004) 13 SCC 257** has held that minor variance in the statement of maker of first information report should not lead to conclude that first information report is antetimed.

24. Adverting to the second contention of learned counsel for the appellant, we notice that the deceased, Sarju Devi died on 15.02.1979 at Kanpur in Ursala Hospital during her treatment. An information was given by Emergency Medical Officer to the Police Station

Kotwali, Kanpur that Sarju Devi had died in an incident of dacoity. A general diary entery no.11 dated 15.02.1979, Ex. Ka-22 was entered at Police Station Kotwali, on the basis of aforesaid information given by Emergency Medical Officer. The same information finds mention in Ex. Ka-18, Panchayatnama, of which, husband of the deceased is also a Panch. However, there is nothing on record to show as to what was the basis of such information. There is nothing on record to suggest that such information was given by either first informant or any family members of the deceased. Therefore, such entry made in general diary at Police Station Kotwali, Kanpur made at the behest of Emergency Medical Officer does not, in any manner, affect the veracity and credibility of prosecution case.

25. From the perusal of the written report Ex. Ka-2, it is apparent that the alleged incident is said to have taken place in two distinct legs.

26. Regarding the first leg of incident, PW-2, first informant, Vijay Bahadur has stated on oath that on the date of incident accused persons, who were armed with fire arms, came to the house of his younger brother Ram Singh. Accused, Ram Bux Singh and Dev Bux Singh opened fire from their guns. Accused, Dev Bux Singh torched the thatches of Ram Sevak, Ram Prakash, Kallu Singh and Bhagauti Lodh. Accused, Dev Bux Singh also torched the thatch of first informant. During this process, accused persons were also making regular fires from their fire arms.

27. This leg of incident has also been witnessed by PW-3, Ram Prakash Singh, who has stated that on 13.02.1979 at 9:00 P.M. in the night, the accused person came to his uncle's house. Accused, Ram Bux Singh and Dev Bux Singh were carrying guns. Kaptan Singh and Raj Bahadur Singh were carrying country made fire arms, Sheo Bux Singh was armed with lathi whereas Nanha Singh was carrying a knife. He has stated to have seen accused persons while they were making indiscriminate firing and accused Dev Bux Singh torched the thatches of Ram Sevak, Ram Prakash, Kallu Singh and Bhagauti Lodh.

28. The investigating officer had collected ashases from the spot during investigation and had prepared memo in respect thereof as Ex. Ka-11. It also appears to us that though, PW-3, Ram Prakash Singh and PW-5 Sri Jaggan have not witnessed this incident since its inception, however, they have categorically stated to have seen the accused persons on the spot while the thatches etc. were burning. In this leg of incident many animals had died due to burn injuries. This fact stood proved by the testimony of PW-6, Dr. R.K. Maheshwari who had conducted postmortem of animals and prepared postmortem report, Ex. Ka-3, according to which, the animals are reported to have died due to burn injuries.

29. The prosecution evidence adduced to prove the first leg of incident appears to us to be consistent. It is based on cogent evidence. No material contradiction could be pointed out to us which may lead to any otherwise inference.

30. Therefore, in view of aforesaid discussion, we converge to the irresistible conclusion that the conviction of appellant no.2, Raj Bahadur Singh, under Sections 148, 436/149, 429/149, 323/149 I.P.C. is based on cogent and reliable evidence available on record.

31. In the second leg of incident, the accused persons are stated to have gone to the house of Ram Sevek, where accused, Nanha Singh is stated to have stabbed the deceased, Sarju Devi mercilessly causing her death. The appellant no.2, Raj Bahadur Singh is also stated to be present on the spot while deceased, Sarju Devi was stabbed by accused, Nanha Singh. The incident of stabbing of deceased, Sarju Devi has occurred at her house where her son Gurudin, PW-4, who is also an injured, was present. His presence on the spot appears to us to be natural being son of the deceased.

32. The PW-4, Gurudin has clearly stated in his testimony that except accused, Sheo Bux Singh no other accused assaulted him. This witness has sustained injuries on his person which has been reported to be a contusion and an incised wound which, according to his injury report, Ex. Ka-6, might have been caused by blunt object and sharp instrument respectively. He has stated to have been given blow from lathi by accused, Sheo Bux Singh.

33. The PW-5, Sri Jaggan, who is an independent witness, has stated in his testimony that the deceased, Sarju Devi was stabbed by accused, Nanha Singh. In his cross examination he has admitted the fact that in his statement recorded under Section 161 Cr.P.C. he had not stated that all the accused persons while chasing the deceased had entered into the house of the deceased, Sarju Devi. Thus, his such statement during trial appears to be an improvement in order to rope in the appellant no.2, Raj Bahadur Singh.

34. On a close scrutiny of the testimony of prosecution witnesses of fact, PW-2, Vijay Bahadur, who is the first informant, PW-3, Ram Prakash Singh, PW-4, Gurudeen, who is son of the deceased and also an injured and PW-5, Sri Jaggan, who is an independent witness, we find that no prosecution witness has stated in his testimony that the appellant no.2, Raj Bahadur Singh either extended threat to the deceased, Sarju Devi or his son, Gurudin, PW-4. He has also not extended exhortation to inflict injuries to Gurudin, PW-4 or the deceased, Sarju Devi.

35. We have been able to notice that the prosecution witnesses have stated in their testimony that in first leg of incident, accused persons including the appellant no.2, Raj Bahadur Singh, who were armed with fire arm, had opened indiscriminate fire. However, significantly, despite being armed with a fire arm in the second leg of incident in which an old hapless lady was done to death by the accused, Nanha Singh by stabbing her mercilessly, no use of alleged country made fire arm being held by present appellant no.2, Raj Bahadur Singh was alleged by the prosecution.

36. Therefore, it appears to us that appellant no.2, Raj Bahadur Singh was not sharing the common object of unlawful assembly insofar as it relates to killing of deceased, Sarju Devi is concerned. There is nothing on record to suggest that he had knowledge that the deceased, Sarju Devi would be killed by the co-accused, Nanha Singh in second leg of incident. The fact that the deceased, Sarju Devi was stabbed by accused, Nanha Singh and injured, Gurudin, PW-4 was inflicted injuries by accused, Sheo Bux Singh stands proved in the light of consistent testimony of prosecution witnesses. However, we find that the conviction of appellant no.2, Raj Bahadur Singh, under Section 302 I.P.C. read with Section 149 I.P.C., in absence of

any cogent evidence to the effect that either he was sharing common object of unlawful assembly to kill the deceased, Sarju Devi or atleast he knew that the co-accused persons are likely to kill the deceased, Sarju Devi, is not sustainable.

37. The Hon'ble Supreme Court in **Chanda v. State of U.P., (2004) 5 SCC 141**, in paragraph no.8 has held as under:-

8. The pivotal question is applicability of Section 149 IPC. The said provision has its foundation on constructive liability which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word "object" means the purpose or design and, in order to make it "common", it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression "in prosecution of common object" as appearing in Section 149 has to be strictly construed as equivalent to "in order to attain the common object". It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to a certain point beyond which they may differ in their objects and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149 IPC may be different on different members of the same assembly.

(Emphasis supplied by us)

38. On the appreciation of evidence on record, we are of the considered view that the appellant no.2, Raj Bahadur Singh did not share common object of unlawful assembly to kill the deceased, Sarju Devi in the second leg of incident. Therefore, on a careful scrutiny of the material on record, we have no hesitation to record that in the facts of the case, the learned trial Court has

committed an error in holding that the appellant no.2, Raj Bahadur Singh was guilty of the offence under Section 302 I.P.C. read with Section 149 I.P.C.

39. The upshot of the aforesaid discussion is that the conviction of appellant no.2, Raj Bahadur Singh under Sections 148, 436/149, 429/149, 323/149 I.P.C. is based on cogent and reliable evidence wherein no interference by this Court is warranted. Whereas, his conviction under Section 302 I.P.C. read with Section 149 I.P.C. has not been established beyond a reasonable doubt. Therefore, the same being illegal and perverse deserves to be set aside.

40. **The instant appeal is thus, partly allowed**. The conviction of appellant no.2, Raj Bahadur Singh under Sections 148, 436/149, 429/149, 323/149 I.P.C. and sentences awarded therefor are affirmed. Whereas his conviction and sentence under Section 302 I.P.C. read with Section 149 I.P.C. are hereby set aside. He is acquitted of the charges under Section 302 I.P.C. read with Section 149 I.P.C.

41. In case, the appellant no.2, Raj Bahadur Singh has already undergone sentences awarded to him for the offences under Sections 148, 436/149, 429/149, 323/149 I.P.C., he shall be released forthwith, unless required in any other case.

42. The appellant no.2, Raj Bahadur Singh, after his release, shall file a personal bond of Rs.50,000/- and two sureties in the like amount to the satisfaction of the learned trial Court in compliance of Section 437A Cr.P.C within a period of one month from today.

43. Let the lower court record along with a copy of this judgment be transmitted forthwith to the learned trial Court for information and necessary compliance.

(2022)05ILR A590
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.04.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE RAJNISH KUMAR, J.

Criminal Appeal No.1166 of 2006

Phool Chand Yadav ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Manu Sharma (A.C.), Sri Ram Pravesh Yadav, Sri R.S. Chauhan

Counsel for the Respondent:
A.G.A.

A. Criminal Law -Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Section 302-challenge to-conviction-modification-broad daylight murder-appellant gave one or two lathi blow to the deceased's head –Though it was on vital part but it was without intention to kill-ocular evidence also shown that the blow of lathi was on head-ocular evidence cannot be discarded on any discrepancy of the medical evidence-appellant knowingly made a single blow that it was likely to cause death it would be a culpable homicide not amounting to murder which fall u/s 304 Part II IPC because the intention to cause death could not be proved.(Para 1 to 29)

B. In the instant case, though any enmity between the deceased and the appellant could not be proved but it is a case of an incident occurred in broad day light in which the deceased had suffered serious injury on account of which he succumbed to death. if the motive and intention to kill is not proved then it is required to be

considered as to whether the offence would fall under the category of murder or not otherwise it may be a case of culpable homicide not amounting to murder. (Para 19 to 27)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Solanki Chimanbhai Ukabhai Vs St. of Guj. (1983) 2 SCC 174

2. Virsa Singh Vs St. of Punj. Manu/ SC/0041/1958 (AIR 1958 SC 465)

3. Pulicherla Nagarjun Vs St. of A.P. (2006) 11 SCC 444

4. Suresh Chandra Bahri Vs St. of Bih. & ors. MANU/SC/0500/1994

5. Joseph Vs St. of Ker. (1994) AIR SC 34

6. Gurmukh Singh Vs St. of Har. (2009) 15 SC 635

7. Gurmail Singh & ors. Vs St. of Punj. (1982) 3 SCC 185

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

1 . This appeal has been preferred against the judgment and order dated 12.01.2006 passed by Additional District and Sessions Judge Court No.6, Jaunpur in Sessions Trial No.126 of 2004; State Versus Phool Chandra under Section 302 IPC, Police Station-Sarai Khwaja, District-Jaunpur arising out of Case Crime No.8 of 2004 whereby the appellant Phool Chandra has been convicted and awarded sentence under Section 302 IPC for life imprisonment.

2. The F.I.R. was lodged by the informant Rajesh Kumar Agrahri son of the deceased Ram Asrey on 08.01.2004 at 18:10 alleging therein that while his father was tying his goat in front of Malhani Bazar (Bhadora) Temple, Police Station Sarai Khwaja, District Jaunpur at 01:30 in the day on 08.01.2004, Phool Chandra Yadav, the appellant son of Kewla Prasad suddenly came and started beating his father by a Danda. His father shouted then the informant and Sonu son of Harish Chandra and Gulab Chandra @ Gullu son of Banarsi rushed to the spot and after seeing them the accused ran away. The deceased was taken to the Sadar Hospital, Jaunpur where he died during treatment. In pursuance of the aforesaid F.I.R. the investigation was conducted and the charge sheet was submitted against the appellant under Section 304 I.P.C.

3. Since the charge was under Section 304 I.P.C. the case was committed to the Sessions Court. The charge was framed by the Sessions Judge, Jaunpur on 20.04.2004 against the appellant under Section 302 I.P.C. Charge was read over and explained to the accused who denied the charge and claimed to be tried.

4. In support of the charge seven witnesses were examined namely Rajesh Kumar Agrahri as PW-1, Sonu Gupta as PW-2 as witnesses of fact. Head Constable Adya Prasad Yadav as PW-3, who had written the F.I.R. on the basis of complaint. Dr. P.N. Pandey as PW-4, who had conducted the postmortem. Constable Subhash Chandra Pandey as PW-5, who took the body of the deceased to the postmortem house. Sub-Inspector Amar Singh as PW-6, the investigating officer of the case and Dr. Rajnath Gautam as PW-7 the Medical Officer who had examined the injuries of the deceased.

5. After the evidence was adduced by the prosecution, the appellant was

examined under Section 313 Cr.P.C. He denied the allegations and stated that the evidence has been given by PW-1 and PW-2 due to enmity and PW-4 to PW-7 are the Government witnesses and they have given forged evidence. Lastly he stated that Ram Asrey was patient of Asthema. He had difficulty in movement. While he was tying the goat near the temple, the goat tried to run, on account of which he fell on well head in which he suffered injuries but he has falsely been implicated. After considering the evidence and material on record, the appellant has been convicted and awarded sentence for life imprisonment under Section 302 I.P.C.

6. We have heard Sri Manu Sharma, learned Amicus Curiae for the appellant and Km. Meena, learned A.G.A. for the State.

7. Learned counsel for the appellant submitted that the appellant has falsely been implicated. The presence of witnesses on the spot and the place of incident is doubtful. The PW-2 stated that he and Rajesh; PW-1 had gone to see fair in Baba at Gauspur and returned home in the evening and then took deceased to hospital. It was informed by the people that the deceased has sustained injuries by lathi danda. He further submitted that injured was admitted in hospital by the villager and not by the son therefore the presence of PW-1 is also doubtful. He further submitted that the place of incident is also doubtful because no blood stain was recovered whereas doctor had stated that deceased died due to excessive bleeding. The doubt has also been raised in regard to place of arrest of the appellant on the ground that PW-1 stated that the arrest was made from sugar cane field whereas PW-2 stated that the appellant was found sitting at his house eating sugar cane. The recovery is also said to be doubtful and it has been argued that there is all possibility that the injury was sustained by the deceased due to accident while tying goat. He further submitted that motive for offence could not be proved therefore the intention to kill also could not be proved so it can not be said to be a case falling under Section 302 I.P.C. because the F.I.R. was also lodged and charge sheet was submitted under Section 304 I.P.C. and charge under Section 302 I.P.C. could not be proved beyond doubt, therefore the sentence awarded is also excessive. Accordingly he submitted that the appeal is liable to be allowed.

8. Learned A.G.A. vehemently opposed the submissions of learned counsel for the appellant. She had taken us to the evidence on record and contended that though the charge sheet was submitted under Section 304 I.P.C. but the charge was rightly framed under Section 302 I.P.C. and the charge was proved by the eye witnesses beyond doubt. It was a case of broad day light murder which has been proved by eye witnesses therefore even if the motive could not be proved, it is of no consequence. The conviction has rightly been made and adequate sentence has been awarded to the appellant. The appeal is liable to be dismissed.

9. We have considered the submissions of learned counsel for the parties and perused the evidence and material on record.

10. The PW-1 Rajesh Kumar Agrahri lodged the F.I.R. at 18:10 on 08.01.2004 in regard to the aforesaid incident at 01:30 PM on the same day. The F.I.R. was lodged under Section 304 I.P.C. PW-1 had proved the F.I.R. He had stated in his evidence that

there are a large number of Yadvas in his village. He is of business community who are in minority therefore the persons of Yadav community keep enmity with them. He had further supported the version of the F.I.R. and stated that after incident he had taken his father to the hospital where he died during treatment. The deceased died during treatment at 05:10 PM and the F.I.R. was lodged at 06:10 PM therefore there was no delay in lodging the F.I.R. because it is a primary duty of the son to first get his father treated in case of such incident. PW-1 had stated that when the appellant had started beating his father by stick, he cried then he alongwith Sonu and Gulab of his village reached on the spot then the appellant ran away. However, on account of beating by lathi (danda) his father suffered serious injuries therefore he was taken to hospital. He also stated in his evidence that his father had suffered injuries on the back side of his head. An exhaustive cross examination was done from PW-1 but nothing could be extracted which may doubt the testimony of PW-1.

11. PW-2 had also stated that the incident is of 1-1/2 PM on 08.01.2004. He alongwith Gulab Chandra @ Gullu and Rajesh Kumar rushed to the spot after hearing the cry of the deceased Ram Asrey then he saw that the appellant was beating Ram Asrey with Lathi & Danda and after sustaining injuries he fell down, but even thereafter he was being beaten. He and others tried to catch the appellant but he ran away. This statement was recorded on 04.01.2005 and after a long cross examination on several dates i.e. 02.02.2005, 22.02.2005 and 27.05.2005 he was got declared hostile by the prosecution as he stated that he and Rajesh had gone to see the fair in Baba of Ghauspur. They returned in the evening and then took the deceased to hospital and the people had informed that the injuries were suffered from Lathi & Danda. Thereafter in cross-examination and suggestion of cross defence he stated that it is wrong to say that he has not seen the incident from his eyes. Therefore even though he was declared hostile after cross examination on several dates but lastly he supported his evidence by the suggestion therefore his earlier statement can not be ignored in which he had proved the incident. It is settled proposition of law that even after a witness has been declared hostile, the evidence which inspires confidence, can be considered and would be relevant. Therefore this Court is of the view that it is a case in which there are two eye witnesses of the incident who have proved the incident and nothing could come out in the cross-examination which may raise any doubt about their testony about the incident. Therefore the contention of learned counsel for the appellant that the presence of witnesses at the time of incident is doubtful, is misconceived and not tenable and liable to be rejected. As such the incident has been proved by two eye witnesses.

12. PW-3 Head Constable 98 Aadya Prasad Yadav has proved the lodging of the F.I.R. and G.D. entries. PW-4 Dr. P.N. Pandey, who had conducted the postmortem, has proved the postmortem report in which one injury was found. He stated that in his opinion the cause of death was excessive bleeding due to anti mortem injury. PW-5 has stated in his evidence that he had sealed the dead body and produced for postmortem before the doctor. The inquest report was prepared by the S.I. Ramesh Chandra Mishra on which he has also signed. PW-6 S.I. Amar Singh has stated that while he was posted as Sub-

Inspector, Police Station- Sarai Khwaja, the F.I.R. vide Case Crime No.804 under Section 304 I.P.C. was lodged on a written complaint of Rajesh Agrahri against the appellant Phool Chandra. The investigation was assigned to him. He after recording the statements and inspection of the site and preparation of the site plan which is in his writing and under his signature had submitted the charge sheet under Section 304. He also stated that he had recovered the Lathi and prepared the form which is signed by the witnesses. PW-7 Dr. Rajnath Gautam, Anaesthesia Department, Moti Lal Nehru Medical College, Allahabad had stated that while he was posted as Emergency Medical Officer, District Hospital Jaunpur on 08.01.2004 had inspected the injuries of the deceased Ram Asrey at 02:53 PM in which he had suffered four injuries. He had also stated that the death could have been caused on account of injuries no.1 and 2. He proved the injury report.

13. Learned counsel for the appellant had submitted that since the presence of witnesses on the spot is doubtful and opinion of the doctor that if the deceased would have been old he could die on account of injuries sustained on the head by falling and the statement under Section 313 Cr.P.C. there is all possibility of injuries to have been caused due to accident while tying the goat and the appellant has been falsely implicated in the case. As discussed above, since the precense of the witnesses can not be doubtted at the time of occurrence and merely because an opinion has been given by the doctor and the appellant has stated in his statement under Section 313 I.P.C. it can not be said that injuries have been caused due to falling and due to accident while tying goat because the occurrence of incident has been proved by the two eye witnesses PW-1 and PW-2. The prosecution witnesses, who are the eye witnesses, have proved that the deceased had suffered injuries by beating of the appellant and even otherwise the appellant or any body else had not made any complaint regarding injuries to have been suffered by the deceased on account of any accident while tying the goat.

14. The deceased, after the incident, was taken to the hospital by PW-1 Rajesh Kumar Agrahri, PW-2 Sonu Gupta and Gulab. He was examined by the Emergency Medical Officer in District Hospital Jaunpur. Four injuries were recorded by the Medical Officer. (i) Lacerated wound 4cmX 1cm deep on left side skull above 5cm from the left ear pinna, bleeding. (ii) Lacerated wound 3cm X ½ cm bone deep on back of skull 8cm post to right ear pinna (iii) Abbression 2cmX1cm above the right year and (iv) abbression 3cmX2cm above the left ear pinna. The injuries (i) and (ii) were kept under observation and X-Ray was adviced. It was opined that the injuries were caused by hard and blunt object. The doubt has also been raised in regard to presence of PW-1 because in the injury report the deceased has been shown brought by Gulab. But it can not be accepted in view of evidence of PW-1 PW-2 and PW-7. No complaint was also made by any body in this regard. The appellant could also have produced Gulab in defence to prove it, but it was not done. The evidence on record is sufficient to reject the contention of learned counsel for the appellant.

15. The deceased died during treatment at 05:10 PM thereafter the F.I.R. was lodged at 06:10 PM. The postmortem of deceased was conducted on 09.01.2004. In the postmortem lacerated wound with

blue mark 8cmX4cm X-skull deep on the right side of head 8cm above right ear pinna under lying skull bone fractured and bleeding was found. Blood was also found in skull. Therefore, though there was difference in the medical examination and the postmortem in regard to the injuries but it is not disputed that anti mortem injury was found on the head of the deceased and the cause of death was anti mortem injuries on the vital part. The ocular evidence also shown that the blow of lathi was on head. The argument was raised that the informant had got the injuries made after making payment to the Emergency Medical Officer. However the doctor has stated in his statement on oath that he has received the prescribed fees.

16. The trial court considered the issue and recorded a finding that the doctor conducting the postmortem with the help of sweeper may have left to see the same. This Court while examining the medical report and the postmortem report found that the lacerated wounds mentioned in the injury report are of 4cmX1cm and 3cmX ½ cm on the head and in the posmortem the injury recorded is 8cmX4cm X-skull deep on the right side of head 8 cm above the right ear pinna and underlying skull bone was fractured. Therefore there is a possibility that the injury may have been seen as one in the postmortem due to bleeding and proximity in the injuries. However this court is of the view that since some doubt has been raised in regard to the injury report and no cogent evidence could be adduced to doubt the post mortem report the post mortem report would prevail. However, both the reports have been proved by the respective doctors and no cross examination was made on it, which may doubt the reports. Therefore non collection of blood from the spot also can not be fatal because it may be a fault on the part of investigating officer. Even otherwise the medical evidence is only corroborative and ocular evidence cannot be discarded on any discrepancy of the medical evidence. The Hon'ble Supreme Court in the case of **Solanki Chimanbhai Ukabhai Versus State of Gujarat; (1983) 2 SCC 174** has considered the issue and held as under in paragraph 13:-

"13. Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eye-witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence."

17. Doubt is also raised by the learned counsel for the appellant regarding the recovery on the ground that Lathi was not produced before the Court. But it can not be a ground for doubting the recovery because the Lathi was recovered, the description of which was made in the recovery memo dated 08.01.2004. Even otherwise the witnesses have proved that the appellant had beaten the deceased by the Lathi and medical and postmortem also indicate that the injuries were caused by the hard and blunt object.

18. The issue raised regarding place of arrest is also not tenable because the

place of arrest is not material in view of proof of case beyond doubt.

19. This is a case in which though any enmity between the deceased and the appellant could not be proved but it is a case of an incident occurred in broad day light in which the deceased had suffered serious injury on account of which he succumbed to death. Since the motive could not be proved therefore it may be a case in which the intention to kill may not be there. If the motive and intention to kill is not proved then it is required to be considered as to whether the offence would fall under the category of murder or not otherwise it may be a case of culpable homicide not amounting to murder. Sections 299, 300 and 304 I.P.C. relevant for the purpose are extracted below:-

*"**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.*

*3**00. 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--*

***2ndly.**--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--*

***3rdly.**--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--*

***4thly.**--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.*

***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's having taken undue advantage or acted in a cruel or unusual manner.*

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.*

304. Punishment for culpable homicide not amounting to murder.-- *Whoever commits culpable homicide not amounting to murder, shall be punished with 1 [imprisonment for life], or imprisonment of either description for a term which may extend to ten 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 ten 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 injury as is likely to cause death.

20. In view of above to bring a case under Section 300 firstly it must be established that a bodily injury is present; secondly the nature of the injury must be proved and thirdly it must be proved that there was an intention to inflict that particular bodily injury and it was not accidental or unintentional or that some other kind of injury was intended and fourthly it must be proved that injury inflicted on the deceased is sufficient to cause death in the ordinary course of nature. If all these eliments are established by the prosecution the offence would be murder under Section 300 I.P.C.

21. The Hon'ble Supreme Court considered the issue in the case of **Virsa Singh Vs. The State of Punjab; Manu/SC/0041/1958 (AIR 1958 SC 465)** and held as under in paragraph 22 to 30:-

22. First, it must establish, quite objectively, that a bodily injury is present;

23. Secondly, the nature of the injury must be proved; These are purely objective investigations.

24. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or

that some other kind of injury was intended.

25. Once these three elements are proved to be present, the enquiry proceeds further and,

26. Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

27. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under s. 300, 3rdly. It does not matter that there was no intention to cause death. It does not matter that there was Do intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death.

No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced that the injury was accidental or otherwise unintentional.

28. We were referred to a decision of Lord Goddard in R v. Steane (1) where the learned Chief Justice says that where a particular intent must be laid and charged, that particular intent must be proved. Of course it must, and of course it must be proved by the prosecution. The only question here is, what is the extent and nature of the intent that s. 300 3rdly requires, and how is it to be proved ?

29. The learned counsel for the appellant next relied on a passage where the learned Chief Justice says that:

"if, on the totality of the evidence, there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if, on a review of the whole evidence, they either think that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted."

30. We agree that that is also the law in India. But so is this. We quote a few sentences earlier from the same learned judgment:

"No doubt, if the prosecution prove an act the natural consequences of which would be a certain result and no evidence or explanation is given, then a jury may, on a proper direction, find that the prisoner is guilty of doing the act with the intent alleged."

22. The Hon'ble Supreme Court in the case of **Pulicherla Nagarjun Vs. State of Andhra Pradesh; (2006) 11 SCC 444** observed as to what is to be considered for deciding a case as to whether it falls under Section 302 or 304 Part-I or 304 Part-II and also the intention to cause death can be

gathered from a combination of circumstances. The relevant paragraph-18 is extracted below:-

"18. Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters # plucking of a fruit, straying of a cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no pre-meditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under section 302, are not converted into offences punishable under section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under section 302.

The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances : (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre- meditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention. Be that as it may."

23. The Hon'ble Supreme Court in the case of **Suresh Chandra Bahri Vs. State of Bihar and Others; MANU/SC/0500/1994** has held that sometimes motive plays an important role and becomes a compelling force to commit a crime and therefore motive behind the crime is a relevant factor for which evidence may be adduced. However it further noticed that in a case where there is clear proof of motive for the commission of the crime it affords added support to the finding of the court that the accused was guilty of the offence charged with. But the absence of proof of motive does not render the evidence bearing on the guilt of the accused nonetheless untrustworthy or unreliable because most often it is only the perpetrator of the crime alone who knows as to what circumstances prompted him to a certain course of action leading to the commission of the crime. Therefore motive may only be a relevant factor to form an opinion as to whether in a given circumstances there was an intention to kill on account of which the case may fall under Section 302.

24. In the present case the injuries were inflicted by a blow of Lathi which can

not be said to be a deadly weapon. However if the injuries inflicted on the vital part it may cause death. Therefore in such circumstance if the motive and intention to kill is not proved the case may fall under Section 304-I or 304-II. The Hon'ble Supreme Court in the case of **Joseph Vs. State of Kerala; AIR 1994 SC 34** has accepted the contention of the appellant that the Lathi used as a weapon is not a deadly weapon. In the said case the occurrence was a result of trivial incident and the accused dealt two blows on the head with a Lathi. Therefore it was held that it can not be said that he intended to cause injury which is sufficient, at the most it can be said that by inflicting such injuries he has knowledge that he was likely to cause a death and in such circumstance the offence committed by him will be culpable homicide not amounting to murder.

25. In the present case though four injuries have been referred in the medical examination held after the incident but in the posmortem conducted on the body of the deceased only one injury was found on the back of head of the deceased i.e. on the vital part. The deceased had died on account of the said anti mortem injury. Therefore even if it is a case of single blow of Lathi and the appellant knowingly made a single blow that it was likely to cause death it would be a culpable homicide not amounting to murder which will fall under Section 304 Part-II I.P.C. because the intention to cause death could not be proved.

26. The Hon'ble Supreme Court in the case of **Gurmukh Singh Vs. State of Haryana; (2009) 15 SC 635** held that the appellant therein on the spur of the moment inflicted a single lathi blow and the other accused have not indulged in any overt act. There was no intention or pre-meditation in the mind of the appellant to inflict such injuries to the deceased as were likely to cause death in the ordinary course of nature. Similar is the position in the present case and if the appellant had intention to kill he must have made repeated blows on the vital part. The age of the appellant at the time of incident was about 22 years of age as recorded in the arrest memo.

27. The Hon'ble Supreme Court in the case of **Gurmail Singh and Others Vs. State of Punjab; (1982) 3 SCC 185** in which the accused no.1 was aged about 19 years shown in the judgment held that having regard to all the circumstances and the facts found by the High Court, it may be said that accused no.1 is shown to have committed an offence under Section 304 Part-II I.P.C.

28. In view of above and considering the over all facts and circumstances of the case it is apparent that the appellant who was aged about 22 years of age at the time of alleged incident made one or two blow of Lathi on the deceased aged about 60 years. Though it was on a vital part but it was without intention to kill because it could not be proved. Though it may be with the knowlodge that it is likely to cause death. Therefore this Court is of the view that the offence would fall under Section 304 Part-II I.P.C. The learned trial court also has awarded the punishment of life imprisonment only under Section 302 I.P.C. whereas the punishment for murder provided under Section 302 is with death or imprisonment for life and shall also be liable to fine therefore only life imprisonment could not have been awarded under Section 302 IPC. In the present case the F.I.R. was lodged under Section 304 and the charge sheet was also filed under

Section 304 but since charge was framed under Section 302 therefore the same has been held to be proved and the punishment has been awarded under Section 302 which is not in accordance with the provision. Therefore, it appears that the court was intending to award punishment under Section 304 but awarded the punishment under Section 302 I.P.C. Accordingly, this Court is of the view that the judgment and order passed by the learned trial court is liable to be modified and punishment awarded to the appellant under Section 302 IPC is liable to be converted under Section 304 Part-II.

29. The appeal is, accordingly, **partly allowed.** The judgment and order dated 12.01.2006 awarding life imprisonment under Section 302 IPC is modified and the appellant is sentenced with the imprisonment of 10 years and a fine of Rs.20,000/- is imposed under Section 304 Part-II because the deceased was aged about 60 years when he was done to death by the appellant. In case the fine is not deposited the appellant will have to serve six moths more in jail. On completion of the aforesaid punishment and in case the appellant is not wanted in any case he shall be released forthwith.

30. Before parting we record appreciation for the assistance rendered by Shri Manu Sharma, Amicus Curiae and quantify the fees as Rs.20,000/- which shall be paid to him forthwith.

31. The copy of this order shall be communicated to the Jail Superintendent of concerned Jail forthwith for communication to the appellant and necessary compliance.

(2022)05ILR A601
APPELLATE JURISDICTION

CRIMINAL SIDE
DATED: ALLAHABAD 18.04.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No.1211 of 1991

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

Counsel for the Appellant:
Sri Rajesh Singh, Sri Arvind Agarwal, Ms. Manju Yadav, Sri Manoj Kumar Yadav

Counsel for the Respondent:
D.G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 374(2) - Indian Penal Code, 1860 - Section 302-challenge to-conviction-motive-dispute over land property-appellant was not happy with the share he got and therefore, he bore enmity with the deceased-accused was assaulting the deceased with an axe- axe not recovered-ocular account rendered by PW-1 and PW-3 reliable and not inconsistent with medical evidence-FIR lodged promptly considering the distance and the mode of transport available-father and step-sister have deposed against him and have proved the charge, with whom no ill-will could be demonstrated-doctor opined that possibility of wound being a consequence of infliction of blow from an axe-Prosecution succeeded in proving its case against the appellant beyond reasonable doubt.(Para 1 to 26)

B. Where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However,

where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.(Para 21 to 24)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Thaman Kumar Vs St. of UT of Chandigarh(2003) 6 SCC 380.

2. Anil Rai Vs St. of Bih. (2001) 7 SCC 318

3. Punjab Singh Vs St. of Har. (1984) Supp SCC 233

4. Abdul Sayeed Vs St. of M. P. (2010) 10 SCC 259

5. CBI & anr. Vs Mohd. Pervez Abdul Kayyum & ors. (2019) 12 SCC 1

6. Sukhdeep Singh Vs St. of U.P. (2010) 2 SCC 177

(Delivered by Hon'ble Manoj Misra, J.
&
Hon'ble Shamim Ahmed, J.)

1. We have heard Sri Manoj Kumar Yadav, holding brief of Ms. Manju Yadav, learned counsel for the appellant and Sri Pankaj Saxena, learned A.G.A., for the State.

2. This appeal is against the judgment and order dated 19.6.1991 passed by VIth Additional Sessions Judge, Bijnor in Sessions Trial No. 445 of 1990 convicting the appellant under Section 302 I.P.C. and sentencing him to imprisonment for life.

3. The prosecution case, as per the first information report (Ex. Ka-1) which has been lodged on oral information provided by the father of the deceased, namely, Harbansh Singh (PW-1), is that deceased Arjun Singh was his younger son. The informant had partitioned his property as per which, his elder son i.e. the accused- appellant Balvinder Singh got equal share as provided to the deceased Arjun Singh, but he was not happy with the share he got and therefore, he bore enmity with the deceased Arjun Singh. It is alleged that on the date of incident i.e. 1.6.1990, at about 8.00 am, the informant (PW-1) went with his daughter Jasveer Kaur (PW-3) to the field where he noticed his help Harphool (not examined) in a petrified state. Immediately thereafter, the informant noticed that the accused-appellant was assaulting the deceased with an axe. It is alleged that as the informant and his daughter raised an alarm, after inflicting several blows on the neck and other parts of the body of the deceased, the accused appellant ran away whereas the deceased fell and died on the spot.

4. The first information report was lodged at 12.15 hours on 1.6.1990 at P.S. Rehad, District Bijnor, which was about 20 km away from the spot, giving rise to Case No.39 of 1990. Upon registration of the first information report, inquest was conducted at the spot by about 15.30 hours. Autopsy of the body was conducted by PW-2 Dr. H.P. Agrawal on 2.6.1990 at about 11.00 a.m. and autopsy report (Ext.Ka.2) describes ante mortem injuries as follows:-

(i) Incised wound 25 cm x 15 cm x cavity deep on back of head and neck extending from one ear to another ear. Brain matter is coming out. All the structures underneath injuries are exposed. Second, third cervical vertebrae and occipital bone are cut;

(ii) Incised wound 2½ cm x 1 cm x 6 cm on right side face 3 cm below the right ear. On exposure, right side mandible cut;

(iii) Abrasion 1 cm x ½ cm on back left hand at the base of left middle finger;

(iv) Incised wound 4 cm x 1 cm x muscle deep on front of right thigh 5 cm above the right knee;

(v) Incised wound 6 cm x 2 cm x muscle on antero lateral aspect of left thigh 10 cm above left knee;

(vi) Abrasion 3 cm x 2 cm on front of left thigh in middle;

(vii) Incised wound 1 cm x ½ cm x muscle deep on lateral aspect of left little toe.

Internal examination disclosed stomach empty, small intestine containing small amount of pasty material and large intestine having faecal matter and gases.

Opinion:- Cause of death is as a result of "shock and haemorrhage" due to head injury.

Time of death:- About one day before.

5. After conducting the investigation, charge sheet (Ext.Ka.10) was submitted by PW-5 K.P. Dixit. On which, after taking cognisance, the case was committed to the court of Session where, on 5.2.1991, charge of an offence punishable under Section 302 I.P.C. was framed against the accused-appellant. During the course of trial, the prosecution examined five witnesses. Their testimony, in brief, is as follows:-

6. PW-1 Harbansh Singh is the father of the deceased as well as of the accused-appellant. He stated that his first wife died 2-2½ months after the birth of the accused-appellant, whereafter he married another lady and out of second wedlock he has two sons, namely, Arjun Singh (the deceased), Kartar Singh, and a daughter, namely, Jasveer Kaur (PW-3). He stated that he divided his property into four parts giving 4 acres each to his three sons and kept 4 acre of land for himself. He stated that on account of above partition, the accused-appellant was not happy as he wanted half share of the land. On account of this, he had bad relations with the deceased. He stated that efforts were made to have a settlement but the settlement was deferred to await the marriage of PW-1's daughter, namely, PW-3, with a promise that the remaining land would be divided thereafter. PW-1 stated that despite the above assurance, the accused-appellant was not happy. He stated that his third son, namely, Kartar Singh is serving outside the district. In respect of the incident, PW-1 stated that on 1.6.1990 at about 8.00 a.m. when the deceased was ploughing the field, he and his daughter (PW-3) went to the field to serve food to the deceased, when they reached there, he noticed Harphool in a petrified state. There he noticed that Balwinder Singh (the accused-appellant), who had an axe (Kulhari), was inflicting blows on the deceased. When they challenged the accused, after inflicting the blows, he ran away. He stated that he witnessed the entire incident. He stated that thereafter he went and lodged the first information report. He proved the Chik FIR placed before him which was marked as Ext.Ka.1.

7. In his cross-examination, he stated that when his first wife died, accused Balwinder Singh was 2-2½ years old. At present Balwinder Singh would be aged about 40 years. He stated that Balwinder

Singh was married 4-5 years before and he has two daughters. He stated that two years ago, Balwinder Singh separated and started residing separately with his family. One year prior to the incident, he had partitioned the property and that partition had taken place in a Panchayat. He stated that the partition was an oral partition and there was no written record of it. He stated that the place of occurrence is about ½ to ¾ miles south to his residence. That field is of 20 Bigha area. The said field is exclusively in the name of Arjun Singh (the deceased). West to the plot there is 'Rasta' and next to the 'Rasta' there is a 'Talab'. He stated that at the time of incident there was no crop standing. When he was about 100 paces away from the spot, he had noticed Balwinder Singh assaulting the deceased but he did not run away seeing the informant. He stated that Balwinder Singh must have taken 4-5 minutes to kill the deceased. He admitted that his statement was recorded before the Magistrate. When confronted with his statement made before the Magistrate, PW-1 stated that what he had stated before the Magistrate was that when they reached near the field, Balwinder Singh had spotted him and had escaped towards south but had not stated that he had escaped while they were away from the field. He stated that he does not know as to how it was written that before he could reach the field, Balwinder Singh had escaped. After stating as above, PW-1 gave graphic description of the blows by stating that the first blow was inflicted on the neck, thereafter on the face and thereafter again on the neck and when the deceased fell, blows were inflicted on his leg. He described the axe as one which is used to cut the wood. He stated that the axe had 5 inch wide blade and that blade was fixed on a wood piece about a yard long. He stated that the first infliction was from the front on neck and face thereafter the infliction was on the leg. On being confronted with his statement in the first information report that he had not mentioned in the report that he had gone to the field to serve food, he stated that might have been left out in the report. On being further cross-examined, he stated that his second wife is alive. He denied the suggestion that the deceased was killed in the darkness of the night by some unknown person and because of his second wife, he has implicated the accused-appellant.

8. PW-2 Dr. H.P. Agrawal, who is the autopsy surgeon, proved the autopsy report and proved the injuries as have been noticed above. The autopsy report was marked as Ext.Ka.2 on his deposition. The doctor in his testimony accepted the possibility of death to have occurred at about 8.00 a.m. on 1.6.1990. He was recalled at the request of the prosecution. On recall, he stated that the incised wound found on the body of the deceased could be a result of infliction of blows with Kulhari and that the abrasions noticed could be on account of friction from hard object. He again reiterated that death as a consequence of those injuries was possible to have occurred on or about 8.00 a.m. of 1.6.1990. In his cross-examination by the defence, he stated that there could be a margin of 6 hours in the estimated time of death and, therefore, it is possible that the death might have occurred between 4 and 5 a.m. in the morning of that day. He specifically stated that stomach was empty and not even liquid was present. Large intestine contained faecal matter. In respect of injury no.1, which was 25 cm x 15 cm in dimension, he stated that such an injury could be inflicted if the blade of axe/Kulhari is 10 inch wide. In respect of abrasions found on the body of the deceased, he admitted the possibility

of such abrasions being a result of friction from some hard blunt object.

9. PW-3 Jasveer Kaur is the sister of the deceased and step-sister of the accused-appellant. She reiterated what was stated by PW-1 in respect of the incident and about infliction of Kulhari blows by the accused-appellant on the deceased. She also stated that whereabouts of Harphool are not known as he has run away due to fear of the in-laws of the accused-appellant. In her cross-examination, she stated that the deceased had left the house to go to the field at about 6 or quarter to 6 a.m. and at that time she had served tea to the deceased and other than tea he had taken nothing. She stated that she is not aware whether the deceased had attended to nature's call before going to the field. She stated that she had not served any snacks with tea to the deceased. She stated that on that day she had prepared vegetable and Roti to serve the deceased and she carried the same in a box with her father (PW-1) to the field. In respect of the partition between the brothers, she stated that partition had taken place about 1-1½ years before the incident and that the place of occurrence was the field of the deceased (Arjun Singh). She stated that she was not aware till the marriage of Balwinder Singh (the accused-appellant) that Balwinder was her step-brother. She came to know about it only 6-7 months after the marriage of the accused-appellant. She stated that she came to know about the relationship only when some dispute started in respect of partition of the land, whereafter she came to understand that she happens to be accused-appellant's step-sister. She stated that after partition of the land, Balwinder Singh (the accused-appellant) started living separately and in her (PW-3's) house, her father, mother and deceased Arjun Singh used to reside. She stated that prior to the incident, there was no fight between the brothers and that there was never a report in respect of any incident between them but whether Balwinder Singh (the accused-appellant) was annoyed with the partition or not, she is not aware of, because he never said anything to her. She stated that on the day of incident, Arjun Singh had taken the plough (Hal) to the field and had also taken a stick for herding the bullocks. Harphool had also gone with Arjun Singh. She stated that the field was being ploughed for the last 1-2 days. She specifically stated that when she reached the field, Arjun Singh was not lying on the field but she saw both Arjun Singh and Balwinder Singh standing over there and Balwinder Singh was assaulting Arjun Singh with axe/Kulhari. At that time, Arjun Sigh had nothing to defend. On being specifically questioned as to whether Arjun Singh had died before she and her father arrived at the spot, PW-3 stated that when she reached near Arjun Singh, by that time Arjun Singh had fallen and when she tried to shake him, she found him dead. On being confronted with her previous statement before the Magistrate wherein she had stated that Arjun Singh was dead before she reached the spot, she stated that the aforesaid statement is correct because when she reached near the body of Arjun Singh and tried to shake his head, she found that he was dead. She stated that her father was ahead of her. She clarified that when she first saw Arjun Singh, he was standing and by the time she could reach the spot, he was lying. She also stated that when Balwinder Singh had inflicted Kulhari blows at Arjun Singh, he was standing in front of Arjun Singh. On being specifically questioned from where she saw the infliction of Kulhari blows on the leg region of the deceased, she stated that she saw the entire incident while she was

running towards the spot seeing that Balwinder Singh was inflicting axe blows on Arjun Singh. She stated that while running she did not specifically notice where Kulhari blows were inflicted, but she did scream that his brother should not be assaulted. She stated that she did not specifically notice whether her step-brother Balwinder Singh had inflicted blows on the leg of Arjun Singh but she did notice that her brother Balwinder Singh was inflicting injuries to Arjun Singh with the axe/Kulhari. She specifically stated that the injuries were inflicted from the sharp side of the axe. At this stage the witness started weeping. She denied the suggestion that in the darkness of the night some unknown person killed the deceased, of which information was received in the morning and upon which they went to the spot. She also denied the suggestion that she is telling lies because she is the step-sister of the deceased.

10. PW-4 Chhatra Singh is the constable who carried the body of the deceased after inquest for autopsy. He proved that the body was carried to the mortuary in a sealed condition. He stated that body had to be carried to Bijnor which is 100 Km away from the spot, therefore they reached next morning.

11. PW-5 K.P. Dixit is the Investigating Officer of the case. He stated that after registration of the case, he took over its investigation. The inquest was conducted by him. He proved that he had taken blood-stained and plain earth from the spot, of which seizure memo was exhibited as Ext.Ka.3. He stated that site plan was prepared by him after inspection and on the instructions of the informant. The site plan was exhibited as Ext.Ka.4. He stated that thereafter he recorded the statement of the witnesses. He proved the inquest report, photo lash, challan lash, letter to C.M.O. and letter to R.I. On his statement, those documents were exhibited as Ext.Ka.5 to Ext.Ka.9. He stated that on 10.6.1990 he arrested the accused. On 7.7.1990 he got the statement of the informant and Jasveer Kaur recorded under Section 164 Cr.P.C. He stated that after completing the investigation, on 10.7.1990 he submitted charge-sheet which was marked as Ext.Ka.10. He also proved the Chik F.I.R. and the G.D. Entry of the FIR by recognising the signature of the clerk, namely, constable Jaipal Singh. The Chik F.I.R. was exhibited as Ext.Ka.1 and G.D. Entry thereof was exhibited as Ext.Ka.11. In his cross-examination, he stated that he arrived at the spot by about 12.00 noon. The place of occurrence is about 20 Km from the police station and the 'Rasta' is kaccha. He used a cycle to cover the distance and the informant Harbansh Singh and witness Harphool were also on their respective cycles with him. He stated that the informant had given the information at the police station and he had arrived at the spot with them on cycle. He stated that none of the witnesses had any injuries on their body. He stated that adjoining the field where the occurrence took place, there was field of Mahendra Singh and west to that field there was a 'Rasta' and thereafter there were fields of Ramesh, etc. He stated that at the spot he did not notice any lathi, danda, panni or any weapon but he did notice a plough (Hal) though there were no bullocks. He also stated that at the spot he did not notice any utensil. He stated that there was a large gathering at the spot and had there been any utensil, the same might have been removed. He clarified his earlier statement by stating that he arrived at the spot at 3-3.15 p.m.

12. The incriminating material appearing in the prosecution evidence were

put to the accused-appellant while recording his statement under Section 313 Cr.P.C. The accused-appellant stated that he has been falsely implicated on account of enmity. He also stated that on account of partition there was no animosity and that he was happy with the partition. The accused-appellant, however, did not examine any witness in defence.

13. The trial Court upon finding that it was a day time incident and there were two eye witnesses to support the prosecution case and their account found corroboration in the medical evidence, convicted the appellant, as above.

14. Questioning the judgment and order of the trial Court, learned counsel for the appellant submitted that there is no strong motive proved by the prosecution for the crime inasmuch as the partition had already taken place about 1-1½ years before the incident and no untoward incident between the two step-brothers or between the accused-appellant or his father was ever reported. The incident occurred in the field surrounding which there was no Abadi. The main eye witness of the incident was Harphool, who has not been examined. The first information report would indicate that the witnesses (PW-1 and PW-3) arrived at the spot after the deceased was killed and therefore, it is an incident which occurred before PW-1 and PW-3 could reach the spot and as the prosecution has suppressed the main witness, namely, Harphool, who was the help of the deceased, an adverse inference is to be drawn against the prosecution. It has also been pointed out that the deceased was found empty stomach whereas the statement of PW-3 would indicate that she had served tea to the deceased about 2 hours before. The doctor (PW-2) specifically stated that neither there was any food material nor any liquid in the stomach of the deceased which would suggest that the prosecution story is contrived and because the accused-appellant is the step-brother of PW-3 and his father was under influence of his second wife i.e. step-mother, who was alive, the accused-appellant has been falsely implicated. It has been submitted that the axe has not been recovered and that according to the ocular account, the blade of the axe had a width of 5 inch which would under no circumstances inflict the kind of injury as was noticed in the shape of injury no.1 recited in the autopsy report.

15. Learned counsel for the appellant also invited our attention to the recital in the autopsy report that the large intestine was loaded with faecal matter to demonstrate that the deceased had not attended to nature's call. It was argued that it is a common practice of villagers to defecate early morning. Presence of faecal matter would suggest that incident occurred in the night, which is a possibility accepted by the doctor as, according to him, death could have also occurred in the wee hours, that is to say, at 4.30 a.m.

16. In a nutshell, the submission of the learned counsel for the appellant is that the witnesses examined were inimical to the appellant; the ocular account suggests that PW-1 and PW-3 either witnessed the incident from a distance or they arrived at the spot when the deceased was already dead; and that the best evidence, which could have been through Harphool, has been withheld, as a consequence whereof, the appellant is entitled to the benefit of doubt. It is submitted that the trial Court has not tested the evidence on the touch stone of probabilities and has accepted the

prosecution story as gospel truth, therefore its judgment be set aside.

17. **Per contra**, learned A.G.A. submitted that it is a case where there is no suggestion to PW-2 or to any of the witnesses in respect of ante timing of the first information report. The informant (PW-1) is the natural father of the deceased as well as of the accused-appellant. He has fully supported the prosecution case. The step-sister of the accused-appellant, namely, Jasveer Kaur (PW-3), has equally supported the prosecution case and she has also specifically disclosed that the accused and she were brought up as brother and sister and they could never feel that they were step brother and sister. It was only after the marriage of the accused-appellant, she could sense that the accused-appellant was born of a different mother. All of this would suggest that witness PW-3 had no animosity with the accused-appellant. She deposed what she actually witnessed therefore, there is no good reason to disbelieve her. Non-examination of Harphool would not be fatal to the case as he was a servant and his whereabouts were not known as after the incident he had escaped due to fear of the in-laws of the accused-appellant. In respect of presence of faecal matter in the large intestine of the deceased, learned AGA submitted that it is not a determining factor to ascertain whether the incident occurred in the wee hours of the morning as much would depend on the habit of a person as also whether there has been complete evacuation during defecation or not. In respect of the conflict of medical evidence with ocular account in respect of the dimension of neck injury qua the dimension of the axe blade, it was submitted that if two blows are inflicted on or about the same neck line, it is possible that it may give appearance of a single incised wound of a larger dimension. It was submitted that otherwise there is no such conflict which may render the ocular account completely unacceptable. It has also been pointed out by learned AGA that the defence has not alleged that the deceased had other enemies also. There is no suggestion to the prosecution witnesses that the incident occurred in some other manner at some other place. Learned A.G.A. concluded by submitting that this is a case of day time occurrence, where the first information report was prompt, considering the distance and the mode of transport available; there are eye witnesses of the incident; and their testimony is in sync with the medical evidence therefore, the trial Court was justified in recording the conviction. He thus prayed that the appeal be dismissed.

18. Having considered the rival submissions we find that there is no dispute in respect of the spot, which is the field of the deceased i.e. the son of PW-1. The prosecution witnesses of the incident are father (PW-1) and sister (PW-3) of the deceased. They have disclosed good reason for their presence at the spot at the time of incident. According to PW-3, the deceased had gone to the field to plough the same early morning at about 6.00 a.m. While going to the field he had taken only tea served by PW-3 therefore, it is quite natural for PW-3, the sister of the deceased, to take food for the deceased who was working at the field. Since PW-3 is a girl, it is quite natural that her father, who was residing with her, would accompany her to the field, which was at a distance of over half a mile from the village Abadi. In these circumstances, the presence of PW-1 and PW-3 at the spot is not improbable or unnatural. Insofar as the submission that

the eye witnesses reached the spot after the incident had occurred is concerned, nothing has come out, during cross-examination, which may discredit their statement with regard to they having arrived at the spot at the time of incident. In fact, PW-1 has given a graphic description of the manner in which the blows were inflicted. According to PW-3, PW-1 was ahead and PW-3 was following PW-1 and therefore, PW-1 witnessed more than what PW-3 could. Moreover, PW-3 being a girl might be in a state of shock at the time when she witnessed the incident and therefore, she did not specifically notice as to how many, and where, injuries were inflicted on her brother. Her testimony in these circumstances cannot be discredited merely because she could not specifically describe the number and site of injuries inflicted. Perhaps it could be that from some distance she noticed her two brothers standing face to face and one inflicting blows on the other while she was running and screaming to stop infliction of blows and by the time she arrived at the spot, her brother (the deceased) had fallen. There appears truth in her statement and nothing could be elicited from her cross examination to doubt her deposition.

19. In respect of the stomach of the deceased being empty despite consumption of tea, as alleged by PW-3, we do not find it to be a circumstance which may discredit the testimony of PW-3 because it is quite possible that if the tea had more water than milk, it might pass through the stomach and enter the small intestine quicker than usual. Moreover, the defence has not cross examined the autopsy surgeon in respect of possibility of tea remaining in the stomach after two hours of its consumption. Noticeably, pasty material was noticed in the small intestine at the time of autopsy. Accordingly, we do not find the circumstance that the stomach contents were nil sufficient to raise a doubt in respect of the eye witness account rendered by PW-3.

20. Insofar as the presence of incised wound of the dimension of 25 cm x 15 cm, recited by way of injury no.1 in the autopsy report, is concerned, no doubt, PW-1, disclosed the width of blade of axe as 5 inch only but, admittedly, the axe has not been recovered therefore, what was the actual width of the blade is just an estimate may be by guess-work or by imagination. Hence nothing much turns on that. Further, the trial court has recorded good reasons for the same by stating that it is quite possible that on account of multiple blows on or about the same area, an incised wound of a larger dimension may appear than the dimension of the blade. Noticeably, there is ocular account in respect of infliction of two blows on the neck of the deceased; one blow on the face and others on leg. This ocular evidence is largely corroborated by the medical evidence i.e. the autopsy report.

21. At this stage, we may notice few decisions of the Supreme 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 vs. 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 straightway 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.

22. In **Anil Rai vs. State of Bihar (2001) 7 SCC 318**, view taken earlier, in **Punjab Singh vs. State of Haryana, 1984 Supp SCC 233,** 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, was affirmed. Similarly, in **Abdul Sayeed vs. State of Madhya Pradesh, (2010) 10 SCC 259**, the legal position, in this regard, has been crystallised, in paragraph 39 of the judgment, as follows:

"39. Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis--vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved."

23. The above view has been affirmed in **Central Bureau of Investigation and Another vs. Mohd. Parvez Abdul Kayyum and others, (2019) 12 SCC 1.**

24. In the light of the law noticed above, what we have to examine is whether the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true. In our view, the medical evidence does not rule out infliction of blows with Kulhari (axe) as is the ocular account. In so far as dimension of the injury found on the neck (i.e. injury no.1 recited in the autopsy report) is concerned, that is not a determinative factor to discredit the ocular account completely for the following reasons: (a) that the dimension of the blade of an axe mentioned in the ocular account i.e. 5 inch may be a result of guess-work because that axe has not been recovered; (b) that the increase in dimension may be a result of the second blow on the same area (neck line) as is the ocular account; and (c) the doctor has admitted the possibility of that wound

being a consequence of infliction of blow from an axe.

25. As we find the ocular account rendered by PW-1 and PW-3 reliable and not inconsistent with medical evidence; and that the first information report was promptly lodged considering the distance and the mode of transport available, we do not find any error in the judgment and order of conviction recorded by the trial court. More so, when it is a case where a natural father and step sister of the accused, with whom no ill-will could be demonstrated, have deposed against the accused-appellant. Keeping in mind that accused-appellant's natural father and step-sister (who was brought up as real sister of the accused-appellant) have deposed against him and have proved the charge, we do not wish to draw an adverse inference for non-production of Harphool who is stated to have left the employment due to threat extended by the in-laws of the accused-appellant as stated by PW-3. We are therefore of the considered view that the prosecution has succeeded in proving its case against the appellant beyond reasonable doubt.

26. For the reasons above, the judgment and order of the trial Court is affirmed. The appeal is **dismissed.**

27. The appellant is reported to be on bail. His bail bonds are cancelled and sureties are discharged. He shall surrender before the court concerned forthwith from where he shall be sent to jail to serve the sentence awarded by the trial court.

28. Let a copy of this order be sent to the trial court along with the record for information and compliance.

(2022)05ILR A611
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.05.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAMEER JAIN, J.

Criminal Appeal No. 1217 of 1993
Connected with
Criminal Appeal No. 1300 of 1993

Akhilesh @ Pappu ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri R.S. Sengar, Sri Adarsh Bhushan, Sri Jeetandra Kumar Sharma, Sri Sushant, Sri V.P. Srivastava (Senior Adv.)

Counsel for the Respondent:
A.G.A.

A. Criminal Law -Code of Criminal Procedure,1973-Sections 374(2) - Indian Penal Code, 1860-Sections 302/34-challenge to-conviction- motive to commit murder-deceased built toilet in front of the house of the accused party, to which they were objecting and had threatened the deceased-PW-1 and PW-2 have throughout disclosed active participation of the accused-ocular version explains the travel of the bullet in a downward direction-the participation of appellant in the occurrence and sharing of common intention with co-accused to kill the deceased proved beyond reasonable doubt.(Para 1 to 39)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Thaman Kumar Vs St. of UT of Chandigarh (2003) 6 SCC 380.

2. Anil Rai Vs St. of Bih. (2001) 7 SCC 318

3. Punjab Singh Vs St. of Har. (1984) Supp SCC 233

4. Abdul Sayeed Vs St. of M. P. (2010) 10 SCC 259

5. CBI & anr. Vs Mohd. Pervez Abdul Kayyum & ors. (2019) 12 SCC 1

6. Sukhdeep Singh Vs St. of U.P. (2010) 2 SCC 177

(Delivered by Hon'ble Manoj Misra, J.)

1. These two appeals question the judgment and order dated 07.07.1993 passed by the Additional Sessions Judge/Special Judge (E.C. Act), Etawah in Sessions Trial No. 11 of 1992 convicting Arvind Kumar (appellant in Criminal Appeal No. 1300 of 1993), under Section 302 I.P.C., and Akhilesh @ Pappu (appellant in Criminal Appeal No. 1217 of 1993), under Section 302 read with Section 34 I.P.C., and sentencing them to imprisonment for life. As the two appeals arise from a common judgment and order, they are being decided by a common judgment and order.

I**NTRODUCTORY FACTS**

2. On a written report (Exb. Ka-1), scribed by Dev Narayan Mishra (not examined), signed by Smt. Sobha Awasthi (PW-1), first information report (FIR) was registered at P.S. Auraiya, District Etawah on 21.08.1991 at 7.45 am, vide GD No. 15 (Exb. Ka-5) of which Chik FIR (Exb. Ka-4) was made/ prepared by Srinarayan Awasthi (PW-6). It is alleged in the FIR that the accused-Arvind Kumar (appellant in Crl. Appeal No. 1300 of 1993) and Akhilesh @ Pappu (appellant in Crl. Appeal No. 1217 of 1993) are both sons of Kunwar Pal and they live across Kharanja (vertical brick-laid road), right in front of the informant's house. It is alleged that informant's husband Satish Chand (the deceased) had built a latrine on the south eastern corner of her house which falls in front of Kunwar Pal's house. As the toilet was in front of Kunwar Pal's house, Kunwar Pal and his sons were not happy with it and were building pressure on the deceased to remove the toilet, but the informant's husband was not agreeable. Two days before the incident, the accused-appellants had threatened the informant in connection with that issue. It is alleged that in the night of 20/21.08.1991 while informant was sleeping in a room, on the southern side of her house and her husband (the deceased), her son (Saurabh) and daughters Km. Seema (PW-2) and Km. Tapasya were sleeping in the courtyard, where a lighted lantern was hanging as usual, at about 2 am, informant's sleep got disturbed because of noise. When she woke up, she saw that her husband (the deceased) was engaged in a scuffle with Arvind whereas Arvind's brother (Akhilesh) was pressing the mouth of her daughter (Km Seema-PW-2) to restrain her from screaming. It is alleged that as soon as the informant raised an alarm, Akhilesh exhorted Arvind to finish off the deceased. Upon which, a shot was fired by Arvind at the deceased, who fell and died. After firing the shot, Arvind and Akhilesh escaped by scaling the wall of the south-east corner of a bathroom of her house. The informant alleged that there was a third person also, who was sitting on the wall and keeping a watch on the incident and as soon as the incident was over, he ran away. In the report it is alleged that the entire incident was witnessed in the light of the lantern. It was also alleged that Shyam Sundar Mishra (not examined) had also noticed these three accused jumping off the wall and escaping in the light of a torch.

Informant alleged that the third person is not known to her but she can recognise him if he is produced in front of her. The FIR also alleges that an empty cartridge was found lying at the spot. Upon registration of the FIR, inquest was conducted by S.I. R.N. Sharma (not examined) under the direction of PW-5. The inquest report (Exb. Ka-6) describes the body as having been laid on a Chadar (bed-sheet) spread on the ground.

3. The autopsy was conducted by Dr. R.N. Sharma (PW- 4) at about 3.30 pm on 22.08.1991. The autopsy report (Exb. Ka-3) recites:-

EXTERNAL EXAMINATION:

Average body built, rigor mortis passed from both the extremities. Decomposition started. Skin peeling off at places. Abdomen, penis, scrotum distended.

ANTE-MORTEM INJURIES:

(i) Firearm wound of entry 1 cm x 1 cm x chest cavity deep on the anterio medial aspect of left shoulder 7 cm below to head of humerus. Margins inverted;

Blackening, tattooing and scorching around the wound;

(ii) Blackening, tattooing in an area 15 cm x 12 cm extending from left side face, sic, left side of neck and some portion of chest.

INTERNAL EXAMINATION:

(i) Left side 3rd rib fractured, left pleura lacerated, left lung lacerated, pericardium lacerated, heart lacerated, one metallic bullet found embedded in the heart; stomach empty, small intestine had digested food matter, large intestine had faecal matter with gases.

CAUSE OF DEATH:

Death due to shock and haemorrhage as a result of ante-mortem injuries.

ESTIMATED TIME OF DEATH:

About 1 and ½ day before.

4. During investigation, the I.O. collected an empty cartridge of .315 bore of which seizure memo (Exb. Ka-10) was prepared. The I.O. collected torches of witnesses, namely, Gyan Prakash and Ramjas (who was not examined), and prepared custody memo (Exb. Ka-12). The I.O. also collected blood-stained earth and plain earth from the spot of which memorandum (Exb. Ka-9) was prepared. The I.O. had collected lantern from Shobha Awasthi (the informant) which was allegedly hung at the spot and in the light of which the incident was witnessed. The I.O. also collected torch from witness Shyam Sundar. A composite collection and custody memo of torch and lantern (Exb. Ka-2) was prepared. The I.O. also prepared site plan (Ex. Ka-13) and, after recording the statement of witnesses and completing the investigation, the I.O. Sri K.R. Mishra (PW-5) submitted charge-sheet (Exb Ka-16) against both the appellants. After taking cognizance on the charge sheet and committal of the case to the Court of Session, vide order dated 02.04.1992, the trial court framed charge against appellants for the offence punishable under Section

302 I.P.C. The appellants denied the charge and claimed trial.

5. During the course of trial, the prosecution examined six witnesses: PW-1 (Shobha Awasthi) and PW-2 (Km. Seema), namely, the wife and daughter, respectively, of the informant, the eye-witnesses of the incident; Pahalwan (PW-3) - the person who took the written report of the informant to be lodged at the police station concerned; Dr. R.N. Sharma (PW-4) - the autopsy surgeon who conducted the autopsy of the body of the deceased; Keshav Ram Mishra (PW-5) - the investigating officer (I.O.) who proved various stages of the investigation; and Sri Narayan Awasthi (PW-6) - the constable who made GD entry of the written report and prepared Chik FIR thereof.

6. After the examination of the prosecution witnesses, the incriminating circumstances appearing in the prosecution evidence were put to the accused while recording their statement under Section 313 Cr.P.C. Both the accused denied their involvement and claimed that they have been falsely implicated because of the enmity arising out of Pradhan Election. It was claimed that in the Pradhan election, the accused party had supported Bhogi Lal Pandit as against Aditya Mishra, who was elected Gram Pradhan. It was stated that Aditya Mishra runs a school in which the informant is a Principal. It was stated that the informant was elected unopposed on the post of Up Pradhan and for the above reason, the informant bore enmity with the accused and has, therefore, falsely implicated the accused. The accused, however, did not lead any evidence in defence.

7. The trial court after considering the ocular account rendered by PW-1 and PW-2 and upon finding that the incident occurred within the house where the presence of PW-1 and PW-2 was natural and that there was no serious conflict between the medical evidence and the ocular account rendered by the witnesses, taking into account that the first information report, in the facts of the case, was not delayed, recorded conviction and sentenced the appellants as above.

8. We have heard Sri V.P. Srivastava, learned senior counsel, assisted by Sri Sushant, for the appellants and Sri J.K. Upadhyay, learned A.G.A., along with Miss. Sanyukta Singh, brief holder, for the State and have perused the record.

SUBMISSIONS ON BEHALF OF THE APPELLANTS

9. Questioning the judgment and order of conviction passed by the court below, the learned counsel for the appellants submitted as follows:-

(i) The prosecution has not been able to prove a serious motive for the crime;

(ii) The ocular account does not inspire confidence for the following reasons:-

(a) If the accused had entered the house with an intent to finish off the deceased and were armed with country made pistol as is the ocular account, there is no logical reason why the accused would not use it at the first opportunity. The allegation that there was a scuffle with the deceased does not inspire confidence

therefore, the incident occurred in some other manner than alleged and the prosecution is hiding true facts;

(b) The ocular account would suggest that the appellant (Arvind) fired a shot at the deceased while the deceased was in a standing position with his hands held by appellant (Akhilesh). Holding of hands by appellant (Akhilesh) is neither disclosed in the FIR nor in the statement recorded under Section 161 Cr.P.C. Further, if the shot had been fired in that position, the bullet would not travel in a downward direction as is disclosed by the autopsy surgeon. According to autopsy surgeon (PW-4), the bullet travelled in a downward direction which suggests that the shot was fired while the deceased was lying on the cot or he was at a much lower level than the assailants;

(c) There appear two injury marks on the body of the deceased suggesting that two shots were fired at the deceased whereas the ocular account is in respect of solitary shot which renders the ocular account untrustworthy and unacceptable.

(d) The empty cartridge was recovered from bathroom at quite a distance from the place where the shot is alleged to have been fired. This suggests that no one witnessed the incident and the ocular account is untrustworthy.

(iii) There is an inordinate delay in lodging the FIR. The incident allegedly occurred in the night, at about 2 am, whereas, the report has been lodged at 7.45 am after 5 hours 45 minutes. This delay would suggest that either none was present at the time of the incident and the informant had to be called to the spot or it is a case where the prosecution story was developed after deliberation on the basis of suspicion and guess work;

(iv) That the independent witnesses, namely, Gyan Prakash, Ramjas and Shyam Sundar, amongst others, were not examined as a result whereof an adverse inference be drawn against the prosecution case.

(v) The scene of crime was altered before the I.O. could reach the spot as the body was found lying on a *Chadar* with a pillow underneath the head therefore, the ocular account cannot draw support from the material collected during the course of investigation.

SUBMISSIONS ON BEHALF OF THE STATE

10. **Per contra**, the learned AGA submitted that this is a case where the incident took place within the house of the deceased. PW-1 is the wife and PW-2 is the daughter of the deceased. Their presence at the spot, particularly during night hours, is natural. The source of light has been disclosed both in the first information report and in the statement made to the I.O. as also in the deposition before the Court. The source of light was shown during investigation and the I.O. also noticed the lantern of which custody memo was prepared and the same was produced as a material exhibit. Since there was death of the husband of the informant, who had two daughters and a young son, it is not expected that she would rush to lodge the first information report leaving her two daughters and a young son back therefore, the written report, after being scribed and signed by the informant, was dispatched through PW-3, who lodged the same at the

police station in the early hours of the morning. PW-3 confirmed that the written report was handed over to him at about 3 am for being lodged at the police station. Under these circumstances, it cannot be said that there is a delay in lodging the report.

11. In respect of the motive for the crime, the learned AGA submitted that the motive is a mental condition which none can speculate upon therefore, whether, in a given set of circumstances, the motive was sufficient for the crime or not is not to be guessed by the Court. Moreover, it is a case based on ocular account therefore, existence or non-existence of motive is not of material significance. Otherwise also, the prosecution has been successful in proving the motive, which is, that the accused party had been objecting to the construction of the latrine which was right in front of the house of the accused, across the Kharanja.

12. In respect of there being conflict between the ocular account and the medical evidence, the learned AGA submitted that there is no apparent conflict. The ocular account is in respect of a single shot fired at the deceased. Notably, there is a solitary gun shot entry wound and the other injuriy noticed is of discharge of gun powder. It has been submitted that merely because the direction of the shot was downwards it would not be sufficient to disbelieve the ocular account because as per the ocular account, the deceased was caught hold by hand by Akhilesh and was shot by Arvind. In that moment, it is possible that the deceased might have bent while Arvind in an erect position would get an opportunity to fire from close, on or about the shoulder region, with barrel pointing downwards so that the bullet could enter the chest cavity near the left shoulder joint, break the rib, proceed downwards, lacerate the lung and the heart and get embedded there as was found during autopsy. In that kind of a posture, if the shot is fired from a country made pistol, there would be discharge of gun powder resulting in blackening of the face, neck and shoulder region as is noticed while recording injury no. 2 therefore, it is not a case where two shots were fired rather it is a case of single shot, which gave rise to two noticeable injury marks, one where the bullet penetrated the body and the other which was on account of discharge of gun powder. It has thus been submitted that there is no conflict between medical evidence and the ocular account.

13. In respect of the submission as to why the accused would enter into a scuffle if they had a desire to finish off the deceased from the beginning, it has been argued by the learned AGA that it is quite possible that the accused might have had a desire to molest the young daughter of the informant (PW-2) and, in that process, the deceased, who was sleeping in the courtyard, might have got up, resulting in a scuffle. It was submitted how the incident started would not be relevant at this point. What is relevant is that both the appellants had entered the house at night. Both participated in the crime. Appellant-Arvind fired the shot whereas the appellant-Akhilesh caught hold the deceased and exhorted the other appellant to fire the shot. As the ocular account is trustworthy and is corroborated by medical evidence on these material particulars, there would be no justification to disbelieve the prosecution account. It was thus prayed by the learned AGA that the prosecution has been able to prove its case beyond reasonable doubt, hence, the appeal be dismissed.

PROSECUTION EVIDENCE

14. Before we proceed to weigh the rival submissions and analyse and evaluate the prosecution case/ evidence, it would be appropriate to notice the testimony of the prosecution witnesses in some detail. The prosecution examined as many as six witnesses, their testimony, in brief, is as follows:

15. **PW-1 - Shobha Awasthi - Informant - the wife of the deceased**. PW-1 deposed about the location of her house being across the Kharanja, in front of the house of the accused. She stated that at the east corner of her house, her husband got a latrine/toilet constructed which falls right in front of the house of the accused across the Kharanja to which the accused had objection and were pressing her husband to demolish the latrine. In connection with which, on 19.08.1991, in the evening, there was an altercation between the deceased and the accused-Arvind and Akhilesh, who left extending threats to the deceased. PW-1 stated that her husband was a teacher in Nehru Inter College, Auraiya. She stated that in the night of the incident (20/21.08.1991) while she was sleeping near the opening of a doorless *kothri* (a small room) of her house, on disturbance, at about 2 am, she woke up and saw her neighbour (Arvind) and her husband grappling with each other. She came out, and in the light of lantern lit there, she saw that accused Akhilesh @ Pappu was pressing the mouth of her daughter (Seema-PW-2). Underneath the *Chappar*, her other daughter (Tapasya) and son (Saurabh), who are aged 14 years and 9-10 years, respectively, were lying on cot. She stated that that day her husband (deceased) was lying in the courtyard *(Aangan)* on a cot. She also stated that with Arvind and Akhilesh, there was one unknown person who was squatting on the wall of the house. She stated that when she came out and raised an alarm, Akhilesh exhorted Arvind to finish off the deceased, upon which Arvind fired a shot from close distance at the deceased. The shot hit the deceased, he fell and died. Whereafter, the accused escaped by scaling the wall of the bathroom. Soon thereafter, neighbours Shyam Sundar and others arrived. They also told her that they had noticed Arvind and Akhilesh in the light of torch. PW-1 stated that she dictated the report to Dev Narayan Mishra. Thereafter she signed the report and gave it to Pahalwan (PW-3), her neighbour, to lodge the report at the police station. The report was marked Exhibit Ka-1. She identified the two accused Arvind and Akhilesh in court. She stated that the police had collected the lantern and gave its custody to her. She proved the custody memo and also produced the lantern.

In her cross-examination, in respect of construction of the house and the latrine/toilet, she stated that her house was constructed 13/14 years ago whereas the toilet was constructed 6-7 years later. She stated that prior to this toilet/latrine, there was no other toilet/latrine in her house. She stated that the latrine is covered and is about two hands away from the *Kharanja*, across which, there is house of the accused. She stated that *Kharanja* is about 15 feet wide with drain on both sides and the water of both sides is discharged into that drain. She was cross-examined, at length, to ascertain whether she is aware of her neighbourhood and surroundings, but nothing much could be elicited therefrom. Consequently, we do not propose to notice the same. Suggestions were put to her that her husband had opened a bank with the

Gram Pradhan (Aditya Narayan Mishra) by the name of Neelanchal and people thought that he had lot of money. She denied both the suggestions.

In respect of the source of light to witness the incident, she stated that that day was *Ekadashi* of *Shukl Paksh* meaning thereby that it was close to full moon. She stated that she is aware that on that day the moon rises near about evening time and sets by about 1.30 am in the night. She denied the suggestion that because it was month of August, kerosene lamp would have had attracted insects therefore, it was not there. She also denied the suggestion that that night it was raining and as there was a full moon, no lantern was lit.

In respect of reporting the incident regarding extension of threat for removal of the latrine, she stated that no report in that regard is to her knowledge but, if her husband has made a report, she is not aware of that. She stated that the accused raised objection regarding the toilet on 19.08.1991 but not before. In respect of the time when they raised objection and extended threat, she stated that when threat was extended it must be between 5-6 pm. She stated that threat was not extended by entering the house but at the door of her house. Threat was extended to her husband (the deceased) and altercation in that regard must have lasted about an hour. She stated that she did not venture out to listen to what all were being said but her husband had told her that the accused were threatening him. She stated that she is not aware whether any other person was present when threats were extended. She denied the suggestion that the story of extension of threat has been introduced on legal advise.

On further cross-examination, she stated that at the time of the incident when she woke up, moon was there and the time must have been around 1-1.30 am. She stated that after killing her husband, the accused escaped from her house at about 2 am. She stated that she saw the accused when they were inside the house and not when they escaped from the house.

In respect of the period during which the accused stayed in the house of the informant, PW-1 stated that between her waking up, on sensing disturbance, and the accused leaving the house at least half an hour must have elapsed.

In respect of the scuffle between her husband and the accused, she stated that during the scuffle, Arvind held a pistol in his hand but he did not assault her husband with that pistol. She stated that at the time of the scuffle, the deceased must have been 1 and ½ pace north of the cot where he had slept. She added that during the course of the scuffle, she was making attempts to come close to her husband but when she was just few paces away, Arvind fired at the deceased. She stated that, at that time, Akhilesh had caught hold the deceased. Prior to that, Akhilesh had been pressing the mouth of her daughter (Seema). She stated that Akhilesh caught hold the deceased when she came near to the deceased and it was only then, that Akhilesh exhorted Arvind to fire.

In respect of the posture which the deceased held at the time of fire, she stated that when Arvind fired shot at the deceased, deceased was in a standing position and Akhilesh had pulled both his hands from behind. She stated that when the shot was fired, her husband's face was

towards north and Arvind's face was towards south.

In respect of the distance from where the shot was fired, she stated that it was a close shot and the pistol was near about touching the body of the deceased. She stated that at that point of time, the distance between the deceased and Arvind must have been less than one hand. She stated that the shot struck the deceased on left side chest. She stated categorically that a single shot was fired and no sooner the shot struck the deceased, the deceased fell and the accused ran away. She also stated that after the shot was fired, the pistol was opened in the courtyard *(Aangan).* She stated that she had not noticed any weapon in the hand of Akhilesh or with the person who was sitting on the wall.

In respect of arrival of the villagers after the incident, she stated that first to arrive was Shyam Sundar; thereafter, there were others including Ramjas and Gyan Prakash. Shyam Sundar, Ramjas and Gyan Prakash had also noticed and recognised the accused while they were running away.

In respect of the time when the report was scribed, she stated that after the villagers, namely, Shyam Sundar, Ramjas and Gyan Prakash, arrived, at about 3 am, she dictated the report to Devendra Narayan Mishra, who is maternal uncle of the deceased, and it was handed over to Pahalwan to be lodged at the police station.

On further cross-examination, she stated that she is a teacher in a Junior High School since 1967 and since 1973 she is a Principal. She stated that Aditya Narayan Mishra, the current Gram Pradhan, is manager of that institution.

In respect of the empty cartridge recovered from her house, she stated that empty cartridge had not fallen in the Aangan (courtyard) but was noticed in the bathroom and it was recovered by the police from the bathroom and its position was not disturbed by anyone. She stated that she came to know about the cartridge lying there when villagers had come in the night and had noticed the same in the light of torch.

She stated that neither she nor any of her children received any injury. She stated that as soon as the accused left, after killing the deceased, she came near the body of the deceased, lifted it and put its head on her lap. She stated that, at that time, the body was bleeding and her clothes got blood-stained but she had not shown blood-stains to the I.O. If the I.O. had seen those blood-stains then she cannot say. Later, those clothes were washed. She stated that her daughters' clothes were not blood-stained.

At this stage, she was confronted with her report where she had not disclosed that the deceased was caught hold by Akhilesh @ Pappu. She stated that during investigation, she had disclosed it to the I.O. but if that had not been written, she cannot tell the reason for the same. She also stated that though, that night, her husband was lying on the cot but at the time when he was killed he was not on that cot and, therefore, on that cot, there was no blood. She stated that when the shot was fired at her husband, he fell on the ground of the courtyard and there was no cloth there. Immediately thereafter, she clarified that when villagers arrived, the body was covered with cloth and when the I.O. arrived, the body was in the same position and the head of the body was on her lap.

But the I.O. took off the head from her lap and placed it on the floor. She stated that she dictated the written report at 3 am while her husband's head was on her lap. She again reiterated that empty cartridge was not at the spot where the shot was fired but was noticed in the bathroom.

She denied the suggestion that in the darkness of the night she did not witness the incident and that the incident was caused by some unknown person. She also denied the suggestion that at the time of the incident, her husband was alone. She also denied the suggestion that no empty cartridge was recovered. She denied the suggestion that the report was not lodged by her and that the same was lodged later, after deliberation.

On further cross-examination, she stated that it must have taken 15 minutes to dictate the report. She stated that the report was carried by Pahalwan son of Shyam Sundar to lodge at the police station. She stated that she is not aware as to which conveyance was used by him to lodge the report but Pahalwan uses a cycle. She stated that he must have left at about 3 am. She denied that a police personnel had arrived at the spot before the arrival of the I.O. She stated that the I.O. first inspected the spot and thereafter he interrogated her and had also noticed the lantern etc. The I.O., thereafter, carried out inquest and the proceedings relating thereto. She stated that the body was carried in a trolley attached to the police jeep. With the body, her dewar (Mahesh Chand) and her brother (Kamla Kant) and Uma Kant were there along with several others. She stated that along with the I.O. there was another Inspector, who left by 12 noon. She denied the suggestion that she was not at Quotara (the village where the incident took place) but had to be called after the incident had taken place. She denied the suggestion that she arrived after day break on 21.08.1991 and, by the time she arrived, the body had been sealed.

16. **PW-2 - Km. Seema - daughter of the deceased, aged about 20 years**. After describing the location of various cots where her family members were laid that night, she stated that in the night of 20/21.08.1991, at about 2.00 am, while she was lying in her cot underneath the Chappar, Arvind and Akhilesh after scaling the wall jumped into the courtyard. She woke up and saw that a person was also squatting on the wall next to the bathroom. Arvind was moving towards her father (the deceased) and Akhilesh came towards her. When she shouted, Akhilesh pressed her mouth and, thereafter, Arvind and the deceased entered into a scuffle. Her mother rushed out and in that scuffle, Arvind fired a shot at the deceased after Akhilesh exhorted him. After receiving injury, her father died. The accused thereafter scaled the wall of the bathroom and escaped. After the incident, several persons arrived. Her mother opened the door on recognising the voice of Shyam Sundar, who was the first to arrive after the incident. Shyam Sundar told her that he had seen the accused Arvind and Akhilesh running along with a third person. She stated that her mother dictated the written report to Devendra Narayan Mishra after which it was handed over to Pahalwan to lodge the report. She also stated that the accused were objecting to the toilet and were pressing the deceased to demolish the same. The clothes that were worn by the deceased at the time of his death, were produced in the Court and she recognised the same. As a result whereof, those clothes were made material exhibits.

In her cross-examination, she stated that *Aangan*/courtyard of her house is open and it has no trees. In the night of

the incident, moon had come out in the evening. It was a bright moon and lantern was also lit in the courtyard as usual. She denied the suggestion that at the time of the incident, no lantern was lit. She also stated that the incident occurred at about 1.30 am and the moon had not set by then. She stated that when she woke up, she saw Arvind and her father in a scuffle, they were at a distance of 1 and 1-1/2 paces away from deceased's cot. They were fighting with both hands though Arvind had held a pistol in one hand. She stated that she did not notice whether Arvind was using both hands but did notice that Arvind had a pistol in his hand. She stated that at the time of the scuffle, her father was not making any utterances and was not shouting. She stated that she had shouted only when she woke up sensing disturbance and soon thereafter, her mother also woke up.

On further cross-examination, she stated that she woke up when the wall of the house was scaled by the accused and they had jumped into the courtyard. The moment she woke up, she shouted. At that moment, Akhilesh was just 2-3 paces away from her. When she woke up and sat on the cot, Akhilesh caught her and pressed her mouth. On that noise, her mother woke up and came out and as soon as her mother came out, Arvind fired at the deceased. She clarified that when her mother came out, Akhilesh left her and caught hold the deceased by his hand and was pulling it from back when the shot was fired. After firing the shot, the accused escaped. She stated that the shot struck the deceased on left side of chest. She stated that the spot where he had fallen, blood had splattered. She stated that the police arrived by about 9 am in the morning. She stated that the body was not displaced till the time police arrived. She also stated that a village doctor had arrived about half an hour after the incident to declare the deceased dead. Villagers had also arrived after the incident. She admitted that the narration of Akhilesh holding the hands of the deceased is for the first time in Court. She also stated that except for Shyam Sundar, no one else in the village had said that they had seen the accused escaping. She stated that the blood had also stained the saree and petticoat of her mother. She stated that she is not aware as to what conveyance was used by the person who took the written report to lodge at the police station. She stated that she is a B.A. IIIrd year student. She denied the suggestion that she was not in the house at the time of the incident and that she did not witness the incident. She denied the suggestion that till the time the body of the deceased was sealed, neither she, nor her mother, was present in the house. She also denied the suggestion that the entire story has been tutored.

17 . **PW-3 - Pahalwan** - the messenger who carried the written report to the police station for registration of the first information report.

He stated that the written report was written by Devender Mishra on the dictation of Smt. Shobha Awasthi (the informant). The written report was handed over to him at 3 am. He waited for the night to pass and at sun rise, he went to the police station and the report was lodged at 7.30 am. He stated that he started his journey back from police station at 8.15 am. The written report (Exb. Ka-1) was identified by him.

In his cross-examination, he stated that he was sleeping in his house when he heard the gun shot. He woke up

and went straight to the house of the deceased. There were several other persons there, at least, fifteen. He got the door of the house opened and saw Satish's body lying in a supine position in the courtyard with injuries and blood flowing out. He stated that he did not notice where the report was written but he was given the written report at 3 am by the informant with instruction to lodge the same at the police station. He stated that he did not recognise who all were present at the spot and in the crowd could not notice whether Devendra Narayan Mishra was present or not. He stated that his house is about 100-200 paces away from the house of the informant. He stated that after taking the report, he went to his house, fed fodder to his cattle and then left for the police station at about 3.30 am. He stated that he covered the distance on foot. On being questioned as to why he did not take a cycle, he stated that it was cloudy and the *Kharanja* was uneven and had rain water therefore, he preferred to walk. He stated that he walked on the footpath. He stated that he went straight to Auraiya and the distance covered by him must be around 11 km. He stated that he took *Kachha* rasta. He denied the suggestion that he did not go to lodge the report and because of his relationship with the informant, he is telling a lie. He stated that he is class 8 pass. In respect of the period he stayed at the police station, he stated that he stayed there for around 20 minutes. He stated that the Station House Officer did not come with him to the spot rather, he came walking. He stated that after returning from the police station, he again went to the spot at 11.30 am and stayed there for half an hour. Thereafter, he did not go again to the house of the deceased. He stated that when he went there again, he saw police there, and also noticed a police jeep parked in the Gali. But he did not notice any other vehicle for carrying the body. He did notice the body lying inside the house but he did not notice whether the body was sealed or not. He denied the suggestion that the body was taken away from the spot between 11.30 am and 12 noon. He also denied the suggestion that neither informant nor her children were present in the house on the date of the incident. He also denied the suggestion that the written report was prepared later.

18. **PW-4 - Dr. R.N. Mishra - the Autopsy Surgeon**. He proved the autopsy report and the injuries noticed therein and accepted possibility of death having occurred at 2 am in the night of 20/21.08.1991. The autopsy report was marked Exhibit Ka-3 on the basis of his statement.

In his cross-examination, he stated that injury no.1 was about 2 to 2 and ¼ inch below the shoulder and its direction was downwards which means that the direction of the barrel of the gun was from up to down, that is the bullet entered around the shoulder region and got embedded in the heart. He stated that because scorching was noticed, the distance of the barrel from the body must have been within 6 to 9 inches. He stated that this injury is not possible if the target and the shooter were face to face at the same level. He stated that if the man was lying and the shot was fired from the head side, such injury could appear. He also accepted the possibility that if the shot is fired from a higher level and the target is close to the barrel, such injury could appear.

In respect of the time of death estimated by him, he stated that in his estimate with regard to death having

occurred 1 and ½ day before, there may be a variation of 4 to 6 hours, either side.

In respect of injury no.2, PW-2 stated that no pellets had entered the body. Rather, it was a splash of gun powder blast.

19. **PW-5 - Keshav Ram - Investigating Officer**. He stated that on 21.08.1991, when he was posted at P.S. Auraiya written report (Exb. Ka-1) was brought by Pahalwan of which Chik report was prepared by Head Moharir Sri Narayan Mishra whose signature, he recognised. The Chik report was marked (Exb. Ka-4). He also proved the GD entry of the report made vide GD report no.15 at 7.45 hours. Carbon copy of the GD entry report was exhibited as Exhibit Ka-5. Upon lodging of the FIR, he recorded statement of Pahalwan; thereafter, he visited the spot and got the inquest proceedings conducted of which report was prepared by S.I. R.N. Mishra whose signatures he recognised and the inquest report was exhibited as Exb. Ka-6. He stated that challan-nash, photonash were prepared by Sri R.N. Mishra and those documents were exhibited as Exb. Ka-7 and 8. He stated that he collected plain earth and blood-stained earth from the spot and prepared its seizure memo, which was exhibited as Exb. Ka-9. Plain earth and blood-stained earth were produced as material exhibits 5 and 6. He stated that he recovered an empty cartridge also, of which a seizure memo exhibit Ka-10 was prepared by him. He produced empty cartridge, which was marked material exhibit. He stated that after he recorded the statement of the informant, Km. Seema, Km. Tapasya, Saurabh and Shyam Sundar Mishra, he also examined lantern of the informant and the torch of Shyam Sundar. They were found in a working condition of which custody memo was prepared as Exb. Ka-2. He, thereafter, recorded statement of Gyan Prakash and Ramjas and the other witnesses and examined their torches, which were found in working condition and of which, custody memo was made. The same was exhibited as Exb. Ka-12. He proved preparation of the site plan on the basis of his inspection. The site plan was exhibited as Exb. Ka-13. He stated that on the same day, after preparing the inquest papers, he wrote a letter to the R.I. as well as CMO for autopsy. Those letters were marked Exhibit Ka-14 and 15. He stated that on 23.08.1991, he recorded the statement of Aditya Kumar Mishra and witness-Mahadev and on 27.08.1991, he recorded statement of Devendra Narayan Mishra and, after completing investigation, on 07.11.1991 he submitted charge-sheet, which was marked Exb. Ka-16.

In his cross-examination, he stated that after registration of the first information report, he left for the spot between 9.15 and 9.30 am. He did not remember whether Pahalwan accompanied him in the jeep. He stated that he reached the spot by 10 am. He stated that the route/road was not in a good condition. He stated that when he reached the house of the deceased, the door of the house was open and villagers were present. The body was lying on the ground over a Chadar and was also covered by *Chadar*. He stated that below the head of the body there was a pillow. He stated that empty cartridge was found by him on the south eastern portion of the house in the bathroom. He stated that first he conducted the inquest proceeding and thereafter he collected empty cartridge. He stated that on the *Chadar* laid below the body, as well as on the *Chadar* laid over the body and the pillow, there were blood spots but as they were laid after the

incident, and as such not connected with the case, were not seized. He stated that he collected the blood from below the *Chadar* and found blood in an area of about 1 and ½ feet. He stated that during interrogation he came to know that murder had not taken place on the *Chadar* and therefore, the *Chadar* was not collected. He stated that he had not noticed whether members of the family had blood-stains on their clothes. He stated that the inquest proceedings were over by about noon and the body was given in the custody of the constables. He stated that the place of occurrence is Beehad (uneven land). He stated that he is not aware whether vehicle used for carrying the body was brought up to the doorstep of the informant. He also could not remember as to in which vehicle the body was brought to Etawah. He stated that he did not record the statement of the constable who carried the body. Upon noticing page 44 of the case diary, he stated that the body was dispatched after the vehicle had arrived.

On further cross-examination, he stated that after the body was dispatched, he collected the blood-stained earth and plain earth as well as the empty cartridge. He stated that he also searched the house of the accused and prepared a memo in that regard and recorded the statement of the informant at about 12.30 hours to 13.00 hours and also recorded the statement of other witnesses, as mentioned above.

He was also cross-examined in respect of the location of the house of other witnesses and whose statement he had recorded but nothing much could be elicited from him to suggest that he had not visited the spot. In respect of preparation of the site plan, he stated that he inspected the spot between 3-4 pm and the spot was inspected in the presence of the informant and other witnesses. He denied the suggestion that at the police station, information received was only in respect of death of Satish (the deceased) and, thereafter, the body was sealed and brought to the police station whereafter, papers relating to the FIR, inquest etc. were prepared. He denied the suggestion that custody memos of lantern and torches were prepared much later. He did not remember whether in the night of the incident it had rained or not. He stated that he did not notice any water logging on way to the spot.

In respect of the statement of the informant that Akhilesh held the hand of the deceased when the deceased was shot, he stated that that was not disclosed by the informant to him during investigation. He stated that only one statement of the informant was recorded by him during investigation. He stated that the distance between Quotara and the police station is 9 Km and the distance between Auraiya and Etawah is 65 Km.

20. **PW-6 - Sri Narayan Awasthi - Head Constable.** He proved the GD entry of the written report as well as the preparation of the Chik FIR at 7.45 am on 21.08.1991. The Chik FIR and the GD entry were marked exhibits.

In his **cross-examination**, he denied receipt of only oral information in respect of death of Satish (the deceased). He denied the suggestion that Chik report and the GD entry of the written report was made in the afternoon. He stated that at one place, by mistake, in respect of the distance, instead of 9 kms, it was written 6 Km, which was corrected. He also stated that the mistake was committed by constable Lakshman Singh.

ANALYSIS

21. Having noticed the submissions and the entire prosecution evidence, the following features stand out:-

(a) There is no dispute that the deceased was the husband of the informant - Smt. Shobha Awasthi (PW-1) and father of Seema (PW-2). Though, there is suggestion to the witnesses that at the time of occurrence, the deceased was alone in the house and upon information, her family arrived at the place of occurrence but there is no suggestion to demonstrate as to at what other place PW-1 and PW-2 could have been at the time of the incident than the place where they resided and the incident occurred. There is also no suggestion to PW-1 that she had sour relations with her husband (the deceased) and had separated or was for some reason residing at any other place.

` (b) The informant was principal of an institution and was elected Up Pradhan. Her husband (the deceased) was a teacher. Though, suggestion has been made that due to PW-1's support to the current Gram Pradhan and association of her husband with current Gram Pradhan, there was animosity in the village including with accused's family, as they had supported another candidate for the Pradhan election, but nothing has come out, either through cross-examination of the witnesses or by way of an explanation under Section 313 Cr.P.C., in respect of occurrence of any incident in the past reflecting such animosity.

(c) There is no serious challenge to the time of the occurrence. The time of occurrence, according to PW-1 and PW-2, would have been any time between 1.30 and 2 am.

(d) Although the defence has sought to raise an issue with regard to the body position being altered after the incident as it was found laid on a Chadar but nothing much turns on that as there is no serious challenge to the incident having occurred within the house of the deceased. Further, there is no suggestion to any of the witnesses that the body was dragged or brought from somewhere else.

(e) It is established beyond doubt, both from the site plan as well as the testimony of the witnesses, that the house of the accused is right in front of the house of the deceased across the Kharanja and there existed a toilet, built by the deceased, right in front of the house of the accused.

22. Having noticed the key features of the prosecution evidence what stands established beyond reasonable doubt is that the incident occurred in between 1.30 am and 2 am in the night of 20/21.08.1991 inside the house of the deceased with whom PW-1 (the wife of the deceased-informant) and PW-2 (the daughter of the deceased) resided. Thus, the presence of the eye-witnesses cannot be doubted particularly when there is no suggestion that the witnesses were present elsewhere at any other specified place, when the incident took place.

23. Before we proceed further, to properly evaluate and analyse the evidence in the context of the submissions made, it would be apposite to notice, in brief, the thrust of the submissions of the defence counsel. According to the defence counsel, there are four important features which

raise a serious doubt as regards the prosecution story. These are:-

(a) The motive for the crime set out is annoyance on account of construction of toilet by the deceased. This motive is completely unfounded because from the testimony of PW-1, it is clear that the deceased had built his house 13-14 years ago and that the toilet was constructed 6-7 years later. This statement of PW-1, during her cross-examination, was recorded on 16.10.1992 i.e. a year after the incident, which means that the toilet had been in existence since 4 to 5 years before the occurrence.

(b) If the accused had entered the house after scaling the wall in the darkness of the night with a pistol and an intention to finish off the deceased what was the reason for the accused to grapple with the deceased with a gun in one hand for about one-half hour and not to use the gun straight away. This clearly suggests that the incident did not occur in the manner alleged. Either the prosecution witnesses did not at all notice the occurrence or the prosecution is hiding true facts.

(c) The incident, according to ocular account, occurred in the courtyard. The autopsy report notices two injuries, one is an entry wound and the other is a gun powder discharge on or about the face region. Notably, an empty cartridge was found in the bathroom much away from the spot where the deceased was shot at by the accused, after engaging in a scuffle with him. It therefore appears to be a case where two shots were fired, one which was a blank shot and the other which carried the bullet. The empty cartridge appears to be a consequence of that blank shot but the ocular account is in respect of solitary shot therefore, the ocular account is unworthy of acceptance.

(d) According to the ocular account, the assailant Arvind at the time of firing the shot was in front of the deceased. The deceased was in a standing position and was being held by Akhilesh who had pulled his hand from behind. If the deceased had been in a standing position and the shot was fired by Arvind from front then the direction of the gun shot travelling downward was impossible, as is the testimony of the autopsy surgeon. Hence, it appears to be a case where the incident occurred in some other manner than alleged. Eye-witnesses were all sleeping at the time when the incident occurred and it is only after the gun shot was heard, story was weaved on the basis of strong suspicion and enmity. Hence, it is a fit case where both the accused-appellants be acquitted.

24. Having noticed the key features of the prosecution evidence and the thrust of the submissions made on behalf of the parties, we frame following points for the convenience of our analysis:-

(i) Whether the motive for the crime existed or not;

(ii) Whether the prosecution story appears unnatural and contrived keeping in mind the manner in which the incident is stated to have occurred;

(iii) Whether in the facts and circumstances of the case, the first information report is delayed and lends credence to the defence argument that the story of the prosecution is contrived;

(iv) Whether there is a serious conflict between the medical and the ocular

evidence rendering ocular account unworthy of acceptance;

(v) Whether the incident occurred in the darkness of the night where there was no source of light and therefore, no one witnessed the incident which is reflected by improvement, during deposition in trial, that the deceased was caught hold by the appellant Akhilesh;

(vi) Whether spreading bed-sheet and laying the body thereupon alters the spot, affecting confirmation of spot by the investigating agency. If so, whether it has material bearing on the merit of the prosecution case; and

(vii) Whether the presence of an empty cartridge in the bathroom, away from the spot, where the incident is stated to have occurred, renders the ocular account untrustworthy and unacceptable.

25. On the issue with regard to existence of the motive, the prosecution story is that a toilet was built by the deceased right in front of the house of the accused party, across the Kharanja, to which the accused party had been objecting and two days prior to the incident, the accused had threatened the deceased. The defence submission is that from the testimony of PW-1, it appears, the toilet had been in existence for the last 4-5 years and as such the motive set out by the prosecution for the crime is unacceptable. There may appear some substance in the defence submissions but motive is a mental state of which the person whose conduct is in question is the sole repository. It is difficult to assess whether the motive is sufficient for the crime in issue because, everyone reacts differently to a given situation. It is possible that existence of the toilet might have been there for sometime but for reasons unknown its existence might have become an eyesore in the recent past. Under these circumstances, we do not propose to dwell further on the issue of motive more so, because the prosecution case is dependent on ocular account and it is well settled that where the prosecution case is based on direct ocular account of the incident, if the court finds the same trustworthy and truthful, existence or non existence of motive for the crime is of no consequence.

26. The issue whether the prosecution story appears unnatural and contrived and whether the first information report is delayed are connected to each other therefore, we propose to deal with the two issues together. Before we evaluate the submission in respect of the prosecution story appearing unnatural and contrived, we propose to analyse the prosecution evidence in respect of the explanation for the delay in lodging the report. According to the prosecution story the incident occurred at or about 2 am. The report was dictated by the informant to one Devendra Narayan Mishra who wrote it and after signature of the informant, it was handed over to Pahalwan (PW-3) to be lodged at the police station. The report has been lodged at 7.45 am at a police station that was about 9 km away from the spot. The lodging of the first information report at 7.45 am is proved by the police witness (PW-6) and nothing could be elicited from him to doubt the registration of the case at that time. The inquest proceeding was conducted later, and completed by noon. The inquest report makes a recital about receipt of the report from Pahalwan (PW-3). Pahalwan has been examined as PW-3. He stated that he resides in the same village where the incident took place. The incident

occurred in the night and he reached the house of the deceased in the night. The informant had dictated the report to Devendra Narayan Mishra and the report was delivered to him at about 3 am in the night itself and as soon as the day broke, he left for the police station to lodge the report and reached there by 7.30 am. Nothing much has come out from his cross-examination to doubt his deposition. Rather, he also explained as to why he visited the house of the deceased in the night by stating that he woke up on hearing the gun shot and many others also woke up for that reason and he reached the house of the deceased where others had also arrived. He also explains that his house is 100 to 200 paces away from the house of the deceased and he has cattle to feed. He fed the cattle in the morning and, thereafter, he left the village on foot to lodge the report. On being questioned as to why he did not take a motorcycle or a cycle to commute, he stated that the route was very bad and as it had rained in the night therefore, he preferred to go on foot. The explanation offered by PW-3 is acceptable. Nothing has been elicited from him, during cross-examination, which may doubt his presence in the village or his arrival at the scene of crime after hearing the gun shot. In these circumstances, keeping in mind that the village was 9 km away from the police station and the incident occurred in the night and very few would make an attempt to lodge the first information report in the night hours when the police station was at such a distance, the explanation is tenable. Moreover, it is quite natural that the informant being a lady, who having lost her husband and had two daughters and a young son to look after, would request some one else to go to the police station. Thus, we are of the considered view that in the facts of the case, the first information report cannot be said to be delayed so as to raise our suspicion with regard to the truthfulness of the prosecution story.

27. As regards the submission that the prosecution story appears unnatural and contrived, the thrust of the submissions of the learned counsel for the appellants is that if the intention of the accused were to finish off the deceased and one of the accused had a pistol in his hand, where was the occasion to enter into a scuffle with the deceased that lasted about half an hour. The above submission though may appear attractive but is not to be accepted for the reason that the prosecution is not required to prove as to what the intention of the accused had been when he entered the house. What the prosecution is required to prove is that the shot was fired with an intention to kill. What was there in the mind of the accused at the time when they entered the house of the deceased in the night, is a mental state of which the accused were privy to, not the informant or the other prosecution witness. It could be possible that the two accused, who resided across the road right in front of the house of the deceased, might have been infatuated with the daughter of the deceased, who was a University going student. It could very much be possible that the accused might have entered the house in the night with that kind of an intention but on disturbance caused by their movement, the deceased might have got up resulting in a scuffle that was noticed by PW-1 and PW-2. It could equally be possible that initially they did not want to kill the deceased but when the deceased was not letting them off, the accused developed an intention to kill the deceased therefore, the scuffle lasted that long. This possibility cannot be ruled out also for the reason that no alarm was raised by the deceased despite noticing intruders

in the night because it is quite natural for a father to protect the honour of the family. It is equally possible that the deceased feared that if he raises an alarm, the entire village may arrive and cast aspersions on the character of his daughter. Thus, in our considered view, whatever the reason for that scuffle might be, the duration of the scuffle, by itself, does not render the prosecution story improbable, unnatural or unacceptable. We, therefore, reject the submission on behalf of the appellants that the prosecution story is completely unnatural and unacceptable.

28. At this stage, we may notice that though the incident occurred post mid-night but the prosecution evidence with regard to existence of light is specific and consistent since the inception of the case. Notably, there was a suggestion to the prosecution witnesses that there was bright moon that night therefore there was no need of putting a lantern. That apart, that night was the first night after full moon i.e. Ekadashi of Shukl Paksha. Moreover, the prosecution evidence is that as usual the lantern was lit in the courtyard. The presence of lantern was confirmed during investigation and it was produced before the investigating officer and from his testimony it is clear that he had also checked whether it was in a working condition and had found it to be in a working condition. The custody memo of the lantern was also prepared. Further, its existence was disclosed in the first information report. Thus, the source of light enabling the witnesses to identify the accused, particularly, when they were neighbours residing just across the Kharanja, cannot be doubted and has been proved beyond reasonable doubt.

29. Now, we shall proceed to examine whether the medical evidence renders the ocular account completely unacceptable or improbable. In this regard, the submission of the 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 the front, if the victim and the assailant were at the same level. It is also urged that the existence of gun powder mark on or about neck and face region of the deceased would suggest that two shots were fired at the deceased whereas the ocular evidence is in respect of single shot.

30. At this stage, we may notice few decisions of the Supreme 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 vs. 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 straightway 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."

31. In **Anil Rai vs. State of Bihar (2001) 7 SCC 318**, view taken earlier, in **Punjab Singh vs. State of Haryana, 1984 Supp SCC 233,** 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, was affirmed. Similarly, in Abdul Sayeed vs. State of Madhya Pradesh, (2010) 10 SCC 259, the legal position, in this regard, has been crystallised, in paragraph 39 of the judgment, as follows:

"39. Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis--vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved."

32. The above view has been affirmed in **Central Bureau of Investigation and Another vs. Mohd. Parvez Abdul Kayyum and others, (2019) 12 SCC 1.**

33. The gist of the legal principle deducible from the pronouncements of the Supreme Court is that ocular evidence has greater evidentiary value vis-a-vis medical evidence. When the medical evidence makes the ocular testimony improbable it becomes a relevant factor in the process of evaluation of evidence. But, when the medical evidence rules out all possibility of the ocular evidence being true, the ocular evidence may be discarded. Bearing this legal principle in mind, at this stage, we may now notice the submissions of the learned AGA in response to defence's submission that there is an irreconcilable conflict between medical evidence and the ocular account. In this regard, it was submitted that as per the ocular account when the scuffle between Arvind and the deceased was going on, accused Akhilesh was pressing the mouth of PW-2 (the daughter of the deceased) but, when PW-1 came close to the deceased, Akhilesh left PW-2, caught hold the hands of the deceased, pulled them backwards and exhorted Arvind to finish off the deceased. At this stage, the shot was fired. The learned AGA submitted that if someone holds a person's hands and pulls them backward, the person, despite being in a standing position, would bend forward leaving his shoulder/neck region exposed and at a level much lower than the height of the person standing in front of him, if both are of same height and at the same ground level. Otherwise also, it was submitted,

when a scuffle is on, it would be difficult to notice and memorise the exact position at which the person was when the shot was fired at him, as the body keeps moving, therefore, if PW-1 stated that the shot was fired from front while the deceased was standing and his hands were pulled back by the other accused (Akhilesh), it cannot be said that because the shot traveled in a downward direction, the ocular account is unacceptable as ruled out by the medical evidence. Similarly, in respect of the presence of injury no.2, learned A.G.A. submitted that when the muzzle of the pistol is close to the face, pointing downwards towards neck, the bullet would enter the body from the upper part of chest, near to neck/ shoulder, and go downwards whereas the discharge of gun powder from the blast, emitted from the muzzle, would splash the face and neck, reflecting the kind of an injury as is injury no.2 noticed by the autopsy surgeon. Thus, it is a case of single gunshot and, therefore, there is absolutely no conflict between medical evidence and the ocular evidence.

34. Having noticed the rival submissions in this regard, at the outset, we may observe that when a scuffle is on and persons who are grappling with each other are moving, it would be impossible to expect any witness to give an accurate account of the posture that the deceased was holding at the time when the shot was fired at him. In **Sukhdeep Singh V. State of UP, (2010) 2 SCC 177 (vide paragraph 17)** it was observed by the Supreme Court "that it would be impossible for any witness to give a categorical statement as to the posture that the deceased or the assailants were holding at the time when the firing incident happened." Bearing this in mind, on a careful perusal of the prosecution evidence, we find that though gun powder /blast mark is there on face and neck of the deceased but noticeably no pellets have entered that area though, a bullet is found ensconced in the heart entering from chest, below the left shoulder region. If someone is bent and a shot is fired at him from a close range by a person who holds the muzzle of the gun near about the face of that person, pointing it downwards, in our view, discharge from the barrel may cause blackening and gun powder marks on or about the face and neck region whereas the bullet may enter the body from about shoulder or upper part of chest region traveling downwards to damage the heart as is the medical evidence of the case at hand. Thus, in our view, the ocular account is not at all ruled out by the medical evidence rather, the medical evidence corroborates the ocular evidence. We therefore reject the appellants' submissions that the ocular account is unacceptable because it is ruled out by the medical evidence.

35. At this stage, we may notice another submission of the learned counsel for the appellants, which is, that since empty cartridge was found in the bathroom, the ocular account that the shot was fired at the deceased in the courtyard is unacceptable. The learned counsel for the appellants submitted that the presence of empty cartridge in the bathroom would indicate that the shot was fired by someone sitting or standing over the wall of the bathroom when, perhaps, the deceased had come to the bathroom. It is submitted that this explains both, that is, the direction of travel of the bullet and the existence of empty cartridge in the bathroom. The learned counsel for the appellants submitted that as the body was lying on a sheet of cloth whereas, admittedly, the incident did not occur whilst he was lying

on that sheet of cloth, it appears, the body was removed from the bathroom. It was argued that the spot where the incident occurred, namely, the courtyard, is not confirmed by investigation therefore, this lends credence to the defence argument that the shot was fired from, or over, the wall of the bathroom and the body was removed from that position and laid in the courtyard.

36. The above submission is not acceptable for two reasons:-

(i) Why would PW-1 and PW-2, who are wife and daughter, respectively, of the deceased, tell lies; and

(ii) The ladies of the house, in ordinary course, would be in a state of shock having lost the head of their family. It is unimaginable that they would contrive a story and drag the body from the bathroom and place it in the courtyard. Noticeably, the I.O. had noticed blood splattered in the courtyard and had lifted blood from that spot lying below the sheet. Further, he made no mention of the presence of any drag marks or blood splattered in some other portion of the house. No suggestion has been put to any witness in respect of dragging the body within the house. Spreading of bed-sheet and placing a pillow below the head of the deceased may be a mark of respect for the dead. Importantly, there is no suggestion either to the prosecution eye witnesses or to the I.O. that the deceased was killed at some other spot and was brought and laid at the spot. Further, there is no suggestion whatsoever in respect of the shot being fired at the deceased when he was near the bathroom. Otherwise also, in the ocular account, it has come that after firing the shot at the deceased, the accused had opened the pistol. May be the accused wanted to have another go at the deceased but noticing that the deceased had collapsed on being struck by the shot, the assailant might have thought better to escape and while scaling the wall, close to the bathroom, to escape, the empty cartridge may have fallen there in the bathroom from where it was recovered. Thus, in our considered view, the presence of the empty cartridge in the bathroom and the spreading of cloth below the body of the deceased and placing a pillow underneath his head neither demolishes the prosecution case nor renders the ocular account improbable or untrustworthy as to confer the benefit of doubt on the accused.

37. At this stage, we may notice an alternative submission of the learned counsel for the appellants, which is, that in so far as the appellant-Akhilesh is concerned, he is not the one who fired the shot at the deceased and that the role of catching hold attributed to him was neither there in the first information report nor in the statements recorded under section 161 CrPC. It was urged that his role is introduced, by way of an improvement, during trial, therefore, he is entitled to the benefit of doubt.

38. We do not accept the above submission for the reason that from the very beginning it is the prosecution story that the appellant Akhilesh entered the house in the night hours with his brother Arvind and on exhortation of Akhilesh to finish off the deceased, Arvind fired at the deceased. It is neither the requirement of law, nor expected of the informant, particularly a lady, who is in a state of shock, to make an accurate disclosure of each action which the accused displayed in the incident either in the first information report or in the statement recorded under

Section 161 Cr.P.C., unless the I.O. or concerned officer specifically questions the person in that regard. When a statement under section 161 CrPC is recorded, a witness may fail to make a disclosure may be because of his understanding that it is not material or may be because no question in that regard is put by the I.O. Therefore, in our view, as to when an improvement would affect the credibility of a witness, much would depend on the facts of a case apart from the nature of the improvement made. In the instant case, notably, both PW-1 and PW-2 have throughout, right from the stage of lodging the FIR, disclosed active participation of the accused Akhilesh, that is, he entered the house with the co-accused in the night by scaling the wall, pressed the mouth of PW-2 and exhorted co-accused Arvind to finish off the deceased. This stand was maintained during trial with an addition that when PW-1 tried to come close to the deceased, while the deceased was grappling with co-accused Arvind, Akhilesh left PW-2, caught hold the deceased by his hands, pulled the hands of the deceased backwards and exhorted Arvind to finish off the deceased. In our view, this addition does not in any way alter the substratum of the prosecution case against Akhilesh rather it fills up the narrative by way of an answer to the question put to the witnesses during the course of their cross examination in court. Otherwise also, there appears truth in the ocular account and indirectly explains the travel of the bullet in a downward direction. In these circumstances, the participation of appellant-Akhilesh in the occurrence and sharing of common intention with co-accused Arvind to kill the deceased has also been proved beyond reasonable doubt.

39 . For all the reasons recorded above, we are of the considered view that the trial court has correctly found the appellants guilty of the charge for which they have been tried and convicted. We, therefore, affirm the judgment and order of conviction and sentence recorded by the trial court. Both the appeals are **dismissed**. Both the appellants are reported to be on bail. Their bail bonds are canceled. They shall be taken into custody forthwith and shall serve out the sentence awarded by the court below.

40. Let the order be communicated to the trial court for information and compliance.

(2022)05ILR A633
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.04.2022

BEFORE

THE HON'BLE ANIL KUMAR OJHA, J.

Criminal Appeal No.5297 of 2021

Chandhari @ Chandhradhari
...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri J.A. Azmi, Sri Krishna Manohar Tiwari (A.C.)

Counsel for the Respondent:
A.G.A.

A. Criminal Law -Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Section 376-challenge to-conviction-As per statement of PW2, victim and PW-6, appellant committed rape upon the victim at the point of knife-As per medical report there was injury on her hymen which is supported by victim statement-Court should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the

statement of victim, which are not of a fatal nature, to throw out an otherwise reliable prosecution case-Mere delay in FIR will not make the prosecution story suspicious-It is a case of rape where testimony of prosecutrix stands at par with that of injured witness.(Para 1 to 34)

The appeal is dismissed. (E-6)

List of Cases cited:

1. St. of Punj. Vs Hakam Singh (2005) 7 SCC 408

2. Raja & ors. Vs St. of Karn. (2016) 10 SCC 506

(Delivered by Hon'ble Anil Kumar Ojha, J.)

1. Heard Sri Krishna Manohar Tiwari, learned Amicus Curiae for the appellant, Sri Ravi Prakash Pandey and Sri Ram Vichar Chaudhary, learned A.G.A. for the State and perused the record.

2. Challenge in this Criminal Appeal is the judgement and order dated 07.03.1998 passed by Sessions Judge, Azamgarh in Sessions Trial No. 722 of 1997, State Vs. Chandhari@Chandradhari arising out of Crime No. 249 of 1997 under Section 376 I.P.C., P.S. Kandharapur, District, Azamgarh whereby learned Sessions Judge, Azamgarh has convicted the appellant, Chandhari@Chandradhari under Section 376 I.P.C. and sentenced him to undergo Rigorous Imprisonment for a period of ten years and pay a fine of Rs. 2,000/- and in default of payment of fine, to suffer six months further Rigorous Imprisonment.

3. Shorn of unnecessary details, case of prosecution is that an F.I.R. was lodged by complainant, Subai on 25.09.1997 at 16:00 hours in P.S., Kandharapur, District, Azamgarh stating therein that on 20.09.1997 at about 4:00 P.M., appellant, Chandhari@Chandradhari forcibly committed rape upon victim at the point of knife. Complainant filed a written report at the police station. Case was registered against accused, Chandhari@Chandradhari at P.S., Kandharapur, District Azamgarh in Crime No. 249 of 1997 under Section 376 I.P.C.

4. Investigating Officer started investigation and prepared site-plan of the spot; he produced the victim before concerned Magistrate for recording of her statement under Section 164 Cr.P.C. Victim's statement under Section 164 Cr.P.C. was recorded; she was medically examined. After recording of statement of witnesses and conclusion of investigation, I.O. submitted charge-sheet against the appellant, Chandhari@Chandradhari in Crime No. 249 of 1997 under Section 376 I.P.C., P.S. Kandharapur, District Azamgarh.

5. The then Additional Civil Judge, Junior Division/Judicial Magistrate First Class, Azamgarh on 19.12.1997 committed the case of appellant to Sessions Court for trial.

6. Learned Sessions Judge framed charge against the appellant, Chandhari@Chandradhari under Section 376 I.P.C. Appellant denied the charges and claimed trial.

7. Prosecution was called upon to adduce the evidence to substantiate the prosecution version. Prosecution produced Subai who lodged the F.I.R. as P.W. 1. He is the complainant/informant of the case. P.W. 1, Subai has supported the prosecution story in his evidence before the Court P.W. 1 proved F.I.R., Ex. Ka-1.

8. P.W. 2 is the victim herself. She has supported the prosecution version and

has specifically stated that appellant, Chandhari@Chandradhari has committed rape upon her.

9. P.W. 3, Narmi is the mother of victim. She has also supported the prosecution story.

10. P.W. 4, Amarjeet Singh is S.O., Kandharapur. He has conducted the investigation and proved the charge-sheet, Ex. Ka-3. P.W.-5, Rajan Yadav is a Court Moharrir who has proved the Chick F.I.R., Ex. Ka-4. P.W. 6, Dr. Sumati Saxena conducted the medical examination of the victim and proved medical examination report as Exhibit Ka-6, Pathological Report Ex. Ka-7, Radiological Report Ex. Ka-8. P.W. 6, Dr. Sumati Saxena opined that victim has been subjected to sexual intercourse.

11. P.W. 7, Dr. S.P. Singh proved the Supplementary-Report as Material Exhibit-1. P.W. 7 has stated in his statement before the Court that as per the Radiological Examination, age of the victim is found to be more than 16 years and less than 18 years and proved X-ray Report, Ex. Ka-9, X-ray plate, Material Ex.-1.

12. Prosecution concluded its evidence; statement of appellant under Section 313 Cr.P.C. was recorded. Appellant denied the evidence and also denied commission of rape and stated his ignorance. He specifically stated that he was a poor labourer and used to do labour work with Shivnath Yadav. He has three sisters and nine brothers.

13. After hearing the prosecution and defence, learned Sessions Judge, Azamgarh convicted the appellant as above.

14. Feeling aggrieved and dissatisfied with the aforesaid judgement, appellant has preferred this appeal.

15. Submission of learned Amicus Curiae for the appellant is that there is five days' delay in the lodgement of F.I.R. Evidence of victim is unworthy of credence; Investigating Officer had not collected the cloth; victim has gone for grass-cutting; she was having weapon, hence she should have inflicted injury upon the appellant. Prosecution story is doubtful. Appellant deserves benefit of doubt.

16. Per-contra, learned A.G.A. vehemently opposed the aforesaid arguments and submitted that victim is a labour class rustic lady. There is no material contradiction in her statement. Evidence of victim is supported by medical evidence. Mere delay in lodging the F.I.R. will not make the prosecution story suspicious. Appellant committed rape upon the victim at the point of knife. Appeal lacks merit and deserves dismissal.

17. In ***State of Punjab Vs. Hakam Singh (2005) 7 SCC 408,*** Hon'ble Apex Court has held that it is not expected of a rustic lady to state with precision the chain of events. In case of rustic lady, Court should keep in mind her rural background and scenario in which the incident happened and should not appreciate her evidence from rational angle and discredit her otherwise truthful version on technical grounds.

18. It is a case of rape where testimony of prosecutrix stands at par with that of injured witness. Law on the point of evidence of rape victim, is clearly settled.

19. In ***Raja and others v. State of Karnataka (2016) 10 SCC 506***, Hon'ble Apex Court has held as follows:

".....It was exposited that insofar as the allegation of rape is concerned, the evidence of the prosecutrix must be examined as that of a injured witness whose presence at the spot is probable but it can never be presumed that her statement should always without exception, be taken as gospel truth.

The essence of this verdict which has stood the test of time proclaims that though generally the testimony of a victim of rape or non- consensual physical assault ought to be accepted as true and unblemished, it would still be subject to judicial scrutiny lest a casual, routine and automatic acceptance thereof results in unwarranted conviction of the person charged."

20. Thus Law on the point is that the testimony of the victim must be appreciated in the background of the entire case and the Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the victim, which are not of a fatal nature, to throw out an otherwise reliable prosecution case.

21. In view of above settled legal position, the evidence of PW2 victim is being analyzed and evaluated.

22. P.W. 2, victim in her examination-in-chief in Court has specifically stated that on the date of incident, she had gone for grass-cutting in the field of Shiv Nath Pasi. It was 4 O' Clock in the evening. Appellant, Chandhari@Chandradhari came there and caught hold her hand. He brought the victim at the bricklin of Baram Dev Ram and put a knife at her breast, she cried to save her. Thereafter, he committed rape upon her; she became unconscious. When she regained consciousness, she went to her home and told the incident to her mother. She again specifically stated that her age is 13 years. Appellant forcibly committed rape upon her at the point of knife.

23. She was cross-examined by defence counsel but could not shake the credibility of victim. She specifically tendered evidence at page 18 of the paper book. That she tried to save herself. Her cloth became stained. Police did not took her cloth.

24. Evidence of victim is natural and probable. There is no major contradiction in her statement.

25. In view of the above, submission of learned Amicus Curiae is that evidence of victim is unworthy of credence has no legs to stand and is rejected accordingly.

26. P.W. 6, Dr. Sumati Saxena has proved the medical examination report. She has stated in her examination-in-chief at page no. 31 of the paper book that on the basis of medical-examination, she is of the opinion that victim was subjected to sexual intercourse. There was injury on her hymen. In the cross-examination, she has also specifically stated that victim was not habitual to sexual intercourse.

27. Thus from the evidence of P.W. 2, victim and P.W. 6, Dr. Sumati Saxena, it is manifest that appellant committed forcible sexual intercourse. As doctor has opined that victim was subjected to sexual intercourse and there was injury on her hymen, so evidence of victim is supported by medical evidence of P.W. 6. In the injury report itself,

the doctor has opined that linear tear seen on posterolateral side of hymen.

28. It is accordingly held that evidence of victim is supported by medical testimony.

29. Learned Amicus Curiae for the appellant submitted that there is five days' unexplained delay in lodgement of F.I.R., hence prosecution story is doubtful. I am unable to accept this contention of learned Amicus Curiae because victim, her father and relatives are illiterate persons belonging to labour class. Promptness in lodgement of F.I.R. cannot be expected from them. Moreover matter pertains to rape wherein parties normally immediately don't rush to police station to save their social prestige.

30. In view of the above, contention of learned Amicus Curiae with regard to delay in lodgement of F.I.R. is rejected.

31. Learned Amicus Curiae eloquently argued that victim has gone for grass-cutting. She was having weapon so she should have inflicted injury upon appellant. There is no sign of resistance by the victim. I am unable to agree with the aforesaid contention because victim is a rustic village lady. Appellant committed rape at the point of knife, so this contention of learned Amicus Curiae is also unsustainable and is rejected.

32. The upshot of the above discussion is that the prosecution has established its case beyond reasonable doubt against the appellant, Chandhari@Chandradhari.

33. The impugned judgment and order passed by lower court is within four corners of law. There is no illegality in the judgment and order dated 07.03.1998 passed by Sessions Judge, Azamgarh in Sessions Trial No. 722 of 1997, State Vs. Chandhari@Chandradhari arising out of Crime No. 249 of 1997 under Section 376 I.P.C., P.S. Kandharapur, District, Azamgarh whereby learned Sessions Judge, Azamgarh has convicted the appellant, Chandhari@Chandradhari under Section 376 I.P.C. and sentenced him to undergo Rigorous Imprisonment for a period of ten years and pay a fine of Rs. 2,000/- and in default of payment of fine, to suffer six months further Rigorous Imprisonment and the same is hereby confirmed. Appeal lacks merit and is liable to be dismissed.

34. Accordingly, this appeal is dismissed.

35. The assistance rendered by Sri Krishna Manohar Tiwari, learned Amicus Curiae for the appellant is appreciable and his fee is assessed Rs. 10,000/-.

36. Registry of this Court is directed to pay Rs. 10,000/- to Sri Krishna Manohar Tiwari, learned Amicus Curiae for the appellant for his assistance.

37. Copy of this judgment be certified to the court below for compliance. Lower court record be transmitted to the District Court concerned forthwith.

(2022)05ILR A637
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.05.2022

BEFORE

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

First Appeal From Order No. 10 of 1993

New India Assurance Co. Ltd. ...Appellant
Versus
Smt. Leela Devi & Ors. ...Respondents

Counsel for the Appellant:
Sri Rajesh Ji Verma, Sri Kamal Dev Rai, Sri Shri Prakash Pal

Counsel for the Respondents:
Smt. Aradhana Chauhan, Sri A.K. Singh, Sri Ajeet Kumar Singh

Civil Law - Workman Compensation Act, 1923 - claimant husband was a driver and employed by respondent no. 7, who passed away due to employment injuries - owner in reply before the Commissioner took stand that they had immediately intimated the insurance company about accidental death of its employee - finding of fact is that the deceased was an employee who had sustained employment injury and died - law is well settled that where employer intimates the amount must be disbursed within one month of incident - Commissioner has dealt exclusively and given cogent reasons for grant of interest and penalty as per Section 4A of the Act - substantial questions of law raised by Insurance company are questions of fact (Para 10, 11)

Dismissed. (E-5)

List of Cases cited:

1. Oriental Insurance Co. Ltd. Vs Siby George & ors., 2012 (4) T.A.C. 4 (S.C.)

2. Golla Rajanna Etc. Vs Divisional Manager & anr., 2017 (1) TAC 259 (SC)

3. North East Karnataka Road Transport Corporation Vs Smt. Sujatha Civil Appeal No.7470 of 2009 decided on 2.11.2018

4. E.S.I.C. Vs S. Prasad . F.A.F.O. 1070 of 1993 decided on 26.10.2017

5. Mackinnon Machenzie Vs Ibrahim Mahmmed Issak, (1969) 2 SCC 607

6. Regional Director, E.S.I. Corp. Vs Francis De Costa, (1996) 6 SCC 1

7. Malikarjuna G. Hiremath Vs Branch Manager, Oriental Insurance Co. Ltd., (2009) 13 SCC 405

8. Shakuntala Chandrakant Shreshti Vs Prabhakar Maruti Garvali, (2007) 11 SCC 668

9. Laxmanrao Vs Maharashtra State Electricity Board, 2015 ACJ 2509

10. Mewar Textile Mills Vs Kushali Bai, (1960) II LLJ 369

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

1. Heard learned counsel for the appellant. None present for the respondents.

2. This is one more classic case where insurance company has challenged meagre amount granted to heir of deceased employee a truck driver for accident which occurred on 13.04.1990. Accident having taken place and causing death of employee and compensation awarded is not in dispute.

3. The appellant has challenged the order dated 07.10.1992 of the Workmans Compensation Commissioner, Etwah under Workman Compensation Act, 1923 (referred as "Act') whereby compensation of Rs.69,984.60/- has been awarded to claimant/respondent for death of her husband who was a driver and employed by respondent no. 7 and 8 herein passed away due to employment injuries.

4. The Insurance Co. has contended that the deceased was not in employment of the appellant and therefore the appellant company could not have been made liable for payment of penalty, as the provisions of Act does not saddle them with liability. It is further submitted that no issue were framed by the Commissioner before deciding the

matter and the owner did not raise any demand

5. The submission of learned counsel for Insurance Company that no issues were framed is not accepted as about 6 issues have been framed and have been decided in seriation by Commissioner, the first submission of the appellant fails. As far as it relates to payment of penalty is concerned, judgment of the Apex Court titled as **Oriental Insurance Co. Ltd. Vs. Siby George and others, 2012 (4) T.A.C. 4 (S.C.)** will not permit this Court to take a different view then that taken by the Commissioner. There need not be any demand, however, the owner in reply before the Commissioner has taken stand that they had immediately intimated the insurance company about accidental death of its employee thus this aspect falls in realm of disputed question of fact and not law, the matter has been prolonged by the Insurance Company a similar situation has been lamented by the apex Court recently in **Golla Rajanna Etc. Etc. Vs. Divisional Manager and Another, 2017 (1) TAC 259 (SC).** The finding of fact is that the deceased was an employee who had sustained employment injury and died.

6. I am supported in my view by the decision of the Apex Court in **Civil Appeal No.7470 of 2009 North East Karnataka Road Transport Corporation Vs. Smt. Sujatha decided** on 2.11.2018 wherein it has been held that the Court has held as under:

"15. Such appeal is then heard on the question of admission with a view to find out as to whether it involves any substantial question of law or not. Whether the appeal involves a substantial question of law or not depends upon the facts of each case and needs an examination by the High Court. If the substantial question of law arises, the High Court would admit the appeal for final hearing on merit else would dismiss in limini with reasons that it does not involve any substantial question/s of law.

16. Now coming to the facts of this case, we find that the appeal before the High Court did not involve any substantial question of law on the material questions set out above. In other words, in our view, the Commissioner decided all the material questions arising in the case properly on the basis of evidence adduced by the parties and rightly determined the compensation payable to the respondent. It was, therefore, rightly affirmed by the High Court on facts.

17. In this view of the matter, the findings being concurrent findings of fact of the two courts below are binding on this Court. Even otherwise, we find no good ground to call for any interference on any of the factual findings. None of the factual findings are found to be either perverse or arbitrary or based on no evidence or against any provision of law. We accordingly uphold these findings."

7. This Court, recently in **F.A.F.O. 1070 of 1993 (E.S.I.C. Vs. S. Prasad)** decided on 26.10.2017 has followed the decision in Golla Rajana (Supra) and has held as follows:

*"The grounds urged before this Court are in the realm of finding of facts and not a question of law. As far as question of law is concerned, the aforesaid judgment in **Golla Rajanna Etc. Etc. Versus Divisional Manager and another (supra)** in paragraph 8 holds as follows*

"the Workman Compensation Commissioner is the last authority on facts. The Parliament has thought it fit to restrict the scope of the appeal only to substantial questions of law, being a welfare legislation. Unfortunately, the High Court has missed this crucial question of limited jurisdiction and has ventured to re-appreciate the evidence and recorded its own findings on percentage of disability for which also there is no basis."

8. In Mackinnon Machenzie v. Ibrahim Mahmmed Issak, (1969) 2 SCC 607, Regional Director, E.S.I. Corporation v. Francis De Costa, (1996) 6 SCC 1, Malikarjuna G. Hiremath v. Branch Manager, Oriental Insurance Co. Ltd., (2009) 13 SCC 405, Shakuntala Chandrakant Shreshti v. Prabhakar Maruti Garvali, (2007) 11 SCC 668, Laxmanrao v. Maharashtra State Electricity Board, 2015 ACJ 2509 and Mewar Textile Mills v. Kushali Bai, (1960) II LLJ 369 similar view is taken.

9. Going by the factual scenario, the deceased was in employment when the incident occurred. The award dated 7th October, 1992 goes on the premise that death occurred during course of employment. While going through the record, it is very clear that this appeal will have to fail and, accordingly, it is held that the deceased died due to employment injuries.

10. The person was covered by insurance which fact is proved, he need not be employee of insurance company. The law is well settled that where employer intimates the amount must be disbursed within one month of incident. Just becauise separate issue is not framed qua payment of interest and penalty will not vitiate the entire order as issue no. 6 relates to what compensation is payable. The Commissioner has dealt exclusively and given cogent reasons for grant of interest and penalty as per Section 4A of the Act which reads as follows:

*"**[4A. Compensation to be paid when due and penalty for default.**--(1) Compensation under section 4 shall be paid as soon as it falls due.*

(2) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the1[employee], as the case may be, without prejudice to the right of the 1[employee] to make any further claim.

3[(3) Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall--

(a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent. per annum or at such higher, rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government by notification in the Official Gazette, on the amount due; and

(b) if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per cent. of such amount by way of penalty:"

Thus, the right of claimant can not defeated and this Court concurs with the same.

11. In view of the above, the appeal fails and is **dismissed.** The so called questions of law framed by the Insurance Company are answered against it. In fact the substantial questions of law raised are questions of fact.

12. Interim relief, if any, shall stand vacated forthwith.

13. This court records the absence of learned counsels for the respondents. The penalty if not deposited be deposited forthwith.

14. This Court is thankful to learned counsel for the appellant for getting this very old matter disposed off.

15. The record be transmitted to the Workmen Commissioner.

16. The amount lying in the fixed deposits will be disbursed to the claimants immediately as more than 30 years have elapsed since the appeal was preferred. As none represent respondent, no litigation expenses are awarded.

(2022)05ILR A641
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.03.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

First Appeal From Order No. 103 of 2001

Employee's State Insurance Corp., Alld.
...Appellant
Versus
Jagdish Prasad ...Respondent

Counsel for the Appellant:
Sri A.K. Srivastava, Sri Vipul Kumar

Counsel for the Respondent:
Sri M. jain, Sri Mritujaya

Employees' State Insurance Act, 1948 - Uttar Pradesh Employees' Insurance Courts Rules, 1952 - Rule 47 - Civil Procedure 1908 (V of 1908), Order 13 Rule 4 CPC - Indian Evidence Act, 1872 - Sections 62 & 63 - Secondary Evidence - Manner of proof - objection as to the mode of proof of a document - Sole respondent sustained an injury to his left eye during the course of employment - Before E.S.I. Court employee relied upon photostat copies of medical certificates & treatment papers to establish that the employment injury had led a permanent dimming of vision in the left eye - originals of those certificates and treatment papers have not been filed - No objection raised before the E.S.I. Court about the admissibility of photostat copies of medical certificates - Held - an objection about admissibility of secondary evidence must be taken before the Court of first instance, where the secondary evidence is filed without foundation - If that objection is not taken before the Court, where the evidence is filed on behalf of a party, it cannot be later on urged in appeal - If no objection as to admissibility of photostat copy of the prescription slips showing treatment of the employee to substantiate the claim of permanent disablement, is raised before the E.S.I. Court, same cannot be permitted to be raised before High Court on ground that primary evidence ought to have been filed (Para 9, 15, 21)

employee produced not only just prescription slips about his treatment, but also medical certificates from the eye specialist signed by the Medical Superintendent, Employees State Insurance Hospital and treatment papers to establish that employment injury had led to a permanent dimming of vision in the left eye - treatment was undergone by the employee at the E.S.I. Hospital, Lucknow and is contemporaneous in time to the injury. There is a further report by

an eye specialist from the Lala Lajpat Rai Medical College and Hospital, Kanpur dated 15.07.1996, which opines in clear terms that loss of vision is one on account of the injury - with the employee adducing so much of evidence from which the E.S.I. Court has drawn a reasonable conclusion about the existence of a scheduled injury, it cannot be said that the burden has not been discharged by the employee - said finding is a pure finding of fact, based on consideration of relevant evidence - Nothing shown that finding is beset by a flagrant and manifest error of law (Para 22)

Employees' State Insurance Act, 1948 - Burden of proof - Sole respondent sustained an injury to his left eye during the course of employment - Held - The Second Schedule, Part II List Of Injuries Deemed To Result In Permanent Partial Disablement, S. no. 32A. Partial loss of vision of one eye. Percentage of loss of earning capacity 10 % - the injury being a scheduled injury under Serial No. 32-A of Schedule-I appended to the Act, the percentage loss of earning capacity is provided by the Statute itself, not requiring any further evidence to establish it - with the employee adducing so much of evidence from which the E.S.I. Court has drawn a reasonable conclusion about the existence of a scheduled injury, it cannot be said that the burden has not been discharged by the employee (Para 23, 24)

Dismissed. (E-5)

List of Cases cited:

1. Padman Vs Hanwanta, 1915 (17) BomLR 609

2. Ajjarapu Subbarao Vs Pulla Venkata Rama Rao & ors., AIR 1964 AP 53

3. The Land Acquisition Officer, Vijayawada Thermal Station Vs Nutalapati Venkata Rao, AIR 1991 AP 31

4. R.VsE. Venkatachala Gounder Vs Arulmigu Viswesaraswami & Vs P. Temple & another, (2003) 8 SCC 752

5. Sudha Agarwal Vs VII Additional District Judge,2006 (4) ALJ 545

6. Employees State Insurance Corp. Vs Sarfuddin, 2005 (4) AWC 3289 All

(Delivered by Hon'ble J.J. Munir, J.)

1. This is an appeal by the Employees State Insurance Corporation from a judgment and order of Mr. Rangnath Pandey, the then Judge, Employees Insurance Court, Kanpur Nagar, allowing the respondent's appeal and accepting his claim of 10%

2. Jagdish Prasad, the sole respondent to this appeal, was employed as a Piecer with the U.P. State Spinning Mills, Raibareli. On 13.12.1995 at about 09:00 p.m., Jagdish Prasad (hereinafter referred to as "the employee") sustained an injury to his left eye during the course of employment. Upon an application made for reference of the employee's case to the Medical Board to assess the loss of earning capacity due to the accident, the employee's case was referred to the Medical Board. The employee was examined by the Medical Board, which was of opinion that the loss of vision was not related to the employment injury and, therefore, did not award anything for the loss of earning capacity. The decision of the Medical Board, that was rendered on 10.10.1996 as aforesaid, was appealed to the E.S.I. Court by the employee under Section 54A(2)(ii) of the Employees Insurance State Insurance Act, 1948 (for short "the Act"). The appeal was registered on the file of the Judge, Employees Insurance Court, Kanpur on 10.12.1996 as Appeal No. 50 of 1996. The

appeal came up for determination before the Judge, Employees Insurance Court on 30.11.2000. It was allowed and the decision of the Medical Board dated 10.10.1996 was set aside, granting benefit of 10% permanent disability to the employee for sustaining a scheduled injury.

3. Aggrieved, the Employees State Insurance Corporation has appealed this decision.

4. This appeal was admitted to hearing on the following substantial questions of law:

(1) A mere photocopy of some prescription slip showing the treatment of the respondent is not enough to substantiate the claim of permanent disablement or permanent loss of earning capacity?

(2) The burden of proof lay upon the respondent-employee to prove the existence of permanent disability arising out of the accident or at least some evidence which would prove that that he has been placed at a job drawing lesser benefits or that he is not being given the periodical increments which his colleagues are getting and in absence of any such evidence on record, whether the court below has erred in passing the impugned judgment/order?

5. Heard Mr. Vipul Kumar, learned counsel for the appellant. No one appears on behalf of the respondent.

6. So far as the first substantial question of law is concerned, it must be remarked that it has not been disputed for a fact that the employee has sustained employment injury to his left eye on 13.12.1995. Now, as to the proof of the consequential loss, the Medical Board, that was convened on 10.10.1996, have rendered opinion to the effect that the loss of vision found to be 6/60 in the left eye is not on account of the employment injury.

7. It is submitted by the learned Counsel for the appellant that before the E.S.I. Court, the employee has relied upon photostat copies of medical certificates and treatment papers to establish that the employment injury had led a permanent dimming of vision in the left eye. The originals of those certificates and treatment papers have not been filed. It is pointed out that in view of the provisions of Rule 47 of the Uttar Pradesh Employees Insurance Court Rules, 1982 (for short "the Rules"), the provisions of the Indian Evidence Act, 1872 (for short "the Act of 1872") would apply to proceedings before the E.S.I. Court 'in respect of matters relating to procedure or admission of evidence, for which no specific provision is made in the Rules.' He submits, therefore, that the provisions of Sections 64 and 65 of the Act of 1872 would apply, forbidding the E.S.I Court from looking into photostat copies of documents relied upon by the employee in support of his case, unless foundation was laid for the reception of secondary evidence.

8. It must be remarked here that a perusal of the record does not show that there was any objection raised before the E.S.I. Court about the admissibility of these documents. No objection has been recorded by the E.S.I. Court, or one that is endorsed on the photostat copies of the documents, that have been taken into consideration by the E.S.I. Court.

9. This Court is of opinion that an objection about admissibility of secondary evidence must be taken before the Court of

first instance, where the secondary evidence is filed without foundation. If that objection is not taken before the Court, where the evidence is filed on behalf of a party, it cannot be later on urged in appeal. For this principle, reference may be made to the decision of the Privy Council in **Padman v. Hanwanta, 1915 (17) BomLR 609**, where in the context of an objection as to the admissibility of a certified copy of the will, the original not being filed before the Trial Court nor any objection being taken to it before that Court, it was held:

"11. The defendants have now appealed to His Majesty in Council, and the case has been argued on their behalf in great detail. It was urged in the course of the argument that a registered copy of the will of 1898 was admitted in evidence without sufficient foundation being laid for its admission. No objection, however, appears to have been taken in the first Court against the copy obtained from the Registrar's office being put in evidence. Had such objection been made at the time, the District Judge, who tried the case in the first instance, would probably have seen that the deficiency was supplied. Their Lordships think that there is no substance in the present contention."

10. The question fell for consideration before a Division Bench of the Andhra Pradesh High Court in **Ajjarapu Subbarao vs Pulla Venkata Rama Rao and others, AIR 1964 AP 53.** The point was raised and decided in very clear terms by their Lordships thus:

"15. Now, one legal aspect deserves to be pointed out at some length. The learned single Judge has, in respect of the majority of documents mentioned above, stated that they are inadmissible on account of the provisions of Section 65 of the Evidence Act. This view does not appear to us to be tenable. The rule in Section 65 excluding secondary evidence is not so rigid as to be enforced even if no objection was taken at the trial by the party against whom the secondary evidence was offered. When a party has waived proof of circumstances justifying the giving of secondary evidence, he cannot raise the objection in appeal, vide Bacharbhai Mohanlal, AIR 1956 Bom 196. A document can be treated as duly admitted where, its admission without being proved is not objected to by the party affected, vide Latchayya Subudhi v. Seetharamayya, 84 Ind Cas 921 : (AIR 1925 Mad 257). Where the objection to be taken h not that the document is in itself inadmissible, but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before it is marked as exhibit and admitted. A party cannot lie by until the case comes in appeal. A strictly formal proof might have been forthcoming had it been insisted on at the trial. The question of proof of a document is a question of procedure and can be waived. On the other hand, questions of relevancy of documents are questions of law and can be raised at the appellate stage as well. There was thus no justification for the learned Judge to have rejected the documents on the mere ground that they are certified copies and not the originals when, as a matter of fact, no such objection was ever taken in the trial Court or even in the memorandum of appeal before the learned Judge."

11 . To similar effect is the holding of the Full Bench of the Andhra Pradesh High Court in **The Land Acquisition Officer,**

Vijayawada Thermal Station v. Nutalapati Venkata Rao, AIR 1991 AP 31, where it is held:

"14. Summarising the position, we hold that any objection as to the mode of proof of a document has to be taken at the stage of marking of a document at the trial under O. 13, R. 4, C.P.C. If no objection is raised at that stage, it cannot be permitted to be raised at any stage subsequently in the same Court or in the Court of appeal. If, for example, the original sale deed or a certified copy thereof is marked as an exhibit without objection, it cannot be contended later that it cannot be looked into as none connected with it has been called as a witness. Point No. I is held accordingly."

12. It was further on remarked in **The Land Acquisition Officer, Vijayawada Thermal Station v. Nutalapati Venkata Rao** *(supra):*

"30. Summarising the position, we hold firstly that if secondary evidence is allowed to be marked for one party without objection at the trial, no objection can be permitted to be raised by the opposite party at any later stage in the same Court or in appeal that conditions foradducing secondary evidence have not been made out initially. ....."

13. The question was most wholesomely considered by their Lordships of the Supreme Court in **R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple and another, (2003) 8 SCC 752**, thus:

"17. The other document is the rent note executed by Defendant 2 in favour of the plaintiff. Here also the photocopy of the rent note was produced. Defendant 2 when in the witness box was confronted with this document and he admitted to have executed this document in favour of the plaintiff and also admitted the existence of his signature on the document. It is nobody's case that the original rent note was not admissible in evidence. However, secondary evidence was allowed to be adduced without any objection and even in the absence of a foundation for admitting secondary evidence having been laid by the plaintiff.

18. The abovesaid facts have been stated by us in somewhat such detail as would have been otherwise unnecessary, only for the purpose of demonstrating that the objection raised by the defendant-appellant before the High Court related not to the admissibility of the documentary evidence but to the mode and method of proof thereof.

19. Order 13 Rule 4 CPC provides for every document admitted in evidence in the suit being endorsed by or on behalf of the court, which endorsement signed or initialled by the Judge amounts to admission of the document in evidence. An objection to the admissibility of the document should be raised before such endorsement is made and the court is obliged to form its opinion on the question of admissibility and express the same on which opinion would depend the document being endorsed as admitted or not admitted in evidence. In the latter case, the document may be returned by the court to the person from whose custody it was produced.

20. The learned counsel for the defendant-respondent has relied on Roman Catholic Mission v. State of Madras [AIR 1966 SC 1457] in support of his submission that a document not admissible in evidence,

though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court.

23. Since documents Exts. A-30 and A-34 were admitted in evidence without any objection, the High Court erred in holding that these documents were inadmissible being photocopies, the originals of which were not produced."

There is a reference in this decision of their Lordships to the holding of the Privy Council in **Padman v. Hanwanta** *(supra).*

14. The decision of the Supreme Court was followed by this Court in **Sudha Agarwal v. VII Additional District Judge,2006 (4) ALJ 545.**

15. In view of this position of the law, there is no doubt that unless an objection about the admissibility of evidence is taken

in the Court of first instance, where the evidence is led, it cannot be raised in appeal for the first time.

16. A copy of the certificate from the eye specialist, that is signed by the Medical Superintendent, Employees State Insurance Hospital, Sarojini Nagar, Lucknow certifies with a reasoned opinion that the dimmed vision is due to the injury in the left eye. There was no objection raised to this report, wherein a photostat copy was filed before the E.S.I. Court, that the original ought to be filed. The appellant ought to have taken it, whereafter the employee could have produced the original. In the absence of an objection taken by the appellant, the specialist's report opining the dimming of vision as one caused due to injury, cannot be held to be inadmissible. The treatment papers, xerox copies whereof have been filed, relate to the E.S.I. Hospital, Lucknow and are contemporaneous in time to the injury. If the appellants had any objection to the photostat copy of the treatment card, they ought to have objected, which they did not, as the record would show. There is a further report by an eye specialist from the Lala Lajpat Rai Medical College and Hospital, Kanpur dated 15.07.1996, which too opines the loss of vision as one on account of injury. Here also, a photostat copy of the treatment card from the Lala Lajpat Rai Hospital has been filed before the E.S.I. Court. About this document also, no objection was raised as to admissibility before the Judge. There being no such objection, as already remarked on behalf of the appellant before the E.S.I. Court, the objection as to admissibility cannot raised before this Court.

17. At this stage, the decision of a learned Single Judge of this Court in **Employees State Insurance Corporation v. Sarfuddin, 2005 (4) AWC 3289 All**, where, in very similar circumstances, reliance on photostat copies by the E.S.I. Court in an appeal from the Medical Board's decision was not favoured by this Court on the strength of Rule 47 of the Rules, has been pressed in aid of the appellant's case. In **Employees State Insurance Corporation v. Sarfuddin** *(supra)*, it was held:

"14. In the present case no oral evidence of any of the parties was recorded. According to Rule 47 of the Rules, 1952 "in respect of matters relating to procedure or admission of evidence for which no specific provision is made in this rule, the provisions of the Code of Civil Procedure 1908 (V of 1908) including the Rules made thereunder and the Indian Evidence Act, 1872 (1 of 1872) shall so far as may be, apply to proceedings under the Act." There is no evidentiary value of photostat document unless the original is produced and proved by the author of the same in the manner laid down by the Indian Evidence Act. But in the instant case, neither the original was produced/summoned nor the doctor (ENT expert) was examined."

18. It must be remarked in this connection that in the decision of this Court in **Employees State Insurance Corporation v. Sarfuddin**, the point was neither raised nor considered, though involved, whether the failure to raise an objection before the Court of first instance about the admissibility of secondary evidence would disentitle the party from raising it and questioning its admissibility in appeal. The entire principle, that objection as to admissibility about the mode of proof must be taken before the

Court of first instance, was not at all considered by the learned Judge rendering the decision in **Employees State Insurance Corporation v. Sarfuddin.**

19. This issue was never raised, argued or considered by the learned Judge in **Employee State Insurance Corporation v. Sarfuddin**. Thus, the said point or issue passed sub silentio and the decision in the aforesaid case is not a binding precedent on the question involved and decided here. The said decision was concerned only with the principle that the Act of 1872 applies to proceedings before the E.S.I. Court and, therefore, primary evidence has to be led and secondary evidence is not admissible, except in accordance with the provisions of the Act of 1872. It is not a binding precedent at all on the principle about the effect of non-raising of the plea of admissibility of secondary evidence in the Court of first instance and the consequent bar of raising it for the first time in appeal before this Court. The said decision does not at all, therefore, come to the appellant's aid here.

20. The other limb of the substantial question of law is centered around the issue whether on the basis of some prescription slips showing treatment of the employee, a claim about permanent disablement or permanent loss of earning capacity can be inferred. Indeed, the evidence here shows that it is just not prescription slips that the employee has relied upon to substantiate his claim. It includes a certificate from the eye specialist that is signed by Medical Superintendent, E.S.I. Hospital, Sarojini Nagar, Lucknow, which certifies with a reasoned opinion that the dimmed vision suffered by the employee is on account of the employment injury in the left eye. There is a further report by an eye specialist from Lala Lajpat Rai Medical College and Hospital dated 15.07.1996, which opines in clear terms that loss of vision suffered by the employee is on account of an employment injury. This part of the present substantial question overlaps with the subject matter of Substantial Question of Law No. 2 and would be answered in greater detail while dealing with the second question. It is for this reason that the present question was urged by the appellant more with regard to the issue of secondary evidence, the other part being spared for consideration, while addressing on the Substantial Question of Law No. 2. Suffice it to say here that it is not on the basis of prescription slips alone that inference about permanent disablement has been drawn in favour of the employee.

21. Substantial Question of Law No. (1) is, accordingly, decided in terms that a photostat copy of the prescription slips showing treatment of the employee, if not raised about their admissibility to substantiate the claim of permanent disablement before the E.S.I. Court, cannot be permitted to be raised before this Court on ground that primary evidence ought to have been filed. Also, the employee's claim to permanent disability is not based on mere prescription slips, but on better and relevant evidence.

22. So far as the second substantial question of law is concerned, the employee has produced not only just prescription slips about his treatment, but also medical certificates and treatment papers to establish that the employment injury had led to a permanent dimming of vision in the left eye. There is a copy of the certificate from the eye specialist that is signed by the Medical Superintendent, Employees State Insurance Hospital, Sarojini Nagar,

Lucknow, which certifies with a reasoned opinion that dimmed vision is due to the employment injury in the left eye. The treatment too was undergone by the employee at the E.S.I. Hospital, Lucknow and is contemporaneous in time to the injury. There is a further report by an eye specialist from the Lala Lajpat Rai Medical College and Hospital, Kanpur dated 15.07.1996, which opines in clear terms that loss of vision is one on account of the injury. Now, from all these documents filed before the E.S.I. Court, a well reasoned inference has been drawn about a permanent damage to vision in the left eye, which is a scheduled injury under the Act. The said finding is a pure finding of fact, based on consideration of relevant evidence. Nothing has been shown to this Court by the learned Counsel for the appellant as to how that finding is beset by a flagrant and manifest error of law.

23. So far as the question of burden of proof is concerned, with the employee adducing so much of evidence from which the E.S.I. Court has drawn a reasonable conclusion about the existence of a scheduled injury, it cannot be said that the burden has not been discharged by the employee.

24. Insofar as the loss of benefits in consequence of the *injury* is concerned, the injury being a scheduled injury under Serial No. 32-A of Schedule-I appended to the Act, the percentage loss of earning capacity is provided by the Statute itself, not requiring any further evidence to establish it.

25. Substantial Question of Law No. (2) is, accordingly, **answered in the negative** in the aforesaid terms.

26. In the result, the appeal **fails** and stands ***dismissed***.

27. There shall, however, be no order as to costs.

(2022)05ILR A649
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.03.2022

BEFORE

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

First Appeal From Order No. 146 of 2017

Smt. Resha Gupta & Ors. ...Appellants
Versus
Sayeed Ahmad & Ors. ...Respondents

Counsel for the Appellants:
Sri Vidya Kant Shukla

Counsel for the Respondents:
Sri Pawan Kumar Singh

Civil Law - Motor Vehicles Act, 1988 - Section 168 - Motor Accident claim - accident occurred on 16.12.2014, deceased was 32 years of age at the time of accident and was in self business having his business -his income was considered by the Tribunal to be Rs.2,89,850/- per annum, which is just - deceased was in the age bracket of 31-35, therefore 40% of the income will have to be added as future loss of income - deduction of 1/3rd granted by the Tribunal is just and proper as the dependents on deceased were widow, mother and a six year old minor daughter. The multiplier of 17 granted by the Tribunal would be recalculated as 16 - amount under non-pecuniary heads should be at least Rs.1,00,000 - deceased was driving car which is a smaller vehicle compared to truck - driver of the truck did not step into the witness box though he is best witness - charge sheet laid was against the driver of truck - finding of Tribunal upheld that the deceased was

25% negligent and was co-author of accident - interest should be 7.5% - from the date of filing of the claim petition till the amount is deposited (Para 6, 9, 10, 11)

Allowed. (E-5)

List of Cases cited:

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

2. Sarla Verma Vs Delhi Transport Corp., (2009) 6 SCC 121

3. Bajaj Allianz General Insurance Co.Ltd. Vs Smt. Renu Singh & ors. First Appeal From Order No. 1818 of 2012 decided on 19.7.2016

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

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

6. Smt. Hansagauri 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 Vidya Kant Shukla, learned counsel for the appellants, Sri Pawan Kumar 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 20.10.2016 passed by Motor Accident Claims Tribunal/Additional District Judge, Kanpur Nagar (hereinafter referred to as 'Tribunal') in M.A.C.No.61 of 2015 awarding a sum of Rs.24,74,984/- with interest at the rate of 7% as compensation As the appeal can be decided on settled legal position for calculation and hence record and paper book by consent of all we dispensed, so that both both competing parties can be benefited for the insurance company can save huge interest.

3. The accident and involvement of vehicle is not in dispute. The respondent has not challenged the liability imposed on them. The only issue to be decided by this Court is, the quantum of compensation awarded. The age of of the deceased as decided by Tribunal has attained finality.

4. It is submitted by learned counsel for the appellant that the deceased was 32 years of age at the time of accident and was in self business having his business in the name of s M/s Tulsi Industries . His income was considered by the Tribunal to be Rs.2,89,850/- per annum, is also not in dispute. It is further submitted that the Tribunal has not granted any amount towards future loss of income of the deceased which should 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 the amount granted under non-pecuniary damages are on the lower side and it should be as per the decision in **Pranay Sethi (Supra).** Unfortunate aspect is that the Tribunal did not award any amount under the head of future loss of income and granted only Rs.15,000/- for non pecuniary damages and deducted 25% holding deceased guilty of contributory negligence.

5. As against this, learned counsel for the Insurance Company has submitted that the award does not require any interference as the date of accident is 16.12.2014 and the decision of the Tribunal is prior to the judgment of **National Insurance**

Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050 and therefore the Tribunal has not committed any error in not granting the future loss of income and the amount for non pecuniary damages granted are as per U.P. Motor Vehicles Rules, 1998 (hereinafter referred to as the U.P. Rules, 1998").

6. Heard the learned counsels for the parties and considered the factual data. This Court finds that the accident occurred on 16.12.2014 causing death of Ashutosh Gupta who was 32 years of age at the time of accident. The Tribunal has assessed his income to be Rs.2,89,850/- per year which according to this Court is just and proper, looking to his vocation. To which as the deceased was in the age bracket of 31-35, 40% of the income will have to be added as future loss of income, in view of the decision of the Apex Court in **Pranay Sethi (Supra)**. The deduction of 1/3rd granted by the Tribunal is just and proper as the dependents on deceased were widow, mother and a six year old minor daughter. The multiplier of 17 granted by the Tribunal would be recalculated as 16 as per the judgment of Supreme Court in **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121.** 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% (rounded to Rs.3,000/-) be added to Rs.70,000/-. In view of the facts and circumstances of the case, this Court feels no interference is called for as far as deduction of personal expenses is concerned.

7. 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.

8. 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

9. This Court is in complete agreement with the finding of facts as far as negligence is concerned as we concur with the finding of Tribunal as the deceased was driving car which is a smaller vehicle compared to truck. The driver of the truck did not step into the witness box though he is best witness. The charge sheet laid was against the driver of truck. The driver is suppose to be more cautious and therefore we uphold the finding of Tribunal that the deceased be held 25% negligent and was co-author of accident.

10. The total compensation payable is recalculated and is computed herein below:

i. Annual Income Rs.2,89,850/-

ii. Percentage towards future prospects : 40% namely Rs.1,15,940/-

iii. Total income: Rs.2,89,850/- + Rs.1,15,940/- = Rs.4,05,790/-

iv. Income after deduction of 1/3rd towards personal expenses : Rs.2,70,527/-

v. Multiplier applicable : 16

vi. Loss of dependency: Rs.2,70,527 x 16 = Rs.43,28,432/-

vii. Amount under non pecuniary heads : Rs.1,00,000/- + Rs.50,000/- to minor daughter

viii. Total compensation : Rs.44,78,432/-

ix. Compensation payable to claimants after deductions of 25% negligence on the part of the deceased : Rs.44,78,432/- - Rs.11,19,608/- = **Rs.33,58,824/-.**

11. 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."

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

13. Claimants will give their saving account number to the Tribunal once the amounts are deposited. The disbursement would be directly paid to the bank account

of the claimants and rest of the amount will be kept in fixed deposit in the name of claimants, minor daughter and mother for a period of three years as more than eight years have elapsed after the accident have taken place.

14. 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.

15. 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.

16. Fresh Award be drawn accordingly as per above direction. The Tribunal shall draw fresh award 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.

(2022)05ILR A654
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.04.2022

BEFORE

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

First Appeal From Order No. 235 of 2014

Ashok Kumar ...Appellant
Versus
Smt. Chhinamalu & Ors. ...Respondents

Counsel for the Appellant:
Sri B.P. Verma

Counsel for the Respondents:
Sri Ashok Kumar Srivastava, Sri Amaresh Sinha, Sri Anubhav Sinha

Civil Law - Motor Vehicles Act,1988 - Section - 168 - Motor Accident claim - Injured Claimant - future loss of income - claimant, a mechanical engineer in Navy, was injured in road accident and his right leg was amputated - Tribunal held that as the appellant is still in service and getting salary as per rules, he cannot be said to have suffered loss of income - Held - even if a person, who is in employment but has suffered due to accidental injuries, he would be entitled to claim compensation -

In the present case due to amputation of leg, promotions were not granted to the appellant and due to denial of promotion, he would have future financial loss during service and even after service, he will have loss of post retirement pensionary benefits, hence there is a big loss of future income, which should be granted - claimant, a mechanical engineer in Navy, was aged about 22 years at the time of accident hence for loss of future earning, 50% would be added to the income & multiplier of 18 would be applied (Para 19)

B. Civil Law - Motor Vehicles Act, 1988 - Section 168 - Motor Accident claim – claimant injured in road accident & his right leg was amputated - disability certificate issued by competent doctor showed permanent disability to the extent of 80% but the learned Tribunal reduced the percentage of disability to 50% - Held - evidence goes to show that the appellant is working in his office and getting salary, hence his functional disability is considered to the tune of 40% (Para 19)

C. Civil Law - Motor Vehicles Act,1988 - Section 168 - Motor Accident claim - Injured Claimant – claimant, a mechanical engineer in Navy, was injured in road accident and his right leg was amputated - service certificate on record shows total salary of the appellant at Rs. 15,198/- per month out of which Rs. 2,313/- got deducted towards various deductions - salary after deduction is Rs. 12,885/- per month - amount payable to the appellant as compensation - For permanent disability : Rs. 16,69,952 - Artificial limb : Rs. 1,00,000 - Pain shock suffering : Rs. 1,00,000 - Loss of amenities : Rs. 2,00,000 - Special diet : Rs. 20,000 - Total : Rs. 20,89,852 - Respondent Insurance Company 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 (Para 23)

Allowed. (E-5)

List of Cases cited:

1. Karthik Subramanian Vs B. Sarath Babu & ors., 2021 (2) TAC 2 1

2. Erudhaya Priya Vs State Express Transport Corp. Ltd., 2020 (3) TAC 1

3. The New India Assurance Co. Ltd. Vs Satish Chandra Sharma & anr., Special Leave to Appeal (C) No.14350 of 2019, decided on 23.2.2022

4. Shivdhar Kumar Vashiya Vs Ranjeet Singh & ors., Civil Appeal No.433 of 2022, decided on 21.1.2022

5. Anisa Begum Vs Oriental Insurance Co. Ltd. & ors., F.A.F.O. No.1418 of 2007, decided on 23.3.2022

6. Anoop Maheshwari Vs Shiv Kumar Singh & ors., FAFO No.3750 of 2009, decided on 7.3.2022

7. Rashmita Biswal & ors. Vs Divisional Manager, National Insurance Co. Ltd. & anr., 2021 0 Supreme (SC) 805

8. Smt. Sarla Verma & ors. Vs Delhi 3 Transport Corporation & anr., reported in 2009 ACJ 1298 & Raj Kumar Vs Ajay Kumar & anr., 2010 0 Supreme (SC) 991

9. U.O.I. & ors. Vs Ashwathanarayan S. Sharma, 1993 (1) G.L.H.1044

10. Raj Kumar Vs Ajay Kumar & anr. (2011) 1 SCC 343

11. Syed. Sadiq & ors. Vs Divisional Manager, United India Insurance Co. Ltd., (2014) 2 SCC 735

12. Kajal Vs Jagdish Chand reported in 2020 (0) AIJEL-SC 65725

13. K. Suresh Vs New India Assurance Co. Ltd. & ors. (2012) 12 scc 274,

14. National Insurance Co. Ltd. Vs Lavkush & anr., 2018 (1) TAC 431

15. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 105

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

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

1. Heard Sri B.P. Verma for the appellant, Sri Anubhav Sinha for New India Assurance Company Limited and Sri Ashok Kumar Srivastava for the National Insurance Company Limited.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 28.10.2013 passed by Motor Accident Claims Tribunal/Addl. District Judge, Court Room No.20, Agra (hereinafter referred to as 'Tribunal') in M.A.C.P. No. 157 of 2010 awarding a sum of Rs. 7,38,000/- with interest at the rate of 7% as compensation.

3. The brief relevant facts are that a claim petition was filed by the appellant-claimant, who was injured in road accident and his right leg was amputated. It is averment in plaint that the injured was serving in Indian Navy. On 9.4.2009 he was going with one Satish Kumar on motorcycle bearing no. AP04G 1840 from guard-room to his unit. Motorcycle was being driven by Satish Kumar. A car No.AP31TV-0145 came from opposite direction and by driving rashly and negligently its driver dashed the car with the motorcycle. In this accident, the appellant sustained serious injuries and his right leg was amputated. At the time of accident, he was mechanical engineer in Navy and was getting salary Rs. 18,000/- per month.

4. The accident is not in dispute. Insurance company did not object to the liability to pay compensation except the quantum. Issue of negligence has not been challenged by respondent. Now, there remains only the question of quantum of compensation to be decided.

5. Learned Counsel for the appellant submitted that in the accident, the appellant sustained serious injuries. His right leg sustained compound fractures. At last during the treatment, the leg of the appellant was amputated from the knee joint and he became permanently disabled. It is further submitted that disability certificate showing permanent disability to the extent of 80% was issued by competent doctor but the learned Tribunal reduced the percentage of disability to 50% and hence less compensation was awarded. It was also submitted that the appellant was treated in government hospital and his expenditure on treatment were Rs. 15,000/- which was not granted by the Tribunal.

6. Learned Counsel for the appellant submitted that the Tribunal reduced the percentage of disability to 50% for body as a whole even then compensation for disability was not awarded as per decisions cited by claimant and it was held by the Tribunal that as the appellant is still in service and getting salary as per rules, he cannot be said to have suffered loss of income. He had loss of income only for going and coming back to the office and the same was considered only Rs. 3,000/- per month as future loss of income. It is submitted by learned Counsel that due to amputation of leg, promotions were not granted to the appellant hence there is a big loss of future income, which should be granted.

7. Learned Counsel for the appellant-claimant has heavily relied on the decisions of the Apex Court in **Karthik Subramanian Vs. B. Sarath Babu and others, 2021 (2) TAC 1, Erudhaya Priya Vs. State Express Transport Corporation Ltd., 2020 (3) TAC 1 The New India Assurance Company Ltd. Vs. Satish Chandra Sharma and another, Special Leave to Appeal (C) No.14350 of 2019, decided on 23.2.2022, and Shivdhar Kumar Vashiya Vs. Ranjeet Singh and others, Civil Appeal No.433 of 2022,** decided on 21.1.2022, and has contended that even if a person, who is in employment but has suffered due to accidental injuries, he would be entitled to claim compensation. The learned Counsel for the appellant has further relied on the decisions of the Apex Court in the case of Anisa Begum mother of deceased Vs. Oriental Insurance Company Lted and others, F.A.F.O. No.1418 of 2007, decided on 23.3.2022 and the same would enure for the benefit of the appellant also and the decision in Anoop Maheshwari Vs. Shiv Kumar Singh and others, FAFO No.3750 of 2009, decided on 7.3.2022 will also enure for the benefit of the appellant. It is also submitted that only Rs. 50,000/- was awarded for pain shock suffering and a very meagre amount of Rs. 20,000/- was awarded for loss of amenities.

8. Learned Counsel for the Insurance company vehemently opposed the submissions made by the appellant and submitted that the certificate of 80% disability is not for the whole body disability of the appellant. The appellant is government servant and still working in his office as before the accident. Hence, he has no loss of earning capacity. Hence, the learned Tribunal has rightly considered Rs.3,000/- as loss of future income. The compensation on other heads is also sufficiently awarded which call for no interference by this Court.

9. Learned Counsel has relied on the decision in ***R*ashmita Biswal and others Vs. Divisional Manager, National Insurance Company Ltd. And another, 2021 0 Supreme (SC) 805, *Smt. Sarla Verma and others Vs. Delhi Transport Corporation and another, reported in 2009 ACJ 1298 and Raj Kumar Vs. Ajay Kumar and another, 2010 0 Supreme (SC) 991.***

10. The learned Counsel for the respondents has also relied on the judgment of Satish Chandra (supra) and has contended that the appellant has been adequately compensated and the injury certificate was not for entire body. He is not immobilized. He can perform his daily job and, therefore, no amount be added and the appeal requires to be dismissed ***(Union of India and others Versus Ashwathanarayan S. Sharma, 1993 (1) G.L.H.1044).***

11. It is admitted fact that appellant was government servant in armed forces. The appellant is still working in his office. The claimant would loss future income. A perusal of impugned judgment shows that just compensation is not awarded by the Tribunal.

12. Before computation of compensation, it is worth mentioning that the principles regarding the determination of just compensation, contemplated under the Motor Vehicles Act (hereinafter referred to as "MV Act') are well settled in view of the decision in ***Raj Kumar Vs. Ajay Kumar and another, reported in (2011) 1 SCC 343 and Syed. Sadiq and***

others Vs. Divisional Manager, United India Insurance Company Limited, (2014) 2 SCC 735 Injuries caused deprivation to the body, which entitles the claimant to claim damages. It is impossible to compensate human sufferings and personal deprivation with money. However, this is what the MV Act enjoins upon the courts to do. The Court has to make a judicious attempt to award damages so that the claimant or the victim may be compensated for the loss suffered by him. The damages may vary according to the gravity of the injuries sustained by the claimant in an accident. On account of injury, the claimant may suffer consequential loss such as loss of earnings as well as future earnings, medical expenditure, special diet and attendant charges etc. Victim may suffer non-pecuniary damages also in the form of loss of pleasure of life by particular limb of the body. In this way, damages can be pecuniary as well as non-pecuniary. The Court/Tribunal should keep in mind that compensation awarded must be just compensation because the damages assessed for personal injuries should be substantial to compensate the injured for the deprivation suffered by him throughout his life.

13. Recently the Apex Court in ***Kajal Vs. Jagdish Chand reported in 2020 (0) AIJEL-SC 65725***, has quoted pertinent observations from a very old case Philips Vs. Western Railway Company (1874) 4QBD 406 as under:

"You cannot put the plaintiff back again into his original position, but you must bring your reasonable common sense to bear, and you must always recollect that this is the only occasion on which compensation can be given. The plaintiff can never sue again for it. You have, therefore, now to give him compensation once and for all. He has done no wrong, he has suffered a wrong at the hands of the defendants and you must take care to give him full fair compensation for that which he has suffered." Besides, the Tribunals should always remember that the measures of damages in all these cases "should be such as to enable even a tortfeasor to say that he had amply atoned for his misadventure."

14. Hon'ble Apex Court has further quoted pertinent observations from a very old case H. West & Son Ltd. v. Shephard 1963 2 WLR 1359 as under:

"Money may be awarded so that something tangible may be procured to replace something else of the like nature which has been destroyed or lost. But money cannot renew a physical frame that has been battered and shattered. All that Judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common assent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards.

In the same case Lord Devlin observed that the proper approach to the problem was to adopt a test as to what contemporary society would deem to be a fair sum, such as would allow the wrongdoer to "hold up his head among his neighbours and say with their approval that he has done the fair thing", which should be kept in mind by the court in determining compensation in personal injury cases."

15. Section 168 of MV Act stipulates that there should be grant of just compensation. Thus, it becomes challenge for a Court of law to determine just compensation which should not be bonanza for the claimant/victim and at the same time it should not be too meagre.

16. The Apex Court in Rajkumar Vs Ajay Kumar and others (2011) 1 SCC 343 has laid down the heads under which compensation is to be awarded for personal injuries which is as follows:

"Pecuniary damages (Special damages)

(I) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii) (a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life.

17. In ***K. Suresh v. New India Assurance Company Ltd. and Ors. (2012) 12 scc 274,*** Hon'ble the Apex Court has held as follows :

"2...There cannot be actual compensation for anguish of the heart or for mental tribulations. The quintessentiality lies in the pragmatic computation of the loss sustained which has to be in the realm of realistic approximation. Therefore, Section 168 of the Motor Vehicles Act, 1988 (for brevity the Act) stipulates that there should be grant of just compensation. Thus, it becomes a challenge for a court of law to determine just compensation which is neither a bonanza nor a windfall, and simultaneously, should not be a pittance."

18. We have perused the judgment of Division Bench of this Court in the case of ***National Insurance Company Limited Vs. Lavkush and another, 2018 (1) TAC 431***, in which the concept of just compensation is discussed elaborately.

19. The injured appellant was getting salary from his office for which he has produced salary certificate on record. Learned Counsel for the appellant has submitted that he was getting salary of Rs. 18,000/- per month. The service certificate on record shows total salary of the appellant at Rs. 15,198/- per month out of which Rs. 2,313/- got deducted towards various deductions. Hence, salary after deduction is Rs. 12,885/- per month which is relevant for computation of compensation. PW-3 is an employee of Indian Navy, who had appeared before the learned Tribunal and **deposed that due to amputation of leg**, the appellant could not get promotions and due to denial of promotion, he would have future financial loss during service and even after service, he will have loss of post retirement pensionary benefits. In our opinion, this is big loss of future earning. Hence, learned Tribunal has committed error by considering only Rs. 3,000/- per month towards loss of future earning and computed it in a wrong way. Hence, for loss of future earning, 50% would be added to the income as held by the Apex Court and also in case titled ***National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 105***, which would be Rs.6,442/-, hence, total income comes to Rs.19,327/-. The age of the appellant was 22 years at the time of accident hence as per **Sarla Verma's** case, the multiplier of 18 would be applied, which would be Rs.41,74,632/-. Although the certificate of disability is issued which shows the disability to the extent of 80% but this is not the whole body disability. The evidence goes to show that the appellant is working in his office and getting salary as per Rules hence his functional disability is considered to the tune of 40%, hence, he would be entitled to get Rs. 16,69,852/- for permanent disability and future earning. The appellant would also be entitled to Rs. 1,00,000/- for artificial limb and for future medicines (post retirement) Rs. 1,00,000/- for pain, shock, suffering. Rs. 2,00,000/- shall be granted to the appellant for loss of amenities. The Tribunal has granted Rs. 20,000/- for special diet which we affirm. As far as the submission of appellant is concerned that he has spent Rs.15,000/- for treatment, learned Tribunal has held in this regard that no such bills or receipt is filed on record. We concur with the findings of the Tribunal as far as medical expenses are concerned as he may have been reimbursed by his employer.

20. On the basis of the above discussions, the amount payable to the appellant as compensation is computed herein below:-

(i) For permanent disability : Rs. 16,69,952/-

(ii) Artificial limb : Rs. 1,00,000/-

(iii) Pain shock suffering : Rs. 1,00,000/-

(iv) Loss of amenities : Rs. 2,00,000/-

(v) Special diet : Rs. 20,000/-

Total : Rs. 20,89,852/- (Rs.20,90,000/- round up)

21. 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."

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

23. 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 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.

24. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein.

(2022)05ILR A661
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.04.2022

BEFORE

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

First Appeal From Order No. 316 of 2012

Smt. Vinita Kesarwani & Ors. ...Appellant
Versus
The Oriental Insurance Co. Ltd. & Anr. ...Respondents

Counsel for the Appellants:
Sri Neeraj Singh, Sri Sharve Singh

Counsel for the Respondents:
Sri Ashok Kumar Jaiswal, Sri S.N. Mishra, Sri Siddharth Jaiswal

Civil Law - Motor Vehicles Act, 1988 - Section 168 - Motor Accident claim - Negligence - on the intervening night of 7/8.3.1998 at 00.30 am truck being driven rashly and negligently dashed the Maruti Car coming from opposite direction causing instantaneous death of driver of Maruti car- Deceased was 39 years of the age at the time of accident, was doing wholesale trading in fruits and was earning Rs.20,000/- per month - deceased was survived by his widow, two minor children and mother – Held - there was a head on collision between car and the truck - Tribunal rightly held the deceased negligent to the tune of 50% - Deceased income in the Income Tax Return was Rs. 1,20,000, the income of the deceased would be considered to be Rs.1,20,000 per annum - as per postmortem report, the deceased was 40 years of age, hence, addition towards future loss of income would be 25% - accident took place in the year 1998, the deceased was survived by two minor children and widow Court awarded Rs.50,000/- to the widow and Rs.40,000/- each to the minor children - rate of interest should be 3% from the date of filing of the claim petition till the amount if deposited and till then 6% if the same has not been paid along with interest (Para 14, 15, 16, 18, 20)

Allowed. (E-5)

List of Cases cited:

1. National Insurance Comp. Ltd. Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 105

2. Bajaj Allianz General Insurance Co.Ltd. Vs Smt. Renu Singh & ors. First Appeal From Order No. 1818 of 2012 decided on 19.7.2016

3. Archit Saini & anr. Vs Oriental Insurance Company Limited, AIR 2018 SC 1143

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

5. Smt. Hansaguri P. Ladhani Vs The Oriental Insurance Comp. Ltd., reported in 2007(2) GLH 291

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

7. Bajaj Allianz General Insurance Comp. Pvt. Ltd. Vs Union of India & ors. vide order dated 27.1.2022

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

1. Heard Sri Sharve Singh, learned counsel for the appellants and Sri Siddarth Jaiswal, learned Advocate appearing Sri Ashok Kumar Jaiswal, learned counsel for the respondent.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 27.9.2011 passed by Motor Accident Claims Tribunal/Special Judge, (SC/ST Act), Allahabad (hereinafter referred to as 'Tribunal') in Claim Petition No. 292 of 1998 awarding a sum of Rs.3,09,500/-.

3. Brief facts of the case are on the intervening night of 7/8.3.1998 at 00.30 am. on Allahabad-Kanpur Road near Chauphatka which lies within the jurisdiction of Police Station Cantt, Allahabad, the truck bearing No.MP17A/0066, which was being driven rashly and negligently dashed the Maruti Car No.UGV-4647 from opposite direction causing instantaneous death of Vinod Kumar Kesarwani who was driving the Maruti Car.

4 . Deceased- Vinod Kumar Kesarwani was 39 years of the age at the time of accident, was doing wholesale trading in fruits and was earning Rs.20,000/- per month. The deceased was survived by his widow, two minor children and mother. The Tribunal has considered his income to be Rs.5,000/- per month, deducted 1/3rd towards personal expenses of the deceased, granted multiplier of 15, granted Rs.9,500/- under non-pecuniary heads and ultimately assessed the total compensation to be Rs.6,00,000/-. The Tribunal held the deceased-who was driving the Car negligent to the tune of 50% and apportioned the amount of compensation to the tune of 50%. The claimants were therefore granted amount of Rs.3,00,000/- plus Rs. 9,500/- as compensation.

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 50%. 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.MP-17A-0066 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 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 Tribunal has not granted interest on the compensation which is bad in the eye of law.

7. As against this, Sri Siddarth Jaiswal, 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 50% as there is head on collision and therefore, it cannot be said that the driver of the truck was solely negligent.

8. It is further submitted by learned counsel for the respondent that the quantum of compensation and non-grant of interest 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 though it 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. A similar view has been taken by 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] andPazhaniammal 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. As there was a head on collision between car and the truck, we are unable to accept the submission of the learned counsel for the appellant that the Tribunal should not have considered the negligence of the deceased to the tune of 50%. We are in agreement with the submission made by Sri Jaiswal and on the basis of material on record, negligence as considered by the Tribunal is just and proper.

15. This takes this Court to the issue of compensation. As far as income of the deceased is concerned, the Tribunal has not considered the Income Tax Returns. The balance sheets of income and audit report for the year 1994-95, 95-96, 96-97 & 97-98 were before the Tribunal and have also been shown to us by the counsel for the appellant as the record is not before us and as there are conciliation going on so that the Insurance Company may not be saddled with heavy interest. We have perused the record which shows his income was in the Income Tax Return to be Rs.1,20,000/- who are shown to be propriety of M/s Sailesh Kumar Sushil Kumar & Company and therefore the finding of the Tribunal that what was the share of the deceased in the income of the firm, is bad and cannot stand the scrutiny of this Court. Hence, the

income of the deceased would be considered to be Rs.1,20,000/- per annum.

16. As far as future loss of income is concerned, learned counsel for the appellant has submitted that 40% should be added towards future loss of income of the deceased. As against this, learned counsel for the respondent states that as per postmortem report, the deceased was 40 years of age, hence, even if this Court considers the judgment in Pranay Sethi (Supra), addition towards future loss of income would be 25%.

17. In Pranay Sethi (Supra), the words used are 'below 40 years' and unless it is clarified that the deceased was below 40 years, addition of 40% is not possible. Hence, we accept the submission of learned counsel for the respondent and hold that 25% should be added in the income to the deceased towards future loss. Deduction of 1/3rd towards personal expenses and multiplier of 15 granted by the Tribunal are just and proper.

18. As far as the amount under the head of non-pecuniary damages is concerned, the accident took place in the year 1998, the deceased was survived by two minor children and widow, we award Rs.50,000/- to the widow and Rs.40,000/- each to the minor children who have lost their father at a very tender age.

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

i. Annual Income Rs.1,20,000/-

ii. Percentage towards future prospects : 25% namely Rs.30,000/-

iii. Total income : Rs. 1,20,000 + 30,000 = Rs.1,50,000/-

iv. Income after deduction of 1/3rd : Rs.1,00,000/-

vi. Multiplier applicable : 15

vii. Loss of dependency: Rs.1,00,000 x 15 = Rs.15,00,000/-

viii. Amount under non-pecuniary head : 50,000 + 40,000 + 40,000 = Rs.1,30,000/-

ix. Total compensation : 16,30,000/-

x. Compensation payable to claimants after deductions of 50% negligence on the part of the deceased : 8,15,000/-

20. As far as issue of rate of interest is concerned, it should be 3% from the date of filing of the claim petition till the amount if deposited and till then 6% if the same has not been paid along with interest within 12 weeks from today. The amount already deposited be deducted from the amount to be deposited.

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

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.

23. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V.**

Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442, the order of investment be passed by Tribunal..

24. 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.

25. 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.

26. The Tribunal shall follow the guidelines issued by the Apex Court in **Bajaj Allianz General Insurance Company Private Ltd. v. Union of India and others** vide order dated 27.1.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. As long time has elapsed, the amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R.

(2022)05ILR A669
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.03.2022

BEFORE

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

First Appeal From Order No.356 of 1992

Smt. Kamleshwari Devi & Anr.
...Appellants
Versus
Shiv Murti Lal & Anr. ...Respondents

Counsel for the Appellants:
Sri V.C. Srivastava, Ms. Anubha

Counsel for the Respondents:
Sri A.K. Shukla, Sri Arvind Kumar

Civil Law - Motor Vehicles Act, 1988 - Section 168 - Motor Accident claim - deceased, a bachelor, was a security-guard - deceased was survived by mother and younger brother - He is deposed to be earning Rs. 800 per month - Held - Income Rs. 800 per month - deceased was in the age bracket of 36 - 40 years, 40% will have to be added towards future prospects : 40% namely Rs.320 - Total income : Rs. 800 + 320 = Rs. 1,120 - deceased was a bachelor and, therefore, deduction of 1/2, Income after deduction of 1/2 : Rs. 560 - Annual income : Rs. 560 x 12 = Rs.6,720 - Multiplier applicable : 15 - Loss of dependency: Rs.6,720 x 15 = Rs. 1,00,800 - Amount under non pecuniary heads : Rs.40,000 - Amount under medical

expenses : Rs. 3,000 - Total compensation : Rs. 1,43,800 - Insurance Company shall deposit the amount with interest at the rate of 6% from the date of filing of the claim petition till the amount is deposited

Allowed. (E-5)

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

1. Heard learned counsel for the appellant and Sri A.K. Shukla, learned counsel for the respondent. None appears for Insurance company though 30 years have elapsed since sending notice.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 18.12.1991 passed by Motor Accident Claims Tribunal/IX Addl. District Judge, Allahabad (hereinafter referred to as 'Tribunal') in M.A.C.P. No. 174 of 1987 awarding a sum of Rs. 30,000/- with interest at the rate of 12% as compensation. Thirty years have passed by when mother and younger brother lost the sole bread winner.

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is not in dispute. The Insurance Company has not challenged the liability imposed on them. The only issue to be decided is the quantum of compensation awarded.

4. The deceased was a security-guard. The deceased was survived by mother and younger brother. He is deposed to be earning Rs.800/- per month. The Tribunal has considered the income of the deceased to be Rs.800/- per month in the year 1987 and granted multiplier of 5 only and did not add any amount under the head of future loss of income and for medical expenses has granted Rs. 3,000/- and Rs.3,000/- for funeral expenses.

5. Learned Counsel for the respondents states that the award does not require any interference as the law as propounded under Motor Vehicles Act, 1939, did not specify any amount to be paid under the head of future loss of income nor the U.P. Rules specify the same. The deceased was a bachelor and, therefore, deduction of ½ is just and proper. The multiplier of 5 in those days was considered as just and proper.

6. After hearing the counsel for the parties and after perusing the judgment and order impugned, this Court comes to the conclusion that the income of Rs. 800/- granted by the Tribunal is just and proper, to which as the deceased was in the age bracket of 36 - 40 years, 40% will have to be added and multiplier of 15 would apply. 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.800/- per month

ii. Percentage towards future prospects : 40% namely Rs.320/-

iii. Total income : Rs. 800 + 320 = Rs. 1,120/-

iv. Income after deduction of 1/2 : Rs. 560/-

v. Annual income : Rs.560 x 12 = Rs.6,720/-

vi. Multiplier applicable : 15

vii. Loss of dependency: Rs.6,720 x 15 = Rs. 1,00,800/-

viii. Amount under non pecuniary heads : Rs.40,000/-

ix. Amount under medical expenses : Rs. 3,000/-

x. Total compensation : Rs. 1,43,800/-

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

8. 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 with interest at the rate of 6% 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.

9. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein.

10. This Court is thankful to both the counsels to see that this very old matter is disposed of.

(2022)05ILR A671
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.03.2022

BEFORE

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

First Appeal From Order No. 463 of 1998

M/S Shriram Investment Ltd. & Anr. ...Appellants

Versus

Smt. Sukhdevi ...Respondent

Counsel for the Appellants:
Sri V.M. Zaidi

Counsel for the Respondent:

Civil Law - Workmen's Compensation Act, 1923 - Section 30 - incident occurred on 28.5.1994, the amount of E.S.I. contribution has been deducted even during this period is a finding of fact - Commissioner rightly not accepted the submissions of appellant-owner - family had given notice to which also there was no rebuttal by the employer that the deceased was not in service - On the contrary, the record shows that he was getting Rs.1000/- per month - judgment dated 16.3.1998 cannot be found fault with - question of law framed are in fact the question of facts

Dismissed. (E-5)

List of Cases cited:

1. Golla Rajanna Etc. Etc. Vs Divisional Manager & anr., 2017 (1) TAC 259 (SC)

2. North East Karnataka Road Transport Corp. Vs Smt. Sujatha decided Civil Appeal No.7470 of 2009 decided on 2.11.2018

3. E.S.I.C. Vs S. Prasad F.A.F.O. 1070 of 1993 decided on 26.10.2017

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

1. Heard Sri V.M. Zaidi, learned Senior Advocate and perused the judgment and order impugned.

2. By way of this appeal, the appellant has challenged the judgment and award dated 16.3.1998 passed by Workmen

Compensation Commissioner/Additional Labour Commissioner, Agra (hereinafter referred to as 'Commissioner') in W.C. Case No. 31 of 1994 awarding compensation of Rs.83,192/- with interest at the rate of 6% for death of sole bread winner of respondents.

3. Recently the Apex Court in such matters has shown its agony for litigating against a poor family who has lost the sole bread winner.

4. The decision of the Apex Court in **Golla Rajanna Etc. Etc. Vs. Divisional Manager and Another, 2017 (1) TAC 259 (SC) and in Civil Appeal No.7470 of 2009 North East Karnataka Road Transport Corporation Vs. Smt. Sujatha decided** on 2.11.2018, precludes me from entering into the factual data under Section 30 of the Workmen's Compensation Act, 1923. However, as learned counsel for the appellant has been heard at length and substantial question of law which has been framed by the counsel for which, this Court while issuing notice did not even admit the appeal and did not frame any question of law way back on 15.5.1998. The respondent for a period of more than 24 years has not been served.

5. The finding of fact goes to show that the deceased was directed to go at the instance of the officer of the appellant. The finding of fact that he was never served with any termination letter which has culminated into his termination belies the theory put forward by the employer that he was no longer in service. The incident occurred on 28.5.1994, the amount of E.S.I. contribution has been deducted even during this period is a finding of fact.

6. Submission of Sri Zaidi, learned Senior Advocate, cannot be countenanced that the deceased was not the employee of the appellant. There is no perversity pointed out by learned Senior Advocate. The learned Commissioner has rightly not accepted the submissions of appellant-owner. The family had given notice to which also there was no rebuttal by the employer that the deceased was not in service. On the contrary, the record shows that he was getting Rs.1000/- per month.

7. In that view of the matter, the judgment dated 16.3.1998 cannot be found fault with. The question of law framed are in fact the question of facts. The provisions of Section 53 of Employees State Insurance Act cannot be made applicable. There was no bar as it was an objection which has been held to be made in eye of law. The relationship of master servant continues. These are all basically the questions of facts which are answered against the appellant.

8. I am supported in my view by the decision of the Apex Court in **Civil Appeal No.7470 of 2009 North East Karnataka Road Transport Corporation Vs. Smt. Sujatha decided** on 2.11.2018 wherein it has been held that the Court has held as under:

"15. Such appeal is then heard on the question of admission with a view to find out as to whether it involves any substantial question of law or not. Whether the appeal involves a substantial question of law or not depends upon the facts of each case and needs an examination by the High Court. If the substantial question of law arises, the High Court would admit the appeal for final hearing on merit else would dismiss in limini with reasons that it does not involve any substantial question/s of law.

16. Now coming to the facts of this case, we find that the appeal before the High Court did not involve any substantial question of law on the material questions set out above. In other words, in our view, the Commissioner decided all the material questions arising in the case properly on the basis of evidence adduced by the parties and rightly determined the compensation payable to the respondent. It was, therefore, rightly affirmed by the High Court on facts.

17. In this view of the matter, the findings being concurrent findings of fact of the two courts below are binding on this Court. Even otherwise, we find no good ground to call for any interference on any of the factual findings. None of the factual findings are found to be either perverse or arbitrary or based on no evidence or against any provision of law. We accordingly uphold these findings."

9. This Court, recently in **F.A.F.O. 1070 of 1993 (E.S.I.C. Vs. S. Prasad)** decided on 26.10.2017 has followed the decision in **Golla Rajana (Supra)** and has held as follows:

"The grounds urged before this Court are in the realm of finding of facts and not a question of law. As far as question of law is concerned, the aforesaid judgment in ***Golla Rajanna Etc. Etc. Versus Divisional Manager and another (supra)*** *in paragraph 8 holds as follows "the Workman Compensation Commissioner is the last authority on facts. The Parliament has thought it fit to restrict the scope of the appeal only to substantial questions of law, being a welfare legislation. Unfortunately, the High Court has missed this crucial question of limited jurisdiction and has ventured to re-appreciate the evidence and recorded its own findings on percentage of disability for which also there is no basis."*

10. In view of the above, this appeal sans merit and is dismissed. The amount deposited, if any, would be remitted to the family members with the interest accrued till today.

11. This Court is thankful to Sri V.M. Zaidi, learned Senior Advocate, that he has assisted this court even without his client sending him any instructions.

(2022)05ILR A673
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.04.2022

BEFORE

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

First Appeal From Order No. 890 of 2022

Dinesh Kumar & Anr. ...Appellants
Versus
Prem Singh & Ors. ...Respondents

Counsel for the Appellants:
Sri Ram Singh

Counsel for the Respondents:
Sri Sushil Kumar Mehrotra

Civil Law - Motor Vehicles Act, 1988 - Section . 168 - Motor Accident claim - claimants' appeal claiming enhancement for the death of child who was eight years of age at the time of death - accident of the year 1997- Held - appellants would be entitled to a sum of Rs. 1,56,000 - insurance company would be liable to pay interest on the additional amount at 6% from the date of filing of the appeal till the delay is condoned and 3% thereafter (Para 5, 6)

Allowed. (E-5)

List of Cases cited:

1. Kishan Gopal & anr. Vs Lala & ors., 2013 (101) ALR 281 (SC) 2013 (131) AIC 219 = 2014 (1) AICC 208 (SC)

2. Manju Devi's case, 2005 (1) TAC 609 2005 AICC 208 (SC)

3. United India Insurance Comp. Ltd. Vs Mumtaz Ahmad & anr., 2017 (2) AICC 1229

4. Kurvan Ansari Kurvan Ali Vs Shyam Kishore Murmu, 2021 (0) AIJEL-SC 67995

5. U.P. State Road Transport Corp.Vs Triloki Chand, 1996 ACJ Page 31

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

1. Heard Shri Ram Singh, learned counsel for the appellants, Sri Sushil Kumar Mehrotra, learned counsel for the respondents and perused the judgment and order impugned.

2. This First Appeal From Order has been filed under section 173 of Motor Vehicle Act, 1988 (hereinafter referred to 'Act, 1988') by appellants being aggrieved by order dated 25.5.2002 passed by the Motor Accident Claims Tribunal/Additional District Judge, Court No.5, Fatehpur in M.A.C.P. No.173 of 1997 awarding sum of Rs.71,000/- with interest at the rate of 9%.

3. This is a claimants' appeal claiming enhancement for the death of child who was eight years of age at the time of death. Learned counsel for the appellant has submitted that in the year 1997, normally the amount awardable to the child would be at least Rs.1,56,000/- and has relied on the decisions of this Court and Apex Court in **Kishan Gopal and another v. Lala and others, 2013 (101) ALR 281 (SC) = 2013 (131) AIC 219 = 2014 (1) AICC 208 (SC) and Manju Devi's case, 2005 (1) TAC 609 = 2005 AICC 208 (SC)** relied by this Court in its recent decision of this Court in United India **Insurance Company Limited. Vs. Mumtaz Ahmad and Another, 2017 (2) AICC 1229** wherein this Court held as follows:

*"6. Sri Ram Singh has heavily relied on the decision in the case of **Kishan Gopal and another v. Lala and others, 2013 (101) ALR 281 (SC) = 2013 (131) AIC 219 = 2014 (1) AICC 208 (SC) and Manju Devi's case, 2005 (1) TAC 609 = 2005 AICC 208 (SC).** It goes without saying the notional figure fixed by the Apex Court since **Manju Devi's** judgment has been consistently Rs.2,25,000 for children below the age of 15 years. I think that is just and proper and hence, the amount requires to be enhanced from Rs.1,57,000 to Rs.2,25,000 with 6% be recovered from the owner. The appeal is partly allowed. The cross-objection is also partly allowed."*

4. As against this, learned counsel for the respondent has submitted that the amount awarded is just and proper as the accident is of the year 1997.

5. 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. The concept of just compensation has been lost site of by the Tribunal. The decision which would hold the feel would not be the judgment of **Kisan Gopal (Supra) and *Kurvan Ansari Alias Kurvan Ali*** but would be the judgment of **Manju Devi's case, 2005 (1) TAC 609 = 2005 AICC 208 (SC)** which

has relied on the judgment of Apex Court in **U.P. State Road Transport Corporation Vs. Triloki Chand, 1996 ACJ Page 31. The recent decision in Manju Devi (Supra)** will enure for the benefit of the appellant. The appellants would be entitled to a sum of Rs.1,56,000/-.

6. Interest granted by the Tribunal is modified. This appeal remain has defective appeal since 2004 and delay was condoned in the year 2022 and the matter is taken up for final disposal, Hence, insurance company would be liable to pay interest on the additional amount at 6% from the date of filing of the appeal till the delay is condoned and 3% thereafter. The amount already deposited, be deducted.

7. In view of the above, the appeal is **partly allowed.** The additional amount be recalculated with interest as directed above and deposited within 8 weeks from today. The judgment and award passed by the Tribunal shall stand modified to the aforesaid extent.

8. This Court is thankful to both the counsels for ably assisting this Court in getting this appeal disposed off.

(2022)05ILR A675
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.04.2022

BEFORE

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

First Appeal From Order No. 926 of 2011

Smt. Kamlesh Devi & Anr. ...Appellants
Versus
U.P. State Road Transport Corp., Ghaziabad & Anr. ...Respondents

Counsel for the Appellants:
Sri V.B. Keshwarwani, Sri Dharmendra Kumar Gupta, Smt. Kiran Gupta

Counsel for the Respondents:
Sri S.K. Misra

Civil Law - Motor Vehicles Act, 1988 - Section 168 - Motor Accident claim - accident took place in the year 2010 - deceased was 27 years of age bachelor and was Constable in Uttar Pradesh Police - Tribunal not granted any amount towards future loss of income & considered the multiplier of 13 as per the age of the parents - Held - Tribunal was suppose to grant future loss of income as the deceased was in employment - multiplier would be as per the age of the deceased and not that of the parents - appellants are also entitled to a sum of Rs.40,000/- each towards filial consortium and Rs.15,000/- towards funeral expenses - rate of interest is should be 7.5% (Para 8, 9)

Allowed. (E-5)

List of Cases cited:

1. Sarla Verma & ors. Vs Delhi Transport Corp. & anr., 2009 LawSuit (SC)

2. Ramesh Singh & anr. Vs Satbir Singh & anr., 2008 (2) SCC 667

3. Kurvan Ansari @ Kurvan Ali & anr. Vs Shyam Kishore Murmu & anr., 2021 (4) TAC 673 (SC)

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

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

6. Smt. Hansaguri P. Ladhani Vs The Oriental Insurance Comp. Ltd., reported in 2007(2) GLH 291

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

8. Bajaj Allianz General Insurance Comp. 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 Dharmendra Kumar Gupta, learned counsel for the appellant and Sri S.K. Misra, learned counsel for the respondent-Uttar Pradesh State Road Transport Corporation (for short 'U.P.S.R.T.C.').

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 10.12.2010 passed by the Motor Accident Claims Tribunal/ Additional District Judge, Court No.9, Bulandshahr (hereinafter referred to as 'Tribunal') in M.A.C.P No.44 of 2010 awarding a sum of Rs.7,23,344/- as compensation with interest at the rate of 7%.

3. The accident having taken place in the intervening night of 5/6.1.2010 is not in dispute. The vehicle of the U.P.S.R.T.C. being involved in the accident is not in dispute. The issue of negligence decided by the Tribunal has attained finality as U.P.S.R.T.C. 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 2010. The deceased was 27 years of age and was Constable in Uttar Pradesh Police. The Tribunal has considered the income of the deceased to be Rs.9,248/- per month, deducted 1/2 towards personal expenses of the deceased as he was bachelor and in view of the prevailing judgement, granted multiplier of 13 considering the age of the parents. The Tribunal has granted Rs.2,000/- towards funeral expenses.

5. It is submitted by 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. The multiplier of 18 should be granted in view of the decision of the Apex Court in Sarla Verma and others Vs. Delhi Transport Corporation and Another, 2009 LawSuit (SC). It is further submitted that the Tribunal has not granted any amount towards filial consortium which should be granted.

6. It is also submitted by learned counsel for the appellant that the interest awarded by Tribunal is on the lower side and it should be as per the repo rate prevailing in those days.

7. As against this, learned counsel for respondent-U.P.S.R.T.C. has contended that Tribunal has rightly not considered any amount under the head of future loss of income; that the Tribunal has considered the multiplier of 13 as per the age of the parents which is just and proper as it was the law prevailing in those days. Sri Misra has lastly contended that the compensation awarded by the Tribunal is just and proper and does not call for any interference of this Court.

8. Having heard learned counsel for the parties, the present appeal requires to be allowed on two short points. The decision in **Sarla Verma (Supra)** was in vogue when the Tribunal has decided the multiplier and passed the impugned award. The Tribunal was suppose to grant future

loss of income as the deceased was in employment but the same has not been granted by the Tribunal. It has been held in **Sarla Verma (Supra)** that the multiplier would be as per the age of the deceased and not that of the parents. The judgment in **Ramesh Singh and Another vs. Satbir Singh and another, 2008 (2) SCC 667** held that where there is death of young person who has aged parents as sole dependent, the choice of multiplier has to be determined by the age of deceased or parents whichever is higher. The Tribunal seems to have misinterpreted the judgment and not relied on the decision in **Sarla Verma (Supra).** Be that as it may, the law is now well settled and we are unable to accept the submission of Sri Misra that multiplier granted by the Tribunal is just and proper.

9. Hence, to the income of Rs. 9248/- per month, a rough 50% would be added towards future loss of income as the deceased was in permanent job and was below 40 years of age. The deceased being in the age bracket of 26-30, the multiplier would be 17 in view of the decision in **Sarla Verma (Supra)** and as discussed above. Deduction of 1/2 is maintained. The appellants are also entitled to a sum of Rs.40,000/- each towards filial consortium and Rs.15,000/- towards funeral expenses in view of the decision in **Kurvan Ansari @ Kurvan Ali and another Vs. Shyam Kishore Murmu and another, 2021 (4) TAC 673 (SC).**

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

i. Monthly Income: Rs.9,248/-

ii. Percentage towards future prospects : 50% namely Rs.4,624/-

iii. Total income : Rs.9,248 + 4,624 = Rs.13,872/-

iv. Income after deduction of 1/2 towards personal expenses : Rs.6,936/-

v. Annual income : Rs.6,936 x 12 = Rs.83,232/-

vi. Multiplier applicable : 17

vii. Loss of dependency: Rs.83,232 x 17 = Rs.14,14,944/-

viii. Amount under non pecuniary heads : Rs.40,000 + 40,000 + 15,000 = 95,000/-

ix. Total compensation : Rs.15,09,944/-

11. 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."

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

13. 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.

14. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442,** the order of investment be passed by Tribunal..

15. 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.

16. 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.

17. 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.

18. This Court is thankful to both the counsels for getting this matter decided without record which was not necessary as in the judgment there is error apparent on the face of record.

19. We had given chance so that U.P.S.R.T.C. may not have to pay more interest but it has been conveyed by Sri S.K. Misra, learned counsel for U.P.S.R.T.C. has no authority to conciliate the matter.

20. The officer concerned of the U.P.S.R.T.C. may instruct the counsel for conciliation in the matters which are covered by the judgment of the Apex Court and this Court which are only for enhancement purposes so that they can save interest.

(2022)05ILR A679
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.03.2022

BEFORE

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

First Appeal From Order No.930 of 2021

Smt. Praveen Rawat & Ors. ...Appellants
Versus
Anuroop Singh & Anr. ...Respondents

Counsel for the Appellants:
Anju Shukla, Sri Nigamendra Shukla

Counsel for the Respondents:
Sri Rahul Sahai

Civil Law - Motor Vehicles Act, 1988 - Sections 166, & 168 - Motor Accident claim - deceased was traveling in car, all of sudden, a blue bull (Neelgay) came on the way - driver tried to save the blue bull and in that process dashed the car into the tree - In the accident deceased sustained serious injuries and died - Tribunal denied the compensation for the death in a road accident, holding the accident to be the result of 'Act of God', and awarded only Rs.50,000/- for no fault liability - Issue - question is if the blue bull come on the road before a vehicle whether it can be termed as "Act of God" or it was human negligence ? - Held - accident may happen by reason of the play of natural forces or by intervention of human agency or by both - It may be that in either of these cases accidents may be inevitable - But it is only those acts which can be traced to natural forces and which have nothing to do with the intervention of human agency that could be said to be Acts of God - Coming of blue bull on the road before a vehicle, as in the case on hand, cannot be termed as Act of God – In the instant case car dashed into tree, when the driver tried to save the blue bull from hitting the car, which goes to show that the car was being plied at a high speed - Had the car being driven at normal speed, the accident could have been avoided or its impact could be minimized - This fact itself shows the negligence of the driver, who was driving the vehicle at an excessive speed - finding of learned Tribunal holding the accident to be the result of Act of God is not sustainable in the eye of law - Court held that the accident had taken place due to the negligence of the driver of the vehicle involved in the accident (Para 18, 20)

Allowed. (E-5)

List of Cases cited:

1. Anita Sharma & ors. Vs The New India Assurance Co. Ltd. & anr., (2021) 1 SCC 171

2. Parmeshwari Vs Amir Chand, (2011) 11 SCC 635

3. Reliance General Insurance Co. Ltd. Vs Subbulakshmi & ors. C.MA. No. 1482 of 2017 [C.M.P. No. 7919 of 2017. (CMA Sr. No. 76893 of 2016)]

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

5. Bimla Devi & ors. Vs Himachal RTC reported in 2009 (13) SCC 530

6. Nugent Vs Smith. (1876- 1 CPD 423)

7. Rylands Vs Fletcher, 1868 Law Reports (3) HL 330

8. Bithika Mazumdar & anr. Vs Sagar Pal & ors., (2017) 2 SCC 748

9. Oriental 9 Insurance Co. Ltd. Vs Smt. Ummida Begum & ors. F.A.F.O. No. 1999 of 2007

10. Smt. Ragini Devi & ors. Vs United India Insurance Company Ltd. & anr. F.A.F.O. No. 1404 of 1999

11. National Insurance Co. Vs Pranay Sethi [2014 (4) TAC 637 (SC)

12. Smt.Sarla Verma Vs Delhi Transport Corp. [2009 (2) TAC 677 (SC)]

13. Kurvan Ansari @ Kurvan Ali & anr. Vs Shyam Kishore Murmu & anr. [2021 (4) TAC (SC)]

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

15. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Co. Ltd., [2007(2) GLH 291]

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

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

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

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

1. This appeal has been preferred by the claimants-appellants against the judgment & award dated 12.09.2007 passed by learned Motor Accident Claims Tribunal/Additional District Judge, Court No.3, District Ghaziabad in Motor Accident Claim Petition No.232 of 2005 (Smt. Praveen Rawat and Others Vs. Anuroop Singh and another), whereby the learned Tribunal has denied the compensation for the death of Dinesh Kumar Singh Rawat in a road accident, holding the accident to be the result of "Act of God', and awarded only Rs.50,000/- for no fault liability.

2. The claimants-appellants have preferred this appeal for enhancement of quantum of compensation.

3. The brief facts of the case are that claimants-appellants filed a Motor Accident Claim Petition before the Tribunal for seeking the compensation under Motor Vehicles Act, 1988 for the death of Dinesh Kumar Singh Rawat (deceased) in a road accident with the averments that on 28.12.2004 at about 7:00 PM the deceased was traveling from Lucknow to Lakhimpurkhiri in car bearing no. U.P. 32 X 3366. The driver of the car was driving the vehicle very rashly and negligenlty and at a very high speed, all of sudden, a blue bull (Neelgay) came on the way. The driver tried to save the blue bull and in that process dashed the car into the tree. After dashing into the tree, the car overturned. In this accident, the deceased sustained serious injuries and died on way to the hospital for treatment.

4. It is also averred that the age of the deceased was 38 years and he was working as Senior Engineer (Technical) in a private company namely, Aircel (HUTCH). Owner and Insurance Company of the aforesaid vehicle filed their respective written statements. Learned Tribunal held that the accident had taken place due to coming a blue bull on the way suddenly, which was not the fault of the driver and accident had taken place due to Act of God. Consequently, the claim was denied and only Rs.50,000/- was awarded for no fault liability.

5. Aggrieved mainly with the non grant of compensation under Section 166 of Motor Vehicles Act awarded, the appellants have preferred this appeal.

6. Heard learned counsel for the appellants-claimants and learned counsel for the respondents. Perused the record.

7. Learned counsel for the appellants-claimants has submitted that impugned judgment and award is against the law. Learned Tribunal has held that the driver of the car was not negligent but this finding is erroneous because if the vehicle would have been driven with proper care and caution, the accident could have been avoided. Learned Tribunal has adopted incorrect approach, because the vehicle was not being driven at a normal speed. In fact, the driver lost the control on staring and the vehicle dashed into the tree.

8. It is also submitted by learned counsel for the appellants-claimants that at the place of accident, the road was not plain and it was having pits, hence, in such a situation, the driver should have controlled the speed but he failed to do so, which reflects that car was being driven at an excessive speed. It is next submitted that two eye witnesses of the accident were produced, who were not relied upon by the learned Tribunal.

9. Per contra, learned counsel for the Insurance Company has vehemently objected the submissions of learned counsel for the appellants-claimants and submitted that appellants brought the case before the learned Tribunal with the fact that on way to Lakhimpurkhiri, a blue bull came on the road suddenly and to save it, car dashed into the tree and overturned but the alleged eye witnesses have deposed that car was being driven at a very high speed and it tried to overtake a tempo and in this overtaking, the car dashed into the tree. Hence, these two contradictory versions put by the appellants before the learned Tribunal.

10. Learned counsel for the insurance company has pointed out that the owner of the vehicle informed the concerned police station on the same day of the accident. This information was entered in General Diary of the police station, in which it is mentioned that a blue bull came on the road and to save it, the car dashed into the tree. Learned Tribunal also held that the accident had taken place in order to save the blue bull. Blue bull came on the road all of sudden, which was not in control of the driver, it was Act of God and there was no negligent driving by the driver. It is also submitted that this finding is based on fact and evidence on record, which calls for no interference by this Court.

11. Learned Tribunal held that accident took place because a blue bull all of sudden came on the road which was beyond the control of the driver and in order to save the blue bull, the accident took place. Learned Tribunal held this accident, as a result of Act of God. First of all, we have to go into the question whether the accident was the result of Act of God or it was human negligence. While deciding the claim petition, learned Tribunal had not kept in mind the standard of proof in Motor Accident Claim Petition.

12. In ***Anita Sharma and Others Vs. The New India Assurance Co. Ltd. and Another, (2021) 1 SCC 171***, the Full Bench of Hon'ble Apex Court narrated the view taken in ***Parmeshwari Vs. Amir Chand, (2011) 11 SCC 635, t***hat it is very difficult

to trace the witnesses and collecting information for an accident which took place many hundreds of kilometers away and further it is held by Hon'ble Apex Court in ***Anita Sharma and Others (Supra)*** that in a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability.

13. The Division Bench of Madras High Court also held in ***Reliance General Insurance Co. Ltd. Vs. Subbulakshmi and Others,*** passed in C.MA. No. 1482 of 2017 [C.M.P. No. 7919 of 2017. (CMA Sr. No. 76893 of 2016)] has referred the case of ***Puspabai Purshottam Udeshi Vs. Ranjit Ginning and Pressing Co., 1977ACJ 343 (SC),*** in which it is observed that the normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of *res ipsa loquitur*. The general purport of the words *res ipsa loquitur* is that the accident 'speaks for itself or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence. Where the maxim is applied the burden is on the defendant to show either that in fact he was not negligent or that the accident might more probably have happened in a manner which did not connote negligence on his part. For the application of the principle it must be shown that the car was under the management of the defendant and that the accident is such as in ordinary course of things does not happen if those who had the management used proper care.

14. In ***Bimla Devi and Others VS. Himachal RTC reported in 2009 (13) SCC 530***, the Hon'ble Supreme Court held that it was necessary to be borne in mind that strict proof of an accident caused by a particular vehicle in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied.

15. In the case on hand the driver and the deceased only were travelling in the said vehicle at the time of accident. The deceased died due to the injuries sustained by him, hence, the real fact of the accident how and in what manner it had taken place lies only within the knowledge of the driver, who has not stepped into the witness-box. It is not disputed that accident had taken place due to coming of blue bull on the road. The G.D. entry of concerned police station also discloses the fact of accident in order to save the blue bull, which is first version of the accident just after three and half hours.

16. It is the version of appellants-claimants as well as respondents and learned Tribunal also reached to the conclusion that accident took place in order to save the vehicle from blue bull which

came on the road all of sudden. Now here comes the question, if the blue bull came on the road before a vehicle whether it can be termed as "Act of God."

17. While considering the question of inevitable accident or an "Act of God", it will be useful to reproduce a passage from the Law of Torts, by Justice G. P. Singh.

"All causes of inevitable accidents may be divided into two classes.

(1) Those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause; and

(2) Those which have their origin either in the whole or in part in the agency of man, whether in acts of commission or omission, non-feasance or mis-feasance or in any other causes independent of the agency of natural forces. The term 'act of God' is applicable to the former class."

18. Act of God is one arising from natural causes. Some of the well-known instances of "Act of God" are the storms, the tides and the volcanic eruptions. They are, in a sense, inevitable accidents beyond the control of man. What is urged in this case is that all inevitable accidents must be taken as acts of God. Matters which are not within the power of any party to prevent are to be considered as acts of God as per the Insurance Company. We are unable to concur with the aforesaid argument of learned counsel for the Insurance Company. In our view, the accident may happen by reason of the play of natural forces or by intervention of human agency or by both. It may be that in either of these cases accidents may be inevitable. But it is only those acts which can be traced to natural forces and which have nothing to do with the intervention of human agency that could be said to be Acts of God. Cockburn C. J.. in the leading case in ***Nugent v. Smith. (1876-1 CPD 423)*** said.

"It is at once obvious, as was pointed out by Lord Mansfield in Forward v. Pittard, that all causes of inevitable accident--" "fortuitus" -- may be divided into two classes -- those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause, and those which have their origin either in the whole or in part in the agency of man, whether in acts of commission or omission, of nonfeasance or of misfeasance, or in any other cause independent of the agency of natural forces. It is obvious that it would be altogether incongruous to apply the term "act of God" to the latter class of inevitable accident. It is equally clear that storm and tempest belong to the class to which the term "act of God" is properly applicable."

19. In Halsbury's Laws of England, Vol. 8, 3rd Edition, page 183, this question is dealt with as under:

"An act of God. In the legal sense of the term, may be defined as an extraordinary occurrence or circumstance which could not have been foreseen and which could not have been guarded against; or. more accurately, as an accident due to natural causes, directly and exclusively without human intervention, and which could not have been avoided by any amount of foresight and pains and care reasonably to be expected of the person sought to be made liable for it or who seeks to excuse himself on the around of it. The occurrence need not be unique, nor need it be one that happens for the first time; it is

enough that it is extraordinary, and such as could not reasonably be anticipated. The mere fact that a phenomenon has happened once, when it does not carry with it or import any probability of a recurrence (when, in other words, if does not imply any law from which its recurrence can be inferred) does not prevent that phenomenon from being an act of God. It must, however, be something overwhelming and not merely an ordinary accidental circumstance, and it must not arise from the act of man."

20. Coming of blue bull on the road before a vehicle, as in the case on hand, cannot be termed as **Act of God**. It is admitted fact that the car, in which, the deceased was traveling dashed into the tree even it if it is believed that it was while saving the blue bull and overturned in a big pit. This is not the case that vehicle dashed into blue bull but it dashed into tree, when the driver tried to save the blue bull from hitting the car, which goes to show that the car was being plied at a high speed. Had the car being driven at normal speed, the accident could have been avoided or its impact could be minimized. This fact itself shows the negligence of the driver, who was driving the vehicle at an excessive speed. The Rule propounded in ***Rylands Vs. Fletcher, 1868 Law Reports (3) HL 330,*** can apply in motor accident cases.

21. The above Rule eventually gained approval in a large number of decisions rendered by Courts in England and abroad. Winfield on Torts has brought out even a Chapter on the "Rule in ***Rylands Vs. Fletcher***. At page 543 of the 15th Edn. Of the calibrated work the learned author has pointed out that "over the years ***Rylands Vs. Fletcher*** has been applied to a remarkable variety of things; fire gas, explosions, electricity, oil, noxious, fumes, colliery spoil, rusty wire from a decayed fence, vibrations, poisonous vegetation.

22. Act of God or vis major are the forces which no human foresight can provide most and of which human prudence is not bound to recognize the possibility. We are, therefore, of the opinion that even apart from Section 140 of Motor Vehicles Act, a victim in an accident which occurred while using motor vehicle is entitled to get compensation from the Tribunal, unless any exception applies.

23. We are of the considered opinion that if the driver of the vehicle would have taken care and caution while plying the vehicle at normal speed, the accident could have been avoided because it is the finding of learned Tribunal in the impugned judgment that the place where the accident had occurred was near Dudhwa National Park, having forest on both sides of the road and blue bulls are found there in large numbers and possibility of blue bulls coming on the road always remains high. Hence, in these peculiar situation and considering the place of accident, the driver of the vehicle was under extra ruts to show caution and was saddled with the duty to take extra care and caution.

24. The finding of learned Tribunal holding the accident to be the result of Act of God is not sustainable in the eye of law and we hold that the accident had taken place due to the negligence of the driver of the vehicle involved in the accident.

25. The policy being in vogue and though orally submitted by counsel for respondents that there is breach of policy and the insurance company did not challenge the award as the amount awarded was under Section 140 M.V. Act, if this

Court decide not to relegate the appellants to Tribunal. The oral objection be heard. We have perused the record, there is no breach of policy proved which can either exonerate the Insurance Company or permit this Court to grant recovery rights to Insurance Company. The finding of fact that the driver of the vehicle had proper driving licence is concurred with us and, therefore, the Tribunal has held the Insurance Company liable, in which we concur the oral submissions of Mr. Rahul Sahai, learned counsel for the respondent-Insurance company that the Insurance Company should be given recovery rights cannot be acceded.

26. Now, we have to decide the quantum of compensation payable to the appellants-claimants. We first thought that the matter can be relegated to the learned Tribunal for fixation of the quantum of compensation but we are mindful of the fact that this is a case in which the accident happened more than 17 years ago. Hence, we incline to fix the quantum of compensation here itself in view of the judgment of ***Bithika Mazumdar and another Vs. Sagar Pal and Others, (2017) 2 SCC 748*** and of this Court in ***F.A.F.O. No. 1999 of 2007 (Oriental Insurance Company Ltd. Vs. Smt. Ummida Begum and others) and also in F.A.F.O. No. 1404 of 1999 (Smt. Ragini Devi and others Vs. United India Insurance Company Ltd. and another)*** decided on 17.04.2019 wherein it has been held that if the record is with the appellate Court, it can decide the compensation instead of relegating the parties to the Tribunal.

27. The deceased was serving as a Senior Engineer (Technical) in a private company namely, Aircel (HUTCH). Learned counsel for the appellants-claimants has submitted that deceased was getting the salary near about Rs.30,000/- per month at the time of death. The age of the deceased was 33 years and he is survived by his wife and three minor children.

28. *Per contra*, learned counsel for the Insurance Company has objected to it and submitted that the income of the deceased is not proved and the age of the deceased was 38 years.

29. Perusal of record confirms that the deceased was serving in private company namely, Aircel (HUTCH). The salary certificate of the deceased is also on record, which is well proved as the learned Tribunal has exhibited it as Ex. KA-1. It transpires from the salary certificate that monthly salary of the deceased is shown as Rs.25,881/-.

30. According to us, admissible component of salary would include the basic salary, management allowance, house rent allowance, conveyance allowance, pay for position and provident fund, rest of the components shown in the salary certificate are subject to the reimbursement, hence, are not part of the salary. Hence, computable salary would be Rs.21,632/- per month.

31. Since the age of the deceased was below 40 years i.e. 38 years as per the High School Certificate and he was in permanent job, 50% shall be added towards future loss of income as held by Hon'ble Apex Court in ***National Insurance Company vs. Pranay Sethi [2014 (4) TAC 637 (SC)].*** Keeping in view the age of the deceased, multiplier of 15 will be applied in the light of the judgment of Hon'ble Apex Court in the case of ***Smt.Sarla Verma vs. Delhi***

Transport Corporation [2009 (2) TAC 677 (SC)]. The deceased is survived by his wife and three minor children, 1/3rd would be deducted from the salary for personal expenses of the deceased.

32. In the light of judgment of ***Pranay Sethi (Supra)***, claimants shall be entitled to get Rs.15,000/- each for loss of estate and funeral expenses. Apart from it, the wife of the deceased shall also be entitled to get Rs..40,000/- for loss of consortium, which are subject to upward revision of 10% of every three years. In this way, the appellants-claimants shall be entitled to get Rs.1,00,000/- for non-pecuniary heads.

33. Three minor children of the deceased, lost their father at a very tender age, hence, children of the deceased shall be entitled to get Rs.50,000/- each towards filial consortium in the light of the judgment of Hon'ble Apex Court in the case of ***Kurvan Ansari alias Kurvan Ali and another vs. Shyam Kishore Murmu and another [2021 (4) TAC (SC)] .***

34. Hence, the total amount of compensation, in view of the above discussions, payable to the appellants-claimants is being computed herein below:

1.	Annual income i.e. Rs.21,632/- per month X 12	Rs.2,59,584/- P/A
2.	Percentage towards future prospect : 50%	Rs.1,29,792/-
3.	Total income : Rs.2,59,584/- + Rs.1,29,792/- =	Rs.3,89,376/-
4.	Income after deduction of 1/3rd : Rs.3,89,376 - Rs.1,29,792/-	
5.	Multiplier applicable : 15 :- Rs. 2,59,584/- X 15	Rs.38.93,760/-
6.	Amount under non pecuniary head : Rs.15,000 + Rs.15,000 + Rs.40,000/- + 10 % upward revision of every three years.	Rs.1,00,000/-
7.	Filial consortium : Rs.50,000/- X 3	Rs.1,50,000/-
8.	Total compensation : Rs.38,93,760/- + Rs.1,00,000/- + Rs.1,50,000/-	Rs. 41,43,760/-
9.	Amount after deduction of no fault liability : Rs.41,43,760/- - Rs.50,000/-	Rs. 40,93,760/-.

35. It is pointed out by learned counsel for the Insurance Company that the appeal is delayed by 308 days and the interest of the aforesaid period would not be paid to the appellants-claimants.

36. It is rightly pointed out by the learned counsel for the Insurance Company

that appeal is delayed by 308 days, hence, interest of one year should be deducted. 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."

37. We fix the rate of interest as 7.5% per annum till the date of judgment by the learned Tribunal. No interest would be paid for one year after the judgment of learned Tribunal and 6% per annum rate of interest would be paid thereafter.

38. In view of the above, the appeal is **partly allowed**. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount within a period of 12 weeks from today with interest as discussed above 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.

39. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of ***Smt. Hansagori P. Ladhani vs. The Oriental Insurance Company Ltd., [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.

40. The Tribunal shall follow the guidelines issued by the Hon'ble Apex Court in ***Bajaj Allianz General Insurance Company Pvt. Ltd. Vs. Union of India and Others,*** vide order dated 27.01.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. Since long time has elapsed, the amount be deposited in the Saving Bank Account of claimant(s) in a nationalized Bank without F.D.R.

(2022)05ILR A688
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.03.2022

BEFORE

THE HON'BLE SALIL KUMAR RAI , J.

First Appeal From Order No. 955 of 2016

Smt. Servesh Devi & Ors. ...Appellants
Versus
Ankush Agarwal & Ors. ...Respondents

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

Counsel for the Respondents:

A. Civil Law - Motor Accident Act, 1988 – Section 173 – Compensation – Determination of income – Deceased was an unskilled labour – Notional income – Tribunal determined it as Rs. 100/- per day – Validity challenged – Held, notional income of unskilled labour cannot be taken to be less than Rs. 200/- per day – Presumption of Rs. 100/- per day as notional income, even for an unskilled labour in the year 2014, would be frugal and by no stretch of imagination can be considered to be just because even the minimum wages fixed by the State Government were much higher than that – Smt. Resha Devi's case relied upon – High Court re-computed the compensation. (Para 10 and 18)

B. Civil Law - UP Motor Vehicle Rules, 1998 – Rule 220-A (3) – Future prospects – Loss of estate, loss of consortium and funeral expenses – Held, there was no rationale not to add future prospects in the income of the self-employed or a person who is on a fixed salary and such denial would be unjust – 30% has to be added as future prospects in the notional income of the deceased while determining the multiplicand as deceased was 40 years old – Pranay Sethi's case relied upon. (Para 12, 13 and 15)

C. Civil Law - U.P. Motor Vehicle Rules, 1998 – Rule 220-A (4) – Compensations – Loss of love and affection and loss of consortium, whether can be awarded separately – Contradiction in statutory provision and judicial precedent – Though the Rule (4) provide for separate compensation for 'loss of love and affection' and 'loss of consortium', Supreme Court held in *Satinder Singh's case* that loss of love and affection is included in loss of consortium and, therefore, there is no justification to award compensation towards loss of love and affection as a separate head – Held, 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 – Claimants were entitled to separate compensation for loss of consortium and for loss of love and affection – *Urmila Shukla's case* relied upon. (Para 15, 16 and 17)

Appeal allowed (E-1)

List of Cases cited :-

1. New India Assurance Co. Ltd. Vs Smt. Resha Devi & ors.; 2017 (3) ADJ 685

2. National Insurance Co. Ltd. Vs Pranay Sethi & ors.; (2017) 16 SCC 680

3. Magma General Insurance Co. Ltd. Vs Nanu Ram; 2018 SCC OnLine SC 1546

4. United India Insurance Co. Ltd. Vs Satinder Kaur @ Satwinder Kaur & ors.; AIR (2020) SC 3076

5. The New India Assurance Co. Ltd. Vs Smt. Somwati & ors.; (2020) 9 SCC 644

6. New India Assurance Co. Ltd. Vs Urmila Shukla & ors.; 2021 SCC OnLine SC 822

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

1. This is a claimants' appeal under Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as, 'Act, 1988') against the judgment and award dated 17.9.2015 passed by the Motor Accident Claims Tribunal, Aligarh in Motor Accident Claim Petition No. 460 of 2014 (Smt. Sarvesh Devi & Ors. vs. Ankush Agarwal & Ors). The appeal is for enhancement of compensation. The office reports dated 16.12.2019, 24.3.2021 and 10.3.2022 state that notices by registered post as well as ordinary post were issued to the opposite parties but no acknowledgment has been returned nor any undelivered cover has been received back. In view of the aforesaid, service of notice on the opposite parties is deemed sufficient. No one has put in appearance on behalf of the opposite parties. No cross appeal or cross objection has been filed by the opposite parties who are the owners, drivers and the Insurance Company.

2. The facts of the case are that Motor Accident Claim Petition No. 460 of 2014 was instituted by the claimants- appellants under Section 166 of the Act, 1988 alleging that one Har Prasad, working as Raaj Mistri, died in an accident caused due to rash and negligent driving of vehicle, i.e., Truck No. U.P. 81 A.F.-3896 (hereinafter referred to as, "the offending vehicle') by its driver. The accident happened on 21st June, 2014 at 07:00 p.m. The appellant no. 1 is the wife of the deceased, the appellant nos. 2 to 4 are the sons and daughter of the deceased. The appellant nos. 2 to 4 were minor at the time of the institution of the claim petition. The appellant no. 5 is the mother of the deceased. The appellant no. 5 died during the pendency of the case and her legal representatives are already on record as appellant nos. 1 to 4. The opposite party no. 1 is the owner of the vehicle, the opposite party no. 3 is the driver of the vehicle and the opposite party no. 2, i.e., Mega General Insurance Company Limited is the insurer of the offending vehicle. It was stated in the claim petition that at the time of accident, the deceased was 34 years old and earned Rs.15,000/- per month and had no bad habits. On the aforesaid facts, the claimants claimed a compensation of Rs.31,10,000/- with 12% interest from the date of accident.

3. In their written statements the opposite parties denied that the accident was caused due to rash and negligent driving of the offending vehicle and pleaded that the accident occurred due to the negligence of the deceased. In its written statement, the opposite party no. 2, i.e., the Insurance Company denied the factum of accident and also its liability to pay compensation.

4. The Tribunal framed four Issues. Issue no. 1 was regarding the factum of accident and the negligence of the driver of the offending vehicle in causing the accident, Issue no. 2 was as to whether, at the time of accident, the driver of the offending vehicle had a valid driving licence, Issue no. 3 was as to whether at the time of accident, the offending vehicle was insured with opposite party no. 2 and Issue no. 4 was regarding the amount of compensation payable to the claimants and the defendant liable to pay compensation.

5. The Tribunal by its award dated 17.9.2015 decided Issue no. 1 in favour of the claimants and held that Har Prasad had died because of injuries caused in the accident occurring due to rash and negligent driving of the offending vehicle.

Issue nos. 2 and 3 were decided in favour of the owner of the vehicle, i.e., 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 offending vehicle was insured with opposite party no. 2, i.e., the Insurance Company. So far as Issue no. 4 is concerned, the Tribunal granted compensation of Rs. 4,40,000/- with 7% simple interest from the date of institution of the claim petition till the payment of compensation on the notional income of Rs.3,000/- per month after deducting 1/4 as personal expenses of the deceased. The Tribunal, while determining the multiplicand, rejected the plea of the claimants that future prospects had to be added in the national income of the deceased while determining the multiplicand. The Tribunal applied a multiplier of 15 for determining the total compensation after holding that the deceased was 40 years old at the time of accident.

6. As no cross appeal or cross objection has been filed by the opposite parties and no one has appeared on behalf of the opposite parties to contest the findings of the Tribunal, therefore, the findings of the Tribunal on Issue nos. 1, 2 and 3 have become final.

7. The appeal is for enhancement of compensation. It was argued by the counsel for the claimants that the Tribunal has wrongly determined the compensation on the notional income of Rs.100/- per day. It was argued that the accident occurred in 2014 and according to the judgment of this Court in ***New India Assurance Co. Ltd. vs Smt. Resha Devi & Ors. 2017 (3) ADJ 685,*** the multiplicand should have been determined on a notional income of Rs.200/- per day. It was further argued that while quantifying the multiplicand, future prospects were also to be added to the notional income of the deceased. It was also argued that the Tribunal has awarded a very meager amount for loss of spousal consortium and has erred in not grating any compensation for loss of parental and filial consortium to the claimant nos. 2 to 5. It was further argued that under Rule 220-A of the U.P. Motor Vehicle Rules, 1998 (hereinafter referred to as, "Rules, 1998'), the claimants were also entitled to compensation for loss of love and affection and the compensation granted to the claimants for funeral expenses is also not in accordance with the judgment of the Supreme Court in ***National Insurance Company Ltd. vs Pranay Sethi & Ors. (2017) 16 SCC 680.***

8. The counsel for the appellants does not challenge the findings of the Tribunal regarding the age of the deceased which the Tribunal held to be 40 years and has also not challenged the deductions of 1/4 as personal expenses of the deceased.

9. I have considered the submissions of the counsel for the appellants and perused the records.

10. A reading of the award of the Tribunal and a perusal of the records indicate that the claimants had pleaded that before his death in the accident, the deceased worked as *Raj Mistri* and was earning Rs.15,000/- per month. However, the claimants could not produce any evidence to prove their plea that before his death, the deceased was earning Rs.15,000/- per month. In view of the aforesaid, the compensation is to be determined on the notional income of the deceased. The Tribunal has determined the notional income of the deceased as

Rs.100/- per day, i.e., Rs.3,000/- per month. In Smt. Resha Devi (supra), a Division Bench of this Court held that the notional income of unskilled labour cannot be taken to be less than Rs.200/- per day and the presumption of Rs.100/- per day as notional income, even for an unskilled labour in the year 2014, would be frugal and by no stretch of imagination can be considered to be just because even the minimum wages fixed by the State Government were much higher than that. The observations of this Court in Paragraph Nos. 9 to 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. In the case of Santosh Devi Vs. National Insurance Company Limited and others (2012) 6 SCC 421 in paragraph 17 of the reports has observed as under :

"17. Although the wages/income of those employed in organised sectors has not registered a corresponding increase and has not kept pace with the increase in the salaries of the government employees and those employed in private sectors, but it cannot be denied that there has been incremental enhancement in the income of those who are self-employed and even those engaged on daily basis, monthly basis or even seasonal basis. We can take judicial notice of the fact that with a view to meet the challenges posed by high cost of living, the persons falling in the latter category periodically increase the cost of their labour. In this context, it may be useful to give an example of a tailor who earns his livelihood by stitching clothes. If the cost of living increases and the prices of essentials go up, it is but natural for him to increase the cost of his labour. So will be the cases of ordinary skilled and unskilled labour, like, barber, blacksmith, cobbler, mason, etc.

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)

11. In the present case also, the accident occurred in 2014. Following the judgment of the Division Bench of this Court, it would be just and fair to treat the notional income of the deceased as Rs. 200/- per day, i.e., Rs.6,000/- per month.

12. So far as future prospects are concerned, apparently the award of the Tribunal is contrary to the judgment of the Supreme Court in ***Pranay Sethi (supra)***. In **Pranay Sethi (supra)**, it was held that if the deceased was self-employed or on a fixed salary, an addition of 25% should be made in the established income of the deceased to determine the multiplicand if the deceased was between the age of 40 to 50 years. In ***Pranay Sethi (supra),*** the Supreme Court held that there was no rationale not to add future prospects in the income of the self-employed or a person who is on a fixed salary and such denial would be unjust. In this context, the observations of the Supreme Court in Paragraph nos. 57 and 59.4 are reproduced below :-

"57. Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, there is really no rationale not to apply the said principle to the self-employed or a person who is on a fixed salary. ***To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust.*** *The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf*

of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardization on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years and an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable.

58. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma 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:

59.1. 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.

59.2. 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.

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)

13. However, 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.

14. The notional income of the deceased is determined on the basis of minimum wages and thus in accordance with the Rules, 1998, 30% has to be added as future prospects in the notional income of the deceased while determining the multiplicand as deceased was 40 years old.

15. The Supreme Court in ***Pranay Sethi (supra)*** referred to only three conventional heads, namely, loss of estate, loss of consortium and funeral expenses while determining the compensation payable under the Act, 1988. In ***Pranay Sethi (supra)***, it was further held that the compensation under the aforesaid conventional heads should be Rs.15,000/-, Rs.40,000/- and Rs.15,000/-, respectively. However, in ***Magma General Insurance Company Ltd. vs. Nanu Ram 2018 SCC OnLine SC 1546***, the Supreme Court awarded compensations for 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 at Rs.40,000/-. The compensation under the aforesaid heads and for the said amount were paid separately to each of the claimants by the Supreme Court. However, subsequently, the Supreme Court in ***United India Insurance Company Ltd. vs. Satinder Kaur @ Satwinder Kaur & Ors., AIR (2020) SC 3076*** held that loss of love and affection is included in loss of consortium and, therefore, there is no justification to award compensation towards loss of love and affection as a separate head. The aforesaid judgment was followed by the Supreme Court in ***The New India Assurance Company Ltd. vs. Smt. Somwati & Ors., (2020) 9 SCC 644. However, Rule 220-A(4)*** of the Rules, 1998 provides for seperate compensation for 'loss of love and affection' and 'loss of consortium'. Rule 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)

16. A reading of the judgments of the Supreme Court in **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 case. The Supreme Court in ***New India Assurance Company Ltd. vs. Urmila Shukla & Ors. 2021 SCC OnLine SC 822*** has 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 Rules was not put under any challenge. It was further 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 observations of the Court from paragraphs 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)

17. In light of the judgment of the Supreme Court in ***Urmila Shukla (supra)*** read with Rules, 1998, it is held that the claimants were entitled to separate compensation for loss of consortium and for loss of love and affection.

18. On applying the aforesaid principles, it is apparent that the compensation awarded to the claimants by the Tribunal is too meager and is to be enhanced. The compensation payable to the claimants is re-determined as follows :-

(1) Notional income of the deceased = Rs.200/- per day, i.e., Rs.6,000/- per month and Rs.72,000/- per annum.

(2) ¼ deductions for the personal and living expenses of the deceased = Rs.18,000/- (72,000/4).

(3) The dependency of the claimants on the deceased = Rs.54,000/-. (Rs. 72,000/- - Rs. 18,000/-)

(4) Future prospects = 30%, i.e., 54,000 x 30% = Rs.16200/-.

(5) Thus, multiplicand = 54,000 + 16,200 = Rs.70,200/-.

(6) Applying the multiplier of 15, the pecuniary damage would be = 70,200 x 15 = Rs.10,53,000/-.

(7) Compensation under the conventional heads -

(i) Loss of estate = Rs.15,000/-

(ii) Funeral expenses = Rs.15,000/-

(iii) Loss of filial consortium to appellant no. 5 = Rs.40,000/-

(iv) Loss of spousal consortium to appellant no. 1 = Rs.40,000/-

(v) Loss of parental consortium to appellant nos. 2 to 4 = Rs. 40,000 x 3 = Rs.1,20,000/- (Rs. 40,000/- each)

(vi) Loss of love and affection to appellant nos. 1 to 5 = Rs. 50,000 x 5

19. **Thus, the total compensation payable to the claimants = Rs.15,33,000/-.**

20. It is held that the claimants are entitled to a compensation of Rs.15,33,000/- and the award of the Tribunal is modified to the aforesaid extent. The claimants shall be entitled to interest at the rate of 7% per annum as awarded by the Tribunal.

21. The balance amount / enhanced compensation so far as pecuniary damages and compensation for loss of estate and for funeral expenses alongwith the interest on the same. shall be paid to appellant no. 1 who is the widow of the deceased. The appellant no. 1 shall also be entitled to get the enhanced compensation awarded for loss of spousal consortium and Rs.50,000/- for loss of love and affection along with the interest payable on the same. The appellant nos. 2, 3 and 4 shall be entitled to compensation for payment of loss of parental consortium as awarded above and for loss of love and affection as awarded above, i.e., Rs.40,000/- and Rs.50,000/- each under the aforesaid heads along with the interest payable on the same. The appellant no. 5 died during the pendency of the present appeal and, therefore, the compensation awarded to her for loss of love and affection and for loss of consortium along with the interest accruing on the same shall be distributed equally between respondent nos. 1 to 4.

22. The appeal is allowed and the award of the Tribunal is modified to the extent indicated above. The balance amount / excess amount as awarded by this Court in the present appeal shall be deposited by the Mega General Insurance Company Ltd., i.e., opposite party no. 2 in the Tribunal within four months. The amount so deposited by the Mega General Insurance Company Ltd. under the present order of this Court shall be deposited by the

Motor Accident Claims Tribunal, Aligarh 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 appellant no. 1, who is also the guardian of appellant nos. 2 to 4, 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 appellants. The concerned bank or post office shall not permit any loan or advance against the fixed deposits made in favour of the appellants. 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.

23. With the aforesaid directions and observations, the appeal is ***allowed.*** Parties shall bear their own cost.

24. The office shall transmit the records of the case to the Tribunal, at the earliest.

(2022)05ILR A697
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.04.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

First Appeal From Order No. 965 of 2021

Bhagwandas & Anr. ...Appellants
Versus
Smt. Rammi Devi & Ors. ...Respondents

Counsel for the Appellants:
Sri Surendra Pal, Sri S.P. Gangwar

Counsel for the Respondents:
Sri Ravinath Tiwari

A. Civil Law - Motor Accident Act, 1988 – Claim – Involvement of offending vehicle – Burden of proof, on whom lie – Held, burden of proof and, particularly, evidential burden, would lie upon the claimants to adduce some evidence, on the basis of which, a reasonable inference about the offending vehicle's involvement can be drawn – After some evidence by the claimants is brought in to show the involvement of the offending vehicle, of course, the purpose and object of the Motor Vehicles Act, insofar it relates to accident claims, that is to secure just compensation to the victim or victims of a motor accident, would require a holistic consideration of the evidence to find out if the offending vehicle is indeed involved – The owner of the offending vehicle, particularly, that is not insured, or even one that is insured, is not permitted to raise fanciful doubts about the involvement of a motor vehicle that has apparently caused an accident, resulting in injury to life or limb. (Para 13)

B. Motor Accident Claim – Involvement of offending vehicle – Nine days Delay in lodging of F.IR. – Impact on claimant's case – Held, if the FIR belatedly reports an accident, truthfully pointing out to the identity of the offending vehicle, the delayed registration of the FIR cannot be a ground to doubt the veracity of the claimants' case – But, at the root of the inquiry, lies the fact, whether the claimants' version carried in the FIR and the claim petition about the identity of the offending vehicle is truthful and genuine. In the present case, mostly, like many other claims, there is an eye-witness account – Held further, the evidence that has come on record does not remotely establish that it was the owner's vehicle, that was involved in the accident – High Court gave liberty to the claimant to claim u/s 161 of M.VsAct. (Para 16, 17, 35 and 42)

C. Motor Accident Claim – Non-insurance of the vehicle, alleged to be involved in

accident – Effect – Tribunal's observation that if it were a case of involving the vehicle for the purpose of realizing compensation, there would be prior concert with the owner and the driver, where it would be ensured that the vehicle had valid papers, how far lay down correct presumption – Held, the fact that the vehicle was not insured, cannot lead the Court to draw a positive inference about the vehicle's involvement in the absence of some evidence *aliunde*, showing that involvement. (Para 38 and 39)

Appeal allowed (E-1)

List of Cases cited:-

1. Ravi Vs Badrinarayan & ors. AIR 2011 SC 1226

(Delivered by Hon'ble J.J. Munir, J.)

1. This is an appeal by the driver and the owner, arising out of an award dated 22.02.2021 passed by Mr. Rakesh Dhar Dubey, Presiding Officer, Motor Accident Claims Tribunal, Pilibhit, allowing Motor Accident Claims Petition No.35 of 2016 and ordering payment of compensation to the claimant-respondents.

2. The facts giving rise to the motor accident claims are these:

On 13th November, 2015, according to the claimants, at about 5:00 o'clock in the evening, the deceased Prem Chand, along with his wife, Rammi Devi, was proceeding on bicycle from his in-laws' place, located in Dehgala, to Village Jagpura in the District of Pilibhit. Following him on a bicycle was his younger brother Bheemsen. Suddenly, a tempo bearing Registration No. UP-26T-0479 appeared from the opposite direction. It was driven at a high speed and negligently by its driver, Bhagwandas. The tempo hit the deceased's bicycle head on. The collision caused the deceased Prem Chand and Rammi Devi to sustain grievous injuries. The accident was witnessed by the deceased's brother and other natives of the village, to name a few, Ram Charan and Puttu Lal. The deceased's condition being serious, he was referred to Dr. S.K. Agrawal at the S.S. Hospital, Pilibhit. The deceased was subjected to an ultrasonographic examination, whereafter he was referred to Ganga Singh Hospital.

3. While on way to the Ganga Singh Hospital, the deceased passed away. An inquest was held by the Police of Police Station Nyuria and the dead body was sent for autopsy. A case was registered by the Police, being Case Crime No.1154 of 2015, under Sections 279, 338, 304A IPC, P.S. Nyuria, District Pilibhit against the driver, Bhagwandas. It is then said in the claim petition that the deceased had agricultural land, upon which he toiled to earn a sum of Rs.15,000/- per month from agricultural produce. In addition, he had seven cattle heads, five buffaloes and two cows that yielded milk, which he sold for Rs.10,000/- a month. The deceased had a total income of Rs.25,000/- per month that he utilized to provide for his wife and children, including the children's education. The deceased was a young and hard working man, who would go on to earn more from his exertions. It is also said in the claim petition that the deceased's wife would also aid him in productive work. Prem Chand's untimely demise plunged the family's future into an abyss of darkness. They faced financial crisis, which led them to sell off their milch cattle. The couple's three children are all pursuing educational courses. The entire finances of the family, including the education of the children, has been

imperiled by the unfortunate accident. The family have also incurred debt. The deceased's wife has been deprived of her spousal consortium, and so have the children of the love and affection of their father. The claimants have asked that they be awarded compensation in the sum of Rs.68,32,000/- together 18% annual interest from the date of accident until realization.

4. Bhagwandas, the driver of the offending vehicle, who is appellant no.1, was arrayed as opposite party no.1 to the claim petition. He shall hereinafter be referred to as 'the driver'. The driver filed a written statement, denying his involvement in the accident. He has asserted that by setting up a false claim, the claimants desire to recover compensation. It is also pleaded that the driver has been wrongly impleaded. He is not answerable to pay any compensation. He did not cause the accident and was not present at the place of accident at all. He has no connection at all to the offending vehicle, that is to say, tempo bearing Registration No. UP-26T-0479 nor had he ever had any connection with the said vehicle. A false and malicious First Information Report (for short, 'the FIR') has been lodged against him. He is not at all responsible for the accident. He has a valid licence, that was valid on the date of accident also.

5. Niranjan Lal is the owner of the offending vehicle and the second appellant here. He was arrayed as opposite party no.2 to the claim petition. Niranjan Lal, appellant no.2 shall hereinafter be referred to as "the owner'. The owner has filed a written statement, denying the accident and the entitlement of the claimants to recover compensation. He has said that burden lies upon the claimants to establish the accident involving the offending vehicle. There is plea raised in his written statement that in the Amar Ujala Hindi Daily dated 14th November, 2015, there was a news item published, reporting that Prem Chand, a resident of Jatpura, was riding his motorcycle along with his wife and proceeding to Jatpura, when he met with an accident involving a tempo. It has been raised as a plea by the owner that the claimants' case that the deceased was riding a bicycle is false.

6. It is also said by the owner that on the date of occurrence, he was not the owner of tempo bearing Registration No. UP-26T-0479 nor was the said vehicle under his control. The driver was never hired by the owner. It has also been pleaded in the written statement by the owner that he purchased the tempo under reference in the year 2011 after securing finance from Mahindra Alfa Shriram Transport Finance Company. The vehicle was registered on 22.01.2011. The owner got the vehicle plied for sometime, but it suddenly broke down. The vehicle's axle broke and it had to be parked at the owner's home. It was no longer road-worthy. In the circumstances, the owner sold the tempo in question to one Rizwan son of Natthu, a native of Mohalla Peelkhana, P.S. Kotwali, District Pilibhit for a sum of Rs.52,000/- on 30.05.2014. It was sold as scrap.

7. An affidavit sworn before a Notary Public was filed about the aforesaid fact. The tempo was not in an operational state and, therefore, no longer a motor vehicle. Rizwan had taken it away after the purchase, not moving on its wheels. After 30.05.2014, the entire control of the vehicle passed on to Rizwan. The entire responsibility about the vehicle was his. The owner has been wrongly impleaded.

The so called offending vehicle bore a false number plate. The offending vehicle bearing the number plate of the tempo, that was once the owner's vehicle, was not that vehicle at all. Its engine number and chassiss number were different. The driver, Bhagwandas, who has been shown to be driving the offending vehicle, was not a driver employed by the owner. Rizwan had not been impleaded as a party to the claim petition. For the said reason, the claim petition was bad for non-joinder of necessary party. The owner is not liable to pay any compensation. If the deceased Prem Chand had sustained any injury in a motor accident, that was on account of his riding a motorcycle negligently and at a high speed, the way it is reported in the Amar Ujala Hindi Daily dated 15.11.2015. On the basis of these facts, the owner prayed that the claim petition be rejected.

8. Upon the pleadings of parties, the following issues were framed (translated into English from Hindi):

"(1) Whether on 13.11.2015 at 5:00 in the evening hours when the claimant's husband, the deceased Prem Chand along with his wife, the injured-claimant was proceeding on the main road at Dhankuna Adda on his bicycle returning from his in-laws at Village Dehgala to Village Jatpura, he was hit head-on by tempo bearing Registration No. UP-26T-0479, that was driven at a high speed and negligently, in consequence of which Prem Chand and his wife sustained injuries, that led to Prem Chand's death? If yes or no, its effect?

(2) Whether on the date of accident, the driver of vehicle No. UP-26T-0479 had a valid and effective driving licence? If yes, its effect?

(3) Whether on the date of accident, Rizwan son of Natthu, resident of Mohalla Peelkhana was the owner of tempo No. UP-26T-0479 and the vehicle was under his control? If yes, its effect?

(4) Whether the claim petition is bad for mis-joinder? If yes, its effect?

(5) Whether the claimants are entitled to any compensation? If yes, how much and from which party?"

9. In support of the claim petition, the claimants examined PW-1, Smt. Rammi Devi, PW-2, Bheemsen and PW-3, Puttu Lal. The opposite parties to the claim petition, that is to say, the owner and the driver, examined themselves as DW-1 and DW-2 in that order.

10. The claimants also led documentary evidence that comprises a certified copy of the FIR, a photostat copy of the bail order relating to Bhagwandas, a photostat copy of the postmortem report, medical papers relating to treatment of the deceased, Prem Chand, medical bills of the deceased's ultrasonography, a letter of reference to the higher centre, medico-legal reports relating to Rammi Devi, that includes a CT Scan report and blood test reports. Further documents have been filed, such as the Aadhar Card relating to Rammi Devi and her identity card. Papers relating to medical expenses involved in Rammi Devi's treatment have also been filed. The claimants also filed through a list bearing paper No. 32ग, a certificate about sale of milk by the deceased issued by one Raj Kumar. The claimants also filed through list 52ग, a certified copy of the charge sheet filed by the Police in the criminal case against Bhagwandas.

11. The driver through a list bearing paper No. 21ग has filed his driving licence. The owner through a list bearing paper No. 23ग has filed a newspaper clipping of Amar Ujala Hindi Daily of 14.11.2015 and an affidavit dated 30.05.2014 sworn by Rizwan son of Natthu. The owner also filed through a list bearing paper No. 62ग, a photostat copy of the insurance cover-note, bearing paper No. 62ग/2.

12. Heard Mr. Surendra Pal, learned Counsel for the the driver and the owner, and Mr. Ravinath Tiwari, learned Counsel for the claimants.

13. The foremost point for determination that arises in this appeal is whether the offending vehicle bearing Registration No. UP-26T-0479 was involved in the accident. This point assumes some seriousness in this matter because there is distinct and specific pleading by the owner that the said vehicle was not at all involved and the allegations have been brought against the said vehicle in order to recover compensation. The driver too has taken a specific stand, which is more to the effect that he is not at all connected to the vehicle bearing Registration No. UP-26T-0479, of which he has never been the driver. The burden of proof and, particularly, evidential burden, would certainly lie upon the claimants to adduce some evidence, on the basis of which, a reasonable inference about the offending vehicle's involvement can be drawn. After some evidence by the claimants is brought in to show the involvement of the offending vehicle, of course, the purpose and object of the Motor Vehicles Act, insofar it relates to accident claims, that is to secure just compensation to the victim or victims of a motor accident, would require a holistic consideration of the evidence to find out if the offending vehicle is indeed involved. The owner of the offending vehicle, particularly, that is not insured, or even one that is insured, is not permitted to raise fanciful doubts about the involvement of a motor vehicle that has apparently caused an accident, resulting in injury to life or limb.

14. It has been argued with much vehemence by Mr. Surendra Pal, learned Counsel for the driver and the owner that there is not a shred of evidence to prove that the offending vehicle was at all involved in the accident. He has drawn the Court's attention to the fact that the accident occurred on 13.04.2015, whereas the FIR relating to the accident was lodged on 21.11.2015, that is to say, after a lapse of eight days of the accident. During this time, the claimants virtually conjured up the identity of the owner's vehicle from some source, which he had already sold in scrap to Rizwan. The latter had scrapped the vehicle and its number plate was fixed to some unknown tempo, that did not bear the engine number or the chasis number of the owner's vehicle, already scrapped. All these eight days in lodging the FIR were spent in searching for a vehicle that could be held out as the offending vehicle, so as to recover compensation from its owner. Learned Counsel for the driver and the owner has taken the Court through the testimony of the claimants' witnesses urging that it does not even remotely establish the offending vehicle's identity as the one responsible for the fatal accident.

15. Mr. Ravindra Nath Tiwari, learned Counsel for the claimants, on the other hand, submits that the driver is named in the FIR, that was lodged as soon as the family could have emerged somewhat from

the trauma. During the relevant period of time, that is to say, between the accident and the lodging of the FIR, the deceased's wife was also hospitalized in a precarious condition and all that has contributed to the delay. He submits that delay in lodging an FIR in a motor accident claim does not cast doubt about the veracity of the claimants' case against the offending vehicle. The driver of the offending vehicle, after investigation by the Police, has been charge-sheeted. He has also been released on bail. That apart, there is a dependable account of three eye-witnesses, including the deceased's wife, who sustained injuries in the accident, that all point unmistakably to the involvement of the owner's vehicle in the accident. He submits, therefore, that the Tribunal has taken a holistic view of the evidence and rightly found the owner's vehicle involved in the accident and ordered him to pay compensation.

16. It is, no doubt, true that the mere fact of delay in lodging the FIR cannot lead at all to the inference that the claimants' case is doubtful. What is of importance, in a matter involving a motor accident, that is, at once an offence and a cause of action for compensation under the Motor Vehicles Act, is the authenticity of the claimants' case. If the FIR belatedly reports an accident, truthfully pointing out to the identity of the offending vehicle, the delayed registration of the FIR cannot be a ground to doubt the veracity of the claimants' case. There could be innumerable reasons for the delay in lodging the FIR and the most commonplace of these is the trauma that the family goes through, particularly, where there is a survivor, still struggling for his/ her life in the hospital. This position of the law is adumbrated by the Supreme Court in **Ravi v. Badrinarayan and others, AIR 2011 SC 1226**. In **Ravi** *(supra)*, it has been held:

"20. It is well-settled that delay in lodging FIR cannot be a ground to doubt the claimant's case. Knowing the Indian conditions as they are, we cannot expect a common man to first rush to the Police Station immediately after an accident. Human nature and family responsibilities occupy the mind of kith and kin to such an extent that they give more importance to get the victim treated rather than to rush to the Police Station. Under such circumstances, they are not expected to act mechanically with promptitude in lodging the FIR with the Police. Delay in lodging the FIR thus, cannot be the ground to deny justice to the victim. In cases of delay, the courts are required to examine the evidence with a closer scrutiny and in doing so; the contents of the FIR should also be scrutinized more carefully. If court finds that there is no indication of fabrication or it has not been concocted or engineered to implicate innocent persons then, even if there is a delay in lodging the FIR, the claim case cannot be dismissed merely on that ground.

21. The purpose of lodging the FIR in such type of cases is primarily to intimate the police to initiate investigation of criminal offences. Lodging of FIR certainly proves factum of accident so that the victim is able to lodge a case for compensation but delay in doing so cannot be the main ground for rejecting the claim petition. In other words, although lodging of FIR is vital in deciding motor accident claim cases, delay in lodging the same should not be treated as fatal for such proceedings, if claimant has been able to demonstrate satisfactory and cogent

reasons for it. There could be variety of reasons in genuine cases for delayed lodgment of FIR. Unless kith and kin of the victim are able to regain a certain level of tranquillity of mind and are composed to lodge it, even if, there is delay, the same deserves to be condoned. In such circumstances, the authenticity of the FIR assumes much more significance than delay in lodging thereof supported by cogent reasons."

17. Therefore, by reason of delay alone in lodging the FIR, the claimants' case cannot be viewed with an eye of suspicion. But, at the root of the inquiry, lies the fact, whether the claimants' version carried in the FIR and the claim petition about the identity of the offending vehicle is truthful and genuine. In the present case, mostly, like many other claims, there is an eye-witness account. There are three eye-witnesses, who have been examined by the claimants. PW-1, Smt. Rammi Devi is a victim of the accident alongside the deceased. This witness in her examination-in-chief has described the accident as she must have experienced it until the traumatic event and has referred to the offending vehicle with its registration number. In her cross-examination on behalf of the driver, this witness has stated thus:

"मैं साढ़े चार बजे अपने घर से चली थी। टक्कर लगते ही मैं नीचे गिर गई थी। जब मुझे होश आया मैं अस्पताल में थी। मुझे करीब नौ-दस दिन के बाद पता चला था कि मेरे रिश्तेदारों में रिपोर्ट लिखा दी है। मुझे भीमसेन ने बताया था कि हमने भगवानदास के विरुद्ध रिपोर्ट दर्ज करा दी है। रिपोर्ट में उन्होने बताया कि भगवानदास का नाम लिखाया है और टैम्पू का क्या नम्बर लिखाया यह देवर भीमसेन को पता होगा। जब मैं अस्पताल में थी तब भीमसेन व मेरे रिश्तेदार अस्पताल में आये इन लोगों ने मुझसे पूछा कि कौन टक्कर मार गया तो मैने बताया कि टैम्पू वाला टक्कर मार गया।"

18. There is no reason to disbelieve that it was a tempo that hit the unfortunate couple, but there is equally no reason to believe the evidence of this witness that it was the offending vehicle that did the evil deed. It is apparent that as soon as the accident happened, this witness fell off of the bicycle and lost consciousness. She regained it in the hospital. In her cross-examination, she has specifically said that on being hit by the offending vehicle, she fell down. When she regained consciousness, she was in the hospital. In this sequence of events, it is difficult to credit this witness with a first-hand account about the registration number or the identity of the offending vehicle. She can be believed to the extent alone that it was a tempo, which hit the victims while they were moving on the bicycle at the date, time and place of occurrence. The further admission of the witness in her cross-examination, that it was Bheemsen, who told her that they have lodged an FIR against Bhagwandas (the driver) and that it is her brother-in-law (Bheemsen), who would know about the registration number of the tempo, makes it pellucid that this witness never had occasion to know the number of the offending vehicle for herself, or identify it by any other means.

19. PW-1, Smt. Rammi Devi has also said in her cross-examination at the instance of the owner that the offending vehicle bears a registration plate in the english language and she does not know english. The evidence of this witness across the length and breadth of it, is of no consequence in ascertaining the identity of

the offending vehicle by reference to its number or otherwise.

20. The other most important witness is Bheemsen, PW-2. He is the author of the FIR, reporting the occurrence. In his examination-in-chief, he has said about his presence on the spot and the identity of the offending vehicle thus:

"महीने का मुझे ध्यान नही है। करीब 14 महीने पहले की बता है। दुर्घटना के समय मेरे भाई साईकिल चला रहे थे व भाभी पीछे बैठी थी। यह दहगला अपनी ससुराल से आ रहे थे। मै इनसे करीब आधा कि०मी० पीछे-पीछे आ रहा था। धनकुना अड्डा पर पहुँचने पर मै अपनी भैया से थोड़ा पीछे था। यह दुर्घटना मेरे सामने हुई थी। भैया की साईकिल मे पीछे से भगवानदास ने टक्कर मारी थी। टैम्पो से टक्कर मारी थी। टैम्पो का नम्बर UP T 26/ 079 था। फिर कहा कि 0479 है। यह नम्बर टैम्पो का U.P. 26 T/0479 गवाह के हाथ पर भी लिखा है। टैम्पो का असली नम्बर 0479 सही है। एक्सीडेंट के समय घटना स्थल पर कौन कौन आ गया था उनके नाम मुझे नही पता। फिर कहा कि- पुत्तूलाल, राम चरन व भीमसेन आ गये थे। टैम्पो वाले को मौके पर नही पकड़ पाये, वह मौके से भाग गया था।"

21. This witness has read up to Class-VIII as he says himself in his cross-examination on behalf of the owner. He has spoken thus about the number of the offending vehicle:

"टैम्पो का नम्बर मेरे घर पर डायरी मे लिखा है। आज मै डायरी नही लाया हूँ। हाथ पर नम्बर मैने अपने आप लिखा है। मै सीधे हाथ से लिखता हूँ व टैम्पो का नम्बर भी मेरे सीधे हाथ पर ही लिखा है।

टैम्पो में लाईट नही जल रही थी। सूरज छिप चुका था। मै दुर्घटना के समय पुलिया के पास दक्खिन मे था। यह पुलिया वहां से करीब 20 कदम दूर होगी। दुर्घटना होते ही टैम्पो भाग गया। टैम्पो पीलीभीत की तरफ भाग निकला था।

हमारी धनकुना चौकी पर सूचना पहुँच गयी थी। वह सूचना वैसे ही दी थी कि दुर्घटना में प्रेमचन्द्र की मृत्यु हो गयी है। लिखकर नही दी थी।

दुर्घटना के आधे घंटे के बाद मेरे भाई मदन लाल धनकुना चौकी पर सूचना दे आये कि दुर्घटना मे प्रेमचन्द्र की मृत्यु था।

यह कहना गलत है मै आज झूठी गवाही दे रहा हूँ। यह कहना गलत है कि जिस नम्बर का टैम्पो मैने बताया है उससे दुर्घटना न हुई हो बल्कि दुर्घटना कही और हुई हो।

टैम्पो का पता चला थाना न्युरिया में है। मैने खुद टैम्पो को ढूढ़ा था। मझोला पकड़िया मे झाड़ी के पीछे खड़ा हुआ था। यह कहना गलत है कि मै सब फर्जी बाते बता रहा हूँ। यह कहना गलत है कि मेरे भाई मोटर साईकिल से गिरे हो।"

22. It is further stated by this witness, in answer to the cross-examination on behalf of the driver, thus:

"जब मैं टैम्पो को ढूढ़ता हुआ मझोला पहुँचा तो मुझे एक टैम्पो झाड़ियो में खड़ा मिली। यह टैम्पो मुझे पांच दिन के बाद मिला था। उसी टैम्पो का नम्बर मैने अपनी डायरी मे नोट किया। और यही नम्बर मैने अपनी तहरीर में लिखकर थाने मे दे दिया था।

दिन शनिवार को लगभग 11 बजे मै अपने घर से दहगला के लिए निकला था। साढ़े 11 बजे मै दहगला पहुँच गया था। वहां से पीलीभीत नही आया था। मेरी वापसी वहां 4.15 पर वापसी हो गयी थी।

जब मै घटना स्थल पर पहुँचा तो ड्राईवर टैम्पो लेकर भाग चुका था। जब मै वहां पहुँचा तो भाभी मेरी वहां पर बेहोश पड़ी थी। वहां पर बहुत भीड़ लगी थी। वहां पर मदन लाल नही आये थे। मै अपनी भाभी को देखने अस्पताल गया था। उनको आठवें दिन होश आया था। तब मैने अपनी भाभी को बताया कि एक टैम्पो मुझे लावारिस हालत में मिला है। उसका नम्बर मैने रिपोर्ट मे लिखा दिया है।

घटना वाले दिन मै रिपोर्ट लिखाने नहीं गया था। घटना को दूसरे, तीसरे, चौथे, पांचवे, छठे, सातवें, आठवे, नौवे दिन तक मै रिपोर्ट लिखाने नही गया क्योंकि मै टैम्पो तलाश करता रहा जब टैम्पो मिला, उसका नम्बर नोट किया तब मुकदमा दर्ज कराया।

मै आकर तहरीर अपने वकील साहब से लिखायी और वहां पर सब घर वालो ने बैठकर तय किया कि यदि क्लेम लेना है तो इसी टैम्पो के खिलाफ रिपार्ट लिखा दो।"

(emphasis by Court)

23. From the testimony of this witness like PW-1, it is vivid that he saw the occurrence, but could not note down the number of the vehicle as it escaped. By the time the accident occurred, darkness had already set in and the offending vehicle did not have its lights on, much less a light that would be illuminating the number plate. To expect a number plate light on a tempo plying in the hinterland is a far-cry. What is beyond doubt is that the offending tempo escaped immediately after the accident, and evidently, there was not enough time for anyone to note down its number.

24. This is all the more evident from the fact that the deceased's inquest and postmortem reports show that the Police took that action on the basis of G.D. Entry No.5 lodged at 50 minutes past midnight on 14.11.2015 at Kotwali, Pilibhit. Apparently, this G.D. Entry was made on the basis of an oral information that PW-2 has spoken about, that was given to the Police after Prem Chand passed away while on way for medical aid to a higher centre at Bareilly. If by that time, PW-2, the deceased's brother had noted down the number of the offending vehicle, it is possible that it might have figured in the G.D. Entry based on the oral information to the Police. In any case, it would have figured in police investigation very early. In all eventualities, the FIR would have been lodged early, mentioning the vehicle. It could be said that in the crisis and trauma that ensued, PW-2 was not left with time or attention to pay to the legal niceties of lodging an encyclopedic written first information or at least one that mentioned the offending vehicle's registration number or other identities. But, that possibility is obviated by what PW-2 has said in his cross-examination. He has stated that he proceeded to Majhaula, where he found the offending tempo parked behind some bushes. This was five days after the occurrence. He has very candidly said that he noted down the number of that tempo in his diary and mentioned it to the Police in his written information lodged later. He has stated in his cross-examination that he lodged the FIR on the ninth day of the occurrence, because he was searching out the offending tempo. He has said that after he had searched out the offending tempo,

he noted down its number and got an FIR registered.

25. It has also been said in his cross-examination by PW-2 towards the tail-end of it that after noting down the parked tempo's number, he went to his Counsel and asked him to draft the FIR and there, all members of the family sat together and expressed opinion that if compensation had to be claimed, then an FIR has to be lodged against this tempo (the one discovered by PW-2 in the bushes at Majhaula).

26. This Court is mindful of the fact that in hit-and-run cases, some kind of a private investigation to ascertain the identity of the offending vehicle is undertaken or has to be undertaken by those who are the unfortunate victims of the accident, or the survivors of the deceased. If they go about the task gathering with reasonable certainty, the identity of the offending vehicle, a mere belated report of the incident to the Police, would not cast any doubt about the claimant's case. Here, the identity of the tempo, going by the words of PW-2, who is an eye-witness, has been ascertained by him. He did not know its identity, when the accident occurred and the offending vehicle escaped. It took him some five days to discover the offending vehicle parked behind some bushes at a place called Majhaula.

27. Remarkably, there is nothing in the testimony of PW-2 to indicate the basis on which he inferred that the vehicle that he found parked behind some bushes at Majhaula was the offending vehicle. The assertion that PW-2 found the offending vehicle behind the bushes at Majhaula is nothing more than pure conjecture, with no basis to the inference. It is not said that there was some feature about the vehicle that this witness had noted at the time of accident, that led him to identify it or that he was informed by someone, who knew about the identity of the offending vehicle. Of course, in the latter case, the person informing him would also have to be examined, but there is no such case. Rather, the closing part of this witness's cross-examination virtually says that after he had searched out the offending vehicle, as if it were by gut feeling, he sat together in conference with other relatives and decided to lodge an FIR against the offending vehicle for the sake of preferring a compensation claim. It is very difficult to accept on the basis of this witness's evidence that the offending vehicle identified by him was indeed the one involved in the accident.

28. The third witness, who has been examined on behalf of the claimants is Puttu Lal, PW-3. He has testified in his examination-in-chief that he was an eye-witness to the accident, about which he broadly says that it was a tempo that hit the deceased and his wife as they were moving on the bicycle. The tempo had proceeded on the wrong side to cause the accident. He has further said in his examination-in-chief that the tempo was being driven by Bhagwandas son of Nandram. The driver is a native of Village Dhankuna. The driver is not a prior acquaintance of the witness or otherwise known to him. It is then said by this witness in his testimony:

"जिस टैम्पो से टक्कर हुई थी उसका नं० U.P.26T/0479 था। उसके बाद टैम्पो चालक को मय टैम्पो के तीन चार लोग चौकी पर ले गये।"

29. In his cross-examination at the instance of the owner, this witness has stated:

"टैम्पू चालक व टैम्पू को मैं थाने नहीं ले गया था। टैम्पू चालक व टैम्पू को मैं चौकी पर

नही ले गया था कौन ले गया था मुझे नहीं पता जो ब्यान आज मैं दे रहा हूँ वह सही है पहले वाला गलत है। यह गलत ब्यान मैने जान बूझकर नही दिया था। मैने टैम्पू के आगे वाला नम्बर देखा था उसका इन्जन नम्बर नही देखा था। यह टैम्पू मैने घनकुना अड्डे पर देखा था वहाँ से कौन ले गया मुझे नहीं पता वहां पर बहुत से लोग इकट्ठे थे वही लोग टैम्पू चालक को ले गये। मैं चौकी पर नही गया था यह पता है कि टैम्पू किसका है। टैम्पू पर नम्बर प्लेट सफेद रंग की काले अक्षर लिखे थे। यह कहना गलत है कि मैं झूठी गवाही दे रहा हूँ।"

30. In his cross-examination at the instance of the driver, PW-3 has stated thus:

"मैं विद्याराम को जानता हूँ। विद्याराम वकील साहब है। गांव के प्रधान हैं। इसी गांव का मै कोटेदार हूँ जिस गांव के विद्याराम प्रधान है मृतक प्रेमचन्द्र विद्याराम के गांव बस्ती के भतीजे थे। कोटा ग्राम प्रधान सत्यापित करता है। मेरे सामने टैम्पू चालक को भीड़ पकड़ कर ले गयी थी। यह बात सही है कि जिस टैम्पू से घटना हुई थई उस टैम्पू के चालक को व टैम्पू को लोगों ने मौके पर ही पकड़ लिया था।

यह कहना गलत है कि मैं अपना राशन का कोटा बचाने के लिए प्रधान विद्याराम के दबाव में झूठी गवाही दे रहा हूँ। यह भी कहना गलत है कि मैं सिखाए से झूठा प्रतिकर दिलाने के लिए गलत ब्यानी कर रहा हूँ।"

31. Now, so far as this witness is concerned, he has largely spoken about the tempo being apprehended on the spot by the crowd and taken to the Police *Chowki* and then to the Police Station. He says that he had seen the number of the vehicle on the front plate at the Dhankuna Stand. It is beyond understanding that if the offending vehicle was apprehended by the crowd on the spot and taken to the Police *Chowki*, why an FIR would be lodged by the deceased's brother nine days later after searching out the tempo, five days after the accident, parked behind some bushes at Majhaula. Even if one were not to look at the irreconcilable contradiction between the evidence of PW-2 and PW-3, an apprehension of the vehicle on the spot by the public would have led to a prompt FIR and immediate arrest of the driver. It does not appear to be the case in the FIR also, pursuant to which the driver surrendered in Court and secured bail. On a comparison done of the two eye-witness accounts of PW-2 and PW-3, the only ones available, the two cannot be reconciled. One speaks about the offending vehicle causing the accident and escaping, whereas the other says that it was apprehended on the spot by the crowd and handed over to the Police at the Police *Chowki*. There is also no such G.D. Entry brought to the notice of this Court that the vehicle was apprehended and handed over to the Police immediately after the accident. The two versions, when compared and also evaluated individually, do not show a hint about the involvement of the offending vehicle in the accident.

32. So far as the evidence of the driver Bhagwandas is concerned, he has entered the witness-box as DW-2 and asserted in his cross-examination that he does not do the job of a driver. He had no connection whatsoever with the offending vehicle. He had never functioned as its driver. He was at home on the date of accident and never driven it. He was not about the place of accident. In his cross-examination, he said that he had read about the accident the following day in the newspaper. The locals know him at Dhankuna, where he was born. He did not

know the deceased and bore no ill-will or grudge against the deceased or his family members. The witness and Bheemsen were not at all inimical. He had a driving licence for a motorcycle and a four wheeler, that was valid. It has been said further in his cross-examination that he got himself bailed out 25 days after the accident and is still facing trial. He had not complained in any Court that he was falsely implicated.

33. The owner of the vehicle, DW-1, Niranjan Lal also entered the witness-box and testified in support of his case. He has said in his examination-in-chief that he had sold off the vehicle to Rizwan son of Natthu Bux for a sum of Rs.52,000/-. A sale letter had been written, which is on record as paper No. 25ग. The sale has been done on 30.05.2014. He has stated that the tempo was not in a motorable condition and was scrap. It was also said that when he came to know about the case, he went to Rizwan, who told him he had got the tempo dismantled as scrap. At the police station, he was told that the number plate of his tempo was affixed to some other vehicle and that the engine and chassiss number were different from those of the owner's vehicle. It was also said that the witness did not know, whether the number plate was genuine or fake, but the number on it was that of his vehicle. He did not know the driver at all and also that the driver had never been employed by him to operate his tempo.

34. In his cross-examination, this witness has said that he did not know that it was necessary to get a transfer of the vehicle registered with the R.T.O. after permission by the Finance Company. He had sold the vehicle to Rizwan and some part of the consideration was due. It is further said that Rizwan had told the witness that after the tempo was transferred to his name, he would pay the balance, but before that could be done, he got the tempo scraped and dismantled. The witness has also said that he did not know the deceased or the claimants. The claimants could not be inimical to him, as they never knew him. It has also been said by this witness that when he was summoned to the police station, he saw the number plate of his tempo on another vehicle, but did not complain about it to the Police or the Court. He did complain about the fact to Rizwan, but did not get any notice served through his Counsel or proceed in the matter before the Court.

35. There is no doubt about the fact that the accident took place involving a tempo, where Prem Chand perished in the accident, leaving behind the claimants. But, in this Court's opinion, the evidence that has come on record does not remotely establish that it was the owner's vehicle, that was involved in the accident. There is no admission on the part of either the owner or the driver, even slightly, that the offending vehicle could be the one involved in the accident.

36. The two witnesses for the claimants, whose evidence alone is material, are PW-2 and PW-3. Both of them have given an utterly contradictory account about the identity of the vehicle, though not about the factum of accident. While PW-2 has spoken about the offending vehicle escaping immediately after causing the accident, PW-3 says that it was apprehended by the crowd gathered on the spot and handed over to the Police. There is absolutely no evidence about the vehicle being handed over to the Police immediately after the accident. The identity of the vehicle surfaced nine days after the

event through the FIR that was lodged by PW-2. PW-2 in his evidence does not indicate, by as much as a hint as to how he could identify that the vehicle that he found parked behind some bushes at Majhaula, was the one that had caused the accident. He has not identified it by reference to anything that he might have noticed at the time of the accident or the driver's identity. He did not know the driver beforehand. He has admitted in his evidence that he had noted down the number of the offending vehicle at the spot, where he found it parked and recorded it in his diary. Later on, he had sat in consultation with other relatives and decided to lodge an FIR against the vehicle that he discovered parked behind some foliage at Majhaula. He has gone to the extent of saying with the utmost candor that after noting down the number of the vehicle at Majhaula, he visited his Counsel, where the other family members sat together and decided that if compensation had to be claimed, a report would have to be lodged against this tempo.

37. The learned Judge in the Tribunal has found the identity of the offending vehicle established by remarks to the effect that PW-2 and PW-3 are eye-witnesses and there is nothing in their evidence or cross-examination to disbelieve them. Apart from it, the fact that an FIR was lodged against the driver of the vehicle, that was registered in the owner's name, on 21.11.2015, where the driver secured bail and a charge sheet filed in Court, all go to prove the involvement of the offending vehicle. It has then been remarked by the Trial Court that though the owner says that he had transferred the offending vehicle to Rizwan, but the insurance policy, that has been filed on record, valid from 28.03.2014 to 27.03.2015, shows that the vehicle was registered in the owner's name. There was no transfer recorded on the basis of the sale letter dated 30.05.2014 in favour of Rizwan by the R.T.O. The Tribunal has taken note of the sale letter, which says that the owner would have to obtain an NOC and then realize the balance consideration of Rs.5000/-, whereafter transfer of ownership would take place. There is no evidence offered by the owner, according to the Tribunal, that shows that the agreed NOC was obtained by him and the transfer recorded in Rizwan's name. The Tribunal has also remarked that though the owner says that his vehicle was sold as scrap, but in the sale letter, there is no mention of the fact that the vehicle was being sold as scrap. The Tribunal has laid great emphasis on the fact that the claimants and their family on one hand and the owner and the driver on the other, are not on any kind of inimical terms. From this fact, the Tribunal has ruled out a case of malicious implication of this vehicle in the accident.

38. It has also been remarked by the Tribunal that if it were a case of involving the vehicle for the purpose of realizing compensation, there would be prior concert with the owner and the driver, where it would be ensured that the vehicle had valid papers. No one for the purpose of realizing compensation would proceed against a vehicle on the basis of a false case that had no valid papers. The reasoning of the Tribunal appears to proceed on the basis that if it were a case of merely recovering compensation on false allegations, a duly insured vehicle would have been chosen as the subject with prior understanding with its driver and owner. It has also been reasoned by the Tribunal that after

investigation, the Police have filed a charge sheet against the driver, which buttresses the fact that it was the offending vehicle that was involved in the accident.

39. The moot question here, as already noticed, is that there is not shred of evidence *aliunde* led on behalf of the claimants to establish that the offending vehicle was the one involved in the accident. The Tribunal has, in the opinion of this Court erred in holding the identity of the vehicle established by ruling out possibilities of a false implication. The learned Judge has adopted what may be called a method of elimination of sorts. That, in the opinion of this Court, is a wrong approach altogether. Merely, because the parties are not on inimical terms and the fact that the vehicle was not insured, cannot lead the Court to draw a positive inference about the vehicle's involvement in the absence of some evidence *aliunde*, showing that involvement. This is not a case where there is a mere delay in lodging the FIR, but the involvement of the vehicle is otherwise sufficiently established. Here, it is not even remotely established. The question about the vehicle being sold as scrap or dismantled, is also irrelevant so long as there is no positive evidence to indicate its involvement. The fact that the owner did not complain to the Police or the Court that the number plate of his vehicle was affixed to a different vehicle is also of no consequence, unless involvement of the offending vehicle is established by positive evidence. All these circumstances would become material, if some evidence were let in to show that it was the offending vehicle that caused the accident. Unfortunately, there is none forthcoming.

40. On the evidence appearing here, it is a hard case, where the accident has turned a blind hit and run. The suffering of the claimants is indeed one that evokes all sympathy, but that cannot lead the Court to order compensation from a party against whom there is absolutely no evidence about the involvement of his vehicle. The claimants would have to rest content by availing their remedy under Section 161(2)(b) of the Motor Vehicles Act, 1988, that is applicable in a case of hit and run.

41. In the result, this appeal succeeds and is **allowed**. The impugned judgment and award passed by the Presiding Officer, Motor Accident Claims Tribunal, Pilibhit is **set aside** and the claim petition stands **dismissed.** The statutory deposit made before this Court shall be permitted to be withdrawn by the appellants.

42. In case, the claimants prefer a claim under Section 161 of the Motor Vehicles Act, their case may be considered in accordance with law giving due allowance to the pendency of the present proceedings.

(2022)05ILR A710
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.03.2022

BEFORE

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

First Appeal From Order No. 992 of 2001

Smt. Usha Tiwari ...Appellant
Versus
Jagdamba Prasad Trivedi & Ors. ...Respondents

Counsel for the Appellant:
Sri R.K. Porwal

Counsel for the Respondents:
Sri A.C. Nigam, Sri Satyam Jaiswal

A. Civil Law - Motor Accident Act, 1988 – Claim petition – Xerox copy of driving licence – Evidentiary value – Tribunal refused to accept Xerox copy as evidence – Permissibility – Claim dismissed on the ground that the scribe of F.I.R. was not examined on oath and that there are minor contradictions in testimony of P.W.2 & P.W.3 – Validity challenged – High Court overruled this kind of hyper technical stand taken in dismissing the claim petition, which is filed under the beneficial piece of legislation – High Court re-computed the compensation by adding 40% future prospect and applying multiplier of 17. (Para 5, 8, 13 and 19)

B. Civil Law - Motor Accident Claim – Rash and negligent driving – Term 'Negligence' – Meaning – Principle of '*res ipsa loquitur*' , when it can be applied – 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 though it is normally accidental – 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. (Para 10)

C. Civil Law - Motor Accident Claim – Principle of contributory negligence – Scope and meaning – 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. (Para 11)

Appeal allowed (E-1)

List of Cases cited:-

1. St. of Karn.VsSatish; 2000 C.A.C. 408 SC

2. United Insurance Co. Ltd. Vs Anwari & ors. 2000 (2) TAC 789 SC

3. First Appeal From Order No. 1818 of 2012; Bajaj Allianz General Insurance Co.Ltd. Vs Smt. Renu Singh & ors. decided on 19.7.2016

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

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

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

7. C.MA. No. 1482 of 2017; Reliance General Insurance Co. Ltd. Vs Subbulakshmi & ors. decided by Madras high Court

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

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

10. Bithika Mazumdar & anr. Vs Sagar Pal & ors. (2017) 2 SCC 748

11. F.A.F.O. No. 1999 of 2007; Oriental Insurance Co. Ltd. Vs Smt. Ummida Begum & ors.

12. F.A.F.O. No. 1404 of 1999; Smt. Ragini Devi & ors. Vs United India Insurance Co. Ltd. & anr. decided on 17.4.2019

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

14. Sarla Verma & ors. Vs Delhi Transport Corp. & anr.; 2009 LawSuit (SC)

15. A.VsPadma Vs Venugopal; 2012 (1) GLH (SC) 442

16. Smt. Hansaguri P. Ladhani v/s The Oriental Insurance Co. Ltd; 2007(2) GLH 291

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

18. Bajaj Allianz General Insurance Co. Pvt. Ltd. Vs U.O.I. & ors. decided by Apex Court on 27.1.2022

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

1. Heard Sri R.K. Porwal, learned counsel for the appellant, Sri Satyam Jaiswal, learned Advocate, appearing for Sri A.C. Nigam, learned counsel for the respondent-National Insurance Company and perused the record.

2. This appeal, at the behest of the appellant-claimant, challenges the judgment and order dated 30.3.2001 passed by the Motor Accident Claims Tribunal/11th Additional District Judge, Kanpur Nagar (hereinafter referred to as 'Tribunal') in M.A.C. No.333 of 1992 rejecting the claim petition which was preferred by the appellant-claimant.

3. The facts as culled out from the record are that on 21.8.1992 at about 5.20 p.m., driver of a bus bearing No. UP 78 V1259 drove the bus rashly and negligently and when he reached the place near Vijay Nagar Crossroad, the bus ran over Anand Tiwari who died instantaneously. The deceased was 27 years of age at the time of accident. The deceased was conductor of vehicle bearing No. UP77/1912 owned by Jasveer Singh and was earning Rs.2,000/- per month and Rs.8,000/- was his income by selling milk. The deceased left behind him his parents, younger brother, his widow and three children. He was the sole bread earning person of his family. Respondent No.1 filed his reply which was one of denial and hold that the driver of the bus was not negligent. The Tribunal raised five issues but answer the same in the negative holding that the claimants did no prove that the driver of the bus was negligent.

4. At the outset, it is to be noted that the driver of the bus did not even step into the witness box. The Tribunal took a stand that it was not proved that the vehicle ran over the deceased. While relying on the decision of the Apex Court in **State of Karnataka v. Satish, 2000 C.A.C. 408 SC**, the Tribunal held that it was necessary for the claimants to prove the negligence of the driver. The Tribunal held that the witnesses did not narrate the correct story. The Tribunal has relied on the decision in **United Insurance Co. Ltd. v. Anwari and others, 2000 (2) TAC 789 SC** and has rejected the claim petition.

5. As far as issue of driving license is concerned, from the record which we have perused, it is clear that the driving license was filed which was the valid driving license but the Tribunal has held that the driving license was a xerox copy which cannot be accepted in evidence. While deciding the issue no.4, the Tribunal held that the matter is dismissed and, therefore, no amount can be paid.

6. Learned counsel for the appellant has submitted that the Tribunal has rejected the claim petition stating that the the claimant had failed to prove her case, and held that the accident occurred due to sole negligence of the deceased, this finding of the Tribunal is bad on the facts and law and requires to be upturned by this Court.

7. As against this, learned counsel for the respondent has submitted that the Tribunal has rightly dismissed the claim petition as there are contradictions in the statements of P.W.2 and P.W.3 and, therefore, they have been rightly not believed by the Tribunal. It is also submitted that the deceased was solely negligent for commission of accident and, therefore, the Tribunal has rightly rejected the claim petition.

8. Issues which are required to be adjudicated by us are (a) whether the Tribunal has rightly held the deceased to be solely negligent & whether the Tribunal can dismiss the claim petition on the basis that the scribe of F.I.R. was not examined on oath and that there are minor contradictions in testimony of P.W.2 & P.W.3; (b) if the dismissal is bad whether the matter be relegated to the Tribunal or compensation can be granted here.

9. While dealing with submission on issue of negligence raised by the learned counsel for the appellant, it would be relevant to discuss the principles for deciding contributory negligence and for that the principles for considering negligence will also have to be looked into.

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 though it 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 F.I.R. categorically goes to show that the vehicle dashed with the deceased who was on his feet, causing instantaneous death. The scribe of F.I.R. was a police officer. We are placing reliance on the decisions in **(a) Smt. Kaushnuma Begum And Ors vs. The New India Assurance Co. Ltd. (2001) 2 SCC 9., (b) Vimla Devi and others Vs. National Insurance Company Limited and others, 2019 (133) ALR 768; (c) Anita Sharma v. New India Assurance Co. Ltd. (2021) 1 SCC 171** and on the decision of Madras High Court. The decision in Madras High Court in **Reliance General Insurance Co. Ltd. Vs. Subbulakshmi and Others, passed in C.MA. No. 1482 of 2017 [C.M.P. No. 7919 of 2017. (CMA Sr. No. 76893 of 2016)] and the decision referred in the said case namely Puspabai Purshottam Udeshi Vs. Ranjit Ginning and Pressing Co., 1977ACJ 343 (SC),** would be applicable in such matters where Tribunal takes hyper technical stand in dismissing the claim petition which is filed under the beneficial piece of legislation. Despite the fact that judgment of **Smt. Kaushnuma Begum And Ors vs. The New India Assurance Co. Ltd. (2001) 2 SCC 9** was very much in vogue, the Tribunal has dismissed the claim petition holding that there are minor discrepancies in the statements of P.W.2 and P.W.3.

14. The Tribunal has recorded contradictory findings, at one stage, the Tribunal holds that the place where the accident occurred was crowded place with human beings and, therefore, driver of the bus could not have driven the vehicle rashly and negligently and at the same time it holds that the accident is not proved and that the negligence of the deceased who was on feet and standing on road was attributed and claim petition was dismissed.

15. If we go by the finding of facts and the evidence on record and even if we hold deceased to be standing in the middle of the road, the fact that the accident occurred and the fatal injuries which the deceased had sustained and which proved fatal as per the postmortem report, it can be safely said that the driver of the vehicle could have been more cautious if it was thickly populated place. Hence, we are unable to concur with the judgment of the Tribunal. We hold that the deceased was also contributory to the accident having taken place but to the tune of 10%.

16. Decisions in **Smt. Kaushnuma Begum And Ors vs. The New India Assurance Co. Ltd. (2001) 2 SCC 9., Vimla Devi and others Vs. National Insurance Company Limited and others, 2019 (133) ALR 768; Anita Sharma v. New India Assurance Co. Ltd. (2021) 1 SCC 171** will not permit the Court to concur with the finding of facts of the Tribunal.

17. The next issue which arises is that as matter has remained pending for 21 years and the record and proceedings are before this Court, whether the matter be remanded to the Tribunal for deciding the quantum of compensation or the same be decided here as the Tribunal has decided all the issues also? The answer is in the affirmative as per the judgments of the Apex Court in **Bithika Mazumdar and another Vs. Sagar Pal and others, (2017) 2 SCC 748** and of this Court in **F.A.F.O.**

No. 1999 of 2007 (Oriental Insurance Company Limited vs. Smt. Ummida Begum and others) and in F.A.F.O. No. 1404 of 1999 (Smt. Ragini Devi and others Vs. United India Insurance Company Limited and another) decided on 17.4.2019 where in it has been held that if the record is with the appellate Court, it can decide compensation instead of relegating the parties to the Tribunal.

18. The deceased, according to learned counsel for the appellant, was serving as conductor in a private bus and it is stated was earning Rs.2,000/- per month. However, there is no record to prove the said fact. Therefore, we consider his income to be Rs.1250/- per month. To which, as the deceased was below 40 years, 40% be added towards future loss of income in view of the decision in **National Insurance Co. Ltd. Vs. Pranay Sethi and others, 2017 LawSuit (SC) 1093**. The deceased being in the age bracket of 26-30 years of age, the multiplier applicable would be 17 in view of the decision in **Sarla Verma and others Vs. Delhi Transport Corporation and Another, 2009 LawSuit (SC).** The deduction towards personal expenses of the deceased would be 1/2 as the claim petition was filed only by the widow of the deceased. The submission of Sri Porwal that there are other dependents also and, therefore, deduction would be more than 1/2, cannot be countenanced. Further, as the accident occurred in the year 1992, Rs.40,000/- will be granted to the appellant-claimant under the head of non-pecuniary heads.

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

i. Monthly Income: Rs.1250/-

ii. Percentage towards future prospects : 40% namely Rs.500/-

iii. Total income : Rs.1250 +500 = Rs.1750/-

iv. Income after deduction of 1/2 towards personal expenses : Rs.875/-

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

vi. Multiplier applicable : 17

vii. Loss of dependency: Rs.10,500 x 17 = Rs.1,78,500/-

viii. Amount under non pecuniary heads : Rs40,000/-

ix. Total compensation : Rs.2,18,500/-

x. Total compensation payable to the claimants after apportionment of 10% negligence on the part of deceased : Rs.1,96,650/-

20. The above amount shall carry interest at the rate of 6% from the date of filing of the claim petition till the date of decision of the Tribunal as the appeal has remained pending for no fault of the Insurance Company. Though the Insurance Company appeared recently, for the remaining period, they would be liable to pay interest at the rate of 3%, reason being, the appellants' counsel also did not take care to see that the matter was heard expeditiously. It was only after the Court directed that all old matter be listed, the matter came to be listed and, therefore, the aforesaid direction is give.

21. In view of the above, the appeal is allowed. Judgment and order passed by the Tribunal is set aside. The Insurance Company shall deposit the amount within 12 weeks from today with interest as awarded herein above.

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 be passed by Tribunal..

23. 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.

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 judgment of **A.V. Padma (supra).** The same is to be applied looking to the facts of each case.

25. 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.

(2022)05ILR A717
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.03.2022

BEFORE

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

First Appeal From Order No. 1043 of 1992

Smt. Maya Devi & Ors. ...Appellants
Versus
U.O.I. ...Respondent

Counsel for the Appellants:
Sri Ramesh Singh, Sri K.L. Grover

Counsel for the Respondent:
Sri C.S. Chaturvedi

A. Civil Law - Motor Vehicles Act, 1988 - Section 168 - Motor Accident claim - claim petition dismissed - Tribunal rejected the claim petition holding that it was not proved that the accident occurred with the military jeep in question - F.I.R. categorically mentions about the truck - Tribunal disbelieved PW1 and PW2 only on the ground that there was a delay in filing the F.I.R. - Held - driver of the truck nowhere stated that the vehicle was not involved in the accident - Filing of final report is not a conclusive proof - Just because final report was filed & protest petition was not filed, it does not mean that the vehicle was not involved in the

accident - Tribunal believed that the death of the deceased was due to accidental injuries and, therefore, dismissing the claim petition is bad in the eye of law - injuries on deceased suggests that the truck driver on the bridge was driving the vehicle rashly and negligently (Para 11, 18)

B. Civil Law - Motor Vehicles Act, 1988 - Section 168 - Motor Accident claim - claim petition dismissed by Tribunal - Remand to Tribunal when not required – If the matter has remained pending for long decade before Appellate court & if the record is with the appellate Court, it can decide compensation instead of relegating the parties to the Tribunal (Para 19)

C. Civil Law - Motor Vehicles Act, 1988 - Section 168 - Motor Accident claim - Quantum of Compensation - accident occurred on 12.03.1987 causing death of deceased who was 28 years of age and left behind him, widow and four minor children - deceased was milk vendor - Deceased Income Rs. 900/- p.m. i.e. below taxable income in the year 1987 - deceased was in age bracket of 26-30 years as Milk worker, 40% of the income will have to be added as future prospects - Income Rs.900 p.m - Percentage towards future prospects : 40% namely Rs.360 - Total income : Rs.900 + Rs.360= Rs.1260 - Income after deduction of 1/4 : Rs.945 - Annual income : Rs.945 x 12 = Rs.11,340 - Multiplier applicable : 17 (as the deceased was in the age bracket of 26- 30 years) - Loss of dependency: Rs.11,340 x 17 = Rs.1,92,780 - Amount under non pecuniary heads = 50,000 - Total compensation : Rs.2,42,780 - -Insurance Company shall directed to deposit the amount along with additional amount within a period of 12 weeks with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is 9 of 10 deposited (Para 22, 27)

Allowed. (E-5)

List of Cases cited:

1. Varinderjit Singh Vs Tajinder Singh & ors., 2008 (4) TAC 250 Punjab & Haryana

2. Devi Prasad Vs Zahur Khan, 2001 (2) TAC 419 Madhya Pradesh

3. Bhanwar Lal Verma Vs Sharad Dholiya, 2007 ACJ 52

4. Vimla Devi & ors. Vs National Insurance Co. Ltd. & anr., (2019) 2 SCC 186

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

6. Rylands Vs Fletcher, (1868) 3 HL (LR) 330

7. Jacob Mathew Vs St. of Pun., 2005 ACJ (SC) 1840

8. Bithika Mazumdar & anr. Vs Sagar Pal & ors., (2017) 2 SCC 748

9. Oriental Insurance Co. Ltd. Vs Smt. Ummida Begum & ors. F.A.F.O. No. 1999 of 2007

10. Smt. Ragini Devi & ors. Vs United India Insurance Co. Ltd. & anr. F.A.F.O. No. 1404 of 1999 decided on 17.4.2019

11. Vimal Kanwar & ors. & ors.Vs Kishore Dan & ors., AIR 2013 SC 3830

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

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

14. Smt. Hansagauri P. Ladhani v/s The Oriental Insurance Co. Ltd., reported in 2007(2) GLH 291

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

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

1. Heard Shri Ramesh Singh, learned counsel for the appellants; Shri C.S.

Chaturvedi, learned counsel for the respondents; and perused the record.

2. This appeal, at the behest of the claimants, challenges the judgment dated 18.3.1992 passed by Motor Accident Claims Tribunal/XIth Additional District Judge, Agra (hereinafter referred to as 'Tribunal') in Motor Accident Claim Petition No.150 of 1987 rejecting the same and not awarding any compensation.

3. The brief facts as culled out from the record are that the deceased met with an accident on 12.3.1987 at about 09.40 hrs. The informant alongwith the deceased was going towards the Agra City, i.e., Agra Fort and the alleged Jeep and the Scooter were coming fro m the Agra City, i.e., Agra Fort. On notice being issued, the Insurance company appeared and filed their reply. The driver and owner accepted the accident having taken place but contended that the accident occurred due to negligence of the deceased herein.

4. Learned Counsel Sri Ramesh Singh has contended that the petition has been dismissed by assigning reasons which are not germane for the facts.

5. The Tribunal framed 3 issues and rejected the claim petition holding that it was not proved that the accident occurred with the military jeep in question. The Tribunal disbelieved PW-1, who is claimant and eye witness. The F.I.R. categorically mentions about the truck. Just because the final report was filed will not conclusively prove that the vehicle was not involved. The Tribunal on surmises and conjectures disbelieved PW1 and PW2 only on the ground that there was a delay in filing the F.I.R. The written statement of the owner ought to have been looked into by the Tribunal before brushing aside the judgment and not relying on the authoritative pronouncements in ***Varinderjit Singh Vs. Tajinder Singh & others, 2008 (4) TAC 250 Punjab and Haryana, Devi Prasad Vs. Zahur Khan, 2001 (2) TAC 419 Madhya Pradesh, and Bhanwar Lal Verma Vs. Sharad Dholiya, 2007 ACJ 52.***

6. It is further submitted that the appellant has challenged impugned award and decision dated 18.3.1992 on the following amongst grounds:

(i) The order passed by the Tribunal is illegal, perverse and against the evidence on record and based on conjectures and surmises and, as such, the same is liable to be quashed.

(ii) It is fully proved by the evidence on record that the accident occurred due to rash and negligent driving of the vehicle No.25879-B, 17947 PCL (Military Jeep), the learned tribunal erred in holding otherwise.

(iii) It is apparent fro the First Information Report and the evidence of PW-1 that the informant alongwith the deceased was going towards the Agra City i.e. Agra Fort and the alleged Jeep and the Scooter were coming from the Agra City i.e. Agra Fort, the tribunal erred in interpreting the words used in First Information Report.

(iv) The Learned Tribunal has suo moto added the word "se" in a sentence written in First Information Report i.e. *"jaise hi hum log Agra Fort ki taraf se chalte huye satsang Ashram....."* while the word "se" is not used in the said sentence in the manner interpreted by the

tribunal written in the First Information Report and, as such, the learned Tribunal erred by misreading the First Information Report by adding himself the word "se" and by returning adverse finding as far as negligence and involvement is concerned.

(v) The Tribunal erred by misreading the testimony of scooter driver Akhlak Hussain i.e. "*wah scooter se kile ke taraf purani mandi taj ganj ja raha tha"*, while the Akhlak Hussaini Scooter Driver has said in his evidence that "main apne scooter se Agra kila se purani mandi Tajganj ja raha tha".

(vi) The photographs-Exhibits No.3 to 6, fully prove that the Military Jeep (No.25879-B-1794 PCL) was involved in the accident, the learned Tribunal erred in holding otherwise and wrongly rejected the claimants claim petition.

(vii) The learned Tribunal erred in returning the finding about non involvement of vehicle which is not supported by the evidence on record.

7. The evidence of the witnesses has not been accepted which is also against the judgment in the case of the Apex Court in **Vimla Devi and others Vs. National Insurance Company Limited and another, (2019) 2 SCC 186** and therefore this court are obliged to hold that the deceased died due to the accidental injuries. The judgment of the Apex Court in **Anita Sharma v. New India Assurance Co. Ltd. (2021), 1 SCC 171** would also apply to the fact of this case.

8. Once the owner admits before the tribunal that the vehicle was involved (2) the final report was filed would not conclusively prove that the vehicle is not involved (3) insurance company has not proved that the vehicle was not involved and it is a fake claim the tribunal could not dispose of the claim when it was not proved by the insurance company that the claimants and owner and driver were in collusion, this is the main issue involved in this appeal.

9. It is submitted by Sri C.S. Chaturvedi for insurance company that the petition was rightly dismissed as the F.I.R. culminated into a report and there was no objection raised to that. The owner has colluded with the petitioners and, therefore, also there is no reason to not concur with the Tribunal.

10. The Insurance company did not examine in person nor was the owner of the vehicle, which is alleged to be involved in the accident, put to any cross-examination as he did not appear before the Tribunal nor did the Insurance company examine him as its witness after the filed written statement. The Tribunal dismissed the claim petition holding that it was not proved by cogent evidence that the accident occurred with the vehicle in question and that the evidence on record conclusively proves that the vehicle was involved in the accident.

11. The findings of the Tribunal that the vehicle was not involved in the accident is perverse on record and against the tenet of evidence and deserves to be reversed. The finding of fact that the truck was not involved in the accident is absurd. The driver of the truck has nowhere stated that the vehicle was not involved in the accident. Filing of final report is not a conclusive proof in view of the judgment of ***Varinderjit Singh Vs. Tajinder Singh & others, 2008 (4) TAC 250 Punjab and Haryana.*** The involvement is proved by

cogent evidence nor these facts are brought on record. Just because protest petition was not filed, it does not mean that the vehicle was not involved in the accident. It cannot be said that the vehicle was not involved. The Tribunal believes that the death of the deceased was due to accidental injuries and, therefore, dismissing the claim petition is bad in the eye of law. Therefore, it cannot be said that it was a planted vehicle.

12. As far as issue of contributory negligence is concerned as alleged by the appellant, this Court will have to consider the principles for deciding the negligence. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. In **Jacob Mathew V/s. State of Punjab, 2005 ACJ (SC) 1840)**, by the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part of driver of another vehicle.

18. This Court cannot concur with the learned Tribunal that it was not proved that the truck driver had not driven the truck rashly and negligently. The injuries on deceased suggests that the truck driver on the bridge was driving the vehicle rashly and negligently. Hence, the said issue is answered in the positive and in favour of the appellant. The appreciation of evidence as held by the Apex Court in the case of Kusum Lata, Saroj and Vimla Devi (supra) will not permit this court to concur with the learned Tribunal.

19. The next issue which arises is that the matter has remained pending for long decade, the record and proceedings are before this Court and the matter whether be remanded to the Tribunal or decided here? The answer is in the affirmative as per the judgments of the Apex Court in **Bithika Mazumdar and another Vs. Sagar Pal and others, (2017) 2 SCC 748** and of this Court in **F.A.F.O. No. 1999 of 2007 (Oriental Insurance Company Limited vs. Smt. Ummida Begum and others) and in F.A.F.O. No. 1404 of 1999 (Smt. Ragini Devi and others Vs. United India Insurance Company Limited and another)** decided on 17.4.2019 where in it has been held that if the record is with the appellate Court, it can decide compensation instead of relegating the parties to the Tribunal.

Compensation

20. Having heard learned counsels for the parties and considered the factual data, this Court finds that the accident occurred on 12.03.1987 causing death of Thakur Das who was 28 years of age and left behind him, widow and four minor children. The deceased was milk vendor. The Tribunal has not granted any amount. The evidence of the witnesses has not been accepted which is also against the Judgment in the case of the Apex Court in ***Vimla Devi and others Vs. National Insurance Company Limited and another, (2019) 2 SCC 186,*** and, therefore, we are obliged to hold that the deceased died due to the accidental injuries. The judgment of the Apex Court in **Anita Sharma v. New India Assurance**

Co. Ltd. (2021), 1 SCC 171 would also apply to the facts of this case.

21. As far as beneficial piece of legislation is concerned, the strict rules of Civil Procedure Code and Evidence Act are no required to adhered to.

22. In view of the judgment of **Vimal Kanwar and others v. Kishore Dan and others, AIR 2013 SC 3830** except income Tax no amount could have been deducted by the tribunal in the year of question, i.e., 1987, his income was below taxable income and hence we will have to consider the income at Rs.900/- per month of the deceased. The deceased was in age bracket of 26-30 years as Milk worker, 40% of the income will have to be added as future prospects in view of the decision of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050.**

18. In this backdrop this Court evaluates the compensation 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.900/- p.m.

ii. Percentage towards future prospects : 40% namely Rs.360/-

iii. Total income : Rs.900 + Rs.360= Rs.1260/-

iv. Income after deduction of 1/4 : Rs.945/-

v. Annual income : Rs.945 x 12 = Rs.11,340/-

vi. Multiplier applicable : 17 (as the deceased was in the age bracket of 26-30 years)

vii. Loss of dependency: Rs.11,340 x 17 = Rs.1,92,780/-

viii. Amount under non pecuniary heads = 50,000/-

ix. Total compensation : **Rs.2,42,780/-**

23. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH 6 (SC), 442, the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

24. 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.

25. 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.

26. 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."

27. In view of the above, the appeal is **allowed**. Judgment and decree 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.

28. We are thankful to learned counsels for the parties for ably assisted the Court.

29. Record be sent back to court below forthwith, if any.

30. We are thankful to learned counsels for parties for ably assisting the Court.

(2022)05ILR A724
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.03.2022

BEFORE

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

First Appeal From Order No. 1083 of 2016

Smt. Shaily @ Sarla & Ors. ...Appellants
Versus
Parmeshwari Dayal & Ors. ...Respondents

Counsel for the Appellants:
Sri Nomman Rajvanshi, Sri Archit Mehrotra, Sri Naman Rajvanshi

Counsel for the Respondents:
Sri Krishna Shanker Chaudhary

A. Civil Law - Motor Vehicles Act,1988 - Section 168 - Motor Accident claim - Quantum of Compensation - Income - deceased was 36 years of age, well educated & was serving as Deputy Manager (Purchase) at M/s. D.M.C.L. Sugar Factory, Loni - income of deceased was Rs. 36,653/- per month - Tribunal committed error in considering the income of deceased to be Rs.14,806 - Held - amount of provident fund and insurance claim cannot be deducted as they have no co-relation - Except superannuation head, there cannot be any deduction under Section 168 of the Motor Vehicles Act - basic salary i.e. 15,275/- + special allowances Rs.1500 + HRA Rs.7638/- + Education allowance Rs.800/- + conveyance allowance Rs.2055/- + PF Rs.1833/- and Gratuity Rs.734/- in total Rs.29835/- (Rs.30,000/- rounded figure) would be admissible (Para 6)

B. Civil Law - Motor Vehicles Act,1988 - Section 168 - Motor Accident claim - Quantum of Compensation - Future prospects - deceased being salaried person and was below the age of 40 years, 50% future prospects will be added - Deduction for personal and Living expense - deceased was survived by a minor son and a minor daughter, hence, deduction of 1/3 and multiplier of 15 - Non pecuniary heads - claimants would be entitled to Rs. 1,00,000/- under non-pecuniary damages and Rs. 50,000/- each to the minor children who lost their father is granted for loss love and affection - interest should be 7.5% - respondent-Insurance Company to 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 - order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers - amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R. (Para 7, 8, 10, 16)

Allowed. (E-5)

List of Cases cited:

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

2. General Manager, Kerala S.R.T.C Vs Susamma Thomas 1994 AIR 1631

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

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

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

6. Bajaj Allianz General Insurance Co. Pvt. Ltd. Vs U.O.I. & ors. dt 27.1.202

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

1. Heard Sri Naman Rajvanshi, learned counsel for the appellant and Sri Krishna Shanker Chaudhary, learned counsel for the respondent-Insurance Company.

2. This appeal, at the behest of the claimants, challenges the award dated 19.11.2015 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.8, Ghaziabad (hereinafter referred to as 'Tribunal') in M.A.C.P. No. 474 of 2009 granting sum of Rs. 18,06,750/- with 7% simple interest.

3. The learned Counsel for appellants has submitted that the Tribunal has erred in not following the mandate of judicial precedents and Rule 220 of U.P. Motor Vehicle Rules while computing the compensation admissible to the legal heirs of deceased who comprise of widow, minor son of 11 years and daughter of 9 years. The deceased was 36 years of age and was

serving as Deputy Manager (Purchase) at M/s. D.M.C.L. Sugar Factory, Loni. The income of deceased was Rs. 36,653/- per month. It is further submitted that the Tribunal has committed error in considering the income of deceased to be Rs.14,806/-. The Tribunal has not considered for granting future loss of income. The learned Counsel further submits that deduction for personal expenses and multiplier need not be disturbed. The learned counsel submits that the amount granted for non-pecuniary damages is on lower side and needs recalculation.

4. It is submitted that the deceased was working as Deputy Manager (Purchase) at D.S.C.L., Sugar Factory, Loni, from where he was getting Rs.36,653/- per month, but the Motor Accident Claims Tribunal by taking hyper technical view only considered the basic salary to compute the compensation.

5. Sri K.S. Chaudhary appearing for the Insurance company has heavily relied on the decision of the Apex Court in the case of ***Vimal Kanwar and others Vs. Kishore Dan and others, 2013 (3) T.A.C. 6 (S.C.)*** so as to contend that the income of the deceased cannot be Rs.36,563/-.

6. Learned Tribunal with profound respect has considered the income of the deceased to be Rs. 14,806/- per month. The deceased was a person who was well educated and was Deputy Manager. The reasoning given for deductions are not germane. The judgment of Vimal Kanwar (supra) is relied on by both the Counsels. The amount of provident fund and insurance claim cannot be deducted as they have no co-relation. Except superannuation head, there cannot be any deduction under Section 168 of the Motor Vehicles Act. Hence, we are holding that basic salary i.e. 15,275/- + special allowances Rs.1500 + HRA Rs.7638/- + Education allowance Rs.800/- + conveyance allowance Rs.2055/- + PF Rs.1833/- and Gratuity Rs.734/- in total Rs.29835/- (Rs.30,000/- rounded figure) would be admissible. The Tribunal has fallen in error in not considering the income of Rs.30,000/- per month. We are unable to accept the submission of learned counsel for the respondent that income should be considered at Rs. 14,806/-. The income of the deceased would have been non-taxable as Rs. 30,300/- in the year of accident he would be entitled to all the deductions and, therefore, there was no TDS deducted by the employer also and nothing has been brought on record that he was a tax payee. Hence, that amount cannot be deducted. Deduction of certain allowances namely executive allowance, books and periodicals, medical expenses, LTA, Superannuation, Furniture (Hard), Furniture (Soft) is not in dispute.

7. The Tribunal has not granted any amount towards future loss of income. The Tribunal has not assigned any reason as to why the judgment of Sarla Verma (supra) will not be applicable. Hence, deceased being salaried person and was below the age of 40 years, 50% future prospects will be added in view of the decision in ***Pranay Sethi (Supra).*** We are fortified in our view by the decision of the Apex Court in ***General Manager, Kerala S.R.T.C vs Susamma Thomas 1994 AIR 1631*** and Rule 220 of U.P. Motor Vehicle Rules, 1998.

8. Further, the deceased was survived by a minor son and a minor daughter, hence, deduction of 1/3 and multiplier of

15 granted by the Tribunal is maintained. The claimants would be entitled to Rs. 1,00,000/- under non-pecuniary damages and Rs. 50,000/- each to the minor children who lost their father is granted for loss love and affection.

9. 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.30,000/-

ii. Percentage towards future prospects : 50% namely Rs.15,000/-

iii. Total income : Rs.30,000 + 15,000 = Rs. 45,000/-

iv. Income after deduction of 1/3rd : Rs. 30,000/-

v. Annual income : Rs.30,000 x 12 = Rs.3,60,000/-

vi. Multiplier applicable : 15

vii. Loss of dependency: Rs.3,60,000 x 15 = Rs. 54,00,000/-

viii. Amount under non pecuniary heads : Rs.1,00,000/- + 50,000 + 50,000/- = Rs.2,00,000/-

ix. Total compensation : Rs. 56,00,000/-

10. 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."

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

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

13. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansaguri P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291**, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any

financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudesna and others Vs. Hari Singh and another) while disbursing the amount.

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 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.

15. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein.

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 12 years have elapsed, the amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R.

17. This Court is thankful to both the counsels to see that this very old matter is disposed of.

(2022)05ILR A728
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.04.2022

BEFORE

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

First Appeal From Order No. 1182 of 1992

M/S United India Insurance Co. Ltd.
...Appellant
Versus
Smt. Jai Laxmi Singh & Ors.
...Respondents

Counsel for the Appellant:
Sri K.S. Amist

Counsel for the Respondents:
Sri Vijay Kumar Bist, Sri G.K. Singh, Sri N.I. Jafri, Sri R.K. Pandey, Sri S.D.Ojha, Sri S.K. Mishra, Sri S.K. Shukla, Sri S.N. Srivastava, Sri Manoj Kumar

A. Civil Law - Motor Accident Act, 1988 – Sections 147, 148, 149 & 157 – Claim petition – Breach of policy – Vehicle was sold and new owner got the vehicle registered as a vehicle to be used for commercial purpose without intimating the Insurance Co. – Effect – Owner would be liable to the insurance Co. for the deliberate wrong in not disclosing the fact as otherwise they would have been liable to pay a higher premium which they have not paid – Held, the breach of policy would fall within the scope of Section 147 of Act, 1988 though not a breach under Section 149 of Act, 1988 – There is a breach of policy, a duty is cast on the subsequent purchaser to convey to the insurance Co. any change in the registration of the vehicle – Insurance Co. was given liberty to recover the amount, already deposited as per the order of this Court, from both the owners. (Para 13 and 14)

B. Motor Accident Claim – Rash and negligent driving – Term 'Negligence' – Meaning – Principle of '*res ipsa loquitur*', when it can be applied – 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 though it is normally accidental – 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. (Para 5)

C. Motor Accident Claim – Principle of contributory negligence – Scope and meaning – A person who either contributes or is co author of the accident would be liable for his contribution to the accident having taken place. (Para 6)
Appeal partly allowed (E-1)

List of Cases cited:-

1. First Appeal From Order No. 1818 of 2012; Bajaj Allianz General Insurance Co.Ltd. Vs Smt. Renu Singh & ors. decided by Allahabad High Court on 19.7.2016

2. Archit Saini & anr. Vs Oriental Insurance Co. Ltd., AIR 2018 SC 1143

3. National Insurance Co. Ltd Vs Swaran Singh, (2004) 3 SCC 297

4. Manuara Khatun Vs Rajesh Kumar Singh, AIR 2017 SC 1204

5. Lal Singh Marabi Vs National Insurance Co. Ltd., 2017(5) SCC 82.

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

1. Heard Sri K.S. Amist, learned counsel for the appellant, Sri S.D. Ojha, learned counsel for claimants-respondent and perused the judgment and order impugned.

2. This appeal, at the behest of appellant-M/S United India Insurance Company Ltd., challenges the award dated 19.8.1992 passed by Motor Accident Claims Tribunal/Vth Additional District Judge, Gorakhpur (hereinafter referred to as 'Tribunal') in M.A.C.No.35 of 1991 awarding a sum of Rs.3,60,000/- with interest at the rate of 12% as compensation.

3. Brief facts as culled out from the record are that on 7.10.1990, Prem Narain Singh was going driving Hero Puch from Chargawan towards Gorakhpur and at about 11:20 a.m. when he reached near M/s Gautam Bhterprises at Khajanchi Chauraha, Police Station Shahpur in Gorakhpur to Bhatahat Road, a Jeep bearing UPH-2756, coming from Dharamshala City, Gorakhpur side to Maharajganj driven in a very rash and negligent manner, dashed against the moped causing grievous and fatal injuries to Prem Narain Singh who later on died in the Hospital on the same day.

4. Learned counsel for the appellant - insurance company submits that Kali Charan- respondent no. 9 who was the owner of the Jeep UPH-2756 at the time of the accident and it was being driven by the Rameshwar Prasad- respondent no. 10. Jeep UPH-2756 was insured with the appellant - insurance company at the time of accident. Kali Charan- respondent no. 9 filed his written statement stated that accident took place on account of the negligence of the deceased himself as he was carrying a gas cylinder on his motor cycle and was driving it at a high speed and the motor cycle became uncontrolled, causing accident. He further states that the jeep was insured from 5.3.1990 to 4.3.1991 for the purpose of private use only in the name of Mohd. Aziz as owner and it

appeared that Mohammad Aziz later on sold the jeep UPH-2756 to Kali Charan who got the registration of jeep transferred for the purpose of using it as taxi but he did not get the insurance policy transferred and the insurance of the jeep remained for the purpose of private use only,therefore, the appellant was not liable to pay any compensation. He further submits that the compensation awarded by the Tribunal is very high and exorbitant and the Tribunal has not followed the correct principles of law in calculating the amount of the award. The Tribunal has illegally not allowed any deduction for lump sum payment, atleast 30% deduction should be allowed. He further submits that the award granted by the Tribunal is illegal and against the evidence on record. The Jeep being UPH-2756 was being driven in violation of the terms and conditions of the insurance policy and the appellant took such specific plea and the appellant was not liable to pay any amount of compensation.

Dispute as to negligence : -

5. 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.

6. 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.

7. 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

8. A similar view has been taken by 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] andPazhaniammal 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."

9. Learned counsel for the respondent submits that there is no contribution of deceased in accident as he was not negligent. The compensation amount does not require any recalculation as compensation awarded is in consonance of just compensation as applicable in the year of decision.

Dispute as to Breach of Policy

10. Sections 147, 148 and 149 and 157 of Act, 1988 reads as follow :

"Section 147 Requirements of policies and limits of liability. --

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

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

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

(i) against any liability which may be incurred by him in respect of the death of or bodily 27 [injury to any person, including owner of the goods or his authorised representative carried in the vehicle] or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

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

Provided that a policy shall not be required--

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

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

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

(ii) to cover any contractual liability.

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

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

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

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

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

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

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

(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy

purports to cover in the case of that person or those classes of persons.

*"**Section 148. Validity of policies of insurance issued in reciprocating countries.**--Where, in pursuance of an arrangement between India and any reciprocating country, the motor vehicle registered in the reciprocating country operates on any route or within any area common to the two countries and there is in force in relation to the use of the vehicle in the reciprocating country, a policy of insurance complying with the requirements of the law of insurance in force in that country, then, notwithstanding anything contained in section 147 but subject to any rules which may be made under section 164, such policy of insurance shall be effective throughout the route or area in respect of which, the arrangement has been made, as if the policy of insurance had complied with the requirements of this Chapter."*

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

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

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

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

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

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

(b) for organised racing and speed testing, or

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

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

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

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

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

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

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

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

(6) In this section the expression "material fact" and "material particular" means, respectively a fact or particular of such a nature as to influence the judgment of a prudent insurer in determining

whether he will take the risk and, if so, at what premium and on what conditions, and the expression "liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

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

157. Transfer of certificate of insurance.--

(1) Where a person in whose favour the certificate of insurance has been issued in accordance with the provisions of this Chapter transfers to another person the ownership of the motor vehicle in respect of which such insurance was taken together with the policy of insurance relating thereto, the certificate of insurance and the policy described in the certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of its transfer. 1[Explanation.--For the removal of doubts, it is hereby declared that such deemed transfer shall include transfer of rights and liabilities of the said certificate of insurance and policy of insurance.]

(2) The transferee shall apply within fourteen days from the date of transfer in the prescribed form to the insurer for making necessary changes in regard to the fact of transfer in the certificate of insurance and the policy described in the certificate in his favour and the insurer shall make the necessary changes in the certificate and the policy of insurance in regard to the transfer of insurance.

11. It is an proved fact that there was breach of policy condition, namely, though the fundamental duty is of the owner and driver to discharge the duty and to prove that they had intimated the insurance company. The new owner to whom vehicle was sold got vehicle registered from private to commercial vehicle but never intimated the insurance company which falls in the purview of fundamental breach of policy under Section 147 of M.V. Act. 1988. It is not fraud but it is definitely misinformation rather non-feasance by the new owner.

12. In **National Insurance Co. Ltd v. Swaran Singh, (2004) 3 SCC 297** which has been thereafter referred and dissented to, the fact remains that the Insurance Company did not prove that the driver was not having valid driving license. It cannot be allowed to avoid its liability unless the said breach or breaches which have contributed to the conduct.

13. The fact that the vehicle was sold and a new owner stepped into the shoes of insured of the owner may not have been very important and would not be a ground for refusing to indemnify the owner but the owner who subsequently bought the vehicle without

intimating the Insurance Company got the vehicle registered as a vehicle to be used for commercial purpose; namely, a passenger vehicle. I am in agreement with the submission of counsel for insurance company that as far as the vehicle used as passenger vehicle is concerned, the premium would be different. The breach of policy would fall within the scope of Section 147 of Act, 1988 though not a breach under Section 149 of 1988 Act. There is a breach of policy, a duty is cast on the subsequent purchaser to convey to the insurance company any change in the registration of the vehicle had the owner who subsequently bought had not converted the same, this stand taken by the insurance company could have been rejected but the fact that the Tribunal did not consider this aspect from this angle vitiates its direction.

14. The Insurance Company having deposited the amount as per the order of this Court, would be at liberty to recovery the same from both the owners. The reason being it is not brought on record as to in whose name, the vehicle stood at the time of accident but it appears that the present respondent/ new owner who had got the vehicle registered as a transport vehicle, must have also got his name registered and, therefore, the present respondent - owner would be liable to the insurance company for the deliberate wrong in not disclosing the fact as otherwise they would have been liable to pay a higher premium which they have not paid. Hence, the submission of counsel for the appellant is accepted.

15. In the **Manuara Khatun Vs. Rajesh Kumar Singh, AIR 2017 SC 1204,** Hon'ble Supreme Court has held that the deceased who was traveling in the goods vehicle can be termed as a gratuitous passenger and not covered under the insurance policy and, therefore, Insurance Company is exonerated, but directed to pay the amount of compensation to claimants with the right to recover the same from the insured. Similar view has been taken in the case of **Lal Singh Marabi Vs. National Insurance Co**

16. As far as the compensation is concerned, it cannot be said that the compensation awarded is on higher side. There is no cross objection filed by the claimant. The compensation awarded is without grant of future loss of income and the amount under non pecuniary damages on lower side and, therefore, also no interference is called for.

17. Appeal is partly allowed. Recovery rights are granted to the appellant.

18. Record be sent back to the Tribunal forthwith.

19. The insurance company to deposit rest of the amount if not yet deposited. On deposit of rest of the amount, the same be disbursed to the claimants. If the amounts are already deposited, the same be disbursed to claimant as 30 years have elapsed from the date of filing of this appeal.

(2022)05ILR A739
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.03.2022

BEFORE

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

First Appeal From Order No. 1209 of 2007
With
First Appeal From Order No. 1266 of 2007

Raj Kumar Agarwal & Ors. ...Appellants
Versus
Ahsan Ali & Ors. ...Respondents

Counsel for the Appellants:
Sri Shailesh Rai, Sri Rishi Bhushan Jauhari

Counsel for the Respondents:
Sri Manish Kumar Nigam, Sri Vipul Kumar, Sri Rakesh Bahadur

A. Civil Law - Motor Accident Act, 1988 – Compensation – Deceased was a Director in a Co. – Non-deduction of Income Tax – Permissibility – Tribunal applied the multiplier of 16 – Validity challenged – Evaluation of the income of deceased – Income Tax Return, how far relevant – Held, the Tribunal has mis-directed itself in not considering the income tax returns. Deceased was a director from 01.04.2003 to 30.09.2003. The income tax returns have to be considered – High Court re-computed the compensation by deducting income tax from it and by adding 25% future loss and applying multiplier of 15 and awarded 7.5% interest. (Para 24, 27 and 29)

B. Motor Accident Claim – Rash and negligent driving – Term 'Negligence' – Meaning – Principle of '*res ipsa loquitur*', when it can be applied – 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 though it is normally accidental – 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. (Para 14)

C. Civil Law - Motor Accident Claim – Principle of contributory negligence – Scope and meaning – A person who either contributes or is co author of the accident would be liable for his contribution to the accident having taken place. (Para 15)

D. Civil Law - Income Tax Act, 1961 – Section 194A (3) (ix) – Withdraw of amount of interest – Certificate of Income Tax authority, when required – Held, if the interest payable to any claimant for any financial year exceeds Rs. 50,000/-, insurance Co./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. (Para 32)

Appeal partly allowed (E-1)

List of Cases cited:-

1. Daljeet Singh & ors. Vs Hardeep Singh & ors., 2002 (1) TAC 613 (MP)

2. Suchitra Sinha & ors. Vs Baij Nath & ors., 2005 (3) TAC 533 (M.P.)

3. Smt. Indraneerja Durari Vs Madras Motor and General As. Co. & ors.; ACC 1996 (1) SC 335

4. Gurmeet Vs Mohinder Singh & ors. TAC 2006 (3) 958 of Punjab & Haryana High Court

5. U.P.S.R.T.C Vs Mamta & ors..; 2016 AIR SC 948

6. First Appeal From Order No. 1818 of 2012; Bajaj Allianz General Insurance Co.Ltd. Vs Smt. Renu Singh & ors. decided on 19.7.2016

7. Khenyei Vs New India Assurance Co. Ltd. & ors.; 2015 LawSuit (SC) 469

8. Sangita Arya & ors. Vs Oriental Insurance Co. Ltd. & ors.; 2020 LawSuit (SC) 432

9. Rukmani Jethani & ors. Vs Gopal Singh & ors. 2021 (4) T.A.C. 23 (SC)

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

11. Kirti & anr. etc. Vs Oriental Insurance Co. Ltd.; 2021 AIR SC 353

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

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

15. A.V.Padma Vs Venugopal; 2012 (1) GLH (SC) 442

16. Smt. Hansaguri P. Ladhani Vs The Oriental Insurance Co.Ltd.; 2007(2) GLH 291

17. Bajaj Allianz General Insurance Co. Pvt. Ltd. Vs U.O.I. & ors. of the Apex Court decided on 27.1.2022

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

1. These appeals have been preferred against the judgment and award dated 27.01.2007 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.8, Shahjahanpur (hereinafter referred to as "Tribunal') in M.A.C.P. No. 200 of 2003 (Raj Kumar Agrawal and Others Vs. Ahsan Ali and Others), whereby the claim petition of the claimants was allowed and awarded a sum of Rs.9,69,500/- as compensation to the claimants with interest at the rate of 6% per annum.

2. Heard Mr. R.B. Jauhari, learned counsel for the claimants-appellants and Mr. Rakesh Bahadur, learned counsel for the Insurance Company. None has appeared for the owner, when the matter is taken up for final disposal.

3. The Insurance Company has felt aggrieved, as also the claimants have felt aggrieved by the decision of the learned Tribunal.

4. The claim petition was filed seeking compensation of Rs.80,00,000/- with interest at the rate of 12% per annum, namely from the date of filing of the claim petition till final payment for the death of Smt. Rajni Agrawal, wife of claimant-appellant no.1 and mother of other minor children.

5. The brief facts as culled out from the record and the judgment are that Smt. Rajni Agrawal wife of Raj Kumar Agrawal, who was aged about 39 years and averred to be earning of Rs.40,000/- per month by doing service, farming and other business. On the fateful day, when she was going alongwith Smt. Kanchan Agrawal from Shahjahanpur to Nanital by car bearing registration no.27 B 8751. The aforesaid car was being driven by one Awadesh @ Nirdos Kumar Saxena. A truck bearing registration no. U.P. 22A 9857 being driven very rashly and negligently came and dashed with the car. The car driver and both the women sustain injuries.

6. The driver of the car and Smt. Rajani Agrawal died while they were being taken to the hospital. The First Information Report was lodged against the driver of the truck. The New Indian Insurance Company Ltd. (in short "Insurance Company") filed its written statement wherein they denied the averments made in the claim petition. The Insurance Company took the plea that the vehicle was being driven against the policy and there is violation of the provisions of Motor Vehicles Act, 1988 and they were not liable to pay any compensation. They took the plea that there is no non-impleadment of all the legal representatives of the deceased. It was alleged that the deceased was not doing farming activities and was not engaged in any job nor she was having any business. It is also contended that deceased did not die out of the injuries caused to her in the said accident. The driver of the car dashed with a unknown vehicle due to his own negligence and as the number of the said vehicle could not be known, only with the view to get compensation in collusion with the police and doctors in pre-planed manner and on concocted grounds, the claim petition was filed.

7. It was further contended before the Tribunal that the driver of the car was not

having valid driving licence nor there was any valid registration certificate nor other valid papers. It is also avert that the Insurance Company is not liable to pay any amount as the driver of the truck had no endorsement and could not have driven the vehicle. The opposite party no.5, Satya Narain Agrawal has also filed his reply admitting the averments made in the claim petition. The vehicle was insured with United India Insurance Company Ltd. on the day of the accident. The legal heirs of the owner of the car have been substituted. The Insurance Company also took the plea of denial. The respondent nos.1 to 3 did not file any reply, therefore, the matter came be heard against them ex parte by Tribunal. The learned Tribunal framed about four issues.

8. The petitioners filed list of certain documentary evidences. No oral or documentary evidence has been led on behalf of any of opposite parties.

9. The Insurance Company has felt aggrieved by the decision dated 27.01.2007 contending that the same is against the evidence on record and requires to be set aside. It is also submitted that the husband of the deceased was earning person and, therefore, he would not be entitled to get any compensation for death of his wife. The learned counsel for the Insurance Company has relied on the decision of Madhya Pradesh High Court titled ***Daljeet Singh and Others Vs. Hardeep Singh and Others, 2002 (1) TAC 613 (MP)*** that earning husband cannot claim any compensation on basis of dependency on death of his wife in accident. The main contention is that husband was not entitled to get any amount and the income of the deceased was not proved. Learned counsel for the Insurance Company has also relied on the decision of Madhya Pradesh High Court in ***Suchitra Sinha and Others VS. Baij Nath and Others, 2005 (3) TAC 533 (M.P.),*** so as to contend that income tax return could not have been considered to decide the income of deceased. The Insurance Company has also challenged the findings on the issue of negligence. A plea is taken that in view of the aforesaid judgment, the learned Tribunal should have applied multiplier of 13 and not 16 and also should have gone by the schedule of Motor Vehicles Act, 1988.

10. The contentions and challenge as culled out from the grounds of appeal raised by the Insurance Company are that one of the claimants namely husband was not dependent on his wife, therefore, he was not entitled to any compensation on account of dependency, for which, learned counsel for the Insurance Company has relied on the decision of ***Suchitra Sinha (Supra)***, so as to contend that the learned Tribunal has committed an error by not deducting 50% for her personal expenses as the other dependents were minor children. It is also submitted that husband of the deceased himself was earning Rs.35,000 to 40,000/- per month and he has re-married during the pendency of litigation. It is further submitted that assessment years of income tax returns were for the period subsequent to the death of the deceased namely 2003-04 was not admissible in evidence as per the judgment of ***Suchitra Sinha (Supra).***

11. The next ground for assailing the judgment by Insurance Company of learned Tribunal is based on the fact that the driver of the car was also contributor to the accident and they were liable to be joined as party and, therefore, the said amount should be deducted, for which, learned

counsel for the Insurance Company has relied on the judgment of ***Smt. Indraneerja Durari Vs. Madras Motor and General As. Co. & Others, ACC 1996 (1) SC 335 and Gurmeet VS. Mohinder Singh and Others, TAC 2006 (3) 958 of Punjab and Haryana High Court.***

12. In view of the judgment of U.P.S.R.T.C Vs. Mamta And Ors., 2016 AIR SC 948, wherein it has been held that all the issues raised by the court of appeal, when appeal under Section 173 of M.V. Act is filed, hence, we are go to decide each ground raised. We would first deal with the issue of negligence raised by the counsel for the Insurance Company.

13. The main two grounds urged by the Insurance Company for assailing the award as quantum and negligence. At the outset, it is clear that no issues which could be taken for avoidance of policy are urged even in written grounds of appeal. None of the principles enunciated for avoidance of policy as averred before the Tribunal. The driver of the truck was having valid driving licence. There was no technical or other breach for which the Insurance Company could avoid its liability and said findings have attained finality.

Appeal of Insurance Company being F.A.F.O. No. 1266 of 2007.

Issue of negligence rather contributory negligence:- The submission of learned counsel for Insurance Company that driver in which deceased was travelling was also negligent and the amount qua his negligence be deducted is taken for discussion as to whether finding of Tribunal requred to be interfered or concurred even if interfered what would be the consequence payable to legal representatives of deceased.

14. The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance take 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 in accident cases involving vehicles of different magnitudes or single vehicle.

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

16. 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 A*ct, 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."

17. The term contributory negligence has to be viewed in light of term composite negligence. The Apex Court in ***Khenyei Vs. New India Assurance Company Limited & Others, 2015 LawSuit (SC) 469*** where the court has explained the term contributory and composite and liability of fortuitous wherein the court 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."

18. As far as the claimants are concerned, the death of the wife/mother can be said to be out of the accidental injuries. Even if we consider the negligence, it would be composite negligence qua the legal heirs. The findings of fact as far as issue of negligence is concerned, goes to show that the accident occurred in morning at 6:30 AM on the national highway involving a truck and a car. The driver of the truck applied short break by which the truck dashed with the car and the car came under the truck (car truck ke niche dab gayi). The two ladies and driver got injured. The charge sheet and the FIR were lodged against the driver of the truck. The car was being driven by one Awadesh. The driver and wife of P.W.-1 died on the spot. The oral testimony of P.W.-2, Kanchan Agrawal who was in the car and was injured eye witness has categorically deposed that driver of truck was negligent. The truck driver was drives the truck in rash and negligent manner. The submission of learned counsel for the Insurance

Company that truck loaded with patatos cannot be driven in a rash and negligent manner cannot be accepted and, therefore, we concur with the finding of the learned Tribunal as far as the negligence is concerned. As far as the submission that the husband cannot be granted any amount, we would be dealing with the same in the appeal preferred by the claimants, when we decide the same.

Compensation in Appeal No.1209 of 2007.

19. It is submitted by learned counsel for the claimants that the income of the deceased was Rs.32,000/- per month (rounded figure) but the Tribunal has wrongly considered income to be Rs.7,500/- only. It is submitted that the learned Tribunal has brushed aside the Income Tax Returns. Learned counsel for the claimants has relied on the decisions in (***a) Sangita Arya & Ors. Vs. Oriental Insurance Co. Ltd. & Ors., 2020 LawSuit (SC) 432, (b) Rukmani Jethani and Others Vs. Gopal Singh and others, 2021 (4) T.A.C. 23 (SC), (c) Vimal Kanwar and Others Vs. Kishore Dan and others, 2013 (3) T.A.C. 6 (S.C.)*** to buttress his submission that the finding of the Tribunal as far as income of deceased is concerned is bad and requires reconsideration.

20. Learned counsel for the claimants-appellants has relied on the judgment of Kirti and another etc. Vs. Oriental Insurance Company Ltd., 2021 AIR SC 353 to claim higher compensation.

21. Learned counsel for the claimants has further submitted that the deceased was survived by her husband and two minor children and, therefore, the deduction towards personal expenses would be 1/3rd as held by the Tribunal.

22. It is also submitted by learned counsel for the claimants that the amount awarded under non pecuniary damages is on the lower side and is required to be enhanced in view of the decision in ***National Insurance Co. Ltd. Vs. Pranay Sethi and others, 2017 LawSuit (SC) 1093*** and the later decision of the Apex Court. Learned counsel for the claimants has lastly submitted that the interest awarded by Tribunal is on the lower side and it should be as per the repo rate prevailing in those days.

23. As against this, learned counsel for Insurance Company has contended that the income which is claimed cannot be granted. It is further submitted by learned counsel for the Insurance Company that deduction towards personal expenses is just and proper and does not call for interference of this Court. It is also submitted by learned counsel for the Insurance Company that the amount awarded under non pecuniary heads and interest granted by the Tribunal are just and proper and does not call for interference of this Court. It is further submitted and reiterated that deduction for personal expenses should ½ as her husband was not dependent on the deceased.

24. Having heard learned counsels for the parties and considering the income tax returns and the decisions cited by the learned counsel for the claimants, we hold that had the deceased been alive, she would have been earning Rs.32,060/- per month. The deceased was Director in a Company. However, we are in agreement with learned counsel for the respondent that from the income, at least

Income Tax should be deducted and, therefore, we consider the income of the deceased to be Rs.30,000/- per month. Addition of 25% toward future loss of income is granted and multiplier of 16 granted by the Tribunal is reduced to 15. As far as deduction towards personal expenses of the deceased is concerned, we are in agreement with learned counsel for the Insurance Company that it should be 1/2nd. Learned Tribunal has not considered the income tax returns. As according to the Tribunal, the income tax returns were dated 31.07.2002. Subsequently, the return dated 14.09.2003 also Rs. 32,000/- was deducted towards income tax. The learned Tribunal has mis-directed itself in not considering the income tax returns. Deceased was a director from 01.04.2003 to 30.09.2003. The income tax returns have to be considered. On what basis, learned Tribunal decided that her income would be Rs.5,000/- per month cannot be fathomed by us. The Tribunal has considered her income of Rs.2,500 that of agricultural income and Rs.2,500/- for her utility as a house wife. The finding is without any basis and we cannot accept the same. The Tribunal has held as the income tax returns are even for a period after the accident occurred, they cannot be accepted as truthful. The accident occurred on 28.09.2003 and, therefore, for amounting year as well as tax is concerned, the income tax return of 2004-05 have to be filled in as her income up to September have to be considered.

25. We would have granted to the husband, amount for loss of love and affection of the wife but he has re-married and the learned Tribunal has also not apportioned or granted any amount. We uphold the same.

26. As far as amount under non-pecuniary heads is concerned, the appellants would be entitled to Rs.70,000/- plus 10% rise in every three years in view of the decision of the Apex Court in Pranay Sethi (Supra) and, therefore, we round up the figure to Rs.1,00,000/- under this head.

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

i. Monthly Income: Rs.30,000/-

ii. Percentage towards future prospects : 25% namely Rs.7,500/-

iii. Total income : Rs.30,000 +7,500/- = Rs.37,500/-

iv. Income after deduction of ½nd towards personal expenses : Rs.18,750/-

v. Annual income : Rs.18,750 x 12 = Rs.2,25,000/-

vi. Multiplier applicable : 15

vii. Loss of dependency: Rs.2,25,000 X 15 = Rs.33,75,000/-

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

ix. Total compensation : Rs.34,75,000/-

28. Learned Tribunal has unfortunately granted 6% rate of interest, which was not the repo-rate applicable in the year of judgment namely 27.01.2007. At least, it should have been 7% per annum. 14 years have elapsed, we do not disturb the same and the rate of interest on awarded amount is maintained. However, on the enhanced amount, it would be be 7.5% per annum.

29. 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."

30. In view of the above, the appeals filed by claimants as well as Insurance Company are partly allowed. Award 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% per annum 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. The claimants shall furnish their bank account numbers and on deposit of amount, the Tribunal shall transfer the amount to the said accounts.

31. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442, the order of investment be passed by Tribunal.

32. 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.

33. 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.

34. 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. 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.

35. This Court is thankful to both the counsels for getting this matter decided. Record be transmitted to Tribunal forthwith.

(2022)05ILR A749
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.03.2022

BEFORE

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

First Appeal From Order No. 1285 of 2008
AND
First Appeal From Order No. 1489 of 2008

The New India Assurance Co. Ltd. ...Appellant
Versus
Amit Kumar Yadav & Anr. ...Respondents

Counsel for the Appellant:
Sri Praful Sahadeva, Sri P. Bahadur, Sri Rakesh Bhahdur

Counsel for the Respondents:
Sri Bhola Nath Yadav, Sri A, Singh, Sri Amish Mishra, Sri Mahendra Pratap Singh, Sri Shiv Nath Singh, Sri Satyam Singh

A. Motor Accident Claim – Role of Tribunal, while deciding the claim cases – Distinction from other civil suits, explained – The role of the Tribunal is not a silent spectator when medical evidence is tendered in regard to the injuries and their effect, in particular the extent of permanent disability – Tribunal does not function as a neutral umpire as in a civil suit. It is an active explorer and seeker of truth who is required to hold an enquiry into the claim for determining 'just compensation'. (Para 28)

B. Civil Law - Motor Accident Act, 1988 – Claim – Compensation – Disability Certificate, proof thereof – No examination of Doctor – Effect – High Court disapproved the argument that there is necessity to prove the disability certificate by calling the doctor when it is not challenged before the Tribunal. (Para 18)

C. Civil Law - Motor Accident Act, 1988 – Claim – Compensation – Loss of amenities – Injured was 21 years unmarried young boy – He became disabled to the tune of 80% and that too by his legs and he is not able to sit properly and walk – He has lost pleasures of life because he cannot lead a normal life after accident. It is natural that he had bleak prospects of marriage and family life – Held, it can be said that the appellant has lost amenities of life to the great extent, which cannot be restored at all. Therefore, he would get Rs. 4,00,000/- for loss of amenities. The disability of the appellant is permanent. Under the head of pain, shock and sufferings, he is entitled to get a sum of Rs. 1,00,000/- – High Court re-computed the compensation and awarded 7.5% interest. (Para 38, 39 and 41)

D. Civil Law - Motor Accident Act, 1988 – Section 168 – Just compensation – Meaning – 'Just' means- fair, reasonable and equitable amount accepted by legal standards – 'Just compensation' does not mean perfect or absolute compensation. It requires examination of particular situation obtaining uniquely in individual case. (Para 21)

E. Motor Accident Claim – Rash and negligent driving – Term 'Negligence' – Meaning – Principle of '*res ipsa loquitur*',

when it can be applied – 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 though it is normally accidental – 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. (Para 7)

F. Motor Accident Claim – Principle of contributory negligence – Scope and meaning – A person who either contributes or is co author of the accident would be liable for his contribution to the accident having taken place. (Para 8)

G. Civil Law - Income tax Act, 1961 – Section 194A (3) (ix) – Withdraw of amount of interest – Certificate of Income Tax authority, when required – Held, if the interest payable to any claimant for any financial year exceeds Rs. 50,000/-, insurance Co./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. (Para 44)

Appeal partly allowed (E-1)

List of Cases cited:-

1. Bijoy Kumar Dugar Vs Bidya Dhar Dutta & ors., (2006) 3 SCC 242

2. First Appeal From Order No. 1818 of 2012; Bajaj Allianz General Insurance Co. Ltd. Vs Smt. Renu Singh & ors. decided by Allahabad High Court on 19.7.2016

3. Raj Kumar Vs Ajay Kumar & anr.; 2011(1) SCC 343

4. Sanjay Verma Vs Haryana Roadways; 2014(3) SCC 210.

5. Kajal Vs Jagdish Chand; 2020 (0) AIJEL-SC 65725

6. Philips Vs Western Railway Co.; (1874) 4QBD 406

7. H. West & Son Ltd. Vs Shephard; 1963 2 WLR 1359

8. K. Suresh Vs New India Assurance Co. Ltd. & ors..

9. Jithendran Vs New India Assurance Co. Ltd. & anr.; 2021 ACJ 2736

10. Smt.Sarla Verma Vs Delhi Transport Corp.; 2009 (2) TAC 677 (SC)

11. Syed Sadiq Vs Divisional Manager, United India Insurance Co.Ltd.; AIR 2014 SC 1052

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

13. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Co. Ltd.; 2007(2) GLH 291

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

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

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

1. Both these appeals arise out of same judgment and order dated 6.2.2008 passed by District Judge, Motor Accident Claim Tribunal, Kanpur Nagar *(herein after referred to as 'the Tribunal')* in Motor Accident Claim Petition No.929 of 2004 (*Amit Kumar Yadav vs. The New India Assurance Co.Ltd. and another).*

2. FAFO NO.1285 of 2008 is filed by the New India Assurance Co.Ltd. for setting aside the impugned judgment with the prayer that claim petition be dismissed while FAFO No.1489 of 2008 is filed by

the claimant for enhancing the award. Since, both the appeals have arisen out of the same judgment, they are heard together.

3. Brief facts of the case are that a motor accident claim petition No.929 of 2004 is filed by claimant, namely, Amit Kumar Yadav before learned Tribunal at Kanpur Nagar for seeking compensation due to sustaining severe injuries in the road accident. It is averred in claim petition that on 1.9.2003 at about 10:30 a.m., the claimant was going on bye-pass road between the Naubasta and Gopal Nagar, District-Kanpur Nagar by riding his bicycle bearing No.UP78AG/4410, when he was hit by rashly and negligently driven tanker bearing No.UP70-B-9916. In this accident, the wheel of the aforesaid tanker ran over both the legs of the claimant and crushed his legs. The claimant was admitted in hospital. First information report of the accident was lodged in concerned police station. It is also averred in petition that the age of the injured claimant was 21 years and he had passed B.Sc.

4. After analyzing the facts and evidence on record, the learned Tribunal allowed the claim petition and awarded a sum of Rs.15,02,000/- with 6% per annum rate of interest. Aggrieved with the judgment, the New India Assurance Co.Ltd., which is the Insurance Company of offending tanker, preferred the appeal and claimant also preferred the appeal for enhancing the compensation.

5. Heard Shri Rakesh Bhadur, learned counsel for the appellant-Insurance Company and Shri Mahendra Pratap Singh, learned counsel appearing on behalf of respondents-claimants.

6. At the very outset, Shri Rakesh Bahadur, learned counsel for the Insurance Company, submitted that the driver of the tanker in question was not at all responsible for the accident and injuries sustained by the claimant but the aforesaid tanker was not directly involved in the accident. It is also submitted that learned Tribunal has rejected the plea of contributory negligence and held that the claimant was not contributor to the accident at all. Learned Counsel has relied on the judgment in ***Bijoy Kumar Dugar vs. Bidya Dhar Dutta and others, (2006) 3 SCC 242.***

7. 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.

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

9. The Division Bench of this Court in First Appeal From Order No. 1818 of 2012 ***(Bajaj Allianz General Insurance Co.Ltd. Vs. Smt. Renu Singh And Others)*** decided on 19.7.2016 has held as under :

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

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

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

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

20. These provisions (section 110A and sec.110B of Motor Act, 1988) are not merely procedural provisions. They substantively affect the rights of the parties. The right of action created by Fatal

Accidents Act, 1855 was 'new in its species, new in its quality, new in its principles. In every way it was new. The right given to legal representatives under Act, 1988 to file an application for compensation for death due to a motor vehicle accident is an enlarged one. This right cannot be hedged in by limitations of an action under Fatal Accidents Act, 1855. New situations and new dangers require new strategies and new remedies.

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

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

(Emphasis added)

10. Learned counsel submitted that injured has himself deposed before the learned Tribunal as PW1 that at the time of accident when he reached at Pratap Hotel on bye-pass road, a tanker bearing No.UP70B/9916 was coming from opposite direction in a zig-zag manner. It is also deposed that after observing the zig-zag driving of tanker, the claimant took his motorcycle to the extreme left side of the road on the pathway, but the tanker hit the motorcycle coming on the wrong side and the front-right wheel of the tanker ran over his legs. It is further submitted that it is crystal clear from the evidence of injured (PW1) that tanker hit his motorcycle from opposite direction while another witness PW2, who is alleged to be eye-witness of the accident has stated in his oral evidence that at the time of accident, he was coming behind the injured-claimant on another motorcycle. Injured was ahead of the tanker and he was behind the tanker and the tanker hit the injured from behind.

11. Learned counsel for the Insurance Company submitted that injured himself says that tanker hit his motor cycle from opposite direction while eye-witness PW2 says that tanker hit the motorcycle from behind. In this way, there is material contradiction between the statements of PW1 & PW2, which shows that PW2 has not seen the accident.

12. Learned counsel for the Insurance Company next submitted that the driver of the tanker is produced before the learned Tribunal as DW1 and he has deposed on oath that at the time of accident, the injured was overtaking the tanker from left-side, a Maruti Car was parked ahead of him and accident occurred due to opening of the door of the car in which the motorcycle of injured was hit and he fell before the tanker. In this manner the wheel of the truck ran over the legs of the injured. Learned counsel further submitted that it shows that tanker-driver was not at all

responsible for the accident, but accident took place due to own negligence of the injured and the Maruti Car. Learned counsel also referred the site-plan and submitted that site-plan was prepared during the investigation of concerned criminal case in which the place of accident was shown by letter 'A', which is on the road while it is the case of the claimant that he took his motorcycle on *kaccha patri* (pathway). It also shows the negligent driving of the claimant.

13. Learned counsel for the claimant strongly objected the submissions made by counsel for the Insurance Company and submitted that the driver of the tanker was driving very rashly and negligently and hit the motorcycle of the claimant from opposite direction, which is clear from the site-plan. It is next submitted by him that learned Tribunal has discussed the manner of accident in the impugned judgment and came to conclusion that the driver of the tanker was solely responsible for accident and there was no contributory negligence on the part of the claimant.

14. The injured-claimant is the best witness to depose regarding the manner of accident. He has stated in his deposition that the tanker hit his motorcycle from opposite direction. This statement of claimant corroborates with the site-plan prepared by Investigating Officer in concerned criminal case of this accident. Perusal of site-plan suggests that motorcycle and tanker were coming from opposite directions. Hence, the motorcycle was hit by tanker from opposite directions. There is no evidence on record except the statement of driver of the truck that the claimant hit the door of Maruti Car and fell before the tanker. The statement of driver of the tanker is contrary to the site-plan while it is admitted by driver of the tanker that the front-wheel of tanker ran over the legs of claimant. It is not a case of overtaking the tanker by the claimant, but it is clear from the site-plan that the spot of accident is not at the extreme left side of the road, which shows that the claimant's motorcycle was slightly towards the middle of the road, which reflects the negligent driving of the claimant also to some extent and, therefore, keeping in view the above facts and circumstances of the case, we are in full agreement with Shri Rakesh Bahadur, learned counsel for the Insurance Company to the extent that there is evidence of contributory negligence on the part of claimant. Hence, we hold the claimant responsible for negligent driving to the tune of 25%.

15. Now, it takes us to the part of the assessment of compensation to be awarded to the claimant. Learned counsel for the claimant submitted that learned Tribunal has not awarded just compensation. It is stated by learned counsel that the Injured was a student of B.Sc. final year and he was earning Rs.7,500/- per month by serving in a private firm and also doing a part-time job, but learned Tribunal has considered his monthly income at Rs.3,000/- only. It is also submitted that on the basis of this meagre amount of Rs.3,000/-, the learned Tribunal has only awarded damages for 14 months as loss of earning and awarded just Rs.42,000/- for loss of earning. He contended that claimant sustained serious injuries and his one lower limb was amputated and he was declared permanently disabled to the tune of 80% as per disability certificate. This fact was not properly appreciated by the learned Tribunal. Further submission is that non-pecuniary damages awarded to the petitioner as on lower side.

16. Learned counsel for the Insurance Company submitted that as per statement of injured-PW1, there was one attendant only for his help while learned Tribunal has awarded compensation for two attendants, which is not the case of the claimant.

17. It is also submitted by learned counsel for the Insurance Company that a disability certificate is issued regarding the disability sustained by the appellant to the tune of 80%, but no doctor is examined to prove the aforesaid certificate. Therefore, it cannot be relied upon.

18. We are not convinced with the aforesaid submission that there is necessity to prove the disability certificate by calling the doctor when it is not challenged before the Tribunal. It is not the case of the Insurance Company that disability certificate is fake or not issued by competent authority. We are in agreement with the submission made on behalf of Insurance Company that in his evidence, the appellant has stated that he was having one attendant for his help yet the Tribunal has awarded compensation for two attendants.

19. This is a case of injury to the appellant, which is very grave in nature. The appellant has sustained very serious injuries as the front-wheel of the tanker ran over both the legs. His one leg was amputated from knee joint and two ligaments of other leg were removed permanently, therefore, more or less he became disabled by both the legs.

20. This is a case where a young boy at the age of 21 years only has lost one leg by amputation and removal of two ligaments of other leg had also made him incapacitated from pursuing any good career in life though he was a student of B.Sc. Final year at the time of accident. He is not able to walk, run or even sit properly. He has lost amenities and pleasure of life. It can safely be assumed that he had bleak prospects of marriage and family life. He is not able to lead a normal life. His disability is permanent. No one can restore his life as it was before the accident, but we should provide 'just compensation'. We have to keep in mind all the factors, which are relevant for just and proper compensation as is object of the Motor Vehicles Act, 1988 *(for short, 'the Act, 1988').*

21. Section 168 of the Act, 1988, contemplates determination of 'just compensation'. 'Just' means-fair, reasonable and equitable amount accepted by legal standards. 'Just compensation' does not mean perfect or absolute compensation. 'Just compensation' principle requires examination of particular situation obtaining uniquely in individual case. When compensation is to be determined on an application under Section 166 of the Act, 1988, various heads under which damages are to be assessed, have to be looked into by Tribunal and not by merely determining income and applying multiplier.

22. The question of determination of compensation directly came up before Supreme Court in ***Raj Kumar Vs. Ajay Kumar and another,*** *2011(1) SCC 343*. Therein, claimant sustained fracture of both bone of left leg and fracture of left radius in a motor accident on 01.10.1991. Tribunal awarded compensation under the heads of loss of future earning, pain and sufferings, loss of earning during period of treatment, medical expenses, conveyance and special diet. He was awarded total compensation of Rs. 94,700/- and 9%

interest. His appeal for enhancement was rejected by Tribunal and ultimately went in appeal to Supreme Court. It observed that scheme of Act, 1988 shows that award must be "just", which means that compensation should, to the extent possible, fully and adequately restore claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. A person is not only to be compensated for physical injury, but also for the loss which he suffered as a result of such injury. It means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned. The heads under which compensation needs be awarded in "personal injury" cases are detailed in para 6 of the judgment in ***Raj Kumar Vs. Ajay Kumar (supra)*** and it reads as under:

"6. The heads under which compensation is awarded in personal injury cases are the following:

Pecuniary damages (Special Damages)

(i) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General Damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii) (b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life."

23. "Disability" refers to any restriction or lack of ability to perform an activity in the manner considered normal for a human-being. "Permanent disability" refers to the residuary incapacity or loss of use of some part of the body, found existing at the end of period of treatment and recuperation, after achieving maximum bodily improvement or recovery which is likely to remain for remainder life of injured. Permanent disability can be either partial or total. "Partial permanent disability" refers to a person's inability to

perform all the duties and bodily functions that he could perform before the accident, though he is able to perform some of them and is still able to engage in some gainful activity. "Total permanent disability" refers to a person's inability to perform any avocation or employment related activities as a result of the accident.

24. The percentage of disability certified in medical terms has been considered and Courts have observed that percentage of disability in respect of a part of body does not mean the same percentage with respect to whole body and it may be different. Para 9 of judgment in ***Raj Kumar Vs. Ajay Kumar (supra)*** said as under:

"9. The percentage of permanent disability is expressed by the Doctors with reference to the whole body, or more often than not, with reference to a particular limb. ***When a disability certificate states that the injured has suffered permanent disability to an extent of 45% of the left lower limb, it is not the same as 45% permanent disability with reference to the whole body.*** *The extent of disability of a limb (or part of the body) expressed in terms of a percentage of the total functions of that limb, obviously cannot be assumed to be the extent of disability of the whole body. If there is 60% permanent disability of the right hand and 80% permanent disability of left leg, it does not mean that the extent of permanent disability with reference to the whole body is 140% (that is 80% plus 60%). If different parts of the body have suffered different percentages of disabilities, the sum total thereof expressed in terms of the permanent disability with reference to the whole body, cannot obviously exceed 100%." (emphasis added)*

25. Court also castigated that Tribunals wrongly assume that percentage of permanent disability is same in terms of percentage of loss of future earning capacity. The two aspects are different. Relevant observations in para 10 of the judgment in ***Raj Kumar Vs. Ajay Kumar (supra)*** are reproduced as under:

"10. Where the claimant suffers a permanent disability as a result of injuries, the ***assessment of compensation under the head of loss of future earnings, would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability.*** *Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation."* (emphasis added)

26. Court also held that in some cases evidence and assessment may show that percentage of loss of earning capacity as a result of permanent disability is approximately the same as percentage of permanent disability and in that case said percentage for determination of compensation may be adopted but it is not always. It is in this context Court further

said that in order to determine, whether there is any permanent disability and if so the extent of such disability, a Tribunal should consider, and decide, with reference to evidence:

"(i) whether the disablement is permanent or temporary;

(ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement;

(iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person."

27. It was also observed that ascertainment of the effect of permanent disability on actual earning capacity involves three steps. First is to ascertain what activities claimant could carry on inspite of permanent disability and what he could not do as a result of permanent disability. The second is to ascertain claimant's avocation, profession and nature of work before accident, as also his age. The third step is to find out whether claimant is totally disabled from earning any kind of livelihood or despite permanent disability, claimant could still effectively carry on activities and functions, which he was earlier carrying on and whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.

28. The role of Tribunal was elaborated by observing that it is not a silent spectator when medical evidence is tendered in regard to the injuries and their effect, in particular the extent of permanent disability. Tribunal does not function as a neutral umpire as in a civil suit. It is an active explorer and seeker of truth who is required to hold an enquiry into the claim for determining 'just compensation'. Tribunal should take an active role to ascertain the true and correct position so that it can assess 'just compensation'. Court also observed that when a doctor gives evidence about percentage of permanent disability, Tribunal must find out whether such percentage of disability is functional disability with reference to whole body or whether it is only with reference to a limb. In para 19 of the judgment in ***Raj Kumar Vs. Ajay Kumar (supra)*** Court summarized the principles in respect of "permanent disability" and assessment of compensation and in para 20 it gives certain illustrations in regard to assessment of loss of future earning. Same are reproduced as under:

"19. We may now summarize the principles discussed above:

(i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the ***percentage of loss of earning capacity is not the same as the percentage of permanent disability*** *(except in a few cases, where the Tribunal on the basis of evidence, concludes that percentage of loss of earning capacity is the same as percentage of permanent disability).*

(iii) The doctor who treated an injured-claimant or who examined him

subsequently to assess the extent of his permanent disability can give evidence only in regard the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.
(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors.

29. A three Judge Bench considered the question of "just compensation" in a case of permanent disability in ***Sanjay Verma Vs. Haryana Roadways***, *2014(3) SCC 210*. Court observed that besides determination of damages under the head "loss of income" and "medical expenses", Tribunal must also award compensation under the head "future treatment" and "pain and sufferings" and where there is requirement of an attendant, cost of attendant should also be included for award of compensation.

30. In ***Kajal Vs. Jagdish Chand*** reported in *2020 (0) AIJEL-SC 65725*, the Apex Court has quoted pertinent observations from a very old case Philips Vs. Western Railway Company (1874) 4QBD 406 as under:

"You cannot put the plaintiff back again into his original position, but you must bring your reasonable common sense to bear, and you must always recollect that this is the only occasion on which compensation can be given. The plaintiff can never sue again for it. You have, therefore, now to give him compensation once and for all. He has done no wrong, he has suffered a wrong at the hands of the defendants and you must take care to give him full fair compensation for that which he has suffered." Besides, the Tribunals should always remember that the measures of damages in all these cases "should be such as to enable even a tortfeasor to say that he had amply atoned for his misadventure."

31. Hon'ble the Apex Court has further quoted pertinent observations from a very old case ***H. West & Son Ltd. v. Shephard*** *1963 2 WLR 1359* as under :

"Money may be awarded so that something tangible may be procured to replace something else of the like nature which has been destroyed or lost. But money cannot renew a physical frame that has been battered and shattered. All that Judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common assent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards.

In the same case Lord Devlin observed that the proper approach to the problem was to adopt a test as to what contemporary society would deem to be a fair sum, such as would allow the wrongdoer to "hold up his head among his neighbours and say with their approval that he has done the fair thing", which should be kept in mind by the court in determining compensation in personal injury cases."

32. Section 168 of MV Act stipulates that there should be grant of just compensation. Thus, it becomes challenge

for a Court of law to determine just compensation which should not be bonanza for the claimant/victim and at the same time it should not be too meagre. Hon'ble the Apex Court in Rajkumar Vs Ajay Kumar and others (2011) 1 SCC 343 has laid down the heads under which compensation is to be awarded for personal injuries which is as follows:

"Pecuniary damages (Special damages)

(i)Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii) (a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life.

33. In ***K. Suresh v. New India Assurance Company Ltd. and Ors.,*** Hon'ble the Apex Court has held as follows :

"2...There cannot be actual compensation for anguish of the heart or for mental tribulations. The quintessentiality lies in the pragmatic computation of the loss sustained which has to be in the realm of realistic approximation. Therefore, Section 168 of the Motor Vehicles Act, 1988 (for brevity the Act) stipulates that there should be grant of just compensation. Thus, it becomes a challenge for a court of law to determine just compensation which is neither a bonanza nor a windfall, and simultaneously, should not be a pittance."

34. Hence, keeping in mind the above contours of 'just compensation', we proceed to determine the quantum of compensation. It is not disputed that appellant has submitted bills for medical expenses and treatment worth Rs.1,93,858/-. As far as permanent disability of the appellant is concerned, doctors have issued disability certificate to the tune of 80%, but the Tribunal has considered 100% permanent disability of both the legs separately, but there is amputation of one leg from the knee-joint and two ligaments of other leg

were removed, therefore, we hold functional disability of the appellant to the tune of 80%. Perusal of impugned judgment shows that amount under the head of permanent disability is not properly calculated by the Tribunal.

35. It is submitted by learned counsel for the appellant that appellant had two source of income. It is said that appellant was working with Mahalaxmi Trading Company and was also employed as part-time Trainer in Sharma Health Group wherefrom he was getting Rs.4,500/- per month and Rs.3,000/- per month respectively. We are in full agreement with the finding of learned Tribunal that these aforesaid source of income and amount of salary is not proved by any cogent evidence. Appellant was student, therefore, we hold his monthly income at Rs.3,000/-. Hence, his annual income was Rs.36,000/-. 40% would be added to it for future loss of income as held by Hon'ble Apex Court in ***Jithendran vs. New India Assurance Co.Ltd. and another, 2021 ACJ 2736,*** which is heavily relied on by counsel for the appellant in which the injured-claimant was of 21 years old. It comes Rs.14,400/-, therefore, total income of appellant would be Rs.36,000/- + Rs.14,400/- = Rs.50,400/-. At the time of accident, the age of appellant was 21 years, hence, multiplier of 18 would be applied as per judgment of Apex Court in ***Smt.Sarla Verma vs. Delhi Transport Corporation*** *[2009 (2) TAC 677 (SC)]*. Hence, loss of dependency would be Rs.50,400/- x 18 = Rs.9,07,200/-, out of which only 80% would be taken as the amount towards permanent disability which comes to Rs.7,25,760/-. In this way, the appellant would be entitled to get Rs.7,25,760/- under the head of permanent disability.

36. We can take a judicial notice of the fact that in some of the cases, the injured like this as in the case in hand requires artificial limb for betterment in movement, where leg is amputated. Purpose of social welfare legislation is to find out ways and means to help the sufferer in all possible fields. If Tribunal finds with medical advice that artificial limb can procure his self-dependency, all possible efforts should be made to get it executed and whatever necessary expenses, it requires, must be treated to be a part of compensation, which should be allowed against the persons liable to pay compensation. Hence, the appellant would be entitled to get Rs.1,00,000/- for procuring artificial limb.

37. It is on record that after the accident, appellant remained hospitalized for 14 months, which had also the loss of income, therefore, he would be entitled to get Rs.42,000/- (Rs.3,000/- x 14) as loss of income during hospitalization. During that period and after discharge from the hospital, the appellant would have taken special diet for which he would get Rs.50,000/-. It can safely be assumed that after amputation of one leg and removal of two ligaments of other leg and by sustaining other injuries also in the accident, the appellant would require to purchase medicines and continuation of treatment in future also for which, he would be entitled to get Rs.1,00,000/-. He would also be entitled to get transportation and miscellaneous expenses of Rs.25,000/- which he had to occur while going to doctors for further treatment and check-ups, etc.

38. Where the appellant has become disabled to the tune of 80% and that too by his legs and he is not able to sit properly

and walk and he has lost pleasures of life because he cannot lead a normal life after accident. It is natural that he had bleak prospects of marriage and family life as he was young boy of 21 years of age only. It can be said that the appellant has lost amenities of life to the great extent, which cannot be restored at all. Therefore, he would get Rs.4,00,000/- for loss of amenities. The disability of the appellant is permanent. Under the head of pain, shock and sufferings, he is entitled to get a sum of Rs.1,00,000/- as held by Apex Court in ***Syed Sadiq vs. Divisional Manager, United India Insurance Co.Ltd.,*** *AIR 2014 SC 1052*.

39. Hence, the appellant would be entitled to compensation as below:

(i) Bills for Medicines and Treatment = Rs.1,93,858/-

(ii) Permanent Disability = Rs.7,25,760/-

(iii) Loss of Earnings during Hospitalization = Rs.42,000/-

(iv) Artificial Limb = Rs.1,00,000/-

(v) Loss of Amenities = Rs.4,00,000/-

(vi) Special Diet = Rs.50,000/-

(viii) Attendant Charges = Rs.50,000/-

(ix) Transportation and Misc.Expenses = Rs.25,000/-

(x) Future Medicines = Rs.1,00,000/-

(xi) Pain, Shock & Sufferings = Rs.1,00,000/-

(xii) Total = Rs.17,86,618/-

= Rs. 17,87,000/- (Round-up figure)

(xiii) Amount after deduction of 25% towards contributory negligence = Rs.4,46,750/-

(xiv) Total Compensation = Rs.17,87,000/- - Rs.4,46,750/- =13,40,250/-

40. 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.) w*herein 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."

41. 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.

42. No other grounds were urged when the matters were heard.

43. Both the appeals are partly allowed. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The Insurance Company shall deposit the amount within a period of 8 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

44. 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.

45. The records and proceedings be sent back to the Tribunal for disbursement.

(2022)05ILR A763
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.03.2022

BEFORE

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

First Appeal From Order No. 1418 of 2007

Rizwan Hussain Farooqi ...Appellant
Versus
Oriental Insurance Co. Ltd. & Ors. ...Respondents

Counsel for the Appellant:
Sri Arun Kumar Tripathi, Sri Ashfaq Husain, Sri Tahir Husain

Counsel for the Respondents:
Sri D.M. Tripathi, Ms. Aarushi Khare, Sri Arun Kumar Shukla, Sri Sudip Ojha, Sri Vinay Khare

A. Civil Law - Motor Accident Act, 1988 – Compensation – Liability to pay – Injured person, a bright student, was studying in a famous coaching centre – However, tribunal has considered his income NIL – Validity challenged – Held, as injured was a bright student and preparing for U.P.S.C., the income with potential to earn can be considered to be Rs. 6000/- per month – Principles enunciated in Kahlon's case relied upon – High Court re-computed the compensation adding 40% as the future loss and awarded 7.5% interest. (Para 8, 10 and 11)

Appeal partly allowed (E-1)

List of Cases cited:-

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

2. Syed. Sadiq & ors. Vs Divisional Manager, United India Insurance Co. Ltd.; (2014) 2 SCC 735

3. VsMekala Vs M. Malathi & anr.; (2014) 11 SCC 178

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

5. Kajal Vs Jagdish Chand; 2020 (0) AIJEL-SC 65725

6. Raj Kumar Vs Ajay Kumar & anr.; (2011) 1 SCC 343

7. Smt. Meena Pawaia & others Vs Ashraf Ali & ors. 2021 0 Supreme (SC) 694

8. National Insurance Co. Ltd. Vs Pranay Sethi & ors. 2017 Law Suit (SC) 1093

9. Civil Appeal No. 433 of 2022; Shivdhar Kumar Vashiya Vs Ranjeet Singh & ors. decided on 21.01.2022

10. Civil Appeal No. 2551 of 2020; Anthony @ Anthony Swamy Vs Managing Director, K.S.R.T.C. decided on June 10, 2020

11. Raj Kumar Vs Ajay Kumar & anr.; (2011) 1 SCC 343

12. Civil Appeal No. 4800 of 2021; The Oriental Insurance Co. Ltd. Vs Kahlon @ Jasmail Singh Kahlon decided on 16.08.2021

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

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

1. Heard Tahir Husain, learned counsel for the appellant, Sri Sudip Ojha, learned counsel for respondent no. 1 and Sri A. K. Shukla, learned counsel for respondent no. 3.

2. This appeal , at the behest of the claimants, challenges the award and decree dated 07.02.20007 passed by M.A.C.T/Additional District Judge, Court No. 3, Farrukhabad (hereinafter referred to as "Tribunal") in M.A.C.P. No. 135 of 2005 awarding a sum of Rs. 2,55,000/- as compensation with interest at the rate of 6%.

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is not in dispute. The respondent-Insurance Company has not challenged the liability imposed on them. The only issue to be decided is, the quantum of compensation awarded.

4. Brief facts as culled out from the record are that on 14.05.205 at about 2:00 p.m Rizwan Hussain Farooqui was coming from Bholepur to Fatehgarh on his own motor-cycle bearing registration no. U.P. 76D/2833 and was accompanied by his friend Amir Ali @ Montu. He was driving his motor-cycle cautiously at a constant speed. When he reached Fatehgarh crossing a tempo driven by driver Neelu @ Diwakar rashly and negligently bearing registration no. U.P. 76E/9110 dashed the moto-cycle of Rizwan from behind. As a result of which Rizwan Hussain Farooqui and his friend Amir Ali @ Montu sustained injuries. Rizwan Hussain Faooqui received grievous injuries on his nose, ear, jawline and on face. He was rushed to nearby Das Nursing Home. He received grievous injury on his head and received fractures in various parts of his body, therefore for treatment and C.T. Scan he was admitted to Regency Hospital, Kanpur. In Regency Hospital he was treated and he underwent many surgeries. It is averred that treatment continued and the appellant had to spent about Rs. 5,00,000/- on his treatment.

5. The injured was 21 years of age and was studying at Rao I.A.S, Delhi at the time of accident. Due to his accident he could not complete his course at Rao I.A.S, Delhi. Injured was giving tuition and was earning Rs. 5,000/- p.m. The tribunal has

considered his income to be Nil, granted Rs. 2,00,000/- towards loss of medical expenses, granted Rs. 50,000/- towards his future medicine and Rs. 5,000/- towards pain, shock and sufferings and ultimately assessed the total compensation to be Rs. 2,55,000/-.

6. It is submitted by learned counsel for the appellant that no amount under the head loss of income has been granted by the Tribunal which is unjust and should be at least Rs.6,000/- per month. It is submitted that no amount is granted under the head of monthly loss to injured which is also unjust and should be at least 40% Rs. 6,000/- per month with future loss of income. It is submitted that no amount under the head of future loss of income has been granted. It is also submitted that the amount under the non-pecuniary heads and the interest awarded are also on the lower side and requires to be enhanced in view of the following authoritative pronouncements:

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

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

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

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

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

(vi) Kajal Vs. Jagdish Chand reported in 2020 (0) AIJEL-SC 65725

7. As against this, it is submitted by the learned counsel for the respondent that the quantum awarded by the Tribunal is just and proper and does not call for any interference of this Court. The learned counsel has submitted that the claimant was not granted any amount as the documentary evidence which were produced did not show that there was any disability which the appellant-claimant. The claimants claim for Rs. 5 lacs as expenses is not supported by any documentary evidence and that the tribunal has rightly held that as the injured was not into any profession no amount could be granted for loss of income and therefore, the tribunal has rightly not granted any amount for loss of income.

8. After hearing the counsel for the parties and perusing the judgment and order impugned, as he was a bright student and preparing for U.P.S.C, this Court feels that income with potential to earn can be considered to be Rs.6000/- per month. To which as the injured was 21 years at the time of accident, 40% of the income would have to be added as future loss of income to the injured in view of the decision of the Apex Court in **Raj Kumar Vs. Ajay Kumar and another, reported in (2011) 1 SCC 343 and Syed Sadiq and others (Supra).** The loss of earning capacity namely 25% as considered by the Tribunal is enhanced to 40% for following reasons. The Apex Court recently in **Smt. Meena Pawaia & others Vs. Ashraf Ali and others 2021 0 Supreme (SC) 694 and National Insurance Co. Ltd. V.s Pranay Sethi and others, 2017 Law Suit (SC) 1093** has held that "even if a person is not earning his potential to earn should also be considered". In our case we fail to understand how the tribunal can hold that the injured cannot be granted any amount under the head of loss of income. The

injuries which are brought on record go to show that the injured had suffered multiple injuries even at the young age which are narrated herein below:-

" Fracture left temporal bone with opaque ethmoid and maxillary sinuses.

- Hyper dense areas suggestive of extra dural haematoma is seen in left tempor parietal region with associated cerebral oedema causing effacement of ipisilateral sylvian fissure and sulci. Slight midline shift is noted to right.

- Rest of the Brain parenchyma is normal

- Left ventriele is partially effected.

Rest of the ventricular system is normal.

- Brain stem and cerebellum appear normal."

These injuries have been considered and accepted by the tribunal but just because the injured was not into any vocation the tribunal did not grant the said amount. We would even base our judgment on the decision titled **Shivdhar Kumar Vashiya Vs. Ranjeet Singh and others in Civil Appeal No. 433 of 2022 decided on 21.01.2022.** The fact that the decision in **Anthony Alias Anthony Swamy Vs. Managing Director, K.S.R.T.C in Civil Appeal No. 2551 of 2020** decided on June 10, 2020 of the Apex Court which has relied on the judgment o**f Raj Kumar Vs. Ajay Kumar and another, reported in (2011) 1 SCC 343 and Syed Sadiq and others (Supra)** will also enure for the benefit of the claimant as we have seen that there were lot of injuries on the body of the claimant. The claimant has produced before us his prolonged illness of two years. This trauma ultimately culminated into the sad demise of the 21 year old person who breathe his last after 5 months of the decision and filing of this appeal. The question is what would legal heirs be entitled after death. The recent judgment of the Apex Court in the case of The **Oriental Insurance Company Ltd. Vs. Kahlon @ Jasmail Singh Kahlon** through his legal representative in Civil Appeal No. 4800 of 2021 decided on 16.08.2021 wherein the Apex Court held that "on death of a person the compensation claims would not abate." In our case also the judgment was rendered when the injured was having 40% disability and was alive. The tribunal unfortunately just gave what is known as medical expenses but did not grant any amount for future loss of income in such a serious matter. The judgment of **Parminder Singh** relied in the aforementioned judgment and in the judgment of **Kajal (supra)** will enure for the benefit of the appellant. Thus the finding of facts by the tribunal are not germane and pervisity has crept in the beneficial peace of legislation has not been properly appreciated and will have to be upturned as in view of the decisions aforementioned and the fact that the injured died after the judgment of the tribunal and after 5 months offiling of the appeal. Thus the principles enunciated in **kahlon (supra)** will have to be borne in mind and therefore the compensation payable would relate to the date of the accident. It goes without saying that we need not to corroborate or give answer whether the death was because of the injuries or not as that is not the subject before us and that is not the issue raised before us, had the deceased died before the award of the tribunal the issue to

be decided would have been different and different parameters would be made applicable.

9. Further, the amount granted by the Tribunal for medical expenses plus 50,000/- rounding the figure to Rs. 2,50,000/- future medicine upto 07.02.2007 and 20,000/- for attendant charges are granted. As far as the amount under pain, shock and sufferings is concerned, looking to the fact that he was admitted in hospital many times and has undergone surgeries, the amount is enhanced to Rs.1,00,000/-. Unfortunately the father of the injured also breathe his last during pendency of this appeal on 11.03.2014 and therefore the amount will have to be disbursed to the legal heirs alive at present and who are representing the estate of the deceased.

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

i. Income : Rs.6000/-

ii. Percentage towards future prospects : 40% namely Rs.2400/-

iii. Total income : Rs. 6000 + 2400 = Rs. 8400/-

iv. Loss of earning capacity : 40% namely Rs. 3400/- (rounded up)

v. Annual loss : Rs. 3400 x 12 = Rs. 40,800/-

vi. Multiplier applicable : 18

vii. Total loss : Rs. 40,800 x 18 = Rs. 7,34,400/-

viii. Medical expenses : Rs. 2,50,000/-(rounded up)

ix. Special diet : Rs. 20,000/-

xi. Attendant charges : Rs. 20,000/-

xii. Amount under pain, shock and suffering : Rs.1,00,000/-

xiii. Total compensation : 11,24,400/-

11. As far as issue of rate of interest is concerned, it should be 7.5% in view decision of the Apex Court in Civil Appeal No.242/243 of 2020 (National Insurance Company Ltd. vs Birender and others) decided on 13 January, 2020 which is the latest in point of time and **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." .

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

13. In view of the above, the appeal is partly allowed. Award and decree passed by the Tribunal shall stand modified to the aforesaid extent. The amount be deposited by the respondent-Insurance Company

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.

14. Record be sent back to tribunal forthwith.

15. This Court is thankful to both the learned Advocates for ably assisting this Court.

(2022)05ILR A768
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.04.2022

BEFORE

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

First Appeal From Order No. 1466 of 2021

Smt. Raj Mala & Ors. ...Appellants
Versus
Sri Surendra Kapoor & Anr. ...Respondents

Counsel for the Appellants:
Sri Brij Raj Singh, Sri Amit Kumar Singh

Counsel for the Respondents:
Sri Vipul Kumar, Sri Siddharth Jaiswal

A. Civil Law - Motor Vehicles Act, 1988 - Section 168 - Motor Accident claim - Quantum of Compensation - accident took place on 6.5.2008 - deceased date of Birth was 1.7.1975 as recorded in School Leaving Certificate and the date of accident was 6.5.2008 therefore the deceased was 33 years of age at the time of accident - deceased was earning Rs 12,000 per month as Plant Operator in PNC Construction Company Ltd - Held - Tribunal has fallen in error in not considering the salary certificate as well as the evidence led before it, documentary evidence 41 G which is the order of deployment of staff dated 18.1.2006, documentary evidence 24 G dated 30.6.2008, where it was specifically mentioned that deceased last drawn salary was Rs. 12,000 per month - Multiplier of 16 is granted as the deceased was in the age bracket of 31 to 35 - deceased left behind him, four minor children and his widow, hence deduction towards personal expenses would be 1/4th - Rs. 70,000 granted under the non pecuniary heads and Rs. 50,000 each to the minor children - claimants would be entitled to 7.5% rate of interest on the enhanced compensation - As 10 years have elapsed, amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R. (Para 12, 13, 19)

Allowed. (E-5)

List of Cases cited:

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

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

3. A.P.S.R.T.C. & ors. v. M. Ramadevi & ors., 2008 (1) T.A.C. 714 SC

4. National Insurance Co. Ltd. v. Indira Srivastava & ors., (2008) 2 SCC 763

5. Asha & ors. Vs United India Insurance Co. Ltd. & anr., (2008) 2 SCC 744

6. A.V. Padma Vs Venugopal, Reported in 2012 (1) GLH (SC), 442

7. Smt. Hansaguri P. Ladhani Vs The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291

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

9. Bajaj Allianz General Insurance Co. Pvt. Ltd. & ors. Vs U.O.I. & ors. dated 27.1.2022

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

1. Heard Sri Amit Kumar Singh, learned counsel for the appellants and Sri Siddharth Jaiswal, learned counsel for respondent-Insurance Company.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 14.12.2009 passed by the Motor Accident Claims Tribunal/Additional District Judge, Court No.16, Agra (hereinafter referred to as 'Tribunal') in Claim Petition No.563 of 2008 awarding a sum of Rs.3,69,500/- as compensation with interest at the rate of 6% from date of filing of the claim petition.

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is also not in dispute. The only issue to be decided is the quantum of compensation awarded.

4. The accident took place on 6.5.2008. The deceased, as per the claimants, was 33 years of age at the time of accident but the Tribunal has considered his age to be 40 to 45 years. The Tribunal considered his income to be Rs.3,000/- per month, deducted 1/3rd towards personal expenses of the deceased, granted multiplier of 15, awarded Rs.9,500/- towards non pecuniary damages and has calculated the total compensation to be Rs.3,69,500/-

5. It is submitted by learned counsel for the appellants that the deceased was earning Rs.12,000/- per month as Plant Operator in PNC Construction Company Ltd. Agra, however, the Tribunal has assessed his income to be Rs.3,000/- which is bad and it should be 12,000/- per month. It is further submitted that the Tribunal has not granted any amount towards future loss of income which should be granted in view of the decision of the Apex Court **National Insurance Co. Ltd. Vs. Pranay Sethi and others, 2017 LawSuit (SC) 1093.**

6. It is submitted by learned counsel for the appellants that the deceased was 33 years of age at the time of accident but the Tribunal has considered his age to be 40 years and granted multiplier of 15 which is bad and the multiplier should be 16 in view of the decision in **Sarla Verma and others Vs. Delhi Transport Corporation and Another, 2009 LawSuit (SC).**

7. It is lastly submitted by learned counsel for the appellants that the amount under non pecuniary heads and the interest awarded by the Tribunal are on the lower side and are required to be enhanced.

8. Per contra, learned counsel for respondent-Insurance Company has submitted that the income of the deceased as considered by the Tribunal is just and proper as income which was claimed was not proved by oral and documentary evidence. It is further submitted that the age of the deceased has rightly been considered as the documentary proof filed in this regard was not certified and the post-mortem report showed his age to be 40 years, therefore, the same has been considered by the Tribunal. Hence, multiplier of 15 granted by the Tribunal is just and proper is the submission of learned counsel for the respondent.

10. Heard learned counsel for the parties and perused the record. The Tribunal has considered the income of the

deceased to be Rs.3,000/- which is nothing else but perversity shown by the Tribunal in such a beneficial piece of legislation. The learned Tribunal has disbelieved the evidence of P.W.3 and the documentary evidence at page 41 G which is the order of deployment of staff dated 18.1.2006. The deceased was appointed as plant operator and his monthly salary was Rs.7,500/-. There cannot be any doubt once documents are produced and proved by the authority concerned who have appointed the deceased and where he was serving. In the documentary evidence at page 24 G dated 30.6.2008, it has been specifically mentioned that his last drawn salary was Rs.12,000/- per month and, therefore, we are unable to accept the submission of Sri Jaiswal that the Tribunal was right in returning the finding on income holding that claimant did not produce any document to show that his income was Rs.12,000/-.As there was no record of the increment which were given, the Tribunal has not accepted the version of P.W.3. P.W.2 and P.W.1 have corroborated each other. The Tribunal has fallen in error in not considering the salary certificate as well as the evidence led before it, as narrated herein above. The Tribunal has misinterpreted the decision of the Apex Court in **A.P.S.R.T.C. and others v. M. Ramadevi and others, 2008 (1) T.A.C. 714 SC**. Principle for assessment of compensation go to show that reasonably accepted legal standard have to be adopted. In our case, the Tribunal has given a go-by to these principles and, therefore, we reiterate that just compensation would mean that the claimants are entitled to be compensated for loss suffered which would be the net salary received by the deceased when he was alive. The decision in National Insurance Co. Ltd. v. Indira Srivastava and others, (2008) 2 SCC 763 and in the case of Asha and others v. United India Insurance Co. Ltd. and another, (2008) 2 SCC 744 will come to the aid of the claimants.

11. In view of the above discussion, we consider the income of the deceased to be Rs.12,000/- per month.

12. The Tribunal has committed error in recording the age of the deceased. His Date of Birth was 1.7.1975 as recorded in School Leaving Certificate and the date of accident was 6.5.2008 which shows that on the date of accident, he was 33 years of age and, therefore, we are unable to subscribe to the submission of learned counsel for the respondent that age of 40 years considered by the Tribunal is just and proper. The deceased is considered to be 33 years of age at the time of accident, hence, 40% should be added towards future loss of income of the deceased. Multiplier of 16 is granted as the deceased was in the age bracket of 31 to 35. The deceased has left behind him, four minor children and his widow. The deceased-father would be spending 1/4th upon him when he has such a huge family to maintain. Hence, the deduction towards personal expenses would be 1/4th. The Tribunal has erred in not considering the decision in **Sarla Verma (Supra)**, and has granted only Rs.9,500/- towards non-pecuniary damages. We, therefore, grant Rs.70,000/- under the non pecuniary heads and Rs.50,000/- each to the minor children who have lost their father at prime age. Hence, the total compensation payable to the appellants is computed herein below:

i. Monthly Income: Rs.12,000/-

ii. Percentage towards future prospects : 40% namely Rs.4800/-

iii. Total income : Rs.12,000 + 4800 = Rs.16,800/-

iv. Income after deduction of 1/4th towards personal expenses : Rs.12,600/-

v. Annual loss : Rs.12,600 x 12 = Rs.1,51,200/-

vi. Multiplier applicable : 16

vii. Loss of dependency: Rs.1,51,200 x 16 = Rs.24,19,200/-

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

ix. Amount granted to minor children towards loss of love and affection : Rs.50,000/- x 4 = 2,00,000/-

x. Total compensation : Rs.24,19,200 + Rs.70,000 + Rs.2,00,000/- = 26,89,200/-

13. The rate of interest also cannot be fathomed in the year 2009 when the repo rate was 9%. The claimants would be entitled to 7.5% rate of interest on the enhanced compensation. The rate of interest granted by the Tribunal on originally awarded amount is maintained.

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

15. In view of the above, the appeal is partly allowed. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the additional amount within a period of 12 weeks from today with interest as directed above.

16. 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.

17. 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.

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 judgment of **A.V. Padma (supra).** The same is to be applied looking to the facts of each case.

19. 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.

20. We request the learned Registrar General to forward a copy of this order to the concerned Judge who has passed the impugned order where he is posted and if he has retired from service then also it should be brought to his notice so that in future such mistake regarding assessment of income may not be committed if he is employed for some good post.

(2022)05ILR A772
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.03.2022

BEFORE

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

First Appeal From Order No. 1556 of 2002

Deen Dayal & Ors. ...Appellants
Versus
Nishan Singh & Ors. ...Respondents

Counsel for the Appellants:
Sri T.A. Khan, Sri Rakesh Kumar Mishra

Counsel for the Respondents:
Sri Radhey Shyam, Sri Vinod Singh

A. Civil Law - Motor Accident Act, 1988 – Beneficial piece of legislation – Compensation – Rash and negligent driving – Driver of the truck dashed with the bicycle from behind – Perverse finding – Tribunal takes hyper technical stand in dismissing the claim petition – Validity challenged – High Court held that the driver of the truck was solely negligence – Vimla Devi's case and Pranay Sethi's case relied upon – High Court re-computed the compensation. (Para 15 and 17)

B. Civil Law - Motor Accident Act, 1988 – Claim petition – Non-production of driving licence – Effect – Recovery right of Insurance – The factum of licence will have to be proved by owner/driver of the vehicle, in question – Held, the amount once deposited, may be recovered from the owner by the Insurance Co. as it is proved that the vehicle was insured on the date of the accident – Tribunal shall decide the issue of liability after hearing the owner and the Insurance Co.. (Para 19 and 20)

Appeal partly allowed (E-1)

List of Cases cited :-

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

2. F.A.F.O. No.3425 of 2016; Smt. Minakshi Srivastava & ors. Vs Dheeraj Pandey & ors. decided on 11.3.2022

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

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

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

6. Dulcina Fernandes & ors. Vs Joaquim Xavier Cruz & anr.; AIR 2014 SC 58

7. C.M.A. No. 1482 of 2017; Reliance General Insurance Co. Ltd. Vs Subbulakshmi & ors. passed by Madras High Court

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

9. Mangla Ram Vs Oriental Insurance Co. Ltd. & ors. 2018 0 Supreme (SC) 283

10. Tahsin Vs Yogesh Kumar & anr., 2019 0 Supreme (All) 1605

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

12. Pappu & ors. Vs Vinod Kumar Lamba & ors. AIR 2018 SC 592

13. Singh Ram Vs Nirmala & ors. (2018) 3 SCC 800

14. Bajaj Allianz General Insurance Co. Pvt. Ltd. Vs U.O.I. & ors. decided on 27.1.2022

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

1. Heard Sri Rakesh Kumar Mishra, learned counsel for the appellants and Sri Radhey Shyam and Sri Vinod Singh, learned counsel for the respondents.

2. By means of this appeal, the appellants challenge the judgment and award dated 20.5.2002 passed by Motor Accident Claims Tribunal/Addl. District Judge, Court No.2, Rampur (hereinafter referred to as 'Tribunal') in M.A.C.P. No. 4 of 2001.

3. Brief facts as culled out from the record are that on 1.11.2000 when the deceased Kuldeep Singh was going to Post Office, Galla Mandi Road, Bilaspur, by his bicycle, the driver of Truck, bearing no.HR 26 GA 1507, driving the vehicle rashly and negligently came and dashed the bicycle at about 10:00 a.m. from behind due to which the deceased died on the spot.

4. The claimants being legal heirs of the deceased preferred the claim petition claiming a sum of Rs. 60,10,000/- from the respondents. The claimants pleaded that the deceased was the sole bread-winner of the family. He was dealing with the electrical goods and he was earning at least Rs. 6,000/- per month and because of his death the entire family has been rendered helpless. An F.I.R. came to be registered, bearing no.399 of 2000, Police Station Bilaspur, district Rampur.

5. The ***Apex Court in UPSRTC Vs. Km. Mamta and others, reported in AIR 2016 SC 948***, has held that all the issues raised in the memo of appeal are required to be addressed and decided by the first appellate court.

6. Respondent no.3 - owner of offending vehicle has filed reply denying certain facts and has contended that the claimants have claimed an exorbitant amount. The written statement specifically contends that the driver of the truck was driving the truck at a slow speed. It was driven by a driver, who had valid licence. The driver was not negligent. Accident occurred due to negligence of the deceased and, therefore, the owner or driver would not be liable. The driver had valid driving licence and the vehicle was insured with National Insurance Company Limited. The Insurance company - respondent no.2 has filed its reply of denial and has contended that the vehicle was not insured with it. It was being driven by driver not having valid driving licence.

7. The Tribunal framed about 5 issues and answered the first issue against the appellants herein and rejected the claim petition. One of the reasons assigned for rejecting the claim petition is that PW1 could not convey as to whether at 10:00 a.m. it was dark or it was day light. The

Tribunal has surmised that PW1 has nowhere stated that he knew English and, therefore, it was very doubtful whether he could have read the number printed in English of the vehicle in question. The Tribunal held that no other eye witness named in F.I.R. was examined by the claimants before the Tribunal and further in his oral testimony opined that PW1 did not convey that the accident occurred at 10:00 a.m. Though, this fact was deposed by PW2. The Tribunal came to the conclusion that when driver ran away from the place of accident, how PW1 came to know his name and number of vehicle. At the out set, these findings are perverse. The Tribunal has not discussed the reply filed by the respondent wherein the respondent has not denied the accident having taken place. The driver has not stepped into the witness box. The findings are based on surmises and conjectures drawn by the learned Tribunal without any pleading.

8. Once F.I.R., chargesheet and the post-mortem report are filed before the Tribunal, prima facie, they would prove that the accident had occurred with the vehicle in question. These are three basic facts, which are required to be established accident involving the motor vehicles even in the year of accident i.e. 2001. The Tribunal with utmost respect has fallen in grave error in dismissing the claim petition. The post-mortem report of the deceased goes to show that he died after he sustained injuries caused due to vehicular accident. The owner of the truck admitted the factum of the accident in written statement filed before Tribunal.

9. A recent decision of Division Bench by this Court in case titled S***mt. Minakshi Srivastava and others Vs. Dheeraj Pandey and others, F.A.F.O. No.3425 of 2016***, decided on 11.3.2022, where the factum of accident is accepted by the owner will apply and enure for the benefit of these claimants.

10. Learned Counsel for the appellant has relied on the decision of this Bench in Smt. Minakshi (supra) wherein it is held that once the owner has accepted the involvement of vehicle in accident, the Tribunal cannot dismiss the claim petition unless proved otherwise.

11. The learned Tribunal has fallen in grave error in not considering the matter under beneficial piece of legislation. It has though narrated that F.I.R. was filed on same day, chargesheet was laid but there is no discussion on the same in the award. The evidence of PW1 and PW2 is clinching so as to establish that Kuldeep singh alias Pappu was dashed by the truck and died on the spot. The findings of fact that Ram Kali did not opine or depose that she saw the accident by her own eyes has no relevance. All these findings are not only perverse but against the record. The Tribunal comes to the conclusion that the claimant did not prove that respondent no.3 was driving the vehicle at the time of the accident when F.I.R. is filed it has its persuasive value. Chargesheet against Nishan Singh was primary evidence of his driving the vehicle, which has not been rebutted nor proned to be concocted.

12. As the matter is of 20 years old, we remand the matter as the owner had not produced any documentary evidence regarding licence of his driver and that the vehicle was insured. All these facts will have to be ascertained by the Tribunal.

13. We are fortified in our view by the decisions of Apex Court in ***(a) Smt.***

Kaushnuma Begum And Ors vs. The New India Assurance Co. Ltd. (2001) 2 SCC 9., (b) Vimla Devi and others Vs. National Insurance Company Limited and others, 2019 (133) ALR 768; (c) Anita Sharma v. New India Assurance Co. Ltd. (2021) 1 SCC 171 (d) Dulcina Fernandes & Ors. vs. Joaquim Xavier Cruz & Anr., AIR 2014 SC 58, and on the decision of Madras High Court in ***Reliance General Insurance Co. Ltd. Vs. Subbulakshmi and Others, passed in C.M.A. No. 1482 of 2017 [C.M.P. No. 7919 of 2017. (CMA Sr. No. 76893 of 2016)] and the decision of Apex Court referred in the said case namely Puspabai Purshottam Udeshi Vs. Ranjit Ginning and Pressing Co., 1977ACJ 343 (SC),*** the ratio laid in these decisions would be applicable in such matters where Tribunal takes hyper technical stand in dismissing the claim petition which is filed under the beneficial piece of legislation. Despite the fact that judgment of ***Smt. Kaushnuma Begum And Ors vs. The New India Assurance Co. Ltd. (2001) 2 SCC 9*** was very much in vogue, the Tribunal has dismissed the claim petition holding that there are discrepancies in the evidence of prosecution witnesses.

14. One more aspect can be looked into namely provisions of Order XII of Code of Civil Procedure, 1908, which deals with judgment on admission which stipulate as under:-

(1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.

(2) Whenever a judgment is pronounced under sub-rule (1) a decree shall be drawn upon in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced."

15. The decision of the Apex Court more particularly in the case of Kusum Lata and Vimla Devi will not permit us to concur with the view of the learned Tribunal. The written statement of the Insurance company and that of the owner ought to have been looked into by the Tribunal before dismissing the claim petition. The matter also has to be looked from the angle of negligence. The principles of deciding negligence when viewed will go to show that the driver of the truck dashed with the bicycle from behind and, therefore, we can safely held that the driver of the truck was solely negligence.

16. We are even supported in our view by the ratio in judgment of Apex Court in case titled ***Mangla Ram Vs. Oriental Insurance Co. Ltd. and others, 2018 0 Supreme (SC) 283*** and this High Court titled ***Tahsin Vs. Yogesh Kumar and another, 2019 0 Supreme (All) 1605.***

17. This takes us to the issue of compensation and liability. The judgment of Vimla Devi (supra) where the Apex Court has also granted compensation where the appeal and the claim petition were dismissed. The judgment in ***Bithika Mazumdar and another Vs. Sagar Pal and others, (2017) 2 SCC 748,*** and the judgment of Vimla Devi (supra) decided the compensation awardable. The deceased was in his own occupation. He was selling electrical goods and in the year of accident i.e. 2001 his income can be safely considered to be Rs. 4,000/- as he was bachelor and was aged 20 years. He has left

behind him his parents, minor brothers and sisters. Hence, 40% would be added to his income. Being a bachelor, he would be spending 1/2 on himself 1/2 would be deducted. Multiplier of 14 would be applicable as per Sarla Verma (supra) and Rs. 40,000/- for filial consortium. 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.4,000/-

ii. Percentage towards future prospects : 40% namely Rs.1600/-

iii. Total income : Rs. 4000 + 1600 = Rs. 5,600/-

iv. Income after deduction of 1/2 : Rs. 2,800/-

v. Annual income : Rs.2800 x 12 = Rs.33,600/-

vi. Multiplier applicable : 14

vii. Loss of dependency: Rs.33,600 x 14 = Rs. 4,70,400/-

viii. Amount under non pecuniary heads : Rs.40,000/-

ix. Total compensation : Rs. 5,10,400/-

LIABILITY

18. The finding that the Insurance company should have proved the driving licence of the driver of the vehicle. Unfortunately, the owner in written statement has stated that the vehicle was being driven by licensed driver but his licence has not been produced. Issue of non production of driving license either by the owner or the driver is no longer res integra as the judgment in ***Pappu and others Versus Vinod Kumar Lamba and others, reported in AIR 2018 SC 592,*** lays down the law. The oral submission of learned Counsel for the Insurance company will have to be allowed and recovery rights will have to be granted. However, this recovery rights would be subject to proving the fact that the owner, who was aware that the driver did not have proper driving licence for which the judgment of the Apex Court in ***Singh Ram Vs. Nirmala and others, (2018) 3 SCC 800,*** would apply in full force.

19. The appeal is partly allowed. We request the Tribunal to take up the matter and decide the same for liability as the licence is not filed either before Tribunal or this Court and owner has absented here. The factum of licence will have to be proved by owner/driver of the vehicle in question. The matter may be decided on or before 31.10.2022 as 20 years have already elapsed.

20. The amount once deposited, may be recovered from the owner by the Insurance company as it is proved that the vehicle was insured on the date of the accident. The Tribunal shall decide the issue of liability only which shall be decided after hearing the owner and the Insurance company. The amount once deposited may be disbursed to the claimants as per the judgment in **Bajaj Allianz General Insurance Company Private Ltd. v. Union of India and other**s vide order dated 27.1.2022.

21. The respondent-Insurance Company shall deposit the amount with interest at the rate of 6% 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. We, therefore, remand the matter to the Tribunal. The record be sent back to the Tribunal forthwith.

(2022)05ILR A777
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.03.2022

BEFORE

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

First Appeal From Order No. 1634 of 2010

Pradeep Kumar Bisla ...Appellant
Versus
Balwant Singh & Anr. ...Respondents

Counsel for the Appellant:
Sri R.K. Srivastava Sri Ankur Mehrotra

Counsel for the Respondents:
Sri N.K. Srivastava

A. Motor Accident Claim – Standard of proof – Civil or criminal cases, compared with – Held, in motor accident claim petition, the standard of prove is not as strict as in civil or criminal cases – Strict prove of an accident in particular manner may not be possible to be done by the claimants – Claimants have to establish their cases on the touchstone of preponderance of probability. (Para 12 and 13)

B. Civil Law - Motor Accident Act, 1988 – Claim – Deceased sustained injuries in accident, subsequently he died during pendency of claim petition – Though the Tribunal found truck driver sole negligent, but denied from awarding compensation for death of the deceased – Legality challenged – Cause of death in Post mortem report is chronic diabetes – Effect – Held, the deceased did not die as a result of injuries sustained in the accident which had taken place before 15 months of his death – High Court found no link of the death of the deceased with the injuries sustained in accident. (Para 14)

C. Motor Accident Claim – Compensation – Loss of estate, when can be granted – Death of claimant during the pendency of claim petition or appeal – Abatement of petition or appeal – Entitlement of legal representative of the deceased – Held, if injured-claimant dies during the pendency of the claim petition or appeal and his/her death is not the result of injuries in the accident, even though the petition or appeal shall not abate and it shall continue by legal representatives but only with regard to the compensation for loss of estate of the deceased – Claims for loss of estate caused, was available to and could be persuade by the legal representative of the deceased in the appeal – High Court found Tribunal's order of brushing aside the medical bills of Yog Dispensary worth Rs. 1,42,500/-, suffered from error and re-computed the compensation with award of 7.5% interest. (Para 15, 17, 18, 21 and 23)

D. Civil Law - Income Tax Act, 1961 – Section 194A (3) (ix) – Withdraw of amount of interest – Certificate of Income Tax authority, when required – Held, if the interest payable to any claimant for any financial year exceeds Rs. 50,000/-, insurance Co./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. (Para 25)

Appeal partly allowed (E-1)

List of Cases cited:-

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

2. C.M.A. No.1482 of 2017; Reliance General Insurance Co. Ltd. Vs Subbulakshmi & ors. decided on 27.04.2017

3. The Oriental Insurance Co. Ltd. Vs Kahlon @ Jasmail Singh Kahlon (deceased); LL 2021 SC 382

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

5. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Co. Ltd.; 2007(2) GLH 291

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

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

8. Bajaj Allianz General Insurance Co. Pvt. Ltd. Vs Union of India & ors. decided by Apex Court on 27.01.2022

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

1. This appeal, at the behest of the claimants, challenges the judgment and order dated 16.02.2010 passed by Additional District Judge, Court No.10, Ghaziabad/ Motor Accident Claim Tribunal, Ghaziabad in Motor Accident Claim Petition No. 24 of 2005 awarding compensation of Rs.4,10,924/- alongwith 6% interest.

2. The brief facts of the case are that injured (later on deceased) Pradeep Kumar Bisla filed a Motor Accident Claim Petition No. 24 of 2005 before the Tribunal at Ghaziabad for sustaining injuries in road accident. **The injured petitioner Pradeep Kumar Bisla died during the pendency of the claim petition.**

3. As per averments in claim petition, the deceased was going to J.P. Nagar from Moradabad on 05.11.2004 at about 07:45 a.m. when he reached at village Nepaniya, a truck bearing no. DL 1GB 2087 came from opposite direction, which was being driven rashly and negligently by its driver and hit the car No. DL 3 CZ 5378, in which the deceased was travelling. In this accident the deceased sustained serious injuries and he was admitted in Primary Health Centre Rajabpur from where he was carried to the hospital in Meerut where he was treated for a long time. On 28.01.2006, the injured died during the treatment.

4. Learned Tribunal found that the accident took place due to the sole negligence of driver of the truck and there was no negligence on the part of the deceased but learned Tribunal awarded compensation under the head of medical expenses and non-pecuniary damages. Tribunal denied from awarding any compensation for death of the deceased holding that it could not be proved by the appellants/claimants that the deceased died as a result of injuries sustained in the aforesaid accident.

5. Heard Sri R.K. Srivastava, learned counsel for the appellant, Sri N.K. Srivastava, learned counsel for the respondent and perused the record.

6. The Insurance Company did not challenge the liability to pay the compensation and no cross appeal is filed by the Insurance Company. The accident is also not in dispute. The major issue in this appeal to be decided is whether appellants are entitled to compensation for death of

the deceased also alongwith medical expenses etc.

7. Learned counsel for the appellants submitted that in the accident in question, the deceased sustained serious injuries. Just after the accident he was admitted in Primary Health Centre, Rajabpur and from there he was shifted to Lokpriya Hospital, Meerut for better treatment. It is also submitted that the medical papers of the deceased go to show that the deceased sustained several serious injuries and he remained hospitalized for a long time and ultimately he died on 28.01.2006 which was the result of the severe injuries sustained in the accident. Learned counsel for the appellant submitted that entire medical record was available before the Tribunal but Tribunal did not appreciated the evidence in right perspective. Copy of post-mortem report is also on record and the employee of Lokpriya Hospital, Meerut was also examined.

8. Per contra, learned counsel for the Insurance Company submitted that appellants failed to prove that the deceased died on account of injuries sustained in the accident, hence, the learned Tribunal has denied compensation for death of the deceased.

9. In reply, learned counsel for the appellant also contended that the Tribunal has awarded Rs.5,000/- which is a very meager amount for special diet and Rs.5,000/- for pain, shock and suffering. It is also submitted that learned Tribunal has awarded loss of income only to the extent of two months salary of the deceased, keeping in view of the fact that he remained hospitalized only for two months. Learned counsel next submitted that the deceased was a Government Employee in the Government of Punjab and he was getting salary near about Rs.30,000 per month. Future loss of income of the deceased is also not considered by the Tribunal.

10. Learned Tribunal has awarded compensation with regard to the medical bills, loss of salary for two months and very meager amount for pain and sufferings and special diet and no compensation was granted with regard to death of the deceased holding that the death was not the result of injuries sustained in the accident.

11. Learned counsel for the appellant made submission that the wife of the deceased has deposed before learned Tribunal that the deceased died due to injuries sustained in the accident but her testimony is not relied by the Tribunal which is wrong appreciation of evidence. On the contrary, learned counsel for the Insurance Company has submitted that it was not proved that the deceased died due to the injuries sustained in accident. In this regard a copy of the post-mortem report is submitted on record by the appellants but this report is not at all readable. Learned Tribunal had given opportunity to appellants to file a legible copy but they failed to do so, hence, ante-mortem injuries and cause of death could not be known by the copy of post-mortem injuries on record, in absence of which it could not be proved that the death occurred due to those injuries which were sustained in a road accident.

12. In motor accident claim petition the standard of prove is not as strict as in civil or criminal cases. In the case of ***Anita Sharma & others Vs. The New India Assurance Co. Ltd. & Anr. (2021) 1 SCC 171,*** the Hon'ble Apex Court has held as under:-

"18. Unfortunately, the approach of the High Court was not sensitive enough to appreciate the turn of events at the spot, or the appellant claimants' hardship in tracing witnesses and collecting information for an accident which took place many hundreds of kilometers away in an altogether different State. Close to the facts of the case in hand, this Court in Parmeshwari v. Amir Chand1, viewed that:

(2011) 11 SCC 635 Page | 9 "12. The other ground on which the High Court dismissed the case was by way of disbelieving the testimony of Umed Singh, PW 1. Such disbelief of the High Court is totally conjectural. Umed Singh is not related to the appellant but as a good citizen, Umed Singh extended his help to the appellant by helping her to reach the doctor's chamber in order to ensure that an injured woman gets medical treatment. The evidence of Umed Singh cannot be disbelieved just because he did not file a complaint himself. We are constrained to repeat our observation that the total approach of the High Court, unfortunately, was not sensitised enough to appreciate the plight of the victim.

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15. In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied."

(emphasis supplied)

13. The Division Bench of the Madras High Court in the case of ***Reliance General Insurance Company Ltd. Vs. Subbulakshmi and others*** passed in C.M.A. No.1482 of 2017 decided on 27.04.2017 has held that strict prove of an accident in particular manner may not be possible to be done by the claimants but claimants have to establish their cases on the touchstone of preponderance of probability. The standard of prove beyond reasonable doubt cannot be applied.

14. In the case in hand, the learned Tribunal has concluded that the accident in question had taken place due to sole negligence of the truck driver and the deceased was not negligent but we are not convinced with the finding of learned Tribunal with regard to the copy of the post-mortem report that it is not at all legible. We have gone through the record and found that although the copy of post-mortem is not clear yet the cause of death is readable which is chronic diabetes, hence we are convinced that the deceased did not die as a result of injuries sustained in the accident which had taken place before 15 months of his death. Hence, we are convinced that the appellants have failed to link the death of the deceased with the injuries sustained in accident.

15. Now it comes another situation which is more relevant in this particular case. The question arises whether the claim petition or its appeal, as the case may be, shall continue after death of the injured claimant. The answer is in affirmative. If injured-claimant dies during the pendency of the claim petition or appeal and his/her death is not the result of injuries in the accident, even though the petition or appeal shall not abate and it shall continue by legal representatives but only with regard to the

compensation for loss of estate of the deceased. The Hon'ble Apex Court has recently in the case of ***The Oriental Insurance Company Limited Vs. Kahlon @ Jasmail Singh Kahlon (deceased)*** through his legal representative Narinder Kahlon Gosakan and Another reported in ***LL 2021 SC 382,*** has held as under:-

9. The Act is a beneficial and welfare legislation. Section 166(1)(a) of the Act provides for a statutory claim for compensation arising out of an accident by the person who has sustained the injury. Under Clause (b), compensation is payable to the owner of the property. In case of death, the legal representatives of the deceased can pursue the claim. Property, under the Act, will have a much wider connotation than the conventional definition. If the legal heirs can pursue claims in case of death, we see no reason why the legal representatives cannot pursue claims for loss of property akin to estate of the injured if he is deceased subsequently for reasons other than attributable to the accident or injuries under Clause 1(c) of Section 166. Such a claim would be completely distinct from personal injuries to the claimant and which may not be the cause of death. Such claims of personal injuries would undoubtedly abate with the death of the injured. What would the loss of estate mean and what items would be covered by it are issues which has to engage our attention. The appellant has a statutory obligation to pay compensation in motor accident claim cases. This obligation cannot be evaded behind the defence that it was available only for personal injuries and abates on his death irrespective of the loss caused to the estate of the deceased because of the injuries.

10. In Umed Chand (supra), giving a broad liberal interpretation to the provisions of the Act so that legal representatives do not suffer injustice, it was observed that the claim for personal injuries will not survive on death of the injured unrelated to the accident but the legal representatives could pursue the claim for enhancement of the claim for loss of the estate which would include expenditure on medical expenses, travelling, attendant, diet, doctor's fee and reasonable monthly annual accretion to the estate for a certain period. It is trite that the income which a person derives compositely forms part of the expenditure on himself, his family and the savings go to the estate. The unforeseen expenses as aforesaid naturally have to be met from the estate causing pecuniary loss to the estate."

The Apex Court in the aforesaid case has further held as follows:-

"14. This view has subsequently been followed in a decision authored by brother Justice M.R. Shah J., (as he then was) in Madhuben Maheshbhai Patel vs. Joseph Francis Mewan and Others, 2015 (2) GLH 499*, holding as follows:*

"12....Considering the aforesaid decision of the Division Bench of this Court in the case of Surpal Singh Ladhubha Gohil (supra); decisions of the learned Single Judge of this Court in the case of Jenabai Widow of Abdul Karim Musa (supra) and in the case of Amrishkumar Vinodbhai (supra); and aforesaid two decisions of the learned Single Judge of the Rajasthan High Court, we are of the opinion that maxim "actio personalis moritur cum persona" on which Section 306 of the Indian Evidence Act (sic Indian Succession Act) is based cannot have an applicability in all actions

even in an case of personal injuries where damages flows from the head or under the head of loss to the estate.

Therefore, even after the death of the injured claimant, claim petition does not abate and right to sue survive to his heirs and legal representatives in so far as loss to the estate is concerned, which would include personal expenses incurred on the treatment and other claim related to loss to the estate. Under the circumstances, the issue referred to the Division Bench is answered accordingly. Consequently, it is held that no error has been committed by the learned Tribunal in permitting the heirs to be brought on record of the claim petition and permitting the heirs of the injured claimant who died subsequently to proceed further with the claim petition. However, the claim petition and even appeal for enhancement would be confine to the claim for the loss to the estate as observed hereinabove."

15. Similar view has been taken by the Punjab & Haryana High Court in Joti Ram vs. Chamanlal, AIR 1985 P&H 2 and the Madras High Court in Thailammai vs. A.V. Mallayya Pillai, 1991 ACJ 185 (Mad).

16. The view taken in Kanamma (supra) and Uttam Kumar (supra) that the claim would abate is based on a narrow interpretation of the Act which does not commend to us. The reasoning of the Gujarat High Court is more in consonance with aim, purpose and spirit of the Act and furthers its real intent and purpose which we therefore approve."

16. In the aforesaid case, lastly the Hon'ble Apex Court has clarified what to be calculated in loss of estate, which is as follows:-

"20. We see no reason to deviate from the consistent judicial view taken by more than one High Court that loss of estate would include expenditure on medicines, treatment, diet, attendant, Doctor's fee, etc. including income and future prospects which would have caused reasonable accretion to the estate but for the sudden expenditure which had to be met from and depleted the estate of the injured, subsequently deceased.

21. However, the compensation under the head pain and suffering being personal injuries is held to be unsustainable and is disallowed."

17. Hence, in such type of case, as in our hand the settled law is that while the claim for personal injury may not have survived after the death of the injured unrelated to the accident or injuries, during the pendency of the appeal, but the claims for loss of estate caused, was available to and could be persuade by the legal representative of the deceased in the appeal.

18. Hence, we are of the considered opinion that the appellants shall be entitled only with regard to the compensation for loss of estate of the deceased. The impugned judgment goes to show that the appellants were awarded Rs.3,46,270/- for medical bills but the learned Tribunal has denied the medical bills for Rs.1,42,500/- which pertains to Yog Dispensary. In this regard, it is concluded by the Tribunal that it is not mentioned in claim petition that deceased was ever admitted to Yog Dispensary and the name of the doctor Amit Talyan is also not mentioned in claim petition in the panel of doctors who treated the injured/deceased. On this basis, the Tribunal has denied the medical bills

pertaining to Yog Dispensary. We have gone through the records and found that the bills pertaining to Yog Dispensary are prepared on the printed bill book having serial numbers and each bill has name of the patient and name of the concerned doctor, hence, these bills could not be thrown away in such a causal manner. Learned Tribunal did so. It is pertinent to mention that the Insurance Company never prayed to the Tribunal to summon the owner/proprietor of dispensary to summon as a witness. If these bills were fake, it was the burden on the shoulders of the Insurance Company to get the proprietary of Yog Dispensary summoned or he could be summoned by the Tribunal as a Court witness and could have been put to cross examination but no such exercise is done either by Insurance Company or Tribunal itself. Hence, the Tribunal has fallen in error in brushing aside the medical bills of Yog Dispensary worth Rs.1,42,500/-, hence, we hold that the appellants shall also be entitled to get Rs.1,42,500/- for medical expenses which come under the head of loss of a estate as per the judgment in the case of ***Kahlon @ Jasmail Singh Kahlon*** *(supra).* The Tribunal has awarded only Rs.5,000/- for special diet which we enhance to Rs.25,000/-. The Tribunal has not awarded any amount under non-pecuniary heads except for special diet. The family members would have cared of the deceased for 15 months and for attending charges, we award lump sum Rs.1/- lac to the family members.

19. However, the compensation under the head of pain and suffering being personal injuries is held to be unsustainable and is disallowed by Hon'ble Apex Court in the aforesaid judgment in the case of ***Kahlon @ Jasmail Singh Kahlon*** *(supra)*, hence, the appellant shall not be entitled to the compensation under the head of pain and suffering i.e. Rs.5,000/-. The decision in ***Kahlon @ Jasmail Singh Kahlon (supra)*** would be applicable but in our case the situation is that the deceased suffered for 15 months consistently, subjected to hospitalization in several hospitals which would have caused the trauma to the family members. Once, we hold that the driver of the truck was liable for the tortious act, the amount for agony and anguish will have to be awarded, we award lump sum of Rs.1/- lac under the non-pecuniary heads.

20. It is as per the reasoning given herein above unfortunately the claimants did not file any disability certificate of the deceased which he would have incurred during the period of his ailment. The medical certificate which we have perused, go to show that there were three injuries and fracture which would bring about some kind of permanent disability, when he was a government employee, and therefore, over and above, the loss of income for two months a lump sum amount of Rs.50,000/- under the loss to the estate even under principle of injuries resulting into ailment, is granted.

21. On the basis of the above discussion, we recalculate the amount of compensation payable to the appellants as under:-

(i). Amount awarded by Tribunal= Rs.4,10,924/-,

(ii). Deduction of amount under the head of pain and suffering= Rs.5,000/-,

(iii). Remaining amount= Rs.4,05,924/-,

(iv). Enhanced amount for special diet= Rs.20,000/-,

(v). Medical bills of Yog Dispensary(etc)= Rs.1,42,500/-,

(vi). Attending charges= Rs.1,00,000/-

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

(viii). Loss of estate= Rs.50,000/-)

(ix). Total amount of compensation payable= Rs.4,05,924+1,42,500+20,000+1,00,000+1,00,000+50,000/-=Rs.8,18,424/-.

(Round Figure Rs.8,18,000/-).

22. 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."

23. 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.

24. 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-National Insurance Company Ltd. (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.

25. 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.

26. The Tribunal shall follow the guidelines issued by the Hon'ble Apex Court in ***Bajaj Allianz General Insurance Company Pvt. Ltd. Vs. Union of India and Others***, vide order dated 27.01.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. Since long time has elapsed, the amount be deposited in the Saving Bank Account of claimant(s) in a nationalized Bank without F.D.R.

(2022)05ILR A785
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.04.2022

BEFORE

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

First Appeal From Order No. 1741 of 2002
With
First Appeal From Order No. 2127 of 2021

Oriental Insurance Co. Ltd., Allahabad
...Appellant
Versus
Shyam Babu Kesarwani & Anr.
...Respondents

Counsel for the Appellant:
Sri Ramesh Singh, Sri K.L. Grover

Counsel for the Respondents:
Sri S.K. Srivastava, Sri D.S. Shukla, Sri Devi Shanker Shukla Sri Sushil Kumar Srivastava

A. Civil Law - Motor Vehicles Act, 1988 - Section 168 - Motor Accident claim - negligence of minor child - daughter of the claimant, died on account of rash and negligent driving by the truck driver of truck - deceased was 5 years of age - Held - even under the Indian Penal Code, a child cannot be held guilty till the age of 7 years – In the instant case the minor was on the extreme left and playing with other children - There was nothing to show that the boy tried to go across the path of the vehicle – the very fact that the vehicle dashed with the child is a factor which goes to show that the driver was responsible for the accident and the death of the boy - minor child has not contributed to the accident - driver who is the best witness did not even appear before the tribunal also considered against the driver of offending vehicle - issue decided against the Insurance Company - a sum of Rs.2,25,000/- with interest would be payable (Para 19, 20, 25)

Allowed. (E-5)

List of Cases cited:

1. Kishan Gopal & anr. Vs Lala & ors., 2013 (101) ALR 281 (SC)

2. Manju Devi's case, 2005 (1) TAC 609 (SC)

3. United India Insurance Co. Ltd.. Vs. Mumtaz Ahmad & anr 2017 (2) AICC 1229

4. U.P.S.R.T.C. Vs. Km. Mamta AIR 2016 (SC) 948

5. Rylands Vs Fletcher, (1868) 3 HL (LR) 330

6. Jacob Mathew Vs St. of Pun., 2005 0 ACJ(SC) 1840

7. Archit Saini & anr. Vs Oriental Insurance Comp. Ltd., AIR 2018 SC 1143

8. Darshan Singh Vs Vimal Rani, (1998) 1 SCC 265 (ALL) (DB)

9. New India Assurance Co. Ltd. Vs Sita Ram Kevidayal Jaiswal, 2012 (2) AllMR 429, 2012 (2) MahLJ 710, 2012 (2) TAC 156

10. Machindranath Kernath Vs D.S. Mylarappa, 2008 ACJ 1964

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

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

13. Bajaj Allianz General Insurance Comp. Pvt. Ltd. Vs U.O.I.

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

1. Heard Sri Ramesh Singh, learned counsel for the insurance company; Shri Anurag Shukla appearing for Shri Devi Shanker Shukla, learned counsel for the claimants; and perused the record and award.

2. Appeal No.2127 of 2021, at the behest of the claimant, challenges the judgment and award dated 15.7.2002 passed by Motor Accident Claims Tribunal/ Special Judge, E.C. Act, Allahabad (hereinafter referred to as 'Tribunal') in Motor Accident Claim Petition No.160 of 2001 awarding a sum of Rs.65,000/- with interest at the rate of 8.5% as compensation. The appellant has questioned the compensation granted.

3. Appeal No.1741 of 2002 is by Insurance company challenging the award on several grounds; (i) driver of vehicle involved not joined as party; (ii) licence of driver of vehicle insured was fake as first licence was found fake but there were two licences the tribunal negatived this objection; and (iii) the case is of Contributory negligence and issue of negligence has been wrongly decided.

4. While issuing notice, this Court had called for the record of the tribunal. Section 173 in The Motor Vehicles Act, 1988 reads is as follows:

173. Appeals.--

(1) Subject to the provisions of sub-section (2) any person aggrieved by an award of a Claims Tribunal may, within ninety days from the date of the award, prefer an appeal to the High Court: Provided that no appeal by the person who is required to pay any amount in terms of such award shall be entertained by the High Court unless he has deposited with it twenty-five thousand rupees or fifty per cent. of the amount so awarded, whichever is less, in the manner directed by the High Court: Provided further that the High Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

(2) No appeal shall lie against any award of a Claims Tribunal if the amount in dispute in the appeal is less than ten thousand rupees."

5. The brief facts of the case in a nutshell are that Km. Pooja daughter of Shyam Babu Kesarwani, died on account of rash and negligent driving by the truck driver of truck number MP 17 C 0034 on 16th February, 2001 at about 6 p.m.. The unfortunate death of Km. Pooja was the result of rash and negligent driving by the truck driver and the first information report was lodged as case crime no.15 of 2001. The claimant/respondent is the father of the deceased, and since at the time of death age of the deceased was 5 years of age. The claimant filed claim petition for claiming compensation of Rs.2,10,000/- before the Motor Accident Tribunal. The owner of the vehicle contested the case but admitted that he is the registered owner. The owner took plea that the vehicle was duly insured with the Oriental Insurance Company and the

driver was driving the vehicle with a valid licence.

6. There is no dispute regarding involvement of vehicle. The injuries caused death is not disputed. Except the three issues which are posed for adjudicating the rest of the findings of the tribunal in the award have attained finality and therefore not discussed.

7. F.A.F.O No. - 2127 of 2021 was filed in 2003 delay was condoned in the year 2021. This is a claimants' appeal claiming enhancement for the death of child who was 5 years of age at the time of death. Learned counsel for the appellant has relied on the decisions of this Court and Apex Court in ***Kishan Gopal and another v. Lala and others, 2013 (101) ALR 281 (SC) and Manju Devi's case, 2005 (1) TAC 609 (SC)*** interpreted and by this Court in its recent decision of this Court in ***United India Insurance Company Limited. Vs. Mumtaz Ahmad and Another, 2017 (2) AICC 1229*** wherein this Court held as follows:

"6. Sri Ram Singh has heavily relied on the decision in the case of Kishan Gopal and another v. Lala and others, 2013 (101) ALR 281 (SC) = 2013 (131) AIC 219 = 2014 (1) AICC 208 (SC) and Manju Devi's case, 2005 (1) TAC 609 = 2005 AICC 208 (SC). It goes without saying the notional figure fixed by the Apex Court since Manju Devi's judgment has been consistently Rs.2,25,000 for children below the age of 15 years. I think that is just and proper and hence, the amount requires to be enhanced from Rs.1,57,000 to Rs.2,25,000 with 6% be recovered from the owner. The appeal is partly allowed. The cross-objection is also partly allowed."

8. The learned counsel contended that even in the year of accident the amount payable would be Rs.5,00,000/- (Rupees Five Lacs Only) as per decision of the Apex Court in Kishan Gopal (Supra).

9. F.A.F.O. No.1741 of 2002: this appeal is preferred by Insurance Company and the challenge is on five grounds, (i) that the claim petition was bad for non - joinder of necessary parties as the driver was not made party in this claim petition; (ii) that the driving licence which was given by the owner of the driver of vehicle involved, after verification by insurance company was found fake, but the learned tribunal did not consider this evidence which was a public document and admissible under the Evidence Act, without examining the authority concerned; and comitted material illegally in awarding; and committed material illegality in awarding compensation directing the appellant company to indemnity the owner for acts of his driver; (iii) it is submitted that the vehicle insured was being plied against the Insurance Policy and the appellant Company was not liable to pay any compensation; but the learned tribunal fastened the liability against the appellant company though the claim petition was liable to be dismissed; (iv) It is further submitted that the learned tribunal erroneously drew inference that the second driving licence was not verified by the opposite party (appellant company) and presumed that the driving was having a valid licence and passed the award against the appellant company in violation of section 6 of the Motor Vehicles Act; and (v) the accident occurred due to contributory negligence on the part of the deceased, was playing on the road, but the learned tribunal without considering the case on facts and law, awarded

compensation on the higher side against the appellant company in breach of established principles of law.

10. The claimant is aggrieved by the compensation awarded, where as the Insurance Company has raised several grounds for challenging the said award. In light of the judgment of the Apex Court reported in ***U.P.S.R.T.C. Vs. Km. Mamta AIR 2016 (SC) 948,*** all the issues raised have to be decided by this Court under Section 173 of the Motor Vehicles Act.

11. In view of the submission made by both the counsels as far as negligence is concerned this court will have to decide the issue of negligence. It would be relevant to discuss the principles for deciding negligence and to decide whether it is a case of contributory negligence and whether the minor child can contribute to the accident having taken place which will also have to be looked into.

12. The principles enunciated for considering the same in a motor accident claim will be sifted and discussed finding on negligence.

13. Negligence means failure to exercise required degree of care expected of a prudent person. 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 and likely to cause physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of parties to accident is required to be assessed.

14. 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 it is the duty of a fast moving vehicle to slow down and if driver did not slow down, but continued to proceed at a high speed without caring to notice that another person/vehicle was at what speed was either then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently and the driver can be held to be the author of the unforseen incident.

15. 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.

16. In light of the above discussion, 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 **(reference to Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840)** would be necessary.

17. 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 v. Oriental Insurance Company Limited, AIR 2018 SC 1143.***

18. The burden of proof would ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle driven by the driver was being driven with reasonable care or it is proved that there is equal negligence on the part the other side in causing the accident.

19. Contention of learned counsel for the insurance company qua negligence of minor child as pleaded by the appellants is required to the rejected as even under the Indian Penal Code, a child cannot be held guilty till the age of 7 years. In our case, the law is very clear that the factors which are necessary for consideration of negligence against insurance company. The minor was on the extreme left and playing with other children. There was nothing to show that the boy tried to go across the path of the vehicle suddenly just because it is mentioned that the vehicle was being driven slowly the same has not been proved that the driver was not rash and negligent. The very fact that the vehicle dashed with the child is a factor which goes to show that the driver was responsible for the accident and the death of the boy. This Court is fortified in its view by the Division Bench of this Court in ***Darshan Singh v. Vimal Rani, (1998) 1 SCC 265 (ALL) (DB).***

20. The finding of the tribunal is also very important and this Court concurs with the said finding, the reason being the minor child was not found to have contributed to the accident having taken place and, therefore, this issue is also decided against the Insurance Company. The fact that the driver who is the best witness did not even appear before the tribunal is also considered against the driver of offending vehicle.

Breach of Policy

21. Sections 147, 148 and 149 of the Motor Vehicles Act, 1988 reads are as follows:-

"147 Requirements of policies and limits of liability. --

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

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

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

(i) against any liability which may be incurred by him in respect of the death of or bodily 27 [injury to any person, including owner of the goods or his authorised representative carried in the

vehicle] or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

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

Provided that a policy shall not be required--

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

(a) engaged in driving the vehicle, or

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

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

(ii) to cover any contractual liability.

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

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

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

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

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

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

(4) Where a cover note issued by the insurer under the provisions of this Chapter or the rules made thereunder is not followed by a policy of insurance within the prescribed time, the insurer shall, within seven days of the expiry of the period of the validity of the cover note,

notify the fact to the registering authority in whose records the vehicle to which the cover note relates has been registered or to such other authority as the State Government may prescribe.

(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons.

Section 148 in The Motor Vehicles Act, 1988

148. Validity of policies of insurance issued in reciprocating countries.--Where, in pursuance of an arrangement between India and any reciprocating country, the motor vehicle registered in the reciprocating country operates on any route or within any area common to the two countries and there is in force in relation to the use of the vehicle in the reciprocating country, a policy of insurance complying with the requirements of the law of insurance in force in that country, then, notwithstanding anything contained in section 147 but subject to any rules which may be made under section 164, such policy of insurance shall be effective throughout the route or area in respect of which, the arrangement has been made, as if the policy of insurance had complied with the requirements of this Chapter.

Section 149 in The Motor Vehicles Act, 1988

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

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

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

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

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

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

(b) for organised racing and speed testing, or

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

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

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

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

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

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

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

(5) If the amount which an insurer becomes liable under this section to

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

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

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

22. The provision of Section 158 (6) will also apply for the benefit of the claimants. The decision in First Appeal From Order No.1731 of 2010 dated 21.11.2011 in the case of ***New India Assurance Co. Ltd. v. Sita Ram Kevidayal Jaiswal, 2012 (2) AllMR 429, 2012 (2) MahLJ 710, 2012 (2) TAC 156*** will enure for the benefit of the claimants.

23. It is contended that the driver was not joined and, therefore, the claim petition should have been dismissed. The said issue is not longer res integra in case of ***Machindranath Kernath v. D.S. Mylarappa, 2008 ACJ 1964,*** the said issue has been decided.

24. In the light of the judgment in ***Oriental Insurance Company Limited v. Poonam Kesarwani and others, 2008 LawSuit (All) 1557***, when it was not proved by the Insurance Company that there was breach of policy conditions, the appeal cannot succeed.

25. As far as the amount of compensation for the death of five years old child is concerned, the judgment of Kisan Gopal (Supra) has been interpreted and distinguished by this Court and, therefore, a sum of Rs.2,25,000/- with interest would be payable.

26. As far as issue of rate of interest is concerned, the rate of interest on awarded amount of Rs.65,000/- at the rate of 8.5% can be found fault with as repo rate in the year of 2001 and when the matter was decided was considered and therefore rate of interest 8.5% cannot be found fault. 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."

27. 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.

28. Hence the appeal preferred by the insurance company being devoid of merits and is **dismissed** and the appeal preferred by the claimant is **partly allowed.** Hence, the respondent-insurance company would deposit a sum of (Rs.2,25,000 - Rs.65,000) = **Rs.1,60,000/-** with interest at the rate of 7.5%. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The Insurance Company shall deposit the additional amount within a period of 12 weeks from today with interest at the rate of 7.5% on additional amount 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.

29. This Court is thankful to learned counsels for the parities for getting these very old matters disposed off.

30. The record be sent back to the Court below, if any.

(2022)05ILR A794
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.04.2022

BEFORE

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

First Appeal From Order No. 1998 of 2021

Smt. Kamini Singh & Ors. ...Appellants
Versus
Raj Kumar Pandey & Ors. ...Respondents

Counsel for the Appellants:
Sri Ashok Kumar Singh, Sri Gaurav Singh

Counsel for the Respondents:
Sri Ajay Singh, Sri Shashi Kant Rai

A. Civil Law - Motor Vehicles Act, 1988 - Section 168 - Motor Accident claim - Quantum of Compensation - Income - income of the deceased was Rs.3,26,856 - Out of which, the Tribunal deducted House Rent Allowance of Rs. 8040 and Income Tax of Rs. 6882 - Held - deduction of House Rent Allowance could not have been done and the only deduction permissible from the salary of the deceased is income tax - out of Rs.3,26,856 only Income Tax of Rs.6882 would be deducted therefore, the income for the purpose of computing compensation would be Rs.3,26,856 - 6882 = 3,19,974/- per annum (Para 19)

B. Civil Law - Motor Vehicles Act, 1988 - Section 168 - Motor Accident claim - Quantum of Compensation - Future Loss of Income - Tribunal not granted any amount towards future loss of income by assigning reason that father of the deceased is a retired government servant and is getting pension, therefore, he has not been dependent on the deceased, the mother of the deceased-has been dependent on the father of the deceased

and the widow would have been appointed on compassionate ground - *Held* - beneficial legislation could not have been dealt with in such a manner - compassionate appointment cannot be a ground for denial of future prospect as the salary which the widow would get, would be for the services which she renders - amount of pension cannot be deducted - 50% of the amount would be added towards future loss of income as the deceased was 30 years of age (Para 6, 13, 16, 19)

C. Civil Law - Motor Vehicles Act, 1988 - Section 168 - Motor Accident claim - Quantum of Compensation - Annual Income : 3,19,974 - Percentage towards future prospects : 50% namely Rs.1,59,987 - Total income : Rs.3,19,974/- + Rs.1,59,987 = Rs.4,79,961 - Income after deduction of 1/3rd : Rs.3,19,974 - deceased being in the age bracket of 26-30, the multiplier applicable would be 17 - Loss of dependency: Rs.3,19,974. x 17 = Rs.54,39,558 - deceased left behind him his widow and two minor children, addition of Rs.40,000 towards spousal consortium and Rs.50,000 each to the minor children who lost their father at very prime age therefore Amount under non-pecuniary head : Rs.40,000 + 50,000 + 50,000 = Rs.1,40,000 - Total compensation :55,79,558 - issue of rate of interest is concerned, it should be 7.5% - amount be deposited within 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited (Para 19)

Allowed. (E-5)

List of Cases cited:

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

2. Montford Brothers of St. Gabriel & anr. Vs United India Insurance Co. & anr. Civil Appeal No. 3269-3270 of 2007 dt 28.1.2014

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

4. Sunita Devi Vs Vimal Dwivedi, 2013 (3) TAC 844

5. National Insurance Co. Ltd. Vs Rekhaben & ors., AIR 2017 SC 2580

6. Hem Raj Vs Oriental Insurance Co.Ltd., (2018) 15 SCC 654

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

8. Sureshchandra Bagmal Doshi Vs The New India Assurance Co. Ltd., AIR 2018 SC 2088

9. K.R. Madhusudan & ors. Vs Administrative Officer & anr, (2011) 4 SCC 689

10. N. Jayasree Vs Cholamandalam M/s General Insurance Co. Ltd., AIR 2021 SC 5218

11. Puttamma Vs K.L. Narayana Reddy, 2013 (15) SCC 45

12. Tamil Nadu State Transport Corp.Ltd. Vs S. Rajapriya, 2005 (0) AIJEL - SC 31621

13. Managing Director, Tamil Nadu State Transport Corp. Vs K.I. Bindu, 2005 (0) AIJEL-SC 35930

14. Syed Basheer Ahamed & ors. Vs Mohd. Jameel and SC, 2009 ACJ 690 (SC)

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

16. A.Vs Padma Vs Venugopal, Reported in 2012 (1) GLH (SC), 442

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

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

19. Bajaj Allianz General Insurance Company Private Ltd. Vs U.O.I. & ors. vide dated 27.1.2022

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

1. Heard Sri Ashok Kumar Singh, learned counsel for the appellant, Sri Ajay Singh, learned counsel for the respondent-Insurance Company and Sri Shashi Kant Rai, learned counsel for owner and driver of the offending vehicle.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 30.1.2017 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.1, Gorakhpur (hereinafter referred to as 'Tribunal') in Claim Petition No. 626 of 2013 awarding a sum of Rs.27,12,928/- as compensation with interest at the rate of 7% per annum.

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is also not in dispute. The Tribunal has held that it is proved that vehicle was insured and there was no breach of policy and Insurance Company has accepted the findings as far as their liability is concerned. The only issue to be decided is the quantum of compensation awarded.

4. The accident took place on 10.10.2013. The deceased was 30 years of age, he was a Teacher in Bitaha Primary School and was earning Rs.27,238/- per month. The Tribunal considered his annual income to be Rs.3,11,934 after deducting income tax and house rent allowance from the salary. The Tribunal deducted 1/3rd towards personal expenses of the deceased, granted multiplier of 13 and awarded Rs.9,500/- towards non pecuniary damages.

5. It is submitted by learned counsel for the appellants that deduction of House Rent Allowance could not have been made and has relied on the decision in **Vimal Kanwar and Others Vs. Kishore Dan and others, 2013 (3) T.A.C. 6 (S.C.).**

6. It is submitted by learned counsel for the appellants that the Tribunal has not granted any amount towards future loss of income by assigning reason that Guru Narain Singh, father of the deceased, is a retired government servant and is getting pension, therefore, he has not been dependent on the deceased, the mother of the deceased-has been dependent on the father of the deceased and the widow would have been appointed on compassionate ground.

7. Learned counsel for the appellant has also relied on the decision in Civil Appeal No. 3269-3270 of 2007 **(Montford Brothers of St. Gabriel and Another vs. United India Insurance Co. & Anr,)** decided on 28.1.2014.

8. It is submitted by learned counsel for the appellants that the Tribunal has lost sight of the decision of the Apex Court in **Sarla Verma and others Vs. Delhi Transport Corporation and Another, 2009 LawSuit (SC) 613** and subsequent judgment and has granted only Rs.9500/- towards non pecuniary damages which is on the lower side and requires to be enhanced in view of the decision of the Apex Court.

9. It is lastly submitted that the interest awarded by the Tribunal is on the lower side and it should be as per the repo rate prevailing.

10. Per contra, learned counsel for the respondent has submitted that the

compensation assessed by the Tribunal is just and proper and does not call for any interference of this Court as the widow was given compassionate appointment and the father of the deceased was also getting pension. It is further submitted that the interest awarded by the Tribunal is just and does not require any enhancement.

11. The judgments on which the Tribunal has relied to grant lesser multiplier cannot be said to be laying down the law of just compensation. The said judgments stand eclipsed by the later judgments which should have been looked into by the Tribunal in the over zeal to hold reasonable compensation.

12. Reasonable compensation cannot be what the learned Judge/Tribunal feels, it has to be just compensation as per the principle of assessment. The decision in **Sunita Devi v. Vimal Dwivedi, 2013 (3) TAC 844** has already been eclipsed by the decision of the Apex Court in **National Insurance Company Ltd. v. Rekhaben & Others, AIR 2017 SC 2580** and also the amount of pension cannot be deducted.

13. The judgment and award passed by the Tribunal cannot be said to be laying down proper law. It is based on surmises and on notion of the learned Judge that the family should be given what is reasonable according to him and, that is how, he has negatived the future loss of income giving reason that the father was a pensioner and not dependent on the deceased, the mother was dependent on the father and the widow could get compassionate appointment and would get pension.

14. The Apex Court in **Hem Raj v. Oriental Insurance Company Limited, (2018) 15 SCC 654** has found merit in the submission that the view taken in **National Insurance Co. Ltd. Vs. Pranay Sethi and others, 2017 LawSuit (SC) 1093** has no bar to grant future prospects over and above the thumb rule where the evidence on record would warrant that the increase was actual and the evidence led should be so that future prospects was higher than the standard percentage. In that case, the Court can award higher compensation. The decision in **Sureshchandra Bagmal Doshi vs The New India Assurance Co. Ltd., AIR 2018 SC 2088** also would permit us to take a different view then that taken by the Tribunal. The judgment in **K.R. Madhusudan & Others v. Administrative Officer & Anr, (2011) 4 SCC 689** has not been considered by the Apex Court while deciding this controversy. The said judgment has also been referred by the Apex Court in **N. Jayasree vs. Cholamandalam M/s General Insurance Co. Ltd., AIR 2021 SC 5218 & Puttamma v. K.L. Narayana Reddy, 2013 (15) SCC 45** which will apply.

15. It is also pertinent here to discuss Section 166 of Motor Vehicles Act, 1988 which reads as under:

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; or

(d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be: Provided that where all the legal represe0.ntatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application. 1[(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred, or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed: Provided that where no claim for compensation under section 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.] 2[***] 3[(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of section 158 as an application for compensation under this Act.]

16. According to this Section father is Class II heir and widow, minor children and mother of the deceased come under Class I heirship. The reasoning given by the Tribunal to not to award future prospect and decreasing the multiplier to 13 are not germane. We would not say that the reasonings are absurd but the matter under beneficial legislation could not have been dealt with in such a manner. The Tribunal has granted multiplier of 13. It has lost sight of the fact that the deceased left behind him also his widow and two minor children. The compassionate appointment cannot be a ground for denial of future prospect as the salary which the widow would get, would be for the services which she renders. The law, as far as multiplier is concerned, has to be followed by the Tribunals would be the decisions in the case of ***Sarla Verma*** and ***Pranay Sethi (Supra).***

17. The Tribunal has relied on the decision of the Apex Court in **Rajpriya (Infra**) and has contended that just and reasonable compensation be granted and not on higher side. This is perverse finding. Reasonable and just compensation has to be as per evidence and not what Tribunal on surmise considers reasonable. The Apex Court in the judgment cited namely **Tamil Nadu State Transport Corporation Ltd. v. S. Rajapriya, 2005 (0) AIJEL - SC 31621** held that multiplier of 12 would be granted looking to the age of the deceased and not because of the amount granted would be more. The age of the deceased in the said matter was 38 years. This controversy has now been put to rest and the Tribunal should have considered the same. It could not have decreased the multiplier placing reliance in **Managing Director, Tamil Nadu State Transport Corporation v. K.I. Bindu, 2005 (0) AIJEL-SC 35930** which are eclipsed by later decisions.

18. We are even fortified in our view by the decision of the Apex Court in **Syed Basheer Ahamed and others v. Mohd. Jameel and SC, 2009 ACJ 690 (SC)** so as to consider what is just compensation and take holistic approach.

19. In view of the above, we recalculate the quantum of compensation

to be awarded to the claimants-appellants. The income of the deceased was Rs.27,238/- per month namely Rs.3,26,856/- per annum. Out of which, the Tribunal has deducted House Rent Allowance of Rs.8040/- (670 per month) and Income Tax of Rs.6882/- (Annual). In view of the decision in **Vimal Kanwar (Supra)** deduction of House Rent Allowance could not have been done and the only deduction permissible from the salary of the deceased is income tax. Hence, out of Rs.3,26,856/-, only Income Tax of Rs.6882/- would be deducted and, therefore, the income for the purpose of computing compensation would be Rs.3,26,856-6882 = 3,19,974/- per annum. To which, 50% of the amount would be added towards future loss of income as the deceased was 30 years of age and it was not pointed out to us also as what would be future income loss, hence, we award 50% towards future loss of income the deceased. Deduction of 1/3rd towards personal expenses of the deceased is maintained. The deceased being in the age bracket of 26-30, the multiplier applicable would be 17. We grant addition of Rs.40,000/- towards spousal consortium and Rs.50,000/- each to the minor children who has lost their father at very prime age. Hence, the total compensation payable to the appellants is computed herein below:

i. Annual Income : 3,19,974

ii. Percentage towards future prospects : 50% namely Rs.1,59,987/-

iii. Total income : Rs.3,19,974/- + Rs.1,59,987 = Rs.4,79,961/-

iv. Income after deduction of 1/3rd : Rs.3,19,974/-

vi. Multiplier applicable : 17

vii. Loss of dependency: Rs.3,19,974. x 17 = Rs.54,39,558/-

viii. Amount under non-pecuniary head : Rs.40,000 + 50,000 + 50,000 = Rs.1,40,000/-

ix. Total compensation :55,79,558/-

20. 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."

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

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 amount be deposited within 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. Record and proceedings be sent back to the Tribunal forthwith. The amount already deposited be deducted from the amount to be deposited.

23. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442**, the order of investment be passed by Tribunal.

24. 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.

25. 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.

26. The Tribunal shall follow the guidelines issued by the Apex Court in **Bajaj Allianz General Insurance Company Private Ltd. v. Union of India and others** vide order dated 27.1.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. As long time has elapsed, the amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R.

27. We request the learned Registrar General that a copy of this order be circulated to the Tribunals in the State of Uttar Pradesh after seeking approval from Hon'ble the Chief Justice so that the Tribunal may not commit such mistake of not granting future loss of income and reduction of multiplier.

28. A copy of judgment be sent to the concerned Judge so that he may not make such mistakes in future and we deprecate the reasoning given by him.

(2022)05ILR A800
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.03.2022

BEFORE

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

First Appeal From Order No. 2706 of 2015

Kamal Singh Sachan & Ors. ...Appellants
Versus
Smt. Savitri Devi & Ors. ...Respondents

Counsel for the Appellants:
Sri Anurag Singh

Counsel for the Respondents:
Sri Amaresh Sinha, Sri Anubhav Sinha

A. Civil Law - Motor Vehicles Act, 1988 - Section 168 - Contributory negligence – Innova car and offending truck dashed into each other from opposite direction - both the vehicles have damaged on front side - site plan shows that Innova car was on its correct side of the road and the truck was on its wrong side – hence it was head on collusion but on the correct side of the Innova car - truck came on the side of the Innov car & resulted in the death of its driver – However the Innova car was also not on the extreme left side of the road - keeping all the facts together Court held the driver of the truck to be 80% negligent and the driver of the Innova car i.e. the deceased to be 20% negligent - 20% deduction towards contributory negligence (Para 11)

B. Civil Law - Motor Vehicles Act,1988 - Section 168 - Quantum of Compensation - income tax returns of the deceased show his annual income to be Rs. 1,78,401, Annual income = Rs.1,78,000 - deceased self employed and below the age of 40 years, future prospects: 40% = Rs.71,200 - Total income: Rs.1,78,000/- + Rs.71,200/- = Rs.2,49,200 - there were four dependents upon the deceased amongst which, one was minor, hence, 1/3rd will have to be deducted towards personal expense of the deceased - Income after deduction of 1/3rd = Rs. 1,66,134 - At the time of the death, the age of the deceased was 27 years, Multiplier applicable = 17 - Loss of dependency: Rs.1,66,134 x 17 = Rs. 28,24,278 - appellants shall be entitled to get Rs, 15,000/- for loss of estate, Rs. 15,000/- for funeral expenses, wife of the deceased shall be entitled to Rs. 40,000/- for loss of consortium, minor son of the deceased would get Rs. 50,000/- as filial consortium; Amount under non pecuniary head = Rs.1,20,000 - Total compensation: Rs.28,24,278 + 1,20,000 = Rs 2944278 - Court held the driver of the truck to be 80% negligent and deceased to be 20% negligent - Amount after 20% deduction towards contributory negligence = Rs.23,55,423 which is rounded off to Rs 2355500 - Interest at rate of 7.5% from the date of filing of the claim petition till the amount is deposited (14, 15, 16)

Allowed. (E-5)

List of Cases cited:

1. Bajaj Allianz General Insurance Co.Ltd. Vs Smt. Renu Singh & ors. F.A.F.O. No. 1818 of 2012 dt 19.7.2016

2. National Insurance Co. Ltd. Vs Pranay Sethi & ors. 2017 (SC) 1093

3. Sarla Verma & ors. Vs Delhi Transport Cor. & anr., 2009 ACJ 1298

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

5. Smt. Hansagori P. Ladhani v/s The Oriental Insurance Company Ltd. 2007 (2) GLH 291

6. Smt. Sudesna & ors. Vs Hari Singh & anr. Review Application No.1 of 2020 in F.A.F.O. No.23 of 2001

7. Tej Kumari Sharma v. Chola Mandlam M.S. General Insurance Co. Ltd. F.A.F.O. No. 2871 of 2016

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

1. By way of this appeal, the claimants have challenged the judgment and order dated 27.07.2015 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.6, Kanpur Nagar (hereinafter referred to as 'Tribunal') in M.A.C.P. No. 103 of 2012 awarding sum of Rs.10,09,500/- as compensation to the claimants with interest at the rate of 7% per annum.

2. Heard Mr. Anurag Singh, learned counsel for the appellants and Mr. Anubhav Sinha, learned counsel for the respondents. Perused the record.

3. Brief facts of the case are that a claim petition is filed before Motor Accidents Claim Tribunal (hereinafter referred to as the 'Tribunal') with the averments that on 21.10.2011, the deceased was returning from his brick kiln to his house in Kidwai Nagar, Kanpur by his Innova car bearing No. UP78CE4408. When he reached between Shambhua railway crossing and village Hadaha, a truck bearing No. UP78N5859, which was being driven very rashly and negligently by its driver, hit the Innova car from opposite direction. In this accident, the deceased Sheel Sachan sustained fatal injuries and died on the spot. First information report of this accident was lodged in the concerned police station. After investigation, charge-sheet was submitted against the driver of the aforesaid offending truck. Learned Tribunal held the drivers of both the vehicles negligent to the tune of 50 % each and awarded Rs. 10,09,500/- as compensation with interest at the rate of 7 % per annum. Aggrieved with the quantum of award and finding of contributory negligence, this appeal has been filed by the appellants.

4. The accident is not in dispute. The liability of insurance company to pay the compensation is also not disputed but the finding of contributory negligence is challenged by the appellants. It is submitted by learned counsel for the appellants that at the time of the accident, the deceased was not at fault and the accident had taken place due to sole negligence of the truck driver.

5. 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.

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

7. 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."

8. In this regard, we have perused the evidence regarding contributory negligence on record.

9. Learned Tribunal has refused to rely on the site plan prepared by the investigating officer during investigation of the concerned criminal case and held that it is not the site plan which could be relied on for determination of contributory negligence but other factors are to be seen such as first information report, charge-sheet and evidence of independent witnesses. Learned Tribunal mainly relied on technical inspection reports of both the vehicles i.e. Innova car and the offending truck and came to the conclusion that there is damage in the front side of both the vehicles. In this way, learned Tribunal concluded that since there is damage on the front side hence, both the drivers were negligent in driving their respective vehicles. Learned Tribunal also relied on the evidence of eye witness PW2 who had deposed that both the vehicles dashed into each other from opposite direction. On the basis of this evidence, learned Tribunal held contributory negligence of both the drivers to the tune of 50% each but we are unable to concur with the aforesaid finding.

10. Learned counsel for the appellant submitted that investigating officer prepared site plan but in the index thereof, he wrongly mentioned the truck with single arrow and Innova car with double arrow while making entry in general diary of police station regarding spot inspection, the investigating officer has rightly mentioned the Innova car with single arrow and truck with double arrow. Learned counsel also submitted that in this regard, a supplementary affidavit has been filed by the appellants.

11. We have gone through the supplementary affidavit which supports the arguments advanced by the appellants as above. It is also pertinent to mention that the driver of the truck has not stepped into the witness box. It is correct that both the vehicles have damaged on front side but it does not mean that it was head on collusion in the middle of the road because the site plan shows that Innova car was on its correct side of the road and the truck was on its wrong side hence, it was head on collusion but on the correct side of the Innova car. Hence, it is clear that the truck came on the side of the Innov car and resulted in the death of its driver. However, we cannot ignore the fact that the Innova car was not on the extreme left side of the road. Hence, keeping all the facts together in the light of the evidence on record, the finding of the learned Tribunal regarding contributory negligence to the tune of 50% each cannot be sustained. We hold the driver of the truck to be 80% negligent and the driver of the Innova car i.e. the deceased to be 20% negligent. Now, it

takes us to determine the quantum of compensation.

12. Learned counsel for the appellant submitted that the deceased was a graduate in Engineering. He was partner in three brick kilns and agriculturist also. The deceased was an income tax payee. The income tax returns filed by him are on record but the learned Tribunal did not rely on those returns. Learned Tribunal has assessed the annual income of the deceased at Rs. 1,56,000/- which is on the lower side. Although, learned counsel for the insurance company submitted that Tribunal has rightly assessed the income of the deceased and it does not call for any interference but we cannot shut our eyes from the fact that the income tax returns of the deceased show his annual income to be Rs. 1,78,401/-. Hence, we hold the annual income of the deceased in round figures to be Rs. 1,78,000/-.

13. It is submitted on behalf of the appellants that the learned Tribunal has not awarded any sum for future loss of income. It is vehemently objected by learned counsel for the insurance company and he submitted that no future loss of income should be granted.

14. We are unable to accept the aforesaid submissions of learned counsel for the insurance company as per judgment of the Apex Court in the case of **National Insurance Co. Ltd. vs. Pranay Sethi and others 2017 (SC) 1093** in which it is held that in case of death of a self employed person, his legal representatives shall be entitled to get compensation for future loss of income. In this case, it is not disputed that the deceased was self employed and he was below the age of 40 years. Hence, as per the aforesaid judgment of **Pranay Sethi** (supra), 40% shall be added to the income of the deceased for future loss of income. There were four dependents upon the deceased amongst which, appellant no.4 was minor, hence, 1/3rd will have to be deducted towards personal expense of the deceased whereas the Tribunal has deducted 1/4th . At the time of the death, the age of the deceased was 27 years, hence, as per the judgment of **Sarla Verma and Others Vs. Delhi Transport Corporation and Another, 2009 ACJ 1298,** the multiplier of 17 shall be applied.

15. A perusal of the impugned judgment shows that learned Tribunal has awarded Rs. 10,000/- for loss of consortium, Rs. 15,000/- for loss of love and affection and Rs. 5000/- for funeral expenses which are on the lower side. As per the judgment of **Pranay Sethi** (supra), the appellants shall be entitled to get Rs, 15,000/- for loss of estate and Rs. 15,000/- for funeral expenses apart from it, the wife of the deceased shall be entitled to Rs. 40,000/- for loss of consortium and the minor son of the deceased would get Rs. 50,000/- as filial consortium since he has lost his father at a very tender age. In this way, the appellants together will get Rs. 1,20,000/- as non-pecuniary damages. On the basis of above discussion, total amount of compensation payable to the appellants is computed hereinbelow:

i. Annual income = Rs.1,78,000/- per annum.

ii. Percentage towards future prospects: 40% = Rs.71,200/-

iii. Total income: Rs.1,78,000/- + Rs.71,200/- = Rs.2,49,200/-

iv. Income after deduction of 1/3rd = Rs. 1,66,134/-

v. Multiplier applicable = 17

vi. Loss of dependency: Rs.1,66,134/- x 17 = Rs. 28,24,278/-

vii. Amount under non pecuniary head = Rs.1,20,000/-

viii. Total compensation: Rs.28,24,278/- + 1,20,000/- = Rs. 29,44,278/-

ix. Amount after 20% deduction towards contributory negligence = Rs.23,55,423/- which is rounded off to Rs. 23,55,500/-.

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

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

17. Learned Tribunal has awarded rate of interest as 7% per annum but we are fixing the rate of interest as 7.5% in the light of the above judgment.

18. No other grounds are argued orally when the matter was heard.

19. 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 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.

20. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansagori P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007 (2) GLH 291** and this High Court in total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimants to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 **(Smt. Sudesna and others Vs. Hari Singh and another)** and in First Appeal From Order No.2871 of 2016 **(Tej Kumari Sharma v. Chola Mandlam M.S. General Insurance Co. Ltd.)** decided on 19.3.2021 while disbursing the amount.

(2022)05ILR A807
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.04.2022

BEFORE

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

First Appeal From Order No. 2783 of 2008

Smt. Raj Biri & Ors. ...Appellants
Versus
Regional Manager, U.P.S.R.T.C., Ghaziabad & Anr. ...Respondents

Counsel for the Appellants:
Sri A.K. Dwivedi, Sri Ashok Kumar Pandey, Sri Bipin, Sri Harish Yadav, Sri Sunil Kumar Yadav, Sri Yogesh Kumar Sinha, Sri Y.K. Sinha

Counsel for the Respondents:
Sri Sunil Kumar Misra, Sri Amaresh Sinha, Sri Anubhav Sinha, Sri Ramanuj Pandey

Civil Law - Motor Vehicles Act,1988 - Section 168 - Quantum of Compensation - Deceased doing dairy business - Court considered his income to be Rs 5000 per month - Annual Income : Rs.60,000 Per annum (Rs.5,000 X 12) - Deceased self employed & below 35 yrs therefore Percentage towards future prospects 40% : Rs. 24,000 - Total income : Rs. 60,000 + Rs.24,000 = Rs. 84,000 - deceased survived by his wife, three minor children and mother, who were dependent on him therefore Income after deduction 1/3 : Rs. 84,000 – 28,000 = Rs.56,000 - Deceased aged 35 years Multiplier applicable : 16 - Loss of Dependency : Rs. 56,000 X 16 = Rs.8,96,000 - Amount under non pecuniary head : Rs. 70,000 - deceased had three minor children Filial Consortium : Rs.50,000 X 3 = Rs.1,50,000 - Total compensation : Rs.8,96,000 + Rs.70,000/- + Rs.1,50,000 = Rs.11,16,000 - Interst at rate of 7.5% from the date of filing of the claim petition till the amount is deposited

Allowed. (E-5)

List of Cases cited:

1. Kurvan Ansari @ Kurvan Ali & anr. Vs Shyam Kishore Murmu & anr., 2021 (4) TAC 673 (Supreme Court)

2. Puttamma & ors. Vs K.L. Narayana Reddy & anr., 2014 (1) TAC 926 & Kishan Gopal & anr.Vs Lala & ors., 2013 (4) TAC 5

3. National Insurance Co. Vs Pranay Sethi [2014 (4) TAC 637 (SC)]

4. Smt.Sarla Verma Vs Delhi Transport Corp. [2009 (2) TAC 677 (SC)]

5. Pappu & ors. Vs Vinod Kumar Lamba & anr., 2018 (0) Supreme (SC) 42

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

7. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Co. Ltd., [2007(2) GLH 291]

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

9. First Appeal From Order No.2871 of 2016 (Tej Kumari Sharma v. Chola Mandlam M.S. General Insurance Co. Ltd.) dt 19.3.2021

10. Bajaj Allianz General Insurance Co. Pvt. Ltd. Vs U.O.I. & ors.

(Delivered by Hon'ble Ajai Tyagi, J.

1. This appeal has been preferred by the claimants-appellants against the judgment & order dated 30.05.2008 passed by learned Motor Accident Claims Tribunal/Additional District Judge, Court No.4, District Ghaziabad in Motor Accident Claim Petition No.158 of 2006 (Smt. Raj Biri and Others Vs. Regional Manager, Regional Office, U.P. State Road Transport Corporation), whereby the

learned Tribunal has awarded a sum of Rs.2,51,600/- as compensation to the claimants with interest at the rate of 6% per annum.

2. The brief facts of the case are that claimants-appellants filed a Motor Accident Claim Petition before the Tribunal for claiming the compensation under Motor Vehicles Act, 1988 for the death of Mahesh in a road accident with the averments that on 19.12.2005, Mahesh-deceased along with his friends was going to his house from Delhi by tractor, when he reached at village Luhari, a bus bearing no. U.P. 14 T 9563 was coming, which was being driven very rashly and negligently by its driver. The aforesaid bus being driven in such a manner dashed the deceased's tractor. In this accident, deceased sustained very serious injuries and died on the way to hospital.

3. Aggrieved mainly with the compensation awarded, the appellants preferred this appeal.

4. Heard learned counsel for the appellants-claimants and learned counsel for the respondents. Perused the record.

5. The accident is not in dispute. The issue of negligence has attained finality as neither the Insurance Company nor the owner of the vehicle has disputed the same even in oral submissions. 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 only issue to be decided is the quantum of compensation awarded by the Tribunal.

6. Learned counsel for the appellants-claimants has submitted that the learned Tribunal has assessed the monthly income of the deceased at Rs.2,400/- per month while the deceased was a farmer and also doing animal husbandry. Deceased was in a dairy business and land record shows that he had property, which was there and was earning Rs.48,000/- per month but learned Tribunal has wrongly assessed the monthly income of the deceased. The Tribunal has not added any amount towards future loss of income, which, in our opinion is bad on facts. Learned Tribunal has deducted 1/3rd towards personal expenses of the deceased and has granted multiplier of 13 and but has not granted any amount under the head of non pecuniary damages.

7. Learned counsel for the respondents have vehemently objected the submissions of learned counsel for the appellants on the issue of enhancement of compensation. It is submitted that learned Tribunal has awarded just compensation as per law admissible to the claimants which does not call for any interference by this Court.

8. Learned counsel for the appellants-claimants has submitted that it is an internal dispute between the insurance company and the owner of the vehicle and the appellants being legal representative of the third party, they cannot be punished for non production of the driving licence by the U.P.S.R.T.C. Learned counsel for the appellants-claimants has submitted that deceased was survived by his wife, three minor children and mother, who were dependent on him, hence 1/4th should be deducted. It is also submitted that appellants-claimants are also entitled to get non pecuniary damages and the same may be granted. It is submitted that recently, the Hon'ble Apex Court has decided the controversy ans settled the law regarding the death of a child in ***Kurvan Ansari @***

Kurvan Ali and another Vs. Shyam Kishore Murmu and another, 2021 (4) TAC 673 (Supreme Court) be made applicable. In this case, the Hon'ble Apex Court has stated that in spite of repeated directions, Scheduled-II of Motor Vehicles Act, 1988 is not yet amended. Therefore, fixing notional income of Rs.15,000/- per annum for non earning members is not just and reasonable. It is further submitted that the Apex Court that in the cases of ***Puttamma and others Vs. K.L. Narayana Reddy and another, 2014 (1) TAC 926 and Kishan Gopal and another v. Lala and others, 2013 (4) TAC 5,*** it is a fit case to increase the notional income by taking into account the inflation, devaluation of the rupees and cost of living.

9. With the aforesaid observations, the Hon'ble Apex Court took the notional income of the deceased who was 7 years old at Rs.25,000/- per annum. In our case, the deceased was running his business and was having 35 buffalos and, therefore, we consider his income to be Rs.5,000/- per month. Since, the deceased will fall within the category of self employed and his age was 35 years at the time of accident, 40% shall be added towards future loss of income as held by Hon'ble Apex Court in ***National Insurance Company vs. Pranay Sethi [2014 (4) TAC 637 (SC)].*** Keeping in view the age of the deceased, multiplier of 16 will be admissible in the light of the judgment of Hon'ble Apex Court in the case of ***Smt.Sarla Verma vs. Delhi Transport Corporation [2009 (2) TAC 677 (SC)]***. We cannot accept the submission that 1/4 be the deduction of personal expenses of the deceased. Learned Tribunal has rightly deduced 1/3rd for personal expenses, we also maintain the same.

10. As far as non-pecuniary damages are concerned, the Tribunal has not awarded any sum towards non pecuniary damages. No reasons are assigned and only Rs.2,000/- is awarded for funeral expenses. In the light of Judgment in the case of ***Pranay Sethi (supra),*** claimants shall be entitled to get Rs.15,000/- each for loss of estate and 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/- for non-pecuniary heads. Three minor children of the deceased, lost their father at a very tender age, hence, children of the deceased shall be entitled to get Rs.50,000/- each towards loss of parental love in the light of the judgment of Hon'ble Apex Court in the case of ***Kurvan Ansari alias Kurvan Ali (Supra***).

11. Hence, the total amount of compensation, in view of the above discussions, payable to the appellants-claimants is being computed herein below:

(i) Annual Income : Rs.60,000/- Per annum (Rs.5,000 X 12)

(ii) Percentage towards future prospects 40% : Rs. 24,000/-

(iii) Total income : Rs. 60,000/- + Rs.24,000/- = Rs. 84,000/-

(iv) Income after deduction 1/3 : Rs.84,000 - 28,000/- = Rs.56,000/-

(v) Multiplier applicable : 16

(vi) Loss of Dependency : Rs. 56,000/- X 16 = Rs.8,96,000/-

(vii) Amount under non pecuniary head : Rs.70,000/-

(viii) Filial Consortium : Rs.50,000 X 3 = Rs.1,50,000/-

(ix) Total compensation : Rs.8,96,000 + Rs.70,000/- + Rs.1,50,000/- =

Rs.11,16,000/-

Submissions for breach of policy conditions as far as licence is concerned.

12. Mr. Anubhav Sinha, learned counsel appearing for the Insurance Company has submitted that this is an appeal which is continuation of the proceedings. He can raise oral cross objection and submitted that there is no finding of fact that U.P.S.R.T.C. had not examined the driver nor did it produce any record showing the driver was certified to drive the bus of U.P.S.R.T.C. on the date of accident and, therefore, the finding is bad and the Insurance Company should be given recovery rights.

13. As against this, Mr. S.K. Mishra, learned counsel appearing for the U.P.S.R.T.C. submits that in fact though filing of reply, it is categorically mentioned that the driver was having valid driving licence to drive the said vehicle but it is accepted position of fact that the same was not produced before the learned Tribunal. It is also submitted that this court may consider the application under Order XLI Rule 27, which was filed long back, which has heavily relied on the decision of this Court passed in First Appeal From Order (Defective) No.171 of 2000 of the learned Single Judge.

14. Learned counsel for the Insurance Company has heavily relied on the judgment of Apex Court in the case of ***Pappu and Others Vs. Vinod Kumar Lamba and Another, 2018 (0) Supreme (SC) 42***, so as to contend that onus would then shift on Insurance Company to rebut the same. The driver of the bus or the owner in whose possession the licence should produce the same and prove the same.

15. As far as issue of rate of interest is concerned, learned Tribunal has awarded the compensation with interest at the rate of 6% per annum. It should be 7.5% on the enhanced amount 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."

16. It is pointed out by learned counsel for the respondents that the appeal was dismissed in default on 03.04.2018 and the same came to be restored recently. However, none has appeared for the Oriental Insurance Company till 08.10.2021, therefore, interest shall not be deducted for the same period. The mute question would be who would pay to the claimants. The primary duty is of the driver

and owner namely, U.P.S.R.T.C. who is the owner of the vehicle. We first direct the Insurance Company to deposit the amount, and we grant recovery rights to the Insurance Company to recover from the U.P.S.R.T.C. who shall by satisfy that the driver had a proper valid driving licence and the vehicle was plied with all requisite documents. The said exercise would be completed within 12 weeks from today.

17. While going through the facts, it is clear that U.P.S.R.T.C. though did not produce the licence before the Tribunal. It has by way of application under Order XLI Rule 27 of C.P.C., produced the copy, which goes to show that they have verified that the driver was authorized to drive the vehicle. The Tribunal could not have shifted the burden on the Insurance Company as the judgment of ***Pappu and Others (Supra)*** is very clear. The Tribunal could not have held that it was primary duty of the Insurance Company. The finding of issue no.2 is whether the driver had proper driving licence. The Tribunal has answered the said question as held against the Insurance Company and has passed the award against all the respondents and, therefore, this oral submission is also considered. The judgment of Apex Court in **Pappu and Others (Supra)** enjoining the duty of the owner to file document which was not filed. The dispute is between the U.P.S.R.T.C. and the Insurance Company. In the beginning, Insurance Company would satisfy the award and if Insurance Company is able to satisfy the executing Court that the driver did not have any driving licence, they would be entitled to recover the amount. As this is the special case of government agency to be going for recovery rights, if the U.P.S.R.T.C. by cogent evidence, proves by the Insurance Company that the driver who was engaged by them was having valid driving licence. The matter should end there, failing which, the Insurance Company would be entitled to recover the amount of the amount deposited and if the U.P.S.R.T.C. satisfy that the driver had a proper driving licence, if they have deposited any amount by virtue of the award of the Tribunal, they would be entitled to reclaimed the amount from Insurance Company.

18. 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 08 weeks from today with interest as discussed above 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.

19. It appears that from 2008, we do not find as per the record, whether any amount was deposited or not. The responsible officer will explain to the learned Tribunal as to why the amount was not deposited when there is no stay order in the matter.

20. It appears from the judgment and order that unfortunately, the learned Tribunal Judge in the operative portion has not clarified who should pay the compensation as it has held all the respondents would be liable. It was an internal dispute between the Insurance Company and the U.P.S.R.T.C. We request the Registrar General, Allahabad High Court to convey our concern to the Motor Claims Tribunal not to pass such omnibus order that all would be liable but satisfied which respondent would be liable to pay

and which will be liable to indemnify. We also direct the Insurance Companies involved and directed to pay other authorities not to grant stay unto themselves so that the claimants do not suffer for the internal dispute between the owner and the Insurance Company, where award is passed against all.

21. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of ***Smt. Hansagori P. Ladhani vs. The Oriental Insurance Company Ltd., [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.

22. The Tribunal shall follow the guidelines issued by the Hon'ble Apex Court in ***Bajaj Allianz General Insurance Company Pvt. Ltd. Vs. Union of India and Others***, vide order dated 27.01.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. Since long time has elapsed, the amount be deposited in the Saving Bank Account of claimant(s) in a nationalized Bank without F.D.R.

(2022)05ILR A812
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.12.2021

BEFORE

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

First Appeal From Order No. 2853 of 2005

The Oriental Insurance Co. Ltd. ...Appellant

Versus

Kalwe Ali & Anr. ...Respondents

Counsel for the Appellant:
Sri Udai Shanker Mishra

Counsel for the Respondents:

Civil Law - Review - First Appeal From Order summarily dismissed - Review Application filed - Held - practice of summarily dismissing appeal without assigning reasons, has been deprecated - where the issues relates to the negligence and the quantum, it cannot be dismissed without discussing the same - review application is allowed (Para 11, 13)

Allowed. (E-5)

List of Cases cited:

1. Thungabhadra Industries Ltd. Vs The Government of A.P. AIR 1964 SC 1372

2. Aribam Tuleshwar Sharma Vs Aribam Pishak Sharma 1979 (4) SCC 389

3. Meera Bhanja Vs Nirmala Kumari Choudhury AIR 1995 SC 455

4. Parsion Devi & ors. Vs Sumitri Devi & ors. 1997 (8) SCC 715

5. Rajendra Kumar Vs Rambai, AIR 2003 SC 2095

6. Lily Thomas Vs U.O.I. AIR 2000 SC 1650

7. Inderchand Jain Vs Motilal (2009) 4 SCC 665

8. Kamlesh Verma Vs Mayawati & ors. 2013 (8) SCC 320

9. U.P.S.R.T.C. Vs Km Mamta & ors. AIR 2016 SCC 948

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

In Ref: Review application

1. This review application is taken up for hearing almost after 16 years. The matter in between, was dismissed in default and then restored.

2. The order of the Division Bench comprising Hon'ble R.P. Mishra, J. and Hon'ble Sanjay Mishra, J., which is brought in review is as follows:-

"Heard Sri Vipin Chandra Dixit, learned counsel for the appellant and perused the record.

There is no force in this appeal. It is dismissed summarily."

3. We now consider this review whether the review is maintainable or not on the principles laid down by various High Courts and the Apex Court regarding allowing review of order/judgement.

4. In **Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh AIR 1964 SC 1372** the Court said:

"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error."

5. In **Aribam Tuleshwar Sharma Vs. Aribam Pishak Sharma 1979 (4) SCC 389** the Court said:

"... there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of Appeal. A power of review is not to be confused with appellate powers which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court."

6. Again, in **Meera Bhanja v. Nirmala Kumari Choudhury AIR 1995 SC 455** while quoting with approval the above passage from **Abhiram Taleshwar Sharma Vs. Abhiram Pishak Shartn**

(supra), the Court once again held that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

7. In **Parsion Devi and others Vs. Sumitri Devi and others 1997 (8) SCC 715** it was held that an error, which is not self evident and has to be detected by process of reasoning, can hardly be said to be error apparent on the face of the record justifying the court to exercise powers of review in exercise of review jurisdiction.

8. In **Rajendra Kumar Vs. Rambai, AIR 2003 SC 2095,** the Apex Court has observed about limited scope of judicial intervention at the time of review of the judgment and said:

"The limitations on exercise of the power of review are well settled. The first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from any error apparent on the face of the order and permitting the order to stand will lead to failure of justice. In the absence of any such error, finality attached to the judgement/order cannot be disturbed."

9. Thus, Review is not an appeal in disguise. Rehearing of the matter is impermissible in the garb of review. It is an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. In **Lily Thomas Vs. Union of India AIR 2000 SC 1650,** the Court said that power of review can be exercised for correction of a mistake and not to substitute a new. Such powers can be exercised within limits of the statute dealing with the exercise of power. The aforesaid view is reiterated in **Inderchand Jain Vs. Motilal (2009) 4 SCC 665.**

10. In **Kamlesh Verma Vs. Mayawati and others 2013 (8) SCC 320**, the Court said:

"19. Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 of CPC. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction.

Summary of the Principles:

20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

20.1. When the review will be maintainable:-

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words "any other sufficient reason" has been interpreted in Chhajju Ram vs. Neki, AIR 1922 PC 112 and approved by this Court in Moran Mar Basselios Catholicos vs. Most Rev. Mar Poulose Athanasius & Ors., AIR 1954 SC 526, to mean "a reason sufficient on grounds at least analogous to those

specified in the rule". The same principles have been reiterated in ***Union of India vs. Sandur Manganese & Iron Ores Ltd. & Ors., 2013 (8) SCC 337.***

22.2. When the review will not be maintainable:-

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived." (emphasis supplied)

11. The judgement of the Apex Court in **U.P.S.R.T.C. Vs. Km Mamta and Others AIR 2016 SCC 948** and subsequent judgements of the Apex Court, this practice of summarily dismissing the appeal by Allahabad High Court, without assigning reasons, has been deprecated.

12. The judgement of Apex in **U.P.S.R.T.C. Vs. Km Mamta and Others AIR 2016 SCC 948** fully applies to the facts of this case.

13. In view of the aforesaid datum figure where the issues went by the Insurance Company relates to the negligence and the quantum, it cannot be dismissed without discussing the same.

14. In that view of the matter, this review application is allowed.

In Ref: Appeal

List the matter on 23rd December, 2021 for hearing.

(2022)05ILR A815
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.03.2022

BEFORE

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

First Appeal From Order No. 2907 of 2015

Smt. Malti Pandey & Ors. ...Appellants
Versus
United India Insurance Co. Ltd. & Ors. ...Respondents

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

Counsel for the Respondents:
Sri Nagendra Kumar Srivastava, Ms. Anubha Gupta

A. Civil Law - Motor Vehicles Act,1988 - Section 168 - Motor Accident claim - Quantum of Compensation - Income - potential of earning of the deceased - deceased 38 years of age & was qualified to be a teacher, he was B.A., B.Ed and was doing Vishist B.T.C. Training - Tribunal considered his income only Rs.3000/- per month - Held - Deceased could have become teacher in any of the government school or private institution - income should be at least Rs.10,000/- per month (Para 10)

B. Future Loss of Income - accident of the year 2012 - Tribunal not added any amount under the head of future loss of income - Held - decision of the Apex Court in Pranay Sethi can be made applicable retrospectively - Merely because the deceased was not in job cannot be ground for refraining future loss of income - Self employed means his own vocation or business and not job - Court granted addition of 40% towards future loss of income of the deceased (Para 11)

C. Civil Law - Motor Vehicles Act,1988 - Section 168 - Motor Accident claim - Quantum of Compensation - Future Loss of Income - deceased self employed - accident of the year 2012 - judgment of the Tribunal prior to the decision in Pranay Sethi - Tribunal not added any amount under the head of future loss of income - Held - decision of the Apex Court in Pranay Sethi can be applied retrospectively in case the appeal is pending - deceased self-employed & aged about 38 years - Court granted addition of 40% towards future loss of income of the deceased - Multiplier applicable : 15 - deceased was survived by three minor children who have lost their father during their childhood, Rs.50,000/- each to the minor children who lost their father at prime age. - Amount under non pecuniary heads : Rs.70,000 + Rs.50,000 + Rs.50,000+ Rs. 50,000 = 2,20,000 - deceased survived by certain period, hence, the medical expenses of Rs.1,03,210 - respondent-Insurance Company directed to deposit the amount within a period of 12 weeks with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited (Para 11, 12, 15)

Allowed. (E-5)

List of Cases cited:

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

2. Smt. Meena Pawaia & ors. Vs Ashraf Ali & ors. 2021 0 Supreme (SC) 694

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

4. A.Vs Padma Vs Venugopal, Reported in 2012 (1) GLH (SC), 442

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

6. Bajaj Allianz General Insurance Co. Pvt. Ltd. Vs U.O.I. & ors.

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

1. Heard Sri Ram Singh, learned counsel for the appellant, Sri N.K. Srivastava, learned counsel for the respondent assisted by Ms. Anubha Gutpa, learned Advocate and perused the record.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 30.7.2015 passed by the Motor Accident Claims Tribunal/District Judge, Banda (hereinafter referred to as 'Tribunal') in M.A.C.P No.114/70 of 2012 awarding a

sum of Rs.5,52,210/- as compensation with interest at the rate of 7%.

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is also not in dispute. The only issue to be decided is the quantum of compensation awarded.

4. The accident took place in the year 2012. The deceased was 38 years of age and was qualified to be a teacher, he was B.A., B.Ed and was doing Vishist B.T.C. Training and was having agricultural land. Despite all these qualifications, the Tribunal has considered his income only Rs.3000/- per month, which according to Sri Ram Singh, learned counsel for the appellant should be at least Rs.10,000/- per month. The Tribunal has given reasoning that the appellants have not proved the income of the deceased by cogent evidence. It is further submitted by learned counsel for the appellants that the Tribunal has not added any amount under the head of future loss of income which should be either 40% or 50% looking to the decision of the Apex Court in **National Insurance Co. Ltd. Vs. Pranay Sethi and others, 2017 LawSuit (SC) 1093** or in view of Uttar Pradesh Motor Vehicle Rules.

5. It is also submitted by learned counsel for the appellant that the amount awarded under non pecuniary damages is on the lower side and is required to be enhanced in view of the decision in **National Insurance Co. Ltd. Vs. Pranay Sethi and others, 2017 LawSuit (SC) 1093** and the later decision of the Apex Court as the deceased was survived by three minor children who have lost their father during their childhood and the parents who were dependent on the deceased and has lost their son at a very young age.

6. Learned counsel for the appellant has lastly submitted that the interest awarded by Tribunal is on the lower side and it should be as per the repo rate prevailing in those days.

7. As against this, learned counsel for respondent-Insurance Company has contended that the income which has not been proved cannot be granted. It is submitted by learned counsel for the respondent that the deceased was 38 years of age and, therefore, multiplier of 16 could not have been granted and it should be 15 in view of the decision of the Apex Court in Sarla Verma and others Vs. Delhi Transport Corporation and Another, 2009 LawSuit (SC).

8. It is further submitted by Sri N.K. Srivastava, learned counsel for the respondent assisted by Ms. Anubha Gupta, learned Advocate, that the accident is of the year 2012 whereas the judgment of the Tribunal is prior to the decision in **Pranay Sethi (Supra)** and, therefore, non addition of future loss of income is just and proper ad the deceased was self employed.

9. In response to the above objection, Sri Ram Singh, learned counsel for the respondent has again submitted that the decision of the Apex Court in **Pranay Sethi (Supra)** can be applied retrospectively in case the appeal is pending.

10. Having heard learned counsel for the parties, in the instant case, there are four aspects which will have to be looked into namely, the potential of earning of the

deceased, he was B.A., B.Ed., he was doing Vishist B.T.C. Training and he could have become teacher in any of the government school or private institution. Therefore, in view of the decision of the **Apex Court Smt. Meena Pawaia & others Vs. Ashraf Ali and others 2021 0 Supreme (SC) 694**, we consider his income to be Rs.10,000/- per month.

11. The submission of Sri N.K. Srivastava, learned counsel for the respondent that non grant of future loss of income is just and proper cannot be countenanced as the decision of the Apex Court in **Pranay Sethi (Supra)** can be made applicable retrospectively. The submission that the deceased was not in job cannot be countenanced for refraining future loss of income. Self employed means his own vocation or business and not job and, therefore, we grant addition of 40% towards future loss of income of the deceased. However, we are in agreement with the learned counsel for the respondent that the multiplier of 15 should be granted in view of the decision in **Sarla Verma (Supra).** Deduction of 1/4th is maintained. As far as amount under non-pecuniary heads is concerned, the appellants would be entitled to Rs.70,000/- plus Rs.50,000/- each to the minor children who have lost their father at prime age. The deceased survived by certain period, hence, the medical expenses of Rs.1,03,210/- as granted by the Tribunal is maintained.

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

i. Monthly Income: Rs.10,000/-

ii. Percentage towards future prospects : 40% namely Rs.4,000/-

iii. Total income : Rs.10,000 +4,000 = Rs.14,000/-

iv. Income after deduction of 1/4th towards personal expenses : Rs.10,500/-

v. Annual income : Rs.10,500 x 12 = Rs.1,26,000/-

vi. Multiplier applicable : 15

vii. Loss of dependency: Rs.1,26,000 x 15 = Rs.18,90,000/-

viii. Amount under non pecuniary heads : Rs.70,000 + Rs.50,000 + Rs.50,000+ Rs. 50,000 = 2,20,000/-

ix. Medical Expenses : 1,03,210/-

x. Total compensation : Rs.22,13,210/-

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

15. 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.

16. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442**, the order of investment be passed by Tribunal..

17. 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.

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 judgment of **A.V. Padma (supra).** The same is to be applied looking to the facts of each case.

19. 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.

20. This Court is thankful to both the counsels for getting this matter decided.

(2022)05ILR A819
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.03.2022

BEFORE

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

First Appeal From Order No. 3586 of 2012

Smt. Priya Rani & Ors. ...Appellants
Versus
Ram Sharan & Ors. ...Respondents

Counsel for the Appellants:

Sri S.D. Ojha

Counsel for the Respondents:
Sri Ashish K. Srivatava, Sri N.K Chatterjee

A. Civil Law - Motor Vehicles Act, 1988 - Section 168 - Motor Accident claim - Quantum of Compensation - Contributory Negligence - 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 - Buren of proof - 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 (Para 6)

At around 9.00 pm, driver of the truck which was moving ahead of the car which deceased was driving, suddenly applied brake & suddenly, speedily and carelessly drove back his vehicle without using dipper and horn & hit the deceased vehicle - truck driver did not even step into the witness box - frugality with the accident occurred goes to show that the driver of the Car is also negligent - Held - driver of the Car 30% negligent - Total compensation : Rs. 28,60,800 - Amount payable to claimants after deduction of 30% negligence of deceased Rs.20,02,560/- (Para 14)

B. Civil Law - Motor Vehicles Act, 1988 - Section 168 - Motor Accident claim - Quantum of Compensation - Future Loss of Income - Tribunal not granted future loss of income as the accident occurred in 2010 - deceased was below 40 years i.e. 29 years and was having his own business - Held - 40% should be added as future loss of income of the deceased - under non-pecuniary heads, claimants entitled to at least Rs.70,000 plus 10% rise in every 3 years in view of the decision in Pranay Sethi (Para 16)

Allowed. (E-5)

List of Cases cited:

1.Mananinga Director, BMTC Vs U.O.I. & ors., 2008 (3) TAC 796 (SC)

2.Indira Devi & ors. Vs Bagada Ram & ors., (2011) 2 SCC 134

3.United Insurance Co. Ltd. Vs T. Gandama & ors., 2010 (2) TAC 345, Andhra Pradesh

4. Managinga Director, BMTC Vs U.O.I. & ors., 2008 (3) TAC 796

5. Indira Devi & ors. Vs Bagada Ram & anr., (2011) 2 SCC 134

6. Smt. K. Anusha & ors. Vs Regional Manager, Shriram General Insurance Company, 2022 (4) TAC 341

7. Smt. Sarla Verma & ors. Vs Delhi Transport Corporation & anr., reported in 2009 ACJ 1298

8. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 105

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

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

11. Smt. Hansaguri P. Ladhani Vs.The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291

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

1. Heard Sri S.D. Ojha, learned counsel for the appellants and Sri N.K. Chatterjee and Ashish Kumar Srivastava, learned counsels for the respondent-Insurance Company.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 1.8.2012 passed by Motor Accident Claims Tribunal/ Additional District Judge, Court No.1, Muzaffar Nagar (hereinafter referred to as 'Tribunal') in M.A.C.P. No. 624 of 2011 awarding a sum of Rs. 9,42,450/- with interest at the rate of 6% as compensation.

3. The accident is not in dispute. The Insurance Company has not challenged the liability imposed on them. The claimants - appellants have challenged the award of the

4. The facts in brief are that Anuj Kumar, aged about 29 year, was a whole seller of textile and was maintaining his wife, son and mother with an annual income of around Rs. 3 Lacs. On 24.8.2010, Anuj Kumar along with his wife Smt. Priya, son Shreya and brother Pankaj was coming to Muzaffarnagar from Saharanpur in his Santro Car No. U.P. 12-J-7976. Anuj Kumar was carefully driving his car in slow and controlled speed at his side. At around 9.00 pm, when they turned towards Rohana after crossing Ghaloli Check Post, the driver of the truck bearing number U.P.-12-L-2062, which was moving ahead them, suddenly applied brake. Following it, Anuj Kumar too applied brake keeping his car at necessary and appropriate distance and stopped the car. The drivers of other vehicles following the car also stopped their vehicles. But the driver of the truck U.P.-12-L-2062 suddenly, speedily and carelessly drove back his vehicle without using dipper and horn. Seeing it, Anuj blew horn of his car and tried to check his car but he could not reverse his car due to there being other vehicles behind the aforesaid car and the driver of the truck reversing the truck speedily and carelessly hit the vehicle Santro Car U.P.-12-J-7976 forcefully and rampaged the truck over the car as a result of which Anuj Kumar, his brother Pankaj and Priya sustained severe injuries. They were taken to District Hospital, Muzaffarnagar. Due to injuries sustained in the accident, Anuj Kumar had been declared dead in the district hospital. In the accident, there was no mistake or carelessness on the part of Anuj Kumar rather the carelessness was on the part of the truck driver regarding which the report was lodged against the truck driver with Crime no. 1519/2010 u/Ss 279, 337, 338, 304-A of I.P.C. at police station Kotwali, Muzaffarnagar.

5. As far as issue of contributory negligence is concerned as alleged by the appellant, we will have to consider the principles for deciding the negligence. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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 ACJ (SC) 1840).

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

12. Hence, the finding of the Tribunal holding driver of the truck 30% negligent relying on the decisions in **Mananinga Director, BMTC Vs. Union of India and others, 2008 (3) TAC 796 (SC), Indira Devi and others Vs. Bagada Ram and others, (2011) 2 SCC 134, United Insurance Company Ltd. Vs. T. Gandama and others, 2010 (2) TAC 345, Andhra Pradesh,** is bad for the reasons assigned herein below.

13. While going through the record, it transpires that the accident took place between the truck and car. They both were on the middle road. The truck, according to the witnesses, was on the side of the road. The accident occurred at 09:00 p.m. in the night. It is nobody's case that the driver of the truck had tried to safeguard by keeping any indicator on would show that the vehicle was stationed with all safety. The learned Tribunal also comes to the conclusion that the truck was stationary without any indicator and, therefore, we hold that contours of the judgment of the Apex Court in **Managinga Director, BMTC Vs. Union of India and others, 2008 (3) TAC 796**, cannot apply in our case as it was night time. The truck driver did not even step into the witness box. The judgment in the case of **Indira Devi and others Vs. Bagada Ram and another, (2011) 2 SCC 134,** cannot be made applicable on the facts of this case. In our case, the vehicle was parked without any parking light and as it was night time and, therefore, also we are unable to accept the submission of the Counsel for the respondents that the driver of the Car was not negligent. Stationary truck was parked on the road, therefore, the judgement of the Apex Court in **Smt. K. Anusha and others Vs. Regional Manager, Shriram General Insurance Company, 2022 (4) TAC 341,** will apply to the facts of this case. Had the truck not being parked on the Highway with no parking light, the accident might have not occurred but the frugality with the accident occurred goes to show that the driver of the Car is also negligent.

14. We are interfering in the finding as far as contributory negligence is concerned as we are unable to accept the submission of Sri Ashish Kumar Srivastava that the driver of the Car dashed with the truck and was fully negligent. The driver of the truck has not entered into the witness box that goes against the truck and Insurance company. We hold the driver of the Car 30% negligent.

15. The challenge to the Tribunal award is that the Tribunal has not granted future loss of income as the accident occurred in 2010. The deceased had a business and, therefore, the Tribunal relied on the judgment of the Apex Court on ***Smt. Sarla Verma and others Vs. Delhi Transport Corporation and another, reported in 2009 ACJ 1298***. There is no dispute as far as computation of compensation is concerned. The income, which has been considered by the Tribunal, is not disturbed.

16. As the deceased was below 40 years namely 29 years and was having his own business, 40% 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.** The deceased was 29 years of age hence multiplier of 17 would apply. It is further submitted that under non-pecuniary heads, the claimants are entitled to at least Rs.70,000 plus 10% rise in every 3 years in view of the decision in Pranay Sethi (supra). Hence, we grant Rs.1,00,000/- (rounded figure) under the head of non-pecuniary damages.

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

i. Annual Income Rs.1,74,000/-

ii. Percentage towards future prospects : 40% namely Rs.69,600/-

iii. Total income : Rs. 1,74,000 + 69,600 = Rs. 2,43,600/-

iv. Income after deduction of 1/3 : Rs. 1,62,400/-

v. Multiplier applicable : 17

vi. Loss of dependency: Rs.1,62,400 x 17 = Rs. 27,60,800/-

vii. Amount under non pecuniary heads : Rs.1,00,000/-

viii. Total compensation : Rs. 28,60,800/-

ix. Amount payable to claimants after deduction of 30% negligence of deceased Rs.20,02,560/-

18. 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."

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

20. 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.

21. 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.

22. 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 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.

23. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein.

24. This Court is thankful to both the counsels to see that this very old matter is disposed of.

(2022)05ILR A825
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.04.2022

BEFORE

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

First Appeal From Order No. 3712 of 2017

Parth @ Pratham ...Appellant
Versus
New India Insurance Co. Ltd. & Ors. ...Respondents

Counsel for the Appellant:
Sri Devesh Pratap Singh Chauhan, Sri Pawan Kumar Singh

Counsel for the Respondents:
Sri Rakesh Bahadur

A. Civil Law - Motor Accident Act, 1988 – UP Motor Vehicle Rules, 1998 – Rule 220 – Compensation – Death of salaried person – Entitlement of future loss – Held, where deceased was salaried person, future loss of income must be added – High Court re-computed the compensation by adding 50% future prospect and applying multiplier of 15. (Para 8 and 13)

B. Motor Accident Claim – Share in compensation – Hindu law or personal law – Applicability – Sole minor survive the deceased – Minor's right of getting the compensation – Tribunal granted 1/6 of the compensation to be paid to the minor – Validity challenged – Held, claim case is not a partition suit. The legal representative/legal heir would be entitled to the compensation for the tortious act of the driver for which the owner would be vicariously liable and the Insurance Co. would have to indemnity the third party – The appellant is the sole surviving legal heir, the compensation has to be decided as per the provisions of

Section 166 and not as per Hindu Law or the personal law, this is error which has crept in the judgment and award of the Tribunal – The Tribunal could not have held that the appellant would be entitled to only 1/6 of the share. (Para 9)

Appeal partly allowed (E-1)

List of Cases cited:-

1. Vimla Kanwar Vs St. of Raj. & ors.; 2018 CrLJ 4111

2. Sarla Verma Vs Delhi Transport Corp.; (2009) 6 SCC 121

3. Gobald Motor Service Ltd. & Vs R. M. K. Veluswami & ors. AIR 1962 SC 1

4. General Manager Kerala State Road Transport Corp. Trivandrum Vs Susamma Thomas & ors. 1994 (2) SCC 176

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

6. Bajaj Allianz General Insurance Co. Pvt. Ltd. Vs U.O.I. & ors. decided by Apex Court on 27.1.2022

7. A.V.Padma Vs Venugopal; 2012 (1) GLH (SC) 442

8. Smt. Hansaguri P. Ladhani Vs The Oriental Insurance Co. Ltd; 2007(2) GLH 291

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

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

1. Heard Sri Devesh Pratap Singh Chauhan, learned counsel appearing for the appellant and Sri Rakesh Bahadur, learned counsel appearing for the Insurance Company. None is present for the owner.

2. The present appeal has been preferred against the judgment and award dated 15.09.2017 passed by Motor Accident Claims Tribunal/ Additional District Judge, Court No.4/ Special Judge, E.C. Act, Farrukhabad in M.A.C.P. No.36 of 2013 (Parth @ Pratham Vs. New India Insurance Co. Ltd. granting compensation of Rs.8,50,960/- with interest at the rate of 6%.

3. A very tragic death of three people of the family leaving a minor of 10 years child who is only sole surviving legal representative, who has preferred this appeal. The award in claim petitions for the compensation on death of other two have attained finality. We have no burden on the judgment of Rajastahan High Court in the case of **Vimla Kanwar Vs. State of Rajasthan & Ors. 2018 CrLJ 4111** with unnecessary facts that the accident took place on 23.06.2011 is not in dispute. Ranveer Singh (the deceased) was a doctor aged about 36 years and was in government job and his monthly income was Rs.43,998/- are not in dispute.

4. Ranveer Singh was a Government Doctor and was fetching net income of Rs.43,998/- per month. The learned Tribunal below had illegally deducted Rs.2,000/- from the monthly income for the purposes of calculation of the compensation. As per the established principles of the law in this regard, the calculation ought to have been done on the basis of the net income. He further submitted that no amount under the head of future loss of income could have been granted.

5. It is further contended by learned counsel for the appellant that the Tribunal has not considered grounds and committed error in granting 1/6 of the amount to the claimant as the claimant is the sole surviving legal heir of the deceased.

6. Sri Rakesh Bahadur, learned counsel for the respondent has submitted

that income which has been considered is just and proper. It is further contended that the Tribunal has not committed any error in granting 1/6 of the amount to the claimant as the claimant is the sole surviving legal heir of the deceased. It is further submitted by Sri Rakesh Bahadur that multiplier granted by the Tribunal is just and proper and demand of Rs.5/- lacs for loss of love and affection and Rs.5/- for constrodian could be granted. It is further submitted by Sri Rakesh Bahadur, learned counsel for the respondent that demand of interest at the 18% is against the rule of U.P. Motor Vehicle Rules, 1998 (Amended in 2011) and it is next submitted that repo-rate is consistently falling, the interest cannot be more than 7%. It is further submitted that non-pecuniary damages should be granted as per the rule (supra).

7. The factum of accident is not in dispute. The negligence of the truck driver which has been considered by the Tribunal is also not in dispute as it is evident from the record that the driver of the truck was driving his vehicle rashly and negligently came on the wrong side and dashed with the car driven by the father of the appellant who along with his wife and his son died on the spot, hence, the same issue has attain finality. As per the liability of the Insurance Company is concerned, there is no dispute that the vehicle was insured and the driver had proper valid driving licence. The Insurance Company and the owner has accepted the finding of facts and they have attend finality. The liability on Insurance Company has been accepted by the Insurance Company.

8. The only question which is left for our consideration is the issue of compensation. The Tribunal though considered the judgment of **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121**, has not added any amount towards the head of future loss of income though the deceased was a doctor and was in government job which is evident from the evidence and the discretion of the Tribunal, and thereafter, even as per the judgment of Sarla Verma (supra) future loss of income would be admissible. The law was very clearly propounded by the Apex Court In **Gobald Motor Service Ltd. & Vs. R. M. K. Veluswami & Others AIR 1962 SC 1** and in **General Manager Kerla State Road Transport Corporation Trivandrum Vs. Susamma Thomas and others 1994 (2) SCC 176** reiterated in Sarla Verma (supra) that where deceased was salaried person, future loss of income must be added. The Rule 220 of **The U.P. Motor Vehicle Rules, 1998 (Amended in 2011)** have specified the same, hence, for the same, we will have to consider the question of future loss of income and modify the same. We will have to decide three aspects, (i) whether, the appellant is entitled to future loss of income for the death of his father, the appellant has lost his father at the tender age of 10 year, (ii) whether, the non-pecuniary damages granted by Tribunal requires and most importantly and very strangely the Tribunal after relying on Rule 220 of the U.P. Motor Vehicle Rules, 1998 (Amended in 2011), which stipulated as follows:-

"Rule 220. Judgment and award of compensation-

(1) The claims Tribunal, in passing orders, shall record concisely in judgment the findings on each of the issues framed and the reasons for such finding and make an award, specifying the amount of compensation to be paid by the insurer or in the case of a vehicle exempted under

sub-section (2) or (3) of Section 146 by the owner thereof and shall also specify the person or persons to whom compensation shall be payable.

(2) Where compensation is awarded to two or more persons under sub-rule (1) the Claims Tribunal shall also specify the amount payable to each of them.

(3) The Claims Tribunal may, while disposing of claims for compensation, make such orders regarding costs and expenses incurred in the proceeding as it thinks fit.

9. Sri Rakesh Bahadur, learned counsel appearing for the respondent submitted that there is a rule that a minor will get 1/6 of the share. The issue is not share and how much will be given to a minor. The question before us is that the minor is the sole legal heir/legal representative to whom the other amount would be admissible, whether it would go as corpus for the same only 1/6 cannot be made available to him as no one else is a recipient of the amount. This is not a partition suit. The legal representative/legal heir would be entitled to the compensation for the tortious act of the driver for which the owner would be vicariously liable and the Insurance Company would have to indemnity the third party. The appellant is the sole surviving legal heir, the compensation has to be decided as per the provisions of Section 166 and not as per Hindu Law or the personal law, this is error which has crept in the judgment and award of the Tribunal. The Tribunal could not have held that the appellant would be entitled to only 1/6 of the share. Learned counsel for the respondent could not satisfies that the said finding requires to be upheld. Once is proved that he is the only legal surviving heir, the entire corpus would go to him.

10. The counsel for the appellant contended that interest 18% should be granted. It is submitted by Sri Rakesh Bahadur, learned counsel for the respondent that the repo-rates have gone down, hence rate of interest 18% cannot be granted. The Rule 220 of the U.P. Motor Vehicle Rules, 1988 (Amended in 2011) specifies that interest would be at the rate of 7%.

11. Having considered the rival submission of both the learned Advocates as far as interest is concerned, we would have to consider the provisions of Section 171 of the Motor Vehicle Act, 1980 enjoy the duty on the Tribunal to grant interest for delay in payment. In this case, the litigation was pending since 2013. The accident took place on 23.06.2011, no reasons are assigned why the conditional rate of interest is granted. As the matter has been conciliated on the basis of compensation on the ground of admissible compensation, we deem it fit to grant interest at the rate of 6% and deprecate the practice of granting such conditional interest which has been deprecated by the Apex Court also. The rate of interest would be 6% from the filing of the claim petition till the amount is deposited.

12. We are in agreement with the submission made by Sri Rakesh Bahadur that The amount which would be admissible Rs.43998/- as granted by the Tribunal + 50% as the deceased was 36 years of age and a salaried person, multiplier granted 15 is just and proper as per the judgment of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0**

Supreme (SC) 1050, we cannot accept the submission of learned counsel for the appellant and Rs.5/- lacs will have to be awarded for loss of love and affection and Rs.5/- lacs for consortium. Three persons who are dependent on him, hence, 1/3 will have to be deducted which also has not been done by the Tribunal. It would be Rs.50,000/- for the minor child for loss of love and affection who lost his father and mother at the prime age. Rs.50,000/- would be granted for funeral charges for parents. The amount under the non-pecuniary head would be Rs.50,000/-.

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

i. Monthly Income: Rs.43,998/-

ii. Percentage towards future prospects : 50% namely Rs.21999/-

iii. Total income : Rs.43,999/- +21,999/- = Rs.65,997/-

iv. Income after deduction of 1/3rd towards personal expenses : Rs.43,998/-

v. Annual income : Rs.43,998/- x 12 = Rs.5,27,976/-

vi. Multiplier applicable : 15

vii. Loss of dependency: Rs.5,27,976/- x 15 = Rs.79,19,640/-

viii. Amount under all non pecuniary heads: Rs.1,50,000/- =

ix. Total compensation: Rs**.80,69,640/-.**

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 additional amount within a period of 12 weeks from today with interest at the rate of 6% 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 young boy would have now become major as the accident took place on 23.06.2011 if he shows cogent evidence that he is capable of handling the money 50% may be released for his further studies. The Tribunal shall follow the guidelines issued by the Apex Court in **Bajaj Allianz General Insurance Company Private Ltd. Vs 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. The amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R., 50% would be deposited for coming five years.

16. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442,** the order of investment be passed by Tribunal.

17. 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.

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 judgment of **A.V. Padma (supra).** The same is to be applied looking to the facts of each case.

19. The Tribunal shall follow the guidelines issued by the Apex Court in Bajaj Allianz General Insurance Company Private Ltd. Vs 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.

20. A copy of this judgment be circulated so that the Tribunals in future may not commit such mistake. A copy of this order be sent to **Balveer Singh** also for his guidance.

21. The record and proceedings, if any, be transmitted to the Tribunal forthwith.

22. This Court is thankful to both the advocates for ably assisting the Court.

(2022)05ILR A830
APPELLATE JURISDICTION
CIVIL SIDE 07.03.2022

BEFORE

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

First Appeal From Order No. 3750 of 2009
With
First Appeal From Order No. 299 of 2010

Anoop Maheshwari ...Appellant
Versus
Shiv Kumar Singh & Ors. ...Respondents

Counsel for the Appellant:
Sri Satya Deo Ojha, Sri Achintya Kumar, Sri Komal Mehrotra, Sri Arvind Srivastava

Counsel for the Respondents:
Sri Anand Kumar Sinha

A. Civil Law - Motor Accident Act, 1988 – Sections 2(21) & 147 – Claim – Breach of policy – Whether driver possessed proper driving licence or not – Nature of vehicle – Determination – Vehicle was having unladen weight of 6200 Kg, which is less than 7500 Kg – Held, though it is termed as a truck, but is Light Motor Vehicle – Held further, vehicle was being driven by a person authorised to drive it. (Para 20 and 22)

B. Civil Law - UP Motor Vehicle Rules, 1998 – R. 220 – Compensation – Future loss – Entitlement – Accident took place in

2007 – Rule 220 providing for future loss, came into force in 2011 – Effect – Held, future loss of income has to be given for injury cases whether the rules specify or not – Just because the rules are silent, the claimant cannot be deprived of this benefit – Kajal's case relied upon – High Court re-computed the compensation by adding 40% future prospect and applying multiplier of 18 and granted Rs. 2 lacks for loss of amenities. (Para 23, 29, 30, 31 and 32)

C. Civil Law - Motor Accident Claim – Rash and negligent driving – Term 'Negligence' – Meaning – Principle of '*res ipsa loquitur*' , when it can be applied – 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 though it is normally accidental – 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. (Para 11)

D. Civil Law - Motor Accident Claim – Principle of contributory negligence – Scope and meaning – A person who either contributes or is co author of the accident would be liable for his contribution to the accident having taken place. (Para 12)

E. Civil Law - Income tax Act, 1961 – Section 194A (3) (ix) – Withdraw of amount of interest – Certificate of Income Tax authority, when required – Held, if the interest payable to any claimant for any financial year exceeds Rs. 50,000/-, insurance Co./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. (Para 35)

Appeal partly allowed. (E-1)

List of Cases cited:-

1. U.P.S.R.T.C. Vs Km. Mamta AIR 2016 (SC) 948

2. Pawan Kumar & anr. vs M/S Harkishan Dass Mohan Lal & ors. decided by Apex Court on 29 January, 2014

3. First Appeal From Order No. 1818 of 2012; Bajaj Allianz General Insurance Co. Ltd. Vs Smt. Renu Singh & ors. decided by Allahabad High Court on 19.7.2016

4. Archit Saini & anr. Vs Oriental Insurance Co. Ltd.; AIR 2018 SC 1143

5. Khenyei Vs New India Assurance Co. Ltd. & ors.; 2015 LawSuit (SC) 469

6. Singh Ram Vs Nirmala & ors. (2018) 3 SCC 800

7. National Insurance Com. Ltd. Vs Annappa Irappa Nesaria & ors. 2008 (1) T.A.C. Page 812 SC.

8. Kajal Vs Jagdish Chand & ors.; 2020 1 Supreme (SC) 110

9. R.D. hattangadi Vs M/s Pest Control (India) Pvt. Ltd. & ors. 1995 0 ACJ 366

10. Raj Kumar Vs Ajay Kumar & anr.; 2010 0 ACJ 1

11. Mohan Soni Vs Ram Avtar Tomar & ors..; 2012 1 ACC 1

12. Syed. Sadiq & ors. Vs Divisional Manager, United India Insurance Co. Ltd.; (2014) 2 SCC 735

13. Mukund Dewagan Vs Oriental Insurance Co. Ltd.; AIR 2017 SC 3668

14. Dinesh Singh Vs Bajaj Allianz General Insurance Co. Ltd; 2014 (2) T.A.C. 737 (S.C.)

15. Pappu Deo Yadav Vs Naresh Kumar; AIR 2020 SC 4424

16. Erudhaya Priya Vs State Express Transport Corp. Ltd.; AIR 2020 SC 4284

17. Karthik Subramanian Vs B. Sarath Babu & Anr.; 2021 ACJ 993

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

19. Gobald Motor Service Ltd. & Vs R. M. K. Veluswami & ors. AIR 1962 SC 1

20. Uttaranchal Transport Corp. Ltd. Vs Vimla Devi; 2009 (0) AIJEL-SC 66148

21. General Manager Kerala State Road Transport Corp. Trivandrum Vs Susamma Thomas & ors. 1994 (2) SCC 176

22. Sarla Verma Vs Delhi Transport Corp. (2009) 6 SCC 121

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

24. Yadava Kumar Vs The Divisional Insurance Co. Ltd. & anr.; (2010) 10 SCC 341

25. Shahikala & ors. Vs Gangalashmamma & anr.; (2015) 9 SCC 150

26. Malarvizhi Vs United India Insurance Co. Ltd. & anr.; (2020) 4 SCC 228

27. Oriental Insurance Com. Vs Mathu Ram; 2019 ACJ 65 (HP)

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

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

30.U.O.I. Vs A.S. Sharma 1995 ACJ 493

31. A.V.Padma Vs Venugopal; 2012 (1) GLH (SC) 442

32. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Co. Ltd..; 2007(2) GLH 291

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

34. Bajaj Allianz General Insurance Co. Pvt. Ltd. Vs U.O.I. & ors. decided by Apex Court on 27.1.2022

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

1. Heard Sri Anand Kumar Sinha, learned counsel for the Insurance Company and Sri Satya Deo Ojha, learned counsel assisted by Sri Achintya Kumar, learned counsel for the claimant.

2. Both these appeals have been preferred against the common award dated 23.10.2009 passed by A.D.J., Special Judge (E.C. Act) Varansasi/ Motor Accident Claims Tribunal, Varanasi in Claim Petition No. 206 of 2000 awarding a sum of Rs.13,23,831/- with interest at the rate of 06%.

3. Parties are referred as claimant and Insurance Company for the sake of convenience.

4. Brief facts of the case are that the accident occurred on 09.04.2007 when the claimant/injured was going with his friend Manish Kodiya on Motorcycle No. U.P. 65A. A-4337. The claimant was plying the said motorcycle and when they came near Sigra, a procession was going and at 02:45 p.m. when the claimant reached at Kuber Complex a Truck bearing No. U.P. 70 U-9437 on which L.P.G. Cylinders were loaded, and, the said truck was trying to overtake the vehicle driven by the claimant/injured and while trying to overtake via left without giving any signal took turn towards left side. The driver Awadhesh Kumar- respondent no.2 was driving the truck in rash and negligent manner dashed the vehicle driven by claimant. The claimant/injured was hospitalized in Singh Medical and Research Centre, Teliyabagh and was operated by Dr. Sunil Saran, Orthopedic Surgeon and Dr. Prashant Baranwal, Plastic Surgeon & General Surgeon and was hospitalized from 09.04.2007 to 12.04.2007. Due to the accidental injuries the doctors had to

amputate left lower limb right from the thigh region. The claimant was thereafter shifted to New Delhi where he was admitted from 12.04.2007 to 17.05.2007 and thereafter also he was admitted in Jai Prakash Narayan, Apex Trama, Centre, AIMS, Delhi 17.05.2007 to 20.07.2007 and from there he was discharged but despite being discharged till he filed the claim petition and till the evidence was recorded he was under pain and he had suffered disability as opined by the doctors.

5. On notices/summons being issued the respondents appeared and did not accept that the accident occurred due to involvement of the said vehicle. Despite the fact that the charge sheet was laid against the drive of the truck. Respondent no.2 namely Awadhesh Yadav did not appear before the Tribunal. Respondent no.3 Insurance Company appeared and filed reply of denial.

6. The Tribunal framed about 8 issues and decided them mostly in favour of the claimant.

7. The claimant is aggrieved by the compensation awarded, where as the Insurance Company has raised several grounds for challenging the said award. In light of the judgment of the Apex Court reported in **U.P.S.R.T.C. Vs. Km. Mamta AIR 2016 (SC) 948,** all the issues raised have to be decided by this Court under Section 173 of the Motor Vehicles Act.

8. The grounds by Insurance Company are as follows:-

"(i) The accident was caused by the truck which was carrying L.P.G. Cylinders and it was a heavy Transport Vehicle having weight of 12,000 Kg. as such driver has to possess driving licence for heavy transport vehicle but the driver has only licence for Light Motor Vehicle even without endorsement of licence for transport vehicle.

(ii) The driver has no valid driving licence to drive transport vehicle and owner has committed breach of policy and as such appellant-Insurance Company is not liable to pay compensation.

(iii) The accident was caused on 09.04.2007 and on the date, the driver of vehicle has driving licence to drive L.M.V. and the driver obtained endorsement for driving transport vehicle on 17.04.2007 i.e. after accident taken place.

(iv) The law is settled that endorsement of Transport vehicle is necessary indiscriminately whether the driving licence is for L.M.V. or for H.G.V. whereas the weight of truck is 12,000. Kg.

(v) The claimant/injured was driving Motorcycle and he was also negligent in causing accident.

(vi) The learned Judge gave the finding that the claimant has no independent income but even then wrongly assess the income of Rs.4,500/- per month arbitrarily without any basis or evidence whereas the Schedule provides that if no income is proved only Rs.15,000/- per annum may be presumed for assessing the income.

(vii) The Tribunal has wrongly applied multiplier according to Schedule although the application was filed under Section 166 of M.V. Act and more than Rs.40,000/- per annum income was assessed and Tribunal also fixed more than

Rs.40,000/- per annum income of the injured/claimant.

(viii) If the injured was sitting on the shop he can still sit in the shop and there is no loss of any earning.

(ix) As per Schedule of workman compensation Act the injured caused is amount 30% disability but the learned Tribunal assess the disability of 45% contrary to the provisions of statute.

(x) The learned Tribunal wrongly allowed Rs.4,70,000/- for artificial leg and in case the artificial leg is fixed to the injured his disability for earning loss will be reduced and the compensation awarded him is much more excessive.

(xi) The Tribunal wrongly allowed Rs.1,00,000/- for assistant which is not permissible under Schedule.

(xii) The Tribunal wrongly allowed Rs.3,39,926/- for medical expenses and over and above Tribunal further allowed Rs.4,70,000/- for artificial leg and such circumstance compensation for Rs.4,13,100/- is absolutely illegal and unjustified."

9. Heard the learned Advocates for the claimant and Insurance Company. None appears for the Owner or driver of the Truck.

10. In these appeals 3(three) issues arise for our consideration: (i) whether claimant was also negligent and the finding of Tribunal not returning a finding holding him contributor of accident is bad? (ii) Whether the finding that there is no breach of policy is bad. (iii) Whether compensation awarded requires re-computation.

Issue No.1:- Negligence visa vis contributory negligence.

The concept of contributory negligence has been time and again evolved, decided and discussed by the courts.

11. 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.

12. 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."

13. 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."

14. 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** which would apply in the facts of this case.

15. The Apex Court in **Khenyei Vs. New India Assurance Company Limited & Others, 2015 LawSuit (SC) 469** has held as under for negligence as well as breach of policy condition:-

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."

16. The Tribunal while considering the issue of negligence has categorically held that the charge sheet, F.I.R and the site plan has been properly evaluated by it and the evidence of the claimant proves that the vehicle was involved in the accident insured by the respondent. The driver of the truck who is the best witness has not stepped into the witness box. The finding of facts as to the accident being authored by the driver of the truck who was driving his truck rashly and negligently cannot be brushed aside. The Tribunal has even considered that in the written statement the owner did not file rebuttal contending that the claimant was negligent. This also will not permit us to consider the submission of Sri Sinha that the claimant was contributor to the accident.

Issue no.2: Breach of Policy:-

This takes us to the submission that the vehicle was being driven without proper licence and there is breach of policy condition.

17. It is the submission of Sri Sinha, learned counsel for the Insurance Company that the vehicle involved in the accident was a heavy motor vehicle and the license of the driver which is endorsed later than the accident goes to show that there is a tick mark on licence for driving heavy motor vehicle but is later than accident. The submission of Sri Sinha is that the interpolation is after the incident took place. It is submitted by Sri Ojha, learned counsel for the claimant that it is a dispute between the owner of the vehicle insured by Insurance Company and driver of the truck, and claimant being third party his right cannot be scuttled. However, considering this aspect we can give recovery rights to Insurance Company subject to proving that the driver did not have license to drive heavy vehicle and that the owner had entrusted the truck to a person fully knowing that he was not having proper driving license, however, the factual finding that the unladen weight of the vehicle would fall within definition of Light Motor Vehicle as per Section 2(21) of the Motor Vehicle Act, 1988. This since on a bare reading of license page 102 that there is a tick mark but the same is not proved before the Tribunal to be after or before the accident.

18. It is further submitted that the driver of the truck was not having license to drive heavy vehicle. It is submitted that this is also apparent from the record. It is submitted that the tribunal has considered that the vehicle involved in the accident was a light motor vehicle This finding according to learned counsel for the appellant-Insurance Company is bad even on facts and law.

19. It is further submitted by learned counsel for the Insurance Company that the Tribunal while considering the aforesaid aspect about licence that the driving licence was valid from 31.01.2005 to 30.01.2025 of the motorcyclist. The driving licence of the driver of offending vehicle shows that Driving Licence No.35910 Varanasi 98 valid from 22.07.2004 to 21.07.2007 for light motor vehicle and from 17.04.2007 it was endorsed for heavy motor vehicle, the said document has been verified by Insurance Company. The accident occurred on 09.04.2007 and therefore, it cannot be said that on 09.04.2007 the driver had proper driving licence. Learned counsel further submitted that the driver did not have valid driving licence whether the vehicle was bearing 6200 kg. has to be evaluated from record which we would advert to later.

20. The definition of Light Motor Vehicle under Section 2 (21) reads as under:-

"(21) "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed [7500] kilograms."

21. Section 147 Requirements of policies and limits of liability. --

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

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

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

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

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

Provided that a policy shall not be required--

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

(a) engaged in driving the vehicle, or

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

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

(ii) to cover any contractual liability.

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

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

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

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

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

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

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

(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons."

22. The document which is produced on Rs.10/- Stamp Paper along with Transport Department, Uttar Pradesh Certificate as document 1/2 and 1/3 goes to show that unladen weight of the vehicle was 6200 kg. and therefore, no fault can be found with the finding of the Tribunal. The Oriental Insurance Company has also mentioned in the policy that weight does not exceed 7500 kg. and can not exceed 12000 kg. which categorically shows that finding of fact that though the vehicle is termed as heavy goods vehicle it was having unladen weight of 6200 kg, though, it is termed as a truck but is Light Motor

Vehicle. Once the prime facie evidence is before the Tribunal and this Court that the unladen weight was 6200 kg., the request of Sri Anand Sinha, learned counsel to grant what is known as recovery rights cannot be granted even on the document at Page 58(G) which is the same xerox copy of the document which is particular slip of the vehicle and also mentions the unladen weight 6200 kg. laden weight is more. In view of the matter, it cannot be said that the vehicle was being driven by a person not authorised to drive the said vehicle. The driver could have been examined by the Insurance Company but the same has not been done. The record goes to show that licence was valid for Heavy Motor Vehicle but whether it was in vogue on date of accident or not will have to be proved, which fact gives rise to doubt about whether licence was valid for Heavy Motor Vehicle from July, 2004 to 27.07.2007. We could grant recovery rights to the Insurance Company on the ground that the driving licence though there is a tick mark to drive heavy goods passengers vehicle, there is a dispute regarding the same and therefore, if the appellant-Insurance Company proves as directed by the Apex Court in the case of **Singh Ram Vs. Nirmala and Others, (2018) 3 SCC 800**, the recovery rights can be granted but the vehicle is held to be Light Motor Vehicle and we concur with the Tribunal on re-scanning the documents produced and proved for the reasons given by Tribunal and reevaluated by us. The Tribunal has rightly relied on the decision in the case of **National Insurance Com. Ltd. Vs. Annappa Irappa Nesaria and Others 2008 (1) T.A.C. Page 812 SC.** so as to come to the conclusion that the vehicle weights less than 7500 kg and therefore, it was a light motor vehicle though cylinders were carried in the said vehicle.

Compensation:-

As far as the compensation granted is concerned and to be granted, learned counsel for the Insurance Company has submitted that in the State of Uttar Pradesh Rule 220 of the Uttar Pradesh Motor Vehicle Rules came into force in the year 2011 and hence, no future loss of income could be granted as in this case accident occurred in the year 2007.

23. In the case titled **Kajal Vs. Jagdish Chand & Ors. 2020 1 Supreme (SC) 110** the Apex Court has held that future loss of income has to be given for injury cases whether the rules specify or not. This is an accident of the year 2007 just because the rules are silent, the claimant cannot be deprived of this benefit. In catena of decisions even prior to year 2011 future loss of income was considered to be grantable. The recent decisions of the Apex Court in the case of (**1) Kajal Vs. Jagdish Chand & Ors. 2020 1 Supreme (SC) 110,** (2) **R.D. hattangadi Vs. M/s Pest Control (India) Pvt. Ltd. And others** reported in **1995 0 ACJ 366, (3) Raj Kumar Vs. Ajay Kumar & Anr.** reported in **2010 0 ACJ 1, (4) Mohan Soni Vs. Ram Avtar Tomar and Ors**. reported in **2012 1 ACC 1, (5) Syed. Sadiq and others Vs. Divisional Manager, United India Insurance Company Limited, (2014) 2 SCC 735,** (6) **Mukund Dewagan Vs. Oriental Insurance Company Ltd.** Reported in **AIR 2017 SC 3668**, cited by Sri Ojha will not permit us to accept the submission of Sri Sinha as the judgment in **Dinesh Singh Vs. Bajaj Allianz General Insurance Co. Ltd (2014 (2) T.A.C. 737 (S.C.)** also deals with case of injury. Raj Kumar (supra) which is a judgment of the year 2010 will not permit us to accept the submission of Sri Sinha which though

appears attractive but cannot apply to the facts of this case. We cannot accept the submission of Sri Sinha as in catena of decisions which are binding on this Court granting future loss of income namely (a) **Pappu Deo Yadav Vs. Naresh Kumar, AIR 2020 SC 4424,** (b) **Erudhaya Priya Vs. State Express Transport Corporation Ltd., AIR 2020 SC 4284** and (c) **Karthik Subramanian Vs. B. Sarath Babu & Anr.,** reported in **2021 ACJ 993** has granted future loss of income. The submission of Sri Sinha so as to point error in judgment as even while considering the judgment prior to the judgment of **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050,** namely **Gobald Motor Service Ltd. & Vs. R. M. K. Veluswami & Others AIR 1962 SC 1** wherein also even in the said decision the future loss of income has been considered. It is submitted by counsel for the Insurance Company that as the accident and the dispute is prior to the decision in **Syed. Sadiq and others Vs. Divisional Manager, United India Insurance Company Limited, (2014) 2 SCC 735** no future loss of income can be awarded. The decision of the Apex Court in **Gobald Motor Service Ltd.** (supra) cannot be countenanced in light of these decisions even in the case of **Uttaranchal Transport Corporation Ltd. Vs. Vimla Devi 2009 (0) AIJEL-SC 66148** wherein also the question of future loss of income of injured was considered. The decisions rendered by the Apex Court in **General Manager Kerla State Road Transport Corporation Trivandrum Vs. Susamma Thomas and others 1994 (2) SCC 176**, thus, the submission of Sri Sinha cannot be accepted in the light of the decisions which are prior to the decision of **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121** and the decision of **Syed. Sadiq (supra)** will apply in full force. We cannot accept the submission of the counsel for the Insurance Company that the matter should be remanded as the judgment in the case of National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050 is for death cases and does not lay down guidelines for injury cases. In (a) Yadava Kumar Vs. The Divisional Insurance Co. Ltd. & Another (2010) 10 SCC 341, (b) **Shahikala & Ors. Vs. Gangalashmamma & Anr. (2015) 9 SCC 150** and in (c) **Malarvizhi Vs. United India Insurance Company Ltd. 7 Anr. (2020) 4 SCC 228** (d) **Oriental Insurance Com. Vs. Mathu Ram 2019 ACJ 65 (HP).** The decision of the Apex Court in the case of **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050** applies to injury cases also and applies for future loss of income. In the facts of this case the latest judgment in the case of **Kajal Vs. Jagdish Chand & Ors. 2020 1 Supreme (SC) 110** will oblige us to award just compensation which we are recalculating.

24. The injured was under treatment when the petition was filed in 2005. He was time and again admitted in hospital which is proved from the records produced before the Tribunal.

25. We have considered the submission of Sri Sinha that the income cannot be Rs.30,000/- per month as the business is continued, however, looking to the ITR returns considering income to be Rs.8,000/- per month. Injured has 45 per cent disability, the age of the injured was 21 years, 40 per cent would have to be added for future loss of income on basis of decisions cited and precedents on this subject. The medical expenses of Rs.8,10,000/- have been granted.

26. The compensation awarded by the Tribunal is Rs.13,23,831/- with interest payable at 6% simple interest.

27. There is a question of remanding the matter as per the submission of the learned counsel for the Insurance Company. It is submitted by Sri Sinha, learned counsel for the Insurance Company that it was the duty of the claimant to prove the medical bills. There is no evidence to prove that the medical bills are fake just because of the statement to hold that it cannot be read in evidence is not accepted in the light of judgment of this High Court in **Oriental Insurance Company Limited Vs. Poonam Kesarwani and others, 2008 LawSuit (All) 1557,** hence, we consider the medical bills to be for figure of Rs.8,00,000/-. For pain, shock and suffering, nothing has been awarded by the Tribunal and we grant Rs.1,00,000/- because of the amputation of lower limb of a young person who was of 21 years.

28. The Tribunal has considered the income of the injured to be Rs.4500/- and considering that he had sustained 45% by way of disability and that is how he held that he is entitled to Rs.24,300/- per year multiplied by 17, granted Rs.8,10,731/- for medical expenses and Rs.4,13,100/- towards loss of income for other non-pecuniary damages a sum of Rs.1/- lac was awarded rounding up the figure to Rs.13,23,831/- at 6%. This is the calculation which according to the learned counsel for the applicant is bad in eye of law. It is submitted by learned counsel for the applicant that the injured was in business and he has proved his income to be Rs.20,000/- and his disability should be considered 50%, hence, Rs.10,000/- be considered as incme to which he being 21 years of age and to his personal income 40% must added and a multiplier of 18 should be granted. It is submitted that the future economic loss Rs.10/- lac should be awarded. Towards pain, shocks and suffering it should be Rs.1/- lacs as he has amputation of lower limb. For medical expenses he has demanded Rs.17,25,790/- and for future medicine it is demanded Rs.5/- lacs should be granted, for special diet and Rs.50,000/- and Rs.3/- lacs for other charges, totaling it to Rs.59,15,790/- lacs and interest at 9% has been demanded. While going by the records one thing is borne in mind that claimant has filed Income Tax Return of last 3 years which shows upward increasing income from the independent and proprietary business of the applicant and it is submitted that the same is ignored by the Tribunal. It is further submitted that for future medical expenses no amount is awarded. It is submitted that report of the Investigator of Oriental Insurance Company Ltd. though was not proved by leading evidence, has been taken into consideration by the tribunal.

29. Having heard the learned counsel for the claimant as well as Sri Sinha as we have held that Income Tax Return should be considered. We have held that future loss of income is admissible. The judgment in **Raj Kumar** (supra) will have to be looked into and a old decision of the Gujarat High in **Union of India Vs. A.S. Sharma 1995 ACJ 493** will have to be looked into before we decide to recompute the amount. Learned counsel for the claimant-appellant had contended that his annual income was Rs.1,96,000/- as he has invested Rs.39/- lacs for his business and in future he would earn Rs.1/- lac per month and before the accident he had his own shop which was known as Amit Traders which was his alias name. For three years namely from the age of 18 he used to earn

Rs.15,000/- per month from the said business. He used to file Income Tax Return also. He has already produced the bills and vouchers of the building material which he used to purchase which is at 25G/4 though the shop is in the name of the appellant's father. The firm is also a registered firm which deals with tiles, sentinel fitting, building materials. The diary of the said firm is also produced on record. The firm was a propitiatory firm despite this fact the tribunal has misread the document in coming to the conclusion that the applicant has not proved how many partners were there. The injured was an entrepreneur who was in last year of B. Com. The tribunal comes to the conclusion that as he was a student he could have not gaven proper attention to his business and that he had any personal income. According to this Court the said finding is an error apparent on the record as the Income Tax Return is in his name The Tribunal comes to the conclusion that Income Tax is only with a view to save the tax to be paid by the mother and father of the injured. This finding is based on his own surmise and conjuncture without any proof, just because the father of the injured has also has a shop which is also of building material this finding is returned and that is why the Tribunal held that the income of claimant to be Rs.4500/- per month which is bad in eye of law. The medical certificate at Document 25G Dr. V.N. Verma who has been examined on oath has proved the said document. The Tribunal goes by the concept in the Workman Compensation Act, 1923 and has come to the conclusion that if both the lower limbs are amputated then 90% would be disability as he has only one limb which is amputated it would be 45% disability. He has not considered the other injuries which have been narrated in the medical forms and that is why he has granted a sum of Rs.4,13,100/-. There are medical bills of Rs.12,54,985/- which are receipts which has been proved by leading evidence but because of same statements which are not proved and which cannot be read into evidence as per judgment of **Poonam Kesharwani** (supra) the Tribunal feels that a sum of rupees that only Rs.3,39,926/- which are found to be correct by the Tribunal is payable. The Tribunal holds that for other claims as he has not proved that he cannot marry, no amount can be awarded. The Tribunal thereafter has considered certain other amount under non-pecuniary damages and has came to the conclusion that sum of Rs.13,23,831/- would be payable. We hold that the income of the injured would be minimum Rs.8,000/-, 40% should be added, his disability would be 50% multiplied by 18, for medical expenses we grant him a sum of Rs.10/- lacs which is proved by the receipts and the other non-pecuniary damages granted by the Tribunal are maintained.

30. Where the appellant has become disabled to the tune of 50% and that too by his leg and he is not able to sit properly and walk and he has lost pleasures of life because he cannot lead a normal life after accident. It is natural that he had bleak prospects of marriage and family life as he was young boy of 21 years of age only. It can be said that the appellant has lost amenities of life to the great extent, which cannot be restored at all. Therefore, he would grant Rs.2,00,000/- for loss of amenities.

31. First of all we calculate the amount of compensation payable to the appellant under the head of permanent disability as under:-

i. Monthly income : Rs.8,000/-

ii. Percentage towards future prospects : 40% namely Rs.3,200/-

iii. Total income : Rs. 8,000 + 3,200 = Rs.11,200/-

iv. Annual loss : Rs.11,200 x 12 = Rs.1,34,400/-

v. Multiplier applicable : 18

vi. Total loss : Rs.1,34,400 x 18 = Rs.24,19,200/-

vi. 50% for permanent disability = Rs.12,09,600/- (as above)

32. Hence, the amount of compensation payable to the appellant would be computed herein below:-

i. Amount for permanent disability: Rs.12,09,600/-,

ii. Medical expenses: Rs.8,00,000/-,

iii. Loss of Amenities: Rs.2,00,000/-,

iv. Amount under pain, shock and suffering : Rs.1,00,000/-,

v. Total compensation : Rs.12,09,600+8,00,000+2,00,000/- +1,00,000/-=23,09,600/-.

The interest at 6% is maintained.

33. In view of the above, both the appeals are partly allowed. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the additional amount within a period of 12 weeks from today with interest at the rate of 6% 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.

34. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442**, the order of investment be passed by Tribunal.

35. 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.

36. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and judgment of **A.V. Padma (supra)**. The same is to be applied looking to the facts of each case.

37. The Tribunal shall follow the guidelines issued by the Apex Court in **Bajaj Allianz General Insurance Company Private Ltd. Vs 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.

38. This Court is thankful to both the counsels for getting this matter decided.

(2022)05ILR A847
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. 4038 of 2012

Smt. Geeta Yadav & Ors. ...Appellants
Versus
Prem Roadways Registered, Punjab & Anr. ...Respondents

Counsel for the Appellants:
Sri S.D. Yadav

Counsel for the Respondents:
Sri Rahul Sahai, Sri Aditya Singh Parihar

A. Civil Law - Motor Accident Act, 1988 – Claim – Rule of road – Obligation of vehicles running on road – Bus dashed the Scooter from behind and dragged the scooterist – Liability – Held, as per road safety it is obligatory on a vehicle coming from behind to be more careful and cautious – The driver of bus has not followed this basic rule – High Court upheld the finding of Tribunal on the issue of negligence. (Para 20)

B. Civil Law - Motor Accident Act, 1988 – Section 169 – Claim – Deceased was serving in Indian Army – Tribunal disbelieved the salary certificate issued by Captain holding that the said document has not been proved by the claimants by examining the Issuing Authority of the salary slip – Tribunal has considered the income of the deceased to be Rs. 3,000/- per month which was that of a labourer – Validity challenged – Held, the finding of the Tribunal is bad as the Tribunal under Section 169 should have called the authority who has issued salary certificate to testify the authenticity of the said document. (Para 22, 25 and 26)

C. Motor Accident Claim – Compensation – Tribunal refused to grant future loss and added multiplier of 15 – Validity challenged – Held, the judgment itself is vulnerable – High Court determined the income of the deceased Rs. 27,000/- per month and re-computed the compensation by deducting 2000/- as the income tax from it and adding 50% future loss and applying multiplier of 16. (Para 26 and 27)

D. Motor Accident Claim – Rash and negligent driving – Term 'Negligence' – Meaning – Principle of '*res ipsa loquitur*', when it can be applied – 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 though it is normally accidental – 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. (Para 12)

E. Motor Accident Claim – Principle of contributory negligence – Scope and meaning – 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. (Para 13)

F. Civil Law - Income Tax Act, 1961 – Section 194A (3) (ix) – Withdraw of amount of interest – Certificate of Income Tax authority, when required – Held, if the interest payable to any claimant for any financial year exceeds Rs. 50,000/-, insurance Co./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. (Para 32)

Appeal allowed, Cross objection of Insurance Co. dismissed (E-1)

List of Cases cited:-

1. First Appeal From Order No. 1118 of 2009; Smt. Nasreen Jahan & ors. Vs Km. Garima Pandey decided on 2.8.2017

2. Sunita & ors. Vs Rajasthan Road Transport Corp. & anr.; 2019 (1) T.A.C. 710

3. F.A.F.O. No. 2389 of 2016; National Insurance Co. Ltd. Vs Smt. Vidyawati Devi 7 ors. decided on 27.7.2016

4. First Appeal From Order No. 1818 of 2012; Bajaj Allianz General Insurance Co. Ltd. Vs Smt. Renu Singh & ors. decided by Allahabad High Court on 19.7.2016

5. Archit Saini & anr. Vs Oriental Insurance Co. Ltd.; AIR 2018 SC 1143

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

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

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

9. C.MA. No. 1482 of 2017; Reliance General Insurance Co. Ltd. Vs Subbulakshmi & ors. decided by Madras High Court

10. C.M.P. No. 7919 of 2017; Puspabai Purshottam Udeshi Vs Ranjit Ginning & Pressing Co., 1977ACJ 343 (SC).

11. Renu Rani Shrivastava Vs New India Assurance Co. Ltd.; 2019 (0) AIJELSC 65364

12. Jumani Begam Vs Ram Narayan, 2019 (0) AIJELSC 65571

13. Nishan Singh Vs Oriental Insurance Co. Ltd.; 2018 (0) AIJEL-SC 62197.

14. F.A.F.O. No. 2019 of 2021l ; Akhilesh Kumar Anand Vs Rahul Mishra & anr.) decided on 18.4.2022

15. Anil Khoshla Vs Mahesh Kumar & ors. 2011 (1) T.A.C. 250 (DEL)

16. Smt. Mithilesh Mishra Vs Ajay Kumar, 2012 (3) T.A.C. 45 (All.).

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

18. Sarla Verma & ors. Vs Delhi Transport Corp. & anr.; 2009 LawSuit (SC)

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

20. A.VsPadma Vs Venugopal; 2012 (1) GLH (SC) 442

21. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Co. Ltd.; 2007(2) GLH 291

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

23. R/Special Civil Application No. 4800 of 2021; The Oriental Insurance Co. Ltd. VsChief Commissioner of Income Tax (TDS) decided by High Court of Gujarat on 5.4.2022.

24. Bajaj Allianz General Insurance Co. Pvt. Ltd. Vs Union of India & ors. decided by Apex Court on 27.1.2022

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

1. Heard Sri S.D. Yadav, learned counsel for the appellants-claimants and Sri Aditya Singh Parihar, learned Advocate appearing for Sri Rahul Sahai, learned counsel for the respondent-Insurance Company. None has appeared for the respondent-owner of the offending vehicle.

2. By way of this appeal, the appellants-claimants, have challenged the judgment and order dated 9.8.2012 passed by the Motor Accident Claims Tribunal/Additional District Judge, Court No.14, Kanpur Nagar (hereinafter referred to as 'Tribunal') in M.A.C. No.299 of 2011 awarding compensation of Rs.3,69,500/- with interest at the rate of 6% simple interest till amount is deposited.

3. Brief facts as culled out from the record are that on 18.10.2009 at about 1.00 p.m. a bus bearing No.PB-3 H 9581 which was coming from Barnala side dashed the Motorcycle of the deceased bearing No.UP 71 E 2269 from behind. It has been averred that the bus was being driven by its driver rashly and negligently and even without blowing horn. The accident caused grievous injuries to deceased-Kaushal Kishore who has succumbed to the injuries in Military Hospital, Bhatinda Cantt.

4. Consequent upon the death of the deceased, the widow of the deceased along with three others filed claim petition before the Tribunal claiming compensation of Rs.88,00,000/- with interest at the rate of 10%. The Tribunal has framed four issues and held driver of the offending vehicle solely negligent for the accident having taken place. As far as compensation is concerned, the Tribunal has considered the income of the deceased to be Rs.3,000/- per month though it was proved that he was in service of Armed Forces, deducted 1/3rd towards personal expenses of the deceased, applied multiplier of 15 and granted Rs.9500/- under non pecuniary heads.

5. It is submitted by learned counsel for the appellants that the deceased was Havildar in Indian Army and was earning Rs.27,000/- per month, his salary certificate was placed on record vide Ex.39 Ga which was disbelieved by the Tribunal. It is stated that this finding of the Tribunal is perverse and is required to be upturned as the reasoning given for not believing the said documents show lack of holistic approach expected of a Motor Accident Claims Tribunal.

6. It is further submitted by learned counsel for the appellants that the Tribunal has not granted any amount towards future loss of income of the deceased which is required to be granted. It is submitted that the deduction towards personal expenses of the deceased should be 1/4th as the deceased was survived by his widow, a minor son and aged parents. It is further submitted that the deceased being in the age bracket of 31-35, multiplier of 16 should be granted.

7. It is lastly submitted by learned counsel for the appellants that the amount under non-pecuniary heads and the interest awarded by the Tribunal is on the lower side and are required to be enhanced.

8. Learned counsel for the appellants has relied on the decision of the Division Bench of this Court in First Appeal From Order No. 1118 of 2009 (**Smt. Nasreen Jahan and Others v. Km. Garima Pandey)** decided on 2.8.2017 and on the decision of the Apex Court in **Sunita and Others vs. Rajasthan Road Transport Corporation and Anr., 2019 (1) T.A.C. 710** so as to contend that the reasoning for non consideration of documentary evidence

9. As against this, the Insurance Company has also challenged the judgment and order impugned by way of **oral cross objection** as far as negligence and compensation awarded are concerned and it is submitted that in view of the decision in **F.A.F.O. No.2389 of 2016 (National Insurance Co. Ltd. Vs. Smt. Vidyawati Devi And 2 Others) decided on 27.7.2016** and under Section 173 of Motor Vehicles Act, 1988, this Court is under obligation to decide the same. The ground of cross objection is that the deceased was also the co-author of the accident and, hence, the finding of the Tribunal holding the driver of the bus to be solely negligent is erroneous and is required to be upturned.

10. It is also submitted by learned counsel for the respondent-Insurance Company that the income which has not been proved by cogent evidence has rightly not been considered by the Tribunal. It is further submitted that the quantum of compensation awarded by the Tribunal is just and proper and does not call for any interference of this Court as the income was rightly not proved by leading cogent evidence. The documents being not public document have rightly not been relied by the Tribunal and there is no cogent reason to enhance the compensation.

11. Before adverting to the issue of compensation awardable, it would be necessary to decide the oral cross objection relating to contributory negligence of the drivers involved in the accident. While dealing with submission on issue of negligence raised by the learned counsel for respondent-Insurance Company, it would be relevant to discuss the principles for deciding contributory negligence and for that the principles for considering negligence will also have to be looked into.

12. 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 though it is normally accidental. Negligence connotes reckless driving and the injured must always prove that the other side is negligent. If the injury or 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 which depends on facts of each case.

13. The principle so as to consider a driver to be contributor to accident 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 his legal representatives if he dies in the accident.

14. 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

15. In **Archit Saini and Another Vs. Oriental Insurance Company Limited, AIR 2018 SC 1143** 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] andPazhaniammal 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)"

16. It is submitted that by Sri Rahul Sahai, learned counsel for the respondent assisted by Sri Aditya Singh Parihar, learned Advocate that the deceased was driving the vehicle in middle of the road and did not give side to the bus coming from behind and the so called eye-witness could not be believed and, thence, finding of negligence requires to be interfered with.

17. The F.I.R. categorically goes to show that the bus dashed the deceased from behind who was going ahead of bus on his Motorcycle which resulted into instantaneous death of the deceased. On perusal of the F.I.R., charge-sheet and the site plan, we do not find any perversity in the finding of the Tribunal as far as negligence is concerned.

18. We are also supported in our finding by the decisions in (a) **Smt. Kaushnuma Begum And Ors vs. The New India Assurance Co. Ltd. (2001) 2 SCC 9., (b) Vimla Devi and others Vs. National Insurance Company Limited and others, 2019 (133) ALR 768; (c) Anita Sharma v. New India Assurance Co. Ltd. (2021) 1 SCC 17**1 and on the decision of **Madras High Court**. The decision in Madras High Court in **Reliance General Insurance Co. Ltd. Vs. Subbulakshmi and Others, passed in C.MA. No. 1482 of 2017 [C.M.P. No. 7919 of 2017. (CMA Sr. No. 76893 of 2016)]** and the decision referred in the said case namely **Puspabai Purshottam Udeshi Vs. Ranjit Ginning and Pressing Co., 1977ACJ 343 (SC).**

19. It is a fact that charge-sheet was filed against the driver of the bus and neither the driver nor the owner of bus has stepped into the witness box so as to prove that the deceased had contributed to the accident having taken place. The finding of fact by Tribunal on the basis of evidence goes to show that the bus dashed the scooter from behind, dragged the scooterist and then crossed and went on otherside of railing.

20. As per road safety it is obligatory on a vehicle coming from behind to be more careful and cautious. Here the driver of bus has not followed this basic rule. These cumulative facts will not permit us to take a different view then that taken by the Tribunal as far as finding of negligence is concerned.

21. In view of the above, the cross objection of respondent-Insurance Company cannot be accepted and cannot succeed. We are also supported in our view on the decisions in **(a) Renu Rani Shrivastava Vs. New India Assurance Co. Ltd., 2019 (0) AIJEL-SC 65364, (b) Jumani Begam Vs. Ram Narayan, 2019 (0) AIJEL-SC 65571, (c) Nishan Singh Vs. Oriental Insurance Company Ltd., 2018 (0) AIJEL-SC 62197.**

Compensation :

22. This takes us to the issue of quantum of compensation awarded. The deceased, according to learned counsel for the appellant, was serving in Indian Army as Havildar and was earning Rs.27,000/- per month. The Tribunal has disbelieved the salary certificate Ex. 39 Ga issued by Captain, Record Officer, Topkhana Abhilekh, Artillery Records, Nasik Road Camp holding that the said document has not been proved by the claimants by examining the Issuing Authority of the salary slip. This finding of the Tribunal is bad as the Tribunal under Section 169 of the Motor Vehicles Act, 1988 should have called the authority who has issued salary certificate to testify the authenticity of the said document. Section 169 of the Act, 1988 reads as under :

"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 kn*owledge of and matter relevant to the inquiry to assist it in holding the inquiry."

23. Recently this Court in F.A.F.O. No. 2019 of 2021 **(Akhilesh Kumar Anand Vs. Rahul Mishra and Another),** vide order dated 18.4.2022 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'."

24. The Tribunal, on one hand, has recorded that the Department where the deceased was serving, there must be provision of pension and compassionate appointment and on the other hand has not believed the document issued by the said department. This is nothing else but perversity has percolated in the finding of the Tribunal. The word 'perversity' is too mild for the reasoning given by the

Tribunal as far as income of deceased is concerned.

25. Finding of the Tribunal is perverse as Tribunal itself has held that the deceased was on the post of Havildar in Indian Army and was earning Rs.27,000/- per month. The documentary evidence is at Exhibit 49 and his PAN Card is at Exhibit 40 Ga/11. He was also having a vehicle, he was also having driving license which was produced as Exhibit 40 Ga/10. The xerox copies were believed for the purpose of considering the age of the deceased to be 30 years and 7 months. The medico legal documents, unfortunately, was discussed by the Tribunal and the Tribunal has considered that as none has objected to the same, the Tribunal has considered the same.

26. The Tribunal has not believed the salary certificate as the same was not orally proved by the Officer who had issued the same despite the fact that wife of the deceased (now widow) had opined that the salary was credited to his husband in his bank account. Learned Tribunal has held that she was not present when the salary certificate which was produced was signed and, therefore, it has not believed the same. It was stated by her that she did not know whether her husband was an Income Tax Payee or not. The Tribunal further holds that there is family pension being paid to her. The claim petition was under Section 166 and not Section 163A of the Act, 1988. Despite that, the Tribunal has considered the income of the deceased to be Rs.3,000/- per month which was that of a labourer. The Tribunal did not grant any amount under the head of future loss of income. The Tribunal did not discuss why it has considered multiplier of 15 instead of 17 and did not even discuss why it has not granted any amount under the head of future loss of income. The judgment itself is vulnerable. The decision referred herein before would permit us to interfere with the decision of the Tribunal for the reasons that (a) no proper reasons have been given showing why income of deceased has been considered to be that of a labourer, (b) why has the salary certificate been rejected without cogent reasons, (c) no reasons have been given for non grant of future loss of income despite the decision of **Sarla Verma (Supra)** & (d) non consideration of judgments in **Anil Khoshla v. Mahesh Kumar and others, 2011 (1) T.A.C. 250 (DEL) and Smt. Mithilesh Mishra v. Ajay Kumar, 2012 (3) T.A.C. 45 (All.).** These findings cannot stand reasoning. These surmises shows the over zeal of the Tribunal to grant what can be said to be just compensation.

27. Therefore, we consider the income of the deceased to be Rs.27,000/- per month. Out of which, the only deduction permissible would be Income Tax i.e. Rs.2,000/- per month. To which, as the deceased was below 40 years, 50% be added towards future loss of income in view of the decision in **National Insurance Co. Ltd. Vs. Pranay Sethi and others, 2017 LawSuit (SC) 1093.** The later judgments could have been applied but it is not proved as to what would have been actual income in future of deceased. Thus, thumb rule of addition of future prospects is applied. The deceased being in the age bracket of 31-35 years of age, the multiplier applicable would be 16 in view of the decision in **Sarla Verma and others Vs. Delhi Transport Corporation and Another, 2009 LawSuit (SC).** The deduction towards personal expenses of the deceased would be 1/3rd as he had three persons dependent on the deceased. The

family would be entitled to Rs.70,000/- plus 10% rise in every three year in view of the decision in **Pranay Sethi (Supra),** we round up this figure to Rs.1,00,000/-.

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

i. Monthly Income: Rs.25,000/-

ii. Percentage towards future prospects : 50% namely Rs.12,500/-

iii. Total income : Rs.25,000 + 12,500 = Rs.37,500/-

iv. Income after deduction of 1/3rd towards personal expenses : Rs.25,000/-

v. Annual income : Rs.25,000 x 12 = Rs.3,00,000/-

vi. Multiplier applicable : 16

vii. Loss of dependency: Rs.3,00,000 x 16 = Rs.48,00,000/-

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

ix. Total compensation : Rs.49,00,000/-

29. 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."

30. In view of the above, the appeal is **allowed.** Cross objection filed by respondent-Insurance Company is **dismissed.** Award and order passed by the Tribunal is modified to the aforesaid effect. The Insurance Company shall deposit the amount within 12 weeks from today with interest as awarded herein above. The amount already deposited be deducted from the amount to be deposited.

31. 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 of amount be passed by Tribunal..

32. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansaguri P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291**, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner

is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 **(Smt. Sudesna and others Vs. Hari Singh and another)** while disbursing the amount. The said decision has also been reiterated by High Court Gujarat in R/Special Civil Application No.4800 of 2021 (**The Oriental Insurance Co. Ltd. v. Chief Commissioner of Income Tax (TDS)** decided on 5.4.2022.

33. 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.

34. 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.

35. A copy of this order be kept on the dossier of the learned Judge by the High Court as we feel that the judgment and award impugned is not in consonance with the facts of the case. We request the learned Registrar General to circulate this judgment to the Motor Accident Claims Tribunals in State of U.P. to see that in future they may not commit such glaring mistakes which increases the burden of the High Court.

(2022)05ILR A859
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.03.2022

BEFORE

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

First Appeal From Order No. 4118 of 2018
With
First Appeal From Order No. 4117 of 2018

Suraj Mukhi & Ors. ...Appellants
Versus
Sunil Garg & Anr. ...Respondents

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

Counsel for the Respondents:
Sri Radhey Shyam, Sri Vinay Kumar Pandey

A. Civil Law - Motor Accident Act, 1988 – Claim – Compensation – Determination of income of the deceased, who were driver and salesman – Future loss – Entitlement – Held, Tribunals should consider the potential of earning of a person – High Court enhanced the income of the driver from Rs. 4500/- to Rs. 6,000/- and of salesman from Rs. 3000/- to Rs. 4500/-, and re-computed the compensation by adding 40% future loss and applying multiplier of 18 and awarded 7.5% interest. (Para 22, 26 and 29)

B. Motor Accident Claim – Rash and negligent driving – Term 'Negligence' – Meaning – Principle of '*res ipsa loquitur*', when it can be applied – 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 though it is normally accidental – 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. (Para 10)

C. Motor Accident Claim – Principle of contributory negligence – Scope and meaning – 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. (Para 11)

D. Civil Law - Income Tax Act, 1961 – Section 194A (3) (ix) – Withdraw of amount of interest – Certificate of Income Tax authority, when required – Held, if the interest payable to any claimant for any financial year exceeds Rs. 50,000/-, insurance Co./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. (Para 31)

Appeal partly allowed. (E-1)

List of Cases cited:-

1. First Appeal From Order No. 1818 of 2012; Bajaj Allianz General Insurance Co. Ltd. Vs Smt. Renu Singh & ors. decided by Allahabad High Court on 19.7.2016

2. Khenyei Vs New India Assurance Co. Ltd. & ors.; 2015 LawSuit (SC) 469

3. Archit Saini & anr. Vs Oriental Insurance Co. Ltd.; AIR 2018 SC 1143

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

5. Sarla Verma & ors. Vs Delhi Transport Corp. & anr.; 2009 LawSuit (SC)

6. Smt. Meena Pawaia & ors. Vs Ashraf Ali & ors. 2021 0 Supreme (SC) 694

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

8. Lakkamma & ors. Vs The Regional Manager M/s United India Insurance Co. Ltd.; AIR 2021 SC 3301

9. A.V. Padma Vs Venugopal; 2012 (1) GLH (SC) 442

10. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Co. Ltd.; 2007(2) GLH 291

11. Bajaj Allianz General Insurance Co. Pvt. Ltd. Vs U.O.I. & ors. decided by Apex Court on 27.1.2022

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

1. Heard Sri Ram Singh, learned counsel for the appellants and Sri Radhey Shyam, learned counsel for the respondent-Insurance Company and Sri Vinay Kumar Pandey, learned counsel for the owner of the offending vehicle.

2. Both these appeals arise out of the same accident causing death of the Sunil and Manoj Kumar. First Appeal From Order No. 4118 of 2018 (arising out of MACP No. 770 of 2014) has been preferred by the legal heirs of the deceased-Sunil and First Appeal From Order No. 4117 of 2018 (arising out of MACP No. 771 of 2014) has been preferred by the

legal heirs of deceased-Manoj Kumar. Both these appeals challenge the judgment and award dated 24.9.2015 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No. 6, Aligarh.

3. As the issues which are to be decided can be decided from the perusal of the judgment impugned and certain documents appended with memo of appeal and as the matter is very old, we dispense with record and decide the same by consent of the parties.

4. At the outset, once again, we direct and request the Registrar General to issue circular to the Motor Accident Claims Tribunals to decide the matters arising out of same accident after consolidating the same.

5. Averments made in the memo of appeal go to show that Sunil, Manoj and wife of Sunil namely Neetu got injured in the vehicular accident. Sunil and Manoj died on the spot. The accident occurred in front of Sonai Station Road on 17.9.2014 at 8.00 p.m. It is unrebutted averments that the Wagon R which was owned by respondent came and rammed into stationery Indica Car being driven by Manoj Kumar. Respondent No.1, Sunil Garg, is the driver and owner of the offending vehicle namely Wagon R. He has not appeared before the Tribunal nor has he appeared before this Court. The Insurance Company came and filed its reply of negation. The accident though having occurred in the year after the 1988 Act, the reply was as if it is under the old Act namely Act of 1939. They denied the fact that vehicle was insured with them. They have denied the fact that premium was paid. The Insurance Company, in its reply, has stated that the vehicle was being driven in breach of policy.

6. All other issues except issue of holding the deceased negligent and compensation granted for the death of Sunil and Manoj Kumar are not under challenge and, therefore, further detailed facts are not required to be elaborately discussed.

7. Sri Radhey Shyam, learned counsel for the respondent has pointed out that Manoj Kumar, the elder brother, of Sunil was driving the vehicle and qua him, Tribunal has considered 10% negligence.

8. Sri Ram Singh, learned counsel for the appellants tried to contend that the vehicle which Manoj Kumar was driving was stationery and he is not at all negligent. It is further submitted by Sri Ram Singh, learned Advocate that the quantum of compensation awarded in both the matters are on the lower side and require to be recalculated in view of the latest decisions of the Apex 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 o*ther 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 b

15. A similar view has been taken by 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] andPazhaniammal 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)"

16. It is admitted position of fact that the charge-sheet was laid against the driver of the Wagon R. who did not appear before the Tribunal. The finding of fact is that the Wagon R came from opposite side and dashed the stationery Indica Car from wrong side. It is not the case that the offending vehicle has dashed the Indica car from behind and, therefore, we also uphold the negligence of the deceased to the tune of 10% and that of the driver of offending vehicle to the tune of 90%.

17. However, as far as legal heirs of deceased-Sunil is concerned, Sunil having not contributed to the accident having taken place, qua him the decision of the Apex Court in **Khenyei (Supra)** will apply and no amount should be deducted from compensation payable to him.

18. This takes us to the compensation in both the matters. The deceased were real brothers who have left behind them their elder and younger brothers and a mother who was aged 55 years in the year of accident. It is contended by Sri Radhey Shyam, learned counsel for the Insurance Company that when the mother is there, brothers would not be entitled for any amount unless it is proved that they were dependent on them. The principle enunciated by the Apex Court in several decisions lay down that legal representative would be entitled to the compensation and it is inter se between the heirs of class I and class II to apportion the amount.

(F.A.F.O. No. 4117 of 2018 : Deceased-Manoj Kumar)

19. Deceased- Manoj Kumar was 20 years of age. The Tribunal has considered his income to be Rs.4500/- per month, deducted 1/2 towards personal expenses, applied multiplier of 18, added Rs.15000/- towards non pecuniary damages and ultimately awarded Rs. 4,50,900/- with interest at the rate of 7% after deducting 10% negligence.

20. It is submitted by learned counsel for the appellant that the income considered by the Tribunal is bad in the eye of law as deceased was driver by profession and was earning Rs.7800/- per month in the year of accident. It is further submitted that the Tribunal has not granted any amount towards future loss of income which should be granted in view of the decision of the

Apex Court in **National Insurance Co. Ltd. Vs. Pranay Sethi and others, 2017 LawSuit (SC) 1093**. It is also submitted by learned counsel for the appellant that deduction towards personal expenses of the deceased should be 1/3rd as the deceased was survived by his mother and two brothers. It is also submitted that the amount under non-pecuniary heads and interest awarded by the Tribunal is on the lower side and require to be enhanced.

21. As against this Sri Radhey Shyam, learned counsel for the respondent-Insurance Company states that the income which has not been proved cannot be granted; that the Tribunal has rightly not granted future income as on the date of award, the decision in **Sarla Verma and others Vs. Delhi Transport Corporation and Another, 2009 LawSuit (SC)** was in vogue.

22. Having heard learned counsel for the parties and perused the award, we recapitulate the income of deceased-Manoj Kumar, who was driver by profession. His driving license was produced on record. Recently, the Apex Court in **Smt. Meena Pawaia & others Vs. Ashraf Ali and others 2021 0 Supreme (SC) 694**, has held that the appellate Court and the Tribunals should consider the potential of earning of a person. Therefore, we consider the income of the deceased to be Rs.6,000/- for a driver in the year 2014. To which, 40% should be added towards future loss of income as the deceased was below 40 years of age. As far as multiplier is concerned, there is no dispute. The deduction towards personal expenses of the deceased would be 1/2 as has been done by the Tribunal and not 1/3rd as the deceased was bachelor. The mother of the deceased would be entitled to Rs.40,000/- towards filial consortium plus Rs.30,000/- towards funeral charges, which will bring the figure to Rs.70,000/- towards non-pecuniary heads. Hence, the total compensation payable to the appellants is computed herein below:

i. Monthly Income Rs.6,000/-

ii. Percentage towards future prospects : 40% namely Rs.2,400/-

iii. Total income : Rs. 6,000 + 2,400 = Rs.8400/-

iv. Income after deduction of 1/2 : Rs.4200/-

v. Annual Income : 4200 x 12 = 50,400/-

vi. Multiplier applicable : 18

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

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

ix. Total compensation : 9,77,200/-

x. Compensation payable to claimant after deduction of 10% negligence on the part of the deceased : 8,79,480/-

(F.A.F.O. No. 4118 of 2018 : Deceased-Sunil)

23. Deceased- Sunil was 18 years of age and was Salesman in Wine Shop. The Tribunal has considered his income to be Rs.3000/- per month, deducted 1/3rd towards personal expenses, applied multiplier of 18, added Rs.15000/- towards

non pecuniary damages and ultimately awarded Rs.4,47,000/- with interest at the rate of 7%.

24. It is submitted by learned counsel for the appellant the Tribunal has considered the income of the deceased to be Rs.3,000/- per month which is bad and as the deceased was Sales Man in Wine Shop and was earning Rs.12000/- per month, hence, this income should be considered. It is further submitted that the Tribunal has not granted any amount towards future loss of income which should be granted in view of the decision of the Apex Court in **National Insurance Co. Ltd. Vs. Pranay Sethi and others, 2017 LawSuit (SC) 1093**. It is also submitted that the amount under non-pecuniary heads and interest awarded by the Tribunal is on the lower side and requires to be enhanced.

25. As against this Sri Radhey Shyam, learned counsel for the respondent-Insurance Company states that the income which has not been proved cannot be granted; that the Tribunal has rightly not granted future income as on the date of award, the decision in **Sarla Verma and others Vs. Delhi Transport Corporation and Another, 2009 LawSuit (SC)** was in vogue. It is also submitted by learned counsel for the respondent that deduction towards personal expenses of the deceased would be 1/2 as the deceased was bachelor.

26. Having heard learned counsels for the parties and perused the award, we recapitulate the income of deceased-Sunil, who was Salesman in a Wine Shop. Recently, the Apex Court in **Smt. Meena Pawaia & others Vs. Ashraf Ali and others 2021 0 Supreme (SC) 694**, has held that the appellate Court and the Tribunals should consider the potential of earning of a person. Therefore, we consider the income of the deceased to be Rs.4500/-. To which, 40% should be added towards future loss of income as the deceased was below 40 years of age. As far as multiplier is concerned, there is no dispute. The deduction towards personal expenses of the deceased would be 1/2 and not 1/3rd as the deceased was bachelor. The mother of the deceased would be entitled to Rs.40,000/- towards filial consortium plus Rs.30,000/- towards funeral charges, which will bring the figure to Rs.70,000/- towards non-pecuniary heads. Hence, the total compensation payable to the appellants is computed herein below:

i. Monthly Income Rs.4500/-

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

iii. Total income : Rs. 4500 + 1800 = Rs.6300/-

iv. Income after deduction of 1/2 : Rs.3150/-

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

vi. Multiplier applicable : 18

vii. Loss of dependency: Rs.37,800 x 18 = Rs.6,80,400/-

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

ix. Total compensation : 7,50,400/-

27. 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."

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

29. In view of the above, the both the appeals are partly allowed. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the difference 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 in both the matters. However, from the date of the decision of Tribunal i.e. 24.9.2015 till the date of filing of the appeal i.e. 6.5.2016, namely the delay in filing the appeal, interest would not be payable to the claimant in both the appeals in view of the decision in **Lakkamma and Others Vs. The Regional Manager M/s United India Insurance Co. Ltd., AIR 2021 SC 3301.**

30. 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.

31. 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.

32. 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.

33. The Tribunal shall follow the guidelines issued by the Apex Court in **Bajaj Allianz General Insurance Company Private Ltd. v. Union of India and others** vide order dated 27.1.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. As 8 years have elapsed, the amount be deposited in the Saving Account of claimants in Nationalized Bank without F.D.R.

34. We are thankful to the learned Advocates for ably assisting the Court.

(2022)05ILR A872
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.03.2022

BEFORE

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

First Appeal From Order No. 4197 of 2018

Smt. Saroj Sachan & Ors. ...Appellants
Versus
Bharti Axa General Insurance Co. Ltd. & Ors. ...Respondents

Counsel for the Appellants:
Sri Shreesh Srivastava, Sri Mohd. Naushad Siddiqui

Counsel for the Respondents:
Sri Pawan Kumar Singh

A. Civil Law - Motor Vehicles Act, 1988 - Section 168 - Motor Accident claim - Quantum of Compensation - deceased was Senior Engineer in Hilman Capital Finance Ltd - His income shown in the pay slip for May 2016 was Rs.60,050/- Form 16AA for the period 1st April 2016 to 9th June 2016, show his income to be Rs. 1,47,923 - Held - from the income, at least Income Tax should be deducted court consider the income of the deceased to be Rs.50,000 per month - Addition of 30% toward future loss of income - multiplier of 12 - deduction towards personal expenses of the deceased should be 1/4th reason being, parent of the deceased who were in their 90s has passed away - appellants would be entitled to Rs. 70,000 plus 10% rise in every three years i.e. Rs. 1,00,000 under this head (Para 10)

Allowed. (E-5)

List of Cases cited:

1. Sangita Arya & ors.. Vs Oriental Insurance Co. Ltd. & ors.., 2020 LawSuit (SC) 432

2. Rukmani Jethani & ors. Vs Gopal Singh & ors., 2021 (4) T.A.C. 23 (SC)

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

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

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

6. A.V. Padma Vs Venugopal, Reported in 2012 (1) GLH (SC), 442

7. Smt. Hansaguri P. Ladhani Vs The Oriental Insurance Company Ltd., 2007(2) GLH 291

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

9. Bajaj Allianz General Insurance Co. Pvt. Ltd. Vs U.O.I. & ors. vide dated 27.1.2022

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

1. Heard Sri Shreesh Srivastava, learned counsel for the appellant, Sri Pawan Kumar Singh, learned counsel for the respondent and perused the record.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 13.8.2018 passed by the Motor Accident Claims Tribunal/VIIIth Addl. District Judge, Kanpur Nagar (hereinafter referred to as 'Tribunal') in M.A.C.P No.700 of 2016 awarding a sum of Rs.42,78,200/- as compensation with interest at the rate of 7%.

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is also not in dispute. The only issue to be decided is the quantum of compensation awarded.

4. The accident took place in the year 2016. The deceased was 48 years of age and was Senior Engineer in Hilman Capital Finance Ltd. The Tribunal has considered the income of the deceased to be Rs.34,000/- per month, added 30% towards future loss of income, deducted 1/3rd towards personal expenses of the deceased, granted multiplier of 12 and awarded Rs.35,000/- towards non-pecuniary damages. That is how the Tribunal has calculated the compensation to be Rs.42,78,200/- against Rs.1,62,00,000/- as claimed by the claimants-appellants which has aggrieved them.

5. It is submitted by learned counsel for the appellants that the income of the deceased was Rs.62,000/- (rounded figure) but the Tribunal has wrongly considered his income to be Rs.34,000/- only. It is submitted that the learned Tribunal has brushed aside the Income Tax Returns and the appointment and considered only basic as according to the Tribunal the deceased was in service only for two month and was a probationer. Learned counsel for the appellant has relied on the decisions in **Sangita Arya & Ors. Vs. Oriental Insurance Co. Ltd. & Ors., 2020 LawSuit (SC) 432, Rukmani Jethani and Others Vs. Gopal Singh and others, 2021 (4) T.A.C. 23 (SC), Vimal Kanwar and Others Vs. Kishore Dan and others, 2013 (3) T.A.C. 6 (S.C.)** to buttress his submission that the finding of the Tribunal as far as income is concerned is bad. The Tribunal has calculated the income of the deceased to be Rs.34,000/- on the basis that it was the basic salary. This could not have been done is the submission of learned counsel for the appellants.

6. Learned counsel for the appellants has further submitted that the deceased was survived by his widow, one son and parents and, therefore, the deduction towards personal expenses would be 1/4th and not 1/3rd as done by the Tribunal.

7. It is also submitted by learned counsel for the appellant that the amount awarded under non pecuniary damages is on the lower side and is required to be enhanced in view of the decision in **National Insurance Co. Ltd. Vs. Pranay Sethi and others, 2017 LawSuit (SC) 1093** and the later decision of the Apex Court.

8. Learned counsel for the appellant has lastly submitted that the interest awarded by Tribunal is on the lower side and it should be as per the repo rate prevailing in those days.

9. As against this, learned counsel for respondent-Insurance Company has contended that the income which is asked cannot be granted and at least income tax

be deducted from the income. It is further submitted by Sri Pawan Kumar Singh, learned counsel for the respondent that deduction towards personal expenses is just and proper and does not call for interference of this Court. It is also submitted by learned counsel for the respondent that the amount awarded under non pecuniary heads and interest granted by the Tribunal are just and proper and does not call for interference of this Court.

10. Having heard learned counsel for the parties and considering the Salary Slip, Form 16 and the decisions cited by the learned counsel for the appellants, we hold that had the deceased been alive, he would have been earning Rs.62,000/- per month. The deceased was Senior Engineer in Hilman Capital Finance Ltd. His income shown in the pay slip for May 2016 was Rs.60,050/- Form 16AA for the period 1st April 2016 to 9th June 2016, show his income to be Rs. 1,47,923/-. However, we are in agreement with Sri Pawan Kumar Singh, learned counsel for the respondent that from the income, at least Income Tax should be deducted and, therefore, we consider the income of the deceased to be Rs.50,000/- per month. Addition of 30% toward future loss of income and multiplier of 12 granted by the Tribunal are just and proper, hence, are not disturbed. As far as deduction towards personal expenses of the deceased is concerned, we are in agreement with Sri Shreesh Srivastava, learned counsel for the appellants that it should be 1/4th reason being, parent of the deceased who were in their 90s has passed away during this interregnum period and unless proved otherwise, they are dependent on their son. Therefore, the deduction of 1/4th would be just and proper.

11. As far as amount under non-pecuniary heads is concerned, the appellants would be entitled to Rs.70,000/- plus 10% rise in every three years in view of the decision of the Apex Court in Pranay Sethi (Supra) and, therefore, we round up the figure to Rs.1,00,000/- under this head.

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

i. Monthly Income: Rs.50,000/-

ii. Percentage towards future prospects : 30% namely Rs.15,000/-

iii. Total income : Rs.50,000 +15,000 = Rs.65,000/-

iv. Income after deduction of 1/4th towards personal expenses : Rs.48,750/-

v. Annual income : Rs.48,750 x 12 = Rs.5,85,000/-

vi. Multiplier applicable : 12

vii. Loss of dependency: Rs.5,85,000 x 12 = Rs.70,20,000/-

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

ix. Total compensation : Rs.71,20,000/-

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

15. 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.

16. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442,** the order of investment be passed by Tribunal..

17. 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.

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 judgment of **A.V. Padma (supra).** The same is to be applied looking to the facts of each case.

19. 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.

20. This Court is thankful to both the counsels for getting this matter decided.

(2022)05ILR A876
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.03.2022

BEFORE

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

First Appeal From Order No. 4228 of 2012

Dharmendra Kumar ...Appellant
Versus
United India Insurance Co. Ltd. & Ors. ...Respondents

Counsel for the Appellant:
Sri Krishna Kumar Singh, Sri Mohd. Asim Zulfiquar

Counsel for the Respondents:
Sri Rajeev Ojha

A. Civil Law -Motor Vehicles Act, 1988 - Section 168 - Motor Accident claim - Quantum of Compensation - Injury case – Disability certificate issued on 20.11.2009 granted by Community Health Centre, Chandausi, District Moradabad showing disability to the tune of 45%. - second disability certificate issued on 16.02.2010 issued after conducting medical examination by a panel of doctors, signed and issued by Chief Medical Officer, Moradabad certifying disability of 45% of body as a whole which is same as shown in certificate issued earlier by Community Health Centre, Chandausi - tribunal discarded certificate of permanent disability on the ground that it is not signed by three doctors and it is not proved by calling the concerned doctors - Also tribunal held that there are two disability certificates on record and it cannot be possible to issue two medical disability certificates - Held - it is not the requirement of law that disability certificate should be proved by calling the Doctors issuing it or doctors on the board - disability certificate requires no oral testimony - merely on the ground that two certificates are issued, it cannot be said that these certificates are fake in absence of any evidence (Para 15 , 16, 17)

B. Civil Law - Motor Vehicles Act, 1988 - Section 168 - Motor Accident claim - Quantum of Compensation - Injury case - Chief Medical Officer, certified disability of 45% of body as a whole - Court assessed functional disability of appellant to the tune of 25% for the purpose of computation of compensation, 25% for permanent disability - court hold the income of the claimant at Rs.5,000/- p.m. because he was a mason - At the time of accident, the claimant was below 40 years of age, hence, 30% of the income be added for future loss of income - claimant was of 28 years of age, hence multiplier of 17 would be applicable - Rs.50,000 for pain and suffering - Amount under other non pecuniary head Rs 50,000 - - Insurance Company directed to deposit the amount along with additional amount with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited - amount be transmitted in the Saving Account of claimant in Nationalized Bank which would be furnished by claimant without F.D.R (Para 19, 21, 24)

Allowed. (E-5)

List of Cases cited:

1. Kajal Vs Jagdish Chand 2020 (0) AIJEL-SC 65725

2. Philips Vs Western Railway Co. (1874) 4QBD 406

3. H. West & Son Ltd. Vs Shephard 1963 2 WLR 1359

4. Rajkumar Vs Ajay Kumar ors. (2011) 1 SCC 343

5. K. Suresh Vs New India Assurance Company Ltd. & ors., (2012) 12 SCC 274

6. National Insurance Company Limited Vs Lavkush & anr., 2018 (1) T.A.C. 431

7. Dasharath Vs Alok Kumar Dubey & ors., F.A.F.O. No.233 of 2006

8. S. Kumar (dead) Vs United India AIR 2019 SC 3235 in the case of

9. Vimla Devi & ors. Vs National Insurance Co. Ltd. & anr., (2019) 2 SCC 186

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

11. Vimal Kanwar & ors. Vs. Kishore Dan & ors., AIR 2013 SC 3830

12. National 7 Insurance Co. Ltd. Vs Mannat Johal & ors., 2019 (2) T.A.C. 705 (S.C.)

13. A.V. Padma Vs Venugopal, Reported in 2012 (1) GLH (SC), 442

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

1. Heard Mohd. Asim Zulfiquar, learned counsel for the appellant; Shri Rajeev Ojha, learned counsel for the Insurance Company - respondents; and perused the record.

2. This appeal, at the behest of the claimants, challenges the judgment and order dated 05.09.2012 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.9, Moradabad (hereinafter referred to as 'Tribunal') in Motor Accident Claim Petition No.222 of 2009 awarding a sum of Rs.62,624/- with interest at the rate of 6% p.a. as compensation.

3. The brief facts as culled out from the record are that this claim petition is filed by the appellant/claimant for seeking compensation for injuries sustained by him in a road accident. Averments in claim petition are that on 28.9.2008 at 08.00 a.m., appellant was going from his Village Mundhapandey to Moradabad for the work of mason. When he alighted from the bus at Gulababadi, a Motorcycle bearing No.UP 21 G 7562 came from behind which was being driven rashly and negligently by its driver and hit the appellant. Appellant sustained serious injuries and he was admitted in District Hospital. Next day, he was shifted to Shreya Hospital, Moradabad. The appellant regained consciousness after 12 days. It is also averred in petition that the appellant sustained serious head injury due to which he became incapable for feeding his family. Respondents filed their respective written statements and opposed the facts mentioned in claim petition.

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 appellant submitted that learned tribunal has awarded compensation regarding some of the medical bills only. It is also submitted that due to the accident, the appellant sustained serious head injury for which grafting was done on his head and face due to which he was medically declared as 45% disabled. His face and head were also disfigured, but learned tribunal has not considered the disability and did not award even a single penny for disablement. It is next submitted that learned tribunal has also not awarded any sum for future loss of income because due to injuries sustained in accident, the

appellant is not able to work as before. It is further submitted that even the learned tribunal has not awarded any sum for pain and suffering.

6. Learned counsel for Insurance Company vehemently objected the submissions made by appellant and further submitted that learned tribunal has considered each and every aspect while awarding compensation and has awarded just compensation. Hence, the impugned judgment does not call for any interference by this Court.

7. We have perused the record and impugned judgment and find that learned tribunal has not followed the contours of just compensation in this matter.

8. Before computation of compensation, it is worth mentioning that the principles regarding the determination of just compensation, contemplated under the Motor Vehicle Act, 1988 (hereinafter referred to as "MV Act') are well settled. Injuries caused deprivation to the body, which entitles the claimant to claim damages. It is impossible to compensate human sufferings and personal deprivation with money. However, this is what the MV Act enjoins upon the courts to do. The Court has to make a judicious attempt to award damages so that the claimant or the victim may be compensated for the loss suffered by him. The damages may vary according to the gravity of the injuries sustained by the claimant in an accident. On account of injury, the claimant may suffer consequential loss such as loss of earnings as well as future earnings, medical expenditure, special diet and attendant charges etc. Victim may suffer non-pecuniary damages also in the form of loss of pleasure of life by particular limb of the body. In this way, damages can be pecuniary as well as non-pecuniary. The Court/Tribunal should keep in mind that compensation awarded must be just compensation because the damages assessed for personal injuries should be substantial to compensate the injured for the deprivation suffered by him throughout his life.

9. In **Kajal Vs. Jagdish Chand** reported in **2020 (0) AIJEL-SC 65725**, the Apex Court has quoted pertinent observations from a very old case **Philips Vs. Western Railway Company (1874) 4QBD 406** as under:

"You cannot put the plaintiff back again into his original position, but you must bring your reasonable common sense to bear, and you must always recollect that this is the only occasion on which compensation can be given. The plaintiff can never sue again for it. You have, therefore, now to give him compensation once and for all. He has done no wrong, he has suffered a wrong at the hands of the defendants and you must take care to give him full fair compensation for that which he has suffered." Besides, the Tribunals should always remember that the measures of damages in all these cases "should be such as to enable even a tortfeasor to say that he had amply atoned for his misadventure."

10. The Apex Court has further quoted pertinent observations from case titled H. West & Son Ltd. v. Shephard 1963 2 WLR 1359 as under:

"Money may be awarded so that something tangible may be procured to replace something else of the like nature which has been destroyed or lost. But

money cannot renew a physical frame that has been battered and shattered. All that Judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common assent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards.

In the same case Lord Devlin observed that the proper approach to the problem was to adopt a test as to what contemporary society would deem to be a fair sum, such as would allow the wrongdoer to "hold up his head among his neighbours and say with their approval that he has done the fair thing", which should be kept in mind by the court in determining compensation in personal injury cases."

11. Section 168 of MV Act stipulates that there should be grant of just compensation. Thus, it becomes challenge for a Court of law to determine just compensation which should not be bonanza for the claimant/victim and at the same time it should not be too meagre. The Apex Court in Rajkumar Vs Ajay Kumar and others (2011) 1 SCC 343 has laid down the heads under which compensation is to be awarded for personal injuries which is as follows:

"Pecuniary damages (Special damages)

(i) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii) (a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life.

12. In **K. Suresh v. New India Assurance Company Ltd. and Ors.,**

(2012) 12 SCC 274, Hon'ble the Apex Court has held as follows :

"2...There cannot be actual compensation for anguish of the heart or for mental tribulations. The quintessentiality lies in the pragmatic computation of the loss sustained which has to be in the realm of realistic approximation. Therefore, Section 168 of the Motor Vehicles Act, 1988 (for brevity the Act) stipulates that there should be grant of just compensation. Thus, it becomes a challenge for a court of law to determine just compensation which is neither a bonanza nor a windfall, and simultaneously, should not be a pittance."

13. We have perusal the Judgement of Division bench of this Court in the case of **National Insurance Company Limited Vs. Lavkush and another, 2018 (1) T.A.C. 431**, in which the concept of just compensation is discussed elaborately.

14. We now proceed to assess the compensation to be granted to appellant.

15. There is no doubt that the appellant sustained serious injuries in the accident. Learned tribunal has awarded only Rs.62,624/- as compensation which is regarding medical bills of the appellant. In this regard, learned tribunal has mentioned in impugned judgment that some of the bills are added twice by the appellant. Hence, we do not disturb the amount awarded by the tribunal for medical bills. The learned tribunal has discarded certificate of permanent disability on the ground that it is not signed by three doctors and it is not proved by calling the concerned doctors. This is not the requirement of law that disability certificate should be proved by calling the Doctors issuing it or doctors on the board.

16. We have fortified our view by the decision in ***Dasharath v. Alok Kumar Dubey and others, F.A.F.O. No.233 of 2006*** where the decision of the Apex Court has been relied and the Court has come to the conclusion that disability certificate requires no oral testimony and this was based on the decision of the Apex Court in **AIR 2019 SC 3235 in the case of S. Kumar (dead) v. United India and Vimla Devi and others Vs. National Insurance Company Limited and another, (2019) 2 SCC 186**

17. Learned tribunal has also lost sight of the fact that due to head injury, grafting was done on the head of the appellant and disfigurement of face is also there. In a case where such serious injuries are sustained by the appellant, learned tribunal has brushed aside the disability certificate in a very casual manner. It is worth mentioning that there is no evidence on record that the disability certificate was challenged by the respondents by producing any evidence to rebut the same. Learned tribunal has stated that there are two disability certificates on record and it cannot be possible to issue two medical disability certificates, but we are not convinced with this finding because the record goes to show that first certificate is granted by Community Health Centre, Chandausi, District Moradabad showing disability to the tune of 45%. It was issued on 20.11.2009 and after that second disability certificate was issued on 16.02.2010 and later disability certificate is issued by conducting medical examination by a panel of doctors. This certificate is finally signed and issued by Chief Medical Officer, Moradabad certifying disability of

45% of body as a whole which is same as shown in certificate issued earlier by Community Health Centre, Chandausi. Hence, merely on the ground that two certificates are issued, it cannot be said that these certificates are fake in absence of any evidence. The disability certificate shows disability regarding speech and hearing. The photographs annexed to the disability certificates clearly show the disfigurement of head/face of the appellant. Learned tribunal has erred in ignoring the disability certificate in this regard.

18. The judgment of the Apex Court in **Anita Sharma v. New India Assurance Co. Ltd. (2021), 1 SCC 171** would also apply to the facts of this case. The evidence of the witnesses has not been accepted which is also against the Judgment in the case of the Apex Court in **Vimla Devi and others Vs. National Insurance Company Limited and another, (2019) 2 SCC 186**

19. Hence we assess the functional disability of appellant to the tune of 25% for the purpose of computation of compensation. We hold the income of the appellant at Rs.5,000/- p.m. because he was a mason. At the time of accident, the appellant was below 40 years of age. In the judgment of **Vimal Kanwar and others v. Kishore Dan and others, AIR 2013 SC 3830**, the Hon'ble Apex Court held that it would be reasonable to say that a person who is self employed or is engaged on fixed wages will also get 30% increase in his total income for a period of time. Hence, 30% of the income shall be added for future loss of income. The appellant was of 28 years of age, hence multiplier of 17 would be applicable.

20. We are shocked to note that in spite of sustaining serious injuries by the appellant where he remained hospitalised for several days, learned tribunal has not awarded any amount under the head of pain and suffering and has not assigned any reasons.

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

i. Income : Rs.5,000/- p.m., it would be Rs.60,000/- p.a.

ii. Percentage towards future prospects : 30% = Rs.18,000/-

iii. Total Income : Rs.60,000+ Rs.18,000/- = Rs.78,000/-

vi. Multiplier applicable : 17

v. Total loss Rs.78,000 x 17 = Rs.13,26,000/-

vi. 25% for permanent disability: Rs.3,31,500/-

vii. Medical bills : Rs.62,624/- (as awarded by the tribunal)

viii. Amount under pain and suffering : Rs.50,000/-

ix. Amount under other non pecuniary head : 50,000/-

x. **Total compensation** (vi+vii+viii+ix): Rs. 3,31,500 + Rs. 62,624 + Rs. 50,000 + Rs.50,000 = **Rs.4,94,124/-**

22. 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."

23. 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 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.

24. The Tribunal shall follow the guidelines issued by the Apex Court in **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442,** as the purpose of keeping compensation is to safeguard the interest of the claimants. As 13 years have elapsed, once the monies are deposited in tribunal, the amount be transmitted in the Saving Account of claimant in Nationalized Bank which would be furnished by claimant without F.D.R.

25. We are thankful to learned counsels for the parties for ably assisting this Court.

26. Record be sent back to the tribunal below forthwith.

(2022)05ILR A882
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.04.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE PIYUSH AGRAWAL, J.

P.I.L. Civil No. 696 of 2022

Namaha ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
In Person, Sri Manindra Mohan Pandey

Counsel for the Respondents:
Sri Manish Goel (Addl. A.G.), Sri Vineet Pandey (C.S.C.), Sri A.K. Goyal (Addl. C.S.C.), Sri Ashutosh Mishra

(A) Public interest litigation is a weapon - used with great care and circumspection - Court has to be careful in lifting the veil and see what is the real objective behind - Chapter XXII of the High Court Rules - Sub-rule (3-A) of Rule 1 - petitioner in a public interest litigation, is required to disclose his credentials - Courts should prima facie verify the credentials of the petitioner before entertaining a PIL - Right to Information Act provides for complete remedies for redressal of grievance of any of the applicant regarding denial or furnishing of incomplete information. (Para - 12,14,15,20)

Petition filed in public interest – seeking direction to respondent No.2 - to disclose his full and actual name in public domain and produce all documents - for taking oath of office and secrecy under his real name and to refrain him from using the word 'Yogi' as title in his official communication - even failed to

furnish in response to an application under the Right to Information Act - petitioner divulged certain facts not in the petition. **(Para - 1,15,16,)**

HELD:- Petition totally misconceived, filed with ulterior motive by a political person, without disclosing his complete credentials and concealing material facts from the Court. **(Para - 21)**

Petition dismissed. (E-7)

List of Cases cited:-

1. Dattaraj Nathuji Thaware Vs St. of Mah. & ors. , (2005) 1 SCC 590

2. St. of Uttaranchal Vs Balwant Singh Chaufal & ors. , (2010) 3 SCC 402

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

1. The present petition has been filed in public interest, seeking direction to respondent No.2 to disclose his full and actual name in public domain and produce all documents thereto. Further direction sought to him, is for taking oath of office and secrecy under his real name and to refrain him from using the word 'Yogi' as title in his official communication.

2. The respondent No.2 has been impleaded as 'Adityanath', Member of Legislative Assembly, Gorakhpur (Urban)/Chief Minister of the State of Uttar Pradesh.

3. The petitioner, who appeared in person, referred to certain documents placed on record to show that respondent No.2 had been using different names at different places on different occasions. He referred to document at page 29 where his name was mentioned as 'Aditya Nath'. Reference was also made to another document at page 55 where his name was mentioned as 'Adityanath'. The same is in Hindi. It is the nomination form of respondent No.2 for election to 64 - Gorakhpur Parliamentary Constituency, as attested on April 22, 2014. It was claimed that the said document was downloaded by the petitioner from the website of the Lok Sabha. Further reference was made an affidavit sworn by respondent No.2, which is typed in Hindi, dated February 4, 2022 while filing his nomination paper for the State Assembly Election wherein his name is mentioned as 'Adityanath'. The same is in Hindi. While referring to the aforesaid documents, it was argued that four sets of nomination papers were filed by the same person and only one person contested the election.

4. Thereafter, reference was made to document at page 83 where the name of respondent No.2 was mentioned as 'Adityanath'. It is said to be downloaded from the website 'National Election Watch', which is claimed to be official website of the Election Commission of India. While referring to notice dated April 11, 2019 issued by the Election Commission of India to the respondent No.2, it was argued that while adding the word 'Yogi' with his name, even the Election Commission of India had mixed up with him, as his name is not Yogi Adityanath.

5. An application was filed to the State Government under the Right to Information Act for furnishing the requisite information, however, the same has not been furnished till date.

6. Referring to the aforesaid documents, it has been submitted that respondent No.2 is using different names at

different places. He had even taken oath while pronouncing his name differently. Hence, a direction is required to be issued to him for disclosing his correct name. More than 25 crore residents of the State of Uttar Pradesh want answer.

7. He further submitted that he had filed a writ petition for correction of the name of our country as mentioned in Article 1 of the Constitution of India, before Hon'ble the Supreme Court. Hence, he is a public spirited person and raises issues of public importance in Courts.

8. On the other hand, Mr. Manish Goel, learned Additional Advocate General appearing for respondent No.1, submitted that a perusal of reliefs prayed for in the writ petition, shows that the same are for direction against respondent No.2, impleaded as a private person. Hence, a writ petition will not be maintainable. He further submitted that the petitioner has not disclosed his credentials as required under sub-rule (3-A) of Rule 1 of Chapter XXII of the High Court Rules. While referring to the judgments of the Hon'ble Supreme Court in **Dattaraj Nathuji Thaware Vs. State of Maharashtra and others, (2005) 1 SCC 590 and State of Uttaranchal Vs. Balwant Singh Chaufal and others, (2010) 3 SCC 402,** it was submitted that the present petition having been filed for ulterior motive, deserves to be dismissed at the threshold, with special costs.

9. In response, the petitioner, who appears in person, submitted that Hon'ble the Supreme Court had sought his personal details while he had filed a writ petition in public interest there. Hence, he thought of asking for details of respondent No.2 as he is bound to disclose his identity. He further submitted that he was a candidate from Laxmi Nagar Assembly Constituency in the elections held in 2020 on a ticket of Lok Janshakti Party and secured about 70-80 votes. He further submitted that he was not aware of the Rules and Orders of this Court, which require disclosure of credentials of a person while filing public interest litigation. It was further claimed that he is illiterate as certified by the Election Commission of India and is not doing anything.

10. He claimed that for filing writ petition before the Hon'ble Supreme Court with reference to the name of our country as mentioned in Article 1 of the Constitution of India, he had read 18 different copies of the Constitution to make out his case. During the course of hearing, he was addressing arguments in English. He could very well go through the provisions of the Constitution, a copy of which he was carrying with himself but, still, he claimed himself to be illiterate person.

11. Heard learned counsel for the parties and perused the paper book.

12. Sub-rule (3-A) of Rule 1 of Chapter XXII of the High Court Rules, in term of which a petitioner in a public interest litigation, is required to disclose his credentials, reads as under:

"(3-A) In addition to satisfying the requirements of the other rules in this chapter, the petitioner seeking to file a Public Interest Litigation, should precisely and specifically state, in the affidavit to be sworn by him giving his credentials, the public cause he is seeking to espouse; that he has no personal or private interest in the matter; that there is no authoritative pronouncement by the Supreme Court or

High Court on the question raised; and that the result of the litigation will not lead to any undue gain to himself or anyone associated with him, or any undue loss to any person, body of persons or the State."

13. In the case in hand, all what is claimed is that the petitioner is a social activist and he has no personal or private interest in the matter.

14. Hon'ble the Supreme Court in **Dattaraj Nathuji Thaware's case (supra),** opined that public interest litigation is a weapon to be used with great care and circumspection. The Court has to be careful in lifting the veil and see what is the real objective behind. The process should not be allowed to be misused. Many petitions are filed just with a view to gain cheap publicity. Paragraph 12 thereof is extracted below:-

"12. Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity- seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not be publicity-oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of the public, who approaches the court is acting bona fide and not for personal gain or private motive or political motivation or other oblique considerations. The Court must not allow its process to be abused for oblique considerations by masked phantoms who monitor at times from behind. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives, and try to bargain for a good deal as well to enrich themselves. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busybodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs."

15. The issue was further examined by Hon'ble the Supreme Court in **Balwant Singh Chaufal and others' case (supra)**. Certain directions have been issued to preserve purity and sanctity of public interest litigation. Paragraph 181 thereof, reads as under:-

"181. We have carefully considered the facts of the present case. We have also examined the law declared by this court and other courts in a number of judgments. In order to preserve the purity and sanctity of the PIL, it has become imperative to issue the following directions:-

(1) The courts must encourage genuine and bona fide PIL and effectively discourage and curb the PIL filed for extraneous considerations.

(2) Instead of every individual judge devising his own procedure for dealing with the public interest litigation, it would be appropriate for each High Court to properly formulate rules for encouraging the genuine PIL and discouraging the PIL filed with oblique motives. Consequently, we request that the High Courts who have not yet framed the rules, should frame the

rules within three months. The Registrar General of each High Court is directed to ensure that a copy of the rules prepared by the High Court is sent to the Secretary General of this court immediately thereafter.

(3) The Courts should prima facie verify the credentials of the petitioner before entertaining a PIL.

(4) The Courts should be prima facie satisfied regarding the correctness of the contents of the petition before entertaining a PIL.

(5) The Courts should be fully satisfied that substantial public interest is involved before entertaining the petition.

(6) The Courts should ensure that the petition which involves larger public interest, gravity and urgency must be given priority over other petitions.

(7) The Courts before entertaining the PIL should ensure that the PIL is aimed at redressal of genuine public harm or public injury. The Court should also ensure that there is no personal gain, private motive or oblique motive behind filing the public interest litigation.

(8) The Courts should also ensure that the petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous considerations."

16. At the time of hearing, the petitioner had divulged certain more facts which were not there in the petition, namely, he claimed that he had contested the Assembly election in Delhi in the year 2020 on a ticket of Lok Janshakti Party and secured 70-80 votes. This fact was concealed from this Court. He being a political person, deliberately chose to conceal his identity while filing the writ petition, apparently with some ulterior motive or cheap publicity.

17. Though, he had given his address of Delhi in the petition, however, at the time of hearing, he stated that he belongs to Uttar Pradesh. Again an effort to mislead the Court.

18. Further, there was a smart answer given by him about his educational qualification. He claimed that he had been certified to be an illiterate person by the Election Commission of India, a fact which was belied on the face of it from the conduct and presentation of the case by the petitioner. He was arguing his case in English. He was carrying copy of the Constitution of India and could read the same very well. Still, he claimed that he had been certified to be illiterate by the Election Commission of India, apparently on the basis of some wrong information furnished by him.

19. From the documents and pleadings in the writ petition, he could not make out any case that is sought to be projected. Rather efforts seem to be for a roving enquiry into certain non-existent facts. Two documents were referred to at pages 36 and 83. The petitioner claimed he had downloaded these from the website of the Election Commission of India, which mention on the top "National Election Watch'. However, as referred to by the learned counsel for the respondents, the same is a website which is managed by an Association for Democratic Reforms, some

private persons/NGO. Hence, any information uploaded thereon, cannot be used against anyone.

20. In the nomination paper filed by respondent No.2 , the name has been correctly mentioned. There is nothing on record to suggest what is sought to be argued. The only prayer made is that respondent No.2 should be asked to furnish the information which he had even failed to furnish in response to an application filed by the petitioner under the Right to Information Act. We may only add here that the Right to Information Act provides for complete remedies for redressal of grievance of any of the applicant regarding denial or furnishing of incomplete information.

21. For the reasons mentioned above, we find this petition to be totally misconceived, filed with ulterior motive by a political person, without disclosing his complete credentials and concealing material facts from the Court. Hence, the same is **dismissed.** To discourage filing of such frivolous petitions, in our opinion, the petitioner deserves to be burdened with cost of ₹1,00,000/-. The same is directed to be deposited by him within a period of six weeks with the Viklang Kendra, Bharadwaj Ashram, Jawaharlal Nehru Road, Muir Road, Prayagraj - 211002.

22. A copy of this order be sent to the aforesaid Viklang Kendra for information and availing appropriate remedy in case the aforesaid amount is not deposited by the petitioner within the time permitted.

(2022)05ILR A887

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 29.03.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

THE HON'BLE JAYANT BANERJI, J.

Writ Tax No. 449 of 2022

Buddha Sortex Rice Industries Pvt. Ltd., Deoria ...Petitioner

Versus

Principal Commissioner of Income Tax, Gorakhpur & Ors. ...Respondents

Counsel for the Petitioner:
Sri Parv Agarwal

Counsel for the Respondents:
Sri Gaurav Mahajan

A. Tax Law - The Income Tax Act, 1961 - Section 148 - Normally the period of limitation which is available to the assessing authority is four years i.e., till 31.03.2020. The aforesaid period was extended for one year by the Ordinance, 2020 and notification issued thereafter. Thus, the normal period of limitation available to the Assessing Authority on the facts of the present case was till 31.03.2021. The impugned notice issued by the Assessing Authority is wholly valid and the same has been issued well within the period of limitation. (Para 9)

Writ Petition Dismissed. (E-10)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Jayant Banerji, J.)

1. Heard Sri Parv Agarwal, learned counsel for the petitioner and Sri Gaurav Mahajan, learned Senior Standing Counsel for the Income Tax Department.

2. This writ petition has been filed praying for the following reliefs:-

"(a) Issue a writ, order or direction in the nature of certiorari quashing the notice dated 30.03.2021 issued by the respondent no.2 under Section 148 of the Act as also the order dated 28.02.2022 passed by6 respondent no.3, rejecting the objections filed by the petitioner against the 'reasons to believe' for assumption of jurisdiction against the petitioner for th Assessment Year 2015-16.

(b) Issue a writ, order or direction in the nature of mandamus restraining the respondents from proceeding with the reassessment proceedings against the petitioner for the AY-2015-16."

3. The only argument advanced by the learned counsel for the petitioner before us is that the normal period of limitation for issuing notice under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as the Act of 1961) would be six years where escapement of income from tax is one lacs or more. In this regard, he referred to the provision of Section 149(1) (b) of the Act of 1961. He further submits that since prior approval of the Principal Commissioner in terms of provisions of Section 151 of the Act of 1961 has not been obtained for issuance of notice under Section 148(1) of the Act of 1961, therefore, issuance of notice after expiry of four years but before expiry of six years, the notice is bad and without jurisdiction. No other arguments have been made before us by the learned counsel for the petitioner.

4. Sri Gaurav Mahajan, learned Senior Standing Counsel appearing for the Income Tax Department submits that the normal period of limitation for re-opening as provided under Section 149(1) (a) of the Act of 1961 is four years in all cases but where four years have expired but not six years and escaped assessment amounts to or likely to amount to Rs. one lac or more for that year, then still notice may be issued but after obtaining approval of the Principal Commissioner as per the provisions of Section 151 of the Act of 1961.

5. Since, in the present set of fact, the normal period of limitation for re-opening for the assessment year 2015-2016 was available till 31.3.2020 which was extended by the Taxation and other Law (Relaxation of Certain Provisions) Ordinance, 2020 and the notification issued thereunder, taking into the situation created due to pandemic Covid-19, the normal period of limitation was available till 31.3.2021. The impugned notice has been issued prior to the expiry of normal period of limitation, therefore, the impugned notice does not suffer from any infirmity and is valid.

6. We have carefully considered the submissions of the learned counsel for the parties.

7. Section 149 of the Act of 1961 provides for limitation for issuance of notice under Section 148. Section 149 as is extended prior to amendment of Finance Act, 2021 is reproduced below:

"149. Time limit for notice*- (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 (b) or clause (c).

(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,

(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."

8. The provisions of Section 149(1) of the Act of 1961 are plain and unambiguous. Bare reading of clause (a) of sub-section (1) of Section 149 leaves no manner of doubt that normal period of limitation for issuance of notice under Section 148 of the Act of 1961 is four years from the end of the relevant assessment year, unless the case falls under clause (b) or clause (c). Thus, after normal period of limitation of four years has expired, larger period of limitation under clause (b) or (c) of sub-section (1) of Section 149 of the Act of 1961 may be invoked, if circumstances so exist.

9. In the present set of fact, the normal period of limitation of four years was available to the Assessing Authority till 31.3.2020 which was extended for one year by the aforesaid Ordinance, 2020 and the notification issued thereunder. Thus, the normal period of limitation available to the Assessing Authority on the facts of the present case was till 31.3.2021. The impugned notice under Section 148 of the Act, 1961 was issued by the Assessing Authority on 30.3.2021 which does not require any prior approval of the Principal Commissioner in terms of the then existing provisions of Section 151 of the Act, 1961. Therefore, the impugned notice under Section 148 of the Act of 1961 issued by the Assessing Authority is wholly valid and same has been issued well within the period of limitation.

10. For all the reasons aforestated, we do not find any merit in this writ petition. Consequently, the writ petition fails and is hereby **dismissed.**

(2022)05ILR A889
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ Tax No. 564 of 2022

Pushpa Yadav ...Petitioner
Versus
Income Tax Officer, Ghaziabad & Ors. ...Respondents

Counsel for the Petitioner:
Sri Mahandra Pratap, Sri Anurag Yadav, Sri R.R. Agarwal (Sr. Advocate)

Counsel for the Respondents:
A.S.G.I., Sri Gaurav Mahajan, Sri Gopal Verma, Sri Krishna Agarwal

A. Tax Law - Income Tax Act, 1961 - Section 148 - The Court did not find any discrepancy in the reason to believe recorded by the authority in notice under Section 148 of the Act. The authority proceeded with the information received from the Investigation Wing and after Independent verification, he came to the conclusion the assessee has made huge cash. (Para 11)

Writ Rejected. (E-10)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.

&
Hon'ble Jayant Banerji, J.)

1. Heard Shri R.R. Agarwal, learned Senior Advocate assisted by Shri Mahendra Pratap and Shri Anurag Yadav, learned counsel for the petitioner, Shri Krishna Agarwal, learned counsel for the respondent nos.1 and 2/Income Tax Department and Shri Gopal Verma, learned counsel for the respondent no.3.

2. This writ petition has been filed praying for the following reliefs:-

"(i) Issue a writ, order or direction in the nature of certiorari quashing the order dated 03.02.2022 passed by the National Faceless Assessment Centre Delhi respondent no.2 rejecting the objection of the petitioner to the reasons recorded for re-opening of the assessment for A.Y. 2016-17 (Annexure-5 to the writ petition).

(ii) Issue a writ, order or direction in the nature of certiorari quashing the notice issued under section 148 of the Income Tax Act for A.Y. 2016-17 dated 32.03.2021 issued by the Income Tax Officer (1), Ward 2(2)(1) Ghaziabad, respondent no.1 (Annexure-2 to the writ petition)."

3. Learned Senior Advocate for the petitioner submits that the impugned notice dated 30.03.2021 under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as the 'Act, 1961') has been issued to the petitioner by the respondent no.1 on the basis of certain information received on account of the search conducted in the premises of M/s Celebrations City Projects (P) Ltd. Therefore, at best, the proceedings against the petitioner-assessee may be initiated in accordance with the provisions of Section 153C of the Act, 1961 which starts with non-obstante clause. He, therefore, submits that the impugned notice under Section 148 of the Act, 1961 and the impugned order dated 03.02.2022 rejecting the objection of the petitioner, are wholly unsustainable and deserve to be quashed and the entire proceeding under Section 148 is without jurisdiction.

4. Learned counsel for the respondents have supported the impugned notice and the order.

5. We have carefully considered the submissions of learned counsels for the parties and perused the records of the writ petition.

6. Reason supplied by the assessing authority to the petitioner for initiating proceedings under Section 147/148 of the Act, 1961, is reproduced below:-

"It was informed by DDIT (Inv.)-1(3), Ghaziabad vide letter dated 26.03.2021 dated during the enquiry proceedings, it was found that that assessee has made cash amount of Rs. 1,18,84,000/- for purchase of units/shops/space etc. in Red Mall, Ghaziabad to M/s Celebration City Projects Pvt Ltd. during the F.Y. 2015-16.

On perusal of the record it is seen that the assessee has filed ITR for A.Y. 2016-17 on 28.07.2016 declaring income of Rs.7,32,670/-. As per record the case has not been assessed u/s 143(3) of the Income Tax Act, 1961.

I have perused the record **in light of the above information and through independent verification of return of the**

assessee with the perusal of the statement recorded on oath came to independent conclusion that the assessee has made huge cash of Rs.1,18,84,000/- for purchase of units/shop etc, in Red Mall to M/s Celebration City Projects Pvt Ltd. during the F.Y. 2015-16 1.e. A.Y. 2016-17. Hence, there is reason to believe that there is escapement of income from the returned income of the assessee. I have reason to believe that there is escapement of more than Rs. 1,18,84,000/- and further additional income and any other income which can come in the the knowledge subsequently in the course of proceedings u/s 147(b), therefore the issue of notice u/s 148 of the income tax act, 1961 is necessary in this case. Hence, the case of Smit Pushpa Yadav is being proposed for approval under the provision of section 151(1) of the I.T. Act, 1961."

(emphasis supplied)

7. While rejecting the objection of the petitioner by the impugned order dated 03.02.2022, the respondent no.1 has observed in paragraphs 2, 5.2.2 and 5.3.2. as under:-

"2. In the case of the assessee, **information has been received** from the DDIT (Inv)-(1)(3) by letter dated 26/3/2021 **that during the course of enquiry, it was found that the assessee has made payment by cash of an amount of Rs.1,18,84,000/-, for purchase of units/shops/space in the Red Mall, Ghaziabad** to the seller M/s Celebration City Projects P Ltd. during the F.Y 2015-16.

The A.O has stated that as per details available, **the assessee has filed ITR for A.Y 2016-17 on 28/07/2016 declaring income of Rs.7,32,670/-, which was processed u/s 143(1) of the Act. The A.O has perused the available records of the assessee in the light of the information received from the Investigation Wing and through independent verification of the return of the assessee with the perusal of the statement recorded on oath, came to the conclusion that the assessee has made the cash payment of Rs.1,18,84,000/- for purchase of units/shops in Red Mall to the seller M/s Celebration City Projects P Ltd. during the FY 2015-16.**

The A.O has therefore, analysed the information with the return of income filed by the assessee for the relevant period, the source of cash deposits was not disclosed in the return of income filed, which is chargeable to tax as discussed in paragraph above and the assessee was assessable under the Act. In view of the above facts, the A.O had reason to believe that the assessee has not disclosed fully and truly all material facts for the year under consideration and the said cash deposits of Rs 22,85,000/- is the income of the assessee that has escaped assessment within the meaning of sec. 147 of the Income Tax Act, 1961.

Accordingly, the assessment was re-opened by issue of notice u/s.148 of the I.T. Act dated 30/3/2021, after taking required approval from the competent authority in the Department as per the provisions of section 151 of the Income Tax Act, 1961.

.....

5.2.2. The arguments of the assessee are unfounded. **In the reasons recorded by the A.O, the A.O has clearly**

specified that he has analysed the information with the return of income filed by the assessee for the relevant period and found that the source of cash deposits was not disclosed in the return of income filed. In view of the above facts, the A.O had reason to believe that the assessee has not disclosed fully and truly all material facts for the year under consideration and the said cash payment of Rs.1,18,84,000/- made by the assessee is the income of the assessee that has escaped assessment within the meaning of sec. 147 of the Income Tax Act, 1961.

.....

5.3.2 5.The assessees's contention is entirely incorrect. **In the assessee's case, there is reliable information from the Investigation** Wing gathered during the course of search and survey operations in the case of M/s Celebration City Projects P Ltd. that payment in cash has been received from the assessee for sale of units/shop rooms from M/s Celebration City Projects P Ltd. **The enquiry report received from the Investigation Wing from the DDIT (Inv). (1)(3) by letter dated 26/3/2021 giving the details of the transaction was analysed with the return of income filed by the assessee. The A.O then arrived at an independent opinion of income having escaped assessment within the meaning of section 147 of the I.T. Act in the case of the assessee.**

There are broadly two limitations on the power of the revenue to reopen assessments - (i) there must be some tangible material based on which the reopening is being undertaken which leads to a reason to believe that there has been escapement of income and (ii) the reopening should not be a "mere change of opinion. Furthermsore, information from the Investigation Wing, can be basis for issue of notice u/s.148, as held in the following judicial rulings -

1. AGR Investment Ltd. Vs. Addl.CIT&Anr. (Delhi) 333 ITR 146.

2. Shalimar Buildcon (P) Ltd. V/s. ITO ITAT (Jaipur), 136 TTJ 701.

(emphasis supplied)

8. Section 153C(1) of the Act, 1961 reads as under :-

"153C. (1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that,-

(a) any money, bullion, jewellery or other valuable article or thing, seized or requisitioned, belongs to; or

(b) any books of account or documents, seized or requisitioned, pertains or pertain to, or any information contained therein, relates to,

a person other than the person referred to in section 153A, then, the books of account or documents or assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against each such other person and issue notice and assess or reassess the income of the other person in accordance with the provisions of section 153A, if, that Assessing Officer is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person for six assessment years immediately preceding the assessment year relevant to the previous

year in which search is conducted or requisition is made and for the relevant assessment year or years referred to in sub-section (1) of section 153A:

Provided that in case of such other person, the reference to the date of initiation of the search under section 132 or making of requisition under section 132A in the second proviso to sub-section (1) of section 153A shall be construed as reference to the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person :

Provided further that the Central Government may by rules made by it and published in the Official Gazette, specify the class or classes of cases in respect of such other person, in which the Assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and for the relevant assessment year or years as referred to in sub-section (1) of section 153A except in case where any assessment or reassessment has abated."

9. From the reason recorded by the assessing authority, it is evident that the assessing authority was having some information from the DDT (Inv.)-1(3), Ghaziabad vide letter dated 26.03.2021. He independently verified the information received from the return of income of the assessee and also perused the statement recorded on oath and then he came to an independent conclusion that the assessee had made huge cash of Rs.1,18,84,000/- for purchase of units/shop etc. in Red Mall to M/s Celebrations City Projects (P) Ltd. during the Financial Year 2015-16. The reason to believe recorded by the assessing authority is not on the basis of any books of account or document seized by Income Tax Authorities in the search conducted on M/s Celebrations City Projects (P) Ltd.

10. Even if it is presumed that copies of certain statements on oath recorded during the course of search by the Investigating Wing, were forwarded to the respondent no.1 alongwith the report, it cannot be said to be either the books of account or document seized so as to fall it within the ambit of clause (b) of sub-section (1) of Section 153C of the Act, 1961.

11. Perusal of the reason recorded by the assessing authority as aforequoted reveals that the assessing authority has proceeded on the basis of certain information received from the Investigating Wing and after independent verification, he came to the conclusion that the assessee had made huge cash of Rs.1,18,84,000/-, which caused him to issue notice to the petitioner under Section 148 of the Act, 1961. It is also admitted case of the petitioner that no assessment was made by the assessing authority for the Assessment Year 2016-17. As per Explanation 2(b) appended to Section 147 of the Act, 1961, if a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the assessing officer that the assessee has **understated the income** or has claimed excessive loss, deduction, allowance or relief in the return; then it shall be **deemed** to be a case where income chargeable to tax has escaped assessment.

12. In view of the above discussions, we find that neither the impugned notice issued by the respondent no.1 under

Section 148 of the Act, 1961 suffers from any illegality nor the impugned order rejecting the objection of the petitioner suffers from any infirmity, which, under the circumstances, cannot be interfered with.

13. For all the reasons aforestated, we find that the writ petition has no substance and is, therefore, **dismissed.**

14. It shall be open for the assessing authority to proceed with the reassessment proceedings in accordance with law, without being influenced by any of the observations made in the body of this judgment

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(2022)05ILR A894

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 04.05.2022

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

Writ Tax No. 902 of 2021

M/S Brij Bihari Singh ...Petitioner

Versus

Commissioner Commercial Tax, Lko & Anr. ...Respondents

Counsel for the Petitioner:
Ms. Pooja Talwar

Counsel for the Respondents:
C.S.C.

A. Tax Law - Period of limitation - U.P. G.S.T. Act, 2017 - Section 107 - U.P. G.S.T. Rules, 2017 - Rue 108 - The statutory right of appeal is not an illusory remedy given to the assessee or a person aggrieved. The appeal forum must be seen to exist and be freely available to the person seeing to approach it without any obstruction. (Para 11)

B. In the present case, the petitioner was disabled from filling appeal (electronically) through the prescribed mode against the order dated 28.02.2019 for reasons attributable to the GSTN authority and not for reasons attributable to the petitioner. The technical glitches were resolved by the GSTN authority on 17.09.2021, the period of limitation to file an appeal started running from that date only. The period starting from 28.02.02019 to 17.09.2021 shall remain suspended. (Para 10, 12 and 13) (E-10)

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1 . Heard Ms. Pooja Talwar, learned counsel for the assessee and learned Standing Counsel for the revenue.

2. Challenge has been raised to the order passed by the Additional Commissioner, Grade-2 (Appeal), Commercial Tax, Sonbhadra dated 12.10.2021 in Appeal No. GST - 47 of 2021 for the period 2019-20. By that order, that Appeal Authority has rejected as time barred the appeal filed by the petitioner against the order dated 28.02.2019, passed by the Proper Officer, cancelling the petitioner's registration, under Section 29 of the U.P. GST Act, 2017 (hereinafter referred to as the Act).

3. Having heard learned counsel for the parties and having perused the record, it transpires, the petitioner's registration under the Act was sought to be cancelled vide notice dated 28.02.2019. The petitioner submitted his reply thereto on 12.03.2019. However, in absence of the petitioner, the said registration was cancelled by an ex parte order dated 09.08.2019. Here, it is not in dispute that the petitioner was served with a copy of that order at the relevant time through the GSTN portal.

4. It is the grievance of the petitioner, despite best efforts, he could not file an appeal against that order for reason of continued malfunctioning/errors in the functioning of the GSTN portal (through which the appeal was to be filed). Evidence was led by the petitioner to establish the continued difficulties faced by him. Thus, print of screen shots (of certain dates when the petitioner attempted to file that appeal), were brought on record in the first appeal, eventually filed on 20.09.2021.

5. The error arising in the working of the GSTN portal was resolved on 17.09.2021. Thereupon, the petitioner received the Ticket No. G2021090862061. The petitioner further received an e-mail from the GSTN authorities on 20.09.2021, informing him of the resolution made to the error in the working of the GSTN portal. The petitioner instituted the appeal through the GSTN portal on 20.09.2021.

6. At that stage, perhaps because the resolution offered by the GSTN portal, the order dated 28.02.2019 came to be displayed (again) on the GSTN portal, with a fresh Reference No. ZA090819050330H with date 17.09.2021. A copy of the same has been filed as Annexure No. 5 to the writ petition.

7. Whatever be the exact nature of communication sought to be made by the GSTN portal, it cannot be disputed that there exists clear evidence of admission made by the GSTN authority of difficulty faced by the petitioner in instituting his appeal against the order dated 28.02.2019, within the normal period of limitation, computed from the date of that order. Also, there is clear evidence of the said difficulty having been first resolved on 17.09.2021, well after expiry of the statutory period of limitation and the extended period of limitation, to file the appeal under Section 107 of the Act.

8. For ready reference, relevant extract of Section 107 of the Act reads as below:

"Section 107. Appeals to Appellate Authority

(1) Any person aggrieved by any decision or order passed under this Act or the Central Goods and Services Tax Act, 2017 (Act No. 12 of 2017) by an adjudicating authority may appeal to such Appellate Authority as may be prescribed within three months from the date on which the said decision or order is communicated to such person.

(2) The Commissioner may, on his own motion, or upon request from the Commissioner of central tax, call for and examine the record of any proceeding in which an adjudicating authority has passed any decision or order under this Act or the Central Goods and Services Tax Act, 2017 (Act No. 12 of 2017) for the purpose of satisfying himself as to the legality or propriety of the said decision or order and may, by order, direct any officer subordinate to him to apply to the Appellate Authority within six months from the date of communication of the said decision or order for the determination of such points arising out of the said decision or order as may be specified by the Commissioner in his order.

(3) Where, in pursuance of an order under sub-section (2), the authorised officer makes an application to the Appellate Authority, such application shall be dealt with by the Appellate Authority as

if it were an appeal made against the decision or order of the adjudicating authority and such authorised officer were an appellant and the provisions of this Act relating to appeals shall apply to such application.

(4) The Appellate Authority may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months or six months, as the case may be, allow it to be presented within a further period of one month."

9. Also, Rule 108 of the UP GST Rules, 2017 pertaining to procedure to file appeal reads as below:

*"**108. Appeal to the Appellate Authority.**- (1) An appeal to the Appellate Authority under sub-section (1) of section 107 shall be filed in **FORM GST APL-01,** alongwith the relevant documents, either electronically or otherwise as may be notified by the Commissioner, and a provisional acknowledgement shall be issued to the appellant immediately.*

*(2) The grounds of appeal and the form of verification as contained in **FORM GST APL-01** shall be signed in the manner specified in rule 26.*

*(3) A certified copy of the decision or order appealed against shall be submitted within seven days of filing the appeal under sub-rule (1) and a final acknowledgement, indicating appeal number shall be issued thereafter in F**ORM GST APL-02** by the Appellate Authority or an officer authorised by him in this behalf:*

*Provided that where the certified copy of the decision or order is submitted within seven days from the date of filing the **FORM GST APL-01**, the date of filing of the appeal shall be the date of the issue of the provisional acknowledgement and where the said copy is submitted after seven days, the date of filing of the appeal shall be the date of the submission of such copy.*

Explanation.? For the provisions of this rule, the appeal shall be treated as filed only when the final acknowledgement, indicating the appeal number, is issued."

10. Since the petitioner had been disabled from filing appeal (electronically) through the prescribed mode, against the order dated 28.02.2019, for reasons attributable solely to the GSTN authority and not for reasons attributable to the petitioner, it has to be assumed, for the limited purpose of the dispute at hand that the forum of appeal was first made available to the petitioner on 17.09.2021, and not earlier. It is so because 17.09.2021 was the date when GSTN authority first resolved the technical issues that had restrained or prevented the petitioner from approaching the appeal authority to file his appeal, against the order dated 28.02.2019.

11. The statutory right of appeal is not an illusory remedy given to the assessee or a person aggrieved. It is an effective and real remedy granted within the structure of the statute to allow for redressal of genuine grievances. Therefore, the appeal forum (wherever provided) must be seen to exist and be freely available to the person seeking to approach it. There must exist no obstruction to access it within time and opportunity granted by the statute, to institute the appeal, before that authority.

12. In the present case, on a technical construction of the statute, the period of

limitation to file an appeal against the order dated 28.02.2019 may appear to run from the date of the order being communicated to the petitioner i.e. 28.02.2019 itself. At the same time, that construction has to be rejected. It is so because, against the order dated 17.09.2021, no appeal could have been filed by the petitioner as it remained completely prevented/obstructed from filing such appeal, owing to technical glitches suffered by the GSTN portal on which that appeal may have been filed.

13. In face of clear evidence existing on record that such technical glitches were resolved by the GSTN authority on 17.09.2021, the period of limitation to file appeal started running from that date only. For the period 28.02.2019 to 17.09.2021, the period of limitation to file the appeal must always be deemed to have remained suspended for reason of appeal forum being not made available for filing of appeal by the petitioner, through prescribed mode.

14. Accordingly, the appeal was filed by the assessee on 20.09.2021, within time. The Appeal Authority has completely erred in rejecting the appeal as time barred. Accordingly, the present writ petition is **allowed.**

15. The order dated 12.10.2021 is quashed. The matter is remitted to the Appeal Authority to hear and decide the appeal on merits, treating the same to have been filed within time.

16. Since the matter has remained pending for very long, it is expected that the Appeal Authority shall take up the appeal proceedings on priority and hear and decide the same as expeditiously as possible, preferably within a period of three months from the date of production of a copy of this order.

(2022)05ILR A897
APPELLATE JURISDICTION
CIVIL SIDE
DATED ALLAHABAD 11.03.2022

BEFORE

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

Special Appeal No. 296 of 2019
with other connected cases

Vipin Kumar & Ors. ...Appellants
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Appellants
Sri Neeraj Shukla, Sri Bhagwan Dutt Pandey

Counsel for the Respondents:
C.S.C., Sri Rajesh Yadav

A. Service Law - U.P. Basic Education (Teachers) Services Rules, 1981 - Party is not allowed to approbate and reprobate at the same time. The appellants who had secured benefit under the transfer policy, voluntarily giving up rights, cannot turn around and regain what they had given up. (Para 13)

The appellants want to retain the benefit of transfer that they have secured in terms of the Government Order dated 23.06.2016 to the districts of their choice, they cannot be permitted to take the benefit and rid themselves of the disadvantage that is coupled with it. (Para 16)

Special Appeal Rejected. (E-10)

List of Cases cited:

1. St. of Punj. & ors. Vs Dhanjit Singh Sandhu (2014) 15 SCC 144 *(followed)*

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

&
Hon'ble J.J. Munir, J.)

1. This judgment will dispose of Special Appeal Nos. 296 to 298, 300, 302, 303 and 853 of 2019 and Special Appeal Defective No. 905 of 2020.

2. Special Appeal No. 296 of 2019 is directed against the order passed by the learned Single Judge in Writ - A No. 22896 of 2018, dismissing the writ petition. This appeal has been preferred by ten out of the twelve writ petitioners, who failed before the learned Single Judge. This appeal and the other seven Appeals, referred to hereinabove, raise common questions of fact and law and are, therefore, being disposed of by a common judgment.

3. Special Appeal No. 296 of 2019 shall be treated as the leading case.

4. Heard learned counsel for the parties and perused the relevant referred record.

5. The question involved in these appeals is :

"Whether an employee, who elects to avail of a benefit under an employer's concession, to which he is not entitled as of right under the Service Rules subject to specified disadvantages, can later on reprobate to retain the benefit, but forsake the coupled disadvantage?"

6. The appellants in all these appeals were appointed as Assistant Teachers in Primary *Pathshalas*, established and run under the Uttar Pradesh Basic Education Act, 1972 by the Uttar Pradesh Basic Education Board (for short, 'the Board'). They were appointed on various dates, which find mention in the different writ petitions, giving rise to these Appeals. The appointments and conditions of services of each of the appellants are governed by the Uttar Pradesh Basic Education (Teachers) Services Rules, 1981 (for short, 'the Rules of 1981'). It is common ground in these appeals that the appellants were all promoted to the post of Headmaster of Primary *Pathshala* or Assistant Teacher, Senior Basic School (Junior High School).

7. On 23.06.2016, a transfer policy was introduced by the State Government, permitting transfer of teachers to the districts of their choice. It is not in dispute that the cadre of teachers, governed by the Rules of 1981, is a cadre based on the local area, where the appointment of a teacher is made. The relevant Rules in the Rules of 1981, that have bearing on the issue, are detailed hereinafter. Rule 4(1) of the Rules of 1981 provides:

"**4. Strength of the Service.**- (1) There shall be separate cadres of service under these rules for each local area.

(2) .....

Provided that the appointing authority may leave unfilled or the Board may hold in abeyance and post or class of posts without thereby entitling any person to compensation:

Provided further that the Board may, with the previous approval of the State Government, create from lime to time such number of temporary posts as it may deem fit."

"Local Area" is defined under rule 2(i) in following words:-

"2. Definitions:- (i) "Local Area" means the area over which a local body exercises jurisdiction;"

The "Appointing Authority' and the "local area' are defined by Section 2(1)(b) and 2(1)(i) of the Rules of 1981 as follows:

"2. Definitions. - (1) In these rules, unless the context otherwise requires,--

(a) x x x x

(b) "Appointing Authority" in relation to teachers referred to in Rule 3 means the District Basic Education Officer;

(c) x x x x

(d) x x x x

(e) x x x x

(f) x x x x

(g) x x x x

(h) x x x x

(i) "Local Area" means the area over which a local body exercises jurisdiction;"

Rule 21 of the Rules of 1981 is about the procedure for transfer, which is extracted below:

"21. Procedure for transfer - There shall be no transfer of any teacher from the rural local area to an urban local area or vice versa or from one urban local area to another of the same district or from local area of one district to that of another district except on the request of or with the consent of the teacher himself and in either case approval of the Board shall be necessary."

8. What appears from the conditions of service of teachers governed by the Rules of 1981 is that an Assistant Teacher of Primary Pathshala, who is promoted to the post of Headmaster, Primary Pathshala or Assistant Teacher, Senior Basic School, has no right to be transferred from one local area to another, or one district to another, except on his request or consent, and in either case, with the approval of the Board.

9. The Government Order dated 23.06.2016, under which the appellants in all the appeals applied for transfer, was in the nature of a concession, to enable the teachers to go to a local area or district of their choice in accordance with Rule 21 of the Rules of 1981. Apparently, since the facility was extended to all desirous teachers, the concern of the Government and the Board was that the existing positions of seniority and prospects of promotion in a local area may not be disturbed to the prejudice of any serving teacher there, governed by the Rules of 1981. At the same time, in order to effectuate the purpose of the policy, that enabled a teacher to go to the district of his choice, the rights of teacher being given the facility and the teacher in the local area cadre, to which he was being transferred, were finely balanced by providing that in the transferred local area, the teacher transferred would be placed at the bottom of the seniority list of teachers in the cadre in which he was transferred.

10. There was another condition in the transfer policy carried in the

Government Order dated 23.06.2016, which does not require much analysis about the reason for its existence. The said term in the policy provides that in the case of an inter-district transfer of teachers, which is not a matter of right under Rule 21 of the Rules 1981, made on the request of a teacher, the transfer would be allowed, depending on the availability of vacancies in the district of choice. Now, the availability of vacancy in the district of choice would mean the availability of vacancy of a post in the grade to which the teacher seeking transfer belongs. Apparently, if a teacher who had been promoted to the post of a Headmaster of a Primary Pathshala or Assistant Teacher, Senior Basic School, sought transfer to another district, banking on the transfer policy, the transfer could only be allowed if a post of that grade is available in the district of choice. If no post of that grade was available, the transfer could not be permitted.

11. The learned Single Judge has very rightly noticed in the judgment impugned in the leading appeal, which is a common feature to all other appeals as well, that the request for transfer made by the appellants could not be considered, because no vacancy existed on the post of Headmaster of a Primary Pathshala or Assistant Teachers, Senior Basic School in the district of choice, to which the appellants applied for transfer. It has then been remarked by the learned Single Judge that in their anxiety to secure a transfer to the district of choice, the appellants made an application, seeking reversion to their substantive post of Assistant Teacher, Primary Pathshala. They also gave an undertaking on affidavit, accepting demotion to the post of Assistant Teacher, Primary Pathshala from their promotional posts in their parent cadres, where they were working in different districts in the specified local area.

12. It appears that after transfer, they were not only demoted, but also placed at the bottom of the seniority list of Assistant Teacher, Primary Pathshala. Once firmly placed in the district of their choice, the appellants in the various appeals have thought of regaining lost ground. There was a prayer on behalf of the appellants in the leading appeal through representations to the Authorities that their pay may be restored to the level that they were drawing before their elective transfers, invoking the principles of pay protection. It was also urged that the appellants be placed at the bottom of the cadre of Headmaster of Primary *Pathshalas*/Assistant Teacher, Senior Basic Schools, instead of placing them at the bottom of the seniority of Assistant Teachers, Primary Pathshala. This prayer was declined and that is what has made the appellants in the leading appeal to approach this Court, asking for a restoration of their status in the higher cadre and also payment of salary along with arrears for the higher post that they had forsaken. This is the common origin of all the appeals and the cause of action involved.

13. The case urged by the appellants in each of the appeals did not find favour with the learned Single Judge, who heard the writ petitions. It was held that the appellants cannot approbate and reprobate and the appellants, who had secured benefit under the transfer policy, voluntarily giving up rights, cannot turn around and regain what they had given up.

14. At the hearing of the appeals, Mr. Ashok Khare, learned Senior Advocate

assisted by Mr. Siddharth Khare, Advocate and Mr. Bhagwan Dutt Pandey, Advocate in the leading appeal and the other appeals, made a strong point that under Rule 15-A(2) of Chapter III of the Financial Handbook, upon a voluntary transfer of an employee, his emoluments cannot be reduced. The appellants were earlier drawing Grade Pay in the scale of Rs. 4600/-, but have now been made to suffer a diminution in their Grade Pay to Rs. 4200/-. It is also assailed that the appellants cannot be demoted to a lower cadre as a part of their transfer in terms of the Government Order dated 23.06.2016. The fact that there were no vacancies in the districts of choice in the cadre of Headmaster, Primary *Pathshala*/ Assistant Teacher, Senior Basic School, is disputed by the appellants.

15. It is also argued that the appellants being legally entitled to a lien on the promotion post they hold in the local area and in the district from which they were transferred, they cannot be demoted to a lower post on the basis of an affidavit taken through compulsion. The demotion, the learned Counsel for the appellants submits, would be in violation of Rule 22 of the Rules of 1981. It was pointed out to the learned Counsel for the respondents during hearing of the appeals that the transfer to the district of choice was a concession offered by the State Government under the Policy dated 23.06.2016, to which the appellants had no right. The concession was offered taking help of the limited right available to an employee to seek transfer from one local area to another or from one district to another, under Section 21 of the Rules of 1981. Since no posts in the relative cadre were available to effectuate the beneficial policy, the appellants were given the choice of accepting the lower post and being placed at the bottom of the seniority list. They accepted both the disadvantages with open eyes for the benefit of being placed in the district of their choice. Still, bearing in mind that the appellants spoke about their lien on the higher post, which, no doubt, can be determined only in accordance with law, the learned Counsel for all the appellants were asked if they were willing to be repatriated to their local areas in the district whence they came. The appellants are unanimous that they do not want to go back to the districts or the local areas where they were earlier working. They want to stay back to the district of their choice, to which they have moved taking benefit of the Government Order dated 23.06.2016. Moreover, the fact that cannot be lost sight of is that the transfer to the districts of choice on the demoted post of Assistant Teacher, Primary Pathshala was made on the appellants' applications and undertaking given on affidavits that they would accept the lower posts.

16. In the circumstances, once the appellants want to retain the benefit of transfer that they have secured in terms of the Government Order dated 23.06.2016 to the districts of their choice, they cannot be permitted to take the benefit and rid themselves of the disadvantage that is coupled with it. The appellants cannot have the cake and eat it too. As the rights of the appellants stand, since they want to continue in the district of their choice after securing a transfer under the transfer policy carried in the Government Order dated 23.06.2016, to which they are otherwise not entitled as of right, they cannot claim restoration of their status or pay in the cadre to which they originally belonged. To permit the appellants to do so, would verily violate the firmly established principle that

a party cannot be permitted to approbate and reprobate. This principle has been applied by the learned Single Judge in the judgment impugned in the leading appeal, particularly, relying on the decision of the Supreme Court in **State of Punjab and others vs. Dhanjit Singh Sandhu, (2014) 15 SCC 144**; and in our opinion, rightly so.

17. In the result, these appeals **fail** and are **dismissed.**

18. There shall be no order as to costs.

(2022)05ILR A902
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.04.2022

BEFORE

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

Writ A No. 2469 of 2022

Purushottam Narayan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anil Babu

Counsel for the Respondents:
C.S.C.

A. Service Law – Recruitment – Medical Examination - On the basis of a report issued by a Private Doctor or Doctor of a Government Hospital, which has not been authorized by the Recruitment Board, the opinion given by the Medical Board and the Appellate Medical Board, being an Expert Body, cannot be annulled and the same are entitled to be given due weight and credence. Petitioner has not produced any document, material or evidence, from which it is established that the medical examinations of the petitioner conducted by the Medical Board and the Appellate Medical Board are incorrect. (Para 7, 11)

B. Matters relating to medical evaluation of candidates in a recruitment process involve expert determination and it may not be desirable to supplant the procedure prescribed therefore as laid down under the relevant recruitment rules and taking any other view may have the effect of derailing the recruitment process. (Para 12)

The opinion of a Medical Board is the outcome of an evaluation by experts in the subject. Except in exceptional situations such as where a finding of unfitness is returned in violation or disregard of the standards prescribed or on grounds which may call upon this Court to consider the correctness of the opinion on a legal plain, it would be wholly inappropriate for this Court to either interfere with the same or substitute its own opinion with respect to the medical fitness of a particular candidate. Treading this path may also cause serious prejudice and jeopardise the recruitment process itself. In the ultimate analysis, it would be pertinent to emphasise that such requests must be entertained with due care and circumspection. (Para 12)

C. Principle of binding precedent - **In the matters of interlocutory orders, principle of binding precedent cannot be said to apply.** However, the need for consistency approach and uniformity in the exercise of judicial discretion respecting similar causes and the desirability to eliminate occasions for grievance of discriminatory treatment requires that all similar matters should receive similar treatment except where factual differences require a different treatment so that there is an assurance of consistency, uniformity, predictability and certainty of judicial approach.

D. For same relief, second writ petition is not maintainable. The proper remedy available to the petitioner was to file a recall application in his earlier writ petition referred to above or to file a Special Appeal against the judgment and order passed in the said writ petition.

Writ petition dismissed. (E-4)

Precedent followed:

1. Ankit Kumar Vs St. of U.P. & ors., Writ-A No. 5668 of 2021, decided on 03.08.2021) (Para 4)

2. Diwakar Paswan Vs St. of U.P. & ors., 2021 (1) ADJ 454 (Para 12)

3. St. of U.P. & ors. Vs Bhanu Pratap Rajput, 2021 (2) ADJ 451 (Para 12)

4. Vishnu Traders Vs St. of Har., 1995 Suppl (1) SCC 461 (Para 16)

5. Smt. Ramapati Jaiswal Vs St. of U.P., AIR 1997 All. 170 (Para 19)

Precedent distinguished:

1. Devesh Shahi (General Male Category) Vs St. of U.P. & ors., Special Appeal No. 458 of 2017, final judgment of Division Bench of this Court dated 07.09.2017 (Para 7, 16)

2. Sandeep Kumar Vs St. of U.P. & ors., Writ-A No. 14726 of 2018, final judgment of a learned Single Judge of this Court dated 28.08.2018 (Para 7, 16)

3. St. of U.P. & ors. Vs Lav Kumar Saroj & anr., Special Appeal Defective No. 639 of 2020, final judgment of Division Bench of this Court dated 23.11.2020 (Para 7, 16)

4. Ashad Varsee Vs St. of U.P. & ors., Writ-A No. 8389 of 2019, final judgment of a learned Single Judge of this Court dated 08.07.2019) (Para 7, 16)

Interim Orders not binding:

1. Vikram Singh Vs St. of U.P. & ors., Writ-A No. 13496 of 2021, interim order of a learned Single Judge of this Court dated 18.11.2021 (Para 7, 17)

2. Ram Kumar Vs St. of U.P. & ors., interim order of a learned Single Judge dated 16.12.2021 (Para 7, 17)

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

1. Heard Mr. Anil Babu, learned counsel for the petitioner and Mr. Pranav Ojha, Additional Chief Standing Counsel assisted by Mr. S.C. Upadhyay, learned counsel for the State-respondents.

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 MANDAMUS directing the respondent authorities to constitute a new Medical Board in Etawah or any other District for the fresh Medical Examination of the Petitioner under the supervision of the medical experts.

....."

3. Petitioner has also approached this Court earlier by means of Writ-A No. 13548 of 2021 (Purshottam Narayan VS. State of U.P. Through Its Principal Secretary Home & 2 Others) for following relief:

(i) calling for records, (ii) quashing the result of the medical examination conducted by the Regional Health Examination dated 26th August, 2021, by which the candidatures of the petitioner has been rejected due to varicose vein, (iii) considering the candidature of the petitioner against the selected post, and (iv) conducting the medical test again."

4. The said writ petition has been dismissed by a Coordinate Bench of this Court vide judgment and order dated 18th October, 2021 in light of the detailed judgment of the Coordinate Bench of Court in the case of Ankit Kumar Vs. State of U.P. & 3 Others (Writ-A No. 5668 of 2021, decided on 3rd August, 2021).

5. It is the case of the petitioner that an advertisement was issued by the Police Recruitment Board of the State of Uttar Pradesh being Advertisement No. P.R.P.B. Ek.-1(138)/2018 II in the year 2018 for the post of Constable Civil Police and Constable PAC. The petitioner being fully eligible applied for the said post under general category and he was called for appearing in written test (computer based test). The petitioner appeared and qualified in the said written examination and thereafter appeared in Physical Efficiency Test/Physical Standard Test/Document Verification (P.S.T./D.V.), wherein he qualified, hence the petitioner was declared successful and his name was placed at serial no. 2435 of the select list for the post of Constable PAC under general category. On 13th August, 2021, the petitioner was called for medical examination, whereby he has orally been informed that his candidature has been cancelled as he is suffering from varicose vein but the copy of the rejection order has not been supplied to the petitioner. Feeling aggrieved by the same, petitioner filed an appeal before the Regional Medical Committee, Agra Division, Agra, wherein a date was fixed for medical examination on 22nd August, 2021 but the medical examination of the petitioner was conducted on 26th August, 2021. In the said medical examination, which was conducted under order of the Regional Medical Committee/Appellate Medical Board, the petitioner was unsuccessful. This time again, no written order was supplied to the petitioner as to for which reason, the petitioner was declared unsuccessful in both the medical examination. The petitioner was informed orally by the Appellate Medical Board that he was found unsuccessful in the medical examination due to Varicose Veins. The petitioner after having knowledge of the medical deficiency of the Varicose Veins, which was orally informed, approached the Ganesh Shanker Vidyarthi Medical College and Associated Hospital, Kanpur (U.P. Government Medical College) on 29th December, 2021 for detecting his deficiency of Varicose Veins, where the petitioner was medically examined with due diligence on 29th December, 2021 and he was absolutely found fit and no disease of Varicose Veins was seen by the Assistant Professor of Orthopedic Department of the G.S.V. Medical College, Kanpur.

6. Further , it is the case of the petitioner that since in two medical examinations conducted by the respondent-authorities the petitioner was orally informed by the Medical Boards that he is medically unfit due to the detection of Varicose Veins in the medical report of the petitioner, whereas in the medical examination conducted by the Assistant Professor of Orthopedic Department of the G.S.V. Medical College, Kanpur, wherein the petitioner was found fit and perfect , rather no deficiency of varicose veins was detected in the medical report of the petitioner, therefore, seeing the contradictory medical reports, in the interest of justice, this Court may direct the concerned respondent to constitute a new medical board in Etawah or any other district under the supervision of the Medical Experts to conduct the fresh medical examination of the petitioner.

7. Learned counsel for the petitioner submits that the petitioner has successfully passed the recruitment examination, physical efficient tests and physical standard test, is entitled to be appointed on the post of P.A.C. constable. The petitioner was wrongly shown medically unfit due to

deficiency of Varicose Veins, because the medical examination conducted on 13th August, 2021 was in arbitrary manner and without following the procedure, rules and instructions given in the brochure inasmuch as the medical examination conducted by the Appellate Medical Board on 26th August, 2021 was nothing but empty formality, whereas in the medical examination conducted by of Orthopedic Department of the G.S.V. Medical College, Kanpur, the petitioner was found medically fit and deficiency of Varicose Veins was not found in the medical report of the petitioner. Learned Counsel for the petitioner, therefore, submits that considering the aforesaid contradictions, which occurred in the aforesaid medical examination reports of the petitioner, this Court may direct the concerned respondent to constitute a new medical board in Etawah or any other district under the supervision of the Medical Experts to conduct the fresh medical examination of the petitioner, so that the petitioner may be selected on the said post. In support of his aforesaid submissions, learned counsel for the petitioner has placed reliance upon following final judgments and interim orders of this Court:

1. Devesh Shahi (General Male Category) VS. State of U.P. & Others (Special Appeal No. 458 of 2017, final judgment of Division Bench of this Court dated 7th September, 2017;

2. Sandeep Kumar Vs. State of U.P. & Others (Writ-A No. 14726 of 2018, final judgment of a learned Single Judge of this Court dated 28th August, 2018;

3. State of U.P. & 3 Others VS. Lav Kumar Saroj and Another (Special Appeal Defective No. 639 of 2020, final judgment of Division Bench of this Court dated 23rd November, 2020;

4. Ashad Varsee Vs. State of U.P. & Others (Writ-A No. 8389 of 2019, final judgment of a learned Single Judge of this Court dated 8th July, 2019;

5. Vikram Singh Vs. State of U.P. & Others (Writ-A No. 13496 of 2021, interim order of a learned Single Judge of this Court dated 18th November, 2021;and

6. Ram Kumar Vs. State of U.P. & Others (Ram Kumar VS. State of U.P. & Others), interim order of a learned Single Judge dated 16.12.2021.

8. On the other-hand, learned Counsel for the State-respondents submits that there is no provision of re-medical in the case. The candidature of the petitioner has rightly been rejected by the Medical Boards referred to above. Apart from the above, learned Standing Counsel submits that nearly for the same relief specifically questioning the medical examination reports of the petitioner dated 13th August, 2021 and 26th August, 2021, the first medical examination conducted by the Medical Examination Board constituted by the Recruitment Board and second conducted by the Appellate Medical Examination Board, earlier the petitioner has filed Writ-A No. 13548 of 2021 (Purshottam Narayan VS. State of U.P. Through Its Principal Secretary Home & 2 Others), which has been dismissed by a Writ Court dated 18th October, 2021 after following observations:

"10. Learned counsel for the petitioner has not placed any material on record to demonstrate that report of Medical Board as well as Review Medical Board is erroneous or incorrect. This Court

in the case of Ankit Kumar (supra) has held that the opinion given by the Medical Board as well as Review Medical Board should not be taken lightly and should be given due credence and it should not be annulled or set aside on the basis of the report of some private doctor or by a government hospital obtained by a candidate from outside.

11.Since, the controversy involved in the present writ petition has already been decided by this Court in the case of Ankit Kumar (supra), therefore, present writ petition is also dismissed with no order as to cost."

9. Learned counsel for the State-respondents, therefore, submits that this second writ petition nearly for the same relief cannot be entertained by this Court and the same is liable to be dismissed on this ground alone. The proper remedy available to the petitioner is to file a recall/modification application in the said writ petition or file a special appeal against the order passed therein.

10. I have considered the submissions made by the learned counsel for the parties and have carefully scanned the records of the present writ petition as well as the copies of the judgment and orders which have been relied upon by the learned counsel for the petitioner.

11. This Court finds that except for relying on the final judgments and interim orders of the Division Benches and Single Benches, learned counsel for the petitioner has failed to produce any provisions of law, rules, regulations etc. on the basis of which this Court may direct the respondent-authority to constitute a medical board for re-medical examination of the petitioner for a third term. Learned counsel for the petitioner has not produced any document, material or evidence, from which it is established that the medical examinations of the petitioner conducted by the Medical Board and the Appellate Medical Board are incorrect. This Court is also of the opinion that on the basis of a report issued by a Private Doctor or Doctor of a Government Hospital, which has not been authorized by the Recruitment Board, the opinion given by the Medical Board and the Appellate Medical Board, being an Expert Body, cannot be annulled and the same are entitled to be given due weight and credence.

12. The similar opinion, as expressed by this Court herein above, has already been dealt with by a learned Single Judge of this Court in the case of **Diwakar Paswan Vs. State of U.P. & 6 Others reported in 2021 (1) ADJ 454,** wherein the learned Single Judge has opined as follows:

"No material has been placed on record, or otherwise referred, to suggest that the opinion of the Medical Board or the Appellate Medical Board could in any manner be said to be casual, inchoate, perfunctory or vague. We are therefore of the view that the Medical Board being an expert body, its opinion is entitled to be given due weight, credence and value.

A similar view has been taken in recent judgments of this Court in Vivek Kumar v. State of U.P.1 and Md. Arshad Khan v. State of U.P.2 wherein it was held that matters relating to medical evaluation of candidates in a recruitment process involve expert determination and it may not be desirable to supplant the procedure prescribed therefor as laid down under the

relevant recruitment rules and taking any other view may have the effect of derailing the recruitment process.

Dealing with an identical challenge this Court in Prakash Singh Vs. State of U.P.3 held:

"The petitioner essentially calls upon the Court to rule on and evaluate the correctness of the reports submitted by experts in their fields. These submissions and reliefs have evidently been sought and addressed without bearing in mind the contours of the writ jurisdiction. The opinion of a Medical Board is the outcome of an evaluation by experts in the subject. Except in exceptional situations such as where a finding of unfitness is returned in violation or disregard of the standards prescribed or on grounds which may call upon this Court to consider the correctness of the opinion on a legal plain, it would be wholly inappropriate for this Court to either interfere with the same or substitute its own opinion with respect to the medical fitness of a particular candidate. Treading this path may also cause serious prejudice and jeopardise the recruitment process itself. The Court is constrained to enter this note of caution conscious of its own limitations with respect to adjudging the medical fitness or otherwise of a particular candidate. In the ultimate analysis, it would be pertinent to emphasise that such requests must be entertained with due care and circumspection."

The Delhi High Court in a recent decision handed down in the matter of Km Priyanka Vs. Union of India4 cautioned against interfering with the opinion formed by medical boards constituted for selection of members of the armed forces on the strength of certificates issued by private or civilian doctors in the following terms: -

"8. We have on several occasions observed that the standard of physical fitness for the Armed Forces and the Police Forces is more stringent than for civilian employment. We have in Priti Yadav Vs. Union of India 2020 SCC Online Del 951;Jonu Tiwari VS. Union of India 2020 SCC Online Del 855; Nishant Kumar Vs. Union of India SCC Online Del 808; and Shravan Kumar Rai Vs. Union of India 2020 SCC Online Del 924 held that once no mala fides are attributed and the doctors of the Forces who are well aware of the demands of duties of the Forces in the terrain in which the recruited personnel are required to work, have formed an opinion that the candidate is not medically fit for recruitment, opinion of private or other government doctors to the contrary cannot be accepted inasmuch as the recruited personnel are required to work for the Forces and not for the private doctors or the government hospitals and which medical professionals are unaware of the demands of the duties of the Forces."

Although learned counsel for the petitioner has placed reliance upon certain interim orders passed by learned Judges of the Court and which stand appended as Annexure 7 to the writ petition, the Court notes that none of those interim orders notice or deal with the principles as elucidated by the Division Bench in Rahul or the decisions in Manish Kumar and Prakash Singh noticed above.

It becomes pertinent to note that the opinions formed by the Medical and Review Boards have not been assailed by

the petitioner on the ground of mala fides. A review of those decisions is sought solely on the basis of a contrary opinion rendered by a doctor of a government hospital. Permitting a reopening of a medical examination conducted by the respondents solely on that basis would set a dangerous precedent especially when the Court by virtue of its inherent limitations would be wholly unequipped to undertake a comparative analysis or evaluation of competing medical opinions. Medical fitness is a subject best left for determination by experts and should not be lightly interfered with unless it be shown to be contrary to the standards prescribed or otherwise be liable to be assailed on other judicially manageable parameters.

Quite apart from the consistent view taken by Courts on this question regard must also be had to the fact that the medical examination in the present case was undertaken in accordance with the provisions made in the statutory rules. Those Rules confer finality upon the opinions formed by the Medical Boards subject to an appeal against the same before a Review Medical Board. Those Rules do not envisage or contemplate a challenge to those reports based upon reports and opinions privately obtained by candidates. Permitting such a course of action would not only be contrary to the Rules which apply and bind the candidate but also result in derailing the recruitment process itself"

(Emphasis added)

13. This Court, therefore, is in respectful agreement with the decision taken by the learned Single Judge in the case of **Diwkar Paswan (Supra)** and finds no good ground to entertain the present writ petition.

14. A Division Bench of this Court in the case of **State of U.P. and others Vs. Bhanu Pratap Rajput,** reported in **2021 (2) ADJ 451**, has observed as follows:

"16. The medical examination by the Medical Board consisting of medical experts under Rule 15(g) cannot be said to be inferior to the physical standard test conducted by a team of non-experts. Therefore, we find that the finding recorded by the learned Single Judge in the impugned judgment that the assessment of physical standard by the committee constituted under Appendix-2 to the Rules, 2015 is liable to be preferred over the determination made by the Medical Board in terms of the Appendix-3, is not sustainable. ***Opinion of a committee of non-experts under Rule 15(d) for physical test of a candidate cannot override the opinion of the team of experts, i.e. Medical Board under Rule 15(g) of the Rules."***

15. This Court also agrees with the observations made by the Division Bench of this Court in the aforesaid case.

16. So far as the two final judgments of the Division Benches of this Court as well as two final judgments of Single Benches in the cases of Devesh Shahi, Sandeep Kumar, State of U.P. and Ashad Varsee (Supras), which have heavily been relied upon the by the learned counsel for the petitioner is concerned, this Court finds that the same are not applicable in the facts o the present case, as the candidates of the aforesaid cases have not been non-suited on the ground of deficiency of Varicose Veins. Therefore, the same are clearly

distinguishable from the facts of the present case.

17. The interim orders in the case of Vikram Singh and Ram Kumar (Supra) relied upon by the learned counsel for the petitioner are not binding upon this Court.

18. In the case of **Vishnu Traders Vs. State of Haryana,** reported in *1995 Suppl (1) SCC 461*, the Apex Court has observed as under:-

"In the matters of interlocutory orders, principle of binding precedent cannot be said to apply. However, the need for consistency approach and uniformity in the exercise of judicial discretion respecting similar causes and the desirability to eliminate occasions for grievance of discriminatory treatment requires that all similar matters should receive similar treatment except where factual differences require a different treatment so that there is an assurance of consistency, uniformity, predictability and certainty of judicial approach."

19. Similar view has been taken by this Court in **Smt. Rampati Jaiswal Vs. State of U.P.,** reported in AIR 1997 All. 170.

20. Lastly, this Court finds substance in the submission made by the learned Standing Counsel that this second writ petition filed for nearly the same relief cannot be entertained by this Court. For same relief, second writ petition is not maintainable. The proper remedy available to the petitioner was to file a recall application in his earlier writ petition referred to above or to file a Special Appeal against the judgment and order passed in the said writ petition.

21. The present writ petition is devoid of merits, and, accordingly, dismissed.

22. There shall be no order as to costs.

(2022)05ILR A909

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 23.03.2022

BEFORE

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

Writ A No. 3583 of 2022

Nidhi Singh ...Petitioner

Versus

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

Counsel for the Petitioner:

Sri Nripendra Kumar Dwivedi, Sri Prasanna Dwivedi

Counsel for the Respondents:

C.S.C., Sri Asim Mukherjee (S.C.)

A. Service Law - Suspension Order - The Court has noticed that prima facie the petitioner has been found guilty of a forged Baramadagi on which her signatures have been appended, which is an admitted position and also for criminal conspiracy by preparing forged and wrong documents showing an alive person dead. Therefore, in view of the aforesaid facts and circumstances, the Court does not find any illegality or infirmity in the order of suspension. (Para 12)

B. Practice & Procedure - quashing of charge sheet - The law on this point is that the Courts should not stay/quash the disciplinary proceedings nor they should go into the correctness or otherwise the charges leveled in the charge-sheet and the departmental inquiry should be allowed to continue uninterrupted to come to its natural conclusion. The tribunal or the Court cannot take over the

functions of the disciplinary authority. It can interfere only if the charges framed are contrary to law or if no misconduct or other irregularity alleged can be said to have been made out.(Para 15 & 16)

Writ Petition Rejected. (E-10)

List of Cases cited:

1. State of Orissa & anr. Vs Sangram Keshari Mishra & anr. (2010) 13 SCC 311

2. Secretary, Ministry of Defence & ors.. Vs Prabhash Chandra Mishra (2012) 11 SCC 565

3. Allahabad Bank & anr. Vs Deepak kumar Bhola (1997) 4 SCC 1

4. St. of Orissa Vs Bimal kumar Mohanti (1994) 4 SCC 125

5. Capt. M. Paul Anthony Vs Bharat Gold Mines Ltd. & anr. (1999) 3 SCC 697

6. St. of U.P. Vs Shri Brahm Datt Sharma & anr. AIR 1987 SC 943

7. St. of H.P. Vs B.C. Thakur 1994 SCC (L&S)

8. U.O.I. Vs Ashok Kacker 1995 Supp (1) SCC 180

9. Secretary to Government, Prohibition & Excise Department Vs L. Srinivasan (1996) 3 SCC 157

10. U.O.I. & ors.. Vs Upendra Singh (1994) 3 Supreme Court Cases 357

11. U.O.I. & anr. Vs Kunisetty Satyanarayana (2006) 12 SCC 28

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

1. Heard Mr. Nripendra Kumar Dwivedi, learned counsel for the petitioner and Mr. Asim Mukherjee, learned Standing Counsel for the State-respondents.

2. By means of the present writ petition, the petitioner has prayed for quashing the charge-sheet dated 24th August, 2021 issued by respondent no.4 (Annexure No.6 to the writ petition) and the order dated 31st October, 2021 passed by respondent no.2 (Annexure No.7 to this writ petition), whereby he has been placed under suspension pending departmental inquiry. Further the petitioner has prayed that a direction be issued to respondents not to proceed with the departmental proceedings pursuant to the charge-sheet dated 24th August, 2021 issued by respondent no.4.

3. It is the case of the petitioner that when the petitioner was posted at Police Station-Adampur, District Amroha, a first information report has been lodged by one Roop Kishore, which has been registered as Crime No. 0051 of 2019 under Sections 363, 366 I.P.C. and Sections 7/8 POCSO Act, at Police Station-Adampur, District Jyotibaphuley Nagar. The investigation of the said case was handed over to one Arif Mohammad, Sub-Inspector. Mr. Arif after recording the statements of the informant and witnesses submitted charge sheet no. 107 of 2029 dated 15th May, 2019 against Horam and Harphool under Sections 363, 366 I.P.C. and Sections 7/8 POCSO Act. The aforesaid case committed to the Court of Special Judge, POCSO ACT, III, Amroha, which was numbered as Session Trial No. 21 of 2019. The investigation of aforesaid Crime No. 0051 of 2019 was transferred to one Ashok Sharma, Inspector on 28th May, 2019, who submitted the charge sheet no. 107A of 2020 on 19th March, 2020. against Roop Kishor, Suresh and Devendra under Sections 302, 201 and 120B I.P.C. Thereafter the investigation was transferred to one Pankaj Sharma, Inspector who submitted his report on 12th

August, 2020 thereafter the case was converted under Sections 363, 366 I.P.C. and Sections 7/8 POCSO Act after deleting Sections 302, 201 and 120B I.P.C. After framing the charge and examination of witnesses, the trial court has acquitted the persons, namely, Horam and Harphool against whom charge sheet no.107 of 2019 was submitted, in Session trial no. 21 of 2019 vide order dated 19th January, 2021. On the basis of charge-sheet no.107A of 2020 dated 19th March, 2020, the case was committed to court of Sessions Judge, Amroha, which has been numbered as Sessions Trial No. 354 of 2020 and charges were framed against Roop Kishore, Suresh and Devendra for the offence punishable under Sections 302, 201 and 120B I.P.C. and further a Session Trial being Session Trial No. 403 of 2020 was registered in which charges were framed against one Suresh for the offence punishable under Section 3/25 Arms Act. Both the Sessions Trial being Sessions Trial No. 354 of 2020 and Session Trial No. 403 of 2020 have been tried together and the session trial no. 354 of 2020 was treated to be the leading case.

4. Further, it is the case of the petitioner that after considering the facts and evidences adduced during trial, the Sessions Court has acquitted all the accused persons from all the charges vide judgment and order dated 31st March, 2021 and further the Sessions Judge, Amroha forwarded a letter dated 31st March, 2021 to the Superintendent of Police, Amroha, Additional Director General of Police, Bareilly Region, Bareilly and Director General of Police, U.P. at Lucknow to initiate departmental proceedings against Inspector Ashok Sharma and those police personnel whose signatures were found over the Fard Baramdagi.

5. Pursuant to the above letter of the Sessions Judge, Amroha, Inspector Ashok Sharma was suspended vide order dated 7th August, 2020 and proceedings under Rule 14 (1) of U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 was initiated and vide order dated 21st November, 2020, the enquiry was allotted to Mr. Vijay Kumar Rana, Circle Officer, Amroha, who submitted his report on 24th March, 2021. On the basis of said report, order dated 21st November, 2020 was cancelled and again a detailed enquiry was allotted to the Additional Superintendent of Police, Amroha i.e. respondent no.3, who submitted his preliminary enquiry, wherein Sub-Inspector Vinod Kumar Tyagi (retired), Sub-Inspector Rakesh Kumar, Sub-Inspector Arif Mohammad, Constable-Krishnaveer, Constable-Aniruddha Singh, Constable-Deepak Kumar, Female Constable Apeksha Tomar, Female Constable-Nidhi Singh (applicant herein), Amroha along with Inspector Ashok Sharma were found guilty of submitting charge-sheet on the basis of fake evidence. Respondent no.3 submitted his report on 8th June, 2021 before the Superintendent of Police, Amroha i.e. respondent no.2. On the basis of the said preliminary enquiry report of respondent no.3, Presiding Officer, Circle Officer, Amroha i.e. respondent no. 4 issued a charge sheet dated 24th August, 2021 for departmental proceedings under Rule 14 (1) of U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991. After issuing the charge-sheet dated 8th June, 2021, the petitioner has been suspended and attached to the Police Lines, Amroha by respondent no.2. The said charge-sheet was served upon the petitioner in the month of September, 2021. Subsequently, one Suresh has lodged a first information report on

23th October, 2021 against 11 persons, namely, Ashok Kumar (Inspector), Mohammad Arif (Sub-Inspector), Rakesh Kumar (Sub-Inspector), Manoj Kumar (Sub-Inspector), Vinod Kumar Tyagi (Sub-Inspector), Bhupendra Singh (Constable-cum-Driver), Krishnaveer singh (Constable), Aniruddha (Constable), Deepak Kumar (Constable), Apeksha Tomar (Women Constable) and Nidh Singh (Women Constable) (applicant herein), which has been registered as Case Crime No. 0286 of 2021 under Sections 120-B, 193, 194, 342, 344 I.P.C., Police Station-Adampur, District-Amroha. In the said case, the petitioner has been granted anticipatory bail from this Court vide order dated 8th February, 2022 a copy of which has been enclosed as Annexure-9 to the writ petition.

6. Challenging the impugned charge-sheet and order of suspension, learned counsel for the petitioner has made following submissions:

i. The Sub-Inspector Mr. Arif Mohammad remained as Investigating Officer since 20th February, 2019 to 27th May, 2019 and he has submitted Charge-Sheet No. 107 of 2019 in Crime No. 0051 of 2019 under Sections 363, 366 I.P.C. and Sections 7/8 POCSO Act and on 28th May, 2019, the investigation of the aforesaid crime was transferred to Ashok Sharma (Inspector), who has submitted Charge-Sheet No. 107A of 2020, under Sections 302, 201, 120B I.P.C. and Sections 3/25 Arms Act on 19th March, 2020. The entire investigation of the aforesaid crime goes to Ashok Kumar (Inspector), therefore, the petitioner being women constable, has no concern with the investigation of the aforesaid crime at any point of time except that recovery memo showing the Baramadagi of clothes, shoes and alakatla, bears her signatures, hence the entire proceedings including the impugned charge-sheet are liable to be quashed by this Court.

ii. The act of respondents by not adopting proper procedure for conducting enquiry is misconceived and not sustainable in the eyes of law.

On the cumulative strength of the aforesaid, learned counsel for the petitioner submits that the impugned charge-sheet dated 24th August, 2021 issued against the petitioner is illegal, unwarranted and against the evidence on record, therefore, the same is liable to be quashed by this Court.

7. On the other-hand, learned Standing Counsel for the State-respondents submits that the charges so levelled against the petitioner cannot be examined at this stage, inasmuch as the explanation and documents relied upon by the petitioner can be a defence in the departmental inquiry, as during departmental inquiry, the petitioner will have ample opportunity to prove her innocence (Reference the judgment of the Apex Court in the case of **State of Orrisa & Another VS. Sangram Keshari Mishra & Another,** reported in *(2010) 13 SCC 311)*. Apart from the above, learned Standing Counsel for the State-respondents submits that ordinarily a writ petition does not lie against a charge-sheet or show-cause notice for the reason that it does not give rise to any cause of action. It does not amount to an adverse order which affects the right of any party unless the same has been issued by a person who has no jurisdiction to do so (Reference-the judgment of the Apex Court in the case of **Secretary, Ministry of Defence & Others**

VS. Prabhash Chandra Mishra reported in *(2012) 11 SCC, 565)*. In view of the aforesaid, learned Standing Counsel for the State-respondents submits that no interference is called for by this Court in exercise of powers under Article 226 of the Constitution of India. Hence, the present writ petition is liable to be dismissed.

8. This Court has considered the submissions made by the learned counsel for the parties and has carefully scanned the records of the present writ petition specifically the laws laid down by the Apex Court on the aforesaid aspect.

9. From the records of the present writ petition, it is established that while deciding the Sessions Trial No. 354 of 2020 along with Session Trial No. 403 of 2020 vide judgment and order dated 31st March, 2021, the Sessions Judge, Amroha has found that prima facie the Police personnels along with Inspector Ashok Sharma were responsible for making a forged baramadagi of clothes, shoes and alakatla of Km. Kamlesh for showing her to be dead, when as matter of fact she is alive, therefore, he wrote a letter dated 31st March, 2021 to the Superintendent of Police, Amroha, Additional Director General of Police, Bareilly Region, Bareilly and Director General of Police, U.P. at Lucknow to initiate departmental proceedings against Inspector Ashok Sharma and those police personnel whose signatures were found over the Fard Baramdagi. Pursuant to the above letter, proceedings were initiated and vide order dated 21st November, 2020, the enquiry was allotted to Mr. Vijay Kumar Rana, Circle Officer, Amroha, who submitted his report on 24th March, 2021. On the basis of said report, again a detailed enquiry was allotted to the Additional Superintendent of Police, Amroha i.e. respondent no.3, who submitted his preliminary enquiry, wherein Sub-Inspector Vinod Kumar Tyagi (retired), Sub-Inspector Rakesh Kumar, Sub-Inspector Arif Mohammad, Constable-Krishnaveer, Constable-Aniruddha Singh, Constable-Deepak Kumar, Female Constable Apeksha Tomar, Female Constable-Nidhi Singh (applicant herein), Amroha along with Inspector Ashok Sharma were found guilty of submitting charge-sheet on the basis of fake evidence. Respondent no.3 submitted his report on 8th June, 2021 before the Superintendent of Police, Amroha i.e. respondent no.2. On the basis of the said preliminary enquiry report of respondent no.3, Presiding Officer, Circle Officer, Amroha i.e. respondent no. 4 issued a charge sheet dated 24th August, 2021. It is not disputed by the learned counsel for the petitioner that on the Baramadagi, petitioner has not appended her signatures. Therefore, this Court finds that the petitioner is prima facie guilty of forged Baramdagi along with other Police personnels. As such, the ground taken by the learned counsel for the petitioner that she has no concern with the investigation of the aforesaid crime as also the respondent authority has not adopted proper procedure in conducting preliminary enquiry, have no legs to stand and the same are liable to be rejected.

10. With respect to challenge made by the learned counsel for the petitioner to the order of suspension, this Court has referred following case laws as settled by the Apex Court, which are relevant for deciding the same:

The Apex Court in the case of **Allahabad Bank And Another vs Deepak Kumar Bhola reported in (1997) 4 SCC 1, in paragraph-11 has held as follows:**

"We are unable to agree with the contention of learned counsel for the respondent that there has been no application of mind or the objective consideration of the facts by the appellant before it passed the orders of suspension. As already observed, the very fact that the investigation was conducted by the C.B.I which resulted in the filing of a charge-sheet, alleging various offences having been committed by the respondent, was sufficient for the appellant to conclude that ***pending prosecution the respondent should be suspended. It would be indeed inconceivable that a bank should allow an employee to continue to remain on duty when he is facing serious charges of corruption and mis-appropriation of money. Allowing such a employee to remain in the seat would result in giving him further opportunity to indulge in the acts for which he was being prosecuted. Under the circumstances, it was the bounden duty of the appellant to have taken recourse to the provisions of clause 19.3 of the First Bipartite Settlement, 1966. The mere fact that nearly 10 years have elapsed since the charge-sheet was filed. can also be no ground for allowing the respondent to come back to duty on a sensitive post in the bank, unless he is exonerated of the charge.***

In our opinion, the High Court was not justified in quashing the orders of suspension. We, accordingly, allow this appeal, set-aside the impugned judgment of the Allahabad High Court and dismiss the Writ Petition No. 6118/1988 which had been filed by the respondent. There will, however, be no order as to costs."

In the case of **State of Orrisa VS. Bimal Kumar Mohanti,** reported in (1994) 4 SCC 125, the the Apex Court inter alia, held that the suspension pending enquiry is not an order of punishment and it is a procedural suspension inasmuch as the delinquent is refrained to avail further opportunity to perpetrate the alleged misconduct or to remove the impression among the members of service that dereliction of duty or conduct unbecoming of a Government servant would pay fruits and the offending employee could get away even pending enquiry without impediment or to prevent an opportunity to such an employee to scuttle the enquiry or investigation or to win over the witnesses. **The Apex Court also specifically observed that each case of suspension must be considered depending upon the nature of allegations, gravity of the situation and the indelible impact that creates on the service for the continuance of the delinquent employee in service pending enquiry or contemplated enquiry or investigation and the suspension must be a step in aid to the ultimate result of the inquiry or investigation.**

(Emphasis added)

The Apex Court in the case of **Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. & Another** reported (1999) 3 SCC 697, in paragraph 29, has opined as follows:

"Exercise of right to suspend an employee may be justified on facts of a particular case. Instances, however, are not rare where officers have been found to be afflicted by "suspension syndrome" and the employees have been found to be placed under suspension just for nothing. It is their irritability rather than the employee's trivial lapse which has often resulted in suspension. Suspension notwithstanding,

non-payment of Subsistence Allowance is an inhuman act which has an unpropitious effect on the life of an employee. When the employee is placed under suspension, he is demobilised and the salary is also paid to him at a reduced rate under the nick name of 'Subsistence Allowance', so that the employee may sustain himself. This Court, in O.P. Gupta Vs. Union of India & Others, (1987) 4 SCC 328 made the following observations with regard to Subsistence Allowance :

"An order of suspension of a government servant does not put an end to his service under the government. He continues to be a member of the service in spite of the order of suspension. The real effect of suspension as explained by this Court in Khem Chand Vs. Union of India, is that he continues to be a member of the government service but is not permitted to work and further during the period of suspension he is paid only some allowance -- generally called subsistence allowance -- which is normally less than the salary instead of the pay and allowances he would have been entitled to if he had not been suspended. There is no doubt that an order of suspension, unless the departmental inquiry is concluded within a reasonable time, affects a government servant injuriously. The very expression 'subsistence allowance' has an undeniable penal significance. The dictionary meaning of the word 'Subsist' as given in Shorter Oxford English Dictionary, Vol.II at p. 2171 is "to remain alive as on food; to continue to exist". "Subsistence" means -- means of supporting life, especially a minimum livelihood."

(Emphasis supplied) ***If, therefore, even that amount is not paid, then the very object of paying the reduced salary to the employee during the period of suspension would be frustrated. The act of non-payment of Subsistence Allowance can be likened to slow-poisoning as the employee, if not permitted to sustain himself on account of non-payment of Subsistence Allowance, would gradually starve himself to death."***

11 . As already noticed above the petitioner is posted as Constable and working in a disciplined force like Police Department of the State of U.P. I am of the considered opinion that a member of a disciplined force must strictly follow the executive orders or circulars or instructions issued by the department or by the higher authority of the department as those executive orders etc. are as good as service condition. As a matter of fact such executive intimation/order has been issued to maintain the discipline in the force directing to keep the appearance and uniform befitting for the members of disciplined force. Further, police force has to be a disciplined force and being a law enforcing agency, it is necessary that such force must have secular image which strengthen the countenance of national integration.

12. This Court has also noticed that prima facie the petitioner has been found guilty of a forged Baramadagi on which her signatures have been appended, which is an admitted position and also for criminal conspiracy by preparing forged and wrong documents showing an alive person, namely, Km. Kamlesh as dead. One Suresh has lodged a first information report against 11 police personnels including the petitioner which has been registered as Case crime No. 0286 of 2021 under Sections 120B, 193, 194, 342, 344 I.P.C. Therefore, in view of the settled legal

positions by the Apex Court referred to herein-above and facts and circumstances of the case, this Court finds no illegality or infirmity in the order of suspension dated 31st October, 2021 passed by respondent no.2.

13. So far as challenge made by the learned counsel for the petitioner to the impugned charge-sheet is concerned, it is necessary for this Court to refer following laws laid down by the Apex Court on the aspect:

In **State of U.P. vs. Shri Brahm Datt Sharma and another** [reported in *AIR 1987 SC 943),* the Apex Court has held that when a show-cause notice was issued to a government servant under the statutory provisions calling upon him to show cause, ordinarily the government servant must place his case before the authority concerned by showing cause and the courts should be reluctant to interfere with the notice at that stage unless the notice is shown to have been issued palpably without any authority of law. The purpose of issuing show cause is to afford opportunity of hearing to the government servant and once cause is shown it is open to the Government to consider the matter in the light of the facts and submissions placed by the government servant and only thereafter a final decision in the matter could be taken. Interference by the Court before that stage would be premature.

The Apex Court in the case of **State of H.P. Vs. B.C. Thakur** reported in *1994 SCC (L&S),* in paragraph nos. 3 and 4 has held as follows:

"(3) HAVING heard learned counsel for the parties, we are satisfied that in the facts and circumstances of the case, the impugned order of the Tribunal quashing the order of respondents suspension does not call for any interference, even though the other part of the Tribunals order quashing the charge-sheet issued to the respondent cannot be sustained. ***The quashing of the charge-sheet by the Tribunal is not on the ground of want of authority to issue the charge-sheet or any other inherent defect therein. This being so, the question of going into the merits of the charges, which are yet to be investigated in the departmental proceedings, did not arise for consideration or adjudication by the Tribunal at this stage.*** *This being so, the Tribunals order quashing the charge-sheet as well, on reaching the conclusion that the suspension order had to be set aside, is unwarranted. The respondent had been under suspension for nearly two years on the date of the Tribunals order and another year has elapsed since then. Setting aside the suspension order in this situation, particularly when no substantial progress in the disciplinary proceedings has been made as yet, does not, therefore, call for any interference.*

(4) CONSEQUENTLY, ***the appeal is partly allowed to the extent that the Tribunals order quashing the charge-sheet issued to the respondent is set aside while the challenge to the quashing of the suspension order dated 10-5-1990 is rejected. No costs."***

The Apex Court in the case of Union of India Vs. Ashok Kacker reported in 1995 Supp (1) SCC 180, while hearing a matter where the employee had challenged the charge sheet, clearly held that the Tribunal entertained the application at a premature stage. It was observed as follows :-

".....In our opinion, this was not the stage at which the Tribunal ought

to have entertained such an application for quashing the charge-sheet and the appropriate course for the respondent to adopt is to file his reply to the charge-sheet and invite the decision of the disciplinary authority thereon. This being the stage at which the respondent had rushed to the Tribunal, we do not consider it necessary to require the Tribunal at this stage to examine any other point which may be available to the respondent or which may have been raised by him."

Again in the case of **Secretary to Government, Prohibition & Excise Department Vs. L. Srinivasan**, reported in (1996) 3 SCC 157, the Apex Court set-aside the order of the Tribunal by which the departmental enquiry and the charge-sheet were quashed on the ground of delay in initiation of the disciplinary proceedings and it was observed as follows :-

"Order dated 12.11.1993 in Nos. Nos. 1702 of 1993 and 2206 of 1993 of the Tamil Nadu Administrative Tribunal, Madras is in question before us. The respondent while working as Assistant Section Officer, Home, Prohibition and Excise Department had been placed under suspension. Departmental inquiry is in process. We are informed that charge-sheet was laid for prosecution for the offences of embezzlement and fabrication of false records etc. and that the offences and the trial of the case is pending.

The Tribunal had set aside the departmental enquiry and quashed the charge on the ground of delay in initiation of disciplinary proceedings. In the nature of the charge, it would take a long time to detect embezzlement and fabrication of false records which should be done in secrecy. It is not necessary to go into the merits and record any finding on the charge levelled against the charged officer since any finding recorded by this Court would gravely prejudice the case of the parties at the enquiry and also at the trial. Therefore, we desist from expressing any opinion on merit or recording any of the contentions raised by the counsel on either side. Suffice it to state that the Administrative Tribunal has committed grossest error in its exercise of the judicial review. The member of the Administrative Tribunal appears to have no knowledge of the jurisprudence of the service law and exercised power as if he is an appellate forum dehors the limitation of judicial review. ***This is one such instance where a member had exceeded his power of judicial review in quashing the suspension order and charges even at the threshold. We are coming across such orders frequently putting heavy pressure on this Court to examine each case in detail. It is high time that it is remedied." (emphasis supplied)."***

The Apex Court in re:- **State of Orrisa and another vs. Sangram Keshari Misra and another** [reported in *(2010) 13 Supreme Court Cases 311]* in para 10 has opined as under:-

"10. Though there appears to be some merit in the said contentions of the first respondent, it is unnecessary to examine the correctness of these contentions as normally a charge-sheet is not quashed prior to the conducting of the enquiry on the ground that the facts stated in the charge are erroneous. It is well settled that the correctness or truth of the charge is the function of the disciplinary authority (vide Union of India v. Upendra Singh1 SCC p. 362, para 6). Therefore we

reject the contention that the charge ought to have been quashed without reserving to the State to proceed in accordance with law."

The Hon'ble Apex Court in re:- **Union of India and others vs. Upendra Singh** [reported in *(1994) 3 Supreme Court Cases 357]* in para 6 has held as under:-

"6. In the case of charges framed in a disciplinary inquiry the tribunal or court can interfere only if on the charges framed (read with imputation or particulars of the charges, if any) no misconduct or other irregularity alleged can be said to have been made out or the charges framed are contrary to any law. ***At this stage, the tribunal has no jurisdiction to go into the correctness or truth of the charges. The tribunal cannot take over the functions of the disciplinary authority. The truth or otherwise of the charges is a matter for the disciplinary authority to go into. Indeed, even after the conclusion of the disciplinary proceedings, if the matter comes to court or tribunal, they have no jurisdiction to look into the truth of the charges or into the correctness of the findings recorded by the disciplinary authority or the appellate authority as the case may be. The function of the court/tribunal is one of judicial review, the parameters of which are repeatedly laid down by this Court.*** *It would be sufficient to quote the decision in H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority, Karnal v. Gopi Nath & Sons5. The Bench comprising M.N. Venkatachaliah, J. (as he then was) and A.M. Ahmadi, J., affirmed the principle thus : (SCC p. 317, para 8)*

*"**Judicial review, it is trite, is not directed against the decision but is confined to the decision-making process. Judicial review cannot extend to the examination of the correctness or reasonableness of a decision as a matter of fact. The purpose of judicial review is to ensure that the individual receives fair treatment and not to ensure that the authority after according fair treatment reaches, on a matter which it is authorised by law to decide, a conclusion** which is correct in the eyes of the Court. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. It will be erroneous to think that the Court sits in judgment not only on the correctness of the decision making process but also on the correctness of the decision itself."*

The Apex Court in the case of **Secretary, Ministry of Defence and others vs. Prabhash Chandra Mirdha [**reported in *(2012) 11 Supreme Court Cases 56*5] in para nos. 10 to 12 has opined as follows:

"11. Ordinarily a writ application does not lie against a chargesheet or show cause notice for the reason that it does not give rise to any cause of action. It does not amount to an adverse order which affects the right of any party unless the same has been issued by a person having no jurisdiction/competence to do so. A writ lies when some right of a party is infringed. In fact, chargesheet does not infringe the right of a party. It is only when a final order imposing the punishment or otherwise adversely affecting a party is passed, it may have a grievance and cause of action. Thus, a chargesheet or show cause notice in disciplinary proceedings should not ordinarily be quashed by the Court. *(Vide*

: State of U.P. Vs. Brahm Datt Sharma, AIR 1987 SC 943; Executive Engineer, Bihar State Housing Board Vs. Ramesh Kumar Singh & Others, (1996) 1 SCC 327; Ulagappa & Ors. v. Div. Commr., Mysore & Ors., AIR 2000 SC 3603 (2); Special Director & Anr. Vs. Mohd. Ghulam Ghouse & Another , AIR 2004 SC 1467; and Union of India & Another Vs. Kunisetty Satyanarayana, AIR 2007 SC 906).

12. In State of Orissa & Anr. v. Sangram Keshari Misra & Anr., (2010) 13 SCC 311, this Court held that normally a chargesheet is not quashed prior to the conclusion of the enquiry on the ground that the facts stated in the charge are erroneous for the reason that correctness or truth of the charge is the function of the disciplinary authority. (See also: Union of India & Ors., (1994) 3 SCC 357).

*13. Thus, the law on the issue can be summarised to the effect that chargesheet cannot generally be a subject matter of challenge as it does not adversely affect the rights of the delinquent unless it is established that the same has been issued by an authority not competent to initiate the disciplinary proceedings. Neither the disciplinary proceedings nor the chargesheet be quashed at an initial stage as it would be a premature stage to deal with the issues. Proceedings are not liable to be quashed on the grounds that proceedings had been initiated at a belated stage or could not be concluded in a reasonable period unless the delay creates prejudice to the delinquent employee. Gravity of alleged misconduc*t is a relevant factor to be taken into consideration while quashing the proceedings."

In the case of **Union of India and another Vs. Kunisetty Satyanarayana,** reported in (2006) 12 SCC 28, Hon'ble the Supreme Court has held as under:-

"Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause notice or charge sheet."

14. It was, therefore, emphasized by the Apex Court that even by way of final order the departmental enquiry or the charge-sheet could not have been quashed. Thus, what could not have been done even at the final stage certainly could not have been done by way of any interim measure by the Tribunal.

15. The law on this point is that the Courts are, therefore, not to grant stay/quash the disciplinary proceedings nor they should go into the correctness or otherwise of the charges leveled in the charge-sheet and the departmental inquiry should be allowed to continue uninterrupted to come to its natural conclusion

16. In the case of charges framed in a disciplinary enquiry, the tribunal or Court can interfere only if on the charges framed (read with imputation or particulars of the charges, if any) no misconduct or other irregularity alleged can be said to have been made out or the charges framed are contrary to any law. The tribunal or the Court cannot take over the functions of the disciplinary authority. The truth or otherwise of the charge is a matter for the disciplinary authority to go into. Indeed, even after the conclusion of their disciplinary proceedings, if the matter comes to court or tribunal, they have no jurisdiction to look into the truth of the

charges or into the correctness of the findings recorded by the disciplinary authority or the appellate authority as the case may be.

17. From the aforesaid legal positions, it is clear that in some very rare and exceptional cases the High Court can quash a charge-sheet or show-cause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal. However, ordinarily the High Court should not interfere in such a matter.

18. In view of the aforesaid settled legal positions of the Apex Court which have been referred to above, this Court does not find any illegality or infirmity in the impugned charge-sheet dated 24th August, 2021 passed by respondent no.4 so as to warrant any interference by this Court in exercise of powers under Article 226 of the Constitution of India.

19. The present writ petition being devoid of merits and is accordingly dismissed.

20. However, it is provided that the departmental inquiry be initiated against the petitioner and brought to its logical end, strictly in accordance with law, at the earliest possible preferably within a period of three months from the date of production of a certified copy of this order before the disciplinary authority.

(2022)05ILR A920
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2022

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Rera Appeal No. 1 of 2022
connected with other cases

Air Force Naval Housing Board Air Force Station, New Delhi & Ors. ...Petitioner
Versus
U.P. Real Estate Regulatory Authority Regional Office, G.B. Nagar & Anr.
...Respondents

Counsel for the Petitioner:
Sri Ashish Kumar Singh, Sri Ajay Kumar Singh

Counsel for the Respondents:
Sri Wasim Masood, Sri Nar Singh, Sri Anil Tiwari

(A) Civil Law - Real Estate (Regulation and Development) Act, 2016 - Sections 2(zk) , 2(zg),4,4(2) ,4(2)(l)(D) ,43(5) ,44,58 & 84 - appeal - Uttar Pradesh Real Estate Regulatory Authority - The Societies Registration Act, 1860 - Section3 - Uttar Pradesh Real Estate (Regulation and Development) Rules, 2016 - Rule 5 - The Real Estate (Regulation and Development) Bill, 2013 - Section 2(zf) ,38(5) , The Consumer Protection Act, 1986 - Section 2(m) ,The Real Estate (Regulation and Development) Bill, 2015 - Section 2(zk) - 'promoter' - The General Clauses Act (10 of 1897) - Section 3(42) , The Income Tax Act (43 of 1961) - Section 2(31) , The Standards of Weights and Measures Act, (60 of 1976) - Finance Act (No.2) (21 of 1998) - Section 87 (k) , Competition Act, 2002 - Section 2(l) , The Prevention of Money-Laundering Act, 2002 - Section 2(s) - "person" - appellants bound to comply the statutory provision of Section 43(5) of the Act, 2016 - pre-deposit, as envisaged under Section 43(5) of Act, 2016, in no circumstances can be said to be onerous, or in violation of Article 14 or 19(1)(g) of the Constitution of India - law is settled as far as mandatory compliance of Section 43(5) of Act, 2016 is concerned in view of the judgment of Apex Court in the case of *M/s Newtech Promoters and Developers Pvt.*

***Ltd. vs. State of U.P. and others.*(Para – 78,79,81)**

Appellants (welfare organization) formed society - providing affordable houses to the serving and retired Air Force and Naval personnel - on "no profit no loss' basis - under-subscription of project - scheme diluted and flats are sold to Army personnel, Coast Guard, Para military personnel, Central and State Government employees - delay in completion of project - some allottees approached RERA - awarded interest on their deposited amount - some cases refund of deposited amount with interest was awarded - Appeal filed before the Appellate Tribunal under section 44 - appellant not complied provisions of Section 43(5) of the Act, 2016 and not deposited the balance amount - appeal dismissed - ground - non compliance of Section 43(5) of the Act, 2016 & appellant not being a promoter is not required to comply condition of predeposit - hence the present appeal.**(Para -2,8,77)**

HELD:-Appellants working in real estate sector and their project having been registered after enforcement of Act, 2016, comes under the purview of ''promoter', as defined under Section 2(zk) of Act, 2016, and necessary compliance of pre-deposit, as enshrined under Section 43(5) of Act, 2016, has to be made before the Tribunal before entertainment of their appeal. No case for interference is made out in the orders impugned. **(Para - 81,82)**

Appeal dismissed. (E-7)

List of Cases cited:-

1. Neelkamal Realtors Suburban Pvt. Ltd. & anr. Vs U.O.I. & ors., 2017 SCC OnLine Bom 9302

2. M/s Newtech Promoters & Developers Pvt. Ltd. Vs St. of U.P. & ors., 2021 SCC OnLine SC 1044

3. Air Force N.H.B. Vs Mohit Anand, S.A. Defective No.237 of 2019

4. Air Force N.H.B. Vs Satish Kumar Sharma , Appeal Defective No. 233 of 2020

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

1. This bunch of appeals filed under Section 58 of Real Estate (Regulation and Development) Act, 2016 *(hereinafter referred to as "Act, 2016")* assails the orders passed by Uttar Pradesh Real Estate Appellate Tribunal *(hereinafter referred to as "Appellate Tribunal")* as well as order passed by Uttar Pradesh Real Estate Regulatory Authority *(hereinafter referred to as "Regulatory Authority")* directing the appellant to pay interest @ MCLR + 1 on the amount paid by the allottee from 01.7.2012 till obtaining of CC/offer of possession, whichever is later.

2. The present appeal has been preferred on the ground that the appeal filed before the Appellate Tribunal was dismissed on the ground of non compliance of Section 43(5) of the Act, 2016 and appellant not being a promoter is not required to comply condition of predeposit.

3. The present appeal was admitted by this Court on 22.12.2021 on the following question of law:

"Whether in the context of the objects clause and the Memorandum of Association of the present appellant and in the context of the activities engaged by it, the appellant is included in the meaning of the word"Promoter" as defined under Section 2(zk) of the U.P. Real Estate (Regulation and Development) Act 2016 as may enforce on the appellant the condition of pre deposit the entire disputed amount for the purpose of maintaining the appeal under Section 43(5) of the Act against the order dated 10.4.2019 passed by the Real Estate Regulatory Authority."

4. Counsel for both the sides have jointly agreed to argue the matter on the question of law framed herein above, thus with the consent of counsel for the parties, all these connected appeals are being heard and decided today. Leading appeal being RERA Appeal No.1 of 2022 wherein challenge has been made to the order dated 10.04.2019 passed by Regulatory Authority and the order dated 28.02.2020 passed by Appellate Tribunal.

5. Facts in brief are that the appellant before this Court known as Air Force Naval Housing Board *(hereinafter referred to as "AFNHB")* is a welfare organization formed with the efforts of Senior Officers of Air Force and Navy with an object to provide suitable and affordable houses to the Air Force and Naval personnel on "no profit no loss' basis. The appellant formed a Society by serving senior officers of Air Force and Navy which was registered on 16.11.1979 under the Societies Registration Act, 1860 (hereinafter referred to as "Act, 1860"). The Board of Directors is comprised of serving officials of Air Force and Indian Navy on the ex officio basis. AFNHB, Meerut is a project launched in the year 2008. The land was allotted by Meerut Development Authority. Thereafter lay out was approved and contract for civil work for initial 5 towers were awarded on 05.05.2010. In the said project, 545 flats was to be constructed.

6. Act, 2016 came into force from 01.05.2016 after receiving presidential assent on 25.03.2016 and was made applicable in the State of U.P. as well. On the date of enforcement of the Act, 2016, the project launched by the appellant was going on, hence its registration under proviso to Section 3 was mandatory and the appellant registered the same with the RERA on 15.08.2017.

7. According to appellant, out of 545 flats, 523 flats have been sold and 418 allottees have already taken possession. Twenty-two flats are lying vacant. As there was delay in completion of project, some of the allottees approached RERA and were awarded interest on their deposited amount and in some cases refund of deposited amount with interest was awarded. RERA on 10.04.2019 on complaint being made by the contesting respondents, who are the allottees, passed following order :

"1. विपक्षी को आदेशित किया जाता है कि वह जुलाई 2019 तक, यदि कोई देय बकाया है, तो उसे प्राप्त कर, कब्जा देना सुनिश्चित करे और देय स्टाम्प शुल्क प्राप्त कर यूनिट का पंजीकरण कराना सुनिश्चित करें।

2. विपक्षी, शिकायतकर्ता को 1.7.2012 (प्रत्येक शिकायत कर्तागण के अनुबन्ध के अनुसार) से ओ.सी./सी.सी. अथवा कब्जा आफर किये जाने, जो भी बाद में हो तक, MCLR+1 प्रतिशत ब्याज सहित अदा करना सुनिश्चित करें। साथ ही यह भी स्पष्ट किया जाता है कि ब्याज की यह धनराशि अंतिम भुगतान की धनराशि में समायोजित की जायेगी। यदि ब्याज की धनराशि देय धनराशि से अधिक है, तो वह नियमानुसार शिकायतकर्ता को वापस की जाये।

3. विपक्षी, जिन शिकायतकर्तागण के टॉवर अपूर्ण हैं, उन्हे शिकायतकर्तागण की सहमति से तैयार टॉवर में बुकिंग किये गये क्षेत्रफल के नजदीक, बुकिंग के समय तय दरों पर यूनिट उपलब्ध कराना सुनिश्चित करे।

4. विपक्षी, यदि शिकायतकर्तागण को जुलाई 2019 तक कब्जा देने में असफल रहते

हैं, तो शिकायतकर्तागण की धनराशि, जमा करने की तिथि से वास्तविक भुगतान की तिथि तक MCLR+1 प्रतिशत की दर से ब्याज सहित दो किस्तों में अदा करना सुनिश्चित करें। विपक्षी 50 प्रतिशत धनराशि दिनांक 31.7.2019 से 45 दिन के अन्दर व शेष, 50 प्रतिशत धनराशि दिनांक 31.3.2020 अथवा यूनिट विक्रय होने, जो भी पहले हो, तक अदा करना सुनिश्चित करे।

5. आदेश की एक एक प्रति सम्बंधित पत्रावलियों पर रखी जाये एवं इस आदेश में प्रतिपादित सिद्धान्त के अनुरूप धनराशि व ब्याज की प्रत्येक मामले में गणना की जायेगी।

6. इस आदेश का उल्लंघन उ०प्र०भू-सम्पदा (विनियमन तथा विकास) अधिनियम,2016 की धारा-63 तथा अन्य सुसंगत प्राविधानों के अन्तर्गत दंडनीय होगा। आदेश पोर्टल पर अपलोड किया जाये।"

8. Against the said order, appellant filed appeal before Appellate Tribunal under Section 44 of the Act, 2016. Accordingly to appellant, they deposited Rs.6,33,000/- on 24.10.2019. The Appellant Tribunal on 24.10.2019 passed an order taking on record the said amount and further directed the appellant to file calculation sheet for total compensation amount certified by Chartered Accountant and fixed 02.12.2019. On 28.01.2020, the Appellate Tribunal recorded its dissatisfaction to the effect that appellant has not complied provisions of Section 43(5) of the Act, 2016 and not deposited the balance amount. As the balance amount was not deposited, the appeal was dismissed on 28.02.2020 hence the present appeal.

9. Sri Ashish Kumar Singh, learned counsel appearing in all the connected appeals filed by the same appellant submitted that AFNHB is a welfare organisation comprising of senior officers of the Air Force and Navy for providing affordable houses to the serving and retired Air Force and Naval personnel on no profit no loss basis. The Board of Management comprises of officers of Air Force and Navy as ex-officio members. According to him, memorandum of Association describes its object and welfare status of the appellant Society. He further submitted that the appellant liaises with Central and State Government authorities for acquiring suitable area for developing housing colonies. These housing projects are self financed, which was developed on the contribution made by the allottees. These housing projects are developed for specific class and not for general public to earn profit. In case of under-subscription of the project, the Board of Management has power to dilute the scheme to Army, Coast Guard, Para military personnel, central and State Government employees so that the project is not stalled in midway due to poor subscription. However, according to him, the Master Brochure of 2012 makes provisions for meeting the expenditure on the staff, Board and project office and 6% project cost is charged which includes 1.5% of reserve fund for the project.

10. According to him, the present project, which was conceptualized and initiated in the year 2008 was an ongoing project when the Act, 2016 was implemented after the presidential assent in the State, and the appellant got the same registered with the RERA. Due to the delay caused by the Contractor, the project was delayed. According to Sri Singh, to ascertain real meaning of the term "promoter', Section 2(zk) has to be read with Section 4(2)(l)(D) of the Act, 2016.

The "promoter' necessarily means the acts to be done by a person or cause to be done by him with the intent and purpose of selling of flats/plots/houses, as the case may be. According to him, from reading of Section 4(2)(l)(D), it transpires that 70% of the amount realized from real estate project from the allottees is to be deposited in an escrow account to cover the cost of construction including cost of land with stipulation that the same shall be used only for that purpose.

11. The true intention of the aforesaid Section finds support from reading of Rule 5 of Uttar Pradesh Real Estate (Regulation and Development) Rules, 2016 (hereinafter referred to as "Rules, 2016") framed by virtue of exercise of power conferred under Section 84 of Act, 2016.

12. According to him, the said provision and rules only speaks about the promoters spending the amount from escrow account which would be to the tune of total 70% of the collection right from the procurement of land till the finish of construction and does not speak anything about rest 30% of the amount and its utilisation by promoter. According to him, the balance 30% of the amount and its utilization by promoter is the profit enjoyed by the promoter.

13. Thus, in the present scenario as the appellant is an organisation running on no profit no loss basis, there is no generation of 30% of this amount, which is enjoyed by the organisation as profit. According to him, this provision was introduced by the legislature to curb unjust enrichment of the builder and reduce fraud and delay alongwith to curb the high transaction cost. He has placed reliance upon the decision of Bombay High Court in the case of **Neelkamal Realtors Suburban Pvt. Ltd. And Anr. vs. Union of India and Ors. 2017 SCC OnLine Bom 9302**. According to him, the Court had held that as the promoter has enjoyed 30% of the amount, therefore, in case of any financial liability, he is also under an obligation to pay the awarded amount/ compensation/ interest from the said 30%.

14. He then contended that the appellant do not have any such funds as per Section 4(2)(l)(D) of the Act, 2016 read with Rule 5 of Rules, 2016. According to him, the appellant do not fall within the definition of promoter as per Section 2(zk) stricto senso as they do not have any profit motive to the extent of 30% rather the appellant board is a zero profit welfare organisation.

15. According to him, the appellant organisation do not fall within the definition of "promoter' and thus provisions contained under Section 43(5) of the Act, 2016 are not attracted and are not applicable upon the appellant. He then contended that the primary intention of the legislature while enacting Act, 2016 was to curb and put restriction on the unjust enrichment of builders and colonizers.

16. Since appellant organisation do not fall under the said categories of builders or colonizer, they are not attracted under the definition of promoter under Section 2(zk) of Act, 2016. He lastly contended that the Act, 2016 takes into consideration for registration of two types of project, one after implementation of the Act, 2016 and those which were ongoing when the Act was implemented. In the case in hand, it was ongoing project as such 70% of the amount, as mandated under Section 4(2)(l)(D) of Act, 2016 was not deposited

as the project was in an advanced stage and thus the Tribunal was wrong in rejecting the appeal on the ground that mandatory provisions of Section 43(5) of Act, 2016 was not complied with. In fact, Rs.6,33,000/- was deposited in the appeal under consideration and flats amounting to Rs.6.23 crores have already been kept as security and further account of organisation having 2.56 crores has already been attached, the appeal should have been heard on merits rather being dismissed on the ground of non compliance of mandatory deposit.

17. Sri Anil Tiwari, learned counsel for the Regulatory Authority at the very outset placed before the Court Real Estate (Regulation and Development) Bill, 2013 (hereinafter referred to as "Bill, 2013") as it was introduced in the Rajya Sabha. In Section 2(zf) of the Bill, 2013 the word "promoter' was defined. According to him, when the bill was passed and enacted, the words "also includes a buyer who purchases in bulk for resale" was removed. Relevant definition of word "promoter', as defined in the bill is extracted as under :

"(zf) ""promoter'' means,--

(i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees and also includes a buyer who purchases in bulk for resale; or

(ii) a person who develops a colony for the purpose of selling to other persons all or some of the plots, whether with or without structures thereon; or

(iii) any development authority or any other public body in respect of allottees of--

(a) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or

(b) plots owned by such authority or body or placed at their disposal by the Government, for the purpose of selling all or some of the apartments or plots; or

(iv) an apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or

(v) any other person who acts himself as a builder, colonizer, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or colony is developed for sale; or

(vi) such other person who constructs any building or apartment for sale to the general public.

Explanation.--For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a colony for sale and the persons who sells apartments or plots are different persons, both of them shall be deemed to be the promoters."

18. He then placed Section 38 of the Bill, 2013, which was in regard to

provision of appeal before the Real Estate Appellate Tribunal. Sub-section (5) of Section 38 of the Bill, 2013 is extracted hereas under :

"38. (1) The appropriate Government or the competent authority or any person aggrieved by any direction or order or decision of the Authority or the adjudicating officer may prefer an appeal to the Appellate Tribunal.

(2) Every appeal made under sub-section (1) shall be preferred within a period of sixty days from the date on which a copy of the direction or order or decision made by the Authority is received by the appropriate Government or the competent authority or the aggrieved person and it shall be in such form, and accompanied by such fee, as may be prescribed:

Provided that the Appellate Tribunal may entertain any appeal after the expiry of sixty days if it is satisfied that there was sufficient cause for not filing it within that period.

(3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may after giving the parties an opportunity of being heard, pass such orders as it thinks fit.

(4) The Appellate Tribunal shall send a copy of every order made by it to the parties and to the Authority or the adjudicating officer, as the case may be.

(5) The appeal preferred under sub-section (1), shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within a period of ninety days from the date of receipt of appeal:

Provided that where any such appeal could not be disposed of within the said period of ninety days, the Appellate Tribunal shall record its reasons in writing for not disposing of the appeal within that period.

(6) The Appellate Tribunal may, for the purpose of examining the legality or propriety or correctness of any order or decision of the Authority or the adjudicating officer, on its own motion or otherwise, call for the records relevant to disposing of such appeal and make such orders as it thinks fit."

19. Sri Tiwari then placed the statement of object and reason, why the bill was introduced by the Central Government. The reason for introduction of the Bill, 2013 was that previously the real estate sector was largely unregulated and only the Consumer Protection Act, 1986 took care of the buyers. The said Act was not adequate to address all concerns of buyers and promoters in the sector. The statement of object and reasons, as stated in the Bill, 2013 is extracted hereas under:

"The real estate sector plays a catalytic role in fulfilling the need and demand for housing and infrastructure in the country. While this sector has grown significantly in recent years, it has been largely unregulated, with absence of professionalism and standardisation and lack of adequate consumer protection. Though the Consumer Protection Act, 1986 is available as a forum to the buyers in the real estate market, the recourse is only curative and is not adequate to address all the concerns of buyers and promoters in that sector. The lack of standardisation has been a constraint to the healthy and orderly growth of industry. Therefore, the need for

regulating the sector has been emphasised in various forums.

2. In view of the above, it becomes necessary to have a Central legislation, namely, the Real Estate (Regulation and Development) Bill, 2013 in the interests of effective consumer protection, uniformity and standardisation of business practices and transactions in the real estate sector. The proposed Bill provides for the establishment of the Real Estate Regulatory Authority (the Authority) for regulation and promotion of real estate sector and to ensure sale of plot, apartment or building, as the case may be, in an efficient and transparent manner and to protect the interest of consumers in real estate sector and establish the Real Estate Appellate Tribunal to hear appeals from the decisions, directions or orders of the Authority.

3. The proposed Bill will ensure greater accountability towards consumers, and significantly reduce frauds and delays as also the current high transaction costs. It attempts to balance the interests of consumers and promoters by imposing certain responsibilities on both. It seeks to establish symmetry of information between the promoter and purchaser, transparency of contractual conditions, set minimum standards of accountability and a fasttrack dispute resolution mechanism. The proposed Bill will induct professionalism and standardisation in the sector, thus paving the way for accelerated growth and investments in the long run."

20. He then placed the draft report of the Standing Committee of the Lok Sabha dated 12th February, 2014 on the Real Estate (Regulation and Development) Bill, 2013 which states that as the demand for housing has increased manifold, taking advantage of situation, the private players have taken over the real estate sector with no concern for the consumers. Though availability of loan both through private and public banks have become easier, the high rate of interest and the higher EMI has posed additional financial burden on the people with the largely unregulated Real Estate and Housing Sector. Consequently, the consumers are unable to procure complete information or enforce accountability against builders and developers in the absence of an effective mechanism in place. Thus, it was felt badly for establishing an oversight mechanism to enforce accountability of Real Estate Sector and providing adjudication machinery for speedy dispute redressal.

21. The draft report further provides that the Bill impose an obligation upon the promoter not to book, sell or offer for sale, or invite persons to purchase any plot, apartment or building, as the case may be, in any real estate project without registering the real estate project with the Authority. In the Bill, it was provided that where the area of land proposed to be developed exceeds one thousand square meters or number of apartments proposed to be developed exceed twelve, registration of project is compulsory. Further, the bill provided to impose an obligation upon the promoter to impose liability to pay such compensation to the allottees, in the manner as provided under the proposed legislation, in case he fails to discharge any obligations imposed on him under the proposed legislation. The Bill further provided for punishment and penalty for contravention of the provisions of the proposed legislation and for non compliance of orders of Authority or Appellate Tribunal.

22. He then invited the attention of the Court to the Draft Committee report on the bill, which states that the Committee had sought public opinion through a press release and analysed the memoranda/suggestions received from various stakeholders/experts such as CII, FICCI and Associations working in the field of real estate on various provisions of the Bill. He then placed Chapter II of the Draft Report of the Parliamentary Committee wherein the Ministry of Housing and Urban Poverty Alleviation submitted a reply and requested for reconsidering the deletion of the words "in a real estate project" in the definition of "real estate agent". The Committee recorded that such a deletion was desirable as it would enable to regulate the role of estate agents in case of sale of secondary market properties also. Chapter III of the Draft Parliamentary Committee report states that small projects have been exempted from the purview of Bill where the area of the land is less than 1000 sq meter or where a building does not have more than 12 flats. An apprehension has been raised that large number of small housing projects will escape the purview of this law on inquiry about the apprehension, the Ministry of Urban Housing and Poverty Alleviation submitted that, initial draft of the Bill had earlier provided for registration of properties above 4000 sq.m. only. However, on suggestions and consultation with stakeholders, it was modified to provide for 1000 sq.m. or 12 apartments.

23. The Parliamentary Committee further noted the requirement of the promoter for enclosing certain documents with the application for registering the project. The Committee took note of the fact that Builder/Developer initially invests huge amount for procuring the land either by purchase or development. Moreover, huge amount are being paid towards payment of fees to the authorities for sanctioning and other statutory clearances. Hence, instead of restricting 30% of amounts to be used, the clause amended to 50% or more. Ministry of Urban Housing and Poverty alleviation suggested that limit of 70% is only indicative to cover "the cost of construction" and the percentage can further be reduced by the State/UT Government through a notification.

24. The Committee further noted on the reply furnished by the Ministry that 30% of project cost includes land and approval cost and the developer/promoter shall be allowed to withdraw 30% upfront as it may already have been incurred by him towards land cost, relevant approval etc. Cities such as Delhi and Mumbai, the land costs could be much higher in comparison to smaller cities. Hence, flexibility has been given to the States to determine the percentage of project cost.

25. Sri Tiwari then placed before the Court the report of Select Committee on the Bill, 2013 wherein the deliberations and general observation of the Committee are recorded. He tried to impress upon the fact that when the bill was introduced, a series of deliberations had taken place with different stakeholders, which were divided into 5 categories. The relevant extract of the report of the Select Committee is extracted hereas under :

"5. The Select Committee as per its decision taken in its first meeting on the 12th June, 2015 visited Kolkata, Bengaluru, Mumbai and Shimla with a view to have wider consultations with various stakeholders on the provisions on the Bill. The Committee also interacted

with various stakeholders in Delhi. For the sake of convenience, the stakeholders were divided into following five categories:-

(i) Consumers and Resident Welfare Associations;

(ii) Promoters/Builders and Real Estate Agents;

(iii) Banks and other financial institutions including RBI and NHB ;

(iv) Representatives of State Government concerned with real estate / housing including Development Authorities;

(v) Legal firms, NGOs and others."

26. According to him, the Government while introducing the Bill had tried to take suggestion from people across the Board who were in some way or the other related or linked to the Real Estate Sector.

27. In regard to Clause 38 of the Bill, the observation and recommendation of the Committee was that while filing an appeal against an order of penalty, imposed by the authority before the Appellate Tribunal, the promoter was required to deposit 30% amount and other liabilities. Relevant recommendation is extracted hereas under :

"The Committee recommends that the promoter, while preferring an appeal to the Appellate Tribunal, should deposit with the Tribunal at least 30% of the penalty amount and other liabilities, if any, imposed on it by Authority so that the realization of the penalty imposed on the promoter is not delayed for a long time."

28. Sri Tiwari then placed the amendments and omission suggested by the Select Committee to the Real Estate (Regulation and Development) Bill, 2015 (hereinafter referred to as "Bill of 2015"). According to him the term "promoter' was defined in Section 2(zk) of the Bill of 2015 wherein the Select Committee indicated its amendment and omission. Relevant definition is extracted hereas under:

"(zk) "promoter" means,--

(i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees (***); or

(ii) a person who develops (***) land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; and

(iii) any development authority or any other public body in respect of allottes of--

(a) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; and

(b) plots owned by such authority or body or placed at their disposal by the Government,

for the purpose of selling all or some of the apartments or plots, or

(iv) an apex State level co-operative housing finance society and a primary cooperative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or

(v) any other person who acts himself as a builder, colonizer, contractor, developer, estate developer or by an other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or (***) plot is developed for sale; and

(vi) such other persons who constructs any building or apartment for sale to the general public.

Explanation:--For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a (***) plot for sale and the persons who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified under this Act or the rules and regulations made thereunder."

29. According to Sri Tiwari, after great consultation and deliberation, Parliament enacted Act No.16 of 2016 wherein the word "promoter' has been defined in Section 2(zk) is a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some part of the apartments to other persons and includes his assignees. It also includes a person who develops land into a project, whether or not the person constructs structures on any plots, for the purpose of selling to other persons all or some plots in the said project. The definition is extracted hereas under :

"(zk) "promoter" means,--

(i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or

(ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or

(iii) any development authority or any other public body in respect of allottees of--

(a) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or

(b) plots owned by such authority or body or placed at their disposal by the Government, for the purpose of selling all or some of the apartments or plots; or

(iv) an apex State level co-operative housing finance society and a

primary co-operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or

(v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or

(vi) such other person who constructs any building or apartment for sale to the general public.

Explanation.--For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the person who sells apartments or plots are different person, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified under this Act or the rules and regulations made thereunder;"

30. Further Section 2(n) defines "real estate project", which is extracted hereas under :

"(zn) "real estate project" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartments, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto."

31. According to him, reading of definition "promoter' with "real estate project' would mean that any person developing a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or development of land into plots or apartments, as the case may be, for the purpose of selling all or some of said apartments or plots or building, as the case may be, by any person would include a promoter developing a real state project.

32. Section 3 takes care of registration of real estate project with the Authority. Proviso to Section 3 provides for registration of ongoing projects on the date commencement of the Act, 2016.

33. Thus, the Act takes care of both types of project which are launched subsequent to the enactment of Act, 2016 and those which are already ongoing, leaving no room for any person carrying out the activity of development of land, constructing of apartments or building, as defined under the Act, 2016 but not to register the same.

34. Thus, the appellants before the Court have launched the project in the year 2008 for constructing apartments for its members and their project having been registered under proviso to Section 3 are covered in the definition of "promoter', which leaves no room for any organization or association to claim that it is out of the purview of the Act. Once the project is registered, no promoter can escape the provisions of the Act.

35. Further, Section 4(2)(l)(D) is a provision to safeguard the money of the allottees who have deposited the money with the promoter, and it provides the mechanism and manner in which the money shall be used by a promoter.

36. According to him, the deposit of 70% amount in an escrow account does not mean that 30% of the remaining amount is the profit of the promoter. It has been only been provided to put a safeguard on the deposits of home buyers so that money collected is used for purchase of land, construction and necessary clearance fees to be deposited with authorities. Nowhere was the intention of the legislature to say that 70% was the cost of project and 30% was the profit amount of a promoter.

37. Sri Tiwari then tried to place link between deliberation of the Standing Committee of Lok Sabha and the report of the Select Committee of the Rajya Sabha on the Bill, 2013 wherein all the stakeholders were taken into confidence and suggestions were invited and further after the suggestion from the Ministry of Housing and Urban Poverty Alleviation, the report was submitted giving leverage to the State and Union Territories to fix the amount to be deposited by promoter in an escrow account securing for purchase of land and construction.

38. Sri Tiwari then invited the attention of the Court to the decision of Bombay High Court in the case of **Neelkamal Realtors Suburban Pvt. Ltd. And Anr. (supra)** wherein a challenge to the legality and constitutional validity of certain provisions of the Act, 2016 was put to. In the said petition, proviso to Section 3(1), 4(2)(l)(D) was prayed to be declared as unconstitutional, illegal, ultra vires and without authority of law. The Bombay High Court upheld these provisions along with other provisions of the Act.

39. In regard to proviso to Section 3(1) of the Act, 2016, he has relied upon paras 88, 90, 91, 92, 93 and 94 of the judgment wherein the contentions of the petitioners were negated by the Court, upholding the validity of the provisions. Relevant paras 90, 91 and 92 are extracted hereas under :

"90. The important provisions like Sections 3 to 19, 40, 59 to 70 and 79 to 80 were notified for operation from 1/5/2017. RERA law was enacted in the year 2016. The Central Government did not make any haste to implement these provisions at one and the same time, but the provisions were made applicable thoughtfully and phase-wise. Considering the scheme of RERA, object and purpose for which it is enacted in the larger public interest, we do not find that challenge on the ground that it violates rights of the petitioners under Articles 14 and 19(1)(g) stand to reason. Merely because sale and purchase agreement was entered into by the promoter prior to coming into force of RERA does not make the application of enactment retrospective in nature. The RERA was passed because it was felt that several promoters had defaulted and such defaults had taken place prior to coming into force of RERA. In the affidavit-in-reply, the UOI had stated that in the State of Maharashtra 12608 ongoing projects have been registered, while 806 new projects have been registered. This figure itself would justify the registration of ongoing projects for regulating the development work of such projects.

91. On behalf of the petitioners it was submitted that Parliament lacks power to make retrospective laws. Series of judgments cited above would indicate a

settled principle that a legislature could enact law having retrospective/retroactive operation. It cannot be countenance that merely because an enactment is made retrospective in its operation, it would be contrary to Article 14 and Article 19(1)(g). We find substance in the submissions advanced by the learned counsel appearing for the respondents that Parliament not only has power to legislate retrospectively but even modify pre-existing contract between private parties in the larger public interest. No enactment can be struck down merely by saying that it is arbitrary and unreasonable unless constitutional infirmity has been established. It is settled position that with the development of law, it is desirable that courts should apply the latest tools of interpretation to arrive at a more meaningful and definite conclusion. A balance has to be struck between the restrictions imposed and the social control envisaged by Article 19(6). The application of the principles will vary from case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.

92. Legislative power to make law with retrospective effect is well recognized. In the facts, it would not be permissible for the petitioners to say that they have vested right in dealing with the completion of the project by leaving the proposed allottees in helpless and miserable condition. In a country like ours, when millions are in search of homes and had to put entire life earnings to purchase a residential house for them, it was compelling obligation on the Government to look into the issues in the larger public interest and if required, make stringent laws regulating such sectors. We cannot foresee a situation where helpless allottees had to approach various forums in search of some reliefs here and there and wait for the outcome of the same for indefinite period. The public interest at large is one of the relevant consideration in determining the constitutional validity of retrospective legislation."

40. As far as Section 4(2)(l)(D) is concerned, the relevant para of the judgment are 97, 98, 99, 100 and 101, which are extracted hereas under :

"97. Section 4(2)(l)(D) mandates that 70% of the amount realized for the real estate project from the allottees from time to time shall be deposited in separate account in a scheduled bank to cover the cost of construction, land and shall be used only for that purpose. This is an important provision under the scheme of RERA. It was submitted during the course of argument that throughout the country and more so in Mega Cities like Delhi and Mumbai number of cases are coming to light, that huge projects are left incomplete by the builders without giving timely possession to the allottees as proposed in the agreement. Allottees have approached the Apex Court/High Courts. Several stringent actions have been initiated by the courts. The purpose behind framing this provision is to see that amount collected from the allottees by the promoter is invested for the same project only. The promoter shall not be entitled to divert the said fund for the benefit of other project or for utilization as per desire of the promoter. Such practices have been curbed under the scheme of RERA and one of such move is to introduce such provision wherein one is bound to deposit 70% amount collected from the allottees to be invested on the project. This is again a legislation in the larger public interest of the consumer and

allottee. We do not find any arbitrariness in this provision.

98. It was submitted that, (a) there is no guidance prescribed in respect of deposit of 70% of the amount realized from the allottees. In a given case, the said amount could have been invested or spent on the project by the promoter; (b) it is possible that promoter would have invested or spent 50% of the amount out of 70% on the said project; (c) it is possible that the allottees fail to deposit according to the terms of the agreement or the promoter could not receive 70% of the amount from the allottees; (d) it is possible in a given case that allottees are at fault in not contributing their share with the promoter and due to their default the promoter is unable to collect the amount. Various situations were deliberated upon during the course of hearing of these petitions. We hasten to add here that legislation cannot be drafted by keeping in view all the possible eventualities, questions and answers. Merely on academic basis it would not be possible to consider the challenge to an enactment. We will have to wait and see how the Act is implemented by testing the provisions of the Act in the real fact situation emerging from case to case.

99. However, the doubts expressed on behalf of the petitioners can be very well explained. The Union of India has clarified that in case 70% amount was invested or spent by a promoter on the project, then such a promoter need not deposit 70% amount realized from the allottees while getting the project registered. It is sufficient if necessary certificate is furnished to the authority concerned to their satisfaction that amount realized from the allottees was spent on the said project. Even if 50% amount was collected from the allottees and spent accordingly, then the authority under RERA would look into the same and deal with the fact situation and pass necessary orders. In case the allottees default in payment, the it would be for the authority to issue necessary instructions and directions so that allottees are made to deposit the amount with the promoter. A promoter would remain always a promoter under RERA. What is registered under Section 3 of RERA is a project and not a promoter. This is a crucial distinction which needs to be understood while analyzing the scheme of RERA. In a given fact situation of the case, the authority may ask the promoter to sell already constructed flats for generating finances so that one is not put to any loss and the remaining development work is carried out. We cannot encompass all the situations for all the times to come at this stage. It is left to the wisdom of the authority concerned, which is expected to deal with the facts of each case while discharging its obligation in implementing the provisions of RERA in letter and spirit.

100. The amount realized by the promoter would remain his money and in no case expropriated or taken over in any way by authority under RERA. The amount is merely sought to be deposited in a separate account to ensure timely completion of the project. The deposit made by the promoter can duly be withdrawn upon certification and under the instructions of the authority. There is no restriction upon the right of the promoter. The money is to be deposited for ensuring that it is utilized for the purpose of project and not misused.

101. The provisions of Section 4(2)(l)(C)(D) states that 70% of amount realized for the real estate project from the

allottees to be deposited in a separate account, which means that 30% of the amount realized shall remain with the promoter/developer, which would be to the benefit of the promoter. In that way, the provision balances rights of promoter and the allottee."

41. Coming to provisions of Section 18, Sri Tiwari submitted that the Act specifically provides for return of amount and compensation if the promoters fails to complete or is unable to give possession of an apartment within the time agreed. The Bombay High Court judgment in para 129 has taken note of the said fact and held that the amount realized and deposited under Section 4(2)(l)(D) utilized by the promoter in construction, leaving 30% of the amount retained by him, is to be used in such contingencies where the promoter defaults to hand over possession to the allottees in the agreed time limit. Relevant paras 129, 310, 311 are extracted hereas under :

"129. Under the provisions of Section 4(2)(l)(D), the promoter would deposit 70% of the amount realized for the real estate project from the allottees in a separate account which means that 30% of the amount realized by the promoter from the allottees will be retained by him. In such case, if the promoter defaults to hand over possession to the allottee in the agreed time limit or the extended one, then the allottee shall reasonably expect some compensation from the promoter till the handing over of possession. In case the promoter defies to pay the compensation, then the same would amount to unjust enrichment by the promoter of the hard earned money of the allottees which he utilized. Such provisions are necessary to be incorporated because it was noticed by the Select Committee and the Standing Committee of the Parliament that huge sums of money collected from the allottees were not utilized fully for the project or the amounts collected from the allottees were diverted to other sectors than the concerned project. We do not notice any constitutional impropriety or legal infirmity or unreasonableness in incorporating these provisions under the RERA."

"310. In my opinion Section 18 is compensatory in nature and not penal. The promoter is in effect constructing the apartments for the allottees. The allottees make payment from time to time. Under the provisions of RERA, 70% amount is to be deposited in a designated bank account which covers the cost of construction and the land cost and has to be utilized only for that purpose. Interest accrued thereon is credited in that account. Under the provisions of RERA, 30% amount paid by the allottees is enjoyed and used by the promoter. It is, therefore, not unreasonable to require the promoter to pay interest to the allottees whose money it is when the project is delayed beyond the contractual agreed period. Even under Section 8 of MOFA on failure of the promoter in giving possession in accordance with the terms of the agreement for sale, he is liable to refund the amount already received by him together with simple interest @ 9% per annum from the date he received the sum till the date the amount and interest thereon is refunded. In other words, the liability under Section 18(1)(a) is not created for the first time by RERA. Section 88 lays down that the provisions of RERA shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

311. As far as interest under Section 18(1)(b) is concerned, it was

submitted that under Section 8 the Authority appoints facilitator/agency for carrying out remaining development works. After ouster of the promoter, he cannot be held responsible on account of delay in handing over possession by the facilitator/agency so appointed by the Authority. It was contended that it is quiet possible that the amount of 70% deposited under Section 4(2)(l)(D) may have been utilized by the promoter for carrying out construction. In that event, it will be extremely harsh and unreasonable to direct the promoter to pay interest till handing over possession after his ouster. The provisions of Section 18(1)(b) are, therefore, violative of Articles 14, 19(1)(g) of the Constitution of India. I do not find any merit in this submission. The promoter is liable to pay interest on account of suspension or revocation of the registration under the Act or for any other reason. The basic presumption is that the promoter was unable to complete the construction despite prescribing the time period under Section 4(2)(l)(C). The amount of 70% is already credited in a dedicated bank account under Section 4(2)(l)(D). The promoter has retained 30% paid by the allottee to him. Thus the allottee has parted with entire consideration for purchasing the apartment and still he is not given possession. The allottee cannot be said to be acting gratuitously. The promoter enjoying the benefit is bound to make compensation to the allottee. In other words though it is a case of unjust enrichment on the part of the promoter, still he is not liable to compensate the allottee by paying interest on the amount retained by him. In view thereof, it cannot be said that Section 18(1)(b) is violative of Articles 14 and 19(1)(b) of the Constitution of India. It also cannot be said to be a penal provision."

42. Sri Tiwari then placed before the Court judgment of Apex Court in case of **M/s Newtech Promoters and Developers Pvt. Ltd. vs. State of U.P. and others, 2021 SCC OnLine SC 1044** wherein the Apex Court while hearing bunch of appeals framed following questions to be decided which are as under :

"1. Whether the Act 2016 is retrospective or retroactive in its operation and what will be its legal consequence if tested on the anvil of the Constitution of India?

2. Whether the authority has jurisdiction to direct return/refund of the amount to the allottee under Sections 12, 14, 18 and 19 of the Act or the jurisdiction exclusively lies with the adjudicating officer under Section 71 of the Act?

3. Whether Section 81 of the Act authorizes the authority to delegate its powers to a single member of the authority to hear complaints instituted under Section 31 of the Act?

4. Whether the condition of pre-deposit under proviso to Section 43(5) of the Act for entertaining substantive right of appeal is sustainable in law?

5. Whether the authority has power to issue recovery certificate for recovery of the principal amount under Section 40(1) of the Act?"

43. Question No.4 was in regard to whether the condition of pre-deposit under proviso to Section 43(5) of the Act for entertaining an appeal was sustainable under the law. The Apex Court dealt with this question in depth and held as under :

"128. It may further be noticed that under the present real estate sector which is now being regulated under the provisions of the Act 2016, the complaint for refund of the amount of payment which the allottee/consumer has deposited with the promoter and at a later stage, when the promoter is unable to hand over possession in breach of the conditions of the agreement between the parties, are being instituted at the instance of the consumer/allotee demanding for refund of the amount deposited by them and after the scrutiny of facts being made based on the contemporaneous documentary evidence on record made available by the respective parties, the legislature in its wisdom has intended to ensure that the money which has been computed by the authority at least must be safeguarded if the promoter intends to prefer an appeal before the tribunal and in case, the appeal fails at a later stage, it becomes difficult for the consumer/allottee to get the amount recovered which has been determined by the authority and to avoid the consumer/allottee to go from pillar to post for recovery of the amount that has been determined by the authority in fact, belongs to the allottee at a later stage could be saved from all the miseries which come forward against him.

129. At the same time, it will avoid unscrupulous and uncalled for litigation at the appellate stage and restrict the promoter if feels that there is some manifest material irregularity being committed or his defence has not been properly appreciated at the first stage, would prefer an appeal for re-appraisal of the evidence on record provided substantive compliance of the condition of pre-deposit is made over, the rights of the parties inter se could easily be saved for adjudication at the appellate stage."

"136. To be noticed, the intention of the instant legislation appears to be that the promoters ought to show their bona fides by depositing the amount so contemplated.

137. It is indeed the right of appeal which is a creature of the statute, without a statutory provision, creating such a right the person aggrieved is not entitled to file the appeal. It is neither an absolute right nor an ingredient of natural justice, the principles of which must be followed in all judicial and quasi-judicial litigations and it is always be circumscribed with the conditions of grant. At the given time, it is open for the legislature in its wisdom to enact a law that no appeal shall lie or it may lie on fulfilment of precondition, if any, against the order passed by the Authority in question.

138. In our considered view, the obligation cast upon the promoter of pre-deposit under Section 43(5) of the Act, being a class in itself, and the promoters who are in receipt of money which is being claimed by the home buyers/allottees for refund and determined in the first place by the competent authority, if legislature in its wisdom intended to ensure that money once determined by the authority be saved if appeal is to be preferred at the instance of the promoter after due compliance of pre-deposit as envisaged under Section 43(5) of the Act, in no circumstance can be said to be onerous as prayed for or in violation of Articles 14 or 19(1)(g) of the Constitution of India."

44. Sri Nar Singh, learned counsel appearing on behalf of respondent No.2 submitted that the argument of appellant that the appellant is a registered society and is a welfare body of Air Force and Navy personnel and that it works on "no profit no

loss basis" is not correct and is denied. According to him, though the Society was registered in 1980, but, it stopped following regulations of a registered organisation. It is not forwarding its audited annual balance Sheets nor informed the Registrar of any change in its policies. Further, its functioning without any Government Regulatory Authority monitoring its functioning.

45. According to respondent No.2, the appellant has now started venturing into more and more bigger projects making flats more than required to sell to civilians at higher rates and also started making projects such as Farm houses etc. Bigger projects are with an intention to make more profit. According to him, there are number of service personnel and civilian staff who were regularly buying flats from the appellant and selling it to the civilians. The character of the appellant has changed from welfare organization to commercial organization. It is further contended that representatives of allottees have time and again sought information regarding expenditure of the money on the Project Fund but no information has been provided and huge amount of money has been advanced to contractors without any bank guarantee or work executed on ground. According to respondent, the appellant till date has not been able to get Completion Certificate and possession have been given in Tower B, C, D and E without Occupancy Certificate/Completion Certificate. According to him, the possession offer was issued only after allottees went to the authority and demanded justice and appellant was compelled to freeze cost and offered possession after obtaining Completion Certificate.

46. Reliance has been placed upon decision of coordinate bench of Lucknow Bench of this Court in **Second Appeal Defective No.237 of 2019 Air Force Naval Housing Board vs. Mohit Anand** as well as decision rendered in batch of appeals filed by the appellant before the Appellate Tribunal in **Appeal Defective No. 233 of 2020 (Air Force Naval Housing Board vs. Satish Kumar Sharma)** wherein the Appellate Authority had held that the appellant was covered under the definition "promoter' and the mandatory requirement under sub-section (5) of Section 43 was to be complied with before the hearing of the appeal.

47. Apart from this, no other argument was raised.

48. I have heard the counsels for the parties and perused the material on record.

49. The sole question, on which the appeal was admitted was, whether appellant is included in the meaning of the word "promoter' as defined under Section 2(zk) of the Act, 2016, as may enforce on the appellant in condition of pre-deposit the entire disputed amount for the purpose of maintaining appeal under Section 43(5) of the Act against the order passed by the Regulatory Authority.

50. The term "promoter' is of the great significance. It has to be seen not only from the definition given under the Act, 2016 but the object and reasons why the Act, 2016 was enacted by the parliament and the various deliberations made before introduction of the bill in the Parliament and its discussion in both the Standing Committee and the Select Committee after inviting suggestions and objections and consulting all the stakeholders connected with the real estate sector.

51. The Statement of Object and reasons of the Act, 2016 itself provides that with growth of population and people shifting towards urbanization, demand for houses has increased manifolds. Government also introduced various housing scheme to cope up with the increasing demand but the experience shows that demand of the housing sector could not be meted out by the Government at its own level for various reasons to meet the requirement. The private players entered into the real estate sector in meeting out the rising demand of houses. The availability of loans both from public and private banks becoming easier, still high rate of interest at EMI has posed additional burden on the people. The real estate and housing sector was largely unregulated and consequence was that consumers were unable to procure complete information for enforced accountability towards builders and developers in the absence of an effective mechanism in place. The Consumer Protection Act, 1986 (hereinafter referred to as "Act, 1986") was available to cater the demand of home buyer in real estate sector but the experience shows that this mechanism was inadequate to address the needs of home buyer and promoters in real estate sector. The object and reason indicates that the bill was introduced to regulate real estate sector having jurisdiction to ensure compliance with the obligation cast upon the promoter.

52. The definition provided under Section 2(zk) of the Act, 2016 finds place after great deliberation by the Standing Committee of the Lok Sabha as well as Select Committee of the Rajya Sabha, which now defines that a person who constructs or poses to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartment for the purpose of selling all or some of the apartments to other persons and includes his assignees. Further, the definition includes a person who develops a land into project whether or not the person constructs structure on any of the plots for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structure on them.

53. The definition of word "promoter' not only includes a person but also apex level housing financial society and a primary cooperative housing society which constructs apartment or building for its members. The definition further adds, any other person who act himself as a builder, colonizer, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of land on which the building or apartment is constructed or colony is developed for sale, or such other person who constructs any building or apartment for sale to general public.

54. Thus, the Parliament was clear that any person, who ventures into the field of real estate by constructing a building or an apartment or launches a project by selling plots, shall be termed as "promoter'. The Act does not make any distinction or leaves any room not to include any organisation, society and association.

55. The Act, 2016 itself defines the word "person' in section 2(zg), which is extracted hereas under :

"Person" includes,--

(i) an individual;

(ii) a Hindu undivided family;

(iii) a company;

(iv) a firm under the Indian Partnership Act, 1932 (9 of 1932) or the Limited Liability Partnership Act, 2008 (6 of 2009), as the case may be;

(v) a competent authority;

(vi) an association of persons or a body of individuals whether incorporated or not;

(vii) a co-operative society registered under any law relating to co-operative societies;

(viii) any such other entity as the appropriate Government may, by notification, specify in this behalf."

56. The word "a person' is of wide connotation and includes any company or association or body of person, whether incorporated or not, as defined under Section 3(42) of the General Clauses Act (10 of 1897).

57. Under the Income Tax Act (43 of 1961), Section 2(31), "person" includes-- (i) an individual, (ii) a Hindu undivided family, (iii) a company, (iv) a firm, (v) an association of persons or a body of individuals, whether incorporated or not, (vi) a local authority, and (vii) every artificial juridical person, not falling within any of the preceding sub-clauses.

58. Similarly, a person has been defined under the Standards of Weights and Measures Act, (60 of 1976) and includes (i) every department or office, (ii) every organisation established or constituted by Government, (iii) every local authority within the territory of India (iv) every co-operative society, (v) every other society registered under the Societies Registration Act, 1860.

59. Similarly, Section 2(m) of Consumer Protection Act, (68 of 1986) defines "person', which includes -- (i) a firm whether registered or not; (ii) a Hindu undivided family; (iii) a co-operative society; (iv) every other association of persons whether registered under the Societies Registration Act, 1860 (21 of 1860) or not.

60. Section 87 (k) of Finance Act (No.2) (21 of 1998) defines "person', which includes- (i) an Individual, (ii) a Hindu undivided family, (iii) a company, (iv) a firm, (v) an association of persons or a body of Individuals, whether incorporated or not, (vi) a local authority, (vii) every artificial Juridical person, not falling within any of the preceding sub-clauses, (viii) assessee, as defined in rule 2 of the Central Excise Rules, 1944, (ix) exporter as defined in clause (20) of section 2 of the Customs Act 1962. (x) importer as defined in clause (26) of section 2 of the Customs Act, 1962, (xi) any person against whom proceedings have been initiated and are pending under any direct tax enactment or indirect tax enactment;

61. Section 2(l) of Competition Act, 2002 provides for the definition of "person' which includes, -- (i) an individual; (ii) a Hindu undivided family; (iii) a company; (iv) a firm; (v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India; (vi) any corporation established by or under any

Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956; (vii) any body corporate incorporated by or under the laws of a country outside India; (viii) a co-operative society registered under any law relating to co-operative societies; (ix) a local authority; (x) every artificial juridical person, not falling within any of the preceding sub-clauses;

62. Likewise, Section 2(s) of the Prevention of Money-Laundering Act, 2002 (Act 15 of 2003) provides for "person', which includes-- (i) an individual, (ii) a Hindu undivided family, (iii) a company, (iv) a firm, (v) an association of persons or a body of individuals, whether incorporated or not, (vi) every artificial juridical person not falling within any of the preceding sub-clauses, and (vii) any agency, office or branch owned or controlled by any of the above persons mentioned in the preceding sub-clauses.

63. Thus, from the reading of definition of word "person', as defined under Act, 2016 as well as under various Acts, which have been extracted above, it is clear that it connotes to include wide range of persons, including individuals, Hindu Undivided Family, Company, Firm, Authorities, associations, corporative societies etc.

64. Use of word "a person' at the outset of the definition clause of word "promoter' clearly signifies that it embraces all type of individuals, association, corporations and authorities dealing in the real estate sector and does not exclude any organization.

65. Its' impact is vast covering all who are there in this game of launching projects by constructing buildings and flats as well as developing plots. The legislature does not leave any individual, association or organization as exception to the word "promoter' so as to give benefit to any person claiming himself to be ousted from the arena of the Act of 2016.

66. In the present case, it is an admitted case of the appellants that the project was envisaged in the year 2008 and started in 2010. When the Act was enforced in the year 2016, the project was ongoing, pursuant to which in terms of proviso to Section 3, the project was registered with the authority. Once there is no denial of the fact that appellant approached authority and got the project registered, they cannot at this stage shirk out from a rigours of provision of Sections 18 and 43(5) of the Act, 2016.

67. The argument of Sri Tiwari, Senior Advocate, that after much deliberations by the Standing and Select Committee of the two houses of the Parliament, the Bill was introduced and in 2016, and the Act came into force after consultation with all the stakeholders in connection with the real estate sector, has force. The very purpose and object for enacting Act, 2016 was to safeguard the interest of the home buyers from the project which were launched by the promoter and was not completed in time and there being no mechanism for saving the home buyers that Government came up with this Act. Not only this, the promoters have also been protected under various provisions. The penal provisions have been provided so as to see that promises made by the promoter/developers in the brochure to a home buyers is actually brought on ground in time and is not a false promise.

68. The argument raised at the behest of the appellants that being a "no profit no

loss' organization, the appellant should be exempted from complying provisions of sub-section (5) of Section 43 does not hold ground, as proviso to the sub-section (5) clearly provides that in case promoter files an appeal, he has to deposit with the Tribunal at least 30% of the penalty or such higher amount determined by the Tribunal, or the total amount to be paid to the allottee including interest and compensation imposed on him.

69. Section 4 of Act, 2016 requires for making an application by a promoter for registration of real estate project. The said application has to be made to the authority in a prescribed manner within the prescribed time accompanied by fees, as may be prescribed along with the documents mentioned in sub-section (2) of Section 4 of Act, 2016.

70. Once it is an accepted case of appellants that they got their project registered with the Authority on 15.8.2017, they cannot resile from the fact that their application for registration of the project was made claiming to be "promoter' of the project. It is clear from the reading of Section 4 that registration of a project is to be done by a promoter and by no one else.

71. The appellants having complied the provisions of the Act, 2016, cannot pull back themselves at the stage of compliance of mandatory requirements for filing an appeal with the Tribunal on the strength of denial of their title as "promoter'.

72. The Act is very clear that whosoever ventures into the real estate sector by developing area of land, which is more than 500 sq.mts. and the apartment proposed to be developed exceed 8 in number, has to get his project registered with the Authority.

73. The word "promoter' has been deliberately used by the legislature in the proviso to sub-section (5) of Section 43, as sub-section (5) provides a remedy of statutory appeal to any person aggrieved by the direction or decision of an authority to file appeal before the Tribunal, but in case of a "promoter' the mandatory deposit has to be made prior to the entertainment of the appeal by the Tribunal.

74. The purpose of insertion of such provision is to safeguard the innocent home buyer who has deposited his hard earned money with the developers/promoter and in case of failure of the project or the project getting delayed and on his complaint, the authority directing for refund of the amount with interest, the promoter is obliged to deposit the same before his appeal is heard. In **Neelkamal Realtors Suburban Pvt. Ltd. And Anr. (supra),** Bombay High Court while upholding the validity of the provisions of Sections 3, 4, 4(2)(l)(D), and 18 had clearly observed and held that these provisions are there for safeguard of the home buyers.

75. Sri Ashish Singh has tried to impress upon the Court that the present project was an ongoing project and 70% amount, as was required to be deposited under Section 4(2)(l)(D) was not done as it was to be complied in case of fresh registration after enforcement of the Act, 2016 does not help his case, as in the present case the order passed by the authority was under challenge before the Appellate Tribunal and mandatory requirement of proviso to sub-section (5) of Section 43 was not complied with and the Tribunal rejected the appeal. The Act

nowhere makes distinction between requisite and mandatory deposit in case of filing an appeal by a promoter whose project was ongoing at the time of implementation of the Act, or it was a case of fresh registration of the project subsequent to the enforcement of the Act. The insertion of proviso to Section 3 was to safeguard the interest of the home buyers, who had deposited their hard earned money with the developer/promoter prior to enforcement of the Act that project was required to get registered with the authority in case of non issuance of Completion Certificate / Occupancy Certificate.

76. Had the promoter got the Completion Certificate from the local authority, as provided under the Act, there was no need for getting the project registered after enforcement of the Act, 2016. But, as the project was not completed, the legislature required the promoter for registration of project to safeguard the interest of the home buyers. Had not the Government enacted Act, 2016 and required the promoter to get his project registered, the contesting respondents in these bunch of appeals would have been running from pillar to post to get possession of their flats or for refund of the money. The litigation before the Civil Court would have taken years to get their hard earned money back. It is through this legislation that the Government had restricted the arbitrary actions of the builders/developers.

77. It is an admitted case of the appellants that they have formed society for providing affordable houses to the serving and retired Air Force and Naval personnel. Further in case of under-subscription of the project, the scheme is diluted and the flats are sold to Army personnel, Coast Guard, Para military personnel, Central and State Government employees. Further, there is no embargo upon the flats being sold to the civilians/ public once it is allotted and sold to the serving and retired Air Force and Naval personnels. Moreover, there is no denial to the fact that the appellants are venturing into bigger project and making flats and Farm Houses.

78. Similar issue in regard to statutory compliance under sub-section (5) of Section 43 was under consideration by this Court in Second Appeal Defective No.237 of 2019, which was filed by the appellants. The Court while dismissing the second appeal of the appellants held that the appellants were bound to comply the statutory provision of Section 43(5) of the Act, 2016.

79. While dealing with Section 43(5) of the Act, 2016 the Hon'ble Supreme Court in **M/s Newtech Promoters and Developers Pvt. Ltd. (supra)** had categorically held that pre-deposit, as envisaged under Section 43(5) of Act, 2016, in no circumstances can be said to be onerous, as prayed for, or in violation of Article 14 or 19(1)(g) of the Constitution of India.

80. Thus, the question framed as to whether appellant is included in the definition of word "promoter', as defined under Section 2(zk) of Act, 2016 as may enforced upon the appellant in condition of pre-deposit, the entire deposit amount for the purpose of maintaining appeal under Section 43(5) of the Act, 2016 against the order of Regulatory Authority stands answered in affirmative i.e. the appellants have to comply the mandatory provisions of Section 43(5) of the Act, 2016 and are included under the definition of "promoter'.

81. Thus, considering the facts and circumstances of the case, this Court finds that as the appellants are working in real estate sector and their project having been registered on 15.8.2017 after enforcement of Act, 2016, comes under the purview of "promoter', as defined under Section 2(zk) of Act, 2016, and necessary compliance of pre-deposit, as enshrined under Section 43(5) of Act, 2016, has to be made before the Tribunal before entertainment of their appeal. Furthermore, the law is settled as far as mandatory compliance of Section 43(5) of Act, 2016 is concerned in view of the judgment of Apex Court in the case of **M/s Newtech Promoters and Developers Pvt. Ltd. (supra).**

82. I, therefore, find that no case for interference is made out in the orders impugned. The appeals fail and are hereby dismissed. Interim orders stand discharged.

83. However, no order as to costs.

(2022)05ILR A944
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.04.2022

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ B No. 295 of 2022

Smt. Kalawati ...Petitioner
Versus
The Board of Revenue & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ramedran Asthana

Counsel for the Respondents:
C.S.C., Sri Rishikesh Tripathi

(A) Land Law - Uttar Pradesh Revenue Code, 2006 - Section 35 - Mutuation in cases of succession , Section 39 - Certain orders of the Revenue Officers not to debar a suit , The Constitution of India - Article 226 - orders of mutation are passed on the basis of possession - no substantive rights of the parties are decided - ordinarily orders passed in mutation proceedings are not to be interfered with in exercise of the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India - unless the same are found to be wholly without jurisdiction or have the effect of rendering findings which are contrary to title already decided by a competent court. (Para - 11,43)

(B) Land law - Uttar Pradesh Revenue Code, 2006 - Section 39 - unequivocal terms - order passed under Section 35 would not debar any person from establishing his rights to the land by means of a suit under Section 144 - an entry in revenue records is only for fiscal purpose - does not confer title on a person whose name appears in record-of-rights - title to the property can only be decided by a competent civil court. Para - 18,44)

Orders of mutation - passed in favour of the predecessor-in-interest of private respondents - basis of claim - petitioner asserting herself to be the second wife of the recorded tenure holder - to support her claim reliance was sought to be placed on various pieces of documentary evidence - proceedings being summary in nature - do not decide the rights of the parties - challenge under writ petition - whether entertainable.**(Para - 3,41)**

HELD:-Court not inclined to exercise its extraordinary discretionary jurisdiction under Article 226 of the Constitution of India against the orders passed in mutation proceedings. **(Para -45)**

Petition dismissed. (E-7)

List of Cases cited:-

1. Lal Bachan Vs B.O.R., U.P., Luck. & ors., 2002 (93) RD 6

2. Smt. Hadisul Nisha Vs Add. Commissioner (Judicial), Faizabad & ors., 2021 (152) RD4 26

3. Mahesh Kr. Juneja & anr. Vs Add. Commissioner Judicial, Moradabad Division & ors., 2020 (146) RD 545

4. Awadhesh Singh Vs Add. Commissioner & ors., 2017 (9) ADJ 378

5. Smt. Bhimabai Mahadeo Kambekar (D) Th. LR Vs Arthur Imp. & Exp. Co. & ors., (2019) 3 SCC 191

6. Jaipal Vs B.O.R., U.P., Alld. & ors., AIR 1957 ALL 205

7. Bindeshwari Vs B.O.R. & ors., 2002 (1) AWC 498

8. Vinod Kumar Rajbhar Vs St. of U.P. & ors., 2012 (1) ADJ 792

9. Buddh Pal Singh Vs St. of U.P. & ors., 2012 (5) ADJ 266

10. Bhimabai Mahadeo Kambekar Vs Arthur Imp. & Exp. Co. & ors., (2019) 3 SCC 137

11. Balwant Singh Vs Daulat Singh, (1997) 7 SCC 137

12. Narasamma Vs St. of Karn., (2009) 5 SCC 591

13. Faqruddin Vs Tajuddin, (2008) 8 SCC 12

14. Narain Prasad Aggarwal Vs St. of M.P. ,(2007) 11 SCC 736

15. U.O.I. & ors. Vs Vasavi Cooperative Housing Society Ltd. & Ors. ,(2014) 2 SCC 269

16. Corpn. of the City of Bangalore Vs M. Papaiah, (1989) 3 SCC 612

17. Guru Amarjit Singh Vs Rattan Chand, (1993) 4 SCC 349

18. H.P. Vs Keshav Ram, (1996) 11 SCC 257

19. Sawarni (Smt.) Vs Inder Kaur (Smt.) & ors.,(1996) 6 SCC 223

20. Suraj Bhan & ors. Vs Financial Commissioner & ors., (2007) 6 SCC 186

21. Harish Chandra Vs U.O.I. & ors., 2019 (5) ADJ 212 (DB)

22. Mahesh Kr. Juneja & anr. Vs Add. Commissioner Judicial Moradabad Division & ors.,2020 (146) RD 545

23. Jitendra Singh Vs St. of M.P. & ors., 2021 SCC Online SC 802

24. Suraj Bhan Vs Financial Commissioner, (2007) 6 SCC 186

25. Suman Verma Vs U.O.I. ,(2004) 12 SCC 58

26. Rajinder Singh Vs St. of J & K, (2008) 9 SCC 368

27. Municipal Corp., Aurangabad Vs St. of Maha., (2015) 16 SCC 689

28. T Ravi Vs B. Chinna Narasimha, (2017) 7 SCC 342

29. Bhimabai Mahadeo Kambekar Vs Arthur Imp. & Exp. Co., (2019) 3 SCC 191

30. Prahlad Pradhar Vs Sonu Kumhar, (2019) 10 SCC 259

31. Ajit Kaur Vs Darshan Singh, (2019) 13 SCC 70

32. Radhey Shyam & ors. Vs St. of U.P. & ors., 2013 (7) ADJ 71

33. Rudramani Shukla Vs Subhash Kr. & ors., 2017 (3) ADJ 510

34. Vijay Shankar Vs Add. Commissioner (Administration) Luck. Divison & ors., 2015 (3) ADJ 186 (LB)

35. Whirlpool Corp. Vs Rregistrar of Trade Marks, (1998) 8 SCC 1

36. Harbanslal Sahnia Vs I.O.C. Ltd., (2003) 2 SCC 107

37. Radha Krishan Industries Vs St. of H.P. & ors., (2021) 6 SCC 771

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

1. Heard Sri Ramendra Asthana, learned counsel for the petitioner, Sri Ajeet Kumar Singh, learned Additional Advocate General assisted by Sri J.P.N. Raj, learned Additional Chief Standing Counsel for the State respondents and Sri Rishikesh Tripathi, learned counsel for the respondent nos. 4 to 7.

2. The present petition has been filed seeking to raise a challenge to the order dated 05.10.2021 passed by the respondent no.1-Board of Revenue, U.P. at Lucknow dismissing the Revision No. REV/1789/2019/Banda (Computerized Case No. R20190711001789, Smt. Kalawati vs. Pramod Singh), the earlier order dated 16.08.2019 passed by the respondent no.2-Up-Ziladhikari, Banda in Appeal No. T2018017110104138 (Smt. Kalawati vs. Smt. Shiv Devi) and also the order dated 26.06.2018 passed by the respondent no.3-Naib Tehsildar Banda, in Case No. 00411/2018 (Computerized Case No. T201807110100411, Report Lekhpal vs. Gyan Singh) under Section 35 of Uttar Pradesh Revenue Code, 20061 rejecting the objection dated 13.02.2017 filed by the petitioner and allowing mutation application dated 02.01.2017 filed by Smt. Shiv Devi, predecessor-in-interest of the respondents nos. 4 to 7 in the present petition.

3. An objection has been taken by the counsel appearing for the respondents by pointing out that the orders which are sought to be challenged have been passed in mutation proceedings and the aforesaid proceedings being summary in nature which do not decide the rights of the parties, the present writ petition seeking to challenge the same would not be entertainable.

4. Counsel for the petitioner though not disputing the aforesaid legal proposition that as per the consistent view taken by this Court, a writ petition arising out of mutation proceedings is not entertainable, seeks to contend that there are certain exceptions to the general rule and it cannot be held that in all situations a writ petition seeking to challenge orders in mutation proceedings would not be entertainable.

5. To support his contention, reliance is sought to be placed on decisions of this Court in **Lal Bachan vs Board of Revenue, U.P., Lucknow and others2 and Smt. Hadisul Nisha vs. Additional Commissioner (Judicial), Faizabad and others3.**

6. Learned Additional Advocate General appearing for the State respondents and also the counsel who has put in appearance on behalf of the private respondent nos. 4 to 7 have contended that mutation proceedings being of a summary nature do not decide any question of title and the orders passed in such proceedings do not come in the way of a person getting his rights adjudicated in a regular suit and it is for the said reason that the consistent view taken by the courts is that such petitions are not to be entertained in exercise of powers under Article 226 of the Constitution of India. Reliance has been placed on the decisions of this Court in **Mahesh Kumar Juneja and another vs. Additional Commissioner Judicial, Moradabad Division and Others4, Awadhesh Singh vs. Additional**

Commissioner and others5 and also a decision of the Supreme Court in **Smt. Bhimabai Mahadeo Kambekar (D) Th. LR vs. Arthur Import and Export Company & Ors.6.**

7. The question of the maintainability of a writ petition against orders passed in mutation proceedings has come up before this Court earlier and it has consistently been held that normally the High Court in exercise of its discretionary jurisdiction does not entertain writ petitions against such orders which arise out of summary proceedings.

8. In the case of **Jaipal Vs. Board of Revenue, U.P., Allahabad & Ors.7** notice was taken of the consistent practice of this Court not to interfere with the orders made by the Board of Revenue in cases in which the only question at issue was whether the name of the petitioner should be entered in the record of rights. The observations made in the judgment in this regard are as follows:-

"3. ...It has however been the consistent practice of this Court not to interfere with orders made by the Board of Revenue in cases in which the only question at issue is whether the name of the petitioner should be entered in the record of rights.

That record is primarily maintained for revenue purposes and an entry therein has reference only to possession. Such an entry does not ordinarily confer upon the person in whose favour it is made any title to the property in question..."

9. The question with regard to the maintainability of a writ petition arising out of mutation proceedings fell for consideration in the case of **Sri Lal Bachan Vs. Board of Revenue, U.P., Lucknow & Ors.2** and it was held that the High Court does not entertain a writ petition under Article 226 of the Constitution of India for the reason that mutation proceedings are only summarily drawn on the basis of possession and the parties have a right to get the title adjudicated by regular suit. The observations made in the judgment are extracted below:-

"11. This Court has consistently taken the view as is apparent from the decisions of this Court referred above that writ petition challenging the orders passed in mutation proceedings are not to be entertained. To my mind, apart from there being remedy of getting the title adjudicated in regular suit, there is one more reason for not entertaining such writ petition. The orders passed under Section 34 of the Act are only based on possession which do not determine the title of the parties. Even if this Court entertains the writ petition and decides the writ petition on merits, the orders passed in mutation proceedings will remain orders in summary proceedings and the orders passed in the proceedings will not finally determine the title of the parties."

10. Reiterating a similar view in the case of **Bindeshwari Vs. Board of Revenue & Ors.8,** it was stated that mutation proceedings do not adjudicate the rights of parties and orders passed in the said proceedings are always subject to adjudication by the competent court and therefore a writ petition against an order in mutation proceedings would not be entertainable. It was observed as follows:-

"11. ...The present writ petition arising out of the summary proceeding of

mutation under Section 34 of U.P. Land Revenue Act, cannot be entertained under Article 226 of the Constitution of India. The mutation proceedings do not adjudicate the rights of the parties and orders passed in the mutation are always subject to adjudication by the competent court."

11. The settled legal position that orders of mutation are passed on the basis of possession and since no substantive rights of the parties are decided, ordinarily a writ petition would not be entertainable against such orders unless the same are found to be wholly without jurisdiction or have the effect of rendering findings which are contrary to title already decided by a competent court, was reiterated in the case of **Vinod Kumar Rajbhar Vs. State of U.P. and others9.**

12. Taking note of the nature and scope of mutation proceedings which are summary in nature and also the fact that orders in such proceedings are passed on the basis of possession of the parties and no substantive rights are decided, this Court in **Buddh Pal Singh Vs. State of U.P. & Ors.10,** restated the principle that ordinarily a writ petition in respect of orders passed in mutation proceedings is not maintainable. It was observed as follows:-

"7. It is equally settled that the orders for mutation are passed on the basis of the possession of the parties and since no substantive rights of the parties are decided in mutation proceedings, ordinarily a writ petition is not maintainable in respect of orders passed in mutation proceedings unless found to be totally without jurisdiction or contrary to the title already decided by the competent court. The parties are always free to get their rights in respect of the disputed land adjudicated by competent court."

13. The proposition that mutation entries in revenue records do not create or extinguish title over land nor such entries have any presumptive value on title has been restated in a recent decision in the case of **Bhimabai Mahadeo Kambekar Vs. Arthur Import and Export Company & Ors.6** placing reliance upon earlier decisions in **Balwant Singh Vs. Daulat Singh11 and Narasamma Vs. State of Karnataka12**. The observations made in the judgment are as follows:-

"6. This Court has consistently held that mutation of a land in the revenue records does not create or extinguish the title over such land nor has it any presumptive value on the title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question. (See Sawarni v. Inder Kaur, Balwant Singh v. Daulat Singh and Narasamma v. State of Karnataka)."

14. Reference may also be had to the judgment in **Faqruddin Vs. Tajuddin13,** wherein it was held that the revenue authorities cannot decide questions of title and that mutation takes place only for certain purposes. The observations made in this regard are as follows:-

"45. Revenue authorities of the State are concerned with revenue. Mutation takes place only for certain purposes. The statutory rules must be held to be operating in a limited sense... It is well-settled that an entry in the revenue records is not a document of title. Revenue authorities cannot decide a question of title."

15. A similar observation was made in **Narain Prasad Aggarwal Vs. State of**

Madhya Pradesh14, wherein it was held as follows:-

"19. Record-of-right is not a document of title. Entries made therein in terms of Section 35 of the Evidence Act although are admissible as a relevant piece of evidence and although the same may also carry a presumption of correctness, but it is beyond any doubt or dispute that such a presumption is rebuttable..."

16. In **Union of India and others Vs. Vasavi Cooperative Housing Society Limited & Ors.15**, the principle that entries in revenue records do not confer any title was reiterated and referring to the previous decisions in **Corpn. of the City of Bangalore v. M. Papaiah,16 Guru Amarjit Singh v. Rattan Chand17 and H.P. v. Keshav Ram18**, it was stated thus :-

"21. This Court in several judgments has held that the revenue records do not confer title. In *Corpn. of the City of Bangalore v. M. Papaiah* this Court held that: (SCC p. 615, para 5)

"5. ...It is firmly established that the revenue records are not documents of title, and the question of interpretation of a document not being a document of title is not a question of law."

In *Guru Amarjit Singh v. Rattan Chand* this Court has held that: (SCC p. 352, para 2)

"2. ...that entries in the Jamabandi are not proof of title."

In *State of H.P. v. Keshav Ram* this Court held that: (SCC p. 259, para 5)

*'"*5. ...an entry in the revenue papers by no stretch of imagination can form the basis for declaration of title in favour of the plaintiffs."

17. A similar view was taken in the case of **Sawarni (Smt.) Vs. Inder Kaur (Smt.) and others19** and it was observed that the mutation of name in the revenue records does not have the effect of creating or extinguishing the title nor has any presumptive value on title and it only enables the person concerned to pay land revenue. It was stated thus :-

"7...Mutation of a property in the revenue record does not create or extinguish title nor has it any presumptive value on title. It only enables the person in whose favour *mutation* is ordered to pay the land revenue in question..."

18. The principle that an entry in revenue records is only for fiscal purpose and does not confer title on a person whose name appears in record-of-rights and title to the property can only be decided by a competent civil court was reiterated in the decision of **Suraj Bhan and others Vs. Financial Commissioner and others20** and it was stated as follows :-

"9...It is well settled that an entry in revenue records does not confer title on a person whose name appears in record-of-rights. It is settled law that entries in the revenue records or jamabandi have only "fiscal purpose" i.e. payment of land revenue, and no ownership is conferred on the basis of such entries. So far as title to the property is concerned, it can only be decided by a competent civil court..."

19. The legal position that entries in revenue records do not confer any title has been considered and discussed in a recent decisions of this Court in **Harish Chandra Vs. Union of India & Ors.21 and Mahesh**

Kumar Juneja and another Vs. Additional Commissioner Judicial Moradabad Division and others4 and it was restated that ordinarily orders passed by mutation courts are not to be interfered in writ jurisdiction as they are summary proceedings, and as such subject to a regular suit.

20. The settled legal position that an entry in revenue records does not confer title on a person whose name appears in record-of-rights and that such entries are only for "fiscal purpose" and no ownership is conferred on the basis thereof and further that the question of title of a property can only be decided by a competent civil court has again been restated in a recent decision of the Supreme Court in **Jitendra Singh Vs. State of Madhya Pradesh and others22** wherein after referring to the previous authorities on the point in **Suraj Bhan Vs. Financial Commissioner20, Suman Verma Vs. Union of India21, Faqruddin Vs. Tajuddin14, Rajinder Singh Vs. State of J & K23, Municipal Corporation, Aurangabad Vs. State of Maharashtra24, T Ravi Vs. B. Chinna Narasimha25, Bhimabai Mahadeo Kambekar Vs. Arthur Import & Export Co.26 Prahlad Pradhar Vs. Sonu Kumhar27 and Ajit Kaur Vs. Darshan Singh28**, it was observed thus :-

"8. In the case of *Suraj Bhan v. Financial Commissioner*, (2007) 6 SCC 186, it is observed and held by this Court that an entry in revenue records does not confer title on a person whose name appears in record-of-rights. Entries in the revenue records or jamabandi have only "fiscal purpose", i.e., payment of land revenue, and no ownership is conferred on the basis of such entries. It is further observed that so far as the title of the property is concerned, it can only be decided by a competent civil court. Similar view has been expressed in the cases of *Suman Verma v. Union of India*, (2004) 12 SCC 58; Fa*qruddin v. Tajuddin*, (2008) 8 SCC 12; *Rajinder Singh v. State of J&K*, (2008) 9 SCC 368; *Municipal Corporation, Aurangabad v. State of Maharashtra*, (2015) 16 SCC 689; T. *Ravi v. B. Chinna Narasimh*a, (2017) 7 SCC 342; *Bhimabai Mahadeo Kambekar v. Arthur Import & Export Co.*, (2019) 3 SCC 191; *Prahlad Pradhan v. Sonu Kumhar,* (2019) 10 SCC 259; and *Ajit Kaur v. Darshan Singh*, (2019) 13 SCC 70."

21. The mutation proceedings being of a summary nature drawn on the basis of possession do not decide any question of title and the orders passed in such proceedings do not come in the way of a person in getting his rights adjudicated in a regular suit. It is for this reason that it has consistently been held that such petitions are not to be entertained in exercise of powers under Article 226 of the Constitution of India. The consistent legal position with regard to the nature of mutation proceedings, as has been held in the previous decisions, may be stated as follows :-

(i) mutation proceedings are summary in nature wherein title of the parties over the land involved is not decided;

(ii) mutation order or revenue entries are only for the fiscal purposes to enable the State to collect revenue from the person recorded;

(iii) they neither extinguish nor create title;

(iv) mutation in revenue records does not have any presumptive value on the

title and no ownership is conferred on the basis of such entries;

(v) the order of mutation does not in any way effect the title of the parties over the land in dispute; and

(vi) such orders or entries are not documents of title and are subject to decision of the competent court.

22. A question would however arise as to whether any exception can be carved out to the aforesaid settled position with regard to non-interference in matters arising out of mutation proceedings in exercise of powers under writ jurisdiction, and if so what would the facts and circumstances under which a writ petition may be entertained in such matters.

23. The circumstances which may persuade a Court for exercising writ jurisdiction to entertain a petition arising out of mutation proceedings were considered in a decision of this Court in **Radhey Shyam and others Vs. State of U.P. and others29,** and it was observed as follows :-

"18. Although it is settled that mutation proceedings is fiscal in nature and the orders passed therein do not decide the right and title of the parties, therefore, the orders passed therein being summary in nature, writ petition would not be maintainable, but here in this case since there is jurisdictional error, therefore the writ petition would lie against such orders, where revisional court has failed to exercise the jurisdiction vested in it. It may also be noticed that although the orders deciding the mutation case do not decide the right and title of the parties. The judgements rendered therein are not binding upon the Courts deciding the title of the matter but it may be kept in mind that the person whose name is recorded in the revenue record can transfer the land through registered sale deed, gift deed etc. In case the sale deed is executed only because of recording of name without there being any valid title, the remedy, for the aggrieved person would be to file a suit but for cancellation of sale deed, not for declaration of right which would consume a very long time and in the meantime even the nature of the land may be changed. Further, the possession would be enjoyed by the persons in whose favour an order of mutation has been passed or the transferee without there being any valid title and the person having valid title will become a looser (sic loser) for the years together and in some cases if the land has gone in the hands of mafia or musclemen, the rightful owner may not be able to get the fruit of litigation during his life time. These contingencies and situations of the cases, although, may not have legal weight but the factual matrix and the reality of the same cannot be brushed aside while entertaining writ petitions against the orders passed in mutation cases."

24. Similar observations were made in the case of **Rudramani Shukla Vs. Subhash Kumar and others30**, and it was stated thus :-

"17. Mutation proceedings are important proceedings as, entries based thereon in the record of rights (*Khatauni*) are presumed to be correct under section 35 of the Land Revenue Act 1901, as also Section 40 of the U.P. Revenue Code 2006, and practically all transaction are made after perusing such entries. No doubt in matters of sale the purchaser is required to make due inquiry with diligence as to the

real owner and any dispute in respect thereof, but if the name is recorded in the revenue records, sale transaction etc. are easily made. True it is that revenue records are not documents of title by themselves and are for purposes of realisation of revenue, but in view of the presumption attached to them, especially in view of the contents of *Khatauni* as prescribed in Section 31 of the Revenue Code, 2006, their importance in practical terms hardly needs to be emphasised. It is easy to say that an aggrieved party may establish his title in regular proceedings but the fact is that such proceedings go on for years together, therefore, judicious application of mind in mutation proceedings, even though they are summary proceedings, can at times prevent injustice and prolonged litigation. This is not to suggest that interference in such matters should be made in a routine manner."

25. An exception to the general rule against interference with orders made in mutation proceedings, in exercise of writ jurisdiction, finds reference in the Division Bench judgement of this Court in the case of **Jaipal Vs. Board of Revenue U.P. Allahabad and others7**, wherein it was stated as follows :-

"3...The only exception to this general rule is in those cases in which the entry itself confers a title on the petitioner by virtue of the provisions of the U.P. Zamindari Abolition and Land Reforms Act..."

26. In the case of **Lal Bachan Vs. Board of Revenue, U.P. Lucknow and others2,** while taking the view that mutation proceedings are subject to adjudication of title by competent court, it was held that writ petition arising out of such proceedings cannot be held to be non-maintainable but such writ petition is not entertained due to reason that parties have right to get the title adjudicated by regular suit and the orders passed in mutation proceedings are summary in nature. In a situation where a challenge is raised to an order passed without jurisdiction, it was held that the writ petition can be entertained despite availability of alternative remedy. Referring to the earlier decision in the case of **Jaipal,** it was stated as follows :-

"18. In view of the above discussions, it is clear that although the writ petition arising out of the mutation proceedings cannot be held to be non-maintainable but this Court does not entertain the writ petition under Article 226 of the Constitution due to reason that parties have right to get the title adjudicated by regular suit and the orders passed in mutation proceedings are summary in nature."

27. Certain exceptions where the remedy of writ petition can be resorted to so as to raise a challenge to orders passed in mutation proceedings have been referred to in **Vijay Shankar Vs. Additional Commissioner (Administration) Lucknow Divison and others31,** and S**mt. Hadisul Nisha Vs. Additional Commissioner (Judicial), Faizabad3.**

28. The reluctance of the Courts to interfere with orders arising out of mutation proceedings is primarily for the reason that the question at issue is with regard to correction of record of rights which is primarily maintained for revenue purposes and an entry therein has reference only to possession and does not ordinarily confer

upon the person in whose favour it is made any title to the property in question.

29. The aforesaid inference that revenue entries made on the basis of orders of mutation do not ordinarily confer upon a person in whose favour they are made, any title to the property in question, stands fortified from the express provision contained under Section 39 of the Code which states in clear terms that the orders passed under the provisions relating to mutation of revenue records would not act as a bar against any person from establishing his rights to the land by means of a declaratory suit.

30. Section 39 of the Code, as referred to above, is being extracted below :-

"39. Certain orders of Revenue Officers not to debar a suit :- No order passed by a Revenue Inspector under Section 33, or by a Tehsildar under sub-section (1) of Section 35 or by a Sub-Divisional Officer under sub-section (3) of Section 38 or by a Commissioner under sub-section (2) of Section 35 or sub-section (4) of Section 38 shall debar any person from establishing his rights to the land by means of a suit under Section 144."

31. The aforementioned section clearly provides that no person shall be debarred from establishing his rights to the land by means of a declaratory suit under Section 144, irrespective of the fact that an order has been passed by; (i) a Revenue Inspector under Section 33 (mutation in case of succession), or (ii) a Tehsildar under sub-section (1) of Section 35 (mutation in case of transfer or succession), or (iii) a Sub-Divisional Officer under sub-section (3) of Section 38 (correction of error or omission), or (iv) a Commissioner under sub-section (4) of Section 38 (correction of error or omission).

32. Section 39 which expressly provides that the orders passed by revenue officers in cases of a mutation and correction of revenue entries would not debar filing of a declaratory suit, is a substantive provision, and corresponds to a similar provision contained under Section 40-A of the U.P. Land Revenue, 1901 (now repealed).

33. The language of the section emphasizes that it applies to all orders passed by the revenue officers in matters relating to mutation and correction of errors or omission of revenue entries and it provides in clear terms that such order shall not debar any person from establishing his rights to the land by means of a declaratory suit under Section 144.

34. The object of the section being to enable a person to seek declaration of his rights on questions of title irrespective of the orders passed in mutation proceedings with regard to correction of revenue entries, the remedy of seeking a declaration on questions of title by filing a declaration suit remains open. The existence of an efficacious statutory alternative remedy would therefore also be a reason for not entertaining a writ petition in exercise of discretionary jurisdiction under Article 226.

35. The exceptions to the "rule of alternate remedy" are well laid out in terms of judicial precedents and would include situations where the statutory authority has not acted in accordance with the provisions of law or acted in defiance of the fundamental principles of judicial procedure; or has resorted to invoke

provisions, which are repealed; or where an order has been passed in violation of the principles of natural justice.

36. The exceptions to the 'rule of alternate remedy' were considered in the case of **Whirlpool Corporation vs. Rregistrar of Trade Marks32**, wherein it was observed as follows :-

"14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."

(emphasis supplied)

37. Following the aforesaid decision, in **Harbanslal Sahnia Vs. Indian Oil Corporation Ltd.33**, it was stated thus :-

"7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies : (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See Whirlpool Corpn.v. Registrar of Trade Marks, (1998) 8 SCC 1) The present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."

(emphasis supplied)

38. The 'rule of alternate remedy' in the context of maintainability of a writ

petition under Article 226 has been examined in a recent decision in the case of **Radha Krishan Industries vs. State of Himachal Pradesh and others34** and it has been held that since the power under Article 226 to issue writs can be exercised not only for enforcement of fundamental rights but for any other purpose as well, the High Court has the discretion not to entertain a writ petition and one of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person. The exceptions to the "rule of alternate remedy" have been held to arise where :

"(i) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution;

(ii) there has been a violation of the principles of natural justice;

(iii) the order or proceedings are wholly without jurisdiction; or

(iv) the vires of a legislation is challenged."

39. The rule of exhaustion of statutory remedies has been held to be a rule of policy, convenience and discretion and existence of an alternate remedy would not divest the High Court of its powers under Article 226 which may be exercised in appropriate cases.

40. Having regard to the foregoing discussion the exceptions under which a writ petition may be entertained against orders passed in mutation proceedings would arise where :

(i) the order or proceedings are wholly without jurisdiction;

(ii) rights and title of the parties have already been decided by a competent court, and that has been varied in mutation proceedings;

(iii) mutation has been directed not on the basis of possession or on the basis of some title deed, but after entering into questions relating to entitlement to succeed the property, touching the merits of the rival claims;

(iv) rights have been created which are against provisions of any statute, or the entry itself confers a title by virtue of some statutory provision;

(v) the orders have been obtained on the basis of fraud or misrepresentation of facts, or by fabricating documents;

(vi) the order suffers from some patent jurisdictional error i.e. in cases where there is a lack of jurisdiction, excess of jurisdiction or abuse of jurisdiction;

(vii) there has been a violation of principles of natural justice.

41. In the case at hand, the grounds which were sought to be canvassed to raise a challenge to the orders of mutation passed in favour of the predecessor-in-interest of the private respondents was founded on the basis of the claim of the petitioner asserting herself to be the second wife of the recorded tenure holder and to support her claim reliance was sought to be placed on various pieces of documentary evidence.

42. It is not disputed that the claim of the petitioner that she was the second wife of the deceased tenure holder which was sought to be set up on the basis of documentary evidence would require adjudication of rights of the parties requiring detailed appreciation of facts and the same would be clearly beyond the scope and purview of summary proceedings relating to claims of mutation.

43. Counsel for the petitioner has not been able to point out any circumstance which may persuade this Court to entertain the writ petition in exception to the settled legal position that ordinarily orders passed in mutation proceedings are not to be interfered with in exercise of the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India.

44. At this stage, learned counsel for the petitioner seeks to urge that the findings returned in the mutation proceedings may prejudice the petitioner's case in a suit pertaining to claim of title. The aforesaid apprehension is wholly without basis since findings returned by mutation courts in summary proceedings are for the limited purpose of correction of revenue records and do not have any presumptive value on a question of title which is required to be adjudicated by the court of competent jurisdiction without being influenced by any finding returned in mutation proceedings. In this regard the provision contained under Section 39 of the Code has already been taken note of wherein it is provided in unequivocal terms that order passed under Section 35 would not debar any person from establishing his rights to the land by means of a suit under Section 144.

45. Having regard to the aforesaid this Court is not inclined to exercise its extraordinary discretionary jurisdiction under Article 226 of the Constitution of India in the facts of the present case.

46. The petition stands dismissed accordingly.

(2022)05ILR A956
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.04.2022

BEFORE
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 26603 of 2021

Sitaram ...Petitioner
Versus
State of U.P. & Ors. ....Respondents

Counsel for the Petitioner:
Sri Guru Prasad Mishra

Counsel for the Respondents:
C.S.C.

(A) Land Law - The Uttar Pradesh Revenue Code, 2006 - Section 98(1), - Restrictions on transfer by bhumidhars belonging to a Scheduled Caste, The U.P. Revenue Code Rules, 2016 - Rule 99 - Collector's permission for transfer of Scheduled Caste bhumidhar's land, proviso to section 98 – conditions under which permission may be granted by the Collector - a decision by an authority exercising discretionary power under a statute must be arrived at by taking into account the relevant considerations and eschewing the irrelevant considerations - in the absence of which the action would have to be held as ultra vires and void.(Para -25)

(B) Land Law - The Uttar Pradesh Revenue Code, 2006 - Conditions which are required to be satisfied while considering

grant of permission by the Collector to a bhumidhar belonging to a scheduled caste - seeking to transfer land belonging to him - having been clearly specified under the proviso to sub-section (1) of Section 98 read with sub-rule (8) of Rule 99 - the reference made in the orders impugned to any other circumstance and on the basis thereof to reject the application of the petitioner seeking grant of permission to transfer - would therefore render the exercise of the discretionary power as ultra vires and invalid.(Para - 20,26)

Petitioner's son died untimely, leaving behind two daughters and two sons - meet liabilities - desired to sell land in question - old and feeble - no one to look after him - sought permission from Collector for transfer of land - report called from committee headed by SDO - report submitted by team of revenue officers - made a clear recommendation in favour of petitioner - indicating that conditions prescribed for purpose under the relevant statutory provision stood satisfied - reasons assigned in order dated 19.07.2021 passed by Respondent no. 3 - that applicant did not state circumstances under which land in question was purchased - could make arrangement for irrigation facilities - not produced any evidence in support of his illness - wholly inconsequential for purpose of grant of permission for transfer - seeking transfer of land for personal gains - not relevant - based on a conjecture - application rejected by Respondent no.3 - revision filed - rejected by Respondent no. 2. **(Para -3,4,19)**

HELD:-Impugned orders passed in the absence of consideration of the relevant provisions and being based on wholly irrelevant consideration, are accordingly held to be legally unsustainable and are set aside and quashed. Matter remitted to Respondent no. 3 for passing of fresh order on the basis of the provisions contained under Section 98 of the Code, 2006 read with sub-rule (8) of Rule 99 of the Rules, 2016. **(Para- 26,27)**

Writ Petition allowed. (E-7)

List of Cases cited:-

1. Lord Esher MR in R. Vs St Pancras Vestry, (1890) 24 Q.B.D. 371

2. Associated Provincial Picture Houses, Ltd. Vs Wednesbury Corporation , (1947) 2 AII E.R. 680

3. Padfield & ors. Vs Minister of Agriculture, Fisheries & Food & ors. , (1968) 1 AII E.R. 694

4. Lord Denning, M.R. in Breen Vs A.E.U. & ors. , (1971) 2 Q.B. 175

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

1. Heard Sri Guru Prasad Mishra, learned counsel for the petitioner and Sri Ajeet Kumar Singh, learned Additional Advocate General assisted by Sri Amit Verma, learned Standing Counsel for the State Respondents.

2. The present petition seeks to assail the order dated 19.07.2021 passed by the Respondent no. 3-Additional Collector (Administration), Muzaffarnagar in Case No. 433 of 2020 (Computerized Case No. D2020095500000433, Sitaram vs. State) whereby permission sought by the petitioner under Section 98(1) of the Uttar Pradesh Revenue Code, 20061 was turned down. The subsequent order dated 16.08.2021 passed by the Respondent no.2-Additional Commissioner (Administration), Saharanpur Division, Saharanpur in Case No. 1145 of 2021 (Computerized Case No. C202109000001145, Sitaram vs. State of U.P.) in terms of which the revision filed by the petitioner has been rejected is also sought to be challenged.

3. As per the facts set out in the writ petition, the petitioner claims himself to be a recorded tenure holder of Khasra No. 379/2 measuring 0.3280 hectares, recorded

in Khata No. 50 situate at Village-Behada Assa, Tehsil Jaansath, District Muzafarnagar. The petitioner is stated to have purchased the aforesaid land on 02.03.2005 and thereafter claims to have become a bhumidhar with transferable rights. It is contended that the petitioner's son died untimely, leaving behind two daughters and two sons and to meet these liabilities, the petitioner desired to sell the land in question. It is also stated that the petitioner had become old and feeble and with no one to look after him, he sought permission from the Collector for transfer of the land and submitted the application in the prescribed RC Form-27. Upon the aforesaid application, a report was called from the committee headed by the Sub Divisional Officer and as per the report dated 13.01.2020, the land in question had been obtained by the petitioner by means of a sale deed and the petitioner was recorded as bhumidhar with transferable rights. It was also stated in the report that the land in question was not a public utility land and that after transfer of the same, the area of the land held by the petitioner would be 4.4150 hectares. It was mentioned in the report that the petitioner was old and remained frequently ill and in the absence of adequate irrigation facilities was finding it difficult to carry on the agricultural operations. Taking into consideration this together with the fact that his son was predeceased leaving behind the liability of two grand-daughters and two grand-sons on the petitioner and that the petitioner was in need of funds for their education and marriage, the report along with the recommendation of the Committee was submitted to the authority concerned.

4. It is submitted that despite the aforesaid report in terms of which a clear recommendation was made in favour of the petitioner, his application was rejected by the Respondent no.3 by an order dated 19.07.2021 by assigning reasons that the application did not state the circumstances under which the land in question was purchased and that the petitioner could make arrangement for irrigation facilities. The order also records that the petitioner had not produced any evidence to support the factum of his illness. It was also stated that the petitioner was allotted the land in question on a patta and that he was seeking transfer of the land for personal gains. The revision filed by the petitioner against the aforesaid order has been rejected by the Respondent no. 2 cursorily after reiterating similar reasons.

5. Contention of the learned counsel appearing for the petitioner is that the reasons assigned by the respondent authorities in rejecting his application seeking permission are wholly inconsequential for the purpose of grant of permission under Section 98 of the Code, 2006. It is submitted that none of the reasons cited by the respondent authorities for rejecting his application could be said to be a valid ground as per the relevant statutory provision.

6. Controverting the aforesaid contention, learned Additional Advocate General has tried to support the order passed by the respondent authorities by seeking to reiterate the reasons which have been specified in the orders under challenge.

7. In order to appreciate the rival contentions, the provisions contained under Section 98 which provide for restrictions on transfer by bhumidhar belonging to Scheduled Caste and the relevant rule under the U.P. Revenue Code Rules, 20162, may be referred to.

"98. Restrictions on transfer by bhumidhars belonging to a Scheduled Caste.--(1) Without prejudice to the provisions of this Chapter, no bhumidhar belonging to a scheduled caste shall have the right to transfer, by way of sale, gift, mortgage or lease any land to a person not belonging to a scheduled caste, except with the previous permission of the Collector in writing:

Provided that the permission by the Collector may be granted only when--

(a) the bhumidhar belonging to a scheduled caste has no surviving heir specified in clause (a) of sub-section (2) of section 108 or clause (a) of section 110, as the case may be; or

(b) the bhumidhar belonging to a scheduled caste has settled or is ordinarily residing in the district other than that in which the land proposed to be transferred is situate or in any other State for the purpose of any service or any trade, occupation, profession or business; or

(c) the Collector is, for the reasons prescribed, satisfied that it is necessary to grant the permission for transfer of land.

(2) For the purposes of granting permission under this section the Collector may make such inquiry as may be prescribed.

Rule 99. Collector's permission for transfer of Scheduled Caste bhumidhar's land. (Section 98).--(1) An application under section 98 (1) or under section 98 (1) read with section 107, for permission to transfer land by way of sale or gift or for permission to bequeath land by will, as the case may be, shall be made by a Bhumidhar with transferable rights belonging to Scheduled Caste to the Collector in **R.C. Form-27.**

(2) An application under section 98 (1), for permission to mortgage his interest in the land shall be made by a bhumidhar, belonging to a Scheduled Caste to the Collector in R.C. Form-28.

(3) An application under section 98 (1), for permission to let out land shall be made by a bhumidhar belonging to a Scheduled Caste to the Collector in **R.C. Form-29.**

(4) On receipt of an application under section 98 (1) the Collector shall make such inquiry as he may, in the circumstances of the case, deem necessary. He may also depute an officer not below the rank of Naib Tahsildar for:

(a) verification of the facts stated in the application; and

(b) reporting the circumstances in which permission for transfer is sought.

(5) The inquiry officer referred to in sub-rule (4) of this rule shall submit the report in duplicate within the period of fifteen days, from the date of receiving the order of such inquiry.

(6) A copy of the report shall be supplied to the applicant free of charge, from the office of the Collector where such report has been submitted.

(7) The applicant may file objection against the report submitted by

the inquiry officer within the period of seven days from the date of receipt of the copy of the report.

(8) After receiving the report submitted under sub-rule (3) and the objection, if any, if the Collector is satisfied that-

(a) the conditions of clause (a) or clause (b) of subsection (1) of section 98 are fulfilled; or

(b) the tenure holder or any member of his family is suffering from any fatal disease regarding which the certificate has been issued by any physician or surgeon specialist in the disease concerned and the permission for transfer is necessary to meet out the expenses for the treatment of such disease; or

(c) the applicant is seeking permission under section 98(1) of the Code for the proposed transfer to purchase any other land from the consideration of such proposed transfer and the facts in this regard in the application are supported with certified copy of a registered agreement to sell in favour of the applicant; or

(d) the area of land held by the applicant on the date of application does not, after such transfer, reduce to less than 1.26 hectares, and

(e) if the permission is being sought for transfer by sale the consideration for the transfer of the land is not below the amount calculated as per the circle rate fixed by the Collector;

he may grant the permission by recording the reasons.

Explanation. --For the removal of doubt it is a hereby clarified that if the condition enumerated in clause (d) of this sub-rule is not fulfilled but any condition enumerated in clauses (a) to (c) of this rule is fulfilled the permission under section 98(1) of the Code may be granted by Collector.

(9) An application referred to in sub-rule (2) or sub-rule (3) of rule 99 for permission to mortgage or to let out land, as the case may be, may be granted by the Collector on his being satisfied that the mortgage or letting out, as the case may be, is not possible in favour of a person belonging to a Scheduled Caste or Scheduled Tribe.

(10) An application referred to in sub-rule (1) of rule 99 for permission to bequeath land by will, may be granted by the Collector on his being satisfied that the bequeath of the land was not possible in favour of the person belonging to a Scheduled Caste or a Scheduled Tribe.

(11) The Collector shall make an endeavor to dispose of the application under section 98(1) within the period of fifteen days from the date of receiving the report submitted by the inquiry officer and if the application is not disposed of within such period the reason for the same shall be recorded."

8. Section 98 of the Code mandates that no *bhumidhar* belonging to a scheduled caste shall have the right to transfer, by way of sale, gift, mortgage or lease any land to a person not belonging to a scheduled caste except with the previous permission of the Collector in writing. The previous permission of the Collector is therefore, a condition precedent before any

bhumidhar of scheduled caste can seek to transfer his land to a person not belonging to a scheduled caste. In the absence of such permission having been obtained, the transfer would be rendered void as per Section 104, and would be subject to the consequences provided under Section 105.

9. The proviso to Section 98 enumerates the conditions under which permission may be granted by the Collector, and the same are as follows:

(i) the *bhumidhar b*elonging to a scheduled caste has no surviving heir specified in clause (a) of sub-section (2) of section 108 or clause (a) of section 110, as the case may be; or

(ii) the *bhumidhar* belonging to a scheduled caste has settled or is ordinarily residing in the district other than that in which the land proposed to be transferred is situate or in any other State for the purpose of any service or any trade, occupation, profession or business; or

(iii) the Collector is, for the reasons prescribed, satisfied that it is necessary to grant the permission for transfer of land.

10. The reasons prescribed, as referred to under clause (c) of the proviso to Section 98(1), upon which the Collector is to record its satisfaction that it is necessary to grant permission for transfer of the land, are specified under sub-rule (8) of Rule 99 of the Rules, 2016, and the same are as follows:

(i) the conditions of clause (a) or clause (b) of subsection (1) of section 98 are fulfilled; or

(ii) the tenure holder or any member of his family is suffering from any fatal disease regarding which the certificate has been issued by any physician or surgeon specialist in the disease concerned and the permission for transfer is necessary to meet out the expenses for the treatment of such disease; or

(iii) the applicant is seeking permission under section 98(1) of the Code for the proposed transfer to purchase any other land from the consideration of such proposed transfer and the facts in this regard in the application are supported with certified copy of a registered agreement to sell in favour of the applicant; or

(iv) the area of land held by the applicant on the date of application does not, after such transfer, reduce to less than 1.26 hectares, and

(v) if the permission is being sought for transfer by sale the consideration for the transfer of the land is not below the amount calculated as per the circle rate fixed by the Collector;

11. The conditions under which permission may be granted for transfer to a *bhumidhar* belonging to a scheduled caste can thus be summarised as follows:-

(i) in the absence of surviving heir specified in clause (a) of sub-section (2) of section 108 or clause (a) of section 110;

(ii) the transferor has settled or is ordinarily residing in the district other than that in which the land proposed to be transferred is situate or in any other State for the purpose of any service or any trade, occupation, profession or business;

(iii) for the reasons prescribed under the Rules, i.e.

(a) the tenure holder or any member of his family is suffering from any fatal disease; or

(b) the applicant is seeking permission for the proposed transfer to purchase any other land from the consideration of such proposed transfer; or

(c) the area of land held by the applicant on the date of application does not, after such transfer, reduce to less than 1.26 hectares, and

(d) if the permission is being sought for transfer by sale the consideration is not below the amount calculated as per the circle rate fixed by the Collector.

12. The explanation to Rule 99 clarifies that in a situation where any condition enumerated in clause (a) to (c) of sub-rule (8) of Rule 99 is fulfilled, the permission may be granted even if the holding of the bhumidhar (transferor) after such transfer reduces to less than 1.26 hectares.

13. The procedure for obtaining permission for transfer under Section 98 is provided for under Rule 99 of the Rules, 2016 and as per sub-rule (3) thereof an application seeking permission to transfer land by way of sale or gift or for permission to bequeath land by will, as the case may be, is to be made by a bhumidhar with transferable rights belonging to scheduled caste to the Collector in RC-Form 27. Upon receipt of such an application, the Collector under sub-rule (4) shall make an enquiry as he may, in the circumstances of the case deem necessary. For the purpose he may depute an officer not below the rank of Naib Tehsildar for : (a) verification of the facts stated in the application; and (b) reporting the circumstances in which permission for transfer is sought. Thereafter, under sub-rule (5), the inquiry officer shall submit the report in duplicate within a period of 15 days from the date of receiving the order of such enquiry. The copy of the report is to be supplied to the applicant under sub-rule (6) whereupon the applicant may file objections against the report within a period of seven days and thereafter the Collector upon being satisfied that any of the conditions under sub-rules (8)(a) to (d), and sub-rule (8)(e) of Rule 99, are fulfilled, he may grant permission after recording reasons.

14. The provision with regard to the transfer by bhumidhar belonging to scheduled caste as contained under Section 98 of the Code, 2006 corresponds to Section 157A and 157-AA of the repealed Uttar Pradesh Zamindari Abolition and Land Reforms Act, 19503, with some points of difference.

15. Under the ZA & LR Act, in terms of Section 157-A no *bhumidhar* or *asami* belonging to a scheduled caste could transfer the land to a person not belonging to a scheduled caste except with the previous approval of the Collector whereas under Section 157-AA the restriction was to the effect that a person belonging to a scheduled caste having become a bhumidhar with transferable rights under Section 131-B shall have no right to transfer the land by sale or otherwise to any person other than a person belonging to a scheduled caste. The transfer under Section 157-AA was to be permissible only to persons belonging to scheduled castes in the order of preference as prescribed under sub-section (1). The restriction on a scheduled caste with regard to the transfer

of land in favour of a person who does not belong to a scheduled caste under Section 157-AA was thus absolute and such transfer was not permissible in any contingency. The language of sub-section (1) of Section 157-AA was such that even in case of a member of a scheduled caste acquiring transferable rights of a bhumidhar under Section 131-B who is desirous to transfer such land to another person belonging to the scheduled caste by way of sale, gift, mortgage or lease the right to transfer was not absolute and the transfer was permissible only in accordance with the preferences specified therein. Sub-section (4) provided that no transfer under Section 157-AA was permissible without the previous approval of the Assistant Collector concerned. These restrictions were made subject to a further condition with the insertion of sub-section (5), in terms of which a transferee of land under sub-section (1) shall have no right to transfer the land by way of sale, gift, mortgage or lease before the expiry of a period of ten years from the date of transfer in his favour.

16. The aforementioned distinction with regard to the rights of a *bhumidhar* with transferable rights belonging to a scheduled caste and a *bhumidhar* who has acquired the transferable rights in respect of an allotted land, is not maintained under the Code, 2006. The restrictions and the preferences enumerated in Section 157-AA of the repealed ZA & LR Act also have no existence under the Code, 2006. The procedure for grant of permission for transfer by *bhumidhar* belonging to a scheduled caste has been simplified under the Code, 2006 and the Rules made thereunder with a view to make the procedure more objective and the requisite permission for transfer is to be granted to a *bhumidhar* belonging to a scheduled caste upon fulfilment of either of the conditions specified under clause (a) or (b) of the proviso to sub-section (1) of Section 98, or upon fulfilment of any of the conditions specified under clause (b), (c) or (d) and clause (e) of sub-rule (8) of Rule 99 of the Rules, 2016.

17. Under Section 98(1) of the Code, 2006 read with Rule 99 of the Rules, the Collector may grant permission for transfer by *bhumidhars* belonging to scheduled caste upon fulfilment of either of the five specified conditions: (i) in the absence of a surviving heir; (ii) the transferor has settled or is ordinarily residing in a different district or State; (iii) the tenure holder or any member of his family is suffering from any fatal disease; (iv) the applicant is seeking permission for transfer to purchase any other land from the consideration of such proposed transfer; (v) the area of the land held by the applicant on the date of application does not, after such transfer, reduces to less than 1.26 hectares. This is subject to a further condition that the consideration for the transfer of the land is not below the amount calculated as per the circle rate fixed by the Collector. The condition with regard to the area of the land, held by the applicant, consequent to the transfer of the land being reduced to less than 1.26 hectares, is not mandatory subject to the fulfilment of any of the other conditions.

18. In a case where the application has been made as per the prescribed procedure and upon due enquiry as provided under the Rules, 2016 either of the aforestated conditions are held to be satisfied, the permission is required to be granted for transfer under Section 98.

19. In the case at hand, the application by the petitioner was made in the prescribed form as provided under Rule 99

upon which the enquiry was duly made for the purpose of verification of the facts stated in the application and also reporting the circumstances under which permission for transfer was being sought. The report submitted by a team of revenue officers made a clear recommendation in favour of the petitioner indicating that the conditions prescribed for the purpose under the relevant statutory provision stood satisfied. In the face of the aforesaid circumstances, the reasons assigned in the order dated 19.07.2021 passed by the Respondent no. 3 that the applicant did not state the circumstances under which the land in question was purchased and that the petitioner could make arrangement for irrigation facilities, or that he had not produced any evidence to support the factum of his illness, are wholly inconsequential for the purpose of grant of permission for transfer. The other reason stated in the order that the petitioner was seeking transfer of the land for personal gains is also not relevant and is based on a conjecture.

20. In exercise of its discretionary power, if the concerned authority ignores or does not take into account considerations which are relevant to the purpose of the statute in question, then its action would be invalid. This would be more so where the statute conferring discretion on the authority has structured the discretion by expressly laying down the consideration which should be taken into account by the authority for exercise of the discretion. In such a case, if the exercise of the discretionary power has been influenced by considerations that cannot lawfully be taken into account or by disregard of the relevant considerations required to be taken into account, the decision arrived at by the authority would be invalid.

21. The "irrelevant considerations" doctrine was stated by **Lord Esher MR in R. vs. St Pancras Vestry4** by observing as follows:

"But they must fairly consider the application and exercise their discretion on it fairly, and not take into account any reason for their decision which is not a legal one. If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion."

22. The scope of interference by Courts in matters relating to exercise of discretion conferred by a statute upon an authority was subject matter of consideration in **Associated Provincial Picture Houses, Ltd. vs. Wednesbury Corporation5**wherein it was stated by **Lord Greene, M.R**. as follows:

"... The law recognises certain principles on which the discretion must be exercised ... They are perfectly well understood. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, they must disregard those matters.

.... the court is entitled to investigate the action of the local authority with a view to seeing whether it has taken

into account matters which it ought not to take into account, or, conversely, has refused to take into account or neglected to take into account matters which it ought to take into account."

23. The circumstances under which exercise of discretionary powers by a statutory authority may be held to be invalid were stated in **Padfield And Others vs. Minister of Agriculture, Fisheries And Food And Others6,** wherein **Lord Upjohn** observed as follows:

"Unlawful behaviour by the Minister may be state with sufficient accuracy ... (a) by an outright refusal to consider the relevant matter, or (b) by misdirecting himself in point of law, or (c) by taking into account some wholly irrelevant or extraneous consideration, or (d) by wholly omitting to take into account a relevant consideration."

24. The principle laid down in the decision of the **House of Lords in Padfield's case** (supra) was reiterated by **Lord Denning, M.R. in Breen vs. Amalamated Engineering Union And Others7**, by stating as follows:

"The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside."

25. The proposition can thus broadly be laid down by stating that a decision by an authority exercising discretionary power under a statute must be arrived at by taking into account the relevant considerations and eschewing the irrelevant considerations, in the absence of which the action would have to be held as ultra vires and void.

26. The conditions which are required to be satisfied while considering grant of permission by the Collector to a bhumidhar belonging to a scheduled caste seeking to transfer land belonging to him having been clearly specified under the proviso to sub-section (1) of Section 98 read with sub-rule (8) of Rule 99, the reference made in the orders impugned to any other circumstance and on the basis thereof to reject the application of the petitioner seeking grant of permission to transfer, would therefore render the exercise of the discretionary power as ultra vires and invalid. The orders impugned having been passed in the absence of consideration of the relevant provisions and being based on wholly irrelevant consideration, are accordingly held to be legally unsustainable and are set aside and quashed.

27. The matter is remitted to the Respondent no. 3 for passing of fresh order on the basis of the provisions contained under Section 98 of the Code, 2006 read with sub-rule (8) of Rule 99 of the Rules, 2016 in the light of the discussion made hereinabove. The respondent authority would be expected to pass appropriate orders on the application of the petitioner under Section 98 seeking grant of permission for transfer, expeditiously, and preferably within a period of three months from the date of presentation of a certified copy of this order.

28. The writ petition stands **allowed** in the manner indicated above.

(2022)05ILR A966
APPELLATE JURISDICTION
CIVIL SIDE
DATED ALLAHABAD 21.04.2022

BEFORE

THE HON'BLE AJIT KUMAR, J.

WRIT A No. 26709 of 2010

Devdutt ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant
Sri Naveen Srivastava, Sri Kashif Gilani, Sri Navin Kumar, Ms. Jigyasa Singh

Counsel for the Respondents:
C.S.C., Sri Manoj Kumar Singh, Sri Manu Saxena

A. Service Law – Voluntary retirement – Pension and Retiral benefits - Civil Service Regulations: Article 418(A) - U.P. Nagar Palika Non Centralized Services Retirement Benefits Rules, 1984 - If an employee has completed qualifying service for getting retirement benefits and has resigned thereafter, he cannot be denied retiral benefits. His resignation would amount to voluntary retirement. (Para 17, 21)

This court finds the only issue to be decided in this case as to **whether the petitioner's resignation should be taken to be a voluntary retirement or a resignation right from service so as to disentitle him to the retirement benefit under 1984 Rules.** (Para 13)

It is within the authority and discretion of an employer to decide as to whether to treat a resignation letter as voluntary retirement or not and once the employer has treated resignation to be for voluntary retirement, there seems to be no scope for any other authority to take a different stand. (Para 21)

In the present case, the petitioner's employer has rightly treated the letter of resignation as voluntary retirement and so made recommendation for payment of retirement benefits including pension. The qualifying service for pension to the employees of the non centralised service of a local body has come to be defined vide Rule 2(ढ़)(ण)(त) defining the same of Uttar Pradesh Nagar Palika Non Centralised Retirement Benefits Regulations, 1984 runs as under. (Para 24)

As per the provisions, an employee if has attained the age of 50 years and has spent 20 years of service, he would be entitled to seek voluntary retirement and so consequential benefits. **The petitioner at the time of resigning from service had already attained 50 years of age and had also completed more than 20 years of service and so he could seek voluntary retirement and consequential benefits.** (Para 25)

B. Difference between Voluntary Retirement and Resignation - Voluntary retirement would also be a case of resignation. The only difference is that in case of voluntary retirement an employee intends to relinquish the job for his attaining advanced age, illness etc. and shows his inability to continue to serve the establishment whereas in case of pure resignation an employee intends to leave the job either for the reason he has got an attractive employment or that he is facing hardships at the end of the employer and circumstances have forced him/her to resign. The intention of an employee can be gathered from the language the resignation letter as the contents of the letter and the language in which it is couched will only be a determinative factor as to its nature and character. (Para 20)

Writ petition allowed. (E-4)

Precedent followed:

1. Sudhir Chandra Sarkar Vs Tata Iron & Steel Co. Ltd. & ors., (1984) 3 SCC 369 (Para 16)

2. P.S. Bhargav Vs U.O.I., (1983) 1 SCC 385 (Para 17)

3. Deokinandan Prasad Vs St. of Bihar, (1979) 2 SCC 330 (Para 17)

4. Sheel Kumar Jain Vs New India Assurance Co. Ltd. & ors., (2011) 2 SCC 197 (Para 22)

5. Shashikala Devi Vs C.B.I., (2014) 16 SCC 26 (Para 23)

Present petition assails order dated 24.01.2007, passed by Assistant Director (Pension) Local Fund Accounts Examination Department, U.P. Sangam Palace VI Floor, Civil Lines, Allahabad.

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

1. Heard Ms. Jigyasa Singh, learned Advocate holding brief of Sri Navin Kumar, learned counsel for the petitioner, Sri Manoj Kumar Singh, learned counsel for respondents no.2 & 3 and Ms. Monika Arya, learned Additional Chief Standing Counsel on behalf of respondent nos. 1 & 4 and perused the record.

2. Affidavit filed today on behalf of respondent nos. 2 & 3, in compliance of earlier order dated 30.03.2022, is taken on record.

3. The petitioner before this Court claims to be a retired employee of the local body namely Nagar Palika Parishad, Khurja, Bulandshahr on the plea that after serving the Nagar Palika for nearly 32 years and six months he opted for voluntary retirement by submitting his application dated 22.12.2000 which was accepted by the Executive Officer, Nagar Palika Parishad, Khurja vide order dated 26.12.2000.

4. The grievance of the petitioner is that in spite of his voluntary resignation being accepted by the Nagar Palika Parishad concerned and his papers for post retirement dues being duly forwarded by the Executive Officer on 28.09.2006, the respondent no.4 vide order impugned dated 24.01.2007 has rejected the claim of the petitioner for pension and other retiral benefits on the ground that petitioner having resigned from service, applying the provisions as contained in Article 418(A) of Civil Service Regulations petitioner would not be entitled to retirement dues.

5. The contention advanced by learned counsel for the petitioner is two fold: firstly, Article 418(A) of the Civil Service Regulations could not be applicable to the employees of the non centralised service of the local body as their retiral benefits are governed under the UP Nagar Palika Non Centralised Services Retirement Benefits Rules, 1984 (hereinafter referred as 'the 1984 Rules') and under the said rules, the pensionable service as defined Article 368 has been only made applicable. It is argued thus, that Rules of 1984 being special rules would override the general law applicable to pensionary benefits and other retiral benefits provided for under the Civil Service Regulations; and **secondly,** by no stretch of imagination, the resignation submitted by the petitioner dated 22.12.2020 can be treated as resignation from service and not a voluntary retirement.

6. It is argued that the option for voluntary retirement or compulsory retirement from service almost stand on similar parameters of discretion. While in case of compulsory retirement it is the establishment that decides the utility of an

employee to continue him in service whereas in case of voluntary retirement the employee himself determines his utility to continue in service so as to serve the establishment.

7. It is argued that looking to the grounds assigned in the letter of resignation dated 22.12.2000, it is quite apparent that the petitioner was ailing and hence he wanted to tender his resignation but the at the same time looking to the condition of family and need of regular income to meet the requirement, he wanted his son to be given employment and therefore, it is submitted that this letter should be taken to be the one indicating the intention of the petitioner to take voluntary retirement from service.

8. It is also argued that since the petitioner had already rendered 32 years and six months of service and was on the verge of his retirement, he was entitled to opt for voluntary retirement as per the relevant provisions of 1984 Rules.

9. Besides above, it is argued that if it is to be taken as a resignation, it was a conditional one and the respondents should have turned it down in the event they were not offering employment to his son. But since the respondent in his wisdom found it to be a case where the petitioner was not health wise in a position to serve the establishment, it accepted the resignation. Thus, it would be a case according to the learned counsel for the petitioner, of voluntary retirement opted by the petitioner.

10. Per contra, learned counsel appearing for the local body has argued that the local body had treated the petitioner's resignation to be one of voluntary retirement and that is why his claim for retirement benefits under the 1984 Rules were forwarded to the Director, Local Bodies on 28.09.2006 and it is the Director, Local Bodies who rejected the claim of the petitioner.

11. A counter affidavit has been filed on behalf of respondent no.4 in which vide paragraph 7a stand has been taken that as per 1984 Rules since the petitioner had resigned from service, he was not entitled for retirement benefits. It is pleaded that the Rules very clearly state that those who resign from service would not be entitled to retirement benefits.

12. Yet another plea has been taken in the counter affidavit that in view of Article 418(A) of the Civil Service Regulations, since resignation from a public service which entails forfeiture of the past service, such an employee cannot be held entitled to retirement benefits. Except for these two paragraphs in the counter affidavit, nothing has been stated to defend the order.

13. Having heard learned counsel for the respective parties and their arguments raised across the bar, this court finds the only issue to be decided in this case as to whether the petitioner's resignation should be taken to be a voluntary retirement or a resignation right from service so as to disentitle him to the retirement benefit under 1984 Rules.

14. In so far as retirement benefits are concerned under the 1984 Rules, I find merit in the submission advanced by counsel for the petitioner that except for Article 368 which provides for eligible service period for the purposes of pension, no other provision has been made applicable. This rule being specially framed for the employees of local bodies in the

State belonging to non centralised services, it would certainly override any other general law that provides for eligibility criteria for the purposes of pension to an employee of any other establishment or a government servant. The relevant rules of 1984 also provide for pension in case of voluntary retirement. However, the Court does not find any provision under the Rules, 1984 which would specify as to when a case would be of resignation so as to disentitle an employee to the retirement dues.

15. On a repeated query being made to the Additional Chief Standing counsel, she has not been able to point out any such provision, nor she could defend paragraph 9 of the affidavit filed on behalf of respondent no.4 according to which as per Article 418(A) of the Civil Service Regulations petitioner would not be entitled to retirement benefits which otherwise is applicable in case of voluntary retirement under the 1984 Rules.

16. In case of ***Sudhir Chandra Sarkar vs. Tata Iron & Steel Co. Ltd. &ors (1984) 3 SCC 369***, the Supreme Court had an occasion to consider the claim of retirement benefits like gratuity etc to an employee who had simply tendered his resignation which was accepted unconditionally and vide paragraph 7 it held thus:

"7.The contention of the respondent is that the plaintiff did not retire from service but he left the service of the Company by resigning his post. This aspect to some extent agitated the mind of the High Court. It may be dealt with first. It is not only not in dispute, but is in fact conceded that the plaintiff did render continuous service from December 31, 1929 till August 31, 1959. On exact computation, the plaintiff rendered service for 29 years and 8 months. Rule 6(a) which prescribed the eligibility criterion for payment of gratuity provides that every permanent uncovenanted employee of the Company whether paid on monthly, weekly or daily basis will be eligible for retiring gratuity which shall be equal to half a month salary or wages for every completed year of continuous service subject to a maximum of 20 months salary or wages in all provided that when an employee dies, retires or is discharged under Rule 11(2)(ii) and (iii) before he has served the Company for a continuous period of 15 years he shall be paid a gratuity at the rate therein mentioned. The expression 'retirement' has been defined in Rule 1 (g) to mean 'the termination of service by reason of any cause other than removal by discharge due to misconduct'. It is admitted that the plaintiff was a permanent uncovenanted employee of the Company paid on monthly basis and he rendered service for over 29 years and his service came to an end by reason of his tendering resignation which was unconditionally accepted. It is not suggested that he was removed by discharge due to misconduct. Unquestionably, therefore, the plaintiff retired from service because by the letter Annexure 'B' dated August 26, 1959, the resignation tendered by the plaintiff as per his letter dated July, 27, 1959 was accepted and he was released from his service with effect from September 1,1959. The termination of service was thus on account of resignation of the plaintiff being accepted by the respondent. The plaintiff has, within the meaning of the expression, thus retired from service of the respondent an he is qualified for payment of gratuity in terms of Rule 6.

17. The Apex Court though interpreted the relevant rules applicable in that case but in pith and substance the ratio

is that if a person has completed qualifying service for the retiral benefits purposes, the same should not be denied. Referring to the judgment in case of ***P.S. Bhargav vs. Union of India (1983) 1 SCC 385*** and another judgment in the case of ***Deokinandan Prasad vs. State of Bihar (1979) 2 SCC 330***, the Supreme Court vide paragraph 18 had held thus:

"18. For centuries the courts swung in favour of the view that pension is either a bounty or a gratuitous payment for local service rendered depending upon the sweet will or grace of the employer not claimable as a right and therefore, no right to pension can be enforced through court. This view held the field and a suit to recover pension was held not maintainable. With the modern notions of social justice and social security, concept of pension underwent a radical change and it is now well-settled that pension is a right and payment of it does not depend upon the discretion of the employer, nor can it be denied at the sweet will or fancy of the employer. Deokinandan Prasad v. State of Bihar & Ors., State of Punjab & Anr. v. Iqbal Singh and D.S. Nakara & Ors. v. Union of India. If pension which is the retiral benefit as a measure of social security can be recovered through civil suit, we see no justification in treating gratuity on a different footing. Pension and gratuity in the matter of retiral benefits and for recovering the same must be put on par."

18. Coming to the issue as to whether the resignation of the petitioner dated 22.12.2000 be taken as voluntary retirement or resignation right from service, one factual aspect of the matter is that petitioner was almost on the verge of retirement as hardly a fortnight was left from the date of retirement when petitioner was to attain age of superannuation and this acquires significance and must be taken into account. At this stage advanced age, if an employee has requested for offering an employment to his son and he wanted to resign as he was not in a condition to serve the establishment being not healthwise well, the only intention seems to be of voluntary relinquishment of the job.

19. In the letter accepting the resignation of the petitioner, it is mentioned that petitioner had requested for giving appointment to his son but it only indicates that resignation of the petitioner has been accepted.

20. Voluntary retirement would also be a case of resignation. The only difference is that in case of voluntary retirement an employee intends to relinquish the job for his attaining advanced age, illness etc. and shows his inability to continue to serve the establishment whereas in case of pure resignation an employee intends to leave the job either for the reason he has got an attractive employment or that he is facing hardships at the end of the employer and circumstances have forced him/her to resign. The intention of an employee can be gathered from the language the resignation letter as the contents of the letter and the language in which it is couched will only be a determinative factor as to its nature and character.

21. On the above analysis, I find that in the case in hand the language of the resignation letter to be indicative of it being meant for voluntary retirement and exercising my equitable jurisdiction under Article 226 of the Constitution of India, I find it to be harsh if I negate the claim of the petitioner

to treat the resignation as voluntary retirement from service by taking it to be resignation simpliciter. Besides above, I find that employer himself had accepted the resignation of the petitioner as that of voluntary retirement and that is why his papers were forwarded for post retirement benefits including pension. In my view, it it within the authority and discretion of an employer to decide as to whether to treat a resignation letter as voluntary retirement or not and once the employer has treated resignation to be for voluntary retirement, there seems to be no scope for any other authority to take a different stand. Moreover, if an employee has completed qualifying service for getting retirement benefits and has resigned thereafter, he cannot be denied retiral benefits. His resignation would amount to voluntary retirement.

22. In the case of ***Sheel Kumar Jain vs. New India Assurance Co. Ltd. and ors. (2011) 2 SCC 197***, the Court had an occasion to interpret the letter of resignation and vide paragraphs 25 & 26 it held thus:

"25. Para 22 of the 1995 Pension Scheme states that the resignation of an employee from the service of the corporation or a company shall entail forfeiture of his entire past service and consequently he shall not qualify for pensionary benefits, but does not define the term "resignation". Under sub-para (1) of Para 30 of the 1995 Pension Scheme, an employee, who has completed 20 years of qualifying service, may by giving notice of not less than 90 days in writing to the appointing authority retire from service and under sub-para (2) of Para 30 of the 1995 Pension Scheme, the notice of voluntary retirement shall require acceptance by the appointing authority. Since "voluntary retirement" unlike "resignation" does not entail forfeiture of past services and instead qualifies for pension, an employee to whom Para 30 of the 1995 Pension Scheme applies cannot be said to have "resigned" from service.

26. In the facts of the present case, we find that the appellant had completed 20 years of qualifying service and had given notice of not less than 90 days in writing to the appointing authority of his intention to leave the service and the appointing authority had accepted notice of the appellant and relieved him from service. Hence, Para 30 of the 1995 Pension Scheme applied to the appellant even though in his letter dated 16-9-1991 to the General Manager of Respondent 1 Company he had used the word "resign"."

23. Very recently in the case of ***Shashikala Devi vs. Central Bank of India (2014)16 SCC 260,*** the Apex Court had relied upon the judgments referred to above and held the petitioner entitled to the retirement benefits treating the letter of resignation as a voluntary retirement by the employee. However, the question of curtailment of notice period was allowed at the discretion of the authority vide paragraph 19 had held thus:

"19. In the result this appeal succeeds and is hereby allowed. The impugned order passed by the High Court is, hereby, set aside and the writ petition filed by the deceased-employee allowed with a direction to the respondent-bank to treat letter dated 8th October, 2007 as a notice for voluntary retirement of the employee and for curtailment for three months notice period. Depending upon the view the competent authority may take on

the question of curtailment of the notice period and/or deduction of three months salary from out of the retiral benefits of the deceased-employee, the deceased-employee's claim for payment of retiral benefits due under the relevant rules including pension shall be processed and released in favour of the appellant-widow as expeditiously as possible but not later than six months from the date a copy of this order is served upon the bank. In the event of the bank's failure to comply with the directions within six months as indicated above, the amount payable to the employee and after his death his widow, shall start earning interest @ 10% p.a. from the date the period of six months expires. The parties are left to bear their own costs."

24. In the case in hand, therefore, I find that the petitioner's employer has rightly treated the letter of resignation as voluntary retirement and so made recommendation for payment of retirement benefits including pension. The qualifying service for pension to the employees of the non centralised service of a local body has come to be defined vide Rule 2(ढ़)(ण)(त) defining the same of Uttar Pradesh Nagar Palika Non Centralised Retirement Benefits Regulations, 1984 runs as under:

"2- जब तक विषय या संदर्भ मे कोई बात प्रतिकूल न हो, इस विनियमावली मे,-

निवार्यतः या स्वेच्छ से सेवानिवृत्त होने पर या स्थायी पद या स्थायी नियुक्ति की समाप्ति पर, यदि पदधारी की नियुक्ति किसी अन्य पद पर न की जाय या उसे उसके पूर्ववक्ता मौलिक पद पर, यदि कोई हो, प्रत्यावर्तित करना संभव न हो, सेवामुक्त होने से हैः

टिपण्णी:- सेवा से स्वेच्छ से सेवानिवृत्त का तात्पर्य ऐसी सेवानिवृत्त से है जो ५० वर्ष की आयु प्राप्त करने के पश्चात २० वर्ष की अर्हकारी सेवा पूरी कर लेने पर हो।

(ण) सेवानिवृत्ति पेंशन का तात्पर्य ऐसी पेंशन से है जो ऐसे पदधारी को स्वीकृत की जाय, जिसे अधिवार्षिता की आयु प्राप्त होने के पूर्व सेवानिवृत्ति होने की अनुझ दी जाय और इसके अन्तर्गत ऐसी पेंशन भी है जो ऐसे पदधारी को स्वीकृत की जाय जिससे अधिवार्षिता की आयु प्राप्त करने के पूर्व सेवा-निवृत्त होने की अपेक्षा की जायः

(त) अधिवाषिता की पेंशन का तात्पर्य किसी ऐसे पदधारी को स्वीकृत पेंशन से है जो सुसंगत विनियमों के अधीन विशिष्ट आयु प्राप्त होने पर सेवा से निवृत होने का हकदार हो।"

(emphasis added)

25 . From a bare reading of the aforesaid provisions, an employee if has attained the age of 50 years and has spent 20 years of service, he would be entitled to seek voluntary retirement and so consequential benefits. The petitioner at the time of resigning from service had already attained 50 years of age and had also completed more than 20 years of service and so he could seek voluntary retirement and consequential benefits.

26. In view of the above, therefore, treating the petitioner's resignation as voluntary retirement from service and I hold him to be entitled to retirement dues.

27. Accordingly, the order passed by the Assistant Director (Pension), Local Fund and Accounts Examination Department, U.P. dated 24.01.2007 (Annexure 6 to the writ petition) is hereby quashed. The petitioner is held entitled to

retirement benefits as per the rules. Since petitioner has been made to suffer for more than 2 decades not for very genuine reasons but for this long drawn litigation, he is also held entitled to 7% simple interest over and above the retiral dues to be calculated as a consequence of the order being passed today. The necessary exercise shall be done by the respondent concerned within a period of three months including the calculation of interest and the same be paid to the petitioner within six weeks thereafter.

28. With the aforesaid observations and directions, petition stands allowed.

(2022)05ILR A973
APPELLATE JURISDICTION
CIVIL SIDE
DATED LUCKNOW 25.05.2022

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

WRIT A No. 232 of 2022

Vijay Kumar Singh ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant
Sri Manish Misra

Counsel for the Respondents:
C.S.C., Sri Gaurav Mehrotra, Sri Ran Vijay Singh

A. Service Law – Selection/Recruitment - U.P. Recruitment to Services (Age Limit) (Tenth Amendment) Rules, 2012 - Rule 6 - U.P. Lekhpal Services Rules, 2006 - Rule 3(n), 10, 14 - U.P. Subordinate Services Selection Commission Act, 2014; U.P. General Clauses Act, 1904 - Section 4(50).

The PET examination is a general examination and is not held for any specific service under any service rules. It is conducted under the U.P. Subordinate Services Selection Commission Act, 2014 (Commission Act). It does not make any person entitled for any post whatsoever, but, is only a preliminary test taken for permitting a person to apply for the Class-III vacancies going to be advertised thereafter, till the said PET examination result is in force. The Commission advertised and initiates the selection process under different service rules. It was open for the State Government as well as for the Commission to proceed or not to proceed for the selection of the Revenue Lekhpal under their service rules. (Para 7)

In case of non advertisement of the said vacancies petitioner had no vested rights. The right vested in the petitioner after clearing PET examination was only to submit application and appear in the selection process for the vacancies under different rules, as advertised by the Commission. Therefore, it cannot be said that any selection process was initiated under the Lekhpal Rules, 2006 merely by conducting PET examination.

U.P. Lekhpal Services Rules, 2006: Rule 14 provides that appointing authority shall determine and intimate to the selection committee the number of vacancies to be filled up during course of the year of recruitment. The selection committee stands replaced by the Selection Commission as per the Commission Act. Therefore, it is for the selection commission to advertise the vacancies as per relevant service rules. Thus, the selection process for the post of Revenue Lekhpal cannot be said to have started with the PET examination but initiated when the same were advertised on 05.01.2022 by the Commission. (Para 7)

Therefore, there is no force in the first submission that, the selection process should be treated to have started in the month of June, 2021, when the PET examination was conducted by the Commission.

B. U.P. Lekhpal Services Rules, 2006 - Rule 10 - U.P. Recruitment to Services (Age Limit) (Tenth Amendment) Rules, 2012 - Rule 6, clearly provide that a candidate must not have attained more than 40 years of age as on first day of July in **calendar year** in which the vacancies are advertised.

In the present case the vacancies are advertised on 05.01.2022. The person must not have attained the age of more than 40 years as on first of July of the year 2022. Admittedly, petitioner is more than 40 years as on 01.07.2022. (Para 9)

C. Words and Phrases – 'calendar year', 'year of recruitment', 'year' – U.P. Lekhpal Services Rules, 2006: Rule 3(n) - The term 'calendar year' and term 'year of recruitment' are entirely different and the term 'year of recruitment' is defined u/Rule 3(n) of the Lekhpal Rules, 2006, which means 12 months commencing from first day of July of a calendar year. From the perusal of the same it is clear that the 'year of recruitment' and a 'calendar year' even as per Rule 3(n) are distinct and separate. The two cannot be interchanged.

Year of recruitment is relevant for Rule 14 and not for determination of age u/Rule 10 or Rule 6 of Age Limit Rules.

U.P. General Clauses Act, 1904: Section 4(50) – The term 'year' is also defined u/s 4(50), which means a "year" shall mean a year reckoned according to the British calendar. There is no reason to interpret the word 'calendar year' in any other manner. (Para 9)

D. Report of the Calendar Reform Committee of GOI, submitted on 10.11.1955 - Petitioner submits that in the said report the committee referred to number of calendars in use in India and did not find favour with the English calendar for use in India and recommended use of Indian calendar. Therefore, the term calendar year as used in Rule 10 should not be read as British calendar but should be treated to be Indian Calendar. (Para 10)

Hon'ble Court held that the said report is only recommendatory in nature. There is nothing to show that the same was ever accepted and enforced, at any point of time. There is nothing to show that while drafting or enforcing the applicable rules, the State Government ever relied upon the said report or referred to any Indian calendar. **The use of the month of July in rules itself shows that rules refer to the British calendar and not to an Indian calendar.**

Therefore, **the term 'calendar year' in which the vacancies are advertised is the year from the 1st of January to 31st December and, it is the first day of July of the said calendar year on which the person should not have attained the age of more than 40 years.** The same in the present case is 2022 as the vacancies were advertised on 05.01.2022. (Para 11)

Writ petition dismissed. (E-4)

Precedent distinguished:

1. Malik Mazar Sultan Vs U.P. Public Service Commission, 2006 (9) SCC 507 (Para 10)

2. Chairman Indore Vikas Pradhikaran Vs Pure Industrial Coke & Chemicals Ltd., 2007 (8) SCC 705 (Para 10)

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Heard Sri Manish Mishra, learned counsel for petitioner assisted by Sri Gaurav Upadhyaya, Advocate and Sri Dilip Pandey, Advocate. Sri Ran Vijay Singh, learned counsel is appearing for respondent Commission and learned Standing Counsel is present for the State.

2. Petitioner has approached this Court praying for a mandamus commanding the respondent no.2 U.P. Subordinate Services Selection Commission, Lucknow (hereinafter referred to as 'Commission') to allow the petitioner to participate in the main

examination for the post of Revenue Lekhpal.

3. The facts of the case as per the writ petition are that the Commission held a common Preliminary Entrance Test (PET) in the month of June, 2021, for facing selections for any Class-III post, to be filled up later through the Commission. Petitioner appeared in the said PET examination held on 17.06.2021 and cleared the same. Thus, he became entitled for appearing in selection examination to be held for any Class-III posts by the Commission. On 24.07.2021 Commission issued a proposed program for selections for different posts scheduled to be conducted by the Commission before March, 2022. The selection for the post of Revenue Lekhpal was proposed to be held in November, 2021. The same, however, could not be advertised in November, 2021 but was advertised on 05.01.2022 by Advertisement No.1 of 2022. Amongst other conditions for eligibility to appear in the selection process for the post of Revenue Lekhpal, one of the condition initially advertised on 05.01.2022 was, that, the age of candidate on 01.07.2021 should not be less than 18 years and not more than 40 years. Therefore, petitioner was qualified as per the said advertisement. The said advertisement, however, was later modified and provided the maximum age limit of 40 years as on 01.07.2022, as per the U.P. Recruitment to Services (Age Limit) (Tenth Amendment) Rules, 2012. Admittedly, petitioner is of more than 40 years on 01.07.2022 as his date of birth is 15.05.1982, and, thus, he has approached this court.

4. Learned counsel for the petitioner submits that petitioner was entitled as per the first advertisement and the change made in the advertisement is arbitrary and illegal. As per the calendar year petitioner ought to be held entitled to appear in the examination. He further submits that even otherwise the selection process had started when the PET examination was taken in the month of June, 2021 and therefore, the same is the relevant date for the selection process.

5. Opposing the same, learned Standing Counsel submits that PET is general combined test taken for all Class-III posts. The purpose of PET is to reduce the huge number of candidates appearing for all Class-III posts advertised by the Commission, which was putting unnecessary burden on the Commission. He further submits that the validity of the PET is already considered and affirmed in number of writ petitions by this Court. Therefore, the same cannot be treated to be initiation of selection process for a particular post and initiation for selection of a particular post starts only when the vacancies of the said post under its rules are duly notified, which in the present case were advertised on 05.01.2022. Therefore, as per the U.P. Lekhpals Services Rules, 2006 (Lekhpal Rules, 2006), the calendar year would be from 01.01.2022 to 31.12.2022 and, therefore, petitioner is not qualified.

6. I have considered the submissions of learned counsels for parties and have perused the record with their assistance.

7. So far as the first submission, that, the selection process should be treated to have started in the month of June, 2021, when the PET examination was conducted by the Commission is concerned, I do not find any force in the said submission. The PET examination is a general examination. The same is not held for any specific service

under any service rules. The same is conducted under the U.P. Subordinate Services Selection Commission Act, 2014 (Commission Act). The same does not make any person entitled for any post whatsoever, but, is only a preliminary test taken for permitting a person to apply for the Class-III vacancies going to be advertised thereafter, till the said PET examination result is in force. Under different service rules the Commission advertised and initiates the selection process. It was open for the State Government as well as for the Commission to proceed or not to proceed for the selection of the Revenue Lekhpal under their service rules. In case of non advertisement of the said vacancies petitioner had no vested rights. The right vested in the petitioner after clearing PET examination was only to submit application and appear in the selection process for the vacancies under different rules, as advertised by the Commission. Therefore, it cannot be said that any selection process was initiated under the Lekhpal Rules, 2006 merely by conducting PET examination. Rule-14 of the Lekhpal Rules, 2006 provides that appointing authority shall determine and intimate to the selection committee the number of vacancies to be filled up during course of the year of recruitment. The selection committee stands replaced by the Selection Commission as per the Commission Act. Therefore, it is for the selection commission to advertise the vacancies as per relevant service rules. Thus, the selection process for the post of Revenue Lekhpal cannot be said to have started with the PET examination but initiated when the same were advertised on 05.01.2022 by the Commission.

8. So far as the next submission of learned counsel for the petitioner, that, petitioner is required to be not more than of 40 years in age on 01.07.2021 and not on 01.07.2022, is concerned, the following rules of U.P. Lekhpal Services Rules, 2006 (Lekhpal Rules, 2006) are relevant:-

"Rule 3(n) 'Year of recruitment' means a period of twelve months commencing on the first day of July of a calendar year.

.....

Rule 10. A candidate for direct recruitment to a post in the service must have attained the age of 18 years and must not have attained the age of more than 40 yrs on the first day of July of the calendar year in which vacancies for direct recruitment are advertised.

Provided that the upper age limit in the case of candidates belonging to the Scheduled Castes, Scheduled Tribes and such other categories as may be notified by the Government from time to time shall be greater by such number of years as may be specified.

Rule 14. The appointing authority shall determine and intimate to the Selection Committee, the number of vacancies to be filled during the course of the year of recruitment as also the number of vacancies to be reserved for candidates belonging to the Scheduled Castes, Scheduled Tribes and other categories under rule 6.

For making direct recruitment, the vacancies shall be notified in the following manner

(i) by issuing advertisement in the daily newspaper having wide circulation:

(ii) by pasting the notice on the notice board of the office or by advertising

through Radio/Television and other Employment newspapers, and

(iii) by notifying vacancies to the Employment Exchange."

Further, Rule 6 of U.P. Recruitment to Services (Age Limit) Rules, 1972 (Age Limit Rules) reads:-

"Rule 6-Computation of Age.- Notwithstanding anything to the contrary contained in any service rules, for the services and posts, whether within or outside the purview of the Public Service Commission, a candidate must have attained the minimum age and must not have attained the maximum age, as prescribed from time to time, on the first day of July of the calendar year in which vacancies for direct recruitment are advertised by the Public Service Commission or any other recruiting authority, or as the case may be, such vacancies are intimated to the Employment Exchange.

Provided that nothing in this rule shall apply to a case where such advertisement or intimation has been made before the commencement of the Uttar Pradesh Recruitment to Services (Age Limit) (Fifth Amendment) Rules, 1984."

9. A bare perusal of Rule-10 of the Lekhpal Service Rules and Rule 6 Age Limit Rules, clearly provide that a candidate must not have attained more than 40 years of age as on first day of July in calendar year in which the vacancies are advertised. In the present case the vacancies are advertised on 05.01.2022. The person must not have attained the age of more than 40 years as on first of July of the year 2022. Admittedly, petitioner is more than 40 years as on 01.07.2022. Due to the non-obstinate clause in Rule 6 of the Age Limit Rules, it is the Rule 6 which is relevant for our purposes and not Rule-10 of the Lekhpal Rules, 2006 but the same is also in same terms. Even otherwise, the term 'calendar year and term 'year of recruitment' are entirely different and the term 'year of recruitment' is defined under Rule 3(n) of the Lekhpal Rules, 2006, which means 12 months commencing from first day of July of a calendar year. From the perusal of the same it is clear that the 'year of recruitment' and a 'calendar year' even as per Rule 3(n) are distinct and separate. The two cannot be interchanged. Further year of recruitment is relevant for Rule 14 and not for determination of age under Rule-10 or Rule-6 of Age Limit Rules. The term 'year' is also defined under Section 4(50) of the U.P. General Clauses Act 1904 which means a **"year" shall mean a year reckoned according to the British calendar.** There is no reason to interpret the word 'calendar year' in any other manner.

10. Learned counsel for the petitioner has also placed before this Court a report of the Calendar Reform Committee of Government of India, submitted on 10.11.1955. Learned counsel for the petitioner submits that in the said report the committee referred to number of calendars in use in India and did not find favour with the English calendar for use in India and recommended use of Indian calendar. Therefore, the term calendar year as used in Rule-10 should not be read as British calendar but should be treated to be Indian Calendar. Learned counsel for petitioner further relied upon the judgments of Supreme Court passed in case of '***Malik Mazar Sultan Vs. U.P. Public Service Commission'*** reported in [2006 (9) SCC

507] and ***'Chairman Indore Vikas Pradhikaran Vs. Pure Industrial Coke and Chemicals Limited' reported in [2007 (8) SCC 705].***

11. I have perused the report of the committee. The said report is only recommendatory in nature. There is nothing to show that the same was ever accepted and enforced, at any point of time. There is nothing to show that while drafting or enforcing the applicable rules, the State Government ever relied upon the said report or referred to any Indian calendar. The use of the month of July in rules itself shows that rules refer to the British calendar and not to an Indian calendar. Therefore, the term 'calendar year' in which the vacancies are advertised is the year from the 1st of January to 31st December and, it is the first day of July of the said calendar year on which the person should not have attained the age of more than 40 years. The same in the present case is 2022 as the vacancies were advertised on 05.01.2022.

12. So far as the judgments relied upon the learned counsel for petitioner are concerned, I have perused both the judgments. The same are not applicable to the facts of the present case, as they are on entirely different facts.

13. No other submissions were made by learned counsel for petitioner.

14. Thus, there is no force in the submissions of learned counsel for petitioner.

15. The writ petition is ***dismissed.***

(2022)05ILR A978
APPELLATE JURISDICTION

CIVIL SIDE
DATED LUCKNOW 04.05.2022

BEFORE

THE HON'BLE RAJAN ROY, J.

WRIT A No. 6640 of 2021

Rawan Awasthi ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant
Sri Vijay Kumar Srivastava, Sri Shailendra Kumar Dubey

Counsel for the Respondents:
C.S.C., Sri Ajay Kumar

A. Service Law – Compassionate Appointment - U.P. Recruitment Dependents of Government Servants Dying in Harness (Fifth Amendment), Rules 1999 - The petitioner completed her intermediate from C.B.S.E. Board prior to 02.05.2019 as the marksheet for the said examination issued by C.B.S.E. bears the said date and she applied for compassionate appointment thereafter on 30.09.2019. In fact, the petitioner on the date of death of her mother was less than sixteen years of age, therefore, she could not possibly apply for compassionate appointment. **Para 3(8) of the G.O. dated 04.09.2000, itself permits submission of such applications within five years from the date of death of the deceased employee. One of the objects of such provision is to enable a dependent who is otherwise minor, may be slightly below the age of majority, so that he or she may not be deprived of such compassionate appointment and may not have to undergo the consequential financial deprivation. Therefore, the provision in para 3(5) does not appear to be reasonable by any standards.** (Para 8)

The provision contained in para no. 3(5) of the aforesaid GO is patently unreasonable and hit by Art. 14 of the Constitution of

India. However, instead of quashing the said provision, the ends of justice would suffice if the words are read down to mean that the dependent of the deceased employee who applies for compassionate appointment should possess the minimum educational qualification prescribed for the post in question on the date of submission of such application or on the date of being considered for selection but within the time limit prescribed by para 3(8) of the said GO dated 04.09.2000, otherwise the provision would not stand the test of Article 14 of the Constitution of India. This will protect it from being declared unconstitutional. (Para 9)

In view of the above clarification of law on the subject, the impugned orders dated 04.12.2019 and 27.08.2020 are quashed. The claim of the petitioner shall now be reconsidered for compassionate appointment for a clerical post in the light of the aforesaid, subject to availability of vacancy and the decision taken shall be communicated to the petitioner within three months. If there is no vacancy on a clerical post then the claim of the petitioner shall be considered for compassionate appointment against a Class-IV post. (Para 9)

Writ petition allowed. (E-4)

Present petition challenges the order dated 04.12.2019 as well as order dated 27.08.2020, to the extent it denies to give appointment on a Group – C post.

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard Sri Vijay Kumar Srivastava, learned counsel for the petitioner, Sri Vivek Shukla, learned Additional C.S.C. and Sri Ajay Kumar, learned counsel for the B.S.A.

2. By means of this petition, the petitioner has prayed for the following relief (s):

"(I) A writ, order or direction in the nature of Certiorari thereby quashing the impugned order dated 04.12.2019 as well as the order dated 27.08.2020, passed by the opposite party No. 3, to the extent it denies to give appointment on a Group-C Post, contained as Annexure No. 1 and 2 to this writ petition.

(IA) a writ order or direction in the nature of Certiorari thereby quashing the Government Order dated 04.09.2000 to the extent it provides for attaining the educational qualification on the date of death of deceased employee, which is contained as annexure no.11 to the writ petition.

(II) A writ, order or direction in the nature of Mandamus thereby directing the opposite parties to provide appointment to the petitioner on Group-C Post under Dying-In-Harness Rules 1974.

(III) Any other order or direction may also be passed which the Hon'ble Court deems fit and proper under the facts and circumstances of the case.

3. The petitioner's mother was an Assistant Teacher at Primary School, Bhagginivada, Block-Shivrajpur, Kanpur Nagar. She died-in-harness on 07.10.2016. The applicant-petitioner who was at that time studying in intermediate after having passed the high school applied for compassionate appointment on 30.09.2019 after completing her intermediate. The claim has been rejected vide orders of B.S.A., Kanpur Nagar dated 04.12.2019 and 27.08.2020 on the ground that as per Government Order dated 04.09.2000, the person applying for compassionate appointment should have the requisite qualification for the post on the date of death of the deceased employee. It is worthwhile to mention that on the date of her mother's death, the petitioner was aged

one month less than sixteen years, her date of birth being 20.11.2000. Para no.5 of the writ petition is relevant in this regard. The high school marksheet also discloses the aforesaid fact, copy of which is annexed as Annexure no.6 to the petition.

4. The State has not filed any counter affidavit inspite of order dated 28.07.2021 and subsequent orders dated 16.08.2021, 06.09.2021 and 21.09.2021. The Court, therefore, proceeds to decide the matter.

5. When the Court peruses the Government Order dated 04.09.2000, it finds that in para no.3 (5), the following provision has been made:-

"(5) ऐसे मृतक आश्रित जो, सम्बन्धित कर्मचारी की मृत्यु के दिनांक को मृतक आश्रित के रुप में सेवायोजन के लिये न्यूनतम शैक्षिक अर्हता इण्टरमीडिएट अथवा उससे अधिक रखते हों और बेसिक शिक्षा परिषद के अधीन अधीनस्थ स्तरों पर लिपिक के सम्वर्ग के सबसे नीचे के पद पर सेवायोजन के लिये अन्यथा अर्ह हों, को सम्बन्धित जनपद के लिपिक के fjDr पद के सापेक्ष्य संवर्ग में सबसे नीचे के पद पर सेवायोजन प्रदान किया जायेगा।

जनपद में fjDr लिपिक के पद पर मृतक आश्रित के रुप में सेवायोजन के लिए izkIr समस्त आवेदन पत्रों को प्रथम आगत प्रथम iznRr के आधार पर पंजीकृत किया जायेगा तथा विभाग के fjDr होने वाले पदों के सापेक्ष्य प्रथम आगत प्रथम iznRr के नियम का पालन lqfuf'pr करते हुए सेवायोजन प्रदान किया जायेगा। fu;qfDr प्राधिकारी तदनुसार मृतक आश्रित अभ्यर्थियों की सूची को प्रत्येक माह के प्रारम्भ में अपने कार्यालय के सूचना पटल पर प्रदर्शित करेंगे और प्रत्येक माह होने वाली fjfDr के सापेक्ष्य सेवायोजित मृतक आश्रित का नाम प्रदर्शित करते हुए mDr सूची का तदनुसार संशोधित कर अगले माह के प्रारम्भ में अद्यावधिक संशोधित सूची कार्यालय में सूचना पटल पर प्रदर्शित करते रहेंगे। तृतीय श्रेणी के fjDr पद के सापेक्ष्य मृतक आश्रित सेवायोजन के लिए प्रत्येक अभ्यर्थी के नाम fu;qfDr प्राधिकारी के कार्यालय में पंजीकृत होने की तिथि से पांच वर्ष की अवधि पूरी होने के माह के अंतिम कार्य दिवस तक यदि प्रथम आगत प्रथम iznRr के सिद्धान्त के अनुसार सेवायोजन हेतु श्रेणी तीन की रिक्ति उपलब्ध नहीं होती तो सम्बन्धित अभ्यर्थी का नाम पंजीकृत अभ्यर्थियों की सूची से निकाल दिया जायेगा किन्तु इस अवधि से पूर्व यदि श्रेणी चार के fjDr पद/अधिसंख्य पद के सापेक्ष्य सेवायोजन हेतु अपना संशोधित आवेदन पत्र fu;qfDr प्राधिकारी के कार्यालय में पंजीकृत करा लें तो उस पर विचार किया जायेगा।

मृतक आश्रित परिवार की कठिन परिस्थितियों को दृष्टिगत रखते हुए यदि कोई अभ्यर्थी, लिपिक संवर्ग के पद की fjfDr के सापेक्ष्य सेवायोजन में, सम्भावित विलम्ब को, दृष्टिगत रखते हुए यदि तत्काल सेवायोजन की आवश्यकता अनुभव करता हो तो नियुक्ति प्राधिकारी के लिए ऐसे अभ्यर्थियों के सम्बन्ध में चतुर्थ श्रेणी में fjDr या अधिसंख्य पदों के सापेक्ष्य मृतक आश्रित के पुनरीक्षित आवेदन पत्र प्रस्तुत करने पर सेवायोजन करने का अधिकार होगा। यहाँ यह स्पष्ट किया जाता है कि एक बार मृतक आश्रित के रुप में iznRr सेवायोजन की सुविधा पर पुर्नविचार का कोई अवसर नहीं रहेगा।"

6. Para no.3 (8) of the same Government Order reads as under:-

"(8) मृतक आश्रित द्वारा सम्बन्धित कर्मचारी के मृत्यु के दिनांक से पांच वर्ष के भीतर सेवायोजन के लिए आवेदन प्रस्तुत किया जा सकता है। परन्तु जहाँ राज्य सरकार को यह

समाधान हो जाये कि सेवायोजन के लिए आवेदन करने के लिए नियत समय सीमा से किसी विशिष्ट मामले में, अनुचित कठिनाई होती है वहाँ वह अपेक्षाओं को, जिन्हें वह मामलें में न्यायसंगत और साम्यपूर्ण रीति से कार्यवाही करने के लिए आवश्यक समझे, अभियुक्त या शिथिल कर सकती हैं। नियमों से इस आशय की vfHkeqfDr/शिथिलीकरण के सम्बन्ध में प्रस्ताव सम्बन्धित नियुक्ति प्राधिकारी द्वारा शिक्षा निदेशक (बे०) के माध्यम से शासन को प्रेषित किये जायेंगे।"

7. Sub-para-(8) of para (3) of the aforesaid Government Order permits filing of such application for compassionate appointment within five years from the date of death of the deceased employee. In suitable cases, this time period can also be extended by the State Government. Para 3(1) of the aforesaid Government Order refers to the U.P. Recruitment of Dependents of Government Servants Dying in Harness (Fifth Amendment), Rules, 1999 and makes provision for the basic education schools accordingly. On a conjoint reading of various provisions contained in the Government Order dated 04.09.2000 especially para 3(5) and 3(8), there can be no rational and intelligible criteria for a condition such as the one mentioned in para 3(5) for providing compassionate appointment to such dependents of a deceased employee who possess the minimum qualification of intermediate or above for such employment as on the date of death of the deceased employee, meaning thereby, those not being the required qualification on the date of death of the deceased employee would not be considered for compassionate appointment The object of such a provision for providing compassionate appointment is to enable the family of the deceased employee to tied-over the financial crisis as has already been held in a catena of decisions. What if a dependent of the deceased employee acquires the minimum educational qualification prescribed for a particular post subsequent to date of death of the deceased employee and within the period of five years during which he/she can move such application for compassionate appointment. If in such eventuality, he/ she is to be denied consideration for compassionate appointment, it will be highly unreasonable and will defeat to the object sought to be achieved. In fact, in the 1974 Rules, as applicable to government servants, there is no such embargo. The provision for compassionate appointment in basic school has been brought about on similar lines as the 1974 Rules applicable to the government servants as amended in 1999 as already referred hereinabove and as is mentioned in para 3(1) of the Government Order dated 04.09.2000. Now, when the Court peruses the aforesaid rules of 1974 as amended in 1999, Rule (5) of the aforesaid Rules, 1974 it does not contain any such stipulation that the educational qualification should be fulfilled by such dependent of a deceased employee on the date of death of the deceased.

8. The petitioner completed her intermediate from C.B.S.E. Board prior to 02.05.2019 as the marksheet for the said examination issued by C.B.S.E. bears the said date and she applied for compassionate appointment thereafter on 30.09.2019. In fact, the petitioner on the date of death of her mother was less than sixteen years of age, therefore, she could not possibly apply for compassionate appointment. Para 3(8) of the aforesaid G.O. itself permits submission of such applications within five years from the date of death of the

deceased employee. One of the objects of such provision is to enable a dependent who is otherwise minor, may be slightly below the age of majority, so that he or she may not be deprived of such compassionate appointment and may not have to undergo the consequential financial deprivation. Therefore, the provision in para 3(5) does not appear to be reasonable by any standards.

9. Considering the aforesaid, the provision contained in para no.3(5) of the aforesaid Government Order is patently unreasonable and hit by Article 14 of the Constitution of India. However, instead of quashing the said provision, the ends of justice would suffice if the words *"(5) ऐसे मृतक आश्रित जो, सम्बन्धित कर्मचारी की मृत्यु के दिनांक को मृतक आश्रित के रुप में सेवायोजन के लिये न्यूनतम शैक्षिक अर्हता इण्टरमीडिएट अथवा उससे अधिक रखते हों ..."* are read down to mean that the dependent of the deceased employee who applies for compassionate appointment should possess the minimum educational qualification prescribed for the post in question on the date of submission of such application or on the date of being considered for selection but within the time limit prescribed by para 3(8) of the said Government Order dated 04.09.2000, otherwise the provision would not stand the test of Article 14 of the Constitution of India. This will protect it from being declared unconstitutional. The Government Order shall now be read, understood and applied accordingly. In view of the above clarification of law on the subject, the impugned orders dated 04.12.2019 and 27.08,2020 are quashed. The claim of the petitioner shall now be reconsidered for compassionate appointment for a clerical post in the light of the aforesaid, subject to availability of vacancy and the decision taken shall be communicated to the petitioner within three months. If there is no vacancy on a clerical post then the claim of the petitioner shall be considered for compassionate appointment against a Class-IV post.

10. Accordingly, the writ petition is **allowed i**n the aforesaid terms.

(2022)05ILR A982
APPELLATE JURISDICTION
CIVIL SIDE
DATED LUCKNOW 07.05.2022

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

WRIT A No. 2555 of 2022

Prakash Chandra Agarwal ...Appellant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellant
Sri Gaurav Mehrotra, Sri Akber Ahmed

Counsel for the Respondents:
C.S.C.

A. Service Law – Disciplinary Inquiry - U.P. Government Servants (Discipline and Appeal) Rules, 1999 - Rule 7 - It is not merely the duty of the inquiry officer to comply with the Rule-7 but also the duty of the punishing authority, while passing order of punishment, to ensure that the inquiry is conducted as per the procedure prescribed. (Para 6)

In the present case, admittedly, there is violation of Rule-7 as the documents relied upon by the inquiry officer were never provided to the petitioner nor the inquiry is conducted following the procedure prescribed under Rule-7, i.e., by summoning the witnesses of the department, giving chance of cross examination, providing

opportunity to the delinquent employee/petitioner to call his witnesses, therefore, impugned order dated 11.04.2022 cannot stand and is set aside. (Para 11)

B. The power exercised by the inquiry officers are quasi judicial in nature and for the same a judicially trained mind is required. The State Government is already having a Judicial Training and Research Institute (J.T.R.I.) which trains/educates the officers of the State Government on the legal compliances/procedures. (Para 8)

Director, J.T.R.I., Lucknow is directed to forthwith prepare an appropriate program for training of the inquiry officers as well as for training of the disciplinary authorities so that such mistakes are not repeated. (Para 9)

Writ petition allowed. (E-4)

Precedent followed:

1. St. of U.P. & ors. Vs Vijay Anand Tiwari, Order dated 13.01.2021, passed in Writ-A No. 12110 of 2020 (Para 7)

Present petition challenges the punishment order dated 11.04.2022, passed by Additional Chief Secretary/Principal Secretary, Secretariat Administration Department, Lucknow.

(Delivered by Hon'ble Vivek Chaudhary, J.)

1. Present writ petition is filed by the petitioner challenging his punishment order dated 11.04.2022 passed by Additional Chief Secretary/Principal Secretary, Secretariat Administration Department, Lucknow (respondent no.2).

2. By the impugned order, petitioner is given a punishment of censure entry and reversion to the post of Section Officer from the post of Under-Secretary.

3. At the very outset, learned counsel for petitioner submits that the inquiry was conducted by the Special Secretary, Medical Education Services, U.P., who submitted her report on 25.08.2021. He submits that in the present case, the inquiry officer was never provided the documents to which she had relied upon in the inquiry. The said documents were summoned by the inquiry officer during the conduct of the inquiry and were also perused by her. However, neither copy of the said documents were provided to the petitioner nor the same were permitted to be perused by the petitioner. Learned counsel for petitioner further submits that a bare perusal of the report shows that the inquiry was conducted in violation of Rule-7 of the U.P. Government Servants (Discipline and Appeal) Rules, 1999 (hereinafter referred to as 'Rules of 1999'), as no date, time and place was fixed in the inquiry.

4. I have perused the inquiry report as well as the impugned punishment order. A bare perusal of the same shows that the inquiry officer has, in fact, not merely failed to follow the procedure provided by Rule-7 of Rules of 1999 but has also placed burden upon the delinquent employee to prove that he is not guilty. In the first line of discussion, the inquiry officer states, that, delinquent employee through his reply to the charge-sheet/statements could not submit any evidence which would prove that the delinquent employee is wrongly charged.

5. In the present case, the Additional Chief Secretary was summoned along with the record. Today he is present in Court along with the record and with his assistance as well as assistance of the counsels for parties, record is perused. Learned Standing Counsel also could not

show from the record of the case that the procedure as prescribed under Rule-7 of Rules of 1999 is followed in conducting the inquiry and any date, time and place was fixed for evidence or evidence relied upon/summoned was provided to the petitioner.

6. Though the matter is simple as it is to be remanded back, but, in large number of cases filed before this Court, it is found that the inquiry with regard to major penalty is conducted in violation of Rule-7 of Rules of 1999. The present case is a glaring example of the same. Inquiry officer is a Special Secretary and the punishing authority is a Principal Secretary. Still a glaring error is committed in conduct of the inquiry by the inquiry officer and in failure to check the same by the punishing authority before punishment order was issued. It is not merely the duty of the inquiry officer to comply with the Rule-7 but also the duty of the punishing authority, while passing order of punishment, to ensure that the inquiry is conducted as per the procedure prescribed.

7. Such mistakes in large numbers are occurring for quite some time now in the State. The State Government as far back as on 22.04.2015 issued a detailed government order explaining at length the manner in which inquiry with regard to minor punishment or major punishment should be conducted. The government order explains at length what is already prescribed in Rule-7. When the inquiries were still not being conducted in proper manner, again under order of this Court dated 13.01.2021 passed in Writ-A No.12110 of 2020; 'State of U.P. & Others Vs. Vijay Anand Tiwari', a Government Order dated 10.02.2021 was issued by the State Government for compliance of Rule-7. Despite two aforesaid government orders, the inquiries are still not conducted in a proper manner. It is sad to note that the both the aforesaid government orders are also not being complied with by the officials. It is also noted that in large number of cases, after remand when the inquiry is re-conducted, the same procedural error is again made and again the inquiry report is submitted without following the due procedure as per Rule-7. This is also putting burden of unnecessary litigation upon this Court. It is the duty of the inquiry officer as well as the punishing authority to ensure compliance of Rule-7.

8. Since these incidences are abundant in number, therefore, this Court finds it necessary now to ensure that every inquiry officer, who at present is conducting an inquiry or appointed to conduct any inquiry in future, is provided proper training with regard to the manner and procedure for conducting the inquiry. Similarly the disciplinary authorities are also required to go through a training with regard to the manner in which the inquiries are to be conducted and, thereafter, punishment orders are to be passed. It goes without saying that the power exercised by the inquiry officers are quasi judicial in nature and for the same a judicially trained mind is required. The State Government is already having a Judicial Training and Research Institute (J.T.R.I.) which trains/educates the officers of the State Government on the legal compliances/procedures.

9. Therefore, Director, J.T.R.I., Lucknow is directed to forthwith prepare an appropriate program for training of the inquiry officers as well as for training of the disciplinary authorities so that such mistakes are not repeated. The J.T.R.I shall

also issue an appropriate identifiable certificate to every officer after he/she completes the training session. The relevant details of the said training session/certificates shall be referred by the officer concerned in every inquiry report submitted by him/her or punishment order passed. All the officers who are conducting any inquiry at present in the State shall attend the training without any delay and such inquiry officers shall conclude their inquiries only after their training is completed. Similarly the punishing authority shall also go through the required training before passing any punishment order and also refer to their session/certificate. It is further directed that no inquiry officer in future shall be appointed for departmental inquiry who has not received the training from the J.T.R.I. The State government shall bear the cost of the aforesaid training at J.T.R.I. at its own cost.

10. Senior Registrar of this Court shall forthwith send a copy of this order to the Chief Secretary of the State of U.P. as well as Director, J.T.R.I., Lucknow for its compliance.

11. Since, in the present case, admittedly, there is violation of Rule-7 as the documents relied upon by the inquiry officer were never provided to the petitioner nor the inquiry is conducted following the procedure prescribed under Rule-7, i.e., by summoning the witnesses of the department, giving chance of cross examination, providing opportunity to the delinquent employee/petitioner to call his witnesses, therefore, impugned order dated 11.04.2022 cannot stand and is set aside.

12. The matter is remanded back to respondent no.2 for conducting fresh inquiry after following proper procedure as prescribed under Rule-7.

13. With the aforesaid, the writ petition is ***allowed.***

(2022)05ILR A985
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.03.2022

BEFORE

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

Writ A No. 959 of 2022

Smt. Kavita Sonkar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Babu Lal Ram, Sri Ankit Sonker

Counsel for the Respondents:
C.S.C., Sri M.N. Singh, Sri V.K.S. Raghuvanshi

A. Service Law – Appointment – Qualification/Eligibility - The essential qualifications for appointment to a post are for the employer to decide. The employer may prescribe additional or desirable qualifications, including any grant of preference. It is the employer who is best suited to decide the requirements a candidate must possess according to the needs of the employer and the nature of work. **The court cannot lay down the conditions of eligibility, much less can it delve into the issue w.r.t. desirable qualifications being at par with the essential eligibility by an interpretive re-writing of the advertisement. Questions of equivalence will also fall outside the domain of judicial review.** (Para 7, 8, 9)

If the language of the advertisement and the rules are clear, the court cannot sit in judgment

over the same. If there is an ambiguity in the advertisement or it is contrary to any rules or law the matter has to go back to the appointing authority after appropriate orders, to proceed in accordance with law. **In no case can the court, in the garb of judicial review, sit in the chair of the appointing authority to decide what is best for the employer and interpret the conditions of the advertisement contrary to the plain language of the same.** (Para 8)

B. The recruitment/selection process should be made strictly in accordance with terms of the advertisement and the recruitment rules. (Para 10)

The petitioner possess the DCA Certificate, which is not equivalent to "O" Level certificate awarded by the DOEACC society or a qualification equivalent thereto, therefore, he is not eligible or qualified for the post of Assistant Review Officer as per the prescribed qualification mentioned in the advertisement, hence it would be impermissible to consider the petitioner as being eligible for the said post and relief as prayed has also not been granted. (Para 11)

Writ petition dismissed. (E-4)

Precedent followed:

1. Zahoor Ahmad Rather Vs Imtiyaz Ahmad, (2019) 2 SCC 404 (Para 7)

2. Maharashtra Public Service Commission Vs Sandeep Shriram Warade, (2019) 6 SCC 362 (Para 8)

3. Punjab National Bank Vs Anit Kumar Das, 2020 SCC Online 897 (Para 9)

4. Yogesh Kumar & ors. Vs Government of NTC Delhi, (2003) 3 SCC 548 (Para 10)

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

1. Instructions passed on to the Court today, is kept on record.

2. Heard Mr. Babu Lal Ram, learned counsel for the petitioner and learned Standing Counsel for the State-respondent no.1 and Mr. V.K.S. Raghuvanshi, learned counsel for the respondents-Commission.

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

"(a) Issue a writ, order or direction in the nature of certiorari quashing thereby call upon the respondents to produce order of cancellation of candidature of the petitioner passed by the respondents and this Hon'ble Court also be pleased to quash the aforesaid order regarding cancellation of candidature of the petitioner.

(b) issue a writ, order or direction in the nature of Mandamus directing the respondents to permit the petitioner to join her duty on the post of A.R.O. in pursuance of the advertisement No.A-6/E-1/2014 R.O./A.R.O. (direct/special recruitment examination 2014) and this Hon'ble Court also be pleased to direct the respondents to recommended selection of the petitioner on the post of R.O./A.R.O."

4. Learned counsel for the petitioner submits that the petitioner applied for the post of A.R.O. in pursuance of Advertisement No. A-6/E-1/2014 and was declared successful in the pre and main examination, but the appointment has not been given to the petitioner for the reasons best known respondents-Commission.

5. Learned counsel for the respondents-Commission, on the basis of instructions received, submits that one of the requirements for the post of Assistant Review Officer is that candidate, should

possess 'O' Level Certificate in computer Application from an Institute recognized by the Government. He further submits that the petitioner, who applied for the post of A.R.O., did not possess "O" Level certificate awarded by the DOEACC society or a qualification equivalent thereto, therefore, his candidature has been rejected when the document were being verified. Thus, the relief as prayed can not be granted.

6. From perusal of impugned advertisement as well as the document as annexed at page 23&24 to the petition, it is clear that the petitioner possesses the DCA Certificate, which is not equivalent "O" Level certificate awarded by the DOEACC society or a qualification equivalent thereto, therefore, he is not eligible or qualified for the post of Assistant Review Officer as per the prescribed qualification mentioned in the advertisement. It is the Commission/competent authority, who has right to consider the case of the petitioner and it is not the function of the Court to adjudge or evaluate the suitability or desirability of a particular qualification that may be prescribed. Here too the Courts must exercise due restraint and desist from treading down this path since these issues must be left to the fair judgment and assessment of the employer and the experts in the field.

7. The Apex Court in the case of ***Zahoor Ahmad Rather Vs. Imtiyaz Ahmad,*** reported in ***(2019) 2 SCC 404*** has held as under: -

*"26. ..... The prescription of qualifications for a post is a matter of recruitment policy. The State as the employer is entitled to prescribe the qualifications as a condition of eligibility. It is no part of the role or function of judicial review to expand upon the ambit of the prescribed qualifications. Similarly, equivalence of a qualification is not a matter which can be determined in exercise of the power of judicial review. Whether a particular qualification should or should not be regarded as equivalent is a matter for the State, as the recruiting authority, to determine. The decision in Jyoti K.K. [Jyoti K.K. v. Kerala Public Service Commission, (2010) 15 SCC 596 : (2013) 3 SCC (L&S) 664] turned on a specific statutory rule under which the holding of a higher qualification could presuppose the acquisition of a lower qualification. The absence of such a rule in the present case makes a crucial difference to the ultimate outcome. In this view of the matter, the Division Bench [Imtiyaz Ahmad v. Zahoor Ahmad Rather, LPA (SW) No. 135 of 2017, decided on 12-10-2017 (J&K)] of the High Court was justified in reversing the judgment [Zahoor Ahmad Rather v. State of J&K, 2017 SCC OnLine J&K 936] of the learned Single Judge and in coming to the conclusion that the appellants did not meet the prescribed qualifications. We find no error in the decision [Imtiyaz Ahmad v. Zahoor Ahmad Rather, L*PA (SW) No. 135 of 2017, decided on 12-10-2017 (J&K)] of the Division Bench."

8. The Apex Court in the case of ***Maharashtra Public Service Commission Vs. Sandeep Shriram Warade,*** reported in *(2019) 6 SCC 362* has also held as under:-

"9. The essential qualifications for appointment to a post are for the employer to decide. The employer may prescribe additional or desirable qualifications, including any grant of preference. It is the employer who is best suited to decide the requirements a

candidate must possess according to the needs of the employer and the nature of work. The court cannot lay down the conditions of eligibility, much less can it delve into the issue with regard to desirable qualifications being on a par with the essential eligibility by an interpretive re-writing of the advertisement. Questions of equivalence will also fall outside the domain of judicial review. If the language of the advertisement and the rules are clear, the court cannot sit in judgment over the same. If there is an ambiguity in the advertisement or it is contrary to any rules or law the matter has to go back to the appointing authority after appropriate orders, to proceed in accordance with law. In no case can the court, in the garb of judicial review, sit in the chair of the appointing authority to decide what is best for the employer and interpret the conditions of the advertisement contrary to the plain language of the same."

9. The Full Bench of the Apex Court in the case of ***Punjab National Bank Vs. Anit Kumar Das, 2020 SCC Online SC 897*** has observed as under:-

"21.Thus, as held by this Court in the aforesaid decisions, it is for the employer to determine and decide the relevancy and suitability of the qualifications for any post and it is not for the Courts to consider and assess. A greater latitude is permitted by the Courts for the employer to prescribe qualifications for any post. There is a rationale behind it. Qualifications are prescribed keeping in view the need and interest of an Institution or an Industry or an establishment as the case may be. The Courts are not fit instruments to assess expediency or advisability or utility of such prescription of qualifications....."

10. The recruitment/selection process should be made strictly in accordance with terms of the advertisement and the recruitment rules as has been held by the Apex Court in the case of ***Yogesh Kumar And Others vs Government Of NTC Delhi reported in (2003) 3 SCC 548.***

11. In view of the aforesaid discussion, the Court is of the considered view that the petitioner possess the DCA Certificate, which is not equivalent "O" Level certificate awarded by the DOEACC society or a qualification equivalent thereto, therefore, he is not eligible or qualified for the post of Assistant Review Officer as per the prescribed qualification mentioned in the advertisement, hence it would be impermissible to consider the petitioner as being eligible for the said post and relief as prayed has also not been granted.

12. Accordingly, this writ petition lacks merits and is dismissed.

(2022)05ILR A988
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.04.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

Writ-A No. 718 of 2014

Virendra Pratap Singh ...Petitioner
Versus
U.P. State Bridge Corp. Ltd. ...Respondent

Counsel for the Petitioner:
Ram Singh 'Paliwal', Ramesh Pandey

Counsel for the Respondents:
Shishir Jain, Ram Ratan

Civil Law – Constitution of India,1950 – Article 226 - UP Uttar Pradesh St. Bridge Corp. Ltd. Service Rules – Rule 40, 40(13)(3), Model Conduct, Discipline And Appeal Rules, 1991 - Rule 33, 35 - Termination – petitioner's services - on the ground of wilful absence from duty which is a matter of misconduct – petitioner's case is that due to suffering from sciatica, spondylitis followed by Paralysis as well as his wife's long-illness he did not discharge his duties – even though during said period he applied for all kinds of leaves – as such absence is neither deliberate nor intentional - it is not a case of abandonment of employment or deemed resignation under the corporation rules – order of termination is unsustainable and quashed – petitioner would be entitle to benefits of his post until age of superannuation thereafter whatever consequential benefits would be follow – he would not entitled to any pecuniary benefit for the absence period – writ petition allowed with directions accordingly. (Para – 32, 33, 35, 38, 39)

Writ Petition Allowed. (E-11)

List of Cases cited: -

1. Aligarh Muslim University Vs Mansoor Ali Khan [(2000) 7 SCC 529 : 2002 SCC (L&S) 965 : AIR 2000 SC 2783]

2. Buckingham and Carnatic Co. Ltd. Vs Venkatiah & anr., AIR 1964 SC 1272

3. Delhi Transport Corporation Vs D.T.C. Mazdoor Congress & ors., 1991 Supp1 SCC 600

4. Jeewanlal (1929) Ltd., Calcutta Vs Workmen, AIR 1961 SC 1567

5. G.T. Lad Vs Chemical and Fibres of India Ltd. [(1979) 1 SCC 590 : 1979 SCC (L&S) 76 : AIR 1979 SC 582]

6. Vijay S. Sathaye Vs Indian Airlines Ltd. & ors., (2013) 10 SCC 253

(Delivered by Hon'ble J.J. Munir, J.)

1. The petitioner is an ex-employee of the Uttar Pradesh State Bridge Corporation Limited. His services were terminated by an order dated 31.12.2012 on the ground of wilful absence from duty. It is this order that the petitioner has impugned in the present writ petition.

2. Heard Mr. Ram Singh Paliwal, learned Counsel for the petitioner and Mr. Ram Ratan, learned Counsel for all the respondents.

3. The petitioner was appointed on the post of a Junior Engineer with the Uttar Pradesh State Bridge Corporation Limited (for short, 'the Corporation') w.e.f. 18.03.1981 vide a letter of appointment dated 09.03.1981. He joined service on 18.03.1981 at Allahabad (now Prayagraj). Until the date of the impugned order terminating his services, the petitioner had rendered 31 years service. It is the petitioner's case that he suffered from spondylitis followed by paralysis and sciatica during the period 04.05.2008 to 18.05.2012. This long spell of ailment of the petitioner was followed by his wife's illness. It is not in dispute that during the period 04.05.2008 to 18.05.2012, the petitioner did not discharge his duties, which the Corporation have termed as unauthorized absence.

4. It is the petitioner's case that during the aforesaid period of time, he had applied for sanction of all kinds of leave available, including medical leave, through applications made on various dates. Some of these leave applications were granted. The petitioner says that his absence from duty is neither deliberate nor intentional. It was caused by his own sickness, followed by that of his wife. The petitioner was under treatment for his

spondylitis at Gorakhpur. The petitioner submitted his joining report on 19.05.2012 to the Office of the Deputy `Project Manager of the Corporation at its Pratapgarh unit. The petitioner was not allowed to join, though he submitted repeat representations before the Corporation through their competent Authorities. The petitioner says that the impugned order of termination dated 31.12.2012 was sent to his local address, whereas he was residing at Gorakhpur in connection with his treatment. For the said reason, he could not come to know of the order in good time. It is the petitioner's case that his services have been terminated without issuing him a show-cause notice or initiating disciplinary proceedings on ground of misconduct, in accordance with the provisions of Rules 33 and 35 of the Model Conduct, Discipline and Appeal Rules, 1991 (amended in the year 1998, as applicable to the Corporation) (for short, "the 1991 Rules).

5. A counter affidavit on behalf of the Corporation has been filed on 07.08.2014, to which the petitioner filed a rejoinder on 1st of November, 2014. The stand of the Corporation in the counter affidavit, briefly put, is that the petitioner remained unauthorizedly absent from duty since 04.05.2008 for a period of more than four years. It is their case that the petitioner unauthorizedly absented himself from duty for a long period of time and did not join for a single day during this period of four years. The petitioner was, therefore, held to have abandoned employment with the Corporation and his services were terminated as such by the order impugned dated 31.12.2012. Dilating more upon the petitioner's conduct during the period of his unauthorized absence, it is averred in the counter affidavit that he was sanctioned earned leave for the period 21.04.2008 to 03.05.2008, but after 03.05.2008, the petitioner did not join duty. The Deputy Project Manager of the Corporation's unit at Pratapgarh, under whom the petitioner was posted, vide a letter dated 08.05.2008, directed the petitioner to join duty. He also sent a telegram.

6. It is the Corporation's case that the petitioner did not join his duties but submitted a leave application through another person, that was answered by the Deputy Project Manager vide his letter dated 03.06.2008. The petitioner then requested for extension of leave due to his illness, that was placed before the Corporation Headquarters. The Corporation Headquarters issued a letter dated 18.07.2008, directing the Deputy Project Manager of the Pratapgarh unit to ensure the petitioner's medical examination. In compliance, the Deputy Project Manager of the Corporation at the Pratapgarh unit vide his letters dated 29.07.2008 and 14.08.2008, directed the petitioner to appear before the Chief Medical Officer, Pratapgarh for his medical examination, but the said letters were returned by the postal agency with the remark: "लिखित पते पर कोई नहीं रहता है". It is then said that the petitioner did not get himself medically examined and continued to send leave applications on the ground of his illness and subsequently that of his wife. In this manner, the petitioner remained unauthorizedly absent without sanction of leave for more than four years.

7. It is pleaded that consequently, the Corporation inferred that the petitioner was not interested in serving them, but somehow to maintain his lien, he would send leave applications, without receiving letters sent to him by the

Corporation. He was, in the Corporation's submission, trying to avoid resuming duties on one pretext or the other. The Corporation, therefore, say that the impugned order dated 31.12.2012 is just, legal and valid. The medical certificate dated 10.01.2010 relied upon by the petitioner, a copy of which is annexed as Annexure No.4 to the writ petition, has been castigated as one not issued by any Government Hospital. It is further said that by the said certificate, the petitioner was declared fit to join, but he did not join duties after the date of the said certificate and remained unauthorizedly absent for about two and a half years thereafter.

8. In paragraph No.9 of the counter affidavit, the Corporation have referred to a certain Rule 40 of the Uttar Pradesh State Bridge Corporation Limited Service Rules (hereinafter referred to as, 'the Service Rules'), which inter-alia governs the right to leave. The Rule says that leave cannot be claimed as a matter of right. It is also provided that "when the exigencies of service so require, discretion to refuse or revoke leave of any description, is reserved to the Authority empowered to grant it", to quote the words of the Rule. The Corporation have taken a stand that as leave could not be claimed as a matter of right and no leave in point of fact was sanctioned beyond 3rd of May, 2008, the petitioner remained unauthorizedly absent from duty for more than four years. As such, his services have rightly been terminated in accordance with the Rules by the order impugned.

9. The petition was not formally admitted to hearing when it came up before this Court on 25.10.2021, but since parties had exchanged affidavits, it was formally admitted. The Court formulated the following question for consideration at the hearing, while admitting the writ petition:

'Whether the petitioner's services for wilful absence from duty were terminated as a matter of misconduct or in the exercise of some power of abandonment of employment exercised (sic) by the employer under the relevant leave rules?'

10. Since in the counter affidavit, and otherwise too no Rule was placed before the Court, indicating the nature and the source of the power that was exercised to terminate the petitioner's services, the Court required the Managing Director of the Corporation to file his personal affidavit, adjourning hearing to 28.10.2021. The Managing Director of the Corporation filed his personal affidavit on 28.10.2021 in Court. The Managing Director has come out with a more informed stand on behalf of the Corporation. The source of power to terminate the petitioner's services has been clearly indicated to be Rule 40.13 (referred to in the Managing Director's affidavit as "paragraph 13') of the Service Rules, more particularly, Rule 40.13.3. It is stated by the Managing Director in paragraph No.11 of the counter affidavit that vide letter No. 1376/2E/08-09 dated 24.09.2001, the petitioner was informed that a disciplinary inquiry had been instituted against him vide Memo No. 1921 ESB/2429 SBC/08 dated 08.09.2008, but the inquiry could not be completed against him because of his non-cooperation.

11. The stand of the Corporation would, therefore, show that initially they decided to initiate disciplinary proceedings in the year 2008, but gave up the same mid-way and chose to fall back upon their power under Rule 40.13.3 of the Service

Rules to terminate the petitioner's services simplicitor, on account of his long absence, without holding disciplinary proceedings. It is, thus, evident that the petitioner's services have been terminated, according to the Corporation, by the order impugned simplicitor on account of his long absence, which could have been dealt with as a misconduct, but was not. In fact, disciplinary proceedings were initiated, but not pursued to their logical conclusion. The power under Rule 40.13.3 of the Service Rules was exercised by the Corporation after the petitioner submitted his joining report on 09.05.2012. It was done by the impugned order dated 31.12.2012 with effect from the date of the said order.

12. The question posed hereinabove is, therefore, required to be carefully examined.

13. Learned Counsel for the petitioner has strenously argued that the petitioner's services could not have been dispensed with by an order simplicitor even if he had absented from duty, as he was a permanent employee. Absenting from duty is also a kind of misconduct, on the basis of which the petitioner could have been proceeded with against by the Corporation in their disciplinary jurisdiction and dealt with according to law, but the Corporation could not have terminated the petitioner's services, where, under the statutory Rules, he holds a lien on the post, simply on account of long absence. It is emphasized that the petitioner is not a temporary employee or a probationer, but the holder of a post under the Corporation, who are a State establishment and his conditions of service are governed by statutory Service Rules. Therefore, for the claimed misconduct, the petitioner ought to have been proceeded with departmentally, affording him due opportunity in disciplinary proceedings, where the Corporation would have to establish charge against the petitioner to the effect that he remained not only absent, but did so intentionally and deliberately, without justification. At the inquiry, the petitioner would be entitled to show that his absence was not intentional or deliberate, and further, that he had a justification to offer on account of his ill-health. The Corporation have deprived him of a civil post held under them, protected by Statute, without following the procedure prescribed for holding disciplinary proceedings in such matters. The impugned order, according to the learned Counsel for the petitioner, is, therefore, bad in law.

14. The learned Counsel for the petitioner, in support of his contention, has placed reliance upon the decision of the Constitution Bench of the Supreme Court in **Delhi Transport Corporation v. D.T.C. Mazdoor Congress and others, 1991 Supp (1) SCC 600**, where it has been held:

"Nature of the power of statutory authority to terminate the services of its employees

264. In *Sukhdev Singh v. Bhagatram* [(1975) 1 SCC 421 : 1975 SCC (L&S) 101 : (1975) 3 SCR 619] the Constitution Bench of this Court put a nail in the coffin of the play of the private master's power to hire and fire his employees and held that Regulations or Rules made under a statute apply uniformly to everyone or to all members of the same group or class. They impose obligations on the statutory authorities who cannot deviate from the conditions of service and any deviation will be enforced through legal sanction of declaration by courts to invalidate the actions in violation of the Rules or

Regulations. The statutory bodies have no free hand in framing the terms or conditions of service of their employees. The Regulations bind both the authorities and also the public. The powers of the statutory bodies are derived, controlled and restricted by the statutes which create them and the Rules and Regulations framed thereunder. The statute, thereby, fetters the freedom of contract. Accordingly declaration was granted that dismissal or removal of an employee by statutory corporation in contravention of statutory provision as void. Mathew, J. in a separate but concurring judgment held that a Public Corporation being the creation of a statute is subject to statutory limitation as a State itself. The preconditions of this Part II viz. that the corporation is created by statute and, the existence of power in the corporation is to invade a statutory right of the individual. Therefore, the governing power must be subject to fundamental statutory limitations. The need to subject the power centres to the control of the Constitution requires an expansion of concept of State action. The duty of State is affirmative duty seeing that all essentials of life are made available to all persons. The task of State today is to make the achievement of good life both by removing obstacles in the path of such achievement and by assisting individual in realising his ideal of self-perfection. The employment under public corporation is a public employment and, therefore, the employee should have the protection which appertains to public employment. (emphasis supplied) The court must, therefore, adopt the attitude that declaration is a normal remedy for a wrongful dismissal in case of public employees which can be refused in exceptional circumstances. The remedy of declaration should be a remedy made an instrument to provide reinstatement in public sector. This principle was extended to numerous instances where the termination of services of the employees of a statutory corporation was affected in violation of the principles of natural justice or in transgression of the statutory rules etc. In Managing Director, U.P. State Warehousing Corporation v. Vinay Narayan Vajpayee [(1980) 3 SCC 459 : 1980 SCC (L&S) 453 : (1980) 2 SCR 773] (SCR pp. 780-F to G and 783-C to 784-A (sic): SCC p. 466, para 14 and pp. 467-68, para 18) this Court held that statutory body cannot terminate the services of its employees without due enquiry held in accordance with the principles of natural justice. The persons in public employment are entitled to the protection of Articles 14 and 16 of the Constitution, when the service was arbitrarily terminated. The question, therefore, is whether the statutory corporations are entitled to be invested with absolute freedom to terminate the services of its employees in terms of the contract of service.

265. In Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489 : (1979) 3 SCR 1014 : AIR 1979 SC 1628] this Court held that expression of welfare and social service functions necessitate the State to assume control over natural and economic resources and large scale natural and commercial activities. For the attainment of socio-economic justice, there is vast and notable increase of frequency with which ordinary citizens come into relationship of direct encounters with the State. The government in a welfare State is the regulator and dispenser of social services and provider of large number of benefits, including jobs etc. Thousands of people are employed in Central/State Government Services and also under local authorities.

The government, therefore, cannot act arbitrarily. It does not stand in the same position as a private individual. In a democratic government by rule of law, the executive government or any of its officers cannot be held to be possessed of arbitrary power over the interests of the individuals. Every action of the government must be informed with reason and should be free from arbitrariness. That is the very essence of rule of law. It was further held: (SCC p. 506, para 12)

"It must, therefore, be taken to be the law that where the government is dealing with the public, whether by way of giving jobs or entering into contracts ... the government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard of norm which, is not arbitrary, irrational or irrelevant. The power of discretion of the government in the matter of grant of largesse including award of jobs, ... must be conditioned and structured by rational, relevant and non-discriminatory standard or norm and if the government departs from such standard or norm in any particular case or cases, the action or the government would be liable to be struck down, unless it can be shown by the government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

266. This statement of law, though was made in the context of contractual relations, it is a general law with width and amplitude which permeates the entire spectrum of actions, legislative as well as executive.

The position of the public employee whether is status

271. The distinguishing feature of public employment is status. In Roshanlal Tandon v. Union of India [(1968) 1 SCR 185, 195 D-E : AIR 1967 SC 1889 : (1968) 1 LLJ 576] the Constitution Bench held that the legal position of a government servant is more one of status than of contract. The hallmark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties. The employment of the government servant and his terms of service are governed by statute or statutory rules. Once he is appointed to the post or office, the government servant acquires a status and his rights and obligations are no longer determined by consent of both parties but by statute or statutory rules. The relationship between the government and its servants is not like an ordinary contract of service between a master and servant. The legal relationship is in the nature of status. The duties of statute (sic status) are fixed by the law and in the enforcement of the duties society has an interest. Status is a condition of membership of a group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned. In Calcutta Dock Labour Board v. Jaffar Imam [(1965) 3 SCR 453 : AIR 1966 SC 282 : (1965) 2 LLJ 112] it was held that the statutory scheme of employment confers on the worker a status. An unlawful act is an interference with status. This view was followed in Sirsi Municipality v. Cecelia Kom Francis Tellis [(1973) 1 SCC 409 : 1973 SCC (L&S) 207 : (1973) 3 SCR 348] . Beg, J. (as he then was) held that the principles applicable to the relation of a private master and servant unregulated by statute, could not apply to the cases of a public statutory body exercising powers of punishment fettered or limited by statute and relevant rules of procedure. This Court in a recent decision extended all the benefits of pay scales to all

the Central Government corporate sector employees. It is, thus, I hold that the employees of the corporations, statutory authority or instrumentality under Article 12 have statutory status as a member of its employees. The rights and obligations are governed by the relevant statutory provisions and the employer and employee are equally bound by those statutory provisions.

Nature of the right of a permanent employee to a post

272. In Parshotam Lal Dhingra v. Union of India [1958 SCR 828 : AIR 1958 SC 36 : (1958) 1 LLJ 544] it was held that the appointment to a permanent post may be substantive or on probation or on officiating basis. A substantive appointment to a permanent post in a public service covers normally substantive right to the post and he becomes entitled to hold a lien on the post. He is entitled to continue in office till he attains the age of superannuation as per rules or is dismissed or removed from service for inefficiency, misconduct or negligence or any other disqualification in accordance with the procedure prescribed in the rules, and fair and reasonable opportunity of being heard or on compulsory retirement or in certain circumstances, subject to the conditions like re-employment on abolition of post. In Moti Ram Deka v. General Manager [(1964) 5 SCR 683 : AIR 1964 SC 600 : (1964) 2 LLJ 467] a majority of seven Judges' bench held that a permanent post carries a definite rate of pay without a limit of time and a servant who substantively holds a permanent post has a title to hold the post to which he is substantively appointed, and that in terms, means that a permanent servant has a right to hold the post until, of course, he reaches superannuation or until he is compulsorily retired under the relevant rule. If for any other reason that right is invaded and he is asked to leave the service the termination of his service must inevitably mean the defeat of his right to continue in service and as such, it is in the nature of penalty and amounts to removal. In other words, termination of service of a permanent servant, otherwise than on superannuation of compulsory retirement, must per se amount to his removal and so, by Rule 148(3) or Rule 149(3) of Railway Establishment Rules if such a termination is brought about, the rule clearly contravenes Article 311(2) and must be held to be invalid. A permanent employment assures security of tenure which is essential for the efficiency and incorruptibility of public administration. In Gurudev Singh Sidhu v. State of Punjab [(1964) 7 SCR 587, 592-93 : AIR 1964 SC 1585 : (1965) 1 LLJ 323] another Constitution Bench held that for efficient administration of the State, it is absolutely essential that permanent public servant should enjoy a sense of security of tenure. The safeguard which Article 311(2) affords is no more than this that in case it is intended to dismiss or remove or reduce them in rank, a reasonable opportunity should be given to them of showing cause against the action proposed to be taken in regard to them. In Moti Ram Deka case [(1964) 5 SCR 683 : AIR 1964 SC 600 : (1964) 2 LLJ 467] it was further held that in a modern democratic State, the efficiency and incorruptibility of public administration is of such importance that it is essential to afford to civil servants adequate protection against capricious action from their superior authority. If a permanent civil servant is guilty of misconduct, he should no doubt be proceeded against promptly under the relevant disciplinary rules, subject, of course, to the safeguard prescribed by

Article 311(2); but in regard to honest, straightforward and efficient permanent civil servants, it is of utmost importance, even from the point of view of the State, that they should enjoy a sense of security which alone can make them independent and truly efficient. The sword of Damocles hanging over the heads of permanent railway servants in the form of Rule 148(3) or Rule 149(3) would inevitably create a sense of insecurity in the minds of such servants and would invest appropriate authorities with very wide powers which may conceivably be abused. Thereby this Court laid emphasis that a permanent employee has a right or lien on the post he holds until his tenure of service reaches superannuation so as to earn pension at the evening of his life unless it is determined as per law. An assurance of security of service to a public employee is an essential requisite for efficiency and incorruptibility of public administration. It is also an assurance to take independent drive and initiative in the discharge of the public duties to alongate (sic actuate) the goals of social justice set down in the Constitution.

273. This Court in Daily Rated Casual Labour v. Union of India [(1988) 1 SCC 122 : 1988 SCC (L&S) 138 : (1987) 5 ATC 228] (SCC pp. 130-31) further held that the right to work, the right to free choice of employment, the right to just and favourable conditions of work, the right to protection against unemployment etc. and the right to security of work are some of the rights which have to be ensured by appropriate legislative and executive measures. It is true that all these rights cannot be extended simultaneously. But they do indicate the socialist goal. The degree of achievement in this direction depends upon the economic resources, willingness of the people to produce and more than all the existence of industrial peace throughout the country. Of those rights the question of security of work is of most importance. If a person does not have the feeling that he belongs to an organisation engaged in production he will not put forward his best effort to produce more (emphasis supplied). That sense of belonging arises only when he feels that he will not be turned out of employment the next day at the whim of the management. It is for this reason it is being repeatedly observed by those who are in charge of economic affairs of the countries in different parts of the world that as far as possible security of work should be assured to the employees so that they may contribute to the maximisation of production.

274. It must, therefore, be held that a permanent employee of a statutory authority, corporation or instrumentality under Article 12 has a lien on the post till he attains superannuation or is compulsorily retired or service is duly terminated in accordance with the procedure established by law. Security of tenure enures the benefit of pension on retirement. Dismissal, removal or termination of his/her service for inefficiency, corruption or other misconduct is by way of penalty. He/she has a right to security of tenure which is essential to inculcate a sense of belonging to the service or organisation and involvement for maximum production or efficient service. It is also a valuable right which is to be duly put an end to only as per valid law."

15. The learned Counsel for the Corporation, on the other hand, has submitted that Rule 40.13.3 is as much a statutory rule as any other, and prescribes a valid mode by which the services of a permanent employee may come to an end. He submits that for long and unauthorized absence that cannot be adjusted or regularized against any class of leave available to an employee, it has to be presumed that the employee concerned has

resigned his position and abandoned employment.

16. This Court has carefully considered the rival submissions, perused the impugned order, the provisions of the Service Rules and the stand taken by the Authorities in their affidavits, particularly, the personal affidavit filed by the Managing Director of the Corporation.

17. In order to understand the nature of the power exercised by the Corporation, reference must be made to Chapter VII of the Service Rules. This is so because the Corporation's stand appears to be that they have chosen not to proceed against the petitioner for his long and unauthorized absence as an act of misconduct, but an act of abandonment of employment under sub-Rule 13.3 of Rule 40 of the Service Rules. It must be clarified here that the Corporation in their affidavit have seemingly, by error of nomenclature, referred to sub-Rule 13 of Rule 40 as Paragraph 13 of the Service Rules. The scheme of Chapter VII shows that it carries a single Rule 40, which has 23 sub-Rules and their clauses. It would be gainful to quote sub-Rules 1 to 13 of Rule 40 of the Service Rules:

अध्याय - सात
अवकाश नियम

अवकाश का अधिकार :40. 1 अवकाश का दावा अधिकार के रूप में नहीं किया जा सकता है। जब सेवा की अत्यावश्यकता के कारण ऐसा करना अपेक्षित हो तो किसी भी प्रकार के अवकाश को अस्वीकृत या प्रतिसंहृत (रद्द) करने का विवेक, अवकाश स्वीकर्ता प्राधिकारी का होगा।

अवकाश का अर्जन : 2 कार्य करने के पश्चात ही अवकाश अर्जित किया जाता है अवकाश की समाप्ति के पश्चात भी जानबूझकर कार्य से अनुपस्थित रहने को दुराचार माना जा सकता है।

अवकाश स्वीकर्ता प्राधिकारी : 3 अन्यथा रूप से स्पष्टतः विहित प्राविधान सिवाय, ऐसे अवकाश को छोड़कर जो सेवानिवृत्ति की तिथि से आगे तक का हो, अन्य अवकाश निगम के ऐसे प्रधिकारियों द्वारा स्वीकृत किया जा सकता है जिन्हे बोर्ड नियमों अथवा आदेशों द्वारा विनिर्द्रिष्ट करें।

अवकाश का प्रारंभ और समापनः 4 अवकाश, साधारणतया, उस दिनांक से शुरू होता है जिस दिनांक को कार्यभार हस्तांतरित किया गया हो और उस दिनांक से ठीक पूर्व के दिनांक को समाप्त होता हैं जिस दिनांक को कार्यभार पुनः ग्रहण किया गया हो। अवकाश या कार्यभार ग्रहण के समय पूर्व या पश्चात में पड़ने वाले रविवार या अन्य मान्य अवकाश दिवसों को ऐसी शर्तो और ऐसी परिस्थितियों के अधीन रहते हुए, जिन्हें बोर्ड द्वारा विहित किया जाय, जोड़ा जा सकता है।

अवकाश को संयुक्त करना : 5 नियमावली में उपबंधित के सिवाय इस नियमावली के अधीन किसी भी प्रकार के अवकाश को किसी अन्य प्रकार के अवकाश की निरन्तरता में अथवा उस के साथ संयुक्त करके स्वीकृत किया जा सकता।

अवकाश की अवधि में सेवायोजन : 6अवकाश पर रहते हुए कोई कर्मचारी, सक्षम प्राधिकारी की पूर्व स्वीकृति प्राप्त किए बिना कोई सेवायोजन नही प्राप्त करेगा।

अवकाश से वापस बुलाया जानाः7 1किसी कर्मचारी को उसके अवकाश की समाप्ति के पूर्व कार्य पर बुलाये जाने के सभी आदेशों में बताया जाना चाहिए कि कर्तव्य (ड्यूटी) पर आना ऐच्छिक है या अनिवार्य है।

2 यदि यह अनिवार्य है तो वह उस दिनांक से जब वह उस स्टेशन के लिए यात्रा शुरू करता है जिसपर पहुँचने के लिए उसे आदेश दिया गया है, ड्यूटी पर समझे जाने का और अपनी यात्रा के लिए यात्रा भत्ता आहरित करने का हकदार होगा।

अवकाश की समाप्ति पर कार्य पर वापसीः 8 जब तक कि अवकाश स्वीकृत करने वाला प्राधिकारी उसे अनुमति न दे दे अवकाश पर गया हुआ कोई कर्मचारी उसे स्वीकृत किए गये अवकाश की अवधि की समाप्ति के पूर्व कार्य पर वापस नही आ सकेगा।

आकस्मिक अवकाशः 9 कोई भी कर्मचारी एक कैलेण्डर वर्ष में 14 दिन से अनधिक और किसी एक समय में 10 दिन से अनधिक आकस्मिक अवकाश लेने का हकदार होगा। प्रतिबन्ध यह है कि यदि कोई कर्मचारी निगम की सेवा कैलेण्डर वर्ष के बीच में ग्रहण करता है तो स्वीकर्ता प्राधिकारी स्वविवेक से आनुपातिक रूप में आकस्मिक अवकाश प्रदान कर सकता है।

आकस्मिक/ विशेष अवकाश को किसी अन्य अवकाश के साथ संयुक्तिकरण पर प्रतिबन्धः 10 आकस्मिक अवकाश को किसी अन्य अवकाश को किसी अन्य अवकाश के साथ संयुक्त नहीं किया जायेगा और वह कैलेण्डर वर्ष की समाप्ति के साथ व्यपगत हो जायेगा।

अर्जित अवकाशः 11 किसी कर्मचारी द्वारा उसके सेवाकाल की अवधि में अर्जित अवकाश की दर, आगामी संचयन व्यपगत होने के पूर्व संचित होने वाले अवकाश की अधिकतम संख्या तथा किसी कर्मचारी को एक समय में स्वीकृत की जा सकने वाले अवकाश की संख्या राज्य सरकार के कर्मचारियों पर लागू नियमों एवं विनियमों के समान होगी। फिर भी, विनिर्दिष्ट मामलों में, जहाँ बोर्ड इन नियमों को संशोधित करने का निर्णय ले तो वह राज्य सरकार के पूर्वानुमोदन से ऐसा कर सकता है। प्रतिनियुक्ति पर कार्यरत कर्मचारी और संविदा पर कार्यरत कर्मचारी भी निगम में प्रवृत्त अवकाश नियगों से शासित होंगें जबतक कि उनकी नियुक्ति/ प्रतिनियुक्ति के समय अन्यथा रूप से उपबंधित न किया गया हो।

निजी कार्य पर अर्ध औसत वेतन पर अवकाशः 12 किसी कर्मचारी को, जिस पर यह नियम लागू होते है, उसकी सम्पूर्ण सेवा की अवधि में निजी मामलो में अर्ध औसत वेतन पर कुल 180 (एक सौ अस्सी) दिन से अनधिक का अवकाश भी प्रदान किया जा सकता है। ऐसा अवकाश उसके द्वारा कर्तव्य पर व्यतीत अवधि के 1/11 की दर से अर्जित किया जायेगा और किसी एक अवसर पर 90 से अनधिक दिनों के लिए प्रदान नही किया जायेगा।

परन्तु इस नियम के अधीन कोई अवकाश तब तक न किया जाय, जब तक कि अवकाश स्वीकृत करने के लिए सक्षम प्राधिकारी के पास यह विश्वास करने के पर्याप्त कारण न हों कि कर्मचारी उसकी समाप्ति पर अपने कर्तव्य (ड्यूटी) पर वापस लौट आएगा।

असाधारण अवकाशः 13 1 जहाँ नियमों के अधीन कोई अन्य अवकाश अनुमन्य न हो, किसी कर्मचारी को असाधारण अवकाश प्रदान किया जा सकता है, जिसकी गणना सेवा के प्रत्येक पूर्ण वर्ष के लिये 15 दिन की दर से की जाएगी और जो साधारणतया किसी एक अवसर पर 120 दिनों से अधिक न होगा और उसकी सम्पूर्ण सेवा की अवधि के दौरान 365 दिनों से अधिक नहीं होगा।

2 प्राधिकारी जिसे अवकाश स्वीकृत करने का अधिकार है, वह इस नियम के अधीन किसी ऐसे अवकाश के साथ में या

निरंतरता में जो कि अनुमन्य हो असाधारण अवकाश प्रदान कर सकता है और बिना अवकाश के अनुपस्थिति की अवधि को पूर्वगामी प्रभाव से असाधारण अवकाश के रूप में परिवर्तित कर सकता है।

3 जहाँ कोई कर्मचारी, जिस पर यह नियम लागू होते हों, इन नियमों के अन्तर्गत उसको स्वीकृत असाधारण अवकाश की समाप्ति पर कार्य पुनर्ग्रहण करने में विफल रहता है या जहाँ ऐसा कर्मचारी जिसको अधिकतम अनुमन्य अवधि से कम अवधि का अवकाश स्वीकृत किया गया हो, किसी ऐसी अवधि, जो स्वीकृत असाधारण अवकाश सहित उस सीमा से अधिक हो जाय जो इस नियमावली के अधीन उसे स्वीकृत किया जा सकता हो, के लिए निरन्तर कार्य से अनुपस्थित रहे तो जब तक कि सक्षम प्राधिकारी मामले की आपवादिक परिस्थितियों को ध्यान में रखते हुए अन्यथा निर्णय न करे, यह समझा जायगा कि उसने अपनी नियुक्ति से त्याग पत्र दे दिया है और वह निगम की सेवां में तदनुसार नहीं रह जायगा। प्रतिबन्ध यह है कि ऐसे सभी मामलों में, जहाँ उप नियम (3) के अधीन किसी कर्मचारी की सेवाओं को समाप्त हुआ प्रस्तावित समझा जाय, सक्षम प्राधिकारी उक्त कर्मचारी को लिखित रूप में उस आशय की एक सूचना देगा।

18. This Court must remark that in keeping with the question formulated on 25.10.2021, there are indeed two distinct and different modes through which, on account of wilful absence from duty, the services of a permanent employee of the Corporation may come to an end. One is by treating the unauthorized absence as an act of misconduct and proceeding against the employee concerned in the disciplinary jurisdiction. If that option is elected by the Corporation, they have to proceed in accordance with the provisions of Rules 33 and 35 of the 1991 Rules. That is the usual option pursued by an employer to punish a recalcitrant employee, who unauthorizedly absents from duty. The other option that the Corporation have under the Service Rules in the Chapter dealing with leave for employees, is a special provision about abandonment of service. This mode of determination of the employer-employee relationship is known to service jurisprudence and rests on the principle that an employee, who absents himself from service without leave or without extension of leave for an unduly long period of time, can be deemed to have abandoned employment. If a rule provides for cessation of service on account of abandonment, the status of a permanent employee, whose tenure is governed by statutory rules, can validly come to an end.

19. The question of abandonment from service found early mention in the context of industrial jurisprudence, where the issue was about 'continuous service' pitted against the break in it, in the context of an employee, who had remained absent from duty for nearly eight and a half months without permission or leave of the employer. This was the controversy in **Jeewanlal (1929) Ltd., Calcutta v. Workmen, AIR 1961 SC 1567**, where it was held:

"**6**. "Continuous service" in the context of the scheme of gratuity framed by the Tribunal in the earlier reference postulates the continuance of the relationship of master and servant between the employer and his employees. If the servant resigns his employment service automatically comes to an end. If the employer terminates the service of his employee that again brings the continuity of service to an end. If the service of an employee is brought to an end by the operation of any law that again is another

instance where the continuance is disrupted; but it is difficult to hold that merely because an employee is absent without obtaining leave that itself would bring to an end the continuity of his service. Similarly, participation in an illegal strike which may incur the punishment of dismissal may not by itself bring to an end the relationship of master and servant. It may be a good cause for the termination of service provided of course the relevant provisions in the standing orders in that behalf are complied with; but mere participation in an illegal strike cannot be said to cause breach in continuity for the purposes of gratuity. On the other hand, if an employee continues to be absent from duty without obtaining leave and in an unauthorised manner for such a long period of time that an inference may reasonably be drawn from such absence that by his absence he has abandoned service, then such long unauthorised absence may legitimately be held to cause a break in the continuity of service. It would thus always be a question of fact to be decided on the circumstances of each case whether or not a particular employee can claim continuity of service for the requisite period or not. In our opinion, therefore, the view taken by the Tribunal is substantially right though we would like to make it clear that in addition to the cases where according to the Tribunal continuity of service would come to an end there would be the class of cases where long unauthorised absence may reasonably give rise to an inference that such service is intended to be abandoned by the employee. ....."

20. The question again arose in the context of the industrial law, where a particular clause in the relevant Standing Order postulated abandonment of service in the event of an employee absenting himself for eight consecutive working days without obtaining leave from the employer. In the context of the certified Standing Orders applicable to parties, under which the issue arose in **Buckingham and Carnatic Co. Ltd. v. Venkatiah and another, AIR 1964 SC 1272**, it was held by their Lordships of the Supreme Court:

"5. .....

This Standing Order is a part of the certified Standing Orders which had been revised by an arbitration award between the parties in 1957. The relevant clause clearly means that if an employee falls within the mischief of its first part, it follows that the defaulting employee has terminated his contract of service. The first provision in clause (ii) proceeds on the basis that absence for eight consecutive days without leave will lead to the inference that the absentee workman intended to terminate his contract of service. The certified Standing Orders represent the relevant terms and conditions of service in a statutory form and they are binding on the parties at least as much, if not more, as private contracts embodying similar terms and conditions of service. It is true that under common law an inference that an employee has abandoned or relinquished service is not easily drawn unless from the length of absence and from other surrounding circumstances an inference to that effect can be legitimately drawn and it can be assumed that the employee intended to abandon service. Abandonment or relinquishment of service is always a question of intention, and, normally, such an intention can not be attributed to an employee without adequate evidence in that behalf. But where parties agree upon the terms and conditions of service and they are included in certified Standing Orders, the doctrines of common law or considerations of equity would not be relevant. It is then a matter of construing

the relevant term itself. Therefore, the first part of Standing Order 8(ii) inevitably leads to the conclusion that if an employee is absent for eight consecutive days without leave, he is deemed to have terminated his contract of service and thus relinquished or abandoned his employment."

21. The question again fell for consideration in the context of the industrial law in **G.T. Lad and others v. Chemical and Fibres of India Ltd., (1979) 1 SCC 590**. The law relating to abandonment was adumbrated in **G.T. Lad** (supra) thus:

5a. Re Question 1: In the Act, we do not find any definition of the expression "abandonment of service". In the absence of any clue as to the meaning of the said expression, we have to depend on meaning assigned to it in the dictionary of English language. In the unabridged edition of the Random House Dictionary, the word "abandon" has been explained as meaning "to leave completely and finally; forsake utterly; to relinquish, renounce; to give up all concern in something". According to the Dictionary of English Law by Earl Jowitt (1959 Edn.) "abandonment" means "relinquishment of an interest or claim". According to Black's Law Dictionary "abandonment" when used in relation to an office means "voluntary relinquishment". It must be total and under such circumstances as clearly to indicate an absolute relinquishment. The failure to perform the duties pertaining to the office must be with actual or imputed intention, on the part of the officer to abandon and relinquish the office. The intention may be inferred from the acts and conduct of the party, and is a question of fact. Temporary absence is not ordinarily sufficient to constitute an "abandonment of office".

6. From the connotations reproduced above it clearly follows that to constitute abandonment, there must be total or complete giving up of duties so as to indicate an intention not to resume the same. In Buckingham & Carnatic Co. v. Venkatiah [AIR 1964 SC 1272 : (1964) 4 SCR 265 : (1963) 2 LLJ 638 : (1963-64) 25 FJR 25] it was observed by this Court that under common law an inference that an employee has abandoned or relinquished service is not easily drawn unless from the length of absence and from other surrounding circumstances an inference to that effect can be legitimately drawn and it can be assumed that the employee intended to abandon service. Abandonment or relinquishment of service is always a question of intention, and normally, such an intention cannot be attributed to a employee without adequate evidence in that behalf. Thus, whether there has been a voluntary abandonment of service or not is a question of fact which has to be determined in the light of the surrounding circumstances of each case."

22. As a source of termination of statutory employment, abandonment, if contemplated under the leave rules, was accepted as a valid mode to bring to an end the employee's lien by the Supreme in **Aligarh Muslim University and others v. Mansoor Ali Khan, (2000) 7 SCC 529.** While answering point Nos.1 and 2 formulated by their Lordships, it was held in **Aligarh Muslim University v. Mansoor Ali Khan** (supra) quoting the relevant Rules, thus:

"10. It reads as follows:

Overstayal of leave:

"5. 8(i) If an employee absents himself from duty without having previously obtained leave or fails to return to his duties on the expiry of leave without having previously obtained further leave,

the head of the department/office concerned in cases where he is the appointing authority, after waiting for three days, shall communicate with the person concerned asking for an explanation and shall consider the same. In cases where the head of the department/office is not the appointing authority, he shall, after waiting for three days from the date of unauthorised absence without leave or extension of leave, inform the Registrar/Finance Officer, and the Registrar (Finance Officer in the case of staff borne on the Accounts Cadre) shall communicate with the person concerned asking for an explanation which shall be submitted to the Vice-Chancellor/ Executive Council.

Unless the appointing authority regards the explanation satisfactory, the employee concerned shall be deemed to have vacated the post, without notice, from the date of absence without leave.

(ii) An officer or other employee who absents himself without leave or remains absent without leave after the expiry of the leave granted to him, shall, if he is permitted to rejoin duty, be entitled to no leave allowance or salary for the period of such absence and such period will be debited against his leave account as leave without pay unless his leave is extended by the authority empowered to grant the leave. Wilful absence from duty after the expiry of leave may be treated as misconduct for the purpose of clause 12 of Chapter IV of the Executive Ordinances of AMU and para 10 of Chapter IX of Regulations of the Executive Council."

11. It will be seen that Rule 5(8)(i) applies to an employee who absents himself from duty without having previously obtained leave or where he has failed to return to his duties on the expiry of leave without having previously obtained further leave. Then Rule 5(8)(i) refers to the manner in which the employee is to be given an opportunity. If the appointing authority regards the explanation as not satisfactory, the employee concerned shall be deemed to have vacated his post, without notice, from the date of absence without leave. In the context of Rule 10 of the 1972 Rules, which deems vacation of post if the absence was for 5 years, it must follow that the above Rule 5(8)(i) applies to absence for a period less than 5 years.

12. Rule 5(8)(ii) deals with a different situation. It relates to a case where such an officer is permitted to rejoin duty. It says that if he is so permitted, he will be entitled to no leave allowance or salary for the period of such absence and such period shall be debited against his leave account as leave without pay. The Rule says that these consequences will not, however, follow if his leave is extended by the authority empowered to grant leave. Then in its latter part, Rule 5(8)(ii) refers to another situation enabling disciplinary action to be taken treating unauthorised absence as misconduct. If a person has been absent without leave being sanctioned, he could be proceeded against for misconduct.

13. These are the different situations in which Rules 5(8)(i) and (ii) apply. Point 1 is decided accordingly.

Point 2

14. Rules 10(c)(i) and (ii) of the 1972 Rules read as follows:

"10. Employee absent from duty.--(a)-(b)***

(c)(i) No permanent employee shall be granted leave of any kind for a continuous period exceeding five years;

(ii) when an employee does not resume duty after remaining on leave for a continuous period of five years, or whether an employee after the expiry of his leave remains absent from duty, otherwise than

on foreign service or on account of suspension for any period which together with the period of the leave granted to him exceeds five years, he shall, unless the Executive Council in view of the exceptional circumstances of the case otherwise determine, be deemed to have resigned and shall accordingly cease to be in the university service."

It will be seen that Rule 10 deals with a different aspect. Now Rule 10(c)(i) states that no permanent employee shall be granted leave of any kind for a continuous period of more than 5 years. However, Rule 10(c)(ii) states that when an employee does not resume duty after remaining on leave for a continuous period of 5 years, or where an employee after the expiry of his leave remains absent from duty (otherwise than on foreign service or on account of suspension) for any period which together with the period of the leave granted to him exceeds 5 years, he shall (unless the Executive Council in view of the exceptional circumstances of the case otherwise determine), be deemed to have resigned and shall accordingly cease to be in the university service. This is the purport of Rule 10(c). Point 2 is decided accordingly."

23. In **Vijay S. Sathaye v. Indian Airlines Limited and others, (2013) 10 SCC 253**, the law about abandonment of employment was considered in the context of facts, where a Pilot of the Indian Air Force applied for voluntary retirement under the Voluntary Retirement Scheme, but did not wait for the outcome of the decision on that application. He was asked to continue till a decision was taken, but the employee did not report for duty the day following receipt of the communication that he should continue until a decision was taken on his V.R.S. Application. The facts in **Vijay S. Sathaye (supra)** can best be recapitulated in the words of their Lordships, which say:

"3. The respondents came out with a Voluntary Retirement Scheme (in short "VRS") for its employees in 1989 in order to reduce the surplus manpower. The said Scheme was for the employees who had completed 25 years of service or had attained 55 years of age. Subsequently, the condition prescribed in the aforementioned Scheme was reduced to 20 years of service in 1992. Regulation 12 of the Service Regulations provided that if an employee fulfils the aforesaid criteria of eligibility he can give three months' notice for voluntary retirement. However, the acceptance of the said resignation would be subject to the approval of the competent authority.

4. The petitioner completed 20 years of service on 19-3-1992. He was promoted as Deputy General Manager (Operations) on 30-8-1994. On 7-11-1994 the petitioner submitted an application seeking VRS w.e.f. 12-11-1994. The petitioner was informed vide letter dated 11-11-1994 that he should continue in service till the time decision is taken. However, the petitioner did not attend the duty after 12-11-1994. The petitioner joined the services of Blue Dart Ltd., and as he did not go to the respondents to work from 12-11-1994 and there had been no response from the respondents, he filed Writ Petition No. 19143 of 1994 for issuance of a writ of mandamus directing the respondents to accept the petitioner's application for voluntary retirement.

5. During the pendency of the said writ petition, the petitioner was informed by Respondent 4 vide letter dated 13-12-1994/15-12-1994 that his application had been rejected. Thus, the writ petition filed by the petitioner had become infructuous

and the petitioner preferred another Writ Petition No. 21384 of 1994 challenging the order dated 13-12-1994/15-12-1994. The respondents contested the said writ petition and during the pendency of the said writ petition the petitioner attained the age of superannuation i.e. 58 years of age on 7-3-2001. The learned Single Judge dismissed the said writ petition vide order dated 12-3-2002 [WP No. 21384 of 1994, decided on 12-3-2002 (Mad)] . Aggrieved, the petitioner preferred Writ Appeal No. 2415 of 2002 which has been dismissed vide impugned judgment and order [Writ Appeal No. 2415 of 2002, decided on 20-7-2007 (Mad)] . Hence, these petitions."

24. In the context of the aforesaid facts, the law regarding abandonment was summarized in **Vijay S. Sathaye** thus:

"**12**. It is a settled law that an employee cannot be termed as a slave, he has a right to abandon the service any time voluntarily by submitting his resignation and alternatively, not joining the duty and remaining absent for long. Absence from duty in the beginning may be a misconduct but when absence is for a very long period, it may amount to voluntary abandonment of service and in that eventuality, the bonds of service come to an end automatically without requiring any order to be passed by the employer.

13. In Jeewanlal (1929) Ltd. v. Workmen [AIR 1961 SC 1567] this Court held as under: (AIR p. 1570, para 6)

"6. ... there would be the class of cases where long unauthorised absence may reasonably give rise to an inference that such service is intended to be abandoned by the employee."

(See also Shahoodul Haque v. Registrar, Coop. Societies [(1975) 3 SCC 108 : 1974 SCC (L&S) 498 : AIR 1974 SC 1896] .)

14. For the purpose of termination, there has to be positive action on the part of the employer while abandonment of service is a consequence of unilateral action on behalf of the employee and the employer has no role in it. Such an act cannot be termed as "retrenchment" from service. (See State of Haryana v. Om Parkash [(1998) 8 SCC 733 : 1999 SCC (L&S) 262].)

15. In Buckingham and Carnatic Co. Ltd. v. Venkatiah [AIR 1964 SC 1272] , while dealing with a similar case, this Court observed: (AIR p. 1275, para 5)

"5. ... Abandonment or relinquishment of service is always a question of intention, and, normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf."

A similar view has been reiterated in G.T. Lad v. Chemical and Fibres of India Ltd. [(1979) 1 SCC 590 : 1979 SCC (L&S) 76 : AIR 1979 SC 582]

16. In Syndicate Bank v. Staff Assn. [(2000) 5 SCC 65 : 2000 SCC (L&S) 601] and Aligarh Muslim University v. Mansoor Ali Khan [(2000) 7 SCC 529 : 2002 SCC (L&S) 965 : AIR 2000 SC 2783] this Court ruled that if a person is absent beyond the prescribed period for which leave of any kind can be granted, he should be treated to have resigned and ceases to be in service. In such a case, there is no need to hold an enquiry or to give any notice as it would amount to useless formalities. A similar view has been reiterated in Banaras Hindu University v. Shrikant [(2006) 11 SCC 42 : (2007) 1 SCC (L&S) 327] , Chief Engineer (Construction) v. Keshava Rao [(2005) 11 SCC 229 : 2005 SCC (L&S) 872] and Bank of Baroda v. Anita Nandrajog [(2009) 9 SCC 462 : (2009) 2 SCC (L&S) 689].

25. A perusal of Rule 40.13.3 of the Service Rules, under which the Corporation have purported to act, would show that the said Rule postulates a case where the employee fails to join duty upon expiry of his sanctioned extraordinary leave, or a case where leave for a shorter duration has been sanctioned than the maximum admissible to an employee, upon expiry whereof he fails to rejoin, despite expiry of the maximum extraordinary leave that could be sanctioned under the Service Rules and remains continuously absent from duty. In either case, the employee concerned would be deemed to have resigned his post and ceased to be in the Corporation's employ, unless the competent Authority, in view of exceptional circumstances, takes decision otherwise.

26. The purport of the Rule aforesaid is an automatic severance of the employer-employee relationship by a deemed resignation or constructive resignation, where the employee overstays his leave within the mischief of the Rule. There is absolutely no requirement for the Corporation, where it treats an employee to have resigned his post under sub-Rule 13.3 of Rule 40 of the Services Rules, to pass an order terminating his services. Thus, if the Corporation intended to treat the petitioner as an employee who had resigned his job on the expiry of the maximum period of extraordinary leave that could be sanctioned to him, they were not required to pass an order terminating his services. Upon the employee submitting his joining report, they could have simply intimated him that he would be deemed to have resigned his post with effect from the date indicated when the maximum leave that could be sanctioned to him ended in his leave account.

27. There is a communication of this kind between the Manager (Personnel-I) of the Corporation addressed to the Chief Project Manager, Allahabad saying that the petitioner be informed that his joining report, presented after four years of unauthorized absence, had been rejected by the Managing Director. Strangely, this communication dated 11.10.2012, which has been annexed to the personal affidavit of the Managing Director filed on 28.10.2021, does not at all appear to have been communicated to the petitioner or acted upon by the Chief Project Manager or the Project Manager of the Corporation at their Pratapgarh unit. Instead, the impugned order dated 31.12.2012 was passed by the Managing Director himself, terminating the petitioner's services with effect from the date of the said order, employing the following words:

"श्री वीरेन्द्र प्रताप सिंह का इतनी लम्बी अवधि तक अनुपस्थित रहना wilful absence from duty की श्रेणी में आता है। अतः निगम से इनकी सेवायें तत्काल प्रभाव से समाप्त की जाती हैं।"

28. A perusal of the impugned order dated 31.12.2012 would show that though it mentions all facts and events about the manner in which the petitioner absented himself after expiry of the initial earned leave that was sanctioned to him from 21.04.2008 to 03.05.2008, it does not show at all that the Corporation treated the petitioner to have resigned his post, or abandoned employment, upon expiry of the maximum leave that could be sanctioned to him, under Rule 40.13.3 of the Service Rules. Rather, the clear purport of the impugned order dated 31.12.2012 is that the Corporation treated the petitioner to be in service until the date of the impugned order and for his act of wilful absence from duty, ordered the

termination of his services with immediate effect. The impugned order is, by no means, an order merely communicating the petitioner the fact that his services have come to an end on account of his unilateral action in abandoning employment, with the employer passively refusing the petitioner to rejoin. The impugned order is a positive and affirmative order, putting to an end the petitioner's services for the misconduct of wilful absence from duty. The impugned order is, therefore, one that is an order of punishment passed by the Corporation for a perceived misconduct of the petitioner, on which they have acted to terminate his services. This kind of an order or action could only be taken after holding disciplinary proceedings in accordance with Rules 33 and 35 of the 1991 Rules; not under Rule 40.13.3 of the Service Rules. The personal affidavit filed by the Managing Director also shows that the Corporation have treated the act of the petitioner as a misconduct. This is evident from the following averments in Paragraph Nos.15 and 16 of the personal affidavit of the Managing Director:

"15. Therefore, under the above paragraph the services of the petitioner can be terminated without conducting regular departmental enquiry against him. The true copy of the U.P. State Bridge Corporation Service Rules paragraph no. 13(1) and 13(3) are being annexed herewith as and marked as **ANNEXURE NO. A-04 & A-05** to this personal affidavit.

16. Moreover, several letters were written to the petitioner and the petitioner did not resume his duty and therefore by office order no. 1988 ESB/407 SBC/2012 dated 31-12-2012 petitioner's services were terminated with immediate effect for wilful absence from duty. Therefore, termination order is perfectly legal and justified."

(Emphasis by Court)

29. It may also be noticed that in the personal affidavit filed by the Managing Director of the Corporation, it has been averred in Paragraph No.11 that the petitioner was informed that a disciplinary inquiry has been instituted against him vide Office Memo No. 1921 ESB/2429 SBC/08 dated 08.09.2008, but it is said that the inquiry could not be carried to its logical conclusion because of the petitioner's non-cooperation. This stand of the Corporation could have been consistent with the exercise of power under Rule 40.13.3 of the Service Rules, provided there was just a communication to the petitioner that after the long lapse of time that he had put in his joining report, he would be deemed to have resigned his post. As already noticed, this was not the course of action that the Corporation followed. They chose to terminate the petitioner's services ex facie for his misconduct of wilful absence from duty, with effect from the date of the impugned order i.e. 31.12.2012. This, as already remarked, could not be done without holding disciplinary proceedings in accordance with law.

30. There is another facet of the matter as well. If by a patently imaginary stretch of Rule 40.13.3 of the Service Rules, the impugned order were held to be one passed under it, it would still not fulfill the intrinsic requirement of the Rule, subject to which alone power under it can be invoked. Rule 40.13.3 of the Service Rules envisages that upon continuous absence from duty of an employee, that exhausts his extraordinary leave and the other kind of leave that can be granted to him, he would be deemed to have resigned

his post with the Corporation, but subject to the proviso that in all such matters the Corporation would have to serve a notice upon the employee that his services would be deemed to have come to an end under the Rule on a proposed basis. The proviso to Rule 40.13.3 shows that a notice carrying a proposal that the employee's services are deemed to have come to an end in terms of the rule for overstaying his leave has to be served. The employment of the word "proposed' in the proviso is clearly suggestive of the unmistakable requirement that before the Corporation regards the services of an employee abandoned or ended under the aforesaid Rule, he has to be given some kind of an opportunity to explain. The explanation would, of course, be about his long absence. The purpose is to adhere to the minimum requirement of natural justice in both the formal and substantial exercise of power, or the enforcement of the Rule, to hold an employee of the Corporation having resigned his post for overstaying the maximum period of his leave. The explanation given is not an empty formality, for Rule 40.13.3 of the Service Rules envisages exceptional circumstances, "आपवादिक परिस्थितियों", to quote from the Rule, under which the employee may not be regarded by the Corporation to have resigned. This is not to say that in the present case the petitioner was never asked the reason to justify his unduly long absence from duty of four years, but certainly no notice under Rule 40.13.3 was ever served or his case dealt with under the said Rule.

31. This is not a case where on the facts of it, the Corporation could not have exercised their power under Rule 40.13.3 to hold the petitioner to have abandoned employment. In the opinion of this Court, they could have done so, subject to consideration of the petitioner's explanation before the decision to regard him as having resigned his post was made final. But, the power in the nature of the transaction and the clear terms of the impugned order was never exercised by the Corporation. The impugned order is clearly an instance of affirmative action by the Corporation, exercising their power to punish the petitioner for his misconduct in overstaying his leave. It is not by any means an invocation of Rule 40.13.3 of the Service Rules, passively holding the petitioner to have resigned his post, or abandoned employment, in terms of the said Rule. For an added assurance about the conclusion, if it were a case of abandonment of employment or deemed resignation under the said Rule, the services of the employee would not have been terminated by and with effect from the date of the impugned order. It is, therefore, held in answer to the question mooted that the petitioner's services have been terminated by the Corporation for his wilful absence from duty, as a matter of misconduct; not as a matter of abandonment of employment, under the leave Rules.

32. According to the petitioner, his date of birth, as entered in his service record, is 01.07.1958. He would, therefore, have attained the age of superannuation in the year 2018. He can no longer be reinstated in service. Nevertheless, in the clear opinion of the Court, the impugned order is unsustainable. At the same time, it has to be borne in mind that the petitioner has remained absent from duties for a period of four years, where he put in his joining report on 19.05.2012. From 19.05.2012 until the date of the impugned order i.e.

31.12.2012, it is the Corporation which has kept the petitioner out of employment.

33. Once the impugned order goes, the petitioner would be entitled to the benefit of his post held with the Corporation until the age he attained superannuation, and thereafter, whatever consequential benefits would follow. The petitioner would, in no case, be entitled to any pecuniary benefit for the period that he remained absent from duty i.e. 04.05.2008 to 19.05.2012. For the period from 19.05.2012 until attaining the age of superannuation, the petitioner, for whatever reason not having worked for the Corporation, would be entitled to 50% of his emoluments and no more. The petitioner would, nevertheless, be entitled to continuity in service for the purpose of reckoning his post retiral benefits.

34. In the result, the writ petition **succeeds** and is **allowed**. The impugned order dated 31.12.2012 is hereby **quashed**. The petitioner shall be deemed to have been in service of the Corporation until the date of his superannuation and entitled to consequential benefits as indicated hereinabove.

35. There shall be no order as costs.

(2022)05ILR A1008
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.03.2022

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Special Appeal No. 362 of 2019

State of U.P. & Ors. ...Petitioners
Versus
Ashif Ali ...Respondent

Counsel for the Petitioners:
Sri Anand Kumar Ray, S.C.

Counsel for the Respondent:
Sri Om Prakash Singh

A. Service Law – Compassionate Appointment – Physical Efficiency Test - The fate of the appeal rests on the question as to whether **the writ petitioner/respondent was compelled to take the physical efficiency test by the appellants despite suffering from fracture in his right leg as alleged by him or the test was taken voluntarily by him after submitting fitness certificate as asserted by the appellants.** (Para 8)

The writ petitioner/respondent is stated to have appeared in the physical efficiency test on 08.05.2018 and participated in the same, although he asserts that he was forced to participate in the same. The appellants on the other hand submit that the petitioner took the test without protest and failed. No intimation on 05.05.2018 as alleged by the petitioner was ever received by them. The petitioner vide letter dated 09.05.2018 (Annexure-6 to the writ petition) is stated to have written to the Principal Secretary Home, Govt. of U.P. complaining about how he was forced to take the test and requested for a fresh test after he is fit. (Para 11)

Hon'ble Court opined that the writ petitioner/respondent was medically fit i.e. did not have the fractured at the time of taking the physical efficiency test on 08.05.2018 and having failed therein and suffered a fracture subsequently has cooked up the plea that the appellants forced him to take the test with a fracture. The plea found favour with the learned Single Judge and the writ petition was allowed primarily basing conclusions on the subsequent report of the Medical Board constituted under the orders of the learned Single Judge which reported that a person with a fracture cannot

take 10 rounds of 400 meter field. However, the screen shots of the physical efficiency test showing the writ petitioner/respondent participating in the same and the results declared thereof belie the version of the writ petitioner/respondent. (Para 12, 13, 14)

Consequently, the learned Single Judge was not justified in directing the appellants to conduct a fresh physical efficiency test of the writ petitioner and consider his claim for compassionate appointment afresh particularly in view of the fact that the Rules and GOs governing the issue do not permit any second attempt to a candidate who has failed the physical test in the first attempt. (Para 15)

Special appeal allowed. (E-4)

Present special appeal challenges the judgment and order dated 30.08.2018, passed by learned Single Judge in Civil Misc. Writ Petition No.15360 of 2018.

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

1. This Intra-Court Appeal has been filed by the State-respondents assailing the judgment and order of the learned Single Judge dated 30.8.2018 passed in Writ-A No. 15360 of 2018 (Ashif Ali versus State of U.P. and 2 others) whereby the writ petition has been allowed with cost of Rs.10,000/- directing the appellants / respondents to conduct a fresh physical efficiency test of the petitioner / respondent after six weeks. Further direction has been issued to the appellants / respondents to keep the original records pertaining to the writ petitioner / respondent in a sealed cover and transmit the same to the Senior Superintendent of Police, Mathura for its safe custody, while considering the petitioner's claim for compassionate appointment afresh.

2. The appeal was filed with a delay of 150 days. This Court vide order dated 5.3.2019 had condoned the delay and directed the office to allot a regular number to the appeal. Learned counsel for the appellant points out that pursuant to the order dated 22.2.2017 passed in Writ-A No. 18981 of 2014, the writ petitioner / respondent was called to participate in the physical efficiency test on 7.5.2018 after he had furnished a declaration of his fitness to take the physical efficiency test and actually participated therein, but failed. The factum of participation in the test aforesaid was disputed by the writ petitioner / respondent on the ground that he had met with an accident on 4.5.2018 after submitting the fitness certificate and was compelled to participate in the physical efficiency test with a fractured leg. Since, the order dated 5.3.2019 recorded the fact that the writ petitioner / respondent had not participated in the test, a modification of the order dated 5.3.2019 was sought. The said application was turned down by this Court vide order dated 19.4.2019 holding that the appeal itself be decided on merits and all points available may be raised during the hearing of the appeal.

3. The parties have exchanged affidavits reiterating their respective stands.

4. Learned counsel representing the writ petitioner / respondent opposing the appeal has filed a counter affidavit stating inter alia therein that the father of the writ petitioner / respondent was a permanent employee posted as Constable who admittedly died in harness on 31.3.2005. The writ petitioner / respondent applied for compassionate appointment for the post of Sub-Inspector vide application dated 16.2.2008. The writ petitioner / respondent was permitted to appear in the physical efficiency test for the post of S. I. (under Dying in Harness) Recruitment-2017, fixed for 7.5.2018. The petitioner /

respondent was required to collect his admit card from the office of SSP, Mathura on 4.5.2018. The petitioner / respondent after collecting the admit card met with an accident on the same day i.e. 4.5.2018 resulting in fracture of his right leg and the right leg was put in plaster. He was advised to take complete rest for four weeks. It is stated that the information of the accident was intimated through registered post vide application dated 5.5.2018 along with medical certificate issued by the District Hospital, Agra. The petitioner was also advised to appear before the Board on 7.5.2018 i.e. the date fixed for the physical test and his claim for postponing his physical test in the next recruitment would be considered. However, the Board did not adhere to the request and the petitioner was compelled to participate in the physical efficiency test and was declared failed. The petitioner / respondent thereafter moved an application before the appellant no. 1 on 9.5.2018 requesting action against the Board. However, no action was taken and the result of the selection was declared on 23.5.2018 wherein the petitioner was declared not selected. The petitioner moved another application dated 31.5.2018 before the appellant no. 3 which too was rejected vide order dated 11.6.2018 holding that there is no provision for appearing as second chance in the physical efficiency test as per Board Circular. The writ petitioner, however, stated that the appellants permitted second chance to some of candidates under dying in harness category who were absent in the physical efficiency test, but the writ petitioner has been denied the chance arbitrarily. It is also contended that the learned Single Judge vide order dated 9.8.2018 issued direction for constituting a Medical Board to examine the writ petitioner and submit its opinion in a sealed cover as to whether the petitioner had in fact suffered such a fracture or not? As also whether it was possible for such a person to run 10 rounds after three days of fracture itself by the next date and the Medical Board so constituted in its report dated 27.8.2018 opined that a person with a fractured cannot take 10 rounds of a 400 meter field.

5. Learned counsel for the appellants has filed a supplementary affidavit dated 1.4.2019 clearly denying the stand taken by the writ petitioner / respondent that he was compelled to participate in the physical efficiency test despite a fractured leg. It is the specific case of the appellants that the writ petitioner / respondent with Roll No. 1810159, Bib No. 1262 participated in the physical fitness test on 8.5.2018 and completed 10 rounds of 400 meters total in 39 minutes 13 seconds whereas he was required to complete 12 rounds of 400 meters in 35 minutes and thus could not qualify the test. The writ petitioner / respondent never made a declaration that he is not physically fit to take the test and also made the signature after completion of the test result whereof were declared before the ADM, Medical Officer and Deputy Superintendent of Police. The appellants have also filed the screen shots of the race to demonstrate the fact that the writ petitioner / respondent actually participated in the race / physical efficiency test without any plaster on the leg.

6. The above statement of fact pleaded by the appellants in their supplementary affidavit has been refuted by the writ petitioner / respondent by filing supplementary counter affidavit by stating that he had sent an application to the department two days before the commencement of the physical efficiency

test on 5.5.2018 by registered post along with medical certificate.

7. We have heard the learned counsel for the parties and have perused the records.

8. We are of the opinion that the fate of the appeal rests on the question as to whether the writ petitioner / respondent was compelled to take the physical efficiency test by the appellants despite suffering from fracture in his right leg as alleged by him or the test was taken voluntarily by him after submitting fitness certificate as asserted by the appellants.

9. A perusal of the record reveals that the writ petitioner / respondent has placed reliance upon a medical certificate issued by the District Hospital, Agra bearing OPD No. 136596 (entered by hand) dated 4.5.2018. The certificate records fracture of shaft (Rt) Tibia and the patient is advised rest from 4.5.2018 to four weeks. Another document filed along with the medical certificate is a document described as an "Out Patient Record" which bears the date of 22.5.2018 and is signed by the Dr. M. Lal, Senior Consultant, District Hospital, Agra, Reg. No. 24722. This document also bears the OPD No. 136596 (printed same as in the Medical Certificate). Yet another document filed as Annexre-4 to the writ petition is a Slip issued by the Radiologist, District Hospital, Agra accompanying the X-ray report. This document bears the date 4.5.2018 and OPD No. 136596 written by hand.

10. Further the writ petitioner / respondent is stated to have intimated the fact that he met with an accident on 4.5.2018 and suffered a fracture in his right leg vide registered letter dated 5.5.2018 requesting for being given a fresh date instead of 7.5.2018 for physical efficiency test. The writ petitioner / respondent has also filed the postal receipt bearing No. 4375. The date mentioned is not very clear but may be presumed to be 5.5.2018 as stated by the writ petitioner / respondent.

11. The writ petitioner / respondent is stated to have appeared in the physical efficiency test on 8.5.2018 and participated in the same, although he asserts that he was forced to participate in the same. The appellants on the other hand submit that the petitioner took the test without protest and failed. No intimation on 5.5.2018 as alleged by the petitioner was ever received by them. The petitioner vide letter dated 9.5.2018 (Annexre-6 to the writ petition) is stated to have written to the Principal Secretary Home, Govt. of U.P. complaining about how he was forced to take the test and requested for a fresh test after he is fit. The said letter is stated to have been sent on 9.5.2018. A receipt issued from the postal department bearing receipt No. 4376 dated 9.5.2018 has been filed as Annexure-6 to the writ petition.

12. We have examined the above mentioned documents in the light of the respective stands of the parties. We find that postal receipt bearing No. 4376 was issued on 9.5.2018. However, the letter dated 5.5.2018 is stated to have been dispatched on 5.5.2018 (as alleged by the writ petitioner) and receipt whereof issued by the postal department bears the No. 4375. It is rather surprising that the postal department has not issued any registered letters between 5.5.2018 and 9.5.2018. This fact is also apparent from the registry number appearing on the receipt No. 4375 which is RU18837153 and the registry number mentioned in the receipt No. 4376 in respect of the letter dated 9.5.2018 is

RU18837154. This fact coupled with the screen shots brought on record by the appellants does not inspire confidence about the version of the writ petitioner / respondent. We do not doubt that the writ petitioner did not meet with an accident resulting in fracture of his right leg, but the said fracture has occurred subsequent to the date of physical efficiency test held on 8.5.2018. The screen shots do not disclose that the writ petitioner / respondent was compelled to take the test with a bandaged / plastered leg even though it is the case of the writ petitioner as set out in Para 3 (d) of the counter affidavit filed on 15.3.2019 in this appeal which is being quoted herewith:

*"**3 (d).** That the respondent / petitioner proceeded for getting admit card from the office of S.S.P., Mathura on 4.5.2018 and while he was returning, unfortunately he met an accident in District Agra and received serious injuries and immediately consulted the doctor of District Hospital, Agra who has declared fracture in his right leg and his leg was plastered. The senior consultant has also advised to take complete rest of four weeks."*

13. The same stand has been taken in Para 8 of the writ petition which is being quoted hereunder:

*"**8.** That the petitioner proceeded for getting Admit Card form the office of S.S.P., Mathura on 4.5.2018 and while returning, unfortunately he met an accident in District Agra and received serious injuries of fracture in his right leg and immediately consulted the Doctor of District Hospital, Agra. His leg was in plaster and the senior consultant has advised to take complete rest of four weeks. A photocopy Medical Certificate issued by Medical Officer, District Hospital, Agra dated 4.5.2018 along with photograph of injured leg covered with Kachha Plaster is being field herewith and marked as Annexure No. 4 to this writ petition."*

14. Thus, in view of the above, we are of the opinion that the writ petitioner / respondent was medically fit i.e. did not have the fractured at the time of taking the physical efficiency test on 8.5.2018 and having failed therein and suffered a fracture subsequently has cooked up the plea that the appellants forced him to take the test with a fracture. The plea found favour with the learned Single Judge and the writ petition was allowed primarily basing conclusions on the subsequent report of the Medical Board constituted under the orders of the learned Single Judge which reported that a person with a fracture cannot take 10 rounds of 400 meter field. However, the screen shots of the physical efficiency test showing the writ petitioner / respondent participating in the same and the results declared thereof belie the version of the writ petitioner / respondent.

15. Consequently, we find that the learned Single Judge was not justified in directing the appellants to conduct a fresh physical efficiency test of the writ petitioner and consider his claim for compassionate appointment afresh particularly in view of the fact that the Rules and Government Orders governing the issue do not permit any second attempt to a candidate who has failed the physical test in the first attempt. The appeal is **allowed**. The judgment and order dated 30.8.2018 passed by the learned Single Judge allowing the writ petition with cost is set aside. The writ petition stands dismissed.

(2022)05ILR A1013
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.04.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

Writ A No. 1000074 of 2012
Rent Control No. 74 of 2012 (Old Number)

Anil Kumar Singh ...Petitioner
Versus
IInd Addl. Distt. Judge Hardoi & Ors. ...Respondents

Counsel for the Petitioner:
Ganga Singh

Counsel for the Respondents:
C.S.C., Akhlaq Ali, Rajendra S. Kushwaha, Sharad Pathak, Shyam Mohan

A. Land Law – Tenancy – Bona-fide need - Refusal of application for release - The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No. 13 of 1972 - Sections 3(g) & 21(1)(a).

Bona-fide need - The specific need that the landlord set up has come to an end with his life that the long course of these proceedings have defeated by sheer lapse of time. Even if a member of the landlord's family, within the meaning of S.3(g) of the Act were alive, the prayer for release could have been considered because the landlord had sought release for the purpose of his residence and to set up his chamber. **The bona fide need for the purpose of the landlord's residence would include the interest of a person who was a member of his family, particularly one who was residing with the landlord, within the meaning of S.3(g) of the Act.** Here, the landlord's wife was not staying with him and upon his death, has not come forward to seek substitution in his stead. (Para 22)

If the landlord's widow or a son had asked to pursue release for the purpose of his/their residence, being members of his family as defined u/s 3(g) of the Act, they would be entitled to maintain the release application. This would be so because a member of the landlord's family would be sharing the landlord's bona fide need for residential purpose. Here, the heirs and LRs who have come on record are the sons of the landlord's brother and claim through a testamentary disposition. Thus, **if the heirs and LRs of the landlord do have a case of bona fide need of their own, it would be generically different and unconnected to the landlord's case, and in that case, they would be free to pursue it by instituting appropriate proceedings before the Prescribed Authority or other Court of competent jurisdiction, as may be advised.** However, so far as the present writ petition is concerned, no relief can be granted in favour of the heirs and LRs of the landlord. (Para 23)

Writ petition dismissed. (E-4)

(Delivered by Hon'ble J.J. Munir, J.)

1. This writ petition is directed against concurrent refusal of an application for release under Section 21(1)(a) of The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No. 13 of 1972) (for short 'the Act') by both the Courts below.

2. An application for release was moved under Section 21(1)(a) of the Act by Anil Kumar Singh, seeking release of House No. 167, situate at Mohalla Sarai Thok Purvi, Pargana Bangar, Tehsil and District Hardoi that was in the tenancy occupation of Brijendra Pal Singh. The release application was registered on the file of the Prescribed Authority/Civil Judge, Hardoi as P.A. Case No. 11 of 1989. This application was instituted way back in the month of August, 1989 before the Prescribed Authority by Anil Kumar Singh

alone, setting up a case of *bona fide* need and comparative hardship in his favour. Later on, Anil kumar Singh's father Surendra Pal Singh was also impleaded as a co-applicant, applicant no. 2 to the application, in order to obviate certain objections that Brijendra Pal Singh raised about the right of Anil Kumar Singh to maintain the proceedings on ground that it was Anil Kumar Singh's father who was the landlord and not Anil Kumar Singh.

3. Anil Kumar Singh passed away pending this petition and his heirs and LRs, to wit, Shitanshu Singh Parmar and Priyanshu Singh Parmar have been brought on record as petitioners nos. 1/1 and 1/2. Anil Kumar Singh and his heirs and LRs shall hereinafter be referred to as 'the landlord', unless the context requires an individual reference. Brijendra Pal Singh, tenant, also passed away pending this petition and his heirs and LRs too have been brought on record. They are four in number and arrayed as respondent nos. 3/1, 3/2, 3/3 and 3/4 to this petition. Brijendra Pal Singh shall hereinafter be referred to as 'the tenant' which would include reference to his heirs and LRs, unless the context otherwise requires. In the latter case, the tenant concerned shall be referred to by name.

4. The landlord came up with a case in his application for release that House No. 161, situate at Mohalla Sarai Thok Purvi, Pargana Bangar, Tehsil & District Hardoi (for short 'the demised premises') is a property of the landlord, his father Surendra Pal Singh and brothers, who constitute a Joint Hindu Family. The landlord's father was the *Karta* of the Joint Hindu Family and the tenant was in occupation of the demised premises that were let out by the landlord's father at a monthly rent of Rs. 20/-. There was a partition of the joint family and its properties where the demised premises had fallen to the landlord's share. The partition was brought about on 10.05.1989 through a family settlement. According to the family settlement, the landlord had become the owner of the demised premises and, therefore, its landlord vis-a-vis the tenant. The fact of this family settlement is well within the tenant's knowledge. The landlord's father, Surendra Pal Singh had permitted him to reside in a part of his house on condition that he could stay there until time that amicably or by taking recourse to legal proceedings, he got the demised premises vacated.

5. The landlord further pleaded that he hails from a respectable and educated family and is an Advocate practicing at the District Court, Hardoi. He is in *bona fide* need of the demised premises for his residence and that of his family members, besides establishing his chamber. It was also asserted by the landlord that the part of his father's house that he was occupying with the latter's permission is not sufficient for his needs and he is facing hardship. The landlord has in his family his wife, who does not get along with her mother-in-law and sisters-in-law, resulting in squabbles in the family. In turn, the landlord has to suffer the resultant tension and anxiety, which adversely impact his profession. It is also pleaded by the landlord that he apprised the tenant about the difficulties faced by him on account of shortage of accommodation and the need for space to establish his chamber. He requested the tenant to vacate the demised premises. The tenant initially agreed to vacate, but later on, acting on the ill-advice of some residents of the locality, refused.

6. The tenant then instituted Original Suit no. 258 of 1989 before the *Munsif* West, Hardoi for permanent injunction, agitating the issue of his right to secure an electricity connection in the demised premises and indicating an apprehension of forcible dispossession. By the aforesaid acts of the tenant, it became evident that he was not minded to vacate the demised premises. The demised premises are located on the Hardoi Bilgram Road and are suitable for the landlord to establish his chamber. The landlord further asserted that he had a pressing need for release of the demised premises. The tenant, on the other hand, had no such need. He was employed as a Teacher with the Raja Rookamagarh Inter College and was well-off. He was in a position to buy land any time and construct his own house thereon. Two of the tenant's daughters were married during the pendency of the appeal arising from the order refusing release. The son and the daughter-in-law of the tenant were employed in government jobs on good positions. They stayed with the tenant. All three of them together have an income of more than Rs. 20,000/- per month.

7. It must be remarked here that this part of the assertion in the application for release appears to have been brought in through amendment made during proceedings of the Appeal. The further case pleaded is that in the city of Hardoi, there are lots of land and constructed houses available under the Awas Vikas Yojana, any of which the tenant was in a position to buy. That apart, there are lots of houses available for rent, which the tenant could settle in according to his need. However, the tenant has made no efforts to search for an alternate accommodation. There is a specific pleading brought in through amendment in paragraph No. 10A of the release application in the alternate to the effect that in case the family settlement is not accepted, *bona fide* need of Surendra Pal Singh, the landlord's father and applicant no. 2 to the release application, may be considered in support of the case for release.

8. The tenant filed a written statement dated 15.11.1989. He generally denied the landlord's case in the parawise reply, except the fact asserted in paragraph no. 6 of the application to the effect that the tenant had instituted a suit. It was also not denied that the tenant was a Teacher with the Raja Rookamagarh Inter College, Hardoi. In the additional pleas, the tenant came up with a case that there was no landlord-tenant relationship between him and the landlord. The landlord was not the owner of the demised premises and, therefore, the release application at his instance was not maintainable. The landlord's father, Surendra Pal Singh, was the owner and landlord of the demised premises and the tenant held the said premises on Surendra Pal Singh's behalf. The tenant was let out the demised premises pursuant to an order of allotment dated 10.03.1967 by Surendra Pal Singh. He was in occupation ever since. The tenant paid rent to Surendra Pal Singh, which he had paid up to the month of October, 1989. The demised premises had no electricity connection. The tenant attempted to get one installed, but in retaliation, the landlord's father attempted to get the demised premises forcibly vacated. This compelled the tenant to institute Original Suit No. 258 of 1989 before the Court of the *Munsif* West, Hardoi. Some injunction was granted in the said suit irked over which Surendra Pal Singh caused the present application for release to be instituted setting up a false case of a family settlement. The landlord's

father, Surendra Pal Singh had a house in Hardoi built on a plot of 100 x 300 ft. The house had 20-22 rooms. Surendra Pal Singh had three members in his family, that is to say, the landlord and his mother, that is to say, Surendra Pal Singh's wife. The landlord had no need for the demised premises. He does not come to Court everyday, but attends infrequently. Some houses of his, the landlord's father has recently got vacated from various tenants, which he has let out again. By contrast, the tenant had a family of eight members. He had two daughters of marriagable age. The tenant needed money in abundance to settle his daughters' marriage. The tenant did not have the necessary wherewithal to buy a house or land and construct a house. The tenant also pleaded that he would not get another house in the city of Hardoi at a rate as cheap as the demised premises. The tenant had a greater need for the demised premises whereas the landlord had none.

9. It was also asserted by the tenant that once vacated, the demised premises would be let out by the landlord at a monthly rent of Rs. 100/-. It is for the said reason that the landlord had instituted the instant proceedings for release on concocted facts. The further case of the tenant is that there was no partition between the landlord, his father and brothers, and the demised premises have not fallen to the landlord's share. The tenant does not have any alternative accommodation in the city of Hardoi except the demised premises. In the event, the demised premises were released, the tenant would face immense hardship, whereas by refusal of the release application, the landlord would not face any. There is also a detail of the accommodation available with the landlord, which according to the tenant, he could utilize to establish his chamber. It is on the foot of all these facts that the tenant resisted the landlord's application for release. The landlord, in support of his case, filed his own affidavit bearing Paper No. 16 Aa, an affidavit of one Mohd. Ali, Paper No. 11 Aa, an affidavit of one Zakir, Paper No. 18 Aa and a rejoinder affidavit of Anil Kumar Singh, the landlord. The tenant filed his affidavits bearing Paper Nos. 28 Aa and 68 Aa, besides those of one Abid and another Satendra Pal Singh, Paper Nos. 29 Aa and 69 Aa, respectively. On behalf of the landlord, an affidavit of Surendra Pal Singh, applicant no. 2, Paper No. 63 Aa was also filed.

10. The Prescribed Authority, by its judgment and order dated 09.10.1991, dismissed the release application. The aforesaid judgment was appealed by the landlord to the District Judge of Hardoi, sitting as the Appellate Authority, under Section 22 of the Act. The Appeal was registered on the file of the learned District Judge as Rent Appeal No. 20 of 1991. The said Appeal, upon assignment, came up for determination before the learned Additional District Judge, Second, Hardoi on 28.03.2020. The Appeal was dismissed and the judgment of the Prescribed Authority affirmed.

11. Aggrieved, this writ petition was filed by the landlord on 10.05.2000 before this Court, arraying the tenant as respondent no. 3 and Surendra Pal Singh, the landlord's father and applicant no. 2 to the release application as respondent no. 4. Apparently, Surendra Pal Singh, respondent no. 4 is a proforma party, as no relief has been claimed against him.

12. No counter affidavit has been filed on behalf of the respondent no. 3, as

the record would show, though time was granted to file a counter affidavit on 14.03.2019 and 17.04.2019 and a supplementary counter affidavit on 17.07.2019 with a stop order. There is a counter affidavit, however, on behalf of respondent no. 4 dated 16.09.2000, which is obviously one by the proforma respondent and not the tenant.

13. Heard Mr. Ganga Singh, learned Counsel for the landlord and Mr. Sharad Pathak, Advocate appearing for the tenant.

14. This Court must remark at this stage that the parties addressed this Court on the merits of their case, irrespective of the fact that the landlord, who had set up his need, passed away pending this petition. His heirs and LRs who have been substituted, urge the same case that Anil Kumar Singh, the deceased-landlord had all along pleaded. May be, if Anil Kumar Singh were alive, for the need set up by him and the evidence on record, conclusions very different from the Authorities below could possibly have been recorded. But, that is not to be. Here, the landlord has not left behind a member of his family within the meaning of Section 3(g) of the Act. There is considerable quarrel about the issue whether the landlord was unmarried, or was married but his wife deserted him shortly after marriage, never to come back again. The landlord has said in his application for release that he was married and had a wife, who did not get along with his mother and sisters. The tenant in his affidavit dated 11.09.1990 filed before the Prescribed Authority has stated thus:

"7. यह कि विवादित मकान की कोई आवश्यकता प्रार्थी अथवा उसके पिता को नही है क्योकि उनके पास संलग्न नक्शा नजरी के अनुसार मकानियत है तथा उनके परिवार में मात्र 3, सदस्य सुरेन्द्र सिंह एवं उनकी पत्नी एवं पार्थी स्वयं रहता है तथा प्रार्थी की पत्नी शादी में एक बार के बाद दुवारा कभी हरदोई नही आकर रही प्रार्थी स्वयं खाना अपनी माँ का बनाया हुआ खाता है तथा प्रार्थी के माता पिता ने अलग रहने का कभी भी जोर नही दिया है क्योकि उनकी सेवा स्वयं प्रार्थी करता है।"

15. The landlord in his affidavit dated 22.09.1990 has denied the aforesaid assertion in the following terms:

"4- यह कि विपक्षी का यह भी कथन कि मुझ शपथी की पत्नी उसके साथ नही रहती है तथा मुझ शपथी हरदोई में अधिवक्ता व्यवसाय नही करता है बिलकुल गलत है।"

16. Surendra Pal Singh, the landlord's father, in his affidavit dated 25.02.1991 has stated:

"4- यह कि शपथकर्ता के तीनों पुत्रों की शादिया हो गयी है तथा परिवार बढ़ जाने से शपथकर्ता व उसकी पत्नी व बहुओं व पुत्रों में अक्सर विवाद हो जाता था तथा उनमें वैमनस्ता बढ़ रही थी अत: पारिवारिक शांति व मान मर्यादा बनाए रखने हेतु शपथकर्ता एवं शपथकर्ता की पत्नी तथा पुत्रों के मध्य दिनाँक 10-5-89 को मौखिक पारिवारिक समझौता हो गया था और उक्त मौखिक पारिवारिक समझौता की यादास्त हेतु एक मेंमोरेन्डस भी तहरीर किया गया था जिसकी नोटरी से प्रमाणित फोटों कापी शपथकर्ता के समक्ष है तथा एक प्रति प्रार्थी अनिल कुमार द्वारा न्यायालय में दाखिल की गयी है जो शामिल पत्रावली है।"

17. Pending this petition, the landlord passed away on 12.08.2020 and a

substitution application to bring on record his heirs and LRs was moved by Sitanshu Singh Parmar and Priyanshu Singh Parmar, since allowed by this Court. The heirs and LRs are the sons of the landlord's brother and they claim on the basis of a will dated 19.06.2020 left by the deceased-landlord. In paragraph no. 5 of the application for substitution duly supported by an affidavit of Sitanshu Singh Parmar, it has been stated:

"5. That the petitioner during his life time executed a registered Will in favour of the applicants as they were taking care of their uncle i.e. petitioner as such on the basis of the registered Will dated 19.06.2020 applicants are only sole legal heirs of deceased petitioner as such applicants deserve to be substituted in place of petitioner, as petitioner was issueless, having no wife. True Photostat copy of the registered Will dated 19.06.2020 is being annexed herewith as Annexure No. 2 to this affidavit."

(Emphasis by Court)

18. Apart from the aforesaid contention about the marital status of the landlord, what is evident is that assuming that the landlord was married at some point of time, his widow never came forward to seek substitution and allowed his nephews to be substituted as the heirs and LRs. For the limited purpose of the present petition, therefore, it has to be held that the landlord was married for a while, who had separated from his wife early in life and the wife was not staying with him at the time of his death. Even if she had a subsisting marriage that has not been severed by divorce, entitling her to be substituted by virtue of being a member of the landlord's family, she has never come forward to assert that right. Whosoever was the landlord's wife, her existence is so obscure that even her name has nowhere figured on the record. The clinching point is that it is the landlord's nephews who have come forward to apply as his heirs and LRs without objection from any quarter and have been substituted on record. Therefore, it is they who have to be heard as the ones representing the landlord's interest in the present proceeding for release.

19. Mr. Ganga Singh, learned Counsel for the landlord submits that his heirs and legal representatives have stepped into his shoes and are entitled to pursue the application for release in the same right as the landlord. He submits that whatever *bona fide* need the landlord had pleaded would enure to the benefit of the legal representatives who now represent him.

20. Mr. Sharad Pathak, learned Counsel for the tenant submits that whatever *bona fide* need was set up in the release application, stands effaced, because the landlord, pending this petition, has passed away. It is submitted that the landlord was an Advocate and required the demised premises to establish his chamber. His heirs and LRs are not entitled to pursue the application for release on the basis of the need set up by the landlord. It is submitted that these proceedings must be held to have outlived their purpose and office and the heirs and LRs of the landlord be required to institute fresh proceedings on the basis of whatever kind of *bona fide* need, if at all, they wish to plead.

21. This Court has keenly considered the rival submissions advanced by learned Counsel for both parties.

22. The specific need that the landlord set up has come to an end with his life that the long course of these proceedings have defeated by sheer lapse of time. Even if a member of the landlord's family, within the meaning of Section 3(g) of the Act were alive, the prayer for release could have been considered because the landlord had sought release for the purpose of his residence and to set up his chamber. The *bona fide* need for the purpose of the landlord's residence would include the interest of a person who was a member of his family, particularly one who was residing with the landlord, within the meaning of Section 3(g) of the Act. Here, the landlord's wife was not staying with him and upon his death, has not come forward to seek substitution in his stead.

23. The heirs and LRs, who have been substituted, claim on the basis of a registered will dated 19.06.2020. It is the case of the heirs and LRs themselves set out in the affidavit that they have filed, in support of the substitution application, that they are the landlord's nephews. They are the sons of his brother Vishnu Pal Singh. No doubt, they have stepped into the landlord's shoes, but the landlord's *bona fide* need cannot enure to their benefit. If the landlord's widow or a son had asked to pursue release for the purpose of his/ their residence, being members of his family as defined under Section 3(g) of the Act, they would be entitled to maintain the release application. This would be so because a member of the landlord's family would be sharing the landlord's *bona fide* need for residential purpose. Here, the heirs and LRs who have come on record are the sons of the landlord's brother and claim through a testamentary disposition. Thus, if the heirs and LRs of the landlord do have a case of *bona fide* need of their own, it would be generically different and unconnected to the landlord's case. If the heirs and LRs of the landlord have a case of *bona fide* need as aforesaid, they would be free to pursue it by instituting appropriate proceedings before the Prescribed Authority or other Court of competent jurisdiction, as may be advised. However, so far as the present writ petition is concerned, no relief can be granted in favour of the heirs and LRs of the landlord.

24. In the result, subject to the above clarification about the rights of heirs and LRs of the landlord, this writ petition **fails** and is **dismissed.**

(2022)05ILR A1019
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.05.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Writ A No. 8366 of 2017
along with
Writ A No. 32882 of 2019

Dr. Om Prakash Gupta & Anr. ...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Avinash Tiwari

Counsel for the Respondents:
C.S.C.

A. Service Law – Dynamic/Special Assured Career Progression (SACP) - An exception has been carved out for the Medical Officers, PMHS while implementing SACP, which in the opinion of the Court is discriminatory, insofar as it excludes the other Medical Officers practising medicine in different streams. (Para 26, 28)

Concept of ACP is the tied over stagnation on a post and to grant financial upgradation to the government servants, it is not based on the concept of equal pay for equal work or the nature of duties being performed by the government servant. It is applicable across the board from Class-D employee to the highest rank officer, wherever such government servant suffers stagnation. (Para 26)

The ACP Scheme in general is not an incentive scheme resting upon to the nature of duty, responsibility or qualification of the government servant. The ACP Scheme, primarily, is to tide over the stagnation which a government servant, irrespective of his duty, post, pay, qualification or seniority, suffers due to stagnation on a post without earning promotion. The ACP Scheme, in the circumstances, provides for pay up-gradation to the government servant which is purely personal. (Para 27)The State Government is justified in not accepting the Dynamic ACP formulated by the Central Government for its Medical Officers, instead formulated the SACP scheme falling within the realme of administrative policy. But the question is whether such a policy upon being provided can discriminate amongst different streams of medicine practised by Medical Officers. Admittedly, the Medical Officers, irrespective of the stream of medicine (Allopathy or conventional) treat the patients which is the core underlying similarity. The **comparison with regard to qualification, course of study/syllabus, nature of duty, responsibility etc. as is being pressed by the State Government to carve out a class of Medical Officers i.e. PHMS being superior to other Medical Officers is misconceived and unfounded insofar it relates to conferment of SACP. The administrative policy is invariably discriminatory in keeping the Medical Officers (Ayurvedic) and other streams out of the scheme having regard to the concept of ACP.** (Para 31)

Writ petition allowed. (E-4)

Precedent followed:

1. North Delhi Municipal Corporation Vs Dr. Ram Naresh Sharma & ors., Civil Appeal No. 4578 of 2021, Arising out of SLP (C) No(s) 10156/2019 (Para 12)

2. Dr. Sanjay Singh Chauhan & ors. Vs St. of Uttarakhand & ors., Writ Petition No. 484 of 2014 (S/B) (Para 14)

Precedent distinguished:

1. Mewa Ram Kanojia Vs All India Institute of Medical Sciences & ors., (1989) 2 SCC 235 (Para 18)

2. St. of M.P. Vs R.D. Sharma & ors., Civil Appeal Nos. 474-475 of 2022 (Arising out of SLP (Civil) Nos. 547-548 of 2021), decided on 27.01.2022 (Para 18)

3. Dr. Puneet Kumar Gupta & anr. Vs U.O.I. through Secy. Ministry of Health and Family & ors., Service Bench No. 738 of 2015 (Para 18)

4. S.C. Chandra & ors. Vs St. of Jharkhand & ors., (2007) 8 SCC 279 (Para 18)

Present petition assails order dated 28.02.2017, passed by Principal Secretary, Department of Finance, Civil Secretariat, Lucknow.

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

1. Heard Sri Avinash Tiwari, learned counsel for the petitioners and Sri Kuldeep Pati Tripathi, learned Additional Advocate General, assisted by learned Standing Counsel appearing for the State-respondents and perused the record with the assistance of the learned counsels for the parties.

2. Both the writ petitions are being heard and decided together on the consent of the parties.

3. The facts and questions of law arising in the writ petitions are identical.

4. The facts of Writ Petition No. 8366 of 2017 is being adverted to for the sake of convenience.

5. The petitioners are confirmed Class-II Officers on the post of Medical Officers (Ayurvedic); the first petitioner claims to be the President of Prantiya Ayurvedic Evam Unani Chikitsa Seva Sangh (for short "Association') duly recognized by the second respondent, Principal Secretary, Department of Medical Education and Ayush (Ayush Anubhag-1), Civil Secretariat, Lucknow. Petitioners are working in the Pay-Scale at Rs. 15600-39100 and Grade Pay at Rs. 6600/-.

6. The instant petition is directed against the order dated 28.02.2017, passed by the first respondent, Principal Secretary, Department of Finance, Civil Secretariat, Lucknow, whereby, the representation of the first petitioner claiming the benefit of Dynamic/Special Assured Career Progression (for short "SACP') Scheme made admissible to the Medical Officers of the Provincial Medical Health Services (for short "PMHS'), has been rejected. Further, a direction has been sought to grant the Medical Officers (Ayurvedic) the benefits of SACP w.e.f. the date it has been allowed to the Medical Officers of PMHS.

7. The facts, inter se parties, are not disputed.

8. The Medical Officers PMHS practice Allopathy stream of medicine. It appears that Medical Officers PMHS made a representation to the State Government for implementation of Dynamic ACP Scheme as made admissible to the Medical Officers under the Central Government. On considering their representation, the State Government vide order dated 14.11.2014, framed a scheme on the recommendation of the Committee. The SACP, primarily, provides that the Medical Officers PMHS would be entitled to upgradation of pay on completing 4, 11, 17 and 24 years of satisfactory service. The scheme was made applicable w.e.f. 01.12.2008. The relevant portion of the Government Order dated 14.11.2014, for the purposes of the instant writ petition, is extracted:

''(1) प्रादेशिक चिकित्सा एवं स्वास्थ्य सेवा (पी0एम0एच0एस0) के चिकित्सकों के लिए केन्द्रीय चिकित्सकों के समान डी0ए0सी0पी0 की व्यवस्था लागू करने का औचित्य नही है।

(2) पी0एम0एच0एस0 संवर्ग के लिए ए0सी0पी0 की विशिष्ट व्यवस्था निर्धारित की जाये। तदनुसार ए0सी0पी0 की विशिष्ट व्यवस्था के अन्तर्गत पी0एम0एच0एस0 संवर्ग के प्रथम स्तर के पद (वेतनमान रू0 8000–13500/ समकक्ष वेतनमान/ पुनरीक्षित वेतन संरचना में सादृश्य वेतन बैण्ड–3 एवं ग्रेड वेतन रू0 5400/–) पर नियुक्ति की तिथि से निम्न तालिका के स्तम्भ–2 में उल्लिखित सेवावधि पर उसके सम्मुख स्तम्भ–3 के अनुसार वैयक्तिक वेतन बैण्ड एवं ग्रेड वेतन अनुमन्य कराये जायेः–

क0 सं0	*पी0एम0एच0एस0 संवर्ग में प्रथम स्तर के पद पर नियुक्ति की तिथि से सेवावधि।*	*ए0सी0पी0 की विशिष्ट व्यवस्था के अन्तर्गत वैयक्तिक रूप से अनुमन्य वेतन बैण्ड एवं ग्रेड वेतन।*
1	*04 वर्ष की निरन्तर संतोषजनक सेवा।*	*वेतन बैण्ड–3 एवं ग्रेड वेतन रू0 6600/–*
2	*कुल 11 वर्ष की निरन्तर संतोषजनक सेवा।*	*वेतन बैण्ड–3 एवं ग्रेड वेतन रू0 7600/–*
3	*कुल 17 वर्ष की निरन्तर संतोषजनक सेवा।*	*वेतन बैण्ड–4 एवं ग्रेड वेतन रू0 8700/–*
4	*कुल 24 वर्ष की निरन्तर संतोषजनक सेवा।*	*वेतन बैण्ड–4 एवं ग्रेड वेतन रू0 8900/–*

9. The petitioners herein belong to a different stream of medicine i.e. Ayurvedic and are entitled to the General ACP Scheme applicable to all other government servants which was conferred by the Government Order dated 04.05.2010, wherein, upon stagnation on a post the government servant is entitled to upgradation of pay at 10, 18 and 26 years of service. The relevant portion of the Government Order dated 04.05.2010 reads thus:

'' (2) (घ) ए0सीपी0 के अन्तर्गत सीधी भर्ती के किसी पद पर प्रथम नियमित नियुक्ति की तिथि से 10 वर्ष, 18 वर्ष व 26 वर्ष की ***अनवरत***

संतोषजनक सेवा के आधार *पर तीन वित्तीय स्तरोन्नयन निम्न प्रतिबन्धों के अधीन अनुमन्य किये जायेंगे:–*

(क) प्रथम वित्तीय स्तरोन्नयन सीधी भर्ती के पद के वेतनमान/ सादृश्य ग्रेड वेतन में 10 वर्ष की ***नियमित सेवा निरन्तर सन्तोषजनक रूप से पूर्ण कर लेने पर देय होगा।"***

10. The General ACP Scheme came to be modified vide Government Order dated 05.11.2014 providing upgradation of pay on satisfactory completion of 8/16/24 years of service.

11. In this back drop, it is submitted by the learned counsel for the petitioners that the petitioners who are Medical Officers (Ayurvedic) and were inducted by the State Government on the same pay scale/band as admissible to the Medical Officers PMHS have been discriminated, merely, because they belong to and practise conventional stream of medicine as against modern medicine. It is submitted that the nature and duties of the Medical Officers rendering medical services in different streams of medicine is not comparable but the primary duty being performed by the Medical Officers (Ayurvedic) is the same i.e. treating patients and number of hours of duty is comparable with the Medical Officer of PMHS. It is further sought to be urged that the issue being raised in the instant writ petition is not based on comparison/parity with the other stream of medical science or treatment. The benefit of SACP admissible to the Medical Officers PMHS, excluding, Medical Officers of their streams viz. Ayurvedic /Unani/Dental is discriminatory. The concept of ACP is based on the principle of tiding over stagnation on a post, ACP, per se, is not an incentive scheme so as to discriminate between Medical Officers engaged in different stream of medical treatment and practice. It is further submitted that the Dynamic ACP Scheme was made admissible to all the medical officers of the Central Health Service, irrespective, of the stream of medicine they practice, whereas, State Government while implementing the SACP has confined it to the Medical Officers PMHS (Allopathy).

12. Learned counsel for the petitioners, in support of his submission, has placed reliance on the decision rendered by the Supreme Court in **North Delhi Municipal Corporation Versus Dr. Ram Naresh Sharma and others1.**

13. The issue before the Court was with regard to the discrimination in the age of superannuation of the medical officers vis-a-vis dentist and doctors covered under the AYUSH, including, Ayurvedic doctors. The Court was of the opinion that the classification of AYUSH doctors and other doctors of Central Health Scheme (for short "CHS') in different categories is not reasonable and permissible under law. The doctors, both under AYUSH and CHS, render service to patients and on this core aspect, there is nothing to distinguish them. It was held that there was no rational justification for having different dates for bestowing the benefit of extended age of superannuation to these two categories of doctors. Paragraph nos.22 and 23 are extracted:

"22. The common contention of the appellants before us is that classification of AYUSH doctors and doctors under CHS in different categories is reasonable and permissible in law. This however does not appeal to us and we are inclined to agree with the findings of the Tribunal and the Delhi High Court that the classification is discriminatory and

unreasonable since doctors under both segments are performing the same function of treating and healing their patients. The only difference is that AYUSH doctors are using indigenous systems of medicine like Ayurveda, Unani, etc. and CHS doctors are using Allopathy for tending to their patients. In our understanding, the mode of treatment by itself under the prevalent scheme of things, does not qualify as an intelligible differentia. Therefore, such unreasonable classification and discrimination based on it would surely be inconsistent with Article 14 of the Constitution. The order of AYUSH Ministry dated 24.11.2017 extending the age of superannuation to 65 Years also endorses such a view. This extension is in tune with the notification of Ministry of Health and Family Welfare dated 31.05.2016.

23. The doctors, both under AYUSH and CHS, render service to patients and on this core aspect, there is nothing to distinguish them. Therefore, no rational justification is seen for having different dates for bestowing the benefit of extended age of superannuation to these two categories of doctors. Hence, the order of AYUSH Ministry (F. No. D. 14019/4/2016-E-1 (AYUSH)) dated 24.11.2017 must be retrospectively applied from 31.05.2016 to all concerned respondent-doctors, in the present appeals. All consequences must follow from this conclusion."

14. Further, reliance has been placed on the decision rendered by the High Court of Uttarakhand in **Dr. Sanjay Singh Chauhan and others versus State of Uttarakhand and others2.**

15. The issue before the High Court was as to whether the Medical Officers (AYUSH) appointed on contract could be discriminated with their counter parts in other streams insofar as salary given to the Medical Officers (Allopathy) and Dental Medical Officers. The High Court allowed the writ petition. Para 10 reads thus:

"10. In the instant case, the duties discharged by the petitioners viz-a-viz Allopathic Medical Officers and Dental Medical Officers are of equal sensitivity and quality, even the responsibility and reliability are the same. The classification made by the State Government is irrational."

16. State of Uttrakhand carried the decision in appeal3, the Supreme Court dismissed the appeal in limine vide order dated 24.03.2022 making the following observations:

"Having heard learned counsel for the parties and considering the facts and circumstances of the case, we do not find any ground for interference with the order passed by the High Court. The special leave petition is, accordingly, dismissed.

However, we may only clarify that the respondents who are Ayurvedic doctors will be entitled to be treated at par with Allopathic Medical Officers and Dental Medical Officers under the National Rural Health Mission (NRHM/NHM) Scheme.

After the order was passed, learned counsel for the petitioners made a statement that petitioners would like to file a review petition before the High Court. It is not for this Court to issue any such direction. It is always open to the petitioners to pursue such remedy as may be available to them in law."

17. In rebuttal, learned counsel appearing for the State-respondents submits

that the reasons assigned conferring SACP to the Medical Officers PMHS as against Medical Officers (Allopathy) is noted in the impugned order. The qualification of the Medical Officers of different streams is not comparable; the nature of duties, responsibility and treatment is entirely different; the Medical Officers of other streams, including, Medical Officers (Ayurvedic) are not engaged in Medico Legal work; further, the Medical Officers PMHS perform complicated surgery and they are not paid Non-Practising Allowance (NPA), whereas, the petitioners, Medical Officers (Ayurvedic), are allowed private practice.

18. In this backdrop, it is submitted by learned counsel for the State-respondents that to encourage the Medical Officers PMHS, the SACP Scheme was formulated in respect of a class of Medical Officers, excluding, Medical Officers of other streams. It is further submitted that the petitioners have not been discriminated against as they are entitled to ACP Scheme as is applicable to all the employees of the State Government vide Government Order dated 04.05.2010. In support of his submission reliance has been placed on the following authorities: **Mewa Ram Kanojia Versus All India Institute of Medical Sciences and others4, State of Madhya Pradesh Versus R.D. Sharma and others5, Dr. Puneet Kumar Gupta and another Versus Union of India through Secy. Ministry of Health and Family and others6, S.C. Chandra and others Versus State of Jharkhand and others7.**

19. The authorities relied upon by the learned counsel appearing for the State-respondents is of no assistance as the decisions pertain to the concept and principle of equal pay for equal work. It is noted therein that the principle of equal pay for equal work cannot be invoked in every kind of service, particularly, in the area of professional services.

20. The issue in the given facts is not with regard to equal pay for equal work, but the Scheme formulated for Career Progression to tide over stagnation on a post.

21. On perusal of the ACP Scheme and the relevant stipulations and conditions, therein, it is evident that the scheme offers higher pay scale/financial upgradation only to those eligible government servants who remained deprived of regular promotions. For such deprivation, they are compensated by grant of monetary benefits on purely personal basis i.e. not dependent upon the post or seniority. The financial upgradation does not amount to functional/regular promotion and does not require creation of new posts. The financial upgradation under the scheme shall be available only if no regular promotions during the prescribed periods have been availed by the government servant. In other words, the ACP Scheme is compensatory and not an incentive scheme to a class of government servants.

22. On specific query, learned counsel appearing for the State-respondents submits that the Medical Officers are inducted on the same pay scale/band and pay-grade at the entry level in the services, however, in the case of Medical Officers PMHS, different pay scale/band and pay-grade is admissible depending upon their specialization or super specialty/qualifications. The petitioners, admittedly, are not claiming equal pay for equal work or the pay scale/band and or pay-grade admissible to the specialist or

super specialist. The claim of the petitioners is confined to a Scheme made applicable to a class of Medical Officers (Allopathy), excluding other Medical Officers (AYUSH).

23. The contention of the petitioners is that a class of Medical Officers, insofar as, it relates to the benefit of SACP have been discriminated against without any justification or rational, merely for the reason that they are rendering medical service in different streams of medical science. The petitioners herein have been inducted as Medical Officers and are performing duties in various AYUSH and Unani Hospitals as has been detailed in para-10 of the writ petition, which is extracted:

"10. That opposite party no. 1 rejected the case of petitioners as in regard of their whole cadre on the fake ground as work and responsibilities are not same and Medical Officers, Ayurvedic are not doing emergency services and surgery and Medico legal work."

24. The averments have not been denied by the State-respondents in the counter affidavit. On a bare perusal of the Government Order dated 14.11.2014, while conferring SACP, the State Government declined the Dynamic ACP applicable to the Medical Officers of the CHS, irrespective of the stream of specialization i.e. Allopathy/Ayurvedic/Unani/Dental. Whereas, SACP has been made applicable to Medical Officers PMHS and the Medical Officers of other streams i.e. AYUSH/ Dental have been kept out of the scheme.

25. On specific query, learned counsel appearing for the State-respondents admits that the Dynamic ACP has been made applicable to all the Medical Officers irrespective of their streams, but submits that the State Government is not bound to implement the Central Government Scheme in totality.

26. Concept of ACP is the tied over stagnation on a post and to grant financial upgradation to the government servants, it is not based on the concept of equal pay for equal work or the nature of duties being performed by the government servant. It is applicable across the board from Class-D employee to the highest rank officer, wherever such government servant suffers stagnation. However, an exception has been carved out for the Medical Officers, PMHS while implementing SACP, which in the opinion of the Court is discriminatory, insofar as it excludes the other Medical Officers practising medicine in different streams.

27. The ACP Scheme in general is not an incentive scheme resting upon to the nature of duty, responsibility or qualification of the government servant. The ACP Scheme, primarily, is to tide over the stagnation which a government servant, irrespective of his duty, post, pay, qualification or seniority, suffers due to stagnation on a post without earning promotion. The ACP Scheme, in the circumstances, provides for pay up-gradation to the government servant which is purely personal.

28. In this backdrop, having regard to the scope and nature of the ACP scheme, the question that arises is as to whether the Medical Officers rendering medical services in different streams can be discriminated as against Medical Officer PMHS depriving the SACP. In alternative,

whether Medical Officer (Ayurvedic) are entitled to be treated at par with Medical Officer PMHS under the SACP scheme.

29. It goes without saying that the Western medicine (Allopathy) is integral to our current health care system, but so are other alternative and complementary health care modalities that are available for the people to choose. Western medicine is sometimes at a loss when it comes to treating the patients holistically. The submission of the learned State Counsel that the classification of Medical Officer (Ayurvedic) and Medical Officers PMHS is reasonable for the purposes of SACP having regard to their qualification and the nature of duties is not convincing. The classification is discriminatory and unreasonable since Medical Officers of both the segments are primarily performing the same function i.e. treating the patients. The difference is that one stream of doctors are using indigenous system of medicine and the other stream Allopathy for treating their patients. The mode of treatment, by itself does not qualify as an intelligible differentia. At the root is treatment of patients. The Medical Officers, both Ayurvedic and Allopathy render medical service to the patients and on this aspect, there is nothing to distinguish them. Treatment of patients is the core function common to the Medical Officers of different streams, therefore, no rational justification is seen to having different ACP scheme of bestowing the benefit of career progression to Medical Officers. As discussed earlier, the ACP scheme is personal to the government servant suffering stagnation and the pay upgradation does not rest upon any other consideration viz. status of post, qualification, nature of duty or seniority. The scheme is purely compensatory. In the circumstances the Medical Officers of the State cannot be discriminated against by providing different period of service to earn the benefit of career progression. Therefore, the classification on face value is discriminatory and violative of Article 14 of the Constitution of India.

30. AYUSH is an acronym for Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homeopathy are the six Indian system of medicines prevalent and practised in India. A department called the departments of Indian system of medicine was created in 1995 and renamed AYUSH in 2003 with a focus to provide increased attention for the development of these systems. This was felt in order to give increased attention to these systems in the presence of a strong counterpart in the form of Allopathic system of medicine. This took a reverse turn after the initiation of National Rural Health Mission (NRHM) and the AYUSH systems were brought into the mainstream health care. NHRM introduced the concept of mainstreaming of AYUSH and revitalization of local health traditions. This concept helped in utilizing the untapped AYUSH workforce, therapeutics and the principle of management of community health problems at different levels. The envisaged objective, inter alia, was to provide choice of the treatment system to the patients and strengthen implementation of national health programs.

31. The State Government is justified in not accepting the Dynamic ACP formulated by the Central Government for its Medical Officers, instead formulated the SACP scheme falling within the realme of administrative policy. But the question is whether such a policy upon being provided can discriminate amongst different streams

of medicine practised by Medical Officers. Admittedly, the Medical Officers, irrespective of the stream of medicine (Allopathy or conventional) treat the patients which is the core underlying similarity. The comparison with regard to qualification, course of study/syllabus, nature of duty, responsibility etc. as is being pressed by the State Government to carve out a class of Medical Officers i.e. PHMS being superior to other Medical Officers is misconceived and unfounded insofar it relates to conferment of SACP. The administrative policy is invariably discriminatory in keeping the Medical Officers (Ayurvedic) and other streams out of the scheme having regard to the concept of ACP as discussed earlier.

32. Accordingly, the writ petition is **allowed.**

33. The impugned order dated 28.02.2017, passed by the first respondent, Principal Secretary, Department of Finance, Civil Secretariat, Lucknow, is set aside and quashed. It is provided that the Special ACP Scheme (SACP) implemented vide Government Order dated 14 November 2014, shall be applicable to the Medical Officers of other streams.

34. No cost.

(2022)05ILR A1027
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.05.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Writ A No. 5962 of 2017
along with
Writ A No. 11470 of 2016

Rajendra Prasad Kureel & Ors. **...Petitioners**

Versus

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

Counsel for the Petitioners:
Mohammad Naseerullah, D.P. Tyagi, I.M. Pandey Ist, Param Shanker

Counsel for the Respondents:
C.S.C.

A. Service Law – Pay Upgradation – Assured Career Progression (A.C.P.)- The sole question that arise for consideration is, as to **whether the services of the petitioners' appointment/recruited by way of deputation would count towards A.C.P. or from the date of merger with the third respondent.** (Para 14)

The State Government on 04.05.2010, issued a GO addressed to all the Secretaries/Heads of the department to implement the A.C.P. scheme pursuant to the recommendations of the Pay Committee (2008). The GO, inter alia, provides that all government servants appointed by way of direct recruitment on any post, from the date of their first regular/confirmed appointment, are entitled to pay upgradation on completing satisfactory continuous service of 10 years, 18 years and 26 years respectively. In other words the first A.C.P. would be granted on completion of 10 years of satisfactory service and the subsequent upgradation would be on completion of 16/26 years of satisfactory service, as the case may be. The GO further provides that in case a government servant in between earns a promotion, then he shall not be entitled to the subsequent upgradation but would be entitled to A.C.P. on completing that many years of service, from the date of promotion. (Para 15)

Attention of the Court has been drawn to the subsequent GO issued on 05.11.2014 bringing slight modification to the A.C.P. Scheme. There is no modification or amendment in the scheme, save the entitlement of A.C.P., has been made applicable on completing satisfactory services i.e. 08 years, 16

years and 24 years as against 10, 18 and 26 years. (Para 18)

Having regard to the A.C.P. Scheme as stipulated in the GOs dated 04.05.2010 and 05.11.2014, there is no ambiguity or any difficulty in holding that the petitioners are entitled of A.C.P. computing the period of service from the date of recruitment on deputation. In the backdrop of admitted facts, petitioners came to be recruited/appointed on deputation with the third respondent in the year 1998. On completing 10 years of service i.e. in 2008, petitioners were entitled to the second A.C.P. It is clarified that since the petitioners came to be appointed on the higher pay-scale on deputation they were not entitled to the first A.C.P. Thereafter, petitioners were entitled to earn the third A.C.P. on completing 26 years of service in 2016. The petitioners were granted A.C.P. by the third respondent vide orders dated 25.08.2010 and 07.04.2015 from their date of appointment on deputation in the department. The third respondent, however, on the directions of the State Government has recalled/modified the orders and consequential orders have been issued to recover the excess amount paid to the petitioners. The impugned order takes the date of merger (2012) for computing the period of service for A.C.P. which is erroneous. (Para 19)

Hon'ble High Court having regard to the conditions stipulated in the GO dated 04.05.2010 held that the petitioners are entitled to second and third A.C.P. on computing their services from the date of their respective recruitment on deputation since 1998 and not from the date of their merger with the respondent department in 2006. In view thereof, the impugned order dated 01.10.2015, passed by the third respondent-Director, Viklang Jan Vikas, U.P. Lucknow, in compliance of the order dated 04.08.2015, issued by the State Government and all consequential orders directing recovery from the petitioners, is unsustainable and liable to the quashed. (Para 20)

Writ petition allowed. (E-4)

Precedent followed:

1. Ram Murti Singh Vs St. of U.P., (2006) 3 UPLBEC 2415 (Para 11)

2. St. of Pun. Vs Rafiq Masih, (2015) 4 SCC 334 (Para 11)

3. Thomas Daniel Vs St. of Kerala, Civil Appeal No. 7115 of 2010, decided on 02.05.2022 (Para 11)

Present petition challenges the order dated 01.10.2015, passed by Director, Viklang Jan Vikas, Lucknow.

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

1. Heard Sri I.M. Pandey and Sri Rajat Rajan Singh, learned counsels for the petitioners and learned counsel appearing for the State-respondents.

2. Both the writ petitions are being heard and decided together on the consent of the learned counsels of the respective parties.

3. The facts of writ petition No.5962 of 2017 is being referred to for the sake of convenience.

4. The petitioners, by the instant writ petition have raised challenge to the order dated 01 October, 2015, passed by the third respondent- Director, Viklang Jan Vikas, Lucknow, whereby, first A.C.P. granted to the petitioners on 01 December, 2008, counting their services w.e.f. 1998, has been recalled/modified computing the period for grant of first A.C.P., from the date of their merger i.e. 26 December, 2006 with the respondent department. As per the impugned order, petitioners are entitled to the first A.C.P. on 26 December, 2016, and thereafter second and third A.C.P. Pursuant to the impugned order, consequential orders have been passed, whereby, recovery of the

excess amount paid, has been ordered to be recovered. It is informed that the recovery from the petitioners had been stayed by this Court.

5. The facts inter-se parties is not in dispute.

6. The first petitioner came to be appointed on the post of Clerk (pay-scale Rs.340-550/-) in Zila Parishad Kanpur, under the Panchayati Raj Department of Uttar Pradesh. The second and third petitioners were appointed on the post of Junior Clerk in same pay-scale with the U.P. Tribal Development, Directorate, Lucknow, on 02 December, 1986 and 31 March, 1989 respectively. The fourth petitioner was appointed Junior Clerk on 03 August, 1990, in the pay-scale Rs.340-550/- (Revised pay-scale Rs.950-1500).

7. Petitioners, thereafter, came to be appointed on deputation on the post of Senior Clerk with the third respondent-Director, Viklang Jan Vikas, Lucknow; on different dates between 31 January, 1998 to 13 November, 1998, in higher pay-scale at Rs.1200-2040/-. The pay-scale, subsequently, came to be revised w.e.f. 01 January, 1996 at Rs. 4000-6000/-. This fact has been admitted by the State-respondents in their counter affidavit dated 16 March, 2018. Thereafter, vide order dated 26 December, 2006, passed by the third respondent-Director, Viklang Jan Vikas, Lucknow, services of the petitioners came to be merged on their respective post with the third respondent, consequently, the lien of their parent department came to be terminated. The past services rendered by the petitioner in the parent department was to be counted towards qualifying service for pensionary benefits duly recorded in the order of merger. Thereafter, services of the petitioners came to be confirmed on 03 May, 2007, on the post of Senior Clerk in the same pay-scale Rs.4000-6000/-.

8. The Government Order dated 04 May, 2010, was issued by the government introducing Assured Career Progression (A.C.P.) Scheme to provide financial upgradation on three stages i.e. at 10 years, 18 years and 26 years from the date of initial appointment to tide over stagnation on the post.

9. The petitioners, herein, were granted first A.C.P. w.e.f. 01 December, 2008, counting ten years from the date of appointment, vide order dated 27 November, 2014. Thereafter, the Government issued the impugned order/direction dated 04.08.2015, addressed to the third respondent to withdraw the benefit of A.C.P. allowed to certain officers named therein, directing that all such officers and similarly placed other officers are entitled to A.C.P. from the date of their merger with the department i.e. from the year 2006, and not from the date of their appointment on deputation, accordingly, the third respondent directed that the excess amount paid to the petitioners from 1998 towards A.C.P., be recovered. The order dated 04 August, 2015, insofar as, it relates to the petitioners is also under challenge.

10. It is also relevant to point out that in consequence second A.C.P. granted by order dated 06 April, 2017 to the petitioners on completion of 16 years' of satisfactory service, was also recalled/modified. The facts, briefly stated herein above, is not being disputed by the State-respondents.

11. In this backdrop, the learned counsel for the petitioner submits that the respondents have committed an error in

passing the impugned order on misreading of the Government Order dated 04 May, 2010, wherein, it has been categorically, provided that the services rendered by the government servants on deputation would count towards the entitlement of A.C.P. It is further submitted that recovery, that has been sought to be made is inequitable having regard to the fact that petitioners had since retired on the date of superannuation. Further, there is no allegation of fraud or misrepresentation against the petitioners in obtaining the orders granting them A.C.P. Reliance has been placed on the decision rendered in **Ram Murti Singh Versus State of U.P. [(2006) 3 UPLBEC 2415], State of Punjab v. Rafiq Masih [(2015) 4 SCC 334]** and recently, the Supreme Court in **Thomas Daniel Versus State of Kerala, (Civil Appeal No. 7115 of 2010) decided on 2 May 2022,** observed and held as follows:

"Such relief, restraining recovery of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion to relieve the employees from the hardship that will be caused if recovery is implemented. A government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it, genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery."

12. In rebuttal, learned counsel appearing for the State-respondents fairly submits that the Government Order dated 04 May, 2010, would apply upon the petitioners in computing the service period for entitlement of A.C.P.. He further submits that it has not being disputed in the counter affidavit that the petitioners are government servants and were working in different departments, they subsequently came to be appointed on deputation with the third respondent- Director, Viklang Jan Vikas, Lucknow, on a higher pay-scale and since then they have continued on the same post subsequently came to be merged with the department. He further submits that the services rendered by the petitioners on the date of recruitment by way of deputation, would not count towards A.C.P; and they have been rightly granted A.C.P. from the date of merger (2006) with the third respondent, after modifying the earlier order issued erroneously.

13. In other words, he submits that the State-respondents are justified in directing recovery after modification/cancellation of the earlier order, which was issued erroneously in teeth of Government Order dated 04 May, 2010.

14. On having considered the rival submissions of the parties, the sole question that arise for consideration is, as to whether the services of the petitioners' appointment / recruited by way of deputation would count towards A.C.P. or from the date of merger with the third respondent.

15. The State Government on 04 May, 2010, issued a Government Order

addressed to all the Secretaries/Heads of the department to implement the A.C.P. scheme pursuant to the recommendations of the Pay Committee (2008). The Government Order, inter alia, provides that all government servants appointed by way of direct recruitment on any post, from the date of their first regular/confirmed appointment, are entitled to pay upgradation on completing satisfactory continuous service of 10 years, 18 years and 26 years respectively. In other words the first A.C.P. would be granted on completion of 10 years of satisfactory service and the subsequent upgradation would be on completion of 16/26 years of satisfactory service, as the case may be. The Government Order further provides that in case a government servant in between earns a promotion, then he shall not be entitled to the subsequent upgradation but would be entitled to A.C.P. on completing that many years of service, from the date of promotion. Para-2(i) and (v) reads thus:

Para-2 "(पद्ध **ए0सी0पी0 के अर्न्तगत सीधी भर्ती के किसी पद पर प्रथम नियमित नियुक्ति की तिथि से 10 वर्ष, 18 वर्ष व 26 वर्ष की अनवरत संतोषजनक सेवा के आधार पर, तीन वित्तीय स्तरोन्नयन निम्न प्रतिबन्धों के अधीन अनुमन्य किये जायेंगें :–**

;कद्ध प्रथम वित्तीय स्तरोन्नयन सीधी भर्ती के पद के वेतनमान/ सादृश्य ग्रेड वेतन में 10 वर्ष की नियमित सेवा निरन्तर सन्तोषजनक रूप से पूर्ण कर लेने पर देय होगा।

परन्तु,

किसी पद का वेतनमान/ग्रेड वेतन किसी समय बिन्दु पर उच्चीकृत की स्थिति में वित्तीय स्तरोन्नयन की अनुमन्यता हेतु सेवावधि की गणना में पूर्व वेतनमान/ग्रेड वेतन तथा उच्चीकृत वेतनमान/ग्रेड वेतन में की गयी सेवाओं को जोड़कर उच्चीकृत ग्रेड वेतन से अगला ग्रेड वेतन अनुमन्य होगा।

;खद्ध प्रथम वित्तीय स्तरोन्नयन के रूप में अनुमन्य ग्रेड वेतन में 08 वर्ष की निरन्तर संतोषजनक सेवा पूर्ण कर लेने पर द्वितीय वित्तीय स्तरोन्नयान देय होगा। इसी प्रकार द्वितीय वित्तीय स्तरोन्नयन के रूप में अनुमन्य ग्रेड वेतन में 08 वर्ष की निरन्तर संतोषजनक सेवा पूर्ण कर लेने पर तृतीय वित्तीय स्तरोन्नयन देय होगा।

परन्तु,

यदि सम्बंधित कार्मिक को प्रोन्नति, प्रथम वित्तीय स्तरोन्नयन के पूर्व अथवा उसके पश्चात् प्राप्त हो जाती है तो प्रोन्नति की तिथि से 08 वर्ष की सेवा पूर्ण कर लेने पर ही प्रोन्नति के पद पर अनुमन्य ग्रेड वेतन से अगला ग्रेड वेतन द्वितीय वित्तीय स्तरोन्नयन के रूप में अनुमन्य होगा। सम्बन्धित पद पर रहते हुए उक्तानुसार द्वितीय वित्तीय स्तरोन्नयन अनुमन्य होने की तिथि से 08 वर्ष की सेवा पूर्ण करने अथवा कुल 26 वर्ष की सेवा पूर्ण करने की तिथि, जो भी पहले हो, से तृतीय वित्तीय स्तरोन्नयन का लाभ अनुमन्य होगा।

;अद्ध ए0सी0पी0 की व्यवस्था लागू होने के पश्चात् सीधी भर्ती के किसी पद पर प्रथम नियुक्ति के पश्चात् संवर्ग में प्रथम पदोन्नति होने के उपरान्त केवल द्वितीय एवं तृतीय वित्तीय स्तरोन्नयन तथा द्वितीय पदोन्नति प्राप्त होने के उपरान्त तृतीय वित्तीय स्तरोन्नयन का लाभ ही देय रह जायेगा। तीसरी पदोन्नति प्राप्त होने की तिथि के प्रश्चात् किसी भी दशा में वित्तीय स्तरोन्नयन का लाभ अनुमन्य न होगा। इस सन्दर्भ में यह भी उल्लेखनीय है कि दिनांक 01 जनवरी, 2006 से लागू पुनरीक्षित वेतन संरचना में एक ही संवर्ग में यदि समान ग्रेड वेतन वाले पद पर पदोन्नति हुई है, तो उसे, भी वित्तीय स्तरोन्नयन की अनुमन्यता हेतु पदोन्नति माना जायेगा।ष

16. The Government Order further provides that the government servant who have worked in any other government department on the same grade-pay, their services shall be considered for A.C.P.. The government servant, who came to be transferred/recruited on deputation would also be considered for A.C.P.. Para-2(vi)(vii) and (viii) is extracted:

"(vi) **प्रदेश के अन्य राजकीय विभागों में समान ग्रेड वेतन में की गयी नियमित सेवा को वित्तीय स्तरोन्नयन के लिए गणना में लिया जायेगा,** परन्तु ऐसे मामलों में ए0सी0पी की व्यवस्था के अर्न्तगत देय किसी लाभ हेतु नये विभाग के पद पर परिवीक्षा अवधि ;चतवइंजपवद चमतपवकद्ध संतोषजनक रूप से पूर्ण करने के उपरान्त ही

विचार किया जायेगा एवं सम्बन्धित लाभ देय तिथि से ही अनुमन्य कराया जायेगा।

(vii) ए0सी0पी की व्यवस्था के अन्तर्गत वित्तीय स्तरोन्नयन हेतु **नियमित सन्तोषजनक सेवा की गणना में प्रतिनियुक्ति/वाह्य सेवा, अध्ययन अवकाश तथा सक्षम स्तर से स्वीकृत सभी प्रकार के अवकाश की अवधि को सम्मिलित किया जायेगा।**

(viii) केंद्र सरकार/स्थानीय निकाय/स्वशासी संस्था/सार्वजनिक उपक्रम एवं निगम में की गयी पूर्व सेवा को वित्तीय स्तरोन्नयन के लिए गणना में नही लिया जायेगा।६

17. Applying the mandate of Government Order to the admitted facts, in the instant petition, it is not being disputed by the respondents that all the petitioners, herein, were government servants working in various departments of the State Government, they came to be appointed on deputation in 1998 on a higher pay-scale/grade-pay. In the circumstances, the petitioners are not entitled to the first A.C.P., however, since the petitioners continued with the third respondent on the same post without earning any subsequent promotion, were entitled to second and third A.C.P. counting the services rendered on deputation with the respondent department as provided under Para-2(vi) and (vii) of the Government Order.

18. Attention of the Court has been drawn to the subsequent Government Order issued on 5 November 2014 bringing slight modification to the A.C.P. Scheme. Para-9 and 11 of the said Government Order is *pari materia* with the conditions stipulated in the Government Order dated 4 May 2010 i.e. the services rendered by the government servant in any earlier establishment/department of the government, and/or the services rendered upon being appointed on deputation would be counted towards A.C.P.. In other words, there is no modification or amendment in the scheme, save the entitlement of A.C.P., has been made applicable on completing satisfactory services i.e. 08 years, 16 years and 24 years as against 10, 18 and 26 years.

19. Having regard to the A.C.P. Scheme as stipulated in the Government Orders dated 4 May 2010 and 5 November 2014, there is no ambiguity or any difficulty in holding that the petitioners are entitled of A.C.P. computing the period of service from the date of recruitment on deputation. In the backdrop of admitted facts, petitioners came to be recruited/appointed on deputation with the third respondent in the year 1998. On completing 10 years of service i.e. in 2008, petitioners were entitled to the second A.C.P. It is clarified that since the petitioners came to be appointed on the higher pay-scale on deputation they were not entitled to the first A.C.P. Thereafter, petitioners were entitled to earn the third A.C.P. on completing 26 years of service in 2016. The petitioners were granted A.C.P. by the third respondent vide orders dated 25 August 2010 and 7 April 2015 from their date of appointment on deputation in the department. The third respondent, however, on the directions of the State Government has recalled/modified the orders and consequential orders have been issued to recover the excess amount paid to the petitioners. The impugned order takes the date of merger (2012) for computing the period of service for A.C.P. which is erroneous.

20. Having regard to the conditions stipulated in the Government Order dated 4 May 2010, the petitioners are entitled to second and third A.C.P. on computing their services from the date of their respective recruitment on deputation since 1998 and not from the date of their merger with the

respondent department in 2006. In view thereof, the impugned order dated 1 October 2015, passed by the third respondent-Director, Viklang Jan Vikas, U.P. Lucknow, in compliance of the order dated 04 August, 2015, issued by the State Government and all consequential orders directing recovery from the petitioners, is unsustainable and liable to the quashed.

21. Order accordingly.

22. The writ petition, is accordingly, **allowed.**

23. The State-respondents are directed to compute the entitlement of second and third A.C.P. from the date of appointment of the petitioners on deputation (1998) with all consequential benefits, including retiral dues. The petitioners are entitled to arrears, if any. It is expected that the State-respondents shall complete the exercise within eight weeks from the date of filing of certified copy of this order, failing which, petitioners shall be entitled to simple interest at the rate of 6% per annum from due date till the date of payment on the amount due to the respective petitioners.

24. No cost.

(2022)05ILR A1033
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.05.2022

BEFORE

THE HON'BLE RAJAN ROY, J.

Writ A No. 3793 of 2018

C/M Azimuddin Ashraf Islamia Inter College, Barabanki ...Petitioner

Versus

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

Counsel for the Petitioner:
Aftab Ahmad, Qazi Mohd. Ahmad

Counsel for the Respondents:
C.S.C.

A. Service Law – Education – Selection and Appointment - U.P. Intermediate Education Act, 1921 - Sections 2(dd), 16FF(4) & 16FF(5) - It was not open for the District Inspector of Schools to reopen the issue after adjudication by the Joint Director of Secondary Education, Faizabad Region, Faizabad vide order dated 30.06.2017. All that he was required to do was to verify the educational testimonials and training documents for the purposes of payment of salary, instead he has embarked upon an unnecessary exercise pointing out certain irregularities in the selection which could not have been seen by him. The order of the Joint Director is referable to S.16 FF (5) of the Act of 1921 as also the GO dated 19.12.1997, contained as Annexure No. 18 to the petition. Counter affidavit is silent as to how the Joint Director of Secondary Education, Faizabad Region, Faizabad did not have the jurisdiction in the matter in view of the GO dated 19.12.1997, veracity of which has not been challenged. (Para 10)

Selected candidates are already working and being paid salary in pursuance to the interim order passed by this Court dated 07.02.2018. The educational testimonials and training documents have been verified by the District Inspector of Schools before paying the salary in compliance of the interim order of this Court. (Para 11)

Writ petition allowed. (E-4)

Present petition challenges the order dated 19.12.2017, passed by District Inspector of Schools, Barabanki, holding the selection and appointment

of teachers by the petitioner (Committee of Management) to be illegal seeking certain clarifications.

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard.

2. By means of this petition the petitioner has challenged the order of District Inspector of Schools, Barabanki dated **19.12.2017** holding the selection and appointment of the Teachers by the petitioner - Committee of Management to be illegal seeking certain clarifications from it.

3. The contention of learned counsel for the petitioner is that selection was held for filling up three posts of Lecturers and one Assistant Teacher in the Petitioner-Institution which is a minority Institution about which there is no dispute in the counter affidavit. The proposal for approval for such selection and appointment was sent to the District Inspector of Schools concerned who vide order dated 30.05.2017 rejected it on account of certain alleged irregularities. The petitioner - Committee of Management filed an appeal/representation before the Joint Director of Secondary Education, 9th Region, Faizabad Region, Faizabad on 06.06.2017 under Section 16 FF (5) of the U.P. Intermediate Education Act, 1921. The matter was considered by the Joint Director who vide order dated 30.06.2017 set aside the order of the District Inspector of Schools dated 30.05.2017. Copy of the order of Joint Direction is annexed as Annexure No. 11. This order was passed in compliance of the judgment and order dated 20.06.2017 passed by this Court in Writ Petition No. 13986 (MS) of 2017 wherein a direction had been issued to the appellate authority to decide the petitioner's appeal, expeditiously, say by 10th of July, 2017 keeping in view the provisions as contained in Section 16 FF (4) of the Act of 1921.

4. The Court has perused the order of the Joint Director dated 30.06.2017 and finds that a categorical finding has been recorded by him that the selected persons possess the requisite qualifications for the post for which they have been selected. Accordingly, in view of Section 16 FF (4) of the Act of 1921 there is no reason for not granting approval. Consequently, he has granted approval subject to the condition that if any concealment or falsehood is found in the matter, then the approval would automatically stand rescinded. He has further observed that the District Inspector of Schools, Barabanki shall be under an obligation to verify the educational testimonials and training documents of the selectees from the concerned Institution/University and pay the salary only thereafter. Now, after this order, all that the District Inspector of Schools was required to do is to verify the educational testimonials and training documents of the selectees. Instead of doing so, by means of the impugned order, he has held that the Joint Director, in fact, had no jurisdiction and under Section 16 FF, it is Regional Deputy Director who had jurisdiction in the matter and thereafter he has pointed out various irregularities in the selection and has held that the selection appears to be irregular, accordingly he has sought information from the petitioner.

5. Counsel for the petitioner has invited attention of the Court to the Government Order dated 19.12.1997 contained as Annexure No. 18 veracity of which has not been denied in the counter affidavit filed on behalf of the respondents,

according to which the tasks which were to be performed by the Deputy Director of Education under the Act of 1921 are to be performed by the concerned Joint Director, but it seems that the District Inspector of Schools, Barabanki was wholly oblivious of this fact.

6. Section 16 FF (4) of the Act of 1921 reads as under:

"16 FF (4) - The Regional Deputy Director of Education or the Inspector, as the case may be, shall not withhold approval for the selection made under this section where the person selected possesses the minimum qualifications prescribed and is otherwise eligible."

7. The Court may refer to Section 2 (dd) of the Act of 1921 which defines "Regional Deputy Director Education as under:

"2 (dd) "Regional Deputy Director, Education" means the Deputy Director of Education in charge of a region and includes an officer authorised by the State Government to perform all or any of the duties of a Regional Deputy Director."

8. In view of this definition State Government can authorise the Joint Director Education to perform all or any of the duties of a Regional Deputy Director and the Government Order dated 19.12.1997 is referable to it.

9. Everyday, we find that such decisions are being taken by the Joint Director of the concerned Region.

10. Considering the provisions of Section 16 FF (4) of the Act of 1921, according to which the Regional Deputy Director of Education which now is Joint Director of Education in view of the aforesaid Government Order which is referable to Section 2 (dd) read with Section 16 FF of the Act of 1921 or the Inspector as the case may be shall not withhold the approval for selection made under this Section where the person selected possesses the minimum qualification prescribed and is otherwise eligible and also in view of the adjudication of the matter by the Joint Director of Education vide order dated 30.06.2017 passed in pursuance to the judgment of this Court dated 20.06.2017 passed in Writ Petition No. 13986 (MS) of 2017 wherein he has held that the selected candidates possess the requisite qualification and has accordingly approved the selection and appointment, the order of the District Inspector of Schools impugned herein is clearly in the teeth of the law as also highly objectionable in the sense he has forgotten the hierarchy and control which is the hallmark of any administrative organization. It was not open for the District Inspector of Schools to reopen the issue after adjudication by the Joint Director of Secondary Education, Faizabad Region, Faizabad vide order dated 30.06.2017. All that he was required to do was to verify the educational testimonials and training documents for the purposes of payment of salary, instead he has embarked upon an unnecessary exercise pointing out certain irregularities in the selection which could not have been seen by him. The order of the Joint Director is referable to Section 16 FF (5) of the Act of 1921 as also the Government Order dated 19.12.1997, contained as Annexure No. 18 to the petition. Counter affidavit is silent as to how the Joint Director of Secondary Education, Faizabad Region, Faizabad did not have the jurisdiction in the matter in view of the Government Order dated 19.12.1997 veracity of which has not been challenged.

11. Selected candidates are already working and being paid salary in pursuance to the interim order passed by this Court dated 07.02.2018. Obviously, the educational testimonials and training documents have been verified by the District Inspector of Schools before paying the salary in compliance of the interim order of this Court.

12. In view of the above, the impugned order dated 19.12.2017 is hereby quashed. Consequences shall accordingly follow as per law.

13. The petition is ***allowed.***

(2022)05ILR A1036
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.03.2022

BEFORE

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

Writ A No.17936 of 2021

Bindu ...Petitioner
Versus
Hon'ble High Court of Judicature at Allahabad & Anr. ...Respondents

Counsel for the Petitioner:
Sri Vijay Tripathi

Counsel for the Respondents:
Sri Ashish Mishra, Sri Rahul Agarwal

Construction of the expression, "<u>if he has been for not less than seven years an advocate</u>" in Article 233(2) of the Constitution - This expression means seven years as an advocate immediately preceding the application and not seven years any time in the past. This is clear by use of 'has been'. **The present perfect continuous tense is used for a position which began at some time in the past and is still continuing.** Therefore, one of the essential requirements articulated by the above expression in Article 233(2) is that such person must with requisite period be continuing as an advocate on the date of application. (Para 4)

The term used "has been" is interpreted to mean seven years and has to be in present perfect continuous tense and not has been seven years during any period. (Para 6)

B. In view of the interpretation of Article 233, rules debarring judicial officers from staking their claim as against the posts reserved for direct recruitment from bar are not *ultra vires* as rules are subservient to the provisions of the Constitution.

- U/Article 232(2), an Advocate or a pleader with 7 years of practice can be appointed as District Judge by way of direct recruitment in case he is not already in the judicial service of the Union or a State.

- For the purpose of Article 233(2), an Advocate has to be continuing in practice for not less than 7 years as on the cut-off date and at the time of appointment as District Judge. Members of judicial service having 7 years' experience of practice before they have joined the service or having combined experience of 7 years as lawyer and member of judiciary, are not eligible to apply for direct recruitment as a District Judge.

- The rules framed by the High Court prohibiting judicial service officers from staking claim to the post of District Judge against the posts reserved for Advocates by way of direct recruitment, cannot be said to be ultra vires and are in conformity with Articles 14, 16 and 233 of the Constitution of India. (Para 7)

In case on hand, the petitioner ceased to be an Advocate under the Advocates Act, 1961 in August 2017 when she got selected as EXAMINER OF TRADE MARK & G.I. It is submitted by learned counsel at that time she surrendered her practicing licence. Thereafter in the year 2019, she was selected as Public Prosecutor in CBI where she is still working. The petitioner is a Public Prosecutor at present but

as Public Prosecutor, she has not put in continuous service of 7 years. (Para 8)

Writ petition dismissed. (E-4)

Precedent followed:

1. Satish Kumar Sharma Vs Bar Counsel of HP, (2001) 2 SCC 365 (Para 5)

2. Shashank Singh & ors. Vs Hon'ble High Court of Judicature at Allahabad & anr., Writ-A No. 27120 of 2018, decided on 03.12.2021 (Para 7)

Precedent distinguished:

1. Deepak Aggrawal Vs Keshav Kaushik & ors., (2013) 5 SCC 277 (Para 2)

Present petition challenges the order dated 22.10.2021.

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

1. Heard Sri Vijay Tripathi, learned counsel for the petitioner and Sri Rahul Agarwal, learned counsel for the High Court-respondents.

2. The petitioner has prayed for the following reliefs:

"*I. issue a writ, order or direction in the nature of certiorari quashing the impugned rejection order dated 22/10/2021 (Annexure No.1 to this writ petition).*

II. issue a writ, order or direction in the nature of mandamus commanding and directing the respondents to allow the petitioner to participate in selection process of U.P. Higher Judiciary Services, 2020.

III. to issue any other writ, order or direction which this Hon'ble court may deem fit and proper in the facts and circumstances of the case."

3. The facts in nutshell for our purpose are that the petitioner applied for being appointed as a Judicial Officer in the U.P. State Higher Judicial Services, the clinching aspect which is under challenge is that the High Court after the petitioner had cleared the preliminary exam, she was not permitted to appear for final exams, on the ground that on interpretation of the rules and placing reliance on the judgment of the Apex Court in **Deepak Aggrawal v. Keshav Kaushik and others, (2013) 5 SCC 277** the committee found that the petitioner does not have continuous practice for seven years on date of exam/filling form. The High Court on its administrative side conveyed to the petitioner that she was not qualified as per rules.

3. Shri Jitendra Kumar holding brief of the counsel appearing on behalf of petitioner has contended that the petitioner has passed preliminary exams and is practicing as a public prosecutor since 2019. Learned counsel for petitioner also places reliance on the judgment of the Apex Court in **Deepak Aggrawal (supra).**

4. At this juncture, it would be relevant for us to verbatim refer to paragraphs no.101 and 102, of decision titled Deepak Aggawal (Supra) which we verbatim reproduce as under:

"101. The Division Bench has in respect of all the five private appellants - Assistant Distri*ct Attorney, Public Prosecutor and Deputy Advocate General - recorded undisputed factual position that they were appearing on behalf of their respective States primarily in criminal/civil cases and their appointments were*

basically under the C.P.C. or Cr.P.C. That means their job has been to conduct cases on behalf of the State Government/C.B.I. in courts. Each one of them continued to be enrolled with the respective State Bar Council. In view of this factual position and the legal position that we have discussed above, can it be said that these appellants were ineligible for appointment to the office of Additional District and Sessions Judge? Our answer is in the negative. The Division Bench committed two fundamental errors, first, the Division Bench erred in holding that since these appellants were in full-time employment of the State Government/Central Government, they ceased to be "advocate' under the 1961 Act and the BCI Rules, and second, that being a member of service, the first essential requirement under Article 233(2) of the Constitution that such person should not be in any service under the Union or the State was attracted. In our view, none of the five private appellants, on their appointment as Assistant District Attorney/Public Prosecutor/Deputy Advocate General, ceased to be "advocate' and since each one of them continued to be "advocate', they cannot be considered to be in the service of the Union or the State within the meaning of Article 233(2). The view of the Division Bench is clearly erroneous and cannot be sustained.

102. As regards construction of the expression, "if he has been for not less than seven years an advocate" in Article 233(2) of the Constitution, we think Mr. Prashant Bhushan was right in his submission that this expression means seven years as an advocate immediately preceding the application and not seven years any time in the past. This is clear by use of "has been'. The present perfect continuous tense is used for a position which began at some time in the past and is still continuing. Therefore, one of the essential requirements articulated by the above expression in Article 233(2) is that such person must with requisite period be continuing as an advocate on the date of application"

5. While perusing the grounds of challenge, it is clear from the factual data that petitioner cannot seek appointment as Judicial Officer/District Judge in this calendar year as the petitioner does not fulfill the criteria fixed as per provisions of Articles 233, 234 and 236 of the Constitution of India and the rules for. The question is whether the break in practice of the petitioner can be condoned? The decision in Deepak Aggarwal (supra) will not help the petitioner as in our case the Rules categorically mention and has been interpreted to mean seven years in **Satish Kumar Sharma v. Bar Counsel of HP, (2001) 2 SCC 365** will have to be looked into. In our case, the petitioner herein from a period of 2017 to 2019 was employed and so there is brake in a legal practice. The Rules framed have to be construed so as to see that the purpose of the legislation is not **withered down.**

6. The term used "has been" is interpreted to mean seven years and has to be in present perfect continuous tense and not has been seven years during any period. This interpretation will not permit us to entertain this petition and grant the mandamus to permit the petitioner to appear in the exam.

7. The recent decision of the Division Bench of this Court titled ***Shashank Singh and others v. Hon'ble High Court of Judicature at Allahabad and another, Writ-A No.27120 of 2018*** decided on

3.12.2021 is also pressed in service by Shri Rahul Agarwal, learned counsel for the High Court-namely respondents where in it is held:

"The subject matter of the writ petition relates to the process of Direct Recruitment to the U.P. Higher Judicial Services-2018 (Part II). The Allahabad High Court issued a Notification dated 12.11.2018 inviting applications for direct recruitment to the Uttar Pradesh High Judicial Service-2018 (Part-II);

For appreciating the arguments raised on behalf of the writ petitioners, it would be appropriate to refer to Rule 5 of the U.P. Higher Judicial Service Rules 1975, which is reproduced as under:-

"5. Sources 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.

The U.P. Higher Judicial Service Rules, 1975 have been framed in exercise of the power conferred by the Proviso to Article 309 read with Article 233 of the Constitution of India.

The Article 233 of the Constitution of India has been recently interpreted by the Hon'ble Apex Court in the Civil Appeal No.1698 of 2020 (Dheeraj Mor Vs. Hon'ble High Court of Delhi) arising out of SLP (C) No.14156 of 2015 and other connected matters vide decision dated February 19th, 2020 reported in 2020 SCC online SC 213. The Hon'ble Apex Court after considering all aspects of the matter observed as under:-

"59. In view of the aforesaid interpretation of Article 233, we find that rules debarring judicial officers from staking their claim as against the posts reserved for direct recruitment from bar are not ultra vires as rules are subservient to the provisions of the Constitution.

60. We answer the reference as under:-

(i) The members in the judicial service of the State can be appointed as District Judges by way of promotion or limited competitive examination.

(ii) The Governor of a State is the authority for the purpose of appointment, promotion, posting and transfer, the eligibility is governed by the Rules framed under Articles 234 and 235.

(iii) Under Article 232(2), an Advocate or a pleader with 7 years of practice can be appointed as District Judge by way of direct recruitment in case he is not already in the judicial service of the Union or a State.

(iv) For the purpose of Article 233(2), an Advocate has to be continuing in practice for not less than 7 years as on the cut-off date and at the time of appointment

as District Judge. Members of judicial service having 7 years' experience of practice before they have joined the service or having combined experience of 7 years as lawyer and member of judiciary, are not eligible to apply for direct recruitment as a District Judge.

(v) The rules framed by the High Court prohibiting judicial service officers from staking claim to the post of District Judge against the posts reserved for Advocates by way of direct recruitment, cannot be said to be ultra vires and are in conformity with Articles 14, 16 and 233 of the Constitution of India.

(vi) The decision in Vijay Kumar Mishra (supra) providing eligibility, of judicial officer to compete as against the post of District Judge by way of direct recruitment, cannot be said to be laying down the law correctly. The same is hereby overruled.

61. In the case of Dheeraj Mor and others cases, time to time interim orders have been passed by this Court, and incumbents in judicial service were permitted to appear in the examination. Though later on, this Court vacated the said interim orders, by that time certain appointments had been made in some of the States and in some of the States results have been withheld by the High Court owing to complication which has arisen due to participation of the ineligible in-service candidates as against the post reserved for the practising advocates. In the cases where such in-service incumbents have been appointed by way of direct recruitment from bar as we find no merit in the petitions and due to dismissal of the writ petitions filed by the judicial officers, as sequel no fruits can be ripened on the basis of selection without eligibility, they cannot continue as District Judges.

They have to be reverted to their original post. In case their right in channel for promotion had already been ripened, and their juniors have been promoted, the High Court has to consider their promotion in accordance with prevailing rules. However, they cannot claim any right on the basis of such an appointment obtained under interim order, which was subject to the outcome of the writ petition and they have to be reverted."

8. In case on hand, the petitioner ceased to be an Advocate under the Advocates Act, 1961 in August 2017 when she got selected as EXAMINER OF TRADE MARK & G.I. It is submitted by learned counsel at that time she surrendered her practicing licence. Thereafter in the year 2019, she was selected as Public Prosecutor in CBI where she is still working. The petitioner is a Public Prosecutor at present but as Public Prosecutor, she has not put in continuous service of 7 years.

9. Hence, Deepak Aggarwal (supra) cannot be made applicable to this case. Paragraph 102 of the said decision which has been quoted above will not permit us to grant writ of mandamus for permitting the petitioner in the exam, as she is not qualified practicing period just when she applied in pursuance to the advertisement issued by the present respondents.

10. In view of these facts, this petition fails and is **dismissed.**

11. We are thankful to both the learned counsels for the parties for ably assisting us.

(2022)05ILR A1041
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2022

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ A No. 11722 of 2021

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

Counsel for the Petitioner:
Sri R.K. Sinha, Sri A.K. Sinha

Counsel for the Respondents:
C.S.C., Sri Yogendra Singh Bohra

A. Service Law – Termination - U.P. Government Servant (Discipline and Appeal) Rules, 1999 - U.P. Basic Education Staff Rules, 197 -; Persons with Disabilities (Equal Opportunities, Protection of Right) and Full Participation Act, 1995 - Where an appointment has been obtained by fraud, the authority doesn't need to follow the procedure contemplated under the rules for conducting enquiry before passing the order of termination. Where the appointment is obtained by fraud, no opportunity of hearing is required to be given. (Para 25, 26, 29)

B. The principles of natural justice, it is well settled, cannot be put into a straitjacket formula. Its application will depend upon the facts and circumstances of each case. It is also well settled that if a party after having proper notice chose not to appear, he at later stage cannot be permitted to say that he had not been given a fair opportunity of hearing. The party should not only be required to show that he did not have a proper notice resulting in violation of principles of natural justice but also to show that he was seriously prejudiced thereby. (Para 25)

The principle of natural justice although is required to be complied with, it has well-known exceptions. Where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because courts do not issue futile writs. (Para 27)

C. A person who seeks equity must act in a fair and equitable manner. It is settled in law that when a person approaches Court u/Art. 226 of the Constitution of India, he should approach the Court with clean hands. (Para 31)

D. Jurisdiction - This Court in its jurisdiction u/Art. 226 of Constitution of India, where it is established that appointment is obtained by fraud, cannot allow fraud to perpetuate by accepting a plea of a person that before terminating his services, the proper procedure for conducting an enquiry as contemplated in the relevant rules should be followed. (Para 32)

E. Words & Phrases – Effect of fraud – 'Fraud' - Suppression of a material document would also amount to a fraud on the Court. (Para 29)

"Fraud" is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. Although negligence is not fraud but it can be evidence on fraud. No judgment of a Court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. **Fraud vitiates all transactions known to the law of however high a degree of solemnity.**

It is a fraud in law if a party makes representations, which he knows to be false, and injury enures therefrom although the motive from which the representations proceeded may not have been bad. (Para 30)

In the present case, a perusal of disability certificate dated 20.12.2002 issued by the office of Chief Medical Officer, Banda reveals that the said certificate mentioned 40% disability, but it

does not mention the nature of disability whether it is permanent or temporary. When on inquiry it was found to be a forged certificate, a show-cause notice was issued to the petitioner specifying the charge against him that disability certificate of the petitioner is forged, and the burden was upon the petitioner to prove by filing material evidence in response to show cause notice that said disability certificate is genuine, which he utterly failed to do. (Para 33, 34)

Therefore, in view of the admitted fact that the nature of disability which the petitioner suffered is temporary, hence, he is not entitled to the benefit of Persons with Disabilities (Equal Opportunities, Protection of Right) and Full Participation Act 1995, and as such, the disability certificate could not be issued to the petitioner. (Para 35)

Writ petition dismissed. (E-4)

Precedent followed:

1. St. of U.P. & ors. Vs Ravindra Kumar Sharma & ors., AIR 2016 SC 690; (2016) 4 SCC 791 (Para 21)

2. Vice Chairman, K.V.S. & ors. Vs Girdharilal Yadav, 2004 (6) SCC 325 (Para 25)

3. Bank of India & ors. Vs Avinash D. Mandivikar & ors., 2005 (7) SCC 690 (Para 26)

4. State of Chhatisgarh & ors. Vs Dhirjo Kumar Sengar, 2009 (13) SCC 600 (Para 27)

5. S.L. Kapoor Vs Jagmohan & ors., (1980) 4 SCC 379 (Para 27)
6. Punjab Urban Planning & Development Authority & anr. Vs Karamjit Singh, 2019 (16) SCC 782 (Para 28)

7. Bhaurao Dagdu Paralkar Vs St. of Mah. & ors., AIR 2005 SC 3330 (Para 29)

Present petition assails order dated 08.01.2021, passed by Deputy Director of Education/Principal, District Education and Training Institute, Aligarh.

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

1. Heard learned counsel for the petitioner, learned Standing Counsel for respondent nos.1 to 3, and Sri Y.S. Bohra, learned counsel for respondent no.4.

2. The petitioner by means of the present writ petition has assailed the order dated 08.01.2021 passed by Deputy Director of Education/Principal, District Education and Training Institute, Aligarh by which services of the petitioner has been terminated.

3. The brief facts of the case are that under a policy of State Government, it has decided to impart six months Special B.T.C. Training Course for the year 2007-08 to those candidates who possess B.Ed. qualification so that they may be appointed as Assistant Teachers in Government Primary Schools. The petitioner states that he is B.A., B.Ed. and as such he has applied for the same under the handicapped quota. The petitioner was selected for Special B.T.C. Training Course, and after successful completion of the B.T.C. Training Course, he was appointed by letter dated 08.02.2009 issued by District Basic Education Officer, Aligarh.

4. Further case of the petitioner is that the State Government by order dated 03.11.2009 directed to constitute a medical board to re-examine the candidates, who had done Special B.T.C. Training Course under handicapped quota. The order dated 03.11.2009 was challenged by one Ravindra Kumar Sharma and others by filing a writ petition which was dismissed by this Court. Against the said order, Special Appeal Defective No.811 of 2010 was filed which was allowed by this Court by judgment dated 09.09.2010 limiting the inquiry to physical verification of disability certificate, and after that, if the authorities

conclude that the candidate has not been genuinely issued a certificate of disability or otherwise, or that he does not suffer from any disability so certified which entitles him to such certificate, in that event the candidate can be subjected to fresh medical test and not otherwise.

5. The aforesaid order dated 09.09.2010 passed by this Court in Special Appeal Defective No.811 of 2010 was challenged by the State Government in S.L.P. (C) No.8880 of 2011 which was allowed by the Apex Court by judgment dated 03.02.2016.

6. It appears that under a Government Order, a show-cause notice was issued to the petitioner on 14.09.2010 calling upon him to show cause as to why his services may not be terminated for obtaining an appointment based on a forged disability certificate. According to petitioner, he has submitted a reply to the said show-cause notice stating therein that in the case of similarly situated candidates namely Sandhya Sharma and others, who preferred writ petition bearing Service Single No.7386 of 2010 against the order of termination, this Court stayed the order of termination of Sandhya Sharma and others by order dated 22.10.2010. Accordingly, he prayed for parity of the said interim order. However, the service of the petitioner was terminated by order dated 25.10.2010.

7. The petitioner challenged the order dated 25.10.2010 by means of Writ-A No.42815 of 2012. It appears that after the judgment of Apex Court dated 03.02.2016, a show-cause notice dated 23.06.2016 was issued by the Principal (DIET) to the petitioner. The petitioner stated that he has furnished a reply to the said show-cause notice, but the Court did not find any evidence on record that the so-called reply has been served upon respondents. However, this Court by judgement dated 27.01.2020 directed the respondents to communicate to the petitioner the final decision taken in respect of his candidature. The Court rejected the submission of counsel for the petitioner that a fresh medical examination of the petitioner be undertaken.

8. Pursuant to the order dated 27.01.2020 passed by this Court, a show-cause notice dated 30.12.2020 was issued to the petitioner, and thereafter, the petitioner submitted a reply to the said show cause notice.

9. Subsequently, the Deputy Director of Education/Principal, District Education, and Training Institute, Aligarh by order dated 08.01.2021 terminated the services of the petitioner. The order dated 08.01.2021 is impugned in the present writ petition.

10. Challenging the aforesaid order, learned counsel for the petitioner has contended that the petitioner has been appointed after following the due procedure of law, and therefore, his services could not have been terminated except in accordance with the law. He submits that termination of an employee is a major punishment, and therefore, the procedure contemplated under the U.P. Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to as 'Rules, 1999') which applies to Assistant Teacher of Primary Schools in view of the U.P. Basic Education Staff Rules, 1973 ought to have been followed by respondents. He submits that in the absence of any inquiry, termination order is not sustainable in law.

11. He further contends that respondent-authority has not afforded any reasonable opportunity of hearing to the

petitioner before terminating him, and on this ground also, the impugned order is not sustainable in law. He submits that proper course for the respondents before taking any final decision is that they should have permitted the petitioner to appear before the Medical Board to assess his disability and only then a finding ought to have been returned by the respondents that disability certificate of the petitioner is forged. Thus, he contends that impugned order is not sustainable.

12. Per contra, learned counsel for the respondents submits that present is a case where appointment has been obtained by fraud, therefore, the procedure contemplated for conducting an enquiry under Rules, 1999 is not applicable in the facts of the present case. He submits that in the instant case, a show-cause notice was given to the petitioner which clearly states that the petitioner has obtained appointment by submitting a forged disability certificate and thus, he submits that if petitioner had any material to defend his case, he ought to have submitted that material alongwith reply to the show-cause notice to defend himself, but in the instant case, no material has been placed by the petitioner to demonstrate that he has suffered permanent disability to avail the benefit of handicapped quota.

13. He further submits that in the instant case, even no opportunity of hearing was required since from the disability certificate dated 08.02.2021 appearing on page 97 of the writ petition, it is evident that the nature of disability of the petitioner is temporary, and thus, petitioner was not entitled to avail the benefit of handicapped quota, and as he obtained appointment by submitting forged disability certificate, his services have rightly been terminated.

14. I have considered the rival submissions of the parties and perused the record.

15. In the instant case, it is not in dispute that the petitioner has obtained an appointment under the handicapped quota by submitting a disability certificate dated 20.12.2002 issued by the office of Chief Medical Officer, Banda. A perusal of the said disability certificate, appearing on page 24, shows that the disability of the petitioner is 40%, but whether such disability is permanent or temporary is not stated in the said disability certificate.

16. It appears that State Government found that several persons have obtained appointments by submitting forged disability certificate. This led the State Government to issue a Government Order dated 03.11.2009 to conduct the verification of disability certificate of the candidates who have obtained B.T.C. Training certificate based on forged disability certificates. Accordingly, the petitioner was issued a show-cause notice dated 14.09.2010 calling upon him to show cause as to why his services may not be terminated for obtaining the appointment on the basis of forged disability certificate.

17. The petitioner submitted a reply to the said show-cause notice, and District Basic Education Officer, Aligarh being not satisfied with the explanation of the petitioner passed an order dated 25.10.2010 terminating the services of the petitioner. The petitioner challenged the said order by filing Writ-A No.42815 of 2012 which was disposed off by this Court by judgement dated 27.01.2020.

18. The judgment dated 27.01.2020 passed in Writ-A No.42815 of 2012

discloses that during the pendency of the writ petition, a show-cause notice dated 23.06.2016 was issued by the Principal, DIET to the petitioner, and according to petitioner, he submitted a reply to said show-cause notice. Accordingly, this Court by judgement dated 27.01.2020 directed the competent authority to communicate the petitioner final decision taken in respect of his candidature. The Court rejected the prayer of the petitioner for fresh medical examination. A relevant extract of the judgement dated 27.01.2020 is reproduced herein below:-

"The Court only notes that insofar as the submission of the learned counsel that a fresh medical examination be undertaken is concerned, the same is clearly misconceived since it was that very direction of the Division Bench which was set aside by the Supreme Court in Appeal."

19. After the judgement of this Court dated 27.01.2020, a show-cause notice was issued to the petitioner on 30.12.2020 to which the petitioner submitted reply.

20. The Deputy Director of Education/Principal, District Education and Training Institute, Aligarh did not find merit in the so-called reply of the petitioner, and accordingly, rejected the same and terminated the services of the petitioner by order dated 08.01.2021.

21. At this point, it is relevant to mention that the Government Order dated 03.11.2009 was challenged in Writ Petition which was dismissed by this Court, against which Special Appeal Defective No.811 of 2010 was allowed by this Court by judgment dated 09.09.2010. The judgment of this Court in Special Appeal Defective No.811 of 2010 was set aside by the Apex Court in S.L.P. (C) No.8880 of 2011. Relevant extracts of the judgment of Apex Court are reproduced herein below:-

"10. The Division Bench of the High Court has ignored and overlooked the material fact that verification has already been done by the Medical Board and it has been found that certificates of 21% were fraudulently obtained. The High Court has issued a direction in the impugned order for physical verification of the candidate by the authorities and in case he does not suffer from disability so certified candidate can be subjected to fresh medical test. The High Court has overlooked that on mere physical verification it may not be possible to know various kinds of disabilities such as that of eyes, ear impairment etc. That can only be done by the medical examination and particularly when the High Court itself has observed that in case there is genuine suspicion and fraud has been committed medical certification can be reopened. Direction issued in this regard has not been questioned by the respondents and in fact process of re-verification was already over when High Court issued aforesaid directions.

11. In our considered opinion in the peculiar facts of this case of such a fraud and genuine suspicion raised in the representation lodged by the Viklang Sangh and when 21% of such certificates have been found to be fraudulently obtained there was no scope for the Division Bench to interfere and issue order to perpetuate fraud, writ is to be declined in such a scenario and no equity can be claimed by the respondents.

12. In the circumstance we set aside the impugned judgment and order passed by the Division Bench of the High

Court and dismiss the writ petition. However before taking any action against the individuals they shall be issued show cause in the matter and thereafter decision will be rendered in accordance with law. Let this exercise be completed within a period of four months. The appeal is allowed to the aforesaid extent."

22. After the judgment of Apex Court, according to the petitioner, a show-cause notice dated 23.06.2016 was issued. This Court by order dated 27.01.2020 commanded the competent authority to take a final decision in respect of the candidature of the petitioner. The explanation of the petitioner was not found satisfactory and he was terminated from service.

23. Now, the moot question that arises for consideration is where an appointment is obtained by fraud whether procedure contemplated under Rules, 1999 for terminating the services is to be followed or a show-cause notice is sufficient to meet the requirement of natural justice before passing the order of termination.

24. To appreciate the said issue, it would be pertinent to consider a few judgments of the Apex Court.

25. In the case of ***Vice Chairman, K.V.S. And Others Vs. Girdharilal Yadav 2004 (6) SCC 325*** the respondent-Girdharilal Yadav obtained an appointment as Principal in K.V.S., Rewari, in the state of Haryana by producing a forged caste certificate showing that he belongs to O.B.C. category. The respondent-Girdharilal Yadav was issued a show-cause notice, and the Apex Court held that where the appointment is obtained by fraud, no opportunity of hearing is required to be given. The relevant extract of paragraph 11 of the said judgment is reproduced herein below:-

"11. ...In terms of Section 58 of the Indian Evidence Act, 1872 facts admitted need not be proved. It is also a well-settled principle of law that the principles of natural justice should not be stretched too far and the same cannot be put in a straitjacket formula. In Bar Council of India v. High Court of Kerala (2004) 6 SCC 311, this Court has noticed that:

"24. The principles of natural justice, it is well settled, cannot be put into a straitjacket formula. Its application will depend upon the facts and circumstances of each case. It is also well settled that if a party after having proper notice chose not to appear, he at later stage cannot be permitted to say that he had not been given a fair opportunity of hearing. The question had been considered by a Bench of this Court in Sohan Lal Gupta v. Asha Devi Gupta (2003) 7 SCC 492 of which two of us (V.N. Khare, C.J. and Sinha, J.) are parties wherein upon noticing a large number of decisions it was held:

"29. The principles of natural justice, it is trite, cannot be put in a straitjacket formula. In a given case the party should not only be required to show that he did not have a proper notice resulting in violation of principles of natural justice but also to show that he was seriously prejudiced thereby."

25. The principles of natural justice, it is well settled, must not be stretched too far'."

26. In the case of ***Bank of India and Others Vs. Avinash D. Mandivikar and Others 2005 (7) SCC 690***, the respondent-Avinash D. Mandivikar has obtained an appointment by submitting a forged caste certificate. The Apex Court has held that where the appointment is obtained by fraud, the conduct of enquiry as per Rules, 1999 for imposing major punishment is not necessary. Paragraph 9 of the said judgment is extracted herein below:-

"9. A similar plea about long years of service was considered by this Court in R. Vishwanatha Pillai v. State of Kerala (2004) 2 SCC 105 to be inconsequential. In para 19 it was observed:

"19. It was then contended by Shri Ranjit Kumar, learned Senior Counsel for the appellant that since the appellant has rendered about 27 years of service, the order of dismissal be substituted by an order of compulsory retirement or removal from service to protect the pensionary benefits of the appellant. We do not find any substance in this submission as well. The rights to salary, pension and other service benefits are entirely statutory in nature in public service. The appellant obtained the appointment against a post meant for a reserved candidate by producing a false caste certificate and by playing a fraud. His appointment to the post was void and non est in the eye of the law. The right to salary or pension after retirement flows from a valid and legal appointment. The consequential right of pension and monetary benefits can be given only if the appointment was valid and legal. Such benefits cannot be given in a case where the appointment was found to have been obtained fraudulently and rested on a false caste certificate. A person who entered the service by producing a false caste certificate and obtained appointment for the post meant for a Scheduled Caste, thus depriving a genuine Scheduled Caste candidate of appointment to that post, does not deserve any sympathy or indulgence of this Court. A person who seeks equity must come with clean hands. He, who comes to the court with false claims, cannot plead equity nor would the court be justified to exercise equity jurisdiction in his favour. A person who seeks equity must act in a fair and equitable manner. Equity jurisdiction cannot be exercised in the case of a person who got the appointment on the basis of a false caste certificate by playing a fraud. No sympathy and equitable consideration can come to his rescue. We are of the view that equity or compassion cannot be allowed to bend the arms of law in a case where an individual acquired a status by practising fraud."

27. In the case of **State of Chhatisgarh and Others Vs. Dhirjo Kumar Sengar 2009 (13) SCC 600**, the Apex Court held that the principle of natural justice although is required to be complied with, it has well-known exceptions. One of such exceptions has been laid down in ***S.L. Kapoor v. Jagmohan and Others (1980) 4 SCC 379***. A relevant portion of paragraph 24 of the said judgment is extracted herein below:-

"24...In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person

who has denied justice that the person who has been denied justice is not prejudiced. As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because courts do not issue futile writs."

(Emphasis supplied)"

28. Similar proposition has been reiterated by the Apex Court in the case of ***Punjab Urban Planning and Development Authority and Another Vs. Karamjit Singh 2019 (16) SCC 782***. Paragraphs 5.5, 6, 6.2 & 7 of the said judgment are reproduced herein below:-

"5.5. It is well settled that an order of regularization obtained by misrepresenting facts, or by playing a fraud upon the competent authority, cannot be sustained in the eye of law.

In Rajasthan Tourism Development Corporation Ltd. v. Intejam Ali Zafri (2006) 6 SCC 275 it was held that if the initial appointment itself is void, then the provisions of the Industrial Disputes Act, 1947 are not applicable for terminating the services of such workman.

In a similar case, this Court in Bank of India v. Avinash D. Mandivikar, (2005) 7 SCC 690 held that since the respondent had obtained his appointment by playing fraud, he could not be allowed to get the benefits thereof.

6. In the present case, the Single Judge had held that "rightly or wrongly", the Respondent had obtained regularization, and was therefore entitled to a disciplinary enquiry. The Division Bench affirmed the Judgment of the Single Judge.

6.2. The illegality of such an appointment goes to the root of the Respondent's absorption as a regular employee. The Respondent could not be considered to be an "employee", and would not be entitled to any benefits under the Regulations applicable to employees of the Appellant- Authority. Therefore, the High Court erroneously placed reliance on the decision in ECIL v B. Karunakar, (1993) 4 SCC 727, which would not be applicable to the facts of the present case.

7. The question of holding disciplinary proceedings as envisaged under Article 311 of the Constitution, or under any other disciplinary rules did not arise in the present case since the respondent was admittedly not an "employee" of the appellant- Authority, and did not hold a civil post under the State Government. He was merely a daily wager on the muster rolls of the appellant-Authority."

29. From the reading of aforesaid judgments, it is clear that where an appointment has been obtained by fraud, the authority doesn't need to follow the procedure contemplated under the rules for conducting enquiry before passing the order of termination. The Apex Court in ***Bhaurao Dagdu Paralkar Vs. State of Maharashtra and Others AIR 2005 SC 3330*** dealt with the effect of fraud. It was held as follows in the said judgment:-

"14...Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in

its truth, or (iii) recklessly, careless whether it be true or false'.

16. Suppression of a material document would also amount to a fraud on the Court. (See Gowrishankar v. Joshi Amba Shankar Family Trust, (1996 (3) SCC 310) and S.P. Chengalvaraya Naidu's case (supra).

17. "Fraud" is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. Although negligence is not fraud but it can be evidence on fraud; as observed in Ram Preeti Yadav Vs. U.P. Board of High School and Intermediate Education (2003) 8 SCC 311.

18. In Lazarus Estate Ltd. v. Beasley (1956) 1 QB 702, Lord Denning observed at pages 712 & 713, "No judgment of a Court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything." In the same judgment Lord Parker LJ observed that fraud vitiates all transactions known to the law of however high a degree of solemnity. (page 722.)."

30. When fraud is perpetrated, the parameters of consideration will be different. The fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is also settled in law that a fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury enures therefrom although the motive from which the representations proceeded may not have been bad.

31. Viewed from another angle, it is also settled in law that when a person approaches Court under Article 226 of the Constitution of India, he should approach the Court with clean hands. A person who seeks equity must act in a fair and equitable manner.

32. Further, it is also pertinent to mention that this Court in its jurisdiction under Article 226 of Constitution of India, where it is established that appointment is obtained by fraud, cannot allow fraud to perpetuate by accepting a plea of a person that before terminating his services, the proper procedure for conducting an enquiry as contemplated in the relevant rules should be followed.

33. Now, coming to the facts of the present case. A perusal of disability certificate dated 20.12.2002 issued by the office of Chief Medical Officer, Banda reveals that the said certificate mentioned 40% disability, but it does not mention the nature of disability whether it is permanent or temporary. When on inquiry it was found to be a forged certificate, a show-cause notice was issued to the petitioner specifying the charge against him that disability certificate of the petitioner is forged, and the burden was upon the petitioner to prove by filing material evidence in response to show cause notice that said disability certificate is genuine, which he utterly failed to do.

34. After noticing the judgment of Apex Court dated 03.02.2016, a show cause notice dated 23.06.2016 was issued to the petitioner, and the petitioner submitted a reply which was noted by the

authority in its order dated 08.01.2021, but the reply of the petitioner does not disclose that he has filed any evidence that his disability is permanent in nature, and his disability certificate is genuine.

35. The petitioner has enclosed the disability certificate with the writ petition appearing on page 97 issued by the office of Chief Medical Officer, Banda, a perusal of which discloses that petitioner is suffering stiffness in the right knee which caused 40% disability to him, but as per the said disability certificate, the nature of disability is temporary and not permanent. Therefore, in view of the admitted fact that the nature of disability which the petitioner suffered is temporary, hence, he is not entitled to the benefit of Persons with Disabilities (Equal Opportunities, Protection of Right) and Full Participation Act 1995, and as such, the disability certificate could not be issued to the petitioner.

36. In view of the aforesaid fact and the settled principles of law laid down by the Apex Court in the aforesaid judgments, this Court finds that the contention of learned counsel for the petitioner that the authority ought to have followed the procedure contemplated under Rules, 1999 before imposing major punishment of dismissal is misconceived and not sustainable in law.

37. Thus, for the reasons given above, the writ petition lacks merit and is accordingly, ***dismissed*** with no order as to costs.

(2022)05ILR A1050
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.04.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Writ A No. 10229 of 2016

Dr. Kamal Kumar Saxena ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sameer Kalia, Sri Rajat Rajan Singh

Counsel for the Respondents:
C.S.C., Sri Satyanshu Ojha

A. Service Law – Misconduct – Suspension – Disciplinary proceedings - Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 - Rule 3, 7 -Sub rule (2), 7 sub rule (3), 7 Rule 7, 7 sub rule (4), 7 sub rule (5); Civil Service Regulations: Article 351-A - When a department enquiry is conducted against the Government servant it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The enquiry officer has to be wholly unbiased. (Para 17)

It is a settled legal proposition that, once the Court set asides an order of punishment on the ground, that the enquiry was not properly conducted, the Court should not severely preclude the employer from holding the inquiry in accordance with law. It must remit the concerned case to the disciplinary authority, to conduct the enquiry from the point that it stood vitiated, and to conclude the same in accordance with law. However, resorting to such a course depends upon the gravity of delinquency involved. (Para 26)

B. The embargo of Article 351-A of Civil Service Regulations would not come on the way of the State to conclude the proceedings from the stage of defect even though the petitioner has retired. The departmental proceedings commenced before the retirement of the petitioner. The impugned order is unsustainable due to the procedural

defect in concluding the enquiry and not owing to an illegality that would vitiate the departmental enquiry itself. The charges against the petitioner pertain to having caused pecuniary loss to the State which can be pressed even after the retirement of the petitioner. The recovery, on the charges being proved, can be made from the pension after approval of the Hon'ble Governor. (Para 28)

In the present facts and circumstances and upon perusal of the material documents, the impugned order dated 13.04.2016, cannot be sustained as the same has been passed without following the mandate of Rule 7 of Rules, 1999. The order dated 13.04.2016, is set aside and quashed. Liberty is granted with directions to the first respondent to appoint an enquiry officer who shall proceed from the stage of the reply submitted by the petitioner. (Para 29, 30)

Writ petition allowed. (E-4)

Precedent followed:

1. Raj Babu Agnihotri Vs Labour Commissioner, 2002 (20) LCD 1354 (Para 18)

2. St. of Hary. & anr. Vs Rattan Singh, (1982) 1 LLJ 46 (SC) (Para 19)

3. Managing Director, ECIL, Hyderabad (9) etc.etc. Vs B. Karunakar etc., AIR 1994 SC 1074 (Para 26)

4. Hiran Mayee Bhattacharyya Vs Secretary, S.M. School for Girls & ors., (2002) 10 SCC 293 (Para 26)

5. U.P. State Spinning Co. Ltd. Vs R.S. Pandey & anr., (2005) 8 SCC 264 (Para 26)

6. U.O.I. Vs Y.S. Sandhu, Ex-Inspector, AIR 2009 SC 161 (Para 26)

7. NOIDA Entrepreneurs Association Vs NOIDA & Ors., AIR 2011 SC 2112 (Para 27)

8. B.J. Shelat Vs St. of Guj. & Ors., AIR 1978 SC 1109 (Para 27)

9. Ramesh Chandra Sharma Vs Punjab National Bank & Anr., (2007) 9 SCC 15 (Para 27)

10. UCO Bank & anr. Vs Rajinder Lal Capoor, AIR 2008 SC 1831 (Para 27)

Present petition assails punishment order dated 13.04.2016.

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

1. Heard Sri Rajat Rajan Singh, learned counsel for the petitioner and Sri Virendra Singh, learned counsel for the State-respondent.

2. Petitioner, a medical officer, working with the State-respondents was served upon a charge sheet dated 19.09.2012, levelling imputation of misconduct on two charges alleging to have caused pecuniary loss to the State. Prior to issue of the charge sheet, petitioner was placed under suspension on 11.06.2012. The disciplinary proceedings against the petitioner is mandated under the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 (for short 'Rules 1999'). The petitioner responded by filing reply on 24.08.2015, denying the charges and further demanded documents which were not supplied to him.

3. It appears that the documents were in the custody of Central Bureau of Investigation (C.B.I.). The relevant documents were supplied to the petitioner on 02.09.2015, calling upon the petitioner to submit his reply. Petitioner submitted his reply on 16.09.2015 and further submitted a list of witnesses he proposed to examine, which included 100-150 witnesses as noted in the enquiry report. The enquiry officer declined to examine the officers as in the opinion of the enquiry officer they were not relevant to the charge or for raising defence by the petitioner. Thereafter, petitioner was called upon for personal hearing. Petitioner appeared on 22.09.2015, before the enquiry officer and the personal hearing was

recorded in question-answer format. Thereafter, vide show cause notice dated 05.11.2015, petitioner came to be served with an enquiry report calling upon him to file objections, if any. Petitioner responded by filing reply to the show cause notice on 21.12.2015. Thereafter, the disciplinary authority passed the impugned punishment order dated 13.04.2016, imposing major punishment of reversion from Level-III to Level-II and directing recovery at Rs. 3,36,300/- and censure entry. Thereafter, petitioner retired on attaining the age of superannuation on 30.06.2021, from the post of Senior Medical Officer (Level-II).

4. It is informed that petitioner has received pension and post retiral dues.

5. In this backdrop, learned counsel for the petitioner has made two fold submissions:(i) that the procedure as mandated under Rule 7 of Rules, 1999, in particular, Rule 7 (vii), the enquiry officer has not fixed any date, time or place after receiving the reply of the petitioner; (ii) the department did not produce any documentary or oral evidence before the enquiry officer to prove/establish the charges; (iii) the enquiry officer submitted the enquiry report on the reply submitted by the petitioner and the documents that were supplied to the petitioner for raising his defence. It is not the case of the State-respondent that the department relied upon the very same documents to prove the charge.

6. On specific query, learned counsel for the State-respondent admits that neither presenting officer was appointed, nor, any document noted in the enquiry report or oral evidence was led to prove the charges against the petitioner.

7. The second leg of the argument of the learned counsel for the petitioner is that at this stage since petitioner has superannuated, it is not open for the State-respondent to de-novo initiate disciplinary proceedings against the petitioner in view of the embargo mandated under Article 351-A of the Civil Service Regulations. It is urged that the charges pertain to the year 2011 which is beyond four years, further, approval is to be sought from the Hon'ble Governor to initiate disciplinary proceedings since petitioner has retired.

8. In rebuttal, learned Standing Counsel does not dispute on perusal of the enquiry report that the procedure as contemplated under Rule 7 (vii) of the Rules, 1999, has not been followed. The enquiry officer submitted the report after calling upon the petitioner for personal hearing. The hearing was recorded in a question-answer format on the documents that were supplied to the petitioner to raise his defence. Enquiry report does not reflect or refer to any such documents that was presented by the department before the enquiry officer to press the charges against the petitioner. The charge sheet does not flag the documents or witnesses in support of the charges.

9. In other words, petitioner came to be punished on the documents that were supplied to the petitioner on his asking for raising defence. In the alternative, it is submitted that petitioner was called upon to prove his innocence against the charges. The department did not produce any evidence, documentary or oral to prove the charge, nor any date, time or place was fixed by the enquiry officer to supply the list of documents/witnesses upon which the department would rely upon to prove the charges.

10. The Rules, 1999, prescribe detailed procedure to be followed in matters of enforcing discipline and imposing penalties/punishments against government servants in U.P., in cases of proven misconduct. Rule 3 gives a list of minor and major penalties that may be imposed by the appointing authority on the government servants.

11. Rule 7 prescribes in detail, the procedure and the manner in which an enquiry shall be conducted before imposing any major penalty on a government servant. Rule 7 sub rule (2) provides the facts constituting the misconduct on which it is proposed to take action shall be reduced in the form of definite charge or charges to be called charge sheet. This charge sheet has to be approved by the disciplinary authority. Rule 7 sub rule (3) further provides that the charge(s) framed shall be so precise and clear as to give sufficient indication to the charged government servant of the facts and circumstances against him. It is mandatory that the proposed documentary evidence and the name of witnesses proposed to prove the charges together with any oral evidence(s) that may be recorded be mentioned in the charge sheet.

12. Thereafter under Rule 7 sub rule (4) the government servant is given an opportunity to put in a written statement, of his defence, within a specified period of time which shall not be less than 15 days. The government servant is also required to indicate whether he desires to cross examine any witnesses mentioned in charge sheet.

13. Sub rule (v) of Rule 7 mandates that the copies of the documentary evidence mentioned in the charge sheet has to be served on the government servant along with the charge sheet. The aforesaid sub rule is as under:

"7(v) The charge-sheet, along with the copy of documentary evidences mentioned therein and list of witnesses and their statements, if any shall be served on the charged Government servant personally or by registered post at the address mentioned in the official records in case the charge-sheet could not be served in aforesaid manner the charge-sheet shall be served by publication in a daily newspaper having wide circulation:

Provided that where the documentary evidence is voluminous, instead of furnishing its copy with charge-sheet, the charged Government servant shall be permitted to inspect the same before the Inquiry Officer."

14. A perusal of the aforesaid rule would clearly show that the disciplinary authority is duty bound to make available all relevant documents which are sought to be relied upon against the government servant in proof of the charges. It is only when the charge sheet together with documents is supplied that the government servant can be said to have had an effective and reasonable opportunity to present his written statement of defence.

15. The inquiry report is vitiated also on the ground that the inquiry officer failed to fix any date for the appearance of the petitioner to inspect the documentary evidence to press the charge. The list of evidence-documentary or oral was not prepared nor supplied to the petitioner.

16. An inquiry officer acting in a quasi judicial proceedings is in the position

of an independent adjudicator. He is not supposed to be a representative of the department/disciplinaryauthority/Governm ent. His function is to examine the evidence presented by the department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no documents have been produced by the department nor proved to conclude that the charges have been proved against the respondents.

17. When a department enquiry is conducted against the Government servant it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The enquiry officer has to be wholly unbiased.

18. In the oral enquiry, what evidence is required to prove the charges is a fact which may differ from case to case. If the allegations in the charges are such which can be proved by oral evidence, it is necessary for the employer to bring oral evidence to prove the charges but if the allegations in an enquiry are such which can be proved from the documents, it is not obligatory for the employer to bring oral evidence. Moreover, even in cases where the charges are based on documents, employer may be required to prove the documents in an event when the genuineness or veracity of the documents has been denied by the delinquent. In a case where the genuineness or veracity of the documents has not been denied by the delinquent, the employer may not fail on the ground that no witness has come forward to prove the document. The disciplinary enquiry is not governed by strict rules of evidence. **(Refer: Raj Babu Agnihotri v. Labour Commissioner1)**

19. In **State of Haryana and another versus Rattan Singh2,** it was held in paragraph 4 by the Apex Court :

"4. It is well-settled that in a domestic enquiry the strict and sophisticated rules of evidence under the Indian Evidence Act may not apply. All materials which are logically probative for a prudent mind are permissible. There is no allergy to hearsay evidence provided it has reasonable nexus and creditability. It is true that departmental authorities and administrative Tribunals must be careful in evaluating such material and should not glibly swallow what is strictly speaking not relevant under the Indian Evidence Act.....The simple point is, was there some evidence or was there no evidence not in the sense of the technical sides governing regular Court proceedings but in a fair common sense way as men of understanding and worldly wisdom will accept."

20. The learned Standing Counsel fairly submits that the respondents be permitted to conclude the enquiry from the stage of reply submitted by the petitioner after following the mandate of Rule 7 of Rules, 1999, as the petitioner is alleged to have caused monetary loss to the State.

21. Insofar as Article 351-A is concerned, it merely provides that in the event disciplinary proceedings has to be initiated against the retired employee, sanction of the Governor is to be obtained. The proviso to Article 351-A carves out an exception that in the event the disciplinary proceedings has not been initiated prior to retirement of the government servant or he was not under suspension in that event an approval has to be obtained from the Governor. Further, the enquiry would not

be conducted on allegation which is prior to four years.

22. Regulations 351A of Civil Service Regulations, for the purpose of the case is extracted:-

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

Provided that-

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

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

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

(Provided further .....For the purpose of this article -

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

23. The substantive part of Regulation 351A confers the power upon the Government of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if the pensioner is found in departmental or judicial proceedings to have been guilty of grave misconduct, or to have caused pecuniary loss to Government by misconduct or negligence, during his service, including service rendered on re-employment after retirement. There is a proviso appended to the Regulation which circumscribes the power conferred by the substantive part of the Regulation. Clause (a) of the proviso with which we are concerned here uses the expression - if not instituted while the officer was on duty either before retirement or during re-employment. Clause (a) of the proviso will, therefore, get attracted only when the departmental proceedings are instituted against the officer after his retirement or when he is not in re-employment. If the departmental proceedings are instituted before an officer has attained the age of superannuation and before his retirement, proviso (a) can have no application. In order to remove any doubt regarding the date of institution of enquiry or the judicial proceedings an Explanation has been appended after the proviso. According to Explanation (a), departmental proceedings shall be deemed to have been instituted (i) when the charges framed against the officer are issued to him, or (ii) if the officer has been placed under suspension from an earlier date, on such date. By incorporating the explanation, the rule framing authority has notionally fixed two dates as the date on which the departmental proceedings shall be deemed to have been instituted

against an officer. A combined reading of the proviso and the explanation would show that there is no fetter or limitation of any kind for instituting departmental proceedings against an officer if he has not attained the age of superannuation and has not retired from service. If an officer is either placed under suspension or charges are issued to him prior to his attaining the age of superannuation, the departmental proceedings so instituted can validly continue even after he has attained the age of superannuation and has retired and the limitations imposed by sub-clause (i) or sub-clause (ii) of clause (a) of proviso to Regulation 351A will not apply.

24. The proceedings for recovery of the amount from a Government servant can be passed in the event he is held to be guilty of grave misconduct or caused pecuniary loss to Government by his misconduct or negligence during his service. Some procedural safeguards, however, have been laid down in terms of proviso appended thereto, including the requirement to obtain an order of sanction of the Governor. Such order of sanction, however, would not be necessary if the departmental proceedings have been initiated while the delinquent was on duty. Proviso appended to Regulation 351-A merely controls the main proceedings. The same would apply in the exigencies of the situation envisaged therein, namely, when the proceedings were initiated after retirement and not prior thereto.

25. Learned Standing Counsel, in the given facts, submits that in the instant case, admittedly, the petitioner was placed under suspension and the disciplinary proceedings was initiated against the petitioner prior to his attaining the age of superannuation. Though the enquiry concluded before the petitioner could superannuate would not mean that a fresh approval has to be obtained from the Hon'ble Governor in terms of the proviso to Article 351-A of the Civil Service Regulations. The State-respondents are not required to issue any fresh charge sheet, rather, on the same charge sheet which admittedly was issued before the retirement of the petitioner disciplinary proceedings would proceed from the stage of the defect committed by the enquiry officer. In other words, it is urged that Article 351-A in the given facts would not be attracted. The matter would be different in case the enquiry proceedings is quashed.

26. It is a settled legal proposition that, once the Court set asides an order of punishment on the ground, that the enquiry was not properly conducted, the Court should not severely preclude the employer from holding the inquiry in accordance with law. It must remit the concerned case to the disciplinary authority, to conduct the enquiry from the point that it stood vitiated, and to conclude the same in accordance with law. However, resorting to such a course depends upon the gravity of delinquency involved. (Refer: **Managing Director, ECIL, Hyderabad etc.etc. v. B. Karunakar etc.etc. AIR 1994 SC 1074; Hiran Mayee Bhattacharyya v. Secretary, S.M. School for Girls & Ors., (2002) 10 SCC 293; U.P. State Spinning C. Ltd. v. R.S. Pandey & Anr., (2005) 8 SCC 264; and Union of India v. Y.S. Sandhu, Ex-Inspector AIR 2009 SC 161**).

27. Supreme Court in **NOIDA Entrepreneurs Association v. NOIDA & Ors., AIR 2011 SC 2112,** 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 the Court, including, **B.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, AIR 2008 SC 1831.**

28. As noted in the preceding paragraphs that the embargo of Article 351-A of Civil Service Regulations would not come on the way of the State to conclude the proceedings from the stage of defect even though the petitioner has retired. The departmental proceedings commenced before the retirement of the petitioner. The impugned order is unsustainable due to the procedural defect in concluding the enquiry and not owing to an illegality that would vitiate the departmental enquiry itself. The charges against the petitioner pertain to having caused pecuniary loss to the State which can be pressed even after the retirement of the petitioner. The recovery, on the charges being proved, can be made from the pension after approval of the Hon'ble Governor.

29. Having regard to the facts and circumstances of the case and upon perusal of the material documents, in particular, the enquiry report, with the assistance of learned counsel for the parties, the impugned order dated 13.04.2016, passed by the first respondent, Principal Secretary, Department of Medical and Health, Government of U.P., Lucknow, cannot be sustained as the same has been passed without following the mandate of Rule 7 of Rules, 1999.

30. Accordingly, the order dated 13.04.2016, passed by the first respondent, Principal Secretary, Department of Medical and Health, Government of U.P., Lucknow, is set aside and quashed. Liberty is granted to the first respondent to appoint an enquiry officer who shall proceed from the stage of the reply submitted by the petitioner. The department shall appoint a presenting officer who shall present the documents to be relied upon in support of the charges and, thereafter, disciplinary proceedings shall be concluded, expeditiously, preferably, within six months from the date of receipt of certified copy of this order, provided the petitioner cooperates and there is no other impediment.

31. With the aforesaid observations, the writ petition is allowed in part.

32. No cost.

(2022)05ILR A1057
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.04.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Writ A No. 6695 of 2016

Smt. Raj Kumari Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rajendra Prasad Shukla

Counsel for the Respondents:
C.S.C.

A. Service Law – Extraordinary Pension - U.P. Police (Extra Ordinary Pension) (First Amendment) Rules, 1975 - Rule 3 - In case person dies because of accident at the time of going or coming back after

official duty, such person shall be entitled for extraordinary pension. In case a person is on duty and while going for official duty some injury is caused and the employee succumbs to injury, then he is also entitled for extraordinary pension. (Para 10)

In present case, it is not in dispute that the deceased police official was duly deputed on a rescue mission duly recorded in the G.D. and as per the enquiry report. The deceased employee complied with directions and successfully rescued the trapped victims. In the course of complying the second leg of the direction that the victims are to be transported to the Trauma Centre, the deceased employee succumbed to the injury caused due to electric shock at the barrack. The death, in the circumstances occurred while the official was on duty complying the official orders. Petitioner is entitled to extraordinary pension being covered under Rule 3 of Rules, 1975. (Para 11)

Writ petition allowed. (E-4)

Precedent followed:

1. Rajanna Vs U.O.I., 1995 Supp. (2) Supreme Court Cases 601 (Para 10)

2. Smt. Noorjahan Vs St. of U.P. & ors., [2003 (21) LCD 264] (Para 10)

3. Smt. Lilawati Devi Vs St. of U.P., 2010 (28) LCD 290 (Para 10)

4. Smt. Sushila Devi Vs St. of U.P. WP No. 4523 (SS) 2013, decided on 08.01.2014 (Para 10)

Present petition challenges the order dated 27.03.2015, passed by Principal Secretary Home Department, Government of U.P., Lucknow.

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

1. Heard Ms. Pallavi Dubey, Advocate, holding brief of Sri Rajendra Prasad Shukla, learned counsel for the petitioner and learned Standing Counsel for the State-respondents and perused the record with their assistance.

2. Petitioner is the wife of the deceased employee (constable 2550 CP Indrasen Yadav), has raised challenge to the impugned order dated 27.03.2015 passed by the first respondent, Principal Secretary Home Department, Government of U.P., Lucknow, whereby, the claim of the petitioner for extraordinary pension admissible under U.P. Police (Extra Ordinary Pension) (First Amendment) Rules, 1975 (for short "Rules, 1975') has been rejected on the ground that the circumstances leading to the death of the petitioner is not enumerated/contemplated under Rule 3 of Rules, 1975.

3. The respondents in the counter affidavit do not dispute that the deceased employee was given duty on 13.09.2012 as fellow traveller as per General Diary (G.D.) entry no. 59 at 18.45. On 14.09.2012, the deceased employee along with others was directed to proceed to Mohalla Sahjadpur, Kasta Amethi, to rescue the persons trapped under the wall that had collapsed due to heavy rain. Petitioner alongwith others proceeded on the spot and showing exemplary courage and valour, the police team was able to rescue the trapped victims under the collapsed wall. The police officials, including, the deceased employee, thereafter, were directed to take the injured to the nearby hospital/Trauma Centre. To comply the order, the deceased employee returned to the barrack for changing his wet clothes drenched in the heavy rain. While changing his apparel at the barrack, the deceased employee succumbed due to electrocution. It appears that the electric current had leaked causing the fatal injury. Circle Officer vide communication dated 22.09.2012, addressed to the Senior

Superintendent of Police, Mohanlalganj, submitted a report, wherein, it has been recorded that the deceased employee's rawangi is duly recorded at G.D. No. 29 on 14.09.2012, directing the deceased employee alongwith others to proceed to the spot to rescue the persons trapped under the collapsed wall. The team was able to rescue the trapped victims and thereafter the rescue team was directed to get the victims admitted in the hospital/Trauma Centre. The deceased employee succumbed to injury caused by the leakage of electric current at the barrack where he had gone to change his drenched clothes.

4. It is submitted by learned counsel for the State-respondent that since the deceased employee succumbed to injury caused by electric current, it cannot be said that he was on official duty within the meaning of Rule 3 of Rules, 1975.

5. Rule 3 for ready reference is extracted:

3–यह नियमावली राज्यपाल के बनाये नियम से निमंत्रित होने वाले स्थायी या अस्थायी रूप में सेवायोजित सभी पुलिस अधिकारियों और कर्मचारियों (राजपत्रित और अराजपत्रित दोनों) पर लागू होगी जो डाकुओं या सशस्त्र अपराधियों या विदेशी प्रतिरोधयों से लडने मे **या किसी अन्य कर्तब्य का पालन करने के दौरान मारे जाये ये जिनकी मृत्यु हो जाये।**

6. The Rule, inter alia, is applicable to the police officers whether temporary or otherwise gazetted/non-gazetted who are killed or die in an encounter with dacoits; armed criminals and foreign insurgencies or while performing any other duty in compliance of a direction/order.

7. On bare perusal of the Rule 3, it appears that the Rule is inclusive and non exhaustive, the expression "or any other duty' encompasses within fold any assigned duty.

8. In the backdrop of Rule 3, it is evident that the deceased employee was deputed on a mission of rescuing the victims trapped under the collapsed wall due to heavy rain. The victims were successfully rescued and thereafter on the direction of the officials the deceased employee and others were required to carry the injured to Trauma Centre at Lucknow. The petitioner to comply the order had gone to the barrack to change his wet clothes and suffered electricity current shock caused due to electric leak. The injury suffered by the employee and consequently his death was in compliance of his duty in the course of his employment and not otherwise.

9. In the circumstances, the death of the petitioner would squarely fall under Rule 3 of Rules, 1975. The impugned order does not notice the entire Rule 3, in particular, "or in compliance of any other duty" which encompasses within its fold any act done by the official during duty.

10. In support of his submission, learned counsel for the petitioner has placed reliance on the decision rendered by the Supreme Court in **Rajanna v. Union of India, 1995 Supp. (2) Supreme Court Cases 601**, wherein, the Court held that in case a person is on duty and while going for official duty some injury is caused and the employee succumbs to injury, then he is also entitled for extraordinary pension. Similarly, in **Smt. Noorjahan v. State of U.P. and others, [2003 (21) LCD 264]**, the Court observed that in case person dies because of accident at the time of going or coming back after official duty, such person shall be entitled for extraordinary pension. **(Refer: Smt. Lilawati Devi**

versus State of U.P.1; Smt. Sushila Devi versus State of U.P.2)

11. In the case at hand, it is not in dispute that the deceased police official was duly deputed on a rescue mission duly recorded in the G.D. and as per the enquiry report. The deceased employee complied with directions and successfully rescued the trapped victims. In the course of complying the second leg of the direction that the victims are to be transported to the Trauma Centre, the deceased employee succumbed to the injury caused due to electric shock at the barrack. The death, in the circumstances occurred while the official was on duty complying the official orders. Petitioner is entitled to extraordinary pension being covered under Rule 3 of Rules, 1975.

12. Accordingly, the writ petition is **allowed**. The impugned order dated 27.03.2015, passed by the first respondent, Principal Secretary Home Department, Government of U.P., Lucknow, is set aside and quashed. State-respondents are directed to compute and grant extraordinary pension to the petitioner w.e.f. 14.09.2012, within two months from the date of receipt of certified copy of this order. Petitioner shall be entitled to interest at the rate of 6% per annum on the due amount from the due date till the payment is received.

(2022)05ILR A1060
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.03.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ A No. 3786 of 2022

State of U.P. & Ors. ...Petitioners
Versus
State Public Service Tribunal, Lko & Ors. ...Respondents

Counsel for the Petitioners:
Sri Chandra Shekhar Singh

Counsel for the Respondents:
Sri S.N. Shukla (S.C.)

A. Service Law – Disciplinary Proceedings – Oral Inquiry - U.P. Government Servant (Discipline and Appeal) Rules, 1999 - Rule 7 - It has been consistently held that a departmental inquiry against government servant is not to be treated as a casual exercise and the principles of natural justice are required to be observed so as to ensure not only that justice is done but is manifestly seen to be done; the object being to ensure that the delinquent is treated fairly in proceedings which may culminate in imposition of a major penalty against him. (Para 14)

After a charge sheet is given to the employee, an oral inquiry is must whether the employee requests for it or not. Further, it is mandatory to give a notice to him indicating the date, time and place of the enquiry, the principle being that charge-sheeted employee should not only know the charges against him but should also know the evidence against him so that he can properly reply to the same. (Para 9)

In the present case, as the inquiry officer failed to fix any date, place or time in the conduct of inquiry and the absence of any witness having been examined to support the charges levelled against the respondent-employee has led to a situation where the delinquent has been condemned unheard. The entire proceedings, being a violation of principles of natural justice and total disregard of procedural fairness, have rightly been held by the Tribunal to be vitiated. (Para 17)

B. The inquiry officer has been held to be in the position of an independent adjudicator and acting in a quasi-judicial authority with a duty enjoined upon him that even in the absence of the delinquent, he is to see whether the unrebutted evidence is sufficient to hold that the charges are proved. **In a case where no oral evidence was examined and the documents have not been proved, the charges could not be held to have been proved against the delinquent employee.** (Para 10)

In the present case, the contention of the petitioner that once the charges stand proved, there is no need of any formal oral inquiry or cross-examination of the witnesses, cannot be held to be sustainable for the reason that the same would amount to gross denial of a fair opportunity to the delinquent to place his defence and would amount to by-passing the procedure under the Rules, 1999, apart from being violative of the principles of natural justice. (Para 18)

Writ petition dismissed. (E-4)

Precedent followed:

1. Radhey Kant Khare Vs U.P. Cooperative Sugar Factories Federation Ltd., 2003 (1) AWC 704 All (Para 9)

2. St. of U.P. & ors. Vs Saroj Kumar Sinha, (2010) 2 SCC 772 (Para 10)

Present petition challenges the order dated 09.09.2021, passed by U.P. State Public Services Tribunal, Lucknow.

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

1. Heard Sri S.N.Shukla, learned Standing Counsel for the State of U.P. appearing for the petitioners.

2. The present petition seeks to raise a challenge to an order dated 09.09.2021 passed by the U.P. State Public Services Tribunal, Lucknow1 in terms of which Claim Petition No. 444 of 2008 (Krishna Kumar Tevatia and others Vs. State of U.P. and others) filed by the deceased respondent no. 2 has been allowed and the order of punishment dated 30.04.2005, the appellate order dated 24.12.2005 and the revisional order dated 18.10.2007, have been set aside and benefits withheld due to the said punishment order have been directed to be refunded to the legal representatives of the deceased respondent no. 2.

3. The facts of the case as reflected from the pleadings are that disciplinary proceedings were initiated against the respondent no. 2 while he was posted as Collection Amin at Jahanabad, District Pilibhit and a charge-sheet dated 30.09.2004 was issued whereupon an inquiry was conducted and a report was submitted on 20.01.2005 holding the respondent no. 2 guilty of the charges. A show cause notice was issued to him on 05.02.2005 to which he submitted a reply on 28.02.2005 and thereafter the order of punishment was passed on 30.04.2005 whereby the respondent no. 2 was reverted to his original pay scale in addition to award of adverse entry in his character role. The appeal and revision filed thereagainst were dismissed on 24.12.2005 and 18.10.2007 respectively.

4. The Tribunal taking into consideration the inquiry report came to a conclusion that neither any date, time or place was fixed by the inquiry officer nor any oral evidence was led and only on the basis of some documentary evidence, the respondent no. 2 was held guilty of the charges. It was also held that the respondent no. 2 was not afforded any opportunity to adduce evidence and was denied reasonable opportunity of defence.

Referring to Rule 7 of the U.P. Government Servant (Discipline and Appeal) Rules, 19992 and also certain legal authorities for the proposition that even in a case where the delinquent employee does not submit any reply to the charge-sheet, the inquiry officer is not absolved from his duty to record oral evidence and provide an opportunity to adduce evidence in defence, the inquiry was held to be vitiated. It was also held that the disciplinary authority has proceeded only on the basis of the inquiry report and therefore the order of punishment being in violation of the principles of natural justice was not sustainable and was accordingly quashed and the claim petition was allowed. Taking notice of the fact that the respondent no. 2 had expired during the pendency of the claim petition, the Tribunal held that no fruitful purpose would be served in remitting the matter for fresh inquiry and in view thereof while setting aside the orders of punishment, the appellate order and the revisional order, the benefits withheld due to the punishment order have been directed to be refunded to the legal representatives of the respondent no. 2.

5. Learned counsel appearing for the petitioner has sought to urge that once the charges stood proved there was no need for any formal oral inquiry or cross-examination of the witnesses and for the said reason the order passed by the Tribunal is manifestly erroneous and legally unsustainable. It is also sought to be contended that the order passed by the Tribunal does not give any cogent reason to set aside the order of punishment and also the orders passed in appeal and revision.

6. The procedure with regard to holding of disciplinary proceedings against government servants in State of U.P. is governed as per the provisions of the Uttar Pradesh Government Servant (Discipline and Appeal), Rules 1999. The procedure for imposing major penalties, the manner in which charge-sheet is required to be given, the holding of an enquiry by the inquiry officer designated for the purpose the grant of opportunity to call witnesses and record their oral evidence are also provided for under the said Rules.

7. The report of the inquiry officer, as has been noticed in the order passed by the Tribunal, shows that neither any date, time and place was fixed by the inquiry officer nor any oral evidence was led to prove the charges. It also records that only on the basis of the certain documentary evidence the employee was held guilty of the charges and therefore it was a case of denial of reasonable opportunity to him to place his defence. The Tribunal has referred to Rule 7 of the Rules, 1999 and also the legal position that even in a situation where the delinquent employee does not submit any reply to the charge-sheet, the inquiry officer is not absolved from his duty to record oral evidence and to provide an opportunity to him to adduce evidence in his defence.

8. The legal position with regard to grant of reasonable opportunity to a delinquent employee to place his defence during the course of a departmental inquiry and the necessity of observance of principles of natural justice and following the due procedure is fairly well setted.

9. A Division Bench of this Court in the case of **Radhey Kant Khare vs. U.P. Cooperative Sugar Factories Federation Ltd.3**, has held that after a charge sheet is given to the employee, an oral inquiry is must whether the

employee requests for it or not. Further, it is mandatory to give a notice to him indicating the date, time and place of the enquiry, the principle being that charge-sheeted employee should not only know the charges against him but should also know the evidence against him so that he can properly reply to the same.

10. In **State of U.P. and others Vs. Saroj Kumar Sinha4**, the inquiry officer has been held to be in the position of an independent adjudicator and acting in a quasi-judicial authority with a duty enjoined upon him that even in the absence of the delinquent, he is to see whether the unrebutted evidence is sufficient to hold that the charges are proved. It was also observed that in a case where no oral evidence was examined and the documents have not been proved, the charges could not be held to have been proved against the delinquent employee.

11. The aforementioned judicial authorities have been referred to by the Tribunal in its order to record its conclusion that the inquiry officer was legally bound to conduct an oral inquiry informing the date, time and place of the enquiry, providing an opportunity to the delinquent employee to cross-examine the witnesses, whether or not any request had been made for the purpose and in the absence thereof, the charges against the employee could not be held to have been proved.

12. The Tribunal has also recorded that even the reply submitted by the employee to the show cause notice issued by the disciplinary authority consequent to the inquiry and the defence raised therein have not been accorded consideration and the disciplinary authority has passed the order of punishment only on the basis of inquiry report in gross disregard to the provisions under the Rules, 1999 and also the principles of natural justice.

13. The departmental proceedings pursuant to which the punishment order has been passed having thus not followed the procedure prescribed under the Rules, 1999 and there being several procedural infirmities in the conduct of enquiry, the order of punishment has rightly been held to be legally unsustainable.

14. It has been consistently held that a departmental inquiry against government servant is not to be treated as a casual exercise and the principles of natural justice are required to be observed so as to ensure not only that justice is done but is manifestly seen to be done; the object being to ensure that the delinquent is treated fairly in proceedings which may culminate in imposition of a major penalty against him.

15. The meaning of a reasonable opportunity of showing cause against the action proposed to be taken is that the delinquent employee is afforded a reasonable opportunity to defend himself against charges on which inquiry is held and has to be given an opportunity to deny his guilt and establish his innocence.

16. The administrative authorities are obliged in law to follow their own regulations, policies and procedures with regard to conduct of departmental proceedings and non-adherence thereto would have potential of causing serious prejudice to the person concerned in the inquiry proceedings and would clearly amount to denial of a reasonable opportunity to submit a plausible and

effective rebuttal to the charges being enquired into.

17. In the present case, as the inquiry officer failed to fix any date, place or time in the conduct of inquiry and the absence of any witness having been examined to support the charges levelled against the respondent-employee has led to a situation where the delinquent has been condemned unheard. The entire proceedings, being a violation of principles of natural justice and total disregard of procedural fairness, have rightly been held by the Tribunal to be vitiated.

18. The principal contention sought to be raised by the learned counsel for the petitioner that once the charges stand proved, there is no need of any formal oral inquiry or cross-examination of the witnesses, cannot be held to be sustainable for the reason that the same would amount to gross denial of a fair opportunity to the delinquent to place his defence and would amount to by-passing the procedure under the Rules, 1999, apart from being violative of the principles of natural justice.

19. The Tribunal upon taking notice of the fact that the respondent no. 2 (petitioner in the claim petition) had expired during the pendency of the claim petition held that no fruitful purpose would be served in remitting the matter for fresh enquiry and while allowing the petition and quashing the order of punishment, the appellate order and the revisional order, the Tribunal has rightly directed the benefits withheld due to the said punishment order, be refunded to the legal representatives of the deceased respondent no. 2.

20. No other ground has been urged on behalf of the petitioner to support the challenge to the order passed by the Tribunal.

21. The petition thus fails and is accordingly dismissed.

(2022)05ILR A1064
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.04.2022

BEFORE

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

First Appeal From Order No. 704 of 1996

Prem Raj & Ors. ...Appellants
Versus
Nagar Palika Shahjahanpur & Ors. ...Respondents

Counsel for the Appellants:
Sri R.S. Kushwaha, Sri Brijendra Kumar Ojha

Counsel for the Resondents:
Sri G.D. Pandey

A. Civil Law – Civil Procedure Code,1908 – O. 41 R. 24 – Power of the First Appellate Court – Remand of the matter to the trial court, when interference is warranted – Held, the appellate court is under obligation to decide by itself the lis between the parties unless it comes to the definite finding that the matter requires leading of evidence once again by the Court below – The remand of matter which has been decided by and between the parties has to be in rarest of the rare cases. (Para 6)

Appeal partly allowed. (E-1)

List of Cases cited:-

1. Sunder Singh Vs Narain Singh; 1969 SCD 900

2. Bhairab Chandra Nandan Vs Ranadhir Chandra Dutta, (1988) 1 SCC 383

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

1. Heard learned counsel for the appellants. None present for the respondents.

2. This appeal, at the behest of the claimant, challenges the judgement and decree dated 08.02.1995 passed by Additional Civil Judge, Shahjahanpur in Appeal No. 96 of 1988, partly accepting the appeal filed against the judgement and decree dated 28.03.1988 passed by Ist Additional Munsif Magistrate, Shahjahanpur.

3. The finding of the lower appellate court that the disputed property falls within the khasra no. 8 shumal no. 38 according to survey report is false and it is the result of misreading of evidence and wrong interpretation of the report of the survey conducted by the Civil Court Amin.

4. The Survey Amin has found that the boundary wall erected around the property which is mentioned in letters- Ka, Kha, Ga, Gha contained old bricks whose age would be assigned above fifty years and in this way the claim of Nagar Palika is totally demolished and such claim is baseless and without any substance.

5. The question of law involved is whether the finding of lower appellate court that the property in suit belongs to Nagar Palika, Shahjahanpur could be sustained inspite of the fact that there is no evidence such as Khasra, Map property register or any other, document pertaining to establish.

6. The appellate court is under obligation to decide by itself the lis between the parties unless it comes to the definite finding that the matter requires leading of evidence once again by the Court below. The remand of matter which has been decided by and between the parties has to be in rarest of the rare cases. The appellate Court is under obligation to dispose of the case finally vide Order 41 Rule 24 of the Code of Civil Procedure, 1908. Record is sufficient to enable the appellate Court to pronounce judgement and, therefore, it will have to decide the matter finally. This is the mandate of the Apex Court spelled out as early as 1969 in the case of **Sunder Singh v. Narain Singh, 1969 SCD 900, reiterated in Bhairab Chandra Nandan v. Ranadhir Chandra Dutta, (1988) 1 SCC 383.** The Appellate Court no doubt has power to remand the matter under Order 41 Rule 23 and 23 A of C.P.C. but it has to follow certain conditions which are not satisfied in the case in hand.

7. In view of the above, this appeal is partly allowed. The first appellate Court shall decide the appeal on merits. However, as there was stay, the suit may not have been proceeded. This Court is not aware about the present status of the remanded matter. Hence, the first appellate Court shall first ascertain these facts and then decide the matter after hearing all the parties.

8. It is made clear that none is present for Nagar Palika since last seven years.

(2022)05ILR A1066
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.02.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE PRAKASH PADIA, J.

Civil Misc. Review Application No. 379 of 2021
In
Writ-A No. 5939 of 2021

Manoj Kumar Mahato & Ors. ...Petitioners
Versus
The Union of India & Ors. ...Respondents

Counsel for the Petitioners:
Sri Manoj Kumar Singh, Sri Anoop Singh, Sri Ashok Kumar Singh

Counsel for the Respondents:
Sri Rajnish Kumar, Sri Devendra Kumar Tripathi

A. Practice & Procedure - Review Petition - Civil Procedure Code, 1908 - Section 114 read with Order 47 Rule 1 - An application for review is more restricted than that of an appeal and the Court of review has limited jurisdiction as to the definite limit mention in Order 47 Rule 1 CPC itself. The power of review cannot be exercised as an inherent power nor can an appellate power can be exercised in the guise of power of review. (Para 12)

Review Application Rejected. (E-10)

List of Cases cited:-

1. Patel Narshi Thakershi Vs Pradyumansinghji Arjunsinghji (1971) 3 SCC 844

2. Rajah Kotagiri Venkata Subbamma Rao Vs Rajah Vellanki Venkatrama Rao (1899-1900) 27 IA 197

3. Hari Shankar Pal Vs Anath Nath Mitter 1949 FCR 36

4. Moran Mar Basselios Catholicos Vs Mar Poulose Athanasius AIR 1954 SC 526

5. Thungabhadra Industries Ltd. Vs Govt. of A.P. AIR 1964 SC 1372

6. Aribam Tuleshwar Sharma Vs Aribam Pishak Sharma (1979) 4 SCC 389

7. Shivdeo Singh Vs St. of Punjab AIR 1963 S.C. 1909

8. K. Ajit Babu Vs U.O.I. (1997) 6 SCC 473

9. Parsion Devi Vs Sumitri Devi (1997) 8 SCC 715

10. Haridas Das Vs Usha Rani Banik (2006) 4 SCC 78

11. Ajit kumar Rath Vs St. of Orissa (1999) 9 SCC 596

12. St. of Har. Vs M.P. Mohla (2007) 1 SCC 457

13. Gopal Singh Vs St. Cadre Forest Officers' Assn. (2007) 9 SCC 369

14. Lily Thomas Vs U.O.I. (2000) 6 SCC 224

15. Inderchand Jain Vs Motilal (2009) 14 SCC 663

16. T.C. Basappa Vs T. Nagappa AIR 1954 SC 440

17. Hari Vishnu Kamath Vs Ahmad Ishaque AIR 1955 SCC 233

18. Meera Bhanja Vs Nirmala Kumari Choudhary (1995) 1 SCC 170

19. State of West Bengal & Ors. Vs Kamal Sengupta & anr. (2008) 8 SCC 612

20. Gopabandhu Biswal Vs Krishna Chnadra Moohanty (1998) 4 SCC 447

21. Chhajju Ram Vs Neki AIR 1922 PC 112

(Delivered by Hon'ble Prakash Padia, J.)

Order on Delay Condonation Application No.Nil of 2021

1. Heard.

2. Cause shown for the delay in filing the review application is sufficient. The delay is condoned.

3. The application is allowed.

Order on Review Application No.379 of 2021

1. Heard Shri Ashok Kumar Singh, learned counsel for the petitioners and Shri Devendra Kumar Tripathi, learned counsel appearing on behalf of respondent-Union of India.

2. This application seeks review of the judgment and order dated 16.06.2021 passed in Writ A No. 5939 of 2021 (Manoj Kumar Mahto and 8 Others vs. Union of India and 6 Others) whereby the petitioners petition was dismissed.

3. Facts in brief are that an Original Application was filed by the petitioners before the Central Administrative Tribunal, Allahabad Bench Allahabad being Original Application No. 0642 of 2019. Original Application was filed challenging the order dated 27.12.2018 endorse vide letter dated 16.05.2019 issued by the Chief Crew Controller (Operating), East Central Railway, Mugalsarai and Gaya. The directions were also sought for excluding the name of the petitioners from pre-promotion training list for the post of Loco Pilot (Goods) dated 3.06.2019 and that they (the applicants) be continued as Loco Pilot (shunting).

4. The case of the petitioners before the Central Administrative Tribunal was that there exists a promotional channel for the Assistant Loco Pilot/Shunters/ET to post of Loco Pilot (Goods). The petitioners being within the zone of consideration were found suitable for pre-promotion training, a pre-requisite for promotion vide order Estb. No. B63/2019 dated 3.6.2019. Petitioners tendered their collective refusal which was tentatively accepted by Sr. DEE (Ops)/DMEs/Power. However, the Authority senior in hierarchy, i.e., Principal Chief Electrical Engineer, East Central Railway vide Communication DO.No. ECR/ELE/OP/370 dated 27.12.2018 advised the Divisional Railway Manager, Mugalsarai Division, East Central Railway to withdraw the acceptance of refusal and the incumbents be immediately sent for next pre-promotional training programme at their associated training centers. The said DO resulted in issuance of communication dated 16.5.2019.

5. The following findings were recorded by the Central Administrative Tribunal while rejecting the applications filed by the petitioners:-

"5. In our considered view, the impugned communication is based on sound reason of serving larger public interest and does not call for any interference. There is more than adequate justification for the decision to post the applicants on operational duties after prescribed training. The applicants have enjoyed the benefit of choosing to remain on the post of their choice for long enough and do not deserve the luxury of this choice throughout their service career. A public utility like the railways is to run in the interest of the public, and this requires effective manning of operational posts. On the other hand, the applicants' demand is purely confined to their own personal comfort and convenience. Moreover, the reasons given by the applicants for refusal of

promotion are vague and do not justify a sympathetic consideration. It is ironic that the applicants have chosen to agitate their promotion and not a denial of it."

6. Aggrieved against the aforesaid, the petitioners have preferred the writ petition before this Court being Writ A No. 5939 of 2021 Manoj Kumar Mahto And 8 Others vs. Union of India And 6 Others). The writ petition was dismissed while recording the following findings:-

"Though submissions similar to those before the Tribunal are reiterated; however, in absence of any Rules or Regulations facilitating the refusal to follow the departmental orders issued by the superior Authorities, being commended at we are not inclined to cause any indulgence with the findings by Tribunal that in public interest the respondents were justified in recalling of the permission by authority to refuse promotion."

7. In this view of the matter, the writ Court was not inclined to cause any indulgence with the findings of the Tribunal on the ground that in public interest the respondents were justified in recalling of the permission by the authorities to refuse permission.

8. Aggrieved against the aforesaid judgment passed by the Division Bench of this Court, the petitioners have preferred the present review petition.

9. It is argued by the counsel for the petitioners that the order passed by the Central Administrative Tribunal dated 26.03.2021 was passed without recording any findings. It is further argued that the higher Court has no occasion to appreciate or adjudicate as to how Central Administrative Tribunal has dealt the issue raised by the petitioners. It is further argued that while passing the judgment, this Court has ignored the material aspects of the matter and committed error apparent on the place on record while dismissing the writ petition in limine.

10. We have gone through the grounds taken in Review Application, which virtually constitutes an attempt to re-argue the matter which cannot be done in the garb of review.

11. It is well settled law that the power of review under Order 47 Rule 1 of Code of Civil Procedure is very limited and it may be exercised only on the ground that :-

"(1) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed.

(2) Order made on account of some mistake.

(3) Error apparent on the face of the record, or for any other sufficient reason."

12. To appreciate the scope of review, it would be proper for this Court to discuss the object and ambit of Section 114 CPC as the same is a substantive provision for review when a person considering himself aggrieved either by a decree or by an order of Court. From the bare reading of Section 114 CPC, it appears that the said substantive power of review under Section 114 CPC has not laid down any condition as the condition precedent in exercise of power of review nor the said Section imposed any prohibition on the Court for exercising its power to review its decision. An application for review is more restricted

than that of an appeal and the Court of review has limited jurisdiction as to the definite limit mentioned in Order 47 Rule 1 CPC itself. The powers of review cannot be exercised as an inherent power nor can an appellate power can be exercised in the guise of power of review.

13. The dictionary meaning of the word "review" is "the act of looking after something again with a view of correction or improvement". It cannot be denied that the review is the creation of a statute. In the case of **Patel Narshi Thakershi vs. Pradyumansinghji Arjunsinghji, (1971) 3 SCC 844**, the Hon'ble Supreme Court has held that the power of review is not an inherent power. It must be conferred by law either specifically or by necessary implication. The review is also not an appeal in disguise.

14. We may now notice some of the judicial precedents in which Section 114 read with Order 47 Rule 1 CPC and/or Section 22(3)(f) of the Central Administrative Act have been interpreted and limitations on the power of the civil court/tribunal to review its judgment/decision have been identified.

15. In **Rajah Kotagiri Venkata Subbamma Rao v. Rajah Vellanki Venkatrama Rao (1899-1900) 27 IA 197** the Privy Council interpreted Sections 206 and 623 of the Civil Procedure Code and observed: (IA p.205)

"... Section 623 enables any of the parties to apply for a review of any decree on the discovery of new and important matter and evidence, which was not within his knowledge, or could not be produced by him at the time the decree was passed, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. It is not necessary to decide in this case whether the latter words should be confined to reasons strictly ejusdem generic with those enumerated, as was held in Roy Meghraj v. Beejoy Gobind Burral, ILR (1875) 1 Cal 197. In the opinion of Their Lordships, the ground of amendment must at any rate be something which existed at the date of the decree, and the section does not authorise the review of a decree which was right when it was made on the ground of the happening of some subsequent event."(emphasis added)

16. In **Hari Sankar Pal v. Anath Nath Mitter, 1949 FCR 36** a five-Judge Bench of the Federal Court while considering the question whether the Calcutta High Court was justified in not granting relief to non-appealing party, whose position was similar to that of the successful appellant, held: (FCR p. 48)

"That a decision is erroneous in law is certainly no ground for ordering review. If the court has decided a point and decided it erroneously, the error could not be one apparent on the face of the record or even analogous to it. When, however, the court disposes of a case without adverting to or applying its mind to a provision of law which gives it jurisdiction to act in a particular way, that may amount to an error analogous to one apparent on the face of the record sufficient to bring the case within the purview of Order 47 Rule 1, Civil Procedure Code."

17. In **Moran Mar Basselios Catholicos v. Mar Poulose Athanasius AIR 1954 SC 526** the Hon'ble Supreme Court interpreted the provisions contained in the Travancore Code of

Civil Procedure which are analogous to Order 47 Rule 1 and observed:

"32. ... Under the provisions in the Travancore Code of Civil Procedure which is similar in terms to Order 47 Rule 1 of our Code of Civil Procedure, 1908, the court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used therein.

It may allow a review on three specified grounds, namely,

(i) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed, (ii) mistake or error apparent on the face of the record and (iii) for any other sufficient reason.

It has been held by the Judicial Committee that the words ''any other sufficient reason' must mean ''a reason sufficient on grounds, least analogous to those specified in the rule'."

18. In **Thungabhadra Industries Ltd. v. Govt. of A.P. AIR 1964 SC 1372** it was held by the Hon'ble Supreme Court that a review is by no means an appeal in disguise whereof an erroneous decision can be corrected.

19. In **Aribam Tuleshwar Sharma v. Aribam Pishak Sharma (1979) 4 SCC 389** the Hon'ble Supreme Court considered the scope of the High Courts' power to review an order passed under Article 226 of the Constitution, referred to an earlier decision in **Shivdeo Singh v. State of Punjab AIR 1963 S.C. 1909** and observed: (Aribam Tuleshwar case (Supra), SCC p. 390, para 3)

"3. ... It is true as observed by this Court in Shivdeo Singh v. State of Punjab (Supra), there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate powers which may enable an appellate court to correct all manner of errors committed by the subordinate court."

20. In **K. Ajit Babu v. Union of India, (1997) 6 SCC 473**, it was held by the Hon'ble Supreme Court that even though Order 47 Rule 1 is strictly not applicable to the tribunals, the principles contained therein have to be extended to them, else there would be no limitation on the power of review and there would be no certainty or finality of a decision. A slightly different view was expressed in Gopabandhu Biswal v. Krishna Chandra Mohanty, (1998) 4 SCC 447). In that case it was held that the power of review granted to the tribunals is similar to the power of a civil court under Order 47 Rule 1.

21. In **Parsion Devi v. Sumitri Devi (1997) 8 SCC 715** it was held by the Hon'ble Supreme Court that: (SCC p. 716)

"Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected'. There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction. A review petition has a limited purpose and cannot be allowed to be "an appeal in disguise'."

22. In **Haridas Das v. Usha Rani Banik, (2006) 4 SCC 78** the Hon'ble Supreme Court made a reference to the Explanation added to Order 47 by the Code of Civil Procedure (Amendment) Act, 1976 and held:

"13. In order to appreciate the scope of a review, Section 114 CPC has to be read, but this section does not even adumbrate the ambit of interference expected of the court since it merely states that it "may make such order thereon as it thinks fit'. The parameters are prescribed in Order 47 CPC and for the purposes of this lis, permit the defendant to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason'. The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the court and thereby enjoyed a favourable verdict. This is amply evident from the Explanation to Rule 1 of Order 47 which states that the fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment. Where the order in question is appealable the aggrieved party has adequate and efficacious remedy and the court should exercise the power to review its order with the greatest circumspection."

23. In **Ajit Kumar Rath v. State of Orissa, (1999) 9 SCC 596**, the Hon'ble Supreme Court reiterated that power of review vested in the Tribunal is similar to the one conferred upon a civil court and held: (SCC p. 608, paras 30-31)

"30. The provisions extracted above indicate that the power of review available to the Tribunal is the same as has been given to a court under Section 114 read with Order 47 CPC. The power is not absolute and is hedged in by the restrictions indicated in Order 47. The power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or

for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for establishing it. It may be pointed out that the expression "any other sufficient reason' used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the Rule.

31. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in Order 47, would amount to an abuse of the liberty given to the Tribunal under the Act to review its judgment."

24. In the case of **Haridas Das vs. Usha Rani Banik (Smt.) and Others, (2006) 4 SCC 78** while considering the scope and ambit of Section 114 CPC read with Order 47 Rule 1 CPC it is observed and held in paragraph 14 to 18 as under:

"14. In Meera Bhanja v. Nirmala Kumari Choudhury, (1995) 1 SCC 170 it was held that:

"8. It is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC. In connection with the limitation of the powers of the court under Order 47 Rule 1, while dealing with similar jurisdiction available to the High Court while seeking to review the orders under Article 226 of the Constitution, this Court, in Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, (1979) 4 SCC 389 speaking through Chinnappa Reddy, J. has made the following pertinent observations:

"It is true there is nothing in Article 226 of the Constitution to preclude the High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found, it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits.

That would be the province of a court of appeal. A power of review is not to be confused with appellate power which may enable an appellate court to correct all manner of errors committed by the subordinate court.' "

15. A perusal of Order 47 Rule 1 shows that review of a judgment or an order could be sought: (a) from the discovery of new and important matters or evidence which after the exercise of due diligence was not within the knowledge of the applicant; (b) such important matter or evidence could not be produced by the applicant at the time when the decree was passed or order made; and (c) on account of some mistake or error apparent on the face of the record or any other sufficient reason."

25. In **State of Haryana v. M.P. Mohla, (2007) 1 SCC 457** the Hon'ble Supreme Court held as under: (SCC pp. 465-66, para 27)

"27. A review petition filed by the appellants herein was not maintainable. There was no error apparent on the face of the record. The effect of a judgment may have to be considered afresh in a separate proceeding having regard to the subsequent cause of action which might have arisen but the same by itself may not be a ground for filing an application for review."

26. In **Gopal Singh v. State Cadre Forest Officers' Assn., (2007) 9 SCC 369** the Hon'ble Supreme Court held that after rejecting the original application filed by the appellant, there was no justification for the Tribunal to review its order and allow the revision of the appellant. Some of the observations made in that judgment are extracted below: (SCC p. 387, para 40)

"40. The learned counsel for the State also pointed out that there was no necessity whatsoever on the part of the Tribunal to review its own judgment. Even after the microscopic examination of the judgment of the Tribunal we could not find a single reason in the whole judgment as to how the review was justified and for what reasons. No apparent error on the face of the record was pointed, nor was it discussed. Thereby the Tribunal sat as an appellate authority over its own judgment. This was completely impermissible and we agree with the High Court (Sinha, J.) that the Tribunal has travelled out of its jurisdiction to write a second order in the name of reviewing its own judgment. In fact the learned counsel for the appellant did not address us on this very vital aspect."

27. In the case of **Lily Thomas vs. Union of India, (2000) 6 SC 224**, it is observed and held by the Hon'ble Supreme Court that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power.

28. It is further observed in this judgment that the words "any other sufficient reason" appearing in Order 47 Rule 1 CPC must mean "a reason sufficient on grounds at least analogous to those specified in the rule" as was held in Chhajju Ram vs. Neki, AIR 1922 PC 112 and approved by the Hon'ble Supreme Courtthis Court in Moran Mar Basselios Catholicos vs Most Rev. Mar Poulose Athanasius, AIR 1954 SC 526.

29. In the case of **Inderchand Jain vs. Motilal, (2009) 14 SCC 663** in paragraphs 7 to 11 it is observed and held by the Hon'ble Supreme Court as under:

"7. Section 114 of the Code of Civil Procedure (for short "the Code") provides for a substantive power of review by a civil court and consequently by the appellate courts. The words "subject as aforesaid" occurring in Section 114 of the Code mean subject to such conditions and limitations as may be prescribed as appearing in Section 113 thereof and for the said purpose, the procedural conditions contained in Order 47 of the Code must be taken into consideration. Section 114 of the Code although does not prescribe any limitation on the power of the court but such limitations have been provided for in Order 47 of the Code; Rule 1 whereof reads as under:

"17. The power of a civil court to review its judgment/decision is traceable in Section 114 CPC. Tjhe grounds on which

review can be sought are enumerated in Order 47 Rule 1 CPC, which reads as under:

1. Application for review of judgment.--(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment of the court which passed the decree or made the order.' "

8. An application for review would lie inter alia when the order suffers from an error apparent on the face of the record and permitting the same to continue would lead to failure of justice. In Rajendra Kumar v. Rambai this Court held: (SCC p. 514, para 6) "6. The limitations on exercise of the power of review are well settled. The first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from any error apparent on the face of the order and permitting the order to stand will lead to failure of justice. In the absence of any such error, finality attached to the judgment/order cannot be disturbed."

9. The power of review can also be exercised by the court in the event discovery of new and important matter or evidence takes place which despite exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the order was made. An application for review would also lie if the order has been passed on account of some mistake.

Furthermore, an application for review shall also lie for any other sufficient reason.

10. It is beyond any doubt or dispute that the review court does not sit in appeal over its own order. A rehearing of the matter is impermissible in law. It constitutes an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. It is also trite that exercise of inherent jurisdiction is not invoked for reviewing any order.

11. Review is not appeal in disguise. In Lily Thomas v. Union of India this Court held: (SCC p. 251, para 56) "56. It follows, therefore, that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise."

30. What can be said to be an error apparent on the face of the proceedings has been dealt with and considered by the Hon'ble Supreme Court in the case of **T.C. Basappa vs. T.Nagappa, AIR 1954 SC 440**. It is held that such an error is an error which is a patent error and not a mere wrong decision. In the case of **Hari Vishnu Kamath vs. Ahmad Ishaque, AIR 1955 SC 233**, it is observed as under:

"It is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. The real difficulty with

reference to this matter, however, is not so much in the statement of the principle as in its application to the facts of a particular case. When does an error cease to be mere error, and become an error apparent on the face of the record? Learned counsel on either side were unable to suggest any clear-cut rule by which the boundary between the two classes of errors could be demarcated."

31. In the case of **Parsion Devi vs. Sumitri Devi (1997) 8 SCC 715** in paragraph 7 to 9 it is observed and held by the Hon'ble Supreme Court as under:

"7. It is well settled that review proceedings have to be strictly confined to the ambit and scope of Order 47 Rule 1 CPC. In Thungabhadra Industries Ltd. v. Govt. of A.P., AIR 1964 SC 1372 this Court opined:

"What, however, we are now concerned with is whether the statement in the order of September 1959 that the case did not involve any substantial question of law is an "error apparent on the face of the record'). The fact that on the earlier occasion the Court held on an identical state of facts that a substantial question of law arose would not per se be conclusive, for the earlier order itself might be erroneous. Similarly, even if the statement was wrong, it would not follow that it was an "error apparent on the face of the record', for there is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by "error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error."

32. Again, in **Meera Bhanja v. Nirmala Kumari Choudhury, (1995) 1 SCC 170** while quoting with approval a passage from **Aribam Tuleshwar Sharma v. Aribam Pishak Sharma AIR 1979 SC 1047**, the Hon'ble Supreme Court once again held that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

"9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not selfevident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise".

33. In the case of **State of West Bengal and Others vs. Kamal Sengupta and Anr., (2008) 8 SCC 612**, the Hon'ble Supreme Court had an occasion to consider what can be said to be "mistake or error apparent on the face of record". In para 22 to 35 it is observed and held as under:

"22. The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 47 Rule 1

CPC or Section 22(3)(f) of the Act. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision."

34. The principles which can be culled out from the abovenoted judgments are:

"(i) The power of the Tribunal to review its order/decision under Section 22(3)(f) of the Act is akin/analogous to the power of a civil court under Section 114 read with Order 47 Rule 1 CPC.

(ii) The Tribunal can review its decision on either of the grounds enumerated in Order 47 Rule 1 and not otherwise.

(iii) The expression "any other sufficient reason" appearing in Order 47 Rule 1 has to be interpreted in the light of other specified grounds.

(iv) An error which is not self-evident and which can be discovered by along process of reasoning, cannot be treated as an error apparent on the face of record justifying exercise of power under Section 22(3)(f).

(v) An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

(vi) A decision/order cannot be reviewed under Section 22(3)(f) on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.

(vii) While considering an application for review, the tribunal must confine its adjudication with reference to material which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

(viii) Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier."

35. In view of above, no ground for review is made out.

36. Application is accordingly rejected. to place their grievance before the Court.

(2022)05ILR A1076
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.05.2022

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Writ - A No. 72166 of 2005

Ex. Constable Radhey Raman Yadav
...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri M.M. Khan, Sri Mustaqeem Ahmad, Sri Rajesh Kumar, Sri Yashodanand Shukla

Counsel for the Respondents:
Sri K.C. Sinha A.S.G.I., Sri Jitendra Prasad Mishra, Sri Kaushik Chatterjee, Sri Kaushik Chatterji, Sri M.P. Shukla, Sri Prem Narayan Rai, S.C.

A. Service Law - Central Reserve Police Force Act, 194 - Sections 9, 10, 11 & 12 - The petitioner was suspended on account of unauthorised absent from work. The Court held that the order of dismissal from service is disproportionate to the offence committed by the petitioner. Absent from work without cause is a less heinous crime under the Act for which punishment ought to have been a little less. (Para 8)

Writ Petition Partly Allowed. (E-10)

List of Cases cited:-

1. Suresh Dhar Dubey Vs UOI 2018 (2) ADJ 854

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

1. Heard Sri Rajesh Kumar assisted by Sri Yashodanand Shukla, learned counsel for the petitioner and Sri Jitendra Prasad Mishra, learned counsel for the respondents.

2. This writ petition has been filed against an order of dismissal dated 20.3.1992 and also against the orders dated 27.4.2005 and 5.9.2005 passed in the appeal and the revision respectively. By these orders the appeal and the revision filed by the petitioner were also dismissed.

3. The petitioner who was working as a Constable in the Central Reserve Police Force eversince 1985 was always much appreciated for his work and, therefore, had also been awarded with various rewards and appreciations from the Governor, the Director General of Central Reserve Police Force, Inspector General of Police and the Commandant. Apart from these awards, the petitioner was also a recipient of various cash rewards.

4. The facts of the case are that when the petitioner was on duty on 24.12.1991, a fellow Constable by the name of Haidar Ali informed the petitioner about the serious illnesses of his mother and that of his child. Upon getting the information, the petitioner was very upset. He tried to give an application on 24.12.1991 for 16 days' leave. However, no orders were passed on that application. On the next day, it was a Christmas holiday and no officer was available for the granting of leave and, therefore, on 26.12.1991, the petitioner after writing an application and after leaving the same in the office of the Commandant of the Headquarter, left for his village. From his village also, the petitioner kept writing through post. When the petitioner re-joined his duty on 23.1.1992, he was placed under suspension on 24.1.1992 and thereafter he was also served with a charge of desertion on 25.1.1992. An Enquiry Officer was appointed and thereafter the Enquiry Officer submitted his enquiry report upon the completion of the enquiry. On 20.3.1992, an order of dismissal was passed for the petitioner's unauthorized absence. The petitioner filed an appeal and when that was rejected on 27.4.2005, he filed a Revision. Upon the dismissal of the Revision on 5.9.2005, the instant writ petition was filed.

5. Learned counsel for the petitioner has submitted that under the Central Reserve Police Force Act, 1949, sections 9 to 12 deal with offences and punishments. Section 9 deals with "more heinous offences" while section 10 deals with "less heinous offences". Section 11 deals with minor punishments and section 12 deals with punishments which are ranging from dismissal to imprisonment. Since learned counsel for the petitioner had brought to the notice of the Court sections 9 to 12, they are being reproduced here as under :-

"OFFENCES AND PUNISHMENTS

More heinous offences.

9. Every member of the force who-

(a) begins, excites, causes or conspires to cause or joins in any mutiny, or being present at any mutiny, does not use his utmost endeavour to suppress it, or knowing, or having reason to believe in, the existence of any mutiny, or of any intention or conspiracy to mutiny or of any conspiracy against the State does not, without delay, give information thereof to his superior officer; or

(b) uses, or attempts to use, criminal force to, or commits an assault on, his superior officer, whether on or off duty, knowing or having or having reason to believe him to be such; or

(c) shamefully abandons or delivers up any post or guard which is committed to his charge, or which it is his duty to defend; or

(d) directly or indirectly holds correspondence with, or assists or relieves any person in arms against the State or omits to discover immediately to his superior officer any such correspondence coming to his knowledge; or who, while on active duty,-

(e) disobeys the lawful command of his superior officer; or

(f) deserts the Force; or

(g) being a sentry, sleeps upon his post or quits it without being regularly relieved or without leave; or

(h) leaves his commanding officer, or his post or party, to go

in search of plunder; or

(i) quits his guard, picquet, party or patrol without being regularly relieved or without leave; or

(j) uses criminal force to, or commits an assault on, any person bringing provisions or other necessaries to campo or quarters, of forces a safeguard or breaks into any house or other place for plunder, or plunders, destroys or damages property of any kind; or

(k) intentionally causes or spreads a false alarm in action or in camp, garrison or quarters; or

(l) displays cowardice in the execution of his duty shall be punishable with imprisonment for a term which may extend to fourteen years or with imprisonment for a term which may extend to fourteen years or with fine which may extend to three months pay or with fine to that extent in addition to such sentence of transportation or imprisonment.

Less heinous offences

10. Every member of the force who-

(a) is in a state of intoxication when on, or after having been warned for, any duty or on parade or on the line of march; or

(b) strikes or attempts to force any sentry; or

(c) being in command of a guard, piquet or patrol, refuses to receive any prisoner or person or person duly committed to his charge or without proper authority releases any person or prisoner placed under his charge or negligently suffers any such prisoner or person to escape; or

(d) being under arrest or in confinement, leaves his arrest or confinement, before he is set at liberty by lawful authority; or

(e) is grossly in-subordinate or insolent to his superior officer in the execution of his office; or

(f) refuses to superintend or assist in the making of any fieldwork or other work of any description ordered to be made either in quarters or in the field; or

(g) strikes or otherwise ill-uses any member of the force subordinate to him in rank or position; or

(h) designedly or through neglect injures or loses or fraudulently disposes of his arms, clothes, tools, equipments, ammunition or accoutrement or any such articles entrusted to him or belonging to any other person; or

(i) malingers or feigns or produces disease or infirmity in himself, or intentionally delays his cure, or aggravates his disease or infirmity; or

(j) with intent to render himself or any other person unfit for service, voluntarily causes hurt to himself or any other person; or

(k) does not, when called upon by his superior officer so to do or upon ceasing to be a member of the force forthwith deliver up, or duly account for, all or any arms, Ammunition, stores, accoutrements or other property issued or supplied to him or in his custody or possession as such member; or

(l) knowingly furnishes a false return or report of the number or state of any men under his command or charge or of any money, arms ammunition, clothing, equipments, stores or other property in his charge, whether belonging to such men or to the Government or to any member of or any

(m) person attached to the force or who through design or culpable neglect, omit, or refuses to make or send any return or report of the matters aforesaid; or

(n) absent himself without leave, or without sufficient cause overstays leave granted to him: or

(o) is guilty of any act or omission which, though not specified in this Act, is prejudicial to good order and discipline: or

(p) contravenes any provision of this Act for which no punishment is expressly provided: or who, while not on active duty :

(q) commits any of the offences specified in clauses (e) to (1) (both inclusive) of Section 9 shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to three months pay, or with both.

Minor punishments.

11. (1) The Commandant or any other authority or officer as may be prescribed, may, subject to any rules made under this Act award in lieu of or in addition to, suspension or dismissal any one or more of the following punishments to any member of the force whom he considered to be guilty of disobedience, neglect of duty, or remissness in the discharge of any duty or of other misconduct in his capacity as a member of the force, that is to say :

(a) reduction in rank;

(b) fine of any amount not exceeding one month's pay and allowances;

(c) confinement to quarters, lines or camp for a term not exceeding one month;

(d) confinement in the quarter-guard for not more than twenty eight days with or without punishment drill or extra guard, fatigue or other duty; and

(e) removal from any office of distinction or special emolument in the force.

(2) Any punishment specified in clause (c) or clause (b) of sub-section (1) may be awarded by any gazetted officer when in command of any detachment of the force away from headquarters, provided he is specially authorised in this behalf by the Commandant.

(3) The Assistant Commandant, a Company Officer or a Subordinate Officer, not being below the rank of Subedar or Inspector commanding a separate detachment or an outpost, or in temporary command at the headquarters of the force,

may, without a formal trial, award to any member of the force who is for the time being subject to his authority any one or more of the following punishments for the commission of any petty offence against discipline which is not otherwise provided for in this Act or which is not of a sufficiently serous nature to require prosecution before a Criminal Court that is to say :

(a) confinement for not more that seven days in the quarter guard or such other place as may be considered suitable, with forfeiture of all pay and allowances during its continuance;

(b) punishment drill, or extra guard, fatigue or other duty, for not more than thirty days, with or without confinement to quarters, lines, or camp.

(4) A Jemadar or Sub-Inspector who is temporarily in command of a detachment or an outpost may in like manner and for the commission of any like offence award to any member of the force for the time being subject to his authority any of the punishment specified in clause (b) of sub-section (3) for not more than fifteen days.

Place of imprisonment and liability to dismissal on imprisonment

12. (1) Every person sentenced under this Act to imprisonment may be dismissed from the force and shall further be liable to forfeiture of pay, allowance and any other moneys due to him, as well as of any medals and decorations received by him.

(2) Every such person shall, if he is so dismissed, be imprisoned in the prescribed prison, but if he is not also dismissed from the force he may if the Court of the Commandant so directs, be confined in the quarter guard or such other place as the Court or the Commandant may consider suitable."

6. Learned counsel for the petitioner submits that since under section 10(n), absenting without leave was considered a less heinous offence, the petitioner should have been given a minor punishment. Learned counsel for the petitioner in this regard has heavily relied upon a judgment of this Court in **Suresh Dhar Dubey vs. Union of India & Ors.** reported in **2018 (2) ADJ 854**. Learned counsel for the petitioner further submitted that the Constable Haidar Ali, who had informed him about the illnesses of his mother and that of his child, was never allowed to be produced in the enquiry, else he would have informed the Enquiry Officer with regard to the fact that in fact the mother and the child of the petitioner were ill. Still further, it has been argued by learned counsel for the petitioner that the petitioner had produced the medical prescriptions/certificates which went to show that the mother and the child of the petitioner were ill but these evidence were not considered by the Enquiry Officer. Still further, learned counsel for the petitioner argued that for being absent and that too because of the fact that there was a cause, the petitioner's case ought to have been considered leniently and he should not have been punished with dismissal.

7. Learned counsel appearing for the Central Reserve Police Force Sri Jitendra Prasad Mishra, however, in reply submitted that the petitioner's absenting without any application from a disciplined force would mean a major offence and, therefore, the petitioner was rightly dismissed from his service.

8. Having considered the submissions advanced by learned counsel for the parties, the Court is of the view that the order of dismissal from service was

disproportionate to the offence committed by the petitioner. In fact the Central Reserve Police Force itself considers absenting without cause to be a "less heinous offence" and for which the punishment also ought to have been a little lesser. The Court also considers that the punishment awarded to the petitioner exceeded the offence. The punishment was, therefore, definitely disproportionate to the offence which was committed by the petitioner.

9. Under such circumstances, the order dated 20.3.1992 passed by the Commandant, 127th Battalion, Central Reserve Police Force, Allahabad, the order dated 27.4.2005 passed by the Appellate Authority and the order dated 5.9.2005 passed by the Revisional Authority are quashed and are set-aside. The petitioner could have been awarded a minor punishment of fine etc. in the shape of stoppage of a few months' salary. The petitioner shall now be reinstated in service with all backwages. However, the wages of three months shall not be paid to the petitioner which stoppage shall be considered as a fine imposed upon the petitioner.

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

16. So even if the application is registered as complaint case even then under process of inquiry Magistrate has ample power to direct for investigation to be made by police officer or by such officer as he thinks fit. So at the stage of inquiry under section 202 Cr.P.C. Magistrate may opt for that.

17. Considering the entire facts and circumstances and the legal proposition there appears to be no necessity for interference. The impugned order passed by the learned Magistrate is sound and reasoned one and does not suffer from any illegality.

18. The application U/s 482 Cr.P.C. is devoid of merit and is hereby dismissed.

(2022)05ILR A1081
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.05.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Spl. Appeal D No. 473 of 2021

State of U.P. & Ors. ...Appellants
Versus
Raj Kumar Srivastava ...Respondent

Counsel for the Appellants:
C.S.C.

Counsel for the Respondent:
Avinash Kant Tripathi

A. Service Law - The U.P. Regularisation of Persons working on Daily Wages or On Work Charge or On Contract in Government Departments On Group "C" and Group "D" Posts (Outside the Purview of the U.P. Public Service Commission) Rules, 2016 - Rule 2(iii), 6(3)

The respondent is seeking regularisation under the Rules 2(iii) of 2016. The criteria given under the said Rules requires the respondent to be employed in a scheme or project of the State or Government of India sponsored programmes but also that he should have been employed on consolidated pay/fixed honoraria. Since the respondent is employed on daily wage basis therefore exclusion as envisaged in Rule 2(iii) will not cover him and therefore he is not entitle to

seek regularisation under the said Rules. (Para 15)

It is further observed that by virtue of Rule 6(3) the appointing authority shall constitute a Selection Committee which shall consider the cases of the candidates on the basis of their records and can even hold interview of the candidates, if find necessary. (Para 17)

The respondent-employee has been employed under the free-boring scheme which is perennial in nature and therefore denial of regularisation in service to such an employee would be unfair. The Court, therefore, directed the competent authority to reconsider the regularisation in accordance with Rule 6 of 2016. (Para 20)

Special Appeal Disposed of. (E-10)

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.
&
Hon'ble Subhash Vidyarthi, J.)

Order on the Delay Condonation Application

1. Having regard to the facts stated in the affidavit filed in support of the application seeking condonation of delay, the application is allowed and the delay in preferring the special appeal is hereby condoned.

Order on the Appeal

2. Heard Shri Jaideep Narain Mathur, learned Senior Advocate assisted by Shri V.P. Nag, learned State Counsel for the appellant-State authorities and Shri D.N. Shukla, learned counsel for the sole respondent.

3. Under challenge in this intra-court appeal is the judgment and order dated 21-09-2021 passed by the learned Single Judge in Writ Petition No. 604 (S/S) of 2021 whereby the writ petition has been allowed and the appellant-State authorities have been directed to regularize the services of the respondent-petitioner under the provisions of The Uttar Pradesh Regularisation of Persons working on Daily Wages or On Work Charge or On Contract in Government Departments On Group "C" And Group "D" Posts (Outside The Purview of the Uttar Pradesh Public Service Commission) Rules, 2016 (hereinafter referred to as "2016 Rules).

4. Further direction issued by the learned Single Judge is that if there no vacancy is available, the appellants shall create a supernumerary post so that services of the respondent may be regularized against such post.

5. Shri Mathur, learned Senior Advocate has contended that the judgment and order dated 21-09-2021 passed by the learned Single Judge is apparently erroneous for the following two reasons:

(i) That Rule 6 (3) of 2016 Rules clearly mandates that for the purposes of considering regularisation of a daily wager or a work charged employee or an employee working on contract basis, the appointing authority has to constitute a Selection Committee in accordance with the relevant provisions of the service Rules and thereafter the Selection Committee is required to consider the cases of the candidates on the basis of their records and that the Selection Committee, if it considers necessary, may also interview the candidate to assess his suitability whereas the learned Single Judge while passing the judgment and order under appeal appears to have lost

sight of the said Rules and has directed the appellant to regularize the services of the respondent without consideration by the Selection Committee and;

(ii) That 2016 Rules clearly exclude from its ambit the person/persons engaged/employed in a scheme or project of the State Government or Government of India sponsored programmes and since engagement of the respondent was made in a scheme known as "free-boring scheme" hence he is not covered by 2016 Rules and accordingly the direction issued by the learned Single Judge in the order under appeal is vitiated.

6. On the other hand learned counsel representing the respondent has opposed the prayers made in this special appeal and has submitted that the order under appeal passed by the learned Single Judge does not warrant any interference and hence the special appeal is liable to be dismissed at its threshold.

7. We have considered the rival submissions made by the learned counsel representing the respective parties and have also gone through the records available before us on this special appeal.

8. Before adverting to the submissions made by the learned counsel for the parties certain background facts which are necessary to be noticed in this case are being stated.

9. The respondent is said to have been engaged in a scheme of the State Government known as "free-boring scheme" on daily wages w.e.f 1st of October, 1990 without any written order. He is said to have continued in the said capacity, however, in the year 1997 the services of the respondent were dispensed with which led the respondent to file Writ Petition No. 284(S/S) of 1998. However, the said Writ Petition No. 284(S/S) of 1998 was dismissed on the ground of availability of an alternative remedy under the Labour Laws and accordingly this Court by means of the judgment and order dated 23-11-1998 refused to entertain the said writ petition by observing that the respondent has an efficacious and alternative remedy. Subsequent to dismissal of the said writ petition by this Court on 23-11-1998 the matter was referred to the Labour Court which gave its award on 09-02-2005 wherein it was provided that the respondent shall be reinstated in service however he will not be entitled to any back wages. The said award by the Labour Court dated 09-02-2025 came to be challenged by the appellant-State authorities before this Court by means of filing a Writ Petition no. 841 (S/S) of 2005. The said writ petition was dismissed by means of judgment and order dated 07-11-2006. Challenging the said order passed by this Court, the appellant-State authorities preferred Special Leave to Appeal (Civil) No. 6727 of 2008 which too was dismissed by the Apex Court by means of the judgment and order dated 10-02-2012.

10. Prior to dismissal of the aforesaid Special Leave to Appeal by the Apex Court, the respondent was reinstated on 22-01-2007. He thereafter, filed Writ Petition No. 19401 (S/S)/2019 claiming his regularisation which was decided by means of the judgment and order dated 18-07-2019 whereby the apellant-State authorities were directed to consider the representation moved by him seeking his regularisation. In compliance of the order dated 18-07-2019 passed by this Court in Writ Petition No. 19401 (S/S)/2019 the matter relating to regularisation of services of the respondent was considered by the appellant-State

authorities which was rejected by means of the order dated 19-09-2019. It is this order dated 19-09-2019 which became the subject-matter of challenge before this Court in Writ Petition No. 604 (S/S) of 2021 which has been decided by the judgment and order dated 21-09-2021 which is under appeal herein.

11. If we consider the submissions made by the learned Senior Advocate representing the appellant-State authorities what we find is that the contention on behalf of the appellants regarding exclusion of the respondent from operation of the 2016 Rules is absolutely misconceived.

12. As observed above learned Senior Advocate has relied upon Rule 2(iii) of the 2016 Rules and submitted that since the respondent was initially appointed on daily wage basis in a scheme known as "free-boring scheme", as such 2016 Rules will have no application and hence the respondent was not entitled to be considered for regularisation of his services under the said Rules.

Rule 2 of the 2016 Rules is extracted hereinbelow:-

"2. These rules shall not apply for regularisation of:

(i) Seasonal Collection Ameen/Seasonal Peon;

(ii) Person/Persons engaged/employed/deployed for seasonal works in Horticulture Department, Agriculture Department, Agriculture Education Department and such similar Departments;

(iii) Person/Persons engaged/employed/deployed on consolidated pay/fixed honoraria in the scheme/projects of State Government or Government of India sponsored programmes;

(iv) Person/Persons engaged/employed/deployed as Home Guard Volunteer and Prantiya Rakshak Dal Volunteer;

(v) Person/Persons engaged/employed/deployed as Shiksha Mitra and Kisan Mitra;

(vi) Person/persons engaged/employed/deployed under MNREGA Scheme (Rural Development Department);

(vii) Person/Persons engaged/ employed/deployed in Aaganbadi Kendra (Women and Child Welfare Department);

(viii) Person/persons engaged/employed/deployed as Asha Bahu (Medical Health and Family Welfare Department);

(ix) Such person/persons or group of persons as notified by the State Government from time to time.

13. The aforesaid 2016 Rules carve out certain exclusions where the said Rules will not operate.

14. Sub Rule 2 (iii) of 2016 Rules provides that 2016 Rules will have no application in case a person is engaged or employed or deployed on consolidated pay/fixed honoraria in the scheme/projects of State Government or Government of India sponsored programmes. What is to be noticed in Rule 2(iii) for exclusion of 2016 Rules it is that is not only that the person seeking regularisation under the said Rules should have been employed in a scheme or project of the State or Government of India sponsored programmes but also that he should have been employed on consolidated pay/fixed honoraria.

15. There is no dispute, so far as the present case is concerned, that the respondent was never employed on consolidated pay/fixed honoraria in the scheme known as free-boring scheme; rather he was always employed on daily wage basis. Thus, in our considered opinion exclusion as envisaged in Rule 2 (iii) of 2016 Rules will not cover those employees, even if they have been employed in a scheme or project, who are paid their remuneration on daily wage basis. It is needles to say that there always exists a difference between remuneration paid on consolidated pay/fixed honoraria basis and remuneration paid on daily wage basis.

16. In the aforesaid view of the matter, we are not impressed by the argument advanced by the learned counsel for the appellant-State authorities that by operation of rule 2(iii) of 2016 Rules the respondent shall not be entitled to seek regularisation under the said Rules.

17. However, having observed as above, what we also notice is that sub-rule (3) of Rule 6 of 2016 Rules clearly mandates that for the purposes of consideration of regularisation of a daily wager under sub-rule (1) of Rule 6 of 2016 Rules, appointing authority shall constitute a Selection Committee in accordance with the relevant provisions of the service Rules. The occurrence of the word "shall' in sub-rule (3) of rule 6 of 2016 Rules thus makes its mandatory that for the purposes of regularisation of any daily wager or work charged employee, the appointing authority has to constitute a Selection Committee. Sub Rule (5) of rule 6 of 2016 Rules further provides that the Selection Committee "shall' consider the cases of the candidates on the basis of their records and if the Selection Committee considers its necessary, it may even hold the interview of the candidate seeking regularisation of his services, for the purposes of assessing their suitability. Thus, as per the scheme enunciated in rule (6) of 2016 Rules, without assessment of the suitability of a daily wager/work charge employee by a Selection Committee to be constituted by the appointing authority in terms of the relevant service rules, no regularisation can be made.

18. In this view of the matter, what we find is that the learned Single Judge appears to have lost sight of the provisions contained in sub-rule (3) and sub-rule (5) of Rule 6 of 2016 Rules. Even otherwise, it is the employer who needs to judge the suitability of an employee seeking regularisation of his services and the satisfaction of the employer for the purpose of regularizing the service of a daily wager/work charge cannot be substituted by the satisfaction of this Court.

19. It is also noticeable that though learned Single Judge while has allowed the writ petition, however, the order dated 19-09-2019 has not been set aside.

20. When we peruse the order dated 19-09-2019 what we find is that the only reason indicated therein is that the respondent is not covered by 2016 Rules in terms of the provisions contained in rule 2 (iii) of the 2016 Rules. As observed above, rule 2(iii) of 2016 Rules will have no application in the present case for the reason that though the respondent was employed in a scheme known as free-boring scheme, however, he was not employed on consolidated/fixed honoraria basis. The free-boring scheme as is clear from the perusal of the Government Order

dated 31st of May 2016 has been in vogue in the State of U.P. since February 1983. There is no denial of the fact that the scheme is perennial in nature and as such denial of regularisation in service to an employee who is working in such a scheme which is perennial in nature, in our considered opinion, would amount to unfair labour practice. Such a practice is not expected from a modern employer like State, that too, in a welfare State. Such a practice is clearly exploitative for the reason that the scheme is not time bound; it has been continuing since 1985 and as on date there is no likelihood of the scheme being discontinued.

21. On the aforesaid counts, we find that the reasons indicated by the appellant-State authorities while passing the order dated 19-09-2019 are not tenable.

22. For the reasons given and discussion made above, this special appeal is **disposed of** with the following directions and orders:-

(A) The order dated 19-09-2019 passed by the Executive Engineer (Minor Irrigation), Division Raebareli as is available at page 116 of this special appeal is hereby quashed.

(B) The competent authority is directed to reconsider the matter of regularisation of the respondent in accordance with rule 6 of 2016 Rules after constituting the Selection Committee as provided in sub-rule 3 of Rule 6 of 2016 Rules within a period of two months from the date a certified copy of this order is produced before the competent authority.

(C) Since we have quashed the order dated 19-09-2019 as such the reasons given therein will not constitute a valid reason for denying the benefit of regularisation in services to the respondent and when the matter is considered afresh under this order the Selection Committee shall only judge the suitability as per the requirement of the rule 6 of 2016 Rules.

(D) Judgement and order dated 21-09-2021 passed by learned Single Judge in Writ Petition No. 604 (S/S) of 2021, shall stand modified to the extent aforesaid.

23. There shall be no order as to costs.

(2022)05ILR A1086
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.05.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Writ-A No. 2894 of 2022

Zuhair Bin Saghir ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Hemant Kumar Mishra, Arti Ganguly

Counsel for the Respondents:
C.S.C.

A. Service Law - The Waqf Act, 1995 - Section 51 - U.P. Vigilance Establishment Act, 1965 - Section 2(2) - Urban Land (Ceiling Regulation) Act, 1986 - Prevention of Corruption (Amendment) Act, 2018 - Sections 7 & 13(1) A read with 13(2) - I.P.C., 1860 - Sections 409 & 120-B - Prevention of Corruption Act, 1988 – Sections 19(3)(b), 7 & 13

The petitioner along with other revenue officers were found involved in acts of corruption. The petitioner contended that the Government orders issued from time to time governing enquiry on a complaint filed against the government servant was not complied. The Court, on perusal of government orders, observed that it is always open for the

competent authority/government to conduct discreet enquiry on any information received depending upon the nature of allegation. The direction in the Government orders seeks to protect the government servants from the onslaught of frivolous complaints but that does not mean that the government servants can take shelter under the Government Orders to escape enquiry and prosecution for their corrupt acts. Any defect in the fact finding enquiry would not vitiate the consequential vigilance enquiry or order of sanction for prosecution against the government officer, provided there is, prima facie, material to support the allegations against the government servant. (Para 20)

Writ Petition Dismissed. (E-10)

List of Cases cited:-

1. Chandrika Prasad Yadav Vs St. of Bihar 2004 6 SCC 331

2. U.O.I. Vs Prakash P. Hinduja (2003) 6 SCC 195

3. Vineet Narain & Ors. Vs U.O.I. 1998 (1) SCC

4. H.N. Rishbud Vs St. of Delhi 1955 SCR 1150

5. Prabhu Vs Emperor AIR 1944 SC 73
6. Lumbhardar Zutshi Vs The King AIR 1950 PC 26

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

1. Heard learned counsel for the petitioner and learned Standing Counsel.

2. Petitioner, by the instant writ petition, has raised challenge to the order dated 16 March 2022, passed by the first respondent, Principal Secretary, Vigilance Department, Lucknow, rejecting the representation of the petitioner pursuant to the directions issued by this Court.

3. The facts giving rise to the present writ petition, briefly stated, is that petitioner is a civil servant and at the time of the alleged incident was posted as District Magistrate, Moradabad. It appears that a complaint dated 23 January 2017, came to be filed for alleged corrupt practices committed by the petitioner in discharge of his duty, accordingly, decision was taken to initiate vigilance enquiry and criminal prosecution against the petitioner pursuant to an enquiry report. Aggrieved, petitioner approached this Court by filing a petition being Writ Petition No. 32018 (M/B) of 2019. The relief claimed by the petitioner, noted in the order of the writ Court reads thus:

"This petition has been filed for quashing the impugned open inquiry report conducted by opposite party No.2 in pursuance of the unauthorized complaint made by the opposite party No.4, as contained in Annexure No.2 to the writ petition, contrary to the government orders dated 9.5.1997, 1.8.1997, 19.4.2012 and 24.5.2012 which is the basis of initiating the criminal prosecution against the petitioner, submitted by opposite party No.2, before opposite party No.1."

4. The writ petition came to be disposed of directing the Chief Secretary to decide the representation of the petitioner in light of Government Orders. The relevant portion of the order dated 08 January 2020 is extracted:

"In the present case, vigilance inquiry has been conducted directly without adhering to the provisions of the Government Orders. The Government Orders clearly mention that first of all the complaints of the complainants should be ascertained preferably it is a normal procedure that class-I officers or other

officers who are holding responsible posts, if a complaint is made against such persons, an affidavit should accompany the complaint. The first action is to be taken by the disciplinary authority or the appointing authority to the effect that a show cause notice should be given and in case it so pleases departmental inquiry can be initiated. It is very interesting to note that even in the complaint and the impugned sanction order, the impugned action taken by the opposite parties, the charge is not very clear. There is no charge of corruption, embezzlement or any other financial loss to the State Government. There has been no money transaction, there is no allegation of bribe, there is no allegation of any nepotism or malafide intentions.

At this juncture, the petitioner has submitted that his sole contention is on the premise that he has never been given any opportunity of hearing in the inquiry as it was required in the departmental procedure to explain his case. He has not been able to produce relevant documents and the judgments of Hon'ble Supreme Court.

The Court feels that interest of justice will be satisfied if the petitioner is given a chance to represent his case before the Chief Secretary.

Accordingly, we direct that the petitioner will move a detailed representation before the Chief Secretary annexing all the relevant documents including the Government Orders and the provisions of the Constitution, his defence and the objections against the complainant and his complaint. This shall be done within a maximum period of fifteen days from today.

In case, such a representation is moved by the petitioner before the Chief Secretary, U.P., he will examine it and pass appropriate speaking orders after considering all the reasons which have been enumerated in the representation. It is provided that the opposite parties will not proceed against the petitioner till the representation is decided. The decision so taken shall be communicated to the petitioner.

With these observations the writ petition stands disposed of."

5. Learned counsel for the petitioner, while assailing the impugned order, has made the following submissions: (i) that a vigilance enquiry cannot be directly initiated on a fictitious complaint bypassing the various Government Orders issued from time to time to protect the officers against malicious complaint; (ii) that pursuant to Government Order dated 14 April 1981, the complaint, as far as possible, should be investigated by an officer who is two rank higher; (iii) that on a complaint made against a Class-I officer, before taking cognizance of the matter, an affidavit shall be called from the complainant and after verifying and ascertaining the identity of the complainant, the complaint should be entertained; (iv) that the mandate of Government Order dated 19 April 2012, specifically directs that the earlier Government Orders be strictly complied before entertaining a complaint; (v) that in view of Government Order dated 24 May 2012, it is mandated that departmental proceedings should be initiated and if culpability of the government officer is found then in that event decision should be taken to lodge F.I.R.; (vi) that Government Order dated 6 August 2018, reiterated that the complaints received against the government officers should be dealt with as per earlier Government Orders dated 9 May 1997, 1 August 1997 and 19 April 2012; (vii) that the aforenoted Government Orders have not been considered nor complied while deciding the representation of the petitioner; (viii) that the

State Government has adopted pick and choose policy while dealing with the complaints filed against the government servants; (ix) that the basis for initiating vigilance enquiry by lodging F.I.R. is a report of Senior Superintendent of Police, Moradabad, obtained flouting the Government Orders.

6. In rebuttal, learned Standing Counsel submits that petitioner while posted as District Magistrate indulged in acts of corruption while discharging official duty, which was duly enquired into by the Revenue authorities and the Senior Superintendent of Police, duly noted in the impugned order. The Government Orders are directory and not mandatory, in any case, upon discreet enquiry and departmental enquiry petitioner has been found of have indulged in corrupt practices in discharge of his official function causing huge loss to the State Exchequer. In the circumstances, it is not open for the petitioner to take recourse under the Government Orders to escape the consequences. The writ petition being devoid of merit and is liable to be dismissed.

7. Rival submissions fall for consideration.

8. The short question involved is as to whether a vigilance enquiry can be initiated on a complaint bypassing the various Government Orders, issued from time to time, by the State Government or in the alternative whether the vigilance enquiry initiated by the State Government would vitiate for want of compliance of the Government Orders dealing with complaints received against the government servant.

9. I have perused the impugned order with the assistance of learned counsel for the parties. The impugned order is a lengthy order and the objections raised by the petitioner in both the representations has been dealt with in detail. In para 8 of the impugned order, it is noted that petitioner while posted as District Magistrate, Moradabad, from 22 September 2015 to 28 April 2015, pursuant to directions of the Government, a six member committee headed by the petitioner was constituted for the construction of a jail premises at 40.334 hectare. The committee submitted a report to the State Government through, the Divisional Commissioner, proposing that land be purchased at four times the circle rate at Rs. 97,80,000/- per hectare. In the proposal at serial no. 14 gata no. 1168 (kha), admeasuring 1.319 hectare land was included, however, no reference was made that the land vested with Waqf Al Aulad. In other words the land vesting with the Waqf was made a part of the proposal for purchase at the proposed rate, thereafter, an order on the proposal was obtained by the petitioner misleading the Divisional Commissioner.

10. In para 9 of the impugned order, the objection of the petitioner that the proposal identifying the land suggested by the committee was duly approved by the Divisional Commissioner, therefore, petitioner alone is not responsible for any irregularity or corrupt practice. The State negated the contention of the petitioner, as noted in the impugned order, that since the committee headed by the District Magistrate was assigned the role of purchase of land, whereas, the Divisional Commissioner was only required to approve the rate proposed by the committee. The Commissioner has no role in identification of the plots suggested by the committee. The Commissioner was misled as the property belonging to Waqf

and Sri Saumya Jain was included for purchase, whereas, the properties of Waqf and Sri Saumya Jain were situated outside the proposed project. It is noted in the impugned order that the property of the Waqf is out side the project at about 500 meter to one kilometer distance. The inclusion of the properties was willful and deliberate at behest of the petitioner against the provision of the Government Orders to cause loss to the State Exchequer. It is further noted in the impugned order that the proposal was placed before the petitioner by the revenue authorities on 23 January 2017, wherein, it was clearly indicated that sale and purchase of the Waqf property is prohibited under the Waqf Act, 1995. But despite the objection property of the Waqf was included in the proposal.

11. It appears from the facts noted in para 12 of of the impugned order that the revenue authorities prepared a report which was false stating that the Waqf property and that belonging to Sri Saumya Jain and others are in the vicinity of the proposed jail, whereas, the properties are situated 500 meter to one kilometer away from the jail land. In para 13, it is noted that petitioner as the Chairman of the committee approved and consented to the illegal proposal that the land vesting in Waqf can be purchased/exchanged which is in violation of Section 51 of the Waqf Act, 1995. Thereafter, the properties belonging to Sri Saumya Jain and others were also initiated for purchase/exchange and the entire process was completed hurridly with seven days.

12. Aggrieved by the orders passed by the subordinate revenue authorities (Sub Divisional Officer) for purchase/exchange of Waqf property came to be challenged by the U.P. Sunni Central Board, in a petition being Writ-C No. 3750 of 2018. This Court observed and held that the exchange of Waqf property could not have taken place under the U.P. Revenue Code, 2006, accordingly, directed an enquiry to be conducted. Pursuant thereof, the order of the Sub Divisional Officer came to be set aside on rehearing the matter. It is noted in para 15 of the impugned order that the exchange of the land vesting in the Waqf with the land of Sri Saumya Jain Trust and others was illegal and was accordingly set aside.

13. In para 16 of the impugned order it is categorically noted that the revenue authorities in their proposal submitted to the petitioner, the Chairman, had categorically noted that in view of the provisions of the Waqf Act, 1995, the Waqf land cannot be sold/exchanged. The land vesting in Gram Sabha/Government land in the same Gram Sabha could only be exchanged. Petitioner willfully and deliberately did not bring to the notice of the Divisional Commissioner that the proposal approved by the committee included the exchange/purchase of Waqf property with the land belonging to Sri Saumya Jain Trust and others. The land proposed was located 500 meter to one kilometer away from the project and was small scattered plots. This fact was not placed before the Divisional Commissioner. In para 18 of the impugned order, the vigilance enquiry was also ordered against the then Sub Divisional Officer, Sadar, District Moradabad, for his involvement in the exchange of land in violation of the Act 2006.

14. In para 18 of the impugned order, it is noted that after fact finding enquiry in the incident an vigilance enquiry was ordered. It is further noted that the U.P.

Vigilance Establishment is the qualified investigating agency and is competent to enquire into the conduct of a government servant in view of Section 2(2) of the U.P. Vigilance Establishment Act, 1965. In para 23 of the impugned order, it is noted that the U.P. Vigilance Establishment collected sufficient documentary material, prima facie, disclosing the culpability of the petitioner in acts of corruption while discharging official duty. In that event the consequence is prosecution of the officer under the Prevention of Corruption Act, 1988.

15. The impugned order further notes that while disposing of the second representation dated 16 August 2021, filed by the petitioner, in para 4 it is noted that under the Urban Land (Ceiling Regulation) Act, 1986, the District Magistrate is competent authority and on the direction of the petitioner the then Additional District Magistrate (City), Moradabad, released/abated the property without hearing the Development Authority. After vesting in the State the land was duly transferred to the Moradabad Development Authority way back in 1993. Thereby, causing huge loss to the State Exchequer. It is noted that the lands in dispute was declared surplus in 1986, which was duly taken into possession on 30 March 1990, by the Supervisor Kanoongo, Pakwada and Naib Tehsildar, thus, vesting in the State. It is further noted in the impugned order that this was done in connivance with the owners of the land for extraneous consideration. In para 8, it is noted that the subsequent District Magistrate on being informed of the illegal proceedings, passed orders declaring the order of abatement/release illegal, thereby, protecting the State from huge loss.

16. In para 9, it has been categorically noted that the allegations of corrupt practices against the petitioner has been leveled upon a fact finding enquiry and it is not based on the complaint of the complainant Sri Dushyant Raj Chaudhary. In para 15, it is admitted that on a complaint the fact finding enquiry was got conducted by the Senior Superintendent of Police, Moradabad, and based on the enquiry, an open enquiry was directed to be conducted by the Vigilance Establishment. In the open enquiry, sufficient material was collected with regard to the culpability of the petitioner and other revenue authorities, accordingly, F.I.R. being Case Crime No. 1084 of 2018, under Sections 7 and 13(1)A read with Section 13(2) of Prevention of Corruption (Amendment) Act, 2018, and Sections 409, 120-B I.P.C., was lodged with Police Station Civil Line, Moradabad.

17. In para 16 of the impugned order, it is noted that in compliance of the writ Court order, before initiating prosecution a committee was constituted by the Divisional Commissioner, headed by the Additional Commissioner (Administration), alongwith Additional District Magistrate (Administration), Moradabad, Additional Secretary Moradabad Development Authority, Moradabad. The committee submitted a report on 1 August 2017, to the Divisional Commissioner and the report prima facie discloses that petitioner and other revenue officers to be involved in corrupt practices. Accordingly, the Divisional Commissioner vide order dated 3 August 2017, directed the District Magistrate Moradabad, to lodge F.I.R. and requested the State Government to take appropriate action against the delinquent officers, including, the petitioner. The departmental enquiry was in terms of the

writ Court order and in compliance of the respective Government Orders.

18. The crux of the argument of learned counsel for the petitioner is that the Government Orders issued from time to time governing enquiry on a complaint filed against the government servant was not complied in the given facts. Hence, it is urged that the directions for initiating vigilance enquiry and prosecution is bad not being in conformity with the mandate of the Government Orders.

19. It would be apposite to peruse the Government Orders being relied upon by learned counsel for the petitioner, which briefly stated, provides thus:

(a) Government Order dated 14 April 1981, addressed to all the Head of the departments, directing that on receiving complaint against a government servant, it should be ensured that during the discreet enquiry the copy of the complaint should not be supplied to the delinquent government servant and neither the name of the complainant should be disclosed. Upon disclosure, the purpose of the enquiry and secrecy gets compromised. In other words, the delinquent employee should not be made aware of the complaint or the enquiry. If possible the enquiry should be got conducted by an officer two rank higher.

(b) Government order dated 9 May 1997, is addressed to all the Principal/Secretaries and Secretaries. The Government order notes that against Class-I officers fraudulent and false complaints are being received. Accordingly, the Government Order to safeguard the interest of Class-I officers, inter alia, provides: (i) complaints received on the letter pad of Member of Parliament and/or Legislative Assembly, before proceeding on the complaint, the contents should be got verified from the Members; (ii) on complaints received from other sources/persons, before proceeding to enquire, an affidavit of the complainant and the material/evidence in support of complaint must be obtained.

(c) Government Order dated 01 August 1997, provides the procedure for entertaining and acting on the complaints of subordinate officers. The procedure is similar to the Government Order dated 9 May 1997.

(d) Government Order dated 19 April 2012, came to be issued on the directions of the writ Court order passed in Kumdesh Kumar Sharma Versus State of U.P. (Writ Petition No. 4372(SS) of 2011) dated 3 January 2012. The Government directed all the Secretaries/Head of departments/Commissioners to strictly comply the Government Order dated 9 May 1997 and 1 August 1997 while dealing with complaints received against government servants. The direction was again reiterated vide Government Order dated 6 August 2018.

(e) With regard to lodging of F.I.R. it is provided in Government Order dated 19 July 2005, and reiterated by Government Order dated 24 May 2012, that disciplinary proceedings/departmental enquiry, in the first instance, should be initiated against the government servant and upon a prima facie finding being returned in the enquiry with regard to the culpability of the officer, F.I.R. thereafter should be directed to be lodged.

20. On bare perusal of the Government Orders, it is evident that the directions/instructions provided therein is to shield the government servant from frivolous and false complaints. But, at the

same time, the government orders nowhere restricts the State authority from carrying out a discreet/confidential enquiry having regard to the nature of allegations made in the complaint, though, the whereabouts of the complainant, his identity or affidavit is not available. It is always open for the competent authority/Government to conduct discreet enquiry on any information received depending upon the nature of allegations. Even in a case where the complaint is not supported by an affidavit or material documents the Government is not prohibited to initiate a fact finding enquiry. The directions in the Government Orders, primarily, seeks to protect the government servants from the onslaught of frivolous complaints. But that would certainly not mean that the government servants can take shelter under the Government Orders to escape enquiry and prosecution for their corrupt acts. It is not open to the government servant to contend that the vigilance enquiry would vitiate for the reason of defect, either with the fact finding enquiry/departmental enquiry initiated on a fictitious complaint. The relevant consideration that would weigh with the Government to direct vigilance enquiry is that the fact finding enquiry reveals prima facie culpability of the government servant in acts of corruption. The mandate of the Government Orders is directory and not mandatory. It therefore follows that any defect in the fact finding enquiry would not vitiate the consequential vigilance enquiry or order of sanction for prosecution against the government officer, provided there is, prima facie, material to support the allegations against the government servant.

21. A provision in a statute is mandatory if the omission to follow it renders the proceeding to which it relates illegal and void, while a provision is directory if its observance is not necessary to the validity of the proceeding, and a statute may be mandatory in some respects and directory in others. The difference between mandatory and directory statutes is one of effect only. If the violation or omission is invalidating, the statute is mandatory; if not, it is directory.

22. The Supreme Court of India has been stressing time and again that the question whether statute is mandatory or directory is not capable of generalization and that in each case the court should try and get at the real intention of the legislature by analyzing the entire provisions of the enactment and the scheme underlying it.

23. In **Chandrika Prasad Yadav v State of Bihar**1, it was held that, the question as to whether a statute is directory or mandatory would not depend upon the phraseology used therein. The principle as regards the nature of the statute must be determined having regard to the purpose and object the statute seeks to achieve.

24. The principle, though applicable to a provision of a statute, applied to the Government Orders under consideration, it is evident that the intent and purpose of the Government Orders is to shield and protect the Government servants from false and vexatious complaints. The Government Orders, however, do not mandate that in the event of non compliance of the provisions therein would vitiate the fact finding enquiry, followed by the vigilance enquiry and prosecution, provided there is material to support the decision of the Government.

25. Further, the Government Order dated 19 July 2005, reiterated by

Government Order dated 24 May 2012, provides that before lodging an F.I.R. against the government servant, a disciplinary proceedings/departmental enquiry should necessarily be conducted and in the enquiry culpability of the government servant is found only then F.I.R. should be lodged. In the facts in hand a departmental enquiry, headed by Additional Commissioner was constituted returning a prima facie finding with regard to the involvement and culpability of petitioner and other revenue authorities noted in the impugned order. In any case, as noted herein above, the tenor of Government Orders is directory, therefore, any defect in the fact finding enquiry or departmental enquiry would have no bearing on the vigilance enquiry/prosecution.

26. In **Union of India v. Prakash P. Hinduja**2, though the facts therein are not similar but an analogy can be drawn, the Supreme Court rejected the argument that since the directions issued by the Court in Vineet Narain and others v. Union of India3, was not followed by the **CBI and Chief Vigilance Commissioner (CVC)** before filing of the charge sheet, the consequential proceedings of prosecution would be a nullity. The Supreme Court declined to quash the proceedings merely on the defect of not complying the directions.

27. The High Court held that in terms of directions issued in **Vineet Narain (supra),** CVC is not entrusted with the responsibility of CBI function. CBI was to report to CVC about all cases taken up by it for investigation; progress of the investigation; cases in which charge-sheets are filed and their progress. CBI was bound to place the final results of its investigation along with all material collected before the CVC for the purposes of review. CBI had not placed before the CVC the results of its investigations and had by-passed it by filing a charge-sheet before the Special Judge. The High Court in view of the mandate in Vineet Narain (supra) not being complied by the CBI allowed the writ petition and quashed the cognizance taken by the Special Judge and all consequential proceedings. The Supreme Court reversed the decision of the High Court.

28. In **H.N. Rishbud v. State of Delhi**4, the Court was called upon to consider the effect of investigation having been done by a police officer below the rank of a Deputy Superintendent of Police contrary to the mandate of Section 5(4) of Prevention of Corruption Act, 1947. The Court held as follows:

".....Here we are not concerned with the effect of the breach of a mandatory provision regulating the competence or procedure of the Court as regards cognizance or trial. It is only with reference to such a breach that the question as to whether it constitutes an illegality vitiating the proceedings or a mere irregularity arises. ***A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial."***

29. Supreme Court referring **Prabhu v. Emperor**5 and **Lumbhardar Zutshi v. The King**6, held that if cognizance is in fact taken on a police report initiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial, which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice and that an illegality committed in the course of investigation does not affect the

competence and the jurisdiction of the Court for trial.

30. Further, Sub-clause (3) (b) of Section 19 of Prevention of Corruption Act, 1988, prohibits that no court shall stay the proceeding under this Act on the ground of any error, omission or irregularity in the sanction for prosecution. Section 19 (3)(b) is extracted:

*"19. **Previous sanction necessary for prosecution.**--(1) No court shall take cognizance of an offence punishable under sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction 1 [save as otherwise provided in the Lokpal and Lokayuktas Act, 2013 (1 of 2014)]--*

(a) .....

*(3) **Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),**--*

(a) .....

(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;"

31. In the given facts, it is noted in the impugned order that on the directions of the writ Court the departmental enquiry came to be set up duly constituted by the Divisional Commissioner, headed by the Additional Commissioner, alongwith two other members. On a prima facie finding returned by the departmental enquiry committee petitioner along with other revenue officers were found involved in acts of corruption in the discharge of their functions with regard to purchase/exchange/release/abatement of parcel of land. The petitioner had misled the Divisional Commissioner, as well as, the State Government in purchase/exchange of land which included Waqf land and land belonging to a private trust.

32. The sale and exchange of waqf property is prohibited under Section 51 of the Waqf Act, 1995. Section 51 is extracted:

*"**51. Alienation of wakf property without sanction of Board to be void**.- (I) Notwithstanding anything contained in the wakf deed, any gift, sale, exchange or mortgage of any immovable property which is wakf property, **shall be void unless such gift, sale, exchange or mortgage is effected with the prior sanction of the Board**: Provided that no mosque, dargah or khangah shall be gifted, sold, exchanged or mortgaged except in accordance with any law for the time being in force.*

Provided....."

33. The impugned order further flags the incident of corruption committed by the petitioner being the Chairman or the competent authority under the Ceiling Act. Further, in ceiling proceedings, the land that had vested in the State upon possession and subsequently transferred to the Moradabad Development Authority was directed to be released/abated in favour of the land lord for extraneous consideration without notice to the Development Authority.

34. Submission of learned counsel for the petitioner that no pecuniary loss was caused to the State Government as the orders were subsequently reversed or recalled would have no bearing.

35. As per Section 7 of the Prevention of Corruption Act, 1988, any public servant

attempts to render service for gratification other than legal remuneration in respect of an official act or showing or forbearing to show favour or disfavour in exercise of his official function is punishable. Section 7 is extracted:

*"7. P**ublic servant taking gratification other than legal remuneration in respect of an official act.**--Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than 1 [three years] but which may extend to 2 [seven years] and shall also be liable to fine.*

Explanations.--(a) .....

*(b) "**Gratification**." The word "gratification" is not restricted to pecuniary gratifications or to gratifications estimable in money.*

36. Further, Section 13 provides for criminal misconduct by a public servant. If a public servant habitually accepts or agrees to accept gratification is said to have committed the offence of criminal misconduct. Section 13 is extracted:

*13. **Criminal misconduct by a public servant**.--(1) A public servant is said to commit the offence of criminal misconduct,--*

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification other than legal remuneration as a motive or reward such as is mentioned in section 7; or

37. The impugned order reflects that petitioner was habitual in accepting gratification other than legal remuneration. It is alleged that in purchase of land for construction of jail and thereafter in ceiling proceedings petitioner showed favour to benefit a party for extraneous consideration.

38. Further, under the Uttar Pradesh Vigilance Establishment Act, 1965, the State Government is competent to get the offences investigated by a special police force.

39. The Legislature enacted the Uttar Pradesh Vigilance Establishment Act, 1965, inter alia, to make provision for the constitution, superintendence and administration of the Uttar Pradesh Vigilance Establishment as a special police force.

40. Section 2 provides for constitution and powers of the Vigilance Establishment. Sub-section (1) reads thus:

*"**Constitution and powers of the Vigilance Establishment.**- (1) Not withstanding anything in the police Act 1861, the State Government may constitute a special police force to be called the Uttar Pradesh Vigilance*

Establishment ***for the investigation of offences notified under the section 3.***

(2) ....."

41. Section 3 confers powers upon the Vigilance Establishment to investigate the offences notified in the Gazettee by the State Government. Section 3 reads thus:

"3. ***Offences to be investigated by the Vigilance Establishment.-*** *The State Government may by notification in the Gazette, specify the offence or classes of offences which are to by investigated by the Uttar Pradesh Vigilance Establishment."*

42. In exercise of powers conferred under section 3 of Vigilance Act 1965, the Governor of U.P. notified on 12 February 1965 the offences and class of offences which may be investigated by the U.P. Vigilance Establishment, which, inter alia, includes offences punishable under the Prevention of Corruption Act, 1988.

43. Having due regard to the facts and circumstances of the case, the State-respondents are justified in directing vigilance enquiry and granting sanction for prosecution. The finding of culpability of the petitioner is writ large from the departmental enquiry. The mandate of the Government Orders have necessarily been complied. Any defect in the fact finding enquiry, rank of the officer or complaint being fictitious and not supported by an affidavit would have no bearing on the vigilance enquiry or the sanction for prosecution.

44. The writ petition being devoid of merit, accordingly, is dismissed.

45. No costs.

(2022)05ILR A1097
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.05.2022

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Criminal Revision No. 2162 of 2016

Smt. Pooja Saxena & Anr. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Dinesh Kumar Yadav, Sri Prashant Kumar Singh, Smt. Pooja Saxena (In Person), Rajni Ojha, Sri Ravindra Nath Chaubey

Counsel for the Opposite Parties:
G.A., Sri Piyush Dubey

A. Criminal Law -Code of Criminal Procedure,1973-Section 397/401 & 125-Quantum of maintenance- Applicant challenged the maintenance amount awarded by the Family Court-Wife was required to sacrifice her employment opportunity for nurturing family and she has a son who is heart patient-Merely because the wife is capable of earning is not sufficient ground to reduce the maintenance-Sustenance does not mean, and cannot be allowed to mean mere survival-Hence, the maintenance awarded by the family Court is enhanced to Rs. 60,000/- from Rs. 35000/-25% of the husband's net salary would be just and proper to be awarded as maintenance to the wife and son.

B. While dealing with the application of a destitute wife or hapless children or parents under this provision, the Court is dealing with the marginalized 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 maintenance amount awarded must be reasonable and realistic, and avoid either of the two extremes i.e. maintenance awarded to the wife should neither be so extravagant which becomes oppressive and unbearable for the Respondent, nor should it be so meagre that it drives the wife to penury. The sufficiency of quantum has to be adjudged so that the wife is able to maintain herself with reasonable comfort.

The revision is allowed. (E-6)

List of Cases cited:

1. Kulbhushan Vs Rajkumari & ors. (1970) 3 SCC 129

2. Rajnesh Vs Neha & ors.(2020) MANU/SC/0833/2020

3. Shailja & anr. Vs Khobbanna CRLA No. 125 of 20174. Sunita Kachwaha & ors. Vs Anil Kachwaha (2014) MANU/SC/0964/2014 : (2014)16 SCC 715

5. Manish Jain Vs Akanksha Jain, Civil Appeal No. 4615 of 2017

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. यह दाण्डिक निगरानी, निगरानीकर्तागण की ओर से **वाद संख्या 598 वर्ष 2015, (श्रीमती पूजा सक्सेना प्रति विवेक माथुर),** अन्तर्गत धारा 125 दं0 प्र0 सं0, थाना हरीपर्वत, जिला आगरा में विद्वान अपर जिला एवं सत्र न्यायाधीश/अपर प्रधान परिवार न्यायाधीश, फास्ट ट्रेक कोर्ट संख्या 1, आगरा द्वारा **पारित निर्णय एवं आदेश दिनांक 16–05–2016 के विरूद्व** योजित की गयी है जिसके द्वारा विद्वान अधीनस्थ न्यायालय ने निगरानीकर्ता का आवेदन पत्र अन्तर्गत धारा 125 दं0 प्र0 सं0 एक पक्षीय रूप से स्वीकार करते हुए विपक्षी विवेक माथुर को आदेशित किया कि वह प्रार्थना पत्र प्रस्तुतिकरण की तिथि से अपनी पत्नी श्रीमती पूजा सक्सेना को रूपया 20,000/– प्रतिमाह तथा याचिका की तिथि से ही अपने पुत्र को 15,000/–प्रतिमाह भरण पोषण हेतु प्रदान करें तथा यह भी आदेशित किया कि आदेश की तिथि तक देय समस्त धनराशि एक माह के अन्दर निगरानीकर्ता को प्रदान करें। वे यह धनराशि निगरानीकर्ता द्वारा बताये गये बैंक खाते में भी जमा कर सकते हैं। श्रीमती पूजा व उनके पुत्र शिखर के लिए प्रतिमाह की देय धनराशि माह के 15 तारीख तक प्रदान की जाए। निगरानीकर्ता यदि किसी अन्य वाद में भरण पोषण की राशि प्राप्त कर रही होगीं तो वह धनराशि समायोजित होगी। इस प्रकार निगरानीकर्ता द्वारा यह याचना की गयी है कि विद्वान अधीनस्थ न्यायालय द्वारा निर्धारित की गयी धनराशि को बढ़ाया जाए।

2. दिनांक 18–4–2022 को निगरानीकर्ता (स्वयं) एवं विपक्षी संख्या 2 के विद्वान अधिवक्ता श्री पीयूष दुबे की बहस सुनने के उपरान्त मामला निर्णय हेतु सुरक्षित कर लिया गया था। निर्णय लिखाते समय न्यायालय ने यह उचित समझा कि पक्षकार उच्च शिक्षित है तथा विपक्षी संख्या 2 विवेक माथुर एक उच्च सेवा में कार्यरत है और कुछ आपसी सूझ–बूझ की कमी के कारण वे अलग अलग रह रहें है और एक दूसरे के विरूद्व मुकदमें दाखिल कर रखें हैं। तत्पश्चात न्यायालय ने उचित समझा कि यदि पक्षकारों को बुलाकर सुलह करा दी जाए तो पक्षकारों का दम्पत्ति जीवन सुखमय हो सकता है। इसके बाद मामला दिनांक 25–4–2022 को सूची बद्व किया गया तथा पक्षकारों को न्यायालय में उपस्थित होने हेतु आदेशित किया गया। दिनांक 25–4–2022 को निगरानीकर्ता श्रीमती पूजा सक्सेना जो कि स्वयं मामले की पैरवी कर रही है, वह न्यायालय के समक्ष उपस्थित रही परन्तु विपक्षी संख्या 2 विवेक माथुर न्यायालय के समक्ष उपस्थित नहीं हुए इसलिए आज 5–5–2022 की तिथि पुनः सुनवाई एवं पक्षकारों की उपस्थिति हेतु नियत की गयी।

3. आज पुनः निगरानीकर्ता श्रीमती पूजा न्यायालय के समक्ष उपस्थित है किन्तु विपक्षी संख्या 2 विवेक माथुर उपस्थित नहीं है लेकिन उनके विद्वान अधिवक्ता श्री पीयूष दुबे उपस्थित है उनके द्वारा न्यायालय को यह बताया गया कि विपक्षी संख्या 2 विवेक माथुर सुलह नहीं करना चाहते हैं। इसी कारण से वह न्यायालय में उपस्थित नहीं है। अतएव न्यायालय गुण–दोष के आधार पर निर्णय पारित कर रही हैं।

4. आज दिनांक 5–5–2022 को निगरानीकर्ता श्रीमती पूजा सक्सेना एवं विपक्षी संख्या 2 विवेक माथुर के विद्वान अधिवक्ता श्री पीयूष दुबे को विस्तारपूर्वक सुना एवं पत्रावली का सम्यक परिशीलन किया।

5. निगरानीकर्ता का कथन है कि उसकी शादी दिनांक 23–1–2003 को हिन्दू रीति रिवाज से विपक्षी संख्या 2 विवेक माथुर के साथ सम्पन्न हुई थी। वर्ष 2015 तक उनका दम्पत्ति जीवन सुखमय व्यतीत हुआ तत्पश्चात आपसी मतभेद उत्पन्न होने के कारण उसने **वाद संख्या 598 वर्ष 2015** विद्वान विचारण न्यायालय के समक्ष योजित किया जिसमें उसके द्वारा यह अभिकथित किया गया कि उक्त शादी में उसकी माँ ने 15 लाख रूपये खर्च किया था। यह भी कथन किया गया कि शादी के समय वह एस0 एन0 मेडिकल कालेज में एम0 डी0 की पढ़ाई कर रही थी जब कि उसके पति की 2004 में इंफोसिस, बैंगलोर में नौकरी कर रहे थे। यह भी कथन किया गया कि उसके पति व उसके परिवारीजन उसपर बदनामी का लांछन लगाकर उसकी नौकरी छुडा दी जिसपर जून, 2005 में वह विपक्षी संख्या 2 विवेक माथुर के पास बैंगलोर चली गयी। नवम्बर, 2005 में निगरानीकर्ता को भी अपोलो हास्पिटल बैंगलोर में नौकरी मिल गयी, लेकिन ससुराल वालों के दबाव में उसने अप्रैल, 2006 में नौकरी छोड दी। उसके बाद उसका चयन यूनाईटेड नेशन, दिल्ली में हो गया लेकिन वह नौकरी भी उसको छोडनी पडी जिसके कारण से वह जुलाई, 2006 से बेरोजगार है। निगरानीकर्ता द्वारा यह भी कथन किया गया कि उसके पति विपक्षी संख्या 2 ने यह कहा कि वह नौकरी के साथ–साथ उच्च शिक्षा प्राप्त करना चाहता इसलिए निगरानीकर्ता अपनी नौकरी छोड दें और घर का ख्याल रखे। इस प्रकार उसने विपक्षी संख्या 2 की बात मानकर लगभग आठ सालों से घर संभाल रही है और विपक्षी संख्या 2 एच0 सी0 एल0 कम्पनी, बैंगलोर में डायरेक्टर के पद पर कार्यरत है। वर्ष 2008 में पक्षकारों के संसर्ग से एक सन्तान उत्पन्न हुई जिसपर उसके ससुराल वालों ने निगरानीकर्ता के विरूद्व यह आरोप लगाया कि उक्त संतान विपक्षी संख्या 2 की नहीं है तब उसने डी0 एन0 ए0 टेस्ट की बात कही तो विपक्षी संख्या 2 तैयार नहीं हुए और मना कर दिया तत्पश्चात निगरानीकर्ता को विपक्षी संख्या 2 व उसके परिवारीजन द्वारा प्रताडित करना प्रारम्भ कर दिया गया और दिनांक 26–3–2014 को विपक्षी संख्या 2 ने निगरानीकर्ता के विरूद्व तलाक का वाद योजित कर दिया जिसमें निगरानीकर्ता ने तलाक देने से मना कर दिया। इसी दौरान विपक्षी संख्या 2 ने अपने मकान को अपनी बहन शालिनी हांडू को गिफट कर दिया। इस प्रकार विपक्षी संख्या 2 व उसके परिवारीजन की प्रताडना के कारण निगरानीकर्ता दिनांक 16–2–2015 से अपनी माँ के पास रह रही है। निगरानीकर्ता द्वारा यह भी कथन किया गया कि विपक्षी संख्या 2 की आय प्रतिमाह पांच लाख रूपये के ऊपर की है। इसके अलावा अन्य स्रोतों से भी उसकी एक लाख रूपये प्रतिमाह की आमदनी है। यह भी कथन किया गया कि विपक्षी संख्या 2 ने एक फलैट एक करोड सत्ताईस लाख रूपये का क्रय कर रखा है इसके अलावा बैंगलोर में उसके चार प्लाट है जिनकी कीमत दो करोड रूपये है और उसके पास लग्जरी गाडी भी है। यह भी कथन किया गया कि निगरानीकर्ता के पुत्र शिखर की आयु 12 वर्ष है और उसके दिल में छेद है जिसका सम्पूर्ण खर्चा निगरानीकर्ता पर निर्भर है वह इसी कारण से नौकरी भी नहीं कर सकती है। नोटिस की तामीला के बावजूद विपक्षी संख्या 2 विद्वान विचारण न्यायालय के समक्ष उपस्थित नहीं हुआ जब कि विपक्षी संख्या 2 पर नोटिस की तामीला पर्याप्त मानी गयी है। विद्वान विचारण न्यायालय ने आदेश दिनांक 16–5–2016 के द्वारा निगरानीकर्ता श्रीमती पूजा सक्सेना को विपक्षी संख्या 2 विवेक माथुर से बीस हजार रूपये प्रतिमाह तथा याचिका की तिथि से उसके पुत्र को पन्द्रह हजार रूपये प्रतिमाह भरण पोषण देने हेतु आदेशित किया है। निगरानीकर्ता द्वारा यह भी कथन किया गया कि बकाया के सम्बंध में उसे चार लाख अटठावन हजार छः सौ रूपये का भुगतान नहीं किया गया जिसके सम्बंध में उसने वसूली हेतु एक वाद सक्षम न्यायालय के समक्ष प्रस्तुत कर रखा है जो विचाराधीन है। निगरानीकर्ता द्वारा यह भी कथन किया गया कि विपक्षी संख्या 2 व उसके परिवारीजन के विरूद्व उसने घरेलू हिंसा अधिनियम के अन्तर्गत एक वाद योजित किया था जिसमें आदेश दिनांक 17–7–2018 के द्वारा पच्चीस हजार रूपया प्रतिमाह अंतरिम भरण पोषण हेतु आदेशित किया गया था उक्त मामला अंतिम निस्तारण हेतु लम्बित है। यह भी कथन किया गया कि उक्त आदेश दिनांक 17–7–2018 को पारित किया गया है परन्तु आज तक उसका भी कोई भुगतान निगरानीकर्ता को नहीं किया गया जब कि वसूली का

आदेश पारित किया जा चुका है। निगरानीकर्ता द्वारा यह भी कथन किया गया कि विपक्षी संख्या 2 ने उसके विरूद्व जो तलाक का वाद योजित किया था वह दिसम्बर, 2017 में खारिज हो चुका है जिसके विरूद्व विपक्षी संख्या 2 ने उच्च न्यायालय, राजस्थान, जोधपुर पीठ के समक्ष अपील योजित की है जो विचाराधीन है। निगरानीकर्ता द्वारा यह भी कथन किया गया कि जिस समय उसे प्रताडित करने की कार्यवाही की गयी उस समय उसका पति विपक्षी संख्या 2 एच0 सी0 एल0 कम्पनी, बैंगलोर में डायरेक्टर के पद पर कार्यरत था और उस समय वह लगभग पांच लाख रूपये प्रतिमाह वेतन प्राप्त करता था तथा उनका रहन–सहन भी उच्च स्तर का था और उनका पुत्र उस समय 6 वर्ष का था जो बैंगलोर में यूरोकिड में प

6. उक्त के विपरीत विपक्षी संख्या 2 के विद्वान अधिवक्ता श्री पीयूष दुबे द्वारा यह तर्क रखा गया कि निगरानीकर्ता एक उच्च शिक्षित महिला है और एम0 डी0 पास है। वह कहीं भी नौकरी करके अपना व अपने पुत्र का पालन पोषण करने में सामर्थ है। ऐसी दशा में विद्वान विचारण न्यायालय द्वारा जो 35,000/–रूपया उसे व उसके पुत्र को देने हेतु निर्देशित किया गया है वह उचित है और उसे बढाये जाने का कोई औचित्य नहीं है। उनके द्वारा माननीय सर्वोच्च न्यायालय के निर्णय **1970 (3) एस0 सी0 सी0 129 (कुलभ ूषण प्रति राजकुमारी एव ं अन्य)** पर विश्वास करते हुए कहा गया कि भरण पोषण की राशि पति के आय का 25 प्रतिशत से अधिक नहीं होना चाहिए।

7. उभय पक्षों के मध्य यह तथ्य स्वीकार्य है कि विपक्षी संख्या 2 जो निगरनीकर्ता का पति है वह एच0 सी0 एल0 कम्पनी, बैंगलोर में डायरेक्टर के पद पर कार्यरत है और वेतन पर्ची के आधार पर उसका मासिक वेतन 2,24,000/–रूपया है तथा उसके पास अच्छे और पॉश इलाके में दो फलैट है जिसमें से एक को उसने किराये पर उठा रखा है जिससे उसे 35,000/–रूपया प्रतिमाह किराया मिलता है। निगरानीकर्ता पूजा सक्सेना जो कि एक उच्च शिक्षित महिला है और जिसने चिकित्सीय क्षेत्र में एम0 डी0 कर रखी है उसकी शादी दिनांक 23–1–2003 को विपक्षी संख 2 के साथ सम्पन्न हुई थी तथा उसने अपोलो हास्पिटल व यूनाइटेड नेशन दिल्ली में नौकरी की थी जिसे उसने अपने ससुरालवालों के दबाव में वर्ष 2006 में छोड दिया और तब से वह बेरोजगार है। वर्ष 2008 में एक संतान उत्पन्न हुई जिसके दिल में छेद है और उसका इलाज चल रहा है। ससुरालवालों ने निगरानीकर्ता पर बदनामी का लांछन लगाया था और उसे प्रताडित करने लगे थे। साथ ही उसके विरूद्व वर्ष 2014 में उसके पति ने तलाक का मुकदमा दाखिल किया था जो विपक्षी संख्या 2 के विरूद्व निर्णीत हुआ। ससुराल के प्रताडना के कारण वह अपने मायके में आकर रहने लगी और उसके बाद उसने भरण पोषण का वाद विपक्षी संख्या 2 के विरूद्व योजित किया जिसमें विद्वान विचारण न्यायालय द्वारा उसे 25,000/–रूपया तथा उसके पुत्र को 15,000/–रूपया प्रतिमाह भरण पोषण के रूप में देने का आदेश पारित किया गया है जो अत्यंत अल्प है जिससे वह न अपना और न ही अपने पुत्र का पालन पोषण, शिक्षा,दव आदि कर पा रही है और न ही उस रहन सहन में रह पा रही है। जिस रहन सहन में वह अपने ससुराल में रह रही थी।

8. पत्नी द्वारा मांगा गया गुजारा भत्ता कोई भीख नही है बल्कि उसका मौलिक अधिकार है जिसे हर हालत में पूरा करना पति का कत्वर्य है। भरण पोषण हर पत्नी, संतान एवं माता पिता को यह अधिकार देता है कि यदि वे पूर्णतया पुत्र पर आधारित है और वह स्वस्थ है तो पति अथवा पुत्र की जिम्मेदारी है कि वह अपनी पत्नी अपने पुत्र एवं माता पिता का पालन पोषण करे और यदि वह ऐसा नहीं करता है तो हर पत्नी, पुत्र व माता पिता को कानूनी अधिकार प्राप्त है कि पति या पुत्र से पालन पोषण का दावा कर सकतें है, जिसें हर हालत में पति अथवा पुत्र को पूरा करना ही होता है। गुजारा भत्ता पति के या पुत्र के रहन सहन के अनुरूप ही होना चाहिए। ऐसा बिल्कुल प्रतीत न हो कि पति अधिक आय प्राप्त करके अलीशान मकान में रहते हुए अपने रहन सहन को अच्छी तरह से रखे और जो गुजारा भत्ता पति अपनी पत्नी को दे रहा है, उससे पत्नी अपना रहन सहन पति के अनुरूप न कर सके। गुजारा भत्ता का आशय इतना है कि पत्नी जिस रहन सहन के साथ पूर्व में पति के साथ रह रही थी, वही सुविधा और रहन सहन उसे पति से अलग होने पर भी मिलना चाहिए। न्यायालय को पत्नी और उसके पुत्रों का पालन पोषण निर्धारित करते समय यह ध्यान में रखना चाहिए कि उसके द्वारा निर्धारित भरण पोषण, पति की आय जिसमें उस पर आश्रित माता पिता, भाई बहन आदि शामिल

है। साथ ही बीमार पत्नी और उसके बीमार पुत्र व शिक्षा को ध्यान में रखते हुए निर्धारित करना चाहिए कि उससे पति पर अतिरिक्त बोझ न पडे।

Rajnesh vs. Neha and Ors. (04.11.2020 - SC) : MANU/SC/ 0833/2020

III-Criteria for determining quantum of maintenance :

The factors which would weigh with the Court inter alia are the status of the parties; reasonable needs of the wife and dependant children; whether the Applicant is educated and professionally qualified; whether the Applicant has any independent source of income; whether the income is sufficient to enable her to maintain the same standard of living as she was accustomed to in her matrimonial home; whether the Applicant was employed prior to her marriage; whether she was working during the subsistence of the marriage; whether the wife was required to sacrifice her employment opportunities for nurturing the family, child rearing, and looking after adult members of the family; reasonable costs of litigation for a non-working wife.

The maintenance amount awarded must be reasonable and realistic, and avoid either of the two extremes i.e. maintenance awarded to the wife should neither be so extravagant which becomes oppressive and unbearable for the Respondent, nor should it be so meagre that it drives the wife to penury. The sufficiency of the quantum has to be adjudged so that the wife is able to maintain herself with reasonable comfort.

62. The Courts have held that if the wife is earning, it cannot operate as a bar from being awarded maintenance by the husband. The Courts have provided guidance on this issue in the following judgments.

63. In Shailja and Anr. v. Khobbanna,12 this Court held that merely because the wife is capable of earning, it would not be a sufficient ground to reduce the maintenance awarded by the Family Court. The Court has to determine whether the income of the wife is sufficient to enable her to maintain herself, in accordance with the lifestyle of her husband in the matrimonial home.10 Sustenance does not mean, and cannot be allowed to mean mere survival.13

64. In Sunita Kachwaha and Ors. v. Anil Kachwaha MANU/SC/0964/2014 : (2014) 16 SCC 715 the wife had a postgraduate degree, and was employed as a teacher in Jabalpur. The husband raised a contention that since the wife had sufficient income, she would not require financial assistance from the husband. The Supreme Court repelled this contention, and held that merely because the wife was earning some income, it could not be a ground to reject her claim for maintenance.

92. In Badshah v. Urmila Badsha Godse MANU/SC/1084/ 2013: (2014) 1 SCC 188, the Supreme Court was considering the interpretation of Section 125 Code of Criminal Procedure. The Court held:

13.3. ...purposive interpretation needs to be given to the provisions of Section 125 Code of Criminal Procedure 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.

9. **1970 (3) एस0 सी0 सी0 129 (कुलभूषण प्रति राजकुमारी एवं अन्य)** में माननीय सर्वोच्च न्यायालय द्वारा यह निर्धारित किया गया है कि भरण पोषण रहन सहन को ध्यान में रखकर को दे दिया है उस पर कोई आपत्ति नहीं है और यह कि निगरानीकर्ता एक उच्च शिक्षा महिला है जो एम0 डी0 है और किडनी की मरीज है तथा उसका पुत्र जो 12 वर्ष का है एवं दिल का मरीज है और अच्छे विद्यालय से शिक्षा प्राप्त कर रहा है। साथ ही पति के अनुरूप रहन सहन को ध्यान में रखा जाए तो निगरानीकर्ता और उसका पुत्र माननीय सर्वोच्च न्यायालय के उक्त निर्णय के आधार पर 25 प्रतिशत भरण पोषण प्राप्त करने के अधिकारी है। निगरानीकर्ता द्वारा अपने तर्क के समर्थन में माननीय सर्वोच्च न्यायालय द्वारा **सिविल अपील संख्या 4615 वर्ष 2017, मनीष जैन प्रति अंकाक्षा जैन, दाण्डिक अपील संख्या 125 वर्ष 2017, शैलजा एवं अन्य प्रति खूबबाना एवं दाण्डिक अपील संख्या 730 वर्ष 2020, रजनीश प्रति नेहा एवं अन्य** में दी गयी विधि व्यवस्थाये भी प्रस्तुत की गयी है।

11. निगरानीकर्ता तथा उसके पुत्र की परिस्थितियां, रहन सहन, उनकी बीमारी का खर्च, पुत्र की प्परिस्थितियां, रहन सहन, उनकी बीमारी का खर्च, पुत्र की पढाई, उसका इलाज, भरण पोषण आदि को ध्यान में रखते हुए विद्वान विचारण न्यायालय द्वारा वाद संख्या 598 वर्ष 2015 में निर्धारित की गयी भरण पोषण की धनराशि को बढाना उचित प्रतीत होता है एवं विपक्षी संख्या 2 को आदेशित किया जाता है कि वह निगरानीकर्ता संख्या 1 को बीस हजार रूपया के स्थान पर पैंतीस हजार रूपया प्रतिमाह एवं निगरानीकर्ता संख्या 2 को पन्द्रह हजार रूपया के स्थान पर पच्चीस हजार रूपया प्रतिमाह कुल साठ हजार रूपया प्रतिमाह भुगतान करेगा। बढी हुई धनराशि का भुगतान आज की तारीख से किया जायेगा

12. वर्तमान निगरानी तदनुसार **अ ंतिम रूप स` निस्तारित की जाती है।**

निर्धारित होना चाहिए। यह भी कहा है कि वह पति के आय का 25 प्रतिशत होना चाहिए।

10. वर्तमान मामले में भी विपक्षी संख्या 2 की प्रतिमाह वेतन दो लाख चौबीस हजार रूपया है और जो फलैट से किराया प्राप्त कर रहा है वह भी पच्चीस हजार रूपया से ऊपर है। उक्त आधार पर कुल दो लाख पचास हजार रूपया का 25 प्रतिशत साठ हजार रूपया बनता है। एक फलैट उसने बहन

(2022)05ILR A1102
APPELLATE JURISDICTION
CIVIL SIDE
DATED LUCKNOW 05.05.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Special Appeal Defective No. 120 of 2021

State Of U.P. & Ors. ...Appellants
Versus
Anurag Gupta & Anr. ...Respondents

Counsel for the Appellants
Sri Atul Kumar Yadav

Counsel for the Respondents:
Sri Ashwani Kumar, Sri Rajendra Singh Kushwaha

A. Service Law - The Court observed that the respondent has given incorrect information regarding possessing eligibility qualification in the Writ Petition. As the petitioner did not possess the eligibility qualification on the date of his appointment to the post of Assistant Teacher, his appointment is illegal. The manager himself stated on oath before the State authorities that the petitioner was not included amongst the teachers working as per the standard. Therefore, it was held that the no direction could be issued to include the petitioner's name in the list of teachers of the college for bringing it on Grant-in-aid list and to

pay his salary from the State Exchequer. (Para 36)

Special Appeal Allowed. (E-10)

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

Order On C. M. Application No. 44248 of 2021

1. Heard Shri Atul Kumar Yadav, learned Standing Counsel for the appellants and Shri Ashwani Kumar, learned counsel for the respondents and perused the record.

2. This application has been filed by the State Appellant seeking Condonation of delay of 54 days in filing the Special Appeal. Having gone through the affidavit filed in support of the Application, we find that the cause shown for the delay in filing the Special Appeal is sufficient and the delay in filing the Appeal deserves to be condoned.

3. Accordingly, the application for condonation of delay is allowed and the delay in filing the Special Appeal is condoned.

Order On Special Appeal

1. Heard Shri Atul Kumar Yadav, learned Standing Counsel for the appellants and Shri Ashwani Kumar, learned counsel for the respondents and perused the record.

2. The instant Intra Court Appeal has been filed by the State authorities against the judgment and order dated 25-11-2020 passed by a learned Single Judge of this Court allowing Writ Petition No. 31660 (S/S) of 2019, which was filed by the respondent no. 1 challenging on order dated 06-09-2019 passed by the District Inspector of Schools, Lakhimpur Kheri (who shall hereinafter be referred to as "the D.I.O.S."), rejecting the petitioner's representation to include his name in the list of teachers of the college for taking it on State Government's Grant-in-aid and consequently pay him salary from the State exchequer.

3. Briefly stated, the facts of the case are that the respondent no. 1 had filed the Writ Petition pleading that he holds the qualifications of Bachelor of Arts alongwith Intermediate Grade Drawing Examination of Bombay and being fully eligible for being appointed on the post of Assistant Teacher (Art), he had applied against a post of Assistant Teacher (Art) advertised by Sri. Hanumant Intermediate College, Lakhimpur-Kheri (the respondent no. 2 in the Appeal, which shall hereinafter be referred to as "the college'). Vide order dated 10-10-1999, the Manager of the college had appointed the petitioner on the aforesaid post on a temporary basis and the petitioner joined his duties on 11-10-1999. The petitioner has alleged that the Manager of the college became annoyed with him and did not allow him to perform his duties for the period from 22-11-2000 till 14-07-2001 and being perturbed, humiliated and victimized, coupled with mental tension and depression, the petitioner fell seriously ill and on 22-11-2000 itself, he gave an application for grant of leave to the Principal of the college. Although the petitioner has alleged that he was required to furnish a compromise that he will not claim salary for the aforesaid period, the document alleged to be a compromise is a letter dated 14-07-2001 written by the petitioner to the D.I.O.S. stating that he had not performed teaching duties in the college between the period 22-11-2000 to 14-07-2001 and, therefore, he will not claim the salary and allowances etc. for the

aforesaid period. A copy of this letter was endorsed to the Manager of the college also. Thereafter the petitioner was allowed to perform his duties with effect from 21-07-2001.

4. The petitioner has stated that the process for taking the college on the Grant-in-aid list was started by the college in the year 1998 and at that time, a list of the staff working in the college was sent to the State Government. As the petitioner was not working at that time, his name was not there in the list. As per the petitioner, in August 2000 the manager of the college had sent another list of members of staff to the D.I.O.S., in which the petitioner's name was there and also that on 16-01-2001, the D.I.O.S. sought some information from the college and the Manager was directed to send the names of the staff members who were working in the college at that time and in the list sent by the Manager in response to the said letter also, the petitioners name was included. However, the petitioner's name was not included in the list of teachers sent by the Manager of the college to the D.I.O.S. for taking the college on Grant-in-aid list.

5. The petitioner has further stated that by means of an order dated 23-02-2005 issued by the Government, the college was taken on the Grant-in-aid list, without including the petitioner's name as a teacher of the college and the post of Principal and one post of Assistant Teacher were shown to be vacant and that on 05-04-2005, the Manager of the college gave an application to the Director, Education (Secondary) stating that no post is vacant in the college and on the post of Principal Sri. Krishna Kant Verma was working and the petitioner was working on the post of Assistant Teacher with effect from 10-10-1999, i.e. since before 01-01-2004, the date on which the college was taken on Grant-in-aid list.

6. On 06-09-2019 the D.I.O.S. passed an order disposing off the petitioner's representation in furtherance of an order dated 31-07-2019 passed by this Court in Writ Petition No. 3386 (S/S) of 2005. The order dated 06-09-2019 states the college was taken on Grant-in-aid list by means of an order dated 23-02-2005, with effect from 01-01-2004. The order dated 06-09-2019 further mentions that initially, the college had applied in the year 1998 for taking it on Grant-in-aid list, sending the particulars of 01 Principal, 07 teachers, 01 clerk and 03 non-teaching staff; that at that time, the petitioner was not working in the college and, therefore, his name could not be included in the list; that the petitioner was appointed by the management on 10-10-1999 and he worked in the college from the period 11-10-1999 to 21-11-2000; that at that time the college was unaided and the petitioner left on 21-11-2000 without any information and, therefore, his name was again not there in the list of Principal/teachers/non-teaching staff (total 18 persons) submitted by the college in the year 2001 in response to information sought by the department. The aforesaid further mentions that on 14-07-2001, the petitioner wrote a letter to the D.I.O.S. stating that he had not performed teaching duties in the college between the period 22-11-2000 to 14-07-2001 and, therefore, he will not claim the salary and allowances etc. for the aforesaid period. It also states that thereafter the petitioner was allowed to perform his duties with effect from 21-07-2001, and that as per the Government's directions, the Director of Secondary Education provided the details of the posts as per the information provided by the college in the year 2000-2001, to the

Government through his letter dated 25-09-2004; that on 04-10-2004, the management had submitted an undertaking and in paragraph 3 thereof, it was categorically stated that the petitioner and one Ram Naresh have been appointed on the post of Assistant Teachers in Art and Science respectively and in case the aforesaid two persons were not taken on Grant-in-aid list, the college/management will bear their expenses from its own sources. The D.I.O.S. in this order dated 06-09-2019 recites that the list of staff members submitted by the college for the first time alongwith the application and the list submitted in October 2001 was valid and the list submitted afterwards including the petitioner's name was not valid.

7. The order dated 06-09-2019 further states that the college was taken on Grant-in-aid list by means of a Government Order dated 23-02-2005, with effect from 01-01-2004, without including the petitioner as a teacher of the college, as his name was not there in the original list; that on 05-04-2005, the Manager of the college wrote a letter to the Director of Education (Secondary) stating that no post was vacant in the college and requesting that the names of Sri. Krishna Kant Verma and the petitioner, who were not working at the time of the application, be included by making amendment in the original list. The order dated 06-09-2019 also discloses that thereafter, the petitioner filed Writ Petition No. 3386 (S/S) of 2005 and in furtherance of the order dated 31-07-2019 passed in the Writ Petition he submitted a representation on 07-08-2019 and that after submitting the representation, the petitioner submitted copies of his experience certificate, character certificate, letter issued by the Board appointing him for evaluation of answer-sheets of Board examinations along with a letter dated 17-08-2019, but these could not justify his claim for being included in the list of staff members of the college, as the petitioner was not working in the college at the time when the application for taking the college on the Grant-in-aid list was submitted. The order thus provided that in case the management is taking work from the petitioner, it has to pay his salary from its own resources. Accordingly, the D.I.O.S. rejected the petitioner's representation.

8. The D.I.O.S. filed a counter affidavit in the Writ Petition before the learned Single Judge stating that the college is a recognized aided college up to High School level and is recognized unaided at the Intermediate level. It was also averred in the counter affidavit that by means of a letter dated 19-12-1985, the Madhyamik Shiksha Parishad had granted recognition to the college for High School Examination with effect from the year 1987 and in the year 1998, the management of the college applied for taking the college on grant-in-aid, indicating in the Management Return list, names of the Principal, 07 teachers, 01 clerk and 03 class IV employees, and that the petitioner's name was not there in the said list. It was also stated in the counter affidavit that the petitioner was appointed on 10-10-1999 and he joined on 11-10-1999, that he stopped attending to his duties with effect from 21-11-2020 without any information or any sanctioned leave, that thereafter, in the Management Return submitted in the year 2000-2001 furnished in response to information sought in furtherance of the application submitted in the year 1998 for bringing the college on Grant-in-aid also, the petitioner's name did not find place. Respondents in the Writ Petition also responded by stating that by means of a

letter dated 25-09-2004, the Director Secondary Education forwarded the Management Return list to the State Government alongwith the details as per the information provided by the college in the year 2000-2001 and the State Government returned the matter for removal of certain short-comings and it required the recommendations alongwith the undertaking. A copy of the undertaking furnished by the Manager of the college on affidavit dated 04-10-2003 was annexed alongwith the counter affidavit and it stated that the following persons were working in the college as per the standard: -

Sl. No.	Name	Post	Date since working
1.	Vacant	Principal	---
2.	Sri. Ram Adhar Pandey	Asstt. Teacher	01-07-1974
3.	Sri. Krishna Kant Verma	Asstt. Teacher	01-07-1974
4.	Sri. Suresh Chandra Verma	Asstt. Teacher	12-09-1978
5.	Sri. Radhey Shyam Rathore	Asstt. Teacher	17-07-1981
6.	Sri. Rama Kant Tiwari	Asstt. Teacher	31-07-1994
7.	Sri. Maheep Singh	Asstt. Teacher	04-01-1999
8.	Sri. Rajeev Kumar	Asstt. Teacher	10-10-1999
9.	Sri. Vinod Kumar Mishra	Clerk	01-08-1994
10.	Sri. Hem Chandra	Peon	07-07-1985
11.	Sri. Ramadhar	Peon	01-07-1988
12.	Sri. Shaukeen	Peon	01-06-1994
13.	Sri. Ved Ram	Peon	30-10-1997
14.	Sri. Rajneesh Kumar	Peon	10-10-1999

9. The aforesaid undertaking given by the manager of the college on affidavit further stated that Sri. Ramadhar Pandey mentioned at serial no. 2 of the list has retired on 30-06-2003 on attaining the age of superannuation and that the persons mentioned in the aforesaid list have to be taken on the Grant-in-aid list. It further recites that two posts had fallen vacant due to the death of Sri. Tej Ram Verma, the Principal and retirement of Sri. Ramadhar Pandey and in order to run the teaching work properly, the petitioner Anurag Gupta had been appointed as Assistant Teacher (Art) and Sri. Ram Naresh had been appointed as Assistant Teacher (Science). The undertaking also mentions that in case the aforesaid two teachers were not taken on Grant-in-aid list, the college will bear the expenses of their salary from its own resources.

10. It was stated in the Counter Affidavit that since the petitioner's name was not there in the approved list, therefore, his representation for including his name in the list was rejected by means of the order dated 06-09-2019.

11. The learned Single Judge allowed the Writ Petition by means of the judgment dated 24-11-2020 holding that the petitioner's appointment since 1999 is not

disputed. Learned Single Judge further records in the judgment under appeal that the college had been brought on Grant-in-aid list after submission of the documents in the year 2004, in which the petitioner's name was included; that the fact of the petitioner having worked or not during the period 02-11-2000 to 20-11-2001 has no bearing on the merit of the case; that the petitioner's name finds place in the affidavit of the manager filed in the year 2004 - which is the basis upon which the college has been included in the grant-in-aid list, as he had been appointed against a sanctioned post which had fallen vacant on the demise of the Principal and retirement of a teacher. The learned Single Judge held that the reason assigned by the D.I.O.S. for excluding the petitioner's name was unsustainable. Learned Single Judge has expressed his opinion that the D.I.O.S. could have dropped the name of a teacher only if he found that the teacher had not been duly and legally appointed in the year 2004. The learned Single Judge further held that the undertaking given by the manager in the affidavit dated 04-10-2004 would not take away the petitioner's right to get salary from the State exchequer.

12. Feeling aggrieved against the aforesaid judgment and order dated 25-11-2020 passed by the learned Single Judge, the State authorities have filed the instant Intra-Court Appeal under Chapter VIII, Rule 5 of the Allahabad High Court Rules mainly on the Ground that only those employees are entitled to receive salary from the State Exchequer, whose names were mentioned in the Government Order dated 23-02-2005 whereby the college was brought on Grant-in-aid list; that the petitioner's name was not there and he has not assailed the validity of the aforesaid Government Order dated 23-02-2005 and that the D.I.O.S. has no authority to make payment of salary to any employee whose name is not there in the Grant-in-aid list.

13. On the direction of the Court, the learned Standing Counsel has produced the original record of the office of the District Inspector of Schools, Lakhimpur Kheri as also of the State Government and we have perused the same.

14. We find that on 11-02-1998, a Government Order was issued in supersession of the earlier Government Orders on the subject, for taking recognized non-Government Higher Secondary Schools on the Grant-in-aid list on the terms and conditions mentioned in the Government Order. One of the conditions mentioned in the Government Order is that the college should give an application on the format given in the Government Order. The format of the application requires the details of the staff working in the college to be furnished. Accordingly, the college submitted an application on 19-09-1998 and the a list of teachers and non-teaching staff of the college was provided alongwith the application, and the petitioner's name was not there in this list of teachers and the members of non-teaching staff of the college.

15. After initiation of the process for taking the college on the Grant-in-aid list, on 12-09-1999 the college issued an advertisement inviting applications for appointment on three posts of Assistant Teachers - one each in Art, Science and P.T. On 10-10-1999, the manager appointed the petitioner in furtherance of the aforesaid advertisement and the petitioner joined on 11-10-1999.

16. On 28-02-1990, a Government Order was issued whereby it was provided

that the teachers to be appointed in L.T. / Lecturer Grade for the subjects Art, P.T., Language, Home Science, Craft, Music, Triple languages, Painting, Typing and Short-hand must possess the eligibility qualification in the subject concerned and Graduate/Post Graduate degree respectively. Although the petitioner is said to have been appointed on 10-10-1999, the record reveals that he acquired the eligibility qualification of Intermediate with Technical Art (Drawing Technical) from U. P. Intermediate Education Board as a private candidate on 12-07-2000, from the college in which he claims to be have been teaching since 11-10-1999. Strangely, although the petitioner's marks-sheet of Intermediate bears the date 12-07-2000, a certificate of having passed Intermediate in drawing has been issued to him on 24-06-2000, i.e., prior to issuance of the marks sheet. The petitioner passed B.A. Part III examination from Chhatrapati Shahu Ji Maharaj University, Kanpur on 23-07-2000 as a private candidate.

17. The record further reveals that on 27-07-2000, the D.I.O.S. wrote a letter to the Manager of the college, asking him to submit a proposal to bring the college on Grant-in-aid list. In response to the aforesaid letter, the Manager of the college sent a letter dated 07-08-2000, furnishing the requisite information and this time, the following list of 18 persons was sent, which too did not contain the name of the petitioner: -

Sl. No.	Name	Post	Date since working
1.	Tej Ram Verma	Principal	20.09.1980
2.	Sri. Ram Adhar Pandey	Asstt. Teacher	01-07-1974
3.	Sri. Krishna Kant Verma	Asstt. Teacher	01-07-1974
4.	Sri. Suresh Chandra Verma	Asstt. Teacher	12-09-1978
5.	Sri. Radhey Shyam Rathore	Asstt. Teacher	17-07-1981
6.	Sri. Rama Kant Tiwari	Asstt. Teacher	31-07-1994
7.	Sri. Maheep Singh	Asstt. Teacher	04-01-1999
8.	Sri. Rajeev Kumar	Asstt. Teacher	10-10-1999
9.	Sri. Vinod Kumar Mishra	Clerk	01-08-1994
10.	Sri. Hem Chandra	Peon	07-07-1985
11.	Sri. Ramadhar	Peon	01-07-1988
12.	Sri. Shaukeen	Peon	01-06-1994
13.	Sri. Ved Ram	Peon	30-10-1997
14.	Sri.	Peon	10-10-

	Rajneesh Kumar		1999
15.	Sri Rajesh Kumar	Peon	03-10-1999
16.	Sri Janardan Singh	Peon	03-10-1999
17.	Sri Arvind Kumar	Peon	03-10-1999
18.	Sri Sandeep Kumar Verma	Peon	03-10-1999

18. On 21-12-2000, the Assistant Accounts Officer of the office of the D.I.O.S. wrote a letter to the D.I.O.S. stating that the number of member of staff in the college in question exceeds the standard strength and an enquiry in this regard needs to be conducted as per the Government Order.

19. On 11-01-2001, the D.I.O.S. sent a letter to the Regional Joint Director of Education, forwarding the papers of three colleges, including the college in question, for taking them on Grant-in-aid list and the papers of the college in question contained an undated list of staff members signed by the Principal and the Manager of the college, which was the same list of 18 persons, as was provided with the earlier letter dated 07-08-2000 and which did not contain the petitioner's name.

20. On 16-01-2001, the D.I.O.S. wrote another letter to the manager of the college requesting him to provide full particulars of the teachers and employees, the year of recognition, names of the teachers and the employees, date of joining, date of grant of approval and the name and designation of the authority who had granted the approval. Again, the college provided the same list of 18 persons under the joint signatures of the Principal and the Manager of the college, which did not contain the petitioner's name. On 24-04-2001, the D.I.O.S. forwarded the same list to the Joint Director, Education.

21. Again, the college provided a list of staff members prepared on 01-05-2001 under the joint signatures of the Principal and the Manager, which again contained the same information of 18 persons, as was provided earlier with the letter dated 07-08-2000, which did not include the petitioner's name. This information was forwarded by the D.I.O.S. to the Joint Director Education on 11-05-2001 and again on 18-07-2001.

22. The record further reveals that on 21-07-2001, the manager of the college wrote a letter to the petitioner, stating that in pursuance of the agreement dated 14-07-2001, he was being adjusted on the post of Assistant Teacher (Art) and was given "re-appointment" on the said post.

23. On 26-07-2001, the Joint Director wrote a letter to the D.I.O.S. stating that upon scrutiny of the papers submitted for providing Grant-in-aid, the certificate of renewal of the society and the documents relating to the land and building of the college were found wanting and he was directed to remove the objections. Again, on 30-07-2001 another letter was written by the authority asking the details of creation of posts and its approval. On 20-08-2001, the D.I.O.S. sent a reply providing the copies of certificate of renewal of the society, khatauni, valuation, secured fund, affidavit and undertaking and

it stated that permission has been granted to run Class 9 but no documents were available regarding creation of the posts.

24. We gather from the record that although there is no letter no. 4989/2001-02 dated 06-10-2001 of the D.I.O.S. available on the original record and no such letter has been brought on record of the Writ Petition by any of the parties, on 20-10-2001 the Manager of the college gave a letter to the D.I.O.S. stating that in furtherance of the letter no. 4989/2001-02 dated 06-10-2001, he was submitting a list of the teachers / non-teaching staff of the college and the list was provided with this letter, which contained the petitioner's name for the first time.

Sl. No.	Name	Post	Date since working
1.	Sri. Ram Adhar Pandey	Principal	01-07-1974
2.	Sri. Krishna Kant Verma	Asstt. Teacher	01-07-1974
3.	Sri. Suresh Chandra Verma	Asstt. Teacher	12-09-1978
4.	Sri. Radhey Shyam Rathore	Asstt. Teacher	17-07-1981
5.	Sri. Rama Kant Tiwari	Asstt. Teacher	31-07-1994
6.	Sri. Maheep Singh	Asstt. Teacher	04-01-1999
7.	Sri. Rajeev Kumar	Asstt. Teacher	10-10-1999
8.	Anurag Gupta	Asstt. Teacher	10.10.1999
9.	Sri. Vinod Kumar Mishra	Clerk	01-08-1994
10.	Sri. Hem Chandra	Peon	07-07-1985
11.	Sri. Ramadhar	Peon	01-07-1988
12.	Sri. Shaukeen	Peon	01-06-1994
13.	Sri. Ved Ram	Peon	30-10-1997
14.	Sri. Rajneesh Kumar	Peon	10-10-1999
15.	Sri Rajesh Kumar	Peon	03-10-1999
16.	Sri Janardan Singh	Peon	03-10-1999
17.	Sri Arvind Kumar	Peon	03-10-1999
18.	Sri Sandeep Kumar Verma	Peon	03-10-1999

25. The manager of the college gave a certificate stating that in case any teachers / non-teaching employees will be found to be in excess of the standard number of posts, the management will pay their salary from its own resources in case the college in taken on the Grant-in-aid list and the college will not make any demand of any grant from the Government for this purpose. On 31-05-2003 these papers were forwarded by the D.I.O.S. to the Joint Director Education.

26. On 17-07-2003, the Director of Secondary Education, U.P. forwarded the information of 29 colleges to the Government, and the information in regard

to the college in question contained the names of teachers and other employees as per the list of 14 persons provided by the college earlier and it did not contain the petitioner's name.

On 25-09-2004, the Deputy Director wrote a letter to the D.I.O.S. with a direction to obtain an undertaking from the college on the basis of the information provided in the year 2000-2001. On 04-10-2004, the manager of the college gave an undertaking on an affidavit stating that the following persons are working in the college as per the standards: -

Sl. No.	Name	Post	Date since working
1.	Vacant	Principal	---
2.	Sri. Ram Adhar Pandey	Asstt. Teacher	01-07-1974
3.	Sri. Krishna Kant Verma	Asstt. Teacher	01-07-1974
4.	Sri. Suresh Chandra Verma	Asstt. Teacher	12-09-1978
5.	Sri. Radhey Shyam Rathore	Asstt. Teacher	17-07-1981
6.	Sri. Rama Kant Tiwari	Asstt. Teacher	31-07-1994
7.	Sri. Maheep Singh	Asstt. Teacher	04-01-1999
8.	Sri. Rajeev Kumar	Asstt. Teacher	10-10-1999
9.	Sri. Vinod Kumar Mishra	Clerk	01-08-1994
10.	Sri. Hem Chandra	Peon	07-07-1985
11.	Sri. Ramadhar	Peon	01-07-1988
12.	Sri. Shaukeen	Peon	01-06-1994
13.	Sri. Ved Ram	Peon	30-10-1997
14.	Sri. Rajneesh Kumar	Peon	10-10-1999

27. The undertaking on affidavit of the manager further states that Sri. Ramadhar Pandey mentioned at serial no. 2 of the list has retired on 30-06-2003 after attaining the age of superannuation. The persons mentioned in the aforesaid list have to be taken on Grant-in-aid list. Two posts have fallen vacant due to the death of Sri. Tej Ram Verma, the Principal and retirement of Sri. Ramadhar Pandey and in order to run the teaching work properly, the petitioner Anurag Gupta has been appointed as Assistant Teacher (Art) and Sri. Ram Naresh has been appointed as Assistant Teacher (Science). In case the aforesaid two teachers are not taken on Grant-in-aid list, the college will bear the expenses of their salary from its own resources.

28. Accordingly, on 23-02-2005, a Government Order was issued taking 09 colleges, on the grant-in-aid list, including the college in question and the enclosed list contains the names of in all 14 teachers and other employees of the college mentioned in the table given in para 26 above, which does not include the petitioner's name.

29. When we analyse the submissions made by learned counsel representing the respective parties in the wake of the record, we find that although the petitioner had approached this Court by categorically

pleading in the writ petition that he holds the qualifications of "Bachelor of Arts alongwith Intermediate Grade Drawing Examination of Bombay" and being fully eligible for being appointed on the post of Assistant Teacher (Art), he was appointed on 10-10-1999 but the record reveals that he acquired the eligibility qualification of Intermediate with Technical Art (Drawing Technical) from U. P. Intermediate Education Board as a private candidate on 12-07-2000, from the college in which he claims to be teaching since 11-10-1999. Strangely, although the petitioner's marks-sheet of Intermediate bears the date 12-07-2000, a certificate of having passed Intermediate in drawing is said to have been issued to him on 24-06-2000, i.e., prior to issuance of the marks-sheet. The petitioner passed B.A. Part III examination from Chhatrapati Shahu Ji Maharaj University, Kanpur on 23-07-2000 as a private candidate. Therefore, on the date of his appointment, i.e. 10-10-1999, the petitioner did not possess any of the essential eligibility qualifications laid down by the Government Order dated 28-02-1990 and he, thus, appears to have given incorrect information regarding possessing eligibility qualification in the Writ Petition. As the petitioner did not possess the eligibility qualification on the date of his appointment to the post of Assistant Teacher (Art), his appointment was illegal.

30. The record further reveals that on 21-07-2001, the manager of the college had "adjusted and re-appointed" the petitioner on the post of Assistant Teacher (Art) in pursuance of some agreement dated 14-07-2001. Although the petitioner possessed the eligibility qualification on the said date, he was given re-appointment in pursuance of some agreement, without advertising the post and without obtaining the requisite sanction/approval from the authority concerned as required by law. Therefore, his re-appointment made on 21-07-2001 was also not in accordance with the law.

31. Although the petitioner has alleged that the Manager of the college became annoyed with him and did not allow him to perform his duties for the period from 22-11-2000 till 14-07-2001 and being perturbed, humiliated and victimized, coupled with mental tension and depression, the petitioner fell seriously ill, but at the same time he alleges that he had given an application for grant of leave to the Principal of the college and on 22-11-2000 itself and he stopped attending the college and, therefore, there was no occasion for the manager to continue to humiliate and victimize the petitioner after 22-11-2000 when the petitioner had stopped attending the college. Moreover, no complaint to this effect is found to have been made by the petitioner to any authority and this allegation appears to have been made for the first time in the Writ Petition.

32. Although the petitioner has alleged that he was required to furnish a compromise that he will not claim salary for the aforesaid period, the document alleged to be a compromise is a letter dated 14-07-2001 written by the petitioner to the D.I.O.S. stating that he had not performed teaching duties in the college between the period 22-11-2000 to 14-07-2001 and, therefore, he will not claim the salary and allowances etc. for the aforesaid period.

33. The petitioner's name was not there in the original list of teachers and other non-teaching staff provided by the college on 19-09-1998, and again on 07-08-2000, and also in the undated lists provided

by the college which were forwarded alongwith the letters dated 11-01-2001 and 24-04-2001 written by the D.I.O.S., and also in the list dated 01-05-2001. His name appeared for the first time in a list provided by the Manager of the college alongwith a letter dated 20-10-2001 written to the D.I.O.S. purportedly in furtherance of some letter no. 4989/2001-02 dated 06-10-2001 written by the latter, although there is no such letter available on the original record or on the record of the Writ Petition or the Special Appeal. At the same time, the manager of the college gave a certificate that in case any teacher/non-teaching employee will be found to be in excess of the standard number of posts, the management will pay salary from its own resources in case the college is taken on the Grant-in-aid list and the college will not make any demand from the Government for any grant for this purpose.

34. On 04-10-2004, the manager of the college gave an undertaking on an affidavit stating that 14 persons named in the affidavit (whose particulars are mentioned in the table given in para 26 above) were working in the college as per the standards, which 14 persons did not include the petitioner, and further stating that two posts had fallen vacant due to the death of Sri. Tej Ram Verma, the Principal and retirement of Sri. Ramadhar Pandey and in order to run the teaching work properly, the petitioner Anurag Gupta had been appointed as Assistant Teacher (Art) and Sri. Ram Naresh had been appointed as Assistant Teacher (Science). In case the aforesaid two teachers are not taken on Grant-in-aid list, the college will bear the expenses of their salary from its own resources.

35. As per the aforesaid undertaking on affidavit available on the record produced by learned State Counsel, the manager of the college himself admitted that the petitioner was not amongst the teachers of the college working as per the standards.

36. Keeping in view all the aforesaid facts, more particularly the fact that the petitioner's appointment/re-appointment was not made in accordance with the law and the manager of the college had himself stated on oath before the State authorities that the petitioner was not included amongst the teachers working as per the standard, we are of a considered opinion that no direction could be issued to include the petitioner's name in the list of teachers of the college for bringing it on Grant-in-aid list and to pay his salary from the State Exchequer.

37. The facts disclosed and reasons given above are self revealing and thus, we are not in doubt that the appointment of the petitioner (respondent No. 1 in this Special Appeal) was not in accordance with law, not only for want of approval by the authority concerned, but also because at the time of his alleged appointment he was not fulfilling the essential minimum qualification for the post. The name of the petitioner is said to have been sent to the D.I.O.S. by the management pursuant to a non-existent letter dated 06-10-2001 and, as such, we also have no hesitation to hold that such uncalled for information said to have been submitted by the management of the college cannot be the basis of inclusion of his name amongst the teachers of the college, who are entitled to receive salary from the State exchequer on the college having been brought on Grant-in-aid list.

38. In the aforesaid view, we do not find ourselves in agreement with the

judgment and order dated 25-11-2020 passed by the learned Single Judge, which is under appeal. The Special Appeal is thus **allowed**. The judgment and order dated 25-11-2020 passed by the learned Single Judge in Writ Petition No. 31660 (S/S) of 2019 is hereby set aside and the Writ Petition is dismissed.

39. However, there will be no order as to costs.

(2022)05ILR A1114
APPELLATE JURISDICTION
CIVIL SIDE
DATED ALLAHABAD 06.05.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE PIYUSH AGRAWAL, J.

Special Appeal No. 676 of 2015
with other connected cases

Shri Ram Chandra Mission & Ors. ...Appellants

Versus

State Of U.P. & Ors. ...Respondents

Counsel for the Appellants
Sri Anil Tiwari (Senior Adv.), Sri Anand Prakash Paul, Sri S.K. Tripathi

Counsel for the Respondents:
Ms. Meenakshi Singh (State Law Officer), Sri Ajit Kumar, Sri Krishna Mohan Garg, Sri Manu Saxena, Sri Rishabh Srivastava, Sri Mohit Kumar, Sri Nitin Kumar

Civil Law – Constitution of India, 1950 - Article 226 - Code of Civil Procedural Code, 1908 - Order 1 Rule 8, Order 6 Rule 17, Order 7 Rule 11 - Societies Registration Act, 1860 - Sections 3A, 3A(4), 3-B, 4, 6, 15, 25, 25(1) & 25(2) – Appeals – arising out of dismissal of writ petitions – in which petitioners are commonly challenged the Election of office bearers, approval of the list of working committee & renewal of registration certificate of the Society – no argument were addressed to concealment of material facts as pointed out by writ court – S*upressio veri, expression faisi* - Appellants are not deserve to any relief from this Court, as they are not only guilty of concealment of material facts from Court but, also are indulged in forum shopping as well as polluting the stream of justice.(Para – 60, 63, 69)

Appeals are dismissed. (E-11)

List of Cases cited: -

1. ABCD Vs U.O.I. & ors. (2020) 2 SCC 52

2. Abhyudya Sanstha Vs U.O.I., (2011) 6 SCC 145

3. Amar Singh Vs U.O.I. & ors., (2011)7 SCC 69

4. Chandra Shashi Vs Anil Kumar Verma, (1995) 1 SCC 421

5. Dalip Singh Vs St. of U.P., (2010) 2 SCC 114

6. Dhananjay Sharma Vs St. of Har. & ors., (1995) 3 SCC 757

7. G. Narayanaswamy Reddy Vs Govt. of Karn., (1991) 3 SCC 261

8. Hari Narain Vs Badri Das, AIR 1963 SC 1558

9. K.D. Sharma Vs Steel Authority of India Ltd. & ors., (2008) 12 SCC 481

10. Kishore Samrite Vs St. of U.P. & ors., (2013)2 SCC 398

11. Moti Lal Songara Vs Prem Prakash @ Pappu & anr., (2013) 9 SCC 199

12. Pushpadevi M. Jatia Vs M.L. Wadhawan etc., (1987) 3 SCC 367

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

1. This order will dispose of a bunch of 11 Special Appeals and one writ

petition. The Special Appeals arise out of a common order passed by the learned Single Judge dated July 10, 2015. The writ petition, inter alia, challenges the orders dated February 21, 2015 and October 12, 2015 whereby the list of the members of the working committee for the year 2015-16 has been approved and the registration certificate of Ram Chandra Mission (Society) for the year 2015-2020 has been renewed.

2. The issue primarily pertains to control and management of Shri Ram Chandra Mission, namely, appellant No.1 (hereinafter referred to as "the Mission'). It is said to be a spiritual society registered under the Societies Registration Act, 1860 (hereinafter referred to as "the Act').

3. At the time of hearing, it was not disputed that there are two rival groups, who are seeking to retain the management of the Mission. One set of persons is the appellants (hereinafter referred to as "Group-I') whereas another set is the private respondents (hereinafter referred to as "Group-II').

BRIEF OF THE WRIT PETITIONS, ORDERS PASSED WHEREIN ARE SUBJECT MATTER OF CHALLENGE IN PRESENT SPECIAL APPEALS

4. The details of the parties and the prayers made in the writ petitions (giving rise to the present Special Appeals), are summed up herein below.

(1) Writ-C No.8950 of 2001 (Special Appeal No.712 of 2015)

The aforesaid writ petition was filed by the Mission through Surendra Kumar Dixit, claiming himself to be duly elected Treasurer of the Mission, along with others (members of Group-I) impleading the State, Registrar and Assistant Registrar, Firms, Societies and Chits as respondents. The prayer made in the aforesaid writ petition was for a direction to respondent No.3 to handover the renewed certificate of registration of the Mission for the year 2000-2005 to the duly elected working committee of petitioner No.1 and not to any other person. Further prayer was that in case any such recognition had been given to Parthasarthi Rajagopalachari, the nominee President (member of Group-II), the same may be quashed.

(2) Writ-C No.40035 of 2004 (Special Appeal No.710 of 2015)

The aforesaid writ petition was filed by the Mission through Navneet Kumar Saxena, claiming himself to be elected President of the Mission, along with K.V. Reddy and Puneet Kumar Saxena (members of Group-I) impleading the State, Registrar and Assistant Registrar of the Firms, Societies and Chits and Parthasarthi Rajagopalachari and Uma Shankar Bajpai (members of Group-II) as respondents. Challenge in the aforesaid writ petition was to the order dated June 19, 2004 whereby the application of Puneet Kumar Saxena, for amendment in the constitution and bye-laws of the Mission, was rejected. Further challenge was to the order dated August 9, 2004 whereby the application filed by Puneet Kumar Saxena seeking recall of the order dated June 19, 2004, was rejected. Further prayer was for a direction to respondent Nos.2 and 3 to recognise and declare petitioner Nos.2 and 3, namely, Navneet Kumar Saxena and K.V. Reddy as the President and the Secretary of the Society/Mission as per Sections 3A(4) and 4 of the Act.

(3) Writ-C No.66631 of 2005 (Special Appeal No.713 of 2015)

The aforesaid writ petition was filed by the Mission through Amresh Kumar, claiming himself to be elected Member of the working committee (member of Group-I), impleading the State, Assistant Registrar, Societies, Chits and Funds and Parthasarthi Rajagopalachari (member of Group-II) as respondents. The prayer in the aforesaid writ petition was for a direction to respondent No.2 to accept the list of the elected working committee/managing body for the period 2005-2006. Further prayer was for direction to respondent No.2 to act in accordance with Section 3A of the Act and the rules framed thereunder.

(4) Writ-C No.69081 of 2005 (Special Appeal No.701 of 2015)

The aforesaid writ petition was filed by the Mission through Navneet Kumar Saxena, claiming himself to be elected President of the Mission, along with K.V. Reddy and Amresh Kumar (members of Group-I) impleading the State, Registrar & Assistant Registrar, Societies, Chits and Funds along with Parthasarthi Rajagopalachari and others (members of Group-II) as respondents. Challenge in the aforesaid writ petition was to the order dated October 10, 2005 whereby registration certificate of the Society/Mission was renewed in favour of respondent No.5, namely, Uma Shanker Bajpai (member of Group-II) for the year 2005-2010.

(5) Writ-C No.5034 of 2010 (Special Appeal No.676 of 2015)

The aforesaid writ petition was filed by the Mission through Navneet Kumar Saxena, claiming himself to be elected President of the Mission, along with K.V. Reddy and Amresh Kumar (members of Group-I) impleading the State, Registrar & Assistant Registrar, Societies, Chits and Funds along with Parthasarthi Rajagopalachari and others (members of Group-II) as respondents. Challenge in the aforesaid writ petition was to the order dated December 19, 2009 whereby list of the members of the working committee for the year 2009-2010 was approved.

(6) Writ-C No.24212 of 2011 (Special Appeal No.702 of 2015)

The aforesaid writ petition was filed by the Mission through Navneet Kumar Saxena claiming himself to be elected President of the Mission, along with Amresh Kumar (members of Group-I) impleading the State, Assistant Registrar, Society, Firm, Chits and Funds along with Parthasarthi Rajagopalachari and U.S. Bajpai (members of Group-II) as respondents. Challenge in the aforesaid writ petition was to the order dated October 27, 2010 whereby registration certificate of the Society/Mission was renewed in favour of respondent No.4, namely, Uma Shanker Bajpai (member of Group-II) for the year 2010-2015.

(**7) Writ-C No.24214 of 2011 (Special Appeal No.709 of 2015)**

The aforesaid writ petition was filed by the Mission through Navneet Kumar Saxena, claiming himself to be elected President of the Mission along with K.V. Reddy and Amresh Kumar (members of Group-I) impleading the State, Assistant Registrar, Society, Firm, Chits and Funds along with Parthasarthi Rajagopalachari and Uma Shanker (members of Group-II)

as respondents. Challenge in the aforesaid writ petition was to the order dated March 16, 2011 whereby, while rejecting the claim of the petitioners, the list of the members of the working committee for the year 2010-2011 submitted by respondent Nos.3 and 4 (members of Group-II) was approved.

(8) Writ-C No.41630 of 2012 (Special Appeal No.699 of 2015)

The aforesaid writ petition was filed by the Mission through Navneet Kumar Saxena claiming himself to be elected President of the Mission along with K.V. Reddy and Amresh Kumar (members of Group-I) impleading the State, Registrar and Assistant Registrar, Societies, Firms, Chits and Funds along with Parthasarthi Rajagopalachari and Uma Shanker (members of Group-II) as respondents. Challenge in the aforesaid writ petition was to the order dated May 5, 2011 whereby list of the members of the working committee submitted by respondent Nos.4 and 5 for the year 2011-2012 (member of Group-II) was approved.

(9) Writ-C No.41631 of 2012 (Special Appeal No.708 of 2015)

The aforesaid writ petition was filed by the Mission through Navneet Kumar Saxena, claiming himself to be elected President of the Mission, along with K.V. Reddy and Amresh Kumar (members of Group-I) impleading the State, Registrar and Assistant Registrar, Societies, Firms, Chits and Funds along with Parthasarthi Rajagopalachari and Uma Shanker (members of Group-II) as respondents. Challenge in the aforesaid writ petition was to the order dated January 18, 2012 whereby the list of the members of the working committee for the year 2012-2013 submitted by respondent No.4 (member of Group-II) was approved.

(10) Writ-C No.48669 of 2013 (Special Appeal No.711 of 2015)

The aforesaid writ petition was filed by the Mission through Navneet Kumar Saxena, claiming himself to be elected President of the Mission, along with K.V. Reddy, Amresh Kumar and Dinesh Kumar (members of Group-I) impleading the State, Registrar and Assistant Registrar, Societies, Firms, Chits and Funds along with Parthasarthi Rajagopalachari and Uma Shanker Bajpai (members of Group-II) as respondents. Challenge in the aforesaid writ petition was to the order dated April 24, 2013 whereby the list of the members of the working committee for the year 2013-2014 submitted by respondent No.5, namely, Uma Shankar Bajpai (member of Group-II) was approved.

(11) Writ-C No.30767 of 2014 (Special Appeal No.700 of 2015)

The aforesaid writ petition was filed by the Mission through Navneet Kumar Saxena, claiming himself to be elected President of the Mission, along with Amresh Kumar (members of Group-I) impleading the State, Assistant Registrar, Societies, Firms, Chits and Funds along with Parthasarthi Rajagopalachari and Uma Shanker Bajpai (members of Group-II) as respondents. Challenge in the aforesaid writ petition was to the order dated April 19, 2014 whereby the list of the members of the working committee for the year 2014-2015 submitted by respondent No.4, namely, Uma Shankar Bajpai (member of Group-II) was approved.

5. The aforesaid writ petitions were dismissed by the learned Single Judge vide common impugned judgment.

6. Writ-C No.7139 of 2016 was also heard along with the bunch of aforesaid Special Appeals. It has been filed by Navneet Kumar Saxena claiming himself to be the elected President of the Mission along with Dinesh Kumar and Amresh Kumar (members of Group-I) impleading the State, Assistant Registrar, Societies, Firms, Chits and Funds along with Kamlesh Desaibhai Patel and Uma Shanker Bajpai (members of Group-II) as respondents. Inter alia, prayer in the aforesaid writ petition is for quashing the orders February 21, 2015 and October 12, 2015.

7. By order dated February 21, 2015, the list of members of the working committee for the year 2015-2016 submitted by respondent No.4, namely, Uma Shankar Bajpai was approved and by order dated October 12, 2015 the registration certificate of the Society/Mission for the period 2015-2020 was renewed in favour of respondent No.4.

ARGUMENTS ON BEHALF OF THE APPELLANTS/PETITIONERS

8. Mr. Anil Tiwari, learned Senior Advocate with Mr. Anand Prakash Paul, learned counsel appearing for the appellants, referred to the bye-laws of the Mission which, according to him, provided that the headquarter of the Mission shall be at Shahjahanpur. It shall work under the guidance and control of the founder or his spiritual representative in the direct line of succession. The entire powers are vested with the President of the Mission.

9. An amendment was carried out in the Act by the State of Uttar Pradesh by U.P. Act No.52 of 1975 vide which Section 3-A was added, which provided that certificate of registration of a society shall be valid for a period of two years. Thereafter renewal will be required, which is granted subject to fulfilment of the requisites.

10. Section 25 of the Act provides for resolution of dispute regarding election of office bearers. As in the case in hand also, the dispute is pertaining to management of the society with reference to election, the matter was required to be referred to the competent authority in terms of Section 25 of the Act. Reference was also made to the Statement of Object and Reasons for carrying out the amendments in the Act vide U.P. Act No.52 of 1975.

11. Further, reference was made to the amendment carried out in the Act vide U.P. Act No.13 of 1978, which received assent of the Governor on April 27, 1978, by which a proviso was inserted in Section 25 of the Act to even specify the grounds on which the election can be set-aside. Earlier, no such grounds had been specified.

12. Reference was also made to the subsequent amendment made in the Act by U.P. Act No.11 of 1984, which received assent of the Governor on April 29, 1984. In terms of the aforesaid, amendment was carried out in Section 3A of the Act, which provided that at the time of filing of application for renewal of the certificate, the application shall be accompanied by a list of members of the managing body.

13. The argument is that ever since the aforesaid amendments, which provided for election in any society, the elections are

being carried out in terms thereof, whereas the claim of the respondents is that the elections were never held and are not required to be held as such.

14. Assailing the order passed by the learned Single Judge, it is submitted that the learned Single Judge had gone wrong in opining that the election would also mean nomination. The provisions of the Act have not been properly appreciated. The amendments made in the Act and the spirit thereof were totally ignored.

15. Reference has been made to the previous litigations between the parties. However, the same was properly explained before the learned Single Judge. The submission is that in terms of the amendment carried out in the Act, elections were required to be held. It is the definite case of the appellants that elections have regularly been held. However, the case set up by the respondents is of nomination and not election in terms of the provisions of the Act. In case, the Society fails to hold the elections, it is for the Registrar to do the needful. Even the Registrar has failed to discharge his statutory duty.

ARGUMENTS ON BEHALF OF RESPONDENTS

16. On the other hand, Mr. Ajit Kumar, along with Mr. Krishna Mohan Garg and Mr. Mohit Kumar, Advocates, appearing for the respondents submitted that Shree Ram Chandra Ji Maharaj was the first President of the Mission, who had constituted the same. He died on April 19, 1983. The appellant No.2, is his grandson. Ever since the death of Shree Ram Chandra Ji Maharaj, the litigation started for control of the Mission. The appellants wanted to retain its control treating the same to be their private property.

17. The first suit, bearing Original Suit No.200 of 1983, was filed on December 26, 1983 by some of the followers of the Mission, namely, Uma Shanker, Basudeo Singh and Bhagwan Dayal, in the group of the appellants. The prayer made therein was that defendant No.1 Parthasarathi Rajagopalachari be restrained from being the President of the Mission. The learned trial court granted ex-parte interim injunction, which was confirmed vide order dated January 4, 1984. The same was impugned by Parthasarathi Rajagopalachari by filing First Appeal From Order No.439 of 1984 before this Court. The interim injunction granted in the suit was vacated by this Court vide judgment and order dated February 25, 1985. As a result thereof, Parthasarathi Rajagopalachari continued as the President of the Mission. Against the aforesaid order, Special Leave to Appeal (Civil) No.7773 of 1985 was filed, which was dismissed vide order dated September 27, 1985 with the observation that the respondents Parthasarathi Rajagopalachari and others shall not alienate or dispose of any part of the property belonging to the Mission and the Headquarter of the Mission will not be changed to any other place from Shahjahanpur. The aforesaid suit was transferred to this Court. An application was filed in the said suit by plaintiff Nos.1 and 2, namely, Uma Shanker and Basudeo Singh, to withdraw the suit unconditionally whereas plaintiff No.3 Bhagwan Dayal prayed that the suit may be dismissed as withdrawn with liberty to file fresh one, in case the cause of action still survived. Though the withdrawal application, as prayed for by the plaintiffs, was allowed vide order dated July 10, 1997, however, cost of ₹4,000/- was imposed as the defendants in the suit

had contested the same for a period of about 14 years.

18. Reference was made to an order passed by this Court on an application filed by the plaintiffs in the aforesaid Original Suit No.200 of 1983 for amendment in the plaint and for impleading Umesh Chandra Saxena as defendant. Vide order dated May 24, 1996, the application filed for impleadment of Umesh Chandra Saxena to represent the Mission as its President was dismissed. Observation was made by this Court in the aforesaid order that no plea was taken earlier in any litigation that Umesh Chandra Saxena was the President of the Mission. It was an afterthought. Special Appeal No.561 of 1996 was filed against the aforesaid order dated May 24, 1996, which was dismissed by a Division Bench on November 24, 1998.

19. Further, reference was made to Original Suit No.142 of 1986 filed by the Mission through its Secretary S.A. Sarnad praying for restraining the defendants, namely, Basdeo Singh, Bhagwan Dayal, Uma Shanker Arya and others from interfering in functioning of the Mission. Umesh Chandra Saxena was impleaded as defendant No.5 in the aforesaid original suit. It is claimed that the aforesaid suit was dismissed as withdrawn, as the defendants had accepted the claim made therein.

20. Reference was made to Civil Misc. Writ Petition No.22657 of 1991 filed by the Mission through its Secretary B.D. Mahajan, praying for recognition of the working committee of the Mission. The same was dismissed as withdrawn on July 10, 1997. Further, reference was made to another writ petition bearing Civil Misc. Writ Petition No.37023 of 1994 filed by the Mission through its President Umesh Chandra Saxena praying for quashing of the order dated September 29, 1994 by which it was directed that P. Rajagopalachari shall continue to work as President of the Mission till the dispute regarding nomination was decided by this Court. The aforesaid writ petition was dismissed by this Court on July 10, 1997. Against the aforesaid order, Special Appeal No.580 of 1997 was filed, which was dismissed on November 24, 1998. Reference was made to the pleadings in the aforesaid writ petition wherein it was claimed that the matter regarding nomination of the President of the Mission was considered in the meetings of the General Body held on February 6, 7 and 8, 1984. P. Rajagopalachari abstained from the meeting. Name of Umesh Chandra Saxena was proposed as President of the Mission, which was accepted.

21. Further, reference was made to Testamentary Suit No.8 of 1993 (converted into Testamentary Suit No.1 of 1994) filed by Umesh Chandra Saxena and Sarvesh Chandra Saxena, both sons of Shree Ram Chandra Ji Maharaj. The Mission was also impleaded through its Secretary B.D. Mahajan as applicant No.3. The prayer made in the aforesaid suit was that Umesh Chandra Saxena be granted Letter of Administration with reference to the properties as mentioned in the suit, he should be declared as President of the Mission and applicant No.2 Sarvesh Chandra Sexana, another son of Shree Ram Chandra Ji Maharaj, be declared as Secretary of the Mission. The aforesaid plaint was rejected by this Court vide order dated October 16, 1995. Special Appeal No.829 of 1995 filed by Umesh Chandra Saxena and others against the aforesaid order, was dismissed by this Court vide order dated November 24, 1998.

22. As the appellants had not succeeded in its efforts to usurp the properties of the Mission by filing one or the other litigations, another Suit No.697 of 1995 was filed by the Mission through its President Umesh Chandra Saxena praying for a declaration that P. Rajagopalachari is not the President of the Mission and he be restrained from acting as such. It was claimed that during his lifetime, the founder President Shree Ram Chandra Ji Maharaj had nominated plaintiff No.2, namely, Umesh Chandra Saxena as the spiritual representative in the direct line of succession and as his successor President of the Mission. The aforesaid suit was dismissed on May 31, 1999 on the application filed by defendant No.1 P. Rajagopalachari under Order 7 Rule 11 C.P.C. Against the aforesaid judgment of the learned trial court, Civil Appeal No.219 of 1999 filed before the learned lower appellate Court, was dismissed on January 11, 2001. Second Appeal No.884 of 2001 filed against the aforesaid judgment, was also dismissed by this Court vide order dated November 26, 2001. Yet another effort of the appellants to retain control over the Mission and usurp its properties failed. In the aforesaid suit, claim made by Umesh Chandra Saxena was on the basis of his nomination as President by Shree Ram Chandra Ji Maharaj during his lifetime. No election was claimed.

23. Another case, bearing Suit No.4 of 1999, was filed by D. Krishna and Bhagwan Dayal, claiming themselves to be the Office Superintendent and Manager of the Mission, impleading Umesh Chandra and P. Rajagopalachari as defendants praying that a decree be passed against the defendants declaring the plaintiffs as Office Superintendent and Manager of the Mission pursuant to the Will deed dated April 10, 1982. The said suit is stated to have been dismissed on May 10, 1999 and Civil Appeal No.90 of 1999 filed against the same was also dismissed on January 5, 2004. The aforesaid orders have not been referred to from record.

24. As the litigation was to continue one after another, Suit No.403 of 2003 was filed by the Mission through K.V Reddy, claiming himself to be elected Secretary, against P. Rajagopalachari (died on December 20, 2014) challenging nomination of P. Rajagopalachari as President of the Mission on March 23, 1974. A decree of permanent injunction was prayed for restraining him from claiming himself to be the President of the Society/Mission. The aforesaid civil suit was dismissed on February 10, 2010. It is claimed that the aforesaid order is under challenge before the lower appellate court. Though K.V. Reddy, who was representing the Mission in the aforesaid case and the sole defendant Rajagopalachari, both had expired, however, till date, no application for substitution has been filed.

25. Forum shopping was the another device used by the appellants, as a writ petition bearing Civil Misc. Writ Petition No.3091 (M/S) of 2010 was filed by the Mission through Navneet Kumar Saxena, son of late Umesh Chandra Saxena, claiming himself to be the elected President of the Mission, and Amresh Kumar, claiming himself to be elected Member of the working committee. Only the State of U.P., Registrar and Assistant Registrar of the Societies were impleaded as respondents in the said writ petition. Though the jurisdiction to entertain the lis was with principal seat of this Court at Allahabad, still the writ petition was filed at Lucknow assailing the direction issued to the Assistant Registrar by the Registrar

dated November 4, 2009. The said writ petition was disposed of on May 21, 2010 directing the Assistant Registrar to hear all the concerned parties and take a decision without being influenced with the direction issued by the Registrar vide letter dated November 4, 2009. When the respondents came to know about passing of the aforesaid order, an application for recall thereof was filed. The aforesaid order was recalled vide order dated May 30, 2012 and the writ petition was dismissed with a cost of ₹10,000/-. It was observed therein that when Writ Petition No.5034 of 2010 was pending at Allahabad, there was no occasion for the writ petitioners therein to have moved Lucknow Bench. Special Appeal against the aforesaid order is stated to be pending (as submitted by learned counsel for the appellants).

26. Reference was also made to Original Suit No.587 of 1999 filed by Umesh Chandra Saxena, which was dismissed as withdrawn on November 26, 2001 unconditionally. No fresh suit for the purpose could be filed.

27. While referring to a Division Bench judgment of this Court dated November 24, 1998 vide which four Special Appeals bearing Special Appeal Nos.829 of 1995, 561 of 1996, 580 and 594 of 1997 were dismissed, it was submitted that the issues sought to be raised by the appellants in the present appeals were taken up in the aforesaid appeals and were rejected. The issue regarding election was also raised and rejected. Hence, there is no occasion for this Court to deal with the same time and again. The Mission is a spiritual society where members do not pay any fee, hence, no question of any elections.

28. Reference was also made to a suit bearing Civil Suit No.360 of 2000 filed by certain followers of the Mission praying for restraining the defendants including Umesh Chandra Saxena from interfering in the activities of the Mission, in which interim injunction was granted restraining the defendants from interfering in the activities of the Mission or representing the same. Writ petition bearing Civil Misc. Writ Petition No.53330 of 2000 filed by Umesh Chandra Saxena impugning the order dated November 27, 2000 by which application filed under Order 7 Rule 11 of the C.P.C. for rejection of the plaint of Suit No.360 of 2000 was rejected, was dismissed by this Court vide order dated November 19, 2002. Certain adverse observations were also made by this Court against Umesh Chandra Saxena. Against the aforesaid order, Review Application was filed by Umesh Chandra Saxena, which is pending. During pendency of the Review Application, Special Leave Petition No.6585 of 2003 was filed before Hon'ble the Supreme Court, which was also dismissed on July 25, 2003. Umesh Chandar Saxena died on November 3, 2003.

29. Subsequent to the death of Umesh Chandra Saxena, an application was filed for impleadment of his sons as legal representatives in Original Suit No.360 of 2000. The same was allowed vide order dated January 30, 2004. A revision bearing Civil Revision No.66 of 2004 was filed against the aforesaid order, which was dismissed on July 19, 2005. Even the review application was also dismissed on April 8, 2010. After the legal representatives of Umesh Chandra Saxena were impleaded in the suit, specific order dated January 30, 2004 was passed that the interim injunction already granted would

continue against newly impleaded defendants.

30. The Constitution, Memorandum of Association and Bye-laws of the Mission were referred to. It was argued that the Mission functions under the sole guidance and control of its founder or its spiritual representative in the direct line of succession and he shall be the President of the Mission. Clause 4(h) of the Memorandum of Association provides that the President shall nominate, amongst his spiritual successors, any person as his representative, who will enjoy all the power and authority vested in the President of the Mission. Clause 6 clearly provides that there is no fee for being a member of the Mission. As there is no fee for being a member of the Mission, no one has right to cast vote and no elections are to be held, if seen in light of Section 15 of the Act.

31. It was submitted by learned counsel for the respondents that as all efforts of Umesh Chandra Saxena to usurp and misuse the properties of the Mission had failed, during his life time, before his death on November 3, 2003, he had executed a Will on June 7, 1999 stating that after his death, with reference to the Mission, he nominates his three sons who will jointly appoint the President. This clearly establishes that he was treating the property of the Mission as his personal property. In fact, on account of pending litigations, he did not have any right even to manage the working of the Mission what to talk of bequeathing the same by way of a Will. This clearly shows that he was under the impression that properties of the Mission are his private properties. It is not a case of either nomination or election.

32. Though, one writ petition was filed, before the death of Umesh Chandra Saxena, in the year 2001, however, all other writ petitions were filed after his death by the persons, who did not have any authority to file the same.

33. All the appeals were filed after the death of Umesh Chandra Saxena in the year 2015. In fact, in terms of the order dated November 27, 2011 passed by the trial court directing that interim injunction restraining Umesh Chandra Saxena from acting and treating himself to be the President of the Mission will continue even against his legal representatives, who were impleaded in the aforesaid Original Suit No. 360 of 2000, they did not have any right to file or prosecute any litigation on behalf of the Mission. He has further referred to list of the working committee of the Mission while submitting that none of the members affected has challenged the same, rather it is Umesh Chandra Saxena who was aggrieved as he was treating the property of the Mission as his private property.

34. He further referred to the discrepancies in the stand taken by Puneet Kumar Saxena son of Umesh Chandra Saxena in the written statement filed in Original Suit No.360 of 2000, as verified on September 17, 2010, where in paragraph 50, he affirmed that Navneet Kumar Saxena was nominated by his late father Umesh Chandra Saxena as per the wish of Shree Ram Chandra Ji Maharaj in terms of the Will dated June 7, 1999 executed by him. Thereafter, Navneet Kumar Saxena was elected as President.

35. He further submitted that in the Will executed by Shree Ram Chandra Ji Maharaj, he had specifically stated that part of his property would go to the Mission whereas part thereof will go to his legal

heirs. On the property, which had been assigned to the Mission, the appellants cannot claim the same to be their property as the same has been given to the spiritual body.

36. Further, the contention raised is that the prayers made in the Special Appeals have been rendered infructuous and even the relief claimed. Though the appellants were indulged in lot of litigations for the last about four decades, in three writ petitions, namely, Writ-C Nos.8950 of 2001, 69081 of 2005 and 24212 of 2011 challenge was to the renewals of recognition of the Society for the years 2000-2005, 2005-2010 and 2010-2015. The period being already over, the aforesaid writ petitions had been rendered infructuous, especially if considered in the light of the fact that subsequent renewals for the period 2015-2020 and 2020-2025 have not been challenged.

37. Further, argument is that in six writ petitions, namely, Writ-C Nos.5034 of 2010, 24214 of 2011, 41630 of 2012, 41631 of 2012, 48669 of 2013 and 30767 of 2014, the challenge was to the orders of approval of the list of members of the working committee of the Mission for six years from 2009-2010, to 2014-2015. The period being already over, the aforesaid writ petitions had also been rendered infructuous, especially if considered in light of the fact that subsequent approvals of the list of members of working committee have not been challenged. The submission is that annual applications had regularly been filed along with list of members of the working committee for its approval, which were approved, with appellants no where in picture.

38. Writ Petition No.40035 of 2004 was filed on behalf of the Mission through Navneet Kumar Saxena for quashing the order dated June 19, 2004 passed by the Registrar, Firms, Societies and Chits rejecting the amendment sought in bye-laws of the Society through an application filed by Puneet Kumar Saxena. Writ Petition No.66631 of 2005 was filed on behalf of the Mission through Amresh Kumar, claiming himself to be elected Member of the working committee, praying for a mandamus to accept the list of the Members of the working committee submitted by the petitioners therein and renew the registration certificate of the society.

39. It was further argued that the appellants are not entitled to any relief as there is concealment of material fact. It is so discussed by the learned Single Judge in the impugned judgment, however, not taken to its logical end.

REJOINDER ON BEHALF OF APPELLANTS/PETITIONERS

40. In response, learned Senior Counsel for the appellants submitted that no formal elec tions are required, if there is no nomination except one for the post. However, the argument seems to be double edged as there is other side, which is refuting such a claim of the appellants. As regards the challenge to the renewal of the registration certificate of the working committee, reference was made to Writ-C No.7139 of 2016 in which renewal of the working committee for the year 2014-15 was challenged. The said writ petition forms part of this bunch of cases. Another writ bearing Civil Misc. Writ Petition No.16788 of 2021 is also stated to be pending. In the said writ petition prayer was to quash the orders dated October 9, 16 and December 20, 2020 whereby the list of

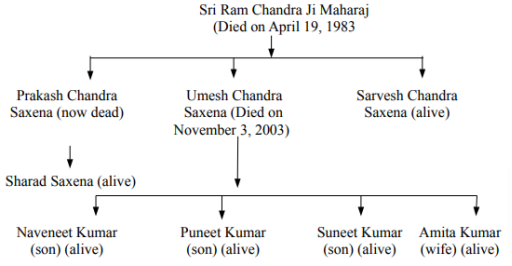
the Members of the working committee of the Mission for the year 2020-2021 was registered and registration certificate of the Society was renewed. It is further submitted that gist of the entire litigation is available in the impugned order passed by the learned Single Judge.

41. Further, the argument raised is that in terms of Section 6 of the Act a society can sue or be sued in its claim but in the case in hand, in none of the cases, writ petitions filed by the appellants, the society was impleaded as a respondent, rather the society is the writ petitioner, though the Members, who are representing the Mission, are not approved by the Registrar of the Societies.

DISCUSSIONS

42. Heard learned counsel for the parties and perused the relevant materials referred to.

43. What emerges from the documents on record, as have been referred to by learned counsel for the parties, is that Shree Ram Chandra Ji, Fatehgarh was a spiritual person. One disciple was Shree Ram Chandra Ji Maharaj of Shahjahanpur. He opted to carry on spiritual mission of his Guru. He got a society registered in the name of Shree Ram Chandra Mission of Shahjahanpur. The registration certificate was issued on July 21, 1945. It is the control and management of the aforesaid Mission, which is in dispute after the death of Shree Ram Chandra Ji Maharaj of Shahjahanpur. He expired on April 19, 1983. He is survived by:



44. It has come on record that there was a document of nomination dated March 23,1974 whereby the founder President claimed to have nominated Sri Parthasarthi Rajgopalachari as President of Mission/Society. The founder President died on April 19, 1983. The nomination aforesaid obviously would become operative after the death of the founder President. It is not disputed that Sri Parthasarthi Rajgopalachari took the charge as President of Mission/Society and started managing its affairs. Firstly, his authority was challenged by Sri Prakash Chandra Saxena, one of the three sons of founder President, and the matter was examined in working committee of the Mission/Society in its meeting dated July 10, 1983. The claim of Sri Prakash Chandra Saxena was doubted in the aforesaid meeting. The matter was posted to October 23, 1983 giving opportunity to Sri Prakash Chandra Saxena to substantiate his claim. In the meeting held on October 23, 1983, the working committee did not accept claim of Sri Prakash Chandra Saxena. The nomination document of March 3, 1974 was honoured and Sri Parthasarthi Rajagopalachari continued to function as the President.

HISTORY OF PREVIOUS LITIGATIONS

45. Brief facts from the previous litigations between the parties are summed up herein.

(A) Suit No.200 of 1983

(i) After the death of Shree Ram Chandra Ji Maharaj on April 19, 1983, the aforesaid suit was filed on December 26, 1983 by the persons from Group-I at Shahjahanpur. An application was also filed under Order 1 Rule 8 C.P.C. seeking permission to prosecute the same in representative capacity. The followers of the Mission in Group-II including P. Rajagopalachari were impleaded as defendants. The relief prayed for in the aforesaid suit was for grant of injunction restraining P. Rajagopalachari from interfering in the functioning of the Mission. It was pleaded that the founder President Shree Ram Chandra Ji Maharaj had not nominated him as the successor. The document, if any, of nomination cannot be treated as Will of the founder President, as the same is manufactured one. The suit was contested by the defendants therein. The trial court vide order dated January 4, 1984 granted ex-parte interim injunction in favour of the plaintiffs therein. The aforesaid order was challenged by the defendants in the suit including P. Rajagopalachari by filing First Appeal From Order No.439 of 1984. The same was allowed by this Court vide judgment dated February 25, 1985 finding the case set up by the defendants therein to be established. The interim injunction was vacated. The plaintiffs in the suit challenged the aforesaid order passed by this Court by filing Special Leave Petition (Civil) No.7773 of 1985, which was dismissed by Hon'ble the Supreme Court vide order dated September 27, 1985 with the observation that the defendants in the suit will not alienate or dispose of any part of the property belonging to the Mission.

(ii) Later on the aforesaid suit was transferred to this Court.

(iii) An application was filed by the plaintiffs therein seeking permission to withdraw the same with liberty to file fresh one. The apparent reason for withdrawing the suit was that they had failed to achieve the objective, for which the same was filed, for a period of 14 years. There were three plaintiffs in the suit. As is evident from the order dated July 10, 1997 passed by this Court on an application filed by the plaintiffs therein for withdrawal of the suit, the issues had been framed therein but it was still at the stage of evidence of the plaintiffs. Before leading any evidence, two applications were filed. First by Plaintiffs No.1 and 2 for withdrawal of the suit without any liberty to file fresh suit and second by Plaintiff No.3 seeking withdrawal of the suit with permission to file fresh suit.

(iv) As far as the first application filed by Plaintiffs No.1 and 2 is concerned, the same was allowed by this Court. As the prayer made in the second application filed by Plaintiff No.3, namely, Bhagwan Dayal was for permission to file a fresh suit, the same was considered on merits. The order dated July 10, 1997 passed by this Court records that in the aforesaid suit, Umesh Chandra Saxena had filed an application for being impleaded as party pleading that he was nominated as President of the Mission vide deed dated April 16, 1982 whereas defendant No.1 P. Rajagopalachari and his associates were trying to usurp the management of the Mission on the basis of a forged deed dated March 23, 1974 claimed to be executed by late Shree Ram

Chandra Ji Maharaj. The application for impleadment of Umesh Chandra Saxena was rejected on May 24, 1996.

(v) The order dated May 24, 1996 passed by this Court rejecting the application filed by Umesh Chandra Saxena for being impleaded as party to the aforesaid suit, shows that prayer made therein was that the Mission and Umesh Chandra Saxena be impleaded as defendants in the suit. Thereafter they should be transposed as plaintiffs, to avoid multiplicity of litigation. Amendment in the plaint was also sought. This Court found that neither the Mission nor Umesh Chandra Saxena were necessary parties to the litigation. The plaintiffs in the suit, in fact, had not sought any relief against the applicants, who were seeking to be impleaded as defendants. From the application for amendment in the suit filed by Umesh Chandra Saxena, it was evident that by his impleadment as party in the suit, he wanted to prosecute his own case by getting the declaration that he was the President of the Mission. Any such pleading would have changed the nature of the suit.

(vi) Another important fact, which was noticed by this Court in the aforesaid order dated May 24, 1996, is that the controversy regarding succession to the office of President arose immediately after the death of Shree Ram Chandra Ji Maharaj. A meeting for the purpose was held in July, 1983. In the said meeting, P. Rajagopalachari staked claim on the basis of his nomination in the year 1974. P.C. Saxena son of Shree Ram Chandra Ji Maharaj staked the claim of his son Sarad Saxena. It was also noticed that Umesh Chandra Saxena was present in the said meeting but he never claimed that he was the nominated President, though at that time it was sought to be pleaded that nomination was done on April 16, 1982. The next meeting was scheduled for December 27, 1983 at Hydrabad. As the members of Group-I did not want to face the meeting to settle the controversy regarding succession of the Mission, they filed a suit on December 26, 1983. It was further noted therein that in the amendment application filed, the reason assigned by Umesh Chandra Saxena was that, due to oversight, the aforesaid facts could not be incorporated in the plaint. It is further relevant to note that though the proceedings of the aforesaid suit at interim stage was contested up to Hon'ble the Supreme Court but no such plea was raised.

(vii) Another fact noticed in the aforesaid order dated May 24, 1996 is that in the year 1993 Umesh Chandra Saxena had filed a testamentary suit claiming his right on the basis of Will executed by Shree Ram Chandra Ji Maharaj in the year 1976. Even at that stage, no application was made to get the plaint amended. Further, this Court noticed that Umesh Chandra Saxena having failed to achieve the objective of having control over the Mission despite previous litigations, filed Suit No.697 of 1995. In that suit, it was claimed that he was the President of the Mission.

(viii) The application for impleadment was held to be not bonafide and the same was dismissed. The aforesaid order was challenged by Umesh Chandra Saxena by filing Special Appeal No.561 of 1996 before this Court. However, the same was dismissed as infructuous on November 24, 1998, as the suit itself stood withdrawn on July 10, 1997.

(ix) The fact remains that the aforesaid suit was filed on December 26,

1983 by persons of Group-I, after the death of Shree Ram Chandra Ji Maharaj on April 19, 1983, but still there was no pleading that Umesh Chandra Saxena had been nominated as President of the Mission, though the document is stated to be executed on April 16, 1982 in his favour prior to filing of the suit. The permission for withdrawing the suit was sought on the ground that proper parties had not been impleaded, hence there were technical defects. The suit was permitted to be withdrawn on behalf of Plaintiff No.3, namely, Bhagwan Dayal with permission to file fresh, in case, cause of action still survived. Cost of ₹4,000/- was also imposed on the aforesaid application to be paid to the contesting defendants, as the defendants were made to contest the suit for a period of about 14 years.

(B) Original Suit No.142 of 1986

(i) The aforesaid suit was filed in the court of Civil Judge, Shahjahanpur by the Mission and its Secretary against the followers of Group-I. Three sons of Shree Ram Chandra Ji Maharaj including Umesh Chandra Saxena and other followers of Group-I were impleaded as defendants.

(ii) Prayer was for grant of permanent injunction against the defendants from interfering in the working of the Mission, from realising any amount in the name of the Mission and from using or utilizing any property thereof. Inter alia, a decree was sought against the defendants therein directing them to handover the money utilized from April 19, 1983. In paragraph 4 of the plaint, it was pleaded as under:-

"4. That in the Society the Office of President has occupied by the Master till his Mahasamadhi and after his Mahasamadhi only the *spiritual nominee*/Representative of the master and none else would have occupied the office the President of the Society. The *Spiritual* Representative nominee of the Master was and is Sri Parthasaarthi Rajagopalachari of Madras who after the Mahasamadhi of the Master become the President of the Society and is discharging the functions as such. Master transmitted and conferred his spiritual power in the aforesaid Sri Parthasarthi Rajagopalachari."

(iii) A perusal of the aforesaid pleadings shows that after the death of Shree Ram Chandra Ji Maharaj, P. Rajagopalachari was pleaded to be nominated as President of the Mission.

(iv) In the written statement dated August 21, 1986 filed by defendant No.5 in the said suit, namely, Umesh Chandra Saxena admitted the contents of paragraph 4 of the plaint. The pleadings in the written statement were quite evasive. No plea was taken that Umesh Chandra Saxena was ever nominated as President of the Soceity.

(v) It was contended that claim made in the suit having been accepted by the defendants, the same was withdrawn.

(C) Writ Petition No.22657 of 1991

(i) The aforesaid writ petition was filed by the Mission through B.D. Mahajan, a member of Group-I, against the State, the Registrar and the Assistant Registrar of Firms, Societies and Chits for a direction to recognise the working committee of the Mission.

(ii) The aforesaid writ petition was permitted to be withdrawn by this Court vide order dated July 10, 1997.

(D) Testamentary Suit No.8 of 1993-Testamentary Suit No.1 of 1994

(i) The Testamentary Suit No.8 of 1993 converted into Testamentary Suit No.1 of 1994, was filed by Umesh Chandra Saxena and Sarvesh Chandra Saxena, sons of Shree Ram Chandra Ji Maharaj and also impleading the Mission as Plaintiff No.3 (members of Group-I). P. Rajagopalachari and another son of late Shree Ram Chandra Ji Maharaj, namely, Prakash Chandra Saxena including others were impleaded as respondents.

(ii) The relief prayed for was for grant of Letter of Administration in favour of Umesh Chandra Saxena and declaring him as the President of the Mission and Petitioner No.2 Sarvesh Chandra Saxena as Secretary. Apparent idea was clearly to grab the property of the Mission. The claim was made on the basis of Will dated December 30, 1976, allegedly executed by late Shree Ram Chandra Ji Maharaj.

(iii) Though the main argument raised is that after the amendment in the Act, the President could be elected, however, the prayer made in the aforesaid suit was for appointment of President as per the Will allegedly executed by Shree Ram Chandra Ji Maharaj.

(iv) Respondent Nos.8 to 12 in the aforesaid suit filed an application under Order 7 Rule 11 C.P.C. seeking rejection of the plaint. The application was allowed vide order dated October 16, 1995. The suit was dismissed finding that the relief prayed for by Umesh Chandra Saxena could not possibly be granted, as the same was misconceived. He was seeking inheritance of the properties of the Mission and not to administer the estate. The Mission was sought to be claimed as a private property.

(v) The dismissal of the aforesaid suit on acceptance of the application filed by respondents No.8 to 12 under Order 7 Rule 11 C.P.C. shows that Umesh Chandra Saxena failed in yet another attempt to usurp the properties of the Mission. As he did not want to leave any stone unturned, rather to take all the chances, the order dated October 16, 1995 was challenged by filing Special Appeal No.829 of 1995, which was dismissed by this Court on November 24, 1998 with cost. The plea raised by Umesh Chandra Saxena, that he along with other heirs of late Shree Ram Chandra Ji Maharaj was entitled to inherit the properties of the Mission, was found to be totally misconceived, as after the properties were given to the Mission, the same were not inheritable by individuals.

(vi) It is noticed in paragraph 46 of the impugned judgment of learned Single Judge that in the aforesaid special appeal, Sarvesh Chandra Saxena, real brother of Umesh Chandra Saxena, filed an affidavit that nomination of P. Rajagopalachari as President of the Mission was valid and claim of Umesh Chandra Saxena is based on forged document.

(E) Writ Petition No.37023 of 1994

(i) The aforesaid writ petition was filed by the Mission including Umesh Chandra Saxena and Sarvesh Chandra Saxena, sons of late Ram Chandra Ji Maharaj and two other followers of Group-I against the Registrar, Firms, Societies and Chits, also impleading P. Rajagopalachari, Prakash Chandra Saxena, another son of

late Ram Chandra Ji Maharaj including others as respondents.

(ii) For the first time, it was pleaded in the aforesaid writ petition that on April 16, 1982 late Shree Ram Chandra Ji Maharaj had nominated Umesh Chandra Saxena as successor President. It was stated in the aforesaid writ petition that various blank papers bearing signatures of late Shree Ram Chandra Ji Maharaj were taken and being misused by P. Rajagopalachari. The document dated December 30, 1976 claiming to be nomination deed executed by Shree Ram Chandra Ji Maharaj nominating P. Rajagopalachari as successor was stated to be forged.

(iii) The prayer made in the aforesaid writ petition was for quashing the order dated September 29, 1994.

(iv) It was further claimed that in the meetings of the Mission held on February 6, 7 and 8, 1984 Umesh Chandra Saxena was appointed as successor President where P. Rajagopalachari did not participate. Further a declaration was sought that Umesh Chandra Saxena was the successor President. The main ground of challenging the order dated September 29, 1994 was that no opportunity of hearing was afforded to Umesh Chandra Saxena. This Court recorded that he was not even party before respondent No.3, namely, Assistant Registrar, Firms, Societies and Chits as he was watching the proceedings sitting at the fence and some other person was canvassing his cause.

(v) The aforesaid writ petition was dismissed by this Court by a detailed judgment dated July 10, 1997.

(vi) Meaning thereby the claim of Umesh Chandra Saxena to have been nominated/elected President of the Mission was not accepted by this Court.

(vii) In paragraph 50 of the written statement September 17, 2010 filed on behalf of members of Group-I in Original Suit No.360 of 2000, it was pleaded that Umesh Chandra Saxena as per the wishes of founder of the Mission late Shree Ram Chandra Ji Maharaj, vide his Will dated June 7, 1999 nominated his son Navneet Kumar Saxena as the President of the Mission. Navneet Kumar Saxena was minor at the time of death of Shree Ram Chandra Ji Maharaj. What wish the founder could have expressed at that time for nominating a minor as President of spiritual Mission. Had that been so, the same would have very well been mentioned by him in his Will executed on December 30, 1976. The aforesaid written statement was filed in the year 2010 and the stand taken therein was that Navneet Kumar Saxena was nominated as President by way of a Will executed by late Umesh Chandra Saxena, though now the claim made is that the President of the Mission has to be elected. The appellants cannot be permitted to blow hot and cold in the same breath and take whatever pleas suit them at different times having failed in all their efforts by adopting different means to usurp the properties of the Mission.

(F) Original Suit No.127 of 1994

(i) Reference of the aforesaid suit is available in the Division Bench judgment of this Court in Special Appeal No.829 of 1995 decided along with Special Appeal Nos.561 of 1996, 580 and 594 of 1997 vide judgment and order dated November 24, 1998. The aforesaid suit was filed on behalf of the Mission through its President Parthasarthi Rajagopalachari (member of

Group-I) against Umesh Chandra Saxena and two others (members of Group-II) praying for restraining the defendants from holding any function in the name of the President or other office bearers of Shri Ram Chandra Mission and further for restraining defendant No.1, namely, Umesh Chandra Saxena from holding the birthday function of Babu Ji Maharaj from April 29, 1994 to May 1, 1994. In the said suit, the plaintiff Parthasarthi Rajagopalachari filed an application to withdraw the suit with liberty to file a fresh, which was allowed subject to payment of ₹2000/- as costs to be paid to defendant No.1.

(G) Special Appeal Nos.829 of 1995, 561 of 1996, 580 and 594 of 1997

(i) Special Appeal No.829 of 1995 arose out of the order dated October 16, 1995 passed by this Court in Testamentary Suit No.1 of 1994. The aforesaid suit was filed by Umesh Chandra Saxena and others for issuing Letter of Administration to Umesh Chandra Saxena in respect of properties of the Mission and also for declaration that Umesh Chandra Saxena was the President of the Mission. This Court holding that the reliefs claimed in the suit cannot be granted in a testamentary proceedings, rejected the plaint under Order 7 Rule 11 C.P.C. vide order dated October 16, 1995 against which the aforesaid appeal was filed.

24, 1996 in Original Suit No.200 of 1983. The aforesaid suit was between Uma Shanker and others (members of Group-I) and Parthasarthi Rajagopalachari and others (members of Group-II). In the aforesaid suit an application under Order 6 Rule 17 C.P.C. was filed for amendment in the plaint. The said application was rejected by this Court vide order dated May 24, 1996 against which the aforesaid appeal was filed.

(iii) Special Appeal No.580 of 1997 arose out of judgment and order dated July 10, 1997 passed in Writ Petition No.37023 of 1994. Two writ petitions were decided by the aforesaid order, namely, Writ Petition Nos.22657 of 1991 and 37023 of 1994. The first writ petition was filed by the Mission through B.D. Mahajan (member of Group-I) claiming himself to be the Secretary of the Mission challenging the validity of action of the Registrar and Assistant Registrar of Firms, Societies and Chits, who had refused to recognise the working committee of the Mission headed by members of Group-I. The second writ petition was also filed on behalf of the Mission through Umesh Chandra Saxena claiming himself to be the President of the Mission impleading Registrar, Assistant Registrar, Firms, Societies and Chits along with Parthasarthi Rajagopalachari and others as respondents. Challenge in the second writ petition was to the order dated September 29, 1994 passed by the Assistant Registrar. A mandamus was also sought for a declaration that Umesh Chandra Saxena was the successor President of the Mission. Further declaration was sought that the deed dated April 16, 1982 was valid and the nomination deed dated March 23, 1974 was forged and invalid. These two writ petitions were connected with Testamentary Suit No.1 of 1994. After decision in Testamentary Suit No.1 of 1994, there was a direction that aforesaid two writ petitions be listed along with Original Suit Nos.200 of 1983 and 127 of 1994. The aforesaid suits were decided separately. Writ Petition No.22657 of 1991 was not pressed and the same was dismissed as withdrawn. Writ Petition No.37023 of 1994 was dismissed on merits

giving rise to Special Appeal No.580 of 1997. The following observations made by the Division Bench of this Court are quite relevant for the issues sought to be raised:-

"According to the Rules of the Society, the post of the President was not an elective one, nor were the members of the working committee to be elected. The rules required the President to nominate the members of the working committee. The Act requires that a Society is to be formed by a memorandum of association and registration by at least seven persons associated with the society. The memorandum of association is to contain the name of the society, the objects of the society, and the names, addresses and occupations of the governors, council, directors, committee, or other governing body to whom, by the rules of the society the management of its affairs is entrusted. A copy of the rules and regulations of the society, certified to be a correct copy by not less than three of the members of the governing body, is to be filed with the memorandum of association. When such memorandum and certified copy of the rules with the required particulars are presented by the Secretary of the Society before the Registrar, he shall certify under his hand that the society is registered under this Act. A registration fee is to be paid for this purpose. Section 3-A of this Act speaks of renewal of certificate of registration. Once a society is registered and a certificate of registration is issued, it would remain in force for a period of five years from the date of issue. If any question arises whether any society is entitled to get itself registered in accordance with Section 3 or to get the certificate of registration renewed, the matter shall be referred to the State Government, as provided in Section 3-B of the Act. Section 4 of the Act requires that once in every year, on or before the fourteenth day succeeding the day which, according to the rules of the society, the annual general meeting of the society is held, or, if the rules do not provide for an annual general meeting in the month of January, a list shall be filed with the Registrar giving the names, addresses and occupations of the governors council, directors, committee, or other governing body then entrusted with the management of the affairs of the society. If at all the managing committee is elected, then the signatures of the old elected members shall be obtained in the list. As observed the rules of the society do not speak of an elected President or an elected working committee. Section 25 of the Act covers disputes regarding election of office-bearers and the Registrar's intervention is possible on his satisfaction that any election of office-bearers of a society has not been held within the time specified in the rules. If there be no election provided in the rules, naturally Section 25(1) or (2) of the Act would not come into play. The applications before the Registrar, however, proposed an interference under Section 25(2) of the Act and the Registrar refused to interfere not on the ground that no election was necessary but on another ground that the matter was sub judice before the High Court. It is true that the Registrar in this application had no authority to direct any body to continue in office, but that is to be read not as a direction but as a reiteration of an interim order given by the High Court. Looking from this angle the very application before the Assistant Registrar for action under Section 25(2) of the Act was untenable and so was the writ petition against the order of the Registrar, when the Registrar had no authority to take action under Section 25(2) of the Act, a writ could not have been

issued for performance of any duty under that section. Although this approach to the subject and the reasoning for this order are different from the approach and reasoning of the Hon'ble single Judge, we are of the view that the writ petition was rightly dismissed as not tenable."

(iv) Special Appeal No.594 of 1997 arose out of order dated July 10, 1997 passed by this Court in Original Suit No.127 of 1997 on an application filed for dismissing the writ petition as withdrawn with liberty to file a fresh. The said application was allowed permitting withdrawal of the suit with liberty to file a fresh subject to payment of ₹2,000/- as costs.

(v) The aforesaid four Special Appeals were dismissed with costs vide common judgment and order dated November 24, 1998 in conformity with the observation made by the learned Single Judge in the judgments and orders impugned therein.

(vi) It may be relevant to note here that all the arguments raised by Umesh Chandra Saxena regarding election/nomination as President of the Mission were considered and it was opined that the writ petitions were totally misconceived and were rightly dismissed by the learned Single Judge.

(vii) The argument with reference to Section 25 of the Act regarding election/nomination as President of the Mission/Society was considered and rejected. It was held therein that once the bye-laws and constitution of the Mission did not provide for any election, the provisions of Section 25 of the Act could not be invoked. The aforesaid judgment attained finality as it was not challenged. The same issue cannot be permitted to be addressed again claiming that the office of the President was an elected office especially when there is no fee prescribed for membership, the society being spiritual.

(H) Original Suit No.697 of 1995

(i) The aforesaid suit was filed by Umesh Chandra Saxena (member of Group-I) claiming himself to be the President of the Mission against Parthasarthi Rajagopalachari and two other followers of the Mission.

(ii) The relief claimed therein was for declaring him as President of the Mission and further for restraining the defendant No.1 Parthasarthi Rajgopalachari from interfering in the peaceful working of the Mission. The suit was filed much after the amendment in the Act, claiming nomination as President though now argument raised is that elections are required to be held.

(iii) In the aforesaid suit, an application was filed by the defendants for rejection of plaint under Order 7 Rule 11 C.P.C. The aforesaid application was allowed and the plaint was rejected vide order dated May 31, 1999.

(iv) The aforesaid order was challenged by Umesh Chandra Saxena by filing Civil Appeal No.219 of 1999. The aforesaid appeal was dismissed vide order dated January 11, 2001 on the ground that no cause of action had been disclosed and the same was also time barred.

(v) Still not satisfied, Second Appeal No.884 of 2001 was filed against the aforesaid orders of the court below, which was also dismissed by this Court vide order dated November 26, 2001.

(I) Original Suit No.4 of 1999

(i) The aforesaid suit was filed by two followers of the Mission impleading Umesh Chandra Saxena and Parthasarthi Rajagopalachari as defendant Nos.1 and 2 respectively, claiming that the plaintiffs are the Manager and Office Superintendent of the Mission. It was stated that though defendant No.1 in the suit, namely, Umesh Chandra Saxena was appointed as President of the Mission vide Will deed executed by late Shree Ram Chandra Ji Maharaj on April 16, 1982, still he was refusing to accept the status of the plaintiffs as such.

(ii) A perusal of the plaint shows that it was pleaded therein that late Shree Ram Chandra Ji Maharaj executed a Will on December 30, 1976 on a plain paper nominating Umesh Chandra Saxena and his younger brother Sarvesh Chandra Saxena as his legal heirs. As late Shree Ram Chandra Ji Maharaj apprehended that the aforesaid Will deed dated April 16, 1982 could be misused, he made another declaration dated April 17, 1982 on the letter pad of the Mission giving exclusive right of the Mission to defendant No.1 (Umesh Chandra Saxena) only.

(iii) It was yet another device coined by Umesh Chandra Saxena to succeed in its ulterior motive to usurp the properties of the Mission after failing in the Testamentary Suit No.1 of 1994 filed by him claiming inheritance on the basis of will allegedly executed by late Shree Ram Chandra Ji Maharaj on December 30, 1976.

(iv) The aforesaid suit was dismissed on May 10, 1999. The appeal against the aforesaid order was also dismissed on January 5, 2004.

(J) Original Suit No.587 of 1999

(i) Reference of the aforesaid suit is available in paragraph 50 of the impugned judgment of the learned Single Judge. It is stated to be a suit filed by Umesh Chandra Saxena. The same was dismissed as withdrawn unconditionally on November 26, 2001. Meaning thereby, any further suit for the same relief will not be maintainable.

(K) Original Suit No.360 of 2000

(i) The aforesaid suit was filed by certain followers of the Mission praying for restraining Umesh Chandra Saxena from interfering in the working of the Mission. Vide order dated November 27, 2000 passed by the Civil Judge (Senior Division) the defendants were restrained from collecting any donation on behalf of the Mission and also from showing any relation with the Mission. They were further restrained from damaging the properties of the Mission or changing the nature thereof.

(ii) In the aforesaid suit, Umesh Chandra Saxena (defendant) filed an application under Order 7 Rule 11 C.P.C. which was dismissed on November 27, 2000. The aforesaid order was challenged by Umesh Chandra Saxena by filing Civil Misc. Writ Petition No.53330 of 2000 before this Court. The same was dismissed vide judgment dated November 19, 2002 (reported in 2002 All.C.J. 1510). Meaning thereby, rejection of the application filed by Umesh Chandra Saxena under Order 7 Rule 11 C.P.C. was upheld and the interim stay granted in favour of the plaintiffs therein was confirmed. Strong observation was made by this Court in paragraph 52 of the aforesaid judgment, which is extracted below:-

"52. So far as the question as to whether the suit is barred by the provisions of the Societies Registration Act is concerned, it may be stated that according to the plaint allegations, the petitioner who is defendant in the suit, had not been successful in his effort to claim himself as President of the Mission as legally elected, nominated President of the Mission as would be clear from a series of litigations referred to above. The petitioner has not brought any material on record to establish his claim that he is the elected/nominated President of the Mission. Mere claiming that he is President of the Mission without any material in support thereof would not be sufficient to invoke the provisions of the Societies Registration Act in so far as the relief of election dispute is concerned. Thus, the provisions of the Societies Registration Act would not be applicable in a case, which has been filed against the rank trespasser who has no connection at all with the society and is interfering in the affairs of the Society by raising funds in the name of the Society by claiming himself to be President thereof."

(emphasis supplied)

(iii) It has been observed in the aforesaid judgment that Umesh Chandra Saxena had not been successful in his efforts to get himself declared as legally elected or nominated President of the Mission despite series of litigations. Umesh Chandra Saxena filed an application for review of the aforesaid order dated November 19, 2002. While the aforesaid review application was pending, he filed Special Leave Petition No.6585 of 2003 before Hon'ble the Supreme Court, which was dismissed on July 25, 2003.

(iv) After the death of Umesh Chandra Saxena on November 3, 2003, his legal representatives were brought on record vide order dated January 30, 2004. On the same day, vide separate order passed by the Court, the interim injunction already granted in the suit, was ordered to be continued against the newly impleaded legal representatives also. Thereafter started series of litigations in this Court, details thereof have already been mentioned in paragraph 3 of this judgment. The fact remains that in all their efforts Umesh Chandra Saxena and his sons had failed to usurp the properties of the Mission.

(L) Original Suit No.403 of 2003

(i) The aforesaid suit was filed in the court of Civil Judge (Senior Division), Shahjahanpur by the Mission through K.V. Reddy (member of Group-I), claiming himself to be elected Secretary of the Mission, against Parthasarthi Rajagopalachari pleading that annual election of the Society/Mission was held on February 6, 2003 in which Umesh Chandra Saxena was elected as President. Despite his election as the President of the Mission, defendant in the said suit namely, Parthasarthi Rajagopalachari was still claiming himself to be the President of the Mission. A declaration was sought that the nomination dated March 23, 1974 in favour of Parthasarthi Rajagopalachari be declared as invalid and inoperative and he should be permanently restrained from claiming himself to be the President of the plaintiff's Society.

(ii) Though it is stated to be dispute between two warring groups to retain control of the Mission, however, still the person, who was claiming to have rightful control over the Mission, was not before the Court, rather it was the Mission

which filed the suit. In fact, from the series of the litigations, it is evident that Umesh Chandra Saxena had been trying to have proxy litigation in the matter by not coming in front in number of such cases.

(iii) In the aforesaid suit again, an application under Order 7 Rule 11 C.P.C. was filed by the defendant, which was accepted by the court vide order dated February 10, 2010.

(iv) It was claimed that the aforesaid order was challenged by filing an appeal. Though the said appeal is stated to be pending, however, the same may not be of any use for the reason, as stated by the learned counsel for the respondents, that during pendency thereof, Parthasarthi Rajgopalachari died on December 20, 2014 and even K.V. Reddy, who was representing the Mission, a statutory body, claiming to be its alleged Secretary, had also expired during pendency of appeal and no application for substitution or for bringing their legal representatives on record was filed.

(v) From number of litigations, which have been referred to above and in the preceding paragraphs, it is evident that when objective of Umesh Chandra Saxena failed at the initial stage to retain control of the Mission, the litigation was never pursued further as either it was withdrawn or remained pending.

(M) Civil Misc. Writ Petition No.3091 (MS) of 2005

(i) Though the jurisdiction to entertain the lis between the parties is at principal seat at Allahabad and all other cases were filed here but still the Mission now represented by Navneet Kumar Saxena and Amresh Kumar, sons of late Umesh Chandra Saxena claiming to be elected Member of the working committee filed the aforesaid writ petition at Lucknow Bench of this Court raising a grievance that before deciding the lis, the Assistant Registrar, Firms, Societies and Chits, Bareilly should not be influenced with the observations made by the Registrar of the Societies in his letter dated November 4, 2009. The same was disposed of on May 21, 2010. Though the dispute is pertaining to be of the management of the Mission where two groups are fighting but still the writ petition was filed by the Mission.

(ii) Having come to know about filing of the writ petition and the order passed therein, an application was filed by Uma Shanker Bajpai, Secretary of the Mission for recall of the order dated May 21, 2010. It was pleaded that the writ petition was totally misconceived and material facts were concealed from the Court. It was claimed that issue regarding Committee of Management had already been settled by the Assistant Registrar by the order dated December 19, 2009 and aggrieved against that order the writ petitioner in the writ petition in question had filed Writ Petition No.5034 of 2010 at Allahabad. The aforesaid application was allowed vide order dated May 30, 2012 with the following observations:

"Upon perusal of the record, I find that by means of application dated 28th of June, 2010 submitted by the petitioners before the Assistant Registrar, Firms, Societies and Chits, Bareilly, the petitioners have very much tried to get recall the order dated 19th of December, 2009 treating the same as an exparte order under the strength of order passed by this court in the instant writ petition, whereas

except this I do not find that he had made any other prayer to get decided any other dispute allegedly pending before the Assistant Registrar, Firms, Societies and Chits, Bareilly. I am further of the view that once the order passed by the Assistant Registrar, may be exparte order, on 19th of December, 2009 is under adjudication by this court at Allahabad through writ petition No.5034 of 2010, there was no occasion to seek the recall of the same under the garb of the order passed in the instant writ petition, whereas, it was open for the petitioner to move an appropriate application before this court at Allahabad in the said writ petition for an appropriate order either to decide the writ petition itself or to issue any direction to the Assistant Registrar to pass a fresh order, but there was no occasion for the petitioners to move such an application. Thus, misrepresentation of facts made by the petitioners cannot be denied, rather it is well established. That itself leads to dismiss the writ petition with heavy costs. "

(iii) Order dated May 21, 2010 was recalled and the writ petition was dismissed with cost of ₹10,000/-. Special Appeal against the said order is stated to be pending. However, the same is of no relevance as much water has flown thereafter.

Litigations claiming right on the basis of Will dated December 30, 1976 and Nomination dated April 16, 1982

46. Claiming right on the basis of Will allegedly executed by late Shree Ram Chandra Ji Maharaj dated December 30, 1976, firstly Testamentary Suit No.1 of 1994 was filed by Umesh Chandra Saxena, which was dismissed on October 16, 1995 finding that the relief prayed for could not possibly be granted in testamentary proceedings.

47. Civil Misc. Writ Petition No.37023 of 1994 was filed on behalf of the Mission through Umesh Chandra Saxena claiming himself to be the President of the Mission impleading Registrar, Assistant Registrar, Firms, Societies and Chits along with Parthasarthi Rajagopalachari and others as respondents, inter alia, seeking a declaration that Umesh Chandra Saxena was the successor President of the Mission. Further declaration was sought that the deed dated April 16, 1982 was valid and the nomination deed dated March 23, 1974 was forged and invalid. The aforesaid writ petition was dismissed on merits giving rise to Special Appeal No.580 of 1997, which was dismissed on November 24, 1998

48. Suit No.697 of 1995 was filed by Umesh Chandra Saxena, claiming himself to be the President of the Mission praying for a declaration that Parthasarthi Rajagopalachari is not the President of the Mission and he be restrained from acting as such. It was claimed that during his lifetime, the founder President Shree Ram Chandra Ji Maharaj had nominated plaintiff No.2, namely, Umesh Chandra Saxena as the spiritual representative in the direct line of succession and as his successor President of the Mission. The aforesaid suit was dismissed on May 31, 1999, Civil Appeal No.219 of 1999 filed before the learned lower appellate Court, was dismissed on January 11, 2001 and Second Appeal No.884 of 2001 filed against the aforesaid judgment, was also dismissed by this Court vide order dated November 26, 2001. In the aforesaid suit, claim made by Umesh Chandra Saxena was on the basis of

his nomination as President by Shree Ram Chandra Ji Maharaj during his lifetime.

49. Original Suit No.4 of 1999 was got filed by certain followers of the Mission impleading Umesh Chandra Saxena and Parthasarthi Rajagopalachari as defendant Nos.1 and 2 respectively, claiming that the plaintiffs are the Manager and Office Superintendent of the Mission. It was stated that though defendant No.1 in the suit, namely, Umesh Chandra Saxena was appointed as President of the Mission vide Will deed executed by late Shree Ram Chandra Ji Maharaj on April 16, 1982, still he was refusing to accept the status of the plaintiffs as such. The said suit is stated to have been dismissed on May 10, 1999 and Civil Appeal No.90 of 1999 filed against the same was also dismissed on January 5, 2004.

50. Umesh Chandra Saxena claiming right on the basis of Will and Nomination, filed an application in Original Suit No.200 of 1983 praying for his impleadment. Impleadment was sought pleading that Umesh Chandra Saxena was nominated as President of the Mission vide deed dated April 16, 1982 whereas defendant No.1 Parthasarthi Rajagopalachari and his associates were trying to usurp the management of the Mission on the basis of a forged deed dated March 23, 1974. The application was rejected by this Court on May 24, 1996. and the Special Appeal filed against the said order was also dismissed.

Will dated June 7, 1999 allegedly executed by Umesh Chandra Saxena

51. The aforesaid document was referred to in the pleadings stated to be on record as Annexure CA-11 to the counter affidavit filed on behalf of respondent No.5 in Special Appeal No.676 of 2015. Umesh Chandra Saxena died on November 3, 2003. In the Will, he mentioned that he is the President of the Mission by succession and has the power to nominate its President. After his death his three sons, namely, Navneet Kumar Saxena, Suneet Kumar Saxena and Puneet Kumar Saxena would inherit his entire moveable and immoveable properties. He further stated that he nominates his three sons as the successors in the Mission and after his death they will collectively appoint any person as the President of the Mission.

52. The narration in the aforesaid Will executed by Umesh Chandra Saxena fortifies his effort to usurp the properties of the Mission by treating the same to be his private property. The efforts in which he failed time and again during his life time. Though it was sought to be argued that process of election has to be followed for appointment of the President but even after the amendments in the Act, which are now sought to be relied upon, in the Will executed by Umesh Chandra Saxena, the Mission was sought to be handed over to his legal representatives with power to nominate the President.

53. It may be out of place if not mentioned here that there was an interim order passed by the court in Civil Suit No.360 of 2000 restraining Umesh Chandra Saxena from dealing with the properties of the Mission in any manner whatsoever. Despite this fact, he claimed himself to be self styled President of the Mission.

IMPLEADMENT OF THE PARTIES

54. In Special Appeal No.676 of 2015 arising out of Writ-C No.5034 of 2010, it is

admitted on record that list of 17 members of the working committee was approved by the Assistant Registrar. Though challenge was to the approval of list of members of the working committee, however, only two of the members were impleaded as parties and not others. In absence of impleadment of all the members as respondents, no relief could possibly be granted to the petitioners/appellants therein, as the same would adversely affect their right in case the orders impugned in the writ petitions are set-aside.

55. In Writ-C Nos.24214 of 2005, 41630, 41631 of 2012, 48669 of 2013 and 30767 of 2014 also though challenge was made to the approvals of the working committee for the different years, however, only two or three of the members were impleaded as parties and not all the members. Hence, in the aforesaid writ petitions also, no relief could possibly be granted.

56. Though the members of Group-I were never accepted either as President or the Member of the working committee of the Mission but still they had been filing the cases representing the Mission, which was totally illegal. It was a dispute between two warrior groups.

Writ-C No.7139 of 2016

57. The aforesaid writ petition was filed by Navneet Kumar Saxena claiming himself to be the elected President of the Mission along with Dinesh Kumar and Amresh Kumar (members of Group-I), inter alia, praying for quashing the orders dated February 21, 2015 and October 12, 2015. By order dated February 21, 2015, the list of members of the working committee for the year 2015-2016 submitted by respondent No.4, namely, Uma Shankar Bajpai was approved and by order dated October 12, 2015 the registration certificate of the Society/Mission for the period 2015-2020 was renewed in favour of respondent No.4. In our view, in view of the aforesaid discussions, this writ petition also deserves to be dismissed as no relief can possibly be granted therein.

CONCLUSIONS

58. Though we are in full agreement with the judgment of the learned Single Judge, however, from the aforesaid conspectus of facts and circumstances discussed above, following additional conclusions have been drawn:

(i) Though in the first meeting held in July, 1983, after the death of Ram Chandra Ji Maharaj, Parthasarthi Rajagopalachari staked his claim on the basis of his nomination in the year 1974 in presence of Umesh Chandra Saxena, however, Umesh Chandra Saxena did not claim himself to be the nominated President of the Mission pursuant to alleged nomination claimed to have been done vide deed dated April 16, 1982. Nomination of Umesh Chandra Saxena vide deed dated April 16, 1982 had not been pleaded in Original Suit No.200 of 1983 filed on December 26, 1983. For the first time, the plea regarding nomination of Umesh Chandra Saxena through the aforesaid deed was taken in Writ Petition No.37023 of 1994, which was filed challenging the nomination of Parthasarthi Rajagopalachari through the nomination deed dated December 30, 1976. This conduct of Umesh Chandra Saxena casts serious doubt on the genuineness of the deed dated April 16, 1982.

(ii) Various litigations were filed by Umesh Chandra Saxena claiming right on the basis of Will and Nomination alleged to have been executed by late Shree Ram Chandra Ji Maharaj, which were dismissed and the orders passed therein had attained finality. Hence now he or his successors in interest cannot be permitted to claim right on the aforesaid basis.

(iii) Vide interim order dated August 9, 2000, the defendant Umesh Chandra Saxena was restrained; first from destroying the Mission's properties in dispute; second from posing himself as the President of the Mission and thereby interfering in the working and management of the affairs of the Mission and third from collecting the money in the name of the Mission and converting the aim of the Mission from philanthropic and spiritual to commercial one. Despite this fact, all the aforesaid writ petitions were filed by the Mission claiming to be through its elected President. The same were clearly in violation of the interim order passed by the court below.

(iv) After dismissal of the aforesaid writ petitions by the learned Single Judge vide impugned judgment, the Mission has filed a set of 11 Special Appeals through Navneet Kumar Saxena (son of Umesh Chandra Saxena) claiming himself to be elected President of the Mission along with other members of Group-I despite the fact that vide order dated January 30, 2005 passed by the learned Civil Judge in Civil Suit No.360 of 2000, the interim injunction was ordered to be continued even against the sons of late Umesh Chandra Saxena including Navneet Kumar Saxena, who had filed the present appeals. Hence, Navneet Kumar Saxena had no right to file the present appeals on behalf of the Mission claiming himself to be President of the Mission.

(v) A Division Bench of this Court, while deciding Special Appeal Nos.829 of 1995, 561 of 1996, 580 and 594 of 1997 vide judgment and order dated November 24, 1998, having already considered and rejected the issues including the issue with reference to Section 25 of the Act pertaining to election/nomination, which are sought to be raised by the appellants in the present Special Appeals, the same cannot be permitted to be addressed again.

(vi) As far as the writ petitions, namely, Writ-C Nos.66631 of 2005, 5034 of 2010, 24214 of 2011, 41630, 41631 of 2012, 48669 of 2013 and 30767 of 2014 are concerned, in the said writ petitions, challenge was to the orders of approval of the list of members of the working committee of the Mission for seven years i.e. 2005-2006 and from 2009-2010 to 2014-2015. As was claimed by the learned counsel for the respondents that the list of the members of the working committee for the period subsequent thereto had been approved and the same were not challenge by the appellants except for the year 2020-2021 by means of Writ-C No.16788 of 2021, hence, they having accepted the approval of the list of the members of the working committee for the period subsequent to one under challenge in the present litigation, nothing survive in the Special Appeals arising out of the aforesaid writ petitions.

(vii) The averments made in paragraph 4 in the plaint of Original Suit No.142 of 1986 is that the Spiritual Representative nominee of the Master was and is Sri Parthasaarthi Rajagopalachari of

Madras, who after the Mahasamadhi of the Master become the President of the Society and is discharging the functions as such, was admitted by Umesh Chandra Saxena himself in his written statement dated August 21, 1986 filed in the aforesaid suit. As the claim in the aforesaid suit was accepted by Umesh Chandra Saxena, the same was withdrawn. Hence, now he cannot be permitted to dispute the status of Parthasarthi Rajagopalachari.

(viii) Though challenge in most of the writ petition was to the orders by which the list of members of the working committee for different years was approved, however, only two or three of the members were impleaded as parties and not all the members. Hence, in the aforesaid writ petitions also, no relief could possibly be granted, as the same suffer from non joinder of necessary parties.

(ix) On the one hand, the claim of the appellants throughout is that the President of the Mission has to be elected but on the other hand initially Umesh Chandra Saxena claimed his right on the basis of nomination and now his son Navneet Kumar Saxena is claiming his right on the basis of Will executed by Umesh Chandra Saxena. Hence, the appellants cannot be permitted to blow hot and cold in the same breath.

(x) Though the members of Group-I were never accepted either as President or the Member of the working committee of the Mission but still they had been filing the cases representing the Mission, which was totally illegal.

(xi) It is claimed to be a spiritual Mission. Though the members of Group-I, ever since the death of Shree Ram Chandra Ji Maharaj on April 19, 1983, are trying to get control over the property of Mission and its management and further Umesh Kumar Saxena even executed a Will pertaining thereto but still nothing was pointed out at the time of hearing by learned counsel for the appellants that the affairs of the Mission were mismanaged by the working committee as approved by the Assistant Registrar, Firms, Societies and Chits.

CONCEALMENT OF FACTS

59. In paragraph 78 of the judgment of learned Single Judge details have been mentioned with reference to concealment of fact by the appellants before the Court. It is with reference to various litigations. Number of judgments have been referred to and were cited by learned counsel for the respondents for taking the cognizance. The plea is that for the same relief successive writ petitions be not entertained. The concealments detailed in paragraph 78 of the impugned judgment are as under:-

(i) passing of judgment dated 25.2.1985 in FAFO No.439 of 1984, holding that Mr. Parthasarthi Rajagopalachari is President;

(ii) filing of writ petition No.22657 of 1991 unauthorizedly in the name of Society and Mr. S.P. Srivastava and Mr. B.D. Mahajan and its dismissal on 10.7.1997;

(iii) filing of writ petition No.37023 of 1994 unauthorizedly in the name of Society and by Mr. U.C. Saxena and its dismissal dated 10.7.1997.

(iv) filing of Testamentary Case No.1 of 1993 converted into Testamentary

Suit No.1 of 1994, its dismissal on 16.10.1995;

(v) filing of Special Appeal No.829 of 1995, its dismissal on 24.11.1999;

(vi) filing of O.S. No.697 of 1995 falsely in the name of society and Mr. U.C. Saxena in the Court of Civil Judge (Senior Division), Allahabad, its rejection on 31.5.1999;

(vii) passing of consolidated judgment dated 24.11.1998 in Special Appeals;

(viii) filing of Civil Appeal No.219 of 1999, its dismissal on 11.1.2001;

(ix) filing of Suit No.4 of 1999;

(x) filing of Suit No.587 of 1999;

(xi) filing of Civil Appeal No.90 of 1999;

(xii) filing of writ petition no.53330 of 2000 against other part of order dated 27.11.2000 by which prayer of Mr. U.C. Saxena was rejected;

(xiii) passing of order dated 9.8.2000 in O.S. No.360 of 2000;

(xiv) passing of order dated 27.11.2000 in O.S. No.360 of 2000;

(xv) filing of Appeal No.15 of 2001 by Mr. U.C. Saxena;

(xvi) filing of FAFO No.1119 of 2004;

(xvii) filing of writ petition No.40035 of 2004 and its order dated 05.10.2004;

(xviii) filing of Revision No.66 of 2004 and its dismissal on 19.7.2005;

(xix) filing of O.S. No.403 of 2003 and its dismissal on 10.2.2010;

(xx) filing of written statement of Mr. U.C. Saxena in O.S. No.142 of 1986 in which he said that he will not claim any office in the society;

(xxi) execution of Will by Mr. U.C. Saxena dated 07.6.1999 wherein he said that he obtained the office of President of Society by way of "mRrjkf/kdkj" and together with he is nominated him the sons as future President under the constitution and bye-laws of the society;

(xxii) non-raising plea of election in the last 16 years, despite amendment having been made on 30.4.1984;

(xxiii) other facts."

60. At the time of hearing, with regard to facts noticed in paragraph 78 of the impugned judgment pertaining to concealment of material facts from this Court in the pleadings in different writ petitions, no arguments were addressed. The same remained undisputed.

61. A perusal of pleadings in various writ petitions filed by the appellants shows that in most of them there were election dispute except in Writ-C No.37023 of 1994 and 53330 of 2000. Only brief reference has been made to the previous litigations without giving much details. From the facts, as noticed above, it is clear that all

the writ petitions, civil suits or other kind of litigations initiated by the appellants or the persons associated with them, have relation with controlling the management and usurping the properties of the Mission. Hence, there was concealment of material facts from this Court by the appellants.

62. In addition to that, fully knowing that the jurisdiction to entertain the lis between the parties was at Allahabad and all other cases were filed and pending there, still Writ Petition No.3091 (M/S) of 2010 was filed at Lucknow concealing the aforesaid fact. Though the aforesaid writ petition was initially allowed but later on the order allowing the writ petition was recalled and the writ petition was dismissed with cost.

63. 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.

64. 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)

65. 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)

66. 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.**

67. 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."

68. 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.

69. Keeping in view the aforesaid authoritative enunciation of law by Hon'ble the Supreme Court, in our view, the appellants do no deserve any relief from this Court, as they are not only guilty of concealment of material facts from the Court but had also indulged in forum shopping. They made efforts at all level to mislead the Court.

70. For the reasons mentioned above, we do not find any merit in the appeals and the writ petition. The same are dismissed with cost of Rs.1,00,000/- to be deposited by the appellants (except the Mission) with the Mission within one month from today.

(2022)05ILR A1147
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.04.2022

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Criminal Misc. Bail Application No. 37253 of 2021

Chandra Prakash Sharma ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Virendra Pratap Singh, Sri Anurag Rai, Sri Birendra Singh

Counsel for the Opposite Parties:
G.A.

Criminal Law - Criminal Procedure Code,1973 - Sections 161, 164 & 439 - Indian Penal Code,1860 - Sections 354, 375, 376, 376(a) & 376(b) - Protection of Children From Sexual Offences (POSCO) Act -2012 - Sections 5 & 6 – Constitution of Indian, 1950 - Article 21 - Application for Bail – allegation of sexual offence - with a girl child aged about 8 years – *Rape* is a heinous crime - not only against the victim but also against the society as well violates the fundamental rights of victims - it is the duty of court to maintain trust of a common man / victims to take right decision at right time – plea of accused about that depth of penetration shall not be acceptable in an offence of rape – Bail application rejected**.** (Para –6, 7, 8)

Bail Application Rejected. (E-11)

List of Cases cited:-

1. Madan Gopal Kakkad Vs Naval Dubey & anr., (1992 vol. 3 SCC 204).

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

1- Heard Mr. Virendra Pratap Singh, learned counsel for the applicant, Mr. Rabindra Kumar Singh learned Additional Government Advocate assisted by Mr. Ajay Singh, learned Brief holder representing the State.

2- By means of this application under Section 439 of Cr.P.C., applicant, who is involved in Case Crime No. 219 of 2021, under Sections 354, 376 IPC and Sections 5/6 POCSO Act, police station Bansgaon, district Gorakhpur seeks enlargement on bail during the pendency of trial.

3- As per prosecution case, in brief, the complainant, who is mother of the victim lodged the first information report on 16.07.2021 at 17:07 hours with regard to an incident which took place on 16.07.2021 against the applicant Chandra Prakash Sharma for the alleged offence under Sections 354, 376 IPC and Sections 5/6 POCSO Act alleging inter alia that today on 16.07.2021, her daughter aged about 8 years went beside her house to pluck guava from guava tree where the applicant was kissing her daughter by sitting her on his lap and thereafter raped her by took off her panty. She came home and told the entire incident to her and her mother-in-law. Thereafter, on the same day, i.e., on 16.07.2021, the victim was medically examined in which doctor opined that sexual violence cannot be ruled out. Victim in her statements under Section 161 and 164 Cr.P.C. has made allegation of rape against the applicant reiterating the prosecution case as mentioned in the first information report. The statement of the victim recorded under Section 164 Cr.P.C. is reproduced herein below:-

"बयान अन्तर्गत धारा 164 आज दिनांक 28/07/2021 को उपरोक्त मुकदमा की बाल पीड़िता X को फोटो और हस्ताक्षर प्रमाणित कर थाना बांसगांव जनपद गोरखपुर के विवेचक मय महिला आरक्षी द्वारा बयान अन्तर्गत धारा 164 दं.प्र.सं. हेतु प्रस्तुत किया गया है बाल पीडिता की उम्र 7 वर्ष है तथा उसकी मनोदशा जानने हेतु निम्न प्रश्न पूछे गये है बाल पीडिता अपनी मां के साथ न्यायालय मे उपस्थित है

प्रश्न : तुम्हारा नाम क्या है

उत्तर : X

प्रश्न : तुम्हारे पिता का नाम क्या है

उत्तर : सोनू चौहान

प्रश्न : तुम किस कक्षा मे पढती हो

उत्तर : कक्षा 2

प्रश्न : तुम आज किस रंग का कपडा पहनी हो

उत्तर : लाल

प्रश्न : तुम्हारा उम्र क्या है

उत्तर : 7 वर्ष

प्रश्न : झूठ बोलना गलत है या नही

उत्तर : गलत

बाल पीडिता बयान हेतु सक्षम है बाल पीडिता का बयान प्रश्नोत्तर रूप मे अंकित किया जा रहा है

प्रश्न : तुम्हारे साथ क्या घटना हुयी थी

उत्तर : बाल पीडिता पूछने पर बता रही है कि मै और मेरी दोस्त अंशिका अमरूद खाने के लिये गये थे अंशिका पेड पर चढ़ गयी और मै नीचे खडी थी तभी एक लडका मुझे खींच लिया मै जब पीछे उसको देखी और चिल्लाने की कोशिश की तो वह मेरा मुह दबा दिया और शौचालय के पीछे ले गया अपना भी पैण्ट खोल दिया और मेरा भी मेरा चड्ढी खोल कर छूने लगे और अपना शूशू मेरे अन्दर डालने लगा मेरे साथ गलत काम किया मै किसी तरह अपना हाथ छुडा कर भाग आयी

प्रश्न : क्या तुम लड़का का नाम जानती हो

उत्तर : हा मेरी मम्मी बताई है उसका नाम चन्द प्रकाश है

प्रश्न : कुछ और कहना है

उत्तर : मै जब भागने लगी तो वह लड़का मुझे पकडने का कोशिश किया मेरी मां जब चन्द प्रकाश को डाटने के लिये पहुची तो मेरी मां को भी मारा

प्रश्न : घटना की सूचना किसको दिया

उत्तर : घटना के बारे मे मैने दादी को बताया

ह. पीडिता ह. अप. उपरोक्त लेखबद्ध बयान मेरे द्वारा पीडिता को पढकर सुनाया तथा समझाया गया जिसे उसने अक्षरशः सही होना बताया पीडिता ने अपना बयान अपनी स्वेच्छा से देना बताया है बयान का अवलोकन किया गया।"

4- It is submitted by learned counsel for the applicant that the applicant has been falsely implicated in this case. No mark of injury has been found on the body of the victim and hymen of the victim was found intact and no fresh injury or bleeding was seen at the time of her medical examination. The victim in her statement under Section 164 Cr.P.C. has not stated that the applicant has committed rape on her, as such, no offence is made out against him. The applicant does not have criminal history to his credit. His bail application has been wrongly rejected by the concerned Court below. Lastly, it is submitted by learned counsel for the applicant that the applicant is languishing in jail since 17.07.2021 and in case, the applicant is released on bail, he will not misuse the liberty of bail and cooperate with the trial.

5- Per contra, learned A.G.A. assisted by learned Brief Holder for the State opposed the prayer for bail of the applicant by contending that the first information report was lodged by mother of the victim on the narration of the incident by the victim who is minor child aged about 8 years and is a student of Class 2. It is next submitted that act committed by the accused-applicant as mentioned in the F.I.R. and disclosed by the victim in her statement under Section 164 Cr.P.C. is a heinous offence and comes within the ambit of rape as defined under Section 375 I.P.C. as well as under the ambit of Sections 5/6 POCSO Act. There is no reason to falsely implicate the applicant. Learned A.G.A. next submitted that it is well settled by the Apex Court in the case of **Madan Gopal Kakkad Vs. Naval Dubey and another, (1992) 3 SCC 204** that even slightest penetration of penis into vagina without rupturing the hymen would constitute rape. He further submitted that in this case, the applicant not only violates the victim's personal integrity, but leaves indelible marks on the very soul of the helpless child. Innocence of the applicant cannot be ad-judged at pre-trial stage. Hence, bail application of the applicant is liable to be rejected.

6- Having heard learned counsel for the parties, this Court is of the view that in this case, a small innocent child aged about 8 years has been raped, who does not understand its meaning. Little girls are worshipped in our country, but the cases of paedophilia are increasing. Rape is a heinous crime. The victim suffers from psychological effects of embarrassment, disgust, depression, guilt and even suicidal tendencies. Many cases go unreported. In almost rape cases, the victim was unwilling to report the name of the abuser. The families of the victim remain silent about the sexual offences in order to protect the family image. The victim/female small child experience sexual abuse once tend to

be more vulnerable to abuse in adult life. Healing is slow and systematic. Rape is not only a crime against the victim, it is crime against the society as well and is also violative of victims most cherished of fundamental rights, mainly right to life contained in Article 21 of the Constitution of India. In such a situation, if the right decision is not taken from the Court at the right time, then the trust of a victim/common man will not be left in the judicial system.

7- I also find that if rape is committed by a man on a little girl under twelve years of age, according the provisions of Section 376A-B of Indian Penal Code, he shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which means that the accused shall be in prison for the remainder of his natural life, and with fine or with death.

8- Having examined the matter in its entirety I do not find any material or cogent reason at this stage to presume the false implication of the applicant. I am also of the considered view that the depth of penetration is immaterial in an offence punishable under Section 376 I.P.C.

9- Having considered the facts and circumstances of the case, nature of offence, the gravity involved therein and the manner in which the crime has been committed, no case for bail is made out.

10- The application for bail is hereby **rejected.**

11- However, it is clarified that the observation, if any, made herein above shall be strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

12- Office is directed to send the copy of this order to the complainant as well as concerned Court below within two weeks.

(2022)05ILR A1150
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.02.2022

BEFORE

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

Crl. Misc. Application (Leave To Appeal) No. 86 of 2018
(U/s 372 Cr.P.C.)
in
Criminal Appeal (Against Acquittal) No. -- of 2017
(U/s 372 Cr.P.C.)

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

Counsel for the Appellant:
Sri Rajesh Yadav

Counsel for the Respondents:
G.A.

Criminal Law – Criminal Procedure Code, Section - 313, 372, 378 (3) - Indian Penal Code, Section – 302, 379, 511 – Arms Act,1959 - Section – 25 - Leave to Appeal - against order of acquittal by the trial court merely on the ground that – all the eye witnesses are related witnesses & the recovered weapon could not be connected with crime – in the light of law down by the Hon'ble Apex court – judgment of trial court needs no interference – hence Appeal dismissed. (Para – 16, 18, 21)

Appeal Dismissed. (E-11)

List of Cases cited:-

1. Babu Vs St. of Kerala, (2010) 9 SCC 189 & (2010) 3 SCC (Cri) 1179,

2. Ramesh Babulal Doshi Vs St. of Guj., (1996) 9 SCC 225 & 1996 SCC (Cri) 972,

3. Anwar Ali & anr. Vs St. of H.P., (2020) 10 SCC 166,

4. Nagabhushan Vs St. of Karn., (2021) 5 SCC 222,

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

6. Rajput Ruda Maha & ors. Vs St. of Guj., 1980 2 SCR 353.

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Subhash Vidyarthi, J.)

1. Heard Sri Rajesh Yadav, learned counsel for the appellant-applicant and Ms. Nandprabha Shukla, learned A.G.A. appearing for the State.

2. As already held by this Court in number of cases that leave application filed under Section 378(3) Cr.P.C. is not required in the appeal filed by the victim under Section 372 Cr.P.C. like the present appeal. A reference may be made to the order dated 4.8.2021 passed in Criminal Appeal U/S 372 Cr.P.C. No. 123 of 2021 (Rita Devi vs. State of U.P. and another). As such, the application for leave to appeal stands rejected as not maintainable and / or not required.

3. This appeal has been filed against the order dated 12.7.2017 passed by the Additional Sessions Judge, Court No. 5, Mathura acquitting the respondent nos. 2, 3 and 4 under Section 302 I.P.C. and Section 25 of Arms Act in Sessions Trial No. 764 of 2013 arising out of Case Crime No. 85 of 2012, under Section 302 I.P.C. and Session Trial No. 765 of 2013 arising out of Case Crime No. 97 of 2012, under Section 25 of Arms Act, P.S. Maant, District Mathura.

4. According to the first information report on 4.6.2012 at about 09:00 P.M. certain persons on highway were committing theft of electricity cable from the electricity poll. On coming to know father of the informant (Virendra Singh) deceased Dorilal s/o Chhitariya reached on the spot along with certain other persons. The persons, who were committing theft, fired hitting the chest of Dorilal (father of the informant), who died on the spot. First information report was registered at 21:50 against unknown persons as Case Crime No. 85 of 2012, under Sections 302, 379, 511 I.P.C., P.S. Maant, District Mathura.

5. In support of prosecution case P.W.-1 Virendra, P.W.-2 Parsadi, P.W.-3 Shivcharan, P.W.-4 Dalchand, P.W.-5 Phoolwati, P.W.-6 S.O Sri Arvind Kumar, P.W.-7 Dr. D.S. Naviyal, P.W.-8 Constable Clerk Sher Singh, P.W.-9 H.C.P. Manni Singh, P.W.10- S.I. Sri Rajendra Singh, P.W.-11 S.I. Sri Radhakrishna and P.W.-12 Sri Sri Omprakash were produced. Two accused persons Geetaram s/o Jagna and Talewar s/o Ramjilal were arrested by the police on pointing out of the informant in the night of 12/13.7.2012 at about 01:00 A.M and a countrymade pistol of 315 bore with one live and one empty cartridge were recovered from the possession of Geetaram. No other recovery was made by other co-accused Talewar. The Case Crime No. 97 of 2012, under Section 25 of Arms Act, P.S. Maant, District Mathura was registered against Geetaram. In the

statement recorded under Section 313 Cr.P.C. the accused persons denied the incident and submitted that they have not committed the offence and their claim was that some other unidentified persons, who were committing theft of electricity cable, had committed the crime.

6. The accused persons were acquitted by the trial court on the ground that all the witnesses are related witnesses and the recovered weapon could not be connected with the crime. It was further found that the statement made by the prosecution witnesses were contradictory in nature and the incident was described in different ways and there was no eye witness of the spot. It was found by the trial court that all the alleged eye witnesses have not proved the incident. It was also found that the eye witnesses were present when report was given by the informant but names of such persons were not disclosed in the first information report and it was alleged that some unidentified persons have committed the crime. It was further found that the incident had taken place in the night of 4.6.2012 at about 09:00 P.M., whereas the accused persons Geetaram and Talewar were arrested after about 5-6 weeks on 12/13.7.2012 and apart from countrymade pistol of 315 bore one live cartridge and one empty cartridge were also recovered from them. Since, it was not understandable that how the used cartridge is connected with the incident herein, therefore, the F.S.L. report was found not worth-believe and no assistance could have taken therefrom by the prosecution. Regarding arrest of the persons it was found that site plan is incorrect and was not supported by the formal witnesses. On the site plan one hut, wherefrom arrest of the accused and recovery of weapon was made, was shown, whereas there was no such hut on the spot. It was also found that the site plan (Ex. 6) and (Ex. 14) are of the same spot but there was material difference in the same. It was also found that countrymade pistol recovered from Geetaram was rusted, therefore, could not have been used in the incident. Insofar as arrest of the accused persons are concerned, the G.D. report dated 12.7.2012 indicates the police party was gone out for patrolling was not proved and there was no independent witness of the arrest of the accused persons and recovery. It was also found that it is proved from the witnesses that one of the accused Talewar was a Panchayatnama witness. The court also observed that as per the statement recorded under Section 313 Cr.P.C. Geetaram was aged about 75 years and therefore, at the time of incident he must be aged about 70 years and under all circumstances trial court found that the prosecution has failed to prove its case beyond doubt.

7. Submission of learned counsel for the appellant is that the accused persons were arrested and weapon used in the incident was recovered from the possession of the accused Geetaram and even the F.S.L. report Ex. 22 has proved that one empty cartridge which was recovered from the possession of Geetaram was fired from the same countrymade pistol, which was recovered from the possession of the accused. Therefore, it is clear that the said weapon was used in the incident. He further submitted that all the statement of the eye witnesses have been incorrectly rejected on the ground that the prosecution witnesses are related to the deceased and the informant. He further submitted that the presence of the eye witnesses on the spot is natural in such circumstances and even otherwise no other person, who is not related, usually does not come forward to

give evidence. He, therefore, submitted that merely because they were relative of the deceased, their eye witness account could not have been rejected. He further pointed out that once there is a direct evidence, the motive is not relevant and, as such, the judgment of the trial court acquitting the accused persons is liable to be reversed and the accused persons are liable to be punished under Section 302 I.P.C. and Geetaram is liable to be punished under Section 25 of Arms Act as well.

8. We have considered the submissions and perused the original record.

9. Before proceeding further it would be appropriate to take note of the law laid down by Supreme Court on the issue involved.

10. In the case of **Babu vs. State of Kerala (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179**, the Hon'ble Apex Court has observed that while dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial Court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial Court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Paragraphs 12 to 19 of the aforesaid judgment are quoted as under:-

"12. This court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the Trial Court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be more, the probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial Court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial Court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject matter of scrutiny by the appellate court. (Vide Balak Ram v. State of U.P. AIR 1974 SC 2165; Shambhoo Missir & Anr. v. State of Bihar AIR 1991 SC 315; Shailendra Pratap & Anr. v. State of U.P. AIR 2003 SC 1104; Narendra Singh v. State of M.P. (2004) 10 SCC 699; Budh Singh & Ors. v. State of U.P. AIR 2006 SC 2500; State of U.P. v. Ramveer Singh AIR 2007 SC 3075; S. Rama Krishna v. S. Rami Reddy (D) by his LRs. & Ors. AIR 2008 SC 2066; Arulvelu & Anr. Vs. State (2009) 10 SCC 206; Perla Somasekhara Reddy & Ors. v. State of A.P. (2009) 16 SCC 98; and Ram Singh alias Chhaju v. State of Himachal Pradesh (2010) 2 SCC 445).

13. In Sheo Swarup and Ors. King Emperor AIR 1934 PC 227, the Privy Council observed as under:

"...the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of

any doubt, and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses...."

14. The aforesaid principle of law has consistently been followed by this Court. (See: Tulsiram Kanu v. The State AIR 1954 SC 1; Balbir Singh v. State of Punjab AIR 1957 SC 216; M.G. Agarwal v. State of Maharashtra AIR 1963 SC 200; Khedu Mohton & Ors. v. State of Bihar AIR 1970 SC 66; Sambasivan and Ors. State of Kerala (1998) 5 SCC 412; Bhagwan Singh and Ors. v. State of M.P. (2002) 4 SCC 85; and State of Goa v. Sanjay Thakran and Anr. (2007) 3 SCC 755).

15. In Chandrappa and Ors. v. State of Karnataka (2007) 4 SCC 415, this Court reiterated the legal position as under:

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

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

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

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

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

16. In Ghurey Lal v. State of Uttar Pradesh (2008) 10 SCC 450, this Court re-iterated the said view, observing that the appellate court in dealing with the cases in which the trial courts have acquitted the accused, should bear in mind that the trial court's acquittal bolsters the presumption that he is innocent. The appellate court must give due weight and consideration to the decision of the trial court as the trial court had the distinct advantage of watching the demeanour of the witnesses, and was in a better position to evaluate the credibility of the witnesses.

17. In State of Rajasthan v. Naresh @ Ram Naresh (2009) 9 SCC 368, the Court again examined the earlier judgments of this Court and laid down that an "order of acquittal should not be lightly interfered with even if the court believes that there is some evidence pointing out the finger towards the accused."

18. In State of Uttar Pradesh v. Banne alias Baijnath & Ors. (2009) 4 SCC 271, this Court gave certain illustrative circumstances in which the Court would be justified in interfering with a judgment of

acquittal by the High Court. The circumstances includes:

i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;

ii) The High Court's conclusions are contrary to evidence and documents on record;

iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

v) This Court must always give proper weight and consideration to the findings of the High Court;

vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal.

A similar view has been reiterated by this Court in Dhanapal v. State by Public Prosecutor, Madras (2009) 10 SCC 401.

19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial Court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference."

11. Hon'ble Apex Court in the case of **Ramesh Babulal Doshi vs. State of Gujarat (1996) 9 SCC 225 : 1996 SCC (Cri) 972** has observed that while deciding appeal against acquittal, the High Court has to first record its conclusion on the question whether the approach of the trial court dealing with the evidence was patently illegal or conclusion arrived by it is wholly untenable which alone will justify interference in an order of acquittal.

12. The aforesaid judgments were taken note of with approval by Supreme Court in the case of **Anwar Ali and another vs. State of Himachal Pradesh (2020) 10 SCC 166, Nagabhushan vs. State of Karnataka (2021) 5 SCC 222**, and Babu (supra) in **Achhar Singh vs. State of Himachal Pradesh (2021) 5 SCC 543**.

13. Hon'ble Supreme Court, in the case of **Rajput Ruda Maha and others vs. State of Gujarat 1980 SCR (2) 353** after hearing the learned counsel and examining the petition of appeal and after going through the relevant parts of the judgment of the High Court, after recording that there are no sufficient grounds of interference dismissed the appeal summarily under Section 384 of the Code of Criminal Procedure.

14. Now we proceed to consider the present appeal on merits.

15. It is not in dispute that the first information report was registered with the allegation that the incident had taken place on 4.6.2012 at about 09:00 P.M. and the first information report was registered at 21:50 on the same date and the distance of the police station is about 4 kms. Thus, a prompt first information report was lodged. First information report was undisputedly lodged against unknown persons and no

eye witness has been named. The alleged eye witnesses have come only through affidavits that too after about eight days. It is also not in dispute that no empty cartridge was recovered from the spot. P.W.-1 the informant, namely, Virendra is son of the deceased and P.W.-5, Phoolwati, is the wife of the deceased. A categorical finding was recorded that the bloodstained clothes of Phoolwati, who embraced the dead body of Dorilal and claimed that her clothes were bloodstained, were not produced or made exhibits in the present case. The accused persons were allegedly arrested after a long gap on 12/13.7.2012 and it is highly improbable that the accused Geetaram would be carrying empty cartridge used in the incident with him. Therefore, in our opinion the importance of F.S.L. report that empty cartridge recovered from the accused Geetaram was fired from the same countrymade pistol of 315 bore, lost its important in the present case.

16. It is settled law that the eye witness account of related witnesses cannot be rejected merely on the ground that they are relatives of the deceased. However, we find that in the present case the alleged witnesses have come in picture only through affidavits after about eight days whereas, significantly, the first information report was lodged promptly, which was allegedly written in the presence of the eye witnesses but still their names were not mentioned in the first information report. Therefore, we also find that it was rightly observed by the trial court that there was material contradiction regarding their presence and description of the alleged incident that had taken place. That apart, we also noticed that in the first information report itself it has been stated that the incident had taken place when certain persons were committing theft of electricity cable from electricity poll but they could not succeed and the cable was found hanging from the electricity poll itself, as has been clearly mentioned in the judgment.

17. Further, if as per the eye witness account the accused-respondents were seen to have committed the offence, they were not named in the first information report. On the contrary, PW-1, Phoolwati had stated that the accused persons were present at the time of preparation of papers by the police and they had gone to Mathura and brought the dead body after postmortem and were also present at the time of cremation.

18. Even in regard to the affidavits of alleged eye witnesses sworn on 22.6.2012 they have stated in the cross-examination that they have not executed any such affidavits and further P.W.-1 has barely signed the affidavit and other two witnesses have clearly stated that they are illiterate and they have put their thumb impression in the affidavit but correctness of the affidavits was denied by giving contradictory stand, therefore, the same cannot be form basis of eye witness account of the incident, which otherwise, as held by the trial court, could not be proved by the prosecution.

19. In above circumstances, it cannot be said that the trial court has failed to take into consideration the admissible evidence or had taken into consideration the evidence brought on record contrary to law on reaching above finding.

20. In such view of the matter, we find that the view as has been taken by the trial court and the judgment of the trial

court is not perverse in nature so as to call interference of this Court.

21. Consequently, after hearing the learned counsel for the applicant and examining the petition of appeal and after going through the detailed discussion of evidence on record, we are of the opinion that the finding recorded by the trial court recording acquittal of the accused is according to the law and we find that there is no sufficient ground for interference. The appeal is summarily dismissed under Section 384 of the Code of Criminal Procedure.

(2022)05ILR A1157
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.04.2022

BEFORE

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

Crl. Misc. Application (Leave To Appeal) No. 329 of 2012
(U/s 372 Cr.P.C.)

Prithvi Singh ...Appellant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Appellant:
Sri Rajul Bhargava

Counsel for the Opp. Parties:
Govt. Advocate

Criminal Law – Criminal Procedure Code,1973 - Sections 29, 37, 372, 378, 394, 394(2), 404, 417 & 431 - Indian Penal Code, 1860 - Section 302/34- Criminal Application for Leave to Appeal - against order of acquittal in a case of murder – during pendency the appeal sole appellant were died – in such circumstances - a question is arises - whether the appeal filed U/s 372 Cr.P.C. by the Victim would be abate on the death of appellant – the right to appeal is controlled differently when an appeal is filed under different provisions of the code – therefore the scheme of right of appeal under Chapter XXXIX of Cr.P.C. which provides the right to appeals including abatement of appeals has to be understood on the basis of the golden rules of statutory interpretation – in view of the light of judgment of Avtar Singh Dhesi's present appeal would stand abated.(Para – 23, 24, 25, 33, 48, 49)

Appeal Abated. (E-11)

List of Cases cited:-

1. Khedu Mohton & ors. Vs St. of Bihar (1971 AIR 66 SC),

2. Avtar Singh Dhesi 6 Vs Ajaib Singh (Jabba) 2015 SCC Online P & H 10017,

3. Dhirendra Nath Das, his Lrs Malaya Das Vs St. of Assam 2019 SCC Online Gua 5669 DB,

4. Nelson Motis Vs U.O.I., AIR 1992 SC 1981,

5. Kanailal Sur Vs Paramnidhi Sadhu Khan, AIR 1957 SC 907,

6. St. of U. P. Vs Vijay Anand Maharaj, AIR 1963 SC 946,

7. Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd Vs Custodian of Vested Forests, AIR 1990 SC 1747,

8. Raghunath Rai Bareja Vs Punjab National Bank, (2007) 2 SCC 230,

9. Shah Bhojraj Kuverji Oil Mills & Ginning Factory Vs Subhash Chandra Yograj Sinha, AIR 1961 SC 1596,

10. Motiram Ghelabhai (deceased L.R.) Vs Jagan Nagar (deceased L.Rs.) & ors., AIR 1985 SC 709,

11. Sundaram Pillai Vs Pattabiraman, (1985) 1 SCC 591,

12. Government of 11 Andhra Pradesh Vs P. Laxmi Devi, (2008) 4 SCC 720,

13. Super Cassettes Industries Ltd. Vs St. of U.P., (2009) 10 SCC 531,

14. Jugal Kishore Khetawat Vs St. of W.B. (2011) 11 SCC 502,

15. Mallikarjun Kodagali (dead) through L.R. Vs St. of Karn. & ors. (2019) 2 SCC 752.

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. This appeal has been filed against the order dated 7.7.2012 passed by the Additional Sessions Judge, Court No. 5, Hathras acquitting the respondent nos. 2 and 3 in Session Trial No. 81 of 2002 (State vs. Bhoop Singh and others) arising out of Case Crime No. 185 of 1994, under Sections 302/34 IPC, Police Station Sadabad, District Hathras.

2. Present appeal has been filed under Section 372 Cr.P.C. with an application to grant leave to appeal, which according to the judgment of Hon'ble Apex Court is not required for the purpose of filing appeal against acquittal by the victim under Section 372 Cr.P.C.

3. On 31.5.2017, as learned counsel for the appellant had been elevated as Judge of this Court (since retired), notice was issued to the appellant-Prithvi Singh through Chief Judicial Magistrate, Hathras to engage another counsel returnable within four weeks. The compliance report dated 26.6.2017 submitted by the CJM, Hathras and the office report dated 25.7.2017 indicates that the appellant is dead. His death certificate issued on 9.6.2017 indicating that he died on 1.12.2015 has also been annexed with the compliance report.

4. No one has come forward to claim that he shall be prosecuting this appeal. Under such circumstances, the question that arises in the present case is as to whether the appeal filed under Section 372 Cr.P.C. by the victim as per proviso as inserted by the Code of Criminal Procedure (Amendment Act No. 5 of 2019) Section 29 dated 31.12.2009 would abate on the death of the appellant or not in view of the provisions of Section 394 (2) Cr.P.C., which provides that every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant.

5. Before proceeding further it would be beneficial to extract relevant provisions, which are as under:-

"The Code of Criminal Procedure, 1898 (Act V of 1898). (The amended provisions of Cr.P.C. as existing prior to coming into force of Code of Criminal Procedure, 1973)

Part VII

Of Appeal, Reference and Revision

Chapter XXXI

404. Unless otherwise provided, no appeal to lie- No appeal shall lie from any judgment or order of a Criminal Court except as provided for this Code or by any other law for the time being in force.

417. Appeal on behalf of Government in case of acquittal- The Local Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.

431. Abatement of appeals- Every appeal under section 417 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant.(emphasis supplied)

Criminal Procedure Code (Act V of 1898) (As Amended by Act (XXVI of 1955)

417. Appeal in case of acquittal- (1) Subject to the provisions of sub-section (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Established constituted under the Delhi Special Police Establishment Act, 1946 (XXXV of 1946), the Central Government may also direct the Public Prosecutor to present an appeal to the High Court from the order of acquittal.

(3) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(4) No application under sub-section (3) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of sixty days from the date of that order of acquittal.

(5) If, in any case, the application under sub-section (3) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1).(emphasis supplied)

The Code of Criminal Procedure (Amendment) Act, 2008
[Act 5 of 2009]

Statement of Objects and Reasons- The need to amend the Code of Criminal Procedure, 1973 to ensure fair and speedy justice and to tone up the criminal justice system has been felt for quite sometime. The law Commission has undertaken a comprehensive review of the Code of Criminal Procedure in its 154th report and its recommendations have been found very appropriate, particularly those relating to provisions concerning arrest, custody and remand, procedure for summons and warrant-cases, compounding of offences, victimology, special protection in respect of women and inquiry and trial of persons of unsound mind. Also, as per the Law Commission's 177th report relating to arrest, it has been found necessary to revise the law to maintain a balance between the liberty of the citizens and the society's interest in maintenance of peace as well as law and order.

2. The need has also been felt to include measures for preventing the growing tendency of witnesses being induced or threatened to turn hostile by the accused parties who are influent, rich and powerful. **At present, the victims are the worst sufferers in a crime and they don't have much role in the court proceedings. They need to be given certain *rights* and compensation, so that there is no distortion of the criminal justice system.** The application of technology in investigation, inquiry and trial is expected to reduce delays, help in gathering credible evidences, minimise the risk of escape of the remand prisoners during transit and also facilitate utilisation of police personnel for other duties. There is an urgent need to provide relief to women, particularly victims of sexual offences, and provide fair-trial to persons of unsound mind who are not able to defend themselves. To expedite the trial of minor offences,

definition of warrant-case and summons-case are to be changed so that more cases can be disposed of in a summary manner.

3. The Code of Criminal Procedure (Amendment) Bill, 2006 seeks to achieve the above objectives."(emphasis supplied)

The Code of Criminal Procedure, 1973

"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.](added by Act No. 5 of 2009)

378. Appeal in case of acquittal.--4[(1) Save as otherwise provided in sub-section (2), and subject to the provisions of sub-sections (3) and (5),--

(a) the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in revision.]

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, 5[the Central Government may, subject to the provisions of sub-section (3), also direct the Public Prosecutor to present an appeal—

(a) to the Court of Session, from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in revision].

(3) [No appeal to the High Court] under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court.

(4) If such an order of acquittal is passed in any case *instituted upon complaint* and the High Court, on an application made to it *by the complainant* in this behalf, grants *special leave* to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6) If, in any case, the application under sub-section (4) for the grant of special leave to appeal from an

order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1) or under sub-section (2).

394. Abatement of appeals.--(1) Every appeal under section 377 or section 378 shall finally abate on the death of the accused.

(2) Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant:

Provided that where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply to the Appellate Court for leave to continue the appeal; and if leave is granted, the appeal shall not abate.

Explanation.--In this section, "near relative" means a parent, spouse, lineal descendant, brother or sister."(emphasis supplied)

6. Insofar as the law on the issue regarding abatement of such appeal against acquittal is concerned, as back in the year 1971 in **Khedu Mohton and others vs. State of Bihar 1971 AIR 66 SC** Hon'ble Supreme Court held as under:-

"7. In view of our above conclusion, it is unnecessary for us to consider the question of law canvassed by Mr. E. C. A- agarwal, learned Counsel for the appellant. But as the same has been argued we shall go into it. The appeal before the High Court was brought after obtaining special leave under sub-s. (3) of s. 417, Cr.P.C. It appears that during the pendency of the appeal, the complainant died. It was contended before the High Court and that contention was repeated before us that the appeal abated in view of the death of the complainant. This contention was rejected by the High Court. In support of that contention, Counsel for the appellant relied on two decisions one of Allahabad High Court in Nehal Ahmad v. Ramji and the other of Madras High Court in Thothan and anr. v. Murugan and ors., A.I.R. 1958 Mad 624. The first decision has no application to the facts of the present case. That was an appeal under S. 476 (B) of the, Cr. P.C. It is true that the Madras decision was rendered in an appeal under s. 417(3) of the Cr. P.C. In our opinion, the learned single judge of the Madras High Court erred in thinking that the decision of the Allahabad High Court lent any support to his conclusion that an appeal filed under S. 417(3), Cr. P.C. abates on the death of the complainant. The question of abatement of criminal appeals is dealt with by s. 431 of Criminal Procedure Code. That section reads "Every appeal under S. 41 1 A, sub-s. 1) or s. 417 shall finally abate on the death of the accused and every other appeal under this Chapter (except an appeal from a sentence of fine) shall abate on the death of the appel- lant."

8. **From this section it is clear that an appeal under s. 417 can only abate on the death of the accused and not otherwise. Once an appeal against an acquittal is entertained by the High Court, it becomes the duty of the High Court to decide the same irrespective of the fact the appellant either does not choose to prosecute it or is unable to prosecute it for one reason or the other.** The argument that while introducing sub-s. (3) to s. 417, Cr. P.C., the Parliament overlooked the provisions. contained in s. 43 1, does not deserve consideration. The language of s. 431 is plain and

unambiguous. Therefore no question of interpretation of that provision arises."(emphasis supplied)

7. Punjab and Haryana High Court in **Avtar Singh Dhesi vs. Ajaib Singh (Jabba) 2015 SCC Online P & H 10017** decided on 12.5.2015 taking a different view of the matter, although taking note of the judgment of Hon'ble Apex Court in **Khedu Mohton (supra)**, held that the appeal would abate. The aforesaid judgment dated 12.5.2015 is quoted as under:-

"The present appeal against the judgment dated 11.11.2014 was preferred by the complainant on whose complaint a First Information Report No.20 dated 05.03.2008 for the offences under Section 364, 342, 384, 506, 323, 148, 149 of Indian Penal Code was lodged. **After the filing of appeal, the complainant died** even before the appeal came up for motion hearing. **Admittedly, no legal heir has come forward to continue with the present appeal.**

2. Learned counsel for the appellant argues that even in the absence of any legal heir, this Court is bound to decide appeal on merits as the provisions of Section 394 of Criminal Procedure Code 1973 (for short 'Code'), deals with abatement of appeals only on account of death of accused. Since there is no provision for abatement of appeal filed on behalf of the complainant, therefore, the appeal is bound to be heard and decided on merits. He relies upon an order passed by the Hon'ble Supreme Court in a judgment reported as AIR 1971 SC 66 titled Khedu Mohton and others v. State of Bihar and GULATI DIWAKER 2015.05.14 14:26 I attest to the accuracy and authenticity of this document order passed by a Division Bench of this Court reported as 1963 PLR 191 titled Dr. Megh Raj v. Shri Joginder Singh and others.

3. We have heard learned counsel for the appellant and **find no merit in the said argument. Section 394 of the Code reads as under:-**

"394. Abatement of appeals. (1) Every appeal under section 377 or section 378 shall finally abate on the death of the accused.

(2) Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant:

Provided that where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply to the Appellate Court for leave to continue the appeal; and if leave is granted, the appeal shall not abate."

4. Sub-Section (1) of Section 394 of the Code deals with an appeal filed under Section 377 and 378 of Code i.e. appeal by the State against conviction and sentence and appeal in the case of acquittal. Such appeal would abate on the death of the accused. Whereas sub-Section (2) contemplates that all other appeals shall abate on the death of the appellant. **Since the State has continuous existence, it is bound to prosecute an appeal filed. Thus, such an appeal would abate only on death of the accused.**

5. **But all other appeals i.e. other than the appeals preferred by the State under Section 377 or 378 of the Code would abate on the death of appellant in terms of sub-Section (2) of Section 394 of Code.**

6. **The judgments referred to by learned counsel for the appellant are not**

applicable to the facts of the present case. In Khedu Mohton's case (supra), the appeal was preferred by the State against the acquittal; therefore, while interpreting Section 431 of Criminal Procedure Code, 1898 corresponding to Section 394 of the Code, it has been observed that the appeal would abate only on account of death of accused.

7. Similarly, in Dr. Megh Raj's case (supra), the complaint was filed by the appellant and resulted into acquittal of the respondents. During the pendency of the appeal, Dr. Megh Raj died. Considering Section 431 of Criminal Procedure Code, 1898, it was held that all appeals preferred by an accused person must abate on his death. So far as the appeals against acquittals are concerned, it is laid down that they must also abate if the accused dies but death of the appellant in an appeal against acquittal, however, would not affect the continuation of the appeal. The Court held that the appeal by the complainant is saved from abatement under Section 431 of Criminal Procedure Code, 1898.

8. We do not find that such judgment advances the argument raised by the appellant **in view of sub-Section (2) of Section 394 of Code which provides that all other appeals shall abate on the death of the appellant Thus, the death of the appellant during the pendency of appeal will entail abatement of appeal.**

9. **Consequently, the present appeal stands abated**."(emphasis supplied)

8. Guahati High Court in the case on the death of **Dhirendra Nath Das, his Lrs Malaya Das vs. State of Assam 2019 SCC Online Gua 5669 DB** held that the appeal would not abate. Relevant paragraph 11 of the aforesaid judgment is quoted as under:-

"11. As **the provision of section 394 of the Cr.P.C., 1973 is pari materia with that of section 431 of the Cr.PC. Of 1898**, we are of the view that the same proposition of law as laid down **by the Supreme Court would also be applicable** in respect of the provisions of section 394, Cr.P.C. of 1973. Accordingly, we are unable to accept the contention of the accused-respondents that the accompanying appeal preferred by the victim under the proviso to section 372 of Cr.P.C. of 1973 stands abated on the death of the victim appellant."(emphasis supplied)

9. Since the provisions of Cr.P.C. in respect of file appeal by victim have substantially changed and infact, the provisions of the relevant part of Cr.P.C. have already undergone substantial change since the decision of Hon'ble Apex Court in **Khedu Mohton (supra)**, therefore, the question framed above would have to be considered in the light of existing provisions as provided under Code of Criminal Procedure, 1973 as amended in the year 2009 by Act No. 5 of 2009, whereby the proviso to Section 372 Cr.P.C. was added.

10. Before proceeding further it would be appropriate to take note of the principles of statutory interpretation as the decision of the question involved in the present case is directly dependant on the interpretation of the statutory provisions. For this purpose we have taken help of the book "Principles of Statutory Interpretation' "13th Edition, 2012' written by Justice G. P. Singh (Former Justice of M. P. High Court).

11. One of the main basic principles of interpretation is that if meaning of words of statute are plain,

effect must be given to it irrespective of consequences.

12. In **Nelson Motis vs. Union of India, AIR 1992 SC 1981** it has been observed that when the words of a statute are clear, plain or unambiguous, i.e., they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of consequences.

13. In **Kanailal Sur vs. Paramnidhi Sadhu Khan, AIR 1957 SC 907** it was observed that if the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.

14. In **State of Uttar Pradesh vs. Vijay Anand Maharaj, AIR 1963 SC 946** it was held that when a language is plain and unambiguous and admits of only one meaning no question of construction of a statute arises, for the Act speaks for itself.

15. It is also a guiding rule of interpretation that language of the statute should be read as it is.

16. In **Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd vs. Custodian of Vested Forests, AIR 1990 SC 1747** it was observed that the intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said.

17. In **Raghunath Rai Bareja vs. Punjab National Bank, (2007) 2 SCC 230** Supreme Court held that departure from the literal rule should be done only in very rare cases and ordinarily there should be judicial restraint in this connection.

18. Insofar as rule of "regard to consequences' is concerned, the aforesaid book clearly provides that this rule has no application when the words are acceptable to only one meaning and no alternate construction is reasonably open. A reference may be made in this regard with citations noted above which provides that if meaning is plain, effect must be given to it irrespective of consequences.

19. In **Shah Bhojraj Kuverji Oil Mills and Ginning Factory vs. Subhash Chandra Yograj Sinha, AIR 1961 SC 1596** it was observed that as a general rule, a "proviso' is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a "proviso' is not interpreted as stating a general rule.

20. However, in Chapter 3 of the aforesaid book at page 206 it has been observed that the insertion of a "proviso' by the draftsman is not always strictly adhered to its legitimate use and at times a section worded as a "proviso' may wholly or partly be in substance a fresh enactment adding to and not merely excepting something out of or qualifying what goes before. A large number of rulings, including the English Law, have been noted in support of the aforesaid observation. A reference in this regard may be made to one of such rulings, namely, **Motiram Ghelabhai (deceased L.R.) vs. Jagan Nagar (deceased L.Rs.) and others, AIR 1985 SC 709**.

21. Purposes of a "proviso' were aptly summarised in **Sundaram Pillai vs. Pattabiraman, (1985) 1 SCC 591**, wherein it was observed that by and large a proviso

may serve the following four different purposes:-

"(1) qualifying or excepting certain provisions from the main enactment;

(2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;

(3) **it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself**; and

(4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision."(emphasis supplied)

22. However, it was observed in the aforesaid book that the above summary cannot, however, be taken as exhaustive and ultimately a "proviso' like any other enactment ought to be construed upon its terms.

23. Insofar as the statutes regulating appeal are concerned, the law is well established that the right to file an appeal is a statutory right and it can be circumscribed by the conditions of the statute granting it. As was observed in **Government of Andhra Pradesh vs. P. Laxmi Devi, (2008) 4 SCC 720** and **Super Cassettes Industries Ltd. vs. State of U.P., (2009) 10 SCC 531,** it is not a natural or inherent right and cannot be assumed to exist, unless provided by a statute.

24. Therefore, the scheme of right of appeal under Chapter XXXIX of the Criminal Procedure Code, which provides the right to file appeals including abatement of appeals, has to be understood on the basis of the above golden rules of statutory interpretation.

25. At this stage, we take note of the golden principle of interpretation that if the meaning of a word of a statute is plain, effect must be given to it irrespective of consequences. The law in this regard has already been discussed and it needs no repetition. The scheme of the right to appeal as provided in the Code of Criminal Procedure, is to be understood by going through the development of the right to appeal, beginning with the Code of Criminal Procedure, 1898 (hereinafter referred to as Cr.P.C. 1898). Part VII of Cr.P.C., 1898 provides for appeal, reference and revision. Chapter XXXI deals with the right to appeal. The provision under Section 404 of Cr.P.C. 1898 that no appeal shall lie from any judgment or order of a Criminal Court except as provided by this Code or by any other law for the time being in force, remained the same in the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C. 1973). Section 417 of Cr.P.C. 1898 provided that the local government may direct the public prosecutor to present an appeal before the High Court from an original or appellate order of acquittal passed by any court, other than the High Court. Nothing further was provided under Section 417 Cr.P.C. 1898. However, the heading was to the effect "Appeal on behalf of Government in case of acquittal'. This clearly indicates that the intention was to provide right to file appeal only to the government and to no other person. This provision has undergone a change in Cr.P.C. 1973 and the same is now "Appeal in case of acquittal'. Now, there is a detailed section divided into six sub-

sections. Significantly, it is provided under sub-section (3) of Section 378 Cr.P.C. 1973 that no appeal to the High Court under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court. Sub-sections (1) and (2) have taken care of several agencies of the government. Significantly again, sub-section (4) of Section 378 of Cr.P.C. 1973 provides that if such an order of acquittal is passed in any case instituted upon a complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court. It is significant to note that under sub-section (3) when an appeal is preferred, it has to accompanied by an application for grant of "leave to appeal", whereas under sub-section (4) the words "special leave to appeal" have been used, where the appeal is proposed to be filed by a complainant, which must be accompanied by an application made by the complainant for grant of such special leave to appeal. Sub-section (5) of section 378 of Cr.P.C. 1973, significantly again, has provided that no application under sub-section (4) for grant of "special leave' to appeal filed by a public servant shall be entertained by the High Court after expiry of six months from the date of that order of acquittal and sixty days in every other case, meaning thereby right of a complainant to prefer appeal is made limited to the specified period. Clearly, a right to file an appeal has been created in favour of the complainant in Cr.P.C. 1973, however, a period of limitation has been provided. In fact, a longer period of limitation of six months has been provided, where the complainant is a public servant. This clearly shows that insofar as the provision regarding filing of appeal against acquittal is concerned, there is a significant change in Section 378 of Cr.P.C. 1973 in comparison to Section 417 of Cr.P.C. 1898, as it further draws a distinction between a complainant, who is a public servant and broadly speaking, a private complainant.

26. It is also clear that an appeal by the State, broadly speaking in sessions trial, where the case is being prosecuted by the State agencies, is distinct and different from the right to appeal created in favour of a complainant, be it by a public servant or by a private person or by any other agency.

27. Now on a comparison between Section 404 of Cr.P.C. 1898 and Section 372 of Cr.P.C. 1973, it is clear that the main provision is intact, insofar it provides that no appeal shall lie from any judgment or order of a criminal court, except as provided by this Code or by any other law for the time being in force. The significant development that has taken place in this provision is that a "proviso' was added by the Amending Act No. 5 of 2009, which provides 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 passed by such Court'.

28. Therefore, by the aforesaid provision a right has been created in favour of the victim, which was not existing earlier in the Code, that a victim shall have right to prefer an appeal against any order by the court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation. If we have a glance over the statement of objects and reasons in paragraph 2, it is very much

clear that while dealing with the right of the victims it has been noted that at present, the victims are the worst sufferers in a crime and they don't have much role in the court proceedings. They need to be given certain "rights" and compensation, so that there is no distortion of the criminal justice system. This, by itself, is clear that the object of adding this proviso is to create a right in favour of the victim to prefer an appeal as a matter of right. It not only extends to challenge the order of acquittal but such appeal can also be filed by the victim if the accused is convicted for a lessor offence or if the inadequate compensation has been imposed.

29. It is, therefore, clear that as per the golden rule of interpretation, this "proviso' is a substantive enactment and it is not merely excepting something out of, or qualifying what was excepting or goes before. Therefore, by adding the "proviso' in Section 372 of Cr.P.C. 1973 by this amendment, a right has been created in favour of the victim.

30. At this stage, it would be appropriate to take note of the definition of "victim' as inserted by the Code of Criminal Procedure (Amendment) Act, 2008 (Act 5 of 2009) by adding sub-section (wa) in Section 2, which provides that "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'.

31. It is also a settled law, as interpreted by the Supreme Court and various High Courts, that victim does not include each and every person or merely an informant, who has lodged a first information report and the term "victim' has to be interpreted as per the definition noted above. We need not go deep into the same. Therefore, from a perusal of the scheme of the right to appeal against acquittal, as reflected from a reading of the above noted provisions, it is clear that initially the right to appeal was exclusively with the State Government and it was not available even to the complainant, even if a public servant was a complainant, leave alone a private individual or any other agency.

32. As has already been noticed, Section 417 of Cr.P.C. 1898 provided for appeal on behalf of the government in cases of acquittal and no other person was authorized to file appeal and that this provision has undergone a major change in Cr.P.C. 1973, Section 378 whereof provides for appeal in cases of acquittal. The term local government has been substituted with several individual agencies to which we are not concerned, however, this is to be noted that even the right of a public servant to file appeal, who is a complainant, has been made limited to be exercised within six months and private complainant can come forward with an application for grant of special leave to appeal from the order of acquittal, which has been limited to sixty days only. Therefore, clearly, the legislature was always conscious of the extent to which the right to appeal is to be provided to different agencies, where they appear in a different capacities.

33. It further appears that the word "leave' and "special leave' have been consciously used by the legislature in Section 378 of Cr.P.C. 1973 obviously with an intention that the grant of leave in a case of complaint should be more strict in nature and may require deeper scrutiny before any such leave to appeal is granted than the

leave to appeal to be granted in sessions trial cases. Thus, the right to appeal is controlled differently when an appeal is filed under different provisions of the Code.

34. Now coming to the provisions regarding abatement of appeals, we may note that vide Section 431 of Cr.P.C. it was provided that every appeal under Section 417 (appeal on behalf of government in case of acquittal) shall finally abate on the death of the accused and every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant. This provision has also undergone a substantial change in Cr.P.C. 1973. Sub-section (1) of Section 394 of Cr.P.C. 1973 provides that every appeal under Section 377 or Section 388 shall finally abate on the death of the accused.

35. We are not concerned with Section 377 for the purpose of the present controversy, as Section 377 relates to "appeal by the State Government against sentence' and is not related to the appeals in cases of acquittal.

36. As we have already noticed that Section 378 of Cr.P.C., 1973 has undergone a major change, which provides "appeal in case of acquittal' in comparison to Section 417 of Cr.P.C., 1898, which provides "appeal on behalf of Government in case of acquittal'. The distinction has already been taken note of in the preceding paragraphs.

37. The second part of Section 431 of Cr.P.C. 1898, broadly speaking, has now been changed as significantly a "proviso' has been added in sub-section (2) and an explanation has also been added to the entire Section 394 of Cr.P.C. 1973. We may take note of the "proviso' to Section 394 Cr.P.C. once again, which provides that "where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply to the Appellate Court for leave to continue the appeal; and if leave is granted, the appeal shall not abate'. The explanation to Section 394 provides that in this section "near relative' means a parent, spouse, lineal descendant, brother or sister. In the "proviso' added to sub-section (2) in Section 394 of Cr.P.C. 1973 it is important to note that it is in respect of an appeal against conviction and sentence of death or of imprisonment and not in respect of an appeal against acquittal. It further provides that if the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days from the death of the appellant, apply to the appellate court for leave to continue the appeal and if leave is granted, the appeal shall not abate. Thus, clearly this proviso to sub-section (2) of Section 394 Cr.P.C. 1973, is only in respect of appeal against conviction and sentence of death or of imprisonment and only near relatives as provided in the explanation, may apply for leave to continue the appeal within thirty days from the death of the appellant, and if leave is granted, the appeal shall not abate. Why this provision was added has been taken note of by the Supreme Court in **Jugal Kishore Khetawat vs. State of West Bengal (2011) 11 SCC 502** wherein it was held that this is to provide a machinery whereby the children or the members of the family of a convicted person who dies during the appeal, could challenge the conviction and get rid of the

odium attaching to the family due to such conviction. Paragraph 7 of the aforesaid judgment is quoted as under:-

"7. Such a proviso has been added in the following circumstances: An amendment to Section 431 was suggested in the Bill introduced in the Parliament by a private Member, Shri K.V. Raghunatha Reddy. **The main object of the amendment was to provide a machinery whereby the children or the members of the family of a convicted person who dies during the appeal could challenge the conviction and get rid of the odium attaching to the family as a result of the conviction.** The Law Commission of India by its Forty-First Report (September 1969, Vol. I, pp. 279-81) found the proposed amendment "eminently sound" and recommended that the amendment be made with certain modifications. Accordingly Section 394 of the Code of Criminal Procedure, 1973 has made the said proviso."(emphasis supplied)

38. Now, insofar as the appeal filed against acquittal by the victim under Section 372 of Cr.P.C. 1973 is concerned, it would be covered by the plain words of sub-section (2) of Section 394 Cr.P.C. 1973, which provides that every other appeal under this Chapter (except an appeal from sentence of fine) shall finally abate on the death of the appellant. In sub-section (2) an exception has been carved out in respect of an appeal from a sentence of fine, obviously for the reason that it involves monetary reasons to the benefit of the victim.

39. As already noticed, a substantive right to prefer an appeal against acquittal was added by the amending Act No. 5 of 2009 by adding a "proviso' to Section 372 of Cr.P.C. 1973. However, significantly, no amendment was made in Section 394 Cr.P.C. 1973, which provides for abatement of appeals.

40. As already noticed, the golden rule of interpretation is that if the meaning of words of a statute are plain, effect must be given irrespective of the consequences. We may refer to the judgments of the Supreme Court in cases of **Nelson Motis (supra), Kanailal Sur (supra), Vijay Anand Maharaj (supra), Gwalior Rayan Silk (supra), Raghunath Rai Bareja (supra).**

41. In the light of **Shah Bhojraj (supra)** and **Khedu Mohton (supra)** it may be argued that once an appeal against acquittal is entertained by the High Court, it becomes the duty of the High Court to decide the same irrespective of the fact that the appellant either does not choose to prosecute it or is unable to prosecute it for one reason or the other. In **Motiram Ghelabhai (supra)** and **Sundaram Pillai (supra)**, the Supreme Court laid down that the "proviso' added to Section 372 Cr.P.C. 1973 is a fresh enactment giving a substantive right to file appeal against acquittal to the victim [as defined in Section 2 (wa)], which was was added by the same amending act, being Act No. 5 of 2009.

42. As observed in **P. Laxmi Devi (supra)** and **Super Cassettes Industries (supra)** it is a settled law that the right to file an appeal is a statutory right and it can be circumscribed by condition / conditions of the statute granting it. In this view of the settled law, it is extremely important to note that at the time when the judgment in **Khedu Mohton (supra)** was passed by the Supreme Court, the proviso to Section 372

of Cr.P.C. 1973 was not in existence and in Cr.P.C. 1973 provision of abatement of appeals was substantially changed in comparison to Section 431 Cr.P.C. 1898.

43. In an appeal against conviction, the right of near relatives to get themselves substituted within a limited period was protected so that they may come forward to prosecute the appeal for the purpose of removing the stigma on the family. However, no such right of a victim was protected. No right to substitute the victim has been granted under Section 394 Cr.P.C. 1973. It is also pertinent to note that sub-section (2) of Section 394 Cr.P.C. 1973 provides that every other appeal shall abate on the death of the appellant.

44. Insofar as abatement of appeals filed under Section 377 (which is in respect of government appeals against conviction) and Section 378 (which is in respect of appeals in cases of acquittal), which can be filed only by seeking leave to appeal and by a complainant by seeking special leave to appeal, it has been provided that they shall abate only in case of death of the accused. Therefore, only complaint case and case against fine are protected under sub-section (1) to the extent that they shall abate on the death of the accused and not on the death of the appellant. It is, therefore, clear that the legislature has consciously not amended Section 394 in respect of Section 372 Cr.P.C. 1973, particularly, an appeal against acquittal filed by the victim.

45. It is also significant to note that earlier different views by different High Courts were existing on the issue whether an application seeking leave to file appeal under Section 378 (4) Cr.P.C. is required or not. Some were of the opinion that even while filing an appeal under Section 372 of Cr.P.C. 1973 victim has to file an application under Section 378 Cr.P.C. 1973 seeking leave to appeal, whereas others were of the opinion that no such application is required. In **Mallikarjun Kodagali (dead) through L.R. vs. State of Karnataka and others (2019) 2 SCC 752** it was held by the Supreme Court that there is no requirement of filing an application seeking leave to file appeal if appeal is filed by a victim under Section 372 Cr.P.C. 1973. Paragraph 76 of the aforesaid judgment is quoted as under:-

"76. As far as the question of the grant of special leave is concerned, once again, we need not be overwhelmed by submissions made at the Bar. **The language of the proviso to Section 372 of the Cr.P.C. is quite clear, particularly when it is contrasted with the language of Section 378(4) of the Cr.P.C.** The text of this provision is quite clear and it is confined to an order of acquittal passed in a case instituted upon a complaint. **The word 'complaint' has been defined in Section 2(d) of the Cr.P.C. and refers to any allegation made orally or in writing to a Magistrate. This has nothing to do with the lodging or the registration of an FIR, and therefore it is not at all necessary to consider the effect of a victim being the complainant as far as the proviso to Section 372 of the Cr.P.C. is concerned.**"(emphasis supplied)

46. This clearly indicates that the Supreme Court has also held that the right to file appeal under Section 372 Cr.P.C. 1973, as added by proviso by amending Act No. 5 of 2009, is different from the right to file appeal in case of acquittal as provided under Section 378 Cr.P.C. 1973. A clear distinction, therefore, has been

noted by the Supreme Court between Section 372 Cr.P.C. 1973 and Section 378 Cr.P.C. 1973. It may also be noticed that there is also a difference in the definition of "victim' as provided under Section 2(wa) of Cr.P.C. 1973 and of the word "complainant' as defined under Section 2(d) of Cr.P.C. 1973.

47. It is, therefore, clear that in view of the amended provision of the Code of Criminal Procedure, the judgment of the Supreme Court in case of **Khedu Mohton (supra)** would not be applicable now and is, thus, clearly distinguishable.

48. There is yet another aspect of the matter. Insofar as the rules of interpretation are concerned, there is a rule which provides that "regard to consequences' are also be taken into consideration while interpreting any statutory provision. However, as already noticed in the preceding paragraphs, this rule has no application when the words are acceptable to only one meaning and no alternate consideration is reasonably open. There can be no dispute that the provisions of sub-section (2) of Section 394 Cr.P.C. 1973 are absolutely plain in their language and must be given effect to irrespective of the consequences. Therefore, the view that in case the appeal filed by the victim is not abated on the death of the appellant, the consequences may be serious, would not be applicable in the present case.

49. We are, therefore, in respectful agreement with the view taken by the Punjab and Haryana High Court in **Avtar Singh Dhesi (supra)** that the appeal filed under Section 372 Cr.P.C. 1973 would stand abated on the death of the appellant.

50. Consequently, in view of the discussions made hereinabove present appeal stands abated.

(2022)05ILR A1171
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.04.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE PIYUSH AGRAWAL, J.

Special Appeal Defective No. 302 of 2020
With
Special Appeal No. 467 of 2021
& With other connected cases

Ashutosh Kumar Srivastava & Ors. **...Petitioners**

Versus

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

Counsel for the Petitioners:
Sri Seemant Singh

Counsel for the Respondents:
Ms. Archana Singh (Addl. C.S.C.), Sri Bheem Singh

Civil Law – Constitution of India, 1950 - Article 226 - Advertisement – for the post of Assistant Teacher – appellant/petitioners were applied and selected – in counselling in respective district – their candidateship were cancelled on the ground of discrepancies found in on-line application form while filing up their marks – challenged in Writ Petitions – out of which some petitions were dismissed & some are allowed - which are subjected matter in present bunch of Special Appeals/petitions – Order *in-persona* - Court remitted back the case of each appellants/petitioners before the concern district authority – for re-examine/review individually in the light of referred judgment of Hon'ble Apex Court – with directions to complete the said review proceeding within one month and each successful candidate in the said proceeding will be entitled for all consequential benefits. (Para – 9, 12, 14, 15)

Appeals/petitions are disposed of. (E-11)

List of Cases cited: -

1. Jyoti Yadav & anr. Vs The St. of U.P. & ors. (Writ No. 322 of 2021, dated 08.04.2021,

2. Rahul Kumar Vs St. of U.P. & ors., Writ Petition (Civil) No. 378 of 2021, dated 29.06.2021

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

1. This order will dispose of a bunch of special appeals and writ petitions. The issue for consideration before this Court is regarding rejection of claim of the candidates, who had applied for the post of Assistant Teacher in Primary School. The advertisement for the same was issued on December 5, 2018 and the select list was notified on May 12, 2020. The candidates were directed to report at the respective districts for which their selection was made. During the course of counselling, their certificates were to be checked. In the said process, the candidature of number of candidates was rejected as it was found that there were discrepancies in the marks filled up by them in on-line applications as compared to the marks mentioned in the mark-sheets produced by them during counselling.

2. Some of the writ petitions were dismissed by the learned Single Judge against which the candidates are in appeals whereas in some cases, the writ petitions were allowed against which the Basic Education Board (hereinafter referred to as 'the Board') is in appeal.

3. In three special appeals bearing Special Appeal Nos. 98, 835 and 845 of 2022, interim orders passed by the learned Single Judge in favour of the candidates in the writ petition bearing Writ-A Nos. 15350, 8525 and 6839 of 2021, are under challenge. As delay in disposal of the writ petitions would further entail delay in conclusion of the process of selection and appointment, the aforesaid writ petitions were directed to be listed before this Court along with aforesaid appeals and the argument of the same have also been heard. Another writ petition bearing Writ-A No. 16905 of 2021 is already tagged with the bunch as identical questions are involved in the same.

4. The argument raised by learned counsel for the candidates is that, in terms of Government Order dated March 5, 2021, the candidature of a candidate is not required to be cancelled in case the marks filled up by him/her in an on-line application form is at a disadvantageous position, while preparing the merit list. In the case in hand, as per the marks filled by the candidates in their on-line applications, the percentage of marks was shown less as compared to the actual marks secured by them.

5. This issue was considered by Hon'ble the Supreme Court in ***Writ Petition (Civil) No. 322 of 2021 titled as Jyoti Yadav and another vs. The State of Uttar Pradesh and others, decided on April 8, 2021 and in Writ Petition (Civil) No. 378 of 2021 titled as Rahul Kumar vs. State of Uttar Pradesh and others, decided on June 29, 2021*** wherein the validity of the aforesaid Government Order dated 05.03.2021 was upheld and it was opined therein that in case the marks filled up by the candidates, cause disadvantage to them as compared to the actual marks obtained, the candidature of such candidates is not to be cancelled. Hence the cases of such candidates, who are before this Court,

either in the writ petitions or in appeals, deserve to be reconsidered by the competent authority.

6. On the other hand, the argument raised by learned counsel for the Board is that if there is any error in filling up the form by a candidate, he cannot be allowed to make any correction. Clause 2 of the Government Order dated 05.03.2021, clearly provides that in such a situation, the candidature is required to be cancelled. The candidate could be given benefit only in case there was error committed by the Board or University. It is further submitted that selection process is already complete and appointments have been made.

7. Heard learned counsel for the parties.

8. In the bunch of appeals and writ petitions, we are not proposing to enter into the facts of each and every case as, after hearing learned counsel for the parties, we find that there has not been proper appreciation of facts by the competent authority while rejecting the candidature of the candidates on account of which they have approached this Court. The State itself found that there were some errors as a result whereof Government Order dated 3.5.2021 was issued. The validity thereof was challenged by some of the candidates before Hon'ble the Supreme Court in the case of ***Joyti Yadav and another (supra)***. The relevant clause thereof reads as under:

"(1) In context of Recommendations of the Committee at Point-1 in reference to more marks mentioned:-

The candidates, who had submitted the application form on the basis of the certificate/marks-sheet available with them and had mentioned more marks but the marks were subsequently changed after scrutiny/reevaluation/back-paper by the University/ issuing authority on its own, those candidates cannot be held to be responsible for changing or wrongfully mentioning marks in the application form as they did not have any option but to fill the marks mentioned in the certificate/marks-sheet available with them at the relevant time of filling up of the application form. Such candidates, if they have obtained more quality points than the last candidate selected in the category in the district, then he/she shall be given the appointment letter in that district. If any such candidate has lesser quality points than the last candidate selected in a particular district but more than the quality point than the last selected candidate in that category in the State list then the details of such candidate shall be provided to the administration by the Director, Basic Education. Further actions will be taken in that regard by the administration.

Where a candidate, without any documentary basis, has mentioned more marks than what he has obtained or has mentioned more maximum marks than what the actual was, his/her selection/candidature shall be cancelled."

9. In the aforesaid case, while upholding the validity of the aforesaid Government Order, it was opined that wherever the mistakes committed by the candidates purportedly gave additional marks or weightage greater that what they actually deserve, according to the Communication dated 05.03.2021, their candidature should be rejected, however, wherever mistakes committed by the candidates actually put them at a disadvantageous position against their original entitlement or the variation could

be one attributable to the University or issuing authority, an exception was made. Hon'ble the Supreme Court in respect of the aforesaid two categories in the Government Order dated 05.03.2021 did not find anything to be irrational. Subsequently, the issue was examined in the case of **Rahul Kumar *(supra)*** with reference to the same selection process. While referring to the Government Orders dated 04.12.2020 and 05.03.2021, it was opined that wherever a candidate had put himself at a disadvantageous position, his candidature is not to be cancelled but if the candidate had been placed at an advantageous position which is beyond his right to claim, his candidature is to be cancelled. Relevant paragraph nos. 7, 8 and 9 of the aforesaid judgment read as under:

"7. We need not consider individual fact situation as the reading of the G.O. and the Circular as stated above is quite clear that wherever a candidate had put himself in a disadvantaged position as stated above, his candidature shall not be cancelled but will be reckoned with such disadvantage as projected; but if the candidate had projected an advantaged position which was beyond his rightful due or entitlement, his candidature will stand cancelled. The rigour of the G.O. and the Circular is clear that wherever undue advantage can enure to the candidate if the discrepancy were to go unnoticed, regardless whether the percentage of advantage was greater or lesser, the candidature of such candidate must stand cancelled. However, wherever the candidate was not claiming any advantage and as a matter of fact, had put himself in a disadvantaged position, his candidature will not stand cancelled but the candidate will have to remain satisfied with what was quoted or projected in the application form.

These petitions are, therefore, disposed of in the light of what is stated above.

8. It must however be stated here that the authorities are not strictly following the intent of the G.O. and the Circular. For example, the Office Order dated 28.03.2021 issued by the Basic Teacher Education Officer, District Hardoi, shows cancellation of the candidature of one Raghav Sharan Singh at Serial No.4, though the projection of marks by way of mistake by said candidate was to his disadvantage. Logically, said candidate would be entitled to have his candidature considered and reckoned at the disadvantaged level. The record shows that even with such disadvantage, the candidate was entitled to be selected.

9. We have given this illustration only by way of an example. The authorities shall do well to consider every such order issued by them and cause appropriate corrections or modifications in the light of conclusions stated above. "

10. From the facts of the bunch of cases listed before us and as has been pointed by some of the counsels, it is evident that the issue has not been examined by the competent authority in terms of the observations made by the Supreme Court in the aforesaid two judgments which relate to the selection process in question. In fact, in some of the cases, the rejection of the candidature, is prior to the aforesaid judgments.

11. As we find that the issues have not been examined by the competent authority in the light of the observations made by the Supreme Court in the aforesaid judgments interpreting the

Government Orders dated 04.12.2020 and 05.03.2021, the matter needs to be re-examined.

12. While setting aside the impugned orders rejecting the candidature of the candidates on account of the error committed by them, we remit the matter to the authority of the district concerned for re-examination thereof in light of the aforesaid judgment of the Supreme Court and to take a final decision thereon.

13. It is made clear that candidates, whose names do not find place in the select list dated 12.5.2020, will not get any benefit with the change of marks as their merit position will not be changed for the reason that in case this is allowed to happen at this stage, it will open the entire selection process which is not the spirit of the order passed by this Court.

14. The entire process shall be completed by the competent authority within a period of one month from the date of receipt of a copy of this order.

15. It is further directed that in case any candidate is found entitled for appointment and is offered appointment on review of his/her case in terms of the aforesaid directions, he/she shall get all the benefits from the date, he/she joins the service

16. The order passed in this bunch of appeals/writ petitions may not be treated to be an order in rem rather it is an order in personam limited to the candidates before the Court who were vigilant enough to place their griev
ance before the Court.

(2022)05ILR A1175

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.05.2022

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Criminal Misc. Bail Application 34421 of 2021
connected with
Criminal Misc. Bail Applications no. 39717 of 2021 & 55230 of 2021

Chandrabhan Singh Yadav ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Varad Nath

Counsel for the Respondents:
G.A., Sri Rahul Kumar Gupta, Mrs. Archana Singh, Sri Sushil Kumar Pal

(i) Criminal Law - Criminal Procedure Code,1973 - Sections 161 & 439 - Indian Penal Code,1860 - Sections 120-B, 406, 19 & 420 – Information Technology Act, 2008 - Sections 66, 66-(C) & 66-(D) - Application for Bail – allegation of Cyber Crime – online fraud of theft of money about 17 lacks from victim's bank account - Admission of accused persons – they are habitual & trained to commit online fraud with innocent public – deserves no mercy from court – hence bail application rejected. (Para – 22)

(ii) Criminal Law - Criminal Procedure Code, 1973 - Sections 161 & 439 - Indian Penal Code,1860 - Sections 120-B, 406, 19 & 420 – Information Technology Act, 2008 - Sections 66, 66-(C) & 66-(D) - Cyber crime is become very serious problem in our society – court can pass directions in the public interest by exceeding its jurisdiction – Government and its machineries & departments (like Bank, Telecom companies, Reserve Bank of India, investigation agencies) should maintain trust of public & account holders – it's time to take strict steps against the cyber crime – Government should fix the liabilities also upon Banks to

secure the money of account holders. (Para – 14, 21)

Bail Application Rejected. (E-11)

List of Cases cited:-

1. Criminal Bail Application No. 20529 of 2021 order dated 12.01.2022

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. दाण्डिक प्रकीर्ण जमानत **आवेदन पत्र संख्या 34421 वर्ष 2021**,आवेदक चन्द्रभान सिंह यादव, दाण्डिक प्रकीर्ण **जमानत आवेदन पत्र संख्या 39717 वर्ष 2021**, आवेदक मोहन कुमार मण्डल एवं दाण्डिक प्रकीर्ण **जमानत आवेदन पत्र संख्या 55230 वर्ष 2021**, आवेदक तौसीफ जमां द्वारा मुकदमा अपराध संख्या 05 वर्ष 2020, अन्तर्गत धारा 406, 419, 420, 120बी0, भा0 दं0 सं0 एवं धारा 66/66 (सी.)/66 (डी) आई0 टी0 एक्ट, थाना साईबर थाना, जिला प्रयागराज में जमानत पर मुक्त किये जाने हेतु प्रस्तुत किया गया है।

2. चूँकि उपरोक्त तीनों जमानत आवेदन पत्र एक ही घटनाक्रम एवं अपराध से सम्बन्धित है। अतएव उपरोक्त तीनों जमानत आवेदन पत्रों का निस्तारण एक साथ किया जाता है।

3. अभियोजन कथानक संक्षेप में इस प्रकार है कि वादी मुकदमा घनश्यामजी ने एक प्राथमिकी दिनाँक 19–10–2020 को थाना साईबर थाना, जनपद प्रयागराज में इस आशय से दर्ज करायी गयी कि प्रार्थी केन्द्रीय आयुध भण्डार छिवकी, नैनी प्रयायगराज से दिनांक 31–7–2020 को सेवानिवृत्त हुआ है। दिनाँक 11–9–2020 को वादी ने अपने मो0 नं0 9935764397 से योनों अप्लीकेशन के माध्यम से जिसका खाता संख्या 36180638813 से 598/–रूपये का एयरटेल का रिचार्ज किया। चूँकि उसके खाते से 598/–रूपये कटने के बावजूद भी उसका मोबाईल रिचार्ज नहीं हुआ, जिसकी शिकायत उसने मौखिक रूप से एक सप्ताह बाद बैंक में की। बैंक मैनेजर अविनाश शुक्ला ने कहा इसकी शिकायत एयरटेल आफिस में करो। एक सप्ताह बाद उसने एयरटेल आफिस में पैसे कटने की शिकायत की। लगभग 25–27 दिन बीत जाने के बाद जब उसके खाते में पैसा वापस नहीं आया तो दोबारा एयरटेल आफिस गया वहां उसकी प्रशांत शुक्ला से बात हुई जिसका मो0 नं0 7318271451 है, उन्होंने बताया कि आपको जहां शिकायत करनी है कर दीजिए। दिनांक 15–10–2020 को लगभग 11–45 बजे उसके पास एक अज्ञात मोबाईल नम्बर 8389905260 से फोन आया वह बोला कि मैं राहुल बोल रहा हूं आपको पैसे वापस करने है। आप अपना खाता संख्या तथा आई0 एफ0 एस0 सी0 कोड बताइये उसने बता दिया तथा जन्मदिन पूछने पर उसे भी बता दिया। फिर कागज पर 1960 और 2020 तथा ए0 टी0 एम0 पिन नम्बर लिखकर योग करने के बाद उसे बता दिया तो उसके खाते में 598/–रूपया आ गये। उसके बाद ओ0 टी0 पी0 आने पर उसे बता दिया। लगभग 1–50–2–00 घण्टें लगातार मैसेज आते रहे और वह ओ0 टी0 पी0 भेजता रहा उसके खाते से पैसे कटते रहे और वह अनभिज्ञ था उसके बेटे द्वारा मैसेज देखने पर पता चला कि उसके खाते से पैसे कट रहे हैं। इसकी शिकायत उसने बैंक मैनेजर अविनाश शुक्ला से की तो उन्होंने कहा शिकायत आपके मोबाईल से होगी, क्योंकि मेरा सर्वर खराब है, फिर उसके मोबाईल से किसी के पास फोन किया और बताया कि आपका ए0 टी0 एम0 लाक कर दिया गया है। उसने सबकुछ लाक कर दिया और कहा उसकी सारी निकासी चेक द्वारा ही हो। इसके बाद उसे एक अज्ञात नं0–7478428583 से फोन आया कि एस0 बी0 आई0 दिल्ली मुख्य ब्रान्च से बात कर रहा हूं उसने बताया कि प्लेस्टोर पर जाइये और उसपे एस0 बी0 आई0 का एक ऐप है उसे लोड कर लीजिए। उसने गुस्से में फोन काट दिया।

4. इसके बाद शाम 5–7 बजे के बीच पैसे कटते रहें। इसकी शिकायत बैंक मैनेंजर अविनाश शुक्ला से की तो उन्होंने बताया कि आपने योनों अप्लीकेशन और नेट बैंकिंग नहीं बंद करवाया है इसलिए पैसे कट रहे हैं। इस पर उसने कहा कि आपने मुझे सन्तुष्ट किया था कि आपके सब कुछ लाक कर दिए गये हैं इसके बाद दोनों दिन का स्टेटमेंट मांगा तो वह भी नहीं दे पा रहे हैं। उसके खाते से कुल 16,78,380/–रूपये कट चुके हैं। वादी की उक्त तहरीर के आधार पर साइबर थाना में मुकदमा पंजीकृत किया गया।

5. दौरान विवेचना अभियुक्त चन्द्रभान सिंह यादव पुत्र जवाहर लाल यादव निवासी ग्राम हर्रायपुर, थाना कोखराज, जिला कौशाम्बी, का नाम प्रकाश में आया तत्पश्चात उसकी गिरफतारी की गयी।

6. अभियुक्त चन्द्रभान सिंह यादव ने अपने बयान अन्तर्गत धारा 161 दं0 प्र0 सं0 में कहा है कि वह ग्राम हर्रायपुर में ग्राहक जनसेवा केन्द्र चलाता है उसके पास मार्च 2020 में फोन आया और फोन करने वाले ने उससे पूछा कि क्या करते हो तो उसने बताया कि वह ग्राहक जनसेवा केन्द्र चलाता है तो फोन करने वाले ने उससे पूछा कि बिजली का बिल भी जमा करते हो तो उसने

कहा हाँ तो उसने पूछा कि तम्हें कितना कमीशन मिलता है तो उसने बताया कि उसको 1 से 2 परसेंट कमीशन सीएससी मिलता है तो उसने मुझसे कहा कि अगर तुम मुझसे बिजली का बिल पेमेण्ट कराते हो तो मैं तुमको 20 परसेंट कमीशन दूंगा मैंने कहा मुझे कैसे भरोसा हो तो उसने कहा कि तुम मुझे बिजली की बिल भेज दिया करो मैं पैसे जमा कर दूंगा जिसके बाद तुम उसको बेवसाइड पर जाकर चेक कर सकते हो अगर वहां पर बिजली का बिल जमा दिखाये तो मुझे पैसे दे देना जिसके बाद मैंने काम करना शुरू कर दिया धीरे–धीरे जान पहचान बढ़ी तो पता लगा कि फोन करने वाला आदमी बिहार का रहने वाला है और वहीं से यह काम करता है उसके साथ कई लोग शामिल है एक दो बार वह भी उन लोगों से मिला है। ये सारे लोग मिलकर कई जगहों से बिजली का बिल व फोन का रिचार्ज करते हैं। इसके बाद मुझे प्रभारी निरीक्षक द्वारा बिहार से सम्बन्धित लोगों के बारे में पूछने पर बताया कि उन लोगों का नाम शुभोशाह पुत्र सुजीत शाह पता राम कृष्ण नगर, थाना हरिहर पारा तेनाचुरा, थाना इस्लामपुर जनपद मुर्सिदाबाद पश्चिम बंगाल, नीरज कुमार मण्डल पुत्र तीरथनाथ मण्डल पता राऊतारा (गाजमोड) थाना चितरा जनपद देवघर झारखंड व तपन कुमार मण्डल पुत्र सरकार मण्डल पता सुपाईडीह (दक्षिणी बहल) थाना जामताडा झारखंड है इन्ही सब लोगों के साथ वह बिजली के बिल का रिचार्ज व फोन रिचार्ज का काम करता है। मैं बहुत गरीब आदमी हूं मैंने लालच में आकर ऐसा काम किया है मैंने कोई अपराध नहीं किया।

7. दाण्डिक प्रकीर्ण **जमानत प्रार्थना पत्र संख्या 34421 वर्ष 2021** में आवेदक चन्द्रभान सिंह यादव की ओर से विद्वान अधिवक्ता श्री वरद नाथ, दाण्डिक प्रकीर्ण **जमानत प्रार्थना पत्र संख्या 39717 वर्ष 2021** में आवेदक मोहन कुमार मण्डल के विद्वान अधिवक्ता श्री राम जतन यादव, दाण्डिक प्रकीर्ण **जमानत प्रार्थना पत्र संख्या 55230 वर्ष 2021** में आवेदक तौसीफ जमां की ओर से विद्वान अधिवक्ता श्री दिलीप कुमार पाण्डेय का यह कथन है कि अभियुक्तगण निर्दोष है और उन्हें प्रश्नगत प्रकरण में झूंठा फसाया गया है उनके कब्जे से कोई बरामदगी नहीं दर्शायी गयी है एवं न ही वे प्राथमिकी में नामजद है। अतएव उपरोक्त सभी अभियुक्तगण जमानत पर मुक्त किये जाने योग्य है।

8. इसके विपरीत राज्य की ओर से श्री शिव कुमार पाल, शासकीय अधिक्ता, श्री प्रशान्त कुमार, श्री लालमणि सिंह, विद्वान अपर शासकीय अधिवक्तागण तथा वादी की ओर से श्री सुशील कुमार पाल एवं श्री राहुल गुप्ता उपस्थित हैं तथा उनके द्वारा जमानत का विरोध किया गया।

9. विद्वान अपर शासकीय अधिवक्ता श्री प्रशान्त कुमार ने सम्पूर्ण विवेचना की दैनांदिनी न्यायालय को दिखाते हुए बताया गया कि आवेदकगण/अभियुक्तगण का एक गिरोह है जो देश के सुदूर राज्य जैसे बिहार, बंगाल, मध्य प्रदेश, उडीसा, छत्तीसगढ, झारखंड आदि है और नेक्सलाईट एरिया में बैठकर साइबर अपराध को अंजाम देते हैं, जहाँ पर पुलिस भी जाने से डरती है। श्री प्रशान्त कुमार द्वारा यह भी बताया गया कि साइबर अपराधी गिरोह में अपने–अपने लैपटाप के द्वारा बैंक ग्राहकों को फोन करके उन्हें भरमाकर अथवा लालच देकर उनका नम्बर ले लेतें हैं और यहीं से उनका खेल प्रारम्भ हो जाता है। साइबर अपराधियों ने हजार से अधिक लोगों के भ्रामक नाम व पते से बैंक खाता खोल रखा है, जिसमें बैंक खाताधारकों का पैसा ठगी के माध्यम से स्थानान्तरित किया जाता है और फिर उसी स्थानान्तरित बैंक खाते से पैसा किसी अन्य बैंक में स्थानान्तरित होता है और उन पैसों की निकासी लोन, बिल, वाटर बिल, हाऊस बिल आदि को जमा करके किया जाता है। जैसा कि वर्तमान मुकदमें में अभियुक्त चन्द्रभान सिंह यादव ने स्वीकार किया है कि वह एक सेवा केन्द्र चलाता है जिसमें वह लोगों के बिल या उसका पैसा लेकर सम्बन्धित विभाग के खाते में आनलाइन जमा करता है, बदले में एक दो प्रतिशत का कमीशन विभाग से मिलता है। आगे यह भी बताया गया कि उपरोक्त अभियुक्तगण एवं अन्य ने उससे कहा था कि वह ग्राहकों के बिल उनके फोन पर भेज दिया करें, वे उसे जमा करा देगा और बदले में 20 प्रतिशत कमीशन देगें। इस प्रकार अभियुक्त चन्द्रभान सिंह यादव उक्त लोगों के पास बिल और पैसा भेजता रहा और बदलें में उसे 20 प्रतिशत कमीशन मिलता रहा।

10. दौरान विवेचना यह तथ्य प्रकाश में आया कि अभियुक्तगण ने जो पैसा ठगी के माध्यम से भ्रामक खातों में स्थानान्तरित किया था, उसे वे टी वैलेट एप, जिसके मालिक कुनाल है, के खाते में स्थानान्तरित करते थे और उसी खाते से लोगों का बिल का भुगतान करते हैं, इस कारण से वे पकड़ में नहीं आते हैं। विवेचक द्वारा सम्बन्धित भ्रामक खातों की जब पड़ताल की गयी तो पता चला कि अमुक व्यक्ति का नाम, पता एवं फोटों सभी भ्रामक है जिसे अभियुक्तगण एवं उनके साथी चलाते हैं। वर्तमान वाद में वादी का पैसा अनगिनत भ्रामक खातों में स्थानान्तरित हुए है, जिनका खाताधारक उसकी फोटों नाम और पता सब गलत है। विवेचक द्वारा यह भी बताया गया कि साइबर क्राइम एक्सपर्ट से राय लेकर कुछ महत्वपूर्ण कदम साइबर ठगों को पकड़ने के लिए किये जा रहें हैं जिसे सार्वजनिक नहीं किया जा सकता है, इससे ठग सावधान हो जायेगें और उन्हें पकड़ा नहीं जा सकेगा। न्यायालय को यह भी अवगत कराया गया कि अभियुक्त चन्द्रभान सिंह यादव ने अपने

बयान अन्तर्गत धारा 161 दं0 प्र0 सं0 में सह–अभियुक्तगण सुबो शाह, निवासी मुर्शिदाबाद पश्चिम बंगाल, तौसीफ जमां निवासी मुर्शिदाबाद पश्चिम बंगाल, नीरज कुमार मण्डल, झारखंड, तपन कुमार मण्डल, जामताड़ा झारखंड का नाम लिया है, उनमें से अभियुक्त नीरज मण्डल, सुबो शाह और तौसीफ जमां की जमानत इस न्यायालय ने लीडिंग **जमानत प्रार्थना पत्र संख्या 20529 वर्ष 2021,** (मुकदमा अपराध संख्या 407 वर्ष 2020), अन्तर्गत धारा 420, 467, 468, 471 भा0 दं0 सं0 एवं धारा 66 (डी) आई0 टी0 एक्ट जिसमें उच्च न्यायालय के एक पूर्व न्यायमूर्ति के साथ साइबर ठगी करके पांच लाख की रकम उनके खाते से निकाली गयी थी, की जमानत दिनांक **12–1–2022** को इस न्यायालय द्वारा खारिज की जा चुकी है। उक्त अपराध की विवेचना में भी इन्हीं अभियुक्तों द्वारा यह स्वीकार किया गया था कि उनका साइबर अपराध का एक गिरोह है जो पूरे देश में अपना जाल बिछाकर बैंक खाताधारकों के खाते में साइबर सेंध लगाकर उनका बैंक खाता खाली कर देता है। उक्त अपराध में सह–अभियुक्त राजू रंजन, नीरज मण्डल, तपन मण्डल ने बयान दिया है वह निम्न प्रकार है।

"सह–अभियुक्त राजू रंजन पुत्र अशोक भगत ने अपने बयान अन्तर्गत धारा 161 दं0 प्र0 सं0 में कहा है कि वह झारखण्ड राज्य ग्रामीण बैंक का ग्राहक सेवा केन्द्र चलाता है जो गाँधी चौक पर उसके घर में ही है। मोबाईल नम्बर 7908793022 को उससे अभियुक्त नीरज मण्डल उर्फ राकेश पुत्र तीरथनाथ मण्डल जो गांजा मोड़ थाना चितरा जनपद देवधर झारखण्ड व तपन कुमार मण्डल पुत्र सरकार मण्डल निवासी सुपाई डीह थाना जामताड़ा जिला जामताड़ा, झारखण्ड बात करते थे लेकिन कुछ समय से बात नहीं करते हैं। तपन मण्डल भी सुपारेड़ी में ग्राहक सेवा केन्द्र चलाता है तथा नीरज मण्डल उर्फ राकेश उसके साथ ही उसके पास आता जाता था लेकिन बाद में उसे पता चला कि नीरज उर्फ राकेश व तपन मण्डल ठीक व्यक्ति नहीं है क्योंकि मण्डल व तपन ने एक बार उससे कहा कि वे लोग लोगों से बात करके उनके बैंक खातों की डिटेल प्राप्त करके अच्छा पैसा कमाते है और यदि वह भी उनके साथ मिलकर काम करेगें तो कोई पकड़ नहीं पायेगा क्योंकि वे लोग फर्जी नाम पता का मोबाईल नम्बर प्राप्त करके उससे कार्य करते है तथा मोबाईल नम्बर 7908793022 की फर्जी पते का ही सिम है। इस पर राजू रंजन ने मना कर दिया तथा तपन ने राजू रंजन के भाई अमित भगत की फर्म जो ट्रेड़िंग सब ब्रोकर का काम करता है, डिमेट एकाउण्ट खोलने के लिए पेपर दिए थे जिसे राजू रंजन ने मना कर दिया कि इनके साथ काम मत करो। नीरज उर्फ राकेश मण्डल व तपन से उसकी बात दिसम्बर के पहले हुई थी। आगे यह भी कहा कि उसे पूरा विश्वास है कि नीरज उर्फ राकेश और तपन मण्डल मिलकर धोखाधड़ी से किसी के खाते से पैसा निकाल लेते हैं। आगे यह भी कहा कि उसका मोबाईल फोन नम्बर 7908793022 आर. जैम 2 के नाम से सेल है।

सह–अभियुक्त नीरज कुमार मण्डल ने अपने बयान अन्तर्गत धारा 161 दं0 प्र0 सं0 में कहा है कि उसके पास मोबाईल नम्बर 7908793022 था तथा यह सिम उसे तपन मण्डल जो उसके मामा का बेटा है। फर्जी नाम पता के आधार पर प्राप्त किया हुआ था लाकर दिया था जिसके माध्यम से वह तपन मण्डल व नीरज कुमार उर्फ नीरज सिन्हा मिलकर लोगों के बैंक एकाउण्ट की सूचना प्राप्त करके धोखाधड़ी से पैसा निकाल लेते हैं। आगे यह भी कहा कि दिसम्बर माह में भी उन सभी लोगों ने एक रिटायर जज महिला का पैसा धोखाधड़ी से निकाल लिए थे, जिसमें नीरज सिन्हा ने ल्वदव ।चच के सहारे से पैसा निकाला था। आगे यह भी कहा कि वे तीनों लोग मिलकर अपराध करते हैं। सिम भी दिसम्बर में तपन मण्डल के दुर्घटना में घायल होने के बाद नीरज सिन्हा के पास रह गया था। नीरज कुमार उर्फ नीरज सिन्हा जनवरी में सिम के साथ राँची साइबर थाना द्वारा पकड़ लिया गया है तथा वर्तमान समय में राँची जेल में निरूद्व है। आगे यह भी कहा कि वे लोग एक साथ मिलकर ही सारा धोखाधड़ी से पैसा निकालने का काम करते हैं।

इसी प्रकार तपन कुमार मण्डल पुत्र सरकार मण्डल ने अपने बयान अन्तर्गत धारा 161 दं0 प्र0 सं0 में यह कहा है कि वह झारखण्ड राज्य ग्रामीण बैंक का ग्राहक सेवा केन्द्र चलाता था तथा उसकी मुलाकात नीरज कुमार उर्फ नीरज सिन्हा पुत्र विनय किशोर प्रसाद निवासी पाकडीह मोहल्ला बेना थाना जामताड़ा, जिला जामताड़ा झारखण्ड से हुई जो पहले से साइबर अपराध करता था उसी ने बताया कि एक गलत नाम पता का सिम ले आओ तो धोखाधड़ी करके खूब पैसा कमाया जायेगा। आगे यह भी कहा कि एक व्यक्ति घूमकर सिम बेच रहा था जिससे उसने मोबाईल नम्बर 7908793022 नम्बर का सिम खरीदा तथा वह अपने बुआ के लड़के नीरज मण्डल उर्फ राकेश से भी बात किया तो वह भी तैयार हो गया उसने सिम नीरज मण्डल को दे दिया तथा समय समय पर इकट्ठा होकर लोगों से उनके बैंक एकाउण्ट की सूचना प्राप्त करके पैसा निकाल लेते थे। इसी तरह दिसम्बर माह में भी उन लोगों ने एक रिटायर महिला जज के खाते से नीरज सिन्हा के माध्यम से दोनों एस0 बी0 आई0 के खाते से लगभग चार लाख रूपया निकाल लिए थे। नीरज मण्डल उर्फ राकेश तथा नीरज सिन्हा मिलकर ही सारा धोखाधड़ी का कार्य करते हैं जो सिम वह खरीद कर लाया था वह नीरज मण्डल के पास रहता था किन्तु दिसम्बर माह में सात तारीख

को उसकी गाड़ी पलट जाने के कारण दुर्घटना में उसे चोट आ गयी थी तब मोबाईल नम्बर 7908793022 नम्बर का सिम नीरज सिन्हा लेकर चला गया था। दुर्घटना के बाद से उसकी मुलाकात नहीं हुई पता चला कि साइबर थाना राँची के मुकदमें में दिनांक 29–1–2021 को पकड़ लिया गया है तथा आज भी राँची में निरूद्व है।"

11. इसी प्रकार उक्त मामले में विद्वान शासकीय अधिवक्ता की ओर से जो तर्क रखे गये हैं कि प्रश्नगत अपराध आवेदकगण द्वारा कारित किया गया है एवं दौरान विवेचना अभियुक्त राजू रंजन पुत्र अशोक भगत, निवासी जनपद देवधर, झारखण्ड, नीरज कुमार मण्डल पुत्र तीरथ नाथ मण्डल जनपद देवधर, झारखण्ड, तपन कुमार मण्डल पुत्र सरकार मण्डल, जिला जामताडा, झारखण्ड का नाम प्रकाश में आया तत्पश्चात उनकी गिरफतारी की गयी। यह भी तर्क रखा किया गया कि प्रश्नगत मामले में उपरोक्त आवेदकों द्वारा अन्य आरोपियों के साथ मिली भगत करके वित्तीय, साइबर धोखाधडी का अपराध किया गया है और ग्राहक पहचान मोड्यूल (सिम) तथा बैंक खाते के लिए निर्मित एवं जाली पहचान पत्रों का उनके द्वारा उपयोग किया गया है। उपरोक्त अपराध के कारित होने में उनके द्वारा सक्रिय भागीदारी को स्थापित करने के लिए अभियोजन के पास पर्याप्त साक्ष्य मौजूद है। वादी मुकदमा के वित्तीय, साइबर धोखाधडी करके जो पैसा निकाला गया उसे पेटियम वालेट (च।ल्ज्डब 123456द्ध से सम्बद्व वालेट नम्बर 8343884119 के माध्यम से निकाला गया था। यह भी तर्क रखा गया कि प्रश्नगत प्रकरणों में उपयोग किये गये आई0 पी0 ऐड्रेस का विवरण प्राप्त करने के बाद एक मोबाईल नम्बर 7076707670 का पता चला है जिसका उपयोग आवेदक सुभो शाह द्वारा किया जा रहा था और जब उपरोक्त फिलपकार्ट के विवरण की जाँच की गयी तो यह पता चला कि उक्त वालेट नम्बर 8343884119 वालेट नम्बर के माध्यम से सात मोबाईल नम्बर 7679054205 के द्वारा आनलाईन खरीदे गये थे जो अब्दुल मोमीन पुत्र नजीब हुसैन निवासी मुर्शीदाबाद के नाम पर था। यह भी तर्क रखा गया कि जब अब्दुल मोमीन से उपरोक्त खरीददारी के सम्बंध में पूंछतांछ की गयी तो उसने अपने बयान अन्तर्गत धारा 161 दं0 प्र0 सं0 में अभियुक्त तौसीफ जमां निवासी मुर्शीदाबाद का नाम लेते हुए बताया कि उपरोक्त मोबाईल इसी व्यक्ति ने लिए है। यह भी तर्क रखा गया कि जांच अधिकारी द्वारा जब सुभो शाह को गिरफतार किया गया तो उसके कब्जे से मोबाईल नम्बर 7076707670 बरामद हुआ जो कि प्रश्नगत अपराध में प्रयुक्त होने की कड़ी में शामिल है। उपरोक्त अभियुक्तों ने फर्जी कार्ड़ के आधार पर सिम निकलवाया और ब्राडबैण्ड कनेक्शन उक्त मोबाईल नम्बर 7076707670 पर लिया जो अभियुक्त सुभो शाह द्वारा प्रयुक्त किया जा रहा था। यह भी तर्क रखा गया कि जब मोबाईल नम्बर 8343884119 का ग्राहक आवेदन पत्र निकाला गया तो पता चला कि यह किसी नईम सरकार के झूठे नाम व नकली पते के आधार पर प्राप्त किया गया था। यह भी तर्क रखा गया कि जांच के दौरान पता चला कि जो पैसा खाते से निकाला गया था वह योनो ऐप के माध्यम से किया गया था और जिस आई0 पी0 पते का उपयोग किया गया था वह मोबाईल नम्बर 7908793022 द्वारा चलाया जा रहा था जब कि उक्त संख्या के ग्राहक आवेदन पत्र का जाँच अधिकारी द्वारा अवलोकन किया गया तो यह पता चला कि शुभ लाल हंसदा नाम के एक व्यक्ति के नाम पर था जिसकी मृत्यु दिनांक 21–6–2016 को हो चुकी है। जब सी0 डी0 आर0 द्वारा उपरोक्त नम्बर का अवलोकन किया गया तो मैक्स बी पार्टी में एक मोबाईल नम्बर (अर्थात मोबाईल नम्बर 7004097335) प्राप्त हुआ और ग्राहक आवेदन पत्र प्राप्त किया गया और उसका अवलोकन किया गया जिसमें अशोक भगत पुत्र राजीव रंजन का नाम सामने आया। यह भी तर्क रखा गया कि जब राजीव रंजन से पूछतांछ की गयी तो उसने बताया कि वह एक ग्राहक सेवा प्रदाता केन्द्र चला रहा है और मोबाईल नम्बर 708793022 का उपयोग नीरज मण्डल उर्फ राकेश और तपन कुमार मण्डल द्वारा किया जा रहा था। नीरज मण्डल और तपन कुमार मण्डल भाई है और मोबाईल नम्बर 7908793022 का उपयोग कर रहे थे, जिनके द्वारा योनो अप्लीकेशन चलाया जा रहा था और उक्त मोबाईल नम्बर एक मृत व्यक्ति के जाली दस्तावेज के आधार पर प्राप्त किया गया था। ऐसी दशा में आवेदकगण जमानत पर मुक्त होने योग्य नहीं है।

12. प्रश्नगत मामले में अभियुक्तों के विद्वान अधिवक्तागण एवं भारत सरकार के विद्वान अधिवक्ता, भारत दूरसंचार के अधिवक्ताओं ने भी बेबाक तर्क रखते हुए कथन किया तथा समाज में बढ़ते साइबर अपराध को रोकने में महत्वपूर्ण सुझाव दिए कि धोखाधड़ी से बैंक ग्राहकों का पैसा निकालने का पूरा प्रकरण रिजर्व बैंक से सम्बन्धित है और वे ही इसके जिम्मेदार हैं। उनके द्वारा आगे यह भी सुझाव रखा गया कि आधार कार्ड के माध्यम से बैंक सभी ग्राहकों के खाते पर नजर रख सकती है।

13. **दाण्डिक प्रकीर्ण जमानत आवेदन पत्र संख्या 20529 वर्ष 2021** में विस्तृत आदेश और जो सुझाव अधिवक्ताओं के माध्यम से दिए गये उसका उल्लेख किया गया है तथा राज्य सरकार, भारतीय रिजर्व एवं भारत सरकार को दिए गये सुझावों पर आज तक कोई कार्यवाही नहीं की गयी।

14. न्यायालय अपने क्षेत्राधिकार से पूर्णतया भिज्ञ है और उससे बाहर नहीं जाना चाहिए किन्तु जब बात

समाज और देश के हित में हो तो सुझाव देने में क्षेत्राधिकार का उल्लघंन नहीं होता है। अतः न्यायालय पुनः अपनी बात दोहराती है। साइबर अपराध जो देश और समाज के लिए एक बडा संकट बनकर खडी है जिससे बडी आर्थिक हानि भी होती है, उसपर ध्यान देना चाहिए। केवल साइबर अपराध सेल बनाने से ही अपराध नहीं रूकेगा बल्कि उसके लिए नये उपकरण, संसाधन एवं विशेषज्ञ की टीम भी बनानी पडेगी और उन्हें वे सुविधायें प्रदान करनी होगी जिसके माध्यम से वे साइबर अपराधियों तक पहुंच सके। साथ ही भारतीय रिजर्व बैंक ने बैंकों के लिए जो गाइड लाइन बनायी है वह पर्याप्त नहीं है। इसमें बैंक की जवाबदेही भी निश्चित करनी पडेगी। बैंक यह कहकर नहीं बच सकता कि ग्राहकों ने ओ0 टी0 पी0 दे दिया या फिर बैंक में शिकायत लिखित नहीं की।

15. वर्तमान मामले में वादी ने बैंक आकर यह कहा कि उसके खाते से ठगों द्वारा पैसा आनलाईन निकाला जा रहा है और लगभग दो लाख रूपया निकल गया है, खाते को बंद कर दीजिए किन्तु इस पर बैंक मैनेजर ने कहा कि ग्राहक अपने फोन से बंद करें न कि बैंक बंद करेगा। साथ ही बैंक मैनेजर यह कहने से भी नही बच सकते कि ग्राहक ने उसे लिखित नहीं दिया इसलिए खाता बंद नहीं किया गया। परिणाम स्वरूप दो लाख रूपया के बाद पन्द्रह लाख रूपया (उसके बाद) दो दिन के अन्दर निकल गये। बावजूद इसके बैंक प्रबंधक जो इस मामले में अभियुक्त है को बिना किसी आधार पर केस से बाहर कर दिया गया।

16. वर्तमान मामले में विवेचक श्री राजीव कुमार तिवारी ने शपथपत्र और प्रतिउत्तर शपथपत्र दाखिल किया है जिसमें बताया गया कि वादी के खाते से जो धनराशि निकाली गयी है उसे जामताडा, झारखंड में तनवीर खांन के आई0 सी0 आई0 सी0 आई0 बैंक के खाता संख्या 257201502362 में स्थानान्तरित किया गया है एवं मोबाईल नम्बर 7384867656 से सम्बद्व है और जिसका ईमेल आई0 डी0 ब्सनइकं.375/ हउंपसण ब्वउण है जिसको गुगल पर देखने पर पता चला कि उक्त बैंक खाते को मोबाईल नम्बर 6289051549 जिसका आई0 एम0 ई0 आई0 नम्बर 866750037730549 है से संचालित किया जा रहा है जिसे तारक मल चला रहा है और लोकेशन पता करने के बाद अभियुक्त मोहन कुमार मण्डल को गिरफतार किया गया जिसके कब्जे से उक्त मोबाईल एवं ई0 एम0 आई0 फोन बरामद हुआ।

17. दौरान विवेचना यह पाया गया कि वादी का 17 लाख रूपया जो विभिन्न बैंक खातों के विभिन्न व्यक्तियों के नाम स्थानान्तरित हुआ है जिनमें अभियुक्त बुद्विश्वर शिकारी, पश्चिम बंगाल, दामोश्वर गौतम साहू, संदीप कुमार, राजस्थान, बृजेश कुमार महाराष्ट्र, अशीष बर्मन, पश्चिम बंगाल, कौशिक करमाकर, पश्चिम बंगाल, शहबाज खांन, पश्चिम बंगाल, मो0 रकीबुल इस्लाम, पश्चिम बंगाल, सौरव कुमार मिश्रा, भागलपुर बिहार शामिल है, जिनके सम्बंध में संबधित राज्यों की पुलिस से पता लगाया जा रहा है। विवेचक श्री राजीव कुमार तिवारी द्वारा मामले की गहन छानबीन की गयी और उन्होंने मामले के तह तक जाकर अपराधियों का पता लगाया है जिनमें से कुछ को गिरफतार करके जेल भेजा जा चुका है और शेष अपराधियों की गिरफतारी हेतु सम्बन्धित राज्यों की पुलिस से सहायता मांगी गयी है। श्री तिवारी द्वारा न्यायालय को बताया गया कि शेष अपराधी के मिलने पर देश में व्याप्त साइबर अपराध पर रोक लग पायेगी क्योंकि इनके ही द्वारा पूरे देश में जाल फैलाया गया है।

18. साइबर क्राइम पुलिस अधीक्षक, श्री त्रिवेणी सिंह ने न्यायालय के समक्ष दिनांक 7–4–2022 को उपस्थित होकर शपथपत्र दाखिल किया है जिसमें उनके द्वारा कहा गया कि उन्होंने (सम्बन्धित बैंक) जहां से वादी के साथ आनलाईन फ्राड हुआ है वहां के बैंक प्रबंधक को एक पत्र दिनांक 23–3–2022 को लिखकर कुछ जानकारी ली है जो शपथपत्र के साथ संलग्नक 1 के रूप में है और जिसमें उनके द्वारा निम्न प्रश्न पूछे गय जो इस प्रकार हैः–

1. Account Statement from 15.10.2020 to 17.10.2020 and also provide beneficiary details.

2. SMS/OTP logs of fraudulent transaction.

3. IP logs of fraudulent transactions with date/time and evice ID/MACID/IMEI No.

4. Mode of online transaction (Mobile Banking/Internet Banking /UPI/Card not present)

5. Date of complaint received in Bank/Bank's Call Centre by victim customer regarding frauddulent transactons.

6. Which alternate delivery channels (Mobile Banking/Internet Bancking/UPI/Card Not Present) was blocked/disabled after receiving the complaint from victim customer.

7. Date of blocking/disavling alternate delivery channerls (Mobile Banking/Ineernet Banking/UPI/Card Not

Present) through which fraudulent transactions had been done.

8. Was victim customer's Bank account was frozen by bank branch after receving the complaint from him on 15-10-2020 to avoid further loss? If not please explain the reason.

9. Date of lodment of complaint at Bank's Call Centre.

10. Victim customer (complaintnant) has informed that his FD is also closed and amount from his FD account is debited whereas FD (Offline FD) was created by bank branch and he had received FD certificate/receipt by his brnach. Please clarify the reason of closing offline FD and debiting FD account (opended by bank branch) through online banking channerl.

11. Also provide the rules/minutes of the meeting /circular of your bank or RBI wherein it is clearly metioned that offline FD (FD created by bank branch) can be closed and debited through online banking channel whereas offline FD certificate/receipt is provided to the customer by the offline FD issuing bank branch.

19. उक्त के जवाब में बैंक ने जो उत्तर दिए है वे सन्तोषजनक नहीं है जो निम्न है:

(1) Accout Statement from 15.10.2020 to 17.10.2020 is provided at Branch level. Benificiary details is in statement.

(2) For SMS/OTP Logs fraudulent transactions (cm2it.cms@sbi.co.in is mailed) This is at RBO1/IT level/ surveillance and investigation deppt.

(3) IP LOGS ID/MACID/IMEINO. This is at RBO1/IT level/ Surveillance and investigation deppt.

(4) Mode of online Transaction-This is at RBOI/IT LEVEL/surveillance and investigation deppt.

(5) Date of complaint received-Not clear so. This is at RBOI/ITLEVEL/surveillance and investigation deppt.

(6) Alternate channerl Block-Not clear so.This is at RBOI/ITLEVEL/surveillance and investigation depp

(7) Date of Blockging alternate channerl-Not clear so.This is at RBOI/ITLEVEL/surveillance and investigation depp.

(8) Was victim customers bank account frozen by the Bank-Not clear so.This is at RBOI/ITLEVEL/surveillance and investigation depp.

(9) Date of lodgment of complaint at Banks call centre-Not clear so.This is at RBOI/ITLEVEL/surveillance and investigation depp.

(10) Closing of offline FD-Not clear so.This is at RBOI/ITLEVEL/surveillance and investigation depp.

(11) Circular of Offline FD Closure of bank or RBI-Not clear so.This is at RBOI/ITLEVEL/surveillance and investigation depp.

20. इसी प्रकार बैंक के विद्वान अधिवक्ता श्रीमती अर्चना सिंह ने भी शपथ पत्र दाखिल करते हुए कहा कि वादी ने स्वयं अपना बैंक खाता का डिटेल साइबर अपराधियों को दिया है इसलिए बैंक इसके लिए जिम्मेदार नहीं है। न्यायालय के यह पूछने पर कि जब वादी ने बैंक में आकर दिनांक 15–10–2020 को यह बताया कि उसके खाते से दो लाख रूपये की आनलाईन की ठगी हो गयी है और कृपया उसका बैंक एकाउन्ट बंद कर दीजिए तब मैनेजर ने उसका एकाउन्ट क्यों नहीं बंद किया। इसके उत्तर में बैंक के विद्वान अधिवक्ता का यह तर्क है कि बैंक बिना लिखित आदेश से किसी का बैंक खाता बंद नही कर सकता है और वादी को स्वयं खाता बंद करना चाहिए था अथवा उसे अपना खाता बंद करने के लिए लिखित आवेदन करना चाहिए था जो कि वादी द्वारा नहीं दिया गया। बैंक के अधिवक्ता का दूसरा तर्क यह है कि वादी ने पुनः कहा था कि उसके खाते में कुछ पैसे आने वाले है, इसलिए उसका खाता बंद न किया जाए। बैंक की ओर से दिए गये उक्त दोनों तर्को में विरोधाभास है। ऐसा प्रतीत होता है कि बैंक अपने को बचाने के लिए विरोधाभासी बयान कर रहा है। व्यवहारतः यह कैसे सम्भव है कि चतुर्थ श्रेणी कर्मचारी के खाते में 17 लाख रूपये (जो उसे

सेवानिवृत्त से प्राप्त हुआ है), उनमें से दो लाख रूपया की आनलाईन बैंक से ठगी हो जाए और वह बैंक जाकर यह कहें कि अभी उसका खाता बंद मत करो और इसके बाद पुनः उसके खाते से 15 लाख रूपया और निकल गया। यह पूर्णतया बैंक की लापरवाही एवं एक गैर जिम्मेदाराना कृत्य है। शिकायतकर्ता एक चतुर्थ श्रेणी कर्मचारी और कम पढ़ा लिखा है। बैंक को उसके साथ हुए पहले दिन आनलाईन ठगी से सावधान रहना चाहिए था और बाकी की 15 लाख रूपया की शेष रकम पर रोक लगानी चाहिए था। साथ ही आर0 बी0 आई0 की गाईड लाइन के अनुसार, स्थानान्तरित बैंक खातों पर रोक लगाने की कार्यवाही करनी चाहिए थी जिसे बैंक ने नहीं की। वादी के धारा 161 दं0 प्र0 सं0 के अन्तर्गत दिए गये बयान से यह पूर्णतः साबित है कि बैंक की लापरवाही एवं गैर जिम्मेदाराना के कारण वादी का खाता बंद नहीं किया जिससे 15 लाख रूपया साइबर ठगों ने निकाल लिया। वादी की प्राथमिकी के कुछ अंश इस प्रकार हैः—

"इसके बाद शाम 5—7 बजे के बीच पैसे कटते रहें। इसकी शिकायत उसने बैंक मैनेंजर अविनाश शुक्ला से की तो उन्होंने बताया कि आपने योनों अप्लीकेशन और नेट बैंकिंग नहीं बंद करवाया है, इसलिए पैसे कट रहे हैं। इस पर वादी ने कहा कि आपने मुझे सन्तुष्ट किया था कि आपके सब कुछ लाक कर दिए गये हैं, इसके बाद उसने दोनों दिन का स्टेटमेंट मांगा तो उसे भी नहीं दे पा रहे हैं। उसके खाते से कुल 16,78,380/—रूपये कट चुके हैं। वादी की उक्त तहरीर के आधार पर साइबर थाना में मुकदमा पंजीकृत किया गया। "

उपरोक्त से भी स्पष्ट है कि बैंक ने वादी के साथ बैंक और ग्राहक के सम्बंध को ध्यान में नहीं रखा। जब कि बैंक का अस्तित्व ग्राहकों के विश्वास के आधार पर ही टिका है जिसे निभाने में बैंक ने एक बडी भूल की है और उससे बचने के लिए अब तरह तरह के बहाने बता रहा है, जिससे न्यायालय संतुष्ट नहीं है। इस न्यायालय ने दाण्डिक प्रकीर्ण जमानत आवेदन पत्र संख्या 20529 वर्ष 2021 निर्णय दिनांकित 12—1—2022 जिसमें सुबो शाह तथा तौसीफ जमां अभियुक्त है, उसमें विद्वान अपर महाधिवक्ता श्री महेश चन्द्र चतुर्वेदी के द्वारा प्रस्तुत किये गये तर्क से भी सहमत है जो निम्न हैः— "आनलाईन अपराध देश के पूरे सिस्टम को खोखला किये जा रहा है और आज शायद ही ऐसा कोई व्यक्ति हो जो इसका शिकार न हो। ऐसी स्थिति में भारत सरकार और राज्य सरकार को ऐसा सिस्टम इजाद करना चाहिए कि ऐसे अपराधों पर रोक लगे। उनके द्वारा यह भी सुझाव दिया गया कि ग्राहकों के पैसों की सुरक्षा की गारंटी होनी चाहिए। चूंकि पैसा बैंक में जमा होता है तो यह जिम्मेदारी बैंक की होती है कि वह ऐसा सिस्टम इजाद करें कि उसके बैंक में ग्राहकों का पैसा किसी भी हाल में साइबर क्राइम के हाथ में न जाए और वह उसे रोकने का हर सम्भव प्रयास करे बावजूद इसके बैंक असफल रहताहै तो ग्राहकों के पैसों की वापसी के लिए बैंक ही जिम्मेदार है। उनके द्वारा यह भी सुझाव रखा गया कि बैंक ग्राहकों का खाता खोलते समय ग्राहकों का पता व मोबाईल नम्बर का सख्ती से सत्यापन नहीं कराता है जिसका लाभ साइबर अपराधी आसानी से उठाता है और हजारों सिम जिसे उसने सम्बन्धित बैंक से जोड रखे है उसे लेकर वह नक्सलवादी क्षेत्रों से संचालित करता है जहां पुलिस भी जाने से डरती है इसलिए सिम बेचने वाली कम्पनी को भी सिम बेचते समय ग्राहकों को तब तक सिम न दे जब तक उसे पूर्ण विश्वास न हो कि अमुक सिम लेने वाला व्यक्ति सही व्यक्ति है। बैंक को खाताधारकों का खाता खोलते समय उसका पूर्ण सत्यापन मोबाईल नम्बर एवं पता पूर्ण रूप से सन्तुष्ट होने पर ही अपने बैंक में खाता खोलना चाहिए। साथ ही उनका यह भी सुझाव है कि आनलाईन पैसा स्थानान्तरित के समय सम्बन्धित बैंक अपने ग्राहकों से व्यक्तिगत फोन करके इसका सत्यापन करें तत्पश्चात पैसों का स्थानान्तरण करें और बैंक द्वारा यदि ऐसा नहीं किया जाता है तो ऐसे सभी आनलाईन फ्राड से ग्राहकों का गया पैसों के लिए बैंक को ही जिम्मेदार ठहराया जाए।"

22. वर्तमान मामले में आवेदक/अभियुक्त चन्द्रभान सिंह यादव ने अपने बयान अन्तर्गत धारा 161 दं0 प्र0 सं0 में यह स्वीकार किया है कि उसे अन्य अभियुक्तों ने जिनमें वर्तमान अभियुक्तगण भी शामिल है उन्होंने प्रलोभन देकर ग्राहकों के बिल मंगाये जिनको वादी के खाते से ही जमा कराया गया है। सह—अभियुक्त मोहन कुमार मण्डल ने भी स्वीकारा है कि वे लोग अन्य व्यक्तियों से साइबर ठगी करते हैं और वे लोग पैसा वालेट के माध्यम से दूसरे के खातों में स्थानान्तरित करते हैं और इनका एक बहुत बडा जाल है जो पूरे देश में साइबर ठगी का काम कर रहा है जिनमें उक्त सभी अभियुक्त शामिल है। वर्तमान प्रकरण में उक्त तीनों अभियुक्तों द्वारा वादी के बैंक खाते से आनलाईन साइबर ठगी करके उसका 17 लाख रूपये निकाला है जो प्रथम द्वष्टया अपराध बनता है।

23. प्रकरण के समस्त तथ्य एवं परिस्थितियों को दृष्टिगत रखते हुए तथा प्रस्तुत मामले के गुण—दोष पर बिना कोई टिप्पणी किये मेरे विचार से आवेदकगण **चन्द्रभान सिंह यादव, मोहन कुमार मण्डल एवं तौसीफ जमां** को जमानत पर मुक्त करने का कोई पर्याप्त आधार नहीं पाया जाता है।

24. तदनुसार आवेदकगण **चन्द्रभान सिंह यादव, मोहन कुमार मण्डल एवं तौसीफ जमां** के उक्त जमानत. आवेदन पत्र बलहीन है एवं निरस्त होने योग्य है।

25. तदनुसार आवेदकगण **चन्द्रभान सिंह यादव, मोहन कुमार मण्डल एवं तौसीफ जमां** के उपरोक्त जमानत आवेदन पत्र निरस्त किये जाते हैं।

(2022)05ILR A1183
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.05.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE MANISH MATHUR, J.

Criminal Misc. Writ Petition No. 230 of 2022

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

Counsel for the Petitioner:
Lalta Prasad Misra, Avinash Singh, Sameer Kalia

Counsel for the Respondents:
G.A., Gaurav Mehrotra

(i) Criminal Law – Constitution of India, 1950 - Article 226 - Explosive Substances Act, 1908 – Section 4/5, National Investigation Agency Act, 2008 (duly Amended w.e.f. Dt. 02.08.2019) – Sections 13,13(i), 22, 22(2)(ii) & 22(4), National Investigation Agency (Amendment) Act, 2019 – Amended Schedule: - Writ of Prohibition – to restrain for further proceeding as well as for transmittance of record to the court of competent jurisdiction – sole question of law that– as to whether cases in which cognizance has been taken by regular courts under provision of an Act not included in the schedule to Act, 2008 are required to be transferred to the Special Court Act upon subsequent inclusion of the offence under schedule to Act of 2008 - held - change of forum is being procedural law would have retrospective operation – consequentially writ petition allowed - direction accordingly.(Para – 13, 22, 25)

Writ Petition Allowed. (E-11)

List of Cases cited:-

1. Securities and Exchange Board of India Vs Classic Credit Ltd. (2018 vol. 13 SCC 1),

2. Ramesh Kumar Soni Vs St. of M.P. (2013 vol. 14 SCC 696).

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

1. Heard Mr. Sameer Kalia, learned counsel for petitioner, Mr. Shiv Nath Tilhari, learned Additional Government Advocate for opposite party no.1 and Mr. Shishir Jain, learned counsel for opposite parties no.2 to 4.

2. In view of order being proposed to be passed, notices to opposite party no.5 stand dispensed with.

3. At the very outset, it may be indicated that no counter affidavit has been filed by the opposite parties till date but since dispute pertains only to applicability of law without the facts being disputed as such, the matter is being decided in absence of the counter affidavit with consent of learned counsel for parties.

4. Petition has been filed seeking a writ in the nature of prohibition to restrain further proceeding in Case Crime No.561 of 2012, State Versus Virendra Sharma and others under Section 4/5 Explosive Substances Act, 1908 registered in Police Station- Kotwali Mahoba, District Mahoba bearing case no.2796 of 2012 which is pending before opposite party no.4 i.e. the Chief Judicial Magistrate, District Mahoba. Further prayer for direction pertaining to transmittance of records to the court of competent jurisdiction at Lucknow has also been sought.

5. Learned counsel for petitioner submits that the petitioner is conducting the business of stone crushing and as such was

validly and legally permitted and entitled to conduct blasting operations in the area of his validly executed mining lease issued by the State Government. It is submitted for the said purpose, stocks of explosive were required to be kept by the petitioner.

6. It is submitted that an FIR bearing Case Crime No.561 of 2012, under Section 4/5 of Explosive Substances Act, 1908 was registered against the petitioner and three others in Police Station Kotwali Mahoba, District Mahoba on the basis of recovery memo prepared by the Station House Officer. The allegation made in the first information report was that upon information being received from the Police Informer pertaining to a cashe of explosive being kept in the premises of one Shree Chandra Mauli Bhardwaj without due permission and its likely misuse in the Forthcoming Assembly Election, 2012, certain recovery was made as a result of search conducted by the police. It is submitted that the first information report was lodged on 11.02.2012 whereafter charge-sheet was submitted on 15.06.2012 and cognizance was taken by the Chief Judicial Magistrate on 24.07.2012.

7. Learned counsel for petitioner submits that at the time of lodging of FIR and cognizance being taken by the court concerned, the Explosive Act was not included in the schedule to the National Investigation Agency Act, 2008 but during pendency of trial, the Explosive Act, 1908 was inserted in the National Investigation Agency Act by means of National Investigation Agency (Amendment) Act, 2019 (16 of 2019) with effect from 02nd August 2019. It is further submitted that subsequently vide notification dated 20.04.2021, the State Government with concurrence of the High Court designated the IIIrd Senior Most Court of District and Sessions Judge, Lucknow as Special Court having territorial jurisdiction over entire State of Uttar Pradesh for the trial of all offences as specified in the schedule appended to the National Investigation Agency Act, 2008 (hereinafter referred Act of 2008).

8. In terms of aforesaid, it has been submitted that once the Explosive Act, 1908 was inserted into the schedule of the Act of 2008 and Special Court has been constituted vide notification dated 20.4.2021, petitioner's trial and records are required to transmitted to the Special Court in terms of Section 13 read with Section 22(4) of the Act, 2008.

9. Learned counsel for petitioner has further elaborated that change of forum during pendency of trial pertains to procedural aspect and is therefore retrospective in nature. As such, even though the offence is said to have taken place prior to insertion of Explosive Act into the schedule of Act, 2008 but the change of forum created due to the amending Act of 2019, would have retrospective operation and therefore the Court of Chief Judicial Magistrate, Mahoba would cease to have jurisdiction which would vest only with Special Court constituted in terms of the Act of 2008.

10. Learned counsel has placed reliance upon the judgment rendered by Hon'ble the Supreme Court in the cases of Securities and Exchange Board of India versus Classic Credit Limited reported in (2018) 13 SCC 1 and Ramesh Kumar Soni versus State of Madhya Pradesh reported in (2013)14 SCC 696 to buttress his submission.

11. Learned counsel appearing on behalf of opposite parties have refuted submission advanced by learned counsel for petitioner with the submission that FIR in the present case was lodged in the year 2012 with cognizance also having been taken by the court concerned on 24.07.2012. It is submitted that at the time of lodging of FIR and taking of cognizance by the court concerned, the Explosive Act had not been included in the schedule to Act of 2008. It is submitted that once cognizance of the case was taken in the year 2012, the amendment incorporating Explosive Act into the Act of 2008 in the year 2019 would not have any retrospective operation since it would pertain to creation of substantive rights which would not have any retrospective operation.

12. Learned counsel have also submitted that Section 22 (4) specifically provides transfer of cases to Special Court only in case investigation has been done under provisions of the Act of 2008 and since in the present matter, investigation was not in terms of the Act of 2008, Chief Judicial Magistrate concerned would be the competent court and not the Special Court.

13. Upon consideration of submissions advanced by learned counsel for parties and perusal of material available on record, the only question of law required to be adjudicated is as to whether cases in which cognizance has been taken by the regular courts under provision of an Act not included in the schedule to the National Investigation Agency Act, 2008 are required to be transferred to the Special Court Act upon subsequent inclusion of the offence under schedule to Act of 2008?

14. The provisions pertaining to jurisdiction of Special Courts and transfer of pending trials under the Act of 2008 are clearly indicated in Sections 13 and 22 of the said Act which are as follows:

"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.

(2) If, having regard to the exigencies of the situation prevailing in a State if,-

(a) it is not possible to have a fair, impartial or speedy trial; or

(b) it is not feasible to have the trial without occasioning the breach of peace or grave risk to the safety of the accused, the witnesses, the Public Prosecutor or a judge of the Special Court or any of them; or

(c)it is not otherwise in the interests of justice, the Supreme Court may transfer any case pending before a Special Court to any other Special Court within that State or in any other State and the High Court may transfer any case pending before a Special Court situated in that State to any other Special Court within the State.

(3)The Supreme Court or the High Court, as the case may be, may act under this section either on the application of the Central Government or a party interested and any such application shall be made by motion, which shall, except when the applicant is the Attorney-General for India, be supported by an affidavit or affirmation.

22 Power of State Government to 1[designate Court of Session as] Special Courts. -

(1)The State Government may 2(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 1[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 1[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 1[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 1[designated]."

15. Learned counsel for the opposite parties have laid much emphasis on Section 22(4) of the Act of 2008 to submit that transfer of pending trials to the Special Court are required only in case the offence has been investigated by the State Government Under provisions of this Act. It has been submitted that since investigation in the current case was not under provisions of the Act of 2008, there is no occasion for transfer of trial to Special Court, which as such would not have jurisdiction.

16. Section 13 of the Act of 2008 clearly indicates jurisdiction of Special Courts setup under the Act of 2008 and begins with a non-obstante clause to the effect that every scheduled offence investigated by the agency shall be tried only by the Special Court within whose local jurisdiction it was committed.

17. For the purpose of construing provisions of Section 13 of the Act of 2008, it is relevant to indicate that Section 22(2)(ii), clarifies that reference to agency in Section 13(i) is to be construed as a reference to the Investigation Agency of the State Government. As such, it is evident that investigation can be carried out by any investigation agency of the State Government and not necessarily the National Investigation Agency.

18. A bare comprehension of Section 13 of Act of 2008 indicates that for purposes of Special Court to have jurisdiction, the offence should be scheduled and investigated by the Agency. The term Agency as indicated hereinabove has already been explained under Section 22(2)(ii) to be an Investigation Agency of the State Government. Section 13 as such is clearly demarcated for purposes of trial of offences and not for the purposes of investigation of offences. The purport of Section 13 does not indicate that the

offence should be a scheduled offence as on the date of investigation. Since Section 13 clearly pertains to trial of offences, the meaning and import of the said Section can readily be construed to mean that the offence investigated by the Agency should be a scheduled offence as on the date when the Special Courts are constituted. Giving a meaning contrary to the one indicated hereinabove would amount to inserting a provision which the legislature in its wisdom has not imported into Section 13 of the Act of 2008. The maximum of casus omissus cannot be supplied merely because a second view is possible.

19. So far as the submission of learned counsel for opposite parties is concerned that the transfer of cases to Special Court can take place only in the case of any offence investigated under provision of this Act is concerned, harmonious construction of Sections 13 and 22(4) of the Act of 2008 would clearly explain that Section 22(4) relates to investigation and trial prior to constitution of Special Courts but once the Special Courts have been setup, their jurisdiction is required to be seen in the context of Section 13 of the Act of 2008. As such, the aspect of transfer of cases investigated under provisions of this Act loses its relevance, since Section 13 of the Act of 2008 clearly indicates that the scheduled offence investigated by the Agency is to be seen as on the date of constitution of the Special Courts, which in the present case was on 21.04.2021 when the offence was clearly a scheduled offence after amendment being incorporated in 2019.

20. Another aspect of the matter is that change of forum is an aspect of procedural law and would have retrospective operation has enunciated by Hon'ble the Supreme Court in the case of Classic Credit Limited (supra) the relevant paragraphs are as follows:-

"49. We will now deal with the legality of the propositions canvassed, at the hands of learned counsel for the rival parties. In our considered view, the legal position expounded by this Court in a large number of judgments including New India Insurance Co. Ltd. v. Shanti Misra, (1975) 2 SCC 840; Securities and Exchange Board of India v. Ajay Agarwal, (2010) 3 SCC 765; and Ramesh Kumar Soni v. State of Madhya Pradesh, (2013) 4 SCC 696, is clear and unambiguous, namely, that procedural amendments are presumed to be retrospective in nature, unless the amending statute expressly or impliedly provides otherwise. And also, that generally change of "forum" of trial is procedural, and normally following the above proposition, it is presumed to be retrospective in nature, unless the amending statute provides otherwise. This determination emerges from the decision of this Court in Hitendra Vishnu Thakur v. State of Maharashtra (1994) 4 SCC 602; Ranbir Yadav v. State of Bihar (1995) 4 SCC 392, and Kamlesh Kumar v. State of Jharkhand (2013) 15 SCC 460, as well as, a number of further judgments noted above.

50. We have also no doubt, that alteration of "forum" has been considered to be procedural, and that, we have no hesitation in accepting the contention advanced on behalf of the SEBI, that change of "forum" being procedural, the amendment of the "forum" would operate retrospectively, irrespective of whether the offence allegedly committed by the accused, was committed prior to the amendment."

21. The aforesaid aspect of retrospective operation of procedural law pertaining to change of forum has also been enunciated by the Supreme Court in the

case of Ramesh Kumar Soni (supra) in the following manner:

11. In Hitendra Vishnu Thakur v. State of Maharashtra (1994) 4 SCC 602, one of the questions which this Court was examining was whether clause (bb) of Section 20(4) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 introduced by an Amendment Act governing Section 167(2) Cr.P.C. in relation to TADA matters was in the realm of procedural law and if so, whether the same would be applicable to pending cases. Answering the question in the affirmative this Court speaking through A.S. Anand, J. (as His Lordship then was), held that Amendment Act 43 of 1993 was retrospective in operation and that clauses (b) and (bb) of sub-section (4) of Section 20 of TADA apply to the cases which were pending investigation on the date when the amendment came into force. The Court summed up the legal position with regard to the procedural law being retrospective in its operation and the right of a litigant to claim that he be tried by a particular Court, in the following words:

"(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

22. From the above aspect as well, it is apparent that change of forum as in the present case being part of procedural law, would have retrospective operation and as such, the matter is clearly cognizable by the Special Court constituted under the Act of 2008.

23. Another aspect which requires mention is that the Special Courts have been setup for speedy disposal of offences pertaining to the Acts indicated in the schedule. As such, also it would be prudent that the Special Court should hear matters relating to offences incorporated in the schedule to the Act of 2008.

24. Considering the aforesaid, it is evident that in the present case offence being related to a scheduled offence as on the date of constitution of Special Court is required to be heard by the Special Court created under the Act of 2008.

25. Consequently, the writ petition succeeds and is allowed issuing a writ in the nature of Prohibition, restraining the opposite party no.4 (Chief Judicial Magistrate, Mahoba) for proceeding further

in Case No.2796 of 2012, pertaining to Case Crime No.561 of 2012, Section 4/5 Explosive Substances Act, 1908, Police Station Kotwali Mahoba, District Mahoba, bearing Case No.2796 of 2012 pending before Court of Chief Judicial Magistrate-Mahoba.

26. A further writ in the nature of mandamus is issued commanding opposite party no.3 (Sessions Judge, District Mahoba) to transmit the relevant records of case no.2796 of 2012 to the Special Court constituted under the National Investigation Agency Act, 2008 at Lucknow.

27. The Registry is directed to circulate the order to the District Judges after obtaining approval from Hon'ble the Chief Justice.

(2022)05ILR A1189
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 04.03.2022

BEFORE

THE HON'BLE RAKESH SRIVASTAVA, J.
THE HON'BLE SAURABH LAVANIA, J.

Criminal Misc. Writ Petition No. 1087 of 2022

Anmolakram & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Surya Kant Tripathi

Counsel for the Respondents:
G.A.

(i) Criminal Law – Constitution of India,1950 - Article 226 - UP Control of Goondas Act, 1970 – Sections 2(b)(i), 3 & 3(1) - Indian Penal Code,1860 – Sections 153, 153-B & 294 - Writ filed against the Show Cause Notice issued under Goondas Act, only on the basis of two criminal cases exist against the accused – preliminary objection – writ petition not maintainable being premature – matter is still under consideration – remedy of appeal available - no plea of 'lack of jurisdiction' – writ petition is dismissed on the ground of availability of alternative remedy.(Para – 8)

Writ Petition Dismissed. (E-11)

List of Cases cited:-

1. Executive Engineer, Bihar St. Housing Board Vs Ramesh Kumar Singh (1996 vol. 1 SCC 327),

2. Kabir Chawla Vs St. of U.P .& ors. (1994 Suppl. Vol. 1 SCC 274),

3. Ballabh Chaubey Vs Additional District Magistrate Mathura & anr. (1997 All.L.J. 1630),

4. N. K. Bapna Vs U.O.I. (1992 vol. 4 JT 49),

5. St. of Tamil Nadu Vs P K Shamsuddin (1992 vol. 4 JT 179),

6. Subhash Mujimal Gandhi Vs L. Miningliana (1994 vol. 6 SCC 14),

7. Raja Vs St. (1972 All. L. J. 537),

8. Harsh Narain Vs District Magistrate (1972 All.L.J. 762).

(Delivered by Hon'ble Rakesh Srivastava, J. & Hon'ble Saurabh Lavania, J.)

1. The show-cause notices issued by the Additional District Magistrate, Sitapur, Respondent 2 herein, under Section 3 (1) of the Uttar Pradesh Control of Goondas Act, 1970 (for short the 'Act') are under challenge in the present writ petition.

2. Ms. Rupa Mishra, Advocate holding brief of Shri Suryakant Tripathi, the learned counsel for the Petitioners has contended that the notices have been issued on the basis of two criminal cases; it is contended that Section 2(b)(i) defines

'Goonda' to mean a person who either by himself or as member or leader of a gang, habitually commits or attempts to commit, or abets the commission of an offence punishable under Section 153 or 153-B or Section 294 of the Indian Penal Code or Chapter XV, or Chapter XVI, Chapter XVII, or Chapter XXII of the said code; that only on the basis of two criminal cases, it cannot be said that the petitioner is a person, who habitually commits the aforesaid offences. It is contended that the general nature of the material allegations against the Petitioners in respect of Clauses (a) (b) and (c) of sub-section (1) of Section 3 of the Act have not been mentioned in the notices and as such the said notices are illegal.

3. Ms. Ruhi Siddiqui, learned Additional Government Advocate appearing on behalf of the State-Respondents on the other hand has raised a preliminary objection regarding the maintainability of the writ petition. The counsel contends that the Petitioners have yet to appear before Respondent 2 and show-cause; the writ petition at this stage, is premature and should not be entertained.

4. At this juncture, it is relevant to keep in mind the observations made by the Apex Court, though in a slightly different context in *Executive Engineer, Bihar State Housing Board vs. Ramesh Kumar Singh, (1996) 1 SCC 327*. Paragarph 10 of the said report reads as under: -

"10. We are concerned in this case, with the entertainment of the Writ Petition against a show cause notice issued by a competent statutory authority. It should be borne in mind that there is no attack against the vires of the statutory provisions governing the matter. No question of infringement of any fundamental right guaranteed by the Constitution is alleged or proved. It cannot be said that Ext. P-4 notice is ex facie a "nullity' or totally "without jurisdiction" in the traditional sense of that expression -- that is to say, that even the commencement or initiation of the proceedings, on the face of it and without anything more, is totally unauthorised. In such a case, for entertaining a writ petition under Article 226 of the Constitution of India against a show-cause notice, at that stage, it should be shown that the authority has no power or jurisdiction, to enter upon the enquiry in question. In all other cases, it is only appropriate that the party should avail of the alternate remedy and show cause against the same before the authority concerned and take up the objection regarding jurisdiction also, then. In the event of an adverse decision, it will certainly be open to him to assail the same either in appeal or revision, as the case may be, or in appropriate cases, by invoking the jurisdiction under Article 226 of the Constitution of India."

(emphasis supplied)

5. In *Kabir Chawla vs. State of U.P. and others, 1994 Supp (1) SCC 274*, while dealing with a challenge to a notice issued under Section (3)(1) of the Act, the Apex Court has held as under :

"The Petitioner has made a grievance in relation to the proceedings that have been initiated against him by the District Magistrate, Nainital, by the show-cause notice dated March 10, 1993 under Section 3 (1) of the U.P. Control of Goondas Act, 1970. The petitioner states that he has submitted his reply to the show-cause notice but no final order has been made so far and that he has to appear before the

District Magistrate. The petitioner, however, prays that the said proceedings may be quashed. We do not find any ground for quashing the said proceedings at this stage. The matter is under consideration before the District Magistrate. It is open to the petitioner to satisfy the District Magistrate that no ground has been made out for passing the order against him. In the writ petition the petitioner has not made out a case that in issuing the show-cause notice the District Magistrate was actuated by mala fides. There is, therefore, no reason to assume that the District Magistrate would not give a fair consideration to the matter. We are, therefore, unable to accept the submissions of the petitioner in this regard."

(emphasis supplied)

6. In *Ballabh Chaubey vs. Additional District Magistrate (Finance), Mathura and another 1997 All LJ 1630*, a Division Bench of this Court considered the question of maintainability of a writ petition at the stage of notice under Section 3 of the Act and after taking into account the provisions of the Act and a catena of decisions of the Apex Court as well as of this Court, dismissed the writ petition on the ground of availability of alternative remedy. Paragraphs 7A to 11 of the said report are extracted below :

"7A. The detention laws like National Security Act, or Conservation of Foreign Exchange and Prevention of Smuggling Activities Act make serious in road in the liberty of a person. Under these laws a person is detained without any prior notice and that too on the subjective satisfaction of the detaining authority which satisfaction cannot be challenged on merits. The person detained gets only a right to make representation against his detention but that too after he has been detained and he has been deprived of his liberty. The decision of the representation naturally takes time. *The principle that the machinery provided by the Act should not be permitted to be bypassed by taking recourse to proceedings under Article 226 of the Constitution prior to execution of the detention order was reiterated even in such cases.* In Additional Secretary to Government of India v. Smt. Alka Subhash Gadia, 1991 (1) JT 549, the submission on behalf of the detaining authority is noticed in para 25 of the Report which is as under :

"It was contended by Sri Sibbal, learned Additional Solicitor General, on behalf of the appellants that since the detention law is constitutionally valid, the order passed under it can be challenged only in accordance with the provisions of, and the procedure laid down, by it. In this respect there is no distinction between the orders passed under the detention laws and those passed under other laws. Hence, the High Court under Article 226 of this Court under Article 32 of the Constitution should not exercise its extraordinary jurisdiction in a manner which will enable a party to by-pass the machinery provided by the law."

The Court after considering the submissions of the parties held as follows in para 30:

"..... The power under Articles 226 and 32 are wide, and are untrammelled by any external restrictions and can reach any executive order resulting in, civil or criminal consequences. However, the Courts have over the years evolved certain self-restraints for exercising these powers. They have done so in the interests of the administration of justice and for better and more efficient and informed exercise of the said powers. These self-imposed restraints are not confined to the review of the orders passed under detention law only. They

extend to the orders passed and decisions made under all laws. It is in pursuance of this self-evolved judicial policy and in conformity with the self-imposed internal restrictions that the Courts insist that the aggrieved person first allow the due operation and implementation of the concerned law and exhaust the remedies provided by it before approaching the High Court and this Court to evoke their discretionary extraordinary and equitable jurisdiction under Articles 226 and 32 respectively. That jurisdiction by its very nature is to be used sparingly and in circumstances where no other efficacious remedy is available....."

This decision has been subsequently followed in N.K. Bapna v. Union of India, 1992 (4) JT 49, State of Tamil Nadu v. P.K. Shamsuddin, 1992 (4) JT 179: (AIR 1992 SC 1937) and Subhash Mujimal Gandhi v. L. Miningliana, 1994 (6) SCC 14: (1994 AIR SCW 4975). *The provisions of detention laws are far more stringent than the Control of Goondas Act as here order is passed after notice and trial and the person against whom order is passed does not lose his liberty. He is merely deprived of his right to live in a particular area from where he is externed but is free to reside any where else in the country. There is no reason why the same principle should not apply in the present case as well. The law being well settled that where a Statute provides a machinery of its own, the aggrieved person should first exhaust the remedies provided under the Statutes before approaching the High Court under Article 226 of the Constitution and the High Court would not normally entertain a petition straightway, the present petition challenging the notice is liable to be rejected on the ground of alternative remedy.*

8. In Raja Sukhnandan v. State, AIR 1972 All 498: (1972 All LJ 537), the writ petition was filed at the stage of notice. The Division Bench examined the contention based upon the constitutional validity of U.P. Control of Goondas Act but refused to consider the submission regarding illegality of the notice on the ground that the same could be agitated before the District Magistrate and if the decision went against the petitioner, in appeal before the Commissioner. In Kabir Chawla v. State of U.P., 1994 SCC (Cri) 577 the validity of the notice u/S. 3 of the Act was assailed but the Supreme Court declined to go into this question on the ground that the petitioner could satisfy the District Magistrate who was seized of the matter. It may be mentioned here that in all the cases where validity of notice issued under similar Statute relating to externment of Goondas was assailed before the Supreme Court, the matter had been taken in appeal against final orders of externment (see Gurucharan Singh v. State of Bombay, AIR 1952 SC 221, Hari Khenu Gawli v. Dy. Commissioner of Police, AIR 1956 SC 559 : (1956 Cri LJ 1104); Bhagubhaj v. District Magistrate, AIR 1956 SC 585 : (1956 Cri LJ 1126) and State of Gujarat v. Mehboob Khan, AIR 1968 SC 1468 : 1969 Cri LJ 26.

9. *There is another reason for not entertaining the writ petition at the stage of notice. As the preamble of the Act shows it has been enacted to make special provisions for the Control and Suppression of Goondas with a view to the maintenance of Public Order. The provisions of the Act are intended to prevent further mischief by a Goonda and not to secure his conviction in a pending case. If a person is permitted to challenge the notice at the initial stage and seek stay of the proceedings the very purpose for which notice is issued and the law under which it is issued will be*

frustrated as the externment order remains in operation only for a limited period.

10. Learned counsel has next submitted that in Ramji Pandey v. State of U.P., 1981 All LJ 897 : 1981 All LJ 897 writ petition had been filed challenging the notice under Section 3 of the Act and the writ petition was allowed by a Full Bench of this Court and therefore the present petition also deserves to be entertained. The judgment of the Full Bench shows that the question whether writ petition should be entertained against a notice was not at all considered. The only question which was canvassed and was considered by the Bench was whether the notice was in accordance with the requirement of Section 3 of the Act. No such argument that a writ petition under Article 226 of the Constitution should not be entertained at the stage of notice seems to have been canvassed and therefore no decision has been given on this point. It is what settled that a decision is an authority for when it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in it. (See M/s Orient Paper and Industries Ltd. v. State of Orissa, AIR 1991 SC 672 para 19). Doctrine of precedent is limited to the decision itself and as to what is necessarily involved in it. Judicial authority belongs not to the exact words used in this or that judgment, nor even to all reasons given, but only to the principle accepted and applied as necessary grounds of decision see Krishna Kumar v. Union of India, (1990) 4 SCC 207 : (1990 Lab IC 1490 paras 18 and 19). The Full Bench having not, considered the question of maintainability of the writ petition at the stage of notice the decision rendered by it cannot be held to be an authority or binding (sic) precedent for holding the writ petition to be maintainable.

11. In view of the reasons discussed above the, writ petitions are dismissed on the ground of alternative remedy."

(emphasis supplied)

7. The validity of Section 3 of the Act has been considered by this Court in Raja v. State, 1972 All LJ 537 and in Harsh Narain v. District Magistrate, 1972 All LJ 762. In both of these cases, the two Division Benches have upheld the validity of the Act.

8. It is not the case of the Petitioners that Respondent 2 has no power or jurisdiction to issue the show-cause notice. The matter is under consideration before Respondent 2. It is open to the Petitioners to show to Respondent 2 that on merits no case is made out against them. If an order is passed against the Petitioners it would be subject to an appeal to the Commissioner. We, therefore, do not think it appropriate to consider the matter on merits in this proceeding.

9. In the result, the writ petition is dismissed on the ground of availability of an alternative remedy.

(2022)05ILR A1193
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHBAD 19.04.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE RAJNISH KUMAR, J.

Criminal Misc. Writ Petition No. 4096 of 2022

Om Prakash & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Rahul Kumar Tyagi

Counsel for the Respondents:
G.A.

(i) Criminal Law – Constitution of India,1950 - Article 226, - Indian Penal Code, 1860 - Sections 425 & 447 – UP Revenue Code 2006 – Section 67 - Public Property (Prevention of Damage) Act, 1984 - Section 3 & 6 - Writ Petition – for quashing the FIR – on the ground that lodging of an FIR in respect of such allegation would be impermissible and would amount to an abuse of process of law – allegation encroachment of a public utility land & change the nature of public property – proceeding under the IPC read with Act of 1984 are independent which are not affected or circumscribed in any manner – Law is settled that St.ment of objects and reasons is in the nature of external aids and can be seen only where the provision are not clear or any confusion prevails – consequentially, prayer to quash the FIR must fail.(Para –6, 7, 18, 19)

Writ Petition Dismissed. (E-11)

List of Cases cited:-

1. Munshi Lal & anr. Vs St. of U.P. & anr. (Application (U/s 482) No. 9964 of 2020),

2. Aswini Kumar Ghose & anr. Vs Arbinda Bose & anr. (AIR 1952 SC 369),

3. Central Bank of India Vs Their Workmen (AIR 1960 SC 12),

4. Gurudevdatta VKss Maryadit & ors. Vs St. of Mah. & ors. (2011 (4) SCC 534),

5. Anandji Haridas & Co. Pvt. Ltd. Vs Engineering Mazdoor Sangh & anr. (AIR 1975 SC 946),

6. Arul Nadar Vs Authorized Officer, Land Reforms (1998 (7) SCC 157),

7. Bhaiji Vs SDO, Thandla & ors. (2003 (1) SCC 692),

8. M/s Govind Saran Ganga Saran Vs Commissioner of Sales Tax & ors. (AIR 1985 SC 1041),

9. Commissioner of Income Tax Orissa Vs M/s NC Budharaja & Co. & anr. (1993 AIR SCW 3317).

(Delivered by Hon'ble Ashwani Kumar Mishra, J. & Hon'ble Rajnish Kumar, J.)

1. This petition has been filed with prayer to quash the First Information Report registered as Case Crime No.0096 of 2022, under Sections- 447 I.P.C. and Section 3 of Public Property (Prevention of Damage) Act 1984, Police Station- Babugarh, District- Hapur on the ground that allegations made in the F.I.R. at best can enable the authorities to initiate action under Section 67 of the U.P. Revenue Code 2006, but lodgement of F.I.R. in respect of such allegation would be impermissible and would amount to an abuse of the process of law.

2. Petition is opposed by learned A.G.A.

3. We have perused the First Information Report which records that Khasra No.940 area 0.063 hectare is recorded in the revenue records as Jauhad (Public Utility Land). As per allegations the petitioners are trying to encroach upon such land and raise construction upon it. Previously such attempt was stalled by the revenue authorities but the petitioners have again changed the nature of the public property and consequently the F.I.R. has been lodged.

4. The aforesaid First Information Report has been lodged under Section 447 I.P.C. read with Section 3 of the Prevention of Damage to Public Property Act, 1984.

Section 3 of the Act of 1984 provides that whoever commits mischief by doing any act in respect of any public property shall be punished with imprisonment for a term which may extend to five years with fine. Mischief specified in Section 3 carries the same meaning as is assigned to it in Section 425 of the I.P.C. Section 425 I.P.C. provides that whoever with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public property or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof or destroys or diminishes its value or utility, or affects it injuriously, commits "mischief". Prima facie allegations made in the F.I.R. clearly make out a case of offence in terms of Section 3 of the Act of 1984. Whether these allegations are correct or not would be an aspect to be examined during course of investigation. Petitioners otherwise have not brought on record any material to indicate that this land was ever recorded in their names or have perfected any right over it. A civil suit appears to have been filed by the petitioners for injunction but no proceedings have been instituted for grant of declaration in favour of the petitioners in respect of such land. The statement made in the F.I.R. that the plot in question is recorded as public utility land is otherwise not disputed or shown to be factually incorrect.

5. Learned counsel for the petitioners has placed reliance upon a judgment of this Court in petition Under Section 482 Cr.P.C. No.9964 of 2020; Munshi Lal and Another Vs. State of U.P. and Another, in which the charge sheet came to be quashed by the learned Single Judge relying upon the statement of objects and reasons contained in the act of 1984 so as to restrict its application only to acts of vandalism including destruction and damage caused to public property during riots and public commotion. Reasoning assigned in that regard is contained in para 11 of the judgment in Munshi Lal (supra), which is reproduced hereinafter:-

"11. As far as the P.D.P.P. Act, 1984 is concerned, the same has been enacted with the specific purpose. The statement of objects and reasons of the said Act shows that it was enacted with a view to curb acts of vandalism and damage to public property including destruction and damage caused during riots and public commotion. A need was felt to strengthen the law to enable the authorities to deal with cases of damage to public property. The "public property" as defined under Section 2(b) of the P.D.P.P. Act, 1984 means any property, whether immovable or movable (including any machinery) which is owned by or in possession of or under the control of the Central or State Government or any local authority or any Corporation or any institution established by the Central, Provincial or State Act or its undertaking. Section 3 of the P.D.P.P. Act, 1984 provides that anyone who commits mischief by doing any act in respect of any 'public property' including the nature referred in sub-section (2) in the said section shall be punished with imprisonment and a fine depending upon the nature of the property as per sub-section (1) and sub-section (2) of Section 3 of the P.D.P.P. Act, 1984. Section 4 provides punishment for an act of 'Mischief' causing damage to pubic property by fire or explosive substance. The P.D.P.P. Act, 1984 is, thus, a Special Act enacted to punish for the offence committed under Sections 3 and 4 of the said Act by doing any act of vandalism including the destruction or damage during any riots or public demonstration in the

name of agitations, bandhs, hartals and the like. The "Mischief" has been defined under Section 2(a) of the P.D.P.P. Act, 1984 having the same meaning as in Section 425 of the Indian Penal Code (45 of 1860). Section 6 is the saving clause which says that the Act' 1984 covers the offence committed under it and the provisions of it are in addition to any other law which provides for any proceeding (whether by way of investigation or otherwise) which may be instituted or taken against the offender, apart from this Act. Special provisions with regard to disposal of a prayer for bail made by a person accused of commission of offence under the Act' 1984 has been provided under Section 5 of the P.D.P.P. Act, 1984.

The provisions oblige a person found guilty of commission of offence to pay the damage or loss caused to the public property. This Act, thus, covers the specific area of damage or loss or destruction of public property and recovery of such damages from the person(s) who is/are found guilty of such damage during the course of any public demonstration in the name of agitations, bandhs, hartals and the like."

6. Law is settled that statement of objects and reasons can not be relied upon so as to interpret the specific provisions contained in the act itself and it (statement of objects and reasons) can be seen only where the provision is not clear or any confusion prevails. In Aswini Kumar Ghose and another Vs. Arabinda Bose and another, AIR 1952 SC 369, Hon'ble Patanjali Sastri, the then CJI, speaking for the majority emphasized the rationale to rule out statement of objects and reasons as an aid to the construction of statute in following words:-

"As regards the propriety of the reference to the statement of objects and reasons, it must be remembered that it seeks only to explain what reasons induced the mover to introduce the Bill in the House and what objects he sought to achieve. But those objects and reasons may or may not correspond to the objective which the majority of members had in view when they passed it into law. The Bill may have undergone radical changes during its passage through the House of Houses, and there is no guarantee that the reasons which led to its introduction and the objects thereby sought to be achieved have remained the same throughout till the Bill emerges from the House as an Act of the Legislature, for they do not form part of the Bill and are not voted upon by the members. We, therefore, consider that the statement of objects and reasons appended to the Bill should be ruled out as an aid to the construction of a statute."

7. In Central Bank of India Vs. Their Workmen, AIR 1960 SC 12, the Supreme Court again held that statement of objects and reasons is in the nature of external aids to interpretation of statutes and can be looked into, only if it is necessary to do so, to ascertain legislative intent in case of confusion. In Gurudevdatta Vksss Maryadit & Others Vs. State Of Maharashtra & Others, (2001) 4 SCC 534, the Supreme Court while following the earlier judgments on the issue made following observations in para 19:-

"19.Further, after introduction of the Bill and during the debates thereon before the Parliament, if a particular provision is inserted by reason of such a debate, question of indication of any object in the objects and reasons of the Bill does not and cannot arise. The statements of objects and reasons need to looked into though not by itself a necessary aid as an aid to

construction only if necessary. To assess the intent of the Legislature in the event of there being any confusion, statement of objects and reasons may be looked into and no exception can be taken therefor this is not an indispensable requirement but when faced with an imperative need to appreciate the proper intent of the Legislature, statement may be looked into but not otherwise. The submission of Mr. Bobde thus can only be given credence only in the event of there being any necessity of such a requirement in the facts of the matter under consideration, to wit: some confusion somewhere for assessment of the intent of the Legislature."

8. In cases where provision in statute is clear the need to refer to statement and objects is clearly disapproved. In Anandji Haridas & Co. Pvt. Ltd., Vs. Engineering Mazdoor Sangh and Another; AIR 1975 SC 946, the Supreme Court also observed as under in para 8 and 9:-

"8. We are afraid what the Finance Minister said in his speech cannot be imported into this case and used for the construction of Clause (e) of Section 7. The language of that provision is manifestly clear and unequivocal. It has to be construed as it stands, according to its plain grammatical sense without addition or deletion of any words.

9. As a general principle of interpretation, where the words of a statute are plain, precise and unambiguous, the intention of the Legislature is to be gathered from the language of the statute itself and no external evidence such as Parliamentary Debates, Reports of the Committees of the Legislature or even the statement made by the Minister on the introduction of a measure or by the framers of the Act is admissible to construe those words. It is only where a statute is not exhaustive or where its language is ambiguous, uncertain, clouded or susceptible of more than one meaning or shades of meaning, that external evidence as to the evils, if any, which the statute was intended to remedy, or of the circumstances which led to the passing of the statute may be looked into for the purpose of ascertaining the object which the Legislature had in view in using the words in question."

9. In Arul Nadar Vs. Authorized Officer, Land Reforms; (1998) 7 SCC 157, the Supreme Court made following observations in para 5 :-

"5. We may notice at this stage the contentions advanced by the learned counsel appearing for the respondent that the object of the Act being to further reduce the ceiling area. Section 21-A, if is made applicable to the pending proceeding then said object would be frustrated. We are afraid that this contention cannot be sustained in as much as when the language of a statute is unambiguous, in interpreting the provisions thereof it is not necessary to look into the legislative intent or the object of the Act. As has been stated by this Court in the case of State of Uttart Pradesh Vs. Vijay Anand Maharaj1963 (1) Supreme Court Reports p.1,

"When a language is plain and unambiguous and admits of only one meaning no question of construction of a statute arises, for the Act speaks for itself."

10. In Bhaiji Vs. Sub-Divisional Officer, Thandla and Others; (2003) 1 SCC 692, the Supreme Court made following observations in paras 11 and 12:-

"11. Reference to the Statement of Objects and Reasons is permissible for

understanding the background, the antecedent state of affairs, the surrounding circumstances in relation to the statute, and the evil which the statute sought to remedy. The weight of judicial authority leans in favour of the view that Statement of Objects and Reasons cannot be utilized for the purpose of restricting and controlling the plain meaning of the language employed by the Legislature in drafting statute and excluding from its operation such transactions which it plainly covers. (See Principles of Statutory Interpretation by Justice G.P. Singh, Eighth Edition 2001, pp.206- 209).

12. The learned senior counsel for the appellant placed strong reliance on M/s Girdhari Lal and Sons Vs. Balbir Nath Mathur and Ors. (1986) 2 SCC 237 wherein it has been held that the courts can by ascertaining legislative intent place such construction on statute as would advance its purpose and object. Where the words of statute are plain and unambiguous, effect must be given to them. The Legislature may be safely presumed to have intended what the words plainly say. The plain words can be departed from when reading them as they are leads to patent injustice, anomaly or absurdity or invalidation of a law. The Court permitted the Statement of Objects and Reasons, Parliamentary Debates, Reports of Committees and Commissions preceding the Legislation and the legislative history being referred to for the purpose of gathering the legislative intent in such cases. The law so stated does not advance the contention of Shri Gambhir. The wide scope of transactions covered by the plain language of Section 170-B as enacted in 1980 cannot be scuttled or narrowed down by reading the Statement of Objects and Reasons."

11. Similar view is expressed by the Supreme Court in M/s Govind Saran Ganga Saran Vs. Commissioner of Sales Tax and Others; AIR 1985 SC 1041, in Raymond Ltd. & Another Vs. State of Chahattisgarh and Others; AIR 2007 SC 2854, and in Commissioner of Income Tax, Orissa, etc. etc Vs. M/s N.C. Budharaja and Company and Another, etc. etc; 1993 AIR SCW 3317 and it can safely be deduced that law on the subject is consistent throughout.

12. We, therefore, are not inclined to subscribe to the view taken by learned Single Judge in Munshi Lal (Supra), particularly as the provision contained in the Act of 1984 are clear & admits of no ambiguity.

13. So far as the petitioners argument with regard to initiation of proceeding under Section 67 of the U.P. Revenue Code is concerned, we notice the argument of the petitioners but are not persuaded to accept it in view of the specific provision contained in Section 6 of the Act of 1984, which reads as under:-

"The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force, and nothing contained in this Act shall exempt any person from any proceeding (whether by way of investigation or otherwise) which might apart from this Act, be instituted or taken against him."

14. Section 6, aforesaid clearly provides that provisions of the Act of the 1984 would be in addition to and not in derogation of the provisions of any other law for the time being in force and nothing contained in this Act shall exempt any person from any proceeding which might, apart from this Act, be instituted or taken against him. Merely because proceedings

under Section 67 can also be initiated against the petitioners in such circumstances would not prohibit the initiation of proceeding under the Act of 1984 particularly in view of Section 6.

15. The purpose of imposing penalty under Section 67 of the U.P. Revenue Code is to recover the damage for the wrongful use of property whereas the penalty / punishment stipulated under the Act 1984 is a separate and distinct offence specified in the Act of 1984. Sub-section 3 of Section 67 is extracted herein below:-

"(3) If the person to whom a notice has been issued under sub-section (2) fails to show cause within the time specified in the notice or within such extended time as the Assistant Collector may allow in this behalf, or if the cause shown is found to be insufficient, the Assistant Collector may direct that such person shall be evicted from the land, and may, for that purpose, use or cause to be used such force as may be necessary, and may direct that the amount of compensation for damage or 34 misappropriation of the property or for wrongful occupation, as the case may be, be recovered from such person as arrears of land revenue."

16. In the event necessary ingredients to attract an offence under the Act of 1984 are made out, the consequences flowing from the statute can not be curtailed merely because a distinct course is otherwise stipulated to recover the damages under the Code of 2006.

17. Argument of learned counsel for the petitioners based upon Rule 67 (7) that only where action is taken under Section 67 that the proceedings under Section 447 I.P.C. can commence is based wholly on the misreading of the provision itself which reads as under:-

"67.(7) Nothing in sub-rule (5) shall debar the Land Management Committee or the local authority as the case may be from prosecuting the person who encroaches upon the same land second time in spite of having been evicted under the Code or the rules, under section 447 of the Indian Penal Code, 1860."

18. In our opinion the proceedings under the I.P.C. read with act of 1984 are independent proceedings which are not affected or circumscribed in any manner by the provisions and the proceedings under the Act of 2006 or the Rules framed pursuant thereto of the year 2016. In the facts of the case, it is otherwise noticed that the F.I.R. contains specific allegations that initially encroachment by the petitioners was got stopped but since the petitioners have again encroached upon the land therefore proceedings have been initiated under the Act of 1984 and the I.P.C.

19. In view of the deliberation aforesaid, we find that prayer made by the petitioners to quash the F.I.R. must fail. The writ petition is, accordingly, **dismissed.**

20. The authorities shall be at liberty to proceed with the investigation pursuant to F.I.R. and conclude it in accordance with law.

(2022)05ILR A1199
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.04.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE RAJNISH KUMAR, J.

Criminal Misc. Writ Petition 11201 of 2021

Amit Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manish Singh

Counsel for the Respondents:
G.A., Sri Rajesh Dwivedi, Sri Sanjay Kumar Srivastava

Criminal Law – Constitution of India,1950 - Article 300-A - Criminal Procedure Code,1973 - Sections 102, 120 (2), 451, 452, 457(1) & 457(2) - Indian Penal Code,1860 – Sections 120-B, 420, 467, 468 & 471 – Arms Act,1878 - Section 25(1-B) - Writ petition – against-seizer order of petitioner's bank account – plea of the petitioner that while freezing the bank account the authority violates the mandatory provisions made U/s 102 of Cr.P.C. as well as in violation of constitutional right envisaged U/Article 300-A – Court founds that freezing of account to be in accordance with applicable law – with observation that merely because the freezing of account is not reported forthwith and reported only on an application moved by the petitioner cannot be said that there were infringement of right of property given under Article 300-A – petition lack of merit deserves dismissal. (Para – 18, 20, 21, 22)

Writ Petition Dismissed. (E-11)

List of Cases cited:-

1. N.Padmamma & ors. Vs S.Ramkrishna Reddy & ors. (Civil Appeal No.3632 of 2008 decided on 16.05.2008);

2. D.B.Basnett (D) through LRs. Vs The Collector East District, Gangtok, Sikkim & anr. (Civil Appeal No.196 of 2011 decided on 02.03.2020);

3. Bajranga (Dead) by Lrs. Vs St. of M. Pr. & ors. (Civil Appeal No.6209 of 2010 decided on 19.01.2021),

4. Ms Swaran Sabharwal Vs Commissioner of Police (1990 (68) Comp Cas 652 Delhi (DB)),

5. Dr.Shashikant D.Karnik Vs The St. of Mah. (2008 Cri.LJ 148 (D.B.);

6. Muktaben M.Mashru Vs St. of N.C.T. of Delhi & anr. (Crl M.C. 4206 / 2018) Decided on 29.11.2019);

7. Smt. T. Subbulakshmi Vs The Commissioner of Police (Crl. O.P. No.13103 of 2013 decided on 30.08.2013);

8. Uma Maheshwari Vs The St. Rep. By Inspector of Police, Central Crime Branch, Egmore, Channai (Criminal O.P. No.15467 of 2013 decided on 20.12.2013);

9. The Meridian Educational Society Vs The St. of Telangana (Writ Petition No.21106 of 2021 decided on 04.10.2021);

10. St. of Har. Vs Raghuveer Dayal (1995 SCC (1) 133),

11. Chief Information Commissioner & anr. Vs St. of Manipur & anr. (2011 (15) SCC 1),

12. St. of Mah. Vs Tapas D. Neogy (1999) 7 SCC 685),

13. Nasiruddin & ors. Vs Sita Ram Agarwal (AIR 2003 Supreme Court 1543).

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

(1) The instant writ petition had been filed by the petitioner Amit Singh for defreezing the Bank account of the petitioner bearing Account No.733910110001489 in Bank of India, Branch Panki, Kanpur Nagar and to allow the petitioner to operate his bank account. Subsequently by way of amendment the petitioner has also prayed for quashing the order dated 18.03.2021, contained in annexure no.11 to the writ petition by means of which the account of the petitioner has been got freezed by the respondent no.2 i.e. Station House Officer, Police Station-Kalyanpur, District-Kanpur Nagar in relation to Case Crime No.1504 of 2020, under Sections 420, 467, 468, 471,

120-B IPC, Police Station-Kalyanpur, District- Kanpur Nagar.

(2) Learned counsel for the petitioner submits that the account of the petitioner has been seized in violation of the provisions made under Section 102 of the Code of Criminal Procedure (hereinafter referred to as Cr.P.C.). The mandatory requirements of Section 102(3) Cr.P.C. has not been followed and the respondent no.2 has not informed the concerned Magistrate regarding seizure of the bank account, forthwith. Therefore the Constitutional right of property envisaged under Article 300-A of the Constitution of India has been infringed. Thus the impugned order is liable to be quashed and the respondents be directed to defreeze the account of the petitioner and allow him to operate the account. Learned counsel for the petitioner has relied upon the judgments in *N.Padmamma and others Versus S.Ramkrishna Reddy and others, Civil Appeal No.3632 of 2008 decided on 16.05.2008; D.B.Basnett (D) through LRs.Versus The Collector East District, Gangtok, Sikkim and another; Civil Appeal No.196 of 2011 decided on 02.03.2020; Bajranga (Dead) by Lrs. Versus State of Madhya Pradesh and others; Civil Appeal No.6209 of 2010 decided on 19.01.2021; Ms Swaran Sabharwal Versus Commissioner of Police, 1990 (68) Comp Cas 652 Delhi (DB); Dr.Shashikant D.Karnik Versus The State of Maharashtra; 2008 Cri.LJ 148 (D.B.); Muktaben M.Mashru Vs. State of N.C.T. of Delhi and Another; Crl M.C. 4206 of 2018, decided on 29.11.2019; Tmt.T. Subbulakshmi Vs. The Commissioner of Police; Crl. O.P. No.13103 of 2013 decided on 30.08.2013; Uma Maheshwari Vs. The State Rep. By Inspector of Police, Central Crime Branch, Egmore, Channai; Criminal O.P. No.15467 of 2013 decided on 20.12.2013; The Meridian Educational Society Vs. The State of Telangana; Writ Petition No.21106 of 2021 decided on 04.10.2021; State of Haryana Vs. Raghuveer Dayal; 1995 SCC (1) 133 and Chief Information Commissioner & Another Vs. State of Manipur & Another; 2011 (15) SCC 1.*

(3) Learned counsel for the respondents vehemently opposed the submissions of learned counsel for the petitioner. It is submitted by learned counsel for the respondents that the account of the petitioner has rightly been got freezed in accordance with law by the respondent no.2 as the consideration received out of the illegal transactions, in regard to which F.I.R. vide Case Crime No.1504 of 2020 (Supra) has been lodged, has been deposited in the said account, hence the same is the case property and it cannot be allowed to be withdrawn by the petitioner.

(4) It was further contended by learned A.G.A. that on an application moved by the petitioner before the concerned Magistrate it has been informed that the Bank account has been seized. Therefore the requirement of Section 102(3) Cr.P.C. stands fulfilled and if there was any delay, that may not give any benefit to the petitioner at this stage to get the account defreezed on this technical ground. However, the petitioner may move an application before the concerned Court for defreezing of his account which may be considered by the concerned court in accordance with law.

(5) We have considered the submissions of learned counsel for the parties and perused the record.

(6) The First Information Report vide case Crime No.1504 of 2020, under Sections 420, 467, 468, 471, 120-B IPC was lodged at Police Station-Kalyanpur, District-Kanpur Nagar by the respondent no.5/Radhelal Goel alleging therein that some person impersonating him as Radhelal sold the land bearing Gata No.782 by executing Power of Attorney in favour of other persons, who has nothing to do with the said land, whereas the land is recorded in the revenue records in the name of Radhelal son of Ram Milan. During course of investigation, the name of petitioner surfaced in commissioning of the alleged crime and he was arrested on 15.03.2021.

(7) It appears that during investigation the Investigating Officer found that the sale consideration received on account of aforesaid fraudulent transfer of land in question was deposited in the account of the petitioner bearing Account No.733910110001489 in Bank of India, Branch Panki, Kanpur Nagar. Therefore the respondent no.2 requested the respondent no.4 to freeze the account of the petitioner in his bank with immediate effect. It was further requested that no transaction be allowed in future without permission of the court or police officer.

(8) It appears that after the petitioner was enlarged on bail by means of order dated 19.05.2021 and released from Jail, he approached the Chief Metropolitan Magistrate, Kanpur Nagar with a prayer to clarify as to on the basis of which order the account of the petitioner has been seized so that he may get the same released through the court. The said application was moved on 03.09.2021. The respondent no.2 by means of the report dated 19.09.2021 informed the court that the account of the petitioner has been seized in connection with the case Crime No.1504 of 2020 (Supra). Thereafter the petitioner approached this court by means of the present writ petition with the aforesaid prayers.

(9) Article 300-A of the Constitution of India provides that "No person shall be deprived of his property save by authority of law." Therefore a person can be deprived of his property only in accordance with law. The Hon'ble Supreme Court, in the case of *Bajranga (Dead) by LRs. Versus State of Madhya Pradesh and others (Supra)*, has held that right to property is still a constitutional right under Article 300-A of the Constitution of India though not a fundamental right and the deprivation of the right can only be in accordance with the procedure established by law. Similar view has been expressed by Hon'ble Supreme Court in the cases of *D.B.Basnett (D) through LRs Versus The Collector East District, Gangtok, Sikkim and another (Supra) and N.Padmamma and others Versus S.Ramkrishna Reddy and others (Supra)*. In the present case however, the bank account has been got seized in exercise of powers under Section 102 Cr.P.C.

(10) The relevant Section 102 of Cr.P.C. is extracted below:-

"*102. Power of police officer to seize certain property;*

(1) Any police officer, may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.

(2) Such police officer, if subordinate to the officer in charge of a police station,

shall forthwith report the seizure to that officer.

(3) Every police officer acting under sub- section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court [or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation], he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same.]"

(11) The aforesaid provision provides that any police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence. Therefore any police officer may seize any property even if there is suspicion that the same is involved in commissioning of any offence. The property includes Bank account and a police officer in course of investigation can seize the account. Therefore once it is found by the Investigating Officer that the sale consideration received on account of alleged fraudulent transaction has been deposited in the said account, there is no illegality or infirmity in seizure of the account of the petitioner for the purposes of investigation because if the same is not secured, the amount deposited in the said account, which would be a case property, may be withdrawn. The Supreme Court considered the issue in *State of Maharashtra Versus Tapas D. Neogy (1999) 7 SCC 685* and held as under in paragraph 12:-

"12.....We are, therefore, persuaded to take the view that the bank account of the accused or any of his relations is "property" within the meaning of Section 102 of the Criminal Procedure Code and a police officer in course of investigation can seize or prohibit the operation of the said account if such assets have direct links with the commission of the offence for which the police officer is investigating into ....."

(12) The scope and object of Section 102 Cr.P.C. is to help and assist in investigation and to enable a police officer to collect and collate evidence to be produced to prove the charge complained of and set up in the charge sheet. There is no requirement of any notice or information to the concerned before seizure.

(13) Sub Section (3) of Section 102 Cr.P.C. provides that every police officer acting under sub-section (1) Cr.P.C. shall forthwith report the seizure to the Magistrate having jurisdiction. The main thrust of learned counsel for the petitioner is that since the police officer acting under sub-section (1) Cr.P.C., who has seized the account has not reported the concerned Magistrate about the seizure forthwith, and thus seizure has become illegal. Sub-section (3) of Section 102 Cr.P.C. further provides that where the property seized is such that it cannot be conveniently transported to the court or where there is difficulty in securing the custody of the said property or where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation, he may give

custody thereof to any person on his executing a bond undertaking to produce the property before the court as and when required and to give effect to the further orders of the court as to the disposal of the same. Therefore the bank account which has been seized and is in the custody of the bank is subject to the further orders of the court as to the disposal of the same, therefore as per scheme of Code the purpose of information being given to the Magistrate concerned is to bring it to the knowledge of the Court but no consequences thereof has been provided. However the concerned person may move appropriate application for its release etc. from the court. Knowing it well the petitioner had also, after release from the Jail on bail, moved an application before the concerned court to know as to under which order the account has been seized, so that he may get the same released through the court. Therefore once the information in response to the aforesaid application has been submitted to the concerned court, it is apparent that the information has been furnished to the concerned court. Therefore the seizure would not become illegal on this ground.

(14) In view of submissions of learned counsel for the parties the main issue which falls for our consideration is as to whether Section 102(3) Cr.P.C. is mandatory or directory in nature? It is well settled that non-observance of a mandatory condition is fatal to the validity of the action. However, non-observance would not matter if the condition is found to be merely directory. In other words, it is not that every omission or defect entails the drastic penalty of invalidity. Whether the provision is mandatory or directory can be ascertained by looking at the entire scheme and purpose of the provision and by weighing the importance of the condition, the prejudice to private rights and the claims of the public interest, therefore, it will depend upon the provisions of the statute and mere use of word "shall' would itself not make the provision mandatory. The Hon'ble Supreme Court in the case of State of Haryana Versus Raghuveer Dayal (Supra) has held that the use of word 'shall' is ordinarily mandatory but it is sometimes not so interpreted if the scope of the enactment, on consequences to flow from such construction would not so demand.

(15) The Hon'ble Supreme Court, in the case of *Nasiruddin and Others Versus Sita Ram Agarwal; AIR 2003 Supreme Court 1543*, has held that it is well settled that the real intention of the legislation must be gathered from the language used. It may be true that the use of the expression "shall or may' is not decisive for arriving at a finding as to whether statute is directory or mandatory. But the intention of the legislature must be found out from the scheme of the Act. It is also equally well settled that when negative words are used the courts will presume that the intention of the legislature was that the provisions are mandatory in character. It has further been held that if an act is required to be performed by a private person within a specified time, the same would ordinarily be mandatory but when a public functionary is required to perform a public function within a time frame, the same will be held to be directory unless the consequences therefor are specified. The relevant paragraphs 38 and 39 are extracted below:-

"38. The court's jurisdiction to interpret a statute can be invoked when the same is ambiguous. It is well known that in a given case the court can iron out the

fabric but it cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of the provision is plain and unambiguous. It cannot add or subtract words to a statute or read something into it which is not there. It cannot re-write or recast legislation. It is also necessary to determine that there exists a presumption that the legislature has not used any superfluous words. It is well settled that the real intention of the legislation must be gathered from the language used. It may be true that use of the expression "shall or may" is not decisive for arriving at a finding as to whether the statute is directory or mandatory. But the intention of the legislature must be found out from the scheme of the Act. It is also equally well settled that when negative words are used the courts will presume that the intention of the legislature was that the provisions are mandatory in character.

39. Yet there is another aspect of the matter which cannot be lost sight of. It is a well-settled principle that if an act is required to be performed by a private person within a specified time, the same would ordinarily be mandatory but when a public functionary is required to perform a public function within a time-frame, the same will be held to be directory unless the consequences therefor are specified. In Sutherland's Statutory Construction, 3rd Edn., Vol. 3, at p. 107 it is pointed out that a statutory direction to private individuals should generally be considered as mandatory and that the rule is just the opposite to that which obtains with respect to public officers. Again, at p. 109, it is pointed out that often the question as to whether a mandatory or directory construction should be given to a statutory provision may be determined by an expression in the statute itself of the result that shall follow non-compliance with the provision.

At p. 111 it is stated as follows:

"As a corollary of the rule outlined above, the fact that no consequences of non-compliance are stated in the statute, has been considered as a factor tending towards a directory construction. But this is only an element to be considered, and is by no means conclusive."

(16) The consequences of non reporting about the seized property have not been provided under the section. In addition, the requirement of reporting in the manner, as stated, is on the part of a public functionary and in view of the law laid down by the Hon'ble Supreme Court, as noticed above, the same is required to be held to be directory unless the consequences thereof are specified. Since the consequences have not been specified, it would be safe to hold that requirement of Section 102(3) Cr.P.C. cannot be termed as mandatory but would be directory in nature.

(17) The Scheme for disposal of property under the Code is provided under Chapter XXXIV of the Cr.P.C. Section 451 provides that when any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial. Section 452 provides the order for disposal of property at conclusion of trial. Section 457 (1) provides that whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such

order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property. Sub-section (2) provides that if the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation.

(18) In view of above scheme of the Code the purpose of information given to the Magistrate regarding seizure of property by the Police Officer is merely to facilitate its disposal in accordance with law during pendency of trial or subsequent thereto. Therefore non reporting of the seizure forthwith, as provided under Section 102(3) Cr.P.C., shall not ipsofacto render the seizure illegal particularly as no period is specified and it's consequences have not been provided. Therefore when on an application moved by the petitioner, the same has been informed, the petitioner may move the concerned Magistrate for the custody of the property i.e. unfreezing of the account of the petitioner, which may be dealt with in accordance with law and on it's own merit.

(19) The Delhi High Court, in the case of *Ms.Swaran Sabharwal Versus Commissioner of Police (Supra*), quashed the prohibitory order on the ground that the moneys in the bank does not constitute "case property". In the case of *Dr. Shashikant D. Karnik Versus The State of Maharashtra (Supra)*, the Bombay High Court allowed the petition on the ground that all the three requirements of Section 102 Cr.P.C. have not been complied. It appears that in this case a direction was issued not to permit operation of the bank accounts of petitioner therein and his family without seizure therefore the court was of the view that there can not be an interim order and thereafter it's continuation. The authorities had also failed to ascertain, by the time it was decided, as to whether there was any connection of it with the alleged crime. The court has only mentioned that sub-section (3) of Section 102 lays down a mandate without any finding as to whether it is mandatory or directory. The Court without any provision has also observed that there is a fourth requirement of law that notice is required to be given before stopping the operation of the account. In the absence of any specific stipulation in the statute or necessary consequence flowing from the scheme contained in the Act, we are not inclined to subscribe to such a view.

(20) In the present case we have considered the issue in detail and are of the view that sub-Section (3) of Section 102 Cr.P.C. is directory in nature and once the court has been informed of freezing of bank account on an application moved by the petitioner, the requirement of statute stands fulfilled. Deprivation of property (freezing of bank account) otherwise being as per law, the argument that Article 300-A of Constitution is violated cannot be accepted. Contrary view taken by learned Single Judges of the High Courts of Delhi, Madras and Telangana in the judgments in *Ms Swaran Sabharwal Versus Commissioner of Police, 1990 (68) Comp Cas 652 Delhi (DB); Muktaben M.Mashru Vs. State of*

N.C.T. of Delhi and Another; Crl M.C. 4206 of 2018, decided on 29.11.2019; Tmt.T. Subbulakshmi Vs. The Commissioner of Police; Crl. O.P. No.13103 of 2013 decided on 30.08.2013; Uma Maheshwari Vs. The State Rep. By Inspector of Police, Central Crime Branch, Egmore, Channai; Criminal O.P. No.15467 of 2013 decided on 20.12.2013; The Meridian Educational Society Vs. The State of Telangana; Writ Petition No.21106 of 2021 decided on 04.10.2021 without considering and dealing with the provisions and scheme of the Code cannot be relied upon. Therefore these judgments can not be of any help to the petitioner. The Judgment, in the case of *Chief Information Commissioner and another Versus State of Manipur and another (Supra)*, relied by learned counsel for the petitioner, is also not applicable in the facts and circumstances of the present case.

(21) In view of the discussions made above this court is of the considered opinion that there is no infringement of Constitutional right of property of the petitioner under Article 300-A of the Constitution of India. Article 300-A of the Constitution of India only provides that no person shall be deprived of his property save by authority of law. The alleged deprivation of property (freezing of bank account) since is found to be in accordance with applicable law i.e. Code of Criminal Procedure, the action complained of is clearly in consonance with Article 300-A of the Constitution of India. Petitioner's plea of violation of Article 300-A of Constitution of India cannot be pressed to impeach the act of freezing of bank account after such act is held to be as per applicable law i.e. the Code of Criminal Procedure.

(22) The bank account of the petitioner has been got freezed in exercise of powers given under Section 102 Cr.P.C. and the Code of Criminal Procedure restricts the release of such bank account only to an order passed by the Magistrate, which is not the case here. The provisions of the Code thus cannot be by-passed on the plea that Article 300-A of Constitution of India is violated. Merely because the freezing of bank account is not reported forthwith and reported only on an application moved by the petitioner, it cannot be said that there is infringement of right of property given under Article 300-A of the Constitution of India. The plea of the petitioner in this regard is misconceived and not sustainable. The writ petition consequently lacks merit and is **dismissed**. No order is passed as to costs.

(2022)05ILR A1207
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.05.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Misc. Writ Petition No. 24795 of 2020

Umesh Dixit ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Girish Kumar Pandey

Counsel for the Respondents:
G.A., Arun Sinha, Mohammad Zeeshan Lari, Siddharth Sinha

Criminal Law – Constitution of India,1950 - Article 14, 72, 161, 226 - Indian Penal Code, 1860 - Sections 120-B, 147, 148, 149, 302, 302(3), 307(4), 338, 379, 452, 504, 323, 336, 352, 427, 452 & 504 – Arms Act, 1878 - Section – 25(1-B) - Criminal Procedure Code,1973 - Sections

432 & 433-A - UP Prisoners Release on Probation Act, 1938 - Section 2 – UP Jail Manual, Para 195, 196, 197, 198 - Writ petition – challenging the order of Govt. of UP for premature release of accused person – who has convicted & sentenced for offence of double murder/attempt to murder/Rioting – out of which some offences are committed during parole also – court held that power of remission cannot be exercised arbitrarily – writ petition partially allowed - impugned order quashed – with direction to - re-considered the matter afresh in the light of law laid down by the Hon'ble Apex court. (Para – 26, 27, 28)

Writ Petition Allowed in part.(E-11)

List of Cases cited:-

1. Laksman Naskar Vs U.O.I. (2000 CrLJ 1471),

2. Maru Ram Vs U.O.I. (1981 (1) SCC 107),

3. NHAI & ors. Vs Madhukar Kumar & ors. (Civil Appeal No. 11141 / 2018, decided on 23.09.2021)

4. St. of Har. Vs Mohinder Singh (2000 vol. 3 SCC 394),

5.Sangeet Vs St. of Har. (2013 vol. 2 SCC 452),

6. Rajan Vs Home Secretary, Home Department of Tamil Nadu, (2019 vol. 14 SCC 114),

7. Ram Chander *Vs* St. of Chhattisgarh & anr. (W P (Crl.) No. 49/2022 decided on 22.04.2022),

8. Laxman Naskar Vs St. of W. B. (2000 vol. 7 SCC 626),

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

(1) The petition under Article 226 of the Constitution has been instituted by Umesh Dixit, whose brother Gyanendra Kumar alias Tinku was said to be murdered by the convict/respondent no.6-Hari Shankar, with the following reliefs :-

i. Issue a writ, order or direction in the nature of Certiorari thereby quashing the impugned order dated 29.11.2019 passed by the opposite party no.1 contained in Annexure No.1 to this writ petition.

ii. Issue a writ, order or direction in the nature of Mandamus thereby commanding and directing the opposite parties no. 1, 2 and 3 to re-arrest the opposite party no.6 so that he serves out the life imprisonment imposed upon him by the Learned Additional Sessions Judge/F.T.C., Court No.3, Sitapur in Sessions Trial No. 78 of 2003, in the interest of justice.

iii. Issue any other writ, order or direction in the nature which this Hon'ble Court may deem fit and proper under the circumstances of the case and in the interest of justice.

iv. Allow the writ petition with costs in favour of the petitioner."

(A) Factual Background

(2) The respondent no.6-Hari Shankar and co-accused were tried by V Additional Sessions Judge, Sitapur in Sessions Trial No. 187 of 1991 arising out of Case Crime No. 171 of 1990, under Sections 147, 148, 452, 149, 302 I.P.C., Police Station Machhrehta, District Sitapur, wherein vide judgment and order dated 19.03.1996 (Annexure No. 3), the learned V Additional Sessions Judge, Sitapur, convicted and sentenced the respondent no.6-Hari Shanker and co-accused under Section 302 read with Section 149 I.P.C. to undergo life imprisonment; under Section 452 read with Section 149 I.P.C. to undergo three years R.I.; and under Section 148 I.P.C. to undergo two years R.I.

(3) According to the petitioner, aggrieved by their conviction and sentence vide judgment and order dated 19.03.1996,

respondent no.6-Hari Shanker preferred Criminal Appeal No. 117 of 1996 : *Hari Shanker Vs. State of U.P.*, wherein respondent no.6-Hari Shanker was granted bail by a Co-ordinate Bench of this Court and the same is still pending final adjudication.

(4) During pendency of the aforesaid criminal appeal and after release on bail in the aforesaid criminal appeal, convict/respondent no.6-Hari Shanker and co-accused Sanju, Nanhu (real nephew of the respondent no.6), Chailu, Shatrughan and Pramanand, murdered the brother of the petitioner, namely, Gyanedra Kumar alias Tinku. In this regard, the petitioner's father Ram Naresh Dixit had lodged an F.I.R. against the aforesaid accused persons including respondent no.6-Hari Shanker, which was registered as Case Crime No. 267 of 2002 under Sections 147, 148, 302/149 I.P.C. at Police Station Machhrehta, District Sitapur. This case was committed to the Additional Sessions Judge/Fast Track Court No.3, Sitapur, wherein respondent no.6-Hari Shanker and co-accused were tried in Sessions Trial No. 78 of 2003 : *State Vs. Sanju and 5 others*, for committing the offence of murder of the petitioner's brother. Co-accused Sanju was also tried in Sessions Trial No. 222 of 2003 : *State Vs. Sanju*, arising out of Case Crime No. 277 of 2002, under Section 25 (1-B) of the Arms Act, Police Station Machhrehta, District Sitapur.

(5) The learned Additional Sessions Judge/Fast Track Court No.3 , Sitapur, heard both the aforesaid appeals i.e. Sessions Trial Nos. 78 of 2003 and 222 of 2003 together and vide judgment and order dated 09.07.2004 (Annexure No.5), convicted and sentenced Hari Shanker (respondent no.6) and co-accused persons under section 302 read with section 149 I.P.C. to undergo life imprisonment and fine of Rs.5000/-, in default, to undergo additional one year imprisonment; under Section 147 I.P.C. to undergo six month R.I.; and under Section 148 I.P.C. to undergo one year R.I., whereas co-convict Sanju was convicted and sentenced under Section 25 (1-B) of the Arms Act to undergo one year's R.I. and fine of Rs.1000/-, in default, to undergo additional three months imprisonment.

(6) Feeling aggrieved by their convictions and sentenced vide judgment and order dated 09.07.2004, convict/respondent no.6-Hari Shanker preferred Criminal Appeal No. 1917 of 2004 : *Hari Shanker Vs. State of U.P.*, whereas co-convicts Sanju, Nanu, Chailu, Shatrughan and Parmanand preferred Criminal Appeal No. 1578 of 2004 : *Sanju and 4 others Vs. State*, before this Court and the same are pending adjudication before this Court.

(7) According to the petitioner, vide orders dated 13.07.2005 (Annexure No. 6), 30.08.2005 (Annexure No. 7) and 22.05.2006 (Annexure No.8), the bail applications preferred by the respondent no.6-Hari Shanker in Criminal Appeal No. 1917 of 2004 were rejected. However, co-convict Sanju, Nanhu (real nephew of the respondent no.6), Chailu, Shatrughan and Parmanand were released on bail vide order dated 13.07.2005 passed by a Co-ordinate Bench of this Court. After released on bail, nephew of the respondent no.6 (Sanju, Nanhu) and co-accused Chailu attacked the brother of the petitioner, hence petitioner's father had lodged an F.I.R. in this regard, which was registered as Case Crime No. 42 of 2007, under Sections 379, 338, 307 I.P.C. on 11.01.2007; and case crime No.

56 of 2007 under Sections 307, 504 I.P.C. at police station Machhrehta, District Sitapur. According to him, in case crime No. 56 of 2007, the trial Court convicted and sentenced the accused persons to undergo ten years imprisonment, against which, criminal appeal has been filed before this Court, wherein the nephew of respondent no.6, Sanju and Chailu, were released on bail in Case Crime No. 56 of 2007, under Sections 307/504 I.P.C. on 17.01.2007. Thereafter, nephew of respondent no.6 murdered the father of the petitioner, hence the brother of petitioner, namely, Mukesh Dixit, lodged an F.I.R. in this regard, which was registered as Case Crime No. 1137 of 2009, under Sections 302, 149, 120-B I.P.C., Police Station Machhrehta, District Sitapur. This case was committed to Sessions Court and the Sessions Court had also awarded life imprisonment in Sessions Trial No. 1137 of 2009 to the nephew of the respondent no.6, namely, Sanju and Chailu.

(8) It has also been stated by the petitioner that when respondent no.6 and other co-accused were confined in District Jail, Sitapur, they were continuously threatening the petitioner and his family members, hence he filed a writ petition, bearing No. 563 (M/B) of 2017, before this Court, which was disposed of vide order dated 11.01.2017 with a direction to the Principal Secretary (Home), U.P., Lucknow to consider a copy of the petition as a representation and take appropriate decision/action within two months. In compliance of the order dated 11.01.2017, the Principal Secretary (Home), Government of U.P., vide office memorandum dated 09.03.2017 (Annexure No. 14), recommended to transfer the respondent no.6-Hari Shanker and co-accused Sanju, Chailu, Parmanand and Shatrohan from District Jail, Sitapur to District Jail, Barelly. Thereafter, the petitioner came to know that the respondent no.6-Hari Shanker was trying to be released prematurely, hence the petitioner had preferred a representation dated 12.12.2018 (Annexure No.15) but without paying any heed on the petitioner's representation, the respondent no.6-Hari Shanker was released prematurely vide order dated 29.11.2019.

(9) Aggrieved by the aforesaid order of premature release dated 29.11.2019, the petitioner has filed the instant writ petition.

(B) Submissions

B.1 Submission on behalf of the petitioner

(10) Shri Girish Kumar Pandey, learned Counsel appearing on behalf of the petitioner, made the following submissions:-

I. Respondent no.6-Hari Shanker has been released prematurely by the impugned order dated 29.11.2019 in absolute contravention of the provisions contained in the Government Order dated 01.08.2018, which *inter alia* provides that a convict, who has been sentenced to undergo life imprisonment, shall not be eligible for release in case he has been convicted for some offence said to have been committed by him during parole and further such convicts sentenced for life imprisonment are also not liable to be released, who have been sentenced for life for more than one offence.

II. Sub-clause (x) of Para-3 of Government Order dated 01.08.2018 clearly provides that the person, who is convicted for life two times, will not be

entitled to be released in light of the provisions of Government Order dated 01.108.2018 but while passing the impugned order of premature release dated 29.11.2019, the respondent no.6-Hari Shanker has been granted the benefit of Section 2 of U.P. Prisoners Release on Probation Act, 1938 (hereinafter referred to as "**Act, 1938**") ignoring the Government Order dated 01.08.2018 by the State Government.

III. The convict/respondent no.6-Hari Shanker was convicted and sentenced to undergo life imprisonment in two separate murder cases and he is a habitual/notorious criminal, hence he is not entitled to be extended the benefit of Section 2 of the Act, 1938.

IV. Hence the impugned order of premature release is liable to be quashed.

B.2 Submissions on behalf of Respondent no.6-Hari Shanker

(11) Shri Siddharth Sinha, learned Counsel appearing on behalf of the respondent no.6-Hari Shanker, made the following submissions :-

I. The respondent no.6 had moved an application of his premature release on the prescribed Form "A'. His Excellency, the Governor of U.P. had accepted the application of the respondent no.6 after satisfying that respondent no.6 fulfills the conditions enumerated under Section 8 of the Act, 1938.

II. In Sessions Trial Nos. 187 of 1991 and 78 of 2003, the respondent no.6 was wrongly convicted by the trial Court, therefore, against his conviction and sentence, he preferred Criminal Appeal Nos. 117 of 1996 and 1917 of 2004, respectively, before this Court, wherein the respondent no.6 was granted bail by this Court.

III. In Criminal Appeal No. 1917 of 2004, the role of firing was actually assigned to co-accused Sanju, resulting into the death of deceased. The cause of death as spelt out in the post-mortem report was ante-mortem firearm injury alleged to have been caused by co-accused Sanju. The respondent no.6 has no role in commission of the murder of the deceased.

IV. The respondent no.6 has neither threatened the petitioner nor his family members. There is a long standing enmity between the family of respondent no.6 and the family of petitioner.

V. The respondent no.6 was released as per the provisions of Government Order No. 1658/22-02-2004-25 (94)/97 dated 06.09.2004 by the competent authorities with the consent of His Excellency the Governor of U.P. Furthermore, the impugned order of release is based on the subjective satisfaction of the releasing authority.

VI. The Government Order dated 06.09.2004 was issued as per the guidelines issued by the Apex Court in **Laksman Naskar Vs. Union of India : 2000 Crl.L.J. 1471**. The respondent no.6 was released by means of impugned order by the authorities as all the guidelines issued by the Apex Court in Laksman Naskar (supra) have been fulfilled by the respondent no.6.

VII. In **Maru Ram Vs. Union of India** : 1981 (1) SCC 107, the Apex Court has held that Section 433-A Cr.P.C. does not and cannot even wee bit the pardon power of Governor or President. The necessary sequel to this logic is that notwithstanding section 433-A Cr.P.C., the President or Governor continues to exercise the power of commutation and release

under Articles 72 and 161 of the Constitution. Hence the impugned premature release of the respondent no.6 was as per the guidelines of the Government Order dated 06.09.2004.

VIII. Hence, the instant writ petition is liable to be dismissed.

B.3 Submissions on behalf of the State/respondents no.1 to 5

(12) Shri S.P. Singh, learned Additional Government Advocate appearing on behalf of the State/respondents no. 1 to 5, made the following submissions :-

I. Convict/respondent no.6-Hari Shankar was released after his application under Form "A' was accepted by the State Government, with the consent of His Excellency of Governor under Section 432 Cr.P.C., under the conditions mentioned in Section 8 of the Act, 1938 on 21.12.2019.

II. Vide Government Order dated 01.08.2018, the policy has been framed for releasing the convicted prisoner prematurely. However, in the present case, no benefit of the Government Order dated 01.08.2018 has been provided to the respondent no.6 but he has been released under the license as provided to Form "A'.

III. The State, while taking decision to release the respondent no.6, had considered the objection moved by the petitioner and after adopting the due process as provided under Government Order dated 06.09.2004, released the respondent no.6 prematurely.

IV. Respondent no.6 was released as per the Government Order dated 06.09.2004, which was issued by the State Government under the provisions of Section 432 Cr.P.C. read with paragraphs 195, 196, 197 and 198 of the U.P. Jail Manual and under the provisions of Act, 1938.

V. The concerned Superintendent of Police and the District Magistrate gave positive report in favour of respondent no.6. However, any breach of the conditions of the license by the respondent no.6, the order for release be cancelled.

VI. Hence, the instant writ petition is liable to be dismissed.

(C) Analysis

(13) The Governor of Uttar Pradesh, while exercising powers under Article 161 of the Constitution of India, issued a Government Order dated 01.08.2018, which relates to a policy for prisoners in respect of pre-mature release on occasion of Republic Day every year. Section 3 of the Government Order dated 01.08.2018 deals with "Reserved Category'. Sub-section (viii) and (x) of Section 3 of the Government Order dated 01.08.2018 are reproduced as under :-

"(viii) आजीवन कारावास से दण्डित ऐसे सिद्धदोष बन्दी जिन्हे पैरोल/गृह अवकाश के दौरान किसी अपराध के लिये दोषी ठहराया गया हो।

(x) ऐसे सिद्धदोष बंदी जिन्हे एक से अधिक अपराधिक प्रकरणो में आजीवन करावास के दण्ड से दण्डित किया गया है।

(14) From perusal of the aforesaid provisions, it is crystal clear that Sub-section (viii) and (x) of Section 3 of the Government Order dated 01.08.2018 restricted to release such life-imprisonment prisoners prematurely, who has been held guilty/convicted for any offence during the period of parole/home leave and also restricted to release such life-imprisonment prisoners prematurely, who have been

convicted and sentenced to more than one criminal offences for life imprisonment.

(15) The contention of the learned Counsel for the petitioner is that since the respondent No.6-Hari Shanker was convicted and sentenced for life imprisonment twice, hence he was not entitled to be released prematurely as per sub-section (viii) and (x) of Section 3 of the Government Order dated 01.08.2018 but contrary to the aforesaid Government Order dated 01.08.2018, the respondent no.6-Hari Shanker was released prematurely by means of the impugned order without considering the aforesaid Government Order dated 01.08.2018.

(16) Per contra, learned Counsel for the respondents has supported the impugned order and have contended that respondent no.6 was released as per the Government Order dated 06.09.2004, which was prevalent at the time of conviction of the respondent no.6, hence the contention of the petitioner that Government Order dated 01.08.2018 has not been considered while passing the impugned order of release of the respondent no.6 prematurely has no substance and the same is liable to be rejected.

(17) This Court has perused the photocopy of the record produced by the learned Additional Government Advocate during the course of final hearing of the case. It transpires from perusal of the records that release of the convict/respondent no.6 prematurely was commenced on the application of the convict/respondent no.6, which is reproduced as under :-

सेवा में,

श्री मान वरिष्ठ अधिक्षक
केन्द्रीय कारागार बरेली।

द्वारा– चक्काधिकारी।
महोदय,

सविनय निवेदन करना है कि प्रार्थी हरीशंकर पुत्र राजाराम, निवासी–भदेभर हाल–राजपुर खर्ग थाना–मछरेहटा, जनपद–सीतापुर माननीय न्यायालय अपर सत्र न्यायाधीश/फास्ट ट्रैक कार्ट संख्या–3, सीतापुर द्वारा दिनांक –09.07.2004 को अ0सं0–267/2002, एस.टी. नं0–78/2003, धारा–147, 148, 302/149 आई.पी.सी. के वाद में आजीवन कारावास के दण्ड से दण्डित किया गया है। मेरे द्वारा सी0आर0पी0सी0 की धारा –433ए के अन्तर्गत 14 वर्ष अपरिहार सजा से अधिक सजा भोग ली गयी है। मै समयपूर्व रिहाई का पात्र हो गया हूँ। मेरा कोई अभिभावक नहीं है।

अतः श्रीमान जी से करबद्ध प्रार्थना है कि मेरा अभिभावक जिला प्राबेशन अधिकारी, सीतापुर को नियुक्त कर मेरा फॉर्म ए प्रेषित करने की कृपा करें।

जिला प्रोबेशन अधिकारी
सीतापुर को
निशानी अंगुठा प्रार्थी
प्रमाणित
अग्रसारित हरीशंकर पुत्र राजाराम
वरिष्ठ अधिक्षक जेलर सी0टी0 नं0– 47572
केन्द्रीय करागार केन्द्रीय कारागार केन्द्रीय कारागार
बरेली बरेली बरेली

(18) It appears that on the aforesaid application of the convict/ respondent no.6 showing his conviction in Sessions Trial No. 78/2003, Form "A' was issued by the competent authority to the respondent no.6, wherein at page no.2 also the Senior Superintendent, Central Jail, Bareilly showed the conviction of the respondent no.6 in Sessions Trial No. 78 of 2003. In Jail Report dated 07.12.2017, the Senior Superintendent, Central Jail, Bareilly also showed the conviction of the respondent no.6 in Sessions Trial No. 78 of 2003.

(19) It also transpires from the record that the Superintendent of Police, Sitapur, on the basis of the following report of its subordinate authority dated 11.05.2018,

had not recommended to release the respondent no.6 prematurely.

महोदय,

निवेदन है कि अभि. मु.अ.सं. 171/90 धारा 147, 148, 149, 452, 302 प्च्च्ब्ब् में बन्दी जो पेरोल पर छुटकर घर आया था अभि. द्वारा पुनः अपराध कारित किया गया जो मु.अ.स. 267/02 धारा 147, 148,149, 302 प्च्च्ब्ब् में पंजीकृत है। अभि. जेल में है। समय पूर्व रिहाई होने पर पुनः अपराध कारित कर सकता है। अतः रिहाई का घोर विरोध किया जाता है। सस्तुति नही की जाती है।

(20) The record further reveals that the Committee so constituted under the Chairmanship of District Magistrate, Sitapur to consider the issue of release of the respondent no.6 prematurely had only considered the life imprisonment awarded to the respondent no.6 in Sessions Trial No. 78 of 2003 arising out of Case Crime No. 267 of 2002, under Sections 147, 148, 302/149 I.P.C. and had not considered the conviction and sentence of life imprisonment granted to the convict/respondent no.6 in Sessions Trial No. 187 of 1991. After considering the life imprisonment awarded in Sessions Trial No. 78 of 2003 to respondent no.6, the aforesaid Committee recommended the release of the respondent no.6 prematurely vide report dated 20.06.2018. The Probation Board, vide its resolution dated 26.06.2019, while considering the fact that the respondent no.6 was convicted and sentenced in Sessions Trial No. 78 of 2003 and considering the recommendation of the Committee headed by District Magistrate dated 20.06.2018, recommended to release the respondent no.6. Thereafter, on 19.09.2019, the Probation Board had again considered the issue of release of the respondent no.6 prematurely and after due consideration, recommended to release the respondent no.6 prematurely. Thereafter, impugned order dated 29.11.2019 has been passed for releasing the respondent no.6 prematurely.

(21) In **National Highways Authority of India and others Vs. Madhukar Kumar and others** (Civil Appeal No (s) 11141 of 2018, decided on 23.09.2021), the Apex Court observed that undoubtedly, in India, every State action must be fair, failing which, it will fall foul of the mandate of Article 14 of the Constitution of India.

(22) In the instant case, from perusal of the series of events, as mentioned hereinabove, in regard to consideration of the prayer of the respondent no.6 for premature release, it transpires that although the convict/respondent no.6 was convicted and sentenced to undergo life imprisonment in two murder cases i.e. Sessions Trial No. 187 of 1991 and Sessions Trial No. 78 of 2003, against which separate criminal appeal has been preferred by the respondent no.6 and the same are still pending before this Court but while passing the impugned order dated 29.11.2019, it appears that the factum of conviction and sentence of the respondent no.6 in the the aforesaid two murder cases have not been considered by the State Government and only the factum of conviction and sentence of respondent no.6 in Sessions Trial No. 78 of 2003 has been considered by the State Government.

(23) At this juncture, it is trite law that the prerogative of the executive is subject to the rule of law and fairness in state action embodied in Article 14 of the Constitution. In **State of Haryana v. Mohinder Singh** : (2000) 3 SCC 394, the Apex Court has held that the power of remission cannot be exercised arbitrarily. The decision to grant remission should be

informed, fair and reasonable. The Apex Court held thus:

"9. The circular granting remission is authorized under the law. It prescribes limitations both as regards the prisoners who are eligible and those who have been excluded. Conditions for remission of sentence to the prisoners who are eligible are also prescribed by the circular. Prisoners have no absolute right for remission of their sentence unless except what is prescribed by law and the circular issued thereunder. That special remission shall not apply to a prisoner convicted of a particular offence can certainly be a relevant consideration for the State Government not to exercise power of remission in that case. Power of remission, however, cannot be exercised arbitrarily. Decision to grant remission has to be well informed, reasonable and fair to all concerned."

(24) In **Sangeet v. State of Haryana** : (2013) 2 SCC 452, the Apex Court reiterated the principle that the power of remission cannot be exercised arbitrarily by relying on the decision in Mohinder (supra).

(25) In **Rajan v. Home Secretary, Home Department of Tamil Nadu** : (2019) 14 SCC 114, the Apex Court has made the following observations:

"18. The petitioner would, however, rely on the unreported decision of this Court in Ram Sewak [Ram Sewak v. State of U.P., 2018 SCC OnLine SC 2012] , to contend that this Court may direct the authorities to release the petitioner forthwith and that there is no point in directing further consideration by the State as the petitioner had already undergone over 30 years of sentence and with remission, over 36 years. The order passed by this Court in Ram Sewak [Ram Sewak v. State of U.P., 2018 SCC OnLine SC 2012] , is obviously in the facts of that case. **As a matter of fact, it is well settled by now that grant or non-grant of remission is the prerogative to be exercised by the competent authority and it is not for the court to supplant that procedure. Indeed, grant of premature release is not a matter of privilege but is the power coupled with duty conferred on the appropriate Government in terms of Sections 432 and 433 CrPC, to be exercised by the competent authority after taking into account all the relevant factors, such as it would not undermine the nature of crime committed and the impact of the remission that may be the concern of the society as well as the concern of the State Government.**

.....

20. Thus understood, we cannot countenance the relief claimed by the petitioner to direct the respondents to release the petitioner forthwith or to direct the respondents to remit the remaining sentence and release the petitioner. The petitioner, at best, is entitled to the relief of having directions issued to the respondents to consider his representation dated 5-2-2018, expeditiously, on its own merits and in accordance with law. We may not be understood to have expressed any opinion either way on the merits of the claim of the petitioner. The fact that the petitioner's request for premature release was already considered once and rejected by the Advisory Board of the State Government, in our opinion, ought not to come in the way of the petitioner for

consideration of his fresh representation made on 5-2-2018. We say so because the opinion of the Advisory Board merely refers to the negative recommendation of the Probation Officer, Madurai and the District Collector, Madurai. The additional reason stated by the State Government seems to be as follows:

"(4) The proceedings of the Advisory Board held on 20-1- 2010 is as follows:

(i) The case is heard and examined the relevant records. The accused is a Srilankan National and lodged at Special 13 Camp at Chengalpet before the commission of this grave offence.

(ii) The Probation Officer, Madurai and the District Collector, Madurai have not recommended the premature release.

(iii) Also this prisoner has not repented for his act.

(iv) The plea for premature release is "Not Recommended'.

(5) The Government after careful examination accept the recommendation of the Advisory Board, Vellore and the premature release of Life Convict No. 23736, Rajan, s/o Robin, confined in Central Prison, Vellore is hereby rejected."

With the passage of time, however, the situation may have undergone a change and, particularly, because now the claim of the petitioner for premature release will have to be considered only in reference to the sentence of life imprisonment awarded to him for the offences under Section 302 (3 counts) and Section 307 (4 counts) of IPC, respectively."

(emphasis supplied)

(26) Recently, in **Ram Chander Vs. The State of Chhattisgarh & Anr** (Writ Petition (Crl) No 49 of 2022, decided on 22.04.2022), the Apex Court, after taking note of the aforesaid dictum as well as **Laxman Naskar v. State of West Bengal** : (2000) 7 SCC 626, observed that it makes clear that the Court has the power to review the decision of the government regarding the acceptance or rejection of an application for remission under Section 432 of the Cr.P.C. to determine whether the decision is arbitrary in nature. The Court is empowered to direct the government to reconsider its decision.

(27) Keeping in mind the aforesaid ratio laid down by the Apex Court, this Court finds that while passing the impugned order of premature release of the respondent no.6 dated 29.11.2019, the factum of conviction and sentence of life imprisonment awarded to respondent no.6 by the trial Court in Sessions Trial No. 187 of 1991 arising out of Case Crime No. 171 of 1990, under Sections 147, 148, 452, 149, 302 I.P.C., Police Station Machhrehta, District Sitapur, has not at all been considered by the State. Moreso, the report of the Superintendent of Police, Sitapur, as referred to hereinabove, has also not been considered. Hence, this Court is of the opinion that as the aforesaid action in not considering the life imprisonment awarded to the respondent no.6 in Sessions Trial No. 187 of 1991 arising out of Case Crime No. 171 of 1990, under Sections 147, 148, 452, 149, 302 I.P.C., Police Station Machhrehta, District Sitapur, on the part of the State appears to be arbitrary, therefore, it is a fit case to remit the case of the respondent no.6 for premature release to the State Government for re-consideration.

(D) Conclusion

(28) Resultantly, the instant writ petition is **allowed in part**. The impugned order dated 29.11.2019 is hereby quashed. The issue of premature release of the respondent no.6 is remitted to the State

Government for re-consideration, on its own merits and in accordance with law, after considering all the relevant factors, such as nature of crime committed and the impact of the remission that may be the concern of the society as well as the concern of the State Government and also life imprisonment awarded by the trial Court in two murder cases i.e. in Sessions Trial No. 187 of 1991 and Sessions Trial No. 78 of 2003, expeditiously, preferably, within a period of **three months from today**.

(29) For the period of three months or till fresh decision on remand, whichever is earlier, the respondent no.6-Hari Shanker shall not be taken into custody to serve the sentence as ordered by the trial Court.

(30) It is clarified that this Court has not expressed any opinion either way on the merits of the claim of the respondent no.6.

(31) For the facts and circumstances of the case, there is no order as to costs.

(32) The petitioner as well as the learned Additional Government Advocate shall produce/sent a certified copy of this order to respondent no.1-Principal Secretary (Home), Government of U.P., Lucknow, for necessary information and its compliance forthwith.

(2022)05ILR A1217
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.04.2022

BEFORE

THE HON'BLE JASPREET SINGH, J.

Transfer Application (Civil) 57 of 2019

Vivek Raj Singh ...Applicant
Versus
Civil Judge Junior Division, Shahjahanpur & Ors. ...Opp. Parties

Counsel for the Applicant:
Subhash Vidyarthi, Sarvesh Kumar Dubey

Counsel for the Opp. Parties:
Gyan Singh Chauhan

Civil Law – Civil Procedure Code, 1908 - Sections 16 & 24 - Order 7, Rule 11 - Transfer Application – to transfer the original Suit from district Shahjahanpur to Lucknow – on the ground of threat perception – question of maintainability raised - cause of action for framing and filing of a Suit is altogether different from a cause of action seeking transfer from one district to anr. – if the case is pending before a Court which is within specified area of Oudh only in that respect of such cases where this Court exercise the power of transfer under section 24 of CPC – since, case is not maintainable at Lucknow due to lack of territorial jurisdiction – liberty granted to move file the application in Prayagraj. (Para – 19, 22, 24, 25)

Transfer Application Dismissed. (E-11)

List of Cases cited:-

1. Shri Nasiruddin Vs St. Transport Appellate Tribunal (1975 (2) SCC 671,

2. Smt. Jyotsna Dixit Vs Civil Judge Khiri & ors. (1999 (1) AWC 107),

3. Mahendra Pratap Bhatt Vs Smt. Saroj Mahana (2016 (116) ALR 742).

4. Raja Khan Vs Uttar Pradesh Sunni Central waqf Board & anr. (2010 (15) SCC 228).

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

1. The instant petition for transfer has been moved under Section 24 C.P.C. with the prayer that the Original Suit bearing No. 140 of 2013 pending in the Court of

Civil Judge, Junior Division, Tilhar, District Shahjahanpur be transferred from the said District to the appropriate Court in District Lucknow.

2. The learned counsel for the parties have argued the matter at length dwelling into the merits of the transfer application.

3. In brief the contention of the learned counsel for the petitioner is that the private respondents have instituted a suit for cancellation of a will before the Civil Judge Junior Division, Tilhar, District Sahjahanpur wherein the present petitioner is the defendant. It is also urged that while contesting the proceedings at Tilhar, an unfortunate incident occurred which has the effect of obstructing the course of justice, as an attempt was made by unknown persons but presumably at the behest of the respondent threatening the petitioner to stop pursuing the case.

4. It has also been pointed out that a supplementary affidavit has been filed by the counsel who had gone to argue the case and had received the threat.

5. It is also urged that after the incident occurred, the application moved by the petitioner under Order 7 Rule 11 C.P.C. was dismissed, however, the petitioner assailed the matter before the District Judge at Shahjahanpur which was allowed and the matter was sent back to the Civil Judge, Junior Division, Tilhar. It is also urged that the petitioner have difficulty in contesting the proceedings at Tilhar.

6. Though, the learned counsel for the respondents has refuted the aforesaid contentions and has stated that the allegations are false and have been deliberately incorporated to seek a transfer but apart from controverting the contentions on merit, Sri G.S. Chauhan, learned counsel for the respondent has raised an objection regarding the maintainability of this transfer petition at Lucknow.

7. It is urged that the proceedings of which transfer is sought is pending before the Civil Judge, Tilhar, District Shahjahanpur which is outside the territorial jurisdiction of this Court, inasmuch as, it is beyond the limits of Oudh, hence, the petition for transfer will not be maintainable before this Court at Luckow.

8. A specific query was put to the learned counsel for the petitioner to indicate as to how the instant petition is maintainable at Lucknow and in response Sri Shantanu Sharma, learned counsel for the petitioner has submitted that the suit is in respect of cancellation of a Will which is executed and registered at Lucknow. It is also submitted that the parties are residents of Lucknow and thus part of cause of action arises at Lucknow.

9. He further relied upon the decision of the Apex Court in the case of ***Sri Nasiruddin Vs. State Transport Appellate Tribunual reported in (1975) 2 SCC 671*** and placed reliance on paragraph 38 to submit that in civil cases where even part of cause of action arises within the territorial jurisdiction of Oudh then this Court would have jurisdiction and in this case since the the Will in question was executed and registered at Lucknow, of which the cancellation has been sought, therefore, part of cause of action arises at Lucknow, hence, this Court has ample jurisdiction to try the instant transfer petition which emanates from the said suit.

10. It is further submitted by Sri Sharma, learned counsel for the petitioner that the testator was also a resident of Lucknow and upon her death, the will also became effective at Lucknow as it was also registered with the Sub Registrar at Lucknow, hence, in a suit for cancellation of a Will as in this case, the whole cause of action has accrued at Lucknow.

11. The Court has heard Sri Shantanu Sharma, learned counsel for the petitioner and Sri G.S. Chauhan, learned counsel for the respondent and has also perused the material on record.

12. Since the question of maintainability has been raised, therefore, the Court will first advert to the issue of maintainability on the ground of territorial jurisdiction and if found maintainable then shall proceed to consider the averments of the respective parties on merit.

13. At this stage, it will be relevant to notice the contents of paragraph 38 of the decision of ***Naseeruddin (supra)*** which reads as under:-

"38. To sum up. Our conclusions are as follows. First, there is no permanent seat of the High Court at Allahabad. The seats at Allahabad and at Lucknow may be changed in accordance with the provisions of the Order Second, the Chief Justice of the High Court has no power to increase or decrease the areas in Oudh from time to time. The areas in Oudh have been determined once by the Chief Justice and, therefore, there is no scope for changing the areas. Third, the Chief Justice has power under the second proviso to para 14 of the Order to direct in his discretion that any case or class Allahabad. Any case class of cases are those which are instituted at Lucknow. The interpretation given by the High Court that the word "heard" confers powers on the Chief Justice to order that any case or class of cases arising in Oudh areas shall be instituted or filed at Allahabad, instead of Lucknow is wrong. The word "heard" means that cases which have already been instituted or filed at Lucknow may in the para 14 of the discretion of the Chief Justice under the second proviso to Order be directed to be heard at Allahabad. Fourth, the expression cause of action with regard to a civil matters means that it should be left to the litigant to institute cases at Lucknow Bench or at Allahabad Bench according to the cause of action arising wholly or in part within either of the areas. 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. Fifth, a criminal case arises when the offence has been committed or otherwise as provided in the Criminal Procedure Code. That will attract the jurisdiction of the Court at Allahabad or Lucknow. In some cases depending on the facts and the provision regarding jurisdiction, it may arise in either place."

14. From the perusal of the aforesaid, it will be noticed that the Apex Court clearly held that in civil cases where the cause of action arise outside the specified areas in Oudh then Allahabad will have the jurisdiction. While if the cause of action in part arises in the specified Oudh areas and

part of cause of action outside the specified areas, it will be open for the litigant to frame the case appropriately to attract the jurisdiction either at Allahabad or at Lucknow.

15. It will be relevant to notice that the instant case has been preferred for transfer of proceedings which are admittedly pending before the Civil Judge, Junior Division, Tilhar, District Shahjahanpur. It is not in dispute that Tilhar, in district Shahjahanpur, is outside the specified areas of Oudh. Ordinarily, the matters relating to District Shahjahanpur are not within the jurisdiction of this Court unless ofcourse a part of cause of action arises within the jurisdiction of this Court within the specified areas of Oudh.

16. It is in this context if the pleadings delivered by the petitioners are noticed, it would reveal that though the will may have been executed and registered at Lucknow but it relates to a property situate within the territorial jurisdiction of District Shahjahanpur. It is for the said reason that the suit was instituted in terms of provisions of Section 16 of C.P.C. in District Shahjahanpur.

17. However, what is material for the present controversy is not the will in question rather it is the threat perception which has been perceived by the petitioner which has given the cause of action to initiate the proceedings under Section 24 C.P.C.

18. A suit relating to an immovable property is to be filed within the territorial jurisdiction where the such property situate in terms of Section 16 C.P.C. which reads as under:

"16. Suits to be instituted where subject matter situate:- Subject to the pecuniary or other limitations prescribed by any law, suits

(a) for the recovery of immovable property with or without rent or profits,

(b) for the partition of immovable property,

(c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property,

(d) or the determination of any other right to or interest in immovable property,

(e) for compensation for wrong to immovable property,

(f) for the recovery of movable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate:

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

Explanation.-- In this section "property" means property situate in 1[India]"

19. The cause of action for framing and filing of a suit is altogether different from a cause of action seeking transfer from one district to another.

20. In ***Smt. Jyotsna Dixit v. Civil Judge, Khiri and others, reported in 1999 (1) A.W.C. 107***, this Court had the occasion

to consider the issue regarding the exercise of territorial jurisdiction in respect of a transfer petition under Section 24 CPC and in the said case a transfer of a suit pending before the Court of Civil Judge, Khiri was sought to be transferred to appropriate Court in District Varanasi and the transfer petition was filed at Allahabad. After considering the decision of ***Naseeruddin (supra)***, the Court in Paragraph-11 held as under:-

11. Now in the present case, the cause of action for the application under Section 24 of the Code, arose on the initiation of proceedings at Lakhimpur Khiri. Solemnisation of marriage at Varan as 1 may be a cause of action for the matrimonial proceeding and the petitioner may be said to be entitled to initiate proceeding, if she so wishes at Varanasi, but such cause of action is distinct and separate from the cause of action for initiation of proceedings under Section 24 of the Code. Such cause of action for transfer of the case arises at initiation of the proceedings at the Court where the plaintiff had instituted the suit. There cannot be any part of the cause of action for transfer of the suit at any place outside Lakhimpur Khiri where the suit has been instituted. Then again. It is a suit pending before the Court within the specified area of Oudh, in respect whereof the Court at Allahabad is precluded from exercising jurisdiction by reason of the compartmentallsation which is peculiar to Uttar Pradesh. It is the Court at Oudh, namely. Lucknow Bench which has jurisdiction in respect of Lakhimpur Khiri by reason of the determination by the Chief Justice under paragraph 14 of the 1948 Order. The suit instituted at Lakhimpur Khiri is sought to be transferred. Lakhimpur Khiri is situated within the Oudh area. It is only the Court at Lucknow can exercise jurisdiction in respect of the said suit. The contention that the Lucknow Bench cannot order transfer to a place outside its prescribed area, is wholly impermissible inasmuch as it can direct transfer of a case pending within its area even to a Court outside its area. It is the question of transferring a suit pending at Lakhimpur Khiri which can be exercised by Lucknow Bench. Allahabad Bench could not exercise jurisdiction in respect of the suit pending at Lakhimpur Khiri even for the purpose of transferring the same to a Court within its Jurisdiction, namely, at Varanasi."

20. In ***Mahendra Pratap Bhatt v. Smt. Saroj Mahana***, reported in ***2016 (116) ALR 742***, the issue before the Division Bench arose from an order passed by the learned Single Judge exercising powers under Section 24 CPC whereby it had referred the matter for mediation at Lucknow in respect of proceedings which were pending before the Court at Allahabad. The Division Bench found that since the matter was pending at Allahabad, the Court did not have the jurisdiction to pass an order referring the matter to the Mediation Centre at Lucknow simply on the ground that an FIR was lodged at Lucknow as this FIR lodged at Lucknow would not make any difference as the whole cause of action for a matrimonial proceedings were within the territorial jurisdiction at Allahabad. The relevant portion of the aforesaid judgment in Mahendra Pratap Bhatt (supra) specially paras 6, 14, 15, 19, 20 and 21 reads as under:-

"6. Chapter VIII Rule 5 of the Allahabad High Court Rules makes a provision for appeal against the orders of

learned Single Judges which is an intra-court appeal subject to the limits provided therein. The dispute in the present appeal arises out of an application filed under Section 24 CPC before the learned Single Judge of this Court in a cause of action relating to the Family Court at Allahabad. A Division Bench of this Court in the case of Amit Khanna v. Smt. Suchi Khanna, 2009 (1) AWC 929, considered the same issue and came to the conclusion in paragraph 21 as follows:

"21. According to above provision no appeal is maintainable from any order of the Court passed in exercise of its original or appellate jurisdiction, except against orders which have been made appealable under Section 104 C.P.C. Undisputedly, an order passed on an application under Section 24 C.P.C. has not been made appealable under any provision of the C.P.C. including Section 104 C.P.C. Right to appeal is not inherent unless it is specifically provided by the statute. Since the Code of Civil Procedure does not specifically provide for an appeal against an order passed on a transfer application and at the same time by implication excludes an appeal against such an order by virtue of Section 105 C.P.C., therefore, merely for the reason Rule 5 Chapter VIII of the Rules of the Court, 1952 is silent in this regard it would not confer jurisdiction of appeal. If any contrary interpretation is made and the appeal is held to be maintainable it would amount to conferring jurisdiction of appeal which otherwise is not specifically provided but is expressly as well as by implication excluded by Section 105 C.P.C. Thus, in the above scenario the right of special appeal as contemplated by Rule 5 Chapter VIII of the Rules of the Court, even though the same is independent to the provisions of C.P.C., against the order of the single judge passed on a transfer application under Section 24 C.P.C. stands impliedly excluded. "

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"14. A case that has also come at hand is the decision in Special Appeal No.973 of 2010, U. P. Sunni Central Waqf Board & Anr. Vs. Raja Khan & Ors. decided on 5.8.2010. In that case, the issue was an order passed by a learned Single Judge issuing notices and passing an interim order in a writ petition arising out of a Civil Suit that was filed before the learned Civil Judge, Hamirpur in a matter relating to district Bahraich. There was a previous history of the litigation also which has been discussed in the said judgment but for the present purpose, suffice it to say that Bahraich falls within the territorial jurisdiction of the High Court at Lucknow and not at Allahabad. Yet, the Suit was filed in Hamirpur which falls within the territorial jurisdiction of Allahabad, and since the Munsarim had made a report that the Suit was not cognizable at Hamirpur, a writ petition was filed against the said report before the High Court at Allahabad in which orders were passed by a learned Single Judge. This was subjected to a Special Appeal in the above mentioned case and the Court allowed the Appeal imposing costs and set aside the judgment of the learned Single Judge in the aforesaid circumstances.

15. The aggrieved party assailed the aforesaid judgment of the Division Bench, to which one of us [Justice A.P. Sahi] was a member, before the Apex Court and the same was upheld with remarks which judgment is reported in 2011 (2) SCC 741, Raja Khan v. Uttar Pradesh Sunni Central Waqf Board and another. The said judgment was subjected to review for expunging of such remarks which was disposed of and the same is reported in

2010 (15) SCC 228, Raja Khan v. Uttar Pradesh Sunni Central Waqf Board and another.

19. In the instant case, the learned Single Judge has assumed jurisdiction to send the matter for mediation at Lucknow on a stated submission which according to the learned Single Judge was a concession."

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"20. We are of the considered opinion that a jurisdiction cannot be assumed on the concession of the counsel for the parties or even otherwise, in a matter that squarely relates to the dispute at Allahabad.

21. Merely because the opposite party had lodged an F.I.R. at Lucknow and instituted a criminal case, the same would not make the application under Section 24 CPC maintainable in relation to the dispute pending before the Family Court at Allahabad. This assumption, therefore, by the learned Single Judge in our considered view is not the correct view for assuming jurisdiction that is totally lacking."

22. Applying the principles to the instant case, it is found that the averments made in the petition relates to the threat received by the counsel for the petitioner while he was arguing the case before the Court in Tilhar district Shahjahanpur. The difficulty is being faced at Tilhar. Thus, the cause of action for the instant petition for transfer wholely accrues at District Shahjahanpur which is beyond the specified area of Oudh.

23. In matters relating to transfer of a case from one district to another, it is to be noticed that if the case is pending before a Court which is within the specified area of Oudh only in respect of such cases does this Court exercises the powers of transfer under Section 24 C.P.C.

24. In the instant case, the petition for transfer relates to a suit pending in District Shahjahanpur which as noticed above, is beyond the specified area of Oudh, accordingly, this Court has no hesitation to hold that the instant case is not maintainable here at Lucknow. Since the Court has come to the conclusion that it does not have the territorial jurisdiction to entertain the matter, hence, for the said reason the Court does not deem appropriate to examine the averments of the respective parties on merits.

25. The petition is dismissed solely on the ground that it is not maintainable at Lucknow, however, liberty is granted to the petitioner to move the appropriate Court in Prayagraj.

(2022)05ILR A1223
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.03.2022

BEFORE

THE HON'BLE MOHD. ASLAM, J.

Application U/S 378 No. 54 of 2017

Smt. Habiba ...Applicant
Versus
The State of U.P. & Ors. ...Respondent

Counsel for the Petitioners:
Zafar Abbas

Counsel for the Respondents:
G.A.

Criminal Law – Criminal Procedure Code,1973 - Sections 156(3), 200, 202, 246, 378 & 378 (4) - Indian Penal

Code,1860 - Sections 498-A & 323 - Leave to prefer Appeal - against judgment & order of acquittal – complaint - filed by a free minded women *(Azad khayaal)* – quarrel between closed relatives - no injury case – no prove of maltreatment – contradiction in St.ments of complainant and her witnesses – hence, all the summoned opposite parties are acquitted from Charges – Prosecution case is not proved beyond reasonable doubt – held, that duty of Court to punish the guilty person when guilt is established beyond reasonable doubt not less than – even it is not a case of two opinion can be drawn - accordingly, appeal dismissed.(Para – 5, 9, 10)

Appeal Dismissed. (E-11)

(Delivered by Hon'ble Mohd. Aslam, J.)

1. Heard Sri Zafar Abbas, learned counsel for the applicant and Sri Sanjay Sharma, learned A.G.A. for the State and perused the record.

2. The instant application has been moved by applicant under Section 378(4) of Cr.P.C. for granting leave to prefer appeal against the judgement and order of acquittal dated 15.3.2017 passed by learned Additional Chief Judicial Magistrate, Court No. 12, Azamgarh in Criminal Complaint Case No.1574 of 2016 (Smt. Habiba Vs. Jamal Ahmed and another).

3. The brief facts of the case is that the complainant moved an application under Section 156(3) Cr.P.C. on 1.12.2009, which was treated as complaint alleging therein that her marriage was solemnized with opposite party no.2 Jamal Ahmed on 21.5.2008 in the village Asadha, Police Statio- Saraimeer, District- Azamgarh according to Muslim Rights and Ceremonies. Opposite party no.2 is the resident of Village Bisaham, Police Station- Mehnagar, District- Azamgarh. After her marriage she went to the house of opposite party No.2 and performed her obligations as wife. After sometime they blessed with a son namely Ismaile. The family members of her in-laws are very rich, but they are very greedy for dowry. After sometime of marriage, her husband Jamal Ahmed, mother-in-law Farzana, Nanad Nazia began to taunt her for bringing meagre dowry and starting creating pressure upon her for bringing Rs.3,50,000/- from her father so that Jamal Ahmed may go to abroad or may purchase a shop. On account of non-fulfilment of the demand, they used to taunt and harass her and were also not giving her sufficient food. They were torturing her physically and mentally. On 8.8.2008 at about 10:00 a.m., she was beaten by them and driven out from the house with only clothes which she wore and they retained her remaining clothes and ornaments. Anyhow she reached at the house of her parents weeping and told the entire incident to her parents. She did not sustain any visible injury, therefore, she was not subjected to medical examination. She went to the Police Station- Mehnagar to lodge the report along with her father, but the Station House Officer of that police station assured them stating that wait he will registered the case against the accused after inquiry he will arrest them, but no action was taken by him. Thereafter, she visited the Circle Officer and apprised him regarding the incident, but no action was also taken. Thereafter, she sent an application by registered post on 8.9.2009 to the Senior Superintendent of Police, Azamgarh, but again no action was taken. Thereafter, the application under Section 156(3) of Cr.P.C. was moved on 1.12.2009, which was treated as complaint vide order dated 1.12.2009.

4. Learned Judicial Magistrate has recorded the statement of complainant Smt. Habiba under Section 200 of Cr.P.C. and also recorded the statements of Kashif and Sahabuddin under Section 202 of Cr.P.C. and after hearing the learned counsel for the complainant vide order dated 9.8.2010 has summoned opposite party no.2 Jamal Ahmed and opposite party no.3 Farzana for facing trial for offence punishable under Sections 498-A & 323 I.P.C. Thereafter, opposite party nos.2 & 3 appeared and the statement of Smt. Habiba was recorded as PW-1 and Kashif was recorded as PW-2 under Section 244 of Cr.P.C. Thereafter, charges of offence punishable under Sections 498-A & 323 I.P.C. was framed against the accused opposite party nos.2 & 3 to which they have not pleaded guilty and claimed to be tried. PW-1 Smt. Habiba and PW-2 Kashif were cross examined at the stage of Section 246 of Cr.P.C. and witnesses Shahabuddin (PW-3) and R.V. Yadav (PW-4) were also examined at the stage of Section 246 of Cr.P.C.

5. Learned lower court after appreciating the evidence of witnesses has held that in cross examination the complainant has stated that her first marriage was taken place with Asif who is resident of village Chhaun, District Azamgarh on 25.12.2006 and no child was born out of that wedlock. She has further admitted that she did not go to village Chhaun second time after marriage. She went to Bhimandi and remained there for five months and being tensed with her in-laws family she came to her parental home, thereafter, her first husband divorced her in year 2008. She has further stated that after that she married with Jamal Ahmed. She has further admitted that it was the first marriage of Jamal Ahmed. Kashif (PW-2) has stated that he is the brother of complainant and Jamal Ahmed is son of his maternal uncle. Learned lower court has held that there are contradictions in the statement of complainant and complainant witnesses. Learned lower court has also held that the marriage of Smt. Habiba with Jamal Ahmed was taken place under pressure of her maternal grandfather Athar Ali. She has also admitted in her cross examination that when she first time went to her in-laws house she felt no problem. She was harassed and maltreated thereafter, but has not given the detail in what manner she was harrassed and maltreated. Kashif (PW-2) has also stated that when Smt. Habiba went to her in laws house she lived there happily. He has further stated that her second marriage has taken place with Jamal Ahmed and out of their wedlock a son namely Ismaile was born. Learned lower court has also held that the complainant and her husband are close relatives. Learned lower court has also held that no injury was found on the body of complainant which establishes that she was not beaten and maltreated. The defence witness Matin as has stated that complainant is free minded (azad khayaal) women. Due to her incompatibility, her first husband has given divorce to her. There was no chance of her second marriage. The complainant was close relative of Jamal Ahmed and her marriage with Jamal Ahmed was taken place under pressure of her maternal grandfather without any dowry. Her husband and her mother-in-law never maltreated her or demanded dowry and held that offence punishable under Sections 323, 498-A I.P.C. is not made out against accused Jamal Ahmed and Farzana and has acquitted them from the above charges vide impugned judgement against which the application for grant of leave to prefer appeal has been filed.

6. It is contended by learned counsel for the applicant that from the statement of PW-1, PW-2, PW-3 it is proved that opposite party no.2 has demanded dowry of

Rs.3,50,000/- and when the applicant failed to fulfil the demand, the applicant was kicked out from her in-laws house on the very same year of marriage, but learned lower court without considering the said evidence has illegally acquitted the opposite party nos.2 & 3. It is further contended that the complainant as well as all the witnesses of the fact established and proved the case against opposite party nos.2 & 3 for offence punishable under Sections 498-A I.P.C., but they were illegally acquitted by learned lower court. It is further contended that the learned lower court has over looked and failed to consider the ingredients of Section 498-A I.P.C. It is further contended that from perusal of the complaint and the statement of the witnesses before the court, the offence punishable under Section 498-A I.P.C. is proved without any reasonable doubt against opposite party nos.2 & 3. It is further contended that there was ample evidence to prove the offence punishable under Sections 498-A, 323 I.P.C., but learned Judicial Magistrate has illegally held that the case of complainant for offence punishable under Sections 498-A, 323 I.P.C. is not proved and illegally acquitted the opposite party nos.2 and 3. On these grounds, learned counsel for the applicant has contended that this court may graciously be pleased to grant leave to prefer appeal against the impugned judgement and order of acquittal.

7. Learned A.G.A. has opposed the application and has contended that the second marriage of the complainant has taken place with the son of her maternal uncle in close relation. It is further contended that the applicant is quarrelsome lady and her divorce has taken place with her previous husband and thereafter her second marriage has taken place with opposite party no.2. It is further contended that she is non-compatible so she used to quarrel with her husband and his family members. It is further contended that there is no infirmity in the impugned judgement and order of the lower court by which the opposite party nos.2 & 3 were acquitted from the charges of offence punishable under Sections 498-A, 323 I.P.C. and prayed that the application for grant of leave to prefer appeal is liable to be dismissed.

8. I have gone through the file and lower court record including the depositions of the witnesses. From perusal of the complaint and the testimonies of the witnesses, it is proved that second marriage of the complainant has taken place on 21.5.2008 with opposite party no.2 Jamal Ahmed. From the evidence on record, it is also proved that opposite party no.3 Farzana is her mother-in-law. It is not disputed that they were blessed with a son named Ismaile. She had stated in her statement recorded under Section 200 of Cr.P.C. that the demand of dowry of Rs.3,50,000/- was demanded after two months of marriage. She has categorically stated that her son was born in June, 2009, who is living with her. She has also stated that she has driven out from in-laws house on 8.8.2008, thereafter, she did not go to her husband's house. Witness Shahabuddin is her Mausa. Witness Kashif is her brother. PW-1 Smt. Habiba in her statement recorded under Section 246 of Cr.P.C. has stated that her first marriage was taken place with Asif resident of village Dhaaun, Police Station Gambhirpur, District Azamgarh on 25.12.2006. After marriage, she did not go to village Dhaaun second time. Thereafter, she went to Bhimandi, Maharastra and remained there for five months and returned thereafter due to tension in her family and did not go to the resident of her first husband. She has

further stated that there was some quarrel with her family members of in-laws between her. She did not file any complaint against her first husband and her family members. She was divorsed by her first husband in February, 2008. She showed ignorance regarding payment of maintenance during iddat by her first husband after divorce. She has further stated that divorce with her first husband was taken place with mutual consent. She has further stated that her maternal uncle Athar father of the accused Jamal Ahmed was in Dubai at the time of her marriage. She has further stated that her family members of in-laws forbade her not to make complaint regarding dowry to her maternal grandfather. She has further stated that she remained in her in-laws house only for one month and thereafter she came to her parents house after bidai and since then she is living in her parents house. She has further stated that the relations of her Mausa Shahabuddin and Jamal Ahmed was tensed. She has further stated that after the divorce from her first husband her son was born after 11 months. She has admitted in her statement that her first husband has divorced her in February, 2008 and her marriage with Jamal Ahmed was taken place on 21.5.2008. From perusal of the statement of Smt. Habiba (PW-1), it is clear that she has admitted that she went to the house of her in-laws once and thereafter her brother visited to her and taken her back to his home.

9. In above circumstances, I find it justified that prosecution case is not proved beyond reasonable doubt and learned lower court has rightly acquitted the accused from the charges of offence punishable under Sections 498-A, 323 I.P.C. From above discussion, it is proved that the complaint was filed on false and frivolous ground. A special leave to appeal could be granted only where the view taken by acquitting judge is clearly unreasonable, it is the duty of the court to punish the guilty person when the guilt is established beyond reasonable doubt not less than, it is the duty to acquit the accused when it is not so established.

10. In such circumstances, the impugned judgement and order of acquittal is justified and even it is not a such case in which two opinion can be drawn. Accordingly, I find no merit in the application for special leave to appeal and consequently, the application for special leave to appeal is dismissed.

11. Lower court record be returned back to the concerned court forthwith.

(2022)05ILR A1227
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.05.2022

BEFORE

THE HON'BLE RAJAN ROY, J.

Writ-A No. 9049 of 2020

Anand Kumar Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Srideep Chatterjee

Counsel for the Respondents:
C.S.C., Abhinav Trivedi, Avadhesh Kumar Singh, Baldev Singh, Dr. V.K. Singh, Shubham Tripathi

Civil Law – Constitution of India,1950 – Article 226, - UP King George Medical University Act, 2002 - Sections 4, 13, 42(1) & 42(2) - UP Recruitment of Dependants of Government Servants (Dying-in-Harness) Rules, 1974 - Rule - 5 – Compassionate Appointment – father of petitioner died-in-harness – Complaint received

that petitioner obtained such Appointment illegally by concealing the factum of his mother's employment in KGMU - Disciplinary Enquiry initiated – Charges were framed - petitioner replied – Enquiry Officer exonerated him on the ground that family members of several other compassionate appointees have already employed in KGMU – enquiry report was accepted by Vice Chancellor - Second complaint received – at this time St. Govt. issued the impugned orders - to initiate Impugned Disciplinary proceeding against petitioner as well as against all other similar appointee including against the earlier Enquiry Officer – Writ Petition – interim protection in favour of petitioner - Court held that, while exercising the writ jurisdiction under Article 226 – A writ court is not for scuttle any such disciplinary proceedings nor to protect any possible illegality – hence writ Petition disposed of - with directions to the Registrar of KGMU to take the disciplinary proceedings to its logical end of justice as per law accordingly. (Para – 32, 33, 35, 38, 39)

Writ Petition Disposed of. (E-11)

List of Cases cited: -

1. Mohd. Zamil Ahmed Vs St. of Bihar & ors. - (2016 (2) ESC 242 (SC),

2. Sumit Kumar Verma Vs St. of U.P. & ors. - Writ - A No.755 of 2022).

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard Sri S.K. Kalia, learned Senior Advocate assisted by Sri Srideep Chaterjee, learned counsel for the petitioner, Sri Subham Tripathi, learned counsel for King George Medical University, Lucknow (KGMU). Dr. V.K. Singh, learned counsel for the applicant/complainant seeking impleadment has also been heard.

2. By means of this petition the petitioner has challenged the Government Order dated 02.06.2020 so far as it relates to issuance of directions to the appointing/disciplinary authority of the petitioner for taking appropriate decision with respect to the appointment of the petitioner. It has also been prayed that the petitioner be allowed to work on the post of Head Assistant and be paid regular salary as and when the same falls due.

3. Pleadings have been exchanged.

4. This Court on 18.06.2020 had asked Sri Abhinav Narain Trivedi, learned counsel for the KGMU to file a counter affidavit bringing on record the final decision which may have been taken on the inquiry report submitted by Dr. Abbas Mehndi. It was further ordered that any action taken in the meantime shall abide by further orders/decision in this petition. Subsequently, the matter was taken up on 06.07.2020 when Sri Abhinav Narain Trivedi sought an adjournment and an interim protection was given to the petitioner that till 08.07.2020 no final order shall be passed in the impugned proceedings by the concerned opposite parties, however, the interim order shall not be extended on the next date without hearing unless it is impossible to hear the matter. The interim order has continued since then.

5. The undisputed facts before the Court are that the father of the petitioner was employed as Chowkidar. He died in harness on 30.11.2003. The mother of the petitioner, namely, Manju Mishra who was already employed as Sick Attendant in KGMU itself, submitted an application on 16.12.2003 for providing compassionate appointment to her son i.e., the petitioner. The petitioner also applied for such compassionate appointment on 19.12.2003. The factum of his mother being already employed in KGMU was not mentioned in

his application. Even in the application of the mother this fact was not mentioned. He was appointed as Junior Clerk on compassionate basis on probation period of one year on 21.04.2004 with the approval of the Vice Chancellor. His services were confirmed on 27.07.2005 and he was promoted as Senior Clerk on 31.05.2006. He was thereafter promoted as Senior Assistant on 01.09.2010. Thereafter, as a result of cadre restructuring, he was made Head Assistant on 02.01.2015.

6. On 04.07.2018 a complaint was made by an Advocate, namely, Anand Kumar Pandey about the petitioner having secured compassionate appointment illegally by concealing the fact that his mother was already employed in KGMU on the date he was given such compassionate appointment and that she continued to be in such employment. On receipt of such complaint, the Under Secretary, Medical Education Department of the Government of U.P. wrote to the Registrar, KGMU, Lucknow on 20.07.2018 to provide point-wise report on the complaint dated 04.07.2018. On 06.09.2018, a reminder was sent to the Registrar, KGMU by the Government in this regard.

7. On 28.12.2018 the State Government, in response to the letter of Registrar, KGMU dated 26.09.2018 seeking its guidance in the matter of alleged illegal appointment of the petitioner by concealing relevant facts, informed him about Rule 5 of U.P. Recruitment of Dependent of Government Servants (Dying-in-Harness) Rules, 1974 and that the matter be examined and appropriate action be taken by him in his capacity as appointing authority, as per Rules.

8. On 22.02.2019 disciplinary proceedings were initiated against the petitioner and a charge-sheet was issued to him on 22.02.2019 itself with approval of the Registrar. The petitioner submitted his reply on 07.06.2019 inter alia stating therein that he was not aware about the Rule position or legal position on the subject of compassionate appointment, as such, there was no concealment on his part while applying for the same and also that other similar compassionate appointments of same nature have been made of persons whose family members were already employed with KGMU giving nine such names. He submitted supplementary reply on 28.09.2019 denying the application Form (not the letter dated 19.12.2003) relied upon by the opposite parties by saying that it was neither in his writing nor it had been signed by him. On 05.12.2019 an inquiry report was submitted by the Enquiry Officer. The Registrar in its wisdom although he was appointing/disciplinary authority of the petitioner placed the matter before the Vice Chancellor who as per noting dated 14.01.2020 accepted the inquiry report and approved exoneration of the petitioner from the charges levelled against him. The Registrar who was the appointing/disciplinary authority did not pass any final order in the matter.

9. Sri Subham Tripathi, learned counsel for KGMU informed the Court during the course of argument that against any order of punishment or order terminating the services of an employee such as the petitioner, appeal lies before the Vice Chancellor under Statute 14 (iv) of the Chatrapati Shahuji Maharaj Medical University First Statutes, 2011. Thus, the final order was not passed by the

appointing/Disciplinary authority but by the appellate authority.

10. On 27.04.2020, the complainant again made a complaint to the State Government whereupon a D.O. letter dated 01.05.2020 was issued to the Registrar, KGMU, Lucknow referring to the earlier order of the State Government dated 28.12.2018 asking him to submit point-wise report on the complaint dated 27.04.2020. On 08.05.2020, the Registrar responded to the letter of the Government mentioning relevant facts including the inquiry report as also new facts which had come to light regarding several other compassionate appointments having been made where family members were already employed in KGMU and also stating that in view of these facts a fresh inquiry had been ordered in respect of such other appointments which were similarly made, and Prof. Abbas Mehndi, Professor, Department of Biochemistry, KGMU had been appointed as the Enquiry Officer. It refers to the approval of the Vice Chancellor dated 19.02.2020 for the aforesaid fresh action and that based on the report, further action shall be taken.

11. On 02.06.2020, the impugned Government Order was issued by the State Government wherein serious objections were raised as to findings of the Enquiry Officer exonerating the petitioner in disregard of Rules of 1974 merely because nine other similar compassionate appointments had been made. The State Government disagreed with the entire exercise as also the report of the Enquiry Officer. It also directed for action against the Enquiry Officer. It also directed the appointing authority/disciplinary authority to take a decision with regard to petitioner's appointment as per Rules. A direction was also issued for completing the inquiry against other similar appointees and taking action as per Rules. It is this Government Order which is impugned.

12. In this context it is not out of place to mention that under Section 42 (1) of the 2002 Act, the First Statutes of the University (KGMU) shall be made by the State Government, by notification, provided that, for so long as the first statutes are not so made, the Statues of the Lucknow University as immediately before the appointed date insofar as they are not so inconsistent with the provisions of this Act, shall, subject to such adaptation and modification whether by way of repeal, amendment or addition, as may be necessary or expedient, as the Statement Government may, by notification provide continue in force, and any such adaptation or modification shall not be called in question. In this context, the Court may refer to Statute 39 of the first Statutes of the Lucknow University as amended in 2001, which reads as under:

"39.00. यदि किसी स्थायी कर्मचारी की सेवा में रहते हुए मृत हो जाय और मृत कर्मचारी की पत्नी या पति (जैसी भी स्थिति हो) केन्द्रीय सरकार या किसी राज्य सरकार या केन्द्रीय सरकार के स्वामित्याधीन या उसके द्वारा नियंत्रित किसी निगम (जिसमें विश्वविद्यालय भी शामिल है) के अधीन पहले से सेवायोजित न हो तो उसके कुटुम्ब के ऐसे एक सदस्य को जो, केन्द्रीय सरकार या राज्य सरकार के स्वामित्याधीन या उसके द्वारा नियंत्रित किसी निगम (जिसमें विश्वविद्यालय भी शामिल है) के अधीन पहले से सेवायोजित न हो महाविद्यालय में सीधी भर्ती के तृतीय श्रेणी या चर्तुथ श्रेणी के रिक्त शिक्षणोत्तर पद पर नियुक्ति के लिए कर्मचारी की मृत्यु के दिनांक से 05 वर्ष के भीतर आवेदन पत्र देता है और ऐसे रिक्त शिक्षणोत्तर पद के लिए न्यूनतम शैक्षिक अर्हता रखता हो प्रबन्धतंत्र द्वारा निदेशक, उच्च शिक्षा के पूर्व अनुमोदन से चयन की प्रक्रिया और अधिकतम आयु सीमा को शिथित करके नियुक्ति किया जा सकता है।

स्पष्टीकरण – इस परिनियम के प्रयोजन के लिए–

1 "आश्रित" का तात्पर्य मृतक के पुत्र उसकी पुत्री अविवाहित या विधवा पुत्री, पुत्र उसकी विधवा या उसका विधुर।

2 "कर्मचारी" के अन्तर्गत संस्था में कार्यरत अध्यापक भी है।"

13. The aforesaid statute very clearly provides that if wife or husband of a permanent employee, who dies in harness, is not already employed under the Central Government or any State Government (in which the University is included), a member of his family who is not already employed may be appointed by the management, etc.

14. In view of Section 42 (1) of the 2002 Act Statue 39 of the First Statues of Lucknow University applies for compassionate appointment in KGMU also and there is an embargo in the said provision regarding appointment of a family member of a deceased employee if husband or wife of the deceased is already employed under the Central Government or the State Government, including the University which in this case is the King George Medical University.

15. Statute 39 as quoted hereinabove was inserted in 2001 that is prior to petitioner's appointment in 2004.

16. A similar provision is contained in Rule 5 of the U.P. Recruitment of Government Servant (Dying-in-Harness) Rules, 1974. Said Rule 5 as it existed at the time of petitioner's appointment vide notification dated 20.01.1990 - 5th amendment to Rules 1974 read as under:

*"5. **Recruitment of a member of the family of the deceased.**-(1) In case a Government servant dies in harness after the commencement of these rules and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a suitable employment in Government Service on a post except the post which is within the purview of the Uttar Pradesh - Public Service Commission, in a relaxation of the normal recruitment rules, if such person*

(1) Fulfills the educational qualifications prescribed for the post,

(ii) is otherwise qualified for Government service, and

(iii) makes the application for employment within five years from the date of death of the Government Servant:

Provided that where the State Government is satisfied that the time limit fixed for making the application for employment causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner.

(2) As for as possible, such an employment should be given in the same department in which the deceased Government Servant was employed prior to his death"

17. Thus, Rule 5 of the 1974 Rules as amended in 1990 also imposes an embargo on compassionate appointment where spouse of the deceased is already employed.

18. The Court was informed about a decision of Executive Council dated

31.08.2004 of the University that the Rules which are applicable to State Government employees will apply to employees of KGMU till it frames its own Rule with the approval of the State Government. Referring to this resolution, it was argued that Rules of 1974 will apply. Although even as per Rule 5 of Rules of 1974 there is an embargo/prohibition in making such appointment if the spouse of the deceased is already employed, the legal basis of this decision appears to be shaky in view of Section 42 (1) of the Act 2002. Moreover, the appointment of the petitioner having been made prior to the decision dated 31.08.2004 i.e., on 21.04.2004, this argument even otherwise is not acceptable. In this case Statute 39 of Lucknow University will apply. Even if Rule 5 of Rules of 1974 were to apply it would not make any difference as it also contains similar embargo, therefore, reference to Rule 5 of Rules of 1974 in the charge-sheet issued to the petitioner or any other document will not by itself enure to his advantage as similar provision is contained in Statute 39 referred hereinabove nor will it prejudice the University.

19. Moreover, the object behind such compassionate appointment is to provide immediate financial assistance to a family which would be in financial distress after death of the bread earner. It is not intended to be a windfall for the family in the sense that there is no such legislative mandate/obligation that even if it has sufficient means to sustain itself and has other family member(s) in employment, even then such appointment has necessarily to be provided. It is not so. It is not as a matter of an indefeasible right.

20. The charge against the petitioner is that at the time of applying for compassionate appointment his mother was already employed as "Aaya" (Sick Attendant) but this fact as also the fact relating to income was concealed and compassionate appointment was obtained by misleading the University.

21. The contention of Sri Kalia was that the State Government did not have any authority/jurisdiction to direct KGMU to act in a particular manner that too after making observations on merits of the charges against the petitioner and findings recorded by the Enquiry Officer, therefore, the Government Order being without jurisdiction is liable to be quashed. In this context, he referred to Section 13 of the U.P. King George Medical University Act, 2002, which has been relied by counsel for opposite parties, to submit that the eventualities and circumstances mentioned therein are not at all attracted in context of the orders passed by the Government as impugned herein, therefore, the said Government Order is not referable to Section 13.

22. Section 13 reads as under:

"13 (1) The State Government shall have the right to cause an inspection to be made by such person or persons. as it may direct, of the University including its buildings, libraries, laboratories, workshops and equipment and also of the examinations teaching and all other works conducted or done by the University or, to cause an inquiry to be made in the like manner in respect of any matter connected with the administration and finances of the University.

(2) Where the State Government decides to cause an inspection or inquiry to be made under sub-section (1), it shall inform the University of the same through

the Registrar, and any person nominated by the Executive Council may be present at such inspection or inquiry as representative of the University and he shall have the right to be heard as such:

Provided that no person shall appear, plead or act as legal practitioner on behalf of the University at such inspection or inquiry.

(3) The person or persons appointed to inspect or inquire under sub-section (1) shall have all the powers of a civil court, while trying a suit under the Code of Civil Procedure, 1908, for the purposes of taking evidence on oath and of enforcing the attendance of witnesses and compelling production of documents and material objects, and shall be deemed to be a civil court within the meaning of sections 345 and 346 of the Code of Criminal Procedure, 1973, and the proceedings before him or them shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code.

(4) The State Government shall address the Vice Chancellor with reference to the result of such inspection or inquiry, and the Vice-Chancellor shall communicate to the Executive Council the views of the State Government with such advice as the State Government may offer upon the action to be taken thereon.

(5) The Vice-Chancellor shall then, within such time as the State Government may fix, submit to it a report of the action taken or proposed to be taken by the Executive Council.

(6) If the University authorities do not, within a reasonable time, take action to the satisfaction of the State Government, the State Government may, after considering any explanation which the University authorities may furnish, issue such directions, as it may think fit, and the University authorities shall be bound to comply with such directions.

(7) The State Government shall send to the Chancellor a copy of every report of an inspection or inquiry caused to be made under sub-section (1) and of every communication received from the Vice-Chancellor under sub-section (5), and of every direction issued under sub-section (6), and also of every report or information received in respect of compliance or non compliance with such directions."

23. As far as Section 13 is concerned, there is no doubt that the State Government has a right to cause an inspection to be made by such person or persons, as it may direct, of the University including its buildings, libraries, laboratories, workshops and equipment and also of the examinations teaching and all other works conducted or done by the University or, to cause an inquiry to be made in the like manner in respect of any matter connected with the administration and finances of the University. The provision is quite wide in its scope as to the subject matter of such inquiry considering the use of the words "and all other works conducted or done by the University" and "to cause an inquiry to be made in the like manner in respect of any matter connected with the administration and finances of the University". The term "administration' used therein has a wide import/meaning so as to include any illegal appointment(s) in the University, but then, as is borne out from the provision such inspection or inquiry as envisaged therein is to be conducted by a person other than one involved in the functioning of the University. If any action is to be taken under Section 13, then entire procedure is provided in the said Section itself. There is nothing on record including the counter affidavit filed by the State

Government to show that any such procedure was adopted. For example sub Section (2) of Section 13 says where the State Government decides to cause an inspection or inquiry to be made under sub-section (1), it shall inform the University of the same through the Registrar, and any person nominated by the Executive Council may be present at such inspection or inquiry as representative of the University and he shall have the right to be heard as such. Sub-Section (4) requires addressing of report of such inspection or inquiry to the Vice Chancellor who in turn shall place it before the Executive Council with such advice as the State Government may offer upon the action to be taken thereon. A report of the action taken is to be submitted by the Vice Chancellor to the State Government under sub-Section (5). This procedure has not been followed. Nevertheless, the State Government does have wide powers to get an inspection or inquiry conducted under Section 13 of the 2002 Act and also to issue direction to the University under sub-Section (6) if the University fails to take action and the University authorities are bound to comply with such directions and in this case it had sought a report from the University before issuing the order dated 02.06.2020.

24. It is not out of place to mention that the State Government provides the funds for payment of salary, etc. to the Officers and employees of the KGMU and it also sanctions the posts, therefore, to that extent certainly the State Government has a stake in the running of the Institution and if it finds any illegality in the Institution, certainly it can ask KGMU to act as per the provisions of the Act, Rules, etc. made therein, therefore, even if the Government Order dated 02.06.2020 is not strictly as per the procedure prescribed in Section 13 of the Act of 2002, it cannot be said to be absolutely unfounded or arbitrary and uncalled for in the facts of the case, especially in view of the cryptic noting of the Vice Chancellor dated 14.01.2020 accepting the inquiry report, even if this notice was not brought to the notice of the Government.

25. State Government's anxiety in the matter is understandable but any observation by it on merits of the matter conclusively in the facts of this case should have been avoided as it could prejudice the appointing/ disciplinary authority in taking a final decision and could be perceived by the petitioner as prejudging of the matter, therefore, this aspect needs to be addressed by this Court which shall be done hereinafter.

26. Learned Standing Counsel relied on Section 4 of the 2002 Act. Section 4 on a bare reading of it is not at all attracted.

27. The submission of Sri Kalia, learned Senior counsel that in this case the Government Order needs to be quashed as it is without jurisdiction and rest of the issues should be left to the discretion of the University specially as the Vice Chancellor has already accepted the inquiry report. The show cause notice issued by the Registrar thereafter is on the dictates of the State Government, therefore, though it is not challenged specifically in this petition, it is also unsustainable.

28. On the other hand, Sri Subham Tripathi, learned counsel for the KGMU submitted that the appointment was patently illegal and the fact that the petitioner's mother was already employed in the KGMU itself was not disclosed either by the mother or by the petitioner

while seeking compassionate appointment. As regards nine persons, who as alleged by the petitioner, had been similarly appointed, on scrutiny, it was found that there were only four such persons who had been given compassionate appointment even though their family members were already working in the University and services of all these four persons had been terminated. The irony is that while their services have been terminated petitioner continues in service on account of interim order. He says that all these four persons have filed writ petitions before this Court and this Court has dismissed one of the writ petitions bearing Writ A No.755 of 2022; Sumit Kumar Verma vs. State of U.P. and others by a detailed judgment. As regards other persons, writ petitions are still pending.

29. He submitted that reliance placed by the petitioner's counsel on the decision of the Supreme Court in the case of ***Mohd. Zamil Ahmed Vs. State of Bihar And Others; 2016 (2) ESC 242 (SC)***, which was the basis for granting interim order in this case, is misplaced, as, in the said case there was no concealment or misrepresentation of material facts. In this regard, he invited the attention of the Court especially to Para 11.1 of the said report.

30. Sri Kalia submitted that, in fact, there was no concealment by the petitioner while seeking compassionate appointment. The form which was being relied upon by the opposite parties and a copy of which has been annexed by the petitioner himself after obtaining it under the Right to Information Act, has neither been filled by the petitioner nor is signed by the petitioner a fact which distinguishes the case of the petitioner from the case of the other four persons in whose case, presumably, the form was signed by them and the column wherein the occupational status of the family members was to be mentioned was either left vacant or was filled incorrectly.

31. The question as to whether petitioner concealed material facts as alleged in the charge-sheet to obtain an illegal compassionate appointment or not is to be judged by the Disciplinary authority.

32. Having considered the matter, this Court is of view that disciplinary authority of the petitioner being the Registrar of the University he should have taken a call on the inquiry report keeping in mind the entire facts and material on record including the Rule position as has been noticed hereinabove and the law on the subject, especially the object for which compassionate appointment is to be made, instead, he very conveniently sent the matter to the Vice Chancellor, who, in fact would be the appellate authority against any order passed by the Registrar in such proceedings. Moreover, the noting of the Vice Chancellor dated 14.01.2020, which is on record, is a cryptic noting which does not disclose any application of the mind to the facts and material on record of the disciplinary proceedings. Most important, the competent authority in this case to take a decision was the Registrar but he has not taken any decision. Therefore, the order/noting of the Vice Chancellor shall not be taken into consideration any further in these proceedings. The fact that it is not under challenge makes no difference as this Court while exercising jurisdiction under Article 226 of the Constitution of India has to do substantial justice.

33. It is the disciplinary authority who has to take a decision on the inquiry report considering the entire material on record in the light of the charges levelled against the

petitioner. Disciplinary authority is not bound to accept the inquiry report. He can differ from it entirely or in part. If he differs he has to give reasons for it in writing an then inform the delinquent accordingly informing him about the points of difference with reasons, giving him an opportunity to defend himself. He has to consider the matter independently and objectively in the light of the material on record, the Rules applicable and the law on the subject.

34. The fact that he has to take a decision independently, uninfluenced by anyone, does not mean that he can act whimsically or arbitrarily, ignoring the facts, evidence and Rule. It only means that decision has to be his own, with due and proper application of mind to all material aspects on fact, Rules and law.

35. Having said so this Court cannot ignore provisions of law discussed hereinabove as also the facts of this case. The charge against the petitioner is of having obtained compassionate appointment illegally by concealing the factum of his mother's employment in KGMU, who in fact is still in employment, as also, as alleged, by concealing income of his family. A Writ Court while exercising jurisdiction under Article 226 of the Constitution of India is not to scuttle any such inquiry/proceedings nor to protect any possible illegality, therefore, the proceedings have to be taken by the Registrar to its logical end as envisaged in law.

36. In view of the above, instead of quashing the order of the Government dated 02.06.2020, ends of justice would suffice if it is provided that the impugned Government Order and the observation made therein shall be read and understood by the University as an expression of serious concern in the matter requiring the competent authority to take appropriate decision in the facts of the case and in the light of the Rules applicable and law on the subject, nothing more. It is ordered accordingly. No observation or direction therein shall be treated as conclusive on any of the issues involved regarding which the Registrar, KGMU is to take a decision. This will allay the fears of the petitioner and on the other hand allow the proceedings to go in an independent and objective manner as discussed hereinabove. The impugned Government Order shall only be treated as a communication to the KGMU about its concern in the matter requiring the University authorities to act as per Rules/law. If the University does not act as per law State Government can proceed under Section 13 of the Act 2002. Any observations/directions therein on merits of the issues regarding which the Registrar is competent to take a decision shall not be read by the Registrar, subject to whatever has been stated hereinabove i.e. he will take a considered decision taking into account the entire factual matrix, the Rule position and the law on the subject.

37. It is not out of place to mention that on 10.06.2020 the Registrar of the University issued a show cause notice to the petitioner albeit in pursuance to the Government Order dated 02.06.2020. The Court has perused the said show cause notice which has been filed along with the supplementary affidavit of the petitioner, and even though it is not specifically challenged, nevertheless, as the contents of the show cause notice show detailed reference to the Government Order dated 02.06.2020, therefore, this notice, obviously, as asserted by Sri Kalia, cannot

be made the basis for any further action which has to be an independent and objective decision on the part of the Registrar who is the competent authority. Accordingly, this show cause notice shall not be read or proceeded further instead a fresh notice shall be issued by the Registrar as ordered hereinafter.

38. The appointing/disciplinary authority is directed to issue a fresh show cause notice to the petitioner in the light of the relevant rules which may be applicable asking the petitioner to submit his response to the same. Thereafter, considering the response, if any submitted by the petitioner, the appointing/disciplinary authority shall take a final decision in the matter independently and objectively considering the entire facts of the case, material on record (except the noting of the Vice Chancellor dated 14.01.2020), the Rule position i.e., Statute 39 quoted hereinabove, and the law on the subject as may be placed before it, but, ignoring the observations/findings, if any in the impugned Government Order dated 02.06.2020 as to the merits of the matter, which shall not be read at all by the disciplinary authority for this purpose. He shall take decision within two months.

39. If at any stage the appointing authority/disciplinary authority forms an opinion that instead of the proceedings at hand, proceedings for cancellation of appointment are liable to be undertaken based on the material collected, it shall be open for him to proceed accordingly as per law.

40. The application of the applicant seeking impleadment through Dr. V.K. Singh, Advocate is disposed off as he has been heard.

41. The petition is ***disposed of*** in the aforesaid terms.

(2022)05ILR A1237
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.03.2022

BEFORE

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

Criminal Appeal No.248 of 2022
(Under section 372 Cr.P.C.)

Raj Kumar Verma ...Appellant (In Jail)
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Rajiv Gupta, Sri Dileep Kumar, Sri Rajrshi Gupta, Shristri Gupta

Counsel for the Respondents:
G.A.

Criminal Law – Criminal Procedure Code,1973 - Section - 372, - Indian Penal Code, 1860 - Section – 302, 394, r/w Section 35-C - Criminal Appeal – challenging the order of acquittal – Unnamed FIR, No prior animosity, neither eye witnesses nor any recovery - names of accused persons are included after one year only on the basis of one alleged extrajudicial confession – it is settled law that an extra-judicial confession is a very weak piece of evidence and same has to be examined with extra care - prosecution fails to established the charges against the accused persons beyond the reasonable doubt - finding of trial court cannot at all be termed as perverse - hence acquitted is proper - Appeal dismissed. (Para – 5, 6, 19, 17, 20, 21, 22)

Appeal Dismissed. (E-11)

List of Cases cited:-

1. Jayamma Vs St. of Karn. (2021 vol. 6 SCC 213),

2. Shailendra Rajdev Pasvan Vs St. of Guj. (2020 vol. 14 SCC 750).

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

1. By means of this appeal filed under Section 372 Cr.P.C. the Appellant has challenged the judgement and order dated 29-09-2012 passed by the Additional Session Judge, Court Number 10, Bijnor, acquitting the accused / respondents Number 2 to 6 of all the charges levelled against them.

2. Briefly stated, the prosecution case is that on 26/12/2009 the Informant - Appellant gave a report to the police stating that he resides in village Khaspura police station Haldaur and he runs a jewellery shop in Kasba Chandpur under the name and style of "Khaspura Jewellers' along with his 21 years' old son Deepak Verma. Both of them used to come daily from village Khaspura to Chandpur on a motorcycle. On 26/12/2009, he and his son had come to the shop at Chandpur. He had to go with some persons campaigning of MLC elections. At about 3:00 PM he kept some articles of jewellery in a steel box and gave the same to Deepak Verma after putting it in a cloth bag and asked him to go home on his motorcycle taking the goods with him. The Informant went for the election campaign While his son Deepak Verma was going on the Hero Honda Super Splendour motorcycle after closing the shop, some unidentified miscreants fired at and killed his son on Chandpur - Paijaniya road a short distance ahead of the railway crossing. The miscreants robbed the jewellery and ran away. He came to know from the neighbours of the shop that Deepak Verma had started for Khaspura after closing the shop at about 4:30 PM on his motor cycle, taking the bag with him.

3. Upon the aforesaid information, a First Information Report was lodged under sections 394 and 302 IPC against unknown miscreants. During investigation on 09-02-2010, the Informant gave an application to the District Magistrate, Bijnor stating that a veterinary hospital was being constructed in his village Khaspura. It was to be constructed on 3,900 square meters area, but the Chief Veterinary Officer and the Contractor were constructing the same only on 1,000 square meters land. The land on which the hospital was being constructed was the land on which a fair was held. The Informant had given a complaint regarding this to the District Magistrate and he had filed a Public Interest Litigation in the High Court at Lucknow and the Court had issued a direction to the Principal Secretary, Animal Husbandry, to pass suitable orders on the petitioners representation. Ultimately his representation was rejected and since after the murder of his son the construction of the hospital has gained peace. The Informant stated that the Chief Veterinary Officer, Bijnor and the contractor who was constructing the hospital, had got his son killed under a conspiracy.

4. After investigation a charge sheet under section 394 302 read with section 35 C was filed on 18-10-2011 against the accused respondents number 2, 3 and 4 and on 12-12-2011 another charge sheet under the aforesaid sections was filed against the accused respondent number 5.

5. After examining the evidence on record, the learned court below came to a conclusion that neither any person had seen

the accused respondents committing the robbery and murder on the place of the incident nor any of the articles robbed from the deceased was recovered from any of the accused persons. No prior animosity of the Informant against the accused respondents could be proved. There is no evidence on record to establish any connection of the accused persons with the Chief Veterinary Officer and the contractors Pradeep Yadav and Vinod Yadav and there is no evidence of the Informant's son Deepak Verma having been killed because of any conspiracy of the aforesaid persons.

6. On the basis of the aforesaid analysis, the learned Court below recorded a finding that the prosecution could not prove the charges against the accused respondents beyond reasonable doubt and, accordingly, by means of the judgement and order dated 29-09-2012 it acquitted all the accused respondents.

7. The Informant Appellant has filed the instant appeal against the aforesaid judgment and order dated 29-09-2012.

8. The appeal was listed on 08-02-2022, on which date no one had appeared on behalf of the Appellant. The court passed an order disposing of the application under Section 378 (3) and the appeal was directed to be listed for admission peremptorily. Thereafter it was listed on 23-02-2022 on which date again no one appeared on behalf of the Appellant even in the revised call and the court passed an order directing the office to allot a regular number to the appeal and the case was ordered to be listed on 25-02-2022 peremptorily.

9. On 25-02-2022 again, no one appeared for the Appellant even in the revised call and the court proceeded to peruse the record with the assistance of the learned A.G.A. and the judgment was reserved.

10. We have examined the grounds of appeal and the lower court record. The Informant Appellant has challenge the judgment and order dated 29-09-2012 on the ground that it is illegal and without jurisdiction and the trial court has misread, misinterpreted and mis-appreciated the evidence on record.

11. In ***Jayamma v. State of Karnataka, (2021) 6 SCC 213***, the Hon'ble Supreme Court has reiterated the manner in which the High Court should exercise its power of scrutiny in an appeal filed against an order of acquittal, in the following words: -

"the power of scrutiny exercisable by the High Court under Section 378 Cr.P.C. should not be routinely invoked where the view formed by the trial court was a "possible view". The judgment of the trial court cannot be set aside merely because the High Court finds its own view more probable, save where the judgment of the trial court suffers from perversity or the conclusions drawn by it were impossible if there was a correct reading and analysis of the evidence on record. To say it differently, unless the High Court finds that there is complete misreading of the material evidence which has led to miscarriage of justice, the view taken by the trial court which can also possibly be a correct view, need not be interfered with. This self-restraint doctrine, of course, does not denude the High Court of its powers to reappreciate the evidence, including in an appeal against acquittal and arrive at a different firm finding of fact."

12. We proceed to examine the record of the case to ascertain as to whether the view taken by the Court below in the judgment and order under challenge is a possible view or whether the findings of the Court below are perverse and warrant interference by this Court.

13. The Informant Raj Kumar Verma - PW - 1 stated in his examination-in-chief, that after the incident he came to know that since 4 days before the murder of his son, he used to see 4 boys standing ahead of the railway crossing at the place where he has been killed and those persons are the accused respondents number 2, 3, 4 and 5. However, the Investigating Officer Gurdeep Singh Grewal (PW - 7) has stated that he took over investigation of the case on 26/12/2009, i.e. the date on which the FIR was lodged. The investigation was transferred from him on 10/1/2010 but during this period, the Informant did not name any accused person. After PW - 7, the investigation was taken over by PW - 8 Raj Kumar Bhardwaj who also stated that the Informant did not name any person. PW - 9 Dhan Pal Singh, who took over investigation after Raj Kumar Bhardwaj, also made a similar statement. On 09/10/2010 the Informant gave an application to the District Magistrate and in that also there was no mention of this fact. This indicates that the statement of PW - 1 naming the accused-respondents 2 to 5 and alleging that they used to keep on standing near the place of the incident since four days before the same, is false.

14. Although in the application dated 09-02-2010 given by Informant Appellant it was alleged that he had given a complaint against the Chief Veterinary Officer and the contractors Pradeep Yadav and Vinod Yadav and had expressed suspicion that the aforesaid persons have got his son killed under a conspiracy, but he did not give any statement to this effect during investigation. No material came to light during investigation indicating involvement of the aforesaid persons in the incident and no charge sheet was submitted against them. The Informant Appellant gave evidence to prove this allegation for the first time in his examination-in-chief, which is not corroborated by any other material. Therefore, this allegation of the Informant / Appellant appears to be without any basis.

15. The Informant / Appellant PW - 1 has admitted the inquest report, which mentions that ₹24,411/- cash was recovered from the deceased's pocket, 2 gold rings were recovered from his hand and some documents in his pocket were recovered from his pocket and the motorcycle and its key was also recovered lying near the place of occurrence. Had the dceased been killed with the intention of committing robbery, the miscreants would have taken away the cash, gold rings and motorcycle etc.

16. Although the Informant - Appellant stated in the report that he had given some items of jewellery put in a steel box kept in a cloth bag to the deceased to be taken home, he has stated in evidence that the deceased did not leave the shop in his presence and no witness has stated that he saw the deceased taking away the items with him. In absence of any evidence to this effect, the aforesaid allegation has also not been proved by the prosecution.

17. Therefore, the learned Court below has rightly recorded a finding that from the statement of the Informant Appellant PW - 1, no allegation against the accused respondent number 2 is established

and we find that the aforesaid at finding is not at all perverse.

18. PW - 2 Ram Kishan Verma, a Brother-in-law of the Informant, stated that on 26/12/2009 he was going in a bus from Nehtaur to Chandpur in a bus. While sitting in the bus he saw some persons assaulting the deceased. He asked to stop the bus the bus didn't stop and he heard a gunshot. When the bus stopped at the railway-crossing, he got off it and went to the place of occurrence and he saw that Deepak Verma was lying dead and the 3 miscreants runaway on a motorcycle. Similar statements have been given by PW - 3 Surendra Verma, who is also a brother-in-law of the Informant. However, in his cross-examination PW - 2 has stated that he saw the incident through a window of the bus and the bus stopped about half kilometre away. PW - 2 and PW - 3 have stated that they sated at the place of the occurrence for about 20 - 25 minutes. They left after the police reached there and they did not make any phone call to the Informant regarding the incident. The police took away the dead body and they did not go with the police. This conduct of the aforesaid witnesses in not informing the police or the Informant about having seen the incident, is highly unnatural and indicative of the fact that they did not see the incident send their statement is false.

19. PW - 2 Ram Kishan Verma has stated that all the accused persons had gone to him at his home on 25-04-2011 and stated that they have killed Deepak Verma by mistake; the police was harassing them and they requested the PW - 2 to help in settling the matter, But in his cross-examination, he has shown ignorance about the date and even the month in which the accused persons had gone to his home. He also did not state as to when did he give information of the visit of the accused persons to his home to the Informant. From this, it appears that the statement of the witness is false.

20. It is settled law that an extra-judicial confession is a very weak piece of evidence and it has to be examined with extra care. In **Shailendra Rajdev Pasvan v. State of Gujarat**, (2020) 14 SCC 750 the Hon'ble Supreme Court reiterated the well settled law regarding extra judicial confessions in the following words: -

" 20. In *Sahadevan v. State of T.N. [Sahadevan v. State of T.N., (2012)* 6 SCC 403 : (2012) 3 SCC (Cri) 146] referring to the aspect of evidentiary value of extra-judicial confession, it was observed : (SCC p. 410, para 14):

"14. It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra-judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra-judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the court would be fully justified in ruling such evidence out of consideration."

21. Elaborating on the jurisprudence that has evolved with regard to extra-judicial confessions, this Court i*n Sahadevan [Sahadevan v. State of T.N.*,

(2012) 6 SCC 403 : (2012) 3 SCC (Cri) 146] had stipulated the principles that are required to be kept in mind while relying on extra-judicial confession as evidence. These principles have been succinctly mentioned in *Jagroop Singh v. State of Punjab [Jagroop Singh v. State of Punjab*, (2012) 11 SCC 768 : (2013) 1 SCC (Cri) 1136] as : (SCC p. 780, para 30)

"30. Recently, in *Sahadevan v. State of T.N. [Sahadevan v. State of T.N.*, (2012) 6 SCC 403 : (2012) 3 SCC (Cri) 146] , after referring to the rulings in Sk. Yusuf v. State of W.B. [Sk. Yusuf v. State of W.B., (2011) 11 SCC 754 : (2011) 3 SCC (Cri) 620] and *Pancho v. State of Haryana [Pancho v. State of Haryana*, (2011) 10 SCC 165 : (2012) 1 SCC (Cri) 223] , a two-Judge Bench has laid down that the extra-judicial confession is a weak evidence by itself and it has to be examined by the court with greater care and caution; that it should be made voluntarily and should be truthful; that it should inspire confidence; that an extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence; that for an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities; and that such statement essentially has to be proved like any other fact and in accordance with law."

21. PW 9 Investigating Officer Dhan Pal Singh has stated that till 16-05-2010, the name of any accused persons had not come to light. The name of the accused persons has been included after about an year after the incident on the basis of an alleged extrajudicial confession made by all the accused persons by going to PW-2 on 25-04-2011 and confessing the incident allegedly occurred on 26-12-2009, which is highly unnatural and which was not corroborated by any other evidence. Therefore, we are of the view that the said extra judicial confession does not appear to be reliable so as to prove the guilt of the accused / respondents beyond reasonable doubt.

22. From a thorough scrutiny of the statement of witnesses, we are of the considered opinion that the prosecution could not establish the guilt of the accused respondent number 2 to 5 and the findings of the Court below in this regard do not suffer from any infirmity and the same are not at all perverse and do not call for interference of this Court in exercie of its appellate jurisdiction.

23. The appeal lacks merits and is accordingly dismissed at the stage of admission itself.

(2022)05ILR A1242
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.03.2022

BEFORE

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

Criminal Appeal No.4858 of 2014
(Under section 372 Cr.P.C.)

Nokhe Lal ...Appellant (In Jail)
Versus
State of U.P & Ors. ...Respondents

Counsel for the Appellant:
Sri V.K. Gupta, Sri Santosh Kumar Tiwari

Counsel for the Respondents:

A.G.A.

Criminal Law – Criminal Procedure Code,1973 - Section - 372, - Indian Penal Code,1860 -Sections 307/34, 323/24, 387, 427, 452, 504, 506 – Arms Act, 1959 - Section – 25 - Criminal Appeal – challenging the order of acquittal - by the trial court giving them benefit of doubt - on the ground that – all the evidence are not proved the story of prosecution & holding that all witnesses are interested witnesses – court held that – in the light of settle law by the Apex Court – Trial Court can only concerned with quality not with the quantity of evidence – the testimony of interested witness has to be examined with extra care and caution – finding of trial court cannot at all be termed as perverse – appellant fails to make out any ground – hence Appeal dismissed. (Para – 17, 19, 21, 23, 24)

Appeal Dismissed. (E-11)

List of Cases cited:-

1. Sunil Kumar Vs St. (Govt. of NCT Delhi) 2003 11 SCC 367,

2. Vadivelu Thevar Vs St. of Madras (AIR 1957 SC 614),

3. Amar Singh Vs Balwinder Singh (2003, SCC 518),

4. Jayamma Vs St. of Karn. (2021 vol. 6 SCC 213).

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

1. Heard Sri Santosh Kumar Tiwari, learned Amicus Curiae, for the appellant and Shri Ratan Singh, learned A.G.A. for the respondents.

2. By means of the instant appeal under Section 372 of the Criminal Procedure Code (herein after referred to as "Cr.P.C.") the informant-appellant has challenged the judgement and order dated 01.10.2014 passed by learned Additional Sessions Judge, Court No. 1/Special Judge, Dacoity Affected Area, Mahoba in Special Case No. 47 of 2004 (State Vs. Hari Ram Prajapati and another) arising out of Case Crime No. 196 of 2004 under Sections 387, 307/34, 452, 323/34 and 427 IPC, Police Station Kabrai, District Mahoba, whereby both the accused have been acquitted giving them the benefit of doubt.

3. Briefly stated, facts of the case are that the informant-appellant gave a report in the concerned Police Station on 11.05.2004 at 20:45 hours stating that when on the same day at about 4:00 p.m., he was coming to Kabrai from his home, the accused-respondent No. 3 (Dhirendra Singh) blocked the passage by parking his motorcycle in front of Jagdish's house, where the passage is narrow. The informant was going on his motorcycle and he stopped there. Dhanni, Rajju, Hariram Prajapati (the accused-respondent No. 2 and Dhirendra Singh (the accused-respondent No. 3) caught hold of the informant and made him sit there and they assaulted the informant by but of a gun, kicks and fists and said that they will set him free only when he pays Rs. 10,000/-. They threatened to kill him with a gun and country made pistols. Upon finding an opportunity, the informant ran towards his home and Dhanni fired towards the informant with a 315 bore country made pistol with the intention to kill him. However, the shot missed the informant's temple and he had a narrow escape. The informant ran and entered the house of Prakash and the aforesaid people attempted to get the door of the house opened. Thereafter, they entered the informant's house and assaulted the informant's mother Achchhi Devi and sister Sudha with kicks, fists and shoes and destroyed the house-hold goods namely deg (a utensil), CD, TV,

Battery and other goods of his shop, which resulted in a loss of about Rs. 5,000/-. The accused threatened that if the informant makes a report of it, it will not be good for him. The incident was witnessed by Shaukilal, Bhawanideen and Deshraj Pradhan and they saved him.

4. On the aforesaid allegation, a Case Crime No. 196 of 2004 under Sections 387, 452, 323, 504 and 506 IPC was registered against the accused-respondents. A case under Section 10/12 of Dacoity Affected Area Act was registered against Dhanni. After investigation, a charge sheet for commission of the offences under Sections 387, 307/37, 452, 323/34, 427 IPC was submitted in the Court against the accused-respondents.

5. PW-1, informant-appellant Nokhe Lal, reiterated the allegations made in the FIR and he further stated that the Sub Inspector visited his home on the following day and saw the broken goods. He prepared a list and gave the goods in the custody of his father. He produced the broken goods, namely, a stabilizer, a CD player and a table fan, a tin box, picture tube of a TV etc. before the Court and said that those were the goods which had been broken by the accused-persons. He and his mother has been medically examined in the Government Hospital at Mahoba.

6. In his cross-examination, PW-1 stated that he had stopped his motorcycle about 3 meters before the platform where the accused persons made him sit. The accused-persons had hit him with sticks, buts and kicks. They had hit him 10-15 times with sticks and 10-12 times with buts. They had hit him on his back and below the shoulder but not on his head and face. However, the assault did not cause any injury mark or bleeding. They did not hit him hard but hit him slowly. He reached the house of Prakash Vishwakarma at about 4:15 p.m. During the entire period, he kept on shouting but nobody came there. The witnesses Shauki Lal and Bhawani Deen came after the incident. The place of incident is surrounded by residential area. After about 1/2 to 1 minute since arrival of the witnesses, the informant got free from the accused persons and ran away.

7. PW-2 Smt. Achchhi Devi is mother of the informant Nokhe Lal, she stated that on the date of the incident at about 4:00 p.m., the accused-persons entered her house, assaulted and injured her and broken the goods kept in the shop. In her cross-examination, PW-2 stated that the house of Saukhi Lal Prajapati and Kamtu Dhobi are adjacent to her house and there are several residences near her house. The distance between her house and Prakash Vishwakarma's house is the same distance as the distance between the court room and the road and the Court made a noting that the distance between the Court and the road is about 200-250 yards.

8. PW-4 Smt. Sudha is the informant's sister, she stated that the accused-persons came to the shop, they hit her mother Achchhi Devi with buts of a country made pistol. They slapped her and broken down the T.V., Fan, C.D. and other goods of the shop. Afterwards, she came to know that they have fired at her brother. The accused-persons took away the jewellery of her and of her sister-in-law.

9. PW-5 Prakash Vishwakarma has denied the incident having been taken place. He said that he has no knowledge of the incident and he did not either see or hear about it. He was declared to be hostile

and in his cross-examination he denied having made any statement under Section 161 Cr.P.C.

10. PW-3 Dr. Mahendra Singh Katiyar has conducted the medical examination of Smt. Achhchhi Devi who has proved that the appellant Nokhe Lal was not found to have been suffered any injury. His mother Smt. Achchi Devi wife of Nanhu had reported that there was some swelling and bluishness on her hip.

11. The defence has produced two witnesses who have denied the incident and have made statements regarding animosity between the informant and the accused.

12. The learned Court below has rightly noted that PW-1, 2 and 4 are informant, his mother and sister respectively which belong to the same family and are interested witnesses and, therefore, their evidence is to be scrutinized very carefully. The informant-appellant has alleged in the report (Ex.A-1) that the accused-respondents threatened him against lodging a report but in his evidence PW-1 has stated that he went alone immediately afterwards to lodge the report. The conduct of PW-1 in going alone to lodge FIR immediately after having been threatened by the accused persons appears to be unnatural. PW-1 has alleged that the accused persons had hit him with but of a gun, stick and kicks but the same did not leave marks or cause bleeding. The accused had not hit him hard but had hit him slowly. PW-3 who conducted medical examination of PW-1 did not found any injury on the person of PW-1, which makes the prosecution case as well as veracity of the evidence of PW-1 and PW-2 doubtful.

13. PW-1 has stated that the medical examination of his sister was also conducted on the same day whereas the sister PW-4 Smt. Sudha has stated that she was not medically examined. No report of PW-4 is available on record and no statement in this regard has been made by PW-3. From this prosecution witnesses appear not to be trustworthy.

14. PW-1 has stated that he had gone to the Police Station alone, however PW-2 stated that her daughter had also gone to the Police Station with her. GD (Ex.A-5) mentions that the informant (PW-1) came with (Smt. Achchhi Devi-PW-2). Thus the version of PW-1, PW-2 and the narration in the GD, all contradict each other which indicates entries in the GD have been concocted.

15. PW-1 has alleged that Dhanni (co-accused) fired with a 315 bore country made pistol. Neither there is any witness of this incident nor was any empty cartridge recovered from the spot which could prove the informant's averment. The statement of PW-4 (informant's sister) that the accused persons hit her mother Smt. Achchhi Devi with but of country made pistol and thrown away the goods of the shop and take away the jewellery and other articles of marriage of PW-4 and her sister-in-law is not corroborated by the statements of PW-1 and PW-2 and appears to be false and unnatural.

16. PW-2 Smt. Achchhi Devi had stated that the accused broke down the goods when the informant had gone to the Police Station for lodging a report. The mention of breakage of goods done by the accused persons in the report Ex.A-1 indicates that the entire prosecution story is planned, concocted and fabricated else this fact could not have been mentioned report (Ex.A-1). From this analysis of the

aforesaid facts, learned Court below passed the judgment and order dated 01.10.2011 acquitted the accused persons from all the charges. The appellant-informant has challenged the aforesaid order on the ground that PW-1, PW-2, PW-3, PW-4 and PW-7 have proved the prosecution story but the evidence adduced from the complainant/informant's side was not considered by the Court below. The grounds of challenge to the judgement and order dated 01.10.2014 taken by the informant/appellant are reproduced herein below:-

"1. Because, the court below has not considered the evidence on record.

2. Because, the prosecution has successfully proved the case.

3. Because, the P.W.1, P.W.2, P.W. 3, P.W. 4 and P.W.7 have proved the prosecution story but the court below has not considered.

4. Because the evidence adduced by the complainant/informant side was not considered by the court below.

5. Because, the prosecution has fully proved that the Opp. Parties have committed alleged crime. But the court below has ignored and overlooked the evidence against the Opp. Parties/respondents which is unfair and improper.

6. Because, the eye witnesses in First Information Report namely Saukhi Lal, Bhawanideen and Deshraj have not been examined before the court below.

7. Because, without considering the fact and circumstances of the case and evidence produced by the prosecution, the trial court has acquitted the accused person illegally."

17. Shri Santosh Kumar Tiwari, learned Amicus Curiae has placed reliance on a decision of Hon'ble Supreme Court in the case of **Sunil Kumar Vs. State (Govt. of NCT Delhi), (2003) 11 SCC 367** in which relying upon earlier decision in **Vadivelu Thevar v. State of Madras, AIR 1957 SC 614**, the Hon'ble Supreme Court has held that:-

"8. In Vadivelu Thevar v. State of Madras this Court had gone into this controversy and divided the nature of witnesses in three categories, namely, wholly reliable, wholly unreliable and lastly, neither wholly reliable nor wholly unreliable. In the case of the first two categories this Court said that they pose little difficulty but in the case of the third category of witnesses, corroboration would be required. The relevant portion is quoted as under: (AIR p. 619, paras 11-12)

"Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.

In the first category of proof, the court should have no difficulty in coming to

its conclusion either way -- it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses."

18. He has also relied on a judgement of Hon'ble Supreme Court in the case of **Amar Singh Vs. Balwinder Singh, (2003) SCC 518,** wherein the Hon'ble Supreme Court has held that in cases of defective investigation the court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect and to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. There can be no dispute to the aforesaid proposition of law but the same does not apply to the facts and circumstances of the present case where the prosecution witnesses themselves have made contradictory statements regarding material facts relating to the incident and where PW-5 in whose house the PW-1 is said to have taken shelter has categorically denied the incident.

19. A perusal of the judgement and order dated 01.10.2014 indicates that the learned Court below has thoroughly examined the statements of all the prosecution witnesses. It is settled law that when witnesses are related persons, although their testimony is admissible and form basis of conviction of the accused-persons, the testimony of interested witness has to be examined with extra care and caution.

20. Upon scrutiny of the statements of the PW-1, PW-2 and PW-4, serious discrepancies have come to light. PW-1 has stated that he had gone to the Police Station alone, however PW-2 stated that her daughter had also gone to the Police Station. GD (Ex.A-5) mentions that the informant (PW-1) came with (Smt. Achchhi Devi-PW-2). Thus the version of PW-1, PW-2 and the narration in the GD, all contradict each other which indicates entries in the GD have been concocted.

21. This finding of the learned Court below is based on a thorough and proper analysis of the prosecution evidence. The finding arrived at after a thorough analysis of the entire admissible evidence placed on record cannot at all be termed as perverse.

22. In **Jayamma v. State of Karnataka, (2021) 6 SCC 213**, the Hon'ble Supreme Court has reiterated the manner in which the High Court should exercise its power of scrutiny in an appeal filed against an order of acquittal, in the following words: -

"the power of scrutiny exercisable by the High Court under Section 378 Cr.P.C. should not be routinely invoked where the view formed by the trial court was a "possible view". The judgment of the trial court cannot be set aside merely because the High Court finds its own view more probable, save where the judgment of

the trial court suffers from perversity or the conclusions drawn by it were impossible if there was a correct reading and analysis of the evidence on record. To say it differently, unless the High Court finds that there is complete misreading of the material evidence which has led to miscarriage of justice, the view taken by the trial court which can also possibly be a correct view, need not be interfered with. This self-restraint doctrine, of course, does not denude the High Court of its powers to reappreciate the evidence, including in an appeal against acquittal and arrive at a different firm finding of fact."

23. A perusal of the grounds taken in the memo of appeal indicates that the order of the learned Court below has not been assailed on the ground that it is perverse. During the submission also, learned Amicus Curiae could not demonstrate that the findings of the learned Court below are perverse.

24. In these circumstances, in view of the law laid down by Hon'ble Supreme Court in the case of **Jayamma (supra)**, we find that the appellant has failed to make out any ground for admission of the appeal. The appeal is accordingly **dismissed** at the stage of admission itself.

(2022)05ILR A1248
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE RAJNISH KUMAR, J.

Criminal Misc. Writ Petition No. 2672 of 2022
AND
Criminal Misc. Writ Petition No. 3000 of 2022
AND
Criminal Misc. Writ Petition No. 3001 of 2022
AND
Criminal Misc. Writ Petition No. 3051 of 2022

Sharad Arora & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Sudhanshu Kumar, Sri Rajrshi Gupta, Sri Dileep Kumar (Sr. Adv.)

Counsel for the Respondents:
A.G.A., Ms. Katyayini, Sri Krishnarjun, Sri Aman Lekhi (Sr.Adv.)

(A) Criminal Law – Constitution of India,1950 - Article 226 - Criminal Procedure Code, 1973 - Sections 156 (3), 438 & 439 - Indian Penal Code, 1860 - Sections 24, 25, 120-B, 406, 409, 420, 467, 468, 471 & 477-A – Arbitration and Conciliation Act, 1996 - Sections 9 & 11 – Companies Act, 2013 - Sections 206 & 224 - Writ Petitions – for quashing the FIR on the ground of non-holding preliminary enquiry as well as alleged offence is comes under commercial dispute thus ought to be resolved under Arbitration proceeding – both proceeding arising out of Civil & Criminal offences can be tried simultaneously – holding of preliminary inquiry in every case of alleged commercial offence would not be mandatory - FIR contains *ex-facie* disclosure of cognizable offence such information would have to be verified during investigation – hence writ petition fails to challenge the FIR.(Para – 17, 28, 29)

(B) Criminal Law – Constitution of India, 1950 - Article 226 - Criminal Procedure Code, 1973 - Sections 156 (3), 438 & 439 - Indian Penal Code, 1860 - Sections 24, 25, 120-B, 406, 409, 420, 467, 468, 471 & 477-A – Arbitration and Conciliation Act, 1996- Sections 9 & 11 – Companies Act, 2013 - Sections 206 & 224 - Writ Petitions – for quashing the order/direction to register the FIR - on the ground that alleged offence is being a commercial dispute ought to be resolved under Arbitration proceeding – preliminary objection about maintainability of writ petition –

court held that - impugned direction to registered FIR is interlocutory in nature - against which Revision would be maintainable - not a writ petition under Article 226 – order accordingly. (Para – 22, 28, 33, 37, 39)

Writ Petition Dismissed. (E-11)

List of Cases cited:-

1. Lalita Kumari Vs Govt. of U.P. & ors. (2014 (2) SCC 1),

2. Priyanka Srivastava & anr. Vs St. of U.P. & anr. (2015 (6) SCC 287),

3. Father Thomas Vs St. of U.O.I. & ors. (2011 Criminal Law Journal 2278),

4. Ajay Malviya Vs St. of U.P. & ors. (2000 Vol. 14 ACC 435),

5. HDFC Securities Ltd. & ors. Vs St. of Maharashtra & anr. (2017 vol. 1 SCC 640),

6. St. of Har.Vs Bhajan Lal (1992 Suppl. (1) SCC 335),

7. Priti Saraf & anr. Vs St. of NCT of Delhi & anr. (2021 SCC online SC 206),

8. St. Vs Navjot Sandhu (2005 (11) SCC 600),

9. Sangeetaben Mahendrabhai Patel Vs St. of Guj. (2017 (7) SCC 621),

10. Monika Kumar (Dr.) Vs St. of U.P. (2008) (8) SCC 781),

11. R. Kalyani Vs Janak C Mehta (2009) (1) SCC 516.

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Jurisdiction of this Court under Article 226 of the Constitution of India is invoked in the present bunch of writ petitions, filed with the prayer to quash the First Information Report in Case Crime No.47 of 2022, under Sections 406, 409, 420, 467, 468, 471, 477-A and 120-B IPC, Police Station Phase-I, District Commissionerate Gautam Buddh Nagar, as also the order dated 18.2.2022 passed by the Chief Judicial Magistrate, Gautam Buddh Nagar directing lodging of aforesaid FIR, primarily on the ground that offences alleged therein are essentially in the nature of commercial dispute, which ought to have been resolved by way of arbitration and lodgement of first information report is an abuse of the process of law.

2. The informant company and its authorized signatory i.e. respondent no. 3 & 4 have appeared on a caveat and have objected to the maintainability of the writ petition, at this stage, urging that prima facie commissioning of cognizable offence is disclosed in the F.I.R. and the investigating agencies be allowed to proceed with the investigation and the rights and contentions advanced, on behalf of the petitioners, be left open for its examination upon conclusion of investigation. It is stressed that extent of offence since is yet to be determined, therefore, investigation into allegations are necessary before embarking upon adjudication of questions raised in these writ petitions. Arguments accordingly have been concluded by the respective counsel for the parties on the aspect relating to entertainability of the present writ petition, at this stage, and the need to interfere with the impugned First Information Report, as of now. The writ petitions, accordingly, are being disposed off by this common judgment with Writ Petition No.2672 of 2022 (Sharad Arora and another Vs. State of U.P. through Principal Secretary, Home, Lucknow and others) treated as the leading case.

3. We have heard Sri Dileep Kumar, learned Senior Counsel assisted by Sri Sudhanshu Kumar, Sri Manish Singh, Mr.

Rajrshi Gupta & Sri Ramesh Chandra Yadav for the petitioners, Sri Arunendra Singh, learned AGA for the State and Sri Aman Lekhi learned Senior Counsel assisted by Sri Krishnarjun, Ms. Katyayini, Ms. Ranjana Roy Gaurai, Sri Ujjwal Jain, Ms. Niharika Behl and Smt. Diksha Mishra for the respondents.

4. Brief facts giving rise to the filing of instant writ petitions are that the petitioners in leading writ petition are the founder promoters and directors of a company named "Sensorise Digital Services Private Limited (hereinafter referred to as "SDSPL'), which is engaged in the business of providing "mission critical connectivity services' for Machine-to-Machine (M2M)/Internet of Things (IoT) by utilizing a technology, which is claimed to be open and fully standardized as per available global standards and registered as trademark "QoSim'. This technology is claimed to have existed since late 1990s and was commonly used for "plastic roaming'. SDSPL QoSim is stated to be a product based on the said solution concept and according to petitioners the product being standard based product has no confidential technology attached to it. SDSPL's Intellectual Property (IP) is restricted to "QoSim' trademark. When used in the AIS140 compliance use cases, the SDSPL QoSim is certified alongwith the device that it is embedded in and the certification belongs to the Device partner. SDSPL buys SIM cards from IIIrd Party manufacturers who own the IP and all the software on the card apart from the pre-requisite certifications for the manufacturing process are purchased from outside. SDSPL's customers allegedly are governmental or non-governmental agencies and the services are provided under well defined service level agreements.

5. SDSPL is otherwise a start-up company. It appears that the company needed infusion of funds to grow further and came in contact with the informant, which also is a company in the name of "KKH Finvest Private Limited' (hereinafter referred to as the "investor company'). It is claimed that after due diligence the officials of informant company entered into a memorandum of understanding (MoU) with the petitioner company in April, 2016, which was followed with execution of Shareholding and Share Subscription Agreement (hereinafter referred to as "SSSHA') between the SDSPL and the informant company.

6. The informant company agreed to infuse funds to the extent of Rs. 9 crore in return for 50% share in SDSPL and 49% voting rights. It is admitted that the amount of Rs. 9 crore has been invested by the informant company, although it is alleged that the deposit was somewhat delayed. It is also alleged that the petitioners were forced to sign a revenue sharing agreement with M/s Rosmerta Technologies Limited and by now approximately Rs. 8 crores have been paid to the company for and on behalf of informant company.

7. The management and control of SDSPL apparently was split between two factions i.e. the petitioners, who are the promoter directors, and the informant company and their relationship was being regulated by the terms of SSSHA. SDSPL continued to function in such manner for the last 5-6 years and various decisions came to be taken in respect of its affairs. It emerges that growth and projections disclosed to informant company, on the basis of which it infused funds in SDSPL, fell well short and differences have arisen between the two groups leading to the lodging of the impugned FIR.

8. SSSHA is on record of the writ petition as Annexure 7. Clause 20.2 of it provides for arbitration and Clause 20.2.1 contains an agreement between the parties that all disputes or differences between them in respect of or concerning or connected with the interpretation or implementation of SSSHA including its breach and termination shall at first instance be resolved through negotiation failing which the dispute be referred to arbitration in accordance with the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act of 1996). The investor company instituted a petition under Section 9 of the Act of 1996 before the Delhi High Court on 13.8.2021 levelling various allegations against the SDSPL and sought various reliefs including deferment of meetings till the disputes are resolved by the arbitral tribunal; restraining the respondents (petitioners herein) from deciding any of the agenda items outlined in the notice of adjournment dated 10.8.2021 etc. The prayer clause is exhaustive and included a direction to conduct an immediate audit of intellectual property of SDSPL; a direction that records of SDSPL including minutes of meetings of the Board of Directors and general meetings be corrected to reflect the true and correct proceedings; a direction for investigation for breach of Clause 15 of SSSHA and not to take any managerial decision in respect of the subsidiary of SDSPL i.e. Sensorise Smart Solutions Private Limited (hereinafter referred to as the "Subsidiary Company').

9. Aforesaid application filed under Section 9 of the Act of 1996 was registered as OMP (I)(COMM) 276 of 2021 before the Delhi High Court and the proceedings were deferred on 6.9.2021 on the statement of the parties that they are in conciliation proceedings and in all likelihood the matter would be settled. On 27th September, 2021 the Court was informed by the investor company that a communication is received from Managing Director of SDSPL about proposed Board meeting having been cancelled. The informant company got the petition under Section 9 of the Act of 1996 withdrawn and all pending applications stood disposed off, accordingly.

10. It is on record that no steps were taken thereafter by the informant company to invoke the arbitration clause and no application was otherwise filed for appointment of arbitrator under Section 11 of the Act of 1996.

11. Instead, an application came to be filed on 24.1.2022 under Section 156(3) Cr.P.C. before the Chief Judicial Magistrate, Gautam Buddh Nagar by the informant company against the promoter directors of SDSPL and its Chief Strategic Officer and other members of its Key Managerial Team and M/s Sim. Things Private Limited and its founders/directors and another company named M/s Iotivity Communications Private Limited and its directors Debdip Saha and Shirsanka Saha, who was earlier a member of Key Managerial Team of SDSPL and had opened a new venture, alleging that the opposite parties in the application have committed cognizable offences in the manner disclosed in the application and the concerned police officials be directed to register FIR against the opposite parties under various sections of IPC.

12. Chief Judicial Magistrate after hearing the applicant called for comments from the concerned Police Station on the question as to whether any FIR has been lodged in the matter, and upon being

informed in the negative, proceeded to direct lodging of the FIR vide his order dated 18.2.2022. This order of Chief Judicial Magistrate is also challenged in the present writ petition.

13. Before proceeding to record the submissions advanced in the matter and dealing with it, on merits, it would be appropriate to note the FIR allegations, for proper appreciation of issues raised in this bunch of writ petitions.

14. Informant has alleged in the FIR that founders, promoters and other officers and persons associated with the SDSPL have committed corporate fraud in a well calculated and pre meditated manner against the informant company. The informant company was invited to join as strategic partner with the clear assurance that the SDSPL and its key management team would continue to operate for the benefit of SDSPL and shall ensure confidentiality and would not engage in any competing business for a reasonable period after their termination with the business activity of SDSPL and based upon such representation succeeded in ensuring investment of Rs.9 crores from the informant company. It has later transpired that false representations were made to induce the informant company into investing funds inasmuch as from the very beginning the intention of petitioners was to cheat and not to act for the benefit of SDSPL. Having succeeded in their efforts to cheat the informant company by such inducement, the accused persons have conspired and connived to cheat the informant company by breaching the fiduciary duties owed as per SSSHA and misappropriated the know how and assets of SDSPL to make wrongful gain for themselves, jointly and severally. The IP (Intellectual Property) and its exclusive technology were diverted to another company formed with the active assistance and collaboration of accused and denied access to it, including its source code to the informant company. It is asserted that accused were never interested in developing the business of SDSPL and from the very beginning acted in a planned way to conspire for undue gain for themselves while causing losses for the informant company. For such purposes the minutes of meetings of SDSPL were also forged and fabricated and the business transacted in such meetings were misreported. The wife of first petitioner and father of second petitioner in the leading petition have set up a rival business in the name of M/s SIM Things Private Limited to engage in identical business activities. Business of SDSPL has been allegedly diverted to "SIM Things' thereby duping the informant company. It is further alleged that the extent of conspiracy and entirety of wrongful gains by accused persons is beyond the means of informant company to ascertain and can be determined only in a thorough police investigation. Dishonest inducement, cheating, falsification of company records to make wrongful gains etc. is thus sought to be inquired into in the FIR so as to punish the accused persons.

15. It is also mentioned in the FIR that despite such facts having been highlighted in the company meetings nothing was done and rather forged minutes were prepared showing presence of representative of informant company while he was hospitalized. It is further alleged that instead of rectifying the mistake the accused misled the informant company to enter into conciliation and utilized this time to perpetrate such fraud. The complaint further alleges that scale of fraud can be

determined only during course of investigation and as the corporate office of SDSPL situates in NOIDA, as such the FIR needs to be registered at the concerned police station at NOIDA, Gautam Buddh Nagar and investigations be made to punish the accused for offences under Sections 406, 409, 420, 467, 468, 471, 477-A, 34 and 120-B IPC.

16. Learned Senior Counsel for the petitioner contends that allegations made in the FIR at best discloses existence of a commercial dispute between two factions of the company i.e. SDSPL and criminal investigation is not warranted for its resolution. It is urged that a preliminary enquiry ought to have been conducted in the matter by the magistrate before ordering registration of FIR in this case. Submission is that the order of magistrate under Section 156(3) Cr.P.C. is a judicial order and preliminary enquiry warranted in a commercial dispute having not been conducted in view of the law laid down by the Supreme Court in Lalita Kumari Vs. Government of U.P. and others, (2014) 2 SCC 1, and Priyanka Srivastava and another Vs. State of U.P. and another, (2015) 6 SCC 287, as such the order of the magistrate directing lodgement of FIR is liable to be quashed. It is further urged that none of the ingredients of various sections of IPC, referred to in the FIR, are disclosed from its bare perusal, inasmuch as there is no entrustment of any property so as to attract sections 406 and 409 IPC; no specific allegation of making false account to attract section 477A; ingredients of "dishonestly' and "fraudulently' defined in section 24 and 25 are not made out as neither any specific allegation of wrongful gain nor making of any forged signature is substantiated; ingredients of section 467 regarding making of false document also is not substantiated. Learned Senior Counsel lastly submitted that the informant is attempting to give a colour of criminal offence to civil dispute and allegations since at best makes out a case of breach of contract and non-maintenance of correct records of company for which adequate adjudicatory process is provided under Chapter XIV of the Companies Act, 2013 from sections 206 to 224 as such the FIR deserves to be quashed.

17. Sri Aman Lekhi, learned Senior Counsel for the respondents, per contra, submits that holding of preliminary enquiry is not mandatory where allegations are specific with regard to commissioning of cognizable offence and the argument to the contrary proceeds on misreading of the referred judgments; same set of facts may give rise to a civil dispute and also criminal offence, both of which can be tried simultaneously, provided ingredients of an offence are disclosed. It is further submitted that specific allegations with regard to commissioning of cognizable offence are made in the FIR and defence of petitioners need not be examined at the threshold, in petition under Article 226 of the Constitution of India, and the investigation be allowed to be held as per Criminal Procedure Code. Argument also is that petitioners have indulged in forum shopping, inasmuch as, after having served notices for grant of anticipatory bail, they have chosen not to file such application and have instead filed the present petition.

18. Sri Arunendra Singh, learned A.G.A. has adopted the arguments of Sri Lekhi and submits that investigation is progressing in the matter and no occasion arises for this Court to interfere in the matter.

19. Learned Senior Counsels for the parties have elaborately addressed the

Court on the aspect relating to maintainability of the present petition for challenging the order of Magistrate, passed under section 156(3) Cr.P.C. It has been urged that order of Magistrate is a judicial order and a writ petition would lie against it on the ground that a preliminary enquiry was not conducted in the matter and the offence alleged falls beyond the territorial jurisdiction of the Magistrate concerned.

20. In reply, it is urged that even if the order of Magistrate is a judicial order yet the petitioners get no right to challenge it, at this stage, particularly after FIR is registered and the challenge would be limited to the FIR on the grounds permissible in law. Submission also is that corporate office of SDSPL is at Gautam Buddh Nagar and major part of the offences are committed there and thus, the territorial jurisdiction of Magistrate to pass an order under Section 156(3) Cr.P.C. cannot be questioned.

21. Nature of an order passed by Magistrate under section 156(3) Cr.P.C. and the remedies available against it are no longer res-integra and fell for consideration earlier before a Full Bench of this Court in Father Thomas vs. State of U.P. and others, 2011 Criminal Law Journal 2278. The issue that arose before the Full Bench was whether the order of Magistrate under section 156(3) Cr.P.C. to direct the police to register FIR and conduct investigation is open to challenge in a revision? Nature of such order i.e. whether it is interlocutory in nature or final also fell for adjudication before the Full Bench. Correctness of the Division Bench judgement in Ajay Malviya vs. State of U.P. and others, 2000 (41) ACC 435 insofar as the revision was held maintainable and, therefore, a writ directed against consequential registration of FIR would not lie, was also questioned.

22. The Full Bench elaborately examined the scheme contained in the Code of Criminal Procedure and the applicable judgments on the issue to hold that right of hearing to a prospective accused at pre-cognizance stage is not conceived and, therefore, no revision would lie against such order which is purely interlocutory in nature, and involves no substantial rights of the parties. After referring to the judgement in Ajay Malviya (supra) the Full Bench observed as under in paragraph 64:-

"64. However it is made clear that the initial order for investigation under section 156(3) is also not open to challenge in a writ petition, as it is now beyond the pale of controversy that the province of investigation by the police and the judiciary are not overlapping but complementary. As observed by the Privy Council in paragraph 37 in Emperor v. Khwaja Nazir Ahmad, [AIR 1945 PC 18.] when considering the scope of the statutory powers of the police to investigate a cognizable case under sections 154 and 156 of the Code, that it would be an unfortunate result if the Courts in exercise of their inherent powers could interfere in this function of the police. The roles of the Court and police are "complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function."

The Full Bench, therefore, clearly held that the view taken by the Division Bench in Ajay Malviya (supra) that Magistrate's order is revisable is not correct and that the direction to register FIR is

interlocutory in nature. The judgment in Father Thomas (supra) holds the field even as of now.

23. The above position in law has been reiterated by the Supreme Court in HDFC Securities Limited and others vs. State of Maharashtra and another, (2017) 1 SCC 640. In para 27 the Court has observed as under:-

"27. It appears to us that the appellants approached the High Court even before the stage of issuance of process. In particular, the appellants challenged the order dated 4-1-2011 passed by the learned Magistrate under Section 156(3) CrPC. The learned counsel appearing on behalf of the appellants after summarising their arguments in the matter have emphasised also in the context of the fundamental rights of the appellants under the Constitution, that the order impugned has caused grave inequities to the appellants. In the circumstances, it was submitted that the order is illegal and is an abuse of the process of law. However, it appears to us that this order under Section 156(3) CrPC requiring investigation by the police, cannot be said to have caused an injury of irreparable nature which, at this stage, requires quashing of the investigation. We must keep in our mind that the stage of cognizance would arise only after the investigation report is filed before the Magistrate. Therefore, in our opinion, at this stage the High Court has correctly assessed the facts and the law in this situation and held that filing of the petitions under Article 227 of the Constitution of India or under Section 482 CrPC, at this stage are nothing but premature. Further, in our opinion, the High Court correctly came to the conclusion that the inherent powers of the Court under Section 482 CrPC should be sparingly used."

(emphasis supplied)

24. We are, therefore, not inclined to entertain the present bunch of writ petitions in so far as the order of Magistrate directing the registration of FIR is challenged. Even otherwise, the order of Magistrate has been given effect to and the consequential FIR has been registered. Challenge to the FIR is permissible on the limited grounds enumerated in State of Haryana Vs. Bhajan Lal, [1992 Suppl (1) SCC 335], and such remedy having been availed the challenge to the order of Magistrate under Section 156(3) Cr.P.C. is declined.

25. So far as the plea of non holding of preliminary enquiry in the matter is concerned, the argument on behalf of the petitioners proceeds on the judgement of the Supreme Court in Lalita Kumari and Priyanka Srivastava (supra). The Constitution Bench in Lalita Kumar (supra) observed as under in para 120.6 of the report:-

"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."

It is urged with reference to the above judgment that the present case falls in second category, at best, and a preliminary inquiry was mandatory.

26. The conclusions expressed in para 120 of the judgment in Lalita Kumari (supra) can be better understood if it is examined in light of observations made in para 119 of the report, which is reproduced hereinafter:-

"119. Therefore, in view of various counterclaims regarding registration or non-registration, what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible, etc. **These are the issues that have to be verified during the investigation of the FIR.** At the stage of registration of FIR, what is to be seen is merely whether the information given ex facie discloses the commission of a cognizable offence. If, after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR."

(emphasis supplied)

The above principle has been reiterated in Priyanka Srivastava (supra) and subsequent judgments on the point.

27. The ratio culled out from paragraph 119 and 120 of the judgment in Lalita Kumari (supra) is that where information given to police ex-facie discloses commissioning of cognizable offence, its registration is mandatory. It is only where information given does not disclose cognizable offence that the FIR may not be registered immediately and some sort of a preliminary verification or enquiry could be held. The use of word 'may' in the judgment is suggestive that such preliminary inquiry is not mandatory in all cases of alleged commercial offences and that such inquiry would be desirable only in a case where information furnished ipso facto does not disclose commissioning of a cognizable offence so as to ascertain whether a cognizable offence has been committed or not?

28. Discretion is, therefore, left with the Magistrate in the matter of holding or otherwise of preliminary inquiry in cases of alleged commercial offence depending upon the facts of a case and it cannot be said that in every case of alleged

commercial offence holding of preliminary inquiry would be mandatory. An order of Magistrate, therefore, cannot be challenged on the ground of non-holding of preliminary inquiry if the information given to Magistrate ex-facie discloses commissioning of cognizable offence.

29. In the facts of the present case we find that the FIR contains ex-facie disclosure of cognizable offence in the matter and whether such information is falsely given or is credible or genuine would have to be verified only during the investigation pursuant to FIR. The challenge to the FIR on the ground of non-holding of preliminary enquiry thus fails.

30. Sri Dileep Kumar, learned Senior Counsel for the petitioners then took us through the contents of application filed before the Delhi High Court by the informant company in application under section 9 of the Act of 1996, in order to submit that same set of facts form the basis of relief therein, as are mentioned in the impugned FIR and, therefore, lodgement of FIR is bad in law.

31. Though the argument of Sri Kumar appears attractive at the first blush, but a deeper examination of the matter persuades us not to accept it for the reasons enumerated hereinafter.

32. Same set of facts may constitute an offence under the Indian Penal Code while constituting breach of agreement on part of one of the parties and parallel proceedings can always proceed on both counts. What is of importance is to ascertain whether ingredients of an offence are made out in the facts of the case or not? In Priti Saraf and another vs. State of NCT of Delhi and another, (2021) SCC Online SC 206 the Court has observed as under in paragraph 32 to 34 of the judgment:-

"32. In the instant case, on a careful reading of the complaint/FIR/charge-sheet, in our view, it cannot be said that the complaint does not disclose the commission of an offence. The ingredients of the offences under Sections 406 and 420 IPC cannot be said to be absent on the basis of the allegations in the complaint/FIR/charge-sheet. We would like to add that whether the allegations in the complaint are otherwise correct or not, has to be decided on the basis of the evidence to be led during the course of trial. Simply because there is a remedy provided for breach of contract or arbitral proceedings initiated at the instance of the appellants, that does not by itself clothe the court to come to a conclusion that civil remedy is the only remedy, and the initiation of criminal proceedings, in any manner, will be an abuse of the process of the court for exercising inherent powers of the High Court under Section 482 CrPC for quashing such proceedings.

33. We have perused the pleadings of the parties, the complaint/FIR/charge-sheet and orders of the Courts below and have taken into consideration the material on record. After hearing learned counsel for the parties, we are satisfied that the issue involved in the matter under consideration is not a case in which the criminal trial should have been short-circuited. The High Court was not justified in quashing the criminal proceedings in exercise of its inherent jurisdiction. The High Court has primarily adverted on two circumstances, (i) that it was a case of termination of agreement to sell on account of an alleged breach of the contract and (ii) the fact that the arbitral

proceedings have been initiated at the instance of the appellants. Both the alleged circumstances noticed by the High Court, in our view, are unsustainable in law. The facts narrated in the present complaint/FIR/charge-sheet indeed reveal the commercial transaction but that is hardly a reason for holding that the offence of cheating would elude from such transaction. In fact, many a times, offence of cheating is committed in the course of commercial transactions and the illustrations have been set out under Sections 415, 418 and 420 IPC. Similar observations have been made by this Court in *Trisuns Chemical Industry v. Rajesh Agarwal (supra):*--

"9. We are unable to appreciate the reasoning that the provision incorporated in the agreement for referring the disputes to arbitration is an effective substitute for a criminal prosecution when the disputed act is an offence. Arbitration is a remedy for affording reliefs to the party affected by breach of the agreement but the arbitrator cannot conduct a trial of any act which amounted to an offence albeit the same act may be connected with the discharge of any function under the agreement. Hence, those are not good reasons for the High Court to axe down the complaint at the threshold itself. The investigating agency should have had the freedom to go into the whole gamut of the allegations and to reach a conclusion of its own. Pre-emption of such investigation would be justified only in very extreme cases as indicated in *State of Haryana v. Bhajan Lal* [1992 Supp (1) SCC 335]"

34. So far as initiation of arbitral proceedings is concerned, there is no correlation with the criminal proceedings. That apart, the High Court has not even looked into the charge-sheet filed against 2nd respondent which was on record to reach at the conclusion that any criminal offence as stated is prima facie being made out and veracity of it indeed be examined in the course of criminal trial."

33. Merely because on similar facts an application under section 9 of the Act of 1996 is instituted or arbitration for resolution of contractual dispute can be availed of, in terms of the agreement, it would not mean that criminal action cannot be set in motion even though prima facie ingredients of offence are disclosed in the FIR. The fact that even after filing application under section 9 of the Act of 1996 the dispute has not yet been referred to the arbitrator, or the court approached under section 11 of the Act of 1996, also cannot be a ground to challenge the FIR if it otherwise discloses cognizable offence.

34. Whether allegations made in the FIR are correct or not is not required to be examined by this Court, under Article 226 of the Constitution of India, at this stage, since the facts are to be ascertained by the concerned investigating agency at the first instance.

35. Law is otherwise well settled that same set of acts or omissions may constitute offences under different enactments and where there are two distinct offences disclosed, made up of different ingredients, the punishment in both would be permissible even if the offences have some overlapping features. In State vs. Navjot Sandhu, (2005) 11 SCC 600 the Court has observed as under in paragraph 255:-

"255. The learned counsel, apart from placing reliance on Section 56 of

POTA, has also drawn our attention to Section 26 of the General Clauses Act and Section 71 IPC. His contention, though plausible it is, has no legal basis. We do not think that there is anything in Section 56 of POTA which supports his contention. That provision only ensures that the conspiracy to commit the terrorist act shall be punishable under POTA. As the appellant is being punished under that section, irrespective of the liability to be punished under the other laws, Section 56 ceases to play its role. Then, we shall turn to Section 26 of the General Clauses Act, which lays down:

"26. Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

It becomes at once clear that the emphasis is on the words "same offence". It is now well settled that where there are two distinct offences made up of different ingredients, the bar under Section 26 of the General Clauses Act or for that matter, the embargo under Article 20 of the Constitution, has no application, though the offences may have some overlapping features. The crucial requirement of either Article 20 of the Constitution or Section 26 of the General Clauses Act is that the offences are the same or identical in all respects. It was clarified in *State of Bihar v. Murad Ali Kha*n [(1988) 4 SCC 655 : 1989 SCC (Cri) 27] : (SCC p. 668, paras 30-31)

""Though Section 26 in its opening words refers to "the act or omission constituting an offence under two or more enactments", the emphasis is not on the facts alleged in the two complaints but rather on the ingredients which constitute the two offences with which a person is charged. This is made clear by the concluding portion of the section which refers to "shall not be liable to be punished twice for the same offence". If the offences are not the same but are distinct, the ban imposed by this provision also cannot be invoked.'

The same set of facts, in conceivable cases, can constitute offences under two different laws. An act or an omission can amount to and constitute an offence under IPC and at the same time constitute an offence under any other law." (emphasis in original)

We accept the argument of the learned counsel for the State Mr Gopal Subramanium that offences under Section 302 IPC, Sections 3(2) and 3(3) of POTA are all distinct offences and a person can be charged, tried, convicted and punished for each of them severally. The analysis of these provisions show that the ingredients of these offences are substantially different and that an offence falling within the ambit of Section 3(1) may not be squarely covered by the offence under Section 300 IPC. The same set of facts may constitute different offences. The case of *State of M.P. v. Veereshwar Rao Agnihotry* [1957 SCR 868 : 1957 Cri LJ 892] is illustrative of this principle. In that case, it was held that the offence of criminal misconduct punishable under Section 5(2) of the Prevention of Corruption Act is not identical in essence, import and content with an offence under Section 409 IPC. The bar to the punishment of the offender twice over for the same offence would arise only where the ingredients of both the offences are the same."

36. In Sangeetaben Mahendrabhai Patel vs. State of Gujarat, (2012) 7 SCC 621 the Court observed as under in paragraph 31 to 33:-

"31. Similar view has been reiterated by this Court in State of Haryana v. Balwant Singh [(2003) 3 SCC 362 : 2003 SCC (L&S) 279 : AIR 2003 SC 1253] , observing that there may be cases of misappropriation, cheating, defamation, etc. which may give rise to prosecution on criminal side and also for action in civil court/other forum for recovery of money by way of damages, etc. Therefore, it is not always necessary that in every such case the provisions of Article 20(2) of the Constitution may be attracted.

32. In Hira Lal Hari Lal Bhagwati v. CBI [(2003) 5 SCC 257 : 2003 SCC (Cri) 1121 : AIR 2003 SC 2545] this Court while considering the case for quashing the criminal prosecution for evading the customs duty, where the matter stood settled under the Kar Vivad Samadhan Scheme, 1998, observed that once the tax matter was settled under the said Scheme, the offence stood compounded, and prosecution for evasion of duty, in such a circumstance, would amount to double jeopardy.

33. In view of the above, the law is well settled that in order to attract the provisions of Article 20(2) of the Constitution i.e. doctrine of autrefois acquit or Section 300 CrPC or Section 71 IPC or Section 26 of the General Clauses Act, the ingredients of the offences in the earlier case as well as in the latter case must be the same and not different. The test to ascertain whether the two offences are the same is not the identity of the allegations but the identity of the ingredients of the offence. Motive for committing the offence cannot be termed as the ingredients of offences to determine the issue. The plea of autrefois acquit is not proved unless it is shown that the judgment of acquittal in the previous charge necessarily involves an acquittal of the latter charge."

37. On behalf of the petitioners it has been emphasized that information disclosed in the FIR would fall short of the ingredients required to constitute offences in the disclosed section(s), and the disclosure otherwise is wrong on facts.

38. Admittedly, the facts in its entirety are not before the Court and the investigation is yet to conclude. At this stage, it would not be safe for this Court to adjudicate facts so as to hold that necessary ingredients of offences alleged are not made out against the writ petitioners. A word of caution has been sounded by the Supreme Court for exercise of power under Article 226 of the Constitution of India in Monika Kumar (Dr.) vs. State of U.P., (2008) 8 SCC 781 and reiterated in R. Kalyani vs. Janak C. Mehta, (2009) 1 SCC 516. In R. Kalyani (supra) the Court observed as under in paragraph 14 & 15 of the judgment:-

"14. However, *Monica Kumar (Dr.) v. State of U.P*. [(2008) 8 SCC 781 : (2008) 9 Scale 166] held: (SCC p. 798, para 36)

"36. ... The inherent power should not be exercised to stifle a legitimate prosecution. The 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 jurisdiction of quashing the proceeding at any stage."

(1) The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in particular, a first information report unless the allegations contained therein, even if given face value and taken to be correct in their entirety, disclosed no cognizable offence.

(2) For the said purpose the Court, save and except in very exceptional circumstances, would not look to any document relied upon by the defence.

(3) Such a power should be exercised very sparingly. If the allegations made in the FIR disclose commission of an offence, the Court shall not go beyond the same and pass an order in favour of the accused to hold absence of any mens rea or actus reus.

(4) If the allegation discloses a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue."

39. We further find force in the argument that petitioners in the facts of the present case have remedy available to them of seeking appropriate protection under Section 438/439 of the code of criminal procedure and in the event such remedy is availed, it shall be dealt with in accordance with law without being influenced by any observation made in the present judgment. We clarify that examination of facts and legal questions in the present judgment were confined to the question posed at the outset i.e. whether interference in the impugned FIR is required in the present petitions or not? All legal and factual issues are thus left open for determination at appropriate stage of the proceedings in accordance with law. Specific role of each petitioner is also not required to be examined by us, at this stage, for the above reasons.

40. In view of our above deliberations we decline to interfere in the present writ petitions which are accordingly dismissed. No order is passed as to costs.

(2022)05ILR A1261
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2022

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE DEEPAK VERMA, J.

Criminal Misc. Writ Petition No. 3010 of 2022

Amit Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rajnish Shukla, Sri Saroj Kumar Dubey

Counsel for the Respondents:
A.G.A.

(i) Criminal Law – Constitution of India,1950 - Article 226 - UP Control of Goondas Act, 1970 - Sections 3, 3(1), 3(1)(a), 3(1)(b), 3(1)(c) & 4 - Indian Penal Code,1860 – Sections 147, 148, 323, 336, 352, 427, 452 & 504 - Writ filed against the Show Cause Notice issued under

Goondas Act, - on the grounds that mandatory provisions provided under section 3(1) – in the light of judgement of Full Bench (five Judges) *Bhim Sain Tyagi' & Ramji Pandey' Cases* – impugned notice is liable to be quashed – writ petition allowed – direction to pass a fresh order accordingly.(Para – 8, 9, 12, 13)

Writ Petition Allowed. (E-11)

List of Cases cited:-

1. Bhim Said Tyagi Vs St. of U.P. (Alld. Criminal Cases 1999 (39) 321),

2. Ram Ji Pandey Vs St. of U.P. & anr. (Criminal Law Journal 1981 (1083).

(Delivered by Hon'ble Deepak Verma, J.)

1. Heard learned counsel for the petitioner; learned A.G.A. for the State-respondents and perused the record.

2. The instant writ petition seeks quashing of the impugned show cause notice dated 01.02.2022 issued by the Additional District Magistrate (Finance and Revenue), Gorakhpur, under Section ¾ U.P. Control of Goondas Act, 1970.

3. It is contended by learned counsel for the petitioner that petitioner is a student of B.A. II year and his examination is going to start from 22.03.2022 and his conduct has always been good. He has been falsely implicated in the impugned notice on account of involvement in a solitary case under Section ¾ U.P. Control of Goondas Act. The petitioner is neither the gang leader nor he is associated with any gang as member and, therefore, no offence under the Goondas Act is made out. He has falsely been implicated in Case Crime No.161 of 2021, under Sections 147, 148, 452, 323, 504, 506, 336, 352, 427 I.P.C. It has next been contended that Investigating Officer has submitted charge sheet in the aforesaid case. The petitioner has been enlarged on anticipatory bail.

4. Counsel for the petitioner next argued that the respondents with mala fide intention initiated proceedings and issued notice dated 01.02.2022 under Section ¾ of U.P. Control of Goondas Act, 1970 against the petitioner, which is faulty and without following the mandatory provisions provided under Section 3(1) of the Act. It has been further argued that notice should contain essential assertion of facts in relation to matter set out in clause a, b and c sub Section 1 of Section 3 of Goondas Act. The notice dated 01.02.2022, challenged herein, does not refer to any evidence or facts.

5. Learned counsel for the petitioner has placed reliance upon full Bench decision (five Judges) **Bhim Sain Tyagi Vs. State of U.P.** reported in Alld. Criminal cases, 1999 (39) 321 and **RamJi Pandey Vs. State of U.P.** and another reported in Criminal Law Journal 1981 (1083) and two other judgments passed by Co-ordinate Bench of this Court.

6. Learned A.G.A. opposed the submissions of counsel for the petitioner and submitted that present petition has been filed against the show cause notice and petitioner has remedy to reply of the show cause notice before the authority. The impugned notice issued against the petitioner is just and proper and according to provisions laid down in Section 3 of Goondas Act. It is further submitted that it is well settled proposition of law that on solitary case, notice can be issued.

7. We have heard learned counsel for the parties and perused the aforesaid judgments.

8. The argument raised on behalf of the petitioner with regard to notice is that it does not contain the essential assertions which are required by Section 3(1) clauses a, b and c of Goondas Act. The notice issued under Section ¾ of the petitioner does not contain the mandatory ingredients provided under Section 3(1) of Goondas Act. Notice issued to the petitioner is quoted below:

उ०प्र०, गुण्डा नियंत्रण अधिनियम की धारा- 3/4 के अन्तर्गत नोटिसः-

संख्या- 249/ पेशकार-22
दिनांक 01.02.22

चूंकि मेरे सामने रखी गयी सूचना के आधार पर मुझे यह प्रतीत होता है कि अमित शर्मा पुत्र धर्मेन्द्र शर्मा, नि० मिश्रौली, थाना गगहा, जिला गोरखपुर एक गुण्डा है अर्थात वह स्वयं भारतीय दण्ड संहिता के अध्याय 16,17,22 के अन्तर्गत दण्डनीय अपराध करता है। समाज के लिये दुःसाहसिक एवं खतरनाक व्यक्ति होने की इसकी सामान्य ख्याति है। वह भा०द०सं० के अध्याय 16,17,22 में वर्णित अपराधो को करने का अपराधी है। इसकी गतिविधियां व्यक्तियों को खति पहुंचाने वाली हैं इसके भय के कारण जनता को कोई भी व्यक्ति इसके विरूद्ध पुलिस को सूचना देने गवाही दने को तैयार नहीं होता हैं इसके विरूद्ध सारवान आरोप संलग्न हैः-
1- अभियुक्त के विरूद्ध मु०अ०सं 161/2021, धारा 147, 148 ,452, 323, 504, 506, 336, 352, 427 भादवि अधिनियम के विरूद्ध पंजीकृत हुआ,जिसके विवेचनांपरान्त पजीकृत हुआ, आरोप पत्र दिनांक 31.07.2021 को न्यायालय प्रेषित किय गया, जो विचाराधीन न्यायालय है।

2- वीट सूचना दिनांक 11.12.2021 थाना गगहा, रपट सं० 53

अतः अभियुक्त अमित शर्मा पुत्र धमेन्द्र शर्मा, नि० मिश्रौली, थाना गगहा, जिला गोरखपुर को एतद्द्वारा आदेश दिया जाता है कि वह मेरे समक्ष दिनांक 28.02.2022 को समय 10.00 बजे मेरे न्यायालय में उपसिति होवे और यदि चाहे तो उक्त सारवान आरोपो के सम्बन्ध में कारण बतलाते हुये अपना लिखित स्पष्टीकरण प्रस्तुत करे कि क्यों न उसके विरूद्ध उ०प्र० गुण्डा नियंत्रण अधिनियम अध्यादेश 1970 की उपधारा (3) के के अधीन आदेश दिया जाये तथा साथ ही मुझे यह भी सूचित करे कि क्या वह अपने स्पष्टीकरण के समर्थन में अपना अथवा किसी अन्य साक्षी का (यदि ऐसा हो साक्षियों के नाम एवं पते) का परीक्षण कराना चाहते है।

अभियुक्त अमित शर्मा पुत्र धर्मेन्द्र शर्मा, नि० मिश्रौली, थाना गगहा, जिला गोरखपुर को पुनः यह सूचित किया जाता है कि यदि वह उपर्युक्त प्रकार से उपस्थित नहीं होता है एवं निर्दिष्ट समय के अन्दर कोई स्पष्टीकरण अथवा सूचना नहीं देता है तो मान लिया जायेगा कि अभियुक्त को उपरोक्त के सम्बन्ध में कोई स्पष्टीकरण देना/ किसी भी साक्षी का परीक्षपण नहीं कराना चाहता है और मेरे द्वारा प्रस्तावित आदेश पारित करने की कार्यवाही कर दी जायेगी।

9. On perusal of notice, it is apparent that notice impugned lacks the assertion of facts in relation to the matters set out in Clause a, b and c and sub Section 1 of Section 3 of Goondas Act. In the instant case, the notice is general in nature and lacking is material particulars. The notice states that petitioner habitually commits crimes or attempts to commit or abets the commission of offences and is generally reported to be a person, who is desperate and dangerous to the community. Witnesses are not willing to come forward to give evidence against him by reason of

apprehension on their part as regards the safety of their person and property.

10. In para-17 of judgment in **RamJi Pandey** (Supra), the Court has held as under :

"17. Learned Standing Counsel urged that on a liberal construction of the notice the material allegations on the basis of which action against the petitioner is proposed' to be taken are dis-cernable, and as such the notice is not rendered illegal and the proceedings taken against the petitioner are valid. It is true that validity of a notice is generally upheld if it substantially conforms with the requirement of law but while considering the validity of a notice issued under Section 3 of the Act the same considerations cannot be applied. As noted earlier, the Act is extraordinary in nature. Its provisions permit serious in-; road on the liberty of a citizen as the provisions permit extemment of a driven (without a judicial trial. The power conferred on the authorities and the procedure provided by the Act seriously impinge upon the fundamental rights of a citizen and it makes a serious inroad on the personal liberty. The provisions of the Act provide slender safeguards to a citizen in requiring the District Magistrate and other authorities to give notice to the person against whom action is proposed under the Act and to set out the general nature of material allegations in the notice with a view to give opportunity to the person concerned to submit his explanation and to defend himself. The persons against whom action is proposed to be taken under the Act has a meagre opportunity of submitting his explanation to the allegations contained in the notice issued to him and to defend himself by producing evidence before the District Magistrate. These are the only safeguaids which the provisions of the Act provide to a citizen against Whom action is proposed to be taken. In such a situation the question of liberal jconstruction of notice does not arise, The Drovisiento of the Act, in our opinjjon, should be strictly complied by the extortive while taking action under the Act. This was emphasised by the Supreme Court in Pandharinath's case 1973 Cri LJ 612 Where it observed (at P. 615):

We will only add that case must be taken to ensure that the terms of Sections 56 and 59 are strictly complied and the slender safeguard which those provisions offer are given, to the proposed] exrternee.

this Court also made similar observations; in Harsh Narainfs case 1972 All LJ 762 in saying that the executive must strictly comply with the pirvisions of the Act. We are therefore ' o$ the opinion that if notice issued) under, Section 3(1) of the Act is not in accorder lance with the provisions of Section 3(1) of the Act and if it fails to comply, with the mandatory requirements of, setting out the general nature of material allegations further proceedings Initialed, in, pursuance of that notice would, also be rendered Illegal."

11. In the aforesaid judgment, it has been held that while issuing notice, the executive must strictly comply with the provisions of Section 3 (1) of the Goondas Act.

12. We find that in view of the full Bench decision, notice issued against the petitioner is not in accordance with the provisions of Section 3(1) of the Goondas Act, hence, impugned notice under Section ¾ of Goondas Act against the petitioner

fails to comply with the mandatory requirement of setting out the material allegation and is not in accordance with the provisions of Section 3 (1) of the Act.

13. Accordingly, the writ petition is **allowed**. The impugned show cause notice dated 01.02.2022 issued by the Additional District Magistrate (Finance and Revenue), Gorakhpur, under Section ¾ U.P. Control of Goondas Act, 1970 is hereby, quashed. However, it is open to the District Magistrate to pass a fresh order, if any material is available against the petitioner.

(2022)05ILR A1265
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.03.2022

BEFORE

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

First Appeal From Order No. 2008 of 2005

Dr. Suresh Prasad Tripathi ...Appellant
Versus
Jai Ram Shukla & Ors. ...Respondents

Counsel for the Appellant:
Sri Brijendra Kumar,Sri Krishna Kumar Singh

Counsel for the Respondents:
Sri Vipul Kumar, Sr Mohan Srivastava

Civil Law – Motor Vehicles Act, 1988, Section – 166 — Appeal filed by claimant - for enhancement of compensation – Accident is not disputed as well as insurance company not disputed any liability – contributory negligence of driver of Bus and Jeep involved in accident – claimant-appellant who was a passenger of said Bus sustained injuries - resulting he become permanently disabled to the tune of 50% – Tribunal Awarded Rs. 10,000/- on the ground that there is no loss of income – medical bills and disability certificated of claimant is highly disputed & doubtful since only photo copies are available on records – Disability certificate is not conformity with the X-ray report on which basis same is prepared – hence, learned Tribunal rightly awarded compensation – Appeal sans merit and is dismissed.(Para - 7, 9, 10, 11)

Appeal Dismissed. (E-11)

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

1. This appeal is preferred by the claimant-appellant for enhancement of compensation awarded to him by Motor Accident Claims Tribunal/First Additional District Judge, Chitrakoot ('Tribunal', for short), vide order dated 21.5.2005 in M.A.C.P. No.123/70/2001 *(Dr.Suresh Prashad Tripathi v. Jai Ram Shukla and others)* whereby claimant/appellant was awarded Rs.10,000/-, as compensation.

2. Brief facts of the case are that claimant/appellant was doctor in Civil Hospital, Chitrakoot. On 3.3.2001, at about 9:00 A.M., he was going from Kervi to Banda for an official work by bus bearing No. U.P.70-S/8555. The driver of the bus was driving the bus rashly and negligently and by driving so, he hit the Jeep No.U.P.70-J/9604 near Pand Nala Puliya, which was coming from the opposite direction. In this accident appellant sustained injuries. His right leg was fractured and he became permanently disabled. Only respondent No.3-New Indian Assurance Company Ltd. contested the petition and filed its written statement.

3. It was claimed by the appellant that he incurred Rs.1,60,000/- towards payment of medical bills and became disabled permanently to the tune of 50%, but

learned Tribunal awarded only Rs.10,000/- for pain and sufferings and rest of the prayers were declined.

4. Heard Shri Krishna Kumar Singh, learned counsel for the appellant, Shri Vipul Kumar, learned counsel for the respondents and perused the record.

5. Learned counsel for the appellant-claimant submitted that impugned judgment is bad in the eye of law and cannot be sustained as Rs.10,000/- were awarded and no amount of medical bills and loss of amenities et cetera was awarded. It is submitted by learned counsel that due to the result of the injuries sustained in accident, appellant became 50% physically handicapped. A permanent disability certificate was issued by Chief Medical officer, Chitrakoot, which is on the record PW2 - Dr.A.K. Mohan proved the certificate. It is also submitted that Dr.A.K. Mohan has also signed the disability certificate, but learned Tribunal did not pay any head towards it and declined the compensation for disability on the ground that claimant did not have any loss of earning due to disability. Learned counsel stated that this finding is erroneous because there is deficiency in day to day functioning of the appellant due to this disability. He next submitted that medical bills were also not reimbursed by the Tribunal. On the basis of above arguments, learned counsel prayed for enhancement of compensation.

6. *Per contra,* learned counsel for the respondent No.3-Insurance Company, submitted that appellant has submitted claim, which is result of exaggeration. First of all, it is said by learned counsel that all the so-called medical bills, filed by the claimant, are just photostat copies and the original bills were not submitted by him. Therefore, learned Tribunal rightly refused to pay for those medical bills. It is also submitted by learned counsel for the Insurance Company that as per the averments made in the petition, claimant was admitted in Priti Hospital, Prayagraj, where his leg was operated, but again no such documentay evidence is placed on record. Learned counsel vehemently submitted that Dr.A.K Mohan has admitted in his evidence as PW-2 that appellant did not receive any injury in his knee while the disability certificate was on the basis of injuries in thigh and knee and it is also admitted by him that there is no loss of income of claimant due to disability. Moreover, claimant himself has said in his cross-examination as PW-1 that he had loss of income for the reason that he had to employ two assistants for his routine-works while he has not filed any such evidence on record. Lastly, learend counsel appearing for the respondent No.3-Insurance Company submitted that the real fact is that PW2-Dr.A.K. Mohan was also serving in District Hospital in Chitrakoot where he was junior to claimant and that's why he and other doctors including Chief Medical Officer have issued a false disability certificate, which was not believed by learned Tribunal for incurring any loss of income by the claimant. Hence, there is no illegality and infirmity in the impugned judgment which calls for any interference by this Court.

7. In this matter, accident is not disputed by respondent No.3, rather a suggestion is given to appellant in his evidence as PW1 that accident took place due to the negligence of driver of the jeep. It means accident is admitted. The Insurance Company has not disputed any liability on it because the bus was insured

on the date of accident, as per the findings in Issue No.4. Now, we come directly to the point of compensation.

8. It is a case of appellant that he sustained injuries in aforesaid accident and became permanently disabled to the tune of 50%, as per disability certificate issued by Chief Medical Officer Chitrakoot. It is also the case of the appellant that he incurred Rs.1,60,000/- towards medical expenses, but these medical bills were not considered by the Tribunal for payment. In this regard, it is admitted that only xerox copies of those bills were produced by the appellant and no explanation is given as to why the original bills were not produced. Even on a query made by us on this point, the learned counsel for the appellant-claimant could not tell any reason. Hence, learned Tribunal has rightly refused to consider the photostat copies of the medical bills. Apart from it, it is relevant to mention that appellant has claimed that his leg was operated upon in Priti Hospital, Prayagraj, and a rod was fitted in the leg and on this point, learned Tribunal has opined that there is no record of admission and discharge of the appellant in aforesaid hospital, but perusal of record shows that there is receipt of Priti Hospital, Prayagraj, on the record for Rs.24,000/-, which also mentions 8.3.2001 as date of admission and 28.3.2001 as date of discharge, but this document is also a xerox copy and not the original one. Hence, this amount also cannot be paid back to the claimant for the xerox copy. Appellant has not clarified as to why original medical bills were not produced even on our asking. Hence, we fully agree with the findings of Tribunal with regard to non-payment of medical bills, as they are xerox copies and may be, being the Government Servant, he may have taken reimbursement from department.

9. Now, we come to the controversy of disability certificate. Although, the learned Tribunal has written in impugned judgment that original disability certificate was not produced and only its photostat copy was on record. Even then, we consider this point in the light of evidence led by PW-1 Dr.A.K. Mohan, because he is the person who has put his signature on disability certificate as Orthopaedic Surgeon, so he has given evidence in this regard. As per injury report of the claimant, only two injuries were found on his body in which injury No.1 is abrasion on the nose and injury No.2 was on the right thigh, which was a contusion. X-ray was adviced but we are suprised from the statement of Dr.A.K. Mohan that he was not sure whether he saw this X-ray report or not. Hence, he denied to give any statement regarding X-ray report in his evidence. It is pertinent to mention that disability certificate was issued on the basis of X-ray report, which shows two injuries; one on thigh and the other on knee and this X-ray report is signed by Dr.A.K. Mohan, but in his statement before the Tribunal the said doctor has stated that he found no injury on the knee, yet he had shown the knee as frozen. Further, it is clarified by him that the knee could be freezed due to negligence of claimant himself and it is also said by him if he had taken physiotherapy treatment, it could have been cured. Appellant/claimant has nowhere said in his statement that he has taken any physiotherapy treatment. Orthopaedic Surgeon Dr.A.K. Mohan was the only doctor in Medical Board, who was having expertise in this type of injuries, sustained by claimant, but he was not sure whether he persued the X-ray plate/X-ray report. It is admission of Dr.A.K. Mohan that he found no injury on knee yet he had shown it frozen. Moreover, it is also stated by him

that claimant's injury could be cured by physiotherapy and frozen knee could be the result of his own negligence.

10. Keeping in view above facts and circumstances of the case, the disabilty certificate, itself, becomes doubtful and is not in confirmity with the X-ray report, on which basis, it is prepared. Hence, this certificate cannot be relied on. As far as, the expenses regarding attendants are concerned, there is no such evidence on record that he had paid any money to any attendant.

11. In view of the discussion made above, we are in full agreement with the findings given by learned Tribunal and claimant was rightly awarded Rs.10,000/- with 7% per annum rate of interest for pain and sufferings, way back in the year 2005 for the accident occured in the year 2001.

12. Hence the appeal sans merit and is **dismissed** accordingly.

(2022)05ILR A1268
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.03.2022

BEFORE

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

First Appeal From Order No. 2047 of 2021

Smt. Urmila Devi & Ors. ...Appellants
Versus
Sri Bachchu Singh & Ors. ...Respondents

Counsel for the Appellants:
Sri Madhav Jain

Counsel for the Respondents:
Sri A.K. Singh

Civil Law – Motor Vehicles Act, 1988 - Section 166, - U.P. Motor Vehicles Rules, 1998 - Rules 220 – Appeal – Quantum of compensation – Accident as well as issue of negligence is not disputed - enhancement of Compensation – deceased was 40 years old and was doing business of Milk & Agriculture – Multiplier of 18 should be applied instead of 17 & deduction of 1/4th towards personal expense instead of 1/3rd as per law lay down in *Sarla Verma's* & Pranay Sethi' Judgment of Hon'ble Apex Court – 40% of income ought to be added towards future loss of income - including Rs. 50,000/- towards non-pecuniary damages - Compensation computed and awarded accordingly.(Para – 5, 8, 9, 12)

Appeal partly allowed. (E-11)

List of Cases cited: -

1. Sarla Verma & ors. Vs Delhi Transport Corporation & anr., 2009 Law Suit (SC)

2. National Insurance Co. Ltd. Vs Pranay Sethi & ors., 2017 vol. 0 Supreme (SC) 105

3. Bajaj Allianz General Insurance Co. Ltd. Vs U.O.I. & ors. (Decided by Hon'ble Apex Court on 27.01.2022)

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

1. Heard Sri Madhav Jain, learned counsel for the appellant and perused the judgment and order impugned. None has appeared for the respondent.

2. This appeal, at the behest of the claimant, challenges the judgment and award dated 2.8.2001 passed by the Motor Accident Claims Tribunal/Additional District Judge, Agra (hereinafter referred to as 'Tribunal') in M.A.C.P No.552 of 1999 awarding a sum of Rs.1,77,000/- as compensation with conditional interest at the rate of 9%.

3. The accident is not in dispute. The issue of negligence decided by the Tribunal is also not in dispute. The only issue to be decided is the quantum of compensation awarded.

4. The accident took place on 20.4.1999. The deceased was 25 years of age and was in the profession of selling milk and agriculture. The Tribunal considered his income to be Rs.15000/- per annum, deducted 1/3rd towards personal expenses of the deceased, granted multiplier of 17 and awarded Rs.7,000/- towards non pecuniary damages and that is how the Tribunal has calculated the total compensation to be Rs.1,77,000/-

5. Learned counsel for the appellant submits that the income of the deceased should be considered to be at least Rs.5,000/- per month. It is further submitted by learned counsel for the appellants that the Tribunal has not added any amount under the head of future loss of income which should be granted in view of decision in of the Apex Court in **National Insurance Co. Ltd. Vs. Pranay Sethi and others, 2017 LawSuit (SC) 1093.** It is also submitted that the Tribunal has applied the multiplier of 17, which would be 18 in view of the decision of the Apex Court in **Sarla Verma and others Vs. Delhi Transport Corporation and Another, 2009 LawSuit (SC)**

6. It is also submitted by learned counsel for the appellant that the amount awarded under non pecuniary damages is on the lower side and is required to be enhanced in view of the decision in **National Insurance Co. Ltd. Vs. Pranay Sethi and others, 2017 LawSuit (SC) 1093.**

7. Learned counsel for the appellant has lastly submitted that the interest awarded by Tribunal is on the lower side and it should be as per the repo rate prevailing in those days.

8. Having heard learned counsel for the appellant, in the instant case, the income of Rs.15,000/- per annum as considered by the Tribunal is just and proper. To which as the deceased was below 40 years and was having his own business, 40% will have to be added towards future loss of income of the deceased in view of the decision in **Pranay Sethi (Supra).** This Court is in agreement with learned counsel for the appellant that the multiplier of 18 should be granted in view of the decision in **Sarla Verma (Supra)**. As far as deduction towards personal expenses of deceased is concerned, it should be 1/4th as the deceased was survived by three minor son, three minor son, widow, mother and three sisters. As far as amount under non-pecuniary heads is concerned, the appellants would be entitled to Rs.50,000/-.

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

i. Annual Income: Rs.15,000/-

ii. Percentage towards future prospects : 40% namely Rs.6,000/-

iii. Total income : Rs.15,000 + 6,000 = Rs.21,000/-

iv. Income after deduction of 1/4th towards personal expenses : Rs.15,750/-

v. Multiplier applicable : 18

vii. Loss of dependency: Rs.15,750 x 18 = Rs.2,83,500/-

viii. Amount under non pecuniary heads : Rs 50,000/-

ix. Total compensation : Rs.3,33,500/-

10. As far as issue of rate of interest is concerned, the Tribunal has granted conditional interest at the rate of 9% which is bad. The claimants would be entitled to 6% rate of interest from the date of filing of the claim petition till the date of award. However, from the date of filing of this appeal and till the delay was condoned, it would be 3% and from the date the delay is condoned, it would be 6% till the amount is deposited.

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

12. In view of the above, the appeal is partly allowed. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount within a period of 12 weeks from today with interest as directed above. The amount already deposited be deducted from the amount to be deposited.

13. 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.

14. This Court is thankful to the counsel for getting this matter decided.

(2022)05ILR A1270
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2022

BEFORE

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

First Appeal From Order No. 2104 of 2019

Smt. Maneesha Dubey & Ors. ...Appellants
Versus
Sri Aakash Gupta & Anr. ...Respondents

Counsel for the Appellants:
Sri Ram Tiwari

Counsel for the Respondents:
Sri Vijay Prakash Mishra

Civil Law – Motor Vehicles Act, 1988 - Section – 173— Appeal – Challenging the rejection order of Claim Petition – in alleged an Accident deceased was died due to fatal injuries - FIR was lodge with highly delay of one year – there were no any information was St.d in FIR regarding involvement of any Car as well as not in the Medico-Legal-Report of the Hospital where the deceased was admitted – testimony of eye witness is doubtful because there were no any evidence or reason given by the eye witness why he did not tell the number of Car at the time of accident - after threadbare analysis of evidence on record – learned Tribunal has rightly appreciated the evidence and rejected the Claim - Appeal sans merit and is dismissed. (Para – 8, 9, 10, 11)

Appeal Dismissed. (E-11)

List of Cases cited:-

1. Ravi Vs Badri Narayan & ors. (2011 (0) Supreme (SC) 201),

2. Vimla Devi & ors. Vs National Insurance Co. Ltd. & anr. (2019 (2) SCC 186).

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

1. By way of this appeal, the claimants have challenged the judgment and order dated 24.10.2018, passed by Motor Accident Claims Tribunal (MACT)/V-Additional District Judge, Kanpur Nagar (herein after referred to as 'the Tribunal') in MACP No.470 of 2014 *(Smt.Manish Dubey and others vs. Ashish Gupta and another)*, by which the claim petition of petitioners was rejected by the Tribunal.

2. Brief facts of the case are that this claim petition is filed on account of death of deceased Rajeev Dubey in road accident. It is averred in claim petition that on 17.6.2012 at about 8:00 p.m., deceased Rajeev Dubey was going from his home to Sachan Guest House by motorcycle bearing No.UP-78-CL/5855 and when he reached Govind Homeo Hall, a Hyundai-car bearing No.UP-78-AK/9049 came from behind, which was being driven very rashly and negligently by its driver, dashed the motorcycle of the deceased from behind. In this accident, deceased sustained fatal injuries and died during the treatment.

3. Respondent No.1-Akash Gupta filed written statement and submitted that he was driving the aforesaid car at the time of accident and was having valid driving-licence. It was also stated that owner and insurer of motorcycle were not made party.

4. Respondent No.2-M/s Sri Ram General Insurance Co.Ltd. also filed its written statement and submitted that accident did not take place by the aforesaid Hyundai-car. This car is falsely planted in order to secure the amount of compensation. Hence, in this way, the involvement of car was vehemently denied by the Insurance Company.

5. Learned Tribunal, while deciding Issue No.1, relating to the factum of accident, held that accident took place due to dashing the motorcycle by the deceased in divider of the road and motorcycle was not hit by car from behind. With these observations, learned Tribunal rejected the claim petition. Hence, this appeal.

6. Heard Shri Ram Tiwari, learned counsel for the appellants-claimants, Shri Vijay Prakash Mishra, learned counsel appearing for the respondent-Insurance Company and perused the record.

7. Learned counsel for the claimants submitted that Tribunal has failed to appreciate the evidence on record, the fact of involvement of car in accident is very-well proved by the cogent evidence, but learned Tribunal did not agree to it. It is also submitted that PW2 was the eye-witness of the accident and he has clearly stated that he saw the accident, which was caused by the car in question. It is strongly submitted that the charge-sheet is filed against the driver of the car by the police after thorough investigation and this fact is ignored by learned Tribunal. It is submitted that initially a closure-report was filed by Investigating Officer, but he subsequently, filed the charge-sheet after collecting the evidence and competent magistrate has also taken cognizance in the matter. He next submitted that it will be presumed that official and judicial acts were performed in due course unless proved otherwise.

8. Learned counsel for the respondent No.2-Insurance Co. submitted that FIR of

this accident is highly belated; it was lodged after one year of the accident. He further submitted that just after the accident, injured/deceased was taken to Regency Hospital and in Medico-Legal Report of that hospital, it is clearly mentioned that motorcycle was dashed in the divider of the road. It is also submitted that after the death of deceased, a written information of the accident was given by Shravan Kumar Shukla, who is brother-in-law of the deceased, to the Police Station-Barra, District-Kanpur Nagar, and he has written in aforesaid report/information that the motorcycle of the deceased was dashed with divider, due to which the deceased sustained head-injuries. He was admitted on 17.6.2012, the day of accident in Regency Hospital wherein he died on 25.6.2012 and in this matter, nobody is responsible. Hence, it is evident that the car is falsely involved in the said accident after nearly one year of the accident otherwise the eye-witness says that he remained present on the spot of the accident about 1/2 hour and saw the number of the car also, but this number was not told to the family members of the deceased because if it would have been so, then the first information report should have been lodged just after the accident.

9. Learned counsel for the appellant relied on the judgments in the case of ***Ravi vs. BadriNarayan and others,*** *2011 (0) Supreme(SC) 201 &* ***Vimla Devi and others vs. National Insurance Co.Ltd. and another,*** *(2019) 2 SCC 186.* These two judgments are on the point that delay in lodging the FIR in claim-cases should not be the ground of dismissal of the petition, but in the case in hand, the facts are entirely different. In this case, the FIR was lodged after 10 months of the accident, and it shows the fabrication because in Medico-Legal Report of the hospital, it is mentioned that the motorcycle of the deceased dashed in the divider. After death of the deceased, his brother-in-law informed the police at P.S.-Barra, District-Kanpur Nagar that deceased sustained head-injuries on account of being his motorcycle dashed in the divider due to which he died. In the aforesaid two documents, there is no mention of the involvement of any car in the accident as stated in the FIR, which is lodged after 10 months of the accident.

10. Perusal of the record also shows that the so-called eye-witness, namely, PW2 has said in his evidence that he saw the accident and remained present on the spot for 1/2 an hour. It is also said by him that the family members of the deceased reached on the spot, but there is no such evidence or reason as to why he did not tell the number of the car to them when he claims that he saw the number of the car. Although, charge-sheet submitted in this matter against the driver of said car after filing the closure-report earlier, but in spite of this fact, the Medico-Legal Report of the Regency Hospital and the information given to the Police Station-Barra, District-Kanpur Nagar by the brother-in-law of the deceased cannot be ignored.

11. Hence, after threadbare analysis of evidence on record, we are of the considered view that learned Tribunal has rightly appreciated the evidence on record and we are in full agreement with the conclusion expressed by the learned Tribunal that accident took place by dashing the motorcycle in divider of the road and it was not occurred due to hitting the motorcycle by car from behind.

12. Hence, the appeal sans merit and is *dismissed*, accordingly.

(2022)05ILR A1273
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.03.2022

BEFORE

THE HON'BLE NEERAJ TIWARI, J

Civil Misc. Transfer Application No. 704 of 2021

Smt. Shalinee Dubey @ Radhika Dubey
...Applicant
Versus
Abhishek Tripathi @ Gopal
...Opposite Party

Counsel for the Applicant:
Sri Chaman Aara, Sri Shiv Vilas Mishra

Counsel for the Opposite Party:
Sri Shreesh Srivastava

(i) Civil Law – Civil Procedure Code, 1908 - Section 24, Criminal Procedure Code,1973 - Section 125 - Hindu Marriage Act, 1955 - Sections 13(a)(i)a & 24 - Domestic Violence Act, 2005 - Section - 12 - Transfer Application - for transfer of Divorce Petition from one city to anr. - in which case Applicant appeared and duly received maintenance U/s 24 of Act, 1955 on month to month basis - in the light of judgment of Hon'ble Apex Court i.e. Abhilasha Gupta's case – no any interference is warranted on the ground of distance & financial stress specially wherein the proceedings are pending at the final stage – hence transfer application is liable to be dismissed. (Para – 5, 7)

(i) Civil Law – Civil Procedure Code, 1908 - Section 24 - Criminal Procedure Code,1973 - Section 125 - Hindu Marriage Act, 1955 - Sections 13(a)(i)a & 24 - Domestic Violence Act, 2005 - Section - 12 - Transfer Application – in case of threat perception - no interference is required for transferring the Divorce petition – liberty is given to the applicant to move application before SSP for security - only for the date of appearance – direction accordingly. (Para – 9)

Transfer Application Dismissed. (E-11)

List of Cases cited:-

1. Abhilasha Gupta Vs Harimohan Gupta (2021 (9) SCC 730),

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard learned counsel for the applicant and Mr. Shreesh Srivastava, learned counsel for the opposite party.

2. Learned counsel for the applicant submitted that applicant is residing at District Etawah. She has also filed Case No. 301 of 2019, under Section 125 Cr.P.C and Case No. 227 of 2019, under Section 12 of Domestic Violence Act at there. He next submitted that only to harass the applicant, opposite party has filed Divorce Petition No. 46 of 2019 before the Principal Judge, Family Court, Auraiya. He further submitted that while she was visting at Auraiya alongwith her father, she was misbehaved and threatened to face dare consequences. For which, applicant has also moved an application before the Senior Superintedent of Police, Auraiya. Lastly, he submitted that under such facts and circumstances, direction may be issued to Court below to transfer her case from Auraiya to Etawah.

3. Mr. Shreesh Srivastava, learned counsel for the opposite party has vehemently opposed the submission of learned counsel for the applicant and submitted that applicant is still residing at District Auraiya, which may be verified from the correspondence between the applicant and S.S.P., Auraiya. Further, pursuant to her alleged application before

S.S.P., Auraiya, no FIR has been lodged. He next submitted that in the divorce petition, applicant has also filed written statements and testimony of P.W.-1 and P.W.-2 have also been recorded. He further submitted that during the pendency of divorce petition, applicant has filed an application under Section 24 of Hindu Marriage Act, 1955 (hereinafter referred to as Act, 1955) for pendente lite maintenance and litigation expenses, which was partly allowed vide order dated 6.4.2021. Opposite party is paying the litigation expenses to the applicant as directed by the Court below vide order dated 6.4.2021. He also submitted that except the testimony of defence witnesses, nothing remains to be recorded for adjudication of the case. In support of his contention, he has placed reliance upon the judgment of the Apex Court in the case of ***Abhilasha Gupta vs. Harimohan Gupta reported in 2021 9 SCC 730*** decided on 24.9.2021 in which Apex Court has taken the view that once the application under Section 24 of Act, 1955 is allowed and case is at the verge of final decision, no interference is required.

4. In his rejoinder argument, learned counsel for the applicant submitted that she is facing problem in appearing before the Family Court, Auraiya, but he could not dispute this fact that she is receiving the litigation expenses upon her application under Section 24 of Act, 1955 as directed by this Court vide order dated 6.4.2021.

5. I have considered the rival submissions of learned counsel for the parties and perused the record as well as judgment of Apex Court. Facts of the case are undisputed that applicant has filed written statements before the Court below and testimony of P.W.-1 & P.W.-2 have also been recorded. It is also not disputed that applicant is receiving litigation expenses on month to month basis awarded by the Court below vide order dated 6.4.2021 upon her application under Section 24 of Act, 1955. In the matter of Abhilasha Gupta (Supra), the very same controversy is before the Apex Court in which Apex Court has refused to interfere the transfer application. The said judgment of Apex Court dated 24.9.2021 is being quoted hereinbelow:-

"The present petition has been filed by the petitioner- wife praying inter alia for transfer of a petition for divorce filed by the respondent-husband under Section 13(a) (ia) of the Hindu Marriage Act, 1955 bearing H.M. Case No. A-130 of 2019 titled "Harimohan Gupta vs. Abhilasha Gupta", pending before the Court of the Additional District and Sessions Judge, Susner, Madhya Pradesh to the Family Court at Kota, Rajasthan. Counter affidavit in opposition to the present petition has been filed by the respondent.

Ms. Ranu Purohit, learned counsel for the respondent- husband states that the divorce petition filed by the respondent-husband is at an advance stage. She draws the attention of this Court to the date-wise tabulated statement Signature Not Verified Digitally signed by Dr. Mukesh Nasa Date: 2021.09.29 17:35:56 IST Reason: enclosed with the counter affidavit, marked as Annexure R-1 and states that the evidence of the husband has concluded and the wife has not cited any other witness except for herself. The matter was last listed on 06.08.2021, for recording her testimony but due to the stay order granted in the present proceeding on 20.07.2021, the said matter has been adjourned.

The learned counsel further stated that the distance between present place of residence of the petitioner-wife and the Family Court at Kota, Rajasthan is less than 200 kilometers and offers that the respondent-husband is willing to pay the expenses towards commuting to the petitioner-wife to enable her to appear before the learned Family Court at Kota, Rajasthan for expeditious conclusion of her evidence and final arguments.

The learned counsel for the respondent-husband draws the attention of this Court to the order dated 14.10.2019, passed by the learned Court of the Additional District and Sessions Judge, Susren, Madhya Pradesh which recorded the request of the petitioner-wife to the effect that she may be paid a sum of Rs. 3,000/- (Rupees Three Thousand only) as transportation charges to appear in the Court alongwith an attendant.

Having regard to the advance stage of the divorce petition filed by the respondent-husband against the petitioner-wife at Kota, this Court is not inclined to allow the present petition. However, it is deemed appropriate to direct the respondent-husband to pay a sum of Rs. 4,000/- (Rupees Four Thousand Only) to the petitioner-wife for appearance on each date of hearing before the Court of Additional District and Sessions Judge, Susren, Madhya Pradesh, towards transportation charges.

The transfer petition is disposed of with the aforesaid orders. Interim order dated 20.07.2021 stands vacated."

6. From the perusal of the aforesaid judgment, it is apparent that present controversy is squarely covered with the judgment of Apex Court in the case of ***Abhilasha Gupta (Supra).***

7. Once the applicant has moved application under Section 24 of Act, 1955, which was allowed and uninterrupted litigation expenses is paid to her, she cannot move transfer application on the ground of distance and financial stress. Similarly, in case the proceedings is at the verge of final hearing, any interference in transfer application would only delay the proceedings. Therefore, under such circumstances, no interference is warranted and transfer application is liable to be dismissed.

8. Accordingly, in light of facts mentioned hereinabove as well as law settled by the Apex Court, transfer application lacks merit and is accordingly, dismissed. No order as to costs.

9. However, in case of threat perception, liberty is given to the applicant to move application before the S.S.P., Etawah alongwith order of this Court for security for the date of appearance. In case, any such application is moved before the S.S.P., Etawah, he shall provide ample security to applicant or other witnesses on the date of their appearances before the Principal Judge, Family Court, Auraiya.

10. This order of security shall be confined to only dates of appearance of applicant and other witnesses before the Court and not for any other purpose.

11. Principal Judge, Family Court, Auraiya is directed to make all endeavour to decide the aforesaid case maximum within a period of three months from the date of production of certified copy of this order.

(2022)05ILR A1276
APPELLATE JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD 02.02.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE PIYUSH AGRAWAL, J.

Special Appeal Defective No. 718 of 2021

Mashkoor Hasan ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri R.K. Ojha (Senior Advocate), Sri S.B. Singh

Counsel for the Respondents:
Sri A.K. Roy (Addl. C.S.C.), Sri Arvind Kumar Pandey

A. Service Law – Appointment/Selection – Uttar Pradesh Secondary Education Services Selection Board Rules, 1998 - Rule 13(4) - After a candidate from the select list joins service, the selection process comes to an end and the waiting list cannot be acted upon as the post stands filled up. (Para 10)

B. Jurisdiction - The Joint Director of Education, even after a direction was issued by this Court for consideration of the representation filed by the appellant, did not have the jurisdiction to direct for appointment of the appellant as the same is contrary to law. (Para 8)

In case the appointed candidate had left service thereafter, no person from the waiting list could be offered appointment and that too about 18 years after the selection process was carried out. The order passed by the Joint Director of Education being totally illegal, the same has rightly been stayed by learned Single Judge. (Para 8)

The candidate at Sr. No. 1 in the merit list namely, Dr. Dinesh Vashishth was issued appointment letter on July 16, 2008 and he joined as Principal of the College on July 19, 2008. However, in the year 2011, he left the job and had gone back to his parent institution, where he was working prior to his appointment and joining as Principal of the College. He retired on July 31, 2020 after attaining the age of superannuation. (Para 9)

In an appeal filed by Dr. Dinesh Vashishth, against the order dated 03.09.2008, the order passed by learned Single Judge was set aside on 25.09.2008 with a request to the learned Single Judge to decide the writ petition expeditiously. It was observed in the aforesaid order that the life of the select list would continue till the decision of the writ petition. (Para 13)

There is no quarrel with the proposition of law that with the joining of a candidate in the select list, the process of selection is complete and the waiting list cannot be acted upon. No rules were cited to show about the validity of a select list. **Only reference was made to the observation made by the Division Bench of this Court in Special Appeal No. 1282 of 2008,** wherein it was recorded that the select list would remain valid till the decision of the WP filed by the Sudhir Kumar Gupta, who was at Sr. No. 2 in the merit list questioning the appointment of Dr. Dinesh Vashishth who was at Sr. No. 1 in the merit list. The present appellant was nowhere in the picture. **The aforesaid order could have relevance to the claim of Sudhir Kumar Gupta, for appointment as Principal and not for any other candidate.** (Para 7, 14)

Even otherwise, in the case in hand, the select list was notified on September 29, 2003 and appointment on the post was sought and offered to the appellant in the year 2020-21. The claim made by the appellant to the post, in the aforesaid factual matrix by filing a representation and then a WP in the year 2020, was otherwise also highly belated. The post in question was vacated by Dr. Dinesh Vashishth in the year 2011. (Para 15)

Special appeal dismissed. (E-4)

Precedent followed:

1. Har Nath Singh Vs St. of U.P. & ors., Special Appeal No. 1115 of 2019, dated 01.11.2019 (Para 2)

2. Chandresh Nath Singh Baghel Vs Bhagwan Singh Sisodia & ors., 2008 (1) ESC 428 (All.) (Para 8)

Precedent cited:

1. Ashutosh Shrotriya & ors. Vs Vice – Chancellor, Dr. Ambedkar University & ors., 2015 (8) ADJ 248 (Para 6)

Earlier litigation in the present Special Appeal:

1. Sudhir Kumar Gupta Vs St. of U.P. & ors., Writ-A No. 45747 of 2008 (Para 4)

2. Dr. Dinesh Vashishth Vs St. of U.P. & ors., Special Appeal No. 1282 of 2008 (Para 4)

Present special appeal assails the judgment and order dated 11.08.2021, passed by Hon'ble Justice Yashwant Verma, J. in Writ-A No. 9776 of 2021.

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

1. The present intra-court appeal has been filed impugning the interim order dated August 11, 2021 passed by learned Single Judge of this Court in a writ petition filed by respondent No.7.

2. Mr. Arvind Kumar Pandey, learned counsel appearing for respondent No.7 raised a preliminary objection regarding maintainability of the present appeal against the interim order passed by learned Single Judge. In support of his arguments, he relied upon a Division Bench judgment of this Court in **Special Appeal No. 1115 of 2019 (Har Nath Singh Vs. State of U.P. and others)**, dated November 1, 2019.

3. Mr. Radha Kant Ojha, learned Senior Counsel appearing for the appellant submitted that an advertisement was issued for selection and appointment to the post of Principal in various institutions including Rani Avanti Bai Inter College, Marhara, District Etah (hereinafter referred to as the "College') in the year 2002. Select list was notified on September 29, 2003. So far as the select list of the College is concerned, Dr. Dinesh Vashishth was at Sr. No.1 whereas Sudhir Kumar Gupta was at Sr. No. 2 and the appellant was at Sr. No. 3 in the merit list.

4. A writ petition was filed by Sudhir Kumar Gupta, the candidate at Sr. No.2 in the merit list, with reference to the said selection and appointment, bearing **Writ-A No. 45747 of 2008 (Sudhir Kumar Gupta Vs. State of U.P. and others)**. In the said writ petition, vide order dated September 3, 2008, operation of the orders impugned therein dated July 31, 2008 and August 12, 2008, was stayed. The said order was challenged by Dr. Dinesh Vashishth by filing **Special Appeal No. 1282 of 2008 (Dr. Dinesh Vashishth Vs. State of U.P. and others),** which was allowed on September 25, 2008. While setting aside the order dated September 3, 2008 passed by learned Single Judge, a request was made to the learned Single Judge for deciding the writ petition expeditiously. The aforesaid writ petition is stated to be still pending.

5. The learned Senior Counsel further submitted that Dr. Dinesh Vashishth, who was at Sr. No. 1 in the merit list has since

retired after attaining the age of superannuation, he is no more a candidate. The candidate at Sr. No. 2 in the merit list namely, Sudhir Kumar Gupta has also left service and hence no more interested to be appointed as Principal of the College. Hence, the appellant was the only candidate available from the select list for being offered appointment as Principal of the College. As his claim was not being considered, he filed **Writ-A No. 8770 of 2020** before this Court. The said writ petition was disposed of on November 11, 2020 with a direction to the Joint Director of Education, Aligarh Region, Aligarh to consider and decide the representation filed by the appellant. Pursuant to the aforesaid order, the claim of the appellant was considered and vide order dated June 26, 2021, a direction was issued for appointment of the appellant as Principal of the College. As far as competence of the Joint Director of Education to direct for appointment of the appellant as Principal is concerned, reference was made to Rule 13(4) of the Uttar Pradesh Secondary Education Services Selection Board Rules, 1998 (hereinafter referred to as "the Rules'). It was further argued that in the Rules, there is no time limit prescribed for the life of a select list. However, in the case in hand, the same is still alive, for the reason that the Division Bench of this Court while disposing of **Special Appeal No. 1282 of 2008** filed by Dr. Dinesh Vashishth, had directed that the life of the select list would continue till the decision of the writ petition by the learned Single Judge. As the writ petition is still pending, the select list is valid. In pursuance of the aforesaid order passed by the Joint Director of Education, an appointment letter was issued in favour of the appellant on July 26, 2021. He joined service and his signatures were also attested. With the passing of the impugned interim order, prejudice has been caused to the appellant as he has been deprived of to serve as Principal of the College, though validly selected.

6. In response to the arguments raised by learned counsel for respondent No.7 regarding maintainability of the present appeal while referring to a Full Bench judgment of this Court in **Ashutosh Shrotriya and others Vs. Vice-Chancellor, Dr. B.R. Ambedkar University and others, 2015 (8) ADJ 248**, it was submitted by the learned Senior Counsel that the interim order in the case in hand being in the nature of final order, intra-court appeal is maintainable. Prayer for setting aside the aforesaid order has also been made so as to enable the appellant to continue to serve as Principal of the College.

7. In response, learned counsel for respondent No.7/writ petitioner submitted that, undisputedly, the select list, on the basis of which the appellant is seeking appointment, was notified on September 29, 2003. The appellant was at Sr. No. 3 in the merit list. He was never a party in any litigation pending before the Court as it was a lis between the candidates at Sr. Nos. 1 and 2, which is still pending in this Court. Though the litigation was pending, still, undisputedly, the candidate at Sr. No. 1 in the merit list namely Dr. Dinesh Vashishth was issued appointment letter on July 16, 2008 and he had even submitted his joining on July 19, 2008. As a consequence, the post for which the selection was carried out, stood filled up and there was no question of operation of any waiting list even if the select list can be said to be still alive, though the same had outlived its life, as far as the appellant is concerned. The observation made by the Division Bench of

this Court while deciding Special Appeal No. 1282 of 2008 was only with reference to a litigation between the candidates at Sr. Nos. 1 and 2 in the merit list, it was not an order in rem rather in personam.

8. The Joint Director of Education, even after a direction was issued by this Court for consideration of the representation filed by the appellant, did not have the jurisdiction to direct for appointment of the appellant as the same is contrary to law laid down by this Court in **Chandresh Nath Singh Baghel Vs. Bhagwan Singh Sisodia and others, 2008 (1) ESC 428 (All)**, as the post in question stood already filled up with reference to the advertisement issued. In case the appointed candidate had left service thereafter, no person from the waiting list could be offered appointment and that too about 18 years after the selection process was carried out. The order passed by the Joint Director of Education being totally illegal, the same has rightly been stayed by learned Single Judge.

9. Learned counsel for the State submitted that the candidate at Sr. No. 1 in the merit list namely, Dr. Dinesh Vashishth was issued appointment letter on July 16, 2008 and he joined as Principal of the College on July 19, 2008. However, in the year 2011, he left the job and had gone back to his parent institution, where he was working prior to his appointment and joining as Principal of the College. He retired on July 31, 2020 after attaining the age of superannuation.

10. Learned counsel for the appellant and the State do not dispute the proposition of law that after a candidate from the select list joins service, the selection process comes to an end and the waiting list cannot be acted upon as the post stands filled up.

11. Heard learned counsel for the parties and perused the documents available on record.

12. Certain basic facts, which are not in dispute, are that an advertisement was issued for selection and appointment on the post of Principal of the College in the year 2002. The select list was notified on September 29, 2003 in the following order of merit:

1. Dr. Dinesh Vashishth
2. Sudhir Kumar Gupta
3. Mashkoor Hasan

13. As is evident from the select list, the appellant was at Sr. No. 3 in the merit list. From the order dated September 3, 2008 passed by learned Single Judge in Writ-A No. 45747 of 2008 filed by Sudhir Kumar Gupta, the candidate at Sr. No.2 in the merit list, it is evident that there was some litigation pending in the Court with reference to the selection in question. Finally, it was upheld by Hon'ble Supreme Court in the year 2008. It was a dispute between the candidates at Sr. Nos. 1 and 2 in the merit list namely, Dr. Dinesh Vashishth and Sudhir Kumar Gupta. Vide order dated September 3, 2008, the learned Single Judge of this Court had stayed operation of the orders impugned therein, dated July 31, 2008 and August 12, 2008. In an appeal filed against the aforesaid order by Dr. Dinesh Vashishth, the aforesaid order passed by learned Single Judge was set aside on September 25, 2008 with a request to the learned Single Judge to decide the writ petition expeditiously. It was observed in the aforesaid order that the

life of the select list would continue till the decision of the writ petition.

14. Further, the undisputed facts which emerge from the documents available on record are that in pursuance of the selection process, the candidate at Sr. No. 1 in the merit list namely, Dr. Dinesh Vashishth was issued appointment letter on July 16, 2008. In pursuance thereto, he submitted his joining report and was permitted to join as Principal of the College on July 19, 2008. He continued to work as such till the year 2011, as submitted by learned counsel for the State. There is no quarrel with the proposition of law that with the joining of a candidate in the select list, the process of selection is complete and the waiting list cannot be acted upon. Even if, for the time being, we do not opine on the issue regarding life of a select list herein, no rules were cited to show about the validity of a select list. Only reference was made to the observation made by the Division Bench of this Court in Special Appeal No. 1282 of 2008, wherein it was recorded that the select list would remain valid till the decision of the writ petition filed by the Sudhir Kumar Gupta, who was at Sr. No.2 in the merit list questioning the appointment of Dr. Dinesh Vashishth who was at Sr. No. 1 in the merit list. The present appellant was nowhere in the picture. The aforesaid order could have relevance to the claim of Sudhir Kumar Gupta, for appointment as Principal and not for any other candidate.

15. Even otherwise, in the case in hand, the select list was notified on September 29, 2003 and appointment on the post was sought and offered to the appellant in the year 2020-21. The claim made by the appellant to the post, in the aforesaid factual matrix by filing a representation and then a writ petition in the year 2020, was otherwise also highly belated. The post in question was vacated by Dr. Dinesh Vashishth in the year 2011.

16. For the reasons mentioned above, we do not find any reason to interfere in the present appeal. The same is, accordingly, **dismissed.**

(2022)05ILR A1280
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.04.2022

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Criminal Misc. Bail Application No. 12419 of 2021

Ram Prakash ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Ashish Kumar Rastogi, Anita Singh

Counsel for the Opposite Party:
G.A.

Criminal Law- Indian Evidence Act, 1872- Section 45A- Polygraph Test- admissibility of- Section 141- Leading Questions- The perusal of polygraph test reveals that the investigating officer has asked a pin-point question- Instead of asking leading question from the eye-witness the prosecution should have asked as to who were those persons who have attacked on him and victim. However, even such question could not have been asked while conducting the polygraph test inasmuch as such test has been disapproved by the Hon'ble Apex Court in re: *Selvi and others* (supra)- When such eye witness and the informant who is wife of deceased had not alleged anything against the present applicant while recording their statement

u/s 161 Cr.P.C. respectively whereas the present applicant was close relative of the informant then the statement of eye witness taken while conducting polygraph test would have no evidentiary value in view of the dictum of Hon'ble Court in re: *Selvi (supra)*. Therefore, when such statement of the eye witness in question has got no evidentiary value in the eyes of law, the implication of the present applicant in such case would not be proper subject to other circumstantial evidence and corroborative material which would be seen during trial.

Where leading questions are asked in a Polygraph test, which has been disapproved by the Supreme Court, then the same would have no evidentiary value specially when no allegations were made against the accused in the statement recorded u/s 161 of the Cr.P.C. (Para 15, 16)

Bail Application allowed. (E-3)

Judgements/ Case law relied upon:-

Selvi & ors. Vs St. of Kar. (2010) 7 SCC 263

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

1. Heard Sri Ashish Kumar Rastogi, learned counsel for the applicant and Sri Rao Narendra Singh, learned AGA for the State.

2. The present applicant is in jail Since 18.6.2021 in Case Crime No. 314 of 2018 u/s 302, 307, 323 IPC, P.S. Gosaiganj, District Lucknow. He has further submitted that the present applicant has been falsely implicated in this case as he has not committed any offence as alleged in the prosecution story.

3. Attention has been drawn towards the impugned F.I.R. which is against the four unknown persons who were beating up the husband of the informant mercilessly through sharp edged weapon and batons on 29.5.2018. As per the informant she has seen those persons through the light of torch as the incident is a night occurrence of 9.30 P.M.

4. The police recorded the statement of informant / wife of the deceased on 31.5.2018. Further, the police recorded the statement of eye witness Guddu s/o Guru Prasad u/s 161 Cr.P.C. on 12.1.2019. When the local police could not investigate the matter as no reliable evidences could be collected, matter was transferred to crime branch for further investigation. The crime branch again recorded the statement of eye witness Guddu on 22.5.2020 where he repeated his earlier version recorded under section 161 Cr.P.C. The crime branch conducted the Polygraph test of Guddu s/o Guru Prasad on 15.3.2021. During polygraph test the leading question has been asked from Guddu as to whether the present applicant has committed crime in question, he replied in affirmative. As per learned counsel for the applicant the leading question could have not been asked during investigation. However, on the basis of aforesaid statement of eye witness Guddu the police arrested the applicant and send him jail on 18.6.2021 without intimating any reason to the applicant or his family members regarding the offence he has committed for that he is being arrested. Thereafter, the police filed charge-sheet on 18.7.2021 implicating the present applicant on the basis of polygraph test.

5. Learned counsel for the applicant has drawn attention of this Court towards para 15 of the bail application wherein it has been categorically indicated that the present applicant is brother-in-law of the informant. Therefore, it is beyond any

comprehension that if the informant was able to recognize the assailants on the date of incident she could not recognize her close relative. To be more precise, as per learned counsel for the applicant had the offence in question been committed by the present applicant the informant would have recognized him being a close relative but since nothing has been alleged against the present applicant by the informant or other witnesses from 29.5.2018, the date of incident till 5.3.2021 when the polygraph test of Guddu s/o Guru Prasad was conducted, therefore, on the basis of polygraph test the present applicant may not be implicated.

6. Learned counsel for the applicant has drawn attention of this Court towards the dictum of Apex Court in re: ***Selvi and others vs. State of Karnataka (2010) 7 Supreme Court Cases 263*** referring para 240, 242 and 264 which reads as under :

"240. We must also contemplate situations where a threat given by the investigators to conduct any of the impugned tests could prompt a person to make incriminatory statements or to undergo some mental trauma. Especially in cases of individuals from weaker sections of society who are unaware of their fundamental rights and unable to afford legal advice, the moth apprehension of undergoing scientific tests that supposedly reveal the truth the act is threatening to administer the impugned tests could also elicit testimony. It is also quite conceivable that an individual may give his/her consent to undergo the said tests on account of threats, false promises or deception by her investigators. For example, a person may be convinced to give his/her consent after being promised that this would lead to an early release from custody or dropping of charges. However, after the administration of the tests the investigators may renege on such promises. In such a case the relevant inquiry is not confined to the apparent voluntariness of the act of undergoing the tests, but also includes an examination of the totality of circumstances.

242. We can also contemplate a possibility that even when an individual freely consents to undergo the tests in question, the resulting testimony cannot be readily characterised as voluntary in nature. This is attributable to the differences between the manner in which the impugned tests are conducted and an ordinary interrogation. In an ordinary interrogation, the investigator asks questions one by one and the subject has the choice of remaining silent or answering each of these questions. This choice is repeatedly exercised after each question is asked and the subject decides the nature and content of each testimonial response. On account of the continuous exercise of such a choice, the subject's verbal responses can be described as voluntary in nature. However, in the context of the impugned techniques the test subject does not exercise such a choice in a continuous control over the subsequent responses given during the test in case of the narcoanalysis technique, the subject speaks in a drug-induced state and is clearly not aware of his/her own responses at the time. In the context of polygraph examination and the BEAP tests, the subject cannot anticipate the contents of the "relevant questions" that will be asked or the "probes" that will be shown. Furthermore, the results are derived from the measurement of physiological responses and hence the subject cannot exercise an effective choice

between remaining silent and imparting personal knowledge. In light of these facts, it was contended that a presumption cannot be made about the voluntariness of the test results even if the subject had given prior consent.

264. In light of these conclusions, we hold that no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty. However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice provided that certain safeguards are in place. Even when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted in accordance with Section 27 of the Evidence Act, 1872."

Emphasis Supplied

7. In the aforesaid judgment the Hon'ble Apex Court has held that no individual should be forcibly subjected to any of the technique in question whether in the context of investigation in criminal case or otherwise and if such technique is adopted, the outcome thereof would have no evidentiary value.

8. Learned counsel for the applicant has submitted that during the aforesaid polygraph test the investigating officer has asked pin pointed question that 'as to whether the present applicant has committed this offence', this witness has given reply in affirmative. As per Sri Rastogi such type of questions are known as 'leading questions' and those questions may not be asked during investigation. Even such leading question may not be asked during examination-in-chief or re-examination during trial except with the permission of the Court, however, during cross-examination such type of questions may be asked.

9. He has further submitted that except the aforesaid statement of eye-witness Guddu during polygraph test no other evidence or material is available with the prosecution to suggest that the present applicant has committed offence in question. Since the charge-sheet has been filed, therefore, there is no apprehension of absconding or tampering of evidence / witness by the applicant.

10. The learned counsel for the applicant has given an undertaking on behalf of applicant that the applicant shall not misuse the liberty of bail and shall cooperate with the trial proceedings and shall abide by all terms and conditions of bail, if granted.

11. Sri Rao Narendra Singh, learned AGA has, however, opposed the prayer of bail but could not dispute the aforesaid submissions so raised by the learned counsel for the applicant. He could also not dispute the proposition of law in re: ***Selvi (supra)***.

12. Heard learned counsel for the parties and perused the material available on record and also perused the dictum of Hon'ble Apex Court in re: ***Selvi (supra)***.

13. Without entering into the merits of the issue and considering the contents of F.I.R., statement of informant, of eye witness and polygraph test dated 5.3.2021

(Annexure no. 8), I find that this is a fit case of bail.

14. The perusal of polygraph test dated 5.3.2021 (Annexure no. 8) reveals that the investigating officer has asked a pin-point question vide question no. 1 from eye witness Guddu s/o late Guru Prasad that *" as to whether Sarhu Ram Prakash and Damad Ashok had assaulted on the victim"*. The said eye-witness replied "Yes".

15. To me instead of asking leading question from the eye-witness Guddu s/o late Guru Prasad the prosecution should have asked as to who were those persons who have attacked on him and victim. However, even such question could not have been asked while conducting the polygraph test inasmuch as such test has been disapproved by the Hon'ble Apex Court in re: ***Selvi and others*** (supra).

16. I am constrained to observe here that when such eye witness Guddu s/o late Guru Prasad and the informant who is wife of deceased had not alleged anything against the present applicant while recording their statement u/s 161 Cr.P.C. on 12.1.2019 and 31.5.2018 respectively whereas the present applicant was close relative of the informant then the statement of eye witness Guddu s/o late Guru Prasad taken while conducting polygraph test would have no evidentiary value in view of the dictum of Hon'ble Court in re: ***Selvi (supra)***. Therefore, when such statement of the eye witness in question has got no evidentiary value in the eyes of law, the implication of the present applicant in such case would not be proper subject to other circumstantial evidence and corroborative material which would be seen during trial. In other words, any observation of this Court in this order would not effect the trial proceedings in any manner whatsoever and the trial would be conducted and concluded strictly in accordance with law. Whether the present applicant is guilty or not in the charges framed against him, will be decided by the trial court on its own merit after analyzing the evidences that surfaces on record during the trial.

17. Therefore, In view of the above the present bail application is ***allowed.***

18. Let the applicant Ram Prakash, involved in aforesaid 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 with the following conditions which are being imposed in the interest of justice:-

(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.

(v) The applicant shall not leave the country without permission of the Court concerned.

19. Before parting with it is expected that the trial shall be concluded with expedition. Further, the learned trial court may take all coercive measures as per law if either of the parties do not co-operate in the trial properly. The learned trial court shall fix short dates to ensure that trial is concluded at the earliest.

(2022)05ILR A1285
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.03.2022

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

S.C.C. Revision No. 13 of 2022

Satya Narayan Bhagat ...Revisionist
Versus
Pitambar Dutt Pandey & Ors.
...Opposite Parties

Counsel for the Revisionist:
Sri Narendra Kumar Chaturvedi

Counsel for the Opposite Parties:
Sri Hausihla Prasad Mishra

Civil Law - Code of Civil Procedure,1908 - Order XV Rule-5 - Rent not paid before the court where the suit is pending, but before another Court under the proceeding of Section 30(1) of U.P. Act No. 13 of 1972. Amount deposited under Section 30(1) of U.P. Act No. 13 of 1972 cannot be adjusted against the amount to be deposited before the Court in compliance of Order XV Rule 5 CPC –impugned order upheld.

Revision dismissed. (E-9)

List of Cases cited:
1. Kedar Nath Vs Waqf Shekikh Abdullah Charitable Madursa & ors.; 2016 6 ADJ 24.
2. Haider Abbas Vs A.D.J. (Court No. 3), Allahabad & ors. ; 2006 (62) ALR 552,
3. More Singh Vs Chandrika Prasad; 2016 130 RD 90
4. Krishna Kumar Gupta Vs Manoj Kumar Sahu; 2017 LawSuit (All) 658
5. Om Prakash Gupta Vs District Judge & anr.; 2019 (2) JCLR 529 (All).

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri N.K. Chaturvedi, learned counsel for revisionist and Sri Hausihla Prasad Mishra, learned counsel for respondents.

2. Learned counsel for revisionist submitted at the bar that he does want to press the revision against order dated 04.12.2021 passed by Additional District and Sessions Judge/ Special Judge (Prevention of Corruption Act), Court No. 3, Gorakhpur and he may be given liberty to file fresh revision against order dated 04.12.2021, for which Sri Hausihla Prasad Mishra, learned counsel for respondents has no objection.

3. Accordingly, present revision stands dismissed against order dated 04.12.2021 with the aforesaid liberty.

4. Learned counsel for the revisionist submitted that plaintiff/ respondents have filed SCC Suit No. 10/2017 for eviction, arrear of rent and damages on 24.08.2017 in which defendant/ revisionist has filed written statement on 28.03.2003 and taken specific plea that he had already deposited the entire due amount prior to filing of suit through different mode. Later on, after refusal of receiving of rent, he had also instituted a case under Section 30(1) of U.P. Act No. 13 of 1972 and continuously depositing the rent amount there. He next submitted that plaintiff/ respondents have filed application dated 3.3.2020 under Order XV Rule-5 CPC, which was numbered as Paper No. 33C to struck off defence, upon which, defendant/ revisionist has filed objection dated 11.02.2021, which was numbered as Paper No. 36C. He next submitted that application of plaintiff/ respondents was allowed and objection of defendant/ revisionist rejected on the ground that in all eventuality, after institution of suit, he has required to deposit monthly rent before the Court, where the suit is pending and any deposit made under Section 30(1) of U.P. Act No. 13 of 1972 cannot be adjusted. He next submitted that impugned order is bad on two grounds; first of all, Order XV Rule- 5 CPC is discretionary and secondly, the provisions should not be interpreted in a way that tenant should be trapped to be evicted. In support of his contention, he has placed reliance upon the judgement of this Court in the matter of ***Kedar Nath Vs. Waqf Shekikh Abdullah Charitable Madursa and others; 2016 6 ADJ 24.***

5. Learned counsel for the plaintiff/ respondents submitted that from the perusal of Order XV Rule-5 CPC, it is apparent that it is not discretionary, but mandatory in nature, therefore, it is required on the part of defendant/ revisionist to deposit entire monthly rent before the Court, where the suit is pending and any deposit made under Section 30(1) of U.P. Act No. 13 of 1972 cannot be adjusted to meet the requirement of Order XV Rule 5 of CPC. Court has rightly struck off the defence of the defendant/ revisionist in lack of deposit of monthly rent before the Court, where the suit is pending. In support of his contention, he has placed reliance upon the judgements of this Court in the matter of ***Haider Abbas Vs. Additional District Judge (Court No. 3), Allahabad and Ors; 2006 (62) ALR 552, More Singh Vs. Chandrika Prasad; 2016 130 RD 90, Krishna Kumar Gupta Vs. Manoj Kumar Sahu; 2017 LawSuit (All) 658 and Om Prakash Gupta Vs. District Judge and another; 2019 (2) JCLR 529 (All).*** He also submitted that judgement of ***Kedar Nath (supra)*** has not considered the earlier judgement of this Court in the matter of ***Haider Abbas (supra)*** and ***More Singh (supra).***

6. I have considered the rival submissions made by learned counsel for the parties. Facts of the case are undisputed. Before proceeding to decide the issue, it would be useful to see the provisions of Order XV Rule 5 of CPC, U.P. Amendment, the same is being quoted below;

"5. Striking of defence for failure to deposit admitted rent, etc. In any suit by a lessor for the eviction of a lessee after the determination of his lease and for the recovery from him of rent or compensation for use and occupation, the defendant shall, at or before the first hearing of the suit, deposit the entire amount admitted by him to be due together with interest thereon at the rate of nine per centum 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 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.

Explanation 1. The expression "first hearing' means the date for filing written statement for hearing mentioned in the summons or where more than one of such dates are mentioned, the last of the dates mentioned.

Explanation 2. The expression "entire amount admitted by him 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, paid to the lessor acknowledged by the lessor in writing signed by him and the amount, if any, deposited in any Court under Section 30 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972.

Explanation 3. (1) 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.

(2) Before making any order for striking off defence, the Court may consider any representation made by the defendant in that behalf provided such representation is made within 10 days, of the first hearing or, of the expiry of the week referred to in sub-section (1), as the case may be.

(3) The amount deposited under this Rule may at any time be withdrawn by the plaintiff:

Provided that such withdrawal shall not have the effect of prejudicing any claim by the plaintiff disputing the correctness of the amount deposited:

Provided further that if the amount deposited includes any sums claimed by the depositor to be deductible on any account, the Court may require the plaintiff to furnish the security for such sum before he is allowed to withdraw the same."

7. It is admitted position that defendant- revisionist has deposited the amount not before the Court, where the suit was instituted, but before another Court under the proceeding of Section 30(1) of U.P. Act No. 13 of 1972. Issue before this Court is as to whether any amount deposited under Section 30(1) of U.P. Act No. 13 of 1972 can be adjusted against the amount to be deposited before the Court in compliance of Order XV Rule 5 CPC during pendency of suit. In support of his contention, learned counsel for the defendant- revisionist has placed reliance upon judgement of this Court in the matter of ***Kedar Nath (supra)***, which was rendered after relying upon different judgements of Apex Court as well as this Court. Relevant paragraph of the said judgement is being quoted below;

"The provisions of Order XV Rule 5 is discretionary, the court is not bound to strike off the defence in every case of mere technical or bonafide default. The provision should not be interpreted in such a way that the tenant should be trapped to be evicted.

(Refer-Vinod Chandra Kala Versus Premier Precisions Tools Manufacturing (P). Ltd., 1996(1) ARC 62; Bhawani Vastrya Bhandan v. Smt. Sahodra Devi, 1996(2) ARC 406)."

8. Earlier, there was conflict of view in judgments of Court on this point and matter was referred to Division Bench of this Court in the matter of ***Haider Abbas(supra)*** by framing the following questions;

"Whether the deposit made under Section 30(1) of U.P. Act No. 13 of 1972 after the date of service of summons of a civil suit for arrears of rent can be taken into consideration for computing the deposit for the purpose of deciding the question whether the defence should or should not be struck off under Order XV Rule 5 CPC?"

9. Division Bench, after considering in detail the provisions of Order XV Rule 5 of CPC and different judgements of Apex Court and this Court, has answered the same, which is as follows;

""The aforesaid decision of the Supreme Court in the case of Atma Ram (supra) emphasizes that 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 required to be fulfilled before the benefit can be claimed, the tenant must strictly comply with that condition failing which he cannot take advantage of the benefit conferred by such a provision. It has further been emphasised that the rent must be deposited in the Court where it is required to be deposited under the 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.

In view of the aforesaid principles of law enunciated by the Supreme Court in the aforesaid case of Atma Ram (supra), it has to be held that the tenant must comply with the requirements of Order XV Rule 5 CPC and make the deposits strictly in accordance with the procedure contained therein. A deposit which is not made in consonance with the aforesaid Rule cannot enure to the benefit of the tenant and, therefore, only that amount can be deducted from the "monthly amount" required to be deposited by the tenant during the pendency of the suit which is specifically mentioned in Explanation 3 to Rule 5 (1) of Order XV CPC.

.....
.....

We, therefore, upon an analysis of the provisions of Rule 5 (1) of Order XV CPC, hold that while depositing the amount at or before the first hearing of the suit, the tenant can deduct the amount deposited under Section 30 of the Act but the deposits of the monthly amount thereafter throughout the continuation of the suit must be made in the Court where the suit is filed for eviction and recovery of rent or compensation for use and occupation and the amount, if any, deposited under Section 30 of the Act cannot be deducted."

10. Again, this issue came up before this Court in the matter of ***More Singh (supra)*** and this Court after considering the judgement of Division Bench of this Court in the matter of ***Haider Abbas (supra)*** and other judgements of Apex Court held as follows;

"It thus follows that while deposits made under Section 30, before the

date of first hearing are to be adjusted but any rent deposited thereafter in proceeding under Section 30 would not enure to the benefit of the tenant for adjudging compliance of the provisions of Order XV, Rule 5 CPC."

11. This Court considered this issue in the matter of ***Krishna Kumar Gupta (supra)*** also and has taken very same view. Relevant paragraph of the said judgement is being quoted below;

"The difference between the two categories discussed herein above, apart from the stage at which they apply, is two fold: (a) in the first category the defendant is required to make a deposit of the admitted dues whereas in the second category, which relates to monthly deposits, whether he admits it to be due or not, the deposit has to be made on a monthly basis, at the admitted rate of rent, throughout the continuance of the suit; and (b) in the first category the tenant can seek adjustment of the amount deposited under section 30 of UP Act No.13 of 1972 as well as the amount, if any, paid to the lessor acknowledged by the lessor in writing signed by him, whereas in the second category, which relates to monthly deposits, no such adjustment is permissible as would be clear from the difference between Explanation 2 and Explanation 3."

12. Once again this issue came up before this Court in the matter of ***Om Prakash Gupta (supra)*** and this Court after considering the different judgements including judgement of Division Bench of this Court in the matter of ***Haider Abbas (supra)*** as well as judgement of Single Bench of this Court in the matter of ***More Singh (supra)***, has held as follows;

"In the instant case, concededly, even after receipt of summons, monthly rent upto December 2012 was deposited by the tenant in proceedings under Section 30 (1) of the Act. It was only since January 2013 that he started depositing monthly rent in the instant suit. Consequently, the benefit of monthly rent deposited under Section 30 (1) after receipt of summons/filing of written statement i.e. 3.12.2010 upto December 2012 could not be extended to the defendant tenant while reckoning compliance of Order 15 Rule 5 CPC. There is no escape from the mischief of Order 15 Rule 5 CPC. The trial court was justified in striking off the defence. The revisional court has committed a grave error of law in extending benefit of these deposits without considering the legal position laid down in Larger Bench judgment in Haidar Abbas (supra).

In consequence and as a result of above discussion, the impugned order dated 13.5.2015 is quashed and the order passed by the trial court dated 8.8.2014 is restored."

13. In light of different judgements discussed herein above, it is apparently clear that judgements of ***Haider Abbas (supra)*** and ***More Singh (supra)*** were delivered prior to judgement of ***Kedar Nath (supra)***, but while giving the judgement in the matter of ***Kedar Nath (supra)***, Court has not considered those judgements. Therefore, the said judgement is *per incuriam* and cannot be treated as precedent.

14. From perusal of Order XV Rule 5 of CPC, it is apparently clear that before first hearing of the suit proceeding, amount which is to be deposited is having two parts; first part is to deposit the entire amount admitted by the defendant together

with interest thereon at the rate of nine per centum per annum as provided in Order XV Rule 5 of CPC and second part is, the amount either admitted or not to be deposited throughout the continuation of suit proceeding from month to month basis. About the first part, any amount deposited by any mode in accordance with law or deposited in proceeding under Section 30(1) of U.P. Act No. 13 of 1972 can be adjusted, but so far as second part is concerned, any such amount deposited under Section 30(1) of U.P. Act No. 13 of 1972, cannot be adjusted. It is always required on the part of defendant to deposit the same before the Court, where the suit is instituted.

15. So far as present case is concerned, there is no dispute of fact and it is admitted position that the revisionist - defendant has never deposited the amount, so due on month to month basis before the Court where the suit was instituted after first date of hearing. Therefore, in light of provisions of Order XV Rule 5 of CPC, ratio of law laid down by the Courts as well as discussion made herein above, no relief can be granted to the revisionist.

16. Accordingly, revision lacks merit and is **dismissed.**

17. No order as to costs.

(2022)05ILR A1290
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 09.05.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE BRIJ RAJ SINGH, J.

Capital Cases No. 1 of 2014

connected with
Criminal Appeal No. 1776 of 2016

State of U.P. ...Appellant
Versus
Deen Dayal Tiwari ...Respondent

Counsel for the Appellant:
Govt. Advocate, Jyotindra Misra (Amicus), Kapil Misra

Counsel for the Respondent:

A. The testimony of an eye-witness merely because he happens to be a relative of the deceased cannot be discarded as close relatives would be the last one to screen out the real culprit and implicate innocent person.

B. If the prosecution case is established by the evidence adduced, any failure or omission on the part of the Investigating Officer cannot render the case of the prosecution doubtful

C. 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.

D. **Civil Law - Evidence Act, 1872 - Section 106** - 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.

E. 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.

F. If Court finds that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, Court may impose death sentence.

G. Where an accused does not act on any spur of the momentary provocation and indulges himself in a deliberately planned crime and meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects the entire moral fibre of the society, death sentence should be awarded.

Capital case confirmed and criminal appeal dismissed. (E-12)

List of Cases cited:-

1. Machhi Singh & ors. Vs St. of Pun. : (1983) SCC 470

2. Dharnidhar Vs St. of U.P. (2010) 7 SCC page 759

3. Amar Singh Vs Balwinder Singh, AIR 2003 SC 1164

4. Sambu Das Vs St. of Assam, AIR 2010 SC 3300

5. St. of U.P. Vs Krishna Master & ors. : 2010 Cri. L.J. 3889 (SC)

6. Sampath Kumar Vs Inspector of Police, Krishnagiri : (2012) 4 SCC 124

7. Brajendra Singh Vs St. of M.P. (2012) 4 SCC 289

8. Bachan Singh Vs St. of Pun. (1980) 2 SCC 684

9. Furman Vs Georgia, (1972) SCC On-Line US SC 171

10. Haresh Mohandas Rajput Vs St. of Mah.: (2011) 12 SCC 56

11. Ramnaresh & others Vs St. of Chhattisgarh reported in (2012) 4 SCC 257

12. Dharam Deo Yadav Vs St. of U.P. reported in (2014) 5 SCC 509

13. Kalu Khan Vs St. of Raj. reported in (2015) 16 SCC 492

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

1. The accused, **Deen Dayal Tiwari**, was tried by the learned Additional District & Sessions Judge, Court No.5, Faizabad in Sessions Trial No. 24 of 2013 : *State Vs. Deen Dayal Tiwari*, arising out of Case Crime No. 746 of 2011, under Section 302 I.P.C., Police Station Pura Kalandar, district Faizabad.

2. Vide judgment and order dated 29.01.2014/30.01.2014, the learned Additional District & Sessions Judge, Court No.5, Faizabad, convicted the appellant-Deen Dayal Tiwari under Section 302 I.P.C. and sentenced him to be hanged to death till he is dead and with fine of Rs.50,000/-.

3. Aggrieved by the aforesaid judgment and order dated 29.01.2014/30.01.2014, convict/appellant, **Deen Dayal Tiwari**, preferred Criminal Appeal No. 1776 of 2016 : *Deen Dayal Tiwari Vs. State of U.P.*

4. Capital Case No. 1 of 2014 arises out of the Reference made by the learned

trial Court under Section 366 (1) of the Code of Criminal Procedure, 1973 to this Court for confirmation of the death sentence of convict **Deen Dayal Tiwari.**

5. Since the above-captioned capital sentence reference and appeal arise out of a common factual matrix and impugned judgment and order dated 29.01.2014/30.01.2014 passed by the trial Court, we are disposing of the aforesaid reference and appeal by this common judgment.

(B) FACTS

6. The informant P.W.1-Dinanath Tiwari had lodged a written report (Ext. Ka.1) on 12.11.2011, at 06:10 a.m., in police station Pura Kalandar, district Faizabad, alleging therein that on 11/12.11.2011, at about 02:30 a.m., on hearing the noise "cpkvks&cpkvks" (save-save) of the wife and daughters of his elder brother Deen Dayal Tiwari (convict/appellant), he (P.W.1) and his wife Smt. Suneeta alias Anita (P.W.2) came out of their house and reached to the house of Deen Dayal Tiwari (convict/appellant). Thereafter, they asked Deen Dayal Tiwari (convict/appellant) to open the door but the door was not opened. Then, they threatened to break the door. After that Deen Dayal Tiwari (convict/appellant) came out of the house armed with blood stained axe and attacked upon them also and asked them to leave from there and said that he had cut down his wife and four daughters; and he would also kill all of them. On being cried, villagers gathered there, then, they all controlled his elder brother Deen Dayal Tiwari (convict/appellant) and went inside the room, where they saw that Deen Dayal Tiwari (convict/appellant) had cut down all his four daughters and his wife.

7. The informant P.W.1-Dinanath Tiwari got scribed the aforesaid written report (Ext. Ka.1) from a person of his village and after affixing signature thereon, proceeded to lodge the same to police station Pura Kalander, District Faiazabad and lodged it. A perusal of the chik FIR shows that the distance between the place of incident and Police Station Purakalander was 15 kilometer. A perusal of the chik FIR also shows that on the basis of written report of P.W.1-Dinanath Tiwari, Case Crime No. 748 of 2011, under Section 302 I.P.C., Police Station Pura Kalander, district Faizabad was registered against convict/appellant, Deen Dayal Tiwari.

8. The investigation of the case was conducted by P.W.5-Ajay Prakash Mishra, who, in his examination-in-chief, had deposed before the trial Court that on 12.11.2011, he was posted as Station Officer at police station Pura Kalandar, district Faizabad. On the same day, he got information that the incident had taken place in his area. After getting the investigation, he made entry of chik and the F.I.R. in the case diary and recorded the statement of informant Dinanath Tiwari (P.W.1). He reached the spot in the morning and saw that Deen Dayal Tiwari (convict/appellant) was present inside the room in his house after closing the door from inside; the door was bolted from outside also; and many people of the village and nearby places were present there. One brick of the eastern wall of the room was out from which he peeped and saw inside the room that Deen Dayal Tiwari (convict/appellant) armed with blood stained "axe' was present and was walking inside the room. With the help of people present, namely, Visheshwar Nath Mishra (P.W.3), Vishun Tiwari, opened the door of the room by pushing it. The

convict/appellant Deen Dayal Tiwari, thereafter, looked behind and wanted to run away but he was caught with the help of the police. After recovering one "axe' from his right hand, the same was taken by the police in its custody. The stain of blood in the iron part of the axe was present and fresh blood in the csV (wooden portion of the axe) was also present. He prepared memo of the same separately under his handwriting and signature. When he asked the name and address of the convict/appellant, he told his name Deen Dayal Tiwari (convict/appellant) son of Late Laxman Prasad Tiwari. Thereafter, he arrested the convict/appellant and handed over by him to the police and instructed to keep him under safe custody. He further deposed that on the pointing out of the convict/appellant, two knives were recovered from the room. After that, he took possession of two knives (one green belt and other yellow metal red green dotted) and one axe and thereafter, he sealed it and prepared memo of the same under his handwriting and signature (Ext. Ka.7). After that, he took possession from the spot of blood stained and plain cloth and bed, recovery memo (Ext. Ka.8) of which, was prepared by him in the presence of witnesses. He, thereafter, collected blood stained soil and plain soil and recovered one sweater and lungi etc. from the spot and thereafter, he sealed it and prepared a recovery memo of it and proved it as Ext. Ka.9 and Ext. Ka. 10 before the trial Court. He further stated that on the pointing out of the informant (P.W.1), he prepared the site plan (Ext. Ka.11) under his handwriting and signature. After that, he recorded the statement of Deen Dayal Tiwari (convict/appellant), who confessed the crime and stated that *" his wife was of a bad character and had illicit relation with someone of the village, due to which his relation with his wife became strained, on account of which, on 11.11.2011 in the evening itself, he had decided that tonight itself he would kill his wife, therefore, he had kept the "knife' and "axe' in the evening itself and at around 3 o'clock in the night, when his wife and his daughters were sleeping, he firstly hit the head of his wife Siallali with axe, due to which she screamed, then, he stabbed her with knife. After that, his daughters woke up and came to save their mother, then, he killed them in turn. Among their daughters, he firstly killed Mani Tiwari, then Riya, then Guddan/Gunjan, then Kumari Mahima with a "knife' and "axe'. On hue and cry of* ***बचाओ बचाओ*** *(save save) of his daughters, people of his village and members his family had gathered and these peoples were threatening to break the door and asked him to come out of the room, therefore, he had closed the door inside of his room."* He further deposed that on the same day i.e. on 12.11.11 on his dictation, S.I. R.K. Tiwari and Manushekhar Singh had prepared the "panchayatnama' of all the dead bodies lying on the spot inside the room viz. Siallali, Mani Tiwari aged 11 years, Riya Tiwari aged 8 years, Guddan Tiwari aged 6 years and Mahima Tiwari aged 4 years (Ext. Ka.12, Ext. Ka.13, Ext. Ka.14, Ext. Ka.15 and Ext. Ka.16). At the same time, the forms related to the dead bodies, photo lash, challan lash, sample seal, Form-13, letter to RI, letter to CMO etc. were prepared by him under his writing and signature (Ext. Ka. 17 to Ext. Ka. 36). After that, recovered knives, axe and clothes were sent to Forensic Science Laboratory, Lucknow through CJM Faizabad, which is marked as Ext. Ka. 37.

P.W.5 Sri Ajay Prakash Mishra had further deposed that on 13.11.2011, he recorded the statement of eye-witness Anita

(P.W.2), Vishnu Tiwari and witnesses of "panchayatnama'. On 14.11.11, the "panchayatnama' was copied in the CD. On 01.12.2011, he recorded the statement of Ashok Tiwari, Ugrasen, Anil Chaurasia and Vishesharnath Mishr (P.W.3). On 02.12.2011, he made entry of all finger impressions taken from the spot in CD. On 13.12.11, he recorded the statement of witness Sanjay Chaurasia and Kashiram Kori and after completion of investigation, he filed charge-sheet (Ext. Ka. 38) against convict/appellant Deendayal Tiwari before the court concerned under his handwriting and signature.

P.W.5 Sri Ajay Prakash Mishra had further deposed that Constable Durga Prasad Mishra was working with him at police station Pura Kalander, district Faizabad, whose handwriting and signature are familiar to him and probably he is posted in Ballia district. Constable Moharrir Durga Prasad Mishra had prepared chik no. 211/11 in his handwriting and signature (Ext. Ka. 39) and endorsed its entry in GD as report no. 7. He proved the carbon copy of GD (Ext. Ka. 40). In report no.16 of G.D., he endorsed his return to the police station and recovery of "knife', "axe' and 7 bundles of cloth marked as Ext. Ka. 41.

In cross-examination, P.W.5 Sri Ajay Prakash Mishra had deposed that he had reached the spot in the morning but he did not remember the time. There was no sunrise. He did not remember the time when he left for place of occurrence from the police station. The information about this case was given by the informant Dinanath Tiwari (P.W.1). He did not remember the time of arrival of P.W.1 at the police station. As soon as the information was received from informant (P.W.1), he left from the police station. The FIR was lodged in his presence. He did not remember how much time it took to write the FIR. He started from police station to the place of the incident at 6.10 a.m. Along with him, S.I. R.K. Tiwari, Constable K.K. Singh, Constable Istiaq, Constable Harihar Tiwari went on a Jeep to the place of incident. The statement of the informant (P.W.1) was recorded on the same day at the police station itself. The informant (P.W.1) had reached the spot by his own conveyance. The place of the incident is 14 Km. from the police station. When he reached to the place of occurrence, the outer door of the house of Deen Dayal (convict/appellant) was opened. There were two rooms, one outside and one inside. The flVduh (iron grill) fixed in the inner door was broken due to push but it was not taken into possession by the police. He denied the suggestion that there was no iron grill inside nor it was broken.

P.W.5, in cross-examination, had further deposed that the body of the wife of the convict/appellant, namely, Siyallali was lying on the cot adjacent to the western wall and the bodies of four daughters were lying on the floor of the room. The width of the room was five steps and the length was seven steps in which the corpses were lying. One axe was recovered from the possession of the convict/appellant and on his pointing out, two knives were recovered. Both the informant (P.W.1) and the convict/appellant are real brothers. The gallery was covered with bricks and it was not cemented and when he reached there, the bricks were fallen. He deposed that there is no signature of the convict/appellant on the seizure memo of weapon of assault. He denied the suggestion that no murder weapon was recovered from the convict/appellant and he had made fake memo. He deposed that first of all, he did the "panchayatnama' of Siallali which started at 6:40 a.m. and

ended at 7:25 a.m. The distance from the place of the incident to the police station was written in the "panchayatnama' about 10 km. After that the "panchayatnama' of Km. Mahima was conducted from 7.30 a.m. to 8.00 a.m. The "panchayatnama' of all was over at 11:30 a.m. The panchayatnama started only after the body was found. The convict/appellant was wearing lungi, vest and sweater. He inspected the place of the incident before the "panchayatnama'. The witnesses in the "panchayatnama' were Vishesharnath Mishra (P.W.3), Vishnu Tiwari, Sanjay Chaurasia, Umashankar Mishra, Kashiram Kori. He also denied the suggestion that apart from axe, knife, there was no injury of stick etc. He also denied the suggestion that all the three weapons were not used by the same person and number of attackers were larger one. He also denied the suggestion that all proceedings was done by him on one day and recorded the statement of Vishesharnath (P.W.3) at the place of the incident on 01.12.2011. He further deposed that he recorded the statement of the wife of the informant at the place of occurrence on 13.11.2011 but he could not remember the time. He denied the suggestion that the informant had not gone to the police station and informant was unconscious at the place of occurrence. He also denied the suggestion that convict/appellant Deen Dayal came to the place of the incident from his *khaliyan* (barn). He also denied the suggestion that accused was shouting that the enemies killed his daughters and wife. He further deposed that at 11.30 a.m., he went to the police station after sending the dead bodies for post-mortem. He came to the police station at 01.00 p.m. He further deposed that when he reached the spot, he inspected the place of the incident, did "panchayatnama', and sent the body for post-mortem. Before starting the "panchayatnama', he prepared all the memos in his handwriting and signature. It would have taken an hour to make all the five memos. He denied the suggestion that no recovery was made from the convict/ appellant and under the pressure of the villagers, they were falsely implicated the convict/appellant.

9. The autopsy on the dead bodies of Smt. Siyallali wife of convict/appellant Deen Dayal Tiwari aged about 36 years and Km. Mani aged about 11 years, Km. Riya aged about 8 years, Guddan aged about 6 years Mahima aged about 4 years, daughters of convict/appellant Deen Dayal Tiwari were conducted on 12.11.2011, at 01:00 p.m., 02:30 p.m., 02:30 p.m., 02:00 p.m and 01:30 p.m., respectively, by Dr. S.K. Shukla (P.W.4), who, found on their persons ante-mortem injuries, enumerated hereinafter :--

"Ante-mortem injuries of Smt. Siyallali wife of convict/appellant Deen Dayal Tewari, aged about 36 years :

1. Incised wound of Lt. side of forehead 2 cm above to Lt. upper eyebrow. Size .5 x 1.0 x bone deep.

2. L/w of Lt. eye orbit just above to Lt. upper eyelid. Size 6 x 2.0 cm x bone deep.

3. Incised wound of left side of face 2 cm below to Lt. down eyelid. Size 2.0 x 1.0 x bone deep.

4. Multiple L/w of Rt. side of face including forehead, 3 c.m. medwal to Rt. ear. Size of longest bone 8.0 x 4.0 x bone deep and size of smallest one 2.0 x 1.0 cm x bone deep.

5. L/w of Lt. shoulder at mid of clavicle. Size 3 x 2.0 x bone deep.

6. Multiple L/w of Lt. side of neck. Size of largest one 3.0 x 1.5 x bone deep.

7. Multiple CRUSH injury of abdomen in epigastric region, including chest cage. Size of longest one 15 x 5.0 cm x bone deep & size of smallest one (paper torn) 1.0 cm.

Ante-mortem injuries of Km. Mani daughter of convict/appellant Deen Dayal Tiwari aged about 11 years:

1. L/w of skull 3 cm above to Lt. ear. Size 5.0 x 5.0 x bone deep.

2. Contusion of forehead at frontal region. Size 7.0 x 5.0 cm.

3. Left section of neck. Size 10 x 4.0 x bone deep.

4. Incised wound of mandible. Size 4.0 x 1.0 x bone deep.

Ante-mortem injuries of Guddan daughter of convict/appellant Deen Dayal Tiwari aged about 6 years :

1. CRUSH injury of Lt. side of skull 2 cm above to Lt. ear. Size 7 x 6.0 x bone deep.

2. Cut Section of Neck at anterior aspect. Size of 8 x 3.0 cm x bone deep.

3. Multiple penetrating wound of Abdomen. Size of longest one 8.0 x 5.0 cm & smallest one 4.0 x 3.0 cm.

Ante-mortem injuries of Km. Riya daughter of convict/appellant Deen Dayal Tiwari aged about 8 years :

1. L/w of Lt. side of face 2 cm medial Lt. ear. Size 4.0 x 2.0 x bone deep.

2. Left section of neck. Size 6.0 x 9.0 x bone deep.

3. Incised wound of chest at Lt. side 3 cm above to epigastric region. Size 2.0 x 1.0 cm.

4. Multiple L/w of Rt. leg. Size of longest one 3.0 x 1.5 cm and smallest 1.5 x 1.0 cm

Ante-mortem injuries of Km. Mahima daughter of convict/appellant Deen Dayal Tiwari aged about 4 years

1. L/w of skull 2 cm above to Lt. upper eyebrow. Size 4.0 x 3.0 x bone deep.

2. L/w of occipital region of skull. Size 12 x 5.0 x Bone deep."

The cause of death spelt out in the autopsy reports of the deceased Smt. Siyallali, Km. Mani, Km. Riya, Guddan and Mahima was shock and hemorrhage as a result of ante-mortem injuries.

10. It is significant to mention that in his deposition in the trial Court, Dr. S.K. Shukla (P.W. 4) has reiterated the said cause of death and also stated therein that on 12.11.2011, he was posted as Anesthetic in District Woman Hospital, Faizabad. On the same day, at 01:00 p.m., he conducted the postmortem of the deadbody of deceased Siyallali wife of convict/appellant Deen Dayal Tiwari, which was sent by S.O. Purakalander, district Faizabad in a sealed condition through Constable Ram Niwas and Lalji Pal, Police Station Pura Kalander, District Faizabad along with ten other enclosures. He deposed that the deceased Siyallali was aged about 36 years; the deadbody was about half a day old; stiffness was present in her body both, above and below, in her hands and feet after death; mouth was open; and both the eyes were open. He further deposed that on internal examination of deadbody of deceased Siyallali, he found that head, neck and skull were as described in the ante-mortem injuries. The membranes of brain and brain were torn; blood clot was present inside the brain; the chambers of both sides of the heart were empty, meaning thereby blood was oozing out; and the upper abdominal membrane was damaged. He also found that the stomach was empty; foods and gases were present in the small intestine; faces and gas were present in the large intestine; liver was pale; gall bladder was full; the bladder was half full; and uterus was empty. He deposed that all the aforesaid injuries were half day old and it

seemed to be attributable by "axe' and "knife'. All the injuries could be attributable on 11.11.2011 at about 2:30-3:00 a.m.

Dr. S.K. Shukla (P.W. 4) had further deposed that on the same day (12.11.2011), at 1:30 p.m., he conducted postmortem of the deadbody of Km. Mahima daughter of convict/appellant Deen Dayal Tiwari, whose age was about 4 years. Her death could be caused about half a day. Her body was average height; stiffness was present after death on the upper and lower parts of her body; her mouth was open; and both eyes of her were closed. On internal examination of the deceased Km. Mahima, he found that injuries on head was as described in the ante-mortem injuries. Her membranes and brain were torn; blood clot had accumulated; there was no internal injury to the chest; the chambers on both sides of the heart were empty, meaning thereby blood was oozing out; teeth in the mouth was 11/11; the stomach was empty; there was food and gas in the small intestine; stool and gas were present in the large intestine; the liver became yellow; the gall bladder was full; the bladder was empty; and there was no irregularity or deficiency in the genital and it was normal. He further deposed that these injuries could be attributable by "axe' or "danda' (stick) and it could be caused on 11.11.2011 at about 2:30-3:00 a.m.

Dr. S.K. Shukla (P.W. 4) had further deposed that on the same day (12.11.2011), at about 2:30 p.m., he conducted the postmortem of the corpse of deceased Km. Mani Tiwari daughter of convict/appellant Deen Dayal Tiwari, whose age was about 11 years. Her deadbody was half a day old; the deceased was of average height; the post-death stiffness was present in both the upper and lower portion; her mouth was half open; and both her eyes were closed. On her internal examination, he found that the membranes of the brain and brain was torn; clot of blood was present in the brain; blood from all injuries of the heart was oozing out; teeth was 12/13; and the uterus was empty. He further deposed that all the above injuries seemed to have been attributed by some sharp edged weapon and it could be caused on 11.11.2011 between 2:00-2:30 a.m.

Dr. S.K. Shukla (P.W. 4) had further deposed that on the same day (12.11.2011), at about 3:00 p.m., he conducted the postmortem of the deadbody of the deceased Km. Riya, daughter of convict/appellant Deen Dayal Tiwari whose average age was 8 years. The body of her was half a day old; stiffness was present in both parts of the body after death; teeth was 13 / 13; mouth was half open; and eyes were closed. On her internal examination, he found that the membranes of the brain were torn; blood clot was found inside the brain; heart was bleeding; the stomach was empty; the uterus was empty; food was present in the small intestine and fecal gas was present in the large intestine; and everything else was found to be normal of the deceased. He further deposed that all these injuries could be attributable by "axe' and "knife' and these injuries could be caused on the night of 11.11.11 at 2.30 p.m.

P.W.4 had further deposed that on the same day, at 02:00 p.m., he conducted the post-mortem of the deadbody of deceased Kumari Guddan daughter of convict/appellant Deen Dayal Tiwari at 2 p.m. whose age is about 6 years. Her body was of average; post-death stiffness was present in both parts of the body; and her mouth and eyes were closed. On internal examination, he found that the upper membranes of the brain as well as brain

were torn; blood clot was present inside the braind; both the lungs turned yellow; heart was empty; the stomach was empty; food and gas inside the small intestine and feces and gas from the large intestine were present; the liver turned yellow; the gallbladder was full; the bladder was empty; and genital was normal.

P.W.4 had further deposed that all the injuries of the deceased seems to have inflicted with a sharp edged weapon like "axe' and "knife', and almost all these injuries were about half a day old before the death. All these injuries appear to have caused at 2.30 am on 11.11.2011. He proved the post-mortem report of the deceased (Ext. Ka. 2, Ext. Ka.3, Ext. Ka.4, Ext. Ka.5 and Ext. Ka. 6).

P.W.4-Dr. S.K. Shukla, in cross-examination, had deposed that post-death claudication begins within 12 hours after the deceased dies and in the next 12 hours after death, stiffness occurs in the whole body. Hence, in 24 hours, the stiffness spreads throughout the body after death. After 24 hours, this stiffness starts to dissipate slowly from the body after death. He deposed that he gave the statement of the time of injuries of the deceased as 2:30-3:00 am in the morning. In this, there can be a gap of four hours back and forth because there is a difference of temperature (winter heat). In this way, the injuries to the deceased could be attributable 11 O'clock or 12 O'clock in the night of 11.11.2011. There are seven cuts and stab wounds found on the body of the deceased, which is possible to come by sharp edged weapon. He further deposed that 12 ruptured injuries, contusion marks, abrasion which are also possible to come from Lathi, Danda.

P.W.4 had further deposed that injury no.3 of Kumari Mani was not attributable by the weapon like knife and axe. This injury no.3 is possible to come from the edge whose width is larger. The injury no.2 of the deceased Miss Guddan whose size is 8 cm. x 7 cm x deep to the bone is not possible to come from weapons like knife and axe. These injuries is also possible to come from a wide-edged weapon. He further deposed that there are two types of knives; one is sharp; and the other is blunt. One end of a knife is sharp and blunt and the tip is sharp on both sides, which makes it possible to have ruptured wound. If this type of knife used for committing murder by stabbing, then, it will be sharp on one side and blunt on the other. He denied the suggestion that the injuries on the bodies of the deceased are not possible to come at 2:00-2:30 p.m. in the night.

11. The case was committed to the Court of Sessions by Chief Judicial Magistrate. The trial Court had framed charges against the convict/appellant, Deen Dayal Tiwari, for the offence under Sections 302 I.P.C. He pleaded not guilty to the charges and claimed to be tried. His defence was of denial.

12. During trial, in all, the prosecution examined five witnesses, namely, P.W.1-Dinanath Tiwari, who is the informant and brother of convict/appellant Deen Dayal Tiwari, P.W.2-Smt. Suneeta *alias* Anita, who is the wife of informant (P.W.1), P.W.3- Vishesharnath Mishra, who is independent witness, P.W.4 Dr. S.K. Shukla, who conducted the postmortem of the corpse of the deceased and P.W.5-Ajay Prakash Mishra, who conducted the investigation of the case.

13. The informant P.W.1-Dinanath Tiwari, in his examination-in-chief, had deposed before the trial Court that he has

two brothers and 5 sisters. The five sisters are in their in-laws' house. Both the brothers were living separately for about 4 years. The house of both of the brothers is adjacent. His exit is in the north direction and the exit of Deen Dayal Tiwari (convict/appellant) is in the east direction. His brother Deen Dayal Tiwari (convict/appellant) used to repair and make City Scan and X-ray machines at Lucknow. After doing B.Sc in Lucknow, his brother Deen Dayal Tiwari (convict/appellant) was doing a job there. His brother Deen Dayal Tiwari (convict/appellant) came from Lucknow for 5-6 months before the incident and was living with his wife and daughters in the village. The incident is dated 11/12.11.11 at 2:30 am in the night. He was sleeping with his children at his house. After hearing the noise of बचाओ बचाओ (save save), he came out of his house and saw that the voice of wife and children of Deen Dayal (convict/appellant) was coming. Till then, some people of the village had come. They tried to open the door. When the door did not open, they started demolishing the wall. Till then, Deen Dayal Tiwari (convict/appellant) opened the door and came out with blood stained axe in his hand and threatened them to run away from there, otherwise, he would kill them too. After that, the door was closed. At the same time, the police came and after opening the door, arrested him (convict/appellant Deen Dayal Tiwari). The dead body of the wife and daughters of Deen Dayal Tiwari (convict/appellant) were lying inside the house. He got scribed the report of the incident from a man of the village and after putting signature thereon, gave it to the Inspector at the place of the incident. He proved the written report (Ext. Ka.1). The Inspector did not record his statement and went away with his report. At that time, his mental condition was not good because five murders took place in the house. These five murders were done by his brother Deen Dayal Tiwari (convict/appellant). His wife (P.W.2) and Vishnu Tiwari of the village, Ashok Tiwari and others (not examined by the prosecution) were present on the spot.

In his cross-examination, P.W.1-Dinanath Tiwari had deposed before the trial Court that he has two brothers. Deen Dayal (convict/appellant) is elder and he is younger. He has passed High School. Deen Dayal Tiwari (convict/appellant) has passed B. Sc and used to work in Lucknow. Deen Dayal Tiwari (convict/appellant) had four daughters and has no son. He has 3 sons and has no daughter. 4-5 years ago, they used to live together and before separation, they were having love and affection with each other. Even at the time of the incident, Deen Dayal Tiwari (convict/appellant) believed in his family and the mutual relationship was cordial. There was no estrangement. In the partition, he got the verandah and half gallery respectively in the north of the house and Deen Dayal Tiwari (appellant) got two rooms, kitchen and half gallery in the southern part. He could not tell the exact length and width of the room. There are no windows and ventilators in the room. There was a slight frost at the time of the incident. On the night of the incident, they had eaten and slept. He came to know about the incident in the morning when some people of the village gathered together and started speaking. At that time, Ashok Tiwari, Anil Chaurasia (not examined), Vishesharnath Mishr (P.W.3) of the village had come. Later, more people had come. As soon as he came to know about the incident, he fainted. After two hours, he regained consciousness. At that time, the police and officers had arrived. On regaining

consciousness, he did not go to the police station to report. He got scribed the report from another and gave it to the Inspector. At that time, his mental condition was not good. He was not in a position to write and understand. He only affixed signature. He never went to the police station about the incident. When he regained consciousness, the dead body was sealed, loaded on the tractor and went from there. He did not go to the room. He came to know about the incident in the morning when some people of the village gathered together and started speaking of occurrence. The position of the corpse could not tell whose corpse was where. The body was in the brother's room. He had heard this when he regained consciousness. The Inspector had never taken any statement from him. He had not seen what his brother was wearing on the day of the incident because the police had caught him in the morning. The winter was light due to which no one was wearing sweater. The peoples were wearing only light clothes.

P.W.1 had further deposed that the house of witness Visheshwarnath Mishr (P.W.3) is about 3 km away from the place of the incident. The house of Ashok Tiwari house is about 300 meters east from the place of the incident. In the middle, there are houses of another 2-3 people. Someone telephonically informed the police. No one had seen the occurrence of the incident. Everyone came to know in the morning. They have about 3 bighas of farmland, which both of brothers used to sow separately.

P.W.1 had further deposed that the distance of police station from his village is 14-15 Km. 2-3 months before the incident, Deen Dayal Tiwari (convict/appellant) had already lost his mind. He did not know about the treatment of his brother (Deen Dayal Tiwari) done at Lucknow and he is not even aware of any treatment of his for mental impairment in jail. His brother Deen Dayal Tiwari (convict/appellant) used to abuse the villagers and also used to quarrel with him. His brother Deen Dayal Tiwari (convict/appellant) also used to beat many people of the village. The villagers were fed up with this behaviour of Deen Dayal Tiwari (appellant) and were upset. His brother Deen Dayal Tiwari used to repair Cityscan and X-ray machines in Lucknow and earned a lot of money from this. The condition of the house had become good. For this reason, the villagers were jealous of him. The incident is of the month of November. The rice paddy was cut. He did not know that Deen Dayal Tiwari (appellant) used to sleep in the field to take care of his paddy. He did not know that Deen Dayal Tiwari was sleeping in the barn on the day of the incident. He denied the suggestion that the Inspector wrote the report by speaking to someone, and got his signature. After that P.W.1 stated that report was wrote down on his dictation and he had signed on it. He denied the suggestion that Deen Dayal Tiwari (convict/appellant) was in the [kfygku (barn) on the night of the incident and at that time, the miscreants entered his house and started robbing him.

14. P.W.2-Smt. Sunita alias Anita, who is the wife of the informant (P.W.1), in her examination-in-chief, had deposed that the name of her tsB (brother-in-law) is Deen Dayal Tiwari (convict/appellant) and the name of her husband is Dinanath (P.W.1). Two years before the incident, partition was happened between her brother-in-law and her husband. On the northern side of the house, there is a room and a verandah, which are on her share and two rooms from south-east respectively and one kitchen is in her brother-in-law's share

and in the middle, there is a wall constructed with brick but it was not cemented. The four daughters of Deen Dayal Tiwari (convict/appellant) and his wife Siallali were sleeping in their room and they were sleeping in her room.

P.W.2 had further deposed that this incident happened on 11/12.11.11 at 2.30 am in the night. When she was sleeping in her room with her husband (P.W.1) and children, then, the sound of **बचाओ बचाओ** (save save) and crying came from her sister-in-law Sialali and her daughters. Hearing this noise, they came out of their house and made alarm, then, many people of the village came. Vishnu Tiwari, Ashok Tiwari etc. came on the spot. After that, they tried to open the door but it was not opened. Meanwhile, the police also came and removed them from there. The deadbodies of Siallali and her daughters Mani, Riya, Guddan, Mahima was in the room of Deen Dayal Tiwari (convict/appellant) and Deen Dayal Tiwari (convict/appellant) was also in the room. She was at her own door and saw that the police took away Deen Dayal Tiwari (convict/appellant). The police was investigating this incident. The police had not questioned her about this incident.

In cross-examination, P.W.2- Smt. Sunita alias Anita had deposed that she has three children and these three are boys. Her brother-in-law Deen Dayal Tiwari had four girls. Brother-in-law (convict/appellant) is elder and her husband (P.W.1) is younger. Her father-in-law was Laxman Prasad Tiwari and he was five brothers, amongst them her father-in-law was the eldest. Durga Prasad Tiwari, Shesar Pal Tiwari, Shivpal Tiwari, Sri Bhagwan Prasad Tiwari and her husband (informant -Dinanath Tiwari) are educated. She have studied till class eight. She did not know how much the convict/appellant Deen Dayal Tiwari is educated. He used to work in Lucknow. She did not know what work he used to do. The situation of Deen Dayal Tiwari's house was good. Two years before this incident, separation took place with Deen Dayal Tiwari (appellant).

P.W.2 had further deposed that when a person from the village used to come to the house of convict/appellant Deen Dayal Tiwari, convict/appellant Deen Dayal Tiwari used to abuse him and drive him away from the door and said that he has nothing to do with them. She further deposed that there is no window or ventilators in the house of Deen Dayal (convict/appellant). This incident happened one and a half year ago. The incident is of November 2011. It was a light winter. The people used to wear winter and cotton ordinary clothes. She was sleeping in her house on the night of the incident. She was sleeping in deep sleep. She was sleeping in her house at night. In the night of the incident, the police came at 04:00-04:30 a.m. in the morning. She and her husband (P.W.1) did not give information of the incident. She did not know who informed the police about this incident. When the police came, it was morning. They wanted to go to Deen Dayal Tiwari's door when the police arrived but the police did not allow them to go towards the room of Deen Dayal Tiwari, therefore, she was at the door of her house. Her husband (P.W.1) was shocked to learn about this incident. Villagers Ashok Tiwari and Vishnu Tiwari and other people had came in the morning whose names she did not know. There was a pile of brick standing as a wall in the gallery between her house and the house of Deen Dayal's house. She further deposed that how did the police break open the door of Deen Dayal's house, she did not know.

P.W.2 had further deposed that since they could not go there, therefore, it could not be told in what condition the dead bodies were present where they were.

She did not see the corpse, hence she has no information about the injuries. The night of the incident was dark. At that time, the paddy was being cut and some paddy was empty to be harvested. She did not know whether Deen Dayal Tiwari (convict/appellant) was guarding the paddy or where he was present on the night of the incident. She could not even tell what weapons were or were not there in the room of the incident.

P.W.2 had also stated that they did not try to open the door of Deen Dayal Tiwari's house. The police opened the door of Deen Dayal Tiwari's house. She denied the suggestion that an unknown miscreant had entered Deen Dayal Tiwari's house on the night of the incident and robbed him and when his wife and children protested against it, assaulted them. She also denied that miscreants had robbed Deen Dayal Tiwari's house and killed his wife and children. She also denied the suggestion that the miscreants after looting and killing kept the outer door of the house opened. She also denied the suggestion that when Deen Dayal Tiwari (convict/appellant) came to the house and found his wife and children in death condition, he was telling the villagers and alleging that all of you together had caused this incident. She also denied the suggestion that even after the arrival of the police, Deen Dayal Tiwari (convict/appellant) was levelling charges upon the villagers in front of the policemen about these killings, due to which the police was reprimanding. She also denied that the villagers had falsely implicated Deen Dayal Tiwari (convict/appellant) with the connivance of police. She also denied that the police had falsely implicated Deen Dayal Tiwari by making false story.

15. P.W.3-Vishweshwar Nath Mishra, in his examination-in-chief, had deposed that on 11.12.11.2011, he was sleeping at his house. At around 2:00-2:30 o'clock in the night, he got a call that some incident had happened at Deen Dayal Tiwari's house and the crowd gathered there. After that, he immediately reached in front of Deen Dayal Tiwari's house and saw that crowd had gathered in front of Deen Dayal Tiwari's house and the police had also reached the spot in front of him. The room of Deen Dayal Tiwari was closed from inside. They tried to get open the door but the door was not opened. Then, they peeped inside through the window of the wall and saw that lantern was burning in the room and Deen Dayal Tiwari (convict/appellant) was walking in the room with drenched axes in his blood soaked hand and inside the room the dead bodies of his wife Siallali and her four daughters were lying in the room. When the police forced to get open the door, then convict/appellant Deen Dayal Tiwari came out with blood stained axe and was arrested by the police on the spot. He (P.W.3) and many other people of the village entered into the room of Deen Dayal Tiwari and saw that the corpse of his wife drenched in blood was lying on the cot and on the ground, corpse of four girls were lying. Deen Dayal Tiwari (convict/appellant) told them that he had killed his wife and girls. Two blood stained knives were also lying on the spot.

PW.3 had further deposed that the Inspector first took into custody a Sweater, one piece of lungi and collected blood stained and plain soil from the spot and also recovered blood stained and plain clothes, bed, one axe, one knife of green handle, one knife of yellow metal handle etc., memo of which was prepared by the Inspector separately on the spot before him and he made his signature on the same. He

proved the memo and his signature thereon. He also deposed that the Inspector had prepared the panchayatnama of five corpses before him, upon which he put signature thereon. The Inspector had prepared the "Panchayatnama' separately for the five dead bodies before him. The Inspector took his statement regarding this incident and five deadbodies were sent for postmortem. He further deposed that the clothes, which were wearing by Deen Dayal (convict/appellant), were having blood stained at everywhere, which was taken in custody by the police. Deen Dayal Tiwari (convict/appellant) told on the spot that his wife was a bad character, due to which he had killed his wife along with his four daughters. He went to the postmortem house with the dead bodies.

In cross-examination, P.W.3-Vishweshwar Nath Mishra deposed that the place of incident is the Pure Brijlal Tiwari Moiya Kapurpur. His house is in Pure Ram Roop Mishra. His house is 1-1½ KM away from the place of incident. He came to know about the incident at 2:00-2.30 O'clock in the night. The phone call was made to him by Vishnu Tiwari. His village is about 1200 meters away from Bharathipur. On getting information from the phone, he went wearing clothes after 10 minutes and reached the spot in five minutes. He reached the spot at around 03:00 a.m.-3.15 a.m. He and the police had arrived together. The police station is about 12-13 Kms. east direction from the place of the incident. His house is in south direction from the place of the incident. Deen Dayal's house has two or three rooms. When he reached at the place of the incident, the main door of Deen Dayal was open and the door of the room where the murder took place was closed. It is wrong to say that the door was not opened by the police by pushing it, but it was opened.

P.W.3 had further deposed that about one o'clock, the entire Panchayatnama proceedings were over. The body was sent for the postmortem. The memo of axe, knife, soil, clothes etc. were prepared. At about 07:00 O'clock, convict/appellant was sent to police station and after sending the convict/appellant to police station, all the memos were prepared. He also went to the place of postmortem. The postmortem was conducted between 03:00-04:00 O'clock. He reached home at about 07:00 O'clock after conducing funeral of the deadbodies.

P.W.3 had further deposed that when the convict/appellant was pulled out, he was on underwear and in the same condition, he was sent to the police station. He denied the suggestion that he had any quarrel with Deen Dayal before the incident. He further deposed that he had no enmity with Deen Dayal. There was no window and ventilators in Deen Dayal's room in which the body was found. The body of his wife was lying in front of the door; the bodies of two girls were on the ground and two were on the bed. On seeing the memos of weapons of murder and knives, he deposed that the signature of convict/appellant is not thereon. He denied the suggestion that accused Deen Dayal was in his barn on the day of the incident. It is wrong to say that when Deen Dayal came to his house from the barn and came to know about the incident, he started shouting that the villagers finished his family through the miscreants. It is also wrong to say that the policemen scolded him. It is also wrong to say that the villagers made Deen Dayal culprit. He deposed that the edge of the axe is four inches; the fall was nine inches; and the handle was two and a half feet.

16. In the statement under Section 313 Cr.P.C., convict/appellant claimed to be innocent and denied the allegations

levelled against him and stated that the prosecution witnesses had falsely implicated them on account of enmity. The convict/appellant stated in his statement under Section 313 Cr.P.C. that before the incident, he was working at Lucknow, upon which he got a good amount of salary and his condition was good. On account of his good condition, his pattedar and villagers were getting jealous to him. He had four daughters and no sons. His brother (informant) had only son. He told that he would give all the properties to his daughters, which was not liked by his brother Dina Nath (informant) because he wanted to get all his properties. He had cordial relationship with his wife and daughters and he loved a lot to his wife and daughters and there were no enmity between them. Before the incident, altercation took place with Visheshar Nath, on account of which, he was inimical to him. He further stated that on the night of the incident, he was sleeping at barn for safety of cutting paddy. When he came home in the morning, he came to know about the incident. He has faith that this incident was done by the villagers and his brother through miscreants. He was stated this by crying but they have falsely implicated him with the connivance of police. No weapon of murder i.e. axe and knife were recovered from his possession.

17. The learned trial Court believed the evidence adduced by Dina Nath Tiwari (P.W.1), Smt. Suneeta alias Anita (P.W.2) and Visheshwar Nath Mishra (P.W.3) and convicted and sentenced Deen Dayal Tiwari in the manner stated in paragraph-2, hereinabove.

18. Hence, the above-captioned appeal and reference.

(C) CONVICT/APPELLANT'S ARGUMENTS

19. On behalf of the convict/appellant, Shri Jyotindra Misra, learned Senior Advocate/Amicus Curiae assisted by Shri Kapil Misra, learned Counsel argued :-

(I) That the case rests entirely on the circumstantial evidence. Unless and until the prosecution proves its case beyond all reasonable doubt, the conviction in a case of circumstantial evidence would not be warranted. His submission is that merely on the basis of suspicion, conviction would not be sustainable.

(II) That the F.I.R. was lodged after arresting of the appellant and, therefore, the F.I.R. is anti-time.

(III) That the investigation of the instant case is tainted as signature of the convict/appellant was not on the seizure memo of weapon of assault. There is no exhibit before the Trial Court to prove that the alleged recovered weapons were used by the convict/appellant. Furthermore, there is no proved serologist report to show that the blood on the murder weapons were of human being and of the deceased. There is a false recovery of axe and knives alleged to be used in the incident by the convict/appellant.

(IV) That P.W.4-Dr. S.K. Shukla, who conducted the postmortem of the deceased had stated in his deposition that some of the injuries over the body of the deceased cannot be caused by alleged recovered weapons.

(V) That there are major contradictions in the statements of P.W.1, P.W.2, P.W.3 and P.W.5.

(V) That the presumption of Section 106 of the Indian Evidence Act cannot be drawn against the convict

/appellant. His submission is that unless the initial burden is discharged by the prosecution, the burden would not shift on the convict/appellant. The convict/appellant in his statement recorded under Section 313 Cr.P.C. had stated that at the time of the incident, he was sleeping in barn for saving his paddy but the trial Court has not considered this fact while convicting the convict/appellant by means of the impugned order.

(VI) That there was no motive for the convict/appellant to commit the alleged crime as alleged by the prosecution. His submission is that in the case of circumstantial evidence, motive plays an important role and the prosecution has utterly failed to prove the case as to motive.

(VII) That when two views are possible, one leaning towards acquittal and another towards conviction, the benefit should be given to accused.

(VIII) That the findings of guilt recorded by the trial Court is based on surmises and conjectures, hence the impugned judgment is liable to be set-aside.

(IX) That the learned trial court has committed error in concluding that the case of the convict/appellant is covered under the "rarest of rare cases' and, therefore, the death sentence awarded to the convict/appellant is not legally justified.

(D) RESPONDENT/STATE ARGUMENTS

20. On behalf of the State, Shri Vimal Kumar Srivastava, learned Government Advocate assisted by Shri Chandra Shekhar Pandey, learned Additional Government Advocate has argued :-

(I) that the motive for the crime was duly proved.

(II) that place of occurrence is proved without doubt as there is no suggestion that the incident occurred at any other place.

(III) that the house of informant P.W.1 is besides the house of the appellant, where the incident had occurred and their houses are partitioned with pile of brick, therefore, it is quite natural and informant P.W.1 and his wife P.W.2 had heard the noise of the daughters and wife of the appellant and after hearing the noise, both of them i.e. P.W.1 and P.W.2 came out of his house and saw the incident.

(IV) that though the deceased are the family members of P.W.1 and P.W.2 and are related to each other, their testimony cannot be discarded merely because the relationship can never be a factor to affect the credibility of witnesses. His submission is that P.W.1 and P.W.2 have established their presence at the place and time of occurrence and their statements are trustworthy.

(V) that the statements of P.W.1, P.W.2 and P.W.3 have been clear and consistent while describing the sequence of events that had taken place on the day of the occurrence. There is no material discrepancy or contradiction in the statements of P.W.1, P.W.2 and P.W.3 as they had identified the convict/appellant, who committed the murder of the deceased with axe and knives, which also corroborates with the medical evidence. Hence, merely not appended the signature of the convict/appellant on the memo of the recovery of the weapons of assault i.e. axe and knives, cannot be said that the whole testimonies of P.W.1, P.W.2 and P.W.3 are not trustworthy and unreliable.

(VI) that the statements of P.W.1, P.W.2 and P.W.3 show that appellant committed the murder of his wife and four minor daughters in the intervening night of

11/12.11.2011 at about 02:30 a.m. with axe and knife and the medical evidences have also supported the prosecution case. The trial Court has rightly discarded the plea of the appellant.

(VII) that the defence had not made suggestion to the Investigating Officer or any member of his team of having any ill motive to falsely implicate the convict/appellant, therefore, there is no occasion to accept the submission that the FIR has been ante-timed, particularly when the record and the GD entry proves prompt lodging of the F.I.R.

(VIII) that the prosecution witnesses i.e. P.W.1, P.W.2 and P.W.3 gave a graphic description of the incident which finds corroboration in the medical evidence as also the position in which the body was noticed at the time of inquest proceedings.

(IX) that absence of serologist report would not make a material difference as this is a case based on ocular account and the spot arrest of the convict/appellant by the police with blood stained axe and knife.

(X) that so far as the sentence is concerned, while placing reliance upon **Machhi Singh and others Vs. State of Punjab :** (1983) SCC 470, he argued that the trial Court has rightly sentenced the appellant for capital punishment as the prosecution has fully established that this case falls under the category of *''rarest of rare cases'.*

(XI) Hence the impugned order is not liable to be set-aside.

(E) DISCUSSION/ANALYSIS

21. We have heard Sri Jyotindra Mishra, learned Senior Advocate/Amicus Curiae assisted by Sri Kapil Mishra, learned Counsel appearing on behalf of the convict/appellant, Sri Vimal Kumar Srivastava, learned Government Advocate assisted by Sri Chandra Shekhar Pandey, learned Additional Government Advocate for the State/ respondent at length and have carefully gone through the impugned judgment and order of conviction and sentence awarded by the learned trial Court by means of the impugned judgment.

22. It would become manifest from the aforesaid that the learned trial Court has based the conviction of convict/appellant on testimonies of the informant Dina Nath Tiwari PW-1, his wife Smt. Suneeta alias Anita PW-2, who are the brother and sister-in-law, respectively, of the convict/appellant and whose house is besides the house of convict/appellant partitioned with brick and Visheshwarnath Mishr P.W.3, who is the independent witness.

23. First, this Court proceeds to test whether the F.I.R. is ante-timed. The offence is said to have been committed in the intervening night of 11/12.11.2011 at 2:30 a.m. The wife and four daughters of the convict/appellant were done to death. The convict/appellant was not spared to lodge the F.I.R. nor informed the police about the incident. It appears that the informant P.W.1-Dina Nath Tiwari, who is the younger brother of the convict/appellant, prepared written report through scribe, whose name has not been disclosed by the prosecution, went to the police station and lodge the F.I.R. at 06:10 a.m. on 12.11.2011. The distance between police station and the place of occurrence is 15 Kms. If statements of P.W.1, P.W.2 and P.W.3 are taken into consideration on this point in consonance with the submission raised by the learned Senior Counsel/ Amicus Curiae, it is evident that information to P.W.1 was received at 02:30 a.m. on 11/12.11.2011. P.W.1 and P.W.2

have stated that when they heard the noise of wife and four daughters of the convict/appellant, they came out of their village and were trying to get open the door of convict/ appellant but when the door was not opened, they started removing bricks of the wall and thereafter the convict /appellant opened the door and came out with blood stained axe and threatened them and other villagers who were gathered there to leave from there, otherwise, he would also kill them and after that convict/appellant closed the door. Immediately thereafter, the police reached there and after opening the door by pushing with the help of the villagers, arrested the convict/appellant on spot with blood stained axe and saw that five deadbodies were lying inside the house of the convict/appellant. Furthermore, on the pointing out of convict/appellant, two knives were recovered by the police inside the room.

24. Referring to the aforesaid fact, it was emphasized by the learned Senior Counsel/Amicus Curiae for the convict/appellant that prosecution did not explain as to how and under what circumstances, police reached the place of occurrence and it was argued on behalf of the appellant that this fact itself shows that F.I.R. is ante-timed.

25. If submissions raised by the learned Senior Counsel/Amicus Curiae are minutely analyzed with statements of P.W.1, P.W.2, P.W.3 and P.W.5, it clearly emerges that aforesaid statement made by P.W.1 to this extent cannot place the prosecution case doubtful as no question was put to P.W.1 that police personnel came there at that moment whether the police actually proceeded from the police station concerned after registering the case or they belong to patrol party. If such was the position, submission raised by the learned Senior Counsel/Amicus Curiae doubting the existence of F.I.R. at the time mentioned therein cannot be accepted. F.I.R. could come in existence at the time mentioned in it. It may also be mentioned that F.I.R. is not the result of afterthought or consultation. If contents of F.I.R. i.e. written report are taken into consideration in the light of entire evidence, there was no chance to falsely implicate convict/appellant in this matter on the basis of due consultation or an afterthought. It is also noteworthy that F.I.R. is not an encyclopedia. All necessary details required to set the law in motion have been mentioned in written report (Ext. Ka. 1). If for the sake of argument or for a moment submission raised by learned Senior Counsel/Amicus Curiae on point of F.I.R. is taken into consideration, then, also entire prosecution if proved from other evidence cannot be disbelieved on the point of ante-timing of F.I.R. In the present case, five persons including four minor girls were done to death. P.W.1 is brother-in-law (nsoj) of deceased Siyallali and his four niece were also done to death brutally by his elder brother Deen Dayal Tiwari (convict/appellant). Time of receiving of information and reaching the place of occurrence of witnesses shown in the prosecution evidence is not based on exact recording of time but is based on assumption. Written report is briefly stated document. It could be prepared within few minutes and thus, on this point, existence of F.I.R. cannot be doubted. Therefore, in our considered view, finding of the trial Court regarding existence of F.I.R. in this matter cannot be termed to be illegal, rather it is based on correct appreciation of facts, evidence and law. It also transpires from the evidence of the Investigating Officer

P.W.5 that the defense had not put any suggestion to him of having ill-motive to falsely implicate the convict/appellant or there was enmity with the Investigating Officer. Hence, no interference is required in finding of the trial Court on this point.

26. Now we come to deal with motive part. It is true that motive is an essential ingredient to commit an offence. Nothing specific was mentioned by P.W.1 in written report (Ext. Ka.-1) on this point. It is evident that when the convict/appellant was interrogated by the police, then, he stated that the character of his wife was bad and she had affair with some person of the village, therefore, he murdered his wife with axe and knife and when their daughters came to rescue their mother, he also murdered their daughters. P.W.3-Visheshwarnath Mishra examined in the matter had testify the aforesaid confession of the convict/appellant made before the police. Murder of wife and daughters of convict/appellant in the house of the convict/appellant has not been disputed nor statement regarding pressurizing by P.W.1 to transfer of immovable property in his name upon convict/appellant was specifically challenged in cross-examination.

27. As regards non-production of documentary evidence to prove motive is concerned, it is noteworthy that a fact may be proved by oral or documentary evidence. The confession referred here-in-above on this issue will certainly come in the category of direct evidence and same has not been specifically impeached in cross-examination and nothing is on record to disbelieve the said confession made by the convict/appellant before the police on point of motive. Thus, we are of the view that submission raised by learned Senior Advoate/Amicus Curiae on this point cannot be accepted. Thus, it can safely be held that finding recorded by Trial Court on point of motive in impugned judgment needs no interference and same is based on correct appreciation of facts and evidence. Convict/ appellant had motive to commit this offence.

28. So far as medical evidence adduced by prosecution in this case is concerned, five persons, namely, Siallali, Km. Mahima, Km. Mani, Km. Riya and Guddan were done to death in the intervening night of 11/12.11.2011 in the house of convict/ appellant. Postmortem was conducted on 12.11.2011 in between 01:00 p.m. to 02:30 p.m. In all postmortem reports, time of death of deceased persons has been shown as 1/2 day old. Injuries found on body of deceased persons are incised, multiple incised, lacerated, multiple lacerated, contusion, multiple panitrating and crush wounds.

29. Postmortem report (Ext. Ka.-2) of deceased Smt. Siyallali, aged about 36 years, reveals that first injury is on left side of forehead in the form of incised wound. Second injury is lacerated wound on eye orbit just above to left upper eyelid. Third injury is on left side of face in form of incised wound. Fourth injury is multiple lacerated wound on right side of face including forehead. Fifth injury is lacerated wound on shoulder at mid of clavicle. Sixth injury is multiple lacerated wound on left side of neck and seventh injury is multiple crush of abdomen in epigastric region including chest cage.

30. In postmortem report (Ext. Ka.-3) of deceased Km. Mahima, aged about 4 years, lacerated wounds were found on

skull above to left upper eyebrow and occipital region of skull.

31. So far as postmortem report (Ext. Ka.-4) of deceased Km. Mani, aged about 11 years, is concerned, lacerated wound was found on skull 3 cm above to left ear; contusion was found on forehead at frontal region; left section of neck was 10 x 4.0 x bone deep; incised wound was found on mandible size 4.0 x 1.0 x bone deep.

32. On dead body of deceased Kumari Riya, aged about 8 years, during postmortem (Ext. Ka.-5), lacerated wound was found on left side of face 2 cm medial left ear; left section was found on neck size 6.0 x 9.0 x bone deep; incised wound was found on chest at left side above to epigastric region; and multiple lacerated wound was found on right leg.

33. As per postmortem report (Ext. Ka.-6) of deceased Guddan, aged about 6 years, crush injury was found on left side of skull; cut section was found on neck at anterior aspect; and multiple penetrating wound was found on abdomen.

34. In the opinion of P.W.4-Dr. S.K. Shukla, cause of death of all deceased persons was due to shock and haemorrhage as a result of ante-mortem injuries. P.W.4-Dr. S.K. Shukla was examined before the trial Court and deposed that time of death of deceased persons was 1/2 day old. If statement of P.W.4 is compared in light of statement of other prosecution witnesses examined in the matter, it is clear that all deceased persons were done to death in the intervening night of 11/12.11.2011 at 2:30 p.m. The convict/appellant used same weapon in committing murder of all deceased persons. It is also evident from record that injuries found on body of deceased persons can be caused with the weapon "axe" and "knife" said to have been recovered from the possession of the convict/appellant on spot. Thus, in our considered view, in instant case, prosecution was able to prove date and time of death of deceased persons.

35. It is pertinent to mention here that incident took place in the month of November. Symptom of Rigor Mortis shown in postmortem report of all deceased persons is probable and possible one. Prosecution was also able to prove the manner in which deceased were done to death and has connected the weapon "axe" and "knife" used by convict/appellant in committing the offence. Thus, finding recorded by Trial Court in the impugned judgment and order on point of medical evidence, in our considered opinion, is also in accordance with facts and evidence which needs no interference by this Court. It may also safely be held in this matter that medical evidence is not contrary to oral version of prosecution.

36. So far as recovery of weapon and clothes are concerned, incident took place in the intervening night of 11/12.11.2011 at 2:30 p.m. P.W.1 and other witnesses have reached the place of occurrence immediately in the intervening night itself and thereafter F.I.R. was lodged by P.W.1. It is also evident that on the basis of F.I.R., local police immediately proceeded to the place of occurrence. P.W.5 Ajay Prakash Mishra has stated that he reached the place of occurrence and after conducting inquest proceedings, he sent the deadbodies for post-mortem. Arrest and recovery memo also reveals that convict/appellant was arrested on spot from his house. On inquiry made by P.W.5, arrested convict/appellant confessed that he murdered his wife and

children as his wife was bad character and she has relationship with some person of the village. As per this witness, on interrogation of convict/appellant, he disclosed that he hidden the weapon used in commission of crime in his house itself. P.W.5, on the basis of disclosure statement made by convict/appellant and on pointing out of convict/appellant, as per recovery memo, weapons "axe" and "knife" were recovered from the room in the house of convict/appellant itself. If statements of P.W.1, P.W.2 and P.W.3 are taken into consideration along with statements of P.W.5, cumulatively, recovery of weapon "axe" and "knife" on pointing out of convict/appellant from the room situated in the house of convict/appellant has been proved by prosecution from its evidence beyond reasonable doubt. Thus, findings recorded by the Trial Court on issue of recovery of "axe" and "knife" on pointing out of convict/appellant need no interference by this Court and same are based on correct appreciation of facts and evidence.

37. As far as truthfulness of statements of P.W.1, P.W.2 and P.W.3 is concerned, certainly P.W.1 and P.W.2 are closely related to each other as also with deceased persons, yet their statements, only on this basis, cannot be discarded. None of them are eyewitness account. Whatever information was gathered by P.W.1 at the place of occurrence, he reproduced the same in handwriting and proceeded to police station concerned. Both these witnesses i.e. P.W.1 and P.W.2 had deposed before the trial Court that the house of his elder brother i.e. convict/ appellant and their house were adjacent and their houses were partitioned with brick of wall which was not cemented. Therefore, it is quite probable that P.W.1 and P.W.2, on hearing the noise of the wife and daughters of the convict/appellant, came out from their house and witnessed the incident. P.W.3-Visheweshwar Mishra had fully supported the statements of P.W.1 and P.W.2 and stated that at the time of the incident, he as well as P.W.1 and P.W.2 were present before the house of the convict/appellant and on their presence, the police came and arrested the convict/appellant on spot with blood stained "axe' and "knife'. Therefore, their presence at the place of occurrence at the time stated by them cannot be doubted. Their statements made before the Court can also not be doubted on this ground that there are contradictions and exaggerations in their statements on some points. If their statements are scrutinized cumulatively in its entirety, there is no contradiction in their statements on point of recovery of dead bodies at the place of occurrence, taking of blood stained and plain soil and other articles from the place of occurrence, which were sent to F.S.L. for chemical examination and also on point of recovery of weapon "axe" and "knife". Exaggerations and contradictions said to have been occurred in their statements, as has been elucidated during course of arguments on behalf of convict/appellant, in our considered view, do not go to the root of the case and do not demolish prosecution evidence on material points.

38. It is settled that the testimony of an eye-witness merely because he happens to be a relative of the deceased cannot be discarded as close relatives would be the last one to screen out the real culprit and implicate innocent person. This aspect of the mater has further been clarified by the Apex Court in the case of **Dharnidhar Vs. State of Uttar Pradesh :** (2010) 7 SCC page 759 as follows:

"12. There is no hard-and-fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the court. It will always depend upon the facts and circumstances of a given case. In **Jayabalan v. UT of Pondicherry** (2010) 1 SCC 199, this Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim."

39. Thus, in our considered view, statements of P.W.1, P.W.2 and P.W.3 on material points are fully reliable. Trial Court, while passing impugned judgment and order, has rightly placed reliance on their statements and finding recorded by Trial Court on this issue needs no interference.

40. As regards laches occurred on part of the Investigating Officer i.e. recovery memo of weapons of assault i.e. "axe' and "knife' is defective one as signature of the convict/appellant was not thereon is concerned, we are of the view that it does not go to the root of the case and do not affect the prosecution case. It may be mentioned that since no prosecution case is free from shortcomings, therefore, merely in not available the signature of convict/appellant on the recovery memo of weapons of assault i.e. "axe' and "knife', cannot be disbelieved. In the instant case, recovery of weapon "axe" and "knife" is supported by statements of P.W.1, P.W.2 and P.W.3, who were also present at the place of occurrence.

41. Further, if the prosecution case is established by the evidence adduced, any failure or omission on the part of the Investigating Officer cannot render the case of the prosecution doubtful [vide : **Amar Singh vs. Balwinder Singh,** AIR 2003 SC 1164, **Sambu Das vs. State of Assam**, AIR 2010 SC 3300].

42. In the case of **State of U.P. Vs. Krishna Master and others :** 2010 Cri. L.J. 3889 (SC), the Apex Court has held that 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.

43. Further, the Apex Court in **Sampath Kumar vs. Inspector of Police, Krishnagiri :** (2012) 4 SCC 124 has also held that minor contradictions are bound to appear in statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

44. The factum of arrest from spot was not denied by the convict/appellant. P.W.1, who is the younger brother of the convict/appellant, P.W.2, who is the wife of P.W.1, P.W.3, who is the independent witness and P.W.5, who is the Investigating Officer, had deposed in clear terms before the trial Court that the convict/appellant was arrested by the police from the place of the occurrence (i.e. from the house of convict/appellant) along with blood stained "axe' and "knives' as well as five dead-bodies (wife and four minor daughters of the convict/appellant). During the interrogation on spot, the convict/appellant made disclosure statement that *as his wife Siyallali had illicit relationship with someone of the village, due to which his relation with his wife became strained, on*

account of which, on 11.11.2011, in the evening itself, he had decided that tonight itself he would kill his wife, therefore, he had kept the "knife' and "axe' in the evening itself and at around 3 O'clock in the night, when his wife and his daughters were sleeping, he firstly hit the head of his wife Siallali with axe, due to which she screamed, then, he stabbed her with knife. After that, his daughters woke up and came to serve their mother, then, he killed them in turn. Among their daughters, he firstly killed Mani Tiwari, then Riya, then Guddan/Gunjan, then Kumari Mahima with a "knife' and "axe'. On hue and cry of save save of his daughters, people of his village and members of his family had gathered and these peoples were threatening to break the door and asked him to come out of the room, therefore, he had closed the door inside his room." P.W.3, who is independent witness, has also deposed before the trial Court that the convict/appellant had made the aforesaid disclosure statement before him at the time of his arrest on the spot during interrogation by the police. The statement of the convict/appellant recorded under Section 313 Cr.P.C shows that he had no enmity with P.W.3. Furthermore, the convict/ appellant had not denied the fact either in the statement recorded under Section 313 Cr.P.C. or the written statement submitted by him under Section 313 Cr.P.C. before the trial Court that he had not made disclosure statement before the Investigating Officer P.W.5 or the disclosure statement made by him was concocted or it was made by him only on exerting pressure by the Investigating Officer.

45. At this juncture, it is relevant to mention here that the convict/ appellant admitted the fact that deadbodies of his wife and four daughters were found by the police from his house. The convict/appellant had alleged in the written statement submitted under Section 313 Cr.P.C. that on the date and time of the incident, he was sleeping at his barn for saving paddy crops and when he came in the morning, he came to know the incident and further he alleged that he believed that his brother and villagers had committed this incident with the connivance of miscreants.

46. It is true that 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.

47. It is settled law that 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.

48. In the instant case, it transpires from the record that the convict/appellant has failed to offer any reasonable

explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act viz. the defense has failed to produce any clinching evidence (1) at the time of the incident, the convict/appellant was sleeping at his barn to save his crops; (2) the convict/appellant was not arrested from spot; and (3) his wife and daughters were murdered by his brother (P.W.1) and villagers with connivance of miscreants.

49. From the aforesaid discussion and evidence on record, this Court is of the view that the motive is proved by the prosecution; the prosecution witnesses had fully supported the prosecution case and proved their presence at the time of the incident on the place of occurrence; the medical evidence has also corroborated by the disclosure statement made by the convict/appellant itself before the police; and the convict/ appellant was arrested on spot by the police with the weapons of assault. Thus, the circumstances established by the prosecution leads to only one possible inference regarding the guilt of the convict/appellant as the prosecution has proved the guilt of the convict/appellant beyond reasonable doubt by leading cogent evidence.

50. Hence, the submission made by the learned Senior Counsel/Amicus Curiae for appellant in this regard cannot be accepted and the finding recorded by the Trial Court on this point is not liable to be interfered with.

(F) SENTENCE

51. Now, we come to see evidence regarding involvement of convict/appellant in commission of crime and nature of evidence adduced by prosecution. Certainly, it is a case of circumstantial evidence, thus we have to see whether circumstances established by prosecution against convict/ appellant are sufficient to sustain conviction of accused-appellant for offence under Section 302 IPC. Before dealing with aforesaid question, it will be useful to quote settled proposition of law on point of circumstantial evidence.

52. In **Brajendra Singh v. State of Madhya Pradesh** : (2012) 4 SCC 289, the Apex Court observed as under :-

27. There is no doubt that it is not a case of direct evidence but the conviction of the accused is founded on circumstantial evidence. It is a settled principle of law that the prosecution has to satisfy certain conditions before a conviction based on circumstantial evidence can be sustained. The circumstances from which the conclusion of guilt is to be drawn should be fully established and should also be consistent with only one hypothesis, i.e. the guilt of the accused. The circumstances should be conclusive and proved by the prosecution. There must be a chain of events so complete so as not to leave any substantial doubt in the mind of the Court. Irresistibly, the evidence should lead to the conclusion inconsistent with the innocence of the accused and the only possibility that the accused has committed the crime. To put it simply, the circumstances forming the chain of events should be proved and they should cumulatively point towards the guilt of the accused alone. In such circumstances, 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.

28. Furthermore, the rule which needs to be observed by the Court while dealing with the cases of circumstantial

evidence is that the best evidence must be adduced which the nature of the case admits. The circumstances have to be examined cumulatively. The Court has to examine the complete chain of events and then see whether all the material facts sought to be established by the prosecution to bring home the guilt of the accused, have been proved beyond reasonable doubt. It has to be kept in mind that all these principles are based upon one basic cannon of our criminal jurisprudence that the accused is innocent till proven guilty and that the accused is entitled to a just and fair trial. [Ref. **Dhananjoy Chatterjee v. State of West Bengal,** JT 1994 (1) SC 33; **Shivu v. High Court of Karnataka**, (2007) 4 SCC 713; and **Shivaji v. State of Maharashtra,** AIR 2009 SC 56].

29. It is a settled rule of law that in a case based on circumstantial evidence, the prosecution must establish the chain of events leading to the incident and the facts forming part of that chain should be proved beyond reasonable doubt. They have to be of definite character and cannot be a mere possibility."

53. In present case, none of the witnesses examined in the matter are eye account witnesses of the incident. It is also evident that incident took place in the intervening night of 11/12.11.2011 at the time and place mentioned in chik F.I.R. and stated by prosecution witnesses. Medical evidence also supports prosecution version. Five persons were done to death. Prosecution was able to prove motive against convict/appellant to commit present offence. Weapon "axe" and "knife" said to have been used in commission of crime was also made recovered by convict/appellant from his house itself. The factum of spot arrest of the convict/appellant has not been disputed and the convict/appellant has failed discharge his burden as per Section 106 of the Evidence Act. Thus, in our considered view, what evidence have been made available by prosecution during trial are sufficient to connect convict/appellant with the present matter. Convict/appellant and deceased both were also residing at some house. Incident took place inside the house. Circumstances established by prosecution are firm, cogent and believable. Chain of events are completed and linked with each other. There is no chance of false implication of convict/appellant. All circumstances including motive and previous conduct of convict/appellant as well as recovery of weapon "axe" and "knife" said to have been made on his pointing out cumulatively point towards the guilt of convict/appellant. It is also noteworthy that the best evidence which could be available in the facts and circumstances of the case were proved by the prosecution. Thus, on the basis of evidence available on record, one and only one hypothesis can be drawn that convict/appellant has committed present offence in which he has eliminated his wife and four daughters of his family.

54. So far as the submission of the learned Senior Counsel/Amicus Curiae that the convict/appellant was not present on the place of incident as he was sleeping in barn for saving his paddy on the date and time of the incident as has been stated by him in his statement under Section 313 Cr.P.C., hence, there was no question of the convict/appellant to murder his wife and four daughters, which is alleged to have occurred at 2:30 a.m.. on 11/12.11.2011, we cannot persuade ourselves to accept this contention of learned Senior Counsel/Amicus Curiae. This defence of alibi which has been pleaded by the

appellant has not been proved by him, as enjoined upon him by Section 106 of the Evidence Act.

55. For convenience, Section 106 of the Evidence Act reads as under :-

"106. Burden of proving fact within knowledge. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustration

(a) When a person does an act with some intention other than that which, the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."

56. In our opinion, the convict/appellant has not been able to discharge this statutory burden enjoined by Section 106 of the Evidence Act. Neither any defence witness has been examined on his behalf to show that he was sleeping in barn at the aforesaid time nor any documentary evidence has been adduced by him and proved which would establish this defence of the convict/appellant. We further find that no suggestion was given to any of the witnesses that at the time of the incident, the convict/appellant was not at the place of incident but was sleeping in barn. The solitary mention of such a defence in his statement under Section 313 Cr.P.C. would not tantamount to the convict/appellant discharging burden upon him as enjoined by Section 106 of the Evidence Act.

57. In view of the aforesaid reasons, the aforesaid contention of learned Senior Counsel/Amicus Curiae for the appellant fails.

58. Thus, we are of the view that Trial Court has rightly held guilty to convict/appellant for committing offence under Section 302 I.P.C. Finding of Trial Court about the guilt of convict/appellant for aforesaid offence is based on correct appreciation of facts and evidence which needs no interference by this Court.

59. As far as sentence imposed upon convict/appellant is concerned, Trial Court in its wisdom has imposed death punishment finding the present case in the category of *"rarest of rare"* cases. Five persons were done to death. Convict/appellant is husband of deceased Siyallali and father of four minor daughters.

60. Aggravating and mitigating circumstances in the present matter can be summarized as under :-

"Aggravating Circumstances

(a) Offence in the present case was committed in an extremely brutal, grotesque, diabolical, revolting and dastardly manner so as to arouse intense and extreme indignation of society;

(b) Offence was also committed in preordained manner demonstrating exceptional depravity and extreme brutality;

(c) Extreme misery inflicted upon his own wife and four minor daughters;

(d) Helpless children were done to death;

(e) Brutality and premeditated plan of convict/appellant also find support from his act as he ensured the death of all deceased by assaulting upon them on the vital part of deceased persons;

(f) Act of convict/appellant is shocking not only to the judicial conscience but also to the Society as he has eliminated his wife and four daughters only to take revenge from his wife as convict/appellant felt that his wife has bad character and she has eloped with some person of his village;

(g) act and conduct of convict/appellant itself shows that there is no chance of reformation and he is menace to the Society; and

(h) it is a cold-blooded murder without provocation.

61. On the other hand, Mitigating Circumstances, as emerged, are (a) age of the convict/appellant i.e. 43 years at the time of recording of statement under Section 313 Cr.P.C.; (b) he belongs to village background and offence was committed because the convict/appellant felt that his wife had bad character and she has illicit relationship some person of his village; and (c) chance for reformation and rehabilitation.

62. Now the question before this Court is whether death penalty in the present case is justified. Before looking to the facts of present case on the question of sentence, it would be appropriate to advert to judicial authorities on the matter throwing light and laying down principles for imposing penalty, in a case, particularly death penalty.

63. In the case of **Bachan Singh v. State of Punjab** : (1980) 2 SCC 684, the Apex Court, in para-164, observed that normal rule is that for the offence of murder, accused shall be punished with the sentence of life imprisonment. Court can depart from that rule and impose sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing death sentence. While considering question of sentence to be imposed for the offence of murder under Section 302 IPC, Court must have regard to every relevant circumstance relating to crime as well as criminal. If Court finds that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, Court may impose death sentence.

64. Relying on the authority in **Furman v. Georgia,** (1972) SCC On-Line US SC 171, the Apex Court noted the suggestion given by learned counsel about aggravating and mitigating circumstances in para 202 of the judgement in **Bachan Singh (supra)** which read as under :-

"202. ... 'Aggravating circumstances: A court may, however, in the following cases impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed -

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful

discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code."

65. Thereafter in para 203, the Apex Court observed that broadly there can be no objection to the acceptance of these indicators noted above but Court would not fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other. Thereafter in para 206 of judgment in **Bachan Singh (supra)**, the Apex Court also suggested certain mitigating circumstances as under :-

"206. ... 'Mitigating circumstances.--In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy conditions (3) and (4) above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."

66. Again in para 207 in **Bachan Singh (supra)**, the Apex Court further said that mitigating circumstances referred in para 206 are relevant and must be given great weight in determination of sentence. Thereafter referring to the words caution and care, in **Bachan Singh (supra)**, the Apex Court observed that it is imperative to voice the concern that Courts, aided by the broad illustrative guidelines, will discharge onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

67. In **Machhi Singh v. State of Punjab,** (1983) 3 SCC 470, stress was laid on certain aspects namely, manner of commission of murder, motive thereof, antisocial or socially abhorrent nature of the crime, magnitude of crime and personality of victim of murder. Court culled out certain propositions emerging from **Bachan Singh (supra)**, in para 38 and said as under :-

"The following propositions emerge from Bachan Singh case:(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

68. The Apex Court in Machhi Singh (supra) further observed that following questions must be answered in order to apply the guidelines :-

"(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence"

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"

(Emphasis added)

69. In **Haresh Mohandas Rajput v. State of Maharashtra** : (2011) 12 SCC 56, after referring to **Bachan Singh (supra)** and **Machhi Singh (supra)**, the Apex Court expanded the *"rarest of rare"* formulation beyond the aggravating factors listed in **Bachan Singh (supra)** to cases where the "collective conscience" of community is so shocked that it will expect the holders of judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining the death penalty, such a penalty can be inflicted. Court, however, underlined that full weightage must be accorded to the mitigating circumstances of the case and a just balance had to be struck between the aggravating and the mitigating circumstances.

70. In para 20 of the judgment in **Haresh Mohandas Rajput (supra),** the Apex Court observed that the rarest of the rare case comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of society. The crime may be heinous or brutal but may not be in the category of "the rarest of the rare case". There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an accused does not act on any spur of the momentary provocation and indulges himself in a deliberately planned crime and meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where victims are innocent children and helpless

women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects the entire moral fibre of the society, death sentence should be awarded.

71. The issue again came up before Hon'ble Apex Court in **Ramnaresh & others v. State of Chhattisgarh** reported in (2012) 4 SCC 257, wherein the Hon'ble Supreme Court reiterated 13 aggravating and 7 mitigating circumstances as laid down in the case of **Bachan Singh (supra)** required to be taken into consideration while applying the doctrine of *"rarest of rare"* case. Relevant para of the same reads thus:-

"76. The law enunciated by this Court in its recent judgements, as already noticed, adds and elaborates the principles that were stated in the case of **Bachan Singh (supra)** and thereafter, in the case of Machhi Singh (supra). The aforesaid judgments, primarily dissect these principles into two different compartments - one being the "aggravating circumstances" while the other being the "mitigating circumstances". The Court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the Court. It will be appropriate for the Court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the Court as contemplated under Section 354 (3) of Cr.P.C.

Aggravating Circumstances:

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 Cr.P.C.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece

staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold blooded murder without provocation.

(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating Circumstances:

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a pre-ordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused."

72. In the case of **Dharam Deo Yadav vs. State of UP** reported in (2014) 5 SCC 509, the Hon'ble Supreme Court has held thus:-

"36. We may now consider whether the case falls under the category of rarest of the rare case so as to award death sentence for which, as already held, in Shankar Kisanrao Khade v. State of Maharashtra (2013) 5 SCC 546 this Court laid down three tests, namely, Crime Test, Criminal Test and RR Test. So far as the present case is concerned, both the Crime Test and Criminal Test have been satisfied as against the accused. Learned counsel appearing for the accused, however, submitted that he had no previous criminal records and that apart from the circumstantial evidence, there is no eye-witness in the above case, and hence, the manner in which the crime was committed is not in evidence. Consequently, it was pointed out that it would not be possible for this Court to come to the conclusion that the crime was committed in a barbaric manner and, hence the instant case would not fall under the category of rarest of rare. We find some force in that contention.

Taking in consideration all aspects of the matter, we are of the view that, due to lack of any evidence with regard to the manner in which the crime was committed, the case will not fall under the category of rarest of rare case.

Consequently, we are inclined to commute the death sentence to life and

award 20 years of rigorous imprisonment, over and above the period already undergone by the accused, without any remission, which, in our view, would meet the ends of justice."

73. In **Kalu Khan v. State of Rajasthan** reported in (2015) 16 SCC 492, the Hon'ble Supreme Court has held that:-

"30. In Mahesh Dhanaji Shinde v. State of Maharashtra, the conviction of the appellant-accused was upheld keeping in view that the circumstantial evidence pointed only in the direction of their guilt given that the *modus operandi* of the crime, homicidal death, identity of 9 of 10 victims, last seen theory and other incriminating circumstances were proved.

However, the Court has thought it fit to commute the sentence of death to imprisonment for life considering the age, socio-economic conditions, custodial behaviour of the appellant-accused persons and that the case was entirely based on circumstantial evidence. This Court has placed reliance on the observations in Sunil Dutt Sharma v. State (Govt. of NCT of Delhi) as follows: (Mahesh Dhanaji case, SCC p. 314, para 35)

"35. In a recent pronouncement in Sunil Dutt Sharma v. State (Govt. of NCT of Delhi), it has been observed by this Court that the principles of sentencing in our country are fairly well settled -- the difficulty is not in identifying such principles but lies in the application thereof. Such application, we may respectfully add, is a matter of judicial expertise and experience where judicial wisdom must search for an answer to the vexed question -- Whether the option of life sentence is unquestionably foreclosed? The unbiased and trained judicial mind free from all prejudices and notions is the only asset which would guide the Judge to reach the "truth'."

74. Applying the exposition of law as discussed above, in the facts of the present case, we have examined the available aggravating and mitigating circumstances in the case in hand.

75. The convict/appellant was 43 years of age, as is disclosed in his statement under Section 313 Cr.P.C.

76. Coming to the aggravating circumstances, we also find that convict/appellant had committed murder of not only his wife but also his four minor daughters. Postmortem reports disclose brutal, grotesque, diabolical murder, which clearly reflects the mindset of convict/appellant.

77. The present incident was committed when convict/appellant felt that his wife was of a bad character and had illicit relationship with someone of the village. The manner in which offence was committed and also the magnitude of crime, in our view, places the present matter in the category of anti-social or socially abhorrent nature of crime. We concur with the finding of Trial Court that five persons were murdered by convict/appellant of his family in most brutal, grotesque, diabolical and dastardly manner arousing indignation and abhorrence of society which calls for an exemplary punishment. Four minor children including their mother have been murdered by convict/appellant when they were helpless and nothing is on record to show that they aggravated the situation so as to arouse sudden and grave passion on the part of convict/appellant to commit such dastardly crime. Convict/ appellant

has also not shown any remorse or repentance at any point of time, inasmuch as, he attempted to hide the weapon in the same house and tried to ran away from the house when the police arrived. Admittedly, when informant P.W.1 reached the house of convict/appellant, the convict/appellant was opened the door and also threatened to leave there, otherwise, he would also kill them. The convict/appellant was arrested on spot on 12.11.2011 in the morning. In the statement recorded under Section 313 Cr.P.C. also, we find no remorse on the part of convict/appellant.

78. The above conduct, attitude and manner in which murder of five persons of his family was committed by convict/appellant shows that convict/appellant is a menace to the Society and if he is not awarded with death penalty, even members of the Society may not be safe. He slayed five lives to quench his thirst. The entire incident is extremely revolting and shocks the collective conscience of the community. Murders were committed in gruesome, merciless and brutal manner.

79. Balancing mitigating and aggravating factors and looking to the fact that convict/appellant had committed crime in a really shocking manner showing depravity of mind, in our view, the aggravating circumstances outweigh the mitigating circumstances by all canons of logic and punishment of life imprisonment would neither serve the ends of justice nor will be an appropriate punishment. Here is a case which can be said to be in the category of *"rarest of rare"* case and justify award of death punishment to convict/appellant. We are also clearly of the view that convict/appellant is a menace to the society and there is no chance of his rehabilitation or reformation and no leniency in imposing punishment is called for.

80. In the circumstances, we are of the view that death punishment imposed upon convict/appellant for the offence under Section 302 IPC is liable to be confirmed. Reference No. 01 of 2014 is liable to be allowed and accepted to the extent of confirmation of death penalty.

(G) **CONCLUSION**

81. In the result, Capital Case No. 01 of 2014 submitted by Trial Court for confirmation of death punishment awarded to convict/appellant, **Deen Dayal Tiwari**, for the offence under Section 302 IPC is hereby accepted and death punishment awarded to convict/appellant in the present matter is hereby **confirmed.**

Consequently, Criminal Appeal No. 1776 of 2016 filed by convict/appellant, **Deen Dayal Tiwari**, is liable to be dismissed and is, accordingly, **dismissed.**

82. However, as provided under Section 415 Cr.P.C. execution of sentence of death shall stand postponed until the period allowed for preferring such appeal has expired and if an appeal is preferred within that period, until such appeal is disposed of. It is also clarified that death punishment shall only be executed in accordance with law complying with all guidelines laid down by Hon'ble Supreme Court time and again.

83. Let a copy of this judgment along with Trial Court record be sent to Court concerned for compliance and two copies

of judgment as well as printed paper book be sent to State Government, as required under Chapter XVIII Rule 45 of Allahabad High Court Rules, 1952.

84. A copy of the judgment be also sent to convict/appellant through Jail Superintendent concerned for intimation. Compliance report be also sent to this Court.

85. Before we part with the case, we must candidly express our unreserved and uninhibited appreciation for the distinguished assistance rendered by Shri Jyotindra Mishra, learned Senior Advocate/learned Amicus Curiae in the above-captioned cases.

(2022)05ILR A1323
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.03.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
HON'BLE VIKRAM D. CHAUHAN, J.

Government Appeal No. 464 of 2021

State of U.P. ...Appellant
Versus
Tarik ...Respondent

Counsel for the Appellant:
G.A.

Counsel for the Resondent:
Sri Ram Kumar Yadav

A. Criminal Law - Indian Penal Code, 1860 - Sections 90, 375 & 376 - Where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives.

B. Criminal Law - Indian Penal Code, 1860 – Section 375 - Consent with respect to Section 375 IPC involves an active (14) understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action.

C. The consent given by the prosecutrix to have sexual intercourse with whom she is in love, on a promise that he would marry her on a later date, cannot be persumed as given under "misconception of fact". Whether consent given by the prosecutrix to sexual intercourse is voluntary or whether it is given under "misconception of fact" depends on the facts of each case. While considering the question of consent, the Court must consider the evidence before it and the (15) surrounding circumstances before reaching a conclusion. Evidence adduced by the prosecution has to be weighed keeping in mind that the burden is on the prosecution to prove each and every ingredient of the offence. Prosecution must lead positive evidence to give rise to inference beyond reasonable doubt that accused had no intention to marry prosecutrix at all from inception and that promise made was false to his knowledge. The failure to keep the promise on a future uncertain date may be on account of variety of reasons and could not always amount to "misconception of fact" right from the inception.

D. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. A failed relationship between two persons which did not culminate into a marriage may not amount to an offence under the Indian Penal Code.

Appeal dismissed. (E-12)

List of Cases cited:-

1. Pramod Suryabhan Pawar Vs St. of Mah., (2019) 9 SCC 608

2. Dhruvaram Murlidhar Sonar Vs St. of Mah., (2019) 18 SCC 191

3. Kaini Rajan Vs St. of Kerala [Kaini Rajan Vs St. of Ker., (2013) 9 SCC 113

(Delivered by Hon'ble Vikram D. Chauhan, J.)

1. Heard Mrs. Alpana Singh, learned Additional Government Advocate appearing for the State and perused the lower court record.

2. The instant appeal is directed against the judgment and order dated 10.12.2019 passed by the Additional Sessions Judge/F.T.C. Meerut, in S.T. No. 638 of 2014 (State vs. Tarik) arising from Case Crime No. 829 of 2013, under Section 376, 323, 504, 506 I.P.C, Police Station - Mawana, District - Meerut, whereby, accused-Tarik is acquitted.

3. In brief, the prosecution version is that on 26.12.2013, victim submitted a typed report to the Senior Superintendent of Police, Meerut that the victim's father Abid had gone to foreign country in connection with work; victim's mother Afsana was looking after her studies and she is a working woman; victim is student of B.Sc. Ist year; Tarik s/o Mateen, r/o Mohalla-Heeralal, Mawana, Near Naion wali Gali, Makhdumpur Stand, Mawana, District-Meerut has been continuously committing rape upon her on false pretext of marriage, and has made nude video clipping of the victim; when victim asked him for marriage, said accused used to ignore her; victim again made an attempt, on which the accused said that he would talk to his parents; victim has been continuously raped on pretext of marriage; due to shock, victim's mother Smt. Afsana expired on 28.7.2013; victim has been rendered helpless due to death of her mother; victim has young brother-sister; accused took victim's signatures on plain paper for preparation of marriage documents but has been postponing the marriage; on 25.12.2013 around 9:00 p.m., victim along with her younger sister Zeenat, went to the house of Mateen s/o Dost Mohammad, Shahbaaz s/o Mateen, Smt. Shaheen w/o Mohd. Mateen and Tarik s/o. Mateen, r/o. Mohalla - Heeralal, Naion Wali Gali, Makhdumpur Stand, Mawana; after reaching the house, victim disclosed to said persons that Tarik had been committing rape upon her for about last two years on pretext of marriage and now she wants to marry him; then Shaheen hurled filthy abuses at the victim and assaulted her; victim opposed the same, on which Mateen armed with iron rod and Shahbaaz armed with stick, beaten the victim, as consequence whereof victim sustained internal injuries, and Shaheen and Tarik tied a noose around the neck of the victim with dupatta/cloth with intention to kill her; when the victim raised alarm, the passers-by of the locality, viz. Mehtab, Javed, Abad, victim's sister Zeenat and many other persons came over there and rescued victim from said persons; after escaping from there, victim started for police station, when Tarik threatned that if you will lodge a report, then your nude clippings will be circulated in the locality and town, and you will neither remain eligible for marriage nor virgin; victim has requested the Police Station Incharge, Mawana to lodge report and give direction for providing life protection to her brother and sister.

4. F.I.R. was lodged on 27 December, 2013 at 10:00 A.M. at Police Station - Mawana against the accused-respondent under Section 376, 323, 504, 506 IPC. After investigation, police report/chargesheet was filed under the aforesaid sections. The charge under Sections 376, 323, 504, 506 I.P.C. was framed by the trial court. Accused denied the charges and claimed trial. Trial Court acquitted the accused - respondent as the prosecution failed to prove the charge beyond reasonable doubt.

5. The prosecution to prove the charge examined victim (PW-1), Smt. Zeenat (PW-2) younger sister of the victim, Aabad (PW-3), Kesav Datt Sharma, Retd. S.I. (PW-4), Head Constable Raj Singh (PW-5), Dr. Smt. Saranju Baliyan (PW-6).

6. The prosecution in support of its case produced the documentary evidence being Written report (Exhibit Ka-1), statement of the victim (Exhibit Ka-2), site plan (Exhibit Ka-3), charge sheet (Exhibit Ka-4), chik FIR (Exhibit Ka-5), carbon copy of GD entry (Exhibit Ka-6), report of weeding of original GD by SSP office (Exhibit Ka-7), medical examination report (Exhibit Ka-8), supplementary medical report (Exhibit Ka-9).

7. The statement of the accused was recorded by the trial court on 24 July, 2019 under Section 313 Cr.P.C. The accused in his statement under Section 313 Cr.P.C. has stated that he has been falsely implicated and incident alleged is false. It is also stated by the accused that the victim was having one sided affair and she was creating pressure on the accused for marriage and he refused to marry, the present false case has been lodged.

8. The investigation in the present case was initiated on the basis of the first information report dated 26 December, 2013 (Ex.Ka.1). On the aforesaid basis, the Chik FIR was prepared and the same was marked as Ex.Ka.5 and the entry was made in the General Diary of the police Station being Ex.Ka.6. The first information report was registered as Case Crime No.829 of 2013 under Sections 376, 323, 504, 506 I.P.C. at Police Station Mawana, District Meerut.

9. During investigation, the statement of the victim was recorded under Section 164 Cr.P.C. by the court concerned. The statement of the victim recorded on 1 January, 2014 was marked as Ex. Ka.2 before the trial court. Victim in her statement has stated that the incident is of 25 December, 2013; she knew Tarik earlier; Tarik assured the victim to marry her and she knew Tarik for last two years; accused by assuring her for marriage had physical relation for last two years; when the victim asked the accused for marriage he would assure that he will talk to his parents. On 25 December, 2013 at 6.00 pm when the victim along with his sister went to the house of the accused to talk about marriage, then accused, his mother, his father and brother have beaten them and threatened for life and thrown them out of their house; threatened that he has prepared a video clip of the victim and in case victim harass him he will upload the same on social media. She has also stated that accused threatened that the way he has treated victim, he will also treat his sister.

10. The Investigating Officer also prepared the site plan of the place of incident on 30 December, 2013. The site plan is marked as Ex.Ka.3. The site plan

was prepared by S.I. Keshave Datt Sharma (PW4).

11. After investigation, the charge sheet was submitted by the Investigating Officer. S.I. Keshav Datt Sharma being PW4. The charge sheet was submitted against the accused under Section 376, 323, 504, 506. The charge sheet is marked as Ex.Ka.4 before the trial court.

12. The victim was medically examined by Dr. Smt. Swaranju Baliyan. Victim was examined on 30th December, 2013. In the medical examination, no external injury was found by the Doctor examining the victim and the hymen was old, torned and healed. The medical examination report dated 30th December, 2013 was marked as Ex.Ka.8 and was proved by PW6.

13. The supplementary medico legal report was also prepared on the basis of the pathology report. In the aforesaid report, no spermatozoa was found. The supplementary report was marked as Ex.Ka.9 was proved by PW6.

14. In support of the prosecution case, victim (PW1) has been examined before the trial court. She has stated that she knew accused for last two years. The accused after making false promise of marriage raped her and also prepared nude video clips; when victim asked the accused for marriage he would assure the victim that he would talk to his family members. On 25 December, 2013, victim along with her younger sister, at about 6.00 pm went to the house of accused; at the house of the accused his father, mother and brother were present and when the victim informed the family members of the accused that the accused was committing rape on the promise of marriage, his family members started abusing and beating the victim and also beaten the victim with rod; thereafter, the accused with the intention to kill the victim has used his Dupatta for strangulation and as a result of the same, the victim sustained injuries; on the alarm by the victim, neighbours of the locality came and saved the victim and her sister; accused and his family members also threatened that in case she report the incident to any person, they will viral the video clipping; she stated that she went to the police station however, her report was not lodged and thereafter, on 26 December, 2013 she had made complaint to the Senior Superintendent of Police, Meerut. The aforesaid witness has proved the first information report Ex.Ka.1. The victim has also stated that her statement was recorded under Section 164 Cr.P.C. and the same was marked as Ex.Ka.2. The victim has also stated that she was medically examined at District Women Hospital, Meerut.

15. The prosecution has further examined Smt. Zeenat as Prosecution witness no 2. The said witness has stated that she knew the accused. She has stated that the victim is her elder sister; she has stated that accused promised the victim to marry her and on the promise of marriage he developed physical relation with the victim. On 25 December, 2013, accused called the victim to her house for talking about marriage. She along with her sister/victim went to the house of accused; accused along with his mother, father and brother were present. Accused and his family members abused the victim and had beaten her. The victim was also beaten by rod as a result of the same, she sustained injuries. On the alarm, the neighbours came; accused threatened the victim that he

has video clip of the victim, which he will show to all the persons or otherwise do not make any report of the incident; victim went to the police station however, her report was not registered and thereafter, on the next date the victim went to the Senior Superintendent of Police, Meerut and gave the application.

16. The prosecution further examined Abaad (PW3), who has stated that he knows accused who lives near his house; he has stated that the victim and accused were having relation and talks of marriage was going on between them; the victim and accused were in relationship for past two years from the date of incident; accused did not marry the victim; on 25 December, 2013 at about 5-6 pm he was present in his house; when he came out of his house he heard noise coming out from the house of Mateen and a huge crowd was assembled at the door steps of accused; when the witness went to the house of Tarik, father of accused namely Mateen, his wife Shaheen, his son Shahbaz, victim and her sister were present. Zeenat was shouting and accused, Shahbaz, Mateen and Shaheen were beating her; victim was raising alarm and was stating that for last two years, accused was making false promise of marriage and was having physical relationship with the victim. Javed and other persons were also present who saved the victim and her sister; accused and his family members were abusing the victim and her sister; the victim and her sister went home crying.

17. The prosecution has further examined Keshav Datt Sharma, retired Sub-Inspector as Prosecution Witness No 4. The said witness has stated that on 27 December, 2013 he was posted at Police Station Station - Mawana as Sub-Inspector; on 27 December, 2013 he has received investigation of the present case and CD-1 was prepared in respect of the application of the victim; on 30 December, 2013 statement of victim under Section 161 Cr.P.C. was recorded; on the identification by victim, the place of incident was visited and the site plan was prepared and the same was marked as Ex. Ka.3; victim was medically examined at District Women Hospital, Meerut; on 1 January, 2014 the statement of the victim under Section 164 Cr.P.C. was recorded and the statement of witness Km. Zeenat was recorded. On 20 January, 2014, accused was taken on remand. On 9 February, 2014, supplementary medical report was received and the statement of Dr. Suranju Baliyan was recorded under Section 161 Cr.P.C. On 22 February, 2014 statement of witness Javed, Aabad, Mohd. Salim was recorded; during investigation the name of Mateen, Shahbaz and Smt. Shaheen was found to be falsely implicated and as such was taken out of investigation; chargesheet was submitted against accused under Section 376, 323, 504, 506 I.P.C. and the charge sheet was marked as Ex.Ka.4.

18. The prosecution has further examined HC-366 Raj Singh as PW5; he has stated that on 27 December, 2013 he was posted as Constable/Clerk at Police Station Mawana; on the said date he had received by post typed application of the victim and on the aforesaid Case Crime No.829 of 2013 was registered under Section 376, 323, 504, 506 I.P.C. against accused and others and the Chik FIR was marked as Ex.Ka.5. The GD entry was made and the carbon copy was marked as Ex.Ka.6. He has also stated that the original General Diary has been weeded out and he has received letter from the office of Senior Superintendent of Police and the same was marked as Ex.Ka.7.

19. The prosecution has further examined Dr. Smt. Suranju Bailiyan as PW6. She has stated that on 30 December, 2013 she was posted at District Women Hospital, Meerut on the post of Senior Consultant; on 30 December, 2013 at 1.45 pm she had examined the victim; victim had given her date of birth as 7th July, 1993; victim had stated that since April, 2011 she had relationship with the accused and the relationship was made on the promise of marriage; the accused thereafter, refused to marry her; 12 days prior to the medical examination accused had made physical relation with the victim. Witness has further stated that on examination she did not find any external injury, hymen was old, torned and healed; she had send the vagina slide for further examination. She has proved the medical examination report and the same was marked as Ex.Ka.8; on 9th February, 2014 on the basis of pathology report she had prepared the supplementary report in which no spermatozoa was found and the report was marked as Ex.Ka.9.

20. The prosecution case is that the accused on the promise of marriage with the victim entered into physical relation with the victim and when the victim asked the accused to marry her, he refused to marry. Accused had physical relation with the victim for two years prior to lodging of the first information report. Victim being PW1 has stated that she knew accused for last two years. Accused after making false promise of marriage raped her and also prepared nude video clips; when victim asked the accused for marriage he would assure the victim that he would talk to his family members.

21. Victim has not made any statement before the trial court that the accused ever went to the house of victim. Victim further stated that she went to the house of accused. Victim further in her cross examination has admitted that she was having love affair with the accused. Further stated that she had gone to the house of accused on several occasion in the last two years prior to the lodging of the first information report.

22. The investigating officer has further stated in his cross examination that the victim has not given details of the date, time and month when physical relation was made between the victim and the accused. Victim has not disclosed as to the place where the physical relation with the accused was made; Victim has not stated that the accused person has made physical relation with her without consent and forcefully. Victim has further not stated as to how many times accused had made physical relation with the victim. Investigating officer has further stated that during investigation no evidence has surfaced that the accused had committed rape of victim. Investigating officer has further testified that the victim wanted to marry the accused and the accused did not want to marry the victim.

23. Abaad (PW 3) has stated that he has not seen the accused committing any objectionable conduct with the victim and the statement made before the trial court was made on the basis of whatever he has heard. Abaad (PW3) is not the eyewitness of the alleged incident nor he has any knowledge with regard to the prosecution case and whatever is stated on the basis of the hearsay.

24. Zeenat (PW 4) who is sister of the victim specifically stated in her statement before the trial court that victim had never

informed about her relationship with the accused to any member of family. She has stated that accused had called the victim for talking about marriage.

25. Victim prior to the present First Information Report had lodged on 22 December, 2013 a report at Police Station - Mawana that accused and another were harrasing the victim and when the victim opposed such conduct, then accused thereatened her for life. It is to be noted that the present first information report was lodged on 26 December, 2013, four-days subsequent to the report dated 22 December, 2013 by the victim against the accused person. The allegations in the report dated 22 December, 2013 was of harassment/objectionable conduct of the accused with the victim, whereas in first information report the allegation is that the accused had physical relation with the victim on the promise of marriage. Victim never made any report with regard to physical relation on the promise of marriage in her report dated 22 December, 2013 however when the first information report was lodged on 26 December, 2013, the allegations of rape on false promise of marriage surfaced and as such the conduct of the victim creates doubt on the prosecution story. The aforesaid further is indicative of the fact that no rape was conducted on the person of the victim by the accused person.

26. The victim on earlier occasion was residing with Aditya and father of Aditya had submitted an application to the District Magistrate which is paper number 29 Kha/2 to 29 Kha/3 and a compromise was also entered being paper no 29 Kha /5 and from the aforesaid it is evident that 1 ½ years prior Victim and Aditya had relation on Facebook; they were having love affair; paper number 29 Kha /7 which is written by Aditya Sharma and wherein the aforesaid person has promised that he will marry the victim and he will not harass the victim. He has also written that they will live as husband and wife. On the aforesaid document, victim has also signed.

27. Further, Aditya Sharma has lodged a first information report dated 27 August, 2017 being Case Crime No. 517 of 2017, under section 384 IPC being paper number 29 Kha/9 wherein it is alleged that the victim and the informant entered into friendship on Facebook and they had differences and as such a compromise was entered into in presence of villagers between both the parties and had paid ₹ 1 lakh with the promise that both the parties will not be in contact with each other and the victim will not harass the family members of Aditya. However, on 9th June, 2017 victim with the intention of blackmailing Aditya started harassing him and his family members that they will be send to jail. He has also alleged that victim is a characterless girl.

28. Further another document being paper number 29 Kha/13 is NCR dated 1st September, 2017, under section 323 IPC lodged by victim against Aditya that on 4 September, 2017 at about 11:30 AM with allegation that Aditya had beaten the victim.

29. The victim in her statement before the trial court has stated that she goes to the house of the accused at any time of the day. She also stated that the accused had taken her to the house of a friend on one occasion; he had also taken her to hotel at Delhi.

30. From the statement of the victim, it is evident that she has not given any

evidence that the accused had on false pretext of marriage engaged in physical relationship with the victim. Further she has also not stated the time, place and date when physical relationship/ rape was committed by the accused. Victim further stated that her date of birth is 9 July, 1993 and as such the victim was major on the date of alleged incident.

31. It is to be noted that where the physical relationship is made between two persons on consensual basis then the allegations of rape cannot be founded unless consent is not voluntarily.

32. Rape is defined in section 375 of the Indian Penal Code as sexual intercourse with a woman, against her will, without her consent or with her consent where the consent has not been obtained voluntarily. Where a woman enters into physical relationship with a man voluntarily, the aforesaid act may not come within the purview of rape when the parties to the aforesaid act are major. The law recognises individual freedom to have physical relation with person of opposite sex as a legitimate right under Article 21 of the Constitution.

33. The sexual intercourse between a man and a woman without the consent of women is rape. In the present case there is no allegation with regard to the fact that the victim was subjected to physical relationship without her consent or forcefully. The allegations against the accused are that the accused entered into physical relationship with the victim on the false promise of marriage. Section 375 of the Indian penal code postulates sexual intercourse with a woman with her consent as rape where such consent has not been obtained voluntarily.

34. Section 114-A of the Evidence Act, 1872 (hereinafter referred to as "the 1872 Act") provides, that if the prosecutrix deposes that she did not give her consent, then the court shall presume that she did not in fact, give such consent. The facts of the instant case do not warrant that the provisions of Section 114-A of the 1872 Act be pressed into service. The sole question involved herein is whether her consent had been obtained on the false promise of marriage. Thus, the provisions of Sections 375 and 376 I.P.C have to be taken into consideration, along with the provisions of Section 90 IPC.

Section 90 I.P.C provides that any consent given under a misconception of fact, would not be considered valid consent and in the context of Section 375 I.P.C, such physical relationship would tantamount to committing rape.

35. Section 90 IPC defines "consent" known to be given under fear or misconception:

"90. Consent known to be given under fear or misconception.- *A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception;"*

36. Where a woman does not "consent" to the sexual acts described in the main body of Section 375, the offence of rape has occurred. While Section 90 does not define the term "consent". A "consent" based on a "misconception of fact" is not consent in the eye of the law.

37. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives.

38. The Apex Court in ***Pramod Suryabhan Pawar v. State of Maharashtra, (2019) 9 SCC 608*** has observed as under :

"12. This Court has repeatedly held that consent with respect to Section 375 IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action. In ***Dhruvaram Murlidhar Sonar v. State of Maharashtra, (2019) 18 SCC 191*** *which was a case involving the invoking of the jurisdiction under Section 482, this Court observed :-*

"15. ... An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in mind of a person to permit the doing of the act complained of."

39. This understanding was also emphasised in the decision of this Court in ***Kaini Rajan v. State of Kerala [Kaini Rajan v. State of Kerala, (2013) 9 SCC 113 :-***

"12. ... "Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance of the moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances."

40. The consent given by the prosecutrix to have sexual intercourse with whom she is in love, on a promise that he would marry her on a later date, cannot be persumed as given under "misconception of fact". Whether consent given by the prosecutrix to sexual intercourse is voluntary or whether it is given under "misconception of fact" depends on the facts of each case. While considering the question of consent, the Court must

consider the evidence before it and the surrounding circumstances before reaching a conclusion. Evidence adduced by the prosecution has to be weighed keeping in mind that the burden is on the prosecution to prove each and every ingredient of the offence. Prosecution must lead positive evidence to give rise to inference beyond reasonable doubt that accused had no intention to marry prosecutrix at all from inception and that promise made was false to his knowledge. The failure to keep the promise on a future uncertain date may be on account of variety of reasons and could not always amount to "misconception of fact" right from the inception.

41. The Apex Court in ***Pramod Suryabhan Pawar v. State of Maharashtra, (2019) 9 SCC 608*** observed as under :

"18. To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act."

42. The Apex Court in ***Dhruvaram Murlidhar Sonar v. State of Maharashtra, (2019) 18 SCC 191*** observed as under :

"23. Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant had actually wanted to marry the victim or had mala fide motives and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely on account of the misconception created by accused, or where an accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do. Such cases must be treated differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 IPC."

43. It is not the prosecution case that physical relationship was entered into without the consent of the victim or she was forcefully raped by the accused. The victim was major on the date of alleged occurrence. There is no evidence to the fact that the victim and the accused were seen together in a room by family members or any other person. There is no evidence to the fact that there was any relationship between the victim and the accused. No nude video of the victim was recovered during investigation.

44. The medical evidence and the statement of Doctor who conducted

medical examination of victim indicates that there was no external injury found on the body of the victim and the hymen was old, torned and healed. No spermatozoa was found in the viginal seamer of victim nor any internal injury in the private part was found. Medical evidence does not support the prosecution story. Prosecution witness no 6 has stated in a cross examination that she did not find any evidence of sexual assault or physical relationship.

45. On the basis of the aforesaid, the trial court came to the conclusion that there is material contradiction in the statement of victim and the physical relationship was established with the consent of the victim, who is major. The prosecution case is surrounded by suspicious circumstances and is doubtful and no case under section 376 IPC is made out against the accused.

46. It is further to be noted that as per the prosecution case the victim was subjected to rape for two years on the promise of marriage. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act. There is no evidence or circumstance in the present case that there was false promise of marriage which was given in bad faith. Further, the allegation of physical relationship with the victim in the facts and circumstances of the present case does not bear any direct nexus to the promise of marriage. The prosecution case rests upon the fact that the accused had physical relationship on the promise of marriage with the victim however when the victim asked the accused to marry her he resiled from his promise to marry. There is no evidence as to the date, time and place when the accused promised to marry the victim. No evidence has been led that the initial promise of marriage was in bad faith. A failed relationship between two persons which did not culminate into a marriage may not amount to an offence under the Indian penal code. The prosecution has not proved the date, time and place when the alleged rape was made by the accused on the victim.

47. The prosecution case further alleges that on 25 December, 2013 at about 6.00 pm accused and his family members had abused and beaten the victim. As per the first information report, victim on 25th December, 2013 along with her younger sister - Zeenat went to the house of the accused, where Mateen, Shahbaz, Smt. Shaheen and accused Tarik were present. Victim informed the family members of the accused that accused on the false pretext of the marriage was having sexual relationship with the victim and she wanted to marry accused Tarik. Accused Tarik and his family members abused the victim and thereafter, have beaten the victim. When the victim objected to the aforesaid act of the accused person and his family members, then Mateen with iron rod, Shahbaaz with danda, beaten the victim and, as a result of the same, victim sustained injuries. It is also alleged that Shaheen and Tarik have entangled dupatta in her neck. When the victim made distress call, the neighbours and other persons came and she was saved.

48. The victim was medically examined by Dr Suranju Kumar Baliyan

(PW6). The medical examination report was exhibited as Ex.Ka.8. As per the medical examination report, no external injury was found on the person of the victim. The doctor who conducted the medical examination of the victim testified before the trial court as PW6. The aforesaid witness has stated before the trial court that no external injuries were found on the body of the victim. The medical examination of the victim was conducted on 30 December, 2013 at District Woman Hospital, Meerut at about 1:45 PM.

49. It is also alleged in the first information report that on 25th December, 2013 victim went to the house of the accused along with younger sister-Zeenat and she was examined before the trial court as PW2. The aforesaid witness has testified before the court that the accused person and his family members have beaten victim and she sustained injuries on account of the aforesaid beating by the accused and his family members. The aforesaid account of the witness does not corroborate with the medical evidence. Further, aforesaid witness has not stated that the accused Tarik and Shaheen had strangled the victim with Dupatta.

50. Abaad (P.W.-3) has stated that he knows accused who lives near his house; he has stated that victim and accused were having relationship and talk of marriage was going on between them; victim and accused were in relationship for past two years from the date of incident; accused did not marry the victim and as such on 25 December, 2013 at about 5-6 pm he was present in his house; when he came out of his house he heard noise coming out from the house of Mateen and a huge crowd had assembled at the door steps of accused; when the witness went to the house of Tarik, father of accused Mateen, his wife Shaheen, his son Shahbaz, victim and her sister were present. At that place Zeenat was shouting and accused, Shahbaz, Mateen and Shaheen were beating her; victim was raising alarm and was stating that for last two years the accused was making false promise of marriage and was having physical relationship with the victim. Javed and other persons were also present who saved the victim. Witness further stated that the medical examination of the victim was held on the same day; he had gone along with the victim for medical examination; victim was having injury; doctor had seen the injury of the victim on 25.12.2013; on 25.12.2013 the police had taken the victim to the doctor; advocate had written the first information report; medical of the victim was held between 9 pm to 10 pm and thereafter the report was prepared; he is stated that the victim sustained 40-50 injuries on her body. The said witness stated that the first information report was lodged on the same day of occurrence at police Station. As per the first information report, the same was lodged on 27/12/2013 after the directions of the Senior Superintendent of Police, Meerut. The medical examination of the victim was held on 30/12/2013 at District Hospital, Meerut. As per the Medical Examination Report no injury was found on the body of the victim. The medical testimony of the doctor also confirmed that there were no external injury and no injury in the private part of the victim. On the aforesaid basis, the testimony of the PW-3 that the victim sustained injury on account of beating/physical assault is not corroborated with the medical evidence. There is serious contradiction in the evidence of prosecution witness no 3 as detailed hereinabove and as such the testimony of the aforesaid witness is doubtful. The trial court on the aforesaid basis discarded the testimony of PW-3.

51. The trial court on the basis of the aforesaid has acquitted the accused for offence under section 376, 323, 504 and 506 by means of judgment dated 10 December, 2013.

52. Considering the overall circumstances and submission of learned A.G.A. and after going through the evidence and lower court record, we are unable to persuade ourselves in taking a different opinion from that of trial court. The trial court was fully justified in acquitting the accused-respondent.

53. Learned AGA failed to point out any illegality, infirmity or perversity in the judgment of the trial court.

54. The leave to appeal application is, accordingly, rejected.

55. The appeal, in consequence, stands dismissed.

(2022)05ILR A1335
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 30.05.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
HON'BLE MRS. SAROJ YADAV, J.

Government Appeal No. 1486 of 2016
&
Habeas Corpus Writ Petition No. 5249 of 2020

State of U.P. ...Appellant
Versus
Taseen Azeem @ Lareab Khan ...Respondent

Counsel for the Appellant:
Sri S.N. Tilhari Govt. Advocate

Counsel for the Respondent:
Mr. I.B. Singh, Senior Advocate, and Ms. Beena Rajesh, Amicus Curiae

A. Fundamental rights enshrined under Articles 20, 21 and 22 of the Constitution of India are available to non citizens also.

Appeal dismissed and Petition is disposed of. (E-12)

List of Cases cited:-

1. Bhim Singh Vs U.O.I. & ors. 2012 SCC online SC 211

2. A.K. Gopalan Vs Govt. of India AIR 1966 (SC) 816

3. Abdul Latif Abdul Wahab Sheikh Vs B.K. Jha, 1987 (2) SCC 22

4. Mohd. Amran @ Naveed Vs St. 2009 SCC online Del. 3364.

5. Lal Singh Vs St. of Guj. 2001 (3) SCC 221

6. Hazara Singh Vs Raj Kumar & ors. 2013 SCC online SC 369.

7. Govind Ramji Jadhav Vs St. of Mah. 1990 (4) SCC 718.

8. Chairman Railway Board & ors. Vs Chandrima Das (MRS) & ors. 2000 (2) SCC 465

(Delivered by Hon'ble Ramesh Sinha, J.
&
Hon'ble Mrs. Saroj Yadav, J.)

1. The above criminal appeal has been filed by the State against the judgment and order dated 10.04.2014 passed by Special Judge (Scheduled Caste and Scheduled Tribes Act)/ Additional Sessions Judge, District Lucknow in Sessions Trial No.237 of 2007 arising out of Crime No.132 of 2006, under Sections 115, 120-B, 121, 121A, 123, 420, 467, 468 and 471 of the Indian Penal Code 1861 (in short I.P.C.) and Section 3/9 and 5/9 of Official Secrets

Act, 1923 and Section 3/14 of Foreigners Act, 1946, Police Station Cantt., Lucknow, whereby the accused/respondent has been acquitted of charges under Sections under Sections 115, 120-B, 121, 121A and 123 of I.P.C. and accused/respondent was punished with allegedly lessor sentence under Sections 467, 468 and 471 of I.P.C. and Section 3/9 and 5/9 of Official Secrets Act and Section 3/14 of Foreigners Act. The State-appellant prayed also for enhancement of the sentence, awarded to the accused/respondent.

2. The above petitioner for writ of Habeas Corpus has been filed by the petitioner/accused for his release and deportation to his own country i.e. Pakistan. This Criminal Appeal and this Habeas Corpus Writ Petition are interrelated, so we are disposing them of with a common judgment.

3. The brief factual matrix of the case is as under:

I. The respondent/accused Taseen Azeem @ Lareab Khan was arrested by Special Task Force, U.P. Lucknow on 13.09.2006 at 12:05 P.M. on the basis of information received. Upon his arrest it was revealed that he was living in India illegally with fake identity in the name of Lareab Khan son of Gulab Khan and working as an agent of Pakistan Intelligence Agency and transmitting the confidential information of India through email. He also got prepared forged driving license, educational certificates of High School, Intermediate and B.A. in the name of Lareab Khan. Some documents in the name of Precyze Company, some maps and other documents were recovered from the respondent/accused. It was also found that respondent/accused was staying in India since two years with a fake name of Lareab Khan and stayed at different places on rent and also stayed in the hotels at different places. It has also been mentioned in the First Information Report (in short F.I.R.) that during the course of stay in India with the help of Imtiyaz Ahmad he got the job in one placement Company situated in Gomti Nagar, Lucknow, thereafter he also did the job in Life Line and started a partnership Company alongwith Rahul Siddhartha and Fariuddin Ahmad and got prepared the documents by Miraz alias Pappu and stayed for nine months at Akhtar Guest House in Mumbai. He also shared a room with some Merchant Navy personnel. It has also been alleged that a book 'C.I.A. Vs. India, Asia and Afghanistan' was also recovered from the possession of respondent/accused. It has also been alleged that respondent / accused used to give information on mobile phone to I.S.I., cross border through one Javed. He used five email ids for transferring the information to Pakistan. The information sent in respect to Indian Army to Pakistan's I.S.I. and were written in coded language. Allegedly some Secret documents related to military were also recovered from the possession of the accused/respondent. It was also found that through Western Union Money Transfer Bank the respondent/accused used to receive money from Pakistan. When the accused/respondent was interrogated upon arrest, he told the arresting official that his real name is Taseem Anzim son of Raees Azam, resident of House No.A 522 Sector 11 A Northern Karachi, Pakistan. He has four brothers and three sisters and all are younger to him and his father does some glass business in Karachi. He came to India for spying. He was sent by Pakistani officials after giving some training there. He used to send some documents related to army and some important informations to

the Pakistan Intelligence Agency. He was doing this job since he was unemployed. Recovery memo was prepared and the articles recovered from the accused/respondent which include two secret documents related to military, two driving licenses, one mobile phone and charger, educational certificates of High School, Intermediate and B.A. and one purse, two diaries, one small telephone diary, two maps, one book, one cheque book, some photostat papers related to Precyze Company and Rs.1,290/- (one thousand two hundred and ninety). The case was registered against the accused/respondent at Case Crime No.132 of 2006, under Sections 115, 120-B, 121, 121A, 123, 420, 467, 468 and 471 of I.P.C. and Section 3/9 and 5/9 of Official Secrets Act and Section 3/14 of Foreigners Act.

II. After investigation chargesheet was submitted against the accused/respondent under Sections 115, 120-B, 121, 121A, 123, 420, 467, 468 and 471 of I.P.C. and Section 3/9 and 5/9 of Official Secrets Act and Section 3/14 of Foreigners Act, the concerned Magistrate took cognizance and committed the matter to Sessions Court for trial. Sessions Court framed the charges under Sections 115, 120-B, 121, 121A, 123, 420, 467, 468 and 471 of I.P.C. and Section 3/9 and 5/9 of Official Secrets Act and Section 3/14 of Foreigners Act. The accused/respondent denied the charges and claimed to be tried.

III. The prosecution in order to prove it's case examined 15 witnesses which are as under:-

a. P.W.1 Vijay Bhushan, Superintendent of Police, City.

b. P.W. 2 Shahab Rasheed Khan, Deputy Superintendent of Police.

c. P.W. Sub Inspector S.N. Dohre.

d. P.W.4 Constable Umrai Lal.

e. P.W.5 Head Constable Manoj Rai.

f. P.W. 6 Sub Inspector Shyam Awadh Singh.

g. P.W. 7 Sub Inspector Chotte Lal.

h. P.W. 8 Parshuram Verma.

I. P.W.9 Mahesh Kumar Gupta.

j. P.W.10 U.C. Mishra.

k. P.W. 11 R.B. Mishra.

l. P.W. 12 Mahendra Babu.

m. P.W. 13 Daljeet Singh.

n. P.W. 14 Sub Inspector N. K. Nagar.

o. P.W. 15 Pramod Kumar Mishra.

IV. Apart from above witnesses, documentary evidence Exhibit Ka-1 to Ka-12 were also proved which includes as under:-

i. Original recovery memo Exhibit Ka-1

ii. Original FIR Exhibit Ka-2

iii. Chick FIR Exhibit Ka-3

IV. Site Plan, Exhibit Ka-4.

v. Charge-sheet Exhibit Ka-5

vi. Sanction Order of U.P. Government Exhibit Ka-6 and Ka-7

vii. Certificate of C.A.V. Intermediate College, Exhibit Ka-8

viii. Letter of Police Station Cantt. Exhibit Ka-9

ix. Confidential report of Allahabad University, Exhibit Ka-10

x. Letter of Police Station Cantt. to Hisar, Exhibit Ka-11

xi. Report of P.S. Kareli, Exhibit Ka-12

V. After completion of evidence of prosecution the statement of accused/respondent under Section 313 of the Code of Criminal Procedure (in short Cr.P.C.) was recorded, wherein he denied all the allegations and said the evidence is

false. He admitted that he is a Pakistani citizen but stated that he was arrested from Nepal border, he never transmitted any information to Pakistan Intelligence Agency, no driving license, no secret documents or educational documents were recovered from him. He also stated that P.W. 9 Mr. Mahesh Kumar Gupta was not the competent authority to give sanction. All the evidences have been created falsely against him. He has been implicated because he is a Pakistani citizen. He also stated that it is true that he came to India without passport, but he did not do any act against the Indian Government or against the country. He did not know who is Lareab Khan, he is confined in jail since last more than seven years and feeling ashamed of his mistake. He also stated that he wants to be a good citizen in the future, so a chance should be given to him to reform. His parents are ill and they are very poor. He did not adduce any evidence in defence.

VI. After hearing the arguments of prosecution and of the accused/respondent in person the learned trial court came to the conclusion that accused has accepted that he is a Pakistani citizen and came to India without any passport, so he is guilty of offence under Section 3/14 of Foreigners Act. It was also concluded by the trial court that accused/respondent was living in India by adopting the name of Lareab Khan, the forged educational certificates of High Schools, Intermediate and B.A. were recovered from the possession of the accused/respondent and that recovery has been proved by the witnesses examined by the prosecution.

VII. The learned trial court came to the conclusion that prosecution has proved the charges levelled against the accused/respondent under Sections 467, 468 and 471 of I.P.C. beyond reasonable doubt. Learned trial court also came to the conclusion that it has been proved by the prosecution that one book 'C.I.A. Vs. India, Asia and Afghanistan' was recovered from the possession of accused/respondent and it has also been proved that some emails were also sent by him to one Javed residing in Pakistan, which includes some informations related to Indian Army which were sent to Pakistan's Intelligence Agency, but it could not be proved what informations were sent, so only offence under Section 3/9 and 5/9 of Official Secrets Act were proved and rest of the offences were not found proved because the accused/respondent did not do any act, which can be termed as terrorist activities or any conspiracy against the India for waging war against India. It has also not been proved that information transmitted related to Army, were of secret nature. Hence, the trial court found and held accused/respondent guilty under Sections 467, 468 and 471 of I.P.C. and under Sections 3/9 and 5/9 of Official Secrets Act, 1923 and under Sections 3/14 of Foreigners Act and punished the accused/respondent in the following manner:-

Sl. No.	Sections	Sentences awarded
1.	Under section 467 I.P.C.	Rigorous imprisonment of eight years coupled with fine of Rs.5,000/- and in default of payment of fine six months additional rigorous imprisonment.
2.	Under section 468 I.P.C.	Rigorous imprisonment of five years coupled with fine of Rs.3,000/- and in default of payment of fine six months additional rigorous imprisonment has been awarded.
3.	Under section 471 I.P.C.	Rigorous imprisonment of five years coupled with fine of Rs.3,000/- and in default of payment of fine six months additional rigorous imprisonment has been awarded.

4.	Under section 3/9 Official Secrets Act.	Rigorous imprisonment of eight years coupled with fine of Rs.5,000/- and in default of payment of fine six months additional rigorous imprisonment has been awarded.
5.	Under section 5/9 Official Secrets Act	Rigorous imprisonment of three years coupled with a fine of Rs.5,000/- and in default of payment of fine six months additional rigorous imprisonment has been awarded.
6.	Under section 3/14 Foreigners Act	Imprisonment of five years coupled with a fine of Rs.5,000/- and in default of payment of fine six months additional rigorous imprisonment has been awarded.

VIII. Learned trial court acquitted the accused/respondent of charges under Sections 115, 120-B, 121, 121A, 123 and 420 of I.P.C. Police Station Cantt., Lucknow. Being aggrieved by this judgment and order the State/appellant preferred this appeal against acquittal as well as for enhancement of sentence awarded.

4. On the other hand, the convict Taseen Azeem @ Lareab Khan filed a Habeas Corpus Petition No.5249 of 2020 praying for the following reliefs:-

"a. Issue a writ, order or direction in the nature of Habeas Corpus directing the opposite party No.1 & 2 to release the petitioner from the custody/detention.

b. Issue a writ in the nature of mandamus to Opposite Party No.3 to deport the petitioner to his Country."

5. In this writ petition it has been stated that petitioner/convict was sentenced for eight years imprisonment in S.T. No.237 of 2007 (State Vs.Taseen Azeem @ Lareab Khan) which he completed on 01.09.2014, on the same day i.e. on 01.09.2014 one false F.I.R. was registered by Police Officer bearing Case Crime No.379 of 2014 under Sections 353, 504 & 506 of I.P.C. and Under Section 3/14 of Foreigners Act, Police Station Mohanlanganj, Lucknow. In the aforementioned Case Crime No.379 of 2014 the petitioner/convict was sentenced with four years imprisonment which he completed on 30.08.2018, since then petitioner is under illegal detention of the jail authorities. The State has filed an appeal for enhancement of the sentence being Criminal Appeal No.1486 of 2016, in which the Hon'ble High Court has directed to send the petitioner back to the jail when he had been called before the Hon'ble High Court on 09.10.2017. Treating this order as interim relief the petitioner is being illegally detained in the District Jail, Lucknow by the State. Even though on the pretext of the pendency of appeal the petitioner cannot be detained in jail as deemed convict which amounts to violation of Article 21 of the Constitution of India. The petitioner /convict challenged the validity of the orders dated 09.10.2017 and 06.03.2019 passed in Criminal Appeal No.1486 of 2016.

6. It has further been stated in the petition that on 09.10.2017 the petitioner was produced for the first time before this Hon'ble High Court in regard to Criminal Appeal No.1486 of 2016 (State Vs. Taseen Azeem @ Lareab Khan) and on that date a co-ordinate Bench of this Court has passed the following order:-

" In compliance of this Court's order dated 13.07.2017, this accused respondent Taseen Azeem @ Lareab Khan was produced before this Court by learned A.G.A., who was brought by Dy. S.P., LIU Lucknow, R.S. Rai.

He informed that earlier he had engaged the counsel but he has not turned up and he may be permitted to argue this case personally.

Summon the lower court record if not received as yet, thereafter, office to proceed for preparation of paper book, as per Rules of the Court.

After preparation of paper book, list this appeal for final hearing, in due course before appropriate Bench.

The accused respondent Taseen Azeem @ Lareab Khan shall be taken back to the District Jail, Lucknow."

7. On 30.08.2018 the petitioner pleaded guilty in Case Crime No.379 of 2014, P.S. Mohanlalganj, Lucknow as the trial was not conducted/commenced and the petitioner already served the stipulated period of sentence in jail and thereafter he was convicted and sentenced under Section 353 of I.P.C. for two years Simple Imprisonment, under Section 504 I.P.C. for two years Simple Imprisonment; under Section 506 of I.P.C. for four years Simple Imprisonment and a fine of Rs.2,000/- by Learned ACJM-III, Lucknow, in Case Crime No.379 of 2014, P.S. Mohanlalganj, Lucknow.

8. The convict/petitioner was not provided any legal assistance during trial to defend him. The counsel who wanted to help the petitioner were beaten and threatened not to defend the petitioner, as such, no proper defense was laid before the Trial Court. The petitioner was arrested on 13.09.2014, on the first occasion he was sentenced for a maximum of eight years rigorous imprisonment, which expired on 12.09.2014 excluding the period of remission. On the second count for an alleged offence committed on 01.09.2014 four years maximum sentence was awarded which also expired on 30.08.2018 excluding the period of remission, as such, the petitioner has already passed about three years more, if remission is counted, i.e. more than the sentence awarded.

9. Heard Shri S.N. Tilhari, learned Additional Government Advocate for the State-appellant and Shri I.B. Singh, Senior Advocate (Amicus Curiae) assisted by Shri Sajeet Kumar Singh and Ms. Beena Rajesh, learned counsel appearing on behalf of convict/respondent. None turned up for Union of India.

10. Shri S.N. Tilhari, learned A.G.A. on behalf of State/appellant submitted that the trial court though held guilty the convict/respondent under Sections 467, 468, 471 of I.P.C. and under Sections 3/9 and 5/9 of Official Secrets Act and under Sections 3/14 of Foreigners Act yet awarded a very meager punishment commensurate to the crime committed by the convict/respondent. The maximum punishment prescribed under I.P.C. for the offences committed under Sections 467 and 471 of I.P.C. is life imprisonment, but the trial court awarded eight years rigorous imprisonment for the offence which is not proper, so the punishment awarded to the convict/respondent should be enhanced. He further submitted that there is evidence for the offences under Sections 115, 120-B, 121, 121A, 123 and 420 of I.P.C. but the trial court has acquitted the convict/respondent for the above offences without applying its legal mind and without appreciating the evidence properly. Hence, the convict/respondent should be convicted for these offences also and the punishment awarded for the offences for which the convict was held guilty should be enhanced.

11. Learned A.G.A. has relied upon following case laws:-

a. Bhim Singh Vs. Union of India and others 2012 SCC online SC 211

b. A.K. Gopalan Vs. Government of India AIR 1966 (SC) 816

c. Abdul Latif Abdul Wahab Sheikh Vs. B.K. Jha, 1987 (2) SCC 22

d. Mohd. Amran @ Naveed Vs. State 2009 SCC online Del. 3364.

e. Lal Singh Vs. State of Gujarat 2001 (3) SCC 221

f. Hazara Singh Vs. Raj Kumar and others 2013 SCC online SC 369.

g. Govind Ramji Jadhav Vs. State of Maharashtra 1990 (4) SCC 718.

12. Contrary to it learned Senior Advocate Shri I.B. Singh, appearing for the convict as Amicus Curiae submitted that it is an admitted fact that convict/respondent is a citizen of Pakistan and he was residing in India without any valid passport or visa, but the allegations that he was involved in anti national activities against India or transmitting the confidential information relating to Indian Army to his own country has not been proved by the prosecution. The Prosecution remained unable to prove that convict/respondent did any terrorist or criminal activity in India which amounted to a threat to the Security of India. Even if it is assumed that the alleged recovery is true, even then the fact that the informations transmitted by the convict/respondent were confidential, has not been proved by any army personnel, so in such a situation it cannot be assumed that the convict/respondent was involved in anti-national activities and was transmitting confidential informations relating to Indian Army to some one in Pakistan.

13. Perusal of the record of the trial court shows that though the prosecution has alleged that the convict/respondent used to transmit information to I.S.I. cross border through one Javed by a mobile phone, but the prosecution did not produce the call details of the alleged mobile phone before the learned trial court. The prosecution has also alleged that the convict/respondent used five email ids for transferring the information cross border to Pakistan, but the prosecution did not adduce any evidence to establish the fact that through the alleged email ids who sent mails and to whom, and also that what was the material sent through the alleged email ids. It was the allegation against the convict/respondent in the FIR that information in respect to Indian Army which would have been sent to I.S.I. was written in coded language, but no evidence has been adduced to show that any effort was made by the Investigating Officer to get decoded the language. It has also been mentioned in the F.I.R. that the convict/respondent used to receive money from Pakistan through Western Union Money Transfer, Bank, but the prosecution did not adduce any evidence in this regard like receipt to show the transfer of money to the convict/respondent through the aforesaid Western Union Money Transfer, Bank.

14. No Army personnel was produced in the Court to prove the fact that information transferred by the convict/respondent was confidential information relating to Indian Army. Admittedly, there is no allegation and evidence of doing any terrorist activity or any such act which may be termed as threat to the security and safety of the nation. In other words, there is no evidence on record to establish the charges levelled against the convict/respondent under Sections 115, 120-B, 121, 121A, 123 and 420 of I.P.C., hence the learned trial court has rightly

acquitted the convict/respondent for the aforesaid offences.

15. Now comes the question of enhancement of sentence. The learned trial court held guilty the convict/respondent under Section 467 of I.P.C. awarded sentence of eight years rigorous imprisonment coupled with fine of Rs.5,000/-, under Section 468 of I.P.C. awarded sentence of five years rigorous imprisonment coupled with fine of Rs.3,000/-, under Section 471 of I.P.C. awarded sentence of five years rigorous imprisonment coupled with fine of Rs.3,000/-, Section 3/9 and 5/9 of Official Secrets Act and Section 3/14 of Foreigners Act awarded sentence of three years rigorous imprisonment coupled with fine of Rs.5,000/- and in default of payment of fine, further six months each, additional imprisonment was awarded.

16. Learned A.G.A. submitted that this punishment was insufficient as the offences which were committed by the convict/respondent were of grave nature and he was working as an agent of Pakistan's Intelligence Agency. He forged certain documents to hide his identity to reside in India, so he should have been punished with maximum sentence prescribed under Section 467 of I.P.C. i.e. Life Imprisonment.

17. Learned A.G.A. has placed reliance on case law Mohd. Amran @ Naveed Vs. State (Supra), where the Delhi High Court has held as under:-

"11. We agree with the submissions made by the learned counsel for the State that for offences relatable to terrorism, no leniency in the imposition of sentence has to be shown, more so, when the crime is committed by foreign national who trespasses into the territory of the Union of India and attempts to over awe the very existence of the State."

18. Learned A.G.A. also submitted that convict/respondent was staying in India without any valid Passport or Visa, so inference should be drawn that he was doing some anti-national activities here, against India. On this submission he relied upon a case law cited in **Lal Singh Vs. State of Gujarat** (Supra), wherein the Hon'ble Supreme Court has held as under:-

"In our view, this submission is required to be considered from a different angle in view of the fact that A-2 is a Pakistani national. If a foreign national is found staying in the country without valid passport and visa and his movements from one place to another with A-1 are established and from the premises occupied by A-1, large quantities of arms and ammunitions etc. are found, it would be prudent and reasonable to draw inference of criminal conspiracy."

19. Here it is evident from the record, the convict/respondent was found guilty and punished on the basis of the evidence that some forged documents which includes two driving licences and mark-sheets of High School, Intermediate and B.A. were recovered from the possession of the convict/respondent, but by using these documents any henious or grave offence was committed by him has not been established by the prosecution. So, considering the nature of the crime committed by the convict/respondent and established by the prosecution, it appears just that trial court awarded the sentence commensurate to the offence committed by the convict/respondent. The case law relied

upon by learned A.G.A. i.e. Mohd. Amran @ Naveed Vs. State (Supra) is of no help to the State because in that case the accused was found guilty of offence related to terrorism who was a Foreign National and attempted to over awe the very existence of the State. In the present matter, no such offence has been alleged or established. There is no evidence on record that convict/respondent was involved in terrorist activities or activities which are dangerous to the security and safety of the nation.

20. The case law ***Lal Singh Vs. State of Gujarat*** *(Supra)* is also of no help to the State-appellant as in the cited case law it was established that from the premises occupied by the accused a large quantity of arms and ammunition etc. was found, so on the basis of that the Hon'ble Supreme Court held that " it would be prudent and reasonable to draw inference of criminal conspiracy". But in the present case, there is no such allegation or recovery. Hence considering the facts and circumstances of the case and the evidence available on record there appears no need to interfere with the judgment and order passed by the trial court.

21. It is admitted that convict/respondent has served out the sentence awarded to him in Case Crime No.132 of 2006 and also in Case Crime No.379 of 2014 and now to detain further the convict/respondent in prison shall be illegal and in clear violation of Article 21 of the Constitution of India.

22. In the case of ***Chairman Railway Board and others Vs. Chandrima Das (MRS) and others 2000 (2) SCc 465*** the Hon'ble Supreme Court has held that fundamental rights enshrined under Articles 20, 21 and 22 of the Constitution of India are available to non citizens also. In the word of Hon'ble Apex Court reads as Under:-

"30. In Anwar Vs. State of Jammu and Kashmir, it was held that the rights under Articles 20, 21 and 22 are available not only to "citizens" but also to "persons" which would include "non-citizens.

31. Article 20 guarantees right to protection in respect of conviction for offences. Article 21 guarantees right to life and personal liberty while Article 22 guarantees right to protection against arbitrary arrest and detention. These are wholly in consonance with Article 3, Article 7 and Article 9 of the Universal Declaration of Human Rights."

23. In the case of *Bhim Singh Vs. Union of India and others (Supra)* the Hon'ble Supreme Court has held as under:-

"5. In Para 11 of the additional affidavit filed Shri Payingattery Venkiteswaran Sivaraman, it is stated that there are 37 Pakistani prisoners who have completed their sentence but they could not be repatriated as their nationality has not been confirmed by the Pakistan High Commission so far. It is also stated that besides, in respect of 11 Pakistani fishermen, Government of Gujarat has informed that no offence has been registered and they have no objection to their repatriation to Pakistan. However, in respect of these 11 Pakistani fishermen also, nationality has yet not been confirmed by the Pakistan High Commission. The list of these 37 Pakistani prisoners and 11 Pakistani fishermen is placed on record as Annexure G. Of the 37 Pakistani prisoners who have completed their sentence, 21 are stated to be mentally challenged. Most of

these 21 persons have completed their sentence in 2007, 2008 and 2009, but their nationality has not been confirmed by the Pakistan High Commission though it appears that the consular access with regard to them was provided a few months before the completion of their sentence. It is indeed unfortunate that these 37 Pakistani prisoners who have served out their sentence and are not required under the Indian laws have been kept in jail because their nationality has not been confirmed. Whatever may be the reason for delay in confirmation of their nationality, we have not even slightest doubt that their continued imprisonment is uncalled for. In no way, can these 37 Pakistani prisoners be treated as prisoners once they have served out their sentence. It is true that unless their nationality is confirmed, they cannot be repatriated and have to be kept in India but until then, they cannot be confined to prison and deprived of basic human rights and human dignity."

24. Hence in the present matter admittedly the convict/respondent has served out the sentence awarded to him in the matter under appeal as well as under another case which was registered against him on the date when he completed the sentence awarded in the present case. Now he cannot be kept in jail and his confinement in jail is uncalled for.

24. Hence in light of the above discussion, we are of the considered view that since convict/respondent has already served out the sentence awarded to him and he is a foreign national without any passport or visa, therefore he must be deported to his own country. The Union of India/respondent No.3 and respondent No.4 are directed to deport him to his own country in accordance with law, unless required in any other case.

25. The above appeal is dismissed and writ petition is ***disposed of*** accordingly.

26. The learned A.G.A., as well as Senior Registrar of this Court are directed to send the copy of this judgment to the concerned authorities/departments at the earliest.

(2022)05ILR A1344
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.04.2022

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Matters U/A 227 No. 269 of 2022 (Civil)

The Straw Board Manufacturing Company Ltd., Saharanpur ...Petitioner
Versus
Union of India & Anr. ...Respondents

Counsel for the Petitioner:
Sri Ashish Kumar Singh, Sri Ajay Kumar Singh

Counsel for the Respondents:
A.S.G.I., Sri Rajnish Kumar Rai

A. Civil Law - Civil Procedure Code, 1908 - Order XXVII Rule 1 - Only the officers appointed by Government under Order XXVII Rule 1 C.P.C., 1908 can sign and verify the papers in legal proceeding on behalf of Government and this power cannot be delegated to any other officers, not appointed by the Government. Any authorization or delegation made to some other officer not appointed by Government then it would be contrary to Order XXVII Rule 1 CPC, 1908 and nullity in the eye of law. Petition allowed.

Petition allowed. (E-12)

List of Cases cited:-

1. M/S C. Lyall and Co. Vs U.O.I. & ors., ILR 1973 Delhi 905

2. St. of J.& K. & anr. Vs Gh. Nabi Bhat & ors., AIR 2003 NOC 555 (J.&K.).

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Ashish Kumar Singh, learned counsel for the petitioner and Sri Rajnish Kumar Rai, learned counsel for the respondents.

2. Present petition has been filed for quashing the order dated 12.11.2021 passed by Additional Civil Judge (Junior Division) IIIrd, Court No. 30, Saharanpur whereby application Paper no. 44-C-2 filed by petitioner in Misc. Case No. 72 of 2020 arising out of Original Suit No. 141 of 1982 has been rejected.

3. Learned counsel for the petitioner submitted that petitioner is a Company duly registered under the provision of Companies Act, 1956. The said Company earlier filed Original Suit No. 141 of 1982 against the Union of India/Railways for permanent prohibitory injunction in which written statement has also been filed. The Trial Court decreed the aforesaid suit vide exparte judgment and decree dated 21.04.1987. He further submitted that after gap of 33 years, recall application was filed by respondents on 27.10.2020 in which petitioner has also filed objection. One separate application 44-C-2 has also been filed raising objection under Order XXVII Rule 1 C.P.C., 1908 and has taken specific plea that in light of Order XXVII Rule 1 C.P.C., 1908, only persons appointed by Central Government can file application alongwith Vakalatnama and affidavit. The said application was rejected vide impugned order dated 12.11.2021. He further submitted that Order XXVII Rule 1 C.P.C., 1908 clearly states that in any suit by or against the Government, the plaint or written statement shall be signed by such person as the Government may, by general or special Order, appoint in this behalf. It is also stated that it shall be verified by any person, whom the Government may so appoint and who is acquainted with the facts of the case. He next submitted that persons appointed can sign the plaint and verify the same. He next submitted that respondents have also filed Notification dated 04.06.1992 issued by Railway Board, which was earlier filed in objection Paper No. 42-C-2, by which at serial No. 30 of the Schedule, has appointed the Senior Divisional Engineer to represent the Railway Administration to sign the papers and also verify the same on its behalf. In the present case, only Vakalatnama was signed by Senior Divisional Engineer, whereas application was filed under the signature of Assistant Divisional Engineer and also verified by Senior Section Engineer, therefore, such application cannot be entertained. He next submitted that without considering the provisions of Order XXVII Rule 1 C.P.C., 1908, the application has been rejected.

4. In support of his contention, learned counsel for the petitioner has placed reliance upon judgment of Delhi High Court in the case of M/S C. Lyall and Company Vs. Union of India and others, ILR 1973 Delhi 905 which deals with similar issue, where it was clarified that person/persons appointed can only represent the Government in all proceedings of the case. He also placed reliance upon a judgment of J. & K. High Court in the case of State of J.& K. and another Vs. Gh. Nabi Bhat and others, AIR 2003 NOC 555 (J.&K.). In this matter, again issue was as to whether Under

Secretary can represent the Government or not and relying upon the notification dated 04.06.1992, the Court held that he can also file the case as Under Secretary is also notified in notification dated 04.06.1992.

5. Lastly, he submitted that in the present case, vide notification dated 04.06.1992 appointment is given to Senior Divisional Engineer, no other officers can file the application or verify the papers. Therefore, the impugned order dated 12.11.2021 is bad in law and liable to be set aside.

6. Per contra, learned counsel for the respondents submitted that once the Senior Divisional Engineer is appointed by Railway Board, which is Government in light of Order XXVII Rule 1 C.P.C., 1908, he can delegate the power to some other officers also to verify the facts of the case. In the present case, notification was issued for all over India, therefore, for practical purpose, Senior Divisional Engineer is authorized to delegate the power to all the officers to file application alongwith signature and verify the same. Accordingly, Senior Divisional Engineer vide letter dated 21.02.2018 has authorized the Assistant Divisional Engineer, Saharanpur to sign the application and also verify the same. He next submitted that the officer posted at Saharanpur is well acquainted with the facts of the case, who has been authorized to sign the application and verify the same. He lastly submitted that even in case, he is not authorized to sign and verify the application, Railway Board may be given liberty to file fresh application for recall of the order in accordance with law.

7. I have considered the submissions made by learned counsels for the parties and perused the record as well as provisions of Order XXVII Rule 1 C.P.C., 1908 For ready reference, Order XXVII Rule 1 C.P.C., 1908 is quoted below:-

"1. Suits by or against Government.- *In any suit by or against the Government the plaint or written statement shall be signed by such person as the Government may, by general or special Order, appoint in this behalf, and shall be verified by any person whom the Government may so appoint and who is acquainted with the facts of the case.*

STATE AMENDMENT

Uttar Pradesh.-*In its application to the State of Uttar Pradesh, in the marginal heading, after the words 'official capacity', insert the words 'or Statutory Authorities, etc.' [Vide U.P. Act 57 of 1976 S. 11 (1-11977)]."*

8. From perusal of the Order XXVII Rule 1 C.P.C., 1908, it is very much clear that only the person, who is appointed by the Government can sign the plaint alongwith signature and also verify the same. In the present case, there is no dispute that Railway Board is an appropriate authority to appoint the person under Order XXVII Rule 1 C.P.C., 1908 and further as per Notification dated 04.06.1992 Railway Board has appointed the persons for compliance of Order XXVII Rule 1 C.P.C., 1908 alongwith Schedule having particular of officers. Notification dated 04.06.1992 alongwith schedule is quoted below:-

R.B.E. No. 91/92

No. E(G)82-LL2-2(A), dated 4.6.1992

ORDER

S.O.....In exercise of the powers conferred by Rule 1 of Order XXVII of the First Schedule to the Code of Civil

Procedure, 1908 (5 of 1908) and in supersession of the notification of the Government of India in the Ministry of Railways (Railways Board) number GSR 198, dated the 21st February, 1983, except as respects things done or omitted to be done before such supersession, the Central Government hereby appoints.

(I) the officers mentioned in the Schedule annexed hereto as persons by whom plaints and written statements in suits in any court of civil jurisdiction by or against the Central Government respect of the Railway Administration shall be signed;

(II) those of the officers referred to in clause (I) who are acquainted with the facts of the case, as persons by whom such plaints and written statements shall be verified.

S C H E D U L E

1. Ministry of Railways (Railways Board):

1. Secretary
2. Joint Secretary
3. Deputy Secretary
4. Under Secretary
5. Executive Director
6. Director
7. Joint Director
8. Deputy Director

II. In all establishments of the Railways including Metro Railway, Chittranjan Locomotive Works, Integral Coach Factory, Wheel and Axle Plant, Diesel Component Works, Metropolitan Transport Project, Railway Electrification, Central Organisation for Modernisation of Workshops, Rail Coach Factory, Kapurthala and Central Organisation for the operations information system of Indian Railways, except the Research Design and Standards Organisation, Training Institute and the Railway Liaison Office:

1. General Manager.
2. Chief Administrative Officer
3. Additional General Manager
4. Deputy General Manager
5. Chief Vigilance Officer
6. Deputy Vigilance Officer
7. Vigilance Officer
8. Enquiry Officer
9. Chief Planning Officer
10. Chief Project Officer
11. Deputy Chief Planning Officer
12. Chief Public Relation Officer
13. Senior Public Relations Officer
14. Divisional Railway Manager
15. Additional Divisional Railway Manager
16. Chief Personnel Officer
17. Deputy Chief Personnel Officer
18. Senior Divisional Personnel Officer
19. Divisional Personnel Officer
20. Chief Security Commissioner
21. Additional Chief Security Commissioner
22. Divisional Security Commissioner/Commanding Officer
23. Chief Engineer
24. Chief Bridge Engineer
25. Chief Project Engineer
26. Chief Track Engineer
27. Chief General Engineer
28. Chief Planning and Design Engineer
29. Deputy Chief Engineer
30. Senior Divisional Engineer
31. Senior Executive Engineer
32. Divisional Executive Engineer
33. Chief Commercial Superintendent
34. Chief Marketing Superintendent

35. Chief Claims Officer

36. Chief Passenger Traffic Superintendent

37. Chief Traffic Safety Superintendent

38. Chief Traffic Planning Superintendent

39. Area Superintendent

40. Deputy Chief Operating Superintendent

41. Deputy Chief Commercial Superintendent

42. Deputy Chief Claims Officer

43. Senior Divisional Commercial Superintendent

44. Senior Divisional Operating/Commercial Superintendent

45. Tank Wagon Superintendent

46. Chief Mechanical Engineer

47. Chief Workshop Engineer

48. Chief Freight Traffic Superintendent

49. Chief Rolling Stock Engineer

50. Chief Motive Power Engineer (R/L)/Diesel)

51. Deputy Chief Mechanical Engineer.

52. Senior Divisional Mechanical Engineer

53. Works Manager/Divisional Mechanical Engineer/Senior Mechanical Engineer

54. Chief Signal and Telecommunication Engineer

55. Chief Communication Engineer

56. Deputy Chief Signal and Telecommunication Engineer

57. Divisional Signal and Telecommunication Engineer/Senior Signal and Telecommunication Engineer

58. Chief Electrical Engineer

59. Chief Electrical Service Engineer

60. Chief Electrical Distribution Engineer

61. Chief Electrical Construction Engineer

62. Chief Electrical Loco Engineer

63. Chief Electrical Project Engineer

64. Deputy Chief Electrical Engineer

65. Divisional Electrical Engineer/Senior Electrical Engineer

66. Controller of Stores

67. Deputy Controller of Stores

68. Chief Material Manager

69. Divisional Controller of Stores/Senior Stores Officers

70. Superintendent Printing and Stationary

71. Chief Medical Officer

72. Chief Hospital Superintendent /Chief Surgeon/Chief Physician

73. Medical Superintendent

74. Senior Divisional Medical Officer

75. Divisional Medical Officer

76. Financial Adviser and Chief Accounts Officer

77. Deputy Chief Accounts Officer

78. Senior Accounts Officer

79. Deputy Manager (MIS), Rail Coach Factory, Kapurthala

80. Administrative Officer-cum-Public Relations Officer, Rail Coach Factory, Kapurthala

81. Officer on Special duty, Rail Coach Factory, Kapurthala

82. Chief Project Administrator, Operations Information System of Indian Railways

83. Chief Operation Manager, Operations Information System of Indian Railways

84. Chief Telecommunication Manager, Operations Information System of Indian Railways

85. System Manager, Operations Information System of Indian Railways

86. Officer on Special Duty, Telecom, Operations Information System of Indian Railways

87. Chief Telecommunication Manager, Operations Information System of Indian Railways.

88. Senior Personnel Officer

89. Divisional Commercial Manager

90. Senior Commercial Manager

9. Undoubtedly, the said Schedule is having the appointment of Senior Divisional Engineer at Serial No. 30, but the said Schedule is not having appointment of Assistant Divisional Engineer or Senior Section Engineer. From perusal of the Order XXVII Rule 1 C.P.C., 1908 as well as Notification dated 04.06.1992, it is apparent that there is no provision for delegation of power to the officer other than that mentioned in Schedule.

10. In the case of M/S C. Lyall and Company (supra), High Court of Delhi, in similar situation, has taken the view that person/persons appointed, only can represent the Government in all proceedings of the case. Relevant paragraphs of the judgment are quoted below:-

"11. The first contention urged on behalf of the Union of India is that the notice of the filing of the award received in the office of the Executive Engineer on 26th April, 1971, could not constitute notice of the filing of the award by the Union of India as neither the person who received the notice nor the Executive Engineer was competent to accept notice on behalf oF the Union of India or otherwise bind the Union of India in relation to any proceedings. Mr. Daphtry who appears for the petitioner, however, relies on a notification being S. R. O. 351 dated January 25, 1958, issued in exercise of powers conferred by Rule 1 of Order XXVII of the first schedule to the Code of Civil Procedure, whereby the Central Government appointed certain officers specified in the schedule to the notification who may sign plaints and written statements in suit in any Court of Civil jurisdiction by or against the Central Government and points out that the schedule to the notification specifically included under the head C. W. P. D., the Superintending Engineers and Executive Engineers which would include the Executive Engineer in question. He further contends that by virtue of the power conferred on the Executive Engineer by this notification to sign the pleadings in any suit by or against the Central Government the said Executive Engineer would be deemed to have been fully authorised to accept notice in respect of the proceedings in relation to which he could sign and verify the pleadings. He further contends that the Executive Engineer in question in whose office the notice had been received was the officer who was concerned with the execution of the contract out of which disputes arose and had been pursuing the proceedings before the Arbitrator on behalf of the Union of India.

(12) This contention of the Union of India must prevail. Order XXVII of the Code of Civil Procedure provides for suits by or against the Government or public officers in their official capacity. Rule 2 A of this order provides that persons being ex-officio or otherwise authorised to act for the

Government in respect of any judicial proceedings shall be deemed to be the recognised agents by whom appearances, acts and applications under this Code may be made or done on behalf of the Government. Rule 3 provides that in suits by or against the Government instead of inserting in the plaint the name and description and place of residence; of the plaintiff or defendant, it shall be sufficient to insert the appropriate name as provided in section 79 of the Code. Section 79 provides that in suit by or against the Government, the authority to be named as plaintiff or defendant, in the case of a suit by or against the Central Government shall be the Union of India. Rule 4 of the Order XXVII provides that the Government pleader in any Court shall be the agent of the Government for the purpose of receiving processes against the Government issued by such Court. Rule 2(B) of the said order defines the term "Government pleader" in relation to any suit by or against the Central Government as the pleader as Government may appoint whether generally or specially for the purposes of the said order. Section 80 of the Code provides that no suit shall be instituted against the Government or against the public servant in respect of any act purporting to be done by such public officer in his official capacity until the expiration of two months next after notice in writing has been delivered or left at the office of, in the case of a suit against the Central Government, the Secretary to that Government.

(13) It, therefore, follows that a notice of any proceeding to the Central Government would be valid only if it was either sent to the Sec- retary to the Government or to any other officer who may be authorised to act for the Government in respect of judicial proceedings or to the pleader as defined in Rule 8(B) of the said Order. It is difficult to hold that any public servant who dealt with any proceedings which may have led to the institution of the suit against the Union of India would be competent to accept notice on behalf of the Union of India. It is equally difficult to hold that Union of India would be bound by notice received by various officers at different levels. In any event, in the absence of any provision of law or any rule of business or any statutory rule to the contrary it is not possible to hold that the Executive Engineer was empowered to accept notice on behalf of the Union of India and that the receipt of notice in his office constituted sufficient notice to the Union of India of the filing of the award in the present case."

11. Similar matter again came up for consideration before the High Court of Jammu and Kashmir in the matter of ***State of J.& K. and another (supra)***, where the issue was as to whether under Secretary of the Government can file application or not. The Court after going through notification came to conclusion that under Secretary may also file application as it is also notified. Relevant paragraphs of the judgment are quoted below:-

"2. We have heard Ld. Counsel for the parties and perused the record, Ld, Counsel for the respondents Mr. M.A. Qayoom has strenuously argued that appeal can only be filed by the person who is aggrieved of the judgment and only such person can either himself sign the memo of appeal/and the application or he can authorise any other competent person to do so on his behalf. According to him, in the writ petition, the judgment which is sought to be appealed against, state through Chief Secretary and Commissioner Secretary

General Department were respondents and therefore they alone can be said to be aggrieved persons. So according to him, the application as well as the power of attorney filed with the application appointing the counsel for prosecution of the application could only be signed by them. According to him in the present case, the application and the power of attorney appointing the counsel for prosecution of application has been signed by Under Secretary to Government General Department who is not legally competent to do so. In support he relies upon case reported in 1998 SLJ Page 46 and 1998 SLJ page 50.

3. Mr. Hussain Ld. Counsel appearing for the applicants submitted that for considering the sufficiency of the cause shown for seeking condonation of delay, liberal approach should be adopted and a meritorious case should not be declined to be heard simply because there is some delay as reported in 2000 SLJ page 335. He further contended that Under Secretary is a competent person under law duly authorised on behalf of the state to make an appeal and sign the same on behalf of the State as well as to make and sign the application for condonation of delay. According to Ld, Counsel the State has empowered the Under Secretary in this behalf by Issuance of SRO 413 dated 18th of August 1973, he relies in support on the case reported in 1974 KLJ page 745.

4. We have considered the respective contentions of the parties raised at the bar and are of the opinion that application seeking condonation of delay has been filed by the competent person for the following reasons:-

State being not a real person, always acts through its officers provision in this regard has been made in order XXVII of the Code of Civil Procedure. It is beneficial to refer to Rules 1 and 2 of Order XXVII in this behalf which are reproduced as under:-

1. Suits by or against Govt. In (the Government) the plaint or written statement shall be signed by such person as the Govt. may, by general or special order, appoint in this behalf and shall be verified by any person whom the Government may so appoint and who is acquainted with the facts of the case.

2. Persons authorised to act for Government -- Persons being ex officio or otherwise to act for the Government in respect of any judicial proceedings shall be deemed to be the recognized agents by whom appearances, acts and applications under this code may be made or done on behalf of the Government."

5. From the bare perused of these rules it is manifestly clear that Government can authorise any person to act on its behalf. Now it is to be seen whether Under Secretary of Administrative department was authorized to act on behalf of the Government. The Government of J & K has issued SRO 413 dated 18th of August 1973 which is as follows.

"Notification SRO 413 dt. 18.8.73; "SRO-413- For purposes of the provisions of Rules 1 and 2 of Order XXVII and Section 2(7) of the Code of Civil Procedure, Svt. 1977, and in modification of paras 38 and 44 of the Revised Law Department Manual, 1935, the Government is pleased to make the following order:-

1. In suits by or against the Government, the plaint or written statement shall be signed by the Secretary/ Head of the concerned Department and shall be verified by either of them or by any other gazetted officer of the Department who is acquainted with the facts of the cases.

2. The Secretary Head of the concerned Department and the Secretary

to Government Law Department are ex-officio authorised *to act for the government in respect of all judicial proceedings.*

Explanation:- for purposes of paras 1 and 2 above secretary shall include the Additional Secretary, the Special Secretary, the Deputy Secretary and the Under Secretary.

3. The Secretary to Govt., Law Department, the Deputy Secretary and the Under Secretary in that Department shall be Government pleaders for the purposes of performing all the function of the Government Pleader under the Code of Civil Procedure within the meaning of Section 2(7) of the said code.

6. As the present case pertains to General Department, as such the Under Secretary to General Department in view of the explanation appended to SRO 413 can be deemed to have been authorized to act on behalf of the Government. So there is no lack of competence on the part of Under Secretary in signing the application and the appeal on behalf of the State and for appointing the counsel for prosecution of the same. Authorities relied upon by the Ld. Counsel for the non applicants are distinguishable and don't deal with the question like in hand."

12. From perusal of Order XXVII Rule 1 C.P.C., 1908, it is apparently clear that only the person appointed by Government by general or special order, shall sign and verify the plaint or written statement. There is no provision of delegation power to any other officer. Therefore, this cannot be interpreted in any other way except as provided in the language of Order XXVII Rule 1 C.P.C., 1908. Only those officer/officers, who are appointed by Government, shall sign and verify the papers, affidavits and Vakalatnama in legal proceeding. He can not authorize any other officer on his behalf as it would be De hors the provision of Order XXVII Rule 1 C.P.C., 1908.

13. This Court is having respectful agreement with the view taken by High Court of Delhi as well as High Court of Jammu and Kashmir in the matters of ***M/S C. Lyall and Company and State of J.& K. and another (supra)*** and holds that only the officers appointed by Government under Order XXVII Rule 1 C.P.C., 1908 can sign and verify the papers in legal proceeding on behalf of Government and this power cannot be delegated to any other officers, not appointed by the Government.

14. In the present case, Railway Board exercising its power conferred under Order XXVII Rule 1 C.P.C, 1908 has appointed many officers to sign and verify the plaint, written statement etc. on behalf of Railway Board and certainly the said appointment is not having appointment of Assistant Divisional Engineer and Senior Section Engineer, therefore, they cannot sign or verify the application. Any authorization made to such officers would be contrary to the Order XXVII Rule 1 C.P.C., 1908 and nullity in the eye of law.

15. There is no dispute on the point that Assistant Divisional Engineer and Senior Section Engineer are given authorization and their appointment is not found place in the notification dated 04.06.1992. Therefore, they cannot file and verify the application on behalf of Railway Board in light of the Order XXVII Rule 1 C.P.C., 1908 as well discussion made hereinabove. Therefore, such documents cannot be accepted and no order can be passed upon that.

16. Accordingly, this petition is **allowed.** The order dated 12.11.2021 passed by Additional Civil Judge (Junior Division) IIIrd, Court No. 30, Saharanpur is hereby quashed.

17. No order as to costs.

18. So far as second prayer for permission to file fresh application is concerned, needless to say that it is always open for the respondents to move applications in accordance with law and for that, no permission is required. It is also obvious that if any such application is filed, same shall be considered and decided in accordance with law.

(2022)05ILR A1353
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.05.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Matters U/A 227 No. 1388 of 2022

Aqama Builders & Develpers Ltd. Lucknow ...Petitioner
Versus
Civil Judge, Senior Division, Malihabad, Lucknow & Ors. ...Respondents

Counsel for the Petitioner:
Nirmit Srivastava

Counsel for the Respondents:
Amrendra Nath Tripathi, Anand Pratap Singh

A. Civil Law - Civil Procedure Code, 1908 - ORDER 39 RULE 1 & 2 - Wherever the proceedings are under the Code of Civil Procedure and the forum is the civil court, the availability of a remedy under the CPC, will deter the High Court, not merely as a measure of self-imposed restriction, but as a matter of discipline and prudence, from exercising its power of superintendence under the Constitution. Hence, the High Court ought not to have entertained the revision under Article 227 especially in a case where a specific remedy of appeal is provided under the Code of Civil Procedure itself.

B. The judgment can be a precedent only for that its actually held therein and not for that which can be inferred therefrom. A Judgment cannot be read as Statute and interpreted.

Petition Dismissed. (E-12)

List of Cases cited:-

1. Radhey Shyam & anr. Vs Chhabi Nath & ors. (2015) 5 SCC 423

2. Surya Dev Rai Vs Ram Chand Rai (2003) 6 SCC 675 (overruled)

3. Naresh Shridhan Mirajkar Vs St. of Mah. AIR 1967 SC 1

4. Bhavnagar University Vs Palilana Sugar Mills (2003) 2 SCC 111,

5. Virudhunagar Hindu Nadargal Dharma Paribalana Sabai Vs Tuticorin Educational Society & ors. (2019) 9 SCC 538

6. A. Venkatasubbiah Naidu Vs S. Chellappan (2000) 7 SCC 695

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

1. Heard Sri Prashant Chandra, learned Senior Counsel assisted by Sri Nirmit Srivastava, and Ms. Radhika Singh, learned counsel for the petitioner and Sri Amrendra Nath Tripathi, learned counsel for the respondent no.2 alongwith Sri Anand Pratap Singh, Advocate.

2. This petition has been filed under Article 227 of the Constitution of India

with the prayer to set aside the order dated 12.04.2022 passed on an application under Order 39 Rule 1 & 2 of the C.P.C. in Regular Suit No. 297 of 2022 and to direct the trial court to maintain the order dated 17.02.2022 by which an *ex parte* ad-interim injunction for maintenance of *Status quo* was passed by the trial court. An additional prayer has been made that the private respondents be directed not to make any transactions in respect of any part of the building known as Paradise Farm, situated at IIM Road, Lucknow without leave of the Court.

3. Sri Amrendra Nath Tripathi has raised a preliminary objection regarding the maintainability of this petition under Article 227 of the Constitution of India by referring to Order 43 Rule 1(r) of the C.P.C., wherein it has been provided that an appeal shall lie under Section 104 against an Order under Rule 1 and 2, 2A, 4 or Rule 10 of Order 39.

4. It has been submitted that the order passed on the application for temporary injunction moved by the plaintiff/petitioner has been passed under Order 39 Rule 1 and 2, and therefore, it is an order where the appeal from Order would lie not a petition under Article 227 of the Constitution of India.

5. Learned Senior Advocate, Sri Prashant Chandra has argued on the basis of the Judgment rendered by the Supreme Court in the Case of ***Radhey Shyam and Another vs. Chhabi Nath and Others (2015) 5 SCC 423*** that against judicial orders of the Civil Court though Writ under Article 226 is not maintainable, judicial orders can be challenged under Article 227. He has described from paragraphs 2 and 3 of the judgment, the controversy which was referred to the Larger Bench with regard to the observations made by the Division Bench in ***Surya Dev Rai vs. Ram Chand Rai (2003) 6 SCC 675*** and the question that was referred to was whether the Constitution Bench of a corum of nine Judges in ***Naresh Shridhan Mirajkar vs. State of Maharashtra AIR 1967 SC 1*** could have been ignored by two learned Judges in *Surya Deo Rai(supra)*. Learned counsel for the petitioner has read out the conclusion arrived at by the three Judges Larger Bench as mentioned in paragraph 21 and 22 of the judgment and also read out certain portions of paragraph 23 of *Radhey Shyam (Supra)* where reference was made to the judgment rendered in the case of *Surya Deo Rai(Supra)* referring to paragraph 19, 24 and 25 of judgement in the case of *Surya Deo Rai(Supra)*. Learned Senior Counsel has also read out certain portions of paragraph 25 and 26 of *Radhey Shyam (Supra)* to argue that Article 227 confers the power of superintendence of Subordinate Court on the High Court and the control of working of Subordinate Courts including illegality or perversity in orders passed by such Subordinate Courts can be looked into under Article 227 of the Constitution of India.

6. It has also been argued that the orders of the Civil Court stand on a different footing from orders of other authorities or Tribunals or courts other then Judicial/Civil Courts, and while appellate or revisional jurisdiction is regulated by the statute, power of superintendence under Article 227 is constitutional.

7. It has been argued by Sri Prashant Chandra that the plaintiff/petitioner is before this Court invoking the power of superintendence under Article 227 of the Constitution of India only because the trial

court has exceeded its jurisdiction and has made observations on the merits of the case by holding a mini trial. Reference has been made to Builders' Agreement entered into between the parties and subsequent unregistered notarized agreements made thereafter between the owner of the land, respondent no.2, and the plaintiff/petitioner who is the builder. Detailed arguments have been made regarding the merits of the case which this Court does not consider necessary to refer to as this Court is of the considered opinion that the judgment rendered in the case of *Radhey Shyam (Supra)* does not lay down the law that even where statutory appeal is maintainable, this Court should interfere in its extraordinary power of supervision under Article 227 of the Constitution of India. The judgement in the case of Radhey Shyam(Supra) was with respect to a particular issue i.e. whether a Writ of Certiorari could have been granted and a Writ Petition under Article 226 was maintainable against orders passed by the Civil Courts in exercise of their powers under the Civil Procedure Code. The question that was referred to the Larger Bench has been mentioned in paragraphs No. 1 to 5 of the said judgment, which are being quoted herein below:-

*"**A.K. Goel, J.**-- This matter has been placed before the Bench of three Judges in pursuance of an order dated 15-4-2009 [Radhey Shyam v. Chhabi Nath, (2009) 5 SCC 616] passed by the Bench of two Hon'ble Judges to consider the correctness of the law laid down by this Court in Surya Dev Rai v. Ram Chander Rai [Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675] that an order of the civil court was amenable to writ jurisdiction under Article 226 of the Constitution. The reference order, inter alia, reads: (Radhey Shyam case [Radhey Shyam v. Chhabi Nath, (2009) 5 SCC 616] , SCC p. 624, paras 30-33)*

"30. ... Therefore, this Court unfortunately is in disagreement with the view which has been expressed in Surya Dev Rai [Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675] insofar as correction of or any interference with judicial orders of civil court by a writ of certiorari is concerned.

31. Under Article 227 of the Constitution, the High Court does not issue a writ of certiorari. Article 227 of the Constitution vests the High Courts with a power of superintendence which is to be very sparingly exercised to keep tribunals and courts within the bounds of their authority. Under Article 227, orders of both civil and criminal courts can be examined only in very exceptional cases when manifest miscarriage of justice has been occasioned. Such power, however, is not to be exercised to correct a mistake of fact and of law.

32. The essential distinctions in the exercise of power between Articles 226 and 227 are well known and pointed out in Surya Dev Rai [Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675] and with that we have no disagreement. But we are unable to agree with the legal proposition laid down in Surya Dev Rai [Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675] that judicial orders passed by a civil court can be examined and then corrected/reversed by the writ court under Article 226 in exercise of its power under a writ of certiorari. We are of the view that the aforesaid proposition laid down in Surya Dev Rai [Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675] , is contrary to the ratio in Mirajkar [Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1 : (1966) 3 SCR 744] and

the ratio in Mirajkar [Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1 : (1966) 3 SCR 744] has not been overruled in Rupa Ashok Hurra [Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388] .

33. In view of our difference of opinion with the views expressed in Surya Dev Rai [Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675] , matter may be placed before His Lordship the Hon'ble the Chief Justice of India for constituting a larger Bench, to consider the correctness or otherwise of the law laid down in Surya Dev Rai [Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675] on the question discussed above."

"2. Since this Bench has to decide the referred question, it is not necessary to mention the facts of the case in detail. Suffice it to say that assailing an interim order of the civil court in a pending suit, the respondent-defendant filed a writ petition before the Allahabad High Court and the High Court having vacated [Chhabi Nath v. Addl. District Judge, Writ-C No. 50636 of 2007, order dated 12-10-2007 (All)] the said interim order granted in favour of the appellant-plaintiff, the appellant moved this Court by way of a special leave petition, inter alia, contending that the writ petition under Article 226 was not maintainable against the order of the civil court and, thus, the impugned order [Chhabi Nath v. Addl. District Judge, Writ-C No. 50636 of 2007, order dated 12-10-2007 (All)] could not be passed by the High Court. On behalf of the respondent, reliance was placed on the decision of this Court in Surya Dev Rai [Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675] laying down that a writ petition under Article 226 was maintainable against the order of the civil court and thus it was submitted that the High Court was justified in passing the impugned order.

"3. As already mentioned, the Bench of two Hon'ble Judges who heard the matter was not persuaded to follow the law laid down in Surya Dev Rai [Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675] . It was observed that the judgment in Surya Dev Rai [Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675] did not correctly appreciate the ratio laid down in the earlier nine-Judge Bench judgment of this Court in Naresh Shridhar Mirajkar v. State of Maharashtra [Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1 : (1966) 3 SCR 744] wherein this Court came to the conclusion that "Certiorari does not lie to quash the judgments of inferior courts of civil jurisdiction (para 62)."

"4. With reference to the observations in Surya Dev Rai (Supra) for not following the conclusion in Naresh Shridhar Mirajkar (Supra) , the referring Bench inter alia observed: (Radhey Shyam case [Radhey Shyam v. Chhabi Nath, (2009) 5 SCC 616] , SCC pp. 622-24, paras 25-30)

"25. In our view the appreciation of the ratio in Mirajkar [Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1 : (1966) 3 SCR 744] by the learned Judges, in Surya Dev Rai [Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675] , with great respect, was possibly a little erroneous and with that we cannot agree.

26. The two-Judge Bench in Surya Dev Rai [Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675] did not, as obviously it could not overrule the ratio in Mirajkar [Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1 : (1966) 3 SCR 744] , a Constitution Bench decision of a nine-Judge Bench. But the learned Judges justified their different view

in Surya Dev Rai [Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675] , inter alia on the ground that the law relating to certiorari changed both in England and in India. In support of that opinion, the learned Judges held that the statement of law in Halsbury, on which the ratio in Mirajkar [Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1 : (1966) 3 SCR 744] is based, has been changed and in support of that quoted paras 103 and 109 from Halsbury's Laws of England, 4th Edn. (Reissue), Vol. 1(1). Those paras are set out below:

"103. The prerogative remedies of certiorari, prohibition and mandamus: historical development.--Historically, prohibition was a writ whereby the royal courts of common law prohibited other courts from entertaining matters falling within the exclusive jurisdiction of the common law courts; certiorari was issued to bring the record of an inferior court into the King's Bench for review or to remove indictments for trial in that court; mandamus was directed to inferior courts and tribunals, and to public officers and bodies, to order the performance of a public duty. All three were called prerogative writs....

*****

109. The nature of certiorari and prohibition.--Certiorari lies to bring decisions of an inferior court, tribunal, public authority or any other body of persons before the High Court for review so that the court may determine whether they should be quashed, or to quash such decisions. The order of prohibition is an order issuing out of the High Court and directed to an inferior court or tribunal or public authority which forbids that court or tribunal or authority to act in excess of its jurisdiction or contrary to law. Both certiorari and prohibition are employed for the control of inferior courts, tribunals and public authorities.'

The aforesaid paragraphs are based on general principles which are older than the time when Mirajkar [Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1 : (1966) 3 SCR 744] was decided are still good. Those principles nowhere indicate that judgments of an inferior civil court of plenary jurisdiction are amenable to correction by a writ of certiorari. In any event, change of law in England cannot dilute the binding nature of the ratio in Mirajkar [Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1 : (1966) 3 SCR 744] and which has not been overruled and is holding the field for decades.

27. It is clear from the law laid down in Mirajkar [Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1 : (1966) 3 SCR 744] in para 63 that a distinction has been made between judicial orders of inferior courts of civil jurisdiction and orders of inferior tribunals or court which are not civil courts and which cannot pass judicial orders. Therefore, judicial orders passed by civil courts of plenary jurisdiction stand on a different footing in view of the law pronounced in para 63 in Mirajkar [Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1 : (1966) 3 SCR 744] . The passage in the subsequent edition of Halsbury (4th Edn.) which has been quoted in Surya Dev Rai [Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1 : (1966) 3 SCR 744] does not show at all that there has been any change in law on the points in issue pointed out above.

28. The learned Judges in Surya Dev Rai [Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675] stated in SCC para 18, p. 687 of the Report that the decision rendered in Mirajkar [Naresh Shridhar

Mirajkar v. State of Maharashtra, AIR 1967 SC 1 : (1966) 3 SCR 744] was considered by the Constitution Bench in Rupa Ashok Hurra v. Ashok Hurra [Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388] and wherein the learned Judges took a different view and in support of that, the following para from Rupa Ashok Hurra [Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388] has been quoted: (Surya Dev Rai case [Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675] , SCC pp. 687-88, para 18)

"(i) that it is a well-settled principle that the technicalities associated with the prerogative writs in English law have no role to play under our constitutional scheme; (ii) that a writ of certiorari to call for records and examine the same for passing appropriate orders, is issued by a superior court to an inferior court which certifies its records for examination; and (iii) that a High Court cannot issue a writ to another High Court, nor can one Bench of a High Court issue a writ to a different Bench of the High Court; much less can the writ jurisdiction of a High Court be invoked to seek issuance of a writ of certiorari to the Supreme Court. The High Courts are not constituted as inferior courts in our constitutional scheme.'

29. We are constrained to point out again that in Rupa Ashok Hurra [Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388] the Constitution Bench did not take any view which is contrary to the views expressed in Mirajkar [Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1 : (1966) 3 SCR 744] . On the other hand, the ratio in Mirajkar [Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1 : (1966) 3 SCR 744] was referred to with respect and was relied on in Rupa Ashok Hurra [Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388] . Mirajkar [Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1 : (1966) 3 SCR 744] was referred to in SCC para 8, p. 399 and again in SCC para 11 on p. 402 and again in SCC para 59, p. 418 and also in SCC para 60, p. 419 of Rupa Ashok Hurra [Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388] . Nowhere even any whisper of a divergence from the ratio in Mirajkar [Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1 : (1966) 3 SCR 744] was expressed. Rather passages from Mirajkar [Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1 : (1966) 3 SCR 744] have been quoted with approval.

30. In fact the question which was referred to the Constitution Bench in Rupa Ashok Hurra [Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388] is quoted in para 1 of the judgment and it is clear from the perusal of the said paragraph that the question for consideration in Rupa Ashok Hurra [Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388] was totally different. Therefore, this Court unfortunately is in disagreement with the view which has been expressed in Surya Dev Rai [Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675] insofar as correction of or any interference with judicial orders of civil court by a writ of certiorari is concerned."

"5. Thus, the question to be decided is: whether the view taken in Surya Dev Rai [Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675] that a writ lies under Article 226 of the Constitution against the order of the civil court, which has been doubted in the reference order, is the correct view?"

8. The Supreme Court answered the reference in paragraph 29, which is being quoted herein below:-

"29. Accordingly, we answer the questions referred as follows:

29.1. Judicial orders of the civil court are not amenable to writ jurisdiction under Article 226 of the Constitution.

29.2. Jurisdiction under Article 227 is distinct from jurisdiction under Article 226.

29.3 Contrary view in Surya Dev Rai is overruled."

9. It is settled law that the judgment can be a precedent only for that its actually held therein and not for that which can be inferred therefrom. A Judgment cannot be read as Statute and interpreted.

10. In ***Bhavnagar University vs. Palilana Sugar Mills (2003) 2 SCC 111***, the Supreme Court observed in Para 59 thus:- *"A decision, as is well known, is an authority for which it is decided and not what can logically be deduced therefrom. It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.-----"*

11. In ***Virudhunagar Hindu Nadargal Dharma Paribalana Sabai vs. Tuticorin Educational Society and Others (2019) 9 SCC 538,*** the Supreme Court was considered "the Maintainability" of a petition under Article 227 of the Constitution, against an order passed by the Civil Court vacating the interim order of injunction granted by the trial court. The interlocutory application filed by the appellants/plaintiffs in Regular Suit filed for Declaration and Permanent Injunction had been allowed by the trial court. The contesting defendants filed a petition under Article 227 of the Constitution against the order of trial court granting injunction whereas a Regular Appeal under Order 43 Rule 1 (r) of the Code of Civil Procedure, 1908 was filed by another defendant to the Suit. Despite objections to the maintainability of such petition under Article 227, on availability of appeal remedy under the Civil Procedure Code, the High Court allowed the petition and set aside the injunction granted by the trial court. The High Court rejected the preliminary objection regarding maintainability on the basis of the few decisions of the Supreme Court which revolved around the supervisory jurisdiction of the High Court to keep the subordinate courts within the bounds of law. The High Court found fault with the trial court for taking up, the application for injunction and passing an order thereon, in great haste and observed that it was a case of justice being hurried and consequently getting buried.

The Supreme Court observed in paragraph 11 that *"the High Court ought to have seen that when a remedy of appeal under Section 104(1)(i) read with Order 43, Rule 1(r) of the Code of Civil Procedure, 1908, was directly available, Respondents 1 and 2 ought to have taken recourse to the same. It is true that the availability of a remedy of appeal may not always be a bar for the exercise of supervisory jurisdiction of the High Court. In* ***A. Venkatasubbiah Naidu v. S. Chellappan (2000) 7 SCC 695,*** *this Court held that "though no hurdle can be put against the exercise of the constitutional powers of the High Court, it is a well-recognized principle which gained judicial recognition that the High Court should direct the party to avail himself of such remedies before he resorts to a constitutional remedy".*

The Supreme Court also observed in para 12 thus:- *"But courts should always bear in mind a distinction between (i) cases*

where such alternative remedy is available before civil courts in terms of the provisions of Code of Civil Procedure, and

(ii) cases where such alternative remedy is available under special enactments and/or statutory rules and the fora provided therein happen to be quasi-judicial authorities and tribunals. In respect of cases falling under the first category, which may involve suits and other proceedings before civil courts, the availability of an appellate remedy in terms of the provisions of CPC, may have to be construed as a near total bar. Otherwise, there is a danger that someone may challenge in a revision under Article 227, even a decree passed in a suit, on the same grounds on which Respondents 1 and 2 invoked the jurisdiction of the High Court. This is why, a 3-member Bench of this Court, while overruling the decision in Surya Dev Rai v. Ram Chander Rai (Supra), pointed out in Radhey Shyam v. Chhabi Nath(Supra) that "orders of civil court stand on different footing from the orders of authorities or tribunals or courts other than judicial/civil courts".

The Supreme Court further observed in paragraph 13 thus:- *"Therefore wherever the proceedings are under the Code of Civil Procedure and the forum is the civil court, the availability of a remedy under the CPC, will deter the High Court, not merely as a measure of self-imposed restriction, but as a matter of discipline and prudence, from exercising its power of superintendence under the Constitution. Hence, the High Court ought not to have entertained the revision under Article 227 especially in a case where a specific remedy of appeal is provided under the Code of Civil Procedure itself."*

12. This Court is only concerned with the challenge raised to an order on an application moved under Order 39 Rule 1 and 2 for Temporary Injunction in a Suit for Permanent Injunction filed by the plaintiff/petitioner and the grounds that have been mentioned in this writ petition and which have been read out in their entirety by the learned Senior Counsel, Sri Prashant Chandra can be raised in appeal which is provided under Order 43 Rule 1(r) of the Civil Procedure Code.

13. This petition is ***dismissed*** as not maintainable.

(2022)05ILR A1360
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.04.2022

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Matters U/A 227 No. 5202 of 2021 (Criminal)
connected with
Matters U/A 227 No. 5204 of 2021

Abhishek Agarwal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Swetashwa Agarwal, Sri Dinkar Lal

Counsel for the Respondents:
G.A.

A. Criminal Law – Criminal Procedure Code, 1973 - Section 451 - Powers under Section 451 of Cr.P.C. should be exercised expeditiously and judiciously. it is a general rule that case property should be released. It should not to be retained in custody of the court or the police for any time longer than what is absolutely necessary and it should be directly or indirectly disposed of and court must pass order for its disposal. Further where the property is subject to speedy and natural decay, resulting in diminishing its value should not be kept lying unattended.

Petitions Allowed. (E-12)

List of Cases cited:-

Sundar Bhai-Amba Lal Desai Vs St. of Guj., reported in 2002 (10) SCC 283

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. These two petitions Under Article 227 of the Constitution of India are being heard together and are disposed of by a common order.

2. Heard Sri Swetashwa Agarwal, learned counsel for the petitioners, Ms. Sushma Soni, learned A.G.A. for the State and perused the record

3. These petitions Under Article 227 of the Constitution of India have been filed with the following prayers:

(I) Issue an appropriate order or direction setting aside the impugned order dated 17.9.2021 passed by the Additional Sessions Judge, Court No. 8, Bulandshahar in Criminal Revision No. 101 of 2021 Abhishek Agarwal Vs. State of U.P. as well as impugned order dated 8.7 2021 passed by the C.J.M. Bulandshahar in Case Crime No. 271 of 2021 State Vs. Abhishek Agarwal, under section 420 IPC and Section 11/12 U.P. Sheera Niyantran Adhiniyam, 1964, P.S. Kotwali Dehat, District Bulandshahar.

(ii) Issue an appropriate order or direction to the court below/C.J.M. Bulandshahar to release the molasses in question weighing 9492 quintal, seized by the O.P. No. 2 from the petitioner's firm-Khiansh Enterprises in connection with Case Crime No. 271 of 2021, under section 420 IPC and Section 11/12 UP. Sheera Niyantran Adhiniyam, 1964, P.S. Kotwali Dehat, District Bulandshahar.

4. In brief the facts are that an FIR Crime No. 271 of 2021, under section 420 IPC and 11/12 U.P. Molasses Control Act, 1964 was registered against the petitioners and one Tushar Agarwal and Sunil Kumar. The allegations of the FIR are that on 4.4.2021 a secret information was received by the complainant regarding storage of molasses, pursuant whereto a raid was conducted by the Excise Officials and upon asking for the molasses related documents, no license or permit could be produced, instead four bills of purchase of Khansari Molasses weighing 755 quintal could only be produced. The molasses stored in the tanks appeared to be much more and there was an apprehension of the same being manufactured by Sugar Mill and 9492 quintal of molasses was found stored in the storage tanks. Samples of molasses was taken at the spot as per the relevant Rules. One of the sample was made available to one Tushar at the factory premises and one sample was sent to the Regional Lab for examination and the seized molasses was given in the custody/superdagi of Unit Representative Tushar Agarwal, directing him not to use or sale the same and that the provisions of UP. Sheera Niyantran Niyamawali, 1974 and U.P. Sheera Nivantran Adhiniyam, 1964 have been violated, for which the first information report is being registered. After investigation charge-sheet has been submitted.

5. Learned counsel for the applicants submitted that the Excise

Officials have initiated the prosecution of the petitioners on their own whims and fancies without there being any offence committed by them. Learned counsel further submitted that all the bills of purchase, GST Invoices and details of Stock Register were duly furnished by the petitioners to the Investigating Officer

during the course of investigation regarding the trading of Khandsari Molasses undertaken by them, but no heed was deliberately paid to the same. The petitioners also brought on record the GST Registration Certificate of the firm Khiansh Enterprises, GST Bills and Returns from Jan. 2021 to March 2021, E. Way Bills, GST Bills and Stock Register relating to the purchase and sale of Khandsari Molasses, in support of the release application moved by them. Perusal of the aforesaid bills and invoices would reveal that the petitioners have been trading with various firms across State of U.P in respect of sale and purchase of Khandsari Molasses, upon which requisite taxes were duly paid.

It is further submitted that neither the Investigating Officer nor the Excise Officials disputed any of the Bills or Invoices or Stock Details furnished by the petitioners along with the release application regarding sale and purchase of Khandsari Molasses. However, relying upon the Lab Test Report of the Excise Department, it was alleged that the Molasses in question has been found to be manufactured by Sugar Mill. The aforesaid Lab Report is of no consequence, once the Excise Department got the sample tested through its own Regional Lab, despite a request having been made by the petitioners to get the sample tested through the Lab of Central Government. As per the information obtained under the R.T.I. Act from the National Sugar Institute, Kanpur, it was disclosed that:-

(i) *It cannot be determined by chemical examination as to whether the sample of Molasses pertains to Khandsari Molasss or that of Sugar Mill.*

(ii) *The Institute/National Sugar Institute has not been informed of any yardstick of differentiating between Molasses obtained through Khandsari or Sugar Mill.*

The learned Magistrate illegally and erroneously rejected the release application of the petitioners. It is also contended that under section 16 of the Act the offence is compoundable. There is no bar for transportation of the molasses within the State. No proceedings for forfeiture of the molasses have been initiated by the Excise Department. The revisional court also failed to consider the aforesaid facts and legal points and has dismissed the revision. Both the courts below have failed to exercise jurisdiction vested in its.

8. Learned A.G.A. contended that petitioners are accused in the case and charge-sheet has been submitted against them. 9492 quintal molasses was found in the possession of petitioners and they could not show the relevant papers. The molasses was obtained from sugar factory in an unauthorized manner. The molasses has been seized and is a case property. Hence, it can not be released in favour of the petitioners in the case. There is no

9. It is undisputed that the molasses has been taken from possession of the petitioners. Case U/s 420 IPC and 11/12 U.P Sheera Niyantran Adhiniyam, 1964, has been registered against the petitioners. The learned Magistrate has rejected the application on the ground that under the Provision of Section 8 of U.P. Sheera Niyantran Adhiniyam, 1964 no person can store or transport the molasses without permission or license of the Controller and the petitioners have failed to file any license or permission for storage or transportation of the molasses.

Section 8 U.P. Sheera Niyantran Adhiniyam, 1964 provides as follows:

"(1) The Controller may specify the order in which storage tank in a factory shall be filled or emptied and such direction shall be binding on the occupier of the sugar factory.

(2) No molasses produced or stored in a factory in a particular molasses year shall be mixed with any molasses of the previous molasses year without the previous permission of the Controller in writing.

(3) No molasses shall be stored in a factory until it has been weighed or measured.

(4) Occupier of a sugar factory shall take adequate safeguards to see that the wastage in the storage of molasses in a year does not exceed two per cent of the total quantity stored. In case the wastage exceeds two per cent, the occupier shall be liable to penalties imposed under the Act, for the contravention of the rule: Provided that if it is proved to the satisfaction of the Controller that the wastage or deficiency in excess of the above prescribed limit has been caused by accident or any other unavoidable cause, the occupier shall not be liable to penalty.

10. The aforesaid provision is applicable to the sugar factories. The case of the petitioners is that they are sole proprietor of Khiansh Enterprises and said firm is duly registered with GST Department. The firm is engaged in trading of Khandsari Molasses through valid bills of purchase upon the payment of requisite taxes. Petitioner have filed all the bills of purchase sale and also copy of the stock register. Learned A.G.A has not pointed out any discrepany in it. No other person is claiming the impugned molasses.

In case of **Sundar Bhai-Amba Lal Desai Vs. State of Gujrat, reported in 2002 (10) SCC 283** the Hon'ble Supreme Court has observed as follows:

"In our view, the powers under section 451 Cr.P.C. should be exercised expeditiously and judiciously. It would serve various purposes, namely:

"1. owner of the article would not suffer because of its remaining unused or by its misappropriation;

2. court or the police would not be required to keep the article in safe custody;

3. if the proper panchnama before handing over possession of the article is prepared, that can be used in evidence instead of its production before the court during the trial. If necessary, evidence could also be recorded describing the nature of the property in detail;

and

4. this jurisdiction of the court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles."

11. The offence is also compoundable in nature. In view of the law laid down it is a general rule that case property should be released. It should not to be retained in custody of the court or the police for any time longer than what is absolutely necessary and it should be directly or indirectly disposed of and court must pass order for its disposal. Further where the property is subject to speedy and natural decay, resulting in diminishing its value should not be kept lying unattended.

12. Considering all the facts and attending circumstances of the case it was just and proper on the part of the Magistrate to release the molasses in favour of the petitioners after taking adequate surety bond after getting its value assessed by a competent authority and learned

Magistrate may have imposed other conditions which it thinks necessary. Learned Magistrate has failed to exercise his jurisdiction properly. The learned revisional court has also failed to appreciate the facts and law on the point so both the orders are not justified and are liable to be set-aside.

13. The petitions Under Article 227 of the Constitution of India are hereby allowed. The impugned order dated 8.7.2021 passed by C.J.M. Bulandshahar in Case Crime No. 271 of 2021 State Vs. Abhishek Agarwal, under section 420 IPC and 11/12 U.P Sheera Niyantran Adhiniyam, 1964, PS. Kotwali Dehat, District Bulandshahar and order dated 17.9.2021 passed by Additional Session Judge, Court No. 8. Bulandshahar in Criminal Revision No. 101 of 2021 Abhishek Agarwal Vs. State of UP are hereby set-aside. The learned C.J.M. Bulandshahar is directed to release the molasses in question in favour of petitioners after taking personal bonds and one surety bond of adequate amount, The learned Magistrate may got the value of the molasses assessed by any competent authority and fix the amount of personal bond and surety bond accordingly and may also impose other conditions he deems just and necessary.

(2022)05ILR A1364
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.04.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Matters U/A 227 No. 33492 of 2019

Smt. Bachchi Devi ...Petitioner
Versus
3rd Addl. District Judge Balrampur & Ors. ...Respondents

Counsel for the Petitioner:
Virendra Mishra, Shraddha Mishra

Counsel for the Respondents:
Mohd. Ali

A. In an Appeal unless the statute restricts the power of the Appellate Court, it has, as a general rule, the same powers as are open to the original authority or court from whose decision the appeal is preferred and a court of appeal has no fetters on it to decide all questions of law and fact which crop up in the case but ordinarily, a court of 11 appeal will not tend to interfere with the exercise of discretion by the lower court and substitute for it, its own discretion unless of course, it is found by the court of appeal that the original court misdirected itself on any question of law or it failed to consider the relevant factors governing the exercise of discretion or its discretion is otherwise vitiated by reason of mis-construction of any statutory provision or on account of misreading of any evidence on record.

B. The relief of interlocutory mandatory injunctions can be granted when
(1).The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction. (2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money. (3) The balance of convenience is in favour of the one seeking such relief."

C. Supervisory jurisdiction conferred upon the High Court under Article 227 is confined only to see whether an inferior court or Tribunal has proceeded within the parameters of its jurisdiction. In its exercise of jurisdiction under Article 227, the High Court does not act as Tribunal and it is not open for it to review the order or reassess the evidence upon which the Trial Court has passed an order.

D. the grant of mandatory injunction is not prohibited in all cases if a clear prima facie material is placed which justifies a finding that

status quo may be altered by one of the parties if the order of mandatory injunction is not given. It has been observed that an ad-interim mandatory injunction can also be given on strong circumstances so as to protect the rights and interest of the parties and so as not to frustrate their rights regarding mandatory injunction. Such interim relief can be granted if the Court is satisfied that withholding of it would prick the conscience of the Court and do violence to the sense of justice, resulting in injustice being perpetuated throughout the hearing and at the end the Court would not be able to vindicate the cause of justice.

Petition disposed of. (E-12)

List of Cases cited:-

1. K.Vs Muralidhar Vs K.Vs Ananda Rao & ors., 2016 (16) SCC 109

2. Rajesh Jaiswal & anr. Vs Amit Shyam & anr., 2012 SCC OnLine All 4007

3. Dr. Chandra Deo Tyagi Vs A.D.J., Court 10 No.1, Meerut & ors., 2020 (7) ADJ 216

4. Shri Ram Singh & anr. Vs Special Judge, E.C. Act, A.D.J., Ballia & ors., AIR 1993 ALL 236

5. Metro Marins & anr. Vs Bonus Watch Co. (Pvt) Ltd. & ors., 2004 (7) SCC 478

6. Dorab Cawasji Warden Vs Coomi Sorab Warded, 1990 (2) SCC 117

7. Ashok Kumar Bajpai Vs Dr. (Smt.) Ranjana Bajpai, 2003 SCC OnLine ALL 1296

8. Banshi Lal Vs Radhey Shyam, 2013 (31) LCD 1530

9. Dilbagrai Punjabi Vs Sharad Chandra, AIR 1988 SC 1858

10. Jagdish Singh Vs Natthu Singh, 1992 (1) SCC 647

11. Raj Kumar Bhatia Vs Subhash Chander Bhatia 2018 (2) SCC 87

12. Sadhana Lodh Vs National Insurance Co. Ltd., 2003 (3) SCC 524

13. Pepsico India Holding Pvt. Ltd. Vs Krishna Kant Pandey, 2015 (4) SCC 270

14. Chandavarka Sita Ratna Rao Vs Ashalata S. Guram, 1986 (4) SCC 4447

15. Waryam Singh Vs Amarnath, AIR 1954 SC 215

16. Nagendra Nath Bora Vs Commissioner of Hills Division, AIR 1958 SC 398.

17. Hammad Ahmed Vs Abdul Majeed & ors., 2019 (14) SCC 1

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

1. This petition has been filed praying for setting aside the order dated 25.10.2019 and the order dated 02.07.2019 passed by the learned Appellate Court in Civil Appeal no.02 of 2014 and the order dated 28.01.2014 passed by learned Trial Court in Regular Suit No.478 of 2011.

2. Heard Sri Virendra Mishra, learned counsel for the petitioner and Sri Md. Ali, learned counsel for the respondent no.3.

3. The case set up by the petitioner before this Court is that as per the pedigree given in paragraph-3 of the petition, one Jagannath was the owner of two houses situated adjacent to each other. He had two sons, namely, Chhailbihari and Lalta Prasad, both are now dead. Chhailbihari had one son Ram Pratap, who has been arrayed as respondent no.3 and Dwarka Prasad also had one son who was differently abled and died a long time ago and the petitioner is the widow of Dwarka Prasad. There are two houses situated adjacent to each other. The house of the

petitioner is existing in a single storey in a dilapidated condition, whereas the house of the respondent no.3 situated next to it is double storey and has a shop also in it. Whereas the house of the respondent no.3 has all basic amenities like electricity connection and water pipeline, the house of the petitioner is in a pitiable condition with no electricity connection or water pipeline. She being a widow, is somehow surviving in the said house. The respondent no.3 taking the benefit of her old age and being a stamp vendor in the Civil Court and aware of court procedure, tried to grab her house by instituting a Regular Suit for permanent injunction against the petitioner on false allegation that he is the exclusive owner in the possession of the house in dispute i.e. the house which is adjacent to his own house and in dilapidated condition in which the petitioner lives, alleging that the father of the plaintiff Chhailbihari and the husband of the defendant Dwarka Prasad were real brothers and the ancestral house which was situated near Cooperative Seed Godown in front of Hatan road had been left by the father of the plaintiff in favour of his brother i.e. the husband of the defendant has he too was differently able and feeble minded.

4. Since the husband of the petitioner and her son were both feeble minded, it was alleged that the plaintiff brought them in the his house and the defenant sold the ancestral house and started residing with the plaintiff. Thereafter the plaintiff got allotted the House no.3/26 in favour of defendant/ petitioner in Kashiram Shahri Awas Yojana and accordingly the defendant/ petitioner shifted in the said house along with her son who died on 12.08.2011. It has been submitted that the petitioner/ defendant was shown to be residing at the house situated in Kashiram Shahri Awas Yojana and not in Mohalla Shubhash Nagar by way of an amendment in the plaint which was allowed on 02.07.2019, which order has also been challenged in this petition. Such amendment was carried out only to avoid proper service of the plaint in Regular Suit being made upon her. It was alleged in the plaint that after the death of her son, the defendant/ petitioner tried to sell the house in dispute in favour of a muscleman after taking forcible the possession from the plaintiff, accordingly necessity arose to file the Suit.

5. It has been submitted by Sri Virendra Mishra, learned counsel for the petitioner that initially the respondent no.3 had shown the correct address of the petitioner i.e. the house in dispute, however mischievously the said plaint was amended and she was shown to have been residing at the house situated at Kashiram Shahri Awas Yojana. This was only to enable the plaintiff to manage that the notice of the Regular Suit be not served upon the petitioner and he may be able to obtain ex parte injunction. It has been submitted that after notice was issued, since the petitioner could not be served, the same was published in some newspaper and such condition was found to be sufficient by the Trial Court and initial date was fixed as 17.04.2012 for considering the application for temporary injunction.

Later on an application was moved on 26.03.2012 by the plaintiff for preponing the date fixed by the Trial Court. The date was preponed and fixed for 07.02.2012 with a direction to the plaintiff to inform the defendant of such preponing of the date. However, no intimation whatsoever regarding change of date was given to the defendant/ petitioner and

accordingly learned Trial Court when it took up the matter on 07.04.2012 while observing that the defendant was not present restrained the defendant/ petitioner from selling the house in dispute till the next date of listing. The defendant/ petitioner is illiterate, old and ailing lady and she was also mentally disturbed in 2011-2012 due to the death of her young son. Any publication made in any newspaper could not have been read by her and she did not have any information of the pendency of the said Regular Suit. Anyhow when she came to know of the ad-interim injunction dated 07.04.2012, she appeared through the counsel and filed written statement and detailed objections to the application for temporary injunction.

6. It was stated in the objections and in the written statement that about 40 years ago, a partition/ family settlement has taken place and the house in dispute fell in the share of the husband of the petitioner/defendant, whereas the portion on the eastern side fell in the share of the father of the plaintiff. Since then both the parties were in possession of their respective portions of the house and the plaintiff is not the owner, nor in possession of the house as shown in the letters A, B, C & D and had no right to file the Suit for permanent injunction. The defendant/ petitioner also filed photocopies of ration card, receipts of house tax etc. to prove that she had been the owner in possession of the disputed house.

7. Learned Trial Court however passed an order on 28.01.2014 allowing the application under Order 39 Rule 1 C.P.C. moved by the plaintiff by going much beyond the pleadings on record and also the final prayer made in the Suit. By this order, the Trial Court not only restrained the petitioner from selling the property in dispute but also restrained the petitioner from using the same for residing therein. There was no finding on record that the petitioner was not in possession of the house and that she is not residing therein, nor she is the legal owner thereof.

8. Learned counsel for the petitioner has further submitted that since the order dated 28.01.2014 was completely against the record and much beyond the final relief that was claimed by the plaintiff in the Regular Suit itself, the defendant/ petitioner filed Misc. Civil Appeal under Order 41 Rule 1 C.P.C. registered as Misc. Civil Appeal No.02 of 2014. During the pendency of the Appeal, an application was filed under Order 41 Rule 27 by the defendant/ petitioner with a request for admitting certain documents/ papers in additional evidence to prove that the disputed house infact is ancestral and was not the self-acquired property of the father of the plaintiff but had been left by way of family settlement in the name of her dead husband by her father-in-law. She filed a copy of the sale deed dated 17.10.1967 where Jagannath, her father in law had executed sale deed of the property situated opposite Cooperative Seed Go-down towards Hatan Road. It has been argued that when the house/ property situated near Cooperative Seed godown has already been sold out in 1967, there was no question of such house being left in favour of her dead husband Dwarka Prasad by his father Jagannath. The Appellate Court allowed this application on 19.11.2018 and admitted the document in additional evidence.

The plaintiff filed an Appeal before the Appellate Court for amendment of the plaint by which he tried to change his stand. Such application was erroneously allowed on

02.07.2019 which order has also been challenged before this Court. By the order impugned dated 25.10.2019, the Appellate Court has rejected the Appeal filed by the petitioner and affirmed the order passed by the Trial Court dated 28.01.2014.

9. Learned counsel for the petitioner has read out the operative portion of the order dated 28.01.2014 passed by the learned Trial Court, wherein the learned Trial Court has observed that *prima facie* the plaintiff had been able to show that he is the owner and in possession of the house in question and therefore balance of convenience and the question of irreparable loss has also been shown to be in favour of the plaintiff. The application for temporary injunction was allowed with a direction to the defendant/ petitioner that during the pendency of the Suit, she should not interfere in the plaintiff's peaceful possession of the house situated at Subhash Nagar, Pargana and Tehsil Utraula, District Balrampur, shown in the plaint with the letters A, B, C & D by taking forcibly the possession thereof or by selling it off.

10. Learned counsel for the defendant/ petitioner has read out the operative portion of the order passed by the Appellate Court on 25.10.2019 rejecting the Appeal filed by the defendant/ petitioner. The Appellate Court found that notice had not been served as the service report initially stated that she lived currently in House No.1/26 Kashiram Shahri Awas Yojana and in another service report, the Process Server has stated that the defendant had refused to accept the notice. After publication of notice, the defendant/ petitioner had appeared and had showed her residence as Mohalla Subhash Nagar, Hatan Road, Pargana Utraula, District Balrampur.

11. Learned counsel appearing for the petitioner has pointed out that the application of the petitioner under Order 41 Rule 27 having been allowed and the additional evidence having been admitted, a duty was cast upon the Appellate Court to consider such additional evidence and give its finding specifically on the points raised in argument on the basis of such additional evidence. He has referred to the judgment rendered by Hon'ble Supreme Court in *K.V. Muralidhar Vs. K.V. Ananda Rao and others*, 2016 (16) SCC 109, and the judgment rendered by a Coordinate Bench in *Rajesh Jaiswal and another Vs. Amit Shyam and another*, 2012 SCC OnLine All 4007 and the judgment rendered by another Coordinate Bench in *Dr. Chandra Deo Tyagi Vs. Additional District Judge, Court No.1, Meerut and others*, 2020 (7) ADJ 216, where similar observations have been made that not only the additional evidence can be filed in an Appeal against a judgment and decree, but also in an Appeal against the order passed on an interlocutory application; if such additional evidence is allowed to be filed and taken on record then the same should be considered and specific finding be recorded thereon.

12. Learned counsel for the petitioner has referred to the judgment rendered by this Court in *Shri Ram Singh and another Vs. Special Judge, E.C. Act, Additional District Judge, Ballia and others*, AIR 1993 ALL 236, where this Court after considering the scope of judicial review under Article 226 and 227 has also considered the scope of Appeal under Order 43 Rule 1 against an order passed on an interlocutory order under Order 39 Rule 1 C.P.C. It has been held that in an Appeal unless the statute restricts the power of the Appellate Court, it has, as a general rule, the same powers as are open to the original authority or court from whose decision the appeal is preferred and a court of appeal has no fetters on it to decide all questions

of law and fact which crop up in the case but ordinarily, a court of appeal will not tend to interfere with the exercise of discretion by the lower court and substitute for it, its own discretion unless of course, it is found by the court of appeal that the original court misdirected itself on any question of law or it failed to consider the relevant factors governing the exercise of discretion or its discretion is otherwise vitiated by reason of mis-construction of any statutory provision or on account of misreading of any evidence on record.

13. Learned counsel for the petitioner has placed reliance upon the judgment rendered by Supreme Court in *Metro Marins and another Vs. Bonus Watch Co. (pvt) Ltd. and other, 2004* (7) SCC 478, where in paragraph-9, the Court had observed that an interim mandatory injunction can be granted only in exceptional cases as noted in the judgment rendered by it in *Dorab Cawasji Warden Vs. Coomi Sorab Warded*, 1990 (2) SCC 117. In *Dorab Cawasji Warden* (supra), the Supreme Court has observed in paragraph 16 as follows:-

"16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief."

14. Learned counsel for the petitioner has referred to the judgment rendered by this Court in *Ashok Kumar Bajpai Vs. Dr. (Smt.) Ranjana Bajpai*, 2003 SCC OnLine ALL 1296 , and paragraph 14 to 17 thereof which mainly consider the judgements relating to interim relief granted in writ jurisdiction by the High Court which amounts to final relief and inadmissibility thereof and is of not much relevance to the controversy in hand.

15. Learned counsel for the petitioner has also referred to another judgment rendered by this Court in *Banshi Lal Vs. Radhey Shyam*, 2013 (31) LCD 1530, where this Court has observed that even in the Second Appeal, interference can be made in findings of fact when material or relevant evidence is not considered, which if considered, would have led to opposite conclusion and where a finding has been recorded by the Appellate Court by placing reliance upon in-admissible evidence which if would have been omitted, an opposite conclusion would have been possible.

16. Learned counsel for the petitioner has further placed reliance upon *Dilbagrai Punjabi Vs. Sharad Chandra*, AIR 1988 SC

1858, paragraph-5 thereof which also relates to the Second Appeal and there is reference to the arguments made by the learned counsel appearing on behalf of the respondent which this Court does not consider necessary to refer to in detail as they are not of much relevance to this case filed under Article 227 of the Constitution.

17. Learned counsel for the petitioner has placed reliance upon the judgment rendered by Supreme Court in *Jagdish Singh Vs. Natthu Singh,* 1992 (1) SCC 647, and paragraph-10 thereof where the Supreme Court has made observations regarding jurisdiction of the High Court to re-appreciate the evidence in a Second Appeal. However such observations are unnecessary to be referred to in detail in view of the fact and circumstances of this case.

18. It is the case of the respondent as argued by Md. Ali that the petitioner is the paternal Aunt/ *Chachi* of the respondent no.3. At the time when the father of the respondent no.3 was alive, a family settlement had taken place in which the ancestral house situated at Hatan road opposite Cooperative Seed godown had been given to the husband of the petitioner who was feeble minded and incapable of earning a livelihood on his own. The father of the respondent no.3 had shifted to a house that he had bought from his own earning as stamp vendor in Mohalla Subhash Nagar at Hatan road in Utraula town. On the said property, he had constructed two shops and was also residing. The house was recorded in the name of the father of the respondent no.3 in the municipality records and he had been paying water tax and electricity bill etc. before his death and after his death the respondent no.3 came into possession of the entire house. Since the petitioner who was his Chachi and her husband Late Dwarka Prasad were living penurious condition at Hatan road in the ancestral house, he used to take care of both his Chacha and Chachi and their feeble minded son, and after the death of his Chacha, he had brought his Chachi and her son to the house situated at Subhash Nagar. After his family grew in size, there was a lack of space and therefore the respondent no.3 made great effort in getting allotted a separate residential house under Kashiram Shahri Awas Yojana in the name of his Chachi where she went to live in 2010 along with her son. When her son died there was no one to look after her and then he brought his Chachi back to his house in Subhash Nagar but she appeared to have changed her mind and with malafide intent wanted to grab the house in which the respondent was living with his family therefore, for the said purpose she approached land mafia and anti-social elements with the intention to forcibly grab the possession of the house in question and to sell it off behind the back of respondent no.3. Being apprehensive of being thrown out of his own house, the respondent no.3 filed a Suit for permanent injunction along with an application for temporary injunction.

19. Notice was initially tried to be served through registered post and process server of the Court upon the petitioner but contradictory reports were returned therefore substituted service was affected and such service was found sufficient on the defendant/ petitioner. The defendant filed objections to the application for temporary injunction and written statement in the said Suit which was duly considered by the Trial Court and the learned Trial Court after considering the facts and

documentary evidence placed on record came to the conclusion that the plaintiff i.e. the respondent no.3 had been able to establish a prima-facie case in his favour for grant of interim injunction. Hence the order dated 28.01.2014 was passed injuncting the defendant/ petitioner from interfering and forcibly taking possession of the house in question or trying to sell it off during the pendency of the Suit. The petitioner thereafter filed an Appeal and again documentary evidence was considered by the Appellate Court and it found no perversity or illegality in the order dated 28.01.2014 and eventually rejected the Appeal by its order dated 25.10.2019.

20. It was found on the detailed examination of evidence that the defendant/ petitioner did not dispute at any stage the contention of the plaintiff that a separate house was allotted to her in Kashiram Shahri Awas Yojana finding her to be homeless and destitute. The Appellate Court also took into account the agreement to sell made out allegedly by the defendant/ petitioner in favour of one Taufeeq Ahmed to sell off the house in dispute for consideration of Rs.4 lakhs and receipt of advance of Rs.1000/- from him. The Appellate Court observed that in view of such evidence of avoiding of service of notice, and then appearing after publication of the same in newspaper, and allotment of separate house at Kashi Ram Shahri Awas Yojana finding her to be homeless and the agreement to sell, it was evident that the plaintiff was right in his submission before the Trial Court that being homeless she tried to take forcibly the possession of the house in dispute, and had also intended to sell it off to a third person.

21. The Appellate Court thus found that a *prima facie* case had indeed been made out by the plaintiff against the defendant and with regard to irreparable loss also the Appellate Court found that the apprehension of the plaintiff of being deprived of the house in question and the intention of the defendant to sell it off had not been suitably controverted by the defendant.

22. The Appellate Court has referred the agreement to sell dated 28.08.2013 and other documentary evidence filed by the plaintiff which was not specifically controverted by the defendant, and it also referred to balance of convenience being in favour of the plaintiff as had been shown on the basis of receipts issued by the Municipality that the house in question was recorded in the name of his father and he had been paying house tax, water tax, electricity tax, etc. since much before the cause of action for institution of Suit arose in 2011, whereas the defendant had produced receipts which were much of later date i.e. of the year 2013 onwards. After referring to the evidence considered by the learned Trial Court, the Appellate Court found no good ground to interfere in the interim injunction granted by the Trial Court on 28.01.2014 and affirmed the same by its order dated 25.10.2019.

23. Learned counsel for the respondent has placed reliance upon *Raj Kumar Bhatia Vs. Subhash Chander Bhatia* 2018 (2) SCC 87, and paragraph-12 thereof, where the scope of interference by the High Court under Article 227 of the Constitution has been considered by placing reliance upon *Sadhana Lodh Vs. National Insurance Company Ltd.*, 2003 (3) SCC 524, where it was held that supervisory jurisdiction conferred upon the High Court under Article 227 is confined only to see whether an inferior court or Tribunal has proceeded within the parameters of its

jurisdiction. In its exercise of jurisdiction under Article 227, the High Court does not act as Tribunal and it is not open for it to review the order or reassess the evidence upon which the Trial Court has passed an order.

24. Learned counsel for the respondent no.3 has also placed reliance upon *Pepsico India Holding Private Limited Vs. Krishna Kant Pandey*, 2015 (4) SCC 270, and paragraph-14 thereof where similar observations have been made by the Supreme Court by considering the earlier binding precedents such as *Chandavarka Sita Ratna Rao Vs. Ashalata S. Guram*, 1986 (4) SCC 4447 and *Waryam Singh Vs. Amarnath*, AIR 1954 SC 215 and *Nagendra Nath Bora Vs. Commissioner of Hills Division*, AIR 1958 SC 398.

25. Learned counsel for the respondent no.3 has also placed reliance upon *Hammad Ahmed Vs. Abdul Majeed and others*, 2019 (14) SCC 1, and paragraph-57 and 58 thereof, where it has been observed that the grant of mandatory injunction is not prohibited in all cases if a clear *prima facie* material is placed which justifies a finding that status quo may be altered by one of the parties if the order of mandatory injunction is not given. It has been observed that an ad-interim mandatory injunction can also be given on strong circumstances so as to protect the rights and interest of the parties and so as not to frustrate their rights regarding mandatory injunction. Such interim relief can be granted if the Court is satisfied that withholding of it would prick the conscience of the Court and do violence to the sense of justice, resulting in injustice being perpetuated throughout the hearing and at the end the Court would not be able to vindicate the cause of justice.

26. This Court having heard the counsel for the parties has also perused the order impugned. It is evident that both the courts below have considered documentary evidence filed by the plaintiff which included receipts starting from the year 1983 onwards of various years till 2009 i.e. before the Suit was filed in 2011. They have also considered the specific case of the plaintiff that a separate house under Kashiram Shahri Awas Yojana had been allotted to the defendants in which due enquiry was held finding the defendant to be homeless which specific case was not controverted by the defendant in any of her affidavits. Learned Trial Court as well as the Appellate Court has also considered the agreement to sell made out on 28.08.2013 after the order of the maintenance of status quo was passed by the Trial Court at the stage of ad-interim ex parte hearing of the said Suit, and after the defendant had appeared before the Trial Court and filed her objections and written statement. The trial court as well as the Appellate Court on the basis of evidence led by the parties came to the conclusion that *prima facie* plaintiff was residing in the house built by his father and that the defendant was trying to sell it off and this apprehension was fortified by agreement to sell made out after the order by the Trial Court for maintenance of status quo passed.

27. In this fact and circumstances, this Court does not find it appropriate to interfere in the orders impugned in this petition.

28. However, since the Suit has been pending since 2011 and evidence has been led by both the parties therein and even additional evidence has been filed which has been taken on record by the Appellate Court, the Trial Court shall try and dispose of the Suit on its merits as expeditiously as possible.

29. Any observations made by this Court in this order have only been made to come to the conclusion regarding justifiability of the orders impugned passed by the Trial Court and the Appellate Court and such observations shall not prejudice the rights of any of the parties in the Suit which is yet to be decided on merits by the competent court.

30. This petition is accordingly ***disposed of.***

(2022)05ILR A1373
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.05.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Civil Misc. Review Application No. 116 of 2022

Distributors India, (South) ...Applicant
Versus
Union of India & Ors. ...Opp. Parties

Counsel for the Applicant:
Shailesh Verma

Counsel for the Opp. Parties:
A.S.G.I., Manish Misra

A. Civil Law - Civil Procedure Code, 1908 - ORDER 47 RULE 1 - It is settled law that review cannot be treated as an appeal and a re-hearing of the matter is not allowed in the name of a review of the judgment. Review of a judgment can be sought only the ground that it suffers from an "error apparent on the face of the record". But error on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on the points where there may conceivably be two opinions.

B. Power of review may not be exercised on the ground that the decision was erroneous on merits.

C. Power of review can also be exercised for any sufficient reason which is wide enough to include a misconception of fact or law by a court or even an advocate.

D. The power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise.

Application dismissed. (E-12)

List of Cases cited:-

1. Raymond Woollen Mills Ltd. Vs I.T.O. (1999) 236 ITR 36 (SC); Arun Gupta Vs U.O.I., (2015) 371 ITR 394 (AII)

2. Phool Chand Bajrang Lal Vs ITO, (1993) 4 SCC 77; Srikrishna (P) Ltd. Vs ITO, (1996) 9 SCC 534

3. Meera Bhanja Vs Nirmala Kumari Choudhury, (1995) 1 SCC 170

4. Perry Kansagra Vs Smriti Madan Kansagra, (2019) 20 SCC 753

5. Srikrishna (Pvt.) Ltd. Vs I.T.O., (1996) 9 SCC 534

6. Aventis Pharma Ltd. Vs ACIT, (2010) 323 ITR 570 (Bom)

7. Arun Gupta Vs U.O.I., (2015) 371 ITR 394 (All)

8. United Electrical Co. Ltd. Vs Commissioner of Income Tax, (2002) 258 I.T.R. 317

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J. & Hon'ble Subhash Vidyarthi, J.)

1. Heard Shri Desh Deepak Chopra, Senior Advocate, assisted by Sri Shailesh

Verma, Advocate, the learned Counsel for the petitioner and Shri Manish Misra, Advocate, the learned counsel for the respondents.

2. The petitioner has sought a review of the judgment and order dated 18-04-2022 passed by this Court dismissing its writ petition, which was filed challenging the validity of a notice dated 26-03-2021 issued under Section 148 of the Income Tax Act, 1961.

3. In the reasons recorded for initiating the re-assessment proceedings, the Assessing Officer has recorded that on examination of the documents on record and 26 AS, it was noticed that the petitioner has received payment under Section 194 J also, but it did not show the said receipts in its Profit and Loss Account and did not give any explanation for the same. The Assessing Officer has further recorded that the petitioner did not disclose the amount of reimbursement of expenses claimed by it and the actual amount received by it towards reimbursement; that it did not submit the details of the expenses incurred by it for verification and it did not produce the ledgers, bills and vouchers of expenses incurred on behalf of the Principal companies and that as per 26 AS the total receipts of the petitioner were Rs.4,66,84,247/- and the TDS was Rs.32,14,869/- whereas it has shown its income at Rs.3,59,59,861/- which is short by Rs.1,07,24,386/- and this income appears to have escaped assessment. The Assessing Officer has recorded that although the petitioner had produced the books of account, annual report, Profit and Loss Account and balance-sheet, but the requisite material facts were embedded in such a manner that the same could not be discovered by the Assessing Officer and it came to light upon investigation conducted subsequent to passing of the assessment order, which would amount to fresh tangible material giving rise to reason to believe that certain income has escaped assessment necessitating initiation of reassessment proceedings.

4. After examining the reasons, this Court had held that the A.O. had recorded his reasons to believe that the petitioner had received payments under Section 194 J also, but it had not shown the said receipts in his Profit and Loss account and had not given any explanation for the same. The petitioner had not disclosed the amount of reimbursement of expenses claimed by it and the actual amount received by it towards reimbursement. It had not submitted the details of expenses incurred by it for verification during the assessment proceedings. It did not produce any ledger, bills and vouchers of expenses incurred on behalf of the Principal Companies. Thus the petitioner did not make a "full and true" disclosure of all the material facts which resulted in an income of Rs. 1,07,24,386/- having escaped assessment.

5. Relying upon the judgments in ***Raymond Woollen Mills Ltd. Vs. I.T.O. (1999) 236 ITR 36 (SC); Arun Gupta Vs. Union of India, (2015) 371 ITR 394 (AII); Phool Chand Bajrang Lal Vs. ITO, (1993) 4 SCC 77; Srikrishna (P) Ltd. V. ITO, (1996) 9 SCC 534***, this Court had held that while scrutinizing a notice under Section 148 of the Act in exercise of our power of judicial review, we can only see whether there was prima facie some material available on record before the Assessing Officer for issuing a notice for re-assessment and we do not have to give a final decision regarding whether there is a suppression of material facts or regarding the sufficiency or correctness of the

material. The notice under Section 148 of the Act has been issued by the Assessing Officer after an Investigation was conducted and going through the income tax return and other related documents of the petitioner and after forming a reason to believe that the petitioner did not truly and fully disclose all the material facts, because of which income amounting to Rs. 1,07,24,386/- has escaped assessment. This Court held that there was prima facie material available on record before the Assessing Officer for issuing a notice under Section 148 for initiating reassessment proceedings. For the aforesaid reasons, the writ petition filed for quashing of the notice issued under Section 148 of the Act and the consequential proceedings was dismissed.

6. The petitioner has filed the instant application for review of the aforesaid judgment passed by this Court dismissing the Writ Petition.

7. Before proceeding to examine the submissions of the learned Counsel for the review-petitioner, it would be appropriate to have a look at the scope of review. It is settled law that review cannot be treated as an appeal and a re-hearing of the matter is not allowed in the name of a review of the judgment. Review of a judgment can be sought only the ground that it suffers from an "error apparent on the face of the record". The meaning of the expression "error apparent on the face of the record" has been explained by the Hon'ble Supreme Court in various decisions, some of are being referred hereinbelow.

8. In ***Meera Bhanja v. Nirmala Kumari Choudhury***, (1995) 1 SCC 170, the Hon'ble Supreme Court explained the term "error apparent on the face of the record" in the following words: -

"an error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions*. We may usefully refer to the observations of this Court in the case of Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale AIR 1960 SC 137, wherein, K.C. Das Gupta, J., speaking for the Court has made the following observations in connection with an error apparent on the face of the record:*

An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior court to issue such a writ."

(Emphasis Supplied)

9. In ***Perry Kansagra v. Smriti Madan Kansagra***, (2019) 20 SCC 753, the Hon'ble Supreme Court referred to the earlier decisions on the point and summarized the law on the subject in the following manner: -

"15.1.In Inderchand Jain (2009) 14 SCC 663 it was observed in paras 10, 11 and 33 as under: (SCC pp. 669 & 675)

"10. ***It is beyond any doubt or dispute that the review court does not sit in appeal over its own order. A rehearing of the matter is impermissible in law. It constitutes an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. It is***

also trite that exercise of inherent jurisdiction is not invoked for reviewing any order.

11. Review is not appeal in disguise. In Lily Thomas v. Union of India (2000) 6 SCC 224 this Court held: (SCC p. 251, para 56)

"56. It follows, therefore, that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise.'

***

33. The High Court had rightly noticed the review jurisdiction of the court, which is as under:

"The law on the subject--exercise of power of review, as propounded by the Apex Court and various other High Courts may be summarised as hereunder:

(i) Review proceedings are not by way of appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

(ii) Power of review may be exercised when some mistake or error apparent on the fact of record is found. But error on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on the points where there may conceivably be two opinions.

(iii) ***Power of review may not be exercised on the ground that the decision was erroneous on merits.***

(iv) Power of review can also be exercised for any sufficient reason which is wide enough to include a misconception of fact or law by a court or even an advocate.

(v) An application for review may be necessitated by way of invoking the doctrine actus curiae neminem gravabit.'

In our opinion, the principles of law enumerated by it, in the facts of this case, have wrongly been applied."

15.2*.In Ajit Kumar Rath(1999) 9 SCC 596, it was observed: (SCC p. 608, para 29)*

"29. In review proceedings, the Tribunal deviated from the principles laid down above which, we must say, is wholly unjustified and exhibits a tendency to rewrite a judgment by which the controversy had been finally decided. This, we are constrained to say, is not the scope of review under Section 22(3)(f) of the Administrative Tribunals Act, 1985...."

15.3.Similarly, in Parsion Devi (1997) 8 SCC 715 the principles were summarised as under: (SCC p. 719, para 9)

"9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise"."

16.On the other hand, reliance was placed by the respondent on the decision in BCCI v. Netaji Cricket Club(2005) 4 SCC 741 to submit that exercise in review would be justified if there be misconception of fact or law. Para 90 of the said decision was to the following effect: (SCC p. 765)

"90. Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for

review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words "sufficient reason" in Order 47 Rule 1 of the Code are wide enough to include a misconception of fact or law by a court or even an advocate. An application for review may be necessitated by way of invoking the doctrine actus curiae neminem gravabit."

17.We have gone through both the judgments of the High Court in the instant case and considered rival submissions on the point. It is well settled that an error which is required to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record. To justify exercise of review jurisdiction, the error must be self-evident. Tested on this parameter, the exercise of jurisdiction in the present case was not correct. The exercise undertaken in the present case, in our considered view, was as if the High Court was sitting in appeal over the earlier decision dated 17-2-2017. ***Even assuming that there was no correct appreciation of facts and law in the earlier judgment, the parties could be left to challenge the decision in an appeal. But the review was not a proper remedy at all. In our view, the High Court erred in entertaining the review petition and setting aside the earlier view dated 17-2-2017."***

(Emphasis Supplied)

10. Now we proceed to examine the grounds taken by the petitioner for seeking a review of the judgment passed by this Court so as to ascertain whether this judgment sought to be reviewed suffers from any such error as strikes on mere looking at the record and as would not require any long-drawn process of reasoning for being established and regarding which there may not be conceivably be two opinions.

11. The petitioner has sought a review of the aforesaid judgment on the ground that the payments made under Section 194 J are clearly reflected in 26 AS and the same had been reconciled by the Assessing Officer during the original assessment proceedings and the difference between the receipts reflected in 26-AS and those reflected in its Profit and Loss Account had been explained through its letter dated 12-02-2015.

12. Whether or not certain receipts are correctly reflected in 26 AS and the Profit and Loss Account of the petitioner, is a disputed question of fact which cannot be decided by this Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India or while reviewing the judgment passed in exercise of its writ jurisdiction. Moreover, by raising the aforesaid question, the petitioner is seeking a re-hearing of the Writ Petition, which is not permissible in the name review of the judgment. Such a question can only be decided by the Assessing Authority during re-assessment proceedings, and the petitioner will have full opportunity to place its case during re-assessment proceedings and it is not the case that the dismissal of the Writ Petition will result any miscarriage of justice being caused to the petitioner.

13. The learned Counsel for the petitioner has next contended that during the assessment proceedings, the petitioner had provided the copy of the ledger account of refundable amount received / to be received with a copy of debit note issued to the Principal Companies and it had disclosed all

the material facts and nothing was concealed. This question has already been decided in the judgment dated 18-04-2022 and this Court refused to interfere with the notice under Section 148 issued on the basis of the reason recorded by the Assessing Officer that although the petitioner had produced the books of account, annual report, Profit and Loss Account and balance sheet, but the requisite material facts were embedded in such a manner that the material facts could not be discovered by the A.O. This material which came to light upon investigation conducted subsequent to passing of the assessment order, would certainly amount to a fresh tangible material giving rise to reason to believe that certain income has escaped assessment necessitating initiation of re-assessment proceedings. This finding does not suffer from any error which may be said to be apparent on the face of the record so as to warrant a review of the judgment.

14. The learned Counsel for the petitioner has next contended that the judgment in the case of **Raymond Woolen Mills Ltd. (supra)** is case specific and it cannot be applied to the case of the petitioner. The ratio of the judgments passed by the Hon'ble Supreme Court in the cases of Raymond Woolen Mills Ltd. (1) and (2) (supra), is that at the stage of issuing a notice for reassessment, the court has only to see whether there is prima facie some material on the basis of which, the department could re-open the case; the sufficiency or correctness of the material is not a thing to be considered at this stage, and this ratio does not appear to be based on any peculiar facts so as to be not applicable to the present case and the learned counsel for the petitioner could not point out as to how the aforesaid ratio is based on any peculiar facts and it would not apply to the present case. Therefore, we are unable to accept the submission of the learned Counsel for the petitioner that the judgment in the case of **Raymond Woolen Mills Ltd. (supra)** is case specific and it cannot be applied to the case of the petitioner.

15. The learned counsel for the petitioner also submitted that the judgment in **Phool Chand Bajrang Lal (supra)** supports the petitioner's contention that to initiate reassessment proceedings, the Assessing Officer must have some tangible material before him before proceeding to initiate the reimbursement under Section 147 of the Act.

16. The learned Counsel for the petitioner has also contended that the order passed by the Hon'ble Supreme Court in **Srikrishna (Pvt.) Ltd. versus I.T.O**., (1996) 9 SCC 534 relied upon by this Court required that the assessee is under obligation to disclose the material facts and such disclosure should be full and true and the petitioner has made true and full disclosure of all material facts.

17. So far as the submission that the judgment in **Phool Chand Bajrang Lal (supra)** supports the petitioner's contention that to initiate reassessment proceedings, the Assessing Officer must have some tangible material before him before proceeding to initiate the reimbursement under Section 147 of the Act, we may state that in **Phool Chand Bajrang Lal (supra)**, the Hon'ble Supreme Court had held that the reassessment proceedings may be started either because of some fresh fact come into light which were not previously disclosed *or some information with regard to the fact previously disclosed comes into light which intends to expose untruthfulness of those facts.*

18. In the present case, the reassessment has been ordered because the A.O. has recorded his reasons to believe that the

petitioner had received payments under Section 194 J also, but it had not shown the said receipts in his Profit and Loss account and had not given any explanation for the same. The petitioner had not disclosed the amount of reimbursement of expenses claimed by it and the actual amount received by it towards reimbursement. It had not submitted the details of expenses incurred by it for verification during the assessment proceedings. It did not produce any ledger, bills and vouchers of expenses incurred on behalf of the Principal Companies. Thus the petitioner did not make a "full and true" disclosure of all the material facts which resulted in an income of Rs. 1,07,24,386/- having escaped assessment. In the instant case, the notice under Section 148 of the Act has been issued by the Assessing Officer after an investigation was carried out and after going through the income tax return and other related documents of the petitioner and after forming reason to believe that the petitioner did not truly and fully disclose all the material facts, because of which income amounting to Rs.1,07,24,386/- has escaped assessment. Thus the reassessment has been ordered upon discovery of apprehended untruthfulness of facts previously disclosed, which came to light after an investigation and, therefore, the judgment in ***Phool Chand Bajrang Lal (supra)*** does not support the petitioner and as per the law laid down in ***Srikrishna (Supra),*** the reassessment proceedings have rightly been initiated.

19. The judgment passed by this Court has also been sought to be reviewed on the ground that various case laws relied upon by the petitioner in support of its claim have not been considered by this Court. In the judgment sought to be reviewed, the judgments of **Aventis Pharma Ltd. versus ACIT**, (2010) 323 ITR 570 (Bom), **Arun Gupta versus Union of India**, (2015) 371 ITR 394 (All) and **United Electrical Co. Ltd. versus Commissioner of Income Tax**, (2002) 258 I.T.R. 317, cited by the learned counsel for the petitioner have been referred to and dealt with. This Court is not obliged to refer to each and every judgment forming part of a compilation of judgments submitted after conclusion of oral submissions, which judgments were not placed before the Court during oral submissions. Moreover, while deciding the writ petition, we have referred to and relied upon the relevant case laws and it is not been submitted by the petitioner that in the judgment sought to be reviewed, the law applicable to the facts of the case has not been taken into consideration. Therefore, this submission also stands rejected.

20. In view of the aforesaid discussion, we do not find any "error apparent on the face of the record" in the judgment and the order dated 18-04-2022 sought to be reviewed. The application for review of the judgment and order dated 18-04-2022 lacks merit and, is accordingly **dismissed**.

21. However, there will be no order as to costs.

(2022)05ILR A1379
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.04.2022

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAMEER JAIN, J.

Criminal Appeal No. 2411 of 1983

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

Counsel for the Appellants:

Sri D.S. Tiwari, Sri Brijesh Sahai, Sri Manvendra Dixit, Sri P.C. Chaturvedi, Sri S. Shukla, Sri Shashwat Shukla, Sri Sageer Ahmad (Senior Adv.)

Counsel for the Respondent:
D.G.A.

A. Testimony of an independent witness can alone form the basis of conviction but before it's acceptance the court must satisfy itself whether the substratum of the story narrated by the witness is consistent with the other evidence on record, the natural course of events, the surrounding circumstances and inherent probabilities of the case and is such which will carry conviction with a prudent person.

B. Mere congruity and consistency are not the sole test of truth, sometimes even falsehood is given at right appearance of truth so that truth disappears and falsehood comes on surface.

C. Once there arises a strong suspicion of the F.I.R. not being registered at the time when it is purported to have been lodged, the benefit of prompt reporting would not accrue to the prosecution. Under these circumstances the prosecution evidence would have to be evaluated and assessed independently after carefully testing it on all material particulars.

D. Absence of strong motive may not be fatal to the prosecution case based on ocular evidence but where there is an occasion to suspect the prosecution testimony motive accrues importance to test the probability of the prosecution case.

E. **Criminal Law - Indian Penal Code, 1860 - Section 141/149** - Where general allegations are made against a large number of persons the court must carefully scrutinize the evidence whether the assembly consisted of some persons which were merely passive witnesses and had joined the assembly as a matter of ideal curiosity without intending to entertain common object of the assembly and should hesitate to convict large number of persons if the evidence available on record is vague and also before convicting with the aid of Section 149 IPC the court must give clear finding regarding nature of common object and that the object was unlawful.

Appeal allowed. (E-12)

List of Cases cited:-

1. Hari Obula Reddy Vs St. of A.P., (1981) 3 SCC 675

2. Jalpat Rai Vs St. of Har., (2011) 14 SCC 208

3. Lakshman Prasad Vs St. of Bihar, 1981 (Supp) SCC 22

4. Alagupandi Vs St. of T.N., (2012) 10 SCC 451

5. Badam Singh Vs St. of M.P., (2003) 12 SCC 792

6. Ramchandran & ors. Vs St. of Kerala: (2011) 9 SCC 257

7. Kuldip Yadav & ors. Vs St. of Bihar: (2011) 5 SCC 324

(Delivered by Hon'ble Manoj Misra, J.
&
Hon'ble Sameer Jain, J.)

1. This appeal was presented on behalf of two appellants, namely, Ram Samujh and Rama Kant. The appeal of Rama Kant was abated vide order dated 21.08.2015, therefore, this appeal survives qua appellant no.1 Ram Samujh only.

2. This appeal is against the judgment and order dated 11.10.1983 passed by the third Additional Sessions Judge, Jaunpur in S.T. No.139 of 1981 connected with S.T. No.120 of 1981 whereby, the surviving appellant no.1 Ram Samujh, along with co-accused Rama Kant and Sher Bahadur Singh, has been convicted and sentenced under Sections 148, 302/149 and 307/149 IPC. Sher Bahadur Singh filed a separate Criminal Appeal No.2412 of 1983 which stood abated vide order dated 11.12.2015. This appeal has, therefore, been pressed only on behalf of the appellant no.1 Ram

Samujh, who has been convicted and sentenced as above in S.T. No.139 of 1981.

3. We have heard Sri Sageer Ahmad, learned Senior Counsel, assisted by Sri Shashwat Shukla, for the surviving appellant no.1 (Ram Samujh); Ms. Sanyukta Singh, Brief Holder, and Sri J.K. Upadhyay, learned AGA, for the State; and have perused the record.

INTRODUCTORY FACTS

4. On a written report (Ex. Ka-1), dated 01.05.1981, submitted by Achhaibar (PW-1), scribed by Devi Prasad Maurya (not examined), Case Crime No.56 of 1981, at P.S. Meerganj, District Jaunpur was registered at 01.30 hrs on 01.05.1981 of which GD Entry No.4 (Ex. Ka-9) and Chik FIR (Ex. Ka-8) was prepared by Shyam Lal Tiwari (PW-7). The FIR alleges that the informant (PW-1) for getting his wheat threshed had been at the pumping set of Yadunath Yadav (not examined) where Saheb Lal (the deceased), Saheb Lal's relative Rai Sahab (not examined) and Hanuman Prasad (PW-2) were present. At about 12 midnight, eight men armed with country made pistol, gun and bomb arrived, tied PW-2 and fired at Saheb Lal (the deceased). Saheb Lal fell whereas Rai Sahab escaped towards the village. In the meantime, when a second shot was fired at Saheb Lal, the informant intervened and pleaded that if they have to rob/loot they may go to the village but they should not kill. Upon which, those men threatened the informant, as a result, the informant tried to escape. While he was escaping, those men hurled a bomb. On explosion of that bomb, the dried Arhar (lentil) crop kept there caught fire and started burning, which lit the spot. In the light of that fire, the informant could identify three men, namely, Rama Kant Dube (the appellant no.2); Ram Samujh Mishra (appellant no.1); and Sher Bahadur Singh (the appellant in the connected appeal), who had country made pistol, gun and bomb with them. It is alleged that as the area got sufficiently lit, the accused effected their escape towards south west. On their escape, large number of persons gathered at the spot. Saheb Lal died on the spot whereas the informant received injury. After making allegations noticed above and by stating that the body of the deceased has been left at the spot, the FIR was lodged.

5. PW-1 (the informant) was medically examined by PW-5 (Dr. R.S. Shukla) at 3.15 pm on 01.05.1981. The injury report (Ex. Ka-6) notices following injuries:-

(i) Multiple tiny abrasions on back in an area of 30 cm x 30 cm. Black in colour. Soft scab red in color present.

(ii) Lacerated wound 1 cm x 0.5 cm x skin deep on left buttock.

(iii) Traumatic swelling 22 cm x 6 cm on left leg with an abrasion 0.4 cm x 0.4 cm, 8 cm below knee joint.

(iv) Multiple Tiny abrasions in area 18 cm x 8 cm on back of right leg. Firm red scab present.

Injuries are simple. No.1 and 4 is caused by blast injury and no.2 and 3 by blunt object. Duration about half day.

It be noted that the Chitthi Majrubi (letter for examination of the injured, prepared at the police station) on which the medical examination of PW-1 was carried out by PW-5 has not been

exhibited. The injury report (Ex. Ka-6) though reflects that it is a police case and the injured was brought by constable Shyam Narain Mishra (not examined) but the case crime number of the case is not mentioned.

6. As per the inquest report (Ex. Ka-10), inquest was completed by 7 am on 01.05.1981 by S.I. T.M. Tiwari (not examined) under supervision of the Investigating Officer (I.O.) Raj Nath Tripathi (PW-8). The inquest report records the name of Bhagelu, Jatashanker, Asha Ram, Devi Prasad and Nirhu as witnesses but none of them have been examined. *It be noted that the inquest report does not bear the case crime number though it mentions the name of PW-1 as the person who gave information at the police station at 1.30 hrs. But there appears overwriting on the digit "1" of the time mentioned in the first column of the inquest report. It be also noted that as per the entry in the inquest report, police left to go to the spot at 5 am in the morning. Another feature noticeable is that the inquest report bears no details of the police papers available, or prepared, or annexed with the inquest report, which, in ordinary course, are to be forwarded with a request for autopsy. As per Challan Lash i.e. Form-13 (Ex. Ka-13), the cadaver reached the District Police Headquarters, 50 km away from the spot, at 14.35 hours of which GD Entry No.22 was made at 14.35 hours at the District Police Headquarters. As per endorsement of Dr. R.P. Rastogi (autopsy surgeon) (PW-6) in Ex. Ka-13, the papers in respect of autopsy were received at the concerned hospital at 4.25 p.m. on 01.05.1981, whereas the body was received in the mortuary, in a sealed cloth, at 4.55 pm and the autopsy commenced at 5 pm. Notably, there is overwriting over digit "4" of the time 4.25 p.m. Another important feature noticeable from the record is that there is nothing to show that the Chik FIR or the GD Entry of the FIR was forwarded to the Autopsy Surgeon or was seen or endorsed by the Autopsy Surgeon (PW-6). It be, however, noted that Challan Nash (Ex. Ka-11), Form No. 33 (Letter requesting the surgeon to conduct autopsy) (Ex. Ka-12), sample seal (Ex. Ka-14) bear case details but the letter of the Station Officer requesting for an autopsy (Ex. Ka-15) bears no such details.*

7. Autopsy was conducted at 5 pm by Dr. R. P. Rastogi (PW-6). As per the opinion expressed in the Autopsy report (Ex. Ka--7), death could have occurred 3/4th of a day before. The features of the cadaver noticed during autopsy are below;

External examination: Body strong built wheatish complexion. Rigor mortis present upper and lower part of the body. Eyes and mouth closed with greenish discolouration (sic). Abdomen not distended.

Ante-mortem injuries:

(i) Gun shot wound of entry 3 ½ x 3 cm x abdomen cavity deep. Right side of abdomen 9 cm above umbilicus at 9 O'clock position and 16 cm below right nipple. Omentum protruded through wound. Blackening and scrorching and tattooing present around the wound.

(ii) Multiple gun shot wound of exit in an area of 15 cm x 12 cm x size 0.2 cm x 0.2 cm x muscle to abdomen cavity deep on lower part of left side of abdomen and left upper and outer of buttock into size 0.2 cm x 0.2 cm muscle to abdomen cavity deep. Margins everted under injury and left iliac bone fractured.

Internal examination:

Stomach ruptured near duodenal part. Semi digested food present. Small intestine having multiple through and through opening. Large intestine of descending colon lower part ruptured. Blood vessel (sic) greater omentum ruptured at many places.

Opinion:- Death due to shock and haemorrhage as a result of above injury.

8. The investigation of the case was conducted by PW-8 and two separate charge sheets were submitted. Ex. Ka-27 is the charge sheet submitted against Rama Kant and Sher Bahadur, whereas, Ex. Ka-28 is the charge sheet submitted against surviving appellant (Ram Samujh). After taking cognizance on the charge sheet, case was committed to the court of session. Two separate trials were instituted, namely, S.T. No.120 of 1981, which was against co-accused Rama Kant and Sher Bahadur, and S.T. No.139 of 1981, which was against the surviving appellant Ram Samujh. All the three accused were charged for offences punishable under Sections 148, 302 / 149 and 307/ 149 IPC. It be noted that in the memorandum of the charge there was an allegation with regard to formation of an unlawful assembly with five other unknown persons and of commission of murder of Saheb Lal and of making an attempt on the life of Achhaibar (PW-1) by hurling a bomb at him. The accused pleaded not guilty and claimed for a trial.

9. During the course of trial, eight prosecution witnesses were examined, namely, **Achhaibar** (PW-1- injured eye witness); **Hanuman Prasad** (PW-2- another eye witness); **Kamla Shanker Upadhyay** (PW-3- the constable who carried the body of the deceased to the mortuary for autopsy); **Kailash Nath** (PW-4- brother of the deceased Saheb Lal - who is not an eye witness but examined to prove the motive for the crime); **Dr. R.S. Shukla** (PW-5- the person who conducted medical examination of PW-1); **Dr. R.P. Rastogi** (PW-6- autopsy surgeon who conducted postmortem examination of the body of the deceased); **Shyam Lal Tiwari** (PW-7 - constable who made GD entry of the written report and prepared Chik FIR); and **Rajnath Tripathi** (PW-8 - the investigating officer who conducted the investigation of the case and submitted charge sheet).

10. After the prosecution evidence was led, the statement of the accused persons were recorded under section 313 CrPC. The trial court convicted and sentenced the appellants as noticed above against which, instant appeal has been filed.

PROSECUTION EVIDENCE

11. Before we proceed to notice the rival submissions, to have a clear understanding of the context in which those submissions have been made, it would be appropriate to notice the testimony of the prosecution witnesses. The testimony of the prosecution witnesses, shorn of unnecessary details, is as follows:-

12. **PW-1- Achhaibar.** He described the place of occurrence as being near to the pumping set of Yadhunath, located about two furlong (one furlong is equal to 220 yards) away from the village abadi, around which there were fields but no abadi. He states that Yadunath and Raghunath are brothers. Raghunath has two wives, namely, Batasi and Ramdei. Raghunath

does not have a son but only one daughter, namely, Chanri. Chanri's son is Rai Saheb. Yadunath has six sons. Three are very young whereas, the other three, Kailash (PW-4), Jayantri and Saheb Lal (the deceased) were adults. In addition to those sons, Yadunath has a daughter named Manju. Manju's Jeth (husband's elder brother) is Hanuman Prasad (PW-2). PW-1 states that at the time of the incident, except for Saheb Lal nobody else of Yadhunath's family was there. Yadunath, Kailash (PW-4) and Jayantri resided in Bombay. The younger sons resided in the village. PW-1 stated that the pumping set of Yadunath runs on electricity and has a thresher attached to it. The thresher machine was used to thresh his (Yadunath's) own as well as crop of other villagers.

In respect of the incident, PW-1 stated that, that night he had taken his crop for threshing to Yadunath's pumping set. He had reached there by about 11 or quarter to 11 pm, as the electricity used to come late in the night. At that time, there was no electricity. There, Saheb Lal (the deceased), Rai Sahab (not examined), Hanuman Prasad (PW-2) and Saheb Lal's mother Ramdei were present. At that spot, three paces away, towards south east of the pumping set, Saheb Lal and Rai Sahab were sleeping in a cot, four paces away towards north of the pumping set, Hanuman Prasad was sleeping in a cot, Ramdei was sleeping near the room, towards west of the pumping set, in her own cot. PW-1 stated that he was sleeping two paces north of the cot of Rai Sahab and Saheb Lal. Then PW-1 clarified that while he was awake, he saw that from west and south, few men, 7-8 in number, with torches on, were coming. When those men came close, PW-1 asked them as to why they have switched on their torches. Those men replied by saying that they had gone to hear folk stories (Birha). By then, Saheb Lal and Rai Sahab woke up. As soon as Saheb Lal stood up, a gun shot was fired at him, as a result of which, he stumbled and fell on a wheat bushel. Thereafter, a second shot was fired. Then, 3-4 men went towards Hanuman Prasad (PW-2) and tied him to the cot. Rai Sahab, however, escaped. PW-1 stated that when the second shot was fired, he ran 50 paces towards north of the pumping set and when he reached near the field of Kedar a bomb was thrown which exploded near dry Arhar (lentil) crop that was set ablaze and splinters of that bomb, struck PW-1 on his leg and back. PW-1 stated that as the Arhar crop started burning, the area got lit, in that light, he could identify Sher Bahadur, Ram Samjuh and Ramakant, the accused put on trial, who ran away. The remaining he could not identify but if they were brought before him, he would be able to identify them. PW-1 stated that Sher Bahadur had a Katta, Ram Samujh had a gun whereas Ramakant was empty handed. PW-1 stated that as Saheb Lal had died, his body was lifted from the wheat bushel, kept on a cot and covered by a cloth. Thereafter, PW-1 got the report scribed and lodged. PW-1 stated that the I.O. had sent him for medical examination to Sadar Hospital, Jaunpur where he was medically examined and had to remain there for eight days.

In his cross-examination, PW-1 admitted that his grand father (Ruchi) had two brothers, namely, Dukhi and Mukkhu. Mukkhu's wife was Ramdei, who is now Raghunath's wife. PW-1 stated that when Ramdei married Raghunath, she was already pregnant with Chanri. He admitted that his brother Bhagelu also has a pumping set, which runs on electricity and where also, there is a thresher. He stated that near

that pumping set, they have their holding and that pumping set is about one furlong away from Yadunath's pumping set. In paragraph 11 of his statement, PW-1 admitted that Ram Samujh (the surviving appellant) is a primary school teacher and has a licensed weapon. In paragraph 13 of his statement, when he was shown that in the FIR he had not mentioned that eight persons had arrived with torches in their hand, PW-1 stated that he made a mention of that in his report but if that was not written, he cannot tell the reason. When confronted with an omission in the FIR that those men, on being questioned, had stated that they were coming after hearing folk stories *(Birha)*, PW-1 stated that he cannot tell the reason for that omission. In paragraph 13 of his statement PW-1 stated that till the time he could notice the accused, he thought that those men were dacoits. When he was confronted with his previous statement under Section 161 CrPC to the effect that Ramakant was carrying a bomb, PW-1 stated that he did not make any such statement but if that was written, he cannot give the reason. In paragraph 14 of his statement, on being confronted with an omission in his previous statement that the gunshot was fired from a gun, PW-1 stated that he had disclosed that the shot was fired from a gun but if that was not written, then he cannot given the reason. In paragraph 15 of his statement, he stated as follows:-

"15– चोट लगने से मैं गिरा नहीं था। खड़ा ही रहा। मैं डर के कारण भागा था। चोट लगने के बाद मैं एक परग आगे बढ़ा और खड़ा हो गया। मैं और यदुनाथ, साहेबलाल एक ही बिरादरी के है। अंधेरे की वजह से मारने वाले को मैं नहीं पहचान पाया था। यह कहना गलत है कि रमाकांत व रामसमुझ मौके पर नहीं थे। यह भी गलत है कि मैं इन दोनों का नाम पार्टीबंदी, दुश्मनी और मृतक के बिरादरी का होने के नाते ले रहा हूँ।''

In paragraph 20 of his statement, he stated as follows:-

"मैं पढ़ा लिखा नहीं हू। मैं अपना नाम लिख लेता हूँ। जब गांव के लोग घटनास्थल पर आ गये तब मैं पंपिंग सेट पर आया। देवीप्रसाद से रिपोर्ट लिखने के लिए मैंने कहा और किसी ने नहीं कहा। घटना होने के 8–10 मिनट के बाद मैंने रिपोर्ट लिखने को कहा। यह गलत है कि दिन होने पर मैंने रिपोर्ट लिखाया था। मुझे ध्यान नहीं कि मैंने रिपोर्ट में यह शब्द आज बीती रात को लिखाया था या नहीं। ऐसी बात नहीं है कि रिपोर्ट थाने पर दूसरे दिन सुबह सलाह मशवरे के बाद लिखी गई। मैं अकेले थाने पर नहीं गया था।''

In paragraphs 22 and 23 of his statement, on being confronted that his son Amarnath was an accused in a case under Section 392 IPC in which Jayantri Lal and Saheb Lal (the deceased) were also accused, and in which Ram Chandra Singh was a witness, PW-1 denied the suggestion that co-accused Sher Bahadur was falsely implicated to pressurise Ram Chandra Singh to not press the case against his son under Section 392 IPC. In paragraph 24 of his statement, he claimed ignorance that Lal Bahadur, relative of Devi Prasad Maurya, scribe of the instant FIR, was an accused with Jayantri in that dacoity case. He also denied the suggestion that there were several cases against Jayantri in which PW-1 was a surety for his bail. He also denied the suggestion that in another case of dacoity, Yadhunath, Jayantri Lal, Saheb Lal and Rai Sahab were accused at the instance of Shyam Lal. In paragraph 27 of his statement he admitted that Arhar crop was at some distance from the spot. In paragraph 28 of his statement, PW-1 stated that Saheb Lal (the deceased) stepped off his cot from the northern side whereas Rai Sahab stepped off the cot from the southern side. The shot was fired from north west. The person who fired shot at Saheb Lal was

four paces away from the cot. He stated that the second shot was fired at Saheb Lal immediately when he fell and when the second shot was fired, it hit Saheb Lal on the left side of his abdomen. Immediately thereafter, PW-1 clarified that he did not notice where the first and second shot had hit Saheb Lal. Only when the area was lit, on return, after the accused had left, he noticed the injury. He denied the suggestion that Rai Saheb and Hanuman Prasad were not present at the spot.

13. **PW-2 (Hanuman Prasad).** He stated that his younger brother Rajendra Prasad is married to Yadunath's daughter Manju and, therefore, has relations with Yadunath and comes there often. In the night of the incident, he came from Mariyahu on a train, alighted at Jarauna Station where he met Rai Rahab and from there, he, along with Rai Sahab, came to village Bhatahar (the place of the incident). He stated that he and Rai Sahab, after having dinner, went to sleep at Yadunath's pumping set. There, he slept on a cot about a pace away, towards west of the water tank, whereas towards south, 7-8 paces away, Rai Sahab and Saheb Lal were sleeping on another cot. At the door of pumping set, Ramdei was sleeping. Ramdei is quite old and has poor eyesight. PW-1 had also arrived there for threshing. At that time, there was no electricity therefore, the thresher machine was not running. PW-2 stated that PW-1 was sleeping about two paces away, towards east, of the cot of Saheb Lal and Rai Sahab. At about 12 midnight, 7-8 men with country made pistol, gun and torches arrived. They started talking to PW-1. On this, PW-2 woke up and sat on the cot. As as he got up, 3 - 4 men came and tied him. He stated that when PW-1 objected to it, they threatened him. When Saheb Lal stood up, he was shot at, as a result whereof, Saheb Lal fell on the wheat bushel. Seeing all of this, Rai Sahab ran away. When Saheb Lal fell, another shot was fired at him. Then, PW-1 ran and was given a chase and a bomb was hurled at him, which fell on the Arhar crop, resulting in a fire lighting the area. PW-2 stated that there were 100-150 bushels of Arhar crop and in the light of that fire, PW-2 noticed Sher Bahadur Singh, Ram Samujh and Ramakant. PW-2 stated that Sher Bahadur had a country made pistol, Ram Samujh held a gun and Ramakant was empty handed. The remaining persons he could not recognise. He stated that Saheb Lal died on account of the injury received by him, whereas PW-1 received blast injuries. He stated he does not know whether the shot was fired from a gun or a country made pistol.

During cross-examination, he stated that he knows the sons of Sher Bahadur but he does not know any person in the family of Ram Samujh and, similarly, he does not know the family of Ramakant. He stated that Yadunath's threshing/ flour machine and the pumping machine are in the same room, which is 10-12 feet wide and long. Towards east of that room, there is a water tank and towards south there is a Khalihan. South west of that room, there is an electricity pole and at a short distance from that pole, Saheb Lal and Rai Sahab were sleeping. In paragraph 10 of his statement, he stated that he had noticed weapons in the hand of the accused even before the area was lit by fire. At this stage, he was confronted with his statement under Section 161 CrPC wherein he had stated that he could recognise the accused in the light of the burning crop and that he had seen Ramakant with a bomb. In response thereto, in paragraph 11 of his statement, he stated that he does not know

as to how that was written. He was also confronted with his previous statement under Section 161 CrPC where he had stated that he was sleeping. In response thereto, he stated that he was about to sleep and had just covered his face with a quilt.

He denied the suggestion that at the spot neither he was present nor he witnessed any of the accused and that what he has stated is on account of being a relative of the victim's family. In paragraph 16 of his cross examination, at the instance of Sher Bahadur, he stated that prior to the date of the incident he had never met Rai Sahab and that he never expected that he would meet Rai Sahab. To test him whether he knew about the village Bhatahar, questions were put to which he gave evasive answer in paragraph 17. From which it appeared that he did not know much about the village. On further cross-examination, in paragraph 20, he stated that except for the informant, the witnesses and the accused of this case, he knew one more person of that village who is a Block Pramukh but he does not remember his name.

In his cross-examination on 24.02.1982, he stated that Ramdei was not sleeping near him but if that has been written in his statement under Section 161 CrPC, then he cannot tell the reason. In paragraph 25 of his statement he stated that he had reached Yadunath's pumping set by 6-7 pm or may be 8-9.30 pm but by the time he reached there, it was dark and nothing was visible. Then, he stated that if it was totally dark, how could he have reached there. He stated that while they were lying there and talking to each other and were on the verge of sleep, PW-1 arrived there, but he had no talk with PW-1. PW-1 had arrived by about 11 pm. He stated that to cover themselves in the morning, they had quilts but they had not covered themselves with quilts at that time. He clarified his earlier statement that he had covered his face with quilt by stating that that statement is incorrect. The correct fact is that the quilt was kept below his head. In paragraph 28 of his statement, he stated that when he woke up and sat on his cot, initially, he thought that dacoits have come. He noticed them first, when they came to tie him. PW-2 stated that they tied him with a rope, which was lying near the well of Yadunath. On a specific question as to how much time it took them to tie him, PW-2 stated that it must have taken them 2-3 minutes and during that period gunshot was fired and when Ram Achhaibar (PW-1) ran, he was chased and a bomb was hurled at him. He further clarified that the statement which he made on the other day that 3-4 men had tied him is not correct but, in fact, the correct statement is that 3-4 men were tying him. At this stage, PW-2 was confronted with his statement under Section 161 CrPC where he had stated that some people had tied him with a cot to which he responded that he does not know the reason for recording the statement in that manner. He stated throughout the incident, 2-3 persons were standing next to him. In paragraph 31 of his statement, he stated that when the accused gave a chase to PW-1, he got opportunity to untie and get off the cot as the accused were giving a chase to Ram Achhaibar (PW-1). He stated that all the accused had given a chase to Ram Achhaibar. In paragraph 31, he stated that the accused chased Ram Achhaibar upto a distance of 50-60 paces. In paragraph 33, he stated that by the time Daroga Ji had arrived, most of the Arhar crop had burnt though some were burning. In paragraph 35 he stated that Rai Sahab was first to run away, thereafter, Ram

Achhaibar (PW-1) ran. PW-2 stated that when he was being tied he heard gunshots. He stated that though he heard two gun shots but he did not notice the firing of gunshot and the causing of injury by the gunshot. He stated that when Rai Sahab was escaping, the miscreants were flashing torch light on him and in that light, he saw Rai Sahab running away. When the accused escaped, he noticed that Saheb Lal was dead. He stated that Saheb Lal was wearing an underwear and a vest. He denied the suggestion that he was not present at the place and time of occurrence and is telling lies because of being a relative of victim's family.

14. **PW-3 Kamla Shanker Upadhyay**. He was the constable who carried the body of the deceased for autopsy. He stated that he received a sealed body for autopsy. He delivered the body in a sealed condition along with papers to the autopsy surgeon.

In his cross-examination, though he stated that the body was delivered to him at 8 am in the morning but he could not remember as to when he left the police station. However, he delivered the body at the mortuary at 4.55 p.m. He stated that he carried the body in a jeep. He also stated that in ordinary course it would take only two hours to cover that distance in a jeep. He denied the suggestion that he started his journey at 3 pm.

15. **PW-4 Kailash Nath.** He is the brother of Saheb Lal (the deceased). He stated that the date on which Saheb Lal was killed, he was not there in the village but was at Bombay. He stated that Sukhdeyi was widow of one Yadav. Prior to the incident, Sukhdeyi had executed a sale deed in favour of Ramakant Dubey (accused). But, alleging that that sale deed was executed by an imposter, Sukhdeyi had instituted a suit for cancellation of the sale deed, which was decreed ex-parte on 09.04.1981. The certified copy of the plaint of that suit was marked as Ex. Ka-2 and the decree passed therein was marked as Ex. Ka-3. PW-4 stated that Sukhdeyi had also instituted proceedings before the Settlement Officer of Consolidation in that regard and to prosecute those proceedings, she had appointed Saheb Lal (the deceased) as her attorney. The power of attorney was exhibited as Ex. Ka-4. PW-4 stated that his family and family of Sher Bahadur were in litigation which was pending as a revision, copy of which was marked as Ex. Ka-5. In paragraph 4 of his statement, PW-4 stated that Ram Samujh's brother, Ramdeo Mishra, is a teacher in an institution whose manager is Jokhan Singh i.e. father of Sher Bahadur Singh. In that institution, there is a Primary Pathshala in which Ram Samujh (surviving appellant) is a teacher and because of that relationship, Sher Bahadur Singh and Ram Samujh have close association with each other. He stated that Saheb Lal stays at home and looks after agricultural operations as well as pending cases.

In his cross-examination, he stated that he had been staying in Bombay since he was aged 8 years and that he visits the village once in a year and stays there for a month or two. He stated that six days after his brother's murder, he visited the village. He also stated that when Ramakant obtained a sale deed of the land of Sukhdeyi, he was not present in the village and he was also not in the village when Sukhdeyi instituted the suit. Only 8-9 days after the murder, he came to know about the sale deed and the suit. He stated that Sukhdeyi is alive and has two daughters,

who are married. In paragraph 7 of his statement, he clarified that the proceedings in connection with which Sukhdeyi executed power of attorney in favour Saheb Lal were still pending and after the death of Saheb Lal those proceedings were being looked after by her son-in-law, namely, Ram Bali and Ram Kishore. He stated that the suit instituted by Sukhdeyi was decreed ex-parte when Ramakant was in jail. He also stated that Sukhdeyi was in possession of that property. On being questioned whether PW-4 had enquired as to whether Ramakant had put in appearance in those proceedings, he feigned ignorance. He also denied the suggestion that the power of attorney was created after the death of Saheb Lal to add colour to the case.

In paragraph 14 of his statement, he stated that Ramdei's first husband was Mukkhu. He stated that he is not aware that Achhaibar (PW-1) is grand son of Mukkhu. He, however, admitted that Achhaibar (PW-1) is of the same Khandan. He denied the suggestion that because they had grabbed the property of Ramdeyi, there were many enemies of Saheb Lal. He also denied the suggestion that Saheb Lal was accused in multiple criminal cases. He claimed ignorance that Ram Samujh is a teacher in an institution which is not in the village.

16. **PW-5 Dr. R.S. Shukla**. - The doctor who medically examined PW-1 for his injuries. He proved injury report (Ex. Ka-6). He stated that he examined PW-1 at 3.15 pm on 01.05.1981. He proved the injuries mentioned in the injury report of which details have already been given above. He stated that all the injuries were simple. Injuries 1 and 4 could be from a blast, whereas injuries 2 and 3 could be from hard object. He stated that the injuries were about half a day old and could have been sustained round about midnight of 30.04.1981.

In his cross-examination, he stated that the injuries 2 and 3 could not have been caused on account of a fall but they could be from a lathi or a hard object. He also stated that it is possible that if someone is clothed and bomb particles hit the body, then injury of the nature described as injury no.2 could be caused.

17. **PW-6 Dr. R.P. Rastogi**, the autopsy surgeon. He proved the autopsy report, which was marked Ex. Ka-7. He stated that he recovered 20 metallic pellets from the body. He accepted the possibility of death having occurred around midnight of 30.04.1981.

In his cross-examination, he stated that *he received police papers at 4.25 pm and he conducted the postmortem at 5 pm*. He stated that in all the papers that he received, he had put his signature. He stated that at the time when he received the police papers, there was no copy of the FIR with it. *He stated that he never received any copy of the FIR.* In paragraph 8 of his cross examination, he stated that the injury no.1 is an entry wound, the margin of which is injury no.2 and the same would be possible if someone standing on the right side, near the head, fires a gunshot at the victim while the victim is lying on a cot. In paragraph 9 he categorically stated that both injuries found on the body of the deceased was from a single shot.

18. **PW-7 Shyam Lal Tiwari**, the constable who prepared Chik FIR and the GD entry of the report. He proved making of the Chik FIR (Ex. Ka-8) and the GD entry (Ex. Ka-9) of the report at its purported time and date.

In his cross-examination, he was confronted with the carbon copy of the Chik prepared of Case Crime No.63 of 1980, under Sections 395/397 IPC. He admitted that that case was registered by Sher Bahadur Singh against Jayantri. This paper was marked *Ex. Kha-1*. He was also confronted with carbon copy of the Chik prepared in connection with Case Crime No.136 of 1980, under Section 392 IPC, in which the informant was Shyam Lal Maurya and the accused were Jayantri, Saheb Lal, etc. This Chik copy was exhibited as Ex. *Kha -2*. In paragraph 5, he denied the suggestion that the report of this case was written at the police station in the presence of the I.O. and him. He also denied the suggestion that the deceased was brought on a cot to the police station and that cot was given to Kailash Nath after few days. *In paragraph 6, he denied the suggestion that the first information report was lodged on 02.05.1981 after obtaining the autopsy report. He also denied the suggestion that the general diary of the police station was kept vacant to fill up details of this case*. He admitted that except for making the Chik report and the GD entry of the written report, he has not prepared any other paper of this case.

19. PW-8 Rajnath Tripathi - Investigating Officer. He stated that after registration of the case, he took over investigation. At 4 am, he arrived at the spot. On account of darkness, he could not hold inquest proceedings till sun rise. He enquired from the witnesses, namely, Rai Sahab, Hanuman Prasad and Ramdei, who were present at the spot. At sun rise, he inspected the body and the spot and the inquest proceedings, under his direction, were conducted by S.I. T.M. Tiwari. He proved the signature of T.M. Tiwari on the inquest report (Ex. Ka-10) and photo-nash (Ex. Ka-11). He stated that the body was sealed on the spot and was sent for autopsy by handing it over to constable Premnath and constable Kamla Shanker Upadhyay (PW-3) along with documents which were exhibited as Ex. Ka-12, Ka-13 and 14. He stated that he prepared site plan (Ex Ka-16) on the basis of spot inspection. He stated that he lifted a portion of the bloodstained wheat bushel where the deceased Saheb Lal allegedly fell after being hit by gun shot. He proved the recovery memo which was marked Ex. Ka-17. That part of wheat bushel was also produced, which was marked material Ex.-1. He also proved recovery of ash of burnt *Arhar* which was marked as Ex. Ka-18 and the burnt ash was produced which was marked material Ex.-2. He proved recovery of particles of bomb and one empty cartridge K.F. Special (12 bore) of which the seizure memo was exhibited as Ex. Ka-19. The articles seized were produced and were marked as material Ex.-3 and 4. He proved recovery of the bed spread over which the body was laid. Seizure memo of which was exhibited as Ex. Ka-20. The bed spread was produced as material Ex. 5. He stated that after recording the statement of the inquest witnesses, he made efforts to arrest the accused and he arrested Ramakant Dubey near Janghai. PW-8 stated that on 02.05.1982, he received the medical examination paper of Ram Achhaibar as also the clothes, etc worn by the deceased at the time when he was killed including the pellets recovered from his body. The clothes and pellets were produced as material Ex. 6 and 7, respectively. He stated that he conducted search operations of the house of accused Sher Bahadur and Ram Samujh but nothing incriminating could be recovered. He proved the search memos of the two houses which were marked Ex. Ka.-21 and Ka.-22,

respectively. He stated that, thereafter, he was transferred from the police station concerned and the investigation of that case was taken over by Gyan Prakash Mishra, thereafter, by Ram Chandra Yadav and, thereafter, by Ram Nagina Singh (each one of them not examined). He also stated that during investigation accused Sher Bahadur Singh had surrendered in court, whereas proceedings under Sections 82/83 CrPC had to be drawn against the accused Ram Samujh and coercive steps were also taken to secure his arrest. He proved the various steps taken by Ram Chandra Yadav to arrest Ram Samujh, which were marked as Ex. Ka.-23 to Ka-26. He also proved submission of charge sheet against Ramakant and Sher Bahadur by investigating officer Gyan Prakash Mishra by identifying his signature, which was exhibited as Ex. Ka-27. He also proved the submission of charge sheet in abscondence against Ram Samujh by I.O. Ram Chandra Yadav, which was exhibited as Ex. Ka-28.

In his cross-examination, he stated that at the time of lodging the report two other men had also come with the injured (i.e. informant) but he was not aware as to how many others were standing outside. *He denied the suggestion that when the report was submitted the night had passed and it was dawn. On being confronted with the statement in the report "आज बीती रात", he stated that when he received the report, the night had not passed. He stated he is aware that term "बीती रात" refers to the night that had passed. Suggestion was put to him that the contents of the FIR suggested that it was scribed at the police station and, therefore, there could have been a correction in the words used in the FIR.* To this suggestion, PW-8 responded by saying that he has no right to change the contents of a written report. He stated that when he left the police station, it was dark. *He had left the police station with panchayatnama register, forms concerning it and case diary and no other paper.* He stated that from the police station the distance of Bankat Gaon is a kilometer and a half and from Bankat, Bhatahar is about another kilometer. In respect of Asha Ram, the witness to the inquest, being a resident of Bankat or Bhatahar, he could not tell as to of which village he was a resident. He also denied the suggestion that Asha Ram had been visiting the police station regularly. He denied the suggestion that Asha Ram had arrived at the spot with the police. He stated that when he arrived at the spot, lantern was lit but he did not notice any other source of light. He stated that whatever he had written there, was in the light of lantern or dibbi (kerosene lamp). He stated that the burnt ash was found 30 yards away, towards north, of the pumping set. He stated that he could not ascertain the quantity of ash. He did not notice any wood piece. He stated that there must be around 10-15 bushels of un-burnt *Arhar* but he did not mention that in any of his papers. He stated that the owner of that Arhar, namely, Kedar, had met him but he had not disclosed about the loss which he had suffered, therefore, there was no specific inquiry in that regard. He admitted that in such matters where crop is burnt, then Section 435 IPC can be put as a charge. He stated that since he was investigating a murder case, he did not investigate into that aspect. He stated that when he arrived at the spot, he found the body on a cot and not on the ground. He stated that there was no blood on the cot and therefore the cot was not seized. He stated that he also did not notice whether the cot was big enough to accommodate two men. He denied the suggestion that because the cot was not big enough to accommodate two men, he

deliberately did not seize the same. He denied the suggestion that the cot had been taken to the police and was brought back later. He stated that except for submitting the charge sheet, the entire exercise of that case was conducted by him.

PW-8 described the pumping station by stating that there were two rooms there, both had common exit.

In respect of site plan, PW-8 stated that if one had slept at "B' spot, he would not be able to see 'T' spot though he may be able to see 'A' spot. He stated that at spot 'B' he was not shown any rope with which Hanuman Prasad was tied. He stated that no such rope was taken by him into custody, though, during investigation, he was told that Hanuman Prasad was tied on a cot but that may not have been mentioned in the case diary. He stated that about 150 yards towards south there is *Harijan abadi* as well as *abadi* of *Lohar* community but he did not enquire from them in respect of the incident. In paragraph 31, he stated that during investigation he could not find report of any incident that might have occurred in last six months between accused Sher Bahadur and the deceased or his family, generating ill-will between them. *In paragraph 32 of his statement, he stated that he is not aware as to when the first parcha of the case was received in the office of Superintendent of Police. He stated that in the first parcha of the case, there is no date mentioned below the signature of the Circle Officer. Then, he stated that in the first parcha the receiving at the S.P. office is dated 2.6.81 and the second parcha also recites 2.6.81. Third and fourth parcha also recite date of receiving at S.P. office as 2.6.81, whereas, the fifth parcha recites the date 16.6.81. He denied the suggestion that he filled parcha nos.1, 2, 3 and 4 on 01.06.1981 and produced it in the S.P. office on 02.06.1981. He stated that on 02.05.1981, he received the postmortem report and then he came to know that there were two gun shot injuries. He denied the suggestion that after getting the result of post mortem, the report was got prepared at the police station. He stated that he does not know as to how the body was taken from the village. He stated that in the site plan which he prepared he did not show the wheat bushel that was brought by Achhaibar for threshing at the spot. He also stated that Achhaibar (PW-1) did not disclose to him that in the village electricity comes in the night and that eight men with torches had arrived and that Ramakant was empty handed and that the gun shot was fired from a gun. In respect of the statement made by Hanuman Prasad, during investigation, he admitted that during investigation Hanuman Prasad had stated that there was no electricity and that he had fallen asleep. He stated that Hanuman Prasad had not stated that he was on the verge of sleeping and had only covered his face with quilt.* PW-8 also stated that Hanuman Prasad stated that Ramdei was sleeping in front of the pumping set. He stated that Hanuman Prasad had also stated that few men had come and had tied him. In paragraph 38 of his statement, PW-8 stated that Sher Bahadur Singh is a man of status, having tractor and holdings. He denied the suggestion that the GD was kept vacant at the police station and the accused were implicated falsely.

20. The incriminating circumstances appearing in the prosecution evidence were put to the accused-appellant. They denied the incriminating circumstances and claimed that they have been falsely implicated out of enmity. It was also stated

that the informant and the prosecution witnesses of fact were close associates of each other and were telling lies. What is important to notice here is that an important circumstance relating to adoption of coercive processes to apprehend the surviving accused-appellant because of his alleged abscondence, as it appeared in the testimony of PW-8, was not put to the surviving appellant Ram Samujh while recording his statement under section 313 CrPC.

TRIAL COURT FINDINGS

21. The trial court found the occurrence duly proved by ocular account as well as material collected during investigation; and that PW-1, who was an injured witness and with whom the accused persons had no proven enmity, appeared wholly reliable. Accordingly, it convicted the accused appellants.

SUBMISSIONS ON BEHALF OF THE SURVIVING APPELLANT

22. The learned counsel for the appellant submitted that the deceased was a criminal and there were criminal cases of serious offences registered against him as is clear from Ex. Kha-1 and Ex. Kha-2. The motive for the crime set out against the accused is that Sukhdevi had instituted a suit to cancel sale deed against Rama Kant (non-surviving appellant) and to pursue the suit, the deceased Saheb Lal was given a power of attorney. It is submitted that this motive by itself is flimsy because how can a civil proceeding terminate by killing of an attorney. Sher Bahadur (non-surviving accused) was implicated because he had lodged a case against Jayantri (brother of the deceased), Saheb Lal (deceased) and others under section 395/ 397 IPC; whereas, Ram Samujh (surviving appellant) was implicated because he was a teacher in an institution of which, Sher Bahadur's father, Jokhan Singh was a manager. Thus, there was a strong reason to settle a score by utilising a night incident, where none could be noticed, to implicate persons with whom the victim party had enmity whereas, there was no strong reason for the accused, who were of different families, to join hand with each other as to form an unlawful assembly and participate in the crime.

23. It is submitted that as the identity of the miscreants could not be fixed, due to darkness, by guess-work, may be suspicion or ill-motive, three accused, out of eight suspects, were named by lodging an ante-timed FIR. To demonstrate that the FIR was ante-timed, following circumstances were highlighted:-

(i) The written report lodged at 1.30 am, in respect of an incident that allegedly occurred at about midnight, opens with the words "आज बीती रात" which suggests that it was lodged after dawn. Being a written report, it is expected for the scribe to be careful for the choice of words used therefore, when a phrase like "आज बीती रात" is used it means that the report is scribed after dawn and not on or about midnight.

(ii) From the statement of PW-8 it is clear that when he left the police station to go to the spot he did not carry with him copy of Chik Report and GD Entry of its registration. Further, the inquest report though mentions the name of the person from whom information with regard to death of the deceased was received but it does not bear the case details, which means that by the time the inquest report was prepared, the FIR had not come into

existence. This is corroborated by the circumstance that neither the FIR copy nor GD Entry copy are entered in the inquest report as documents accompanying inquest report to conduct autopsy.

(iii) From the challan lash (Ex. Ka-13) it appears the body reached the police headquarters, 50 kilometer away from the spot, at 14.35 hours, when, as per the statement of PW-3, the body was handed over to him at 8 am. Importantly, PW-3 stated that the distance which he covered should have been covered in two hours. According to PW-3, the body was taken in a jeep. If he had taken the body at 8 am in the morning, the body would have reached district police head quarters by 10 am or so but here it took them six hours 35 minutes. That apart, as per entry in Ex. Ka-13, the police papers were received by autopsy surgeon at 4.25 pm whereas body was received at 4.55 pm and, most interestingly, according to the doctor (PW-6) he did not receive copy of the FIR. All of this would suggest that the FIR was not lodged by then. It is therefore clearly proved that the FIR is ante-timed.

(iv) Another circumstance which is clinching on this issue is that the CD parcha nos.1, 2, 3 and 4 were all received in the office of Superintendent of Police on 02.06.1981 which is suggestive of the fact that there was no prompt reporting of the case to the supervising authority inasmuch as the police papers were being prepared at leisure. The very fact that the investigating officer was changed thrice would also suggest that the investigation was being carried out with ulterior motive and, therefore, not only the FIR was ante-timed but evidence was fabricated.

24. In respect of reliability of the ocular account of PW-1, it was submitted that PW-1 might have received injuries but all his injuries are on his back and leg while he was running. Admittedly, he neither recognised the person who fired at the deceased nor noticed the surviving appellant hurling a bomb at him. When the bomb was thrown and the gunshots were fired there was total darkness. What is important is that through Ramdei (second wife of Raghunath, who is brother of Yadunath i.e. father of the deceased Saheb Lal) PW-1 is related to the deceased. PW-1 admitted that he belongs to the same Khandaan. Thus, he is a partisan witness and interested in the prosecution of the accused for the reasons noticed above. Further, he improves upon the FIR to introduce torch flashes at the scene of occurrence when, otherwise, the FIR is silent in that regard. Not only that he also improves upon the FIR by specifying that the fire arm injury received by the deceased was from a shot fired from a gun and not from a country made pistol. Further, the ocular account is in respect of two gun shots fired upon the deceased whereas the autopsy report suggests that it is a case of single gun shot. Moreover, according to the doctor, the gun shot injury suggested that the shot was fired at the deceased whilst the deceased was lying and the shot was fired by a person who would have been standing on the right side of the head of the deceased. The ocular account does not match with this medical evidence. Moreover, according to ocular evidence two shots were fired. First, when the deceased stood up from the cot and was in a standing position and when, after the first shot, the injured (the deceased Saheb Lal) fell on the wheat bushel, the second shot was fired which struck him on right side abdomen. This account being at variance with autopsy report clearly suggests that nothing was witnessed except that unknown assailants came and fired and

threw bomb for whatever reason it might be.

25. In respect of reliability of PW-2, it is submitted that he is also a partisan witness being elder brother of the son in law of the victim's family and, importantly, is a chance witness who arrived that very day. Further, his statement that he was tied on a cot is not corroborated by seizure of any chord and who tied him is not disclosed by him. Importantly, from the site plan, it appears, he was lying on a cot at the other side of the pumping set room and from there he could not have noticed the assailants. Otherwise also, he speaks of two gun shots fired at the deceased which is in conflict with medical evidence.

26. That the I.O. made no effort to connect the empty 12 bore cartridge recovered from the spot with the licensed gun of the surviving appellant Ram Samujh; and the best evidence, namely, Rai Sahab, who was sleeping with the deceased in the same cot, has been withheld.

27. Lastly, it was submitted that all the accused have been prosecuted with the aid of Section 149 IPC. Though, it is alleged that there were eight persons but neither their identity has been confirmed nor it has been established beyond reasonable doubt that they shared a common object and constituted an unlawful assembly. It is submitted that as per the prosecution testimony those eight persons did not immediately launch an attack. Rather, as per ocular account, they entered into some kind of talks and, thereafter, fired a shot at the deceased. Who fired the shot is not disclosed and there is no statement that there was an exhortation to finish off the victim or to fire shots for any particular purpose. Under the circumstances, till the first shot was fired, there was no unlawful assembly. Otherwise also, according to the prosecution evidence those eight men were returning from a program (Birha - recital of folk stories). Under these circumstances even if those persons were allegedly carrying guns that, by itself, would not be sufficient to assume that they formed an unlawful assembly as the weapon could be for their own protection in the night. Further, after the shot was fired, it is not the case that all eight were moving together. Rather, the evidence is in respect of 3-4 persons tying PW-2 and of giving a chase to PW-1. Consequently, there was hardly any evidence to indicate that 5 or more persons formed an unlawful assembly with a common object. Hence, in any view of the matter, conviction with the aid of Section 149 IPC is not at all justified. It has thus been prayed that the judgment and order of the trial court which fails to take into consideration all these relevant aspects be set aside and the accused-appellant Ram Samujh (the only surviving appellant) be acquitted.

SUBMISSIONS ON BEHALF OF THE STATE

28. **Per Contra**, on behalf of the State it was argued that though there might be enmity between the parties but that by itself is not a ground to doubt the prosecution case more so, because the prosecution case is based on direct evidence. It has been submitted that it is proved on record that there were eight men, who were armed, and they had arrived together and had opened fire at the pumping station of Yadunath, at about midnight, killing one and injuring another by hurling a bomb. Therefore, it can easily be inferred that they were part of an unlawful assembly. Moreover, when they arrive as a group, variously armed with deadly weapons,

the members of that unlawful assembly could be imputed knowledge that any such offence as has been committed was likely to occur in prosecution of that object. It was submitted that PW-4 has also proved the motive for the crime and even assuming that the prosecution evidence is not specific in respect of who inflicted gun shot injury but as it is specific that the three accused, who have been put on trial, were part of that unlawful assembly comprising of eight men, the conviction of the accused appellant with the aid of section 149 IPC is justified. In respect of the FIR being ante-timed, learned AGA pointed out that non mention of case crime number in inquest report is not a clinching circumstance to assume that the FIR was ante-timed because there is no column in the form to mention those details. Moreover, the inquest report did disclose the name of the informant and the time at which the information was given. Hence, on that ground, the first information report cannot be said to be ante-timed. Further, a misstatement in the FIR with respect to "आज बीती रात" may be on account of change of date, post midnight, when the report was lodged therefore, it has no bearing on the issue. In respect of the delay in taking the body for autopsy, the learned AGA pointed out that the said delay by itself is not indicative that the FIR was not in existence because there may be various reasons for the delay. In respect of not forwarding copy of FIR and GD Entry thereof, the learned AGA submitted that it is a matter of practice but not a requirement of law to forward copy of the FIR to the autopsy surgeon therefore, on this ground it cannot be assumed that the FIR was ante-timed. He, therefore, submits that this is a case where prompt report was lodged.

29. In respect of the ocular account being in conflict with medical evidence, the learned AGA submitted that the witnesses though spoke about two gun shots but whether the two shots hit or only one shot hit the deceased was not possible to notice in the darkness of night therefore, the prosecution story cannot be discarded merely on that ground. Hence, there is no such discrepancy between the ocular account and the medical evidence as to render the ocular account completely unacceptable.

30. In respect of the source of light, learned AGA submitted that that the source of light were torches and the fire light generated on burning of Arhar crop which is confirmed by recovery of ash from the spot. It has thus been submitted that as the prosecution story flows from an injured witness whose presence cannot be doubted, there is a ring of truth about it and is fully supported by medical evidence as well as material collected during investigation therefore, the conviction recorded by the trial court calls for no interference.

ANALYSIS

31. Having noticed the rival submissions and the entire prosecution evidence, before proceeding further, it would be apposite to observe that the instant case is a case where the occurrence is of midnight. Admittedly, there was no electric power supply when the incident occurred and it is not the prosecution case that there were lanterns lit or there existed any other source of light except the flash of torches brought by those eight men (i.e. the accused) and the light of fire, which came, later, after the gunshots were fired and bombs were hurled, due to burning of Arhar crop. In this background, out of those eight men, naming only three, who, though, have enmity with the informant side for different reasons but are not of the same

family or group as to associate with each other, particularly, in that darkness of night, being men of stature with property and one of them (i.e. the surviving appellant) a teacher, leaves us to ponder whether it is a case where the informant party has exploited the situation of an occurrence to outwit its opponents. No doubt, motives do not have much significance where the prosecution case is based on ocular account but where the circumstances are such that due to darkness of night it might be difficult to identify a person whereas, strangely, the witnesses identify only those with whom they have enmity, by itself, is a reason for us to be circumspect while evaluating the prosecution testimony.

32. In addition to above, we would be dealing with a case where the witnesses are of the same family which had been in litigation with the accused side except the surviving appellant Ram Samujh. Therefore, it is a case where we have to deal with testimony of an interested witness/partisan witness. In that context, before we proceed to weigh the testimony of the prosecution witnesses, it would be apposite to notice few decisions as to how an interested witness testimony is to be evaluated. It is well settled that where the prosecution story finds support from interested or highly inimical witnesses, a degree of caution is required. In ***Hari Obula Reddy v. State of A.P., (1981) 3 SCC 675***, a three-judge Bench of the Supreme Court, with regard to the nature of caution required while assessing the testimony of an interested witness, in paragraph 13 of the judgment, observed as follows:

"..... it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it 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 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. Although in the matter of appreciation of evidence, no hard and fast rule can be laid down, yet, in most cases, in evaluating the evidence of an interested or even a partisan witness, it is useful as a first step to focus attention on the question, whether the presence of the witness at the scene of the crime at the material time was probable. If so, whether the substratum of the story narrated by the witness, being consistent with the other evidence on record, the natural course of human events, the surrounding circumstances and inherent probabilities of the case, is such which will carry conviction with a prudent person. If the answer to these questions be in the affirmative, and the evidence of the witness appears to the court to be almost flawless, and free from suspicion, it may accept it, without seeking corroboration from any other source. Since perfection in this imperfect world is seldom to be found, and the evidence of a witness, more so of an interested witness, is generally fringed with embellishment and exaggerations, however true in the main, the court may look for some assurance, the nature and extent of which will vary according to the circumstances of the particular case, from independent evidence, circumstantial or

direct, before finding the accused guilty on the basis of his interested testimony. We may again emphasise that these are only broad guidelines which may often be useful in assessing interested testimony, and are not iron-cased rules uniformly applicable in all situations." Emphasis Supplied

33. In **Jalpat Rai v. State of Haryana, (2011) 14 SCC 208,** after reiterating the general principles as noticed above, in paragraph 42 of the judgment, the Supreme Court cautioned the courts of the stark reality that where there is rivalry, hostility and enmity there is a tendency to over implicate and distort the true version against the person(s) with whom there is rivalry, hostility and enmity. In that context, it was observed as follows:

"42..... But it is a reality of life, albeit unfortunate and sad, that human failing tends to exaggerate, over implicate and distort the true version against the person(s) with whom there is rivalry, hostility and enmity. Cases are not unknown where an entire family is roped in due to enmity and simmering feelings although one or only few members of that family may be involved in the crime.

Prior to that, in paragraph 41 of the judgment, in respect of the mode to be adopted by the court while assessing the worth of an interested witness' testimony, the Supreme Court observed:

"41.....To find out the intrinsic worth of these witnesses, it is appropriate to test their trustworthiness and credibility in light of the collateral and surrounding circumstances as well as the probabilities and in conjunction with all other facts brought out on record."

34. In **Lakshman Prasad V. State of Bihar, 1981 (Supp) SCC 22,** in paragraph 3, the Supreme Court had observed that mere congruity and consistency are not the sole test of truth. It was also observed there that sometimes even falsehood is given an adroit appearance of truth, so that truth disappears and falsehood comes on the surface.

35. The law is thus clear that though testimony of an interested witness can alone form the basis of conviction but before its acceptance the court must satisfy itself whether it is free from suspicion, embellishment and exaggeration and whether the substratum of the story narrated by the witness is consistent with the other evidence on record, the natural course of human events, the surrounding circumstances and inherent probabilities of the case and is such, which will carry conviction with a prudent person.

36. Having noticed the law in respect of the caution to be exercised while assessing an interested witness' testimony, we shall now notice few decisions with regard to the relevance of motive. In **Alagupandi v. State of T.N., (2012) 10 SCC 451 (see para 29)** it was observed that though existence of a motive for committing a crime is not an absolute requirement of law but is a relevant factor which is to be taken into consideration by the courts for assistance in analysing the prosecution evidence and determining the guilt of the accused. In **Badam Singh v. State of M.P., (2003) 12 SCC 792,** the apex court, upon finding that the prosecution evidence was suspect and the deceased was a history sheeter and, therefore, could have had multiple enemies, whereas the prosecution had failed to prove motive against the accused put on trial, while giving benefit of doubt to the accused, in para 20 of the judgment, as

reported, observed: *"....Even though the existence of motive loses significance when there is reliable ocular testimony, in a case where the ocular testimony appears to be suspect the existence or absence of motive acquires some significance regarding the probability of the prosecution case." Thus, what is clear is that although absence of strong motive may not be fatal to the prosecution case based on ocular evidence but where there is an occasion to suspect the prosecution testimony, motive acquires importance to test the probability of the prosecution case.*

37. In the instant case, the motive for the crime is set out in the testimony of PW-4 who is not an eyewitness of the incident. According to him there is a land dispute between Sukhdeyi and Ramakant (non-surviving appellant). Sukhdeyi had executed a power of attorney in favour of Saheb Lal (the deceased) to prosecute her case in respect of cancellation of a sale deed set up by Ramakant as also to contest proceedings before the Settlement Officer of Consolidation in respect of grant of permission for such sale. Thus the motive set out against Ramakant is a civil dispute. As against Sher Bahadur there is a twin motive, one which is set out by the prosecution in the testimony of PW-4 and the other which has been suggested by the defence as a reason for his false implication. The motive set up by the prosecution against Sher Bahadur is a pending civil dispute between Yadunath (father of the deceased) and Satyendra Pratap (son of Sher Bahadur Singh) of which details have come in Ex. Ka-5. Whereas, according to the defence, the reason for false implication of Sher Bahadur is that he had lodged a case against Saheb Lal (the deceased) and Jayantri (brother of Saheb Lal), under sections 395/ 397 IPC, which was demonstrated on record through Ex. Kha-1 proved by PW-7. In so far as Ram Samujh (the surviving appellant) is concerned, the motive as against him is flimsy, which is, that Ram Samujh is a teacher in an institution whose manager, namely, Jokhan Singh, is the father of Sher Bahadur Singh. What is notable here is that though some motive has been attributed against all the accused but there is no indication as to why those three would join hand to launch an attack on Saheb Lal. This does affect the probability of the prosecution case and puts us on guard to carefully scrutinise the prosecution evidence to rule out the possibility of the informant party taking advantage of the situation to settle its score against three differently placed persons at one go. At this stage, we may notice that though there is no direct motive set out against the surviving appellant Ram Samujh for committing the crime but, it has come in the evidence (vide paragraph 11 of PW-1's statement) that Ram Samujh held a licensed gun, therefore, the presence of licensed firearm with him might have been a reason for his implication, either because of strong suspicion or to make him ineffective. But, what is important is that this firearm has not been forensically connected with the crime even though an empty cartridge is stated to have been recovered.

38. At this stage, we may notice that, though, the trial court considered Achhaibar (PW-1) as an independent witness but, on a close scrutiny of the prosecution evidence, it transpires that he is related to Ramdei (i.e. second wife of Raghunath i.e. uncle of Saheb Lal) and, therefore, falls in the same *Khandaan* to which the victim party belongs. In so far as PW-2 Hanuman Prasad is concerned, he is

deceased's sister's *Jeth* (elder brother in law) therefore, he too, cannot be considered an independent witness. Moreover, PW-2 appears to be a chance witness who belongs to another place and had allegedly arrived that very day by train in the night. He states that he met Rai Sahab, whom he had never met before, at the station and had come with him to the place of occurrence. As we have noticed the background facts, the eyewitnesses do fall in the category of partisan witnesses and, therefore, their testimony would have to be put to stringent tests before acceptance to record conviction.

39. No doubt, PW-1 is a person injured in the incident therefore, his presence at some stage of the incident cannot be doubted. But whether he had been present at the place of occurrence from the very beginning or arrived later or whether the incident occurred in the manner alleged are all issues which will have to be examined to ascertain whether the prosecution has been able to bring home the charge against the accused appellant beyond reasonable doubt. Notably, this is a case which occurred at midnight and at a place where, admittedly, there was no electricity at the time of occurrence and no source of light except the flash of torches, allegedly brought by the accused, and the light generated by fire, post the firing of gunshots and hurling of bomb. Therefore, merely, because PW-1 is a person injured in the incident, his testimony is not to be accepted as gospel truth and would have to be evaluated and assessed in the context of the surrounding facts and circumstances of the case borne out from the evidence brought on record.

40. To appropriately, evaluate the testimony of PW-1, we propose to divide his testimony into multiple parts, which are as follows: (i) PW-1 arrived at the spot at 11 pm or so, with his wheat bushel, for threshing at the pump station of Yadunath (deceased's father); (ii) as there was no electricity, he kept lying in wait for electricity to come; (iii) at that spot, there were Saheb Lal (the deceased) and Rai Sahab on one cot, Hanuma Prasad (PW-2) at some distance, on the other side of the pumping set room, on another cot, Ramdei near the door of the pumping set room in a separate cot and there, PW-1 lay not on a cot but on a Gath (a bushel); (iv) at about midnight, he saw 7 to 8 men flashing their torches and coming towards the spot from west and south; (v) when those men came close, PW-1 asked them as to why they were flashing their torches to which they responded by saying that they were coming after hearing folk stories (Birha); (vi) at this point, Saheb Lal and Rai Saheb stood up from their cot; (vii) as soon as Saheb Lal got up, he was shot from a gun, as a result, Saheb Lal fell on a Gath (bushel), immediately thereafter, another shot was fired from the gun; (viii) thereafter, 3-4 men went towards Hanuman Prasad (PW-2) and tied him to the cot; (ix) in the meantime, as soon as the first shot was fired, Rai Sahab effected his escape; (x) that when the second shot was fired, PW-1 also effected his escape towards north of the pumping set; (xi) that after running 50 paces, when he reached Kedar's field, a bomb was hurled, which exploded near *Arhar* bushel, resulting in a fire and some splinters also injured him; (xii) that the fire lit the spot and in that light he spotted and identified the three named accused including the surviving appellant and noticed that Sher Bahadur held a *Katta* (country made pistol), Ram Samujh held a gun whereas, Rama Kant was empty handed; (xiii) thereafter, the accused

escaped towards south west and Saheb Lal died on spot and his blood got splattered on the bushel.

41. On a cumulative view of all the above parts of PW-1's testimony, the ocular account rendered by PW-1 is in respect of two stages of the incident. First stage is where there was no light. The second stage is where there was light on account of crop burning. Notably, PW-1 does not say that he could recognise or identify any of the offenders before the area was lit by fire on account of crop burning. No doubt, there is mention of flashes of torch light by the accused but it is not his deposition that he could recognise anyone in those flashes of torch light. Another important aspect is that he does not say that he recognised any one on the basis of his voice. Rather, he stated that when the incident occurred, his initial impression was that dacoits have come. Meaning thereby, that initially he could recognise none. Therefore, what we have to test is whether PW-1 could and did recognise the appellants in the light of fire or the prosecution story is contrived as a figment of imagination, based on strong suspicion, or guess-work, or ill motives.

42. Ordinarily, where there is a prompt reporting of an incident, the possibility of the prosecution story being contrived is remote as there is not much time to deliberate and do guess-work. On record, the FIR is prompt. Therefore, the charge of the defence is that the FIR is ante-timed and has been lodged much after dawn and, probably, after autopsy. We therefore proceed to test whether the FIR is ante-timed. In this regard, at the outset, we may observe that this a case more than forty years old when digital records were a dream. With scientific advancement and records being in digital format it is difficult to canvass that the FIR is ante-timed. But in those old days where there were no digital records, ante-timing and back dating was possible. Consequently, we proceed to test the submissions bearing in mind the year to which this case relates to.

43. To test whether a first information report is ante-timed or not, there are no cut and dried formulae. As a first step in this regard, the court has to check whether the police papers prepared after registration of the first information report are not inconsistent with its existence. Ordinarily, where an inquest is conducted after the murder has been reported, the inquest report bears the case details. In this case, the inquest was, purportedly, carried out by 7 am on 01.05.1981 whereas the first information report was, purportedly, lodged at 01.30 hours of 01.05.1981 yet, it bears no case details. But what is important is that the inquest report recites the name of PW-1 as the person on whose information the inquest commenced. It also mentions the time at which the information was given at the police station, which matches with the time at which the FIR was purportedly lodged. But this recital is not conclusive of the existence of the FIR. The defence would say that the FIR was not in existence rather, a page / slot in the General Diary was reserved for filling the details later. Whereas, the prosecution would say that once receipt of information at 1.30 hrs is noted, and the name of informant appears in the inquest report, it means that the information was received at the police station. Both arguments are based on possibilities. As to what is probable, we would have to probe further on the issue.

44. In this context, we shall examine another submission of the defence counsel. According to the defence counsel, neither

the FIR nor the GD Entry of the report accompanied the inquest report or the papers forwarded to the autopsy surgeon for autopsy. Rather, the autopsy surgeon (PW-6) made a categorical statement that he did not receive copy of the FIR with the police papers. The learned AGA submitted that there is no requirement of law to forward the copy of the FIR therefore this is not a conclusive circumstance to indicate that the FIR was not in existence by then. In this regard, we may observe that the Code of Criminal Procedure is silent as to what papers need be forwarded by the I.O. along with his request for autopsy. However, U.P. Police Regulations, which is a compilation of instructions, issued by way of guidelines, vide paragraph 139 provides for the procedure to be observed when a body is sent for post-mortem examination. As per the procedure two forms are necessarily to be filled. One is Form No.13, which is commonly referred to as challan lash and the other is Form 33, which is a request letter addressed to the Civil Surgeon to conduct autopsy of the cadaver. Sub regulation (6) of Regulation 139 states that the investigating officer shall prepare in duplicate a descriptive roll of the body (i.e. commonly referred to as photo nash), containing particulars of identification and injuries that may be distinctly apparent. Paragraph 139 (7) of the UP Police Regulations mandate that Form No.13 must be filled with utmost care. In this Form No.13, the name of the police constable to whom the body is handed over and the time of such handing over has to be meticulously entered. It is also provided in sub regulation (7) of Regulation 139 that the I.O. shall also send information with regard to the cause of death as far as the investigating officer has been able to ascertain. Usually to comply with this requirement it is almost customary to forward the inquest report and sometimes they forward copy of Chik FIR or copy of GD Entry of the FIR, or both. In the instant case, the inquest report bears the signature of the autopsy surgeon suggesting that it was forwarded. But neither the inquest report nor the challan lash - Form 13 reflects the case crime number though it mentions the time of receipt of information/ report. Form 13 discloses that the body was handed over to the constable at 7 am and was received at the police head quarters, which was at a distance of 50 km from the spot, at 14.35 hrs. What is interesting is that the autopsy doctor received the papers at 4.25 pm whereas the body was received at 4.55 pm. Notably, in Form No.33 (Ex. Ka-12) there is an endorsement, marking to the doctor, to conduct autopsy. This endorsement is made at 4.15 pm. However, in our view, nothing much turns on these entries and the papers discussed above, as nothing is shown to us that there exists a statutory requirement to forward the Chik FIR or the GD Entry of the FIR along with the request for autopsy. But what is important here is that the inquest and autopsy related papers do not conclusively indicate that the FIR was in existence at the time of inquest as also at the time when requisition was sent for autopsy. What is also important is that there was delay in the body reaching the district police headquarters for autopsy.

45. At this stage, we may notice another submission of the defence counsel, which is that PW-1 was examined for his injuries by PW-5 at 3.15 pm on 01.05.1981. The injury report (Ex. Ka-6) does not disclose the case details and the *Chitthi Majrubi* has been suppressed. It was argued that if PW-1 was the informant and had arrived at the police station at 01.30 hrs in an injured condition, what was the reason

not to send him for medical examination promptly and to wait till 3.15 pm. It is submitted that this clearly suggests that that night he had not been to the police station to lodge the report. In our view, this does raise a doubt as to whether the report was lodged in the night at 1.30 hrs. However, what clinches the issue for us is an interesting recital in the written report with regard to the time of the incident. The first information report recites *"Aaj Beeti Raat"*, which means the night that had passed. If the night had not passed and it was just about midnight when the report was lodged, what was the occasion to mention what has been quoted above. This, therefore, creates a strong suspicion with regard to the first information report being lodged early morning or may be after the inquest was done. And when we consider this circumstance in conjunction with other circumstances, such as the inquest report not bearing the case details and the statement of the I.O. (PW-8) that after registration of the case he left the police station with no other paper except the panchayatnama register, forms concerning it and the case diary, the suspicion gets fortified, which gets amplified when we notice that the body sent on a Jeep reaches the destination, just 50 km away, in 6 hours 35 minutes. Noticeably, PW-3, the person who carried the body to the mortuary for autopsy, states that he was handed over the body at 8 am and that, in ordinary course, the distance of 50 km could be covered in two hours. But he gives no reason for the delay. All of this raises a strong suspicion that the police papers were under preparation and, therefore, the movement of the body was kept on hold. Be that as it may, once there arises a strong suspicion of the FIR not being registered at the time when it is purported to have been lodged, the benefit of prompt reporting would not accrue to the prosecution. Under these circumstances, the prosecution evidence would have to be evaluated and assessed independently after carefully testing it on all material particulars.

46. Bearing that in mind, we now proceed to assess and evaluate the worth of the ocular account rendered by PW-1 and PW-2. The ocular account is in respect of three overt acts of the accused comprising a group of seven to eight persons. First is with regard to a member of that group firing at the deceased; second is with regard to 3 to 4 members of that group tying PW-2 to cot; and the third is in respect of a member of that group throwing a bomb. All the above three overt acts were done in total darkness as it is not the prosecution case that either of the two eyewitnesses recognised any of the named accused before the *Arhar* crop caught fire. As per the ocular account, the three named accused could be recognised only when the *Arhar* crop caught fire. Notably, *Arhar* crop is not a petroleum product that it would burn instantaneously. It is thus probable that for a large scale burning of the crop to occur, some time must have elapsed inviting attention of fellow villagers who had their Abadi in the vicinity. In such circumstances, the possibility of the accused staying there at the spot and not effecting their escape when the job was done does not appeal to logic unless their intention was to loot or rob, which is not the prosecution case. Notably, the *Arhar* crop damaged was of Kedar who does not figure in the picture. Further, what is important is that, during cross examination, PW-1 admitted that his brother Bagelu was having a pumping set with a thresher attached to it, near which, PW-1 had his holding, which was just a furlong away. In that context, what was the

occasion for PW-1 to come to the spot for threshing. Therefore, the question that arises for consideration is whether PW-1 arrived when the incident was on the go or he was there from the start. At this stage, what is important to note is that PW-1 did not have his cot laid at the spot, rather, according to him, he was lying on a bushel. Bearing in mind that PW-1's brother had a thresher, near which PW-1 had his holding, there appears very little logic for PW-1 to arrive at the spot with his bushel for threshing. Notably, presence of PW-1's bushel at the spot has not been confirmed by the I.O. In these circumstances, the presence of PW-1 since the start of the incident appears doubtful and there is a possibility of him arriving at the spot when there was commotion due to gunshots and it is equally possible that when he may have arrived some miscreant may have thrown a bomb near him. But what we have discussed above, is a mere possibility, which is not sufficient to discard PW-1's testimony because we would have to test the same on the scale of probabilities.

47. When we test the ocular account on the scale of probabilities, the ocular account does not inspire our confidence as to the genesis of the incident, inasmuch as, if eight men had come armed with an object to finish off Saheb Lal why would they enter into a dialogue with PW-1 and tell him that they were returning after hearing folk stories *(Birha)*. Rather, they would, if they held torches enabling them to spot and identify, straight away launch an attack on their target and effect escape. What assumes importance here is that the accused had allegedly entered into a dialogue with PW-1. If it were so, and the named accused had been there, who belong to the same village, they would have been identified by their voice, gait or other distinguishable features and their participation in either firing of gunshots, or tying PW-2 to the cot, or hurling bomb(s), would have been specifically disclosed. But, interestingly, they could be recognised only when the crop started burning. And, most interestingly, when they were recognised, they did nothing. As we have observed earlier that *Arhar* crop is not a petroleum product as to have a low flash point, there would be some time taken to have a full fledged fire out of it. Therefore, the prosecution story does not inspire our confidence not only as to the genesis of the incident but also leaves a lingering doubt that the incident occurred in some other manner than what has been alleged. Notably, Saheb Lal was himself an accused in two cases and one of them was at the instance of one Shyam Lal Maurya. Thus, the possibility of him having other enemies cannot be ruled out. Another important feature of the case is that neither PW-1 nor PW-2 disclose that they heard accused exhorting each other or making any such utterances from which they could be recognised, or their intention, or object, could be gathered. They were also not able to tell as to who fired the shot at the deceased and who tied PW-2. Yet another feature noticeable in the prosecution testimony is that although 7 to 8 men are stated to have arrived, but participation by five or more persons, at any stage of the occurrence, is not borne out from the prosecution evidence. Noticeably, one man fired two shots, 3-4 persons tied PW-2 and, thereafter, they chased PW-1 and hurled bomb. Thus, it is not clear whether amongst those 7 to 8 men only 3 to 4 were miscreants or the entire bunch of 7 to 8 men were moving as a group comprising an unlawful assembly. At this

stage, we may observe that to fasten liability with the aid of section 149 IPC there should be clear evidence of constitution of an unlawful assembly comprising of five or more members. In absence whereof, conviction with the aid of section 149 IPC would not be lawful. No doubt, it is not necessary that all five, or more members, be identified as there could be unidentified persons also as part of that assembly, but where it is not clear that five or more persons were acting as a group and participating with an unlawful common object, assuming the existence of an unlawful assembly merely on the basis of count and conduct of few (less than 5 persons), when some of them might be innocent, it would be extremely unsafe to record conviction of two or three persons with the aid of section 149 IPC on their mere armed presence with no specific overt act ascribed to them. It be noted that in the instant case, there is no evidence that all the 7 to 8 persons were exhorting each other or acting in concert or belonged to a same group or family. Rather, the evidence is that they were returning from a village program (Birha). In such circumstances, few of them carrying weapon for their protection, particularly at night, by itself might not be an incriminating circumstance to assume that all of them held a common unlawful object so as to constitute an unlawful assembly. We are conscious of the law that an inference as to whether a group of persons constitute an unlawful assembly or not can be gauged from the conduct of that group as a whole, but each case turns on its own facts. In the instant case, the incident occurred in the darkness of night. There is no clear and cogent evidence that five or more persons participated at any given stage of the occurrence. Reference in the ocular account is specific to participation by 3 to 4 persons though there is reference of 7 to 8 persons coming with torches. Thus, in our view, the evidence with regard to existence of an unlawful assembly is nebulous and vague.

48. In the case of ***Ramchandran and others Vs. State of Kerala: (2011) 9 SCC 257,*** the Apex Court, in respect of determination as to whether an unlawful assembly existed or not, observed as follows:-

"The crucial question for determination in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons which were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly."

The Court also observed in paragraph 27 of the judgment that where general allegations are made against a large number of persons the court must carefully scrutinise the evidence and hesitate to convict large number of persons if the evidence available on record is vague.

49. In the case of **Kuldip Yadav and others Vs. State of Bihar: (2011) 5 SCC 324** the Court had observed that before convicting accused with the aid of Section 149 IPC, the Court must give clear finding regarding nature of common object and that the object was unlawful. In the absence of such finding as also any overt act on the

part of the accused persons, mere fact that they were armed would not be sufficient to prove common object. Section 149 creates a specific offence and deals with punishment of that offence. It was observed that whenever the court convicts any person or persons of an offence with the aid of Section 149, a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only the nature of the common object but also that the object was unlawful.

50. In the instant case, though the prosecution case is to the effect that there were seven to eight persons who had arrived at about midnight with weapons but there is no clear cut evidence that they had arrived with a view to finish off the deceased or as an unlawful assembly having one, or more, of the objects specified in Section 141 IPC. No doubt, an inference can be drawn with regard to existence of an unlawful assembly from the conduct of its members. But, here, what is important is that till the gunshot was fired at Saheb Lal there is nothing to indicate that those seven or eight persons shared a common object. Rather, those seven or eight persons were returning after attending a *Birha* program. It is not the prosecution evidence that there was no *Birha* program in the village. Thus, how and why an attack was launched at Saheb Lal required some explanation, which is completely lacking. There is no indication in the prosecution evidence that there were hot words exchanged or utterances made. The prosecution evidence in this regard is completely silent and vague. Notably, when the shot was fired the accused were not recognisable either by their face or by their voice therefore, in that darkness, how could it be gathered that those 7 to 8 men, as a group, were targeting Saheb Lal. Thus, it appears to be a case where the incident occurred in some manner other than what has been alleged by the prosecution and the informant party, who were inimical towards the accused, took advantage of the incident to implicate those with whom they had enmity.

51. To satisfy ourselves further, whether the witnesses could even recognise and identify in that darkness, we propose to test the ocular account with reference to the site plan (Ex. Ka-16) prepared by the I.O. on the basis of the spot inspection. The index of site plan depicts various points by letters, which are as follows: **"A"** is the spot where the cot of Saheb Lal (the deceased), on which he had slept with Rai Sahab, was located; "**B**" is the spot where the cot of Hanuman Prasad (PW-2), on which he had slept, was located; **"D"** is the spot from where blood etc. was lifted and near which the informant had slept; **"E"** is the spot where one empty cartridge was found; "F" is the spot where the burnt ash of Arhar crop was found; "M" is the spot inside the room where there was an electric motor; and "T" is the spot where thresher machine run with that motor was located.

52. What is noticeable in the site plan is that from point **"B"** where PW-2 is stated to have been lying, point **"A"** might not be easily visible as in between there is a built structure i.e. the room of the floor mill /the pumping set. The empty cartridge is found at point **"E"** and not at point "**A**" (i.e. the spot where deceased had his cot laid). Point "**D**" from where the blood has been recovered is next to point **"A"** and might not be noticeable from point **"B**" due to darkness as also because of the two rooms in between. The point **"F"** where the burnt ash of Arhar crop has been found

is towards north of points **"B"** and "**E**" and is far far away from from points **"A"** and **"D"**. If we take the site location into account, if at point **"B"** PW-2 had been tied, it would have been extremely difficult for him to witness the gunshots fired at the deceased at point **"A"**, particularly, in complete darkness, and, similarly, if the Arhar crop was set on fire, the light of that crop may not be sufficient to visualise as to what was happening at point **"B"**. Notably, in the testimony of the I.O. (PW-8), if somebody had slept at point "B", he will not be able to visualise place **"T"** though, he may be able to see place "**A**" but this appears to be on guess work because, place "**A**" and place **"T"** are adjoining each other and the view might get blocked by the rooms. Most importantly, in paragraph 25 of PW-8's statement, the burnt ash was discovered 30 yards towards north of the pumping set rooms. Interestingly, PW-1 ran 50 yards and then he stopped. From that distance, it appears improbable, if not impossible, for PW-1 to spot the perpetrators of the crime. Notably, the injuries which PW-1 suffered were on his back that is suggestive of him being in a running state when the bomb was hurled. Therefore, he could not even noticed as to who hurled the bomb. In that scenario with his back towards the accused probability of PW-1 recognising the named accused is low. Importantly, the site plan does not disclose as to where the named accused were, when they were spotted by PW-1. Even the location of PW-1 from where he spotted the named accused is not disclosed. What is interesting is that the eye witnesses have not stated that the accused were near the burning *Arhar* crop or were near the deceased when they were identified.

53. In view of the discussion above, we are of the considered view that the prosecution has not been able to prove its case against the surviving appellant beyond reasonable doubt. The possibility of an attack by dacoits or miscreants in the night on the victim party being taken as an opportunity to implicate those with whom the informant party had enmity appears probable. This probability is lent credence by a circumstance that out of seven or eight persons, the witnesses could identify only three with whom they had enmity and who, interestingly, do not come from one family as to associate with each other to participate in the crime. Further, there appears no commonality of interest in these three identified accused except that they have enmity with the informant party for different reasons. Once that is the position and there is a high probability of the FIR being ante-timed, as discussed above, we have no hesitation to extend the benefit of doubt to the accused appellant.

54. At this stage we may observe that in the prosecution evidence it has come that the surviving appellant held a licensed gun but no effort was there to seize it and connect it with the empty cartridge found on the spot. Further, the evidence brought on record suggests that the investigating officer of the case was changed several times. What was the reason for change of the investigating officers is not known but it does reflect upon the fairness of the investigating officer.

55. For all the reasons above, the appeal is **allowed.** The judgment and order of the trial court convicting and sentencing the surviving appellant Ram Samujh is set aside. The appellant is acquitted of the charge for which he has been tried and convicted. The appellant Ram Samujh was earlier on bail but his bail bonds were cancelled by order dated 10.03.2022 and

non bailable warrants were issued against him. If he has not yet been taken into custody, he is not to be taken in custody, subject to compliance of the provisions of Section 437-A CrPC. But, if he has been taken into custody, he shall be released forthwith, subject to compliance of the provisions of Section 437-A CrPC to the satisfaction of the trial court.

56. Let a copy of this order be forwarded to the court below along with the record for information and compliance.

(2022)05ILR A1408
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.04.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ Tax No.569 of 2022

Mohan Lal Santwani (HUF) ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Satya Vrata Mehrotra, Sri Abhinav Mehrotra

Counsel for the Respondents:
A.S.G.I., Sri Arvind Kumar Goswami, Sri Gaurav Mahajan

A. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department in itself an objectionable phrase or that is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court.

B. If there is a stay obtained from a higher forum, the mere fact of filing of an appeal will not entitle the authority to not comply with the order of the Forum.

Writ Petition allowed. (E-12)

List of Cases cited:-

1. U.O.I. Vs Kamlakshmi Finance Corp. Ltd. 1992 (Suppl) SC-C 443 (para 6)

2. Official Liquidator Vs Dayanand & ors. (2008) 10 SCC (para 90)

3. Kishore Samrite Vs St. of U.P. & ors. 2013 (2) SCC 398 (para 29)

4. Bishnu Ram Borah & anr. Vs Parag Saikia & ors. 1984 (2) SCC 488 (para 11)

5. Bhopal Suger Industries Ltd. Vs Income Tax Officer, Bhopal AIR 1961 (5) SC 182

6. Commissioner of Income Tax Vs Ralson Industries Ltd 2007 (2) SCC 326 (para 9)

7. U.O.I. Vs Namit Sharma 2013 (1) SCC 745 (para 108.14)

8. Dr. H. Phunindre Singh & ors. Vs K.K. Sethi & anr. (1998) 8 SCC 640 (para 2)

9. Ghaziabad Development Authority Vs Balbir Singh (2004) 5 SCC 65 (para 26)

10. Pramod Kumar Dixit & anr. Vs Central Administrative Tribunal & Ors Writ Petition No. 1082 (SB) of 2009, decided on 15.12.2010

11. Sadanand Mukherji Vs St. of U.P. & ors. 2009 (1) UPLBEC 167 (para 4 and 5)

12. Income Tax Appeal No. 293 of 2016 (The Pr. Commissioner of Income Tax-9, Mumbai Vs M/s Associated Cables Pvt. Ltd, Mumbai, decided on 03.08.2018

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Jayant Banerji, J.)

1. Heard Sri Abhinav Mehtotra, learned counsel for the petitioner and Sri Gaurav Mahajan, learned counsel for the Income Tax Department.

Order on Amendment Application No.02 of 2022 dated 18.04.2022

2. With the consent of the learned counsel for the parties, amendment application is allowed. Necessary amendment be carried out during the course of the day.

The applicant is also permitted to correct the Assessment Year in the prayer clause of the amendment application.

Order on Writ Petition

3. This writ petition has been filed praying for the following relief:-

"(a) Issue a writ, order or direction in the nature of certiorari quashing the order dated 19.03.2022 passed by the respondent revenue rejecting the objections taken by petitioner on the matter concerning "issue" of notice under Section 148 of the Income Tax Act.

(b) Issue a writ, order or direction in the nature of certiorari quashing the notice under Section 148 of Income Tax Act, as also the Sanction, authorizing the issuance of such notice, both even dated 31.03.2021; and the connected proceeding for reassessment of Income for A.Y. 2013-14.

(c) That, this Hon'ble Court be pleased to issue a writ, order or direction in the nature of certiorari, quashing the impugned order of Assessment for A.Y. 2013-14 , dated 29.03.2022, bearing DIN ITBA/AST/S/147/2021-22/1041898744(1), passed by Assessing Officer."

4. On 18.04.2022, this writ petition was heard at length and following order was passed.

1. Heard Shri Abhinav Mehrotra, learned counsel for the petitioner, Shri Gaurav Mahajan, learned Senior Standing Counsel for the respondent nos. 2, 3 and 4 and Shri Arvind Kumar Goswami, learned Central Government Standing Counsel for the respondent no. 1.

2. This writ petition has been filed praying for the following relief:

"(a) Issue a writ, order or direction in the nature of certiorari quashing the order dt. 19.03.2002 passed by the respondent revenue rejecting the objections taken by petitioner on the matter concerning "issue" of notice under Section 148 of the Income Tax Act.

(b) Issue a writ, order or direction in the nature of certiorari quashing the notice under Section 148 of the Income Tax Act, as also the sanction, authorising the issuance of such notice, both even dt. 31.03.2021; and the connected proceedings for reassessment of income for A.Y. 2013-14."

3. The petitioner has earlier filed Writ Tax No. 171 of 2022 which was disposed of by order dated 10.3.2022 as under:

"Heard Sri Abhinav Mehrotra, learned counsel for the petitioner, learned A.S.G.I. for the Union of India - respondent No.1 and Sri Gaurav Mahajan, learned senior standing counsel for the Income Tax Department - respondent Nos.2 and 3.

All the learned counsels for the parties jointly state *that the question of issuance of notice has been decided today by this court in Writ Tax No.78 of 2022 (Daujee Abhushan Bhandar Pvt. Ltd. vs. Union of India and 2 others). They jointly state* ***that since the petitioner has raised objection before the Assessing Authority on the point of issue of notice which is pending disposal before the Assessing Authority, therefore, the Assessing Authority may be directed to decide the objection in accordance with law after considering the judgment in the case of Daujee Abhushan Bhandar Pvt. Ltd. (supra).***

In view of the aforesaid, the writ petition is disposed of directing the respondent-authority concerned to decide the objection of the petitioner against the notice under Section 148 of the Act, 1961, in accordance with law on the point of date of issuance of notice."

4. Thereafter, the respondent no. 4 has passed the impugned order in which it observed as under:

"Further, Hon'ble Allahabad High Court has quashed such notices issued u/s 148 on or after 01.04.2021. But the Department has filed SLP before Hon'ble Supreme Court on this issue. Therefore, till the outcome of the issue pending before Hon'ble Court, it cannot be said that the notice is not valid. Therefore, your objections have no force and therefore rejected. *Please this may be treated as disposal of your objections."*

5. Thus, the aforequoted observation made by the respondent no. 4 in the impugned order dated 19.3.2022, prima facie, appears to be highly contemptuous, whimsical and against all settled principles of propriety and law.

6.Apart from above, ***the impugned order, prima facie, appears to be misleading inasmuch as in the impugned order, the respondent no. 4 has deliberately not disclosed 'sent time stamp' reports which is always available with the department.*** *That apart, as per reports being filed before this Court by means of counter affidavits and to be precise in Writ Tax No. 211 of 2022, there is 'Income Tax Business Application Technical Team' which used to give the date and time of (i) generation of notice, (ii) digital signing in ITBA by AO, and (iii) triggering of e-mail. These details are also totally lacking in the impugned order.*

7. Under the circumstances, we direct the respondent no. 4 to file a personal affidavit of an officer of the Centre not below the rank of Additional Commissioner of Income Tax to explain the things as noted above and file copies of 'sent time stamp' and reports of Income Tax Business Application Technical Team, within three days.

8. Put up as a fresh case on 21.4.2022 at 10:00 AM.

(emphasis supplied by us)

5. On 21.04.2022, matter was again heard and following order was passed, as under"-

"1. Heard learned counsels for the parties.

2. Shri Gaurav Mahajan, learned Senior Standing Counsel for the respondent-Income Tax Department prays for further time to enable the respondent

no.4 to file his personal affidavit in compliance to the order dated 18.04.2022.

3. In our order dated 18.04.2022, we have noted the facts as well as the conduct of the respondents that they have clearly denied to obey the final judgment of this Court. That apart, the respondents have also attempted to mislead the Court by suppressing material facts. Despite time granted, personal affidavit is not being filed by the respondent no.4.

4. Instances of not obeying orders of this Court by the respondent-Income Tax authorities, are increasing day-by-day.

5. In view of the aforesaid, last opportunity is afforded to the respondent no.4 to file his personal affidavit in compliance of the order dated 18.04.2022 before the next date fixed subject to payment of cost of Rs.5000/- which shall be deposited with the High Court Legal Services Committee, High Court, Allahabad.

Put up as a fresh case for further hearing on 25.04.2022 at 10:00 a.m."

6. Sri Gaurav Mahajan, learned counsel for the respondents has filed a print out of online deposit of Rs. 5,000/- as cost with the High Court Legal Services Committee, High Court Allahabad along with a receipt i.e. the amount of cost imposed by means of the previous order dated 21.04.2022.

7. Today, a short counter affidavit dated 24.04.2022 has been filed by the learned Senior Standing Counsel on behalf of the respondent nos. 2,3 and 4. In paragraph no. 3,5,6,7,8 and 9 of the aforesaid short counter affidavit filed on behalf of the respondent no.2,3 and 4, it has been stated as under:-

*3. That at the very outset it is most humbly and respectfully submitted that t**he deponent personally and on behalf of the officers of the ReFAC(AU) tenders an unconditional apology for the language used in the order dated 19.03.2022** by which supplementary/additional objection of the petitioner were decided.*

Neither the deponent nor the officers of the Assessment Unit had any intention to disobey/disregard the judgment of this Hon'ble Court in the case of Ashok Kumar Agarwal and have the highest regard to the judgments of the Hon'ble Court.

*5. That it is most respectfully submits **that FAO** who may be sitting in any corner of the Country for the Faceless Assessment Scheme **is not aware of the technical information about date and stamp of issue of notice, dispatch of notice or service of notice.** The FAO receives a digitally maintained Order Sheet which automatically got generated on the date of issuance of the notice u/s 148 of the Act. The digitally generated order sheet mentions the date wise, actions/descriptions, from user to user, remarks etc. A photocopy of the order sheet maintained digitally is enclosed herewith and marked as Annexure No. SCA-1.*

6. That the information available with FAO was that the notice under 148 of the Act was issued by Jurisdictional assessing Officer on 31-03-2021 and that the notice u/s 148 was placed on the e filing portal of the assessee on 31-03-2021. The rest of information with regard to issuance

of notice is now provided by the ITBA /JAO in response to the High Court Order vide his email dated 23-04-22 sent to office of the deponent.

7. That in the present case the Technical Team of ITBA provided the following details to the JAO through email on 22.04.2022 and the same was also shared with the office of the deponent. The reply received from the Technical Team of ITBA is as follows :-

Date & time of Generation of Notice u/s 148 in ITBA system by AO:

3/31/2021 9:01:29 PM

Date & time of Digital signing (DSC) in ITBA by AO :

3/31/2021 9:51:46 PM

Date &time of triggering of email automatedly by ITBA technical servers :

4/01/2021 5:30:08 AM

Date & time of delivery of email as per data in ITBA technical servers : 4/01/2021 5:30:10 AM

A photocopy of the email from JAO is enclosed herewith and marked as Annexure No. SCA-2.

8. That it is most respectfully submitted that there was no concealment on the part of FAO or ReFAC(AU) as such there was no attempt to misiead nor was there any intention to mislead. That it is most respectfully submitted that on the order dated 19.03.2022 was passed keeping in mind the directions of Hon'ble Court vide order dated 10.03.2022 "to decide the objection of the petitioner against the notice under Section 148 of the Act, 1961, in accordance with law on the point of date of issuance of notice" and as per the details available that the notice was issued on 31.03.2021, the FAO was under bonafide belief that the notice been duly reflected on the portal of the assessee on 31.03.2021. It is further most respectfully submitted that the details of time of issuing the notice and digitally signing have now been received from JAO/ITBA team.

9. That the deponent has examined the orders and letters issued by FAO and it is undeniable that the choice of words and language used by FAO is unacceptable. The FAO has represented before the deponent that he cannot even dream to think of disobeying or showing disregard to the orders of the Court. The only purpose was to communicate and convey to the assessee the fact that the SLP of the Department was pending before the Hon'ble Supreme Court and on the date of this affidavit the judgment has been reserved by the Hon'ble Supreme Court."

8. From the averments made by the respondent nos. 2,3 and 4 in the aforesaid short counter affidavit, it is evident that the notice under Section 148 of the Income Tax Act, 1961 for the Assessment Year 2013-14 was issued to the petitioner on 01.04.2021, whereas the limitation of issuing the notice expired on 31.03.2021. Thus notice under Section 148 of the Income Tax Act, 1961 was time barred and consequently it was without jurisdiction.

9. Since large number of writ petitions are being filed in which the date and time of issuance of notice under Section 148 of the Income Tax Act, 1961 are in issue, and, importantly, those notices are being issued by e-mail, **it is directed**

that the respondent no. 1 shall ensure that the date and time of triggering of e-mail for issuing notices and orders are reflected in the online portal relating to the concerned assessees.

10. Facts of the case as discussed above, particularly the observations made by the respondent no.4 in the last line of the impugned order dated 19.03.2022 noticed by us in our order dated 18.04.2022 quoted in paragraph 4 above clearly indicates that the order dated 19.02.2022 has been passed by the respondents in breach of judicial discipline and propriety causing harassment to the petitioner/assessee on account of the failure to give effect to the order of this Court dated 10.03.2022 in Writ Tax No. 171 of 2022 which was filed by the petitioner. We propose to comment on the conduct of the officer concerned but the respondents have tendered unconditional apology by filing a short counter affidavit dated 22.04.2022, as noted in para 7 above, therefore, in view of the unconditional apology tendered by the deponent Sri Pawan Kumar Sharma, Additional Commissioner of Income Tax in the aforesaid short counter affidavit, we do not propose to proceed against the respondent no.4 by referring the matter for contempt. However, we direct the respondents to be careful in future and must have due regard to the judgments and orders of this Court, keeping in mind the settled principal of judicial propriety and discipline.

Breach of Judicial Discipline-Misconduct-Contemptuous.

11. In the case of ***Union of India Vs. Kamlakshmi Finance Corpn. Ltd. 1992 (Suppl) SC-C 443 (para 6)*** Hon'ble Supreme Court upheld the observation of Hon'ble High Court on the conduct of an Assistant Collector and the harassment to the assessee caused by the failure of these officers to give effect to the order of authorities higher to them in the appellate hierarchy and has held as under:

"6. Sri Reddy is perhaps right in saying that the officers were not actuated by any mala fides in passing the impugned orders. They perhaps genuinely felt that the claim of the assessee was not tenable and that, if it was accepted, the Revenue would suffer. But what Sri Reddy overlooks is that we are not concerned here with the correctness or otherwise of their conclusion or of any factual mala fides but with the fact that the officers, in reaching their conclusion, by-passed two appellate orders in regard to the same issue which were placed before them, one of the Collector (Appeals) and the other of the Tribunal. ***The High Court has, in our view, rightly criticised this conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellate hierarchy.*** *It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal.* ***The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not***

"acceptable" to the department -- in itself an objectionable phrase -- and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws."

(Emphasis supplied by us)

12. In the case of ***Official Liquidator Versus Dayanand & Ors. (2008) 10 SCC (para 90)*** Hon'ble Supreme Court observed that ***"....it must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in last six decades...."***

13. In the case of ***Kishore Samrite versus State of U.P. and others 2013 (2) SCC 398 (para 29),*** Hon'ble Supreme Court held as under:-

"29. Judicial discipline and propriety are the two significant facets of administration of justice*. Every court is obliged to adhere to these principles to ensure hierarchical discipline on the one hand and proper dispensation of justice on the other. Settled canons of law prescribe adherence to the rule of law with due regard to the prescribed procedures. Violation thereof may not always result in invalidation of the judicial action but normally it may cast a shadow of improper exercise of judicial discretion."*

14. In the case of ***Bishnu Ram Borah and another Vs. Parag Saikia and others 1984 (2) SCC 488 (para 11),*** Hon'ble Supreme Court observed as under:-

"11. It is regrettable that the Board of Revenue failed to realize that like any other subordinate tribunal, it was subject to the writ jurisdiction of the High Court under Article 226 of the Constitution. ***Just as the judgments and orders of the Supreme Court have to be faithfully obeyed and carried out throughout the territory of India under Article 142 of the Constitution, so should be the judgments and orders of the High Court by all inferior courts and tribunals subject to their supervisory jurisdiction within the State under Article 226 and 227 of the Constitution****. We cannot but deprecate the action of the Board of Revenue in refusing to carry out direction of the Hon'ble High Court.....".*

15. ***In the case of Bhopal Suger Industries Ltd. Versus Income Tax Officer, Bhopal AIR 1961 (5) SC 182,*** *Hon'ble Supreme Court observed that " .....the Income Tax Officer had virtually* ***refused to carry out the clear and unambiguous directions*** *which a superior tribunal like the Income Tax Appellate Tribunal, had given to him by its final order in exercise of its appellate powers in respect of an order of assessment made by him, such refusal* ***is in effect a denial of justice, and is furthermore destructive of one of the basic principles in the administration of justice based as it is in this country on a hierarchy of courts...."***

16. Law laid down in the aforesaid judgments has been reiterated by the Hon'ble Supreme Court in the case of ***Commissioner of Income Tax versus Ralson Industries Ltd 2007 (2) SCC 326 (para 9).***

17. In the case of ***Union of India Versus Namit Sharma 2013 (1) SCC 745 (para 108.14)*** Hon'ble Supreme Court explained the precedent and judicial discipline and held as under:-

*"**108.14.** Under the scheme of the Act of 2005, it is clear that the orders of the Commissions are subject to judicial review before the High Court and then before the Supreme Court of India. In terms of Article 141 of the Constitution, the judgments of the Supreme Court are law of the land and are binding on all courts and tribunals. Thus, it is abundantly clear that the Information Commission is bound by the law of precedence i.e. judgments of the High Court and the Supreme Court of India. In order to maintain judicial discipline and consistency in the functioning of the Commission, we direct that the Commission shall give appropriate attention to the doctrine of precedence and shall not overlook the judgments of the courts dealing with the subject and principles applicable, in a given case. It is not only the higher court's judgments that are binding precedents for the Information Commission, but even those of the larger Benches of the Commission should be given due acceptance and enforcement by the smaller Benches of the Commission. The rule of precedence is equally applicable to intra-court appeals or references in the hierarchy of the Commission".*

18. In the case or ***Dr. H. Phunindre Singh and others Vs. K.K. Sethi and another (1998) 8 SCC 640 (para 2)*** Hon'ble Supreme Court considered the question of deliberate violation of the subsisting order of the Court and held as under:-

" 2. Heard learned counsel for the parties. In our view, in the facts of the case, particularly when the order passed by the learned Single Judge of the High Court was not stayed by the Division, Bench, the contempt petition should have been disposed of on merits instead of adjourning the same till disposal of the appeal, so that question of deliberate violation of the subsisting order of the Court is considered and enforceability of the Court's order is not permitted to be diluted. In the facts of the case, we feel that the contempt petition should be disposed of within a period of three months from the date of the communication of this order and we order accordingly. It is further directed that before disposal of the contempt petition, the pending appeal should not be taken up hearing. The appeal is accordingly disposed of".

19. In the case of ***Ghaziabad Development Authority Vs. Balbir Singh (2004) 5 SCC 65 (para 26)*** Hon'ble Supreme Court held that " .....***We therefore clarify that unless there is a stay obtained from a higher forum, the mere fact of filing of an appeal will not entitle the authority to not comply with the order of the Forum***. *Even though the authority may have filed an appeal/revision, if no stay is obtained or if stay is refused, the order must be complied with....."*

20. In the case of ***Asit Kumar Das Versus J. Panda, the Chief Post Master Central and Ors. (Civil Appeal No.1227 of 2015)***, order dated 22.02.2015 Hon'ble Supreme Court observed that "..... *it is trite that the* ***filing of an Appeal does not result in the assailed order becoming inoperative and unworthy of being complied with***. *There was, therefore, no justification for taking the contempt petition off the list of the High Court, albeit with permission granted for its relisting....."*

21. In the case of ***Pramod Kumar Dixit & another Vs. Central Administrative Tribunal & Ors Writ Petition No. 1082 (SB) of 2009***, decided on

15.12.2010, Division Bench of this Court held that ***" .....once this Court had given a direction to decide the matter on merit it was not open for the Tribunal to dilute the mandate of the order by declining the admission of original application***. The order of the Tribunal seems to be bordering on the contempt of the order of the High Court....."

22. In the case of ***Sadanand Mukherji Vs. State of U.P. & others 2009 (1) UPLBEC 167 (para 4 and 5) Hon'ble Court held as under:-***

"4. Now, while deciding the present controversy learned Tribunal recorded a finding that the claim petition is not maintainable for the same relief, ***when this Court while remitting back the case to the Tribunal directed the Tribunal to decide the same on merit, it was not open for the Tribunal to make observation that the claim petition was barred by principle of res judicata and not maintainable.*** *Once the writ petition was allowed by the Division Bench of this Court, then Tribunal should have decided the case on merit alone and not on any other ground like being barred by principle of res judicata. It is for the second time that the Tribunal while recording the finding that the claim petition is barred by principle of res judicata. has dismissed the claim petition in violation of the judgment and order of this Court dated 23.8.2005 passed in Writ Petition No.1381 (S/B) of 2005.*

5. In the hierarchy of system, the power of superintendence on all subordinate courts, authorities and tribunals is vested under Article 227 of the Constitution of India. After remitting of matter by this Court by the judgment and order dated 23.8.2005, it was not open for the Tribunal to reject the petitioner's case with the finding that the claim petition is barred by res judicata. Learned member of the Tribunal while recording such finding have over stepped jurisdiction vested in them which at the face of record, amounts to contempt of this Court. *Both the members of the Tribunal ought to have been cautious of the settled principles of law that they should not have rejected the claim petition in contravention of directions issued by this Court."*

23. In Income Tax Appeal No. 293 of 2016 (The Pr. Commissioner of Income Tax-9, Mumbai Versus M/s Associated Cables Pvt. Ltd, Mumbai, decided on 03.08.2018 Division Bench of Bombay High Court held that "..... *Merely filing of an SLP from the order of Hindustan Unilever Ltd.(supra) would not make the order of this Court bad in law or give a license to the Revenue to proceed on the basis that the order is stayed and/or in abeyance....."*

24. In view of law laid down by the Hon'ble Supreme Court and High Court, the **principles of judicial discipline and propriety and binding precedent,** we hold as under:-

(a) Judicial discipline and propriety are the two significant facets of administration of justice. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department in itself an objectionable phrase or that is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this

healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws.

(b) Just as the judgments and orders of the Supreme Court have to be faithfully obeyed and carried out throughout the territory of India under Article 141 of the Constitution, so should be the judgments and orders of the High Court by all inferior courts and tribunals subject to supervisory jurisdiction within the State under Article 226 and 227 of the Constitution.

(c) If an officer under the Income Tax Act, 1961 refuses to carry out the clear and unambiguous direction in a judgment passed by the Hon'ble Supreme Court or High Court or the Income Tax Appellate Tribunal then in effect, it is denial of justice and is destructive of one of the basic principles in the administration of justice based on hierarchy of the Court.

(d) Unless there is a stay obtained by the authorities under the Income Tax Act, 1961 from higher forum, the mere fact of filing appeal or SLP will not entitle the authority not to comply with the order of the High Court. Even though the authority may have filed an appeal or SLP but either could not obtain a stay or the stay is refused, the order of the High Court must be complied with. Mere filing of an appeal or SLP against the judgment or order of High Court does not result in the assailed judgment or order becoming inoperative and unworthy of being complied with.

25. In view of the principles settled by Hon'ble Supreme Court and by High Courts in the judgments, briefly discussed above, **we direct the respondents to maintain judicial discipline and follow the doctrine of binding precedent and be careful in future, having due regard to the authorities of the Court, keeping in mind the judicial propriety and discipline.**

26. The impugned notice dated 31.03.2021 issued on 01.04.2021 under Section 148 of the Income Tax Act, 1961, being without jurisdiction, cannot be sustained and is hereby quashed. Consequently, the order dated 19.03.2022 and the Reassessment Order dated 29.03.2022 for the Assessment Year 2013-14 can also not be sustained and are hereby quashed inasmuch as, the jurisdictional notice itself was without jurisdiction.

27. For all the reasons afore-stated, the writ petition is ***allowed*** to the extent and in terms herein above.

28. Let copy of this judgment be sent by the Registrar General of this Court to the respondent no.1 for circulation amongst the authorities under the Income Tax Act, 1961 and for observance of the principles of the judicial discipline and propriety, stated above.

(2022)05ILR A1417
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.04.2022

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Criminal Misc. Transfer Application No. 285 of 2021

Shailendra Kumar Prajapati ...Applicant
Versus
State Of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Ram Raj Prajapati, Sri D.K. Maurya

Counsel for the Opp. Parties:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Sections 407 & 408 .- अर्गर निकसी पकार को यL यर्थोक्षि]त आशंका Lै निक उसे न्याय की प्रानिप्त नLीं Lो पायेर्गी तो मामला या अपील का अन्तरर्ण कर देना]ानिLए। इस नाते पकार को यL दशा ने की आवश्यकता नLीं Lै निक न्याय अनिनवाय रुप से निवफल Lो जायेर्गा, अर्गर वो ऐसे परिरस्थिस्र्थक्षितयां निदखाने में सफल Lोता जाता Lै, जिजनसे यL अनुमान लर्गाया जा सकता Lै, निक उसको आशंका Lै, जो परिरस्थिस्र्थक्षितयों के मद्देनजर यर्थोक्षि]त भी Lै तो स्र्थान्तरर्ण का मामला Lो जायेर्गा। परन्तु मात्र अशिभकर्थन की निकसी मामले में न्याय न Lोने की आशंका Lै, स्र्थान्तरर्ण का पया प्त कारर्ण नLीं Lोर्गा तर्था न्याय के उद्देश्यों के लिलये समी]ीन भी नLीं Lोर्गा। न्यायालय को यL निन/ा रिरत करना Lोर्गा निक उक्त आशंका यर्थोक्षि]त Lै न निक काल्पनिनक जो मात्र अनुमान और अटकलों पर आ/ारिरत.

Application Dismissed. (E-12)

List of Cases cited:-

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4. नाLर सिंसL यादव प्रक्षित भारत संघ (2011) 1 एस सी सी 307

5. उसमान र्गनी आदम भाई वोLरा प्रक्षित र्गुजरात राज्य व एक अन्य : (2016) 3 एस सी सी 370,

6. राजकुमार साTू प्रक्षित मे. साTू ट्रेड प्राइवेट लिलनिमटेड : 2021 एस सी सी ऑनलाइन एस सी 378

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

तथ्यात्मक प्रारुप

1. आवेदक (शैलेन्द्र कुमार प्रजापति) ने वर्तमान स्थानान्तरण प्रार्थना पत्र अंतर्गत धारा 407 दण्ड प्रक्रिया संहिता (संक्षेप में द. प्र.सं.) के माध्यम से सत्र परीक्षण संख्या 90 वर्ष 2021, राज्य प्रति शैलेन्द्र (मुकदमा अपराध संख्या 48 वर्ष 2019 धारा 376, 452, 506 भारतीय दण्ड संहिता, थाना विनवार, जिला हमीरपुर से अग्रसर) जो वर्तमान में अपर जनपद एवं सत्र न्यायधीश एफ.टी.सी. हमीरपुर के न्यायालय में लंबित है को जिला हमीरपुर के उक्त सत्र न्यायालय से उसी जिला के किसी दूसरे सत्र न्यायालय में अन्तरित करने की प्रार्थना की है।

2. वर्तमान आवेदन के प्रस्तुत करने से पूर्व, आवेदक ने एक स्थानान्तरण प्रार्थना पत्र जनपद एवं सत्र न्यायाधीश, हमीरपुर के समक्ष धारा 408 भा.दं.सं. के अंतर्गत उपरोक्त प्रार्थना के लिये किया था परन्तु वो जनपद एवं सत्र न्यायाधीश के आदेश दिनांक 4.10.2021 के द्वारा निरस्त कर दिया गया।

आवेदक का पक्ष

3. आवेदक के विद्वान अधिवक्ता श्री डी.के. मौर्या (आवेदक के अधिवक्ता श्री राम राज प्रजापति द्वारा निर्देशित) ने कथन किया कि आवेदक के विरुद्ध एक गलत मुकदमा दायर किया गया है तथा उचित जांच करे बिना ही उसके विरुद्ध आरोप पत्र प्रेषित कर दिया गया है। आवेदक वर्तमान में जमानत पर है तथा अवर न्यायालय के समक्ष कार्यवाही में उपस्थित हो रहा है।

4. आवेदक के विद्वान अधिवक्ता ने स्थानान्तरण की प्रार्थना के पक्ष में कथन किया की-

(i) आवेदक को कोई पूर्व सूचना दिये बिना ही, जब अभियोजन साक्ष्य संख्या 2 का ब्यान लिखा जा रहा था, उसी दौरान उपरोक्त सत्र परीक्षण फास्ट ट्रैक कोर्ट- II को स्थानान्तरित कर दिया गया और आवेदक को अग्रिम तिथि की सूचना के अभाव में साक्षी की प्रति परीक्षा का अवसर भी समाप्त कर दिया गया। इस संदर्भ में उसने एक प्रार्थना पत्र भी

दाखिल किया। जब कोरोना महामारी के कारण सम्पूर्ण देश में कार्यवाहियां/गतिविधियां रुक सी गयी थी, तब भी पूर्वाग्रह से ग्रसित होकर, आवेदक के विरुद्ध गैर जमानती वारन्ट जारी कर दिया गया, जो बाद में प्रार्थना पत्र देने पर निरस्त किया गया।

(ii) विद्वान अधिवक्ता ने यह भी कथन किया कि सत्र न्यायालय में काम कर रहे पेशकार (जगदीश मिश्रा) जो पीड़िता के अधिवक्ता के दोस्त है वो इस मामले में पूर्वाग्रह से ग्रसित हो मामले में आवेदक के विरुद्ध आदेश करवा रहा है। आवेदक की अनुपस्थिति को उपस्थिति दिखा कर, प्रति परीक्षा के लिये तिथि नियत करवा दी, जिसकी सूचना आवेदक व उसके अधिवक्ता को न होने के कारण अगली नियत तिथि पर वो अनुपस्थित रहे, जिसके कारण प्रतिपरीक्षा का अवसर समाप्त कर दिया गया।

(iii) उपरोक्त निवेदन के आधार पर विद्वान अधिवक्ता ने कथन किया कि अगर मेरे पक्षकार को यथोचित आशंका है कि न्याय नहीं हो पायेगा, तो सत्र परीक्षण को स्थानान्तरित कर दिया जाना चाहिए। निष्पक्ष सुनवाई का आश्वासन, न्याय व्यवस्था की प्रथम अनिवार्यता है। अतः प्रार्थना पत्र स्वीकार किया जाये।

5. प्रतिवादी संख्या 2 (विनोद) जो प्रथम सूचना रिपोर्ट के शिकायतकर्ता है उनको वर्तमान प्रार्थना पत्र का नोटिस बजात खास तामील कराया गया परन्तु न तो वो स्वयं और न ही अधिवक्ता के माध्यम से न्यायालय के समक्ष उपस्थित हुए जबकि इस कारण से दो बार वर्तमान प्रार्थना पत्र पर अगली तिथि भी नियत की गयी।

<u>राज्य का पक्ष</u>

6. राज्य का पक्ष उसके अतरिक्त शासकीय अधिवक्ता ने न्यायालय के समक्ष रखा। उन्होने न्यायालय का ध्यान जनपद एवं सत्र न्यायाधीश के आदेश दिनांक 4.10.2021 पर आकर्षित करवाया जिसके द्वारा आवेदक की स्थानान्तरण प्रार्थना पत्र (अन्तर्गत धारा 408 दं0प्र0सं0) निरस्त किया गया है। उक्त आदेश में यह उल्लेखित है कि जब आवेदक के विद्वान अधिवक्ता को प्रार्थना पत्र पर बहस करने हेतु आमंत्रित किया गया तो उनके द्वारा यह कथन किया गया कि उन्हे कुछ नहीं कहना है तथा प्रार्थना पत्र का परिशीलन करके ही आदेश पारित कर दें। प्रार्थना पत्र भी नवीन अधिवक्ता ने दाखिल किया था जो सत्र परीक्षण में आवेदक के अधिवक्ता नहीं है। आवेदक को अभियोजन साक्ष्य संख्या 2 को प्रतिपरीक्षा की अनुमति उनके द्वारा प्रार्थना पत्र को स्वीकार करते हुए दी जा चुकी है। वर्तमान में शिकायतकर्ता द्वारा एक प्रार्थना पत्र धारा 319 भा.दं.प्र.सं. के अन्तर्गत दो अन्य लोगों को तलब करने हेतु दिया गया है। जिस पर कोई आदेश पारित नहीं हुआ है। आवेदक द्वारा स्थानान्तरण का प्रार्थना पत्र मात्र मामले को विलम्बित रखने के उद्देश्य से दिया गया है तथा प्रकरण में कोई यथोचित आकांक्षा नहीं है तथा ऐसा कारण भी नहीं है कि आवेदक को न्याय मिलने की संभावना न हो, अतः प्रार्थना पत्र निरस्त किया जाये।

7. आवेदक व राज्य के विद्वान अधिवक्ताओं को सुना व पत्रावली की सम्यक परिशीलन किया।

संदर्भ- आपराधिक मामलों के अन्तरण की विधि-

8. भारतीय दण्ड प्रक्रिया संहिता के अध्याय 31 में आपराधिक मामलों के अन्तरण की प्रक्रिया उल्लेखित की गई है। धारा 408 के अन्तर्गत मामलों और अपीलों को अन्तरित करने की सत्र न्यायधीश की शक्ति का उल्लेख है, जबकि धारा 407 के अंतर्गत मामलों और अपीलों को अन्तरित करने की उच्च न्यायालय की शक्ति का उल्लेख किया गया है। संदर्भ के लिये दोनों धारा निम्न उल्लेखित की जा रही है-

"407. मामलों और अपीलों को अन्तरित करने की उच्च न्यायालय की शक्ति- *(1) जब कभी उच्च न्यायालय को यह प्रतीत कराया जाता है कि-*

(क) उसके अधीनस्थ किसी दंड न्यायालय में ऋजु और पक्षपातरहित जांच या विचारण न हो सकेगा; अथवा

(ख) किसी असाधारणतः कठिन विधि प्रश्न के उठने की संभाव्यता है; अथवा

(ग) इस धारा के अधीन आदेश इस संहिता के किसी उपबंध द्वारा अपेक्षित है, या पक्षकारों या साक्षियों के लिए साधारण सुविधाप्रद होगा, या न्याय के उद्देश्यों के लिए समीचीन है,

तब वह आदेश दे सकेगा कि-

(I) किसी अपराध की जांच या विचारण ऐसे किसी न्यायालय द्वारा किया जाए जो धारा 177 से 185 तक के (जिनके अन्तर्गत ये दोनों धाराएं भी हैं) अधीन तो अर्हित नहीं है, किन्तु ऐसे अपराध की जांच या विचारण करने के लिए अन्यथा सक्षम है;

(ii) कोई विशिष्ट मामला या अपील या मामलों या अपीलों का वर्ग उसके प्राधिकार के अधीनस्थ किसी दंड न्यायालय से ऐसे समान वरिष्ठ अधिकारिता वाले किसी अन्य दंड न्यायालय को अंतरित कर दिया जाए;

(iii) कोई विशिष्ट मामला सेशन न्यायालय को विचारणार्थ सुपुर्द कर दिया जाए; अथवा

(iv) कोई विशिष्ट मामला या अपील स्वयं उसको अन्तरित कर दी जाए, और उसका विचारण उसके समक्ष किया जाए।

(2) उच्च न्यायालय निचले न्यायालय की रिपोर्ट पर, या हितबद्ध पक्षकार के आवेदन पर या स्वप्रेरणा पर कार्यवाही कर सकता है:

परन्तु किसी मामले को एक ही सेशन खंड के एक दंड न्यायालय से दूसरे दंड न्यायालय को अन्तरित करने के लिए आवेदन उच्च न्यायालय से तभी किया जाएगा जब ऐसा अन्तरण करने के लिए आवेदन सेशन न्यायाधीश को कर दिया गया है और उसके द्वारा नामंजूर कर दिया गया है।

(3) उपधारा (1) के अधीन आदेश के लिए प्रत्येक आवेदन समावेदन द्वारा किया जाएगा, जो उस दशा के सिवाय जब आवेदक राज्य का महाधिवक्ता हो, शपथपत्र या प्रतिज्ञान द्वारा समर्थित होगा।

(4) जब ऐसा आवेदन कोई अभियुक्त व्यक्ति करता है, तब उच्च न्यायालय उसे निदेश दे सकता है कि वह किसी प्रतिकर के संदाय के लिए, जो उच्च न्यायालय उपधारा (7) के अधीन अधिनिर्णीत करे, प्रतिभुओं सहित या रहित बंधपत्र निष्पादित करे।

(5) ऐसा आवेदन करने वाला प्रत्येक अभियुक्त व्यक्ति लोक अभियोजक को आवेदन की लिखित सूचना उन आधारों की प्रतिलिपि के सहित देगा जिन पर वह किया गया है, और आवेदन के गुणावगुण पर तब तक कोई आदेश न किया जाएगा जब तक ऐसी सूचना के दिए जाने और आवेदन की सुनवाई के बीच कम से कम चौबीस घंटे न बीत गए हों।

(6) जहां आवेदन किसी अधीनस्थ न्यायालय से कोई मामला या अपील अंतरित करने के लिए है, वहां यदि उच्च न्यायालय का समाधान हो जाता है कि ऐसा करना न्याय के हित में आवश्यक है, तो वह आदेश दे सकता है कि जब तक आवेदन का निपटारा न हो जाए तब तक के लिए अधीनस्थ न्यायालय की कार्यवाहियां, ऐसे निबंधनों पर, जिन्हें अधिरोपित करना उच्च न्यायालय ठीक समझे, रोक दी जाएंगी:

परन्तु ऐसी रोक धारा 309 के अधीन प्रतिप्रेषण की अधीनस्थ न्यायालयों की शक्ति पर प्रभाव न डालेगी।

(7) जहां उपधारा (1) के अधीन आदेश देने के लिए आवेदन खारिज कर दिया जाता है वहां, यदि उच्च न्यायालय की यह राय है कि आवेदन तुच्छ या तंग करने वाला था तो वह आवेदक को आदेश दे सकता है कि वह एक हजार रुपए से अनधिक इतनी राशि, जितनी वह न्यायालय उस मामले की परिस्थितियों में समुचित समझे, प्रतिकर के तौर पर उस व्यक्ति को दे जिसने आवेदन का विरोध किया था।

(8) जब उच्च न्यायालय किसी न्यायालय से किसी मामले का अन्तरण अपने समक्ष विचारण करने के लिए उपधारा (1) के अधीन आदेश देता है तब वह ऐसे विचारण में उसी प्रक्रिया का अनुपालन करेगा जिस मामले का ऐसा अन्तरण न किए जाने की दशा में वह न्यायालय करता।

(9) इस धारा की कोई बात धारा 197 के अधीन सरकार के किसी आदेश पर प्रभाव डालने वाली न समझी जाएगी।

408. मामलों और अपीलों को अन्तरित करने की सेशन न्यायाधीश की शक्ति- *(1) जब कभी सेशन न्यायाधीश को यह प्रतीत कराया जाता है कि न्याय के उद्देश्यों के लिए यह समीचीन है कि इस उपधारा के अधीन आदेश दिया जाए, तब वह आदेश दे सकता है कि कोई विशिष्ट मामला उसके सेशन खंड में एक दंड न्यायालय से दूसरे दंड न्यायालय को अन्तरित कर दिया जाए।*

(2) सेशन न्यायाधीश निचले न्यायालय की रिपोर्ट पर या किसी हितबद्ध पक्षकार के आवेदन पर या स्वप्रेरणा पर कार्यवाही कर सकता है।

(3) धारा 407 की उपधारा (4), (5), (6), (7) और (9) के उपबंध इस धारा की उपधारा (1) के अधीन आदेश के लिए सेशन न्यायाधीश को आवेदन के संबंध में वैसे ही लागू होंगे जैसे वे धारा 407 की उपधारा (1) के अधीन आदेश के लिए उच्च न्यायालय को आवेदन के संबंध में लागू होते हैं, सिवाय इसके कि उस धारा की उपधारा (7) इस प्रकार लागू होगी मानो उसमें आने वाले "एक हजार रुपए" शब्दों के स्थान पर "दो सौ पचास रुपए" शब्द रख दिए गए हैं।"

9. उच्चतम न्यायालय ने कई निर्णयों में स्थानान्तरण के कारणों की व्याख्या की है। न्याय न केवल होना चाहिये परन्तु हुआ है ऐसा दर्शित भी होना चाहिये। अन्तरण की विधि सुस्थापित है कि अगर किसी पक्षकार को यह यथोचित आशंका है कि उसे न्याय की प्राप्ति नहीं हो पायेगी तो मामला या अपील का अन्तरण कर देना चाहिए। इस नाते पक्षकार को यह दर्शाने की आवश्यकता नहीं है कि न्याय अनिवार्य रुप से विफल हो जायेगा, अगर वो ऐसे परिस्थितियां दिखाने में सफल होता जाता है, जिनसे यह अनुमान लगाया जा सकता है, कि उसको आशंका है, जो परिस्थितियों के मद्देनजर यथोचित भी है तो स्थान्तरण का मामला हो जायेगा। परन्तु मात्र अभिकथन की किसी मामले में न्याय न होने की आशंका है, स्थान्तरण का पर्याप्त कारण नहीं होगा तथा न्याय के उद्देश्यों के लिये समीचीन भी नहीं होगा। न्यायालय को यह निर्धारित करना होगा कि उक्त आशंका यथोचित है न कि काल्पनिक जो मात्र अनुमान और अटकलों पर आधारित है।

10. स्थान्तरण के आवेदन को निस्तारित करने के कोई नियमित या सख्त नियम विहित नहीं किये जा सकते है तथा मामले की परिस्थितियों के संदर्भ में ही आवेदन निस्तारित किये जाने चाहिये। पक्षकारों व साक्षियों की सुविधा का अर्थ अनिवार्य रुप से आवेदक की ही सुविधा नहीं है, जो न्यायालय के समक्ष आशंका की मिथ्य धारणा के आधार पर आवेदन करता है। स्थान्तरण के संदर्भ में सुविधा का तात्पर्य अभियोजन, अन्य अभियोगी, साक्षियों व वृहत रुप से समाज की सुविधा से है। निष्पक्ष सुनवाई का आश्वासन, न्याय व्यवस्था की प्रथम अनिवार्यता है। आपराधिक विचारण का उद्देश्य, ऐसा उचित व निष्पक्ष न्याय प्रदान करना है, जो किसी भी प्रकार के वाह्य प्रतिफल से अप्रभावित हो।

11. प्रकरण में अगर यह विदित हो जाये कि समाज का विचारण के निष्पक्षता पर विश्वास गंभीर रुप से दुर्बल हो गया है, पीड़ित पक्ष स्थानान्तरण के लिये आवेदन कर सकता है। अगर आपराधिक विचारण निष्पक्ष व स्वतंत्र नहीं है और अगर वो पक्षपात पूर्ण हो तो आपराधिक न्याय व्यवस्था दाँव पर लग जायेगी और जन सामान्य का व्यवस्था के प्रति विश्वास अस्थिर हो जायेगा।

12. न्याय की निष्पक्षता, संविधान का मूल भूत विशिष्टता है, जो यह अपेक्षा करता है कि न्यायधीश, शासकीय अभियोजक, अपराधी का अधिवक्ता या न्यायालय मित्र का सामाजिक हितों में ताल मेल रखते हुए तथा अपराधी के हैसियत व शासन के प्रभाव से अप्रभावित होकर कार्य करेंगे।

(देखें : **गुरुचरन दास चड्ढा प्रति राजस्थान राज्य ए आई आर : (1966) एस सी 1418, अमरिन्दर सिंह प्रति प्रकाश सिंह बादल : (2009) 6 एस सी सी 260, लालू प्रसाद यादव प्रति झारखण्ड राज्य : (2013) 8 एस सी सी 593, नाहर सिंह यादव प्रति भारत संघ (2011) 1 एस सी सी 307 व उसमान गनी आदम भाई वोहरा प्रति गुजरात राज्य व एक अन्य : (2016) 3 एस सी सी 370, राजकुमार साबू प्रति मे. साबू ट्रेड प्राइवेट लिमिटेड : 2021 एस सी सी ऑनलाइन एस सी 378)**

<u>विश्लेषण व निष्कर्ष</u>

13. आवेदक की निष्पक्ष व स्वतंत्र न्याय न मिलने की आशंका का आधार विचारण न्यायालय में कार्यरत एक कर्मचारी है, जो कथित रुप से पीड़िता के अधिवक्ता का मित्र है और अपने पद का अनुचित उपयोग कर न्यायिक प्रक्रिया में पीड़िता के अनुकूल व आवेदक के प्रतिकूल आदेश न्यायालय से पारित करवाने में सहायता करता है तथा इसी प्रभाव के कारण न्यायालय ने अभियोजन साक्ष्य की प्रतिपरिक्षा का अवसर समाप्त कर दिया था। परन्तु यह आकांक्षा पत्रावली पर न्यायालय की आदेश के परिशीलन से निराधार प्रतीत होती है, क्यों कि आवेदक को प्रतिपरीक्षा का आवेदन अपर न्यायालय द्वारा 10.2.2021को स्वीकार किया जा चुका है तथा अभियोजन साक्ष्य संख्या 2 (वन्दना) को तलब भी किया जा चुका है। परन्तु आवेदक के हाजिर न होने के कारण उसके विरुद्ध गैर जमानतीय वारन्ट दिनांक 05.03.2021 व 10.3.2021 को जारी किये गये जो प्रार्थनापत्र के आधार पर आदेश दिनांक 02.04.2021 द्वारा निरस्त कर दिये गये। यहाँ यह उल्लेख करना आवश्यक है कि उपरोक्त आदेश विधिनुसार व उचित प्रक्रिया के अंतर्गत किये है। जिनका निदान भी प्रक्रिया के अंतर्गत किया गया है। इसी दौरान शिकायतकर्ता ने एक प्रार्थना पत्र धारा 319 भा.द.सं., के अन्तर्गत दाखिल कर दिया तथा पत्रावली वर्तमान में उक्त प्रार्थना पत्र के निस्तारण के स्तर पर है। अतः आवेदक का स्थान्तरण का आधार यथोचित आकांक्षा पर आधारित नहीं है। उपरोक्त वर्णित आदेश के कारण यह यथोचित आकांक्षा नहीं हो जाती है कि आवेदक को निष्पक्ष व उचित न्याय नहीं प्राप्त होगा और यह भी नहीं प्रतीत होता है कि आवेदक के प्रतिकूल पारित आदेश किसी पूर्वाग्रह या दबाव या अनुचित प्रभाव के अंतर्गत पारित किये गये हैं। अतः आवेदक इस न्यायालय के समक्ष, ऐसा कोई यथोचित कारण या ऐसी परिस्थितियां जिनके कारण यथोचित आकांक्षा हो कि निष्पक्ष न्याय नहीं मिल पायेगा, प्रस्तुत करने में असमर्थ रखा है और न ही कोई ऐसा कारण उपस्थित है कि वर्तमान प्रकरण में स्थान्तरण की प्रार्थना स्वीकार करना, न्याय के उद्देश्य के लिये समीचीन होगा।

14. उपरोक्त विधिक व तथ्यात्मक विश्लेषण का एक ही निष्कर्ष है कि वर्तमान प्रकरण में आवेदक, स्थान्तरण के लिये उचित या निष्पक्ष न्याय न मिलने का कोई यथोचित या वास्तविक आकांक्षा स्थापित करने में असमर्थ रहा है। अतः वर्तमान आवेदन में की गई स्थान्तरण की प्रार्थना बलहीन होने के कारण अस्वीकार की जाती है तथा वर्तमान प्रार्थना पत्र इस आदेश के साथ अंतिम रुप से निस्तारित की जाती है कि सत्र न्यायालय प्रकरण की सुनवाई शीघ्रता व नियमनुसार करेगा तथा इस संदर्भ में इस न्यायालय द्वारा पारित **आदेश दिनांक** 07.06.2021, **रविन्द्र प्रताप शाही उर्फ पप्पू शाही बनाम उत्तर प्रदेश राज्य (आपराधिक प्रकीर्ण जमानत प्रार्थना पत्र संख्या**-20591/2021) के मामले में 'त्वरित न्याय' के विश्लेषण को ध्यान में रखेगा।

(2022)05ILR A1422
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.05.2022

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

S.C.C. Revision No. 42 of 2022

Tara Prasad Sonkar & Anr. ...Revisionists
Versus
Smt. Binod Devi & Ors. ...Opposite Parties

Counsel for the Revisionists:
Sri Devid Kumar Singh, Sri Neeraj Rai, Sri Prateek Rai, Sri Chandan Sharma

Counsel for the Opposite Parties:
Sri Brijesh Chandra Naik

Civil Law - Code of Civil Procedure,1908 - Section 21- Suit for eviction and recovery of rent filed-suit was filed claiming rent to be Rs. 5000/- per month-Revisionist disputed the rent-issue was decided in revisionist's (tenant) favour-no objection was ever raised even while filing the Written submission-as to the jurisdiction of Court-only St.d in the W.S. that excess rent was shown to bring the case in appellate jurisdiction-No objection with regard to competence of court as to pecuniary jurisdiction be allowed by any Appellate or Revisional court-jurisdiction cannot be challenged without taking objection in the Written submission at the first instance.

Revision dismissed. (E-9)

List of Cases cited:

1. Jagmittar Sain Bhagat Vs Dir. Health Services, Har. & ors.; (2013) 2 SCC (LS) 841

2. Om Prakash Agarwal Since deceased thr. L.Rs. & ors. . Vs Vishan Dayal Rajpoot & ors. ; 2018 (191) AIC9

3. Prabha Rani Agrawal Vs Income Tax Officer & ors. ; (2013) 259 CTR (All) 118

4. Om Prakash Agarwal Since deceased thr. L.Rs. & ors. . Vs Vishan Dayal Rajpoot & ors. ; 2018 (191) AIC9

5. Rajendra Kumar @ Vinay Kumar Vs Pankaj Kumar Agarwal; 2019 (3) ARC 621

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Chandan Sharma, advocate holding brief of Sri Neeraj Rai, learned counsel for the revisionists and Sri Brijesh Chandra Naik, learned counsel for opposite parties.

2. Present revision has been filed for setting aside the judgement and order dated 17.02.2022 passed by learned Additional District Judge, Court No. 10, Varanasi in Small Causes Case No. 04 of 2019 (Smt. Bindo Devi and others Vs. Tara Prasad Sonkar and others).

3. Apart from many other grounds taken in revision, learned counsel for the revisionists has pressed the ground of jurisdiction of the Court only before this Court.

4. Learned counsel for the revisionists submitted that opposite parties instituted Small Causes Case No. 04 of 2019 (Smt. Bindo Devi and others Vs. Tara Prasad Sonkar and others) seeking eviction of revisionists- defendants from disputed property and for recovery of rent arrears also. While filing the suit, opposite parties contended that shop in question was rented at the rate of Rs. 5,000/- per month calculating the valuation of suit Rs. 2,40,000/-. Revisionists- defendants disputed the rent and submitted that shop in question was rented at the rate of Rs. 500/- per month and accordingly, issue No. 2 was framed with regard to actual determination of rent as to whether it was Rs. 5,000/- or Rs. 500/- per month. He next submitted that this issue was decided in favour of revisionists-defendants accepting the rent at the rate of Rs. 500/- per month. He further submitted that once the rent was fixed at the rate of Rs. 500/- per moth by deciding issue No. 2, valuation of suit has been decreed to less than one lac and Court of District Judge would have no jurisdiction to try the case in light of Section 15 of Code of Civil Procedure, 1908 (hereinafter referred to as "CPC, 1908"). Section 15 of CPC mandate that every suit shall be instituted in the Court of lowest grade competent to try and in the present case, it has to be decided by concerned Small

Causes Court. He next submitted that once the Court has no jurisdiction, order passed by the Court is nullity in the eye of law. In support of his contention, he placed reliance upon the judgements of Apex Court in the case of ***Jagmittar Sain Bhagat Vs. Dir. Health Services, Haryana and others; (2013) 2 SCC (LS) 841 (paragraph 7)*** and ***Om Prakash Agarwal Since deceased thr. L.Rs. and Ors. Vs. Vishan Dayal Rajpoot and Ors; 2018 (191) AIC9 (paragraph 20, 21, 34, 47)*** as well as of this Court in the matter of ***Prabha Rani Agrawal Vs. Income Tax Officer and Ors; (2013) 259 CTR (All) 118.***

5. Learned counsel for opposite parties opposed the submissions raised by learned counsel for the revisionists and submitted that there are two situations; first, Court is having inherent lack of jurisdiction, second, after filing written statement or any subsequent development, Court may not have the jurisdiction to decide the case. He next submitted that in present case, it is necessarily required on the part of revisionists-defendants to raise objection with regard to jurisdiction in written submission to enable the Court to frame issue and decide the same. In the present case, suit was filed alongwith valuation of Rs. 2,40,000/- and the Court is having pecuniary jurisdiction to hear the same on the date of filing, therefore, it is not the case of lack of inherent jurisdiction. Further, while filing written statement, revisionists-defendants has never raised objection about the jurisdiction of the Court and only it was stated in written statement that suit has been filed by showing excess rent to bring the case in appellate jurisdiction of Small Causes Court for early disposal of the matter. It is also stated in written statement that just to deprive one step of appellate court at District Judgeship, excess rent has been shown. He reiterated that at no point of time, revisionists-defendants has raised objection of jurisdiction, therefore, Court is having full jurisdiction to decide the case. In support of his contention, he placed reliance upon the judgement of Apex Court in the matter of ***Om Prakash Agarwal Since deceased thr. L.Rs. and Ors. Vs. Vishan Dayal Rajpoot and Ors; 2018 (191) AIC9 (paragraph 49, 56, 57)*** as well as of this Court in the matter of ***Rajendra Kumar @ Vinay Kumar Vs. Pankaj Kumar Agarwal; 2019 (3) ARC 621.***

6. I have considered the rival submissions raised by learned counsel for the parties as well as perused the judgements relied upon Facts of the case are undisputed.

7. After going through the pleadings, the only question before this Court is to decide as to whether without raising the issue of jurisdiction in written submission, Court is bound to first decide its jurisdiction based on pecuniary limits i.e. valuation of case and then proceed to decide the case on merits or not.

8. Learned counsel for the revisionists has only submitted that he has raised objection with regard to amount of rent and once the objection is accepted, it is required on the part of Court to first consider its own jurisdiction to decide the case, but he could not dispute this fact that in written statement, no objection has been raised about the jurisdiction of the Court. Case was filed showing the rent at the rate of Rs. 5000/-, therefore, Court is having full jurisdiction to decide the same. After filing written statement showing the rent at the rate of Rs. 5,00/-, Issue No. 2 was framed with regard to determination of rent and

that was ultimately decided in favour of revisionists-defendants accepting the rent at the rate of Rs. 500/- per month. Thereafter, proceeded to decide the case on merits.

9. Learned counsel for the revisionists has relied upon paragraph 7 of judgement of Apex Court in the matter of ***Jagmittar Sain Bhagat (supra)***, which is quoted below;

" 7. Indisputably, it is a settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior Court, and if the Court passes a decree having no jurisdiction over the matter, it would amount to nullity as the matter goes to the roots of the cause. Such an issue can be raised at any stage of the proceedings. The finding of a Court or Tribunal becomes irrelevant and unenforceable/ inexecutable once the forum is found to have no jurisdiction. Similarly, if a Court/Tribunal inherently lacks jurisdiction, acquiescence of party equally should not be permitted to perpetuate and perpetrate, defeating the legislative animation. The Court cannot derive jurisdiction apart from the Statute. In such eventuality the doctrine of waiver also does not apply. (Vide: United Commercial Bank Ltd. v. Their Workmen, MANU/SC/0067/1951: AIR 1951 SC 230. Smt. Nai Bahu v. Lal Ramnarayan & Ors. MANU/0367/1977: AIR 1978 SC 22; Natraj Studios (P) Ltd. v. Navrang Studios & Anr., MANU/SC/0477/1981: AIR 1981 SC 537' and Kondiba Dagadu Kadam v. Savitribai Sopan Gujar & Ors., MANU/SC/0278/1999: AIR SC 2213)."

10. Learned counsel for the revisionists has relied upon paragraphs 20, 21, 34 & 47 of judgement of Apex Court in the matter of ***Om Prakash Agarwal Since deceased thr. L.Rs. and Ors. (supra)***, which are quoted below;

"20. By the above amendment in the Provincial Small Cause Courts Act, 1887 the limit of pecuniary jurisdiction of small causes court was increased from Rs.25,000/-to Rs.1 Lakh. The Judge, Small Causes Court in the State of U.P. is senior-most Civil Judge, working in the district. Although the Court of Small Causes was empowered to take cognizance of a suit upto the valuation of Rs.1 lakh w.e.f. 07.12.2015, the suit in question namely Small Causes Suit No.1 of 2010 which was pending in the Court of Additional District Judge, Firozabad continued to proceed in the court of Additional District Judge. None of the parties raised any objection with regard to hearing of suit by Additional District Judge, consequently, the Additional District Judge heard the parties and by judgment dated 22.10.2016 decreed the suit for eviction and due rent & compensation. The tenant aggrieved by the judgment of Additional District Judge filed a revision under Section 25 of Provincial Small Cause Courts Act, 1887, before the High Court.

21. One of the grounds taken before the High Court was that in view of the U.P. Civil Laws (Amendment) Act, 2015, the Court of Additional District Judge ceased to have jurisdiction to try suit between lessor and lessee of value upto Rs.1 Lac w.e.f. 07.12.2015, assumption of jurisdiction subsequent thereto, is without jurisdiction.

34. Whether the Additional District Judge, in the facts of the present case, had jurisdiction to take cognizance of small causes suits having valuation upto Rs. 1 lakh and could still have proceeded to decide the suit, whose valuation was less than Rs. 1 lakh? We may also notice

provision of Section 15 of the Code of Civil Procedure, which provides that suits shall be instituted in the Court of the lowest grade competent to try it. Section 15 of the Code of Civil Procedure is as follows:- "Every suit shall be instituted in the Court of the lowest grade competent to try it."

47. As noted above, the proviso to subsection (2) provides that figure Rs.5,000/- shall be construed to Rs.25,000/-. By U.P. Civil Laws (Amendment) Act, 2015, the figure of Rs.25,000/- stood substituted by Rs.1 lac. Reading sub-section(2) read with proviso and U.P. Civil Laws (Amendment Act), 2015 clearly means that Small Cause suits with aluation not exceeding Rs.1 lac shall be cognizable by Court of Small Causes. When a Small Cause suit not exceeding value of Rs.1 lac is cognizable by Court of Small Causes, obviously, no other court can take cognizance. Additional District Judge to whom small causes suit in question was transferred since its valuation was more than of Rs.25,000/- was not competent to take cognizance of the suit after U.P. Civil Laws (Amendment Act), 2015 w.e.f.07.12.2015, when the suit in question became cognizable by Small Causes Court i.e. Court of Civil Judge, Senior Division. To the above extent, the judgment of learned Single Judge in Shobhit Nigam's Case has to be approved and judgment of Single Judge in Pankaj Hotels (Supra) laying down that even after 07.12.2015, the Additional District Judge had jurisdiction to decide the suit in question cannot be approved."

11. Learned counsel for the revisionists has also relied upon paragraph 25 of judgement of this Court in the matter of ***Prabha Rani Agrawal (supra)***, which is quoted below;

"25. From the aforesaid decisions, it follows that (i) a question relating to jurisdiction which goes to the root of the matter can always be raised at any stage, be in appeal or revision, (ii) initiation of proceedings under section 147 of the Act and/or service of notice are all questions relating to assumption of jurisdiction to assess escaped income, (iii) if an issue has not been decided in appeal and the matter has simply been remanded, the same can be raised again notwithstanding with the fact that no further appeal has been preferred, (iv) in the reassessment proceedings, relief in respect of item which was not originally claimed cannot be claimed again as the reassessment proceedings are for the benefit of the Revenue, and (v) relief can only be claimed in respect of the escaped income. Applying the principles laid down in the aforesaid cases to the facts of the present case, we find that in the first round of proceedings before the Commissioner of Income-tax (Appeals), the appellant had specifically questioned the validity of the proceedings initiated under section 148. of the Act. That issue was not decided by the Commissioner (Appeals) who had remanded the matter for fresh assessment after providing opportunity of hearing. The question relating to the jurisdiction assumed under section 147/148 of the Act goes to the very root of the matter and it can be raised in appeal for the first time. The appellant had raised this question again in appeal and, therefore, it was incumbent upon the "Commissioner of Income-tax (Appeals) to adjudicate upon the grounds' taken before him., In fact, he had casually observed that the proceedings under section 148 of the Act had been validly initiated but, wrongly applied the principles laid down by the apex court in the case of Sun Engineering Works P., Ltd., MANU/SC/0707/1992: [1992] 198 ITR 297 (SC)."

12. Learned counsel for the opposite parties has also relied upon the judgement of Apex Court in the matter of ***Om Prakash Agarwal Since deceased thr. L.Rs. and Ors. (supra)***. In that case when issue of jurisdiction came before the Apex Court for adjudication, Apex Court framed three issues and issue No. 3 covers the controversy involved in this matter. Issue No. 3 and findings of Apex Court are quoted herein below;

"5. From the above submissions of learned counsel for the parties and the pleadings on record, following are the issues, which arise for consideration in this appeal:

(i)

.....

.....

(ii)

.....

.....

(iii) Whether respondents (tenants) having not raised any objection regarding jurisdiction of the Court of Additional District Judge where the suit was pending after amendments made by Uttar Pradesh Civil Laws (Amendment) Act, 2015, the respondent (tenant) is precluded to question the competence of the Court of Additional District Judge to decide the suit vide his judgment dated 22.10.2016 in view of Section 21 of Code of Civil Procedure, 1908 in revision filed under Section 25 of the Provincial Small Causes Court Act?

ISSUE NO. 3.

"It is the submission of learned counsel for the appellant that even if the Additional District Judge was not competent to decide the small causes suit on 22.10.2016, the judgment of the Additional District Judge was not liable to be interfered with by the revisional court in view of Section 21 of the Code of Civil Procedure. Section 21 of the Code of Civil Procedure relates to objection to jurisdiction. Section 21 of the Code of Civil Procedure is as follows:- "21. Objections to jurisdiction.--[(1)] No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

[(2) No objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and, in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(3) No objection as to the competence of the executing Court with reference to the local limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the executing Court at the earliest possible opportunity, and unless there has been a consequent failure of justice.]"

The policy underlying Section 21 of Code of Civil Procedure is that when the case has been tried by a court on merits and the judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it has resulted in failure of justice. The provisions akin to Section 21 are also contained in Section 11 of the Suit Valuation Act, 1887 and Section 99 of Code of Civil Procedure. This Court had occasion to consider the principle behind Section 21, Code of Civil Procedure and Section 11 of the Suit Valuation Act, 1887

in AIR 1954 SC 340, Kiran Singh v. Chaman Paswan. In paragraph 7 of the judgment following was laid down: −

7. ....The policy underlying Sections 21 and 99 of the Civil Procedure Code and Section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate court, unless there has been a prejudice on the merits. The contention of the appellants, therefore, that the decree and judgment of the District Court, Monghyr, should be treated as a nullity cannot be sustained under Section 11 of the Suits Valuation Act.

One more submission which was raised in the said appeal was considered by this Court. One of the submission of the appellant who had instituted the suit in the subordinate court was that as per the revised valuation, the appeal against the decree of subordinate judge did not lay before the District Court but to the High Court, hence, the judgment of the District Judge in appeal should be ignored. The appeal in the High Court be treated as first appeal. It was contended that appellant has been prejudiced in the above manner. Rejecting the above submissions, this court laid down following in paragraphs 11 and 12:−

11. .....This argument proceeds on a misconception. The right of appeal is no doubt a substantive right, and its deprivation is a serious prejudice; but the appellants have not been deprived of the right of appeal against the judgment of the Subordinate Court. The law does provide an appeal against that judgment to the District Court, and the plaintiffs have exercised that right. Indeed, the undervaluation has enlarged the appellants right of appeal, because while they would have had only a right of one appeal and that to the High Court if the suit had been correctly valued, by reason of the undervaluation they obtained right to two appeals, one to the District Court and another to the High Court. The complaint of the appellants really is not that they had been deprived of a right of appeal against the judgment of the Subordinate Court, which they have not been, but that an appeal on the facts against that judgment was heard by the District Court and not by the High Court. This objection therefore amounts to this that a change in the forum of appeal is by itself a matter of prejudice for the purpose of Section 11 of the Suits Valuation Act.

12. The question, therefore, is, can a decree passed on appeal by a court which had jurisdiction to entertain it only by reason of undervaluation, be set aside on the ground that on a true valuation that court was not competent to entertain the appeal? Three High Courts have considered the matter in Full Benches, and have come to the conclusion that mere change of forum is not a prejudice within the meaning of Section 11 of the Suits Valuation Act. Vide Kelu Achan v. Cheriya Parvathi Nethiar Mool Chand v. Ram Kishan and Ramdeo Singh v. Raj Narain. In our judgment, the opinion expressed in these decisions is correct.

The above principle has been reiterated by this Court in AIR (1962) SC 199, Hiralal vs. Kalinath and AIR 1963 SC 634, Bahrain Petroleum Co. vs. P.J.Pappu and Another.

This court in (1993) 2 SCC 130, R.S.D.V. Finance Company Private Limited

vs. Shree Vallabh Glass Works Ltd. had again considered Section 21 of the Code of Civil Procedure. In paragraphs 7 and 8, following has been laid down: −

7. ....It may be further noted that the learned Single Judge trying the suit had recorded a finding that the Bombay Court had jurisdiction to entertain and decide the suit. Sub−section (1) of Section 21 of the Code of Civil Procedure provides that no objection as to the place of suing shall be allowed by any appellate or revisional court unless such objection was taken in the court of first instance at the earliest possible

opportunity and in all cases where issues are settled at or before such settlement and unless there has been consequent failure of justice. The above provision clearly lays down that such objection as to the place of suing shall be allowed by the appellate or revisional court subject to the following conditions:

(i) That such objection was taken in the court of first instance at the earliest possible opportunity;

(ii) in all cases where issues are settled then at or before such settlement of issues;

(iii) there has been a consequent failure of justice.

8. In the present case though the first two conditions are satisfied but the third condition of failure of justice is not fulfilled. As already mentioned above there was no dispute regarding the merits of the claim. The defendant has admitted the deposit of Rs 10,00,000 by the plaintiff, as well as the issuing of the five cheques. We are thus clearly of the view that there is no failure of justice to the defendant by decreeing of the suit by the learned Single Judge of the Bombay High Court, on the contrary it would be totally unjust and failure of justice to the plaintiff in case such objection relating to jurisdiction is to be maintained as allowed by the Division Bench of the High Court in its appellate jurisdiction.

In (2005) 7 SCC 791, Harshad Chiman Lal Modi vs. DLF Universal Ltd., this court had again considered Section 21 and other provisions of Code of Civil Procedure. In paragraph 30, following has been laid down: −

30. ....The jurisdiction of a court may be classified into several categories. The important categories are (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction; and (iii) jurisdiction over the subject−matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject− matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject− matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is a nullity.

Again in (2007) 13 SCC 650, Subhash Mahadevasa Habib v. Nemasa Ambasa Dharmadas, this court held that there is distinction between lack of inherent jurisdiction and objection to territorial and pecuniary jurisdiction. This court noticed the amendments made in Section 21 in the year 1976. Following was stated in paragraph 34, 37 and 41:−

34. It may be noted that Section 21 provided that no objection as to place of the suing can be allowed by even an appellate or revisional court unless such

objection was taken in the court of first instance at the earliest possible opportunity and unless there has been a consequent failure of justice. In 1976, the existing section was numbered as sub−section (1) and sub−section (2) was added relating to pecuniary jurisdiction by providing that no objection as to competence of a court with reference to the pecuniary limits of its jurisdiction shall be allowed by any appellate or revisional court unless such objection had been taken in the first instance at the earliest possible opportunity and unless there had been a consequent failure of justice .....

37. As can be seen, Amendment Act 104 of 1976 introduced sub−section (2) relating to pecuniary jurisdiction and put it on a par with the objection to territorial jurisdiction and the competence to raise an objection in that regard even in an appeal from the very decree. This was obviously done in the light of the interpretation placed on Section 21 of the Code as it existed and Section 11 of the Suits Valuation Act by this Court in Kiran Singh v. Chaman Paswan followed by Hiralal Patni v. Kali Nath and Bahrein Petroleum Co. Ltd. v. P.J. Pappu. Therefore, there is no justification in understanding the expression objection as to place of suing occurring in Section 21−A as being confined to an objection only in the territorial sense and not in the pecuniary sense. Both could be understood, especially in the context of the amendment to Section 21 brought about by the Amendment Act, as objection to place of suing.

41. In the light of the above, it is clear that no objection to the pecuniary jurisdiction of the court which tried OS No. 61 of 1971 could be raised successfully even in an appeal against that very decree unless it had been raised at the earliest opportunity and a failure of justice or prejudice was shown. Obviously therefore, it could not be collaterally challenged. That too not by the plaintiffs therein, but by a defendant whose alienation was unsuccessfully challenged by the plaintiffs in that suit.

Now, reverting back to facts of this case it is apparent from the judgment dated 22.10.2016 of Additional District Judge, that no objection to the competence of Additional District Judge to decide the case was taken by any of the parties. No objection having been taken to the pecuniary jurisdiction of the Additional District Judge, Section 21 of the Civil Procedure Code comes into play. Subsection (2) of Section 21 provides that no objection as to the competence of the Court with reference to the pecuniary limits of the jurisdiction shall be allowed by any Appellate or Revisional Court unless conditions mentioned therein are fulfilled. No objection has been raised by respondent tenant regarding competence of the Court. Subsection (2) precludes the revisionist to raise any objection regarding competence of the court and further revisional court ought not to have allowed such objection regarding competence of Court of Additional District Judge to decide the suit. The respondent tenant did not raise any objection regarding competence of the Court and took a chance to obtain judgments in his favour on merits, he cannot be allowed to turn-round and contend that the court of Additional District Judge had no jurisdiction to try the Small Cause Suit and the judgment is without jurisdiction and nullity. Section 21 has been enacted to thwart any such objection by unsuccessful party who did not raise any objection regarding competence of court and allowed the matter to be heard on merits. Further, in deciding the small cause suit by Additional District Judge, the tenant

has not proved that there has been a consequent failure of justice.

The High Court in the impugned judgment has not adverted to Section 21 of the Code of Civil Procedure. In judgment of Shobhit Nigam (Supra) also, affect of Section 21 was neither considered nor raised. Section 21 contains a legislative policy which policy has an object and purpose. The object is also to avoid retrial of cases on merit on basis of technical objections.

There is another judgment of Single Judge of the High Court referred to by the learned counsel for the respondent i.e. SCC Revision No.305 of 2016, Tejumal vs. Mohd. Sarfraz, 2017 (121) ALR 392. In the above case, learned Single Judge had allowed the revision under Section 25 against the judgment dated 12.08.2016 passed by Additional District and Sessions Judge on the ground that the judgment of Additional District Judge was without jurisdiction. In paragraph 6 of the judgment, High Court had noticed judgment of this court in R.S.D.V. Finance Company Private Limited vs. Shree Vallabh Glass Works Ltd. where it was held that in view of Section 21(1) of the Code of Civil Procedure, objection as to the place of suing should be taken by the party concerned in the court of first instance at the earliest possible opportunity and the objection to this effect shall not be allowed by the Appellate or Revisional Court but relying on the judgment of this Court in Kiran Singh Vs. Chaman Paswan, learned Single Judge held that defect of jurisdiction whether pecuniary or territorial or to the subject matter cannot be cured and can be set up at any stage of the proceeding.

We are of the view that the above view of the learned Single Judge is neither in consonance with the judgment of this Court in Kiran Singhs case nor with R.S.D.V. Finance Company Private Limited (supra) which has been noted and referred to by learned Single Judge. Section 21 is statutory recognition of the legislative policy which cannot be ignored or given a go−by by the litigants who challenges an unfavourable decision.

We thus of the view that the view of the learned Single Judge in Tejumal Vs. Mohd. Sarfraj does not lay down the correct law and cannot be approved.

In the foregoing discussion, we are of the view that High Court committed error in allowing the S.C.C. Revision filed by the respondent tenant without taking into consideration Section 21 of the Code of Civil Procedure.

We thus hold that even when the court of Additional District Judge was not competent to decide the Small Causes Suit in question on the ground that the pecuniary jurisdiction is vested in Court of Small Causes i.e. Civil Judge, Senior Division w.e.f. 07.12.2015, no interference was called in the judgment of Additional District Judge in the exercise of Revisional Jurisdiction by High Court in view of the provisions of Section 21 of Code of Civil Procedure."

13. Learned counsel for the opposite parties has also relied upon paragraph 5 of judgement of this Court in the matter of ***Rajendra Kumar @ Vinay Kumar (supra)***, which are quoted below;

"5. In view of the fact admitted by learned counsel for the tenant-revisionist that objection as to the pecuniary jurisdiction was not specifically raised by the tenant-revisionist before the court below after the amendment was made in Section 15 of the Provincial Small Cause Courts Act, 1887, he can not be permitted to raise the objection as to the pecuniary

jurisdiction in view of the provisions of Section 21 of the Civil Procedure code, 1908 and the law laid down by Hon'ble Supreme Court in the case of Om Prakash Agarwal since Deceased Thr. Lrs. & Ors (supra) (paragraphs 56 to 59). Thus, there is no merit in this revision, therefore, the revision is dismissed."

14. Learned counsel for the revisionists has admitted that revisionists-defendants have not raised the issue of jurisdiction due to pecuniary limits in their written submission, but his argument was focused only on the ground that it is a question relating to jurisdiction which goes to the root of matter and can be raised at any stage. Judgement relied by him also support the very same contention.

15. There is no doubt in the submission of learned counsel for the revisionists that a question relating to jurisdiction which goes to the root of the matter can be raised at any stage, but in present case, there is specific bar provided in Section 21 of CPC, 1908, which says that it can be raised in the Court of first instance and not thereafter. Therefore, argument so advanced and judgement relied upon cannot be accepted.

16. Certainly Section 15 of CPC, 1908 provides Court in which suits to be instituted whereas Sections 21 of CPC, 1908 provides objection to jurisdiction. Sections 15 & 21 are being quoted below;

*"**15. Court in which suits to be instituted.-** Every suit shall be instituted in the Court of the lowest grade competent to try it.*

***21. Objections to jurisdiction.-** [(1)] No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues or settled at or before such settlement, and unless there has been a consequent failure of justice.*

[(2) No objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(3) No objection as to the competence of the executing Court with reference to the local limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the executing Court at the earliest possible opportunity, and unless there has been a consequent failure of justice.]"

17. Section 21 of Sub-section (1) deals with the pecuniary limits of jurisdiction of Court and it is very well stated that no objection with regard to competence of Court with reference of pecuniary limits shall be allowed by any Appellate or Revisional Court, unless such objection was taken in the Court of first instance at the earliest possible opportunity. Whereas in present case, this objection has never been taken in written submission, therefore, at this stage, contrary to provisions of Section 17(1) of the Provincial Small Cause Courts Act, 1887, no objection can be entertained with regard to jurisdiction of Court based upon pecuniary limits.

18. It is also not disputed that it is not a case of lack of inherent jurisdiction.

There is no doubt on the point that at the time of filing of Small Causes Case, rent was claimed as Rs. 5,000/- per month and accordingly, valuation of suit was more than Rs. 1,00,000/-. Therefore, Court was having jurisdiction to try the case and jurisdiction can only be ceased based on pecuniary limits subject to raising objection in written submission, which was never raised. Therefore, competence of Court based upon jurisdiction cannot be challenged without taking objection in written submission at the first instance. Apex Court in the matter of ***Om Prakash Agarwal (Supra)*** has taken very same view that no order can be passed contrary to provisions of Section 21 of CPC, 1908. Relying upon the very same judgement, this Court in the matter of ***Rajendra Kumar @ Vinay Kumar (supra)*** has also taken the same view.

19. Therefore, under such facts of the case as well as provisions of Section 21 of CPC, 1908 and the judgements discussed above, there is no illegality in the impugned order.

20. Accordingly, revision lacks merit and is **dismissed.**

21. No order as to costs.

(2022)05ILR A1433
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.05.2022

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

S.C.C. Revision No. 43 of 2022

Sabir Ahmad & Anr. ...Revisionists
Versus
Khali Ulla ...Opposite Party

Counsel for the Revisionists:
Sri Muktesh Kumar Singh

Counsel for the Opposite Party:
Sri Pankaj Agarwal, Sri Pankaj Agarwal

Civil Law - Code of Civil Procedure,1908 - Order IX Rule 13 - Provincial Small Cause Courts Act , 1887- Section 17-Revisionist-tenant could not receive summon-suit decreed ex-parte-Application under Order IX Rule 13 CPC-recall-decretal amount deposited as per section 17 of the Provincial Small Cause Courts Act- Application filed by landlord for releasing the deposited amount-objection-can only be released after disposal of application filed-objection rejected-amount if released before-would frustrate the intention of legislature-result in multiplicity of litigation-allowing application for release of money is against section 17 of the Act.

Revision allowed. (E-9)

List of Cases cited:

1. Smt. Krishna Devi Vs Shobha Chandra; 1981 ALL. L.J. 989

2. Prem Chandra Mishra Vs IInd Addl. District Judge, Etah & ors.; 2008 9 ADJ 13.

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Muktesh Kumar Singh, learned counsel for revisionists and Sri Pankaj Agarwal, learned counsel for opposite party.

2. Present revision has been filed challenging the order dated 09.03.2022 passed by District Judge, Aligarh in Misc. Case No. 340 of 2021 (Sabir Ahmad & another vs. Khali Ulla) arising out of S.C.C. Suit No. 22 of 2019 (Khali Ulla vs. Sabir Ahmad & another).

3. Learned counsel for defendants-revisionists submitted that SCC Suit No. 22

of 2019 has been filed claiming rent of Rs. 5,000/- per month. Defendants-revisionists could not receive summon, therefore, they were unable to appear before the Court below. Accordingly, the said suit was decreed *ex parte* vide order dated 07.12.2020. It is next submitted that after knowing about the order dated 07.12.2020, defendants-revisionists have moved application under Order IX Rule 13 of CPC for recalling of *ex parte* order dated 07.12.2020. It is also submitted that Section 17 of the Provincial Small Cause Courts Act, 1887 (hereinafter referred to as "Act, 1887') provides to deposit the decretal amount for setting aside the *ex parte* decree, therefore, defendants-revisionists have also deposited the said amount. It is next submitted that plaintiff-opposite party has also moved application for releasing of amount so deposited in his favour, upon which defendants-revisionists have filed objection dated 12.01.2022 with specific case that this amount can only be released after disposal of application filed under Order IX Rule 13 of CPC and not before that. Lastly, it is submitted that as per Section 17(2) of Act, 1887, as on date, defendants-revisionists are not liable to pay the amount and they would be liable only if application filed under Order IX Rule 13 of CPC is rejected. In support of his contention, he has placed reliance upon the judgment of this Court in the matter of ***Smt. Krishna Devi vs. Shobha Chandra; 1981 ALL. L.J. 989.*** Therefore, under such circumstances, impugned order is bad and liable to be set aside.

4. Per contra, Sri Pankaj Agarwal, learned counsel for opposite party submitted that recall application has been filed by the defendants-revisionists with specific case that rent of house in question is only Rs. 200/-, therefore, in case of appearance of defendants-revisionists before the Court, they are required to fulfil the conditions of Section 20(4) of The U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as "U.P. Act No. 13 of 1972'). He further submitted that Section 20(6) of U.P. Act No. 13 of 1972 provides that any amount so deposited by the tenant under sub-section (4) or under Rule 5 of Order XV of the First Schedule to the Code of Civil Procedure, 1908 (Act No. 5 of 1908) shall be paid to the landlord forthwith on his application without prejudice to the parties pleadings and subject to the ultimate decision in the suits. Court below has rightly released the amount so deposited in favour of landlord. In support of his contention, he has placed reliance upon the judgment of this Court passed in the matter of ***Prem Chandra Mishra vs. IInd Addl. District Judge, Etah and others; 2008 9 ADJ 13.*** He lastly submitted that in the light of Sections 20(4) & (6) of U.P. Act No. 13 of 1972 read with Order IX Rule 13 of CPC and Section 17(1) of Act, 1887, there is no illegality in the impugned order, therefore, present revision is liable to be dismissed.

5. I have considered the rival submissions advanced by learned counsels for parties and perused the records, provisions of law as well as judgments relied upon.

6. Facts of the case are undisputed and only question which is to be decided is as to whether the amount so deposited in compliance of Section 17 of Act, 1887 along with application under Order IX Rule 13 of CPC be released in favour of landlord or not.

7. Before coming to any conclusion, it is required to reproduce Section 17 of Act, 1887.

"17. Application of the Code of Civil Procedure.--(1) 1[The procedure prescribed in the Code of Civil Procedure, 1908 (5 of 1908), shall, save in so far as is otherwise provided by that Code or by this Act,] be the procedure followed in a Court of Small Causes in all suits cognizable by it and in all proceedings arising out of such suits:

Provided that an applicant for an order to set aside a decree passed *ex parte* or for a review of judgment shall, at the time of presenting his application, either deposit in the court the amount due from him under the decree or in pursuance of the judgment, or give [such security for the performance of the decree or compliance with the judgment as the Court may, on a previous application made by him in this behalf, have directed.]

(2) Where a person has become liable as surety under the proviso to sub-section (1), the security may be realised in manner provided by section 3[145] of the Code of Civil Procedure, 4[1908 (5 of 1908)]."

8. From the perusal of language of Section 17 of Act, 1887, it is very much clear that though it was enacted to protect the interest of landlord, but the interest of tenant can also not be ignored. Therefore, in Section 17(2) of Act, 1887, it has been clearly held that where a person become liable as surety under the proviso to sub-section (1), the security may be realised. Application under Order IX Rule 13 of CPC has been filed to set aside the *ex parte* decree and to protect the interest of landlord, decretal amount has to be deposited. In case of allowing the application under Order IX Rule 13 of CPC and setting aside the *ex parte* , there would have no occasion for landlord to realise the security or encash the money so deposited. In case of rejection of application under Order IX Rule 13 of CPC, interest of landlord is protected and he may realise the amount so deposited.

9. This Court in the ***Smt. Krishna Devi(Supra)*** has taken the very same view. Relevant paragraph of the said judgment is quoted below:-

"5. The second contention is without substance. The amount deposited by the defendant and security furnished remained intact till such time that the exparte decree was not set aside. It is only after the *ex parte* decree had been set aside that the amount and the security were withdrawn. Although the proviso has been incorporated in S. 17 to protect the interest of the decree holder, but its language does not justify the contention that the amount deposited or the security furnished should remain lying in the Court till such time that the suit is disposed of. The deposit and the security under the proviso have to remain intact during the pendency of the application for setting aside the *ex parte* decree. In case the application for setting aside the *ex parte* decree is dismissed the amount deposited will be adjusted towards the decree and the security furnished enforced for the same purpose. In the event of the decree being set aside the purpose of the deposit comes to an end. For there is no decree left to be satisfied and the defendant is free to withdraw this amount. Counsel urged that this Court had passed an order restraining the defendant from withdrawing the amount or the security at the time when this revision was admitted. Without deciding as to whether the defendant committed a breach of the direction of this Court, the withdrawal would not affect the validity of the application. For the deposit and the security have to be maintained in

case where the application is allowed, only till such time that the application is not decided in favour of the defendant."

10. Not only this, learned counsel for opposite party has placed reliance upon paragraph No. 18 of the judgment passed by this Court in ***Prem Chandra Mishra (Supra)*** in which the Court has taken the very same view. Relevant paragraph of the said judgment is quoted below:-

"18. The object behind proviso of Section 17(1) of Provincial Small Causes Courts Act, 1887 is that unscrupulous tenants against whom rent is due, who do not appear on the date fixed may not take advantage of not paying rent and thereby causing harassment of the landlord. The purpose of adding this proviso to Section 17 is to protect the interest of landlord from further harassment and to secure and ensure payment of rent and to put tenant to term to legally make said deposits. Idea behind said provision is to strike a balance between rival interests so as to be just law. In case of *ex parte* decree tenant has been given liberty to move application under Order IX Rule 13 of Code of Civil Procedure on the ground provided therein but under proviso to Section 17(1) of Provincial Small Cause Court Act, 1887 condition has been imposed so that tenant does not take undue advantage for non-appearance and in this background as condition precedent is it has been made obligatory on the part of the tenant to deposit the amount which is due so that in the even an application for setting aside decree is dismissed the decree in question may be satisfied from the amount deposited or from the security furnished by the judgment-debtor."

11. Therefore, as provided in Section 17 of Act, 1887 as well as law discussed here-in-above, it is apparent that while framing Section 17 of Act, 1887, legislation was conscious enough to protect the interest of landlord as well as tenant. Section 17(1) of Act, 1887 provides for deposit of decretal amount before moving application under Order IX Rule 13 of CPC to protect the interest of landlord whereas Section 17(2) of Act, 1887 provides that only in case a person has become liable as surety, he may realise the money which protects the interest of tenant. Therefore, before decision upon the application filed under Order IX Rule 13 of CPC, if amount is released, that would frustrate the intention of legislation. In case money is released prior to the decision upon the application filed under Order IX Rule 13 of CPC, it may intend to multiplicity of litigation as in case of allowing the application, tenant would have no option but to initiate separate legal proceeding for recovery of the money so realised by the landlord. Therefore, during the pendency of application filed under Order IX Rule 13 of CPC, allowing the application of release of money is against the provisions of Section 17 of Act, 1887.

12. So far as compliance of Sections 20(4) & (6) of U.P. Act No. 13 of 1972 is concerned, in case of setting aside of *ex parte* decree, it is open for SCC Court to ensure the compliance of necessary statutory provisions. In case of non-compliance of any provision, it is also open for the parties to move appropriate application before the SCC Court under the provisions of Rules and it is incumbent upon the SCC Court to decide the same in accordance with law.

13. Therefore, in light of observations made here-in-above, order dated

09.03.2022 passed by District Judge, Aligarh is hereby set aside.

14. Accordingly, Revision is **allowed.**

15. No order as to costs.

(2022)05ILR A1437
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.03.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

S.C.C. Revision Defective No. 45 of 2020

Ram Autar Khandelwal ...Revisionist
Versus
Addl. District & Session Judge Lucknow & Anr. ...Opposite Parties

Counsel for the Revisionist:
Nirankar Nath Jaiswal, Prashant Jaiswal

Counsel for the Opposite Parties:
Umesh Kumar Tiwari

Civil Law - Code of Civil Procedure,1908 - Order XV Rule 5- Despite application being made-defendant not paid at all during pendency of suit-neither in account nor in cash in the Court concerned -where suit for arrears of rent and eviction was pending-decree in favour of Landlord-upheld.

Revision rejected. (E-9)

List of Cases cited:

1. Hari Shankar & ors. Vs Rao Girdhari Lal Chowdhury AIR 1963 Supreme Court 698

2. Rama Murti Devi Vs Pushpa Devi & ors. 2017 (15) SCC 230

3. Mundri Lal Vs Sushila Ram (2007) 8 SCC 609

4. "Bal Gopal Maheshwari & ors. Vs Sanjeev Kumar Gupta 2013 (6) AWC 5823 (SC)

5. Bimal Chand Jain Vs Shri Gopal Agarwal 1981 (3) SCC 486

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

1. Heard learned counsel for Revisionist and learned counsel appearing on behalf of the Respondent, Mr. Umesh Kumar Tiwari at length.

2. This Civil Revision has been filed against the judgment and order dated 08.10.2020 passed by the learned Additional District & Sessions Judge, Court No. 19, Lucknow in SCC No. 30 of 2017, 'Ajay Kumar Agarwal Vs. Ram Autar Khandelwal' with a delay of around one month. Although time was granted earlier to the counsel for the contesting respondents to file objections but he has not filed objections.

3. Learned counsel for the respondent no.2 says that he does not propose to file any objection and the matter be heard on merits.

4. Delay is condoned.

5. Office is directed to give a Regular number to this Revision.

6. It is the case of the Revisionist that the respondent landlord had given a shop on monthly rent of Rs.5,500/- to the Revisionist in 2008. Since then the Revisionist has been paying advance rent continuously either through cash or cheque on demand of the landlord as mutually and orally agreed upon by them. It has been alleged that the respondent's son had asked the Revisionist for Rupees Two Lakhs for

opening a new business, but the Revisionist could not furnish such a huge amount immediately. Becoming annoyed the respondent's son persuaded his father to throw the Revisionist out from the premises and had many times illegally approached the Revisionist at his shop forcing him to vacate the premises. The Revisionist ultimately filed an Injunction Suit No. 821 of 2017 before the Civil Judge (Junior Division), Lucknow in May, 2017. After getting notice of such Injunction Suit the respondent landlord sent a legal notice on 27.05.2017 for arrears of rent amounting to Rs.78,000/- for the period between 15.04.2016 to 14.05.2017. Such demand was illegal as the Revisionist had already deposited rent w.e.f. March, 2016 to August, 2016 in the bank account of A. K. Enterprises, the transport firm of the respondent landlord, through cheque No. 405647 on 15.02.2016. The Revisionist on receipt of such legal notice had sent a reply on 27.06.2017 that he had already deposited cheque dated 15.02.2016 in the bank account of the firm for the period w.e.f. March, 2016 to August, 2016. Nevertheless cheque No. 488540 of Rs.78,000/- as demanded by the landlord was again being sent along with the reply through registered post to satisfy the demand for arrears of rent. Since reply had been sent along with a cheque of Rs.78,000/- to the respondent landlord, the Revisionist presumed that the matter had been settled satisfactorily.

7. It has been argued that the respondent landlord with malafide intent filed S.C.C. Suit No. 30 of 2017 on 01.07.2017 for arrears of rent and for eviction. On 07.09.2017, the respondent landlord returned the cheque of Rs.78,000/- to the Revisionist through registered post saying that the account of the Firm had been closed long back and the cheque, therefore, could not be accepted. The Revisionist did not accept this cheque, but approached the court for depositing rent where he was surprised to find out about the pendency of the aforesaid S.C.C. Suit No. 30 of 2017. The Revisionist moved an application under Order 15 Rule 5 read with Section 151 of the CPC on 19.03.2018 for depositing rent along with 9% interest and Advocate's fee that is a total amount of Rs.2,29,220/-. Such arrears were deposited on 12.04.2019. Also, thereafter the Revisionist continued to deposit all rent continuously, as and when it fell due, in the court. However, the S.C.C. Suit has been decreed in favour of the respondent landlord, without appreciating the evidence on record including the application under Order 15 Rule 5 read with Section 151 CPC.

8. It has been argued by Sri Prashant Jaiswal, Advocate appearing for the Revisionist that the learned trial court failed to see that the S.C.C. Suit for arrears of rent was not maintainable as there was no default of rent by the Revisionist. The learned trial court failed to notice that neither the landlord had filed any rent agreement, registered or unregistered, along with the Suit nor he had filed any rent receipt issued by him for any period to show that he was the landlord. The learned trial court could not have come to the conclusion that the Revisionist was a defaulter unless the relationship of landlord and tenant was established and it was also established that the arrears of rent fell due on a particular date. The Revisionist had filed his bank statement to show that all rent was transferred in the bank account of the landlord. The fact of default in payment of Arrears having not been established the very basis of the S.C.C. Suit fell through.

In the Application under Order 15 Rule 5 of the CPC, the Revisionist had specifically stated that advance rent of the period w.e.f. 15.03.2016 to 14.08.2016 had already been paid in the Landlord's Firm's Account i.e. A K & Company's account on 15.02.2016 and the rest of the rent w.e.f. 15.08.2016 to 14.07.2017 had been paid through another cheque again made out in favour of A K & Company sent to the landlord along with this reply of notice dated 27.05.2017. It has also been argued that since the Revisionist had paid rent w.e.f. 15.03.2016 to 14.08.2016 through cheque dated 15.02.2016, the notice that was sent by the landlord in May 2017, was invalid. Even after receipt of notice the petitioner had deposited Rs.78,000/- through cheque in the account of A K & Company on 30.06.2017, therefore, there were no arrears of rent due from the Revisionist and the Suit was not maintainable.

9. It has also been argued that the Suit was not maintainable also for the reason that Ajay Kumar Agarwal had filed a Suit in his personal capacity whereas there was no relationship of landlord and tenant between Ajay Kumar Agarwal and the Revisionist. The Revisionist was running Vinayaka Agencies' retail counter in the shop in question situated at Dubagga on Hardoi Road and the landlord was A K & company of which Ajay Kumar Agarwal was only the proprietor, just as the Revisionist was the proprietor of Vinayaka Agencies. In the Original Suit No. 821 of 2017 filed by the Revisionist against Ajay Kumar Agarwal before the Civil Judge(Junior Division), Haveli, Lucknow, only notice could be served but no temporary injunction could be granted to the Revisionist as the court remained vacant.

10. The learned counsel for the respondent landlord has pointed out the issues framed by the learned trial court that the first issue was with regard to whether there existed any landlord and tenant relationship between the plaintiff and the defendant. The trial court had noted that it was the contention of the Revisionist that there was no relationship of landlord and tenant between him and Ajay Kumar Agarwal and that he was the tenant of A K & Company of which Ajay Kumar Agarwal was only the proprietor and rent had been given through cheques to A K & Company. But in the written statement filed by the tenant, he had admitted that he used to give rent to Ajay Kumar Agarwal also in cash and there was no written agreement between the parties as the landlord and the tenant were good friends in the beginning and landlord Ajay Kumar Agarwal had orally agreed for renting out the shop in question. Also, the Suit for Permanent Injunction, namely Original Suit No. 821 of 2017, had been registered as "Ramavatar Khandelwal vs. Ajay Kumar Aggarwal' and not as "Ramavtar Agarwal vs. A K & Company. The learned trial court came to the conclusion that admission is the best form of evidence. It had been admitted by the tenant that initially rent was giving either in cash to Ajay Kumar Aggarwal or through cheques since the beginning of the tenancy in 2008. Later on, cheques were deposited in the account of A K & Company. It had been admitted by the defendant that Ajay Kumar Agarwal was the only proprietor of the said Firm and no other person had been authorised to receive rent on behalf of the landlord. Besides no documentary evidence was filed by the defendant that the shop in question and the land appurtenant thereto belonged to the Firm A K & Company and not to Ajay Kumar Agarwal.

11. It has been argued by the learned counsel for the Respondent landlord that with regard to the second issue framed by

the learned trial court as to whether there was any default in payment of rent by the defendant, the learned trial court has found that the plaintiff had alleged that the defendant had not paid rent since March 2016, whereas the defendant had alleged that rent had been paid w.e.f. March, 2016 in the account of A K & Company. On the application moved by the defendant under Order 15 Rule 5 of the CPC, it had already been held on 10.05.2019 that arrears of rent along with interest and cost of litigation had not been deposited by the defendant in time despite permission being granted in this regard. It had been alleged by the tenant that all arrears of rent including interest and cost of litigation had been deposited through cheque in the name of A K & Company and not in the name of Ajay Kumar Agarwal, whereas there was an admission in the written statement that the shop in question had been taken on rent by the defendant from Ajay Kumar Agarwal and initially rent was also paid to him in cash by the defendant. After the order dated 10.05.2019, the defence of the tenant had been struck off. The learned trial court had also examined the bank statement filed by the tenant as documentary evidence of payment of rent. It was found that although there is a mention of withdrawal of an amount of Rs.79,588/- on 15.02.2016 through cheque, but there is no mention of the account in which such cheque has been paid. The plaintiff had categorically refused that such amount was ever transferred into the account of the landlord or even the firm A K & Company of which he was the proprietor.

It has been pointed out by the learned counsel for the respondent, landlord, that it is evident from the reply to the legal notice sent by the Revisionist on Page 32 of the paper book that he had knowledge of the account of A K & Company having been closed on 27.06.2017 itself, but he issued a cheque dated 28.06.2017 in the name of A K & Company and sent it by post to the respondent landlord.

12. It has also been pointed out by the learned counsel for the respondent that the company's account was opened only on 23.12.2009, and the Revisionist had taken the premises in question on rent since July, 2008 and had been making payment to Ajay Kumar Agarwal in cash since July, 2008 onwards. Inexplicably, he stopped paying rent to Ajay Kumar Agarwal in 2016 and started depositing cheques in the name of A K & Company thereafter. Even if the tenant's contention that he had paid rent into the account of A K & Company was taken to be correct, it would still not make such payment admissible as arrears of rent due to the plaintiff, Ajay Kumar Agarwal, who was admittedly the person from whom the Revisionist had taken the shop on rent. It has been pointed out by the learned counsel for the respondent that till date the Revisionist has refused to give any rent to Ajay Kumar Agarwal, insisting that his landlord is A K & Company and not Ajay Kumar Agarwal.

13. The learned counsel for the respondent landlord has also pointed out from Annexure 5, page 46 of the paper book that the application moved under Order 15 Rule 5 of the CPC on 19.03.2018 had enumerated the heads under which money was proposed to be deposited. Such application was allowed conditionally, but no money was deposited in time prescribed, as a result the learned trial court rejected the application of the tenant on 22.05.2018. A recall application was filed by the tenant on 14.08.2018, which was allowed on

19.01.2019, but no rent was deposited even thereafter, as a result the learned trial court struck off the defence of the tenant on 10.05.2019. Against such an order the tenant filed Writ Petition No. 16426 (M/S) of 2019, where no interim order was granted and after decision of the trial court impugned in this Revision such petition has become infructuous.

14. The third issue framed by the learned trial court related to whether notice issued to the tenant through registered post on 27.05.2017 by the landlord was a valid notice and had been served upon him. The learned trial court on the basis of evidence on record found that not only the notice was served, it was duly replied to by the tenant. With regard to the relief admissible to the plaintiff then learned trial court found that all three issues having been decided in favour of the plaintiff he was entitled for decree of arrears of rent and for eviction. It therefore directed the defendant to pay arrears of twelve months of rent at the rate of Rs.6,500/- from the date of institution of the Suit as also damages *pendente lite* at the same rate, and to vacate the premises in question and deliver peaceful possession thereof within two months from the date of the order.

15. The learned counsel for the respondent has placed reliance upon judgement rendered by the Supreme Court in ***"Bal Gopal Maheshwari and Others Vs. Sanjeev Kumar Gupta 2013 (6) AWC 5823 (SC)"***, where the Supreme Court has considered the provisions of Order 15 Rule 5 of the CPC and striking off of the defence of the defendant on failure to comply. After considering the language of the provision as added by way of amendment in 1972 in the CPC, the Supreme Court placed reliance upon ***"Bimal Chand Jain Vs. Shri Gopal Agarwal 1981 (3) SCC 486*** to say that :- *"a comprehensive understanding of Rule 5 of Order 15 should be thus:- Sub-Rule(1) obliges the defendant to deposit, at or before the first hearing of the Suit, the entire amount admitted by him to be due together with interest thereon at the rate of 9% per annum and further, whether or not he admits any amount to be due, to deposit regularly throughout the continuation of the suit, the monthly amount due within a week from the date of its accrual. In the event of any default in making any deposit, the court may, subject to the provisions of Sub-Rule (2) to strike off his defence. We shall presently come to what this means. Sub-Rule 2 obliges the court, before making an order for striking off the defence to consider any representation made by the defendant in that behalf. In other words, the defendant has been vested with a statutory right to make a ''representation' to the court against the decision of his defence being struck off. If a representation is made the court must consider it on its merits, and then decide whether the defence should or should not be struck off. This is the right expressly vested in the defendant and enables him to show by bringing material on the record that he has not been guilty of default alleged or if the default has occurred, there is a good reason for it. Now, it is not impossible that the records may contain such material already. In that event, can it be said that Sub-Rule (1) obliges the court to strike out the defence? We must remember that an order under Sub-Rule (1) striking off defence is in the nature of a penalty. A serious responsibility rests on the court in the matter and the power is not to be exercised mechanically. There is a reserve of discretion vested in in the court not to strike out the defence if on the facts and circumstances already existing on the record, it finds good reason*

for not doing so. It will always be a matter for the judgement of the court to decide whether on the material before it, notwithstanding the absence of a representation under Sub-Rule (2) the defence should or should not be struck off. The word "may' in Sub-Rule (1) merely vested the power in the court to strike out the defence. It does not oblige it to do so in every case of default. ....."

16. The Supreme Court in the judgement of *Bal Gopal Maheshwari(Supra)* went on to say that if such discretion is exercised by the learned trial court after looking into an application made by the plaintiff to strike off the defence of the defendant and its reply thereto is submitted by the defendant it would amount to considering the "representation' in the light of Sub-Rule (2) and the High Court should not have interfered in a well considered order passed by the trial court in this regard.

17. The learned counsel for the respondent landlord, has also placed reliance upon a Constitution Bench judgement in the case of ***"Hari Shankar and others Vs. Rao Girdhari Lal Chowdhury AIR 1963 Supreme Court 698"***, and judgement rendered in ***"Rama Murti Devi Vs. Pushpa Devi and Others 2017 (15) SCC 230"***, regarding the scope of Revision under Section 25 of the Provincial Small Causes Courts Act. Learned counsel for the respondent has pointed out paragraph 29 to 38 of the judgement rendered in *Rama Murti Devi(Supra),* wherein after considering the Constitution Bench judgement, as aforesaid , it has been observed that the object of Section 25 is to enable the High Court to see that there has been no miscarriage of justice, that the decision was given according to law. The Court placed reliance on observations made by Chief Justice Beaumont in *"Bell and Co Ltd. v Waman Hemraj AIR 1938(Bombay) 223", where he said :- ".....The section does not enumerate the cases in which the court may interfere in revision, as does, Section 115 of the Code of Civil Procedure, and I certainly do not propose to attempt an exhaustive definition of the circumstances which may justify such interference; but instances which readily occur to the mind are cases in which the court which made the order had no jurisdiction or in which the court has based its decision on evidence which should not have been admitted, or cases where the unsuccessful party has not been given a proper opportunity of being heard, or the burden of proof has been placed on the wrong shoulders. Wherever the court comes to the conclusion that the unsuccessful party has not had a proper trial according to law, then the court can interfere. But in my opinion, the court ought not to interfere merely because it thinks that possibly the judge who heard the case may have arrived at a conclusion which the High Court would not have arrived that.....".*

18. The Supreme Court referred to another judgement rendered in ***"Mundri Lal Vs. Sushila Ram (2007) 8 SCC 609"***; where it was held that a pure finding of fact based on appreciation of all the evidence although may not be interfered with but there are several circumstances in which the Revisional Court under Section 25 of the 1887 Act, can interfere with the finding of fact. It referred to the observations made by the court in paragraph 22 and 23 as follows :

" 22. There cannot be any doubt whatsoever that the Revisional jurisdiction

of the High Court under Section 25 of the Provincial Small Causes Courts Act is wider then Section 115 of the Code of Civil Procedure. But the fact that Revision is provided for by the statute, and not an Appeal, itself is suggestive of the fact that ordinarily Revisional jurisdiction can be exercised only when a question of law arises.

"23. We however do not mean to say that under no circumstances finding of fact cannot be interfered with. A pure finding of fact based on appreciation of evidence although may not be interfered, with but if such finding has been arrived at upon taking into consideration irrelevant factors or therefore, relevant fact has been ignored, the Revisional Court will have the requisite jurisdiction to interfere with the finding of fact. Applicability of provisions of Section 2 (2) of the Act may in that sense involve determination of mixed question of law and fact."

19. Having heard the learned counsel for the Revisionist and the learned counsel appearing on behalf of the respondent landlord, I have also carefully perused the order impugned. This is not a case where the trial court has considered any irrelevant fact or has ignored any relevant fact. There is also no perverse finding of fact against the record. The Revisionist may have been alleging that he had paid all arrears of rent due to the landlord, the burden was on him to prove such allegations. The learned trial court on the basis of documentary evidence and provisions of Order 15 Rule 5 of the CPC has come to a conclusion that despite an application being made, the defendant had not made any payment at all during the pendency of the Suit in the account of the respondent landlord nor had deposited any sum in cash in the court concerned where the Suit for Arrears of Rent and Eviction was pending. This Court, therefore, finds no good ground to show interference in the order impugned.

20. The Revision stands ***Rejected***. Since the order of the trial court stands affirmed it shall be complied with strictly by the Revisionist, who shall pay all arrears of rent and also damages *pendente lite* with interest at the rate of 12 percent per annum and vacate the premises in question within a period of two months.

(2022)05ILR A1443
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.03.2022

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

S.C.C. Revision No. 41 of 2022

Radhe Shyam Chaurasiya & Anr.
...Revisionists
Versus
Smt. Babita ...Opposite Party

Counsel for the Revisionist:
Sri Mahadeo Singh Chandel

Counsel for the Opposite Party:
Sri Harsh Narayan Singh

Civil Law - Code of Civil Procedure,1908 - Order XV Rule 5 - Suit for eviction and arrears of rent against revisionist-opposite party filed Written St.ment denying tenancy of revisionist no.1 but accepted tenancy of revisionist no.2 -opposite party filed application under Order XV Rule 5 to strike off defence-no payment of rent before the Court concerned- after first hearing of suit-defence rightly struck off.

Revision dismissed. (E-9)

List of Cases cited:

1. Maya Devi & anr. Vs Vipin Kumar Kushwaha & anr. passed in S.C.C. Revision No. 489 of 2014 decided on 26.8.2016

2. S.B.I., City Branch Pandey Hata, Thru. its Branch Manager & anr. Vs Ram Niwas Verma & ors. reported in 2018 (127) ALR 362

3. Gaya Prasad Vs Thakur Krishna Chandra Ji Maharaj Virajman Mandir Bag Beniram & anr. reported in 2018 (127) ALR 104

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard learned counsel for the revisionists and Sri Harsh Narayan Singh, learned counsel for the opposite party.

2. Present revision has been filed challenging the impugned order dated 3.11.2021 passed by the Additional Session Judge, Court No.1, Banda in SCC No. 3 of 2019 (Smt. Babita vs. Radhe Shyam Chaurasiya).

3. Learned counsel for the revisionist submitted that revisionist no.1 is never the tenant of opposite party, whereas tenancy is with the revisionist no. 2 through her husband since 1989. After institution of Suit No. 3 of 2019, opposite party has filed written statement denying the tenancy of revisionist no.1, but accepted the tenancy of revisionist no. 2. During the pendency of suit proceedings, opposite party has filed an application under Order XV Rule 5 of Code of Civil Procedure (in short C.P.C.) on 5.1.2021 to struck off the defence, which was replied by the revisionists-defendants on 2.2.2021. In its reply, it is stated that revisionist no.1 is never the tenant and revisionist no.2 is shown to be sub-tenant, against whom, no rent is claimed, therefore, both are not liable to pay rent as required under Order XV Rule 5 of C.P.C.. Further, revisionist no. 2 is continuously tried to pay rent, but the same was not accepted by the opposite party, therefore, revisionist no.2 sent the rent of shop in question through post office on 30.4.2019. He also stated that revisionist no.2 paid the rent of 32 months from 13.2.2015 to 13.10.2017. Lastly, he submitted that under such facts and circumstances, application has wrongly been allowed and order is bad in law and liable to be set aside.

4. Per contra, Sri Harsh Narayan Singh, learned counsel for the opposite party submitted that both the defendants-revisionists are tenant of shop in question and taking contrary view. On one hand, they are saying that they are not tenant and on the other hand, it is accepted by revisionist no.2 that she has deposited rent from time to time. He next submitted that in case, revisionist no.1 is not the tenant, he must file an affidavit to this effect before the Court below with the specific averment that his name may be deleted from the array of the parties and he is only visitor at the shop of revisionist no.2, who is original tenant. He further submitted that now it is admitted by the revisionist no.2 that she is tenant. Further, from the pleadings of this revision as well as objection filed to the application under Order XV Rule 5 of C.P.C., it is admitted by the revisionist no.1 that he was not the tenant, therefore, he has not paid rent and revisionist no.2 is tenant, but never deposited the rent as required under provision of Order XV Rule 5 of C.P.C. Therefore, there is no illegality or irregularity in allowing the application filed under Order XV Rule 5 C.P.C.

5. In support of this contention, he placed reliance upon the judgments of this Court in the cases of ***Maya Devi another vs. Vipin Kumar Kushwaha and another passed in S.C.C. Revision No. 489 of 2014 decided on 26.8.2016, State Bank of India,***

City Branch Pandey Hata, Thru. its Branch Manager and another vs. Ram Niwas Verma and others reported in 2018 (127) ALR 362 and Gaya Prasad Vs. Thakur Krishna Chandra Ji Maharaj Virajman Mandir Bag Beniram and another reported in 2018 (127) ALR 104.

6. I have considered the rival submissions advanced by the learned counsel for the parties and perused the provision of Order XV Rule 5 of C.P.C. as well as judgments of this Court. Order XV Rule 5 of C.P.C. Provides as follows:-

"5. Striking of defence for failure to deposit admitted rent, etc. In any suit by a lessor for the eviction of a lessee after the determination of his lease and for the recovery from him of rent or compensation for use and occupation, the defendant shall, at or before the first hearing of the suit, deposit the entire amount admitted by him to be due together with interest thereon at the rate of nine per centum 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 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.

Explanation 1. The expression "first hearing' means the date for filing written statement for hearing mentioned in the summons or where more than one of such dates are mentioned, the last of the dates mentioned.

Explanation 2. The expression "entire amount admitted by him 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, paid to the lessor acknowledged by the lessor in writing signed by him and the amount, if any, deposited in any Court under Section 30 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972.

Explanation 3. (1) 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.

(2) Before making any order for striking off defence, the Court may consider any representation made by the defendant in that behalf provided such representation is made within 10 days, of the first hearing or, of the expiry of the week referred to in sub-section (1), as the case may be.

(3) The amount deposited under this Rule may at any time be withdrawn by the plaintiff:

Provided that such withdrawal shall not have the effect of prejudicing any claim by the plaintiff disputing the correctness of the amount deposited:

Provided further that if the amount deposited includes any sums

claimed by the depositor to be deductible on any account, the Court may require the plaintiff to furnish the security for such sum before he is allowed to withdraw the same."

7. The first part deals with the deposit of the 'entire amount admitted by him to be due' together with interest at or before the first hearing of the suit. The second part deals with the deposit of 'monthly amount due' which has to be made throughout the continuation of the suit. So far as any amount deposited prior to institution of the suit, may be adjusted against the arrears, if any such application is filed. Whereas second part is concerned, it is mandatory requirement to deposit the rent before the Court concerned, where the suit is instituted. In the objection dated 2.2.2021 filed to the application under Order XV Rule 5 of C.P.C as well as affidavit filed before the Court, it is accepted by the revisionist no.2 that no rent has been paid by her before the Court concerned after first hearing of the suit.

8. This Court in the matter of Maya Devi (Supra) has taken specific view that in case of denial of tenancy, he may not be required to deposit the amount admitted to be due at or before the first hearing of the suit but he would still be required to deposit the monthly amount due within a week. Relevant paragraph of the said judgment is being quoted hereinbelow:-

"In the aforesaid case it was held that where the defendant denies the existence of landlord and tenant relationship, he may not be required to deposit the amount admitted to be due at or before the first hearing of the suit but he would still be required to deposit the monthly amount due within a week from the date of its accrual throughout the continuation of the suit because such deposit has to be made in spite of the fact he admits any amount to be due or not."

9. In the matter of ***Gaya Prasad (Supra)***, Court has taken the view that rent is required to be deposited in compliance of provisions of Order XV Rule 5 of C.P.C. Relevant paragraph of the said judgment is being quoted hereinbelow:-

"Default in payment of rent is admitted and stands proved on record inasmuch as according to own case of the defendant-petitioner he has not paid rent after 04.08.1999. It is also not disputed that the rent has not been deposited in compliance to the provisions of Order XV Rule 5 C.P.C. Consequently, his defense was also struck off. The order striking off the defense, therefore, also does not suffer from any manifest error of law."

10. In the matter of ***State Bank of India, City Branch Pandey Hata (Supra),*** Court has again taken the same view that rent is not deposited by the tenant, therefore, there is no illegality in striking off the defence. Relevant paragraph of the said judgment is being quoted hereinbelow:-

"Considering the admitted facts of the case that the defendants-petitioners have neither disputed the arrears of rent on the first date of hearing nor paid monthly rent and as such protection of order XV Rule 5 C.P.C. was not available to him. Consequently, the court below has not committed any error of law in allowing the application 37Ga and striking off the defence of the defendants-petitioners/tenants. So far as the rejection of application 50Ga is concerned, I find that as per statement made by learned

counsel for the plaintiffs-respondents before this Court and not disputed by learned counsel for the defendants-petitioners, the date 8.2.2018 is fixed before the court below for arguments. Therefore, I find it appropriate to request the court below to decide the aforesaid SCC Suit No.05 of 2016 (Ram Niwas Verma and others Vs. State Bank of India and another) in accordance with law, expeditiously, preferably within eight weeks from the date of presentation of a certified copy of this order, without granting any unnecessary adjournment to either of the parties."

11. From perusal of Order XV Rule 5 of C.P.C., it is apparently clear that any deposit made prior to first appearance in SCC suit may be adjusted for arrears of rent due upon filing an application, but after institution of suit, it is mandatory requirement to deposit rent before the Court, where the suit is instituted. Once it is not disputed that rent has not been deposited before the Court concerned, where the suit is instituted, there is no option before the Court to struck off the defence as provided under the provisions of Order XV Rule 5 of C.P.C.

12. So far as present case is concerned, there is admission on the part of revisionist no.2 that she has paid rent from time to time and she is tenant. She also admitted that she has never paid rent before the Court concerned after first hearing of the suit as required under Order 5 Rule 15 of C.P.C.

13. Therefore, in light of facts of the case as well as law laid down by this Court from time to time, there is no illegality or irregularity and Court has rightly struck off the defence of revisionists. Revision lacks merit and is, accordingly, **dismissed.** No order as to costs.

(2022)05ILR A1447
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.02.2022

BEFORE

THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Second Appeal No. 940 of 1997

Kamlesh Shukla & Ors. ...Appellants
Versus
Smt. Annapurna Devi & Anr. ...Respondents

Counsel for the Appellants:
Sri S.D. Kautilya, Sri Dinesh Dwivedi

Counsel for the Respondents:
Sri R.P. Shastri, Sri H.P. Mishra, Sri Raghvendra P. Shastri, Sri Vivek Saran

Civil Law - Hindu Succession Act, 1956 - Section 14 -Deceased had two wives-deceased wife was entitled for residence and maintenance from her husband-family settlement-several properties devised in her favour and also to her step son-to avoid future dispute-house in dispute-right to transfer with consent of step son-possession handed to her-she died in 1977-Hindu Succession Act came into force in 1956-she was occupying the property on that time-through family settlement-her pre-existing right of maintenance and residence was recognized-she became full owner of the property in question by virtue of section 14(1) and section 14 (2) cannot be applied. (E-9)

List of Cases cited:

1. V. Tulasamma & ors. Vs V. Shehsa Reddy, AIR 1977 SC 1944

2. Badri Parasad Vs Smt. Kanso Devi AIR 1970 SC 1963

3. Rangaswami Naicker Vs Chinnammal, AIR 1964 Mad 387

4. Gullapalli Krishna Das Vs Vishnumolakala Venkaiah & ors., AIR 1978 SC 361

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

1. Heard Sri S.D. Kautilya, learned counsel for the appellants and Sri H.P. Mishra, learned counsel for the respondents.

2. This second appeal arises from the judgment and decree dated 12.09.1997 passed in First Appeal No.12/1993 (Smt. Annapurna Devi and others vs. Pt. Ram Shankar Shukla substituted by his legal heirs) by learned First Additional District Judge, Pilibhit by which learned court has allowed the appeal and set aside the judgment and decree dated 28.11.1981 passed by Civil Judge, Pilibhit in O.S. No.49/2007 (Ram Shankar Shukla Vs. Smt. Annapurna Devi and Harish Chandra Bajpai) holding that Smt. Ramshri Kunwar (mother of Smt. Annapurna Devi) became full owner of the property in suit by virtue of Section 14 (1) of the Hindu Succession Act and not a licencee.

3. The facts giving rise to the present appeal are in brief that Pt. Jagan Mohan Shukla was owner of movable and immovable property. He had two wives, one Smt. Ramshri Kunwar and other Smt. Saraswati Devi. Smt. Annapurna Devi was daughter of Smt. Ramshri Kunwar and Pt. Ram Shankar Shukla was son of Smt. Saraswati Kunwar. Sri Ram Shankar Shukla was represented by his son Kamlesh Kumar, daughter Smt. Indra Prakashini and Smt. Raj Mohini. During pendency of this appeal, Kamlesh Shukla also died and represented through his legal representatives. Likewise respondent Smt. Annapurna Devi died and represented through her legal representatives.

4. Pt. Jagan Mohan Shukla executed a family settlement deed on 27.05.1940 with a view to maintain peace and harmony in the family between Sri Ram Shankar Shukla and Smt. Ramshri Kunwar his step mother. He made arrangement of his entire property and gave life estate to his wife Smt. Ram Shri Kunwar in two houses as described in para no.4 A of the plaint and granted absolute rights of ownership of one shop as mentioned in para no.4C, half share in two grooves as mentioned in para no.4B of the plaint. He reserved for his own use, the property mentioned in para no.5 for lifetime and after his death, the plaintiff/Ram Shankar Shukla was to become its absolute owner. The settlement deed dated 27.05.1940 was acted upon and Smt. Ramshri Kunwar was given possession accordingly. She sold some of the property given to her by the deed dated 27.05.1940 and continued to occupy the houses mentioned in para no.4A of the plaint till she died on 16.04.1977 and then property was occupied by her daughter Smt. Annapurna Devi and her husband. Since Smt. Ram Shri Kunwar was given life interest in the property (houses) and daughter of Smt. Ram Shri Kunwar with her husband was living in the houses even after the death of Smt. Ram Shri Kunwar, therefore, they were asked to vacate the property but on their failure, this suit was filed by the plaintiff Ram Shankar Shukla which was decreed by the learned trial court holding that since Smt. Ram Shri Kunwar was given life interest in the disputed houses by way of gift-cum-will-cum family settlement by Pt. Jagan Mohan Shukla, therefore, the case was covered by

sub Section 2 of Section 14 of the Hindu Succession Act.

5. Being aggrieved with this judgment and decree Smt. Annapurna Devi preferred first appeal before the District Judge which was heard and decided by learned First Additional District Judge, Pilibhit on 12.09.1997 by which learned court allowed the appeal and held that Smt. Ram Shri Kunwar became the owner of the property in view of Section 14 of the Hindu Succession Act and she was not a licencee. Being aggrieved with this judgment and decree this second appeal has been preferred by legal heirs of Ram Shankar Shukla against Smt. Annapurna Devi (died during the pendency of appeal) and her husband Harish Chandra Bajpai before this Court.

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

7. In this appeal two substantial questions of law were formulated.

I. Whether the Gift-cum-will-cum-family settlement dated 27.5.1940 executed by Pt. Jagan Mohan Shukla is not covered by the provisions of Section 14(2) of the Act of 1956.

II. Whether the defendants/opposite parties have any rights on the property in dispute by virtue of the settlement dated 27.05.1940.

8. Learned counsel for the appellants has argued that in the present situation of the case sub-section (2) of Section 14 of Hindu Succession Act will apply because property was not given to Smt. Ram Shri Kunwar by her husband Pt. Jagan Mohan Shukla for her maintenance with limited interest but she was admitted to the property as licencee. The family settlement by which property was devised will not come within the ambit of sub-section (1) of Section 14 of the Act. Nowhere the word maintenance gets mention in the deed of family settlement. In this view, the judgment and decree passed by learned first appellate court is to be set aside and appeal be allowed.

9. Per contra, learned counsel for the respondents urged that the reasoning as given by the learned counsel for the appellants does not get support from the language as used in sub-section (1) & (2) of Section 14 of Hindu Succession Act. It is against the intention of the legislature. By passing the act the legislature intended to confer full rights of ownership in the property possessed by a female Hindu either before or after the commencement of the Act. As per interpretation by Hon'ble the Supreme Court, if pre-existing right of a female is recognized in conferring rights regarding some property then sub-section (1) of Section 14 will apply. On the contrary if new right is created only then sub-section (2) may apply. In the present case respondent Smt. Annapurna Devi is daughter of Smt. Ram Shri Kunwar wife of Jagan Mohan Shukla who was entitled for her residence and maintenance from her husband and that right was recognized by devising the property to her through family settlement, therefore, sub-section (1) of Section 14 will apply but not sub-section (2). The learned first appellate court has passed the judgment and decree in question in this appeal after considering all these facts in the light of law as laid down by Hon'ble the Supreme Court and as provided under Section 14 of the Hindu Succession Act. There is no any illegality or infirmity in the impugned judgment but this appeal

being forceless, is liable to be dismissed with cost. Learned counsel for the respondent relied on the cases of *V. Tulasamma & othes Vs. V. Shehsa Reddy, AIR 1977 SC 1944* and *Gullapalli Krishna Das Vs. Vishnumolakala Venkaiah & others, AIR 1978 SC 361.*

10. To decide the question, as to whether property in dispute which was devised by Pt. Jagan Mohan Shukla in favour of Smt. Ram Shri Kunwar through family settlement creating life interest in it, confers full right of ownership on her by virtue of sub-section (1) of Section 14 of the Hindu Succession Act or it is covered with the provisions of sub-section (2) of Section 14 of the Act, it is necessary to go through the provisions as contained in Section 14 of the Act and also the various judicial pronouncements in this regard.

11. Section 14 of Hindu Succession Act, 1956 provides that :-

"14(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation.---In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheri-tance or device, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner what- ever, and also any such property held by her as stridharas immediately before the commence- ment of this Act.

(2) Nothing contained in sub-section (1) shah apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

12. Prior to the enactment of Section 14, the Hindu Law restricted the nature of the interest of Hindu female in property acquired by her. The legislature by enacting sub-section (1) of the Section 14 intended to convert the interest which a Hindu female has in property, however, restricted the nature of that interest under the Shastri Hindu Law, into absolute interest. The Hindu Succession Act, 1956 had made far reaching changes in this regard. The Act confers upon the Hindu female, full rights of inheritance and sweeps away the traditional limitations on her powers of disposition.

13. Section 14 (1) is wide in its scope and ambit. It provides that any property possessed by a female Hindu, whether acquired before or after the commencement of this Act shall be held by her as full owner thereof and not as a limited owner. The words 'any property' are large enough to cover any and every kind of property but in order to make it comprehensive, there is an explanation. Now, whatever be the kind of property movable or immovable and whichever be the mode of acquisition, it would be covered by sub-section (1) of Section 14, the object of legislature being to wipe out the disabilities from which a Hindu female suffered in regard to ownership of property under the old law.

14. The provision under sub-section (2) of Section 14 is more in the nature of a proviso or exception to sub-section (1). It

cannot be interpreted in a manner to deprive a Hindu female of the protection sought to be given to her by sub-section (1). Sub-section (2) must, therefore, be read in the context of sub-section (1) so as to leave as large a scope for operation as possible to sub-section (1). It must be confined to cases where property is acquired by a female Hindu for the first time as a grant without any pre-existing right, under a gift, will, instrument, decree, order or award, the terms of which prescribe a restricted estate in the property.

15. This line of approach in the construction of sub-section (2) of section 14 is amply borne out by the trend of judicial decisions of Hon'ble the Apex Court. In this connection reference be made to the decision in the case of ***Badri Parasad vs. Smt. Kanso Devi AIR 1970 SC 1963.*** The facts in that case were that one Gajju Mal owning self- acquired properties died in 1947 leaving five sons and a widow. On August 5, 1950, one Tulsi Ram Seth was appointed by the parties as an arbitrator for resolving certain dif- ferences which had arisen relating to partition of the properties left by Gujju Mal. The arbitrator made his award on December 31, 1950 and under clause 6 of the award, the 'widow was awarded certain properties and it was expressly stated in the award that she would have a widow's estate in the properties awarded to her. While the widow was in possession of the properties, the Act came into force and the question arose whether on the coming into force of the Act, she became full owner of the properties under sub- section (1) or her estate in the properties remained a restricted one under sub-section (2) of section 14. It was held that although the award gave a restricted estate to the widow in the properties allotted to her, it was sub-section (1) which applied and not sub-section (2), because inter alia the properties given to her under the award were on the basis of a pre-existing right which she had as an heir of her husband under the Hindu Women's Right to Property Act, 1937 and not as a new grant made for the first time. Sub-section (2) can come into operation only if acquisition in any of the methods enacted therein is made for the first time without there being any pre-existing right in the female Hindu who is in possession of the property. It was further held that the mere fact that the partition was by means of an award would not bring the matter within Section 14(2) of the Act, because the interest given to the widow was on the basis of pre-existing right and not a new grant for the first time. So also in Nirmal Chand v. Vidya Wanti (dead) by her legal representatives, C.A. No.609 of 1965, D/- 21-1 1969 (SC) there was a regular partition deed made on December 3, 1945 between Amin Chand, a coparcener and Subhrai Bai, the widow of a deceased coparcener, under which a certain property was allotted to Subhrai Bai and it was specifically provided in the partition deed that Subhrai Bai would be entitled only to the user of the property and she would have no right to alienate it in any manner but would only have a life interest. Subhrai Bai died in 1957 subsequent to the coming into force of the Act after making a will bequeathing the property in favour of her daughter Vidyawati. The right of Subhrai Bai to bequeath the property by will was challenged on the ground that she had only a limited interest in the property and her case was covered by sub-section (2) and not sub-section (1). This contention was negatived and it was held that though it was true that the instrument of partition prescribed only a limited interest for Subhrai Bai in the property, that was in

recognition of the legal position which then prevailed and hence it did not bring her case within the exception contained in sub-section (2) of section 14. It was observed:

"If Subhrai Bai was entitled to a share in her husband's properties then the suit proper- ties must be held to have been allotted to her in accordance with law. As the law then stood she had only a life interest in the properties taken by her. Therefore the recital in the deed in question that she would have only a life interest in the properties allotted to her share is merely recording the true legal position. Hence it is' not possible to con- clude that the properties in question were given to her subject to the condition of her enjoying it for her life time. Therefore the trial court as well as the first Appellate Court were right in holding that the facts of the case do not fall within S. 14 (2) of the Hindu Succession Act, 1956."

16. It will be seen from these observations that even though the property was acquired by Subhrai Bai under the instrument of partition, which gave only a limited interest to her in the property, the Court held. that the case fell within sub-section (1) and not sub-section (2). The reason obviously was that the property was 'given to Subhrai Bai in virtue of a pre-existing right inhering in her and when the instrument of partition provided that she would only have a limited interest in the property, it merely provided for something which even otherwise would have been the legal position under the law as it then stood. It is only when property is acquired by a Hindu female as a new grant for the first time and the instrument, decree; order or award giving the property prescribes the terms on which it is to be held by the Hindu female, namely, as a restricted owner, that sub- section (2) comes into play and excludes the applicability of sub-section (1).

17. The object of sub-section (2), as pointed out by Hon'ble the Apex Court in ***Badri Prasad's case (supra)*** while quoting with approval the observations made by the Madras High Court in ***Rangaswami Naicker v. Chinnammal, AIR 1964 Mad 387***, is "only to remove the disability of women imposed by law and not to interfere with contracts, grants or decree etc. by virtue of which a woman's right was restricted" and, there- fore, where property is acquired by a Hindu female under the instrument in virtue of a pre-existing right, such as a right to obtain property on partition or a right to maintenance and under the law as it stood prior to the enactment of the Act, she would have no more than limit- ed interest in the property, a provision in the instrument giving her limited interest in the property would be merely by way of record or recognition of the true legal position and the restriction on her interest being a "disability imposed by law" would be wiped out and her limited interest would be enlarged under sub-section (1). But where property is acquired by a Hindu female under an instrument for the first time without any pre-existing right solely by virtue of the instrument, she must hold it on the terms on which it is given to her and if what is given to her is a restricted estate, it would not be enlarged by reason of sub-section (2).

18. In the light of the above decisions of the Hon'ble Apex Court the following principles appear to be clear:

(1) that the provisions of Section 14, of the 1956 Act must be liberally construed in order to advance the object of

the Act which is to enlarge the limited interest possessed by a Hindu widow which was in consonance with the changing temper of the times;

(2) it is manifestly clear that sub-s. (2) of Section 14 does not refer to any transfer which merely recognises a pre-existing right without creating or conferring a new title on the widow. This was clearly held by this Court in Badri Parshad's case (supra).

(3) that the Act of 1956 has made revolutionary and far-reaching changes in the Hindu society and every attempt should be made to carry out the. spirit of the Act which has undoubtedly supplied a long felt need and tried to do away with the invidious distinction between a Hindu male and female in matters of intestate succession;

(4) that sub-s. (2) of Section 14 is merely a proviso to. subs. (1) of Section 14 and has to be interpreted as a proviso and not-in a manner so' as to destroy the effect of the main provision.

19. The Hon'ble Apex Court in the case of ***V. Tulasamma & othes Vs. V. Shehsa Reddy, AIR 1977 SC 1944*** has considered the aforesaid cases and discussed the legal position elaborately relating to sub-section (2) of Section 14 and held in Para No.40 as under :-

"Finally, we cannot overlook the scope and extent of a proviso. There can be no doubt that sub-s. (2) of Section 14 is. clearly a proviso to Section 14 (1) and this has been so held by this Court in Badri Prasad's case (supra). It is well settled that a provision in the nature of a proviso merely carves out an exception to the main provision and cannot be interpreted in a manner so as to. destroy the effect of the main provision or to render the same nugatory. If we accept the argument of the respondent that sub-s. (2) to Section 14 would include even a property which has been acquired by a Hindu female at a partition or in lieu of maintenance then a substantial part of the Explanation would be completely set at naught which could never be the intention of the proviso Thus we are clearly of the opinion that sub-s. (2) of of the proviso should be interpreted in such a way so as not to substantially erode Section 14 (1) or the Explanation thereto. In the present case we feel that the proviso has carved out completely a separate. field and before it can apply three conditions must exist:

(i) that the property must have been acquired by way of gift, will, instrument, decree, order of the Court or by an award;

(ii) that any of these documents executed in favour of a Hindu female must prescribe a restricted estate in such property; and

(iii) that the instrument must create or confer a new right, title or interest on the Hindu female and not merely recognise or give effect to a pre-existing right which the female Hindu already possessed."

20. In the case of ***Gullapalli Krishna Das Vs. Vishnumolakala Venkaiah & others, AIR 1978 SC 361***, the Hon'be Apex Court has again affirmed the law as laid down by it in the case of V. Tulasamma Vs. V. Shehsa Reddy (supra).

21. In the instant case Pt. Jagmohan Shukla had two wives and Smt. Ram Shri Kunwar was one of them who had a

daughter namely Smt. Annapurna Devi. Ram Shankar Shukla was from the other wife. Being wife, Smt. Ram Shri Kunwar was entitled for residence and maintenance from her husband Pt. Jagan Mohan Shukla. Through family settlement several properties were devised in favour of her and her step son Ram Shankar Shukla by Pt. Jagan Mohan Shukla to avoid future disputes. She was also conferred right of full ownership in respect of other properties but the houses in dispute except the right to transfer with the consent of Ram Shankar Shukla. Possession was also handed over to her. In the year 1956, the Hindu Succession Act came into force with Section 14 conferring the rights of full ownership on Hindu women. At that time, she was occupying the property. She died on 16.04.1977. It is crystal clear that through family settlement the pre-existing right of residence & maintenance of Smt. Ram Shri Kunwar was recognized. No any new right was conferred on her. So she became full owner of the property in question by virtue of sub-section (1) of Section 14 of the Hindu Succession Act and sub-section (2) of Section 14 of the Act, cannot be applied.

22. Consequently the defendant/respondent Smt. Annapurna Devi, daughter of Smt. Ram Shri Kunwar, who became the full owner of the property in question, is also entitled to inherit the property.

23. This Court is of the considered opinion that there appears no illegality or impropriety in the judgment and decree dated 12.09.1997 passed by learned First Additional District Judge, Pilibhit by which learned court had allowed the appeal and set aside the judgment and decree dated 28.11.1981 passed by Civil Judge, Pilibhit in O.S. No.49/2007.

24. Accordingly, this second appeal lacks merit and is, hereby, ***dismissed*** and the judgment and decree passed by first appellate court is confirmed.

25. No order as to costs.

(2022)05ILR A1454
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.05.2022

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Second Appeal No. 957 of 2017

Gokul Pandey & Ors. ...Appellants
Versus
Gram Pradhan & Anr. ...Respondents

Counsel for the Appellants:
Sri Sheo Shankar Tripathi, Sri Adya Prasad Tewari

Counsel for the Respondents:
Sri Girish Vishwakarma, Sri Tariq Maqbool Khan, Sri P.K. Giri (Addl. C.S.C.)

Civil Law - Specific Relief Act,1963 - Section 34 - Declaratory Suit against defendants/respondent-for declaring them as legal heir of deceased-and for declaring Markandey Pandey as dead-not heard and seen for last ten years-Appellate Court recorded-though suit u/s 34 maintainable-no notice u/s 80 (2) CPC given to defendants being St. -appeal rejected-error in dismissing.

Second Appeal allowed. (E-9)

List of Cases cited:

1. LIC of India Vs Anuradha, 2004 (10) SCC 131

2. Sanju Devi & ors. Vs St. & ors. 2014 SCC Online Delhi 65

3. Smt. Alka Sharma & ors. Vs U.O.I. & ors., Second Appeal No.192 of 2007

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

1. Heard Sri A.P. Tewari, learned counsel for the appellant and Sri P.K. Giri, learned Additional Chief Standing Counsel for the respondents.

2. This is plaintiffs' appeal under Section 100 of Code of Civil Procedure *(in short "CPC")* against the judgment and decree dated 04.08.2017 passed by Additional District and Sessions Judge/Special Judge (Gangster Act), Court No.8, Deoria in Civil Appeal No.45 of 2016 arising out of judgment and decree dated 22.11.2016 passed by Additional Civil Judge (Junior Division), Court No.24, Deoria in Original Suit No.983 of 2007.

3. The facts, in brief, are that the plaintiffs-appellants filed a declarator suit against the defendants-respondents for declaring them as the legal heirs of deceased Markandey Pandey and also for declaring Markandey Pandey as dead.

4. The plaint version is that, on 12.10.1996, Markandey Pandey left the home to visit Vaishno Devi Temple, but when no whereabouts were heard by the family members, a report of missing person was given to the concerned police station. Further, as the whereabouts of Markandey Pandey was not heard for 7 years and the defendants were not passing orders for entry in the revenue records of the plaintiffs-appellants, Original Suit No.983 of 2008 was filed.

5. The aforesaid suit was contested by the defendant no.2, who filed his written statement and denied the allegations. It was further stated that no first information report has been lodged nor any publication in newspaper has been made regarding missing of Markandey Pandey. The trial Court framed the following issues:-

"01- क्या वादीगण वाद पत्र में उल्लिखित कारणों के आधार पर उदघोषणात्मक ब्यादेश का अनुतोष पाने का अधिकारी है ?

02- क्या वाद अवमूल्यांकित है ?

03- क्या अदा न्याय शुल्क अपर्याप्त है ?

04- क्या न्यायालय को मामले की सुनवाई के क्षेत्राधिकार नहीं है ?

05- क्या वाद आदेश 7 नियम-11 सि० प्र ० सं ० से बाधित है ?

06- अन्य कोई अनुतोष ? "

6. The trial Court, while deciding issue no.1, held that no first information report has been brought on record and only through Paper No.23-Ga, an application given to the police station was filed. The Court held that it had no jurisdiction to declare the plaintiffs as the successors of Markandey Pandey and thus, dismissed the suit.

7. Against the said judgment, a Civil Appeal No.45 of 2016 was preferred and the lower appellate Court dismissed the appeal on the ground that notice under Section 80 (2) CPC was not given before the filing of the suit and there was technical error in the filing of the suit and thus,

appeal was dismissed on 04.08.2017, hence the present appeal.

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

9. The plaintiffs-appellants filed suit for declaring them to be the legal heirs of Markandey Pandey who was missing since 12.10.1996 and further sought that Markandey Pandey be declared dead.

10. Section 34 of the Specific Relief Act provides for the declaratory decrees for which any person is entitled to. Section 34 of Specific Relief Act, 1963 is extracted hereasunder:-

*" **34. Discretion of court as to declaration of status or right.**--Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief: Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.*

Explanation.--A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence, and whom, if in existence, he would be a trustee."

11. From the bare perusal of the above provision, it is clear that a suit for declaration could be filed by any person for the following objects (a) for his or her legal character, (b) for any right as to any property. Thus, it is clear that a suit for declaration may be instituted for declaring status or legal character which a person/party may be entitled to. However, in a suit for declaration of a civil death of another person, plaintiff is not entitled to such legal character under Section 34 of the Act. It is because that a suit has been brought for legal character for another person and not of the plaintiff.

12. Section 34 clearly provides that any legal character may be declared for which a plaintiff is entitled. Besides this, he should not be stranger to a dead person, but he must be interested in such legal character, may be as his legal heirs. The suit filed at the instance of plaintiff can be contested by anyone, denying or interested to deny his title to such character or right. Section 34 of the Act further bars any such declaration where the plaintiff is able to seek further relief. Legal character is a position recognised by law. A person's legal character is the attribute which law attaches to him. After death of a person his heirs, having interest in such legal character, have title to seek declaration of such legal character as to the death of the person. The suit at the instance of any such person for a declaration is maintainable, if he can stand the test that he is entitled to any legal character, even though, he cannot lay to immediate claim to any property.

13. In most of the case, the defendants almost accept the fact of missing of a person for whom declaration of civil death is sought, therefore, absence of denial from the side of defendants bars the relief sought. A mere suit of declaration of death of a person is not maintainable. Section 107 and 108 of the Evidence Act are regarding missing of person. Relevant Sections 107

and 108 of Evidence Act are extracted hereasunder:-

"107. Burden of proving death of person known to have been alive within thirty years.- When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

108. Burden of proving that person is alive who has not been heard of for seven years.- [Provided that when] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is 2[shifted to] the person who affirms it."

14. Evidence Act is procedural law and doesn't create any substantial right or obligation. It only facilitates the Court in trial and the above provision comes under the Chapter (burden of proof). From the reading of above provision, it is clear that they come into play only when question arises, whether a man is alive or dead. Section 108 only provides for the circumstances on which onus of proof shifts upon the person who claims that a person is alive for whom no one had heard for seven years. Moreover, it is established principle of law that presumption under Section 108 would be raised in any proceeding.

15. Thus, in a suit filed for declaration by plaintiff claiming himself to be the legal heir of a person missing, the Court can take presumption of death of a missing person under Section 108 of the Evidence Act. The Apex Court in **LIC of India Vs. Anuradha, 2004 (10) SCC 131,** while dealing with the scope of Sections 107 and 108 of the Evidence Act held that presumption as to death by reference to Section 108 would arise only on lapse of seven years. Relevant para 14 is extracted hereasunder:-

"On the basis of the abovesaid authorities, we unhesitatingly arrive at a conclusion which we sum up in the following words. The law as to presumption of death remains the same whether in Common Law of England or in the statutory provisions contained in Section 107 and 108 the Indian Evidence Act, 1872. In the scheme of Evidence Act, though Sections 107 and 108 are drafted as two Sections, in effect, Section 108 is an exception to the rule enacted in Section 107. The human life shown to be in existence, at a given point of time which according to Section 107 ought to be a point within 30 years calculated backwards from the date when the question arises, is presumed to continue to be living. The rule is subject to a proviso or exception as contained in Section 108. If the persons, who would have naturally and in the ordinary course of human affairs heard of the person in question, have not so heard of him for seven years the presumption raised under Section 108 ceases to operate. Section 108 has the effect of shifting the burden of proving that the person is dead on him who affirms the fact. Section 108, subject to its applicability being attracted, has the effect of shifting the burden of proof back on the one who asserts the fact of that person being alive. The presumption raised under Section 108 is a limited presumption confined only to presuming the factum of death of the person who's life or death is in issue. Though it will be presumed that the person is dead but there is no presumption as to the date or time of death. There is no

presumption as to the facts and circumstances under which the person may have died. The presumption as to death by reference to Section 108 would arise only on lapse of seven years and would not by applying any logic or reasoning be permitted to be raised on expiry of 6 years and 364 days or at any time short of it. An occasion for raising the presumption would arise only when the question is raised in a Court, Tribunal or before an authority who is called upon to decide as to whether a person is alive or dead. So long as the dispute is not raised before any forum and in any legal proceedings the occasion for raising the presumption does not arise."

16. In **Sanju Devi and others Vs. State and others 2014 SCC Online Delhi 65**, the Court held that proceedings under the Indian Succession Act, 1925 are summary proceedings and the petitioner has to file a civil suit to establish the factum of death and then claim the decree accordingly from the civil Court.

17. In **Smt. Alka Sharma and others Vs. Union of India and others, Second Appeal No.192 of 2007**, decided on **17.01.2020**, this Court while deciding question of law framed in the appeal as "whether in view of Section 108 of Evidence Act, 1872 for proving a civil death of a person who is reported to be missing and is not traceable for over seven years, submission of final report by police is mandatory?" This Court held that submission of final report by police is not mandatory inasmuch as police investigation is in the domain of criminal law and that is neither influenced by plaintiff claiming declaration nor is within the authority and control seeking such declaration. Once, the factum of lodging of report and not hearing about that person for seven years or more is proved and admitted by the defendants in regard to whom declaration is being sought is sufficient then requirement of Section 108 of the Evidence Act has been fulfilled.

18. In the case in hand, the relief sought in the suit was for declaring the plaintiffs as the legal heirs of deceased Markandey Pandey against the defendants and also for declaring Markandey Pandey as dead. The contesting State in its written statement has denied the averment of the plaint, while the trial Court while deciding the issue no.1 had recorded finding that DW-1, Vishwakarma Sharma, the Lekhpal in his examination-in-chief had stated that Markandey Pandey is not heard for last ten years and he has not seen him for the said time.

19. Moreover, Paper No.23-Ga was filed before the trial Court to prove the fact that missing report of Markandey Pandey was given to the police. The trial Court had wrongly held that it did not have the jurisdiction to grant such declaration.

20. The lower appellate Court while recording the finding that the suit for declaration under Section 34 of the Specific Relief Act, though, being maintainable, the relief could not be granted as no notice under Section 80 (2) CPC was given to the defendants being the State and, on the basis of technical error dismissed the appeal.

21. From the perusal of the judgment of the trial Court as well as the appellate Court, it is clear that Paper No.9-C and 10-C were brought on record which were the notice given by the plaintiffs under Section 80 CPC and Section 106 of Panchayati Raj Act, 1947, the finding recorded is totally against the material on record. Thus, I find that both the trial Court and the lower

appellate Court committed error in dismissing the suit and the appeal, thus, finding recorded by both the Courts below are against the material on record as well as the provisions of law and are, thus, set aside.

22. Thus, considering the facts and circumstance of the case, I find that the suit filed by the plaintiffs as to the legal character that they may declared as the legal heirs of Markandey Pandey being the sons and wife of the deceased and Markandey Pandey be declared dead, was very well maintainable before the trial Court. Both the Courts below fell into trap of holding that the suit as well as the appeal was not maintainable.

23. The judgment and decree passed by the lower appellate Court dated 04.08.2017 and judgment and decree dated 22.11.2016 passed by the trial Court is, hereby, set aside. The suit filed by the plaintiffs-appellants seeking relief of declaration as the legal heir of deceased Markandey Pandey stands decreed.

24. In view of the above, as the the judgment and decree of both the Court below having been set aside, the second appeal stands **allowed.**

(2022)05ILR A1459
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.04.2022

BEFORE

THE HON'BLE ANIL KUMAR OJHA, J.

Habeas Corpus Writ Petition No. 58386 of 2017

Master Prakhar @ Palash & Anr.
...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Amit Daga, Sri Mayank

Counsel for the Respondents:
G.A., Sri Rahul Sahai

Habeas Corpus-Corpus-minor son-does not want to meet his father-resides with maternal grandparents- father seek visitation rights-if custody given to one parent-other parent must have visitation rights-father cannot be deprived of his visitation rights.

Petition disposed off. (E-9)

List of Cases cited:

1. Yashita Sahu Vs St. of Raj. & ors. in Criminal Appeal No. 127 of 2020 (Special Leave Petition (CRL) No. 7390 of 2019)

(Delivered by Hon'ble Anil Kumar Ojha, J.)

1. Heard learned counsel for the petitioners, learned counsel for the respondent no. 5 & 6, learned A.G.A. for the State and perused the record.

2. In compliance of order dated 12.04.2022, the respondent no. 5 & 6 produced the corpus Prakhar Singhania @ Palash before this Court.

3. On interaction and some queries, the corpus replied that he does not want to live with his father. He said that his name is Prakhar Singhania and he is studying in D.A.V. Public School, Ghaziabad. He further stated that he does not want to meet his father.

4. Submission of learned counsel for the petitioner is that corpus is the son of petitioner no. 2. The corpus Master Prakhar Singhaniya is currently residing with his

maternal grand-father and grand-mother i.e. respondent no. 5 & 6. Learned counsel for the petitioner further submitted that the petitioner no. 2 simply wants visitation rights to meet his son i.e. corpus. Further submitted that as petitioner no. 2 is the father of corpus, so he should be given visitation rights at least twice in a month and at the festivals of Holi and Diwali.

5. Learned counsel for respondent no. 5 & 6 submitted that the corpus does not want to meet his father i.e. petitioner no. 2, hence, visitation rights should not be given to
petitioner no. 2.

6. In ***Yashita Sahu v. State of Rajasthan & Ors.*** in Criminal Appeal No. 127 of 2020 (Special Leave Petition (CRL) No. 7390 of 2019) the Hon'ble Apex Court has held as follows:

"9. It is too late in the day to urge that a writ of habeas corpus is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can invoke its extraordinary writ jurisdiction for the best interest of the child. This has been done in Elizabeth Dinshaw v. Arvand M. Dinshaw & Ors., Nithya Anand Raghavan v. State (NCT of Delhi) & Anr. and Lahari Sakhamuri v. Sobhan Kodali among others. In all these cases, the writ petitions were entertained. Therefore, we reject the contention of the appellant wife that the writ petition before the High Court of Rajasthan was not maintainable.

19. A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every reunion may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents. ***Even if the custody is given to one parent, the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights.***

21. Normally, if the parents are living in the same town or area, the spouse who has not been granted custody is given visitation rights over weekends only. In case the spouses are living at a distance from each other, it may not be feasible or in the interest of the child to create impediments in the education of the child by frequent breaks and, in such cases the visitation rights must be given over long weekends, breaks and holidays. In cases like the present one, where the parents are in two different continents, effort should be made to give maximum visitation rights to the parent who is denied custody."

7. Thus, law on the above point is that even if the custody is given to one parent,

the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child.

8. So far as the facts of the present case are concerned, the corpus is residing with his maternal grand-father and grand-mother, therefore, this Court is of the opinion that a father cannot be deprived of his visitation rights.

9. In view of the law laid down by Hon'ble Apex Court and considering the facts and circumstances of this case, petitioner no. 2 being father of the corpus is entitled for visitation rights subject to following conditions:

(1) Petitioner no. 2 is granted visitation rights to meet his son i.e. corpus once in every month, on the first opening day of every month after study hours for two hours at the School of corpus.

(2) Petitioner no. 2 is also granted visitation rights to meet his son i.e. corpus on the festival of Holi and Diwali, just before the closing day before festival for two hours at the School of corpus.

(3) Petitioner no. 2 shall not create any disturbance in school campus while meeting the corpus and he shall not create any pressure upon the corpus in any manner.

(4) It is made clear that SHO concerned and Principal of DAV Public School, Ghaziabad shall facilitate and ensure the meeting of petitioner no. 2 with corpus.

10. With the above directions, this Habeas Corpus Writ Petition is disposed of finally.

(2022)05ILR A1461
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.04.2022

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Habeas Corpus Writ Petition No. 126 of 2022

Kumari Neha ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Krishna Chandra Yadav

Counsel for the Respondents:
G.A.

Habeas Corpus-Mother sought illegal detention of her daughter in custody of opposite party-corpus St.d that she has married the opposite party (homosexual marriage) -and both are major-though their marriage cannot be declared legal-but the Petition is not maintainable-corpus not in illegal detention.

Petition disposed off. (E-9)

List of Cases cited:

1. Navtej Singh Johar Vs U.O.I.,2018 (10) SCC 1

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. यह बन्दी प्रत्यक्षीकरण याचिका, भारतीय संविधान के अनुच्छेद 226 के अन्तर्गत याची की ओर से इस आशय से योजित की गयी है कि विपक्षी संख्या 4 को आदेशित किया जाए कि याची कु0 नेहा चन्द्रा जो कि विपक्षी संख्या 4 की अभिरक्षा में अवैधानिक रूप से निरूद्व है, उसे इस न्यायालय

के समक्ष प्रस्तुत किया जाए और उसे उसकी माता की अभिरक्षा में सुपुर्द किया जाए।

2. याचिका के तथ्य इस प्रकार है कि याचिनी कु0 नेहा चन्द्रा की माँ श्रीमती अंजू देवी ने एक प्रार्थना पत्र विपक्षी संख्या 3 थानाध्यक्ष, अतरसुईया, जिला प्रयागराज के समक्ष इस आशय का प्रस्तुत किया कि विपक्षी संख्या 4 संजना ने उसकी पुत्री कु0 नेहा चन्द्रा को जबरदस्ती अपने कब्जे में अवैधानिक रूप से निरूद्व कर रखा है जिसे उसकी सुपुदर्गी में दिया जाए परन्तु इस सम्बंध में स्थानीय पुलिस द्वारा कोई कार्यवाही नहीं की गयी। यह भी कथन किया गया कि कु0 नेहा चन्द्र का स्वास्थ ठीक नहीं है एवं वह वयस्क है जिसकी आयु 21 वर्ष से अधिक है और वह स्नातक है।

3. याचिनी के विद्वान अधिवक्ता की बहस सुनने के पश्चात इस न्यायालय के आदेश दिनांक 6–4–2022 के द्वारा विद्वान अपर शासकीय अधिवक्ता को निर्देशित किया गया कि वह याची कु0 नेहा चन्द्रा एवं विपक्षी संख्या 4 कु0 संजना को दिनांक 7–4–2022 को न्यायालय के समक्ष प्रस्तुत करें।

4. आदेश दिनांक 6–4–2022 के अनुपालन में याची कु0 नेहा चन्द्रा एवं विपक्षी संख्या 4 कु0 संजना न्यायालय के समक्ष आज दिनांक 7–4–2022 को उपस्थित हुई। उन्होंने न्यायालय को बताया कि वे दोनों वयस्क है और आपस में एक दूसरे को प्यार करते है तथा दोनों ने आपसी सहमति से समलैगिंक विवाह कर लिया है। उन्होंने इस सम्बंध में न्यायालय को एक वैवाहिक अनुबंध पत्र भी दिखाया जिसमें याची कु0 नेहा चन्द्रा व विपक्षी संख्या 2 कु0 संजना ने अपनी आयु क्रमशः 23 व 22 वर्ष दिखायी है और यह बताया है कि उन्होंने आपस में समलैगिंक विवाह कर लिया है और आगे वे अपने दम्पत्ति दायित्वों का निर्वहन करते रहेगें।

5. याची कु0 नेहा चन्द्रा व विपक्षी संख्या 4 कु0 संजना द्वारा न्यायालय से यह अनुमति मांगी गयी है कि वे वयस्क है और मानसिक रूप से स्वस्थ हैं तथा एक दूसरे से बहुत प्यार करते हैं एवं उन्होंने आपसी सहमति व बिना किसी डर, भय के समलैगिंक विवाह कर लिया है। अतएव उनके समलैगिंक विवाह को न्यायालय द्वारा मान्यता प्रदान की जाए जिससे वे दोनों अपना जीवन वैधानिक रूप से समाज के समक्ष प्रस्तुत कर सकें। साथ ही साथ यह भी कहा कि माननीय सर्वोच्च न्यायालय ने **नवतेज सिंह जोहर प्रति यूनियन आफ इण्डिया 2018 (10) एस0 सी0 सी0 1** के मामले में समलैगिंक रिश्तों को अपराध नहीं माना है और दो वयस्क व्यक्तियों को आपसी सहमति के अनुसार साथ रहने में छूट प्रदान की गयी है। उनके द्वारा आगे यह भी कहा गया कि हिन्दू विवाह अधिनियम में दो लोगों की शादी करने की बात कही गयी है परन्तु समलैगिंक विवाह का विरोध नहीं किया गया है। अतएव उनके समलैगिंक विवाह को मान्यता मिलनी चाहिए। यह भी कहा गया कि संविधान में प्रदत्त मौलिक अधिकारों के तहत समानता के आधार पर भी उन्हें भारतीय संविधान के अनुच्छेद 14, 16 एवं 21 के अन्तर्गत मौलिक अधिकार प्राप्त है, अतः उनके समलैगिंक विवाह को वैधानिक अधिकार मिलना चाहिए। यदि उन्हें समलैगिंक विवाह का अधिकार नही मिलता है तो भारतीय संविधान में मिले मौलिक अधिकारों का हनन होगा। विश्व के 25 देशों से अधिक देशों ने समलैगिंक विवाह को मान्यता प्रदान की है।

6. विद्वान अपर शासकीय अधिवक्ता श्री लालमनि सिंह एवं श्री एस0 बी0 मौर्या ने उक्त पर निम्न आपत्ति उठायी है कि यह भारत देश है जहाँ भारतीय संस्कृति, धर्म एवं भारतीय विधि के अनुसार देश चलता है। यहाँ पर विवाह को एक पवित्र संस्कार माना गया है जब कि अन्य देशों में विवाह एक अनुबंध है। भारतवर्ष में विवाह के समय हिन्दू स्त्री पुरूष, भगवान व अग्नि को साक्षी मानकर शपथ लेतें है कि वह जीवन पर्यन्त एक दूसरे के सुख–दुख में शामिल होगें। हिन्दू विवाह अधिनियम में भी विवाह हेतु एक स्त्री व एक पुरूष की बात कही गयी है। स्त्री, पुरूष के अभाव में विवाह भारतीय परिवेश में किसी भी प्रकार से स्वीकार नहीं किया जा सकता है क्योंकि यह भारतीय परिवारिक संकल्पना से परे है। हिन्दू विवाह अधिनियम 1955, विशेष विवाह अधिनियम 1954 एवं विदेशी विवाह अधिनियम 1969 में भी कहीं समलैगिंक विवाह की अनुमति नहीं दी गयी है। यहाँ तक कि मुस्लिम, बौद्व, जैन, सिक्ख आदि धर्म में भी समलैगिंक विवाह को मान्यता नहीं दी गयी है।

7. भारतीय सनातन विधि के अनुसार 16 प्रकार के संस्कार बताये गये हैं, जिनमें गर्भावास्था से लेकर अन्तेष्टि संस्कार शामिल है। गर्भावास्था में शिशु के उत्पन्न होने से और उसके मरण तक के सभी प्रकार के संस्कार बताये गये हैं जो निम्न प्रकार से हैः–

(1) गर्भाधान संस्कार, (2) पुंसवन, (3) सीमांतोनन्यन, (4) जातकर्म, (5) नामकरण, (6) निष्क्रमण, (7) अन्नाप्राश्न, (8) चूडाकर्म, (9) विद्यारम्भ, (10) कर्णवेध, (11) यज्ञोपवीत, (12) वेदारंभ, (13) केशांत, (14) समावर्तन,(15) विवाह, (16) अन्तेष्टि।

8. आगे यह भी कहा गया कि इस प्रकार उक्त 16 संस्कारों में स्त्री पुरूष की अहम भूमिका दर्शायी गयी है और स्त्री पुरूष के अभाव में उक्त संस्कार पूर्ण नहीं हो सकतें हैं। शिशु के उत्पन्न न होने की दशा में कोई भी संस्कार सम्भव नहीं है। इसी को ध्यान में रखते हुए अपने भारतीय संस्कृति और भारतीय विधि में विवाह के लिए एक जैविक पति और जैविक पत्नी का होना अनिवार्य बताया गया है और उनके विवाह को ही मान्यता प्रदान की गयी है। उक्त के अभाव में समलैगिंक विवाह को मान्यता प्रदान नहीं की जा सकती है क्योंकि इसमें स्त्री पुरूष का अभाव है और न ही वे संतान उत्पन्न कर सकते हैं। हिन्दू विधि में विवाह को महत्वपूर्ण माना गया है जिसके अन्तर्गत स्त्री और पुरूष दोनों एक साथ रहकर संतान उत्पन्न करके मानव श्रृंखला को आगे बढ़ाते हैं।

9. आगे यह भी कहा गया कि याची कु0 नेहा चन्द्रा तथा विपक्षी संख्या 4 कु0 संजना की याचना जिसमें उन्होंने अपने समलैगिंक विवाह को मान्यता प्रदान करने का अनुरोध किया है यदि उसे स्वीकार कर लिया जाए तो यह भारतीय संस्कृति, धर्म एवं भारतीय विधि के अनुसार अमान्य होगा और ऐसा होने पर भारतवर्ष के विभिन्न कानूनों में इसका प्रतिकूल प्रभाव पड़ेगा जिसे स्त्री एवं पुरूष को ध्यान में रखकर बनाया गया है।

10. उपरोक्त सभी परिस्थितियों को ध्यान में रखते हुए याची कु0 नेहा चन्द्रा के समलैगिंक विवाह के अनुरोध को खारिज किया जाता है।

11. उपरोक्त टिप्पणी के साथ यह बन्दी प्रत्यक्षीकरण याचिका **अन्तिम रूप से निस्तारित** की जाती है।

(2022)05ILR A1463
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.04.2022

BEFORE

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

Habeas Corpus Writ Petition No. 80 of 2022

Ram Vilas & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Letter Petition

Counsel for the Respondents:
G.A.

The Constitution of India 1950 - Article 14,19,21 & 22 -Petitioners were called at police Station-were detained and threatened-their daughter filed Letter Petition-entertained by Court-oral summoning and subsequent detention resorted without lodging of FIR-action of Police personnel -clear flouting of right under Article 14,19,21 and 22 of the Constitution. (E-9)

List of Cases cited:

1. A.K. Gopalan Vs St. of Mad., A.I.R. 1950 Supreme Court 27

2. Kharak Singh Vs St. of U.P., A.I.R. 1963 Supreme Court 1295

3. Rustom Cavasjee Cooper Vs U.O.I., 1970, 1 SCC 248

4. National Legal Services Authority Vs U.O.I., 2014 (5) SCC 438

5. K.S. Putta Swamy Vs U.O.I., 2017 (10) SCC 1

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

1. Learned A.G.A. has filed short counter affidavit, the same is taken on record.

2. Heard Mr. Shyamendra Singh learned counsel for the petitioner whose power is taken on record, Mr. S.P. Singh learned Additional Government Advocate and perused the material brought on record of this Habeas Corpus Writ Petition.

3. Pursuant to our previous order passed on 8th April, 2022, treating the Letter Petition filed by daughter of petitioners to be a Habeas Corpus Petition, certain facts were brought to the notice of this Court on point that the petitioners namely, Savitri and Ram Vilas have been called at Police Station- Mahila Thana, Lucknow, from where they have not returned as yet. The petition after being treated as Habeas Corpus was heard by us, wherein, learned A.G.A. on behalf of the State brought to our notice the fact that no such occurrence took place at the police station as stated.

4. Today petitioners Savitri and Ram Vilas are present before this Court along with their daughter Sorojini duly identified by their counsel and it was informed by the petitioners that some police personnel came to them and required their presence at the police station. Pursuant thereto, petitioners went to the police station where they were allegedly detained and threatened by some police personnel.

5. In the short counter affidavit sworn by Ms. Durgawati posted as Inspector, Mahila Thana, Lucknow who is also personally present in Court, certain facts have been brought to the notice of this Court that petitioners had visited the police station on 08.04.2022 around 12 noon and after recording their statements were allowed to leave the police station at around 3.30 p.m., the same day. The dispute between the complainant- Smt. Sushma Devi and her in-laws i.e. petitioners pertains to partition of ancestral property. Complainant's husband- Vinay Kumar who is the son of Ram Vilas is also supporting his wife and claiming his share in the ancestral property.

6. Deponent Durgavati seeks unconditional apology for inconvenience caused to the Court for the mistake committed while providing information the Court on 8.4.2022, when this petition was listed on a short notice. The mistake committed was not intentional or deliberate but due to carelessness and in-subordination of Head Constable No.1681Shailendra Singh who had not informed the deponent Durgavati that he had summoned Sri Ram Vilas and his wife Savitri. The deponent Durgavati has sent a report to Deputy commissioner of Police (Central), District Lucknow, Commissionerate to take appropriate disciplinary action against him, copy whereof has been annexed as Annexure No.3 to this affidavit.

7. It has been stated by deponent Durgavati that there was no deliberate attempt to humiliate or harass the petitioners but it was misconduct and in-subordination of the Constable concerned otherwise there was no cause for the police to have indulged in any maltreatment of petitioners. In future the police shall be mindful of their activities.

8. In such case we after deliberation express unhesitatingly that there appears to be someone amongst the police personnel who fished in troubled waters and took advantage of the situation both to the detriment of private parties as well as to the working efficiency of the police system and in particular the police station concerned. It is incumbent and obligatory upon the police authorities concerned to nip the mischief in its bud.

9. The right of a citizen not to be detained or restrained by the State or its instrumentalities without the backing of any law is fundamental as reflected in Articles 19(1)(d), 21 and 22 of the Constitution of India. Article 19(1)(d) protects rights of citizens to move freely throughout the territory of India with sub section 5 imposing reasonable restrictions either in the interest of general public or for protection of interest of any scheduled tribe. Article 21 relates to protection of life and personal liberty of any person including non citizens. Article 22 of the Constitution inheres protection against arrest and detention in certain cases.

10. As far back as 1950, His Lordship Hon'ble Justice Fazl Ali in the case of **A.K. Gopalan versus State of Madrass, A.I.R. 1950 Supreme Court 27** in his dissenting judgment has held that there is no antithesis between words 'restriction' and 'deprivation'. It was held that restraint on the right to move can assume a variety of forms and restriction would be the most appropriate expression to be used in Clause (v) so as to cover all those forms ranging from total to various kinds of partial deprivation of freedom of movement. It was also held that the penal code does not primarily or necessarily impose restrictions on the freedom of movement and it is incorrect to say that it is a law imposing restrictions on the right to move freely. In fact the primary object of code was held to punish crime and not to restrict movement. His Lordship further held that punitive detention is essentially different from preventive detention and a person can be punitively detained only after a trial for committing a crime and after his guilt has been established in a competent court of jurisdiction whereafter a person so convicted can raise appeal thereagainst and the final judgment would constitute a reasonable restriction which may not follow the right under Article 19(1)(d). However a person who is punitively detained does not require to face any such obstacle.

11. It was held that the expressions 'personal liberty' and 'personal freedom' have a wider and a narrower meaning. In the wider sense they include not only immunity from arrest and detention but also freedom of speech, freedom of association etc while in the narrower sense, they mean immunity from arrest and detention. The concept of personal liberty was used not only in the sense of immunity from arrest but also that it consisted in freedom of movement and locomotion.

12. However with regard to interplay between various articles pertaining to fundamental rights, the majority view in the case of A.K. Gopalan (supra) was that they were distinct and separate without any overlapping and thus the views of Fazl Ali J. remained a minority view.

13. The said aspect was again considered by the Supreme Court in the case of **Kharak Singh versus State of U.P., A.I.R. 1963 Supreme Court 1295** in which the majority view of A.K. Gopalan (supra)

was confirmed with the dissenting view being taken by His Lordship, Hon'ble Justice Subba Rao who followed the minority view in the case of A.K. Gopalan (supra) while holding that rights conferred by part (III) of the Constitution have overlapping areas and where a law or State action is challenged as infringing rights in different Articles of part (III), the State must satisfy the test of each Article individually. It was held that the expression 'personal liberty' is a comprehensive one and the right to move freely is an attribute of 'personal liberty'. It was held that the rights indicated in Articles 19 and 21 of Constitution were independent fundamental rights, though there was overlapping and as such there was no question of one being carved out of another. It was further held that in case a person's fundamental right under Article 21 was infringed, the State could only rely upon a law to sustain the action but the same would be required to satisfy the tests laid down in Article 19 as well. It was also held that the right of personal liberty takes in not only a right to be free from restriction placed on a person's movements but should also be free from encroachments on his private life.

14. The minority views in the cases of A.K. Gopalan (supra) and Kharak Singh(supra) were thereafter upheld in the subsequent constitution bench judgment by the Supreme Court in the case of **Rustom Cavasjee Cooper versus Union of India, 1970, 1 SCC 248.**

15. Subsequently in the case of **National Legal Services Authority versus Union of India, 2014 (5) SCC 438,** examining the ambit of Article 21, the Supreme Court held as follows:-

*" **73.** Article 21 of the Constitution of India reads as follows:*

*"**21.Protection of life and personal liberty.**?No person shall be deprived of his life or personal liberty except according to procedure established by law."*

Article 21 is the heart and soul of the Indian Constitution, which speaks of the rights to life and personal liberty. Right to life is one of the basic fundamental rights and not even the State has the authority to violate or take away that right. Article 21 takes all those aspects of life which go to make a person's life meaningful. Article 21 protects the dignity of human life, one's personal autonomy, one's right to privacy, etc. Right to dignity has been recognised to be an essential part of the right to life and accrues to all persons on account of being humans. In Francis Coralie Mullin v. UT of Delhi [(1981) 1 SCC 608 : 1981 SCC (Cri) 212] (SCC pp. 618-19, paras 7 and 8), this Court held that the right to dignity forms an essential part of our constitutional culture which seeks to ensure the full development and evolution of persons and includes "expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings".

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75. Article 21, as already indicated, guarantees the protection of "personal autonomy" of an individual. In Anuj Garg v. Hotel Assn. of India [(2008) 3 SCC 1] (SCC p. 15, paras 34-35), this Court held that personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty

guaranteed under Article 21 of the Constitution of India. "

16. As such it was held that Article 21 protects the basic fundamental right pertaining to dignity of human life and personal liberty.

17. In the case of **K.S. Putta Swamy versus Union of India, 2017 (10) SCC 1**, it has been held as follows:-

*"**119.** To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfilment of dignity and is a core value which the protection of life and liberty is intended to achieve."*

18. The conjoint reading of aforesaid clearly indicates the consistent view taken by the Supreme Court that right to live with dignity is an essential part of right to life envisaged under Article 21 of Constitution of India since such a right coupled with the right to privacy ensures the fulfilment of core values which the protection of life and liberty is intended to achieve. The Supreme Court in the case of K.S. Putta Swamy (supra) has also held that the freedoms and liberties guaranteed under Article 21 has been interpreted to mean that life does not mean merely a physical existence and in fact includes all those faculties by which life is enjoyed. The ambit of 'procedure established by law' under Article 21 has been interpreted to mean that the procedure placing restriction on such rights must be fair, just and reasonable and the coalescence of Articles 14, 19 and 21 recognizes the interrelationship between rights guaranteed under the said Articles and such requirements of fairness and non discrimination animate both the substantive and procedural aspects of Article 21. It has been held that any law or State action impacting life or personal liberty has to be assessed not with reference to its object but on the basis of its effect and impact on fundamental rights.

19. The observations of Fazl Ali J. in the case of A.K. Gopalan (supra) to the effect that Article 21 purports to protect life and personal liberty and it would be a precarious protection and a protection not worth having if the elementary principle of law pertaining to fundamental rights is to be ignored and excluded is quite apposite in the present context. In the case of K.S. Putta Swamy (supra) the Supreme Court interpreting Article 21 in the context of various judgments has held as follows:-

283. .....Protection of life and personal liberty.*No person shall be deprived of his life or personal liberty except according to procedure established by law.'*

If this Article is expanded in accordance with the interpretative principle indicated in Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] , it will read as follows:

'No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law.'

In the converse positive form, the expanded Article will read as below:

'A person may be deprived of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law.' "

20. In the case of K.S, Putta Swamy (supra) it has been held that when validity of law or State action is questioned on the ground that it violates a guarantee contained under Article 21, the scope of challenge is not confined only to whether the procedure for deprivation of life or personal liberty is fair, just and reasonable but expands to the interrelationship between the guarantees against arbitrariness and the protection of life and personal liberty which operates in a facilitated plane since the procedure for deprivation must be fair, just and reasonable since Article 14 impacts both the procedure and the expression law.

21. The Supreme Court in the case of K.S. Putta Swamy (supra) has indicated three requirements which are to be fulfilled in order to keep the restraints imposed upon a person, within the ambit of fundamental rights. It has been held that the first requirement for imposing such a restraint must be based on a law in existence to justify any such encroachment on the express rights of Article 21. It has been held that existence of law is an essential requirement for imposing restrictions on rights which are guaranteed under part (III) of the Constitution.

22. Secondly the requirement that such State action or law which imposes restriction falls within the zone of reasonableness mandated by Article 14, which is a guarantee against arbitrary State action.

23. Thirdly that the requirement imposing restriction ensures that the means adopted are proportional to the object sought to be achieved since proportionality is an essential facet of the guarantee against arbitrary State action.

24. The concept of life and personal liberty as envisaged under Article 21 have been interpreted in the case of K.S. Putta Swamy (supra) as follows:-

*"**318.** Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution.*

***319.** Life and personal liberty are not creations of the Constitution. These rights are recognised by the Constitution as inhering in each individual as an intrinsic and inseparable part of the human element which dwells within."*

25. Upon examination of the aforesaid pronouncements by the Supreme Court, it is apparent that the guarantees envisaged by the Constitution of India in part (III) can be restricted or controlled only in accordance with provisions of aforesaid Articles constituted in part (III) itself. As such the power of locomotion is an essential element of personal liberty and detention in jail or in a police station is a drastic invasion of that liberty as held by Patanjali Sashtri J. in the case of A.K. Gopalan (supra).

26. The code of criminal procedure also prescribes the manner and procedure under which an investigation is to ensue subsequent to lodging of complaint.

However there is no provision in either the constitution of India or even under the code of criminal procedure which prescribes a police official to summon and detain the person even without lodging of first information report and that too orally. Any such act by police personnel has to be seen in the context of right to personal liberty as envisaged under Article 21 and necessarily stipulates that a procedure which is fair, just and reasonable is required to be followed so that it does not encroach upon the life and personal liberty guaranteed under Articles 21 and 22 of the Constitution.

27. As has already been held that invasion of life or personal liberty must be based on a valid law defined in terms of legitimate state and should be proportional to ensure a rational nexus between the object and means to achieve it.

28. The action taken by police personnel in the present case indicates clear flouting of the right guaranteed to the petitioners under Articles 14, 19, 21 and 22 of the Constitution since oral summoning of the petitioners and their subsequent detention in police station has been resorted to without even lodging of first information report.

29. The State in its counter affidavit has not been able to explain any law under which such a procedure could have been followed particularly when the police personnel summoning the petitioners was not even the investigating officer of the case.

30. Right of locomotion being an essential part of right to life and personal liberty can not be trifled with in such a casual manner merely being clothed with State authority. It is the bounden duty of State and its instrumentalities to be ever vigilant so that fundamental rights guaranteed under part (III) of the Constitution are not infringed, particularly without any authority of valid law which would have a deleterious effect on an ordered society.

31. In view of aforesaid, it would be necessary to direct the State and its instrumentalities that in case any application or complaint is given at any police station which requires investigation and presence of the accused then suitable course of action as prescribed under provisions of Criminal Procedure Code are to be followed which contemplate a written notice being served upon such a person but that too only consequent to a case being registered. In case there is no investigating officer at that juncture, the subordinate police officials are required to take permission/approval of the station incharge before issuing such notice or summons. On no account can an accused or any other person be summoned to a police station orally by subordinate police officials without the consent/approval of the station incharge. The life, liberty and dignity of any person can not be thrown to the winds merely on verbal orders of police officials. It is expected that State and its instrumentalities will be cautious in future with regard to observations and directions issued herein above.

32. With the aforesaid observations, this petition for habeas corpus is finally disposed of.

33. Registry is directed to send a copy of this order to the Additional Chief Secretary, Department of Home, State of U.P. for taking appropriate action for

ensuring compliance of aforesaid directions by the police.

(2022)05ILR A1470
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 05.05.2022

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Application U/S 482 No. 627 of 2020

Mahant Dharmendra Das ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Mohiuddin Khan

Counsel for the Opposite Parties:
G.A., Nadeem Murtaza, Rupendra Kumar Singh, Sheeran Mohiuddin Alavi

Criminal Law - Code of Criminal Procedure, 1973 - Section 145 - Opposite party in peaceful possession-over disputed land since 2006-presently legal title in his favour-which is never disturbed by any Civil Court-Revisional Court held-proceedings u/s 145 Cr.P.C. not maintainable-as title and possession is settled in favour of opposite party-Impugned order upheld.

Application dismissed. (E-9)

List of Cases cited:

1. Ramabai Govind Vs Raghunath Vasudeo AIR 1952 Bombay 106

2. Misrilal Raidani Vs Netaichand Nandi AIR 1934 Calcutta 372

3. Bhinka & ors. Vs Charan Singh AIR 1959 SC 960

4. Civil Appeal No. 3007-3008 of 2017 (Prabhakar Adiga Vs Gowri & ors.)

5. Ram Sumer Puri Mahant Vs St. of U.P. & ors.; AIR 1985 SC 47

6. Ganesh Prasad & ors. Vs St. of U.P. & 4 others

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

1. Heard Shri Mohiuddin Khan, learned counsel for the applicant and Shri Rupendra Kumar Singh, learned counsel for the respondent.

2. This petition under Section 482 Cr.P.C. has been filed for setting aside the judgment and order dated 13.12.2019 passed by the Additional Sessions Judge, Court No.7, Lucknow in Criminal Revision No. 674 of 2019(Bharat Singh Vs. State of U.P. and another) and order dated 18.10.2019 passed by the Sub Divisional Magistrate, Bakshi Ka Talab, Lucknow in case no. 10190 of 2019 (Computerized No. T201910460410190) (Dharmendra Das Vs. Bharat Singh).

3. Submission of the learned counsel for the applicant is that land bearing Gata No. 259 area 6.7660 hectare, Khasra No. 333 area 1.1320 hectare and Khasra No. 406 Ga area 0.9780 hectare situated in village- Aldampur, P.S. Itaunja District-Luknow originally belongs to Thakur Ji Maharaj Trust, Udaseen Sangat, Guruduwara, Nanak Shahi, Purani Sabji Mandi Chowk Lucknow (hereinafter referred to as "Thakur Ji Maharaj Trust") and the opposite party no. 2 is claiming to have purchased the disputed land from Shri Mahant Bharat Das through sale deed dated 17.7.2006.

4. Learned counsel for the applicant submits that due to lack of management of the properties situated at village-Adlampur

by Shri Mahant Sabzi Mandi Chowk, Lucknow and taking advantage of such problems the opposite party no. 2 produced Baba Ram Bhajan Das as Chela of Late Mahant Ganga Das Ji and got his name recorded in the revenue record. Thereafter opposite party no. 2 is claiming to have purchased the land bearing Gata No. 259, ad-measuring 6.7660 from Shri Mahant Bharat Dass, Chela of Mahant Baba Ramji Dass through sale deed dated 17.7.2006 and purchased the property in the name of Anmol Gramudyog Sansthan, Awadh Poultry Farm, Faridi Nagar, Lucknow. Opposite party no. 2 is also claiming that his mother and wife had jointly purchased the land bearing Gata No. 333 ad-measuring 1.1320 hectare and Gata No. 406 Ga ad-measuring 0.978 hectare through sale deed dated 18.9.2006.

5. Learned counsel for the applicant further submits that sale deed dated 17.7.2006 and 18.9.20006 are void ab-initio in view of the provisions contained in Section 36 and 37 of the Indian Trusts Act, 1882 and executor of both the sale deed namely Mahant Bharat Dass was not appointed/authorized as Mahant of Thakur Ji Maharaj Trust. Hence he was having no authority to execute the alleged sale deeds. He further submitted that Mahant Parmeshwar Das had resigned and made a declaration through registered sale deed dated 7.2.2011 appointing the applicant as Mahant and Sarvakar of the Thakur Ji Maharaj Trust. A photo copy of the sale deed dated 7.2.20211 is being annexed as Annexure 3 to the petition.

6. Learned counsel for the applicant submitted that the applicant having been appointed as Mahant and regarding this Mahajjarnama was also executed which was registered on 19.10.2012 recognizing the applicant as Mahant appointed on the vacant post of the Thakur Ji Maharaj Trust. The petitioner has been handed over possession over the land in question on 13.12.2018 and 17.12.2018. On the spot, the constructed building, Puja Sthan, Kothan, Snan Kund etc are situated and the opposite party no. 2 through muscle power wants to disturb the possession of the petitioner regarding which F.I.R. has been lodged at Police Station- Itaunja, District-Lucknow and report was submitted on 17.9.2019 and on the basis of the said report, case no. 10190 of 2019 (Mahant Dharmendra Das Vs. Bharat Singh) was registered and notice was issued to the opposite parties. The Sub Divisional Magistrate, Bakshi Ka Talab vide his order dated 18.10.2019 has attached the property in dispute under Section 146 (1) Cr.P.C. and appointed Shri Atul Kumar Shukla, Gram Pradhan, Gram Panchayat, Aldampur as receiver on 25.10.2019. The petitioner has filed his detailed objection on 9.10.2019 but same has not been considered by S.D.M., Bakshi Ka Talab (opposite party no. 1.)

7. Learned counsel for the applicant submitted that opposite party no. 2 is regularly trying to take over forcible possession over the disputed land and in this regard, the appointed receiver namely Shri Atul Kumar Shukla, Gram Pradhan has moved a complaint dated 30.10.2019 before Sub Divisional Magistrate, Bakshi Ka Talab for issuing necessary directions to the police of Police Station- Itaunja. The opposite party no. 2 when could not succeed in obtaining forcible possession over the disputed land has filed criminal revision no. 674 of 2019 on 1.11.2019. The Additional Sessions Judge, Court No. 7, Lucknow vide his impugned judgment and order dated 13.12.2019 has allowed the

revision thereby setting aside the order dated 18.10.2019 passed by opposite party no. 1- the Sub Divisional Magistrate, Bakshi Ka Talab, Lucknow. On the basis of that Civil Judge Hawali (Junior Division), Lucknow in Suit No. 544 of 2009 by the judgment and order dated 6.8.2010 decreed the suit in favour of the opposite party no. 2 and decree was passed restraining the erstwhile respondent in suit permanently not to interfere in the peaceful possession of the applicant.

8. Learned counsel for the applicant submits that decree passed in Suit No. 544 of 2009 was obtained against Parmeshwar Das and Rajendra Singh. The applicant was not party of above suit and thus, the opposite party no. 2 has obtained decree against wrong person hence the same is not enforceable against the applicant according to law. The opposite party no. 2 is trying to take possession of the disputed land. Therefore, the petitioner has filed application dated 21.12.2019 before the Sub Divisional Magistrate, Bakshi Ka Talab for recording the name of Thakur Ji Maharaj in revenue record over the land in dispute and stopping the opposite party no. 2 from interfering in the peaceful possession of the petitioner but till date no action has been taken in the matter. Learned counsel for the petitioner vehemently submits that opposite party no. 2 and Bharat Das @ Ram Newaj Singh are trying to alienate the properties of the trust. The claim of the opposite party no. 2 over the land of the Thakur Ji Maharaj Trust on the basis of the sale deed executed by Bharat Das @ Ram Newaj Singh without obtaining the permission from the competent court is liable to be rejected. Since the property in question belongs to Thakur Ji Maharaj Trust , the applicant- Mahant Dharmendra Das is entitled to get the possession of the property.

9. Thus, in view of the facts and circumstances of the case it is expedient and necessary in the interest of justice that the instant petition be allowed with costs by setting aside the impugned judgment and order dated 13.12.2019 passed by the Additional Sessions Judge and order dated 18.10.2019 passed by the Sub Divisional Magistrate, Bakshi Ka Talab, Lucknow. In support of his submission, learned counsel for the applicant relied upon the judgment of Bombay High Court in the case of ***Ramabai Govind Vs. Raghunath Vasudeo AIR 1952 Bombay 106,*** judgment of Calcutta High Court in the case of ***Misrilal Raidani Vs. Netaichand Nandi AIR 1934 Calcutta 372*** and judgment of Hon'ble Supreme Court in the case of ***Bhinka and others Vs. Charan Singh AIR 1959 SC 960.***

10. Learned counsel for the opposite party no. 2 submits that at the very outset it is pertinent to submit that the instant petition deserves to be dismissed in limine, as the order under challenge in the instant petition is reviseable. He further submitted that the applicant approached this Court by filing of petition under Section 482 Cr.P.C. invoking the inherent powers of this Hon'ble Court, in absolute disregard to the alternative and efficacious remedy available to him. The opposite party no. 2 had purchased the property in question bearing Khasra No. 260, Gata No. 259 admeasuring 6.7660 hectare jointly with his father-in-law, namely, Shri Ramji Singh from the then recorded tenure holder Shri Mahant Bharat Das, chela of Mahant Baba Ramji Dass for sale consideration of Rs.

10,40,000/- by registered sale deed dated 17.7.2006. The land bearing Gata No. 333 admeasuring 1.1320 hectare and Gata No. 406-Ga admeasuring 0.978 hectare were purchased jointly by mother of the opposite party no. 2 namely, Smt. Kalawati Singh and the wife of the opposite party no. 2, namely, Madhu Singh vide sale deed dated 18.9.2006. Thus, the opposite party no. 2 is bonafide purchaser of the aforesaid property and has got absolutely no concern with the dispute between the seller of the aforesaid property i.e. Shri Mahant Bharat Dass and his rivals including the applicant herein. He further submitted that Mahant Ramji Dass was the undisputed chela of Mahant Shri Atma Dass Ji and Mahant Ramji Dass had in his lifetime clarified that he has only two disciples, namely, Baba Dayal and Baba Bharat Dass (who was appointed as Mahant Sarvakar after demise of Mahant Baba Ramji Dass). Baba Parmeshwar Das, who has absolutely no concern with the Thakur Ji Maharaj Trust, claimed successor of Mahant Baba Ramji Dass. The applicant claimed his title over property of the Thakur Ji Maharaj Trust through aforesaid Baba Shri Parmeshwar Dass. Baba Bharat Dass was duly recorded as successor of Mahant Baba Ram Ji Dass and name of Baba Bharat Dass was also recorded in the revenue record.

11. Learned counsel for the opposite party no. 2 submitted that Mahant Parmeshwar Dass challenged the succession certificate granted to Mahant Baba Bharat Dass, however, the same was withdrawn by Mahant Parmeshwar Dass and acknowledged that Mahant Baba Bharat Dass is the rightful successor of Mahant Baba Ram Ji Dass. On 5.2.2011 Mahant Parmeshwar Dass, who himself had no title over the aforesaid properties, had declared the applicant to be his successor. However, the declaration letter was revoked by Mahant Parmeshwar Dass on 7.9.2012. Copy of the aforesaid declaration letter dated 5.2.2011 and 7.9.2012 are collectively annexed as Annexure C.A.-3 with counter affidavit. Thus, the petitioner has no right to interfere in the property belonging to the opposite party no. 2.

12. Learned counsel for the opposite party no. 2 further submitted that the opposite party no. 2 filed a suit before the learned Civil Judge, Hawali (Junior Division), Lucknow for permanent injunction against Arvind Kumar Singh and Baba Shri Parmeshwar Dass (allegedly guru of the applicant), which is registered as Original Suit No. 544 of 2009 wherein the court restraining the applicant to interfere in the peaceful possession of the opposite party no. 2. The injunction suit is binding on Parmeshwar Dass Ji as well against his legal representative. Learned counsel for the opposite party no. 2 also submitted that some of the Khasra No. 259 has been kept in mortgage by the opposite party no. 2 in the name of Gramin Bank of Aryawart. The wife of the opposite party no. 2 is also running a milk production dairy under the Kamdhenu Shceme on the part of the aforesaid land from several years after constructing the requisite built area. Copies of the revenue records are collectively annexed as Annexure C.A.-8 with counter affidavit. It is fully established that the opposite party no. 2 has peaceful possession over the land of Village-Aldampur, Tehsil-Bakshi Ka Talab, District- Lucknow.

13. Learned counsel for the opposite party no. 2 further submitted that the proceeding under Section 145 Cr.P.C. was initiated with malafide intention and notice

was issued under Section 145 (1) Cr.P.C. against the opposite party no. 2. The opposite party no. 2 presented a detailed written statement and also brought on record judgment and order dated 6.8.2010 passed in O.S. No. 544 of 2009 by which the title of the opposite party no. 2 has been confirmed and decree of permanent injunction has been passed in favour of the opposite party no. 2 but the Sub Divisional Magistrate without application of judicial mind passed the order of attachment on 18.10.2019. It is also submitted that the land bearing Gata No. 333, which has already been sold by the wife of the opposite party no. 2 to the M/s. Fortune Realtors, who has not been made party to the proceedings under Section 145 Cr.P.C. Being aggrieved by the order dated 18.10.2019 the opposite party no. 2 preferred criminal revision no. 674 of 2019 and Criminal Revision Court vide order dated 13.12.2019 after hearing both the parties allowed the revision and set aside the order passed by the Sub Divisional Magistrate. The petitioner had got the interim order dated 10.2.2020 from this Court by suppressing the material facts.

14. Learned counsel for the opposite party vehemently submitted that it is no more a rest-integra that the purpose of the provision of Section 145 Cr.P.C. is to prevent a breach of peace at the instance of the parties who should, like law abiding citizens, place their disputes before a civil court and not take law into their own hands. The provision of Section 145 Cr.P.C. is intended only as a stop-gap arrangement, till the rights are not properly adjudicated by the civil court. Thus, the order of attachment can be passed if it is considered that the case is one of emergency but in the present case the opposite party no. 2 had settled that he has title over the above land and he was in peaceful possession after getting sale deed executed in his favour and permanent injunction was awarded in favour of the opposite party no. 2. The land in question rightly owned and possessed by the opposite party no. 2, therefore, the present application filed by the applicant under Section 482 Cr.P.C. is nothing but abuse of the process of law and thus, learned counsel for the opposite party no. 2 prayed to dismiss the present petition and vacate the interim protection passed by this Court. In support of his submission learned counsel for the opposite party no. 2 reliedupon the judgments of the Hon'ble Supreme Court passed in ***Civil Appeal No. 3007-3008 of 2017 (Prabhakar Adiga Vs. Gowri and others)*** and judgment of Hon'ble Supreme Court passed in the case of ***Ram Sumer Puri Mahant Vs. State of U.P. and others; AIR 1985 SC 47.***

15. I have heard learned counsel for the petitioner and perused the record. In this application under Section 482 Cr.P.C. the main prayer of the applicant is to set aside the judgment and order dated 13.12.2019 passed by the Additional Sessions Judge, Court No.7, Lucknow and also prayed to quash the order dated 18.10.2019 passed by the Sub Divisional Magistrate, Bakshi Ka Talab, Lucknow.

16. The main prayer of learned counsel for the applicant is that the possession over the disputed land in question was handed over on 13.12.2018 but the opposite party no. 2 through muscles power wanted to disturb the peaceful possession of the petitioner regarding which the petitioner lodged the F.I.R. against the opposite party no. 2. It is also submitted that it is the trust property. The trustee has no right to sell the trust property unless the deed of trust confers

such a power. There is no such express power conferred by the Trust Act upon the trustee. Merely because the property is vested in the trustee, the trustee is not entitled to sell the same. He is not the full owner of the property in the real sense of the term, because there is beneficial interest and the ownership therein carved out in the property. The legal ownership which vests in the trustee is for the purpose of the trust and administration of the trust. Therefore, the petitioner submitted before the Court that no legal title accrue in favour of the opposite party no. 2.

17. Learned counsel for the opposite party no. 2 submitted before the Court that he had purchased the property in question from the then recorded tenure holder Shri Mahant Bharat Das for sale consideration of Rs. 10,40,000/- by registered sale deed dated 17.7.2006. Another Gata bearing No. 406-Ga admeasuring 0.978 hectare and the land bearing Gata No. 333 admeasuring 1.1320 hectare were purchased jointly by mother of the opposite party no. 2 and the wife of the opposite party no. 2 by the sale deed executed on 18.9.2006. Learned counsel for the opposite party no. 2 further submitted that till then the alleged property was in possession of the opposite party no. 2 and his family members. The name of the opposite party no. 2 and other family members were also recorded in revenue records. Till then after execution of the sale deed in favour of the opposite party no. 2 and his family members, they peacefully possessed the land but the applicant wanted to grab the property therefore, on behest of the applicants, proceedings under Section 145 Cr.P.C. was started by Sub Divisional Magistrate.

18. I have heard both the parties at length and perused the record.

19. The provisions of Section 145 (1) and 145 (2) Cr.P.C. and Section 146 Cr.P.C. are quoted herein below:

"145. Procedure where dispute concerning land or water is likely to cause breach of peace. (1) Whenever an Executive Magistrate is satisfied from a report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, on a specified date and time, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

(2) For the purposes of this section, the expression" land or water" includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property.

.....

"146 . Power to attach subject of dispute and to appoint receiver.

(1) If the Magistrate at any time after making the order under sub- section (1) of section 145 considers the case to be one of emergency, or if he decides that none of the parties was then in such possession as is referred to in section 145, or if he is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach the subject of dispute until a competent Court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof: Provided that such Magistrate may withdraw the attachment at any time if he is satisfied that there is no

longer any likelihood of breach of the peace with regard to the subject of dispute."

20. The object of the section 145 Cr.P.C. is to bring to an end by a summary process disputes relating to property, which are essentially of a civil nature, with a view to prevent breach of peace. Orders under the section are mere police orders which do not concern question of title. The section is primarily meant for the prevention of breach of peace where the dispute relates to the possession of immovable property, and to provide a speedy remedy by bringing the parties before the Court and ascertaining who of them was in actual possession and to maintain *status quo* until their rights are determined by a competent Court. Enquiry under this section is limited to the question as to who was in actual possession on the date of the preliminary order irrespective of the rights of the parties and the S.D.M. can not determine right and title of the properties. Due to this, preliminary order was passed by the Magistrate under Section 145 Cr.P.C. Notice was also issued and order was passed under Section 146 (1) Cr.P.C. for attachment of the property.

21. Being aggrieved with this order of the learned Magistrate for attachment of alleged property the opposite party no. 2 preferred the revision and the revision was allowed by impugned judgment of the Sessions Court.

22. Learned counsel for the opposite party no. 2 contended that proceedings under Section 145 Cr.P.C. are summary in nature, even if the rights of the parties are disputed before the competent civil court, and right of any party is protected by the court through interim injunction then the aggrieved party should place its grievance before the competent civil court and summary proceedings under Section 145 Cr.P.C. are not maintainable. Since the permanent injunction in favour of the opposite party no. 2 was passed vide order dated 6.8.2010 passed by Civil Judge Hawali (Junior Division), Lucknow in Suit No. 544 of 2009 (Bharat Singh and others Vs. Arvind Singh and Parmeshwar Das. The suit was decreed in favour of the opposite party no. 2 and decree was passed restraining the erstwhile respondent (legal representative of applicant) permanently not to interfere in the possession of the opposite party no. 2. The decree for permanent injunction, which is passed in favour of the opposite party no. 2, is binding even against the legal representative of the opposite party no. 2 of Original Suit No. 544 of 2009. The record indicates that the applicant failed to indicate that any appeal filed against the order dated 6.8.2010 passed by the Civil Judge, Hawali. Since title is in favour of the opposite party no. 2 is well settled, therefore, the contention of the learned counsel for the applicant is that he was not party of the original suit no. 544 of 2009, so the decree is not binding upon him have no force. The decree for permanent injunction shall be enforceable even against the legal representative. Learned counsel for the applicant failed to show any suit for cancellation of sale deed which was executed in favour of opposite party no. 2 and his family members.

23. In support of his submission learned counsel for the opposite party no. 2 relied upon the judgment of Hon'ble Supreme Court in the case of ***Ram Sumer Puri Mahant Vs. State of U.P. and others; AIR 1985 SC 472*** in which it has been held that:-

When a civil litigation is pending for the property wherein the question of possession is involved and has been

adjudicated, we see hardly any justification for initiating a parallel criminal proceeding under Section 145 of the Code of Criminal Procedure. There is no scope to doubt or dispute the position that the decree of the Civil Court is binding on the criminal court in a matter like the one before us. Counsel for respondents 2-5 was not in a position to challenge the proposition that parallel proceeding should not be permitted to continue and in the event of a decree of the Civil Court, the criminal court should not be allowed to invoke its jurisdiction particularly when possession is being examined by the civil court and parties are in a position to approach the civil court for interim orders such as injunction or appointment of receiver for adequate protection of the property during dependency of the dispute. Multiplicity of litigation is not in the interest of the parties nor should public time be allowed to be wasted over meaningless litigation. We are, therefore, satisfied that parallel proceedings should not continue and the order of the learned Magistrate should be quashed. We accordingly allow the appeal and quash the order of the learned Magistrate by which the proceeding under Section 145 of the Code of Criminal Procedure has been initiated and the property in dispute has been attached.

In support of his submission learned counsel for the opposite party no. 2 also relied upon ***judgment dated 27.3.2018 of this Court passed in the case of Ganesh Prasad & 5 others Vs. State of U.P. & 4 others*** in which it has been held that:-

13. After having heard at length the rival contentions and having perused the record, this Court is of the opinion that the learned SDM should not have drawn the proceedings under section 145 (1) or 146 (1) Cr.P.C., when the matter was pending before competent courts for getting the title over the said land decided as well for seeking injunction. The revisionists-second party have admittedly moved revenue court for getting their ownership/title declared over the disputed property vis-a-vis the opposite party Nos. 2 and 3-first party, while the opposite party Nos. 2 and 3-first party have moved Civil Court for seeking permanent injunction against the revisionists, which proceedings are pending. It is also on record that these proceedings were pending from prior to the initiation of proceedings under section 145 (1) or 146 (1) Cr. P.C., therefore, the learned SDM ought to have shunned entertaining any application for such relief. It is also apparent from evidence on record that no emergent situation has been shown to exist which compelled the learned SDM to attach the property in dispute. Not even an iota of evidence is there which would reflect that there was any kind of emergency of compelling nature for the SDM to pass an order for attachment of the disputed property. It would be pertinent to refer to the position of law to substantiate the decision of this Court.

14. The reliance is placed by the learned counsel for the revisionist-second party upon (2002) 3 SCC 700, Ranbir Singh vs Dalbir Singh and others, wherein the order of the High Court setting aside the order passed by SDM under section section 145 (1) and 146 (1) Cr. P.C., was upheld holding that while dealing with a proceeding under section 145 Cr. P.C., the Court has to be concerned only with possession of the property in dispute on the date of the preliminary order and dispossession, if any, within two months prior to that date. The Court is not required to decide either title to the property or rights of possession of the same. It was also found by the Apex Court that both the

parties had filed suits seeking decree of permanent injunction against each other and in suit filed by the appellant, an order of interim injunction had been passed and an objection had been filed by the respondent No. 1, in such a situation there was no need for the SDM to draw proceedings under section 145 (1) and 146 (1) Cr.P.C., it was nothing but an abuse of process of Court. The relevant paragraph of the said judgment is quoted herein below:

"8 . However, the High Court was in error in dealing with the Revision Petition as if it was exercising appellate jurisdiction. The High Court has dealt with the developments in the case relating to the acquisition of title, the allegations of fraudulent transfers made by Karnail Singh and M/s. Homestead and the circumstances in which the suit was dismissed as withdrawn. Keeping in view the limited scope of the proceeding under section 145, Cr. P.C. these questions were not material for determination of the main issues in the case. The Court, while dealing with a proceeding under section 145 Cr. P.C., is mainly concerned with possession of the property in dispute on the date of the preliminary order and dispossession, if any, within 2 months prior to that date; the Court is not required to decide either title to the property or rights of possession of the same. The question for determination before the High Court in the present case was one relating to the validity or otherwise of the preliminary order passed by the learned Sub - Divisional Magistrate under section 145 (1) Cr. P.C. and sustainability of the order of attachment passed under section 146 (1) Cr. P.C.. For deciding the questions it was neither necessary nor relevant for the High Court to have considered the matter relating to title to and right of possession of the property. Further, both the parties in the case have filed suits seeking decree of permanent injunction against each other and in the suit filed by the appellant an order of interim injunction has been passed and an objection petition has been filed by respondent No. 1. The suits and the interim order are pending further consideration before the Civil Court. "

24. In view of the above facts and circumstances and after considering the above cited law, it appears that opposite party no. 2 possessed the peaceful possession over the disputed land since 2006 and presently the legal title of the above land in question is in favour of the opposite party no. 2 and which is never disturbed by any civil court. Learned Additional Sessions Judge/revisional court had rightly found that the title as well as possession over the land in question is already settled in favour of the opposite party no. 2 (Bharat Singh). Thus, the proceedings under Section 145 Cr.P.C. is not maintainable and there appears no incorrectness, impropriety or illegality in passing the impugned order, so on the basis of the above discussion findings of the Revisional Court dated 13.12.2019 in passing of the impugned order appears to be justified and proper. Thus, in my considered opinion that the present application filed by the applicant under Section 482 Cr.P.C. is devoid of merit and not maintainable, therefore, the present petition is liable to be dismissed.

25. **Interim protection granted earlier shall be vacated forthwith.**

26. **The application under Section 482 Cr.P.C. is, accordingly, dismissed.**

(2022)05ILR A1479
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.05.2022

BEFORE

THE HON'BLE ANIL KUMAR OJHA, J.

Application U/S 482 No. 2763 of 2022

Anuj Kumar @ Sanjay & Ors. ...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Rajiva Dubey

Counsel for the Opposite Parties:
G.A.

Civil Law - SC/ST Act,1989 - Section 14 A(1)-Interim order passed in relation to an offence in S.C./S.T. Act-will come in category of order provided u/s 14 A(1) of SC/St Act-against which only Appeal shall lie before the High Court both on facts and law-

Application u/s 482 Cr.P.C. dismissed. (E-9)

List of Cases cited:

1. Girish Kumar Suneja Vs CBI, (2017) 14 SCC 809

2. Madhu Limaye Vs St. of Mah. (1997) 4 SCC 551

3. Satender Kumar Antil Vs Central Bureau of Investigation & anr., (2021) 10 SCC 773

(Delivered by Hon'ble Anil Kumar Ojha, J.)

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

2. Applicants have filed this application with following prayers:-

"Wherefore, it is most respectfully prayed in the interest of justice that this Hon'ble Court may kindly be pleased to allow this application U/s 482 Cr.P.C. and quash the impugned charge-sheet and summoning order dated 16-2-2022, passed by Learned II Additional Sessions Judge/ Special Judge, S.C./S.T. Act, Lakhimpur Kheri summoning the applicants to face trial vide Special Sessions Trial No. 93/2022, Crime No. 314/2020, U/s 323/504/506 I.P.C. & 3(1) ?, ? of the Act, Police Station- Neemgaon, District- Lakhimpur Kheri, contained as Annexures No. 1 and 2 to this application.

It is further prayed that this Hon'ble Court may kindly be pleased to quash the entire criminal proceedings pending against the applicants in the court of Learned II Additional Sessions Judge/ Special Judge, S.C./S.T. Act, Lakhimpur Kheri vide Special Sessions Trial No. 93/2022, Crime No. 314/ 2020, U/s 323/504/506 I.P.C. & 3(1) ?, ? of the Act, Police Station- Neemgaon, District- Lakhimpur Kheri in pursuance of the impugned charge sheet and summoning order, contained as Annexures No. 1 and 2 to this application.

It is further prayed that this Hon'ble Court may kindly be pleased to issue a direction commanding the concerned court below to decide the bail application of the applicants providing them the benefit of the legal proposition laid down by the Hon'ble Apex Court in the reported case Satender Kumar Antil vs. Central Bureau of Investigation & Another, 2021(4) Crimes 139 (S.C.)."

3. In ***Girish Kumar Suneja v. CBI, (2017) 14 SCC 809***, three Judge Bench of Hon'ble Apex Court has made following observations in para nos. 21, 22 and 23:

"21. The concept of an intermediate order was further elucidated in Madhu Limaye v. State of Maharashtra by contradistinguishing a final order and an interlocutory order. This decision lays down the principle that an intermediate order is one which is interlocutory in nature but when reversed, it has the effect of terminating the proceedings and thereby resulting in a final order. Two such intermediate orders immediately come to mind-an order taking cognizance of an offence and summoning an accused and an order for framing charges. Prima facie these orders are interlocutory in nature, but when an order taking cognizance and summoning an accused is reversed, it has the effect of terminating the proceedings against that person resulting in a final order in his or her favour. Similarly, an order for framing of charges if reversed has the effect of discharging the accused person and resulting in a final order in his or her favour. Therefore, an intermediate order is one which if passed in a certain way, the proceedings would terminate but if passed in another way, the proceedings would continue.

22. The view expressed in Amar Nath and Madhu Limaye was followed in K.K. Patel v. State of Gujarat wherein a revision petition was filed challenging the taking of cognizance and issuance of a process. It was said :

It is now well-nigh settled that in deciding whether an order challenged is interlocutory or not as for Section 397(2) of the Code, the sole test is not whether such order was passed during the interim stage (vide Amar Nath v. State of Haryana, Madhu Limaye v. State of Maharashtra, V.C. Shukla v. State through CBI and Rajendra Kumar Sitaram Pande v. Uttam. The feasible test is whether by upholding the objections raised by a party, it would result in culminating the proceedings, if so any order passed on such objections would not be merely interlocutory in nature as envisaged in Section 397(2) of the Code. In the present case, if the objection raised by the appellants were upheld by the Court the entire prosecution proceedings would have been terminated. Hence, as per the said standard, the order was revisable."

23. We may note that in different cases, different expressions are used for the same category of orders-sometimes it is called an intermediate order, sometimes a quasi-final order and sometimes it is called an order that is a matter of moment. Our preference is for the expression "intermediate order" since that brings out the nature of the order more explicitly."

4. From the perusal of the prayer made by applicants, it is clear that applicants have prayed to quash the summoning order dated 16.02.2022 passed by II Additional Sessions Judge/ Special Judge, S.C./S.T. Act, Lakhimpur Kheri, which reads as follows:

"16.02.2022-

5. In ***Re: Provision of Section 14a of SC/ST (Prevention of Atrocities) Amendment Act, 2015,*** full Bench of this Court has held as follows:

"B. Whether in view of the provisions contained in Section 14-A of the Amending Act, a petition under the provisions of Article 226/227 of the Constitution of India or a revision under Section 397 of the Code of Criminal Procedure or a petition under Section 482 Cr.P.C., is maintainable. OR in other words, whether by virtue of Section 14-A of the Amending Act, the powers of the High Court under Articles 226/227 of the

Constitution or its revisional powers or the powers under Section 482 Cr.P.C. stand ousted?

We therefore answer Question (B) by holding that while the constitutional and inherent powers of this Court are not "ousted" by Section 14A, they cannot be invoked in cases and situations where an appeal would lie under Section 14A. Insofar as the powers of the Court with respect to the revisional jurisdiction is concerned, we find that the provisions of Section 397 Cr.P.C. stand impliedly excluded by virtue of the special provisions made in Section 14A. ***This, we hold also in light of our finding that the word "order" as occurring in sub-section(1) of Section 14A would also include intermediate orders."***

6. In ***Girish Kumar Suneja v. CBI (Supra)***, Honble Apex Court in para 21 has specifically stated referring the judgement of ***Madhu Limaye Vs. State of Maharashtra (1997) 4 SCC 551*** that taking cognizance of an offence and summoning the accused is intermediate order, thus impugned summoning order dated 16.02.2022 is an intermediate order.

7. Now it is to be seen whether Application U/s 482 Cr.P.C. lies against the impugned summoning order dated 16.02.2022 or appeal will lie under Section 14A(1) of the S.C./S.T. Act.

8. Relevant portion of Section 14A(1) of the S.C./S.T. Act. are quoted below for ready reference:

"14A. Appeals.- *(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an appeal shall lie, from any judgment, sentence or order, not being an interlocutory order, of a Special Court or an Exclusive Special Court, to the High Court both on facts and on law."From the perusal of provisions of Section 14A(1) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities Act), 1989, it is clear that an Appeal shall lie from any judgement, cognizance order, order not being interlocutory order of Special Court, or an exclusive Special Court to the High Court, both on facts and on law."*

9. Full Bench of this Court in ***Re: Provision of Section 14a of SC/ST (Prevention of Atrocities) Amendment Act, 2015*** while answering question B has specifically stated- "we hold also in light of our finding that the word "order" as occurring in sub-section(1) of Section 14A would also include intermediate orders.

10. Thus if any intermediate order is passed by Special Court or an exclusive Special Court in case relating to an offence in the S.C./S.T. Act, that will come in the category of order as provided under Section 14A(1) of SC/ST Act against which only an appeal shall lie before the High Court, both on facts and on law.

11. In view of the above discussion, I am of the considered opinion that Application U/s 482 Cr.P.C. cannot be filed against summoning order dated 16.02.2022 passed by Learned II Additional Sessions Judge/ Special Judge, S.C./S.T. Act, Lakhimpur Kheri.

12. Perusal of prayer further reveals that prayer has also been made to issue a direction commanding the court below to decide the bail application of the applicants providing them the benefit of the legal proposition laid down by the Hon'ble Apex Court in the reported case ***Satender Kumar***

Antil vs. Central Bureau of Investigation & Another, (2021) 10 SCC 773.

13. In ***Satender Kumar Antil (supra)***, the Hon'ble Apex Court has issued guidelines to trial courts and High Courts to keep them in mind while considering the bail applications. A copy of the aforesaid judgment was also ordered to be circulated to the Registrars of different High Courts to be further circulated to the trial courts so that necessary bail matters do not come up before Hon'ble Apex Court. Relevant portion of ***Satender Kumar Antil (supra)*** is quoted as under:-

"5. The trial courts and the High Courts will keep in mind the aforesaid guidelines while considering bail applications. The caveat which has been put by the learned ASG is that where the accused have not cooperated in the investigation non appeared before the investigating officers, nor answered summons when the courts feels that judicial custody of the accused is necessary for the completion of the trial, where further investigation including a possible recovery is needed, the aforesaid approach cannot give them benefit, something we agree with.

10. A copy of this order be circulated to the Registrars of the different High Courts to be further circulated to the trial courts so that the necessary bail matters do not come up to this Court."

14. During the course of arguments, Advocates complained that Districts Courts do not follow dictum of ***Satender Kumar Antil (supra)*** unless specifically directed by the High Court. This is a sorry state of affair. The law laid down by the Hon'ble Apex Court in ***Satender Kumar Antil (supra)*** is law of land and is binding upon all courts in India.

15. Hence, there is no need to issue a direction to the trial court concerned to decide the bail application applying the legal proposition laid down by the Hon'ble Apex Court in the reported case ***Satender Kumar Antil (supra)***.

16. However, it would be appropriate that a copy of this order be sent to the Registrar General of Allahabad High Court, who if required may issue circular to all the courts in the State of Uttar Pradesh under subordination of High Court of Judicature at Allahabad to follow the law laid down by the Hon'ble Apex Court in ***Satender Kumar Antil (supra)***.

17. This Application U/s 482 Cr.P.C. is ***disposed of*** with the observation that applicants are permitted to file fresh petition before the appropriate forcum.

(2022)05ILR A1482
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.05.2022

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application U/S 482 No. 4022 of 2021

Ramesh Yadav ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Anupam Mehrotra, Anil Kumar Yadav

Counsel for the Opposite Parties:
G.A., Akash Prasad, Amitav Singh

Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Cognizance order and order committing case to Court of Session challenged-chargesheet filed on relevant material and evidences-sufficient as per

prosecution -FSL report not filed initially with chargesheet-filed later on-present case relates to grave offence of brutal murder-procedural lapse or technical error in preparation of charge sheet -not causing any miscarriage of justice and are curable and can be regularised under law-proceedings cannot be quashed.

Petition dismissed. (E-9)

List of Cases cited:

1. R.R. Chari Vs The St. of U.P., AIR (38) 1951 SC 207,

2. Narayandas Bhagwandas Madhavdas VsThe St. of W. B., AIR 1959 SC 1118,

3. Raghubans Dubey Vs St. of Bihar, AIR 1967 SC 1167

4. Darshan Singh Ram Kishan Vs The St. of Mah., 1971 SCC (Cri) 628

5. Mowu Vs The Superintendent, Special Jail, Nowgong, Assam & ors., 1972 SCC (Cri) 184

6. St. of W.B. Vs Manmal Bhutoria & ors., (1977) 3 SCC 440

7. Tula Ram & ors. Vs Kishore Singh, (1977) 4 SCC 459.

8. Raj Kishore Prasad Vs St. of Bihar & anr., (1996) 4 SCC 495.

9. Satya Narain Musadi & ors. Vs St. of Bihar, (1980) 3 SCC 152

10. Divine Retreat Centre Vs St. of Kerala & ors, AIR 2008 SC 1614

11. V. K. Sasikala Vs St. Represented by Superintendent of Police, (2012) 9 SCC 771

12. Parminder Kaur Vs St. of U.P. & anr., (2010) 1 SCC 322

13. Karan Singh Vs St. of Har. & anr., AIR 2013 SC 2348

14. St. of Guj.Vs Afroz Mohammed Hasanfatta, (2019) 20 SCC 539

15. Bhushan Kumar & anr. Vs St. (NCT of Delhi) & anr., (2012) 5 SCC 424.

16. Central Bureau of Investigation Vs R.S. Pai & anr., (2002) 5 SCC 82

17. U.O.I. Vs Prakash P. Hinduja & anr., (2003) 6 SCC 195

18. St. of Mah. Vs Sharadchandra Vinayak Dongre & ors., (1995) 1 SCC 42

19. Central Bureau of Investigation (CBI) Vs R.S. Pai & ors. , (2002) 5 SCC 82

20. Dhanaj Singh alias Shera & ors. Vs St. of Pun., (2004) 3 SCC 654

21. Mutha Associates & ors. Vs St. of Mah. & ors., (2013) 14 SCC 304

22. Amanullah & anr. Vs St. of Bihar & ors., (2016) 6 SCC 699

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

1. Heard Sri Anupam Mehrotra, learned counsel for the applicant and Sri Anurag Verma, learned AGA-I for the State as well as Sri H.G.S. Parihar, learned Senior Advocate, assisted by Sri Akash Prasad and Sri Amitav Singh, learned counsel for opposite party no.6/ complainant.

2. This petition/application under Section 482 Cr.P.C. has been filed challenging the orders of cognizance and commitment of the case to the Court of Session dated 10.01.2020 (Annexures No.1 & 2); police report/ charge sheet no.01/2020 dated 25.12.2019 (Annexure No.3) and further proceedings thereto. As an interim prayer, further proceedings of Sessions Trial No.11 of 2020, order of cognizance as well as commitment order dated 10.01.2020 and the trial of the

present case have been prayed to be stayed during pendency of the present petition.

3. Sri Anupam Mehrotra has assailed the aforesaid orders saying that the impugned police report/charge sheet no.01 of 2020 dated 25.12.2019 (Annexure No.3) was filed on the basis of incomplete investigation in Case Crime No.366 of 2019 lodged at Police Station Harchandpur, Raebareli (under Sections 147, 148, 149, 323, 302, 201, 120-B & 216 IPC), wherein the applicant and fifteen more accused persons have been implicated, therefore, such police report may not be termed as police report strictly in terms of Section 173 Cr.P.C. He has also assailed the order dated 10.1.2020 whereby the learned Chief Judicial Magistrate, Raebareli has taken cognizance of the charge sheet committing the case for trial to the Court of Sessions Judge without ascertaining and verifying the fact as to whether the police report/ charge sheet has been properly filed or not. As per Sri Mehrotra, since the police report/charge sheet has been filed on the basis of incomplete investigation and such fact is clear from the charge sheet itself, therefore, learned Chief Judicial Magistrate instead of taking cognizance of said charge sheet and committing the case for trial, he should have ordered either for further investigation or should wait till investigation completes and all relevant material is placed before the court.

4. Brief facts to consider the prayers of the present applicant are that one FIR was lodged by opposite party no.6, which has been registered as Crime No.366 of 2019, originally under Sections 302 & 201 IPC and was subsequently converted under Sections 147, 148, 149, 323, 302, 201, 120-B & 216 IPC, Police Station Harchandpur, Raebareli against Suresh Yadav, the owner of Somu Dhaba and the unidentified staff members of Somu Dhaba. The alleged incident occurred on 9.10.2019 at 22:00 hours at Somu Dhaba and in the FIR in question, it has been alleged that Aditya Pratap Singh alias Ravi, son of Pradeep Kumar Singh, the complainant (the opposite party no.6 herein) was at the house of his 'bua', (the sister of Ravi's father, Pradeep Kumar Singh, the complainant/opposite party no 6 herein) at Jankipuram, Kanpur Road, P.S. Kotwali Sadar, Raebareli in the night of 9.10.2019 when at around 10:00 PM, Ravi on being called by three persons (Manish Singh, Saurabh Singh and Ajay Singh), went to meet them on a motorcycle (No. UP 33 N 7162). That night, when Ravi did not return to the house of his bua, his bua tried the whole night to contact Ravi on his mobile phone but could not contact him. On the next day, at 7:00 AM, the call of Ravi's bua on Ravi's mobile phone was answered by the S.H.O., Police Station Harchandpur, Raebareli, who told Ravi's bua that the person, the call on whose mobile phone is being answered, his dead body has been found near a godown near Garhi Khas (at Raebareli) and the police has taken the dead body to the District Hospital, Raebareli. On being informed by Raj Kumari Singh about what the S.H.O, told her, Pradeep Kumar Singh (the father of Ravi/the complainant/the opposite party no 6 herein) reached the District Hospital, Raebareli where he found his son lying dead. Thereupon, Pradeep Kumar Singh (the complainant/the opposite party no 6 herein) called Ajay and Manish (supra) to enquire about the death, upon which Pradeep Kumar Singh was told that the previous night, Ravi, along with Manish Singh, Saurabh Singh and Ajay Singh mentioned above, went to the Somu Dhaba for dinner where, in a fracas, Ravi was

beaten up by Suresh Yadav (the owner of Somu Dhaba/the applicant's cousin) and the staff members of Somu Dhaba with bamboo stick, poles and iron stick ("lathi, dandey and sariya"). In this fracas, as apprehended by Pradeep Kumar Singh (the complainant/the opposite party no.6 herein), Ravi was killed and his dead body might have been thrown near the godown near Garhi Khas to make the murder appear as an accident. Further, the complainant/the opposite party no 6 herein also apprehended that the CCTV Footages of Somu Dhaba of the intervening night of October 9 and 10, 2019 from 10:00 PM to 01:00 AM might have been deleted so as to erase the evidence of murder.

5. As per Sri Mehrotra, for the aforesaid incident one local leader-Member of Legislative Council, U.P. from Raebareli (for short "MLC"), namely, Sri Dinesh Pratap Singh wrote a letter dated 12.10.2019 to the Chief Minister of U.P. alleging that death of Aditya Pratap Singh alias Ravi is murder at Somu Dhaba and the accused persons are guilty of this murder. It has been further alleged in the said letter that the victim succumbed to the injuries caused by the heated tools used for cooking food. Sri Mehrotra has further submitted that on the aforesaid letter dated 12.10.2019, the Chief Minister of the State directed his Special Secretary to do the needful exercise with promptness and effective action be taken to punish the guilty persons. On the direction of the Chief Minister, the Special Secretary wrote a letter to the Additional Chief Secretary, Home, enclosing therewith the letter of MLC for doing the needful exercise. Therefore, as per Sri Mehrotra, the entire exercise has been carried out by the police at the behest of local MLC and the Chief Minister.

6. Sri Mehrotra has further submitted that since the Additional Chief Secretary, Home, was taking personal interest in the matter, therefore, the investigation was hurriedly concluded and charge sheet was filed on 25.12.2019. The aforesaid charge sheet was based on incomplete investigation inasmuch as during investigation on 14.11.2019, three hard-disks and two adopters of CCTV footage were sent by the police to the Forensic Science Laboratory (FSL) and FSL report was not enclosed with the charge sheet. Sri Mehrotra has drawn attention of this Court towards the last page of the charge sheet to show that the Investigating Officer has categorically indicated that despite the couple of reminders being sent to obtain FSL report, the same has not been received for the reason that no such examination could take place. It has been further indicated that as soon as such FSL report is received, the same shall be produced before the learned court. However, it has been requested in the said charge sheet that on the basis of material available on record, the evidences collected and the statements recorded during investigation, the accused persons may be punished. He has further submitted that despite the fact that charge sheet has already been filed on 25.12.2019, even then the supplementary statements (Mazeed Bayaan) have been recorded by the Investigating Officer of certain persons on 8.1.2020, which is not permissible in the eyes of law inasmuch as there cannot be any further investigation when the original investigation is incomplete. However, ignoring the aforesaid legal binding, the Chief Judicial Magistrate, Raebareli took cognizance of the charge sheet on 10.1.2020 and committed the issue to the Court of Session.

7. Sri Mehrotra has drawn attention of this Court towards the order dated

13.9.2021 (Annexure No.13) whereby the court of Additional Sessions Judge-I, Raebareli, the trial court, directed the State/prosecution to apprise that whether the investigation has completed or not. On the basis of aforesaid order dated 13.9.2021, Sri Mehrotra has submitted that it is evident that so called police report/charge sheet was filed on the basis of incomplete investigation, therefore, the proceedings of trial court are futile as it cannot take cognizance of the offence unless the case has been committed to it by a Magistrate under Section 193 Cr.P.C. For the convenience, relevant portion of Section 193 Cr.P.C. is being reproduced herein below:-

"193. Cognizance of offences by Courts of Session. Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code."

8. Sri Mehrotra has submitted that since the impugned charge sheet as well as cognisance order are nullity in the eyes of law, therefore, those may be quashed. He has further submitted that since the charge sheet and cognizance order are not sustainable in the eyes of law, therefore, further trial proceedings in the case in question may be stayed till conclusion of proper investigation as per law. Sri Mehrotra has submitted that the Chief Judicial Magistrate has overlooked the fundamental features of taking cognizance within the meaning of Section 193 Cr.P.C. These well settled features are; (1) for "taking cognizance" no formal action is prescribed, it is taken when a Magistrate first takes judicial notice of an offence i.e., when the Magistrate applies mind for the purpose of proceeding further on a complaint or on a police report or upon information of a person other than a police officer, as the case may be ("judicial notice" inherently means due application of mind); and (2) "Cognizance" means taking cognizance of offence and not of the offenders i.e., the due application of mind by the Magistrate is to be on how much is the commission of an alleged offence made out by the police report ('charge sheet') for the purpose of having a triable case. However, in the present case, as per Sri Mehrotra, the Chief Judicial Magistrate did not take cognizance/applied his mind to the alleged offence, as no conclusion on the commission of alleged offence was possible without the FSL report and without the completion of investigation. In support of his aforesaid submission, he has placed reliance upon the dictums of the Hon'ble Apex Court in re; **R.R. Chari v. The State of Uttar Pradesh, AIR (38) 1951 SC 207, Narayandas Bhagwandas Madhavdas v. The State of West Bengal, AIR 1959 SC 1118, Raghubans Dubey v. State of Bihar, AIR 1967 SC 1167, Darshan Singh Ram Kishan v. The State of Maharashtra, 1971 SCC (Cri) 628, Mowu v. The Superintendent, Special Jail, Nowgong, Assam and others, 1972 SCC (Cri) 184, State of West Bengal v. Manmal Bhutoria and Others, (1977) 3 SCC 440 and Tula Ram and Others v. Kishore Singh, (1977) 4 SCC 459.** He has referred para-9 of the dictum of of the Apex Court in re; **R.R. Chari** (supra). Relevant extract of para-9 of **R.R. Chari** (supra) is being reproduced herein below:-

"(9) ....What is taking cognizance has not been defined in the Cri.P.C. & I have no desire to attempt to define it. It

seems to me clear however that before it can be said that any Mag. has taken cognizance of any offence u/s. 190(1)(a) Cri.P.C., he must not only have applied his mind to the contents of the petn but he must have done so for the purpose of proceeding, in a particular way as indicated in the subsequent provisions of this Chap., proceeding u/s. 200 & thereafter sending it for inquiry & report u/s. 202....."

9. In support of his argument that in absence of the completion of investigation, cognizance order of the Chief Judicial Magistrate is a nullity, pursuant to which the trial is impossible and could not commence, Sri Mehrotra has cited the dictum of the Apex Court in re; **Raj Kishore Prasad v. State of Bihar and Another, (1996) 4 SCC 495.**

10. Referring the dictum of the Apex Court in re; **Satya Narain Musadi and Others v. State of Bihar, (1980) 3 SCC 152,** Sri Mehrotra has submitted that the Hon'ble Apex Court has clarified about the police report in paras 9 & 10 of the aforesaid judgment observing that Section 173 (2) (1) Cr.P.C. provides that on completion of investigation the police officer investigating into the cognizable offence shall submit a report in the form prescribed by the State Government. Statutory requirement of the report under Section 173 (2) Cr.P.C. would be complied with if the various details therein prescribed are included in the report. On the strength of the aforesaid dictum, Sri Mehrotra tried to explain that unless and until the entire material is collected by the investigating agency, charge sheet should have not been filed and if charge sheet is filed on the basis of incomplete investigation, the learned court of Magistrate should not take cognizance thereof.

11. He has further submitted that the Apex Court in re; **Divine Retreat Centre v. State of Kerala & Ors, AIR 2008 SC 1614, V.K. Sasikala v. State Represented by Superintendent of Police, (2012) 9 SCC 771, Parminder Kaur v. State of Uttar Pradesh and Another, (2010) 1 SCC 322 and Karan Singh v. State of Haryana & Anr., AIR 2013 SC 2348,** has observed that the investigation is the duty of the police in which the courts do not ordinarily interfere. An exception to this is the abuse of police power in an investigation, against which interference by the High Court lies. Application of mind by the Magistrate under Section 173 (2) Cr.P.C. and the plenary powers of the High Court have been held to be the adequate safeguards for ensuring fair investigation.

12. *Per Contra*, Sri Anurag Verma, learned AGA has raised preliminary objection regarding maintainability of the instant petition/ application in view of the recent pronouncements of the Apex Court in re; **State of Gujarat v. Afroz Mohammed Hasanfatta, (2019) 20 SCC 539**, wherein it has been held as follows:-

"16. It is well settled that at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and the Magistrate is only to be satisfied that there are sufficient grounds for proceeding against the accused. It is fairly well settled that when issuing summons, the Magistrate need not explicitly state the reasons for his satisfaction that there are sufficient grounds for proceeding against the accused.....

22. In summoning the accused, it is not necessary for the Magistrate to examine the merits and demerits of the case and whether the materials collected is adequate for supporting the conviction. The court is not required to evaluate the evidence and its merits. The standard to be adopted for summoning the accused under Section 204 CrPC is not the same at the time of framing the charge. For issuance of summons under Section 204 CrPC, the expression used is *"there is sufficient ground for proceeding...";* whereas for framing the charges, the expression used in Sections 240 and 246 IPC is *"there is ground for presuming that the accused has committed an offence...".* At the stage of taking cognizance of the offence based upon a police report and for issuance of summons under Section 204 CrPC, detailed enquiry regarding the merits and demerits of the case is not required. The fact that after investigation of the case, the police has filed charge-sheet along with the materials thereon may be considered as sufficient ground for proceeding for issuance of summons under Section 204 CrPC.

23. Insofar as taking cognizance based on the police report is concerned, the Magistrate has the advantage of the charge-sheet, statement of witnesses and other evidence collected by the police during the investigation. Investigating officer/SHO collects the necessary evidence during the investigation conducted in compliance with the provisions of the Criminal Procedure Code and in accordance with the rules of investigation. Evidence and materials so collected are sifted at the level of the investigating officer and thereafter, charge-sheet was filed. In appropriate cases, opinion of the Public Prosecutor is also obtained before filing the charge-sheet. The court thus has the advantage of the police report along with the materials placed before it by the police. Under Section 190(1)*(b)* CrPC, where the Magistrate has taken cognizance of an offence upon a police report and the Magistrate is satisfied that there is sufficient ground for proceeding, the Magistrate directs issuance of process. In case of taking cognizance of an offence based upon the police report, the Magistrate is not required to record reasons for issuing the process. In cases instituted on a police report, the Magistrate is only required to pass an order issuing summons to the accused. Such an order of issuing summons to the accused is based upon subject to satisfaction of the Magistrate considering the police report and other documents and satisfying himself that there is sufficient ground for proceeding against the accused. In a case based upon the police report, at the stage of issuing the summons to the accused, the Magistrate is not required to record any reason. In case, if the charge-sheet is barred by law or where there is lack of jurisdiction or when the charge-sheet is rejected or not taken on file, then the Magistrate is required to record his reasons for rejection of the charge-sheet and for not taking it on file.

24. In the present case, cognizance of the offence has been taken by taking into consideration the charge-sheet filed by the police for the offence under Sections 420, 465, 467, 468, 471, 477-A and 120-B IPC, the order for issuance of process without explicitly recording reasons for its satisfaction for issue of process does not suffer from any illegality."

13. Therefore, Sri Verma has submitted that there subsists no valid ground for quashing the criminal proceedings against the accused-applicant and the present petition deserves to be outrightly dismissed.

14. Sri Verma has further submitted that by way of catena of judicial pronouncements, the Apex Court has held that at the time of cognizance, the Magistrate is not required to write a detailed order. So as to strengthen the aforesaid argument, he has placed reliance upon the dictum of the Apex Court in re; **Bhushan Kumar and Another v. State (NCT of Delhi) and Another, (2012) 5 SCC 424.** Sri Verma has vehemently denied the contention of Sri Mehrotra that the investigation was not carried out in a fair and impartial manner. As per him, the investigation was carried out absolutely in a fair and impartial manner, without any political intervention and pursuant to the revelation of credible and cogent evidence regarding complicity of the accused person, a charge sheet was prepared strictly in consonance with the provisions of Cr.P.C. and was forwarded to the competent court. Sri Verma has further submitted that all reliable and credible evidences have been collected and statements of all witnesses including the injured witnesses have been recorded. Further, at the time of submission of charge sheet only the report from FSL regarding electronic evidence was awaited which will not make the charge sheet against the applicant and other co-accused defective in any manner whatsoever.

15. Sri Verma has however informed the Court that such FSL report regarding electronic evidence gathered during the course of investigation has been received from the Forensic Science Laboratory and the same was duly endorsed in the case diary on 2.11.2021. Such FSL report, which is dated 24.9.2021, has been filed along with supplementary counter affidavit filed on 25.11.2021. Sri Verma has filed statements of all the witnesses including the injured persons by filing counter affidavit and supplementary counter affidavit.

16. Sri Verma has submitted that there is no specific bar to the effect that the additional documents cannot be produced subsequently. If the Investigating Officer obtains reliable document, he may produce the same later on. Not only the above, if the Investigating Officer has himself indicated in the charge sheet that he shall be filing the FSL report when the same is received to him, he can file such report before the learned court concerned and in the present case such FSL report has already been filed. So as to strengthen his aforesaid argument, Sri Verma has cited the dictum of the Apex Court in re; **Central Bureau of Investigation v. R.S. Pai and Another, (2002) 5 SCC 82,** wherein in para-7, it has been held as under:-

"7. From the aforesaid sub-sections, it is apparent that normally, the investigating officer is required to produce all the relevant documents at the time of submitting the charge-sheet. At the same time, as there is no specific prohibition, it cannot be held that the additional documents cannot be produced subsequently. If some mistake is committed in not producing the relevant documents at the time of submitting the report or the charge-sheet, it is always open to the investigating officer to produce the same with the permission of the court. In our view, considering the preliminary stage of prosecution and the context in which the police officer is required to forward to the Magistrate all the documents or the relevant extracts thereof on which the prosecution proposes to rely, the word "shall" used in sub-section (5) cannot be interpreted as mandatory, but as directory. Normally, the documents gathered during

the investigation upon which the prosecution wants to rely are required to be forwarded to the Magistrate, but if there is some omission, it would not mean that the remaining documents cannot be produced subsequently. Analogous provision under Section 173(4) of the Code of Criminal Procedure, 1898 was considered by this Court in *Narayan Rao v. State of A.P.* [AIR 1957 SC 737 : 1958 SCR 283 : 1957 Cri LJ 1320] (SCR at p. 293) and it was held that the word "shall" occurring in sub-section (4) of Section 173 and sub-section (3) of Section 207-A is not mandatory but only directory. Further, the scheme of sub-section (8) of Section 173 also makes it abundantly clear that even after the charge-sheet is submitted, further investigation, if called for, is not precluded. If further investigation is not precluded then there is no question of not permitting the prosecution to produce additional documents which were gathered prior to or subsequent to the investigation. In such cases, there cannot be any prejudice to the accused. Hence, the impugned order passed by the Special Court cannot be sustained."

17. Sri Verma has further submitted that endeavour of the applicant/ petitioner to portray the illegality in the investigation and the consequent cognizance is entirely misplaced and fallacious. Citing the dictum of the Apex Court in re: **Union of India v. Prakash P. Hinduja and Another, (2003) 6 SCC 195,** he has submitted that assuming though not conceding that there is any error in preparation of the charge sheet in the instant case, the same is no legitimate ground for interference under inherent power of this Court either with the cognizance or with the charge sheet. Relevant extract of para 21 of the aforesaid case is as under:-

"21. ...The Court after referring to *Parbhu v. Emperor* [AIR 1944 PC 73 : 46 Cri LJ 119] and *Lumbhardar Zutshi v. R.* [AIR 1950 PC 26 : (1950) 51 Cri LJ 644] held that if cognizance is in fact taken on a police report initiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial, which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice and that an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the court for trial. This being the legal position, even assuming for the sake of argument that CBI committed an error or irregularity in submitting the charge-sheet without the approval of CVC, the cognizance taken by the learned Special Judge on the basis of such a charge-sheet could not be set aside nor could further proceedings in pursuance thereof be quashed. The High Court has clearly erred in setting aside the order of the learned Special Judge taking cognizance of the offence and in quashing further proceedings of the case."

18. Therefore, Sri Verma has submitted that the present petition may be dismissed.

19. Sri H.G.S. Parihar, learned Senior Advocate, assisted by Sri Akash Prasad, learned counsel for opposite party no.6, has also adopted the arguments of Sri Anurag Verma, learned AGA. Sri Parihar has further submitted that in the present case after recording the statements of the complainant as well as other witnesses and collecting the material, charge sheet has been filed and the same may not be declared invalid for the reason that at the time of filing the charge sheet, FSL report

was not filed. However, he has submitted on the basis of instructions that said FSL report has been filed. As per him, the trial is going on, therefore, no interference in the trial may be required and the present petition may be dismissed.

20. Heard learned counsel for the parties and perused the material available on record.

21. It has been gathered from the material available on record that the prosecution has collected material evidences during the course of the investigation including video footage and clips so as to corroborate the prosecution story. The vehicle used in the assault was also recovered and after proper physical examination of such vehicle, it was allegedly found that this was the vehicle which was used by the assailants/accused persons to kill the victim. Statements of relevant and material witnesses and eye witnesses have been recorded. The statements of aforesaid witnesses including eye witnesses vis-a-vis FSL report of the vehicle in question have been enclosed alongwith the counter affidavit and supplementary counter affidavit filed by the State.

22. Law is settled on the point that there is no specific bar to collect the evidence and file the same after filing the charge-sheet. If the material/evidence is credible and relevant for taking the trial court on any certain conclusion, the same may be accepted by the Magistrate/ trial court. The Hon'ble Apex Court in re; State of **Maharashtra v. Sharadchandra Vinayak Dongre and Others, (1995) 1 SCC 42,** has held that Magistrate can take cognizance of the offence if he is satisfied that the material placed by the prosecution is sufficient for taking cognizance. He is not debarred from doing so merely because police has filed an application after submission of the charge sheet seeking permission to file supplementary charge sheet.

23. The Hon'ble Apex Court in re; **Central Bureau of Investigation (CBI) v. R.S. Pai and Ors, (2002) 5 SCC 82,** has held that the Investigating Officer is required to produce all the relevant documents at the time of submitting the charge sheet. At the same time, as there is no specific prohibition, it cannot be held that the additional documents cannot be produced subsequently. If some mistake is committed in not producing the relevant documents at the time of submitting the report or charge sheet, it is always open to the Investigating Officer to produce the same with the permission of the court. Sri Verma has submitted that the aforesaid exercise is also permitted in view of Section 173 (8) Cr.P.C.

24. The Hon'ble Apex Court in re; **Dhanaj Singh alias Shera and Others v. State of Punjab, (2004) 3 SCC 654**, has observed in paras 5 to 8 as under:-

"5. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. (See *Karnel Singh v. State of M.P.* [(1995) 5 SCC 518 : 1995 SCC (Cri) 977]

6. In *Paras Yadav v. State of Bihar* [(1999) 2 SCC 126 : 1999 SCC (Cri) 104] it was held that if the lapse or

omission is committed by the investigating agency or because of negligence the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not, the contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts; otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

7. As was observed in *Ram Bihari Yadav v. State of Bihar* [(1998) 4 SCC 517 : 1998 SCC (Cri) 1085] if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law-enforcing agency but also in the administration of justice. The view was again reiterated in *Amar Singh v. Balwinder Singh* [(2003) 2 SCC 518 : 2003 SCC (Cri) 641] . As noted in *Amar Singh case* [(2003) 2 SCC 518 : 2003 SCC (Cri) 641] it would have been certainly better if the firearms were sent to the Forensic Test Laboratory for comparison. But the report of the ballistic expert would be in the nature of an expert opinion without any conclusiveness attached to it. When the direct testimony of the eyewitnesses corroborated by the medical evidence fully establishes the prosecution version, failure or omission or negligence on the part of the IO cannot affect the credibility of the prosecution version.

8. The stand of the appellants relates essentially to acceptability of evidence. Even if the investigation is defective, in view of the legal principles set out above, that pales into insignificance when ocular testimony is found credible and cogent. Further effect of non-examination of weapons of assault or the pellets, etc. in the background of defective investigation has been considered in *Amar Singh case* [(2003) 2 SCC 518 : 2003 SCC (Cri) 641]. In the case at hand, no crack in the evidence of the vital witnesses can be noticed."

25. So far as arguments of Sri Mehrotra that charge sheet has been filed under the influence of the local leader, therefore, the same is an outcome of malafide, the Hon'ble Apex Court in re; **Mutha Associates and Others v. State of Maharashtra and Others, (2013) 14 SCC 304,** has observed in paras 44 to 50 as under:-

"44. That the allegations of mala fides would require a high degree of proof to rebut the presumption that administrative action has been taken bona fide was laid down as one of the principles governing burden of proof of allegations of mala fides levelled by an aggrieved party. The Court in *Ajit Kumar Nag v. Indian Oil Corpn. Ltd.* [(2005) 7 SCC 764 : 2005 SCC (L&S) 1020] observed thus: (SCC p. 790, para 56)

"56. ... It is well settled that the burden of proving mala fide is on the person making the allegations and the burden is "very heavy'. (Vide *E.P. Royappa v. State of T.N.* [(1974) 4 SCC 3 : 1974 SCC (L&S) 165]. There is every presumption in favour of the administration that the power has been exercised bona fide and in good faith. It is to be remembered that the allegations of mala fide are often more easily made than made out and the very seriousness of such allegations demands proof of a high degree of credibility. As Krishna Iyer, J. stated in *Gulam Mustafa v. State of Maharashtra* [(1976) 1 SCC 800] (SCC p. 802, para 2): "It (mala fide) is the last refuge of a losing litigant.'"

45. In *State of M.P. v. Nandlal Jaiswal* [(1986) 4 SCC 566] this Court laid emphasis on the need for furnishing full particulars of allegations suggesting mala fides. The use of words such as "mala fides", "corruption" and "corrupt practice" was held to be insufficient to necessitate an enquiry into such allegations. The Court observed: (SCC p. 611, para 39)

"39. Before we part with this case we must express our strong disapproval of the observations made by B.M. Lal, J. in paras 1, 9, 17, 18, 19 and 34 of his concurring opinion. The learned Judge made sweeping observations attributing mala fides, corruption and underhand dealing to the State Government. These observations are in our opinion not at all justified by the record. In the first place it is difficult to appreciate how any such observation could be made by the learned Judge without any foundation for the same being laid in the pleadings. It is true that in the writ petitions the petitioners used words such as "mala fide', "corruption' and "corrupt practice' but the use of such words is not enough. What is necessary is to give full particulars of such allegations and to set out the material facts specifying the particular person against whom such allegations are made so that he may have an opportunity of controverting such allegations. The requirement of law is not satisfied insofar as the pleadings in the present case are concerned and in the absence of necessary particulars and material facts, we fail to see how the learned Judge could come to a finding that the State Government was guilty of factual mala fides, corruption and underhand dealing."

46. To the same effect is the decision of this Court in *Swaran Lata v. Union of India* [(1979) 3 SCC 165 : 1979 SCC (L&S) 237] the Court held that in the absence of particulars, the Court would be justified in refusing to conduct an investigation into the allegations of mala fides.

47. In *A. Peeriakaruppan v. Sobha Joseph* [(1971) 1 SCC 38] this Court held that even when the Court examining the validity of an action may find a circumstance to be disturbing it cannot uphold the plea of mala fides on ground of mere probabilities. A note of caution was similarly sounded by this Court in *E.P. Royappa v. State of T.N.* [(1974) 4 SCC 3 : 1974 SCC (L&S) 165] , where the Court held that it ought to be slow to draw dubious inferences from incomplete facts particularly when imputations are grave and they are made against the holder of an office which has high responsibility in the administration. The following passage from the decision is apposite: (E.P. Royappa case [(1974) 4 SCC 3 : 1974 SCC (L&S) 165] , SCC pp. 41-42, para 92)

"92. Secondly, we must not also overlook that the burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility. Here the petitioner, who was himself once the Chief Secretary, has flung a series of charges of oblique conduct against the Chief Minister. That is in itself a rather extraordinary and unusual occurrence and if these charges are true, they are bound to shake the confidence of the people in the political custodians of power in the State, and therefore, the anxiety of the Court should be all the greater to insist on a high degree of proof. In this context it may be noted that top administrators are often required to do acts which affect others adversely but which are necessary in the execution of their duties.

These acts may lend themselves to misconstruction and suspicion as to the bona fides of their author when the full facts and surrounding circumstances are not known. The Court would, therefore, be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration. Such is the judicial perspective in evaluating charge of unworthy conduct against ministers and other high authorities, not because of any special status which they are supposed to enjoy, nor because they are highly placed in social life or administrative set up--these considerations are wholly irrelevant in judicial approach--but because otherwise, functioning effectively would become difficult in a democracy. It is from this standpoint that we must assess the merits of the allegations of mala fides made by the petitioner against the second respondent."

48. The charge of mala fides levelled against the appellant Mr Rane, the then Minister was not supported by any particulars. The writ petition filed by APMC did not provide specific particulars or details of how the decision taken by the Minister was influenced by Mutha Associates or by any other person for that matter. The averments made in the writ petition in that regard appeared to be general and inferential in nature. Such allegations were, in our opinion, insufficient to hold the charge of "malice in fact" levelled against the Minister proved.

49. It is true that the High Court has enumerated certain stark irregularities in the decision-making process or the use of material obtained on behalf of *(sic* behind) the back of the beneficiary of the acquisition as also the denial of fair opportunity to the beneficiary to present its case before the Minister yet those irregularities do not inevitably lead to the conclusion that the Minister had acted mala fide. Failure to abide by the principles of natural justice or consideration of material not disclosed to a party or non-application of mind to the material available on record may vitiate the decision taken by the authority concerned and may even constitute *malice in law* but the action may still remain bona fide and in good faith.

50. It is trite that every action taken by a public authority even found untenable cannot be dubbed as mala fide simply because it has fallen short of the legal standards and requirements for an action may continue to be bona fide and in good faith no matter the public authority passing the order has committed mistakes or irregularities in procedures or even breached the minimal requirements of the principles of natural justice. The High Court has attributed to the Minister, the appellant in Civil Appeals Nos. 2856-57 of 2002, mala fides simply because the order passed by him was found to be untenable in law. Such an inference was not in our view justified, no matter the circumstances enumerated by the High Court may have given rise to a strong suspicion that the Minister acted out of extraneous considerations. Suspicion, however strong cannot be proof of the charge of mala fides. It is only on clear proof of high degree that the court could strike down an action on the ground of mala fide which standard of proof was not, in our opinion, satisfied in the instant case. To the extent the High Court held the action of the Minister to be mala fide, the impugned order would require correction and Civil Appeals Nos.2856 and 2857 of 2002 allowed."

26. The power of this Court enshrined under Section 482 Cr.P.C. is an inherent

power to secure the ends of justice or to prevent any abuse of the process of any Court. This is an extra-ordinary power of the High Court like Article 226 of the Constitution of India but at the same time, this Court must be much careful and cautious before invoking this power to ensure that if this power is not invoked, the litigant would suffer irreparable loss and injury and it would be manifest injustice and abuse of the process of the law. Therefore, the Apex Court has observed in catena of cases that this power should be invoked very sparingly and cautiously.

27. The Hon'ble Apex Court in re; **State of U.P. v. O.P. Sharma, (1996) 7 SCC 705,** in paras 12 & 13 has observed as under:-

"12. In *State of Bihar v. Rajendra Agrawalla* [Crl. A. No. 66 of 1996, decided on 18-1-1996] this Court observed as under:

"It has been held by this Court in several cases that the inherent power of the court under Section 482 of the Code of Criminal Procedure should be very sparingly and cautiously used only when the court comes to the conclusion that there would be manifest injustice or there would be abuse of the process of the court, if such power is not exercised. So far as the order of cognizance by a Magistrate is concerned, the inherent power can be exercised when the allegations in the first information report or the complaint together with the other materials collected during investigation taken at their face value, do not constitute the offence alleged. At that stage it is not open for the court either to shift the evidence or appreciate the evidence and come to the conclusion that no *prima facie* case is made out."

13. In *Mushtaq Ahmed v. Mohd. Habibur Rehman Faizi* [JT (1996) 1 SC 656] this Court held as under:

"... According to the complaint, the respondents had thereby committed breach of trust of government money. In support of the above allegations made in the complaint copies of the salary statements of the relevant periods were produced. In spite of the fact that the complaint and the documents annexed thereto clearly made out a, *prima facie* case for cheating, breach of trust and forgery, the High Court proceeded to consider the version of the respondents given out in their petition filed under Section 482, CrPC vis-à-vis that of the appellant and entered into the debatable area of deciding which of the version was true, -- a course wholly impermissible... ."

28. The Hon'ble Apex Court in re; **Amanullah and Another v. State of Bihar and Others, (2016) 6 SCC 699**, while considering the scope of Section 482 Cr.P.C. has observed in paras 25 to 29 as under:-

"25. A careful reading of the material placed on record reveals that the learned CJM took cognizance of the offences alleged against the accused persons after a perusal of the case diary, charge-sheet and other material placed before the court. The cognizance was taken, as a *prima facie* case was made out against the accused persons. It is well settled that at the stage of taking cognizance, the court should not get into the merits of the case made out by the police, in the charge-sheet filed by them, with a view to calculate the success rate of prosecution in that particular case. At this stage, the court's duty is limited to the extent of finding out whether from the material placed before it, the offence alleged therein against the accused is made out or not with a view to proceed further with the case.

26. The proposition of law relating to Section 482 CrPC has been elaborately dealt with by this Court in *Bhajan Lal case* [*State of Haryana v. Bhajan Lal*, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] . The relevant paras 102 and 103 of which read thus : (SCC pp. 378-79)

"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 Act concerned (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 Act concerned, 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.

103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

27. Further, this Court in *Rajiv Thapar v. Madan Lal*

Kapoor [Rajiv Thapar v. Madan Lal Kapoor, (2013) 3 SCC 330 : (2013) 3 SCC (Cri) 158] has laid down certain parameters to be followed by the High Court while exercising its inherent power under Section 482 CrPC, in the following manner : (SCC pp. 347-49, paras 29-30)

"29. The issue being examined in the instant case is the jurisdiction *[Madan Lal Kapoor v. Rajiv Thapar,* 2008 SCC OnLine Del 561 : (2008) 105 DRJ 531] of the High Court under Section 482 CrPC, if it chooses to quash the initiation of the prosecution against an accused at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 CrPC, at the stages referred to hereinabove, would have far-reaching consequences inasmuch as it would negate the prosecution's/ complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. *To invoke its inherent jurisdiction under Section 482 CrPC the High Court has to be fully satisfied that the material produced by the accused is such that would lead to the conclusion that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence.* For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 CrPC to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashment raised by an accused by invoking the power vested in the High Court under Section 482 CrPC:

30.1. Step one : whether the material relied upon by the accused is sound, reasonable, and indubitable i.e. the material is of sterling and impeccable quality?

30.2. Step two : whether the material relied upon by the accused would rule out the assertions contained in the charges levelled against the accused i.e. the material is sufficient to reject and overrule the factual assertions contained in the complaint i.e. the material is such as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false?

30.3. Step three : whether the material relied upon by the accused has not been refuted by the prosecution/complainant; and/or the

material is such that it cannot be justifiably refuted by the prosecution/complainant?

30.4. Step four : whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

30.5. If the answer to all the steps is in the affirmative, the judicial conscience of the High Court should persuade it to quash such criminal proceedings in exercise of power vested in it under Section 482 CrPC. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as proceedings arising therefrom) specially when it is clear that the same would not conclude in the conviction of the accused."

(emphasis supplied)

28. After considering the rival legal contentions urged by both the parties, case law referred to supra and the material placed on record, we are of the view that the High Court has exceeded its jurisdiction under Section 482 CrPC. It has erred in quashing the cognizance order passed by the learned CJM without appreciating the material placed before it in the correct perspective. The High Court has ignored certain important facts, namely, that on 17-10-2008, Appellant 1 was allegedly threatened by the accused Mukhtar for which FIR No. 104 of 2008 was registered against him for the offences punishable under Sections 25 and 26 of the Arms Act, 1959. Further, there are statements of various witnesses made under Section 164 CrP3C, before a Judicial Magistrate, to the effect that the deceased has been murdered by none other than her husband Mukhtar. The evidence collected by the IO by recording the statements of the prosecution witnesses, filed along with the charge-sheet was duly considered by the learned CJM before taking cognizance and therefore, the same should not have been interfered with by the High Court in exercise of its inherent power under Section 482 CrPC.

29. Further, the High Court has failed to take into consideration another important aspect that the case at hand relates to the grave offence of murder and that the criminal proceedings related thereto should not lightly be interfered with, which is a well-settled proposition of law."

29. Therefore, considering the aforesaid settled proposition of law of the Hon'ble Apex Court, I am also of the view that the court should not, except in extra-ordinary circumstances, exercise its jurisdiction under Section 482 Cr.P.C., so as to quash the prosecution proceedings after they have been launched.

30. From the material available on record, I am not convinced that there would be manifest injustice or there would be abuse of the process of the court, if such power is not exercised in this case. Notably, the charge sheet has been filed only after collecting the relevant material and evidences which, as per prosecution, were sufficient to file the charge sheet. The FSL report, which was not filed initially with the charge sheet, has been filed later on.

31. On the basis of material available on record, I am of the opinion that non-filing of FSL report along with the charge sheet did not vitiate the charge sheet inasmuch as all other relevant and cogent material, as per prosecution, had been filed. As per prosecution, even on the basis of those materials, which were filed along with the charge sheet, were sufficient for the prosecution to establish its case beyond all reasonable doubts and the accused

persons can be held liable on the basis of said material evidence.

32. The law is trite that the additional documents/evidence can be produced subsequently if the same has not been filed along with the charge sheet. However, the Investigating Officer is required to produce all required documents at the time of submitting charge sheet but there is no specific prohibition to that effect.

33. So far as the arguments of Sri Mehrotra regarding the factum of *malafide* is concerned, on the basis of material available on record, such allegation does not, *prima facie*, appear to be established inasmuch as the authorities concerned have only discharged their duties and responsibilities within four corners of the law.

34. On the basis of allegations of the FIR, material so demonstrated by the learned counsel for the parties, I am conscious about the fact that the present case relates to the grave offence of murder and the manner in which the said murder is said to have been executed is so brutal as the same has been committed after chasing the victim for quite long distance. Even if some irregularities so caused during investigation or court proceedings as demonstrated by Sri Anupam Mehrotra, the same irregularities are curable and can be regularised under the law and such irregularities may not convince the Court to treat the impugned proceedings as a futile exercise to quash them. The law is trite on this point that the inherent power can be exercised when the allegations in the First Information Report or the complain together with the other materials collected during investigation taken at their face value, do not constitute the offence alleged. I am afraid I cannot agree with the aforesaid submissions of Sri Mehrotra.

35. As to whether the accused persons would be held guilty or not is absolute domain of learned trial court but on the basis of *prima facie* satisfaction to interfere with the impugned orders as prayed in the present petition, I do not find any substance to invoke my extra-ordinary inherent jurisdiction enshrined under Section 482 Cr.P.C.

36. In view of what has been considered above, I do not find any infirmity or illegality in the impugned orders, thus I am not inclined to interfere with the impugned orders as prayed in this petition.

37. It is made clear that the observations made herein above shall not affect the trial in any manner.

38. It would be apt to note here that initially the judgement was reserved on 13.12.2021, however, while dictating the judgment, some clarifications from the parties were required, therefore, the case was again listed on 07.04.2022 for further hearing.

39. On 07.04.2022, Sri Mehrotra filed certified copy of the application of the prosecution dated 24.12.2019 whereby 14 days' time was sought for remand by submitting that some evidences are to be collected. On that, this Court asked the learned AGA to apprise the Court as to what evidences have been collected within 24 hours inasmuch as such application was filed on 24.12.2021 and charge sheet was filed next day i.e. 25.12.2019.

40. On 13.04.2022, learned AGA provided copy of case diaries bearing CD-

60, 61,62 & 63. He has referred CD62 to show that on 24.12.2019, statement of Pradeep Kumar Singh, informant/complainant and Raj Kumar Singh, eye witness, have been recorded. Serial No.4 (f) of CD61 has been demonstrated to show that name of one accused Sarvesh Yadav son of Bharat Lal Yadav has been dropped from the charge sheet. As per learned AGA, the aforesaid exercise has been carried out on 24.12.2019. On that Sri Anupam Mehrotra has submitted that the aforesaid facts may not be considered as collection of evidence and at the best, it is a recording of statement of some witnesses.

41. As per Sri Mehrotra, there is difference between recording of statement and collecting of evidence. He has further submitted that the aforesaid exercise being carried out till 3:00 PM of 25.12.2019, which has been shown in papers of CD63. Therefore, charge sheet would have been prepared after 3:00 PM. Thereafter, it would have been sent to the supervisory authority, who is Circle Officer and Circle Officer must have taken some time to go through the complete case diary and filed before the court on or before 4:00 PM. Thus, Sri Mehrotra has submitted that it was not practically possible for the prosecution to file charge sheet before the court on 25.12.2019 but the same has been filed on the same date before the court, which is beyond any comprehension. On that, Sri Anurag Verma, learned AGA, has submitted that this fact may not be challenged in a petition filed under Section 482 Cr.P.C. as no miscarriage of justice would be caused to the applicant and only for this reason, impugned charge-sheet, orders and proceedings may not be quashed in view of the settled proposition of law by the Apex Court as cited above.

42. Considering the aforesaid aspects of the issue in question, I am constraint to observe that the prosecution could not explain properly the aforesaid chain of events, but at the same time, I am conscious about the fact that even if there is any procedural lapse or technical error in preparation of the charge sheet, which is curable under the law and such error does not appear to be manifest error and is not causing any miscarriage of justice to the applicant as ample opportunity would be provided to the applicant/defence at the time of trial as per law, therefore, invoking powers enshrined under Section 482 Cr.P.C., charge-sheet and proceedings so challenged may not be quashed.

43. Accordingly, this petition fails and is **dismissed.**

44. No order as to costs.

(2022)05ILR A1500
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.04.2022

BEFORE

THE HON'BLE MOHD. ASLAM, J.

Application U/S 482 No. 16489 of 2021

Manoj Mishra ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Kamlesh Kumar Tiwari

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Section 482-Application u/s 156 (3) Cr.P.C.-against the doctor and Hospital's Management-for gross negligence-as

RT-PCR report of his father was negative-swab and blood sample was positive-Application rejected by Magistrate-no independent expert report to establish gross-negligence.

Application dismissed. (E-9)

List of Cases cited:

1. Jacob Mathew Vs St. of Pun. reported in (2005) 6 SCC 1.

2. Civil Appeal No.6507 of 2009 (Dr. Mrs. Chanda Rani Akhouri & Ors. Vs Dr. M.A. Methusethupathi & Ors.).

(Delivered by Hon'ble Mohd. Aslam, J.)

1. Heard learned counsel for the applicant as well as learned A.G.A. for the State.

2. The instant application under Section 482 Cr.P.C. has been filed by the applicant with the prayer to quash the impugned order dated 06.08.2021 passed the the learned Chief Judicial Magistrate-Gorakhpur in Case No.2152 of 2021 (Manoj Mishra v. Dr. Sudhakar Pandey), by which, the application of the applicant under Section 156(3) Cr.P.C. was rejected.

3. The brief facts of the case is that the father of the applicant was ill and got serious on 03.05.2021, thereafter, applicant took him to the District Hospital-Gorakhpur but In-charge of the Emergency Ward of the District Hospital-Gorakhpur stated that he would not look after the father of the applicant without COVID test report. The applicant's father was tested for COVID-19 on the same day and the antigen as well as RT-PCR report was "negative". The applicant approached the In-charge of the Emergency Ward of the District Hospital-Gorakhpur who stated that his father was not in a serious condition and advised the applicant to take his father home. After reaching home on the same day i.e. 03.05.2021 at about 09:00 p.m., his father fell down and, thereafter, the applicant called for ambulance and the father of the applicant was again taken to the District Hospital-Gorakhpur at about 10:30 p.m. and his father was allotted bed in the COVID Ward at about 12 'o' clock in the night. There was no management of oxygen in the hospital. On 04.05.2021, the applicant rushed to the house of opposite party no.2 and stated about the condition of his father and management of the hospital but when opposite party no.3 came on round, he did not checked his father as the bed ticket was not prepared by the authority concerned. On 04.05.2021, the swab and blood sample was taken for COVID-19 test. The RT-PCR report came on 26.05.2021 as "positive". However, on 04.05.2021, at about 10:30 p.m., the father of the applicant was declared dead. Thereafter, the applicant moved an application under Section 156(3) Cr.P.C. against the opposite party nos.2 and 3 but the said application was rejected by the learned lower court *vide* order dated 06.08.2021 by relying on the law laid by the Hon'ble Apex Court in ***Jacob Mathew v. State of Punjab reported in (2005) 6 SCC 1.***

4. Feeling aggrieved by it, the applicant preferred the instant application under Section 482 Cr.P.C.

5. It is submitted by the learned counsel for the applicant that on 03.05.2021, the RT-PCR report of his father was found "negative" and the swab and blood sample taken on 04.05.2021 was tested "positive". It is further submitted that the contradictions in the two reports reflect 'gross-negligence' on the part of the doctors concerned.

6. *Per contra*, learned A.G.A. for the State opposed the application and stated

that it may be possible that the result of the rapid antigen COVID Test report and the RT-PCR report may vary. It is further submitted that the above-noted variations in the two report cannot be termed as 'gross-negligence' on the part of the doctors concerned.

7. I have given thoughtful consideration to the submissions advanced by the learned counsel for the parties and gone through the material available on record.

8. Hon'ble Apex Court in ***Jacob Mathew*** (supra) has held that:-

"To prosecute the medical professionals for negligence under criminal law, something more than mere negligence had to be proved. Medical professionals should not be dragged into criminal proceedings unless negligence of a high order is shown. "

9. Hon'ble Apex Court has reiterated the above-noted proposition of law in the latest judgement passed in ***Civil Appeal No.6507 of 2009 (Dr. Mrs. Chanda Rani Akhouri & Ors. v. Dr. M.A. Methusethupathi & Ors.).***

10. Moreover, there is no independent expert report to establish that there was 'gross-negligence' on the part of opposite party nos.2 and 3. There is possibility that the rapid antigen COVID Test report and the RT-PCR report may vary and that cannot be termed as the 'gross negligence' on the part of opposite party nos.2 and 3.

11. In view of the above, the instant application under Section 482 Cr.P.C. is devoid of merit and is, accordingly, ***dismissed.***

(2022)05ILR A1502
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.04.2022

BEFORE

THE HON'BLE MANISH KUMAR, J.

Application U/S 482 No. 18403 of 2021

Ramendra Sharma & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Mohit Singh

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Section 195 - FIR lodged by Sub-Inspector-chargesheet filed-cognizance taken by Trial Court-for offence u/s 174-A IPC-in absence of any complaint in writing by officer concerned-Circle Officer-C.O. is subordinate to SP-Superintendent of Police (SP) not filed any complaint as required u/s 195 Cr.P.C.-Proceeding initiated in pursuance of F.I.R. lodged by Sub Inspector-who is not the investigating Officer-order of Trial Court without jurisdiction abinitio-proceeding quashed.

Application allowed. (E-9)

List of Cases cited:

1. Daulat Ram Vs St. of Pun., 1962 Supp (2) SCR 812 : A.I.R. 1962 SC 1206.

2. Yogeshwar Sood & anr. Vs St. of U.P. & ors. Criminal Misc. Writ Petition No.12772 of 2020

3. Daulat Ram Vs St. of Pun. reprted in 1962 Supp(2) SCR 812; AIR 1962 SC 1206; (1962)2 Crl LJ 286

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

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

2. The present petition under Section 482 Cr.P.C. has been filed with the prayer to allow this application and quash the entire proceedings of Case No.179/2021, arising out of Case Crime No.0312/2020, under section 174-A IPC, P.S. Behjoi, District - Sambhal, pending before the court of learned Chief Judicial Magistrate, Sambhal at Chandausi, to quash the impugned charge sheet dated 01.09.2020 submitted in the aforesaid case and also to quash the impugned cognizance order dated 11.01.2021 passed by the learned Chief Judicial Magistrate, Sambhal at Chandausi. It has further been prayed to stay the entire proceedings of the aforesaid case.

3. The brief facts of the case are that an F.I.R. being Case Crime No.192 of 2020 dated 19.05.2020 has been lodged against the applicants under Section 34, 120-B, 504, 302, 149, 148, 147 I.P.C. and Section 3(2)(V) SC/ST Act, 1985. In the said case, despite the non-bailable warrant the applicants had not appeared before court then the order of proclamation under Section 82 Cr.P.C. was passed and thereafter, the applicants surrendered before the court below as stated in Para 18 to the application / present petition, which has not been disputed in Para 16 of the counter affidavit filed on behalf of State. After the applicants enlarged on bail. On 09.07.2020 an F.I.R. has been lodged by the Sub-Inspector against the applicants under Section 174-A IPC Case Crime No.0312 of 2020 has been registered in which after filing of chargesheet dated 1.9.2020 the cognizance order dated 11.01.2021 has been passed by the Chief Judicial Magistrate, Sambhal, Chandausi. The present petition/application has been preferred feeling aggrieved by the chargesheet dated 1.9.2020 and the cognizance order dated 11.01.2021 passed by the Chief Judicial Magistrate.

4. Learned counsel for the applicants has submitted that at no point of time, neither any summon, bailable warrant and non-bailable warrant were ever served upon the applicants nor there is any evidence during the investigation on the record regarding the service or refusal to accept the service or the applicants were not present at the address given before the court, same has specifically been pleaded in Para 28 of the application / petition, which has not been either denied or disputed by the state in Para 18 of the counter affidavit.

5. It is further submitted that as per Section 195 Cr.P.C., the lodging of an F.I.R. for Section 174 (A) IPC is not maintainable as per the procedure provided in Cr.P.C., if any proceeding is to be initiated i.e. by filing a complaint in writing either by the public servant concerned, or some other public servant to whom he is administratively subordinate. It is further submitted that in the present case public servant concerned means the Investigating Officer or the officer under whom that Investigating Officer is administratively subordinate. In the case of the applicants the investigating officer was the Circle Officer but the F.I.R. was lodged by the Sub-Inspector. In support of his submission, learned counsel for the applicants has relied upon the judgement and order of this Court dated 20.11.2020

passed in ***Criminal Misc. Writ Petition No.12772 of 2020 (Yogenshwar Sood And Another vs State of U.P. and 2 others) and the judgement of Hon'ble the Apex Court in the case of Daulat Ram vs. State of Punjab, 1962 Supp (2) SCR 812 : A.I.R. 1962 SC 1206.***

6. Learned counsel for the applicant has further submitted that the order under Section 82(4) Cr.P.C. was passed on 12.06.2020 and the specific date for appearance of the appellant fixed was 16.07.2020, whereas prior to that date the F.I.R. was lodged on 9.7.2020 which shows the malicious action on the part of the complainant that without waiting the specified date, he proceeded against the applicants.

7. On the other hand, learned A.G.A. has submitted that the applicants had not appeared despite the non-bailable warrants were issued against them. The applicants appeared only after passing proclamation under Section 82 Cr.P.C. It is further submitted that Section 174-A I.P.C. provides initiation of proceeding and punishment against the persons who avoid the summons of the court, hence there is no illegality in the proceedings initiated against the applicants, but unable to dispute the submissions raised by the learned counsel for the applicants and the judgement relied upon.

8. After hearing learned counsel for the parties and going through the record and the judgements relied, it is found that Section 174 A I.P.C. provides that initiation of proceedings and punishment against the person, whoever fails to appear at the specified place and the specified time in response to the proclamation issued under Section 82 Cr.P.C., for the convenience Section 174-A I.P.C. is quoted hereinbelow:

"[174A. Non-appearance in response to a proclamation under section 82 of Act 2 of 1974.?Whoever fails to appear at the specified place and the specified time as required by a proclamation published under sub?section (1) of section 82 of the Code of Criminal Procedure, 1973 shall be punished with imprisonment for a term which may extend to three years or with fine or with both, and where a declaration has been made under sub?section (4) of that section pronouncing him as a proclaimed offender, he shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine.]."

9. From perusal of the above mentioned provision, it is clear that if a person fails to appear on a specified place and the specified time as required by the proclamation published under Section 82 of the Code of Criminal Procedure, 1973, the proceedings under Section 174-A I.P.C. shall be initiated wherein the punishment provided is with imprisonment for a term which may extend to three years or with fine or with both, and where a declaration has been made under sub-section (4) of that section, the persons shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine.

10. In the present case, it is not disputed that the applicants had surrendered after the proclamation order was passed under Section 82 Cr.P.C., but not on the specified place and time as mentioned in the proclamation but the submission of the learned counsel for the applicant is that for initiating a proceeding under Section 174-A I.P.C. the procedure is provided under Section 195 Cr.P.C., for convenience the relevant extract of Section 195 is quoted below:

"195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.
(1) No Court shall take cognizance-
(a) (i) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or
(ii) of any abetment of, or attempt to commit, such offence, or
(iii) of any criminal conspiracy to commit such offence, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;

11. From perusal of the provisions, wherein it has been provided that no court shall take cognizance of any offence punishable under Section 172 to 188 I.P.C. except a complaint made by public servant concerned or some other public servant to whom is administrative subordinate and in the present case concerned public servant is the officer who had investigated the matter and in the present case the circle officer was the investigating officer and he was under the administrative subordinate of Superintendent of Police but neither any complaint in writing was filed by the circle officer or some other public servant to whom the Investigating Officer is administrative subordinate.

12. In the judgement / order dated 20.11.2020 passed by this Court in Criminal Misc. Writ Petition No.12772 of 2020 (Yogeshwar Sood And Another vs. State of U.P. & 2 others) where the F.I.R. was challenged on the same ground and the Hon'ble Court has quashed the F.I.R. on the ground that as per provision contained in Section 195(1) in the Code of Criminal Procedure, 1973, there is a specific bar for taking cognizance of any offence punishable under Section 172 to 188 of the I.P.C. and quashed the F.I.R. with an undertaking of the petitioners that they will appear before the concerned Magistrate / Court. The relevant extract of the judgement is quoted hereinbelow:-

"After hearing counsel for the parties and going through the record, it is apparent that Section 174-A deals with non-appearance and in case of issuance of a proclamation under section 82 of the Act-2 of 1974. As per provisions contained in Section 195(1) in the Code of Criminal Procedure, 1973 there is a specific bar from taking cognizance of any offence punishable under section 172 to 188 (both inclusive) of the IPC. Thus registration of FIR against petitioners under section 174-A, prima facie appears to be abuse of the process. However, in the writ jurisdiction we have to also balance equities. "

13. Learned counsel for the applicant has also relied upon judgement passed in the case of ***Daulat Ram vs. State of Punja reprted in 1962 Supp(2) SCR 812; AIR 1962 SC 1206; (1962)2 Crl LJ 286,*** the relevant para is quoted hereinbelow:

"4. Now the offence under s. 182 of the Penal Code, if any, was undoubtedly complete when the appellant had moved the Tehsildar for action. Section 182 does not require that action must always be taken if the person who moves the public servant knows or believes that action would be taken. In making his report to the Tehsildar therefore, if the appellant believed that some action would be taken (and he had no reason to doubt that it would not) the offence under that section was complete. It was therefore incumbent, if the prosecution was to be launched, that the complaint in

writing should be made by the Tehsildar as the public servant concerned in this case. On the other hand what we find is that a complaint by the Tehsildar was not filed at all, but a charge sheet was put in by the Station House Officer. The learned counsel for the State Government tries to support the action by submitting that s. 195 had been complied with inasmuch as when the allegations had been disproved, the letter of the Superintendent of Police was forwarded to the Tehsildar and he asked for "a calendar". This paper was flied along with the charge sheet and it is stated that this satisfies the requirements of s. 195. In our opinion, this is not a due compliance with the provisions of that section. What the section comtemplates is that the complaint must be in writing by the public servant concerned and there is no such compliance in the present case. The cognizance of the case was therefore wrongly assumed by the court without the complaint in writing of the public servant namely the Tehsildar in this case. The trial was thus without jurisdiction ab inito and the conviction cannot be maintained. "

14. From the above mentioned judgement, wherein the Hon'ble Apex Court has held that the Tehsildar was investigating the matter and the chargesheet was filed by the Station House Officer, whereas the competent public servant was the Tehsildar and he has not submitted any written complaint, hence, the cognizance of the case was therefore wrongly assumed by the court and the trial was thus without jurisdiction ab initio and the conviction cannot be maintained.

15. In the present case also in pursuance of the F.I.R. lodged by the Sub-Inspector, the chargesheet was filed and the cognizance has been taken by the trial Court for an offence under Section 174-A I.P.C. in absence of any complaint in writing by the officern concerned. In the present case the officer concerned is the Investigating Officer i.e. the Circle Officer or the officer/ the public servant under whom he is administratively subordinate. In the present case the Circle Officer who is under administrative Sub-ordinate of the Superintendent of Police, so the Superintendent of Police has also not filed any complaint as required under Section 195 Cr.P.C. The proceedings were initiated in pursuance of an F.I.R. lodged by Sub Inspector, who was not the investigating officer and hence the order of the trial Court is without jurisdiction ab initio and the proceeding is liable to be quashed.

16. As per the discussion made hereinabove, the proceeding of Case No.179/2021, arising out of Case Crime No.0312/2020, under section 174-A IPC, P.S. Behjoi, District - Sambhal is quashed.

17. The present petition/ application is ***allowed.***

(2022)05ILR A1506
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.03.2022

BEFORE

THE HON'BLE GAUTAM CHOWDHARY, J.

Application U/s 482 No. 16864 of 2021

Krishna Kant Pachauri & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Shashi Shekhar Mishra, Sri A.K. Mishra, Sri Upendra Kumar Tiwari

Counsel for the Opposite Parties:
G.A.

Civil Law - SC/ST Act,1989 -Sections 3(1) (Da) & 3(1) (Dha)- Business relation between the applicant and accused-FIR lodged u/s 406, 420, 504, 506 IPC & u/s 3(1) (Da) & 3(1) (Dha) SC/ST Act -SC/ST Act has been imposed to make their case strong-Summoning order is quashed only to extent of section 3(1) (Da), 3(1) (Dha) SC/St Act.

Application partly allowed. (E-9)

List of Cases cited:

1. Hitesh Verma Vs The St. of Uttarakhand & anr. 2020 AIR(SC)5584

2. Khuman Singh Vs St. of M.P. , 2019 SCC OnLine SC 1104

3. Sher Ali Vs St. of U.P. & ors., Application Us 482 No. 12850/2021

4. R.P. Kapoor Vs St. of Pun.

5. Zandu Pancharishth & Ms. Niharika Infrastructure Vs St. of Mah.

6. Satendra Kumar Antil Vs Central Bureau of Investigation & anr. (Special Leave to Appeal (Crl.) No. 5191 of 2021

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

1. आवेदकगण की ओर से धारा 482 दं0प्र0सं0 के अन्तर्गत यह आवेदन पत्र, मु0अ0सं0 243 सन 2020, अन्तर्गत धारा 406, 420, 504, 506 भा0दं0वि0 एवं 3(1)(Da), 3(1)(Dha) SC/ST ।बज, थाना फरह, जिला मथुरा में प्रेषित आरोप पत्र दि0 21–7–2021 से उद्भूत विशेष सत्र परीक्षण सं0 917 सन 2021 में स्पेशल जज, एस0सी0/एस0टी0 ऐक्ट, मथुरा द्वारा पारित प्रसंज्ञान आदेश दि0 29–7–2021 के विरूद्ध दायर किया गया है।

2. आवेदकगण के विद्वान अधिवक्ता, विपक्षी सं0 2 के विद्वान अधिवक्ता एवं विद्वान अपर शासकीय अधिवक्ता को सुना तथा पत्रावली का परिशीलन किया।

3. आवेदकगण के विद्वान अधिवक्ता का कथन है कि विपक्षी सं0 2 दिलीप सिंह जाटव ने दि0 20–3–2020 को जिलाधिकारी, मथुरा को जो आवेदन पत्र दिया है उसमें उसने कहा है कि : **"चेयरमैन फरह श्री कृष्णकान्त ने धोखाड़ी से बेईमानी की नियत से स्वयं एंट्री कर फर्जी तरीके से प्रार्थी व उसके भाई के खाते में से रूपया निकाल लिये। प्रार्थी जब चेयरमैन कृष्णकान्त से 13.3.2020 को सायं उनके पास गया तो कृष्णकान्त व उनके भाई बंटी व मनमोहन मिले, सभी ने प्रार्थी को गन्दी–गन्दी गालियां दी और कहा कि साले चमरे यह हमारे कमीशन के पैसे हैं, यहॉ से चला जा नहीं तो जान से मार देंगे। काफी लोग इकट्ठे हो गये जिन्होंने मुझे व मेरे साथ गये अशोक ने बचाया। प्रार्थी श्रीमान जी की सेवा में रिपोर्ट दर्ज करने आया है।"** विपक्षी सं0 2 दिलीप सिंह जाटव की ओर से इन्हीं कथनों के साथ दि0 31–8–2020 को थाना फरह में एक प्राथमिकी भी पंजीकृत करायी गयी।

4. आवेदकगण के विद्वान अधिवक्ता का कथन है कि इस प्राथमिकी एवं श्किायती पत्र के बारे में जॉच अधिकारी/डिप्टी कलेक्टर, मथुरा द्वारा जॉच की गयी तथा उन्होंने शिकायतकर्ता द्वारा की गयी शिकायत को छल कपट, धोखाधडी व कूटरचित कहने के तथ्य को निराधार माना है, उनके आदेश दि0 6–6–2020 का मुख्य अंश इस प्रकार है :– **"शिकायतकर्ता श्री दिलीप कुमार जाटव, पुत्र श्री कुवरसेन, निवासी ग्राम बढ़ाय लतीफपुर बागर की शिकायत एवं श्री कृष्णकान्त पचौरी, चेयरमैन नगर पंचायत फरह मथुरा द्वारा उपलब्ध कराये गये लिखित बयानों का भली–भॉति परीक्षण किया तो पाया गया कि श्री दिलीप कुमार का खाता मथुरा जिला सहकारी बैंक लि0 मथुरा में है, जिसका खाता संख्या 000620000016953 है तथा श्री लालसिंह का खाता भी मथुरा जिला सहकारी बैंक लि0, मथुरा में है जिसका खाता संख्या 000620000016951 है। श्री दिलीप कुमार को बैंक द्वारा जारी की गयी चैक बुक के चैक संख्या 693251 से 4,67,000/–रू0 दिनांक 20–2–2020 को तथा श्री लाल सिंह को बैंक द्वारा जारी की**

गयी चैक बुक के चैक संख्या 693202 से 1,35,000/रू0 दिनांक 20–2–2020 को उपरोक्त दोनों धनराशियॉ मथुरा जिला सहकारी बैंक लि0, मथुरा के बैंक मैनेजर द्वारा हस्ताक्षर एवं चैकों का मिलान करके ही भुगतान किया गया होगा। अतः शिकायतकर्ता द्वारा की गयी शिकायत कि छल–कपट, धोखा–धड़ी व कूटरचित करके श्री कृष्णकान्त पचौरी द्वारा 6,02,000/रू0 अपने खाते में ट्रान्सफर करा लिये गये हैं निराधार है क्योंकि मथुरा जिला सहकारी बैंक लि0, मथुरा के बैंक मैनेजर द्वारा हस्ताक्षर एवं चैकों का मिलान करके ही भुगतान किया गया है। शिकायतकर्ता की शिकायत निक्षेपित किये जाने योग्य है।"

5. आवेदकगण के विद्वान अधिवक्ता का यह भी कथन है कि केस डायरी के अवलोकन से यह स्पष्ट होता है कि श्री सतीश चन्द्र मिश्रा, बैंक मैनेजर ने विवेचक को यह बयान दिया है कि :– **"èरे सामने कृष्णकान्त पचौरी द्वारा कोई चार सौ बीसी, धोखाधड़ी व षड़यन्त्र नहीं किया गया था। लाल सिंह व दिलीप ने मेरे समक्ष चैक पर हस्ताक्षर किये थे, हस्ताक्षरों का कम्प्यूटर पर मिलान स्वयं मेरे द्वारा किया गया था, इनका क्या विवाद है, मुझे नहीं मालूम, बैंक में कोई चार सौ बीसी, षड़यन्त्र व धोखाधड़ी नहीं की गयी है।"**

6. आवेदकगण के विद्वान अधिवक्ता का कथन है कि जॉच अधिकारी/डिप्टी कलेक्टर, मथुरा की उपरोक्त जॉच आख्या एवं संबंधित बैंक मैनेजर द्वारा विवेचक को दिए गए बयान से इस प्रकरण में आवेदकगण के विरूद्ध एस0सी0/एस0टी0 का मामला नहीं बनता है, पक्षकारों के मध्य आपस में व्यापारिक संबंध था तथा व्यापारिक पैसों के लेन–देन का विवाद था, जिसमें उनके मध्य ट्रान्जेक्शन भी हुआ है, किन्तु उसी विवाद के कारण विपक्षी सं0 2 द्वारा आवेदकगण को तंग व परेशान करने के लिए एस0सी0/एस0टी0 ऐक्ट के अन्तर्गत भी फॅसा दिया है, जिसमें विद्वान अवर न्यायालय द्वारा बिना तथ्य एवं साक्ष्यों पर समुचित विचार किए हुए प्रसंज्ञान आदेश पारित कर दिया गया, जो कि अनुचित है तथा अपास्त किए जाने योग्य है।

7. आवेदकगण के विद्वान अधिवक्ता ने अपने तर्को के समर्थन में भ्पजमी टमतउं टेण् जीम ैजंजम वि न्जजंतींदक ंदक ंदवजीमत 2020 ।प्ै;ब्द्ध5584 में माननीय उच्चतम न्यायालय द्वारा प्रतिपादित विधि व्यवस्था के प्रस्तर 14, 17, 20, 23 एवं 24 की ओर न्यायालय का ध्यान आकृष्ट किया, जो निम्नवत् हैं :–

"14. Another key ingredient of the provision is insult or intimidation in "any place within public view". What is to be regarded as "place in public view" had come up for consideration before this Court in the judgment reported as Swaran Singh & Ors. v. State through Standing Counsel & Ors.5. The Court had drawn distinction between the expression "public place" and "in any place within public view". It was held that if an offence is committed outside the building e.g. in a lawn outside a house, and the lawn can be seen 5 (2008) 8 SCC 435 by someone from the road or lane outside the boundary wall, then the lawn would certainly be a place within the public view. On the contrary, if the remark is made inside a building, but some members of the public are there (not merely relatives or friends) then it would not be an offence since it is not in the public view. The Court held as under:

"28. It has been alleged in the FIR that Vinod Nagar, the first informant, was insulted by Appellants 2 and 3 (by calling him a "chamar") when he stood near the car which was parked at the gate of the premises. In our opinion, this was certainly a place within public view, since the gate of a house is certainly a place within public view. It could have been a different matter had the alleged offence been committed inside a building, and also was not in the public view. However, if the offence is committed outside the building e.g. in a lawn outside a house, and the lawn can be seen by someone from the road or lane outside the boundary wall, the lawn would certainly be a place within the public view.

Also, even if the remark is made inside a building, but some members of the public are there (not merely relatives or friends) then also it would be an offence since it is in the public view. We must, therefore, not confuse the expression "place within public view" with the expression "public place". A place can be a private place but yet within the public view. On the other hand, a public place would ordinarily mean a place which is owned or leased by the Government or the municipality (or other local body) or gaon sabha or an instrumentality of the State, and not by private persons or private bodies."

17. In another judgment reported as Khuman Singh v. State of Madhya Pradesh, 2019 SCC OnLine SC 1104 this Court held that in a case for applicability of Section 3(2)(v) of the Act, the fact that the deceased belonged to Scheduled Caste would not be enough to inflict enhanced punishment. This Court held that there was nothing to suggest that the offence was committed by the appellant only because the deceased belonged to Scheduled Caste. The Court held as under:

"15. As held by the Supreme Court, the offence must be such so as to attract the offence under Section 3(2)(v) of the Act. The offence must have been committed against the person on the ground that such person is a member of Scheduled Caste and Scheduled Tribe. In the present case, the fact that the deceased was belonging to "Khangar"-Scheduled Caste is not disputed. There is no evidence to show that the offence was committed only on the ground that the victim was a member of the Scheduled Caste and therefore, the conviction of the appellant-accused under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act is not sustainable."

18. Therefore, offence under the Act is not established merely on the fact that the informant is a member of Scheduled Caste unless there is an intention to humiliate a member of Scheduled Caste or Scheduled Tribe for the reason that the victim belongs to such caste. In the present case, the parties are litigating over possession of the land. The allegation of hurling of abuses is against a person who claims title over the property. If such person happens to be a Scheduled Caste, the offence under Section 3(1)(r) of the Act is not made out.

19. This Court in a judgment reported as Dr. Subhash Kashinath Mahajan v. State of Maharashtra & Anr., (2018) 6 SCC 454 issued certain directions in respect of investigations required to be conducted under the Act. In a review filed by the Union against the said judgment, this Court in a judgment reported as Union of India v. State of Maharashtra & Ors., (2020) 4 SCC 761 reviewed the directions issued by this Court and held that if there is a false and unsubstantiated FIR, the proceedings under Section 482 of the Code can be invoked.

The Court held as under:

"52. There is no presumption that the members of the Scheduled Castes and Scheduled Tribes may misuse the provisions of law as a class and it is not resorted to by the members of the upper castes or the members of the elite class. For lodging a false report, it cannot be said that the caste of a person is the cause. It is due to the human failing and not due to the caste factor. Caste is not attributable to such an act. On the other hand, members of the Scheduled Castes and Scheduled Tribes due to backwardness hardly muster the courage to lodge even a first information report, much less, a false one. In case it is found to be false/unsubstantiated, it may be due to the faulty investigation or for other various reasons including human failings

irrespective of caste factor. There may be certain cases which may be false that can be a ground for interference by the Court, but the law cannot be changed due to such misuse. In such a situation, it can be taken care of in proceeding under Section 482 CrPC."

20. Later, while examining the constitutionality of the provisions of the Amending Act (Central ActNo. 27 of 2018), this Court in a judgment reported as Prathvi Raj Chauhan v. Union of India & Ors., (2020), 4 SCC 727 held that proceedings can be quashed under Section 482 of the Code. It was held as under:

"12. The Court can, in exceptional cases, exercise power under Section 482 CrPC for quashing the cases to prevent misuse of provisions on settled parameters, as already observed while deciding the review petitions. The legal position is clear, and no argument to the contrary has been raised."

23. This Court in a judgment reported as Ishwar Pratap Singh & Ors. v. State of Uttar Pradesh & Anr., (2018) 13 SCC 612 held that there is no prohibition under the law for quashing the charge-sheet in part. In a petition filed under Section 482 of the Code, the High Court is required to examine as to whether its intervention is required for prevention of abuse of process of law or otherwise to secure the ends of justice. The Court held as under:

"9. Having regard to the settled legal position on external interference in investigation and the specific facts of this case, we are of the view that the High Court ought to have exercised its jurisdiction under Section 482 CrPC to secure the ends of justice. There is no prohibition under law for quashing a charge-sheet in part. A person may be accused of several offences under different penal statutes, as in the instant case. He could be aggrieved of prosecution only on a particular charge or charges, on any ground available to him in law. Under Section 482, all that the High Court is required to examine is whether its intervention is required for implementing orders under the Criminal Procedure Code or for prevention of abuse of process, or otherwise to secure the ends of justice. A charge-sheet filed at the dictate of somebody other than the police would amount to abuse of the process of law and hence the High Court ought to have exercised its inherent powers under Section 482 to the extent of the abuse. There is no requirement that the charge-sheet has to be quashed as a whole and not in part. Accordingly, this appeal is allowed. The supplementary report filed by the police, at the direction of the Commission, is quashed."

24. In view of the above facts, we find that the charges against the appellant under Section 3(1)(r) of the Act are not made out. Consequently, the charge-sheet to that extent is quashed. The 10 (2018) 13 SCC 612 appeal is disposed of in the above terms."

8. विपक्षी सं0 2 के विद्वान अधिवक्ता ने आवेदकगण के विद्वान अधिवक्ता के तर्को का खण्डन करते हुए तर्क प्रस्तुत किया कि आवेदक सं0 1 कृष्ण कान्त पचौरी ने सूचनाकर्ता एवं उसके भाई से 2 ब्लैंक चेक ले लिया था एवं उनपर हस्ताक्षर करा लिये थे तथा आवेदकगण ने विपक्षी सं0 2 के साथ धोखाधड़ी करते हुए उसके पैसों को फर्जी तरीके से हड़प लिया है, परिवादी एवं उसके भाई के धारा 161 दं0प्र0सं0 के बयान एवं प्राथमिकी से आवेदकगण के विरूद्ध उपरोक्त धाराओं का अपराध गठित होता है, इस स्तर पर यह नहीं कहा जा सकता कि आवेदकगण निर्दोष हैं एवं उन्होंने तथाकथित अपराध कारित नहीं किया है, विवेचक ने सही एवं निष्पक्ष विवेचना करते हुए आवेदकगण के विरूद्ध आरोप पत्र दिनांकित 21–7–2021 प्रेषित किया है, जिसके आधार पर विद्वान विशेष न्यायाधीश, एस0सी0/एस0टी0 ऐक्ट, मथुरा द्वारा

आवेदकगण के विरूद्ध प्रसंज्ञान का आदेश पारित किया गया है, ऐसी स्थिति में आवेदकगण द्वारा धारा 482 दं0प्र0सं0 के अन्तर्गत आवेदकगण द्वारा दायर आवेदन पत्र निरस्त किए जाने योग्य है। उन्होंने अपने तर्को के समर्थन में Sher Ali Vs. State of U.P. and others, Coordinate Bench of this Hon'ble Court Application Us 482 No. 12850/2021 frvofrf pm 5/10.2021, R.P. Kapoor Vs. State of Punjab, Zandu Pancharishth and Ms. Niharika Infrastructure Vs. State of Maharashtra की ओर न्यायालय का ध्यान आकृष्ट किया।

9. मैंने विपक्षी सं0 2 के विद्वान अधिवक्ता द्वारा प्रस्तुत उक्त विधि–व्यवस्थाओं का अवलोकन किया। उक्त विधि व्यवस्थाओं के तथ्य वर्तमान वाद के तथ्य एवं परिस्थितियों से भिन्न होने के कारण, उनका लाभ विपक्षी सं0 2 को नहीं प्रदान किया जा सकता है।

10. मैंने उभय पक्ष के के विद्वान अधिवक्ता के तर्को के परिप्रेक्ष्य में पत्रावली पर उपलब्ध साक्ष्य एवं प्रश्नगत आदेशों का परिशीलन किया।

11. मेरे विचार से आवेदकगण के विरूद्ध धारा 3(1)(Da), 3(1)(Dha) SC/ST ।बज का अपराध गठित नहीं होता है। यह तथ्य सत्य है कि आवेदकगण एवं विपक्षी सं0 2 तथा उसके भाई के मध्य व्यापारिक संबंध थे, पक्षकारों में आपस में पैसों का लेन–देन हुआ करता था, जिससे विपक्षी सं0 2 ने व्यथित होकर आवेदकगण के विरूद्ध प्राथमिकी दर्ज करायी एवं उच्चाधिकारियों को शिकायती पत्र प्रेषित किए तथा अपनी बात को अधिक बलशाली बनाने के उद्देश्य से उन्होंने आवेदकगण के विरूद्ध अन्य धाराओं के साथ अपनी जाति का फायदा उठाते हुए धारा 3(1)(Da), 3(1)(Dha) SC/ST ।बज भी लिखा दिया। जबकि उन्हें सत्य बातों की शिकायत करने का अधिकार तो है परन्तु अपनी बात को अधिक बलशाली बनाने के उद्देश्य से एस0सी0/एस0टी0 को जबरन नहीं जोड़ना चाहिए। उन्हें किसी व्यक्ति पर अनावश्यक रूप से इस तरह के आरोप लगाने से बचना चाहिए, अन्यथा भविष्य में समाज उनके साथ व्यापारिक व मिलने जुलने वाले संबंधो से दूरी बना लेगा, जो कि समाज के लिए उचित नहीं है।

12. मामले के तथ्यों एवं परिस्थितियों के दृष्टिगत यह आवेदन पत्र **आंशिक रूप से स्वीकार** किया जाता है तथा विशेष सत्र परीक्षण सं0 917 सन 2021 में स्पेशल जज, एस0सी0/एस0टी0 ऐक्ट, मथुरा द्वारा पारित प्रसंज्ञान आदेश दि0 29–7–2021 में धारा 3(1)(Da), 3(1)(Dha) SC/ST ।बज समाप्त किया जाता है तथा धारा 406, 420, 504, 506 भा0दं0वि0 के अन्तर्गत प्रसंज्ञान लिये जाने का आदेश यथावत रहेगा।

13. इस स्तर पर आवेदकगण के विद्वान अधिवक्ता ने अनुरोध किया कि आवेदकगण के जमानत आवेदन पत्र का निस्तारण करने हेतु संबंधित अवर न्यायालय को निर्देशित कर दिया जाय।

14. उभय पक्ष के विद्वान अधिवक्ताओं के तर्को को श्रवणोपरान्त, पत्रावली के परिशीलन से, न्यायालय ने पाया कि प्रथम सूचना रिपोर्ट में लगाए गए आरोप एक संज्ञेय अपराध के कमीशन का खुलासा करते हैं और वह आरोप, की गयी विवेचना के उपरान्त लगाए गए हैं, उन आरोपों को इस न्यायालय द्वारा धारा 482 दं0प्र0सं0 के तहत अपनी शक्ति का प्रयोग करते हुए, जॉच के दौरान एकत्र की गयी सामग्री के आरोपों की शुद्धता और विश्वसनीयता का आकलन करने की आवश्यकता नहीं है, इस स्तर पर अभियुक्त के विवादित बचाव पर विचार नहीं किया जा सकता है। तद्नुसार आरोप पत्र या उपरोक्त वाद की कार्यवाही को रद्द करने की प्रार्थना और परिणामी कार्यवाही अस्वीकृत की जाती है।

15. इस स्तर पर, आवेदकगण के विद्वान अधिवक्ता का अनुरोध है कि आवेदकगण को अभी तक उपरोक्त मामले में गिरफ्तार नहीं किया गया है और पुलिस आवेदकगण को गिरफ्तार करने के प्रयास में है, और संबंधित अवर न्यायालय द्वारा आवेदकगण के खिलाफ दण्डात्मक प्रक्रिया जारी की जा सकती है, इसलिए आवेदकगण के जमानत आवेदन पत्र पर विचार करने के लिए संबंधित अवर न्यायालय को निर्देश जारी कर दिया जाय।

16. माननीय उच्चतम न्यायालय द्वारा Satendra Kumar Antil Vs. Central Bureau of Investigation and another (Apecial Leave to Appeal (Crl.) No. 5191 वि 2021 के प्रकरण को आदेश दि0 7—10—2021 द्वारा पहले ही जमानत हेतु दिशा निर्देश देते हुए निस्तारित किया जा चुका है, इसके पश्चात् अब संबंधित अवर न्यायालय को जमानत देने के लिए उनके विवेक और विचार को नियंत्रित करने वाले वैधानिक प्राविधानों को प्रभावित किए बिना, इस न्यायालय द्वारा कोई विशिष्ट निर्देश जारी करने की आवश्यकता नहीं है, क्योंकि यह अपेक्षा की जाती है कि संबंधित अवर न्यायालय आवेदक के जमानत प्रार्थना पत्र को निस्तारित करते समय माननीय उच्चतम न्यायालय द्वारा पहले से जारी आवश्यक दिशानिर्देशों को ध्यान में रखेगा।

17. उपरोक्त टिप्पणियों के साथ, यह आवेदन पत्र अन्तिम रूप से **निस्तारित** किया जाता है।

(2022)05ILR A1512
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.03.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

Second Appeal No. 1468 of 1992

Sahabal & Ors. ...Appellants
Versus
Budhiram & Ors. ...Respondents

Counsel for the Appellants:
Sri Faujdar Rai, Sri C.K. Rai

Counsel for the Respondents:
Sri S.L. Yadav, Sri B.B. Paul, Sri Rajendra Rai, Sri Rajesh Maurya, Sri Shamumul Hasnain, Sri Sheo Ram Singh

Civil Law - U.P. Consolidation of Holdings Act, 1961- Section 49-section Suit for decree of possession-Plaintiff's title to suit property accepted by both Courts-cannot be faulted-no discussion to show case of joint possession—except a licence-if on revocation of licence-defendant could be removed from possession-no joint possession may hinder a decree of exclusive possession passed in favour of Plaintiff-subject to valid revocation of licence-suit property comprises constructions -raised by Plaintiff-licensed to defendants-suit maintainable-unaffected by section 60 of Indian Easements Act-During consolidation operations-no objection about title been raised by defendants-now defendants precluded from raising question of title -bar u/s 49 of U.P.C.H. Act.

Appeal dismissed. (E-9)

List of Cases cited:

1. Jai Narain Vs Sri Ram Narain (deceased by L. R's.) & ors., AIR 1989 All 182

2. Babu Fazal Haq & ors. Vs Lala Data Ram & anr., AIR 1975 All 373

3. Ramesh Vs Pandurangrao Ratnalikar & ors., 2006 SCC OnLine Bom 81

4. Dhool Singh Vs Smt. Bardhu Bal & ors., AIR 1974 Raj 90

(Delivered by Hon'ble J.J. Munir, J.)

1. This is a defendants' second appeal, arising from a suit for recovery of possession and mesne profits.

2. Heard learned Counsel for the appellants and Mr. Rajesh Maurya and Mr. Sheo Ram Singh, learned Counsel appearing on behalf of the respondents.

3. Budhiram, the sole plaintiff-respondent, who is now represented by his heirs and LRs before this Court, instituted Original Suit No.627 of 1995 in the ex-Court of Munsif, Mohammadabad Gohna, District Azamgarh against Sahabal and Ninku, arrayed as the defendants first set,

for a decree of possession, directing the defendants first set to the suit to deliver possession of a house and underlying land shown by letters अ ब स द with boundaries detailed at the foot of the plaint. A further decree was sought praying that the defendants first set be directed to pay the plaintiff mesne profits at the rate of Rs.20/- per month w.e.f. 10.05.1985 till date of delivery of actual physical possession of the suit property.

4. The plaintiff arrayed his brothers, Muktinath and Dhuppu as defendants second set or proforma defendants to the suit, for whose benefit also he instituted the suit. Later on, by an amendment to the plaint, Mahavir, a brother of Ninku, was impleaded as defendant no.5/defendant third set, against whom also relief was claimed to the same effect as the defendants first set.

5. In this appeal, the defendants first set and third set, that is to say, Sahabal, Ninku and Mahavir are the appellants. All three of them had together instituted the present appeal before this Court, but pending appeal they have passed away. They are represented on record by their heirs and LRs, duly substituted. All the three defendants-appellants, that is to say, the original defendants first and third sets to the suit, now represented by theirs heirs and LRs, shall hereinafter be referred to as the defendants, wherever the reference is made collectively. In case of an individual reference to any of the original defendant-appellant, the concerned party would be referred to by his name.

6. Budhiram, the plaintiff, who had instituted the suit, is arrayed to the appeal as the plaintiff-respondent no.1. He has passed away pending appeal and is represented on record by his heirs and LRs. Likewise, the two brothers of Budhiram, to wit, Muktinath and Dhuppu, who were arrayed in the suit as defendants second set in a proforma capacity, have also passed away pending appeal. They too are represented on record by their heirs and LRs. Budhiram, represented by his heirs and LRs, shall hereinafter be referred to as the plaintiff. Muktinath and Dhuppu, who were the defendants second set or the proforma defendants to the suit, now represented by their heirs and LRs, shall hereinafter be referred to collectively as the proforma defendants. Both the plaintiff and the proforma defendants would be referred to individually by their names, wherever the context necessitates.

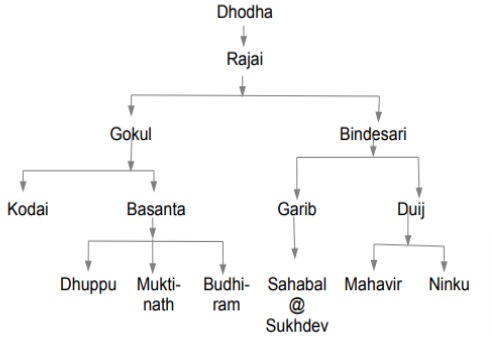
7. According to the plaintiff, Plot No. 276 (formerly numbered as 531) situate at Village Lado, *Tappa* Badokhar, *Pargana* and *Tehsil* Sagri, District Azamgarh was held as a *bhumidhari* by Basanta, the plaintiff's and the proforma defendants' father. Five years prior to the institution of the suit, Basanta passed away. After his death, the plaintiff and the proforma defendants succeeded to his rights as bhumidhar of the plot aforesaid. They are bhumidhar in possession of Plot No. 276 (for short "the plot in question") ever since.

8. It is the plaintiff's case that the plaintiff and the proforma defendants live way far off from the plot in question and, therefore, for ease of farming and supervision of crops, they built a temporary shelter, described in vernacular as Madai. The site of this temporary construction is denoted in the map at the foot of the plaint by letters अ ब स द. It is then said that about two and a half years ante-dating the institution of the suit, the plaintiff and the proforma defendants constructed a kachcha

house (for short "the suit property") at the site and in place of the temporary shelter. The plaintiff and the proforma defendants would stay in the suit property and take care of their crops. It is the plaintiff's further case that the defendants are natives of the village and their house is located at a distance of about 400 yards from the suit property. The defendants are said to have represented to the plaintiff and the proforma defendants that their house had fallen down and the way it was dangerous to inhabit. The defendants did not have the necessary wherewithal at that time to reconstruct or repair it. They requested the plaintiff to permit them to use the suit property until such time that they could get their own reconstructed. It was also said that the defendants would vacate the suit property as soon as their house was reconstructed/repaired. The plaintiff permitted the defendants use of the suit property as a licensee on condition that they would vacate it on the plaintiff's demand.

9. It is also the plaintiff's case that the defendants' house has been reconstructed and on the 10th of May, 1985, the plaintiff asked the defendants to vacate, but the defendants, at the instance of inimical elements in the village, turned dishonest and refused to vacate. The plaintiff thereupon revoked the defendants' licence and asked them to vacate. The defendants did not oblige. According to the plaintiff, the defendants are trespassers in the suit property ever since 10.05.1985. The plaintiff is entitled to recover possession of the suit property, besides mesne profits from the defendants w.e.f. 10.05.1985 until delivery of actual physical possession. It is on the basis of the aforesaid facts and cause of action that the suit was instituted on 03.07.1985.

10. The defendants put in a written statement and contested the plaintiff's claim. They propounded a pedigree in support of a case of a co-sharer's right with the plaintiff and the proforma defendants in the plot in question. It is the defendants' case that the plaintiff, the proforma defendants and the defendants are part of a joint Hindu family who were living together. The following pedigree was pleaded by the defendants in their written statement:



11. Based on the pedigree aforesaid, it was pleaded by the defendants that the plaintiff, the defendants and the proforma defendants are the descendants of a common ancestor and constitute a joint Hindu family. It was pleaded that Bindesari, whose branch the defendants represent, had gone insane. For the said reason, after the death of Rajai, Gokul was recorded as the Karta and after him, Kodai and Basanta. The defendants trusted Kodai and Basanta, in both of whom they had faith. Kodai and Basanta were, therefore, recorded over the joint family property. It is pleaded further that during the consolidation operations, the plaintiff had served as a Chakbandi Lekhpal. The defendants would trust the plaintiff also and it was the plaintiff who would take care

of records of the family's property and other business after Basanta's death.

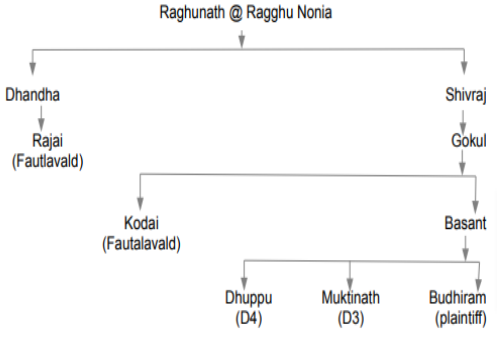
12. The defendants have pleaded that upon the members of the family increasing in numbers, Kodai and Basanta set up home in the residential house and in the part of the property where the animals were housed, described as Bardaur, the defendants set up residence. In substance, it was pleaded that growing numbers of the family were spread out into different parts of the property, that the joint family held. After some time, the defendants too set up separate dwelling. Basanta, finding the defendants to be short of accommodation, asked them to utilize the land, comprising the plot in question, for the purpose of a living accommodation and also to house their cattle. The plot in question was close by to the abadi and the defendants, therefore, constructed a temporary shelter thereon, described as Madai, which they later on, by and by replaced by a kachcha house with a tiled roof.

13. It is pleaded that the suit property has no concern with the plaintiff or his ancestors. During the consolidation operations, it was pleaded that the *chak* of both parties were entered over the plot in question, which, according to the allotment, are in their respective possession. It is then pleaded that the plaintiff and his brothers too separated and the plaintiff and Muktinath, defendant no.3 to the suit, set up residence in the house, wherein regular residential quarters are located. Their cattle were also housed there. The defendants stayed in the suit property and in a part of it, towards the west, the plaintiff and the proforma defendants kept up storing their fire-wood in the same manner as they were doing since long. Dhuppu, defendant no.4 (a proforma defendant) set up separate residence at the place where the family would earlier store their agricultural implements. All his living and that of his family were built around that place.

14. Some years earlier, on the north-western corner of the suit property, where both parties have their chak, both parties sunk a private tubewell and at that place, the plaintiff got his house constructed. The plaintiff and his children stay in that house. In the suit property, neither the plaintiff nor his father ever built a temporary shelter (Madai). It is denied that the defendants' house located in the abadi ever collapsed, so as to require a reconstruction. Much to the contrary, it is pleaded by the defendants that their house located in the abadi is still in existence where it was. The plaintiff never asked the defendants to vacate the suit property. It is pleaded that the plaintiff's intentions went foul during the consolidation operations, about which the defendants never had knowledge. The plaintiff got his father's name entered exclusively over the chak that comprises land coming down from common ancestors. The defendants got the revenue records inspected and then came to know about the fact. Thereupon, the defendants instituted a suit before the Court of competent jurisdiction. It was also pleaded that the plaintiff had no right to institute the present suit. The suit was time barred. The suit is barred by estoppel and bad for mis-joinder. It is also barred by Section 34 of the Specific Relief Act, 1963.

15. The plaintiff filed a replica and pleaded that the defendants never had any right to or interest in the plot in question or the suit property. What was particularly pleaded through the replica is the fact that the defendants were not at all connected to the family of the plaintiff and the proforma

defendants. The pedigree shown was denied as false and concocted. It was also pleaded that Bindesari, the defendants' ancestor, was not a son of Rajai or a member of his family. The plaintiff propounded a pedigree of his family, that he claimed depicted the correct relationship between parties in Paragraph No.3 of his replica. The pedigree pleaded by the plaintiff is shown below:



16. Mahavir, defendant no.5 and the original appellant no.3 to the appeal, also filed a separate written statement dated 04.05.1987, more or less pleading on the same lines as the defendants. An additional written statement dated 22.07.1988 was filed on behalf of the defendants jointly. A similar additional written statement, also on behalf of the defendants jointly, was filed on 18.08.1988. These pleadings more or less do not add anything material to the defendants' case.

17. On the pleadings of parties, the Trial Court framed the following issues (translated into English from Hindi):

"(1) Whether the plaintiff is entitled to possession of land and the house denoted by letters अ ब स द and things attached to it?

(2) Whether the plaintiff is entitled to mesne profits as claimed in the plaint?

(3) Whether the suit is barred by time?

(4) Whether the suit is barred by estoppel?

(5) Whether the suit is bad for non-joinder of necessary parties?

(6) Whether the suit is undervalued and the court-fee insufficient?

(7) Whether the suit is barred by Section 34 of the Specific Relief Act, 1963?

(8) Whether the suit is barred by Section 43 of the Code of Civil Procedure, 1908?

(9) Whether the plaintiff is entitled to any relief?

(10) Whether the suit is bad for mis-joinder of necessary parties?

(11) Whether the suit is barred by Section 42 of the Code of Civil Procedure, 1908?"

18. The plaintiff led voluminous documentary evidence in support of his title, including those relating to proceedings during consolidation operations and the rights recorded during consolidation. Documents were also filed, that are very old revenue entries and extracts of the Family Register. A summary of documentary evidence led on behalf of the plaintiff finds a detailed reference in the judgment of the Lower Appellate Court and need not be recapitulated. The plaintiff examined three witnesses, to wit,

Budhiram, PW-1, Katwaru, PW-2 and Dharamdev, PW-3.

19. The defendants, on the other hand, also led documentary evidence, a summary of which is also detailed in the judgment of the Lower Appellate Court and is not being reproduced here for the sake of brevity. The defendants examined two witnesses, that is to say, Sahabal, DW-1 and Mangali, DW-2.

20. The issue of valuation was decided by an order of the Trial Court made on 18.12.1986, about which there is no surviving controversy. Issues Nos.3, 4, 7, 8 and 11, all of which are defendants' issues, were not pressed at the trial and, therefore, answered in the negative. The issues of non-joinder of necessary parties and mis-joinder were also decided in the negative in favour of the plaintiff and against the defendants by an order made by the Trial Court on 15.07.1987.

21. The Trial Court tried the suit substantially on Issues Nos. 1 and 2 and decided both in favour of the defendants and against the plaintiff. It was held by the Trial Court that the plaintiff's title to the land, whereon the suit property is located, is established on the basis of documentary evidence, but accepted the defendants' case that the constructions standing thereon were ones of a permanent character, in relation to which, their license could not be revoked, in view of the provisions of Section 60(b) of the Indian Easements Act, 1882. It is on the said findings that the suit was dismissed.

22. Aggrieved by the decree of the Trial Court, the plaintiff instituted Civil Appeal No.110 of 1989 before the District Judge of Azamgarh on 28.02.1989. The said appeal came up for hearing upon assignment, before the learned Additional Civil Judge (now equivalent to the Court of the Civil Judge, Senior Division) on 22.07.1992. The learned Judge allowed the appeal, reversed the decree of the Trial Court in part and decreed the plaintiff's suit, ordering the defendants to deliver possession of the suit property to the plaintiff, including the underlying land, after withdrawing from its possession within a period of three months. However, the plaintiff's claim for mesne profits was dismissed.

23. Aggrieved, this second appeal has been instituted by the defendants

24. This appeal was admitted to hearing on 06.11.1992 on the following substantial questions of law:

(1) Whether the plaintiff could be granted relief in effect of exclusive possession in the face of joint possession?

(2) Whether the suit could be maintainable in view of Section 60 of the Indian Easements Act, 1882?

(3) Whether an issue about tenure of land was desirable and if so, whether there was a mistake of law in not framing and referring the same to the Revenue Court under Section 331-A of the U.P. Z.A. & L.R. Act, 1950?

25. The first substantial question of law has been raised on the basis of a case that the suit property was part of a larger holding that was the property of a Joint Hindu family, who had lived together without a formal partition. The defendants have made out themselves to be members of the Joint Hindu

family, of which the highest and relevant ancestor was Dhonda. The family, according to them, went into the branches of Gokul and Bindesari, where the defendants represent the branch of Bindesari and the plaintiff and the proforma defendants, the branch of Gokul. The defendants' case proceeds on the basis that Bindesari being of unsound mind, it was the branch of Gokul who served as Karta for the Joint Hindu Family, that the defendants say they were. It is the defendants' case that when Basanta was functioning as the Karta, he had permitted the defendants to set up residence for themselves on a part of the plot in question, in deference to their share in the joint family property. The defendants' case, therefore, is that they first built a temporary shelter, Madai and then a kachcha house on the bidding of Basanta, no doubt, but in realization of their right to hold a specific share in the joint family property that would come by in case of a formal partition. The case of the defendants, therefore, is of a pre-existing right in the Joint Hindu Family property belonging to the Joint Hindu family, of which Dhonda is the progenitor. The permission given to the defendants by Basanta is, therefore, not a license to construct over the suit property. Rather, it is the defendants' case that the permission was given in realization of the defendants' right as a member of the Joint Hindu family to a specific portion of the property thereof, bringing about a partition through an oral family settlement. In effect, therefore, the defendants plead a case of title to the suit property, flowing from their status as members of the joint family in question and a permission from the Karta thereof, which is in the nature of a family settlement.

26. By contrast to the defendants' case, the plaintiff disowns the fact that the defendants and the plaintiff are in any way the members of a Joint Hindu Family. He says that the defendants are in no way connected by a bloodline to the plaintiff or the proforma defendants. They are utter strangers to the plaintiff's family. The plot in question, as well as the suit property is owned by the plaintiff and the proforma defendants that they have inherited from a common ancestor, Raghunath through Shivraj, Gokul and Basanta in successive generations. Bindesari is not at all connected to the plaintiff's family, though a native of the village. Basanta never permitted the defendants to raise constructions over the suit property. Rather, it was the plaintiff who permitted the defendants to use the suit property that had already been constructed by the plaintiff and proforma defendants in order to take care of their crops that stood in the land in dispute. The plaintiff had constructed the suit property first as a temporary shelter, a Madai and then as a kachcha house to look after their crops, because their house was located far away from this part of their agricultural holding. The permission had been given to the defendants to occupy the suit property for such period of time that the defendants needed to reconstruct their own house located some 400 yards away, that had fallen down. The permission that was granted was revoked on 10th of May, 1985 after the defendants' house was reconstructed. Thus, the defendants are trespassers in the suit property, after revocation of their licence by the plaintiff.

27. For the purpose of determination of the substantial question of law under consideration, the two Courts below, particularly the Lower Appellate Court, has gone into the genealogy of parties to determine whether the defendants on one hand, and the plaintiff as well as the proforma defendants on the other, were members of a Joint Hindu Family. The

question about the "jointness of possession' of parties really does not arise on the state of evidence here. If it did, perhaps, it would require determination by a competent Revenue Court. Here, there is overwhelming evidence, rather evidence documentary, that establishes the plaintiff's claim to the suit property. There is no documentary evidence to show even a hint or shadow about the defendants' title to the suit property. The plaintiff and his ancestors have consistently remained recorded over the suit property, since before the abolition of Zamindari and until date of the commencement of action. The Lower Appellate Court has made a punctilious reference to the various revenue records, dating back to the year 1940-41, mentioning the relevant Fasli Year. The Lower Appellate Court has taken note of the Bandobast of the year 1349 Fasli, where the name of Kodai and Basanta, sons of Gokul, is recorded. Also considered by the Lower Appellate Court is Khatauni Jild Bandobast of the year 1308 Fasli corresponding to the calendar year 1900-1901. During that period of time, the name of Rajai, son of Dhonda, was recorded and in the same document, the name of Gokul son of Shivraj is also recorded.

28. It has been noted by the Lower Appellate Court that in none of the record of rights relating to the land in dispute, including the suit property, the name of Bindesari occurs, who is said to be the link connecting the defendants to the plaintiff's pedigree. This Court is of opinion that if truly it were a case where the existence of the bloodline claimed by the defendants was necessary to determine the rival claim of the parties about title to the suit property, this case might require trial by the competent Court of revenue jurisdiction, the land being a bhumidhari. But, no question of title arises in this case, for the reason that consolidation operations have admittedly intervened, where, according to the defendants, the parties' chaks have been entered. There is no record from the consolidation that may show title or possession of the defendants or a joint possession for the defendants, a fact found by both the Courts below and more eloquently by the Lower Appellate Court. It is for this reason that so far as title is concerned, the Trial Court and the Lower Appellate Court have returned unanimous findings in favour of the plaintiff and the proforma defendants. The findings recorded by the Authorities under the U.P. Consolidation of Holdings Act, 1961 (for short "U.P. C.H. Act") about title inter partes are final and unassailable before any Court or Authority. If after close of the consolidation operations, about which there are CH Form-23 and CH Form-41 on record, the rights of the defendants are not recorded over the land in dispute or the suit property, there is no title dispute that survives for determination by a Court of revenue jurisdiction.

29. It must be recorded here that the judgments of the two Courts below indicate that the defendants did go for a determination of their rights to the Revenue Court and filed a suit under Section 229-B/ 176 of the U.P. Z.A. & L.R. Act, being Suit No.383/413, which was dismissed. Appellate or Revisional remedies against the said determination were invoked by the defendants, but nothing has been brought to this Court's notice to show that the defendants succeeded in their endeavour to establish title to the land in dispute or the suit property. This Court has also perused the certified copy of the judgment and decree dated 31.10.1986 passed by the Sub-Divisional Officer, Sagri, Azamgarh in Suit

No.383/413, under Section 229-B/ 176 of the U.P. Z.A. & L.R. Act. The suit was filed by Sahabal, son of Gareeb, Mahavir and Ninku, the three defendants here, against Budhiram, Muktinath and Dhuppu, the plaintiff and the proforma defendants. The suit related to the defendants' claim for declaration of title and partition of Gata No.531 (old) based on the case of a Joint Hindu Family property, where the property came down from a common ancestor. The issues in the suit, amongst others, were whether the plaintiff and the defendants were co-sharers in possession of the suit property and they had a half share. It was also an issue whether the suit is barred by Section 49 of the U.P. C.H. Act. The Sub-Divisional Officer has recorded a finding that no objection was raised during consolidation operations by the plaintiffs (the defendants here) and, therefore, the suit was barred by Section 49 U.P. C.H. Act. The Revenue Court has also returned a finding that it was the defendants to that suit (who are the plaintiff and the proforma defendants here) who were recorded over the suit property. Nothing has been shown to this Court or noticed by the Courts below that this judgment of the Sub-Divisional Officer has been overturned by a Court of competent jurisdiction in appeal.

30. The plaintiff's title to the suit property has been accepted by both the Courts below on the findings and evidence noticed hereinabove, which cannot be faulted. There is absolutely no evidence to show a case of joint possession between the plaintiff and the defendants, based on a title properly so called, except a licence. Therefore, if on the revocation of the licence, validly made, the defendants could be removed from possession, there is no joint possession inferable by any principle of law for the defendants that may hinder a decree of exclusive possession being passed in favour of the plaintiff, of course, subject to a valid revocation of the licence.

31. In view of the aforesaid conclusion, Substantial Question of Law No. (1) is answered in the affirmative in the terms that exclusive possession can be granted where joint possession of the party resisting dispossession is not based on some kind of a right or title, but a mere licence, of course, subject to its valid revocation.

32. The second substantial question of law raised is whether the suit is maintainable in view of Section 60 of the Indian Easements Act. The question precisely is whether the defendants being in possession of the suit property as licensees, where they have raised constructions of a permanent character, are entitled to resist revocation of their license, in view of the provisions of Section 60(b) of the Indian Easements Act. This substantial question of law has arisen because of the judgment of the Trial Court, which held the plaintiff to be the owner and/ or bhumidhar of the land in dispute, including the suit property, like the Lower Appellate Court, but opined that the defendants had raised constructions comprising the suit property of a permanent character in accordance with the licence given by the plaintiff or his predecessor-in-title.

33. The Lower Appellate Court, on the second point of determination, that it has considered, has examined the plaintiff's case of a license to live in the house constructed by him on the one hand and the defendants' case of being given the land by the plaintiff's predecessor Basanta, pursuant whereto they had raised construction of a permanent nature on the other. The Lower

Appellate Court has meticulously examined evidence of witnesses, including the documentary evidence, particularly the documents relating to consolidation proceedings and opined that if the constructions had been raised by the defendants, acting on the permission given by Basanta before consolidation commenced, the suit property and its value would figure in consolidation proceedings. The witnesses' testimony about who actually constructed the suit property was also considered, particularly that of PW-2, who has said that he was the contractor involved in the construction of the suit property. The said witness has been believed, together with the documentary evidence relating to proceedings during consolidation, by the Lower Appellate Court to find for a fact that constructions comprising the suit property were raised by Budhiram and not the defendants years ago on a permission given by Basanta. These are findings of fact recorded after a careful scrutiny of oral and documentary evidence and cannot be disturbed by this Court sitting in second appeal. In fact, the defendants have spoken about a permission to raise constructions, that have now become the suit property, located over the plot in question, not as licensees but in acknowledgment of their right as coparceners or co-sharers of a Joint Hindu Family with a permission by Basanta acting as the Karta. It is perhaps on account of the fact that the Trial Court has disbelieved the defendants' case of title to the suit property, in whatever manner, that the permission given by Basanta was then examined from the vantage of Section 60(b) of the Indian Easements Act.

34. The Trial Court had held for a fact that it was Basanta who permitted the defendants to raise constructions over a part of the plot in question, that is now the suit property. The Trial Court proceeded to reason that in the absence of any title with the defendants being established to the plot in question or the suit property, the permission, that Basanta granted, must be held to be a licence, permitting the defendants to raise construction of a permanent character. This finding, for cogent reasons assigned, has been overturned by the Lower Appellate Court, upon a consideration of relevant evidence, both documentary and oral. The Lower Appellate Court has held that the constructions were never raised by the defendants, but by the plaintiff, and the defendants were allowed to occupy the suit property for a short period of time between August, 1984 and May, 1985, in order to facilitate the defendants to tide over the crisis of reconstructing their house that had actually collapsed.

35. Learned Counsel for the defendants, however, has impressed upon the Court that the provisions of Section 60(b) of the Indian Easements Act forbid the grantor of a licence from revoking it, where, acting on the licence, a licensee had executed a work of a permanent character and incurred expenses in its execution. Learned Counsel has placed reliance upon the decision of this Court in **Jai Narain v. Sri Ram Narain (deceased by L. R's.) and other, AIR 1989 All 182.** The attention of this Court has been drawn to Paragraph Nos.7 and 8 of the report in **Jai Narain** *(supra),* that read:

"7. I am unable to agree. A some what identical situation came up for consideration before this Court in the case of Azahar Husain v. Mansab, reported in 1940 All LJ 354 : (AIR 1940 All 324). The question raised there was whether S.60(b)

of the Easements Act could be pressed in and in respect of that portion of the land which is left by the licensee unbuilt and which is used by him as his Sehan Darvaja. There the licensee had instituted the suit for restraining the licensor from interfering with his possession in respect of vacant piece of land. The learned Judge hearing the second appeal negatived the contention of the licensee holding that where a licence is given to one to build a house on a piece of land and acting upon that licence, he builds a house keeping a portion of the land vacant so that it might be used as sehan darvaza the license would be irrevocable under S.60(b) of the Easements Act both in regard to the site of the house as well as the piece of land, which is appurtenant thereto. The ratio was that a person building a house may legitimately use the land appurtenant thereto for the proper enjoyment of his house provided of course the licensee built the house in pursuance of the terms of the license and the site of the house and the appurtenant land does not exceed the area in respect to which the license was granted.

8. That precisely is the situation obtaining in the present case. With respect, I find myself in complete agreement with the ratio of the decision cited above. The finding in the present case is that the appurtenant land is being used by the plaintiff for tethering cattle and other miscellaneous acts. Further finding is that this land is part and parcel of the land which was granted to the plaintiff under the license. That being so, S.60(b) was attracted in terms. Lease granted in favour of the defendant was hence of no avail to the defendant as against the plaintiff."

36. A perusal of the issue, that fell for consideration of this Court in **Jai Narain,** shows that it was not about the irrevocability of the licence generally, where the licensee had been permitted to raise constructions of a permanent character by the licensor. That position appears to have been undisputed on facts there. The issue was about a part of the land given on licence by the *Zamindar*, that was not built upon pursuant to the licence, but remained open. The open portion of the land was appurtenant to the constructions that had been erected acting on the licence. The question, therefore, was whether Section 60(b) would be attracted to that portion of the land held on licence, which the licensee had not utilized to raise constructions. It was held that the protection of Section 60(b) would extend to the unbuilt land held on licence, if it were appurtenant to the land that had been constructed upon in terms of the licence.

37. This Court is afraid that the principle in **Jai Narain** is not at all attracted to the facts of the present case, where for a fact, the Lower Appellate Court has returned an unassailable finding of fact that the suit property comprises constructions that were raised by the plaintiff and licensed to the defendants as such. The defendants had never themselves raised any construction, acting on any permission or licence, to raise constructions of a permanent character.

38. The other decision relied upon by the learned Counsel for the defendants is **Babu Fazal Haq and others v. Lala Data Ram and another, AIR 1975 All 373. In Babu Fazal Haq** *(supra)*, it was held by their Lordships of the Division Bench of this Court, thus:

"22. We have now to consider whether the said licence was revocable.

Section 60 of the Indian Easements Act provides :

"A licence may be revoked by the grantor, unless -

(a) it is coupled with a transfer of property and such transfer is in force;

(b) the licensee, acting upon the licence, has executed a work of a permanent character and incurred expenses in the execution."

The above section embodies two exceptions to the general rule that a licence is revocable. The instant case is covered by clause (b) of Section 60 which is based on the principle of estoppel by acquiescence. When the licensee acting upon a licence has executed a work of permanent character and incurred expenses in the execution the licence cannot be revoked by the grantor. The man who stands by and allows another person to build on his land, in the belief that he has power or authority to do so, and incurs expenses in such building, cannot turn round and claim the removal of such building on the ground that the latter had no authority to build. He is estopped by his conduct from adopting that course and the law will presume an authority from him in such cases. In the instant case we find from the own admission of the plaintiff that within a few days after obtaining his permission the defendants raised the constructions over the disputed land and they established their factory by installing a saw machine, oil expeller and flour mill. The house of the plaintiff is admittedly situate at a very little distance from the said land. It is quite clear that if the plaintiff had not given the land to the defendants for the aforesaid purposes, he would have taken exception to the making of constructions over the same and the installation of the saw machine, oil expeller and the flour mill. As We have already pointed out, the finding of fact recorded by the courts below is that the land was given by the plaintiff to the defendants for the purpose of making constructions and establishing a factory over it. Since acting on that agreement the defendants made costly constructions of permanent nature, the licence has now become irrevocable....."

39. The law laid down by their Lordships of the Division Bench is without exception as to principle, but of little assistance to the defendants here. The reason is that the holding in Babu Fazal Haq came in the wake of facts, where the findings returned by the Courts of fact were that the licensee was permitted to raise constructions of a permanent nature over his land by the licensor, which was a saw machine, oil expeller and flour mill. It was in that context remarked by their Lordships that if the licensor permits another to raise constructions of a permanent character over his land, where that other incurs expenses in its execution, the licence becomes irrevocable. But again, the aforesaid principles or the holding of their Lordships in **Babu Fazal Haq** would not help the defendants, because it has been found for a fact by the Courts below that the suit property comprises constructions that were raised by the plaintiff and licensed to the defendants; not constructions raised by the defendants on land licensed by the plaintiff or his predecessors.

40. This Court must also remark that a plea to avail the benefit of Section 60(b) of the Indian Easements Act does not appear to have been specifically raised in the written statement. The case in the written

statement was about the proprietary right as a co-sharer or coparcener of a Joint Hindu Family that the defendants set up, where they raised constructions in exercise of a proprietary right with permission of the Karta. That case has not been found vindicated by the Court of facts below, and in the absence of a plea about a licence, acting whereon, constructions of a permanent character were raised by the defendants incurring expenditure, no issue was framed by the Trial Court about it. It is for this reason that the parties did not lead any evidence about a case founded on Section 60(b) of the Indian Easements Act. It is the Trial Court that carved out this case for the defendants out of the shambles of a failed plea of title, based on membership of the Joint Hindu Family and their right as co-sharers therein. The Lower Appellate Court, therefore, for very valid reasons, has held that a plea or an issue claiming for a party the benefit of Section 60(b) of the Indian Easements Act, is a mixed question of fact and law, which requires a specific plea to be taken in the written statement and then evidence led by parties on the issue framed.

41. The point whether a case based on Section 60(b) of the Indian Easements Act could be raised without a specific plea in that behalf, fell for consideration of the Bombay High Court in **Ramesh v. Pandurangrao Ratnalikar and others, 2006 SCC OnLine Bom 81,** where it was held:

"10. Even though, initially, the defendants in two suits had taken plea of purchase of the land, that plea could not be proved. In all the matters, the plaintiff-respondent has proved his title over the land. The defendants appellants have failed to prove their adverse possession. The trial Court in all the five matters held that the defendants were occupying the land by virtue of licence. Now in the Second Appeals, the defendants have not raised dispute either to the title of the plaintiff nor they have raised the plea of adverse possession. According to them for last ⅔ generations, they are living on the suit lands by constructing huts, which are permanent structures and therefore, in view of section 60(b) of Easements Act, licence has become irrevocable and therefore, the plaintiff cannot revoke the licence and seek possession back. In view of this, the matters rest on the following issue:

11. Whether the defendants-appellants prove that the licence has become irrevocable in view of the provisions of section 60 clause (b) of Indian Easements Act.

12. It is not in dispute that the plaintiff is owner of the land. The defendants or their fathers had taken possession of the land as licensees. It is also not in dispute that the plaintiff issued notices for revocation of license. The said notices were not accepted and thereafter, the plaintiff issued a public notice in local newspaper "Prajawani". Section 60 reads as follows:

"60.Licence when revocable: A licence may be revoked by the grantor unless:--

(a) it is coupled with a transfer of property and such transfer is in force:

(b) the licensee acting upon the licence, has executed a work of a permanent character and incurred expenses in the execution."

13. Admittedly, clause (a) is not applicable to the facts of the present case. Under clause (b) the licence would become irrevocable if licensee acting upon the licence has executed a work of permanent character and incurred expenses in the execution. All the three conditions have to be satisfied, naturally burden lies on the licensee to prove these three conditions, who pleads that the licence has become irrevocable. It is well settled principle of law that before any evidence of any fact may given in a Civil proceeding, party has to plead the fact, so that on such disputed fact issue may be framed and then parties may lead evidence on that issue. Admittedly, in the present matters, the defendants in their written statements had not admitted that they were licensees and further they had also not pleaded that they had, acting upon the licence, constructed huts or houses of permanent character and had incurred expenses in execution of the said work. Naturally, in absence of any such plea of irrevocability of licence, no issue was framed. The plaintiff proceeded to lead evidence to prove his title, licence and revocation of licence by issuing notice. Defendants, on the other hand, tired to lead evidence to prove their title or adverse possession over the said lands for more than 12 years. Plea of irrevocability was not raised in the written statement. Relying on certain authorities of the Supreme Court in Elizabeth v. Saramma, AIR 1985 NOC 159 (Ker.), the Kerala High Court held that irrevocability of licence has to be pleaded and proved and in absence of any pleadings or issue on this point, it cannot be said that licence was irrevocable. In Shankar Gopinath Apte v. Gangabai Hariharrao Patwardhan, (1976) 4 SCC 112 : AIR 1976 SC 2506, the Supreme Court had to deal with the similar case in which the defendant had not pleaded irrevocability of licence nor any issue was raised but it was contended that the defendant-appellant was deemed to be licensee and since he had executed the work of permanent character involving heavy expenditure. Hence, the licence would be irrevocable under section 60(b) of the Easements Act. After discussing the facts of the case, Their Lordships made following observations in para 14

"Only one more thing need be stated: even assuming that the appellant has executed work of a permanent character on the land it cannot be said that he has done so "acting upon the licence", as required by section 60(b) of the Easements Act. If he really improved the land by executing a work of a permanent character, he did so in the belief that being a tenant he will become a statutory purchaser of the land, or that the oral agreement of sale will one fine day be implemented. The execution of work would therefore be in his capacity as a tenant or a prospective purchaser and not in his capacity as a licensee."

42. Again, the point was pronounced upon eloquently by the Rajasthan High Court in **Dhool Singh v. Smt. Bardhu Bal and other, AIR 1974 Raj 90**, where it was held:

7. ..... The parties had fought the litigation on the question of title alone. Whereas the plaintiff claimed that on account of a gift in his favour by Smt. Kesar Bai, he was the owner of the property, the defendant asserted that the portion sold by the plaintiff to Kadar Bux had been given in "Kanya Dan' to his mother and on account of the unauthorised alienation the disputed portion was given by the plaintiff to the defendant in exchange. It was the plea of the plaintiff

that the defendant was in permissive possession. In answer to that the defendant only asserted his own title to the property, but did not set up any case in the alternative that even if he were a licensee the licence would be irrevocable on account of the defendant having raised a construction of permanent character on the property.

Normally a licence is revocable unless the case falls under clauses (a) or (b) of sec. 60 of the Easements Act.

Under clauses (a) of the licence is coupled with a transfer of property and such transfer is in force the licence would not be revocable, and under clause (b) if the licensee, acting upon the licence, had executed a work of permanent character and incurred expenses in the execution then too the licence will not be revocable. It was a mixed question of fact and law whether the necessary conditions about the irrevocability of the licence existed or not. It was, therefore, necessary for the defendant to have pleaded the necessary facts in his written statement and to have a proper issue framed. It is true, two of the witnesses produced by the plaintiff namely, P.W. 4 Kadar Bux and P.W. 5 Vishmmbhar Dayal support the defendant, but these statements can be of no avail to the defendant. Even so, I have considered the question whether the defendant can be said to have made any works of permanent character by the construction of the room or the latrine. So far as the latrine is concerned, the defendant has clearly admitted as P.W. 8 that when he wanted to construct the latrine the plaintiff prevented him and, therefore, he had to content himself by merely having a latrine of "Tat Pattis" (screens made of gunny bags). This latrine cannot, therefore, be said to be any work of a permanent nature. As regards the room, the court below has found that it was "Kucha'. Whether a particular construction is one of permanent character or not is primarily a question of fact and the finding can be given only in the light of the nature of the construction and other attendant circumstances. There is no hard and fast rule to determine as to what construction would be regarded as a work of a permanent, character and what construction otherwise than of permanent character. The court below has held that the room was "Kucha' and, therefore, on the material as it stands one cannot hold that the room was a work of a permanent character. It was for defendant to have raised a plea in his written statement and then to have an issue framed for its determination. In the circumstances of the present case one cannot say that the work was of the permanent character.

11. In these circumstances without there being any plea in the written statement, nor there being any issue one cannot go by just the statements of two of the plaintiff's witnesses. The courts below were, therefore, not right in holding in the circumstances that the licence was irrevocable."

43. Apart from the fact that there is no plea in the written statement urging a case of irrevocable licence based on Section 60(b) of the Indian Easements Act, or in substance asserting such a case, the Lower Appellate Court has found for a fact, that we have already approved as an unexceptionable finding based on relevant evidence, that the suit property comprises constructions raised by the plaintiff and licensed to the defendants.

44. In view of what this Court has found, Substantial Question of Law No.(2)

is answered in the affirmative in terms that the suit is maintainable, unaffected by the provisions of Section 60 of the Indian Easements Act.

45. So far as the third substantial question of law is concerned, the defendants have strenuously urged that there being a question of title to the agricultural land involved, an appropriate issue should have been framed and sent to the Assistant Collector for a decision of the same. Learned Counsel for the defendants has strongly disputed it. He submits that this substantial question of law does not arise for consideration in this appeal at all. It is submitted that the plaintiff and the proforma defendants are recorded title holders, with no hint of an interest for the defendants in the suit property being discernible anywhere. The defendants' suit under Section 229-B read with Section 176 of the U.P. Z.A. & L.R. Act has failed and all issues of title are now concluded, in view of the provisions of Section 49 of the U.P. C.H. Act. He submits that during consolidation operations, no objection about title has been raised by the defendants against the plaintiff or his predecessors. Now, therefore, the defendants are precluded from raising the question of title in view of the bar contained in Section 49 of the U.P. C.H. Act. This Court has already remarked that there is absolutely no evidence noticed by the two Courts of fact below, where a triable case relating to title may have been raised by the defendants. Substantial Question of Law No.(3) does not, therefore, arise for consideration and is not required to be answered in view of the provisions of sub-Section (5) of Section 100 CPC.

46. In the result, this appeal **fails** and is **dismissed** with costs throughout.

47. The interim stay order dated 06.11.1992 is hereby vacated.

Order on the Cross-objections

1. This cross-objection was filed on 22.02.1993 by the plaintiff against the part of the decree by which his claim for mesne profits has been refused by the Lower Appellate Court. No substantial question of law has been formulated in the memorandum of the cross-objections. During the hearing of the appeal also, no substantial question of law was pointed out by the learned Counsel for the plaintiff, on the basis of which the cross-objections could be admitted to hearing.

2. The cross-objection, accordingly fails and is **dismissed.**

(2022)05ILR A1527
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.05.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Civil Revision No. 13 of 2022

Vijay Dembla ...Revisionist
Versus
Sanjay Dembla & Anr. ...Opposite Parties

Counsel for the Revisionist:
Brijesh Kumar

Counsel for the Opposite Parties:

A. Civil Law - STAMP ACT,1899 - ARTICLE 17(iii) of the SECOND SCHEDULE - It is applicable in cases where the plaintiff seeks to obtain declaratory decree without consequential reliefs and there is no other provision in the Court Fees Act for payment of fee relating to relief claimed.

B. Civil Law - COURT FEES ACT, 1870 - SECTION 17(iv-A) - As applicable in St. of U.P. this section specifialy provides for payment of Court fee in a case where the suit is for declaration/ invoking cancellation of an instrument relating to property.

Revision Allowed. (E-12)

List of Cases cited:-

1. Nami Chand Vs The Edward Mills Co. Ltd. AIR 1953 SC 28

2. Shailendra Bhardwaj & ors. Vs Chandra Pal & anr. (2013) 1 SCC 579

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

1. Heard Sri B. K. Saxena, learned counsel for the revisionist and Sri Ratnesh Chandra, learned counsel for the opposite party no.1.

2. This Revision has been filed challenging the order dated 04.04.2022 passed in Original Suit No. 256 of 2007, "Vijay Dembla vs. Sanjay Dembla and Others by the Court of Civil Judge(Senior Division), Lucknow where the learned Trial Court has decided the issue of Valuation of the Suit i.e. Issue no. 3 and also Issue no.4 relating to payment of enhanced court fee thereon.

3. It has been submitted by the learned counsel for the revisionist that the plaintiff i.e. the petitioner filed a Suit for Declaration of Will executed by his mother and also the mother of the opposite party no.1 and 2, Late Rekha Devi Dembla as void and for the Permanent Injunction injuncting the defendant from interfering in the property in dispute. According to the Plaint, a copy of which has been filed as annexure-02 of the application for interim relief, paragraph 14 mentions the contents of the Will and states such contents as factually incorrect, and paragraph 53 mentions, the valuation for the purpose of pecuniary jurisdiction of court fee. As the relief sought was for Declaration in respect of the Will valuation of which was not possible it was notionally fixed at Rs. 35,000/- upon which maximum court fee Rs. 200/- was paid and for further relief of permanent injunction regarding property in dispute Rs.35,00,000/- was fixed as market value and a maximum court fee of Rs. 500/- was paid. The total valuation of the Suit as per the plaint was Rs.35,35,000/- on which Court Fee of Rs.700/- was paid. Against such a statement being made in the plaint the respondent no.1 filed a Written Statement. While replying to the contents of paragraph 53 of the plaint in paragraph 45 of the Written Statement, it was stated that they were misconceived and wrong and that the Suit filed by the plaintiff for Declaration and Permanent Injunction was not maintainable, and also that the Court Fee had not been properly paid by the plaintiff, and therefore, the Suit was liable to be dismissed.

4. It has been argued by the learned counsel for the plaintiff that there is no mention of less valuation of the Suit in Para 45 of the Written Statement. The only mention is with regard to Payment of less Court Fee. It has been also argued that Valuation of Suit and Court Fee are two different things and therefore, two issues were framed issue no.3 relating to Valuation of Suit, Issue no.4 relating to Court Fee paid. It has been further argued that the learned trial court relied upon two sheets of papers submitted during the course of the arguments by the counsel for the respondent no.1 describing a large number of properties and giving their

valuation arbitrarily. Such sheets of paper were not filed as documents alongwith list of documents relied upon by the respondent in the written statement, they were not filed alongwith the objection. Not being part of the pleadings in the written statement, they could not have been considered by the trial court while passing the order impugned.

5. It has been argued on the basis of an Execution Application filed on 15.05.1998, a copy of which has been filed as Annexure-02 to the Application for Interim Relief, that two consent awards dated 18.08.1996 and 17.08.1997 had been given by the Sole Arbitrator with regard to the assets left by father of the revisionist and the respondents no.1 and 2 Late Shri Chander Dembla with relation to family assets, for example, Cash, FDRs, Shares, Investment, etc. and all business and properties in dispute between the parties. As per such Awards for which Execution Application has already been filed by the revisionist, only Rs. 5,00,000/- from the family assets were reserved for Late Rekha Devi Dembla, the Mother and each of the two sons i.e. Vijay Dembla and Sanjay Dembla were required to give Rs. 2,500/- per month to her as pocket expenses. In the said Execution Application it was stated that since Sanjay Dembla was not disclosing all the properties belonging to their father, the revisionist was reserving his right to file such details of assets after finding them out.

6. It has been argued that the Execution Application filed under Section 36 of the Arbitration and Cancellation Act, 1996 for execution of the two consent awards is still pending before the District Judge.

7. It has been argued that under Section 7(iv-A) of the Court Fees Act as applicable in U.P., for cancellation or adjudging void an instrument or a decree involving money or property, the Court Fee has to be paid on the Valuation of such property. The valuation not being disputed in the Written Statement by the respondent and only loose sheets of paper being provided to the Trial Court for determination of valuation at the time of argument, no reliance on such loose sheets of papers could have been placed by the learned Trial Court for fixing valuation. The valuation which was mentioned in the plaint by the plaintiff alone could have been relied upon.

8. Learned counsel for the revisionist has referred to Section 6 of the Court Fees Act which refers to court fee and Sub Section (3) thereof, where if a question of deficiency in court fees in respect of any claim/ or memorandum of appeal is raised, the trial court shall proceed to record a finding on the Court Fee and whether it had been paid sufficiently or not. If the court finds that the court fee is insufficient it can call upon the plaintiff or the appellant as the case may be to make good the deficiency within time as prescribed by the trial court/appellate court and in case of failure to do so it may reject the plaint or the appeal. The trial court/appellate court may also for sufficient reasons grant time or extend the time for payment of deficiency in court fee and may also give opportunity to the plaintiff or the appellants for filing security in lieu thereof. But in any case no judgment shall be delivered finally on the plaint or the appeal without such deficiency of court fee as determined by the court being made good by the plaintiff for the appellant.

It has been argued that under Section 12 of the Court Fees Act, a question of valuation for the purpose of determination of the amount of fee payable on the plaint or the appeal has to be decided by the Court and such decision shall be final as between the parties to the Suit/Appeal. It has been argued on the basis of such Section of the Court Fees Act, 1870 (as applicable State of U.P.) that the order passed by the trial court in this case has attained finality and therefore, was a Revisable Order as has been held by the Supreme Court in the Case of ***Nami Chand vs. The Edward Mills Company Limited AIR 1953 SC 28*** where the Supreme Court held that the finality attached to the order regarding valuation of Suit as given under Section 12 of the Court Fee Act means that the parties cannot impugne such a decision by preferring an appeal, but that does not confer on such decision a complete immunity from examination in a higher Court. Learned counsel for the petitioner has read out the observations made by the Supreme Court which are as follows:-

"------ in other words, Section 12 when it says that such a decision shall be final between the parties, only makes the decision of the Court on a question of court-fee non-appealable and places it on the same footing as other interlocutory non-appealable orders under the Code and it does no more than that. If a decision under Section 12 is reached by assuming jurisdiction which the Court does not possess or without observing the formalities which are prescribed for reaching such a decision, the order obviously would be revisable by the High Court in the exercise of revisional powers.------."

9. It has been argued by the learned counsel for the revisionist that a perusal of the trial court's order would show that the formalities required for determination of valuation as per procedure prescribed under law were not followed and therefore, the order passed by the trial court fixing valuation and determining court fees as insufficient is liable to be interfered with by this Court in this revision.

10. It has also been argued by the learned counsel for the revisionist that it is evident from a bare perusal of the order under challenge that not only inadmissible evidence was taken into consideration by the trial court but also the fixation of valuation of Suit at Rupees Two Crores was completely without any material on record, and therefore, the order impugned can also to be said to be perverse and liable to be set aside. Learned counsel for the petitioner has placed reliance upon a Coordinate Bench decision of this Court in ***"Abhay Sood vs. Babu Butuk Nath"*** in Civil Revision No. 116 of 2010 decided on 03.12.2012. The Court had observed that in deciding a case, the court should rely upon the evidence led by the parties for deciding the case. *"A court of law cannot function as an "assessor'. The Assessment by the Court of law is nothing short of introduction of a third case, which is not permissible under Indian Judicial System. While rejecting the values as proposed by one either of the parties including the valuation report submitted by one of them, the trial court had enhanced the value of the property to the detriment of the plaintiff, without any substance or evidence. Such a determination amounted to perversity which has been defined as deliberately departing from what is normal and reasonable and against the material on record."*

11. Learned counsel for the respondent no.1, Sri Ratnesh Chandra, on the other hand, has argued on the basis of

the plaint that the Suit was filed for declaration and permanent injunction, the declaration was sought for the Will executed by the Mother of the plaintiff and the defendant, Smt. Rekha Devi Dembla w/o Late Sri Chandra Dembla on 27.04.1998. For determining the validity of a document, the valuation has to be done only on the basis of the value of the properties as mentioned in the document/instrument. He has placed placed before this Court a copy of Will dated 27.04.1998 made out by the Late Mother of the parties wherein she has mentioned that she is owned of 1/3 of all the property owned by her husband including residential houses, shopping complex, plots of land, business, bank accounts, FDRs Shares etc. alongwith her two sons, Vijay Dembla and Sanjay Dembla. She had also mentioned in her Will that being the only daughter of her parents (who died much earlier), she had also inherited property in Village Andal District Burdwan in West Bengal. She had a bank account in her name in the State Bank of Saurashtra and also had movable property and self acquired jewelry for which she was the complete and sole owner and no part of it belonged to anyone but herself. It has been argued that when this fact was placed before the trial court, the trial court passed an order on 20.11.2021 directing the respondent no.1 to place on record the details of all the properties that were involved including movable and immovable, which were either owned solely by Late Rekha Devi Dembla, or in part alongwith her two sons. On such a direction being issued by the trial court, the respondent no.1 had filed a list of such properties. A copy of such list has been filed as Annexure to the application for interim relief, which shows that Late Rekha Devi Dembla owned certain share in residential house, plots of land, shops etc. as well as property in District Burdwan, West Bengal, the total estimated immovable property came to about Rupees Thirty One Crores Thirdy One Lacs and odd. The list of movable properties and their approximate value was also given which including FDR's, bank accounts and shares of more than Rupees Eleven Crores. The total amount of movable property was more than Rupees Twelve Crores Ninty Lacs, the total approximate market value of all the properties of Late Rekha Devi Dembla was more than Rupees Forty Six Crores. It was also mentioned that all the above properties were already under an injunction order passed by the District Judge looking in Execution Case No. 6 of 1998, "Vijay Dembla vs. Sanjay Dembla since 1998 and that the plaintiff had deliberately undervalued the property of Late Rekha Devi Dembla, and if and when such Will is declared void then alone, it could be said that the property has a notional value as submitted in the plaint. The learned counsel for the respondent no.1 has pointed out paragraph 53 and Sub Para (1) thereof as stated in the plaint which says that the Will is incapable of valuation, yet the plaintiff fixed a notional value of the Will at Rs. 35,000/- only, and therefore, paid maximum Court Fee of Rs. 200/- thereon. Learned counsel for the respondent also referred to Section 7(iv-A) of the Court Fee Act, 1870 (as applicable in the State of U. P.) which says that Court Fee has to be paid *ad-valorem* as per the valuation of the property involved in the decree or instrument.

12. Learned counsel for the respondent no.1 has placed reliance upon judgment rendered by the Supreme Court in the case of ***Shailendra Bhardwaj and Ohers vs. Chandra Pal and Another (2013) 1 SCC 579.*** He has referred to

paragraph 2 of the said judgment where the relief as claimed in the plaint is mentioned by the Supreme Court and Paragraph 9, which is the conclusion arrived at after consideration of Section 7 (iv-A) (as applicable to the State of U.P.). He has read out the observations made by the Supreme Court which are as follows:-

"9. The suit, in this case, was filed after the death of the testator and, therefore, the suit property covered by the will has also to be valued. Since Section 7(iv-A) of the U. P. Amendment Act specifically provides that payment of court fee in case where the suit is for or involving cancellation or adjudging/declaring null and void decree for money or an instrument, Article 17 (iii) of Schedule II of the Court Fees Act would not apply. The U. P. Amendment Act, therefore, is applicable in the present case, despite the fact that no consequential relief has been claimed. Consequently, in terms of Section 7 (iv-A) of the U. P. Amendment Act, the court fees have to be computed according to the value of the subject-matter and the trial court as well as High Court have correctly held so."

13. It has been argued by the learned counsel for the respondent no.1 that the order of the trial court dated 20.11.2021 has not been placed on record, which order of the trial court is material and should be considered because it allowed the respondent no.1 the defendant in the said suit, to place on record the correct valuation of the property involved in the Will of Late Rekha Devi Dembla. He has argued that the Shares of various Companies alone that were involved in the Will amounted to more than Rupees Eleven Crores, besides there was property in West Bengal, Jewelery etc. and the plaint itself stated that the Will was incapable of valuation. Yet the trial court somehow came to conclusion that the property was more than Rupees Two Crores and fixed court fee, accordingly.

14. This Court has perused the order impugned passed by the trial court and finds that the trial court no doubt has stated that the plaintiff has not mentioned the details of the properties involved in the Will, a declaration for which was sought, and therefore, it had directed the defendant to produce the list of properties movable and immovable, which were a subject matter of the Will of the testator. After referring to the details as given by the defendant, it has decided that the valuation of the property involved in the instrument i.e. the Will was much more then has been disclosed by the plaintiff, and has thereafter, fixed its value as Rupees Two Crores. How such a valuation of Rupees Two Crores has been arrived at when the document submitted by the defendant showed that it was worth more than Rupees Forty Six Crores is not evident from the order impugned dated 04.04.2022.

15. This Court has perused the Will a copy of which was been handed over to this Court by the learned Counsel for the respondent during the course of the arguments. This Court has also perused the papers filed by the respondent before the trial court in pursuance of the order dated 20.11.2021. This Court has also carefully considered the provisions of Article 17 (iii) of the Second Schedule to the Stamp Act and compared it with the language used in Section 7 (iv-A) of the Stamp Act as amended and applicable to the State of U.P. Article 17(iii) is applicable in cases where the plaintiff seeks to obtain a declaratory decree without consequential reliefs and there is no other provision in the Court

Fees Act for payment of fee relating to relief claimed. Since Section 7 (iv-A) of the Court Fees Act as applicable to the State of U.P. specifically provides for payment of Court Fee in a case where the Suit is for declaration/involving cancellation of an instrument relating to property which most-surely a Will Deed relating to bequeathing of property is all about, the said Section would squarely be applicable. It is apparent that the petitioners/plaintiff had sought the relief of cancellation/declaration of Will as null and void alongwith relief of prohibitory injunction as a consequential relief. The Will Deed related to movable and immovable properties of the Testator and therefore, the Suit had to be valued only on the face value of such a Will till it was declared void by the Court, and was to chargeable to Stamp Duty "ad valorem" i.e. awarding to the value of the property which has been dealt with in the Will or the instrument bequeathing property.

16. The Order dated 04.04.2022 is ***set aside,*** the matter is ***remitted*** to the trial court to decide afresh, both Issues No. 3 and 4 in the Suit, after giving opportunity to both the parties to lead evidence. Since the defendant to the Suit has already filed a list of properties, movable and immovable of the testator, the plaintiff is granted four weeks time to file his list of property, which according to him are involved in the Will prayed by him to be declared void.

17. Accordingly, this petition is ***allowed.***

18. Let such issues to be decided by the Trial Court within a period of three months from the date a copy of this order is produced before it.

(2022)05ILR A1533

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 09.05.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE BRIJ RAJ SINGH, J.

Capital Cases No. 2 of 2020
connected with
Jail Appeal No. 364 of 2020

State of U.P. ...Appellant
Versus
Buddha ...Respondent

Counsel for the Appellant:
Govt. Advocate

Counsel for the Respondent:

A. Criminal Law – Indian Penal Code, 1860 - Sections 302/34, 323/34 & 452/34 – Arm Act, 1878 - Section 4/25 - Conviction under. Imposition of death penalty. Committed double murder and attempted to commit murder of one Shivangi. Convicted and sentenced to death by a trial Court for committing double murder in a cruel and diabolic manner. Case does not fall in the rarest of rare cases and in view of mitigating circumstances death penalty commuted to life term.

B. Criminal Law – Indian Penal Code, 1860 - Section 34 - To attract the applicability of Section 34, it must be proved that there existed a common intention before a person can be convicted vicariously for the criminal act of the other. The ultimate act should be done on furtherance of the common intention. Thus an overt act is not a requirement of law.

Capital case dismissed and Jail Appeal partly allowed. (E-12)

List of Cases cited:-

1. Bachan Singh Vs St. of Pun. AIR 1980 SC 898

2. Machhi Singh & ors. Vs St. of Pun. (1983) SCC 470

3. Ram Naresh Vs St. of Chhattisgarh, (2012)4 SCC 257

4. Sk. Sayed Abdul Hamid Vs St. of M.P. (1998)3 SCC 188

5. Allauddin Mian Vs St. of Bihar (1989)3 SCC 5

6. A. Devendran Vs St. of T.N. (1997)11 SCC 720

7. Om Prakash Vs St. of Har. (1999)3 SCC 19

8. Accused X Vs St. of Mah. (2019)7 SCC 1

(Delivered by Hon'ble Brij Raj Singh, J.)

1. This appeal has been filed under Section 374(2) Cr.P.C. against the judgment and order dated 24.01.2020 passed by the IVth Additional District and Sessions Judge/Special Judge/E.C. Act, Lucknow in Sessions Trial No.471 of 2010, arising out of Case Crime No.577 of 2009, under Sections 302/34, 307/34, 323/34, 452/34 I.P.C. and in Sessions Trial No.472 of 2010 arising out of Case Crime No.580 of 2009, under Section 3/25 Arms Act, Police Station Malihabad, District Lucknow, whereby the appellant was convicted and sentenced under Section 302/34 I.P.C. to death sentence and fine of Rs.25,000/- and in default of payment of fine to undergo simple imprisonment of one year, under Section 307/34 I.P.C. to rigorous imprisonment of ten years and fine of Rs.10,000/- and in default of payment of fine to undergo simple imprisonment of additional six months, under Section 323/34 I.P.C. to simple imprisonment of one year, under Section 452/34 I.P.C. to rigorous imprisonment of seven years and fine of Rs.5,000/- and in default of payment of fine to undergo simple imprisonment of additional three months, under Section 3/25 Arms Act to rigorous imprisonment of two years and fine of Rs.2,000/- and in default of payment of fine to undergo simple imprisonment of additional one month.

2. As per prosecution case, complainant - Rakesh Kumar lodged report at 4.50 A.M. on 12.12.2009. The complainant stated in the F.I.R. that at about 2.00 A.M. in the night of 12.12.2009 his mother Smt. Sursati, wife of late Sukru, nephew Suraj, aged about 10 years and niece Shivangi, aged about 8 years, were sleeping inside the house and the complainant was also sleeping beside them. The brother-in-law of complainant - Buddha, son of Galhu Raidas, resident of Village Raja Kheda, Police Station Mall, was married to the complainant's sister Deshpati prior to 10 years, but there was no cordial relation between them that is why Dehspati was married to Panchram, resident of Village Vilauli Fatehpur, Police Station Barabanki. She had come to meet the family members on Sunday and after meeting them she returned back. Buddha had enmity with the family and he entered into the house along with his two companions and he killed complaint's mother Sursati, nephew Suraj by using sharp-edged weapon and caused serious injuries on his niece Shivngi. Buddha and his companions assaulted the complainant and ran away from the place.

3. On the basis of written Tahrir, the report was lodged against the accused-Buddha and the Investigation Officer, Chandra Bhan Yadav investigated the case and after recording statement the charge sheet was filed in the Court under Sections 302, 307, 323, 452 I.P.C.

4. S.H.O. - Rajveer Singh lodged report on 15.12.2009 at 19.00 hours, in which it has been mentioned that Buddha was arrested by him and on his pointing

out, the Banka was recovered and case was lodged under Section 3/25 Arms Act. The charge sheet was filed under Section 3/25 Arms Act. The charges were framed against Buddha under Sections 302/34, 307, 323, 452/34 I.P.C. on 20.09.2010 and similarly the charges were framed under Section 3/25 Arms Act on 20.09.2020.

5. Since both the cases were arising out of the same case crime, therefore, both the cases were connected together and trial of both the cases were held together.

6. The prosecution had produced as many as 15 witnesses to prove the case. P.W.-1 Rakesh Kumar, P.W.-2 Ram Chandar, P.W.-3 Constable Raj Dev, P.W.-4 Nazrul Hasan, P.W.-5 Rajesh, P.W.-6 Harish Chandra, P.W.-7 Deshpati, P.W.-8 Dr. S.N.S. Yadav, P.W.-9 Dr. Sunil Kumar Yadav, P.W.-10 Vinod Kumar Pandey, P.W.-11 Kishan Lal Jatav, P.W.-12 Retired Inspector Chandra Bhan Yadav, P.W.-13 Constable Tribhuvan Singh, P.W.-14 Raj Veer Singh, P.W.-15 S.I. Amrish Kumar.

7. The prosecution had also produced 35 exhibits on record. The F.S.L. report dated 25.02.2010, 18.05.2010 and 05.03.2010 were also available on record.

8. The accused has produced D.W.-1 Shankar Ram, D.W.-2 Sundar Lal and D.W.-3 Kewal in his defence.

9. The trial court conducted the trial and the statements were recorded of the prosecution witness and thereafter the accused was confronted with circumstances on which prosecution relied upon its case under Section 313 Cr.P.C. on 09.08.2019. The accused denied the prosecution case. In the statement under Section 313 Cr.P.C., he deposed that he was falsely implicated out of enmity. He further denied the recovery of Banka at his pointing out and pleaded that he was falsely implicated under Section 3/25 Arms Act. The accused further deposed before the court below that his wife had married to other person that is why he was falsely implicated in the case on the basis of doubt.

10. After adducing evidence on record, the trial court convicted the accused under Sections 302/34, 307/34, 323/34, 452/34 I.P.C. and Section 3/25 Arms Act and further reference dated 24.01.2020 has been sent to this Court seeking confirmation of death penalty, hence the present appeal.

11. Heard Shri Raza Zaheer, learned *Amicus Curiae* appearing on behalf of convict/respondent/appellant- Buddha and Shri Vimal Kumar Srivastava, learned Government Advocate assisted by Ms. Smiti Sahai, learned Additional Government Advocate for State/appellant.

12. The complainant - Rakesh Kumar (P.W.-1) deposed in examination-in-chief that his mother Smt. Sursati, nephew Suraj, niece Shivangi were sleeping inside the house on 12.12.2009. He further deposed that he was also lying on the cot beside them and Buddha along with his two companions entered into the house. His nephew Suraj raised alarm and he saw that Buddha along with two companions were assaulting his mother. He further stated that out of three assailants someone assaulted him with knife and he caught hold of the hand which was armed with knife. He threw quilt to the assailant and entered into other room which was filled with husk and escaped himself. It was further deposed before the court below that his sister Deshpati was married to Buddha ten years

back, thereafter, his sister was married to other man Panchram, due to which Buddha was having enmity. Buddha used to come to his village and used filthy language and many times he threatened his family to face dire consequences. He further stated that his sister had come to the village but she had returned back to her husband's residence prior to one day from the date of the incident. On the alarm raised by him many villagers came to the place of occurrence and in the meantime, his mother and nephew died. Shivangi was badly injured who was admitted to Trauma Centre by the police. The said facts were narrated by him to his cousin Prem Chandra who read over the contents of the application and the same was signed by him.

13. He admitted in the cross-examination that his sister was married second time but there was no divorce between her and accused-Buddha. She was married in the court. He further admitted that when his sister was present at the house, Buddha had come one or two times and he threatened his sister and the family members. The information was sent to the police regarding the threat given by Buddha but no action was taken by the police. He further admitted in the cross-examination that his sister was married second time in the year of the incident. He stated that there are ten or eleven houses nearby his house and there are three accused. He raised alarm due to which people of the village came to the place of occurrence but he could not tell for how long they stayed there. He could not chase the accused and he jumped in the husk-room. He accompanied the police who raided the house of the accused. The dead-body of the mother was taken away for last rites at 5.00 a.m. He further admitted that his sister was separated from Buddha and no notice was given to Buddha regarding the separation of his sister. He submitted that it is wrong to say that Buddha did not commit the murder. He received injury caused by the accused at the time of occurrence and accused has been charged because of his gruesome act of committing murder.

14. In the cross-examination P.W.-1 admitted that his sister was married in the Court and he was not present at the time of marriage. His sister lived with Buddha for 10 years, thereafter, he and his family members arranged second marriage of his sister. He stated that he received injury on his hand who was examined by the Doctor and he had no idea whether the injury report was available on record.

15. P.W.-2, Ram Chandar was also examined who supported the prosecution case and stated that he was present at the brick kiln where he was working. He admitted that he got information while he was present at brick kiln (Bhattha) and got information that there was incident of loot at his house. He admitted that on the information, he reached to his village where he found that his mother and male child had died and his daughter was badly injured and hospitalized by the police in Trauma Centre. He further admitted that is daughter Shivangi died in Trauma Centre. In his cross-examination, P.W.-2 Ram Chandar admitted that accused - Buddha was brother in law and was of a bad character due to which he was sent to jail number of times. His sister was unhappy due to bad habits of Buddha, therefore, she was married second time with Pancharam. Buddha was having enmity due to the second marriage of his sister and many times he threatened to kill the family members.

16. P.W.-3 Constable Raj Dev, P.W.-4 Nazrul Hasan SSI, P.W.-8 Dr. S.N.S. Yadav,

C.M.O., P.W.-9 Dr. Sunil Yadav, P.W.-10 Vinod Kumar Pandey, P.W.-11 Kishan Lal Jatav S.I., P.W.-12 Inspector Chandra Bhan Yadav, P.W.-13 Tribhuvan Singh, Constable Moharrir, P.W.-14 Raj Veer Singh, Station In-charge, Malihabad, P.W.-15 Amrish Kumar, S.I., are formal witnesses, who have proved the document. P.W.-5, Rajesh brother of P.W.-1 and P.W.-6 Harish Chandra the brother of complainant and P.W.-7 Deshpati, sister of the complainant was also examined before the court. It is worth to be noted here that P.W.-5, P.W.-6 and P.W.-7 are not witnesses of the incident and all the three witnesses have admitted in the cross examination that they were not present at the time of the incident otherwise they have supported the prosecution case to the effect that accused Buddha had enmity with their family due to the reason that Dehspati was married to other man Pancharam. All the three witnesses have stated that due to enmity the accused Buddha has committed the crime by killing Sursati, Suraj and Shivangi.

17. P.W.-3, Constable Raj Dev was examined before the court and he deposed that the Banka was recovered from Buddha and the recovery memo was prepared which was signed by him and he proved the documents of recovery. P.W.-4, S.S.I. Nazrul Hasan deposed before the court that he arrested the accused Buddha on 15.12.2009 and recovered Banka and Section 3/25 Arms Act was imposed by him due to recovery of illegal arms. He further stated before the court that Buddha made confession that he killed Sursati, Suraj and Shivangi. P.W.-8 Dr. S.N.S. Yadav, C.M.O. was also examined who stated that he was posted as Medical Officer in Balrampur Hospital on 12.12.2009 and the post-mortem of all the three deceased was conducted by him. The injuries received by the deceased, have been described by the doctor. The post-mortem report of Shivangi, Sursati and Suraj indicates the nature of injury. Following antemortem injuries were found on the body of Shivangi:-

"Ante-mortem Injuries:-

Multiple incised wound in an area 18 cm X 12 cm present in Rt. Side forehead, face & Rt. side Head joint in-front of Rt. ear size varying from 2.5 cm X 1 cm X Bone deep to 7 cm X 2 cm X Brain cavity deep. Margins of all above injuries are sharp clean cut & well defined.

On-Opening:- *Ecchymosis present underneath all the injuries mentioned above. Frontal bone on Rt. side Rt. maxilla, Rt. Temporal & parietal Bone (Rt.) found cut underneath the injury mentioned above. Meaninges & brain matter Rt. side found cut at multiple places. Subdural haematoma present above the brain. Rt. middle cranial Fossa & Rt. Ant. Cranial fossa fractured. Lt. Ring finger, middle finger & index finger found cut through & through. Amputated part is missing, Margin Sharp clean cut & well defined. Ecchymosis present underneath the injuries."*

Cause of death of Shivangi as opined by the doctor is due to coma as a result of ante-mortem head injury as noted.

Post-mortem report of Sursati indicates five injuries:-

"Ante-Mortem Injuries-

1. Incised wound 2.5 cm X 1 cm X bone deep present on Rt. side face 1 cm below lobule of Rt. ear.

2. Incised wound 3 cm X 1 cm X bone deep present on Rt. side near the below injury no.1.

3. Incised wound 2 cm X 1 cm X Bone deep present on Rt. side Forehead 2 cm above Rt. eyebrow.

4. Incised wound X Bone deep present on Lt. Cheek.

5. Multiple Incised wound in an area 18 cm X 12 cm present in side face & head 2 cm behind outer angle of Lt. eye size varying from 3 cm X 1 cm X Bone deep X 2 cm X Brain cavity deep. Margins of all above injury are sharp clean cut & well defined.

On-Opening:- *Ecchymosis present underneath all the injuries mentioned above. Underlying bone found cut underneath the injury mentioned above. Margins & Brain matter found cut & Multiple places. Sub dural haematoma present above the brain."*

The Doctor has opined that the cause of death is due to coma as a result of ante-mortem injuries as noted.

Post-mortem report of Suraj indicates one injury:-

"Anti-Mortem Injuries:-

1. Multiple incised wound in area 18 cm X 12 cm present on left side face and head 3 cm behind outer angle of the left eye size has varries from 3 cm X 1 cm into bone deep to 8 cm X 3 cm in brain cavity deep.

Margin sharp clean cut and well defined.

On-Opening:- *Ecchymosis present underneath injury left side temporary, left parietal, frontal and occipital bone on left side found cut and depression and underneath the injury noted above.*

- Left side middle cranial fossa fracture margins and brain matter on left side found cut at multiple places.

- Sub dural haematoma present all over the brain."

The doctor has opined that the cause of death is due to coma as a result of ante-mortem injury as noted.

18. P.W.-9, Dr. Sunil Kumar Yadav was also examined before the court below and he proved the fact that he conducted the postmortem. According to him, Suraj aged about 10 years died prior to half day. He has given opinion that death is due to comma and ante-mortem injuries.

19. P.W.-10, Vinod Kumar Pandey was also examined before the court below and he stated that he conducted the Panchayatnama of deceased Suraj. The Panchayatnama was conducted in presence of Shyam Bihari, Shiv Sagar, Laxman Prasad and Vinod Kumar. He proved the exhibit of Panchayatnama and all the related documents were proved by him.

20. P.W.-11, Kishan Lal Jatav deposed in his examination-in-chief that he was posted as S.I. in Police Station Malihabad on 15.12.2009 and he conducted the investigation of Case Crime No.580 of 2009, under Section 3/25 Arms Act. On the pointing out of the witnesses, he prepared the site plan of the place of occurrence and accused Buddha was charge-sheeted by him on the basis of approval dated 04.02.2010 by the prosecution authority. He proved all the related documents. He further admitted in the examination that he investigated the case under Section 3/25 Arms Act and visited the place of occurrence and prepared the site plan. He stated that he recorded the statement of witnesses who were belonging to the police party and there was no independent witness. He further admitted that recovery of weapon was made in his presence.

21. P.W.-12, Retired Inspector, Chandra Bhan Yadav was also examined before the court. He admitted that the aforesaid Case Crime No.577 of 2009, under Sections 307, 302, 452, 323 I.P.C. was registered in his presence. He further deposed before the court that on the

pointing of complainant, the site plan was prepared by him. He also collected the blood stained soil. He also sealed blood stained bed. The entire documents related to the aforesaid proceeding were proved by the witnesses. In his cross-examination, he admitted that S.I., Vinod Kumar Pandey and other police constable reached the place of occurrence, Rakesh Kumar was not appointed as Panch. He further admitted that he did not send the blood stained soil and blood stained clothes for examination by F.S.L. He further admitted that the entire bundle which was sealed by him, was opened before him and they are pertaining to blood stained soil, blood stained cloth and blood stained bed on which case crime numbers are mentioned. P.W.-12 has proved the entire exhibits from exhibit 1 to 14. He also proved exhibit Ka-21 and Ka-19. He admitted that inquest of deceased Sursati was prepared by him on 12.12.2009. He proved the inquest of deceased Sursati as Exhibit - 26.

22. P.W.-13, Constable Tribhuvan Singh was also examined before the court who admitted that he was posted as Constable Moharrir on Police Station Malihabad on 12.12.2009. On the written Tahrir of Rakesh Kumar, the F.I.R. was lodged. Similarly P.W.-14, Raj Veer Singh also deposed that earlier the said case was investigated by S.I., Chandra Bhan Yadav and thereafter, he started the investigation on Parcha - A. He recorded the statement of complainant and his family members. He further admitted that he prepared the recovery memo of blood stained Banka and site plan of the place of incident. He further submitted that on the basis of material collected by him accused Buddha was charge-sheeted by him in Charge Sheet No.38/2010. He proved the related exhibit documents.

23. P.W.-15, S.I. Amrish Kumar was examined before the court below. He submitted that the death memo of Shivangi was made available to him and Panchayatnama was done at 14.20 hours and ended 15.15 hours. He further admitted that the inquest was prepared before him. He proved the inquest report Ex.-30, Ex.-11 and Ex.-12.

24. D.W.-1, Shankar Ram was also examined before the court and he deposed in examination-in-chief that Buddha is known to him who used to ply rickshaw. He further admitted that Buddha was married with Deshpati prior to 6-7 years and she deserted Buddha and married somewhere else. Buddha used to reside with his mother and he came to know in the year 2009 that Buddha was arrested by the police for the reason that he committed murder of his mother-in-law. He further deposed before the court that Buddha was present with him on the night of the incident and he remained with him throughout night. He further deposed that Buddha had never gone to any place. In the cross-examination, D.W.-1 has admitted that his village and village of Buddha is same and he further deposed that Buddha used to ply rickshaw in Lucknow prior to 6-7 years from the date of incident. Buddha was working at brick kiln at Bakshi Ka Talab on the date of incident. Buddha used to come to his house after every 10-15 days. He further admitted that Buddha is his nephew.

25. D.W.-2, Sundar Lal was examined before the court below who deposed that Buddha is son of his elder father and used to work at brick kiln. He further admitted that he was married with working woman at brick kiln and he has no knowledge about the date of the incident. He further

deposed that Buddha met him at the morning and evening on the date of the occurrence and Buddha was falsely implicated. He deposed that Buddha did not commit the crime.

26. D.W.-3, Kewal was also produced before the court, who deposed that the incident took place prior to 10 years. He also admitted that Buddha met him in the morning and at evening on the date of occurrence and Buddha was falsely implicated. He also admitted that Buddha used to ply rickshaw at Lucknow.

27. Learned counsel for the appellant-accused has submitted that there is no source of light mentioned in the F.I.R. as well as in the statement of P.W.-1 and the incident took place on 12.12.2009 at 2.00 a.m. He further submitted that there is no description as to how the informant recognized the accused and parentage of the accused, has not been mentioned. The informant has also not mentioned the type of the weapon used by the accused. It has been further submitted that informant has not stated as to how long he had hidden himself during the commission of offence and when the villagers came to the place of occurrence and it has been submitted that the presence of informant at the place of occurrence is highly doubtful.

28. He has further submitted that P.W.-2, Ram Chandar has admitted that he got information on mobile phone that the loot had taken place at his house, therefore, the entire prosecution story appears to be false and the murder took place in the incident of dacoity. He has further submitted that two witnesses of the recovery, namely, Harish Chandra and Rajesh were not produced in the court and their statements were not recorded. It is argued that in absence of the cross examination of the aforesaid two witnesses, the recovery of Banka is false. The recovery is not genuine and the prosecution case is standing on weak footing.

29. Learned counsel for the appellant-accused has further submitted that defence witness-1, Shankar Ram has clearly stated that accused Buddha was present with him in the night of the incident and on the basis of plea of alibi the accused is liable to be acquitted. He has further submitted that D.W.-2 and D.W.-3 deposed before the court that Buddha met them and told that he was not present at the place of occurrence and strong plea of alibi has been pleaded by the counsel for the appellant.

30. Learned counsel for the accused-appellant has further submitted that trial has not been conducted in fair manner and P.W.-1 was not cross-examined in detail. It is, thus, clear that the evidenciary value of the witnesses were destroyed. Lastly, he has further submitted that death punishment was not warranted and it is not coming from the purview of the rarest of the rare case. There is no material which shows that the accused has grave and serious threat to the society.

31. Learned counsel for the appellant has further submitted that there is no source of light mentioned in the F.I.R. It is admitted case that Buddha is brother-in-law of P.W.-1 and they are closely related to each other. It is always easy to recognize the close acquainted relative, even if there is no source of light. The alarm was raised by Suraj, nephew of P.W.-1 and he woke up and made protest and was caused injury by the accused. There is sufficient time and circumstance to recognize Buddha who is close relative of the appellant. The

argument of the source of light, has no relevance in the present case. His other argument that two witnesses, namely, Harish Chandra and Rajesh were not produced, has also no relevance. It is worth to be mentioned that Banka was proved by P.W.-14 Constable Raj Veer Singh. He admitted that he prepared recovery memo of blood stained Banka and site plan of the place of incident. The F.S.L. report was obtained and it was found that human blood was found on the Banka. In absence of examination of witnesses, Harish Chandra and Rajesh, recovery of Banka cannot be falsified.

32. P.W.-1, Rakesh Kumar has categorically stated that the accused-Buddha entered into his house at 2.00 a.m. on 12.12.2009 and assaulted his mother, Sursati and nephew Suraj by causing injury with Banka and killed them. He also assaulted his niece Shivangi with Banka who was badly injured and later on died in the Trauma Centre. P.W.-1 has submitted that he is witness of the incident and injury was caused to him by Buddha and his companions with knife. He ran away from the place and could hide himself in the husk-room. It is noted that the blood stained sweater Ex. Ka-2 and injury of P.W.-1 Ex. Ka-3 was proved before the court. It is, thus, clear that P.W.-1 is the eye witness of the incident and strong motive has been assigned behind triple murder. The motive is very strong, the accused had come to kill his ex-wife, the daughter of deceased Sursati. It has already come on record that her ex-wife, Deshpati had returned to her husband's house prior to one day. The accused came to kill her but he could not find Deshpati in the house and the deceased were killed by him out of enmity. The strong motive can be attributed to accused in view of the fact that the deceased mother-in-law was instrumental in the second marriage of Deshpati, due to which accused Buddha had strong motive to eliminate her. Since, the two children were also sleeping side by side of their grandmother and were witnesses of the said incident that is why they were also eliminated by the accused and his companion by making assault on them. In cross-examination, P.W.-1 has admitted that his sister Deshpati was married with accused-Buddha prior to ten years. Buddha was a drunkard and did not do anything to earn livelihood for sustenance of the family. His sister was beaten many times by Buddha, that is why P.W.-1 and his family members married his sister second time with Pancharam, the resident of Barabanki. In cross-examination, it is admitted by P.W.-1 that his sister Deshpati had come to his house one day before and she had returned back to her husband's house. It is further stated that Buddha had information that his sister was present in his house that is why he came to kill her but killed his mother Surasati, nephew Suraj and niece Shivangi. It is direct evidence against the accused.

33. P.W.-1 is the eye witness who was present at the place of occurrence. P.W.-1, Rakesh Kumar, P.W.-2 Ram Chandar, P.W.-5, Rajesh, P.W.-6 Harish Chandra, P.W.-7 Deshpati have strongly attributed the strong motive behind killing of Sursati, Suraj and Shivangi. P.W.-7, Deshpati has stated that Buddha was married with her and did not do any work for sustenance of the family and she further stated that she was married second time with Pancharam that is why Buddha had enmity with her and entire family. She further stated that prior to one day she had returned back to her husband's residence. It is further relevant to mention here that the marriage of Buddha with

Deshpati was admitted by D.W.-1 Shankar Ram and D.W.-2 Sundar Lal, thus, the strong motive can be attributed to the accused in the present case.

34. The prosecution witness, Nazrul Hasan P.W.-4, deposed before the court that Buddha was arrested by him on 15.12.2009 and on his pointing out Banka Ex.-5 was recovered which was proved in the court. F.S.L. report on the Banka was also obtained from laboratory and the human blood was found on the Banka. As per report, the recovery of Banka was also proved before the court. S.I. Vinod Kumar Pandey (P.W.-10) had proved the inquest report of deceased Suraj, Shivangi and all the documents relating to the inquest proceedings have been proved in the court.

35. Chandra Bhan Yadav (P.W.-12) had collected the blood stained soil and sweater and exhibit of the same were proved. He proved the entire Ex.-1 to Ex.-14 related to sweater, blood stained soil, box, soil, the bed, the hair of the deceased, bundle, papers etc. The blood stain was found on sweater, Kathari, blood stained soil, Saree, Blouse, Petticoat, Pant.

36. The inquest of deceased, Sursati, the Police Form No.13, photographs were also proved by the I.O. Chandra Bhan Yadav before the court. Similarly, the inquest of deceased Shivangi and all the related papers of Shivangi including postmortem were also proved. The postmortem of Sursati was also proved before the court by Dr. S.N.S. Yadav (P.W.-8). The doctor had deposed before the court that deceased Shivangi and Sursati were assaulted on their face and head with sharp edged weapon and they received many injuries. The doctor further admitted that the deceased died due to ante-mortem injuries. The postmortem of Suraj was also proved by Dr. Sunil Kumar Yadav (P.W.-9) who stated that Suraj also received injury with sharp-edged weapon on his face and head. He also opined that Suraj died due to ante-mortem injuries. The site plan prepared by Chandra Bhan Yadav (P.W.12) also proved as Ex.-Ka-28. He also proved blood stained sweater, box and lighter. The I.O., Raj Veer Singh (P.W.14) also proved the recovery of the Arm and he also proved the site plan and the F.I.R. in Case Crime No.577 of 2009, under Sections 307, 302, 452, 323 I.P.C.

37. D.W.-1 was examined before the court below who said that accused Buddha was present with him in the night of occurrence but in cross examination the said witness has admitted that Buddha used to work at brick kiln situated at Bakshi Ka Talab. The timing was not ascertained as to when he used to come. He admitted that Buddha was his nephew. Similarly, D.W.-2, Sundar Lal deposed before the court that he met with Buddha in the morning and at the evening. It was further stated that Buddha used to work at Barabanki, Sitapur, Lucknow and used to come after one week. D.W.-3 had admitted that Buddha met him in the morning and evening on the date of occurrence. He also admitted that Buddha used to ply rickshaw in Lucknow but he could not tell as to when Buddha used to come to village. All three defence witnesses did not make statement either before Investigating Officer or Superintendent of Police regarding the presence of Buddha. These witnesses could not produced credible evidence to prove the plea of alibi. Thus, the plea of alibi is not trustworthy.

38. P.W.-1 Rakesh Kumar received injury Ex.Ka-3, which is not serious one but he had received two cut wound 1 cm x

1.5 cm, deep muscle on the right palm. The second cut injury 1 cm x 2 cm deep muscle on left side. Though, the doctor was not examined but the injured witness Rakesh Kumar had deposed before the court that he received two injuries on his hand and ran away from the place and could hide himself to save his life. It is, thus, clear that P.W.-1 was assaulted and is the witness of incident, therefore, the prosecution has proved the case beyond reasonable doubt.

39. Accused - Buddha was arrested on 15.12.2009 and there was recovery of 12 bore country made pistol, two live cartridges of 12 bore. The said fact was admitted by Nazrul Hasan (P.W.-4) in the court during examination-in-chief. Exhibits of recovery was also proved and the site plan for recovery, the charge sheet Ex.Ka-17 were proved by Kishan Lal Jatav (P.W-11).

40. The defence counsel has vehemently argued that it was the case of dacoity and murders were committed. P.W.-2 Ram Chandar got information that there was dacoity in his house. It is astonishing as to how the information of loot was given to Ram Chandar (P.W.-2) and why the information of murder was not given to him. It is, thus, clear that the prosecution cannot be disbelieved on the aforesaid statement of Ram Chandar (P.W.-2) who is not witness of the case. The statement of P.W.-1, Rakesh goes to show that accused - Buddha was arrested and on his pointing out the weapon of assault Banka was recovered. There was human blood found on it. P.W.-1 has narrated the manner of assault by the accused and how the deceased were mercilessly assaulted by accused. The prosecution case is intact and cannot be disbelieved. The argument that there is no independent witness of the case, has no relevancy in the present case. The statement of P.W.-1, P.W.-2, P.W.-5, P.W.-6 and P.W.-7, if perused together, the prosecution case is intact and there is no iota of doubt that accused has not committed the crime. Though, there is no independent witness but the entire prosecution case as stated by the aforesaid witnesses goes to show that offence has been committed by the accused. The formal witnesses have proved the documents and the weapon used in furtherance of crime.

41. It is true that capital punishment is discussed in the social and judicial platform frequently. Undisputedly, neither possible nor prudent to state any cursory form which would be applicable to all the cases of criminology whether capital punishment has been prescribed. Each cases should be examined on its own fact in the light of the principles for death penalty, the circumstances of the offender are also required to be taken into consideration along with the circumstance of crime for the reason that life imprisonment is the rule and death sentence is an exception.

42. Before going into the propriety of sentence imposed upon the accused - appellant, we have to deal the cases with respect to the death penalty and a glance is required to be taken in view of the judgment of Hon'ble the Supreme Court.

43. Hon'ble Supreme Court in the case of **Bachan Singh Vs. State of Punjab : AIR 1980 SC 898** has dealt the capital punishment in detail. The relevant paragraph of the judgment is reproduced here-in-below:-

"132. To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex

and intractable issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provision as to death penalty in Section 302 of the Penal Code on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioners argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose. If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelized through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world, if the framers of the Indian Constitution were fully aware -- as we shall presently show they were -- of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235 (2) and 354 (3) in that Code providing for presentence hearing and sentencing procedure on conviction for murder and other capital offences were before the Parliament and presumably considered by it when in 1972-1973 it took up revision of the Code of 1898 and replaced it by the Code of Criminal Procedure, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302 of the Penal Code is unreasonable and not in the public interest. We would, therefore, conclude that the impugned provision in Section 302, violates neither the letter nor the ethos of Article 19."

"200. Drawing upon the penal statutes of the States in U.S.A. framed after Furman v, Georgia, in general, and Clauses 2(a), (b), (c), and (d) of the Indian Penal Code (Amendment) Bill passed in 1978 by the Rajya Sabha, in particular, Dr. Chitale has suggested these "aggravating circumstances":

"Aggravating circumstances : A Court may, however, in the following cases impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed-

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of

murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the CrPC, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.

201. Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other.

204. Dr. Chitaley has suggested these mitigating factors:

"Mitigating circumstances":- In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. It the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society. (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect unpaired his capacity to appreciate the criminality of his conduct.

207. We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence.

209. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354 (3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures albeit incomplete, furnished by the Union of India, show that in the past Courts have inflicted the extreme penalty with extreme infrequency - a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the high-road of legislative policy outlined in

Section 354 (3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

44. The law propounded by Hon'ble the Supreme Court in the case of **Macchi Singh Vs. State of Punjab : (1983) 3 SCC 470** is also worth to be looked into from the point of view of the rarest of rare case and two questions have been formulated to determine the rarest of rare cases in which the death sentence can be awarded. The two questions formulated in the said case is quoted here-in-below:-

"(i) Is there something uncommon, which tenders sentence for imprisonment for life inadequate calls for death sentence ?

(ii) Rather the circumstances of the crime such that there is no alternative, but to impose the death sentence even after according maximum weightage to the mitigating circumstances which speaks in favour of the offender ?"

45. Hon'ble Supreme Court in **Macchi Singh v. State of Punjab (supra)**, then, proceeded to lay down the circumstances in which death sentence may be imposed for the crime of murder and has held as under :

"32. The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent for those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by "killing" a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so "in rarest of rare cases" when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:

I. Manner of commission of murder

33. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or

dastardly manner so as to arouse intense and extreme indignation of the community. For instance,

(i) when the house of the victim is set aflame with the end in view to roast him alive in the house.

(ii) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. Motive for commission of murder

34. When the murder is committed for a motive which evinces total depravity and meanness. For instance when

(a) a hired assassin commits murder for the sake of money or reward

(b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, or

(c) a murder is committed in the course for betrayal of the motherland.

III. Anti-social or socially abhorrent nature of the crime

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

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

IV. Magnitude of crime

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

V. Personality of victim of murder

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

38. In this background, the guidelines indicated in Bachan Singh case will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh case.

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life Imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate

punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

46. In the case of **Macchi Singh Vs. State of Punjab** (supra) Hon'ble the Supreme Court has confirmed the death sentence awarded to Kashmir Singh, as he was found guilty of causing death to a poor child aged about 6 years.

47. The law propounded by Hon'ble Supreme Court in the case of **Bachan Singh and Macchi Singh (supra)** are the source for deciding a case whether death penalty has been awarded and till today the aforesaid cases are the very important to weigh the conviction of death penalty. The principle for looking into the death penalty can be seen in the following three principles:-

(i) Conviction based on circumstantial evidence alone.

(ii) Failure of the prosecution to discharge its onus.

(iii) A case of residual dues.

(iv) Where the other peculiar mitigating circumstances outweighed aggravating circumstances.

48. The issue has again came up before Hon'ble Supreme Court in **Ramnaresh & others v. State of Chhattisgarh : (2012) 4 SCC 257,** wherein the Hon'ble Supreme Court reiterated 13 aggravating and 7 mitigating circumstances as laid down in the case of **Bachan Singh v. State of Punjab (Supra)** required to be taken into consideration while applying the doctrine of "rarest of rare" case. The relevant para of the aforeaid judgment of the Hon'ble Supreme Court reads as under :

"76. The law enunciated by this Court in its recent judgements, as already noticed, adds and elaborates the principles that were stated in the case of Bachan Singh (supra) and thereafter, in the case of Machhi Singh (supra). The aforesaid judgments, primarily dissect these principles into two different compartments - one being the "aggravating circumstances" while the other being the "mitigating circumstances". The Court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the Court. It will be appropriate for the Court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the Court as contemplated under Section 354 (3) of Cr.P.C.

Aggravating Circumstances:

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by

the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 Cr.P.C.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold blooded murder without provocation.

(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating Circumstances:

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a pre-ordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused."

49. In **Sk Abdul Hamid vs. State of MP** reported in **(1998) 3 SCC 188**, while dealing with the question of sentence for the offence of murder, has observed thus:-

"9. Now, coming to the death sentence awarded to the appellants which was confirmed by the High Court, it may be noted that under sub-section (3) of Section 354 CrPC when the conviction is for an offence punishable with death or in the alternative, with an imprisonment for life, the Court is required to state reasons for sentence awarded, and in case of sentence of death, the special reasons for such sentence are to be given. Thus, under the provisions of the Code of Criminal Procedure, life imprisonment for the offence of murder is the rule and death sentence is an exception to be resorted to for special reasons to be recorded by the Court. This Court in a number of decisions has laid down guidelines when the extreme penalty of death sentence is to be awarded. (See: Bachan Singh v. State of Punjab and Machhi Singh v. State of Punjab.) In these cases, it was pointed out that death penalty could be awarded in the rarest of rare cases and the circumstance, when the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner, so as to arouse intense and extreme indignation of the community would fall within the category of the rarest of rare cases.

10. Special reasons given by the trial court in awarding death sentence to the appellants and confirmed by the High Court, were that it was such a cruel act where the appellants have not even spared the innocent child and the motive being to grab the property. We have given our earnest consideration to the question of sentence and the reasons given by the High Court for awarding death sentence to the appellants. Having regard to the guidelines stated above, it may be noticed that in the present case it was not pointed out by the prosecution that it was a cold-blooded murder. There is nothing on record to show how the murder has taken place. In the absence of such evidence, we do not find that the case before us falls within the category of the rarest of rare cases, deserving extreme penalty of death. Keeping in view the afore-stated facts, we are of the view that the ends of justice would be met if we substitute the death sentence with that of life imprisonment under Sections 302/34 IPC, while upholding the appellants' conviction, as recorded by the High Court."

50. In the matter of **Dharam Deo Yadav vs. State of UP** reported in **(2014) 5 SCC 509,** the Supreme Court has held thus:-

"36. We may now consider whether the case falls under the category of rarest of the rare case so as to award death sentence for which, as already held, in Shankar Kisanrao Khade v. State of Maharashtra (2013) 5 SCC 546 this Court laid down three tests, namely, Crime Test, Criminal Test and RR Test. So far as the present case is concerned, both the Crime Test and Criminal Test have been satisfied as against the accused. Learned counsel appearing for the accused, however, submitted that he had no previous criminal records and that apart from the circumstantial evidence, there is no eye-witness in the above case, and hence, the manner in which the crime was committed is not in evidence. Consequently, it was pointed out that it would not be possible for this Court to come to the conclusion that the crime was committed in a barbaric manner and, hence the instant case would

not fall under the category of rarest of rare. We find some force in that contention. Taking in consideration all aspects of the matter, we are of the view that, due to lack of any evidence with regard to the manner in which the crime was committed, the case will not fall under the category of rarest of rare case. Consequently, we are inclined to commute the death sentence to life and award 20 years of rigorous imprisonment, over and above the period already undergone by the accused, without any remission, which, in our view, would meet the ends of justice."

51. In **Kalu Khan v. State of Rajasthan** reported in **(2015) 16 SCC 492,** the Hon'ble Supreme Court has held that:-

"30. In Mahesh Dhanaji Shinde v. State of Maharashtra, the conviction of the appellant-accused was upheld keeping in view that the circumstantial evidence pointed only in the direction of their guilt given that the modus operandi of the crime, homicidal death, identity of 9 of 10 victims, last seen theory and other incriminating circumstances were proved. However, the Court has thought it fit to commute the sentence of death to imprisonment for life considering the age, socio-economic conditions, custodial behaviour of the appellant-accused persons and that the case was entirely based on circumstantial evidence. This Court has placed reliance on the observations in Sunil Dutt Sharma v. State (Govt. of NCT of Delhi) as follows: (Mahesh Dhanaji case, SCC p. 314, para 35)

"35. In a recent pronouncement in Sunil Dutt Sharma v. State (Govt. of NCT of Delhi), it has been observed by this Court that the principles of sentencing in our country are fairly well settled -- the difficulty is not in identifying such principles but lies in the application thereof. Such application, we may respectfully add, is a matter of judicial expertise and experience where judicial wisdom must search for an answer to the vexed question -- Whether the option of life sentence is unquestionably foreclosed? The unbiased and trained judicial mind free from all prejudices and notions is the only asset which would guide the Judge to reach the "truth'."

31. In the instant case, admittedly the entire web of evidence is circumstantial. The appellant-accused's culpability rests on various independent evidence, such as, him being "last seen" with the deceased before she went missing; the extra-judicial confession of his co-accused before PW 1 and the village members; corroborative testimonies of the said village members to the extra-judicial confession and recovery of the deceased's body; coupled with the medical evidence which when joined together paint him in the blood of the deceased. While the said evidence proves the guilt of the appellant-accused and makes this a fit case for conviction, it does not sufficiently convince the judicial mind to entirely foreclose the option of a sentence lesser than the death penalty. Even though there are no missing links in the chain, the evidence also does not sufficiently provide any direct indicia whereby irrefutable conclusions can be drawn with regard to the nexus between "the crime" and "the criminal". Undoubtedly, the aggravating circumstances reflected through the nature of the crime and young age of the victim make the crime socially abhorrent and demand harsh punishment. However, there exist the circumstances such as there being no criminal antecedents of the appellant-accused and the entire case having been rested on circumstantial evidence including

the extra-judicial confession of a co-accused. These factors impregnate the balance of circumstances and introduce uncertainty in the "culpability calculus" and thus, persuade us that death penalty is not an inescapable conclusion in the instant case. We are inclined to conclude that in the present scenario an alternate to the death penalty, that is, imprisonment for life would be appropriate punishment in the present circumstances."

52. In **Allauddin Mian v. State of Bihar** reported in **(1989) 3 SCC 5**, it was laid down that unless the nature of crime and the circumstances of the offender reveal that the criminal was a menace to the society and the sentence of life imprisonment would be altogether inadequate, the court should ordinarily impose a lesser punishment and not the extreme punishment of death which should be reserved for exceptional cases only.

53. In **A. Devendran v. State of Tamil Nadu** reported in **(1997) 11 SCC 720,** which is a case of triple murder, the Hon'ble Supreme Court held that the trial court was not justified in awarding death sentence as the accused had no pre-meditated plan to kill any person and as the main object was to commit robbery.

54. In **Om Prakash v. State of Haryana** reported in **(1999) 3 SCC 19**, a dispute over a small house between two neighbours resulted in the murder of seven persons. Death sentence was imposed on the accused by the trial court which was confirmed by the appellate court. The Hon'ble Supreme Court observed that the bitterness increased to a boiling point and the agony suffered by the appellant and his family members at the hands of the other party, and for not getting protection from the police officers concerned or total inaction despite repeated written prayers, goaded or compelled the accused to take law in his own hands which culminated in the gruesome murders. The accused was a BSF Jawan aged 23 at the time of incident. The Hon'ble Supreme Court commuted the death penalty to imprisonment for life.

55. In the case of **Accused 'X' v. State of Maharashtra,** reported in **(2019) 7 SCC 1,** the Supreme Court, while considering the post-conviction mental illness of accused/death row convict as mitigating factor, has observed as under:

"55. Having observed some of the general aspects of sentencing, it is necessary to consider the aspect of post-conviction mental illness as mitigating factor in the analysis of ''rarest of the rare' doctrine which has come into force post Bachan Singh case (supra).

56. As a starting point, we need to refer to Piare Dusadh v. King Emperor, AIR 1944 FC 1, that has already recognized pos-conviction mental illness as a mitigating factor in the following manner: (SCC OnLine FC)

"Case No. 47-The applicant in this case was convicted by a Special Judge of the offence of murder and was sentenced to death on 30.9.1942. His appeal to the Allahabad High Court was dismissed and the sentence of death was confirmed.

The appellant is a young man of 25 who has been twice widowed. His victim was his aunt, 30 years of age, whose husband (Kanchan) had about six years previously murdered his own brother, appellant's father. Kanchan was

sentenced to death for the murder, but lost his reason while awaiting the execution of the death sentence, and is now detained as a lunatic.

The evidence in this case leaves no room for doubt that the appellant was rightly convicted of murder. There is some confusion as to the exact motive for the undoubtedly brutal assault of which the appellant made his aunt the victim. The prosecution alleged that the appellant being a widower was chagrined by the refusal of his aunt to become his mistress. In his statement before, the Special Judge he said that another uncle (P.W. 7) who according to the appellant was behind the prosecution was on terms of improper intimacy with the deceased and resented even small acts of kindness on the part of the deceased towards the appellant. In the appeal preferred by him through the jail authorities to the High Court, the appellant stated that his aunt was a woman of loose character and was pursuing him with unwelcome attentions. The previous history of this family indicates that the appellant probably suffers from an unbalanced mind. The nature and ferocity of the assault upon his aunt appear to confirm this. In committing the offence the appellant must have been actuated by jealousy or by indignation either of which would tend further to disturb the balance of his mind. He has besides been awaiting the execution of his death sentence for over a year. We think that in this case a sentence of transportation for life would be more appropriate than the sentence of death. We accordingly reduce the sentence of death to one of transportation for life and subject to this modification dismiss the appeal."

(emphasis supplied)

However, this case does not provide any guidelines or the threshold for evaluating what kind of mental illness needs to be taken into consideration by the Courts.

57. We note that, usually, mitigating factors are associated with the criminal and aggravating factors are relatable to commission of the crime. These mitigating factors include considerations such as the accused's age, socio-economic condition etc. We note that the ground claimed by "accused x' is arising after a long time-gap after crime and conviction. Therefore, the justification to include the same as a mitigating factor does not tie in with the equities of the case, rather the normative justification is founded in the Constitution as well as the jurisprudence of the "rarest of the rare' doctrine. It is now settled that the death penalty can only be imposed in the rarest of the rare case which requires a consideration of the totality of circumstances. In this light, we have to assess the inclusion of post-conviction mental illness as a determining factor to disqualify as a "rarest of the rare' case.

59. All human beings possess the capacities inherent in their nature even though, because of infancy, disability, or senility, they may not yet, not now, or no longer have the ability to exercise them. When such disability occurs, a person may not be in a position to understand the implications of his actions and the consequence it entails. In this situation, the execution of such a person would lower the majesty of law.

71.1 That the post-conviction severe mental illness will be a mitigating factor that the appellate court, in appropriate cases, needs to consider while sentencing an accused to death penalty."

56. In the light of above proposition of law, we are required to scrutinize the case in hand minutely to find out whether the case falls under the category of "rarest

of the rare case", whether imposition of death penalty, which is an exception, would be the only appropriate & meaningful sentence and whether imprisonment for life which is the rule would not be adequate and would not meet the ends of justice.

57. The court has awarded the death punishment making observation that accused - Buddha committed gruesome act of murder of mother of P.W.-1 aged about 65 years, nephew of P.W.-1 Suraj aged about 10 years and niece of P.W.-1 Shivangi aged about 6 years by using sharp aged weapon i.e. Banka. The court has recorded the finding to award death punishment for the reason that deceased Sursati was caused many injuries on her face and neck, Incised wound 2.5 cm X 1 cm X bone deep present on right side face. Incised wound 3 cm X 1 cm X bone deep present on right side near the below injury no.1. Incised wound 2 cm X 1 cm X Bone deep present on right side forehead 2 cm above right eyebrow. Incised wound bone deep present on left cheek. Multiple Incised wound in an area 18 cm X 12 cm present on face & head. Similarly, Suraj 10 years old received Multiple incised wound in area 18 cm X 12 cm present on left side face and head 3 cm behind outer angle of the left eye size has varies from 3 cm X 1 cm into bone deep to 8 cm X 3 cm in brain cavity deep. Similarly, 6 years' old Shivangi also received multiple incised wound in an area 18 cm X 12 cm present in right side face & right side head joint in-front of right ear size varying from 2.5 cm X 1 cm X Bone deep to 7 cm X 2 cm X Brain cavity deep. The court below has recorded the finding that looking into the inhuman act of the accused, it is obvious that he does not deserve any mercy as he committed murder of three deceased. All the three deceased were innocent and helpless and Buddha had enmity with his wife - Deshpati but he committed murder of the three innocent person and the said act is not pardonable. The court below recorded the finding that in view of the law declared by Hon'ble the Supreme Court in the Case of **Bachan Singh and Macchi Sigh (supra)**, the case is coming within the purview of the aggravating circumstances and death punishment was awarded on the aforesaid facts. The court below has further mentioned that though the age of the accused is 50 years and at the time of the incident he was aged about 40 years but there is no mitigating circumstance and he is liable to be punished for the death sentence.

58. The law propounded by Hon'ble the Supreme Court in the case of **Ramnaresh (supra)** is relevant in the present facts and circumstances of the case, particularly, the mitigating circumstances which is discussed in para 76 of the said judgment. Seven points have been formulated for mitigating circumstances:-

"(1) The manner and circumstances in and under which the offence was committed and number (7) wherein it is propounded that upon the testimony of a sole eye-witness whether the death penalty can be converted to life imprisonment.

59. In the present case, we see that there is only one eye-witness i.e. P.W.-1, who has seen the occurrence though he was able to prove the case beyond reasonable doubt but in our opinion, it is not the case coming within the purview of rarest of rare case to award capital punishment on the basis of the sole eye witness i.e. P.W.-1. The point no.1 regarding the mitigating circumstances discussed in the case of

Ramnaresh (supra) is also relevant because in the present case, the accused had gone to kill his wife, the sister of P.W.-1, who had performed second marriage, but she was not found and in the aggravated mental situation he found his mother-in-law and two children in the house and killed them. The point no.5 of mitigating circumstances in the case of **Ramnaresh (supra)** is also relevant which discusses possible behaviour could have effect of giving rise to mental imbalance in that given situation like persistent harassment or in fact leading to such a peak of human behaviour that, in that circumstance of the case, the accused believed that he was morally justified in committing the offence. In the present case, the fact is borne out that he was upset because his wife had married second time leaving him aside and he was getting continuous and persisting pain, perhaps that was cause to commit the crime.

60. It is true that the manner in which crime was committed with Banka, is brutal, cruel and gruesome but looking into the aforesaid circumstances, mental state of the accused and case of single testimony of eye witness, and persistent harassment due to separation of wife, the offence was committed. This could be on account of frustration, mental stress or because of emotional disorder which would be mitigating circumstances to be taken note of.

61. Shri Raza Zaheer, learned *Amicus Curiae* appearing on behalf of the appellant-Buddha has argued that the trial Court was not right in holding that there was a common intention among the convict/appellant and two other unknown assailants to cause the death of the deceased so as to invoke Section 34 IPC, hence conviction and sentence of the convict/appellant with the aid of Section 34 I.P.C. is liable to be set-aside.

62. To attract applicability of Section 34 IPC, the prosecution is under an obligation to establish that there existed a common intention before a person can be vicariously convicted for the criminal act of another. The ultimate act should be done in furtherance of common intention. Common intention requires a pre-arranged plan, which can be even formed at the spur of the moment or simultaneously just before or even during the attack. For proving common intention, the prosecution can rely upon direct proof of prior concert or circumstances which necessarily lead to that inference. However, incriminating facts must be incompatible with the innocence of the accused and incapable of explanation by any other reasonable hypothesis. Thus, an overt act is not a requirement of law for Section 34 IPC to operate but prosecution must establish that the persons concerned shared the common intention, which can be also gathered from the proved facts.

63. When this Court apply the aforesaid principles relating to applicability of Section 34 IPC to the facts of the present case, this Court is of the view that convict/appellant is entitled to the benefit of doubt on the ground that it cannot be with certainty held that convict/appellant had common intention, viz. none of the prosecution witnesses deposed before the trial Court that before the incident, convict/appellant and other two unknown assailants had met and planned the crime nor the prosecution had stated that the convict/appellant armed with deadly weapon had entered the house of the informant and committed the murder of the

deceased but the evidence of the informant P.W.1-Rakesh Kumar shows that on the date of the incident at about 2:00 a.m., when convict/appellant and two other assailants entered into the house, his nephew raised alarm and on his alarm, he woke up and saw that convict/appellant and other two assailants assaulted his mother. Thus, the prosecution has failed to establish the common intention of the convict/appellant to murder the deceased, hence conviction and sentence of the convict/appellant for the offence with the aid of Section 34 I.P.C. is not sustainable.

64. In view of the foregoing discussions, we pass the following order :--

(A) Capital Case No. 02 of 2020

As the appellant has murdered the deceased, which was his individual act and he is responsible for the same, hence he is liable to be convicted for the offence under Section 302, 307, 323, 452 I.P.C. as **''simpliciter'.**

Accordingly, this Court modify the conviction of the appellant for the offences under Sections 302/34, 307/34, 323/34 and 452/34 I.P.C to Section 302, 307, 323, 452 I.P.C. as **''simpliciter'** and set-aside the death sentence of the convict/appellant under Section 302 I.P.C. and instead sentence him to imprisonment for life.

Convict/appellant Buddha is in jail and shall serve out the sentence.

Subject to this alteration in the sentence, **Capital Case No. 1 of 2020 is dismissed.**

(B) Jail Appeal No. 364 of 2020 :-

The instant appeal is **partly allowed**. This Court modify the conviction of the appellant for the offences under Sections 302/34, 307/34, 323/34 and 452/34 I.P.C to Section 302, 307, 323, 452 I.P.C. as **''simpliciter'** and set-aside the death sentence of the convict/appellant under Section 302 I.P.C. and instead sentence him to imprisonment for life.

Appellant **Buddha** is in jail and shall serve out his sentence.

65. Before parting, we record our appreciation rendered by Shri Raza Zaheer, learned *Amicus Curiae* who assisted this Court in the disposal of the above-captioned reference and appeal, therefore, this Court deem it appropriate to direct for payment to Shri Raza Zaheer, learned *Amicus Curiae* for his valuable assistance as per Rules of the Court.

66. Let Shri Raza Zahir, learned *Amicus Curiae* be paid remuneration as per Rules of the Court within a month.

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

(2022)05ILR A1556
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.05.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ Tax No. 378 of 2022

M/s Awlesh Kumar Singh ...Petitioner
Versus
U.O.I. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Krishna Mohan Singh, Sri Aloke Kumar

Counsel for the Respondents:
A.S.G.I., Sri Praveen Kumar, Ms. Sheetla Prasad Gound, Sri Gaurav Mahajan

A. Civil Law – Income Tax Act , 1961 - Section 34 (1-A)- Reason to believe- Meaning Scope and Consequences- words 'reason o believe' suggest that belief must be that of an honest and reasonable person based upon reasonable grounds and the I.T.O. may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour.

B. Civil Law – Income Tax Act , 1961 - Section 47 (a) - important words as used in Section 47 (a) of th Act are stronger than the words "is satisfied". The belief entertained by the I.T.O. must not be arbitrary or irrational. It must be based on reasons which are relevant and material. The use of the words "reason to believe" in Section 147 has to be interpreted schematically and the as the liberal interpretation of the words would have the consequences of conferring arbitrary power on the assessing officer.

C. Change of Opinion- the words "change of opinion implies formulation of opinion and then a change thereon. In terms of assessment proceedings, it means formulation of belief by an assessing officer resulting from what he thinks on a particular question.

D. Reassessment of income under Section 147 of the Income Tax Act, 1961 – Cannot be made and change of opinion. Accordingly notice issued under Section 148 of I.T. Act quashed (para 23, 25 & 26)

Writ Petition allowed with cost of Rs. 5000. (E-12)

List of Cases cited:-

1. St. of U.P. & ors. Vs Aryaverth Chawal Udyog & ors. (2015)17 SCC 324(Paras 28-50)

2. The Commissioner of Sales Tax, U.P. Vs M/s Bhagwan Industries (P) Ltd., Lucknow AIR 1973 SC 370(Para 9 and 10)

3. M/s Parmarth Steel & Alloys Pvt. Ltd. Vs St. of U.P. & ors. Writ Tax No. 874/2010(Decided on 28.03.2022)(Para 17)

4. Shivnath Singh Vs Appellate Assistant CIT (1972)3 SCC 234(Para 10)

5. U.O.I. & ors. Vs M/s Rai Singh Dev Singh Bisht & ors. AIR 1974 SC 478

6. I.T.O. Vs Lakhmani Mewal Das (1976)3 SCC 757(Para 11 and 12)

7. M/s S. Gangasaran & sons (P) Ltd. Calcutta Vs I.T.O. & ors. (1981)3 SCC 143(Para 6)

8. Income Tax Officer, Ward No. 62 Vs Tech Span India Pvt. Ltd. & anr. (2018)6 SCC 685 (Para 14-18)

9. Radha Krishna Industries Vs St. of H.P. (2021)6 SCC 771

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Jayant Banerji, J.)

1. Heard Sri Aloke Kumar, learned counsel for the petitioner and Sri Praveen Kumar, learned Senior Standing Counsel for the Income Tax Department.

2. This writ petition has been filed praying for the following relief:-

"(i) Issue a suitable writ, order or direction in the nature of certiorari quashing the notice dated 31.03.2021 and 22.11.2021(contained as Annexure 2 and 4 to the writ petition) issued by respondent n.2 for reassessment under Section 148 and 143(2) read with Section 147 of the Act for the assessment year 2017-18.

(i-a) Issue a suit writ, order or direction in the nature of certiorari quashing the order dated 30/03.2022 (contained as Annexure No.8 to the writ

petition) passed by the respondent no. 3 under section 147 read with section 144B of the Income Tax Act, 1961 for the assessment year 2017-18"

Facts

3. Briefly stated facts of the present case are that the petitioner derives income from civil contract work. For the Assessment Year 2017-18, the petitioner filed a return of income on 21.03.2018 along with audit report dated 02.11.2017. The case of the petitioner was selected for scrutiny and notice under section 143(2) of the Income Tax Act, 1961 (hereinafter referred to as "the Act, 1961") was issued on 13.08.2018 which was followed by notices under Section 142(1) of the Act, 1961. A show cause notice dated 07.12.2019 was also issued to the petitioner and the petitioner submitted entire details as required by the assessing officer.

4. Vide notice dated 23.11.2019 under Section 142(1) of the Act, 1961 issued during the course of regular assessment proceedings, the assessing officer required the petitioner to furnish reply on several points and also required him to furnish entire details of all the accounts maintained with the Bank/Post Office/Financial Institutions and **the cash deposited by him in the Bank during the demonetization period.** Every details with regard to cash deposit were also required to be furnished. The petitioner furnished the entire details which were examined by the assessing authority. After thorough scrutiny of the case, the assessment order under Section 143(3) of the Income Tax Act, 1961 was passed on 25.12.2019 by the assessing officer, assessing the petitioner's total income at Rs. **44,74,620/-.** He made an addition of Rs. 2,00,000/-.

5. Thereafter, notice dated 31.03.2021 under Section 148 of the Income Tax Act, 1961 for the Assessment Year 2017-18 was issued by the assessing officer to the petitioner. **The assessing officer recorded "reason to believe" as under:-**

" As per the information received from the Investigation Wing under category of High Risk CRIU/VRU Information on Insight Portal of he Department, the ***assessee has deposited cash in aggregating sum of Rs. 4,97,24,000/- during demonetization period*** *which is being treated as undisclosed income during the previous year related to the assessment year under consideration".*

6. Aggrieved with the aforesaid notice for reassessment under Section 148 of the Income Tax Act, 1961, the petitioner has filed the present writ petition on 07.02.2022 which was subsequently amended. The reliefs sought in the present writ petition have been quoted above.

7. **In paragraph 8 of the counter affidavit dated 25.04.2022, the respondent no.2 has stated as under:-**

(8) That in the present case, since there was information that the assessee has undertaken huge financial transactions, much beyond the taxable limit, considering all the details and materials available on record, the ***case was selected for reassessment under Section 147/148 of Income Tax Act, 1961 as per CBDT Circular F.No. 225/40/2921/ITA-II dated 04.03.2021 which prescribes for guidelines regarding categories of cases to be considered as 'potential cases" for taking action under Section 148 of the Act by the jurisdictional assessing officer. The present case is covered under Clause-1(iii) (a) of the aforesaid circular.*** For the kind perusal of this Hon'ble Court, a true

photostat copy of the circular dated 04.03.2021 is being filed herewith and marked as Annexure CA-2 to the present affidavit.

8. In paragraph 8 of the counter affidavit, the respondent no.2 has referred and relied upon the **Circular of CBDT dated 04.03.2021**, which is reproduced below.

F. No. 225/40/2021/ITA-II
Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes
Ndw Delhi, the 4th March, 2021.
To

All. Pr. Chief Commissioner of Income Tax/Chief Commissioners of Income Tax.

Madam/Sir,

Subject:- Instructions regarding selection of cases for issue of notice under section 148 of the Income Tax Act, 1961-regarding.

1. The Central Board of Direct Taxes (Board), in exercise of its power ***under section 119 of the Income Tax Act, 1961 (Act), with an objective of streamlining the process of selection of cases for issue of notice under section 148 of the Act, hereby directs that the following categories of cases be considered as 'potential cases' for taking action under section 148 of the Act by 31.03.2021 for the A.Y. 2013-14 to A.Y. 2017-18 by the jurisdiction Assessing Officer (JAO):***

i. Cases where there are Audit Objection (Revenue/Internal) which require section under section 148 of the Act;

ii.Cases of information from any other Government Agency/Law Enforcement Agency which require action under section 148 of the Act;

iii. ***Potential cases including:-***

(a) Reports of Directorate of Income -tax (Investigation),

(b) Reports of Directorate of Intelligence & Criminal Investigation.

(c) Cases from Non-Filer Management System (NMS) & other cases as flagged by the Directorateof Income -tax (System) as per risk profiling;

iv. Cases where information arising out of field survey section, regarding action under Section 148 of the Act.

v. Cases of information received from any Income -Tax authority regarding action under Section 148 of the Act with the approval of the Chief Commissioner of Income Tax Concerned.

2. No other category of cases, except the above, shall be considered for taking action under section 148 of the Act by the JAO.

3. ***It is clarified that action under Section 148 of the Act shall be taken by the Assessing Officer in respect of the above categories of cases after forming a reasonable belief that income chargeable to tax has escaped assessment and reasons to believe shall be recorded and required sanction as per section 151 of the Act shall be obtained before issuing notice under section 148 of the Act.***

4. These instructions shall not be applicable to the Central charges and International Taxation charges for which separate instructions are being issued.

5. Issues with the approval of the Chairman, CBDT.

(Rajarajeswari R)"

Submissions

9. Learned counsel for the petitioner submits that there was no basis or material before the assessing authority for recording 'reasons to believe' and consequently

proceeding under Section 148 of the Income Tax Act, was itself without jurisdiction.

10. Learned counsel for the respondents submits that **notice under section 148 of the Income Tax Act, 1961 was issued on the basis of Circular dated 04.03.2021 inasmuch as, the petitioner's case was considered as 'potential case'** for taking action under section 148 of the Act,1961 by the assessing authority and averments in this regard has been made in paragraph 8 of the counter affidavit. He further submits that the petitioner has not submitted any objection to the 'reasons to believe' recorded by the assessing authority, instead he directly filed the present writ petition. Since the petitioner has not submitted any objection to "reasons to believe" recorded by assessing authority, therefore, writ petition is not **maintainable.**

Discussion & Findings

11. We have carefully considered the submissions of learned counsels for the parties.

12. In the impugned reassessment order dated 30.03.2022, the respondent no.3 has recorded conclusion, as under:-

"Considering the facts of the case, the submission/documentary evidences filed by the assessee in response to show cause, were found not verifiable and acceptable to justify the genuineness of transactions. Notice u/s 133(6) of the I.T. Act, dated 09.02.2021 issued for same amount of Rs. 1,05,00,000/- from department. In notice u/s 133(6), it is seen that in notice 133(6), details have been sought regarding source of cash deposits in SBN Notes, amounting to Rs. 1,05,00,000/- in bank accounts during the period 08.11.2016 to 31.03.2017. Period mention in notice u/s 133(6) is specific, not for period 01.04.2016 to 31.03.2017 (for F.Y. 2016-17).

Once again, it has stated that the submission/documentary evidences filed by the assessee, were found not verifiable and acceptable to justify the genuineness of transactions.

Subject to the above remarks, the amount of Rs. 38,83,000/- is added as undisclosed income** and the assessment is completed u/s147 r.w.s. 144B of IT Act, 1961 **after adding Rs. 38,83,000/- as undisclosed income."

13. The **first question** that needs to be considered in the present writ petition is as to **whether "reason to believe" recorded by the assessing officer was totally unfounded and whether it was based on "change of opinion".**

Reason to Believe-Meaning, Scope and Consequence:-

14. In the case of **State of Uttar Pradesh & Others vs. Aryaverth Chawal Udyog & Others** reported in **(2015) 17 SCC 324** (paragraphs 28 to 30), the Hon'ble Supreme Court has held as under:

*"28. This Court has consistently held that **such material on which the assessing Authority bases its opinion must not be arbitrary, irrational, vague, distant or irrelevant.** It must bring home the appropriate rationale of action taken by the assessing Authority in pursuance of such belief. **In case of absence of such material, this Court in clear terms has held the action taken by assessing Authority on such "reason to believe" as arbitrary and bad in law.***

In case of the same material being present before the assessing Authority during both, the assessment proceedings and the issuance of notice for re-assessment proceedings, it cannot be said by the assessing Authority that "reason to believe" for initiating reassessment is an error discovered in the earlier view taken by it during original assessment proceedings. (See: Delhi Cloth and General Mills Co. Ltd. v. State of Rajasthan, (1980) 4 SCC 71).

29. ***The standard of reason exercised by the assessing Authority is laid down as that of an honest and prudent person who would act on reasonable grounds and come to a cogent conclusion.*** *The necessary sequitur is that a mere change of opinion while perusing the same material cannot be a "reason to believe" that a case of escaped assessment exists requiring assessment proceedings to be reopened. (See: Binani Industries Ltd. v. CCT,(2007) 15 SCC 435; A.L.A. Firm v. CIT, (1991) 2 SCC 558). If a conscious application of mind is made to the relevant facts and material available or existing at the relevant point of time while making the assessment and again a different or divergent view is reached, it would tantamount to "change of opinion".*

If an assessing Authority forms an opinion during the original assessment proceedings on the basis of material facts and subsequently finds it to be erroneous; it is not a valid reason under the law for re-assessment. ***Thus, reason to believe cannot be said to be the subjective satisfaction of the assessing Authority but means an objective view on the disclosed information in the particular case and must be based on firm and concrete facts that some income has escaped assessment.***

30. ***In case of there being a change of opinion, there must necessarily be a nexus that requires to be established between the "change of opinion" and the material present before the assessing Authority.*** *Discovery of an inadvertent mistake or non-application of mind during assessment would not be a justified ground to reinitiate proceedings under Section 21(1) of the Act on the basis of change in subjective opinion (CIT v. Dinesh Chandra H. Shah, (1972) 3 SCC 231; CIT v. Nawab Mir Barkat Ali Khan Bahadur, (1975) 4 SCC 360)."*

(emphasis supplied)

15. In the case of **The Commissioner of Sales-Tax U.P. vs. M/s. Bhagwan Industries (P) Ltd., Lucknow, AIR 1973 SC 370 (Paras 9 & 10)**, Hon'ble Supreme Court has held as under:

"9. The controversy between the parties has centered on the point as to whether the assessing authority in the present case had reason to believe that any part of the turnover of the respondent had escaped assessment to tax for the assessment year 1957-58. Question in the circumstances arises as to what is the import of the words "reason to believe", as used in the section. ***In our opinion, these words convey that there must be some rational basis for the assessing authority to form the belief that the whole or any part of the turnover of a dealer has, for any reason, escaped assessment to tax for some year. If such a basis exists, the assessing authority can proceed in the manner laid down in the section. To put it differently, if there are, in fact, some reasonable grounds for the assessing authority to believe that the whole or any part of the turnover of a dealer has escaped assessment, it can take action under the section. Reasonable grounds necessarily postulate that they must be***

germane to the formation of the belief regarding escaped assessment. If the grounds are of an extraneous character, the same would not warrant initiation of proceedings under the above section. If, however, the grounds are relevant and have a nexus with the formation of belief regarding escaped assessment, the assessing authority would be clothed with jurisdiction to take action under the section. Whether the grounds are adequate or not is not a matter which would be gone into by the High Court or this Court, for the sufficiency of the grounds which induced the assessing authority to act is not a justiciable issue. What can be challenged is the existence of the belief but not the sufficiency of reasons for the belief. At the same time, it is necessary to observe that the belief must be held in good faith and should not be a mere pretence.

10. It may also be mentioned that at the stage of the issue of notice the consideration which has to weigh is ***whether there is some relevant material giving rise to prima facie inference that some turnover has escaped assessment. The question as to whether that material in sufficient for making assessment or re-assessment under section 21 of the Act would be gone into after notice is issued to the dealer and he has been heard in the matter or given an opportunity for that purpose. The assessing authority would then decide the matter in the light of material already in its possession as well as fresh material procured as a result of the enquiry which may be considered necessary."***

(Emphasis supplied)

16. A Division Bench of this Court, while dealing with the validity of the re-assessment notice under Section 148 in **Writ Tax No.874 of 2010 (M/S Parmarth Steel And Alloys Pvt. Ltd. vs. State of U.P. and Others,** decided on 28.03.2022, held as under (Para 17) :

"17. It is settled principles of law that proceedings under Section 21 of the Act, 1948 can be initiated if the material on which the Assessing Authority bases its opinion, is not arbitrary, irrational, vague, distant or irrelevant. There must be some rational basis for the assessing authority to form the belief that the whole or any part of the turnover of a dealer has, for any reason, escaped assessment to tax for some year. If such a basis exists, the assessing authority can proceed in the manner laid down in Section 21 of the Act, 1948. If the grounds are of an extraneous character, the same would not warrant initiation of proceedings under the above section. If, however, the grounds are relevant and have a nexus with the formation of belief regarding escaped assessment, the assessing authority would be clothed with jurisdiction to take action under the section. Whether the grounds are adequate or not is not a matter which would be gone into by the High Court for the sufficiency of the grounds which induced the assessing authority to act is not a justiciable issue. The question as to whether that material in sufficient for making assessment or re-assessment under section 21 of the Act would be gone into after notice is issued to the dealer and he has been heard in the matter or given an opportunity for that purpose. The assessing authority would then decide the matter in the light of material already in its possession as well as fresh material procured as a result of the enquiry which may be considered necessary.

17. In the case of **Sheo Nath Singh vs. Appellate Assistant CIT, (1972) 3 SCC 234 (Para-10),** Hon'ble Supreme

Court while considering the similar provisions of Section 34 (1-A) of the Indian Income Tax Act, 1922, held as under:-

"..... There can be no manner of doubt that the words "reason to believe" suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the Income Tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The Income Tax Officer would be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section. The court can always examine this aspect though the declaration or sufficiency of the reasons for the belief cannot be investigated by the court."

18. In the case of **Union Of India And Others vs M/S. Rai Singh Dev Singh Bist & others, AIR 1974 SC 478 : (1973) 3 SCC 581 (para-5)**, Hon'ble Supreme Court held as under:-

"..... before an Income-tax Officer can be said to have had reason to believe that some income had escaped assessment, he should have some relevant material before him from which he could have drawn the inference that income has escaped assessment. His vague feeling that there might have been some escape of income from assessment is not sufficient... ....."

19. In the case of **ITO vs. Lakhmani Mewal Das, (1976) 3 SCC 757 (para-11 and 12),** Hon'ble Supreme Court has held as under:-

"11. As stated earlier, the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income-tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. It is no doubt true that the court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the Income-tax Officer on the point as to whether action should be initiated for reopening assessment. At the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and farfetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. The fact that the words "definite information" which were there in section 34 of the Act of 1922 at one time before its amendment in 1948 are not there in section 147 of the Act of 1961 would not lead to the conclusion that action cannot be taken for reopening assessment even if the information is wholly vague, indefinite, farfetched and remote. The reason for the formation of the belief must be held in good faith and should not be a mere pretence.

12. The powers of the Income-tax Officer to reopen assessment though wide are not plenary. The words of the statute are "reason to believe" and not "reason to suspect". The reopening of the assessment after the lapse of many years is a serious matter. The Act, no doubt, contemplates the reopening of the assessment if grounds exist for believing that income of the assessee has escaped assessment. The underlying reason for that is that instances of concealed income or other income

escaping assessment in a large number of cases come to the notice of the income-tax authorities after the assessment has been completed. The provisions of the Act in this respect depart from the normal rule that there should be, subject to right of appeal and revision, finality about orders made in judicial and quasi-judicial proceedings. It is, therefore, essential that before such action is taken the requirements of the law should be satisfied. The live link or close nexus which should be there between the material before the Income-tax Officer in the present case and the belief which he was to form regarding the escapement of the income of the assessee from assessment because of the latter's failure or omission to disclose fully and truly all material facts was missing in the case. In any event, the link was too tenuous to provide a legally sound basis for reopening the assessment. The majority of the learned Judges in the High Court, in our opinion, were not in error in holding that the said material could not have led to the formation of the belief that the income of the assessee respondent had escaped assessment because of his failure or omission to disclose fully and truly all material facts. We would, therefore, uphold the view of the majority and dismiss the appeal with costs."

20. In the case of **M/s. S. Ganga Saran and Sons (P) Ltd. Calcutta vs. ITO and others, (1981) 3 SCC 143 (Para-6)**, Hon'ble Supreme Court held as under:-

"6. It is well settled as a result of several decisions of this Court that two distinct conditions must be satisfied before the Income Tax Officer can assume jurisdiction to issue notice under section 147 (a). First, he must have reason to believe that the income of the assessee has escaped assessment and secondly, he must have reason to believe that such escapement is by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. If either of these conditions is not fulfilled, the notice issued by the Income Tax Officer would be without jurisdiction. The important words under section 147 (a) are "has reason to believe" and these words are stronger than the words "is satisfied". The belief entertained by the Income Tax Officer must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons which are relevant and material. The Court, of course, cannot investigate into the adequacy or sufficiency of the reasons which have weighed with the Income Tax Officer in coming to the belief, but the Court can certainly examine whether the reasons are relevant and have a bearing on the matters in regard to which he is required to entertain the belief before he can issue notice under section 147 (a). It there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the Income Tax Officer could not have reason to believe that any part of the income of the assessee had escaped assessment and such escapement was by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts and the notice issued by him would be liable to he struck down as invalid."

21. In the case of **Income Tax Officer, Ward No.62 vs. TechSpan India (P.) Ltd. and another, (2018) 6 SCC 685** (Paras 14 to 18), Hon'ble Supreme Court held as under:

"14. The language of Section 147 makes it clear that the assessing officer certainly has the power to re-assess any income which escaped assessment for any assessment year subject to the provisions of Sections 148 to 153. However, the use of this power is conditional upon the fact that the assessing officer has some reason to believe that the income has escaped assessment. The use of the words "reason to believe' in Section 147 has to be interpreted schematically as the liberal interpretation of the word would have the consequence of conferring arbitrary powers on the assessing officer who may even initiate such re-assessment proceedings merely on his change of opinion on the basis of same facts and circumstances which has already been considered by him during the original assessment proceedings. Such could not be the intention of the legislature. The said provision was incorporated in the scheme of the IT Act so as to empower the Assessing Authorities to re-assess any income on the ground which was not brought on record during the original proceedings and escaped his knowledge; and the said fact would have material bearing on the outcome of the relevant assessment order.

15. Section 147 of the IT Act does not allow the re-assessment of an income merely because of the fact that the assessing officer has a change of opinion with regard to the interpretation of law differently on the facts that were well within his knowledge even at the time of assessment. Doing so would have the effect of giving the assessing officer the power of review and Section 147 confers the power to re-assess and not the power to review.

16. To check whether it is a case of change of opinion or not one has to see its meaning in literal as well as legal terms. The words "change of opinion" implies formulation of opinion and then a change thereof. In terms of assessment proceedings, it means formulation of belief by an assessing officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection.

17. It is well settled and held by this court in a catena of judgments and it would be sufficient to refer ***Commissioner of Income Tax, Delhi vs. Kelvinator of India Ltd. (2010) 320 ITR 561(SC)*** *wherein this Court has held as under: (SCC p.725, para 5-7)*

"5....where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1-4-1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe"..... Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen.

6. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment of certain precondition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place.

7. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1-4-1989, Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must

have a live link with the formation of the belief."

18. Before interfering with the proposed reopening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed reassessment proceedings. Every attempt to bring to tax, income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the reassessment proceedings."

22. In the case of **Radha Krishna Industries vs. State of H.P., (2021) 6 SCC 771,** Hon'ble Supreme Court reiterated the law laid down in its earlier judgments in the case of **Kelvinator of India Limited** (supra) and **TechSpan India (P.) Ltd.** (supra) and held that the power to reopen an assessment must be conditioned on the existence of *"tangible material" and that "reasons must have a live link with the formation of the belief"*.

23. The law laid down in the judgment referred above, leaves no manner of doubt that:-

(a) The assessing officer under Section 147 of the Act, 1961 has the power to re-assess any income which escaped assessment to tax for any assessment year subject to the provisions of Sections 148 to 153. The power to reassess under Section 147 of the Act, 1961 has been incorporated so as to empower the Assessing Authorities to re-assess any income on the ground which escaped his knowledge.

(b) The words **"reason to believe"** suggest that the belief must be bona fide and must be that of an honest and reasonable person based upon reasonable grounds and that the Income Tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. His vague feeling that there might have been some escapement of income from assessment is not sufficient. The reasons for the formation of the belief must be based on tangile material and must be based on a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income-tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular assessment year. In other words, such material on which the assessing Authority bases its opinion must not be arbitrary, irrational, vague, distant or irrelevant. If the grounds for formation of "reason to believe" are of an extraneous character, the same would not warrant initiation of proceedings under Section 147 of the Act, 1961.

(c) If, there are, in fact, some reasonable grounds for the assessing authority to believe that the whole or any part of income of the assessee has escaped assessment, it can take action under Section 147 of the Act, 1961. If the grounds taken for initiating reassessment proceedings under Section 147 of the Act, 1961 are relevant and have a nexus with the formation of belief regarding escaped assessment, the assessing authority would

be clothed with jurisdiction to take action under the section. Whether the grounds are adequate or not is not a matter which would be gone into by the High Court for the sufficiency of the grounds which induced the assessing authority to act is not a justiciable issue. What can be challenged is the existence of the belief but not the sufficiency of reasons for the belief. The belief must be held in good faith and should not be a mere pretence.

Change of Opinion

(f) Reassessment of income under Section 147 of the Act, 1961 cannot be made on **change of opinion.** The words "change of opinion" implies formulation of opinion and then a change thereof. If the Assessing Officer has earlier made assessment for the same Assessment Year expressing an opinion of a matter either expressly or by necessary implication then on the same matter, a reassessment proceedings for the alleged escapement of income from assessment to tax, cannot be initiated as it would be a case of "change of opinion". If the assessment order is non-speaking, cryptic or perfunctory in nature, then it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed reassessment proceedings. If a conscious application of mind is made to the relevant facts and material available or existing at the relevant point of time while making the assessment and again a different or divergent view is reached, it would tantamount to "change of opinion". If the assessing Authority forms an opinion during the original assessment proceedings on the basis of material facts and subsequently finds it to be erroneous; it is not a valid reason under the law for re-assessment.

24. Coming to the facts of the present case, we find that during the course of regular assessment proceedings, the assessing officer had required all details of the cash deposited by the petitioner in the bank during the Assessment Year 2017-18, which were furnished by the petitioner-assessee. The assessing officer required various other details by notice dated 23.11.2019 under Section 142(1) of the Act, 1961 which were also furnished by the petitioner and thereafter, the regular assessment order under section 143(3) of the Act, 1961 dated 25.12.2019 was passed. The explanation submitted by the petitioner regarding cash deposits in bank during Assessment Year 2017-18, was accepted by the assessing officer.

25. After the assessing officer had earlier made assessment for the same assessment year and accepted the explanation of the petitioner regarding cash deposits in bank, reassessment proceedings for the alleged escapement of the income from assessment to tax on the ground of cash deposits in bank which were earlier considered by the assessing officer in regular assessment proceedings, would amount to "change of opinion". Since the assessing officer, during the course of the regular assessment proceedings, consciously applied his mind to the cash deposits in bank by the petitioner, then initiation of the reassessment proceedings on the same set of facts would tantamount to "change of opinion". Therefore, the assessing officer could not assume jurisdiction to initiate reassessment proceeding in the facts and circumstances of the present case.

26. Apart from above, "reason to believe" recorded by the assessing officer was neither bonafide nor based

upon reasonable ground. It was based on vague feeling that there might have been some escapement of income from assessment. Therefore, reason to believe recorded by the Assessing Officer could not give jurisdiction to the assessing officer to issue notice under section 148 of the Act, 1961. The stand taken by the respondents in the aforequoted para 8 of the counter affidavit dated 25.04.2022 reveals that the case of the petitioner was selected for reassessment under Section 147/148 of the Act, 1961 on the basis of CBDT Circular dated 04.03.2021 being "potential case" for taking action under Section 148 of the Act, 1961. The assessing officer has blindly applied the aforesaid Circular of the CBDT, without looking into the facts of the present case and in complete ignorance of the direction of the CBDT in paragraph 3 of the said Circular. In paragraph 3 of aforesaid Circular the CBDT has clarified that action under Section 148 of the Act shall be taken by the assessing Officer in respect of the specified categories of cases after forming a reasonable belief that income chargeable to tax has escaped assessment. Thus "reason to believe" recorded by the Assessing Officer for issuing the impugned notice under section 148 of the Act, 1961 blindly applying the Circular of CBDT dated 04.03.2021 and without forming reasonable belief that income chargeable to tax has escaped assessment, cannot authorise the Assessing Officer to assume jurisdiction to issue notice to the petitioner under Section 148 of the Act, 1961. Therefore, the impugned notice under Section 148 of the Act, 1961 issued by the respondents to the petitioner was itself without jurisdiction.

27. Even conclusion drawn in the reassessment order dated 30.03.2022 as aforequoted, clearly indicates that there was no material before the Assessing Officer to hold that the cash deposited by the petitioner in Bank during the Assessment Year in question has escaped assessment to tax, inasmuch as , the Assessing Officer has abruptly and without recording any reason has held Rs. 38,83,000/- as undisclosed income for Assessment Year 2017-18. There is no whisper in the impugned reassessment order as to how the Assessing Officer has arrived at the aforesaid amount as undisclosed income and that how the aforesaid amount represents undisclosed income of the petitioner/assessee. Thus the reassessment proceeding initiated by the Assessing Officer against the petitioner for the Assessment Year 2017-18 was not only without jurisdiction but also it was abuse of power and the impugned reassessment order was passed arbitrarily and unauthorisedly.

28. For all the reasons aforestated, the impugned notice dated 31.03.2021 and 22.11.2021 under Section 148 and 143 (2) read with Section 147 of the Act, 1961 for the Assessment Year 2017-18 and the reassessment order dated 30.03.2022 under Section 147 read with Section 144B of the Act, 1961 for the Assessment Year 2017-18 cannot be sustained and are hereby ***quashed.***

29. The writ petition is ***allowed with cost of Rs. 5000/-*** which shall be deposited by the respondents with the High Court Legal Services Committee, High Court, Allahabad within four weeks from today.

(2022)05ILR A1569
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.04.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ Tax No. 419 of 2022
with
Writ Tax No. 424 of 2022

M/s Alok Traders ...Petitioner
Versus
Commissioner, Commercial Taxes, Lucknow & Ors. ...Respondents

Counsel for the Petitioner:
Ms. Pooja Talwar

Counsel for the Respondents:
C.S.C.

A. Civil Law - C.G.S.T. Act, 2017 - Section 54 (1) - CGST Rules - Rule 89 - As per provisions of Section 54 (1) of C.G.S.T. Act the petitioner could claim refund by making an application before the expiry of two years from the relevant date in such form and manner as may be prescribed. The relevant date for the purposes of present case is referable to explanation 2(d) appended to Section 54 which provides that incase where tax becomes refundable as a consequence of judgment, decree, order or direction of the appellate authority, appellate tribunal or any court, the date of communication of such judgment, decree, order or direction would be the relevant date.

B. Construction which permits one to take advantage of one's own wrong or to impair one's own objections under a Statute should be disregarded. The interpretation should as far as possible be beneficial in the sense that it should suppress the mischief and advance the remedy without doing violence to the language. No one can take advantage of his own wrong. Applying the afore settled principles the respondents cannot be allowed to take advantage of their own wrong so as to deny the payment of interest to the petitioner on delayed refund.

Writ Petitions allowed . (E-12)

List of Cases cited:-

1. Commissioner of Customs (PreVs) Mumbai Vs M. Ambalal 2010(260) ELT 487(Para 11)

2. U.O.I. Vs Shakti LPG 2008(223) ELT 129(SC)(Para 9).

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Jayant Banerji, J.)

1. Heard Ms. Pooja Talwar, learned counsel for the petitioner and learned Additional Chief Standing Counsel for the State-respondents.

2. Personal affidavit of respondent no.1 dated 25.04.2022 has been filed today, which is taken on record.

3. The aforesaid two writ petitions have been filed praying for the following reliefs:-

Reliefs as prayed in Writ-Tax No.419 of 2022	**Reliefs as prayed in Writ-Tax No.424 of 2022**
(a) Issue a writ, order or direction in the nature of MANDAMUS directing the respondent no.3 and respondent no.2 to refund the amount of security of Rs.4,70,400/- deposited in the form of Draft under Section 129 (1) of the U.P. Goods and Service Tax Act, 2017 due to the petitioner along with interest under section 56 in compliance of the appellate order dated 30.06.2018 passed in Appeal No. 10 for the assessment Year 2017-18;	(a) Issue a writ, order or direction in the nature of MANDAMUS directing the respondent no.3 and respondent no.2 to refund the amount of security of Rs.5,60,000/- deposited in the form of Draft under Section 129 (1) of the U.P. Goods and Service Tax Act, 2017 due to the petitioner along with interest under section 56 in compliance of the appellate order dated 29.06.2018 passed in Appeal No. 14 for the assessment Year 2017-18;

(b) Issue a writ, order or direction in the nature of MANDAMUS directing the respondent No. 3 to provide the temporary ID and password on the official website so as to enable the petitioner to file the ONLINE application required under Rule 89 of the U.P. Goods and Service Tax Rules, 2017; (c) Issue any other suitable writ, order or direction as this Hon'ble Court may deem fit and proper in the circumstances of the case in the facts and circumstances of the case; (d) Award the costs of the petition to the petitioner.	(b) Issue a writ, order or direction in the nature of MANDAMUS directing the respondent No. 3 to provide the temporary ID and password on the official website so as to enable the petitioner to file the ONLINE application required under Rule 89 of the U.P. Goods and Service Tax Rules, 2017; (c) Issue any other suitable writ, order or direction as this Hon'ble Court may deem fit and proper in the circumstances of the case in the facts and circumstances of the case; (d) Award the costs of the petition to the petitioner.

4. Since facts and issues involved in both the writ petitions are similar and inter-parties, therefore, with the consent of learned counsels for the parties, both the writ petitions are being heard together and facts of Writ-Tax No.419 of 2022 are being noted.

Writ-Tax No.419 of 2022

5. The petitioner is a registered dealer dealing in tobaco. His place of business is at Vileshwar Road, Near Talab, Post-Kunjrao, District-Anand (Gujarat). While certain goods sold by him were being transported through vehicle bearing registration No.GJ06/AX/7576, it was intercepted by the Assistant Commissioner, Mobile Squad Unit-5, State Tax, Jhansi and an order dated 30.12.2017 under Section 129(3) of the Uttar Pradesh Goods and Service Tax Act, 2017 (hereinafter referred to as the 'Act, 2017) was passed demanding tax of Rs.2,35,200/- and penalty of equal amount, total Rs.4,70,400/-, for release of goods. Although the petitioner is a registered dealer and all particulars relating to him were well mentioned in the accompanying invoice and other documents, yet the aforesaid Assistant Commissioner, Mobile Squad Unit created at its own a temporary ID and released the goods on deposit of the aforesaid demanded amount by the petitioner by an account payee bank draft.

6. Against the aforesaid order dated 30.12.2017 under Section 129(3) of the Act, 2017, the petitioner filed an appeal under Section 107 of the Act, 2017 before the appellate authority, which was allowed by order dated 30.06.2018. Thereafter, the petitioner moved a refund application dated 09.07.2018 alongwith a copy of the appellate order (received by the respondent no.3 on 11.07.2018) incorporating therein the operative portion of the appellate order, which is reproduced below:-

"सेवा में

श्रीमान असिए कमि० वाणिज्य कर/राज्य कर / सचल दल/ पंचम इकाई, झाँसी

विषय: रिफंड हेतु प्रार्थनापत्र

वर्ष: 2017.18, उ०प्र० माल एवं सेवाकर अधिनियम 2017 के अन्तर्गत

आदरणीय महोदय.

निवेदन है कि वाहन संख्या : जी जे 06 ए एक्स / 7576 के द्वारा परिवहन किये जा रहे माल को श्रीमान जी के द्वारा रोका, एवं प्रार्थी से कर एवं अर्थदण्ड के रूप में रू०: 4700000 जमा कराये।

प्रार्थी के द्वारा उक्त आदेश के विरुद्ध माननीय एडीशनल कमिश्नर / ग्रेड 2/ अपील / द्वितीय वाणिज्य कर / राज्य कर झाँसी के न्यायालय में अपील दाखिल की जो अपील संख्या : 10/ 2018 वर्ष 2017.18 उ०प्र० माल एवं सेवाकर अधिनियम 2017 की धारा 129/3/ के अन्तर्गत पंजीकृत हुयी। **माननीय न्यायालय के**

द्वारा आदेश संख्या 17 दि० 30.6.2018 के द्वारा निम्न आदेश पारित किये -

" अपील संख्या: 17/18 स्वीकार की जाती है, तथा सचल दल अधिकारी के द्वारा उ०प्र० माल एवं सेवाकर अधिनियम 2017 की धारा 129/3/ के अन्तर्गत पारित आदेश संख्या : 236 दि० : 30.12.2017 समाप्त किया जाता है, माल को बिना जमानत अवमुक्त किये जाने के आदेश दिये जाते है । ***यदि अपीलकर्ता के द्वारा उक्त मद में कोई धनराशि/ बैंक गारंटी जमा की गयी हो तो वह अपीलकर्ता को नियमानुसार वापिसी योग्य है।"***

प्रार्थना

अतः प्रार्थी का विनम्र निवेदन है कि संगत वर्ष में अधिक जमा धनराशि वापिस करने की कृपा करे ।

भवदीय

दिनांक : 9-7-2018

सर्वश्री आलोक ट्रेडर्स,

विलेश्वर रोड नियर तालाब,

पोस्ट- कंजर, आनन्द 388335 गुजरात

जी एस टी नं. 24PVVPM 3807-1ZW

सलंग्न:

माननीय एडीशनल कमिश्नर / ग्रेड 2 / अपील / वाणिज्य कर झाँसी के द्वारा पारित आदेश की कॉपी"

7. Since the respondents have neither refunded the amount nor made any communication, therefore, the petitioner moved applications/reminders dated 08.12.2020, 18.01.2021 and 25.01.2021. Thereafter, the respondents sent letter no.92, dated 27.01.2021 and letter no.102, dated 12.02.2021 to the petitioner informing as under :-

"पत्र संख्या - 92 दिनांक 27-01-2021

" ***मूल पत्रावली की जाँच पर यह प्रकाश में आया कि रू470400 को मार्च 2018 को आलोक धनीधर मिश्रा के नाम पर दिये गये TMP - ID पर जमा करा दिया गया है।*** *जिसकी एक प्रति आपको सूचनार्थ उपलब्ध कराई जा रही है। उक्त दाखिल प्रार्थना पत्र के क्रम में जाँच पर विभागीय सर्वर पर सम्बंधित लम्बित आर एफ डी - 01 का ए आर एन नहीं पाया गया है। जिसकी अनुपस्थिति में उक्त जमा धनराशि वापिस नहीं ली जा सकती है।"*

पत्र संख्या- 102 दिनांक 12-02-2021

"आपको निर्देशित किया जाता है कि केन्द्रीय/राज्यकर अधिनियम-2017 के अन्तर्गत फार्म जी एस टी - आर एफ डी01 इलैक्ट्रानिक्ली विभागीय पोर्टल पर दाखिल करते हुये उक्त का ए आर एन नम्बर उपलब्ध कराये।"

8. The petitioner again submitted an application dated 01.06.2021 before the respondent no.3. In paragraphs 4, 5 and 6 of the application dated 01.06.2021, the petitioner has stated as under :-

"4/ यह कि उक्त सम्यव्यवहार उत्तर प्रदेश प्रान्त के बाहर से उत्तर प्रदेश प्रान्त के भीतर से सम्बंधित है । जिस पर आई जी एस टी के प्रावधान लागू होते हैं। जबकि श्रीमान जी के द्वारा समस्त धनराशि सी जी एस टी एंव एस जी एस टी के मद में जमा की है ।

5/ यह कि श्रीमान जी के द्वारा दिनांक 12-02-2020 के पूर्व प्रार्थी को कोई टैम्परेरी आईडी से उक्त धनराशि जमा होने की जानकारी नहीं दी है और न ही कोई पासवर्ड/ मोबाईल नम्बर उपलब्ध कराया है। जिसमें कि रिफण्ड के प्रार्थना पत्र का ए आर एन नम्बर आ सके ।

6/ यह कि प्रार्थी जी एस टी अधिनियम के अर्न्तगत पंजीकृत होने के बाद

<u>भी उक्त धनराशि टैम्परेरी आई डी में क्यो जमा की गयी आज तक स्पष्ट नहीं किया गया है ।</u>

7/ यह कि प्रार्थी को उक्त समस्त धनराशि मय व्याज के वापिस करने की कृपा करे। तथा प्रार्थी को यह मार्गदर्शन देने की कृपा करे कि श्रीमान जी के द्वारा जो टैम्परेरी आई डी बनाकर प्रार्थी के द्वारा दिये गये ड्राफ्ट को जमा किया है उसका रिफण्ड किस प्रकार से होगा ।"

9. Thereafter, the respondent no.3 sent a letter no.58, dated 16.07.2021 to the petitioner stating as under :-

"पत्रांक- 58 / 21-22 / असि०कमि०स0द0 पं0 ई० अम्बावाय, झौंसी।

कार्यालय - असिस्टेंट कमिश्नर (प्रभारी) स0द0 पंचम इकाई, अम्बावाय, झाँसी।

दिनांक 16 जुलाई 2021

सर्वश्री आलोक ट्रेडर्स,

विलेश्वर रोड नियर तालाब,

पोस्ट- कंजर, आनन्द गुजरात 388335

आप द्वारा दिनांक 08.07.2021 को प्राप्त कराये गये "रिफण्ड हेतु प्रार्थना पत्र" का अवलोकन किया गया। आपको पूर्व में भी सूचित किया गया था वाहन संख्या (GJ06AX7576 एवं वाहन संख्या GJ23Y6273 से सम्बन्धित अर्थदंड के जमा की कार्यवाही उस समय प्रभावी पत्र सं० स० द० नकद धनराशि जमा 2017-18 / 1718046 / वाणिज्य कर, कार्यालय कमिश्नर, वाणिज्य कर प्रदेश (सचल दल अनुभाग), लखनऊ दिनांक नवंबर 7, 2017 तथा पत्र सं० स०द० नकद धनराशि जमा 2017-18 / 1405 / 1718031 / वाणिज्य कर, कार्यालय कमिश्नर, वाणिज्य कर प्रदेश (सचल दल अनुभाग), लखनऊ दिनांक अगस्त 7, 2017 के क्रम में की गयी थी। **आप द्वारा दिए गए प्रार्थना पात्र में पासवर्ड की मांग की जा रही है जो कि एक तकनीकी समस्या है, जिसके लिए ज्वाइन्ट कमिश्नर (आई०टी०अनुभाग) मुख्यालय से सम्पर्क करते हुए मार्गदर्शन मांगा गया है।** साथ ही आपको पुनः अवगत कराया जाता है कि फोन नम्बर एवं रिफण्ड फाईल करने सम्बन्धी अन्य किसी तकनीकी समस्या के लिए आप स्वयं भी https://selfservice.gstsystem.in/ पर सम्पर्क करते तकनीकि समस्या के लिए टोकन जेनेरेट करते हुए प्रयास करें एवं इस कार्यालय को भी उक्त प्रयासों से अवगत कराये।

(शरद प्रताप सिंह)

असिस्टेंट कमिश्नर

(प्रभारी) वाणिज्य कर,

सचलदल मंचम इकाई, झांसी।"

10. The petitioner again submitted an applications dated 27.07.2021 and 14.02.2022 before the respondent no.3 and the Joint Commissioner IT Division, Commercial Tax/State Tax, Gomti Nagar, Lucknow as **eighth reminder** in which the petitioner again mentioned that the respondent no.3 has deposited the draft submitted by him by making at his own a temporary ID and, therefore, it may be guided as to how the amount would be refunded to the petitioner pursuant to the appellate order. Since nothing was done by the respondents, therefore, the petitioner has filed the present writ petitions.

11. **On 28.03.2022, this Court passed the following order:-**

"Heard learned counsel for the petitioner and learned Standing Counsel for the respondents.

A sum of Rs. 04,70,400/- deposited by the petitioner through bank draft pursuant to the order of the respondent no.2 under Section 179 (1) of the CGST/UPGST Act, 2017 is not being refunded, despite the order has been set

aside by the appellate authority vide order dated 30.06.2018. The petitioner moved physical application before the respondent no.3 requesting to provide the Treasury Challan through which bank draft was deposited. It is only thereafter, the respondent no.3 has intimated to the petitioner that by letter dated 27.01.2021 the aforesaid bank draft was deposited in the name of Alok Dharnidhar Mishra on Temporary-ID. Again petitioner wrote several letters to the respondents to provide password so that the petitioner may generate A.R.N. for R.F.D.-01. In response to it, the respondent no.3 sent a letter to the petitioner dated 16.07.2021 in which he mentioned, as under:-

आप द्वारा दिए गए प्रार्थना पत्र में पासवर्ड की माँग की जा रही है जो कि एक तकनीकी समस्या है, जिसके लिए ज्वाइन्ट कमिश्नर (आई०टी०अनुभाग) मुख्यालय से सम्पर्क करते हुए मार्गदर्शन मांगा गया है।

Again the petitioner has moved several applications before the respondent no.3 including the applications dated 27.07.2021 and 14.02.2022 requesting for password and also to guide how his amount shall be refunded. However, nothing has been done by the respondents so far, as evident from the instructions dated 07.03.2022 produced today by the learned Standing Counsel which further shows that the respondents have attempted to mislead the Court and very conveniently suppressed the facts aforementioned.

Under the circumstances, we direct the respondent no.1 to file counter affidavit by means of his personal affidavit and show cause that why exemplary cost be not imposed.

Put up as a fresh case before the appropriate bench on 04.04.2022."

12. It is only after this Court passed the order, the refund was sanctioned to the petitioner on 31.03.2022 and it was paid on 04.04.2022.

13. On 04.04.2022, the following order was passed by this Court:-

"1. Heard Ms. Pooja Talwar, learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

2. On 28.03.2022, this Court passed the following order:-

"Heard learned counsel for the petitioner and learned Standing Counsel for the respondents.

A sum of Rs. 04,70,400/- deposited by the petitioner through bank draft pursuant to the order of the respondent no.2 under Section 179 (1) of the CGST/UPGST Act, 2017 is not being refunded, despite the order has been set aside by the appellate authority vide order dated 30.06.2018. The petitioner moved physical application before the respondent no.3 requesting to provide the Treasury Challan through which bank draft was deposited. It is only thereafter, the respondent no.3 has intimated to the petitioner that by letter dated 27.01.2021 the aforesaid bank draft was deposited in the name of Alok Dharnidhar Mishra on Temporary-ID. Again petitioner wrote several letters to the respondents to provide password so that the petitioner may generate A.R.N. for R.F.D.-01. In response to it, the respondent no.3 sent a letter to the petitioner dated 16.07.2021 in which he mentioned, as under:-

आप द्वारा दिए गए प्रार्थना पत्र में पासवर्ड की माँग की जा रही है जो कि एक तकनीकी समस्या है, जिसके लिए ज्वाइन्ट

कमिश्नर (आई०टी०अनुभाग) मुख्यालय से सम्पर्क करते हुए मार्गदर्शन मांगा गया है।

Again the petitioner has moved several applications before the respondent no.3 including the applications dated 27.07.2021 and 14.02.2022 requesting for password and also to guide how his amount shall be refunded. However, nothing has been done by the respondents so far, as evident from the instructions dated 07.03.2022 produced today by the learned Standing Counsel which further shows that the respondents have attempted to mislead the Court and very conveniently suppressed the facts aforementioned.

Under the circumstances, we direct the respondent no.1 to file counter affidavit by means of his personal affidavit and show cause that why exemplary cost be not imposed.

Put up as a fresh case before the appropriate bench on 04.04.2022."

3. Today, a counter affidavit by means of personal affidavit of the respondent no.1 has been filed by the learned Standing Counsel, which is taken on record.

4. Learned counsel for the petitioner has also produced before the Court a letter dated 31.03.2022 said to have been written by the petitioner to the Additional Commissioner, Grade-1, Commercial Tax, Jhansi in the matter of present writ petition which is also kept on record. The aforestated letter is reproduced below:-

"सेवा में,

श्रीमान एडी० कमि० ब्रेड-1 वाणिज्यकर झाँसी।

विषय -रि संख्या-419/2020 रिफण्ड प्रार्थना पत्र वर्ष 2017-18

आदरणीय महोदय,

निवेदन है कि वाहन संख्या: जी जे 06 ए एक्स / 7576 के द्वारा परिवहन किये जा रहे माल को श्रीमान असि0 कमि०/ सचल दल / पंचम इकाई झाँसी के द्वारा रोका, एवं प्रार्थी से कर एवं अर्थदण्ड के रूप में रू० : 470400 जमा कराये। जिसके सम्बंध में प्रार्थी ने माननीय उच्च न्यायालय इलाहबाद के समक्ष उक्त रिट याचिका दाखिल की है कि प्रार्थी को रिफण्ड शीघ्र से शीघ्र दिलाया जाये । इस सम्बंध में माननीय उच्च न्यायालय इलाहबाद के द्वारा निर्णय दिनांक 28-03-2022 के द्वारा कमि० वाणिज्यकर उत्तर प्रदेश को रिफण्ड के सम्बंध में निर्देश दिये है। मेरी समस्या की जानकारी जब श्रीमान कमि० वाणिज्यकर उत्तर प्रदेश को हुई तब उनके द्वारा अपने अथक प्रयास से जी एस टी एन उच्चाधिकारी से सम्पर्क किया गया तब उन्हें यह जानकारी हुई कि टैम्परेरी आई डी में जमा धनराशि के रिफण्ड के सम्बंध में एक विषम तकनीकी समस्या है। लेकिन कमि० वाणिज्यकर उत्तर प्रदेश द्वारा इस सम्बंध में जी एस टी एन के उच्चाधिकारियों से व्यक्तिगत रूचि लेते हुये वार्ता की गयी और वार्ता करने पर मेरी 3 साल पुरानी तकनीकी समस्या का समाधान तलाशा गया। जिसके कारण ई मेल आई डी एवं पासवर्ड सेट करने की समस्या का समाधान हुआ । मै अनुग्रहीत हूँ कि माननीय कमि० महोदय के संज्ञान में मेरा प्रकरण आने पर मेरी समस्या का तीव्र गति से समाधान कराया। अब मुझे उक्त रिफण्ड के सम्बंध में वाणिज्यकर/ राज्यकर विभाग से कोई भी शिकायत नहीं है। इस सम्बंध में माननीय कमि० वाणिज्यकर उत्तर प्रदेश के द्वारा अपने अथक प्रयास से प्रार्थी को आई डी पासवर्ड उक्त रिफण्ड दिलाये जाने सम्बंधित समस्त कार्यवाही पूर्ण कर ली है। जिसके कारण अब प्रार्थी को उक्त रिफण्ड के सम्बंध में अब कोई परेशानी नहीं है। प्रार्थी ने माननीय उच्च न्यायालय इलाहबाद के समक्ष जो रिट याचिका दाखिल की है जिसमें सुनवाई की तिथि 04-04-2022 नियत

है उसे प्रार्थी अब वापिस ले रहा है। इस सम्बंध में प्रार्थी में अपने अधिवक्ता को भी सूचित कर दिया है।

दिनांक - 31-03-2022

भवदीय
सर्वश्री आलोक ट्रैडर्स,
विलेश्वर रोड नियर तालाब,
पोस्ट- कंजर आनन्द 388335
गुजरात
जी एस टी नं. 24 BPVVPM 3807-1ZW

प्रतिलिपि - माननीय कमि० वाणिज्यकर / राज्यकर उत्तर प्रदेश को इस धन्यवाद के साथ कि उनके संज्ञान में मेरा तथ्य आते ही उन्होंने मेरी समस्या का तीव्र गति से समाधान कराया । इसके लिये में उनका सदैव अभारी रहूँगा।"

सर्वश्री आलोक ट्रैडर्स"

5. **Perusal of the aforequoted letter dated 31.03.2022** said to have been written by the petitioner to the Additional Commissioner, Grade-1, Commercial Tax, Jhansi, who is not even the respondent in the present petition, **prima facie, shows that the said letter appears to have been procured to get the writ petition dismissed as withdrawn so that adjudication on merits may not take place and the question as posed by the Court in its order dated 28.03.2022 with regard to the imposition of exemplary cost may not be adjudicated.**

6. Considering the facts and circumstances of the case, we direct the respondent no.1 to file his personal affidavit explaining the circumstances and the procurement of the aforequoted letter, within three days from today.

7. Put up as a fresh case before the appropriate Bench on **07.04.2022 alongwith the records of Writ-Tax No.424 of 2022."**

(emphasis supplied)

14. Since in the aforequoted order dated 04.04.2022, this Court noticed that certain letters have been procured by the respondent so as to avoid to comply with the direction given in paragraph 5 of the order of this Court dated 04.04.2022, the respondent no.1 filed her personal affidavit dated 06.04.2022 stating in paragraph 5, as under :-

"5. That in reply to the same, the Additional Commissioner Grade-1, Commercial Tax, Jhansi has informed that **the said letter has been given by the petitioner's counsel Sri Naresh Kumar Gupta, Advocate Jhansi** out of his own willingness and there was no pressure on him to do so. A true copy of letter dated 06.4.2022 written by Additional commissioner Grade-1 jhansi and letter dated 31.3.2022 given by advocate Shri Naresh Kumar Gupta are being appended herewith and marked as Annexure-1 to this affidavit."

15. Perusal of Anenxure-1 to the aforesaid personal affidavit dated 06.04.2022 shows that at page 7 is the letter of the Additional Commissioner dated 06.04.202 and at pages 8 and 9 are two letters, both dated 31.03.2022 (one relating to Writ-Tax No.419 of 2022 and the other relating to Writ-Tax No.424 of 2022), which is said to have been signed by the counsel at Jhansi.

16. As per **reliefs sought** in the writ petitions, the petitioner has prayed for **refund of the amount and grant of interest.** Under the circumstances, **learned counsel for the petitioner has now pressed for the relief for grant of interest** and, therefore, this Court heard learned counsels for the parties and passed the **order dated 21.04.2022, as under :-**

"1. Heard learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. High handedness, abuse of power and harassment of dealers by the respondents are evident on record and also reflected from the orders passed by this Court in the leading petition, being Writ-Tax No.424 of 2022 as well as the orders dated 28.03.2022 and 04.04.2022 passed in the connected Writ-Tax No.419 of 2022.

3. From the orders dated 28.03.2022, it is evident that despite the petitioner succeeded in appeal, the respondents, on one pretext or the other, and also on account of dereliction in their duty, have not given effect to the appellate order to grant refund to the petitioner of the amount deposited by him. Despite our order dated 18.04.2022, in the two personal affidavits filed today, there is not even a whisper about payment of interest on illegally withheld amount deposited by the petitioner.

4. Learned Standing Counsel submits that since GST is a new regime, therefore, some direction by the Court for grant of interest under the facts and circumstances of the case, is needed.

5. Oral request made by the respondents through the learned Standing Counsel, as recorded above, be brought on record by means of personal affidavit of the respondent no.1 for consideration by this Court. The personal affidavit may be filed on or before the next date fixed.

6. Put up as a fresh case for further hearing on 27.04.2022 at 10:00 a.m. alongwith connected writ petition."

(emphasis supplied)

17. Today, a **personal affidavit of the respondent no.1 dated 25.04.2022** has been filed in which the **respondent no.1 has stated in paragraphs 12 to 21 as under :-**

"12. That on 09.07.2018 the petitioner gave his letter for refund due to appellate order but file RFD-01A on common portal nor did he informed the proper officer that there was any technical issue for filing of RFD-01A which is a mandatory requirement as per Rule 89(1) and 97A of CGST/UPGST Rules, 2017. For kind perusal of this Hon'ble Court true copy of Form RFD-01A is being appended herewith and marked as Annexure-8 to this affidavit.

13. That again on 09-12-2020 and on 21-01-2021 reminder letter was given by the petitioner before the proper officer and in turn proper officer duly communicated to the petitioner that he should file online application in format (RFD-01) on the common portal but it was not complied with.

14. That on request of the petitioner to provide password, the proper officer suggested him to generate a token for technical glitches on the common portal at https:// selfservice.gstsystem.in/, even after this communication no compliance was made by petitioner.

15. That the petitioner could have approached on self help portal which had started functioning since 22.1.2018 and also there was a help desk established in GSTN but there was no averment in the writ petition that the petitioner ever approached GST self-help portal for the technical difficulties faced by him.

16. That due to technical glitches, the temporary I.D. of the petitioner was not available at the end of proper officer's login as it was at development stage of GST Portal and hence it was not possible to provide the

password to the petitioner from the proper officer's end.

17. That when the entire problem came into knowledge of the deponent, she took it up on top priority with GSTN and after continuous efforts with CEO of GSTN, it was possible to activate the temporary I.D. at the login of the proper officer to provide password

18. That after receiving the password, the online refund application in form RFD-01 was filed by the petitioner on 31.03.2022. A true copy of RFD-01 filed by the petitioner is being appended herewith and marked as Annexure-9 to this affidavit.

19. **That the abovementioned application RFD-01 was disposed and refund was sanctioned in Form RFD-06 within the time period specified under Section 56 of the CGST/UPGST Act, 2017 hence liability to pay interest does not arise. True copy of the Refund Sanction Order ic. RFD-06 is being appended herewith and marked as Annexure-10 to this affidavit.**

20. **That as per Section 54 of CGST/UPGST Act and rules 89 of CGST/UPGST Rules and circulars issued by the department, refund can only be made after the taxpayer file refund application in form RFD-01/RFD-01A as the case may be and there was no system of giving suo moto refund at the officer level under the GST system.**

21. That in view of the aforesaid facts and circumstances mentioned above, this Hon'ble Court may be pleased to pass appropriate orders/direction in the interest of justice."

(emphasis supplied)

18. That facts of the case as discussed above leaves no manner of doubt that the respondent No.3 mischievously created temporary I.D. for depositing of the sum of Rs.4,70,400/- made by the petitioner pursuant to the order dated 30.12.2017 passed by the respondent No.3 under Section 129 of the U.P. GST Act, 2017, even though he was well aware of the fact that the petitioner is a registered dealer of Gujrat State and the provisions of IGST Act are applicable and all details relating to petitioner were available with him and there was no need to create a temporary I.D.. The password of the temporary I.D. created by the respondent No.3 was never communicated to the petitioner despite repeated demands made by him which fact is further evident from own letters of the respondents quoted in paragraphs 7 and 9 of this judgment and paragraph-16 of the personal affidavit of the respondent No.1 dated 25.04.2022 quoted in paragraph 17 of this judgment. The appellate authority, by order dated 30.06.2018, not only allowed the appeal of the petitioner and set aside the order dated 30.12.2017 passed by the respondent No.3, but also directed for refund of the amount/ bank guarantee deposited by the petitioner. The petitioner moved the application dated 09.07.2018 for refund before the respondent No.3 along with a copy of the order of the appellate authority. Subsequently, it was followed by several applications written by him to various authorities/ respondents. Thus, it was wholly impossible for the petitioner to submit online Form RFD-01A for refund inasmuch as the petitioner was not having the password of the temporary I.D. mischievously created by the respondent No.3 at its own. The respondent No.1 herself has stated in paragraph-16 of her personal affidavit dated 25.04.2022 that due to technical glitches, the temporary I.D. of the petitioner was not available at the end of proper officer's login as it was at development stage of GST Portal and hence

it was not possible to provide the password to the petitioner from the proper officer's end. Thus, facts sufficiently establish that the petitioner was entitled for refund in terms of the order for refund passed by the First Appellate Authority dated 30.06.2018 and he applied for refund on 09.07.2018 but the respondents deliberately did not refund the amount on one pretext or the other. There was no fault on the part of the petitioner asking the respondents to refund the deposited amount in terms of the order of the First Appellate Authority dated 30.06.2018. It is only when this court passed the order dated 28.03.2022, the respondents awoke and allowed the petitioner also to submit Form RFD-01A. Thus, online RFD-01A filed by the petitioner as required by the respondents, relate back to his refund application dated 09.07.2018 whereas the refund has been sanctioned by the respondents to the petitioner on 31.03.2022 and it was paid on 04.04.2022 but without interest. The letter dated 31.03.2022 was procured by the respondents from the local counsel of the petitioner at the time of sanctioning of the refund i.e. on 31.03.2022 which prima facie amounts to interference in court proceedings by the respondents and constituting criminal contempt. However, learned standing counsel much persuaded us not to refer the matter for criminal contempt particularly in view of the unconditional apology tendered by the respondent No.1.

19. Now the question that remains for consideration is as to whether under the facts and circumstances, the petitioner is entitled for interest on the amount of Rs.4,70,400/-, was liable to be refunded in terms of the order of the First Appellate Authority dated 30.06.2018 but it was refunded on 04.04.2022.

20. Sections 54 and 56 of the C.G.S.T. Act and Rule 89 of the C.G.S.T. Rules provides for refund, which are reproduced below:

"Section 54. Refund of tax

(1) ***Any person claiming refund*** *of any tax and interest, if any, paid on such tax or any other amount paid by him,* ***may make an application*** *before the expiry of two years from the relevant date* ***in such form and manner as may be prescribed:***

PROVIDED that a registered person, claiming refund of any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49, may claim such refund in the return furnished under section 39 in such manner as may be prescribed.

(2) A specialised agency of the United Nations Organisation or any Multilateral Financial Institution and Organisation notified under the United Nations (Privileges and Immunities) Act, 1947, Consulate or Embassy of foreign countries or any other person or class of persons, as notified under section 55, entitled to a refund of tax paid by it on inward supplies of goods or services or both, may make an application for such refund, in such form and manner as may be prescribed, before the expiry of six months from the last day of the quarter in which such supply was received.

(3) Subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised input tax credit at the end of any tax period:

PROVIDED that no refund of unutilised input tax credit shall be allowed in cases other than--

(i) zero rated supplies made without payment of tax;

(ii) where the credit has accumulated on account of rate of tax on

inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council:

PROVIDED FURTHER that no refund of unutilised input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty:

PROVIDED ALSO that no refund of input tax credit shall be allowed, if the supplier of goods or services or both avails of drawback in respect of central tax or claims refund of the integrated tax paid on such supplies.

(4) The application shall be accompanied by--

(a) such documentary evidence as may be prescribed to establish that a refund is due to the applicant; and

(b) such documentary or other evidence (including the documents referred to in section 33) as the applicant may furnish to establish that the amount of tax and interest, if any, paid on such tax or any other amount paid in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such tax and interest had not been passed on to any other person:

PROVIDED that ***where the amount claimed as refund is less than two lakh rupees, it shall not be necessary for the applicant to furnish any documentary and other evidences but he may file a declaration,*** *based on the documentary or other evidences available with him,* ***certifying that the incidence of such tax and interest had not been passed on to any other person.***

(5) ***If,*** *on receipt of any such application,* ***the proper officer is satisfied that the whole or part of the amount claimed as refund is refundable, he may make an order accordingly*** *and the amount so determined shall be credited to the Fund referred to in section 57.*

(6) Notwithstanding anything contained in sub-section (5), the proper officer may, in the case of any claim for refund on account of zero-rated supply of goods or services or both made by registered persons, other than such category of registered persons as may be notified by the Government on the recommendations of the Council, refund on a provisional basis, ninety per cent. of the total amount so claimed, excluding the amount of input tax credit provisionally accepted, in such manner and subject to such conditions, limitations and safeguards as may be prescribed and thereafter make an order under sub-section (5) for final settlement of the refund claim after due verification of documents furnished by the applicant.

(7) ***The proper officer shall issue the order under sub-section (5) within sixty days from the date of receipt of application complete in all respects.***

(8) Notwithstanding anything contained in sub-section (5), ***the refundable amount shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to--***

(a) refund of tax paid on export exports of goods or services or both or on inputs or input services used in making such zero-rated supplies 1"export" and "exports";

(b) refund of unutilised input tax credit under sub-section (3);

(c) refund of tax paid on a supply which is not provided, either wholly or partially, and for which invoice has not been issued, or where a refund voucher has been issued;

(d) refund of tax in pursuance of section 77;

(e) the tax and interest, if any, or any other amount paid by the applicant, if he had not passed on the incidence of such tax and interest to any other person; or

(f) the tax or interest borne by such other class of applicants as the Government may, on the recommendations of the Council, by notification, specify.

(8A) The Government may disburse the refund of the State tax in such manner as may be prescribed.

(9) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provisions of this Act or the rules made thereunder or in any other law for the time being in force, no refund shall be made except in accordance with the provisions of sub-section (8).

(10) Where any refund is due under sub-section (3) to a registered person who has defaulted in furnishing any return or who is required to pay any tax, interest or penalty, which has not been stayed by any court, Tribunal or Appellate Authority by the specified date, the proper officer may--

(a) withhold payment of refund due until the said person has furnished the return or paid the tax, interest or penalty, as the case may be;

(b) deduct from the refund due, any tax, interest, penalty, fee or any other amount which the taxable person is liable to pay but which remains unpaid under this Act or under the existing law.

Explanation.--For the purposes of this sub-section, the expression "specified date" shall mean the last date for filing an appeal under this Act.

(11) Where an order giving rise to a refund is the subject matter of an appeal or further proceedings or where any other proceedings under this Act is pending and the Commissioner is of the opinion that grant of such refund is likely to adversely affect the revenue in the said appeal or other proceedings on account of malfeasance or fraud committed, he may, after giving the taxable person an opportunity of being heard, withhold the refund till such time as he may determine.

(12) Where a refund is withheld under sub-section (11), the taxable person shall, notwithstanding anything contained in section 56, be entitled to interest at such rate not exceeding six per cent. as may be notified on the recommendations of the Council, if as a result of the appeal or further proceedings he becomes entitled to refund.

(13) Notwithstanding anything to the contrary contained in this section, the amount of advance tax deposited by a casual taxable person or a non-resident taxable person under sub-section (2) of section 27, shall not be refunded unless such person has, in respect of the entire period for which the certificate of registration granted to him had remained in force, furnished all the returns required under section 39.

(14) Notwithstanding anything contained in this section, no refund under sub-section (5) or sub-section (6) shall be paid to an applicant, if the amount is less than one thousand rupees.

Explanation.--For the purposes of this section,--

(1) "refund" includes refund of tax paid on zero-rated supplies of goods or services or both or on inputs or input services used in making such zero-rated supplies, or refund of tax on the supply of goods regarded as deemed exports, or refund of unutilised input tax credit as provided under sub-section (3).

*(2) **"relevant date" means--***

(a) in the case of goods exported out of India where a refund of tax paid is available in respect of goods themselves or,

as the case may be, the inputs or input services used in such goods,--

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India; or

(ii) if the goods are exported by land, the date on which such goods pass the frontier; or

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;

(b) in the case of supply of goods regarded as deemed exports where a refund of tax paid is available in respect of the goods, the date on which the return relating to such deemed exports is furnished;

(c) in the case of services exported out of India where a refund of tax paid is available in respect of services themselves or, as the case may be, the inputs or input services used in such services, the date of--

(i) receipt of payment in convertible foreign exchange 3 "or in Indian rupees wherever permitted by the Reserve Bank of India", where the supply of services had been completed prior to the receipt of such payment; or

(ii) issue of invoice, where payment for the services had been received in advance prior to the date of issue of the invoice;

(d) ***in case where the tax becomes refundable as a consequence of judgment, decree, order or direction of the Appellate Authority, Appellate Tribunal or any court, the date of communication of such judgment, decree, order or direction;***

(e) in the case of refund of unutilised input tax credit under clause (ii) of the first proviso to sub-section (3), the due date for furnishing of return under section 39 for the period in which such claim for refund arises;

(f) in the case where tax is paid provisionally under this Act or the rules made thereunder, the date of adjustment of tax after the final assessment thereof;

(g) in the case of a person, other than the supplier, the date of receipt of goods or services or both by such person; and

(h) in any other case, the date of payment of tax.

Section 56 - Interest on delayed refunds:-

If any tax ordered to be refunded under sub-section (5) of section 54 to any applicant is not refunded within sixty days from the date of receipt of application under sub-section (1) of that section, interest at such rate not exceeding six per cent. as may be specified in the notification issued by the Government on the recommendations of the Council shall be payable in respect of such refund from the date immediately after the expiry of sixty days from the date of receipt of application under the said sub-section till the date of refund of such tax:

PROVIDED that where any claim of refund arises from an order passed by an Adjudicating Authority or Appellate Authority or Appellate Tribunal or court which has attained finality and the same is not refunded within sixty days from the date of receipt of application filed consequent to such order, interest at such rate not exceeding nine per cent. as may be notified by the Government on the recommendations of the Council shall be payable in respect of such refund from the date immediately after the expiry of sixty days from the date of receipt of application till the date of refund.

Explanation: For the purposes of this section, where any order of refund is

made by an Appellate Authority, Appellate Tribunal or any court against an order of the proper officer under sub-section (5) of section 54, the order passed by the Appellate Authority, Appellate Tribunal or by the court shall be deemed to be an order passed under the said sub-section (5).

Rule 89 of the C.G.S.T. Rules:-

Rule 89 - Application for refund of tax, interest, penalty, fees or any other amount

(1) ***Any person,*** *except the persons covered under notification issued under section 55,* ***claiming refund of any tax, interest, penalty, fees or any other amount paid by him,*** *other than refund of integrated tax paid on goods exported out of India,* ***may file an application electronically in FORM GST RFD-01 through the common portal, either directly or through a Facilitation Centre notified by the Commissioner:***

PROVIDED that any claim for refund relating to balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49 may be made through the return furnished for the relevant tax period in ***FORM GSTR-3 or FORM GSTR-4*** *or* ***FORM GSTR-7,*** *as the case may be:*

PROVIDED FURTHER that in respect of supplies to a Special Economic Zone unit or a Special Economic Zone developer, the application for refund shall be filed by the -

(a) supplier of goods after such goods have been admitted in full in the Special Economic Zone for authorised operations, as endorsed by the specified officer of the Zone;

(b) supplier of services along with such evidence regarding receipt of services for authorised operations as endorsed by the specified officer of the Zone:

PROVIDED ALSO that in respect of supplies regarded as deemed exports, the application may be filed by, -

(a) the recipient of deemed export supplies; or

(b) the supplier of deemed export supplies in cases where the recipient does not avail of input tax credit on such supplies and furnishes an undertaking to the effect that the supplier may claim the refund:

PROVIDED ALSO that refund of any amount, after adjusting the tax payable by the applicant out of the advance tax deposited by him under section 27 at the time of registration, shall be claimed in the last return required to be furnished by him.

(2) ***The application under sub-rule (1) shall be accompanied*** *by any of the following documentary evidences in Annexure 1 in* ***Form GST RFD-01,*** *as applicable, to establish that a refund is due to the applicant, namely:-*

(a) the reference number of the order and a copy of the order passed by the proper officer or an appellate authority or Appellate Tribunal or court resulting in such refund or reference number of the payment of the amount specified in sub-section (6) of section 107 and sub-section (8) of section 112 claimed as refund;

(b) a statement containing the number and date of shipping bills or bills of export and the number and the date of the relevant export invoices, in a case where the refund is on account of export of goods;

(c) a statement containing the number and date of invoices and the relevant Bank Realisation Certificates or Foreign Inward Remittance Certificates, as the case may be, in a case where the refund is on account of the export of services;

(d) a statement containing the number and date of invoices as provided in

rule 46 along with the evidence regarding the endorsement specified in the second proviso to sub-rule (1) in the case of the supply of goods made to a Special Economic Zone unit or a Special Economic Zone developer;

(e) a statement containing the number and date of invoices, the evidence regarding the endorsement specified in the second proviso to sub-rule (1) and the details of payment, along with the proof thereof, made by the recipient to the supplier for authorised operations as defined under the Special Economic Zone Act, 2005, in a case where the refund is on account of supply of services made to a Special Economic Zone unit or a Special Economic Zone developer;

(f) a declaration to the effect that tax has not been collected from the Special Economic Zone unit or the Special Economic Zone developer, in a case where the refund is on account of supply of goods or services or both made to a Special Economic Zone unit or a Special Economic Zone developer;

(g) a statement containing the number and date of invoices along with such other evidence as may be notified in this behalf, in a case where the refund is on account of deemed exports;

(h) a statement containing the number and the date of the invoices received and issued during a tax period in a case where the claim pertains to refund of any unutilised input tax credit under sub-section (3) of section 54 where the credit has accumulated on account of the rate of tax on the inputs being higher than the rate of tax on output supplies, other than nil-rated or fully exempt supplies;

(i) the reference number of the final assessment order and a copy of the said order in a case where the refund arises on account of the finalisation of provisional assessment;

(j) a statement showing the details of transactions considered as intra-State supply but which is subsequently held to be inter-State supply;

(k) a statement showing the details of the amount of claim on account of excess payment of tax;

(l) a declaration to the effect that the incidence of tax, interest or any other amount claimed as refund has not been passed on to any other person, in a case where the amount of refund claimed does not exceed two lakh rupees:

PROVIDED that a declaration is not required to be furnished in respect of the cases covered under clause (a) or clause (b) or clause (c) or clause (d) or clause (f) of sub-section (8) of section 54;

(m) a Certificate in Annexure 2 of ***FORM GST RFD-01*** *issued by a chartered accountant or a cost accountant to the effect that the incidence of tax, interest or any other amount claimed as refund has not been passed on to any other person, in a case where the amount of refund claimed exceeds two lakh rupees:*

PROVIDED that a certificate is not required to be furnished in respect of cases covered under clause (a) or clause (b) or clause (c) or clause (d) or clause (f) of sub- section (8) of section 54;

Explanation.- For the purposes of this rule-

(i) in case of refunds referred to in clause (c) of sub-section (8) of section 54, the expression "invoice" means invoice conforming to the provisions contained in section 31;

(ii) where the amount of tax has been recovered from the recipient, it shall be deemed that the incidence of tax has been passed on to the ultimate consumer.

(3) Where the application relates to refund of input tax credit, the electronic credit ledger shall be debited by the applicant by an amount equal to the refund so claimed.

(4) In the case of zero-rated supply of goods or services or both without payment of tax under bond or letter of undertaking in accordance with the provisions of sub-section (3) of section 16 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), refund of input tax credit shall be granted as per the following formula -

Refund Amount = (Turnover of zero-rated supply of goods + Turnover of zero-rated supply of services) x Net ITC ÷Adjusted Total Turnover

Where, -

(A) "Refund amount" means the maximum refund that is admissible;

(B) "Net ITC" means input tax credit availed on inputs and input services during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both;

(C) "Turnover of zero-rated supply of goods" means the value of zero-rated supply of goods made during the relevant period without payment of tax under bond or letter of undertaking or the value which is 1.5 times the value of like goods domestically supplied by the same or, similarly placed, supplier, as declared by the supplier, whichever is less, other than the turnover of supplies in respect of which refund is claimed under sub-rules (4A) or (4B) or both.

(D) "Turnover of zero-rated supply of services" means the value of zero-rated supply of services made without payment of tax under bond or letter of undertaking, calculated in the following manner, namely:-

Zero-rated supply of services is the aggregate of the payments received during the relevant period for zero-rated supply of services and zero-rated supply of services where supply has been completed for which payment had been received in advance in any period prior to the relevant period reduced by advances received for zero-rated supply of services for which the supply of services has not been completed during the relevant period;

(E) "Adjusted Total Turnover" means the sum total of the value of-

(a) the turnover in a State or a Union territory, as defined under clause (112) of section 2, excluding the turnover of services; and

(b) the turnover of zero-rated supply of services determined in terms of clause (D) above and non-zero-rated supply of services, excluding-

(i) the value of exempt supplies other than zero-rated supplies; and

(ii) the turnover of supplies in respect of which refund is claimed under sub-rule (4A) or sub-rule (4B) or both, if any,

during the relevant period.'

(F) "Relevant period" means the period for which the claim has been filed.

(4A) In the case of supplies received on which the supplier has availed the benefit of the Government of India, Ministry of Finance, notification No. 48/2017-Central Tax, dated the 18th October, 2017 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub- section (i), vide number G.S.R 1305 (E) dated the 18th October, 2017, refund of input tax credit, availed in respect of other inputs or input services used in making zero-rated supply of goods or services or both, shall be granted.

(4B) Where the person claiming refund of unutilised input tax credit on

account of zero rated supplies without payment of tax has -

(a) received supplies on which the supplier has availed the benefit of the Government of India, Ministry of Finance, Notification No. 40/2017-Central Tax (Rate), dated the 23rd October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1320 (E), dated the 23rd October, 2017 or Notification No. 41/2017-Integrated Tax (Rate), dated the 23rd October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1321(E), dated the 23rd October, 2017; or

(b) availed the benefit of Notification No. 78/2017-Customs, dated the 13th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Subsection (i), vide number G.S.R 1272(E), dated the 13th October, 2017 or Notification No. 79/2017-Customs, dated the 13th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 1299(E), dated the 13th October, 2017,

the refund of input tax credit, availed in respect of inputs received under the said notifications for export of goods and the input tax credit availed in respect of other inputs or input services to the extent used in making such export of goods, shall be granted.

(5) In the case of refund on account of inverted duty structure, refund of input tax credit shall be granted as per the following formula:-

Maximum Refund Amount = {(Turnover of inverted rated supply of goods and services) x Net ITC ÷ Adjusted Total Turnover} - tax payable on such inverted rated supply of goods and services.

Explanation:- For the purposes of this sub-rule, the expressions -

(a) Net ITC shall mean input tax credit availed on inputs during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both; and

(b) "Adjusted Total turnover" and "relevant period" shall have the same meaning as assigned to them in sub-rule (4)."

21. As per provisions of Section 54(1) of the CGST Act, 2017, the petitioner could claim refund by making an application before the expiry of two years from the relevant date in such form and manner as may be prescribed. The relevant date for the purposes of the present case is referable to Explanation 2(d) appended to Section 54 which provides that in case where the tax becomes refundable as a consequence of judgment, decree, order or direction of the **Appellate Authority**, Appellate Tribunal or any court, **the date of communication of such judgment, decree, order or direction.**

22. It is undisputed that the proper office while accepting the deposit of tax and penalty by bank-draft from the petitioner for Rs.4,70,400/- for release of goods pursuant to the order dated 30.12.2017 under Section 129 (3) of the U.P. Goods and Service Tax Act, 2017, mistakenly shown the deposit under the aforesaid Act instead of IGST Act and further committed a manifest error whether deliberately or otherwise, to deposit the aforesaid amount by creating a temporary ID at its own, without informing any relevant fact or password etc. to the petitioner. Therefore, it was wholly impossible for the petitioner to apply online for refund under Section 54(1) of the Act read with Rule 89 of the Rules. It is well settled that law does not compell a man to

do what he cannot possibly perform. Under the circumstances, the petitioner admittedly moved a refund application dated 09.07.2018 in physical form for refund of the aforesaid amount pursuant to appellate order dated 30.06.2018 and also enclosed a copy of the appellate order along with the refund application. Since then, the petitioner who is based in the State of Gujrat has been running from pillar to post to get the refund as is evident from the facts briefly noted in paragraph-6 to 10 of this judgment. The respondents themselves have forgotten the password of the temporary ID and, therefore, could not provide it to the petitioner as is evident from their own letter dated 16.07.2021 referred in the order dated 28.03.2022 passed by this court (quoted in paragraph-11 above). The fact that the petitioner was compelled to apply for refund physically vide application dated 09.07.2018, also stands admitted by the respondent No.1 in paragraph-16 of her personal affidavit dated 25.04.2022 quoted in paragraph 17 above, that due to technical glitches, the temporary I.D. of the petitioner was not available at the end of proper officer's login as it was at development stage of GST Portal and hence it was not possible to provide the password to the petitioner from the proper officer's end.

23. Thus, as per own admitted case of the respondents, they themselves firstly proceeded arbitrarily and deposited the amount received from the petitioner, by creating a temporary ID and did not give access to the petitioner to the said ID and even the said temporary ID was not available at the end of the proper officer's login and its password was not provided to the petitioner as per own stand taken by the respondents in the afore-quoted paragraph-16 of the personal affidavit dated 25.04.2022. Under the circumstances, when the appellate authority vide order dated 30.06.2018 directed for refund and the order was communicated to the respondents by the petitioner vide letter dated 09.07.2018, then, the respondents were bound to refund the amount along with interest under Section 56 of the CGST/ U.P. GST Act, 2017 but on one hand, they arbitrarily withheld the refund of the petitioner for more than 33 months and on the other hand, they again arbitrarily acted and have not granted interest to the petitioner on the delayed refund of the amount in question. The principal amount deposited was refunded by the respondents to the petitioner only on 04.04.2022. Thus, the petitioner is entitled for interest under Section 56 of the Act, 2017.

24. There is another aspect of the matter, so far as the payment of interest by the respondents to the petitioner is concerned. As per refund sanctioned order dated 31.03.2022 (Annexure-10 to the personal affidavit of the respondent No.1 dated 25.04.2022), the reason for granting refund has been recorded as under:

"With reference to order 17/2018 dated 30-06-2018 issued by Additional Commissioner, Grade-2 (Appeal), second, commercial tax, Jhansi zone, Jhansi."

25. The communication of the aforesaid appellate order dated 30.06.2018 was made to the respondents on 09.07.2018 which fact could not be disputed by the respondents. Thus, the relevant date as per explanation 2(d) of the explanation appended to Section 54 of the Act, 2017 is 09.07.2018, i.e. date of communication of the appellate order. As per the proviso to Section 56 of the Act, 2017, where the

appellate order has attained finality and refund arisen therefrom is not refunded within sixty days from the date of receipt of application filed consequent to such order, interest at such rate not exceeding 9% as may be notified by the Government on the recommendations of the Council shall be payable in respect of such **refund from the date immediately after the expiry of sixty days from the date of receipt of application till the date of refund**. Thus, the amount refunded by the respondents pursuant to the appellate order dated 30.06.2018 communicated on 09.07.2018, the interest shall be liable to be paid by the respondents to the petitioner for the period from 09.09.2018 to 31.03.2022.

26. In the present set of facts, the respondents have committed wrong **firstly** by not showing the deposit under IGST Act, **secondly** by showing the deposit by creating temporary ID at its own and **thirdly,** not informing the petitioner the password for the temporary ID so created, to enable him to apply in the prescribed form. The Respondent No.1 in paragraphs-16, 17 and 18 of her personal affidavit dated 25.04.2022 (aforequoted) has herself stated that due to technical glitches, the temporary I.D. of the petitioner was not available at the end of proper officer's login as it was at development stage of GST Portal and hence it was not possible to provide the password to the petitioner from the proper officer's end, and it was the effort made at the end of the respondent No.1 that it became possible to activate the temporary ID at the login of the proper officer to provide password when the entire problem came into knowledge of the respondent No.1 and thereafter, on receiving the password, the petitioner made online application in RFD-01 on 31.03.2022. Thus, the respondents arbitrarily and illegally withheld the amount of refund despite the order of the first appellate authority dated 30.06.2018 for refund.

27. It is well settled that **"construction which permits one to take advantage of one's own wrong or to impair one's own objections under a Statute should be disregarded. The interpretation should as far as possible be beneficial in the sense that it should suppress the mischief and advance the remedy without doing violence to the language", vide Commissioner of Customs (Prev.), Mumbai vs. M. Ambalal, 2010 (260) ELT 487 (para-11).** It has also been settled that **no one can take advantage of his own wrong vide Union of India vs. Shakti LPG Lt., 2008 (223) ELT 129 (SC) (para-9)**. Therefore, applying the aforesaid settled principles, the respondents cannot be allowed to take advantage of their own wrong so as to deny the payment of interest to the petitioner on delayed refund.

28. For all the reasons afore-stated, **both the writ petitions are allowed.** The respondents are directed to pay interest to the petitioner within a month from today, for the period from 09.09.2018 to 31.03.2022, at the rate notified under Section 56 of the Act.

(2022)05ILR A1587
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.05.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ Tax No. 465 of 2022

Harish Chandra Bhati ...Petitioner
Versus
Principal Commissioner of Income Tax, Noida & Ors. ...Respondents

Counsel for the Appellant:

Sri Ashish Bansal, Sri Bhavnesh Saini

Counsel for the Respondents:
Sri Gaurav Mahajan, Sri Arvind Kumar Goswami, Sri S.P. Singh (A.S.G.I.), Sri Ashish Agarwal

A. Court is frequently coming across writ petitions in which impugned orders reflect non-observance of principles of natural justice and eve reply submitted by assesses is not being considered by Assessing Officers under the faceless regime as well as non-faceless regime under the Act, 1961.

B. Taxpayers are important pillars of economy of the country. Their harassment not only causes jolt to the economy of the country and also employment and also comes in the way of economic policy of the Government including the policies "Ease of Doing Business". The instructions dated 23.04.2022 issued by the CBDT in exercise of powers conferred u/S 119 of the Act, 1961 and St.ment made by the Respondent No.04 in the afore quoted Para 10 of the personal affidavit dated 19.05.2022 needs to be implemented truly and effectively and, therefore, necessary mandamus needs to be issued to the respondents.

Writ Petition disposed of. (E-12)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Jayant Banerji, J.)

1. Heard Sri Ashish Bansal, learned counsel for the petitioner, Sri S.P. Singh, learned Additional Solicitor General of India assisted by Sri Arvind Kumar Goswami, learned Central Government Standing Counsel and Sri Ashish Agarwal, learned Standing Counsel for the respondent-Income Tax Department.

2. A personal affidavit of respondent No.4, namely, Sri Tarun Bajaj, Revenue Secretary to the Government of India, New Delhi dated 19.5.2022 has been filed today which is taken on record.

3. Learned Additional Solicitor General has referred to paragraphs 9 and 10 of the aforesaid personal affidavit dated 19.5.2022 and stated that the date of circular in paragraph 10 has been wrongly mentioned as 25.4.2022 instead 23.4.2022 and copy of said circular dated 23.4.2022 has already been filed alongwith the personal affidavit dated 3.5.2022. He further states that the Government's stand stated in paragraph 10 of the personal affidavit dated 19.5.2022 is clear and, accordingly, the Government shall take all actions against the erring officers.

4. In the order dated 30.03.2022 passed by this court, submissions of the learned counsel for the petitioner have been noted as under:-

"Learned counsel for the petitioner submits that the two land in question were jointly owned by seven persons. The petitioner herein and the aforesaid Dushyant Bhati both were also co-owners of the aforesaid agricultural land which was sold by two separate registered sale deeds. For the same set of reasons proceedings under Section 148 of the Act, 1961, were initiated against the petitioner and the aforesaid Dushyant Bhati who is the son of the petitioner. The Assessment Order dated 23.03.2022 under Section 147 read with Section 144 B of the Act, 1961, in respect of Dushyant Bhati has been passed by the National Faceless Assessment Centre, Delhi, accepting his claim that the land in question was accepted to be an agricultural land situate beyond 8 km. of municipal limits. Thus the disclosed income in the returns for the Assessment Year 2013-14 has been

accepted and no tax has been imposed in respect of the sale of the land in question. On the other hand totally contrary view has been taken in the matter of the petitioner vide reassessment order dated 28.03.2022, under Section 147 read with Section 144 B of the Act, 1961, passed by the National Faceless Assessment Centre, Delhi, whereby 1/7th of the consideration in respect of the land in question, belonging to the petitioner, has been assessed as a long term capital gain on the finding that the land in question is not an agricultural land. Thus, on the same set of facts while the respondents have accepted the claim of petitioner's son in respect of the same land and on the other hand in respect of the same land the stand taken by the petitioner has been rejected and the sale proceeds of the agricultural land has been assessed as a long term capital gain."

5. In the order dated 18.04.2022, submission of learned counsel for the respondent Nos.1, 2 and 3 has been noted, as under:

"Today, learned counsel for the respondent nos.1, 2 and 3 states that conflicting orders are being passed by National Faceless Assessment Centre and for which steps shall be taken to remove the anomalies.

In view of the statement as aforenoted and also the fact that two conflicting reassessment orders have been passed by the National Faceless Assessment Centre in respect of two co-owners of the same land, we direct the newly impleaded respondent no.4 to look into the matter and file his personal affidavit explaining the state of affairs and the steps being taken by the Government."

6. In response, a personal affidavit dated 03.05.2019 on behalf of Union of India has been filed by Sri Tarun Bajaj, Revenue Secretary to the Government of India who has stated in paragraph-11 of the affidavit, as under:

*"11. **The petitioner has an alternate administrative remedy in form of approaching the Local Committee** for grievance settlement instead of approaching the Court in writ proceedings. **Local committee has been empowered to deal with Taxpayer's Grievances from High-Pitched Scrutiny Assessment upon receipt of grievances, related to High-pitched Scrutiny assessments completed either under the Faceless Assessment regime or non-faceless Assessment regime and ascertain whether there is a prima-facie case of High-pitched Assessment, non-observance of principles of natural justice, non-application of mind or gross negligence of Assessing Officer/Assessment Unit.** Issues such as the present case can be resolved by individual taxpayers through the remedy of approaching local committees set up for grievance redressal.*

[A True Copy of the Revised Instruction for dealing with Taxpayer's grievance from High pitched scrutiny assessment, dated 23.04.22 (earlier version being Instruction No 17/2015 dt. 09/11/2015) is marked as Annexure A]"

7. True copy of **instructions/ Circular F.No.225/101/2021-ITA-II,** Government of India, Ministry of Finance, Department of Revenue, Central Board of Direct Taxes **dated 23.04.2022** issued under Section 119 of the Income Tax Act, 1961 and filed as Annexure A-1 to the personal affidavit dated 03.05.2022 is reproduced below:

"F.No.225/101/2021-ITA-II
Government of India

Ministry of Finance

Department of Revenue

Central Board of Direct Taxes

****

Room No. 245-A, North Block,
New Delhi, the 23rd April, 2022

To

All Pr. CCsIT/DGsIT/Pr.CCIT(Exemption)/Pr. CCIT(International-tax)

Madam/Sir,

Subject: Revised Instruction for constitution and functioning of ''Local Committees to deal with Taxpayers' Grievances from High-Pitched Scrutiny Assessment' -reg.

The Central Board of Direct Taxes (the 'CBDT'), by its Instruction No. 17/2015, dated 9-11-2015 (copy enclosed) provided for constitution of 'Local Committees to deal with Taxpayers' Grievances from High-Pitched Scrutiny Assessment' in each Pr.CCIT region. The Local Committees were constituted to expeditiously deal with Taxpayers' grievances arising from High-Pitched Scrutiny Assessment.

2. Taking into consideration the changes in organizational set-up subsequent to launch of Faceless Assessment regime, ***the CBDT, in exercise of its powers under section 119 of the Income-tax Act, 1961*** *('the Act') and in supersession of its earlier Instruction No. 17/2015 dated 9-11-2015,* ***hereby issues the following instructions regarding constitution and functioning of 'Local Committees to deal with Taxpayers' Grievances from High-Pitched Scrutiny Assessment':***

A. Constitution of Local Committees:

(i) Local Committees to deal with Taxpayers' Grievances *from High-Pitched Scrutiny Assessment ('Local Committees')* ***are required to be constituted in each Pr.CCIT region across the country including the Pr.CCIT(Exemption) and Pr.CCIT(International Taxation).***

(a) The ***Local Committee shall consist of 3 members*** *of Pr.CIT/CIT rank. To have a perspective of processes involved in Faceless Assessment process, Local Committees so constituted in each Pr. CCIT region and Pr.CCIT(Exemption) shall have one Pr.CIT (AU) of the region. The Local Committee constituted under the Pr.CCIT(International Taxation) need not have a Pr.CIT(AU) as a member, as the assessments under the International Taxation charges are outside the purview of Faceless Assessment regime.*

(b) The other members may be selected from the pool of officers posted as Pr.CsIT/Pr. CIT(Central)/CIT(Judicial)/ CIT(Audit)/CsIT(DR), ITAT of the respective Pr.CCIT region. For the Local Committees constituted under the Pr.CCIT(Exemption) and Pr.CCIT(International Taxation), members may be selected from their respective pool of officers.

(c) The senior most Member would be designated as the Chairperson of the Committee.

(d) The Addl. CIT (Headquarters) to such Pr. CCIT would act as a Member - Secretary to the Local Committee.

(ii) *The Local Committees so constituted may co-opt other members, if necessary.*

(iii) The Pr. CCIT concerned should ensure that the Local Committees are duly reconstituted after transfer/promotion of Members of the existing Local Committees.

(iv) Adequate publicity shall be given regarding constitution and functioning of Local Committees for filing of grievance petitions regarding High-Pitch Scrutiny Assessments. The communication address of such Local Committees shall be displayed at prominent places in the office building.

B. Jurisdiction of Local Committees:

The Local Committees constituted as above shall deal with the grievance petitions of the assessees under the ***jurisdiction of respective Pr.CCIT regarding High-Pitched Scrutiny Assessments completed under both Faceless and non-Faceless Assessment regimes.*** *These Committees constituted in Pr. CCIT Region will also handle the grievances pertaining to Central Charges located under the territorial jurisdiction of the Pr. CCIT concerned.*

C. Receipt of Grievances:

(i) Grievances related to High-Pitched Scrutiny Assessments completed under the Faceless Assessment regime will be received by NaFAC through dedicated e-mail id: samadhan.faceless.assessment@incometax.gov.in. *Grievances so received shall be forwarded to Local Committee of the Pr. CCIT concerned by NaFAC, under intimation to Pr. CCIT of the Region/ Pr.CCIT(Exemption).*

(ii) Grievances related to High-Pitched Scrutiny Assessments completed under the non-Faceless Assessment regime will be received by the office of Pr.CCIT concerned, physically or through e-mail. *Grievances so received shall be forwarded to Local Committee of the Pr. CCIT concerned.*

D. Action to be taken by the Local Committees on grievance petitions:

(i) A grievance petition *received by the Local Committee would be acknowledged. A separate record would be maintained for dealing with such petitions by the Member-Secretary.*

(ii) Member - Secretary *on receipt of taxpayers' grievances of High-Pitched Assessment,* ***will forward the same to the Chairman and Members of the Local Committee within three days of receipt of the grievance.***

(iii) *The grievance petition received by Local Committee would be examined by it to ascertain whether there is a prima facie case of High-Pitched Assessment, non-observance of principles of natural justice, non-application of mind or gross negligence of Assessing Officer/Assessment Unit.*

(iv) *The Local Committee may call for the relevant assessment records to peruse from the Jurisdictional Pr.CIT concerned.*

(vi) *The Local Committee may seek inputs from the Directorate of Systems (ITBA/e-filing/CPC-ITR, CPC-TDS, etc.), on Systems-related issues emanating from the grievance/matter under consideration, if considered necessary.*

(vii) *Local Committee would ascertain whether the addition(s) made in assessment order is/are not backed by any sound reason or logic, the provisions of law have grossly been misinterpreted or obvious and well-established facts on records have outrightly been ignored. The Committee would also take into consideration whether principles of natural justice have been followed by the Assessing Officer/Assessment Unit. Thereafter, Local Committee shall submit a report treating the order as High-Pitched/Not High-pitched, along with the reasons, to the Pr. CCIT concerned.*

(viii) The Local Committee shall *endeavor to* ***dispose of each grievance petition within two months from the end of the month in which such petition is received by it.***

(ix) *Member-Secretary will ensure that the* ***meetings of the Local Committees are held at least twice in every month*** *during the pendency of the grievance petitions and that timely reports are submitted to the Pr. CCIT concerned.*

E. Follow up action by Pr.CCIT:

(i) On receipt of the report of Local Committee, Pr. CCIT concerned may take suitable administrative action in respect of cases where assessment was found to be High-Pitched by the Local Committee, which inter alia include:

(a) Calling for explanation of the Assessing Officer/Assessment Unit *(through Pr.CCIT, NaFAC) and any other administrative action as deemed fit.*

(b) ***Administratively advise the Pr.CIT concerned to prevent any coercive recovery in cases identified as high pitched by the Local Committee.***

(ii) ***The findings of the report*** *of the Local Committee may also be shared by the Pr.CCIT concerned with NaFAC and/or Directorate of Income-tax(Systems),* ***as feedback, for revisiting the SOP/policy on Faceless Assessment and/or addressing the Systems related issues.***

F. Monitoring the functioning of Local Committee:

(i) ***The Pr. CCIT concerned shall review the work of the Local Committee on a monthly basis.*** *Pr. CCsIT shall highlight outcome of work of Local Committees along with the action taken on the suggestions made by the Local Committees in respect of cases where assessment were found to be High-Pitched by the Local Committees, in their monthly D.O. letters to the respective Zonal Member.*

(ii) ***Quarterly Report*** *regarding the functioning of Local Committees shall be furnished by the Pr. CCIT concerned to the O/o Member (IT&R), CBDT under intimation to the respective Zonal Member in the prescribed format (copy enclosed) by 15th of the month following the quarter ended.*

3. The purpose of constitution of Local Committees is to effectively and efficiently deal with the genuine grievances of taxpayers and help in supporting an environment where assessment orders are passed in a fair and reasonable manner. It is to be noted that Local Committees cannot be treated as an alternative forum to dispute resolution/appellate proceedings.

4. It is emphasized that the task of ***constitution of Local Committees as per this Instruction be finalized within 15 days of issue of this Instruction or 30-4-2022, whichever is later,*** *and compliance report may be sent by the Jurisdictional Pr. CCsIT/Pr. CCIT (Intl.Tax.)/ Pr.CCIT(Exemptions) to their respective Zonal Members with a copy to Member (IT&R), CBDT.*

5. This issues with the approval of Chairman, CBDT.

Enclosure: As above

(Ravinder Maini)

(Director)(ITA-II), CBDT.

Copy to:

1) The Chairperson, CBDT and all Members, CBDT

2) PS to the Secretary (Revenue)

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7) CIT (Media Coordinator), CBDT

8) Guard file

(Ravinder Maini)

(Director)(ITA-II), CBDT.

Annexure:

Quarterly Report on functioning of Local Committees to deal with taxpayers' grievances from High-Pitched Scrutiny Assessments

Date: Quarter 1/2/3/4, Year____

Number of grievances brought forward by the Local Committees from the last quarter	*Number of grievances received by the Local Committee during the quarter*	*Number of grievances disposed of by the Local Committee during the quarter*	*Number of grievances pending with the Local Committee at the end of the quarter*	*Number of grievances where assessment was found to be high-pitched*	*Synopsis of administrative actions taken in respect of cases found high-pitched (Name, PAN and Asst. Year Wise description has to be given.)*
(1)	*(2)*	*(3)*	*(4)*	*(5)*	*(6)*

(Note: The above information is to be submitted by 15th of the month following the quarter ended)"

8. On 05.05.2022, this Court passed the following order:

"Sri S.P. Singh, learned Additional Solicitor General has filed a personal affidavit dated 03.05.2022 of Sri Tarun Bajaj, Revenue Secretary to the Government of India annexing therewith a ***circular dated 23.04.2022 providing for constitution of local committees which prima facie appears to be wholly unsatisfactory and a complete eyewash to address the problem being faced by assessees on account of conflicting orders by the National Faceless Assessment Centre, New Delhi inasmuch as it merely provides a forum for complaint without any relief to the complainant and without fixing of accountability of the erring officers. It is highly improbable that an assessee shall make complaint against his assessing officer whether faceless or non-faceless without any relief to him from arbitrary assessment order or order passed in breach of principles of natural justice.***

Learned Additional Solicitor General states that the Revenue Secretary to the Government of India shall file a better affidavit indicating solution to the problem of conflicting orders, arbitrary orders and frequent breach of principles of natural justice by assessing authorities including National Faceless Assessment Centre, within two weeks.

Time as prayed is granted.

Put up as a fresh case on 19.05.2022 for further hearing."

9. In the personal affidavit filed today, the respondent No.4 by means of personal affidavit of Sri Tarun Bajaj, Revenue Secretary to the Government of India, New Delhi has stated in paragraphs-10 and 12, as under:-

"10. It is further respectfully submitted that even though a large number of assessments were carried out efficiently

and effectively, yet, recognising the difficulties faced by the tax payers, the Central Board of Direct Taxes issued instruction F. No. 225/101/2021/-ITA-II, dt. 25/04/22, for dealing with taxpayers grievances. The local committee ascertains whether the additions made in the assessment order is not backed by any sound reasons or logic, provisions of law have been grossly misinterpreted or obvious and well-established facts on record have been ignored outrightly. ***The said instruction also provides for initiation of suitable administrative action against the erring officer in case where assessments are found by the local committee to be high-pitched or where there is non-observance of principles of natural justice, non- application of mind or gross negligence of assessing officer/ Assessment Unit.*** *Also, the findings of the local committee are considered for revisiting SOP/policy on faceless assessment and addressing systems related issues.*

12. The Petitioner has statutory remedy under the Income Tax Act, 1961 which he may avail by filing revision petition before the jurisdictional Principal Commissioner of Income Tax under section 264 or filing appeal before the Commissioner of Income Tax (Appeals) under section 250. The Petitioner has also filed application for witndrawal of Writ Petition to avail the remedy available under law. As such the Writ Petition is liable to be dismissed."

10. In instructions/ Circular F.No.225/290/2015-ITA-II, dated 09.11.2015 issued by the Government of India, Ministry of Finance, Department of Revenue (CBDT), the Central Board of Direct Taxes (for short "CBDT") itself has noted that ***"it has been brought to the notice of Board that the tendency to frame high-pitched and unreasonable assessment orders is still persisting due to which grievances are being raised by the taxpayers. Such grievances not only reflect harassment of taxpayers but also lead to generation of unproductive work for Department as well as Appellate Authorities."*** Under the aforesaid instructions dated 09.11.2015, Local Committees were constituted to resolve quickly the taxpayers' grievances on account of high-pitched and unreasonable additions made by the Assessing Authorities. But it appears that tendency to frame high-pitched and unreasonable assessment orders is still persisting as also acknowledged by the respondents which resulted in issuance of instructions/ Circular dated 23.04.2022 under Section 119 of the Income Tax Act, 1961 so as to give it statutory backing.

11. This Court is also frequently coming across the writ petitions in which impugned orders reflect non-observance of principles of natural justice and even reply submitted by assessees are not being considered by Assessing Officers under the faceless regime as well as non-faceless regime under the Act, 1961.

12. Tax payers are one of the important pillars of economy of the country. Their harassment not only causes jolt to the economy of the country and employment but also comes in the way of economic policy of the government including the policy "Ease of Doing Business". The instructions dated 23.04.2022 issued by the CBDT, in exercise of powers conferred under Section 119 of the Act, 1961 and statement made by the respondent No.4 in the aforequoted para-10 of the personal affidavit dated

19.05.2022, needs to be implemented truly and effectively. Therefore, necessary mandamus needs to be issued to the respondents.

13. In view of the aforesaid, **the writ petition is disposed off** giving liberty to the petitioner to avail statutory remedy of appeal or revision under the Act, 1961 as he may be advised. All pending applications are disposed off.

14. In view of the discussions made above, particularly considering the instructions dated 23.04.2022 issued by the CBDT in exercise of powers conferred under Section 119 of the Act, 1961 and the statement of the respondent No.4 made in para-10 of the personal affidavit filed on 19.05.2022, the following directions in the nature of mandamus are issued:-

(i) The respondent No.4 shall ensure that copies of instructions F.No.225/101/2021-ITA-II, Government of India, Ministry of Finance, Department of Revenue, Central Board of Direct Taxes dated 23rd April, 2022 is circulated within a month from today to Tax Bar Associations at District Level, State Level and National Level for information along with the following contents of paragraph-10 of the personal affidavit dated 19.05.2022:-

"The said instruction also provides for initiation of suitable administrative action against the erring officer in case where assessments are found by the local committee to be high-pitched or where there is non-observance of principles of natural justice, non-application of mind or gross negligence of assessing officer/ Assessment Unit."

(ii) The respondent No.4 shall ensure that the aforesaid instructions dated 23.04.2022 along with afore-quoted contents of paragraph-10 of the personal affidavit dated 19.05.2022 shall be displayed on the official website of the Income Tax Department for awareness and information of taxpayers and consultants.

(iii) The constitution of Local Committees, procedure for submissions, receipts and disposal of grievances as provided in the aforesaid instructions dated 23.04.2022 and the above noted contents of the paragraph 10 of the personal affidavit dated 19.05.2022, for the purposes of publicity and awareness amongst taxpayers/ assessees to achieve the mandate of Clause 2.A.(iv) of the aforesaid instructions dated 23.04.2022, shall be published regularly for one year at least once in three months in two National Newspapers (one in English and the other in Hindi) and two State Level Newspapers (one in Hindi or Local Language and the other in English).

(iv) In the event "Local Committees" as referred in Clause 2.A.(i) of the aforesaid instructions dated 23.04.2022 in all the regions across the country including Pr.CCIT (Exemptions) and Pr.CCIT (International Taxation) have not yet been constituted, then the respondent No.4 shall ensure that Local Committees as provided in Clause 2.A.(i) of the aforesaid instructions dated 23.04.2022 be constituted within fifteen days from today and be made functional.

(v) The respondent No.4 shall ensure to establish a monitoring cell at the level of Government or CBDT within a month from today, if not established so far, which shall ensure regular monitoring of the Local Committees, follow up actions and review by Principal Chief Commissioners of Income Tax and Zonal Members, and analyse the quarterly reports for effective implementation of the

instructions dated 23.04.2022 and the statement made in paragraph 10 of the personal affidavit dated 19.05.2022 aforequoted.

(vi) The Local Committee shall dispose off each grievance petition within two months from the end of the month in which grievance petition is received by it and its result and action taken on administrative side, if any, shall be communicated in writing to the concerned assessee within next four weeks.

(vii) The CBDT shall regularly monitor and shall take all necessary steps from time to time for effective implementation of the scheme/ instructions dated 23.04.2022 and necessary modifications/ improvements therein in the interest of assessees so as to achieve the object of the aforesaid scheme/ policy decision/ instructions dated 23.04.2022.

(2022)05ILR A1596
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.04.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ Tax No. 518 of 2022

Uphill Farms Pvt. Ltd., Noida, U.P. **...Petitioner**

Versus

Union of India & Anr. **...Respondents**

Counsel for the Petitioner:
Vedika Nath, Sri Nishant Mishra

Counsel for the Respondents:
A.S.G.I., Sri Gaurav Mahajan, Sri Manu Ghildyal

A. Civil Law – Income Tax Act , 1961 - Section 147 - The assessing officer under Section 147 of the Act has power to reassess any income which escaped assessment to tax for any assessment year subject to provisions of Section 148 to 153 of the Act.

B. Reassessment of Income under Section 147 of the Act cannot be made on change of opinion**.**

C. The words 'reason to believe' suggest that belief must be that of an honest and reasonable person based upon reasonable grounds and the I.T.O. may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour.

D. Notice issued to the petitioner u/s 148 of the Act failed to pass the standard of reason as that of an honest and prudent person.

Writ Petition allowed with cost of Rs. 5,000. (E-12)

List of Cases cited:-

1. St. of U.P. & ors. Vs Aryaverth Chawal Udyog & ors. (2015)17 SCC 324(Paras 28-50)

2. The Commissioner of Sales Tax, U.P. Vs M/s Bhagwan Industries (P) Ltd., Lucknow AIR 1973 SC 370(Para 9 and 10)

3. M/s Parmarth Steel & Alloys Pvt. Ltd. Vs St. of U.P. & ors. Writ Tax No. 874/2010(Decided on 28.03.2022)(Para 17)

4. Shivnath Singh Vs Appellate Assistant CIT (1972)3 SCC 234(Para 10)

5. U.O.I. & ors. Vs M/s Rai Singh Dev Singh Bisht & ors. AIR 1974 SC 478

6. I.T.O. Vs Lakhmani Mewal Das (1976)3 SCC 757(Para 11 and 12)

7. M/s S. Gangasaran & Sons (P) Ltd., Calcutta Vs I.T.O. & ors. (1981)3 SCC 143(Para 6)

8. Income Tax Officer, Ward No. 62 Vs Tech Span India Pvt. Ltd. & anr. (2018)6 SCC 685 (Para 14-18)

9. Radha Krishna Industries Vs St. of H.P. (2021)6 SCC 771

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Jayant Banerji, J.)

1. Heard Shri Nishant Mishra, learned counsel for the petitioner and Shri Manu Ghildyal, learned Standing Counsel for the respondent-Income Tax Department.

2. By order dated 11.04.2022, this Court specifically directed the respondent no.2, vide paragraph 10 of the order, as under :-

"10. In view of the aforesaid, we direct the respondent no.2 to file a short counter affidavit by means of his personal affidavit stating as to how the notice under Section 148 of the Act, 1961 issued by him to the petitioner was a valid notice and how the respondent no.2 could get jurisdiction to issue notice under Section 148 of the Act, 1961 when the very basis of issuing notice, ie., 'reason to believe', recorded by him was totally unfounded, non-existent and wholly baseless."

3. Today, a counter affidavit dated 22.04.2022 on behalf of the respondent no.2 has been filed by Kumari Sukanya Kirti, Assistant Commissioner of Income Tax, Circle 5(3)(1), Noida. In paragraph 3 thereof, the respondent no.2 has stated as under :-

"3. That, vide order dated 11.04.2022, the Hon'ble Court has specifically sought reply to the following questions:-

(i) how the notice under Section 148 of the Act, 1961 issued by him to the petitioner was a valid notice?

(ii) how the respondent no.2 could get jurisdiction to issue notice under Section 148 of the Act, 1961 when the very basis of issuing notice, ie., 'reason to believe', recorded by him was totally unfounded, non-existent and wholly baseless."

4. Perusal of the counter affidavit shows that there is not even a whisper with respect to the query of the Court (as itself mentioned by the respondent no.2 in paragraph 3(ii) of her counter affidavit). On the other hand, in the re-assessment order, it has been specifically mentioned that "on perusal of the documentary evidence submitted by the assessee in reference to the information available on record, no inference is drawn in connection with the amount of Rs.45 lakhs". It shall not be out of place to mention that the petitioner submitted objection to the 'reason to believe' recorded by the assessing authority. In his objection, the petitioner has specifically stated that the petitioner has not entered into any transaction amounting to Rs.45 lakhs during the year under consideration which has been made basis for recording the "reason to believe" and to issue notice under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as the 'Act, 1961'). The petitioner has also produced documentary evidences to show that no transaction of Rs.45 lakhs as alleged was entered by the petitioner. Despite of these facts, on totally baseless and unfounded grounds, a notice under Section 148 of the Act, 1961 was issued by the respondent no.2 and, in a most arbitrary manner, the objection of the petitioner was not considered by the asssessing authority and was arbitrarily rejected.

5. Despite our order dated 11.04.2022, the **respondent no.2 has deliberately filed an evasive affidavit (counter affidavit)** in

which there is no whisper with regard to the second query of the Court.

Reason to Believe - Meaning, Scope and Consequence:-

6. In the case of **State of Uttar Pradesh & Others vs. Aryaverth Chawal Udyog & Others** reported in **(2015) 17 SCC 324** (paragraphs 28 to 30), the Hon'ble Supreme Court has held as under:

"28. This Court has consistently held that ***such material on which the assessing Authority bases its opinion must not be arbitrary, irrational, vague, distant or irrelevant.*** *It must bring home the appropriate rationale of action taken by the assessing Authority in pursuance of such belief.* ***In case of absence of such material, this Court in clear terms has held the action taken by assessing Authority on such "reason to believe" as arbitrary and bad in law.***

In case of the same material being present before the assessing Authority during both, the assessment proceedings and the issuance of notice for re-assessment proceedings, it cannot be said by the assessing Authority that "reason to believe" for initiating reassessment is an error discovered in the earlier view taken by it during original assessment proceedings. (See: Delhi Cloth and General Mills Co. Ltd. v. State of Rajasthan, (1980) 4 SCC 71).

29. ***The standard of reason exercised by the assessing Authority is laid down as that of an honest and prudent person who would act on reasonable grounds and come to a cogent conclusion.*** *The necessary sequitur is that a mere change of opinion while perusing the same material cannot be a "reason to believe" that a case of escaped assessment exists requiring assessment proceedings to be reopened. (See: Binani Industries Ltd. v. CCT,(2007) 15 SCC 435; A.L.A. Firm v. CIT, (1991) 2 SCC 558). If a conscious application of mind is made to the relevant facts and material available or existing at the relevant point of time while making the assessment and again a different or divergent view is reached, it would tantamount to "change of opinion".*

If an assessing Authority forms an opinion during the original assessment proceedings on the basis of material facts and subsequently finds it to be erroneous; it is not a valid reason under the law for re-assessment. ***Thus, reason to believe cannot be said to be the subjective satisfaction of the assessing Authority but means an objective view on the disclosed information in the particular case and must be based on firm and concrete facts that some income has escaped assessment.***

30. ***In case of there being a change of opinion, there must necessarily be a nexus that requires to be established between the "change of opinion" and the material present before the assessing Authority.*** *Discovery of an inadvertent mistake or non-application of mind during assessment would not be a justified ground to reinitiate proceedings under Section 21(1) of the Act on the basis of change in subjective opinion (CIT v. Dinesh Chandra H. Shah, (1972) 3 SCC 231; CIT v. Nawab Mir Barkat Ali Khan Bahadur, (1975) 4 SCC 360)."*

(emphasis supplied)

7. In the case of **The Commissioner of Sales-Tax U.P. vs. M/s. Bhagwan Industries (P) Ltd., Lucknow, AIR 1973 SC 370 (Paras 9 & 10)**, Hon'ble Supreme Court has held as under:

"9. The controversy between the parties has centered on the point as to whether the assessing authority in the

present case had reason to believe that any part of the turnover of the respondent had escaped assessment to tax for the assessment year 1957-58. Question in the circumstances arises as to what is the import of the words "reason to believe", as used in the section. ***In our opinion, these words convey that there must be some rational basis for the assessing authority to form the belief that the whole or any part of the turnover of a dealer has, for any reason, escaped assessment to tax for some year. If such a basis exists, the assessing authority can proceed in the manner laid down in the section. To put it differently, if there are, in fact, some reasonable grounds for the assessing authority to believe that the whole or any part of the turnover of a dealer has escaped assessment, it can take action under the section. Reasonable grounds necessarily postulate that they must be germane to the formation of the belief regarding escaped assessment. If the grounds are of an extraneous character, the same would not warrant initiation of proceedings under the above section. If, however, the grounds are relevant and have a nexus with the formation of belief regarding escaped assessment, the assessing authority would be clothed with jurisdiction to take action under the section. Whether the grounds are adequate or not is not a matter which would be gone into by the High Court or this Court, for the sufficiency of the grounds which induced the assessing authority to act is not a justiciable issue. What can be challenged is the existence of the belief but not the sufficiency of reasons for the belief. At the same time, it is necessary to observe that the belief must be held in good faith and should not be a mere pretence.***

10. It may also be mentioned that at the stage of the issue of notice the consideration which has to weigh is whether there ***is some relevant material giving rise to prima facie inference that some turnover has escaped assessment. The question as to whether that material in sufficient for making assessment or re-assessment under section 21 of the Act would be gone into after notice is issued to the dealer and he has been heard in the matter or given an opportunity for that purpose. The assessing authority would then decide the matter in the light of material already in its possession as well as fresh material procured as a result of the enquiry which may be considered necessary."***

(Emphasis supplied)

8. A Division Bench of this Court, while dealing with the validity of the re-assessment notice under Section 148 in **Writ Tax No.874 of 2010 (M/S Parmarth Steel And Alloys Pvt. Ltd. vs. State of U.P. and Others,** decided on 28.03.2022, held as under (Para 17) :

"17. It is settled principles of law that proceedings under Section 21 of the Act, 1948 can be initiated if the material on which the Assessing Authority bases its opinion, is not arbitrary, irrational, vague, distant or irrelevant. There must be some rational basis for the assessing authority to form the belief that the whole or any part of the turnover of a dealer has, for any reason, escaped assessment to tax for some year. If such a basis exists, the assessing authority can proceed in the manner laid down in Section 21 of the Act, 1948. If the grounds are of an extraneous character, the same would not warrant initiation of proceedings under the above section. If, however, the grounds are relevant and have a nexus with the formation of belief regarding escaped assessment, the assessing authority would be clothed with jurisdiction to take action under the

section. Whether the grounds are adequate or not is not a matter which would be gone into by the High Court for the sufficiency of the grounds which induced the assessing authority to act is not a justiciable issue. The question as to whether that material in sufficient for making assessment or re-assessment under section 21 of the Act would be gone into after notice is issued to the dealer and he has been heard in the matter or given an opportunity for that purpose. The assessing authority would then decide the matter in the light of material already in its possession as well as fresh material procured as a result of the enquiry which may be considered necessary.

9. In the case of **Sheo Nath Singh vs. Appellate Assistant CIT, (1972) 3 SCC 234 (Para-10)**, Hon'ble Supreme Court while considering the similar provisions of Section 34 (1-A) of the Indian Income Tax Act, 1922, held as under:-

"..... There can be no manner of doubt that the words "reason to believe" suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the Income Tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The Income Tax Officer would be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section. The court can always examine this aspect though the declaration or sufficiency of the reasons for the belief cannot be investigated by the court."

10. In the case of **Union Of India And Others vs M/S. Rai Singh Dev Singh Bist & others, AIR 1974 SC 478 : (1973) 3 SCC 581 (para-5),** Hon'ble Supreme Court held as under:-

"..... before an Income-tax Officer can be said to have had reason to believe that some income had escaped assessment, he should have some relevant material before him from which he could have drawn the inference that income has escaped assessment. His vague feeling that there might have been some escape of income from assessment is not sufficient... ....."

11. In the case of **ITO vs. Lakhmani Mewal Das, (1976) 3 SCC 757 (para-11 and 12),** Hon'ble Supreme Court has held as under:-

"11. As stated earlier, the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income-tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. It is no doubt true that the court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the Income-tax Officer on the point as to whether action should be initiated for reopening assessment. At the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and farfetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. The fact that the words "definite information" which

were there in section 34 of the Act of 1922 at one time before its amendment in 1948 are not there in section 147 of the Act of 1961 would not lead to the conclusion that action cannot be taken for reopening assessment even if the information is wholly vague, indefinite, farfetched and remote. The reason for the formation of the belief must be held in good faith and should not be a mere pretence.

12. The powers of the Income-tax Officer to reopen assessment though wide are not plenary. The words of the statute are "reason to believe" and not "reason to suspect". The reopening of the assessment after the lapse of many years is a serious matter. The Act, no doubt, contemplates the reopening of the assessment if grounds exist for believing that income of the assessee has escaped assessment. The underlying reason for that is that instances of concealed income or other income escaping assessment in a large number of cases come to the notice of the income-tax authorities after the assessment has been completed. The provisions of the Act in this respect depart from the normal rule that there should be, subject to right of appeal and revision, finality about orders made in judicial and quasi-judicial proceedings. It is, therefore, essential that before such action is taken the requirements of the law should be satisfied. The live link or close nexus which should be there between the material before the Income-tax Officer in the present case and the belief which he was to form regarding the escapement of the income of the assessee from assessment because of the latter's failure or omission to disclose fully and truly all material facts was missing in the case. In any event, the link was too tenuous to provide a legally sound basis for reopening the assessment. The majority of the learned Judges in the High Court, in our opinion, were not in error in holding that the said material could not have led to the formation of the belief that the income of the assessee respondent had escaped assessment because of his failure or omission to disclose fully and truly all material facts. We would, therefore, uphold the view of the majority and dismiss the appeal with costs."

12. In the case of **M/s. S. Ganga Saran and Sons (P) Ltd. Calcutta vs. ITO and others, (1981) 3 SCC 143 (Para-6)**, Hon'ble Supreme Court held as under:-

"6. It is well settled as a result of several decisions of this Court that two distinct conditions must be satisfied before the Income Tax Officer can assume jurisdiction to issue notice under section 147 (a). First, he must have reason to believe that the income of the assessee has escaped assessment and secondly, he must have reason to believe that such escapement is by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. If either of these conditions is not fulfilled, the notice issued by the Income Tax Officer would be without jurisdiction. The important words under section 147 (a) are "has reason to believe" and these words are stronger than the words "is satisfied". The belief entertained by the Income Tax Officer must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons which are relevant and material. The Court, of course, cannot investigate into the adequacy or sufficiency of the reasons which have weighed with the Income Tax Officer in coming to the belief, but the Court can certainly examine whether the reasons are relevant and have

a bearing on the matters in regard to which he is required to entertain the belief before he can issue notice under section 147 (a). It there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the Income Tax Officer could not have reason to believe that any part of the income of the assessee had escaped assessment and such escapement was by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts and the notice issued by him would be liable to he struck down as invalid."

13. In the case of **Income Tax Officer, Ward No.62 vs. TechSpan India (P.) Ltd. and another, (2018) 6 SCC 685 (Paras 14 to 18),** Hon'ble Supreme Court held as under:

"14. The language of Section 147 makes it clear that the assessing officer certainly has the power to re-assess any income which escaped assessment for any assessment year subject to the provisions of Sections 148 to 153. However, the use of this power is conditional upon the fact that the assessing officer has some reason to believe that the income has escaped assessment. The use of the words "reason to believe' in Section 147 has to be interpreted schematically as the liberal interpretation of the word would have the consequence of conferring arbitrary powers on the assessing officer who may even initiate such re-assessment proceedings merely on his change of opinion on the basis of same facts and circumstances which has already been considered by him during the original assessment proceedings. Such could not be the intention of the legislature. The said provision was incorporated in the scheme of the IT Act so as to empower the Assessing Authorities to re-assess any income on the ground which was not brought on record during the original proceedings and escaped his knowledge; and the said fact would have material bearing on the outcome of the relevant assessment order.

15. Section 147 of the IT Act does not allow the re-assessment of an income merely because of the fact that the assessing officer has a change of opinion with regard to the interpretation of law differently on the facts that were well within his knowledge even at the time of assessment. Doing so would have the effect of giving the assessing officer the power of review and Section 147 confers the power to re-assess and not the power to review.

16. To check whether it is a case of change of opinion or not one has to see its meaning in literal as well as legal terms. The words "change of opinion" implies formulation of opinion and then a change thereof. In terms of assessment proceedings, it means formulation of belief by an assessing officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection.

17. It is well settled and held by this court in a catena of judgments and it would be sufficient to refer ***Commissioner of Income Tax, Delhi vs. Kelvinator of India Ltd. (2010) 320 ITR 561(SC)*** *wherein this Court has held as under: (SCC p.725, para 5-7)*

"5....where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1-4-1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to

believe"..... Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen.

6. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment of certain precondition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place.

7. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1-4-1989, Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief."

18. Before interfering with the proposed reopening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed reassessment proceedings. Every attempt to bring to tax, income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the reassessment proceedings."

14. In the case of **Radha Krishna Industries vs. State of H.P., (2021) 6 SCC 771,** Hon'ble Supreme Court reiterated the law laid down in its earlier judgments in the case of **Kelvinator of India Limited** (supra) and **TechSpan India** (P.) Ltd. (supra) and held that the *power to reopen an assessment must be conditioned on the existence of "tangible material" and that "reasons must have a live link with the formation of the belief*".

15. In view of the above discussion, **we summarize the principles, powers and limitations on exercise of powers under Section 147/148 by Income Tax Officers/ Authorities under the Income tax Act, 1961, as under:-**

(a) The assessing officer under Section 147 of the Act, 1961 has the power to re-assess any income which escaped assessment to tax for any assessment year subject to the provisions of Sections 148 to 153. The power to reassess under Section 147 of the Act, 1961 has been incorporated so as to empower the Assessing Authorities to re-assess any income on the ground which escaped his knowledge.

(b) Reassessment of income under Section 147 of the Act, 1961 cannot be made on change of opinion. The words **"change of opinion"** implies formulation of opinion and then a change thereof. If the Assessing Officer has earlier made assessment for the same Assessment Year expressing an opinion of a matter either expressly or by necessary implication then on the same matter, a reassessment proceedings for the alleged escapement of income from assessment to tax, cannot be initiated as it would be a case of "change of

opinion". If the assessment order is non-speaking, cryptic or perfunctory in nature, then it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed reassessment proceedings. If a conscious application of mind is made to the relevant facts and material available or existing at the relevant point of time while making the assessment and again a different or divergent view is reached, it would tantamount to "change of opinion". If the assessing Authority forms an opinion during the original assessment proceedings on the basis of material facts and subsequently finds it to be erroneous; it is not a valid reason under the law for re-assessment.

(c) The words **"reason to believe"** suggest that the belief must be bona fide and must be that of an honest and reasonable person based upon reasonable grounds and that the Income Tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. His vague feeling that there might have been some escapement of income from assessment is not sufficient. The reasons for the formation of the belief must be based on tangile material and must be based on a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income-tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular assessment year. In other words, such material on which the assessing Authority bases its opinion must not be arbitrary, irrational, vague, distant or irrelevant. If the grounds for formation of "reason to believe" are of an extraneous character, the same would not warrant initiation of proceedings under Section 147 of the Act, 1961.

(d) If, there are, in fact, some reasonable grounds for the assessing authority to believe that the whole or any part of income of the assessee has escaped assessment, it can take action under Section 147 of the Act, 1961. If the grounds taken for initiating reassessment proceedings under Section 147 of the Act, 1961 are relevant and have a nexus with the formation of belief regarding escaped assessment, the assessing authority would be clothed with jurisdiction to take action under the section. Whether the grounds are adequate or not is not a matter which would be gone into by the High Court for the sufficiency of the grounds which induced the assessing authority to act is not a justiciable issue. What can be challenged is the existence of the belief but not the sufficiency of reasons for the belief. The belief must be held in good faith and should not be a mere pretence.

(e) The question as to whether the material on the basis of which the assessing authority has formed the belief for "reason to believe" is sufficient, for making assessment or reassessment under Section 47 of the Act, 1961, would be gone into after the notice is issued to the assessee and he is heard or given an opportunity for that purpose. The assessing authority would then decide the matter in the light of material already in his possession as well as fresh material procured as a result of inquiry, if any, which may be considered necessary.

16. Perusal of the impugned notice under Section 148 of the Act, 1961 and other impugned orders clearly shows that the "reason to believe" recorded by the assessing authority, failed to pass the standard of reason exercised by the

assessing authority to be that of an honest and prudent person who would act on reasonable grounds and come to a cogent conclusion. The reasons recorded were totally unfounded and consequently the jurisdictional notice under Section 148 of the Act, 1961 issued by the assessing authority was without jurisdiction. Once the notice under Section 148 of the Act, 1961 issued by the assessing authority was without jurisdiction, the subsequent proceedings, including re-assessment order, cannot be sustained.

17. For all the reasons afore-stated, the impugned notice dated 31.03.2021 under Section 148 of the Act, 1961 issued by the respondent no.2, the order dated 09.03.2021 rejecting the objection of the petitioner, the re-assessment order dated 31.03.2022 under Section 147 of the Act, 1961 for the Assessment Year 2013-14 and the demand notice dated 31.03.2022 issued under Section 156 of the Act, 1961 cannot be sustained and are hereby quashed.

18. For all the reasons aforestated, the writ petition is **allowed** with cost of Rs.5000/-, which the respondents shall deposit with the High Court Legal Services Committee, High Court, Allahabad within three weeks from today, failing which the amount shall be recovered as fine.

(2022)05ILR A1605
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. 600 of 2022

M/s Gobind Tobacco Manufacturing Co., Panipat (Haryana) & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Aloke Kumar

Counsel for the Respondents:
C.S.C.

A. Civil Law - I.G.S.T. Act, 2017 - Section 207 - C.G.S.T. Act, 2017 - Section 129 (1) - Seizure of Goods and Vehicle- Petitioner no. 1 dispatched the consignment of Bijli Spit Tobacco to Nepal from Panipat under Invoice dated 14.01.2022 through transporter Ankit Transport Service. On same day petitioner no.01 generated E-Way bill from the portal of Government of India. Due to imposition of strict and rigid condition imposed by Nepal Government for entry in Nepal due to Covid 19 pandemic the driver of the vehicle did not fulfill the conditions so imposed. The goods were left in godown of petitioner no. 02 for onward transport to Nepal and by that time the period specified in E-Way bill expired. The petitioner no.02 arranged the vehicle and generated E-Way bill on 26.05.2022 in compliance of Rule 138 and 138-A. Thus, there was no intention for evasion of tax. Accordingly, seizure of good and vehicle is illegal and arbitrary.

Writ Petition allowed. (E-12)

List of Cases cited:-

1. Assistant Commissioner(ST) & ors. Vs M/s Satyam Shivam Papers Pvt. Ltd. & anr. Special Leave to Appeal No. 21132 of 2021(Decided on 12.01.2022)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Jayant Banerji, J.)

1. Heard Shri Aloke Kumar, learned counsel for the petitioners and Shri Nimai

Das, learned Additional Chief Standing Counsel for the State-respondents.

2. This writ petition has been filed praying for the following reliefs:-

"(i) Issue a suitable writ, order or direction in the nature of certiorari quashing the Detention/ Seizure Order dated 07.03.2022 [Annexure no. 13 to the writ petition] passed by respondent no. 3 under Section 20 of the IGST Act read with section 129 (1) of the CGST Act.

(ii) Issue a suitable writ, order or direction in the nature of certiorari quashing the Order of release dated 13.03.2022 [Annexure no. 16 to the writ petition] passed by respondent no. 3 under Section 20 of the IGST Act read with section 129 (3) of the CGST Act.

(iii) Issue a suitable writ, order or direction in the nature of certiorari quashing the Notices dated 22.03.2022 and 28.03.2022 [Annexure no. 18 and 20 to the writ petition] issued by respondent no. 3.

(iv) Issue a suitable writ, order or direction in the nature of mandamus commanding the respondent no.3 to release the goods and vehicle no. UP65BT/2241 so seized/ detained vide Order dated 07.03.2022.

(v) Issue any other suitable writ, order or direction in favor of the petitioner as this Hon'ble High Court may deem fit and proper under the facts and circumstances of the case.

(vi) Award the cost of the petition to the petitioner."

3. This writ petition was heard at length on 21.04.2022 and a detailed order was passed. The matter was again heard on 29.04.2022 and 06.05.2022. Counter and rejoinder affidavits have been exchanged between the parties.

4. **Petitioner no.1** is the partnership concern engaged in manufacture and sale of tobacco products and is registered under the provisions of The Central Goods & Service Tax Act, 2017 (hereinafter referred to as the 'CGST Act') having GSTIN 06AABFG2788A1ZQ at Panipat (Haryana). **Petitioner no.2** is a proprietorship concern engaged in transportation of goods and is registered under the CGST Act as a service provider having GSTIN 09ACIPY7858G2ZO at Gorakhpur. The aforesaid facts stated in paragraphs 4 and 5 of the writ petition have not been denied by the respondent no.3 in the counter affidavit dated 05.05.2022.

5. **In paragraph 6 of the writ petition,** it has been stated that the goods manufactured by petitioner no.1 are usually consumed in Nepal which **he used to export to Nepal covered under the letter of undertaking for export of excisable goods without payment of duty under Notification No.42/2001- CE(N.T.) dated 26.06.2001. In paragraph 7 of the writ petition,** it has been stated that in the course of business, petitioner no.1 dispatched the consignment of **BIJLI SPIT TOBACCO** packed in 200 boxes valuing Rs.7,20,000/- covered under the invoice no.51/2021-22/GTMC dated 14.01.2022 to **Lumbini Traders, Krishna Nagar, Nepal,** through the transporter namely, Ankul Transport Service. In paragraphs 8 and 9, it has been stated that HSN code of the commodity meant for export was mentioned on the aforesaid invoice, and that the digits of tariff mentioned therein are required to be mentioned only when the commodity is subject matter of export. **In paragraph 10** of the writ petition, it has been stated that in the invoice it was specifically mentioned that **"Export to Nepal Goods dispatched under LUT**

ARN No.AD0603210027240 DTD. 06/03/2021" and the copy of LUT was attached with the invoice for the purpose of transshipment to Nepal. **In paragraph 11** of the writ petition, it has been stated that the invoice issued for the goods was in accordance with the condition prescribed in Tariff Code-24039910. **In paragraph 12,** it has been stated that the petitioner no.1 got generated E-way Bill No.3414 0160 4901 from the portal of Government of India on 14.01.2022 at 3:09 P.M. for the goods in question by giving the reference of invoice.

6. The aforestated paragraphs 6, 7, 8, 9, 10, 11 and 12 of the writ petition have been replied by the respondent no.3 in paragraph 31 of the counter affidavit as under :-

"31. That the contents of paragraph nos.6, 7, 8, 9, 10, 11 & 12 of the writ petition do not call for any reply and comments being matter of record be verified therefrom."

7. In paragraphs 14, 15, 16 and 17 of the writ petition, the petitioners have stated as under :-

"14. That as **the Government of Nepal after opening its border** (which was sealed in March 2020 with India) **imposed conditions of 7 days quarantine and the visitors are allowed only after 14 days from the date of having last dose of COVID-19 vaccine and as the driver of the vehicle does not fulfill the conditions required for entry in Nepal thus he left the goods in the godown of petitioner no. 2 situated at Gida, Gorakhpur for further transshipment by another vehicle to Nepal.** In support of the above said submission the petitioner is bringing on record a news report published in Kathmandu Post. A true/photo copy of the news report as published in Kathmandu Post is being filed herewith and marked as Annexure No.8 to this writ petition.

15. That **as the quantity of the goods of the petitioner is not a full truck load further limited drivers are available intended to transport goods in Nepal thus the period specified in E-way bill expired.**

16. That **the expiry of period of E-way bill is beyond the control of the petitioner and is not a deliberate act of the petitioner in fact the same is bona fide.**

17. That under the above said specific circumstances the goods in question can only be transported to Nepal, when the vehicle is available and **in the instant case the petitioner no. 2 ultimately arranged the vehicle no. UP 65 BT 2241 and issued GR No. 635 dated 26.02.2022 for the goods in question and for the purpose of compliance of the provisions of rule 138 and 138A being transporter generated E-way bill no. 4712 3392 2443 on 26.02.2022 itself by giving the details of the documents.** A true/photo copy of the GR No. 635 dated 26.02.2022 and E-way bill no. 4712 3392 2443 are being filed herewith and marked as Annexure No.9 and 10 to this writ petition.

8. The aforequoted paragraphs 14, 15, 16 and 17 of the writ petition have been replied by the respondent no.3 in paragraphs 33, 34 and 35 of the counter affidavit in which he has not specifically denied the contents of the aforesaid paragraphs of the writ petition. Thus, the averment of facts made in paragraphs 14, 15 and 16 of the writ petition stands admitted to the respondents. **What has been stated in the counter affidavit while replying the aforesaid paragraphs of the writ petition is that the petitioners being**

aware of the COVID-19 pandemic situation, should not have export the goods and, instead of getting generated the second e-way bill, should have got extended the validity of the e-way bill within 8 hours of its expiry as per the provisions of Rule 138(10) of the CGST/IGST Rules.

9. **In paragraph 22** of the writ petition, the petitioners have stated that ***"there is no intention of evasion of tax and the goods in question are covered by documents required to be carried as per the provisions of Rule 138(A)."*** **In paragraph 27** of the writ petition, the **petitioner no.2** has stated that ***"he was of the bonafide opinion that the place of dispatch is required to be disclosed from Panipat as the goods had originally originated from Panipat not from Gorakhpur"***. **In paragraph 28** of the writ petition, it has been stated that the **petitioner no.2** had generated e-way bill on 26.02.2022 indicating the said invoice as bill of supply bonafidely and in doing so there is no intention of evasion of tax. **The contents of aforesaid paragraphs of the writ petition have been replied by the respondents in paragraphs 37 and 38 of the counter affidavit in which the facts so stated have not been specifically denied at all.**

10. **In paragraph 43 of the writ petition,** the petitioners have stated that they have sent the objection through speed post but no order or notice fixing any other date has been communicated to them. **In paragraph 44** of the writ petition, the petitioners have stated that **they cannot be punished for the mistake occasioned bonafidely** under the specific condition imposed by the Government of Nepal for entry due to COVID-19. **These paragraphs 43 and 44 have been replied in paragraph 40 of the counter affidavit in which the facts as aforementioned have not been specifically denied by the respondents.**

11. In **paragraphs 46, 47 and 48 of the writ petition,** the petitioners have stated that the respondent no.3 had issued notice dated 28.02.2022 in the form of an order in arbitrary exercise of his power and ordered for deposit of more than Rs.1,00,000/- for release of the vehicle and while issuing the said notice directed to deposit Rs.3,00,000/- as against the outer limit of Rs.1,00,000/- fixed by the Statute. **In paragraphs 50, 51 and 52 of the writ petition,** the petitioners have made detailed and pointed specific averments that neither there was any intention of evasion of tax nor have they committed any default nor a sum of Rs.27,07,200/- could have demanded for release of goods nor the goods could be confiscated. It has further been specifically stated that the **transaction in question was covered by IGST Act. These paragraphs have been replied in paragraphs 42, 43, 44 and 45 of the counter affidavit in which there is no specific denial.**

12. Thus, from the facts as may be ascertained from the averments made by the parties in the writ petition and the counter affidavit, it is admitted to the parties that the goods in question originated from Panipat and were being transported with valid invoice from Panipat to Nepal but due to restriction imposed on account of COVID-19 pandemic, as specifically mentioned in paragraphs 14, 16, 17, 27 and 28 of the writ petition, the goods were unloaded at Gorakhpur and after the arrangement of another vehicle was made under prevailing situation of COVID-19

pandemic, the goods were transported to Nepal. Since the time gap was much, therefore, a second e-way bill was generated so that the goods may reach to its destination at Nepal. There is absolutely no dispute that the goods in question were dispatched by the petitioner no.1 from Panipat (Haryana) under valid invoice and valid papers. The goods in question were intercepted and seized by the respondents on hyper-technical ground and assumptions, without there being any allegation of intention to evade payment of tax. The second e-way bill was generated bonafidely and in circumstance beyond control of the petitioners. The averments of the petitioners in paragraph No.16 of the writ petition that generating the second e-way bill was totally bonafide, has also not been denied by the respondents. Since the goods were covered by valid documents, therefore, it could not have been detained or seized and hence the entire proceedings were totally arbitrary, illegal and without jurisdiction. The action of the respondents in seizing the goods in question is evidently an act of harassment to the petitioners, breach of their fundamental rights guaranteed under Article 14 of the Constitution of India and blatant abuse of power by the respondents.

13. In the case of **Assistant Commissioner (ST) & Ors. vs. M/s Satyam Shivam Papers Pvt. Limited & Anr. (Special Leave to Appeal No.21132 of 2021,** decided on 12.01.2022, Hon'ble Supreme Court held as under:-

"Having heard learned counsel for the petitioners and having perused the material placed on record, we find no reason to consider interference in the well-considered and well-reasoned order dated 2nd June, 2021, as passed by the the High Court for the State of Telangana at Hyderabad in Writ Petition No. 9688 of 2020. Rather, **we are clearly of the view that the error, if any, on the part of the High Court, had been of imposing only nominal costs of Rs. 10,000/- (Rupees Ten Thousand) on the respondent No. 2 of the writ petition, who is petitioner No.2 before us.**

The consideration of the High court in the order impugned and the **material placed on record leaves nothing to doubt that the attempted inference on the part of petitioner No.2, that the writ petitioner was evading tax because the e-way bill had expired a day earlier, had not only been baseless but even the intent behind the proceedings against the writ petitioner was also questionable,** particularly when it was found that the goods in question, after being detained were, strangely, kept in the house of a relative of the **petitioner No.2** for 16 days and not at any other designated place for their safe custody.

The High Court has, inter alia, found that:

"41. ..... It was the duty of 2nd respondent to consider the explanation offered by petitioner as to why the goods could not have been delivered during the validity of the e-way bill, and **instead he is harping on the fact that the e-way bill is not extended even four(04) hours before the expiry or four(04) hours after the expiry, which is untenable.**

The 2nd respondent merely states in the counter affidavit that there is clear evasion of tax and so he did not consider the said explanations.

This is plainly arbitrary and illegal and violates Article 14 of the Constitution of India, because there is no denial by the 2nd respondent of the traffic blockage at Basher Bagh due to the anti

CAA and NRC agitation on 4.01.2020 up to 8.30 pm preventing the movement of auto trolley for otherwise the goods would have been delivered on that day itself. He also does not dispute that 04.01.2020 was a Saturday, 05.01.2020 was a Sunday, and the next working day was only 06.01.2020."

The High Court has further found and, in our view, rightly so thus:

"42. How **the 2nd respondent could have drawn an inference that petitioner is evading tax merely because the e-way bill has expired,** is also nowhere explained in the counter- affidavit.

In our considered opinion, there was no material before the 2nd respondent to come to the conclusion that there was evasion of tax by the petitioner merely on account of lapsing of time mentioned in the e-way bill because even the 2nd respondent does not say that there was any evidence of attempt to sell the goods to somebody else on 06.01.2020. **On account of non-extension of the validity of the e-way bill by petitioner or the auto trolley driver, no presumption can be drawn that there was an intention to evade tax".**

The High Court has also commented on blatant abuse of the power by the **petitioner No.2** and has deprecated his conduct in the following words:

"43. We are also unable to understand why the goods were kept for safe keeping at Marredpally, Secunderabad in the House of a relative of 2nd respondent for (16) days and not in any other place designated for such safe keeping by the State.

44. In our opinion, there has been a blatant abuse of power by the 2nd respondent in collecting from the petitioner tax and penalty both under the CGST and SGST and compelling the petitioner to pay Rs.69,000/- by such conduct.

45. We deprecate the conduct of 2nd respondent in not even adverting to the response given by petitioner to the Form GST MOV-07 in Form GST MOV-09 and his deliberate intention to treat the validity of the expiry on the e-way bill as amounting to evasion of tax without any evidence of such evasion of tax by the petitioner."

Having said so, the High Court has set aside the levy of tax and penalty of Rs. 69,000/- (Rupees Sixty-nine Thousand) while imposing costs of Rs. 10,000/- (Rupees Ten Thousand), payable by the **petitioner No.2** to the writ petitioner within four weeks.

The analysis and reasoning of the High Court commends to us, when it is noticed that the High Court has meticulously examined and correctly found that no fault or intent to evade tax could have been inferred against the writ petitioner. However, as commented at the outset, **the amount of costs as awarded by the High Court in this matter is rather on the lower side**. Considering the overall conduct of the **petitioner No.2** and the corresponding harassment faced by the writ petitioner we find it rather necessary to enhance the amount of costs.

Upon our having made these observations, learned counsel for the petitioners has attempted to submit that the questions of law in this case, as regards the operation and effect of Section 129 of Telangana Goods and Services Tax Act, 2017 and violation by the writ petitioner, may be kept open. The submissions sought to be made do not give rise to even a question of fact what to say of a question of law. As noticed hereinabove, on the facts of this case, **it has precisely been found that there was no intent on the part of the**

writ petitioner to evade tax and rather, the goods in question could not be taken to the destination within time for the reasons beyond the control of the writ petitioner. When the undeniable facts, including the traffic blockage due to agitation, are taken into consideration, the State alone remains responsible for not providing smooth passage of traffic.

Having said so; having found no question of law being involved; and having found this petition itself being rather mis-conceived , we are constrained to enhance the amount of costs imposed in this matter by the High Court.

The High Court has awarded costs to the writ petitioner in the sum of Rs. 10,000/- (Rupees Ten Thousand) in relation to tax and penalty of Rs.69,000/- (Rupees Sixty-nine Thousand) that was sought to be imposed by the petitioner No.2. **In the given circumstances, a further sum of Rs. 59,000/- (Rupees Fifty-nine Thousand) is imposed on the petitioners toward costs, which shall be payable to the writ petitioner within four weeks from today. This would be over and above the sum of Rs. 10,000/- (Rupees Ten Thousand) already awarded by the High Court.**

Having regard to the circumstances, we also make it clear that the **State would be entitled to recover the amount of costs, after making payment to the writ petitioner, directly from the person/s responsible for this entirely unnecessary litigation.**

This petition stands dismissed, subject to the requirements foregoing.

Compliance to be reported by the petitioners."

(emphasis supplied by us)

14. Applying the law laid down by Hon'ble Supreme Court in the case of Satyam Shivam Papers Pvt. Ltd. (supra) on the facts of the present case, the writ petition deserves to be allowed with cost.

15. For all the reasons aforestated, the impugned detention order dated 07.03.2022, the release order dated 13.03.2022 and notices dated 22.03.2022 and 28.03.2022, are hereby quashed being totally arbitrary and illegal. The goods and vehicle in question seized by the respondents are directed to be released forthwith.

16. The writ petition is, accordingly, **allowed with cost of Rs.50,000/- to each of the petitioners, i.e. total Rs.1,00,000/-** which the respondents shall pay the petitioners within four weeks from today.

(2022)05ILR A1611
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.04.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

Matters U/A 227 No. 872 of 2019 (Civil)

Ashok Kumar Kesarwani ...Petitioner
Versus
6th Additional District Judge Court No. 5, Allahabad & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vishal Khandelwal, Sri Prakash Chandra Gupta

Counsel for the Respondents:
Sri Prem Sagar Verma, Sri Arvind Srivastava, Sri Kunal Shah, Sri Madan Mohan

A. U.P. Act No. 13 of 1972- Section 21(1)(a) - Release of a part of residential accommodation for business purpose. In view of bar in clause (ii) of third proviso to Section 21(1)(a) of the Act, this plea never taken in the written St.ment nor raised before the appellate court and hence cannot be argued for the first tie before the High Court.

B. The disability under the aforesaid provision would be attracted if the tenant-petitioner or any member of his family has acquired another residential building in the same city, municipality etc.

Petition dismissed. (E-12)

List of Cases cited:-

1. Deepak Tandon & anr. Vs Rajesh Kumar Gupta (2019)5 SCC 537

2. Shiv Singh Chak Vs Baby Jain (2008)5 SCC 486

3. Laxmi Kant Bhatnagar Vs District Judge, Muzaffarnagar & anr. 2012 SCC Online All 3798

(Delivered by Hon'ble J.J. Munir, J.)

1. This petition is directed against an order of Mr. Ramesh Chandra, the 8th Additional District Judge, Court No.5, Allahabad passed in Rent Control Appeal No.10 of 2018, dismissing the said appeal and affirming the order of the Prescribed Authority/ Additional Civil Judge (Senior Division), Court No.14, Allahabad, allowing the landlord's application for release under Section 21(1)(a) of The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No. 13 of 1972)1.

2. An application for release under Section 21(1)(a) of the Act was made by Deepak Tandon and Shekhar Tandon, both sons of the late Manmohan Tandon, seeking release of a part of residential accommodation bearing premises No 18/15, Hastings Road, 1/5 Nyay Marg, Tandon Quarters, Allahabad (now Prayagraj), as detailed at the foot of the application. The aforesaid accommodation, that shall hereinafter be referred to as the property in dispute, is in the tenancy occupation of Ashok Kumar Kesarwani. Kesarwani is a tenant in the property in dispute at a monthly rent of Rs.520/-, besides water tax and house tax. The property in dispute was let out to Kesarwani's father, the late Kundan Lal Kesarwani for residential purposes. Kundan Lal Kesarwani lived in the property in dispute during his lifetime and left behind him Ashok Kumar Kesarwani, who is the opposite party to the application for release and the petitioner here, besides two other sons and daughters. The two other brothers of Ashok Kumar Kesarwani, who shall hereinafter be referred to as 'the tenant-petitioner', moved away from the property in dispute and settled elsewhere in Allahabad. The tenant-petitioner's sisters got married and have settled down in their matrimonial homes. The late Kundan Lal Kesarwani passed away some 20 years prior to institution of proceedings for release. The tenant-petitioner has inherited the tenancy and stays in the property in dispute along with his family. The tenant-petitioner manages a General Merchant and Grocers Shop located 25 metres away from the property in dispute. The tenant-petitioner's shop aforesaid is housed in the premises of one Smt. Chanda Rani Tandon, an aunt of the the two landlords, Deepak Tandon and Shekhar Tandon. Pending proceedings before the Courts below, Shekhar Tandon has passed away and is represented on record before this Court by his two sons, Ayush Tandon and Utkarsh Tandon, besides his widow Smt. Archana Tandon. Deepak Tandon is arrayed as

respondent no.3 to the petition. The heirs of Shekhar Tandon and Deepak Tandon shall hereinafter be referred to as 'the landlord-respondents' in case of a collective reference; in case of an individual reference, the landlord concerned shall be mentioned by name.

3. It is the landlord-respondents' further case that the tenant-petitioner has built a house of his own bearing Premises No. 62/30/6 B, Nawab Yusuf Road, Allahabad and has moved to the aforesaid house of his after vacating the property in dispute. For all practical purposes, the tenant-petitioner has moved out of the property in dispute and holds it in namesake, as it carries meagre rent. The tenant-petitioner has placed his lock on the property in dispute in order to retain possession thereof. It was the case of Deepak Tandon and Shekhar Tandon that their mother is very old and stays with them at their residential premises located at 47/33, Lukarganj, Allahabad. The distance between the landlord-respondents' residence and that of their business premises is about 3 kilometers. Deepak Tandon owns a firm by the name of Shubham Fluent Controls and Dynamics, whereas Shekhar Tandon owns a business by the name of Tele Links. Both the businesses are housed in parts of premises owned by Smt. Chanda Rani Tandon, an aunt of Deepak Tandon and Shekhar Tandon.

4. The landlord-respondents are doing business in rented accommodation that is located at a distance of 100 metres for Deepak Tandon and 25 metres for Shekhar Tandon from the property in dispute. Deepak Tandon and Shekhar Tandon have to stay in their business premises in connection with their business from 9:00 a.m. to 9:00 p.m. Both of them are turning old and to spend 12 hours and more at work causes exertion and tension. Deepak Tandon is a heart patient and has been advised by Doctors to eschew excessive labour and tension. The passage between the business premises of Deepak Tandon and Shekhar Tandon and their house involves negotiating the Railway Over-bridge, which is plagued by extraordinary traffic congestion leading the two brothers to face extreme inconvenience and difficulties.

5. It is the landlord-respondents' case that Deepak Tandon has filed P.A. Case No. 20 of 2011 against Rajesh Kumar Gupta, who is in occupation of accommodation abutting the tenant-petitioner. That accommodation is sought release of by Deepak Tandon for business's purposes. The said relief has been granted by the Prescribed Authority and the Appellate Authority, but the case was pending before this Court when the present release application was moved. Likewise, another P.A. Case was filed against a different tenant by Deepak Tandon and Shekhar Tandon, that is to say, Rajendra Kumar Abbi, who was in occupation of a shop, also sought release of for business purposes.

6. It is the pleaded case of the landlord-respondents that they made another release application being P.A. Case No. 6 of 13, Deepak Tandon and another vs. Smt. Saroj Anand, seeking release of part of the house in her possession on the ground of personal need for residential occupation for themselves and their families. It is the landlord-respondents' further case that in future they desire to have a house that was next to their office and business premises. For the present, the

two landlords, Deepak Tandon and Shekhar Tandon said that they *bona fide* required the property in dispute for the purpose of lunch and rest during the afternoon, as it was close by to their business premises. If available, it would obviate obviate the necessity for the two brothers negotiating the traffic jam to make it to their residence located at Lukerganj everyday for lunch and rest.

7. It is the landlord-respondents' further case that the tenant-petitioner's need for the property in dispute has been effaced because he has acquired in the same city area at the distance of a mere 150 metres from the last mentioned property, a house of his own, much larger in size, that is a three storied structure. The tenant-petitioner resides in the aforesaid house of his along with his family members.

8. It is specifically pleaded that the requirement of the two landlords, Deepak Tandon and Shekhar Tandon is *bona fide* for the property.

9. The tenant-petitioner filed a written statement and also an additional written statement, wherein he has not disputed his status as a tenant in the property in dispute, whereof the landlord-respondents have been acknowledged to be the landlords. It is the tenant-petitioner's case that the property in dispute has been in the tenancy occupation of the family since the past 50 years. His father was originally the tenant and used the said property as a godown to store his wares. After the death of the tenant-petitioner's father, he took up residence in the property in dispute and at the same time, utilized it as a godown. The tenant-petitioner denied the fact that he utilizes the property in dispute exclusively for the purpose of his residence, as asserted by the landlord-respondents. It was further pleaded at the instance of the landlord-respondents that the tenant-petitioner, from time to time, increased the monthly rent, which, in the current time, is a sum of Rs. 520/- per mensem. It includes water tax and sewer tax. The landlord-respondents, in the month of November, 2015 demanded of the tenant-petitioner that the rent may be enhanced to a sum of Rs. 3,000/-, which the latter declined. There is a case also pleaded about the fact that initially, the landlord-respondents accepted the rent, but later on refused, on account of which, the tenant-petitioner is regularly depositing the same under Section 30(1) of the Act. It was then pleaded that some other tenants have been evicted and there is available accommodation with the landlord-respondents to satisfy their claimed *bona fide* need, but deliberately the landlord-respondents have suppressed the facts and made the present release application *mala fide.*

10. There is also a specific plea raised in paragraph no. 25 of the written statement, setting out names of various tenants who are continuing to occupy different parts of the landlord-respondents' premises, but no proceedings for eviction have been taken against them. The tenant-petitioner, on the basis of singling him out for eviction proceedings has raised a plea of mala fides against the landlord-respondents. In the additional written statement, the tenant-petitioner has not denied the fact that he has got constructed a house of his own bearing Premises No. 62/30/6B, Nawab Yusuf Road, Allahabad, but said that his house is very small, admeasuring 15' x 30'. The tenant-petitioner goes to the said house to retire for the night. It is then pleaded in the additional written statement that in the

afternoon hours, he takes time off from his shop and eats his lunch, utilizing the property in dispute. The tenant-petitioner also says that he is afflicted by kidney disease, that causes him to frequently need the urinal. He utilizes the property in dispute that was located at the distance of a three quarters of a kilometer from his shop for the twin purpose of eating his lunch and answering the frequent call of nature, a fallout of his diseased kidneys. In addition, the property in dispute is used as a godown for his shop, where he can conveniently and quickly ensure supplies to his shop. It is also the tenant-petitioner's case that pending the proceedings for release, the landlord-respondents have got vacated adjoining shops from the other tenants, Rajesh Kumar Gupta, Surendra Kumar, Suresh Khanna, Rajendra Kumar Abbi, all of which has led the landlord-respondents to acquire in a vacant state much accommodation, that they can utilize for the purpose of satisfaction of their claimed *bona fide* need. The shops vacated by the above named persons are part of the same premises as the property in dispute and adjoining it. It is broadly on the aforesaid pleas that the tenant-petitioner has resisted the release application.

11. The parties filed their affidavits and some on behalf of the witnesses in support of their respective cases. The Prescribed Authority *vide* judgment and award dated 30.11.2017 allowed the release application. The tenant-petitioner filed Rent Appeal No. 10 of 2018 before the District Judge of Allahabad. The appeal came up for determination before the Additional District Judge, Court No. 5 Allahabad, who proceeded to hear and dismiss the appeal vide the judgment impugned dated 07.01.2019.

12. Dissatisfied, the tenant-petitioner has filed the present petition under Article 227 of the Constitution.

13. Parties have exchanged affidavits.

14. Heard Mr. Vishal Khandelwal, learned Counsel for the tenant-petitioner and Mr. Kunal Shah, learned Counsel appearing on behalf of respondent nos. 3 to 6.

15. It has been argued by Mr. Khandelwal that the property in dispute being one that is a residential building, it cannot be released for a business purpose, because what the landlord-respondents have said in their application normally constitutes a business purpose. He points out that the application is not maintainable, in view of Clause (ii) of the third proviso to Section 21(1) of the Act. It is argued that the landlord-respondents have pleaded a case that they need the property in dispute so that they can eat their lunch conveniently, as it is situate close to their business premises, sparing them the trouble of going home everyday, that is located three kilometers away from their place of work. This purpose the learned Counsel for the appellant submits is a business purpose, and not residential purpose.

16. This Court is afraid that the aforesaid objection is not very well-founded, because the plea that the property in dispute is a residential accommodation, attracting the bar carried in Clause (ii) of the third proviso to Section 21(1)(a) of the Act, was never taken in the written statement filed before the Prescribed Authority. It was also not argued before the Appellate Authority. It is before this Court that the plea has been urged for the first time. Learned Counsel for the tenant-petitioner says that the position is admitted that the property in dispute is a residential accommodation, and therefore, no pleading to that effect is required. He has urged that

admission is the best form of proof and here, this position it admitted that the property in dispute is a residential accommodation. This submission too is not borne out by the facts on record. In paragraph no. 21 of the written statement filed by the tenant-petitioner, it has been averred that the property in dispute was used since the time of their father for the purpose of his godown and also residence and until date, the tenant-petitioner utilizes the said property as a godown and also for the purpose of residence. However, a perusal of paragraph no. 5 of the additional written statement shows that the tenant-petitioner utilizes the property in dispute as a godown in order to facilitate his business and the only other use to which it is put is that the tenant-petitioner eats his lunch there and uses the washroom. This clearly would not show that the property in dispute was let out for a residential purpose. Rather, the totality of the pleadings indicate that since the time of his father, the property in dispute was used as a godown. Quite apart, how much of it was used for residence and what part as a godown would be a matter which would have been gone into from the point of view of maintainability, if that plea had specifically been raised before the Authorities below. The plea was not specifically taken before the Authorities below, on account of which, that issue with reference to the evidence was never examined. The same issue arose between the petitioner and another tenant, Rajesh Kumar Gupta, against whom, release was ordered by the Prescribed Authority and the Appellate Authority. This Court, however, in a writ petition, set aside the order on the ground that the tenancy was essentially for a residential purpose, where three rooms were utilized for residence and one for a shop, whereas the landlord-respondents had sought release for commercial purpose, attracting the bar under the third proviso to Section 21 of the Act.

17. The aforesaid view of this Court did not find favour with their Lordships of the Supreme Court in **Deepak Tandon and another v. Rajesh Kumar Gupta**2 where it was held :

15. In our considered opinion, the High Court committed jurisdictional error in setting aside the concurrent findings of the two courts below and thereby erred in allowing the respondent's writ appeal and dismissing the appellants' application under Section 21(1)(a) of the 1972 Act as not maintainable. This we say for the following reasons:

15.1. First, it is not in dispute that the respondent (opposite party) had not raised the plea of maintainability of the appellants' application under Section 21(1)(a) of the 1972 Act in his written statement before the Prescribed Authority.

15.2. Second, since the respondent failed to raise the plea of maintainability, the Prescribed Authority rightly did not decide this question either way.

15.3. Third, the respondent again did not raise the plea of maintainability before the first appellate court in his appeal and, therefore, the first appellate court was also right in not deciding this question either way.

15.4. Fourth, it is a settled law that if the plea is not taken in the pleadings by the parties and no issue on such plea was, therefore, framed and no finding was recorded either way by the trial court or the first appellate court, such plea cannot be allowed to be raised by the party for the first time in third court whether in appeal,

revision or writ, as the case may be, for want of any factual foundation and finding.

15.5. Fifth, it is more so when such plea is founded on factual pleadings and requires evidence to prove i.e. it is a mixed question of law and fact and not pure jurisdictional legal issue requiring no facts to probe.

15.6. Sixth, the question as to whether the tenancy is solely for residential purpose or for commercial purpose or for composite purpose i.e. for both residential and commercial purpose, is not a pure question of law but is a question of fact, therefore, this question is required to be first pleaded and then proved by adducing evidence. It is for this reason, such question could not have been decided by the High Court for the first time in third round of litigation in its writ jurisdiction simply by referring to some portions of the pleadings. In any case and without going into much detail, we are of the view that if the tenancy is for composite purpose because some portion of tenanted premises was being used for residence and some portion for commercial purpose i.e. residential and commercial, then the landlord will have a right to seek the tenant's eviction from the tenanted premises for his residential need or commercial need, as the case may be.

15.7. Seventh, the High Court exceeded its jurisdiction in interfering with the concurrent findings of fact of the two courts below while allowing the writ appeal entirely on the new ground of maintainability of the application without examining the legality and correctness of the concurrent findings of the two courts below, which was impugned in the writ appeal.

15.8. Eighth, the High Court should have seen that the concurrent findings of facts of the two courts below were binding on the writ court because these findings were based on appreciation of evidence and, therefore, did not call for any interference in the writ jurisdiction.

18. This is precisely the position here on facts and the state of pleadings. In view of holding of the Supreme Court in **Deepak Tandon** *(supra)*, the point urged by Mr. Khandelwal does not hold substance. So far as the question of *bona fide* need and comparative hardship is concerned, both the Authorities below have concurrently answered it against the tenant-petitioner and the inference drawn by both Courts from the evidence on record is, in no way, perverse or based on irrelevant material. The most important fact that tips the scales heavily in favour of the tenant-petitioner on both the counts of *bona fide* need and comparative hardship is that it is admitted to the tenant-petitioner that he has acquired/got constructed a house within the same city, situate at Premises No. 62/30/6B, Nawab Yusuf Road, Allahabad. The tenant-petitioner has, no doubt, attempted to explain the possession of a residential accommodation on the ground that the house constructed by him is very small, as he says in paragraph no. 5 of his Additional W.S., admeasuring 15' x 30' that he utilizes to retire at night alone, but that explanation is in apology for a plenary admission of the fact that the tenant-petitioner has a residential accommodation available to him in the same city. Rather, the tenant-petitioner's further case that he utilizes the property in dispute to eat his lunch and answer the call of nature excludes the case that he utilizes the property in dispute for residential purposes at all. These facts have figured in the pleadings of the tenant-petitioner, let alone the evidence. The findings that the Authorities below have given on its basis cannot, therefore, be faulted at all.

19. It is, thus, clear that the property in dispute is not at all utilized as a residential premises by the tenant-petitioner, but as a godown and a place to facilitate his business located at a short distance. It is the tenant-petitioner's case that he utilizes the property in dispute to eat his lunch and use the washroom, accessing it conveniently from his shop located close by. The landlord-respondents also need the property in dispute for a similar purpose, that is to say, as an adjunct or facility to their business, which they can utilize during the day to eat their lunch, instead of going to their faraway located home. Once both the tenant-petitioner and the landlord-respondents seek to utilize the property in dispute for a similar purpose and the landlord-respondents have shown that they need it to carry on their business with ease, the *bona fide* need of the landlord-respondents must be accepted. Likewise, comparative hardship would also have to be held in favour of the landlord-respondents, as both the tenant-petitioner and the landlord-respondents need the property in dispute for a similar purpose. Where the competing need is similar and evenly balanced, comparative hardship has to be held in favour of the landlord-respondents.

20. The Appellate Court has taken note particularly of the fact that in paragraph no. 13 of the affidavit, Paper No. 24ka, the tenant-petitioner has admitted the fact that he has recently got constructed the house bearing Premises No. 62/30/6B, Nawab Yusuf Road, Allahabad and has, on that basis, opined that the tenant-petitioner has no right whatsoever to object to the release of the property in dispute. This line of reasoning is an alternate to that this Court has hitherto considered. It proceeds on the tenant-petitioner's assertion that the property in dispute is residential or that was the purpose for which it was let out. Even if this case of the tenant-petitioner were to be accepted, Explanation (i) to Section 21(1) of the Act would come into play and disable the tenant-petitioner from objecting to the application for release. The disability under the aforesaid provision would be attracted if the tenant-petitioner or any member of his family has acquired another residential building in the same city, municipality etc. In this connection, reference may be made to the decision of the Supreme Court in **Shiv Singh Chak v. Baby Jain3,** where it has been held :

8. Explanation (i) to Section 21(1) of the Act provides that where a proceeding for eviction is initiated by the landlord in regard to a residential building under Section 21(1) of the Act and where the tenant or any member of his family has acquired a vacant residential building in the same city/town/area, the prescribed authority shall not entertain any objection of the tenant against the application for eviction. In effect this means that where the landlord avers and proves in an eviction proceedings relating to a residential building under Section 21(1) of the Act, that the tenant has acquired vacant possession of a residential building in the same city/town/area, it will not be permissible for the tenant to challenge the *bona fide*s of the landlord or put forth any hardship as a defence. But the said Explanation (i) to Section 21(1) does not apply to non-residential buildings. The Explanation to Section 21(1) starts with the words "In the case of a residential building". As the Explanation is inapplicable to a non-residential building, the bar contained in Clause (i) of the Explanation will not operate where the eviction petition is in regard to a non-

residential building. But the fact that the tenant has acquired a suitable alternative non-residential building may, however, be urged as a good ground to hold that no hardship will be caused to the tenant if he is evicted from the premises let out to him.

21. To the same effect is the decision of this Court in **Laxmi Kant Bhatnagar v. District Judge, Muzaffarnagar and another4**, where it was observed :

8. The legislative mandate is very clear. Once a tenant has himself got a residential accommodation, or through any member of his family who has been normally residing with him or is wholly dependent on him, in a vacant state, no objection against release application under section 21(1)(a) of Act, 1972 shall be entertained from such tenant.

9. The sale-deed is on record. There is nothing to show that accommodation was not vacant at the time of execution of sale-deed between petitioner-tenant's wife and erstwhile landlord of said building. No other material has been placed to show that the building when acquired was not vacant. The acquirement of building by petitioner's wife is not in dispute. It is also not in dispute that Explanation (i) would be attracted in the present case. Even during course of argument Sri A.K. Mehrotra has not controverted that the said provision i.e., Explanation (i) to section 21(1)(a) shall be attracted in the present case.

10. That being so, against landlord's application for release of residential accommodation, no objection can be entertained from the tenant. It means that the tenant loses any locus standi to object prayer for release made by the landlord.

11. That being so, it results in extinguishing any right to contest prayer of landlord for release of residential building which embraces within itself right to pursue or contest in subsequent proceedings also.

22. Thus, viewed from any angle and whichever way it is considered, no case for interference with the impugned order is made out.

23. In the result, this petition fails and is **dismissed.** There shall be no order as to costs.

(2022)05ILR A1619
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.05.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

Matters U/A 227 No. 7532 of 2021 (Civil)

Shivpal Singh & Ors. ...Petitioners
Versus
Dafedar Singh & Ors. ...Respondents

Counsel for the Petitioners:
Sri Satish Kumar Pandey, Sri Anil Kumar

Counsel for the Respondents:
Sri Yogendra Kumar Srivastava

Civil Law - Code of Civil Procedure, 1908 - Transfer Application u/S 24 - Petition u/A 227--- Power of the District Judge and High Court u/S 24 C.P.C. is concurrent and, therefore, once the application u/S 24 moved before District Judge has been dismissed the aggrieved party can approach u/S 24 of the CPC and not by way of petition u/A 227 of Constitution as held in Smt. Sunita Devi v Ram Kripal & anr. 2014 SCC Online Allahabad 13486 and Indian Oil Corp. Ltd. Vs Ram Swaroop Bajaj 2016 SCC Online Allahabad 2743

Petition referred to larger bench. (E-12)

List of Cases cited:-

1. Jaikaran Singh & ors. Vs Balak Ram & ors. 2020 SCC Online All 632

2. Smt. Sunita Devi Vs Ram Krapal & anr. 2014 SCC Online All 13486

3. Indian Oil Corporation Limited through it's Principal Secretary Vs Ram Swaroop Bajaj(Deceased) Through his Legal Heir Km. Aparna Bajaj 2016 SCC Online 2743

4. Jagdish Kumar Vs District Judge, Budaun 1998(33) ALR 400

(Delivered by Hon'ble J.J. Munir, J.)

Heard Mr. Satish Kumar Pandey, learned Counsel for the petitioners and Mr. Yogendra Kumar Srivastava, learned Counsel appearing for the respondents via video conferencing.

2. This is a petition under Art. 227 of the Constitution, seeking to set aside the order dated 26.10.2021 passed by the District Judge, Mainpuri in Transfer Application No. 85 of 2021, praying for a transfer of Civil Appeal No. 40 of 2016, Shivpal Singh and others v. Dafedar Singh, pending before the Ist Additional District Judge, Mainpuri to the Court of the District Judge. The appellants in the civil appeal pending before the District Court appear to be defendants of Suit No. 939 of 1996, decided by the Civil Judge (Junior Division), Mainpuri *vide* judgment and decree dated 20.10.2016. They are the petitioners here, whereas respondent nos. 1 to 13 are the plaintiff-respondents to the present petition as well as the appeal before the District Court. The petitioners' application for transfer has been dismissed by the learned District Judge of Mainpuri *vide* order dated 26.10.2021.

3. Before this Court could examine the merits of the order passed by the District Judge dated 26.10.2021, refusing the petitioners' plea for transfer of the appeal, Mr. Yogendra Kumar Srivastava, learned Counsel appearing for respondents took an objection that in view of the decision of this Court in **Jaikaran Singh and others v. Balakram and others1,** this petition is not maintainable. Instead, a transfer application would lie to this Court under Section 24 of the Code of Civil Procedure, 19082 after rejection of the petitioners' transfer application by the District Judge under the aforesaid provision.

4. Mr. Satish Kumar Pandey, learned Counsel for the petitioners, on the other hand, has countered the objection as to the maintainability of this petition under Art. 227 of the Constitution. He submits that once a transfer application under Section 24 of the Code is rejected by the District Judge, asking for transfer of a suit or appeal from one Court to another in the same judgeship, the only remedy is a petition under Art. 227 of the Constitution and not a transfer application made further to this Court under Section 24 of the Code. He has placed reliance upon the decision of this Court in **Smt. Sunita Devi v. Ram Kripal and another3** and another decision of this Court in **Indian Oil Corporation Ltd. through its Principal Secretary v. Ram Swaroop Bajaj** (deceased) through his legal heir Km. Aparna Bajaj4.

5. This Court has examined the matter, and there appears to be difference of opinion on the point between learned Single Judges of this Court. In **Jaikaran Singh** *(supra)*, Siddharth Varma, J. held that against an order of the District Court declining a transfer application under Section 24 of the Code, a petition under Art. 227 of the Constitution does not lie.

The remedy of the unsuccessful applicant for transfer is to invoke the concurrent jurisdiction of this Court under Section 24 of the Code. His Lordship in **Jaikaran Singh** has opined :

10. Having heard the learned counsel for the parties, I am of the view that an Application under Article 227 of the Constitution of India did not lie against an order passed under Section 24 of the CPC by the District Court. The High Court can always independently look into the grounds of a Transfer Application afresh. The jurisdiction conferred on both - the High court and the District was concurrent and was independently available to both the Courts.

11. However, the parties should approach the District Court first and thereafter the High Court as judicial property demand that judicial hierarchy be maintained. It was, therefore, always in the interest of justice that the powers of the District Court be invoked initially and, thereafter, those of the High Court. Certainly an order passed on a Transfer Application does not bring to an end the litigation between the parties and, therefore, as has been held in *Asrumati Debi v. Kumar Rupendra Deb Raikot (supra)* as an order passed under Section 24 of the C.P.C. is not a judgement the High court cannot exercise its supervisory jurisdiction. Thus, once when the doors of the District Court have been knocked the filing of a Transfer Application before the High Court is neither prohibited nor excluded. A bare reading of the Section 24 of the C.P.C. would clarify the point in issue and, therefore, Section 24 of the C.P.C. is being reproduced here as under:

24. General power of transfer and withdrawal.- (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High Court or the District court may at any stage--

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which is thereafter to try or dispose of such suit or proceeding may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

(3) For the purposes of this section.--

(a) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court;

(b) "proceeding" includes a proceeding for the execution of a decree or order.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Cases shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

(5) A suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it.

12. In contrast, the provisions of Order IX Rule 13 of the C.P.C. may also be looked into which clearly put a bar on the filing of an application under Order IX

Rule 13 of the C.P.C. once the parties had got an Appeal decided by a higher court. The provisions of Order IX Rule 13 of the C.P.C. are also being reproduced here as under:--

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 that 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.]

13. Under such circumstances, to say that the legislature desired the filing of only one application, either before the High Court or before the District Court would be an erroneous interpretation.

14. Therefore, relying on *Asrumati Debi v. Kumar Rupendra Deb Raikot4 I* hold that since the High Court had not to sit in appeal or under its supervisory jurisdiction over the order passed by the District Court while rejecting a Transfer Application, and in fact it had to independently decide the Transfer Application afresh, the Application under Article 227 of the Constitution of India was not maintainable.

15. The application, therefore, under Article 227 of the Constitution of India is dismissed as being not maintainable.

6. Much earlier than the decision in **Jaikaran Singh**, Surya Prakash Kesarwani, J. appears to have taken a contrary view, holding that no power has been conferred on the High Court to set aside orders made by the District Court on a transfer application under Section 24 of the Code and that, therefore, against an order passed by the District Judge allowing a transfer application, further transfer application to this Court would not lie under Section 24 of the Code. His Lordship has followed an earlier decision of this Court to the same effect in **Smt. Sunita Devi.** His Lordship in **Indian Oil Corporation Ltd.** *(supra)* held :

5. From perusal of the aforesaid provisions, it is apparently clear that no power has been conferred on the High Court to set aside the order passed by the District Court on an application under section 24 of C.P.C.

6. In the case of *Dr. Ajay Chaturwedi v. Smt. Shobhana1*, a Division Bench of this Court has considered the nature of power under section 24 of C.P.C. and held that transfer of proceedings of suit, appeal etc. can be directed by the High

Court/District Court on an application as also suo moto. This power of transfer is not an exercise of original jurisdiction, it is not an exercise of appellate jurisdiction nor it is an exercise of revisional jurisdiction. The power of transfer of suit and other proceedings is an exercise of power of superintendence. The legal position has also been explained by the Madras High Court in the case of *P. Karuppiah Ambalam v. Ayya Nadar2.* The power conferred under section 24 of C.P.C. gives power to two Superior Courts, *viz.*, the High Court or the District Court to withdraw any suit, appeal or other proceedings pending in any Court subordinate to it and either try and dispose of the same, or transfer the same for trial or disposal to any Court, subordinate to it and competent to try or dispose of the same. Section 24 confers a very wide power, and it is intended to enable the two Superior Courts mentioned in it to exercise their general power of superintendent over Subordinate Courts, or in the interest of justice.

7. In the case of Sunita Devi *(supra)*, this Court considered the scope of section 24 of C.P.C. and held as under:

"8. The expression "the High Court or the District Court" clearly indicates that the power of the District Judge and that of the High Court under section 24 of the C.P.C. Is mutually exclusive. The word "or" in the expression "the High Court or. The District Court" in sub-section (1) is used disjunctively and not conjunctively which means that a person can move either the High Court or the District Court and not both the Courts in succession one after the other. Thus, from the aforesaid expression it is crystal clear that the application under section 24 of the C.P.C. can either be moved before the District Judge or the High Court and cannot be moved simultaneously or one after the other. Thus, the remedy can be availed either by approaching the District Judge or directly to the High Court. Since the jurisdiction of the District Judge and the High Court is concurrent under section 24 of the C.P.C, so if one party has approached the District Court, that party would be precluded from approaching the High Court under section 24 of the C.P.C. The High Court under section 24 of the C.P.C. cannot sit over the order of the District Judge as a Revisional Court or as an Appellate Court.

10. From the above provision of the Cr. P.C. it is clear that if any transfer application is rejected by the Sessions Judge the applicant can come to the High Court for getting the case transferred from one Court to the other in the same judgeship on the same ground but there is no such provision in the C.P.C. So, in the absence of such provision no party can approach the High Court after rejection of his application by the District Judge. In this reference, the ruling of the Hon'ble High Court rendered in *Dadi jagannadham v. Jammulu Ramula1*, may be referred to. In this ruling, it has been held that the Court could not add words to a statute or read words into it which are not there, especially when the literal reading produces an intelligible result.

11. So, in the absence of any specific provision in the C.P.C. a person cannot approach the High Court under section 24 of the C.P.C. or any other provision of the C.P.C. to get his case transferred from one Court to another in the same judgeship after rejection of his transfer application by the District Judge on the same ground. But he is not remediless. He may approach the High Court for this purpose by means of filing the writ petition under Article 226 and 227 of the Constitution of India and may invoke the High Court's power of superintendence" 9.

In view of the aforesaid, I find that transfer application filed by the applicant is not maintainable. Consequently, the transfer application deserves to be dismissed.

7. It must be remarked that the decision of this Court in **Smt. Sunita Devi** was rendered in a case where the applicant before this Court had moved a transfer application under Section 24 of the Code, after rejection of his application seeking transfer of the suit within the same judgeship by the District Judge. It was in that context that Mohd. Tahir, J. held that a further transfer application under Section 24 CPC would not lie, for the reasons indicated in Paragraph Nos. 10 and 11 of the report. In **Jaikaran Singh**, the two earlier decisions of this Court in **Smt. Sunita Devi** and **Indian Oil Corporation Ltd.** were not brought to His Lordship's notice.

8. This issue appears to have been considered by a Division Bench of the Calcutta High Court in **Gora Chandas v. Dipali Das5** and an earlier decision of a Division Bench of the same Court in **Hari Nath Biswas and another v. Devendra Nath Biswas6** where it was held that against refusal of an application under Section 24 of the Code by the District Judge, a fresh application for transfer to the High Court under Section 24 of the Code is maintainable. Their Lordships of the Division Bench in **Gora Chandas** *(supra)* followed a learned Single Judge of the Patna High Court in **Sheo Nandan Lal and others v. Mangal Chand7.**

9. To my understanding, the jurisdiction under Section 24 of the Code is concurrent and nature of the power exercised under Section 24 is essentially administrative. It is administrative in the sense that it does not decide rights of parties in the sense that it is done in a *lis* before the Court. All that is decided in an application under Section 24 of the Code is the Court that would hear a suit or an appeal or other proceedings governed by the Code of Civil Procedure, 1908. The resultant of a determination under Section 24 of the Code is nothing more than the fact whether Court "A' "B' or "C' would hear and decide a *lis* between parties. To transfer a case within a judgeship, the District Judge has concurrent jurisdiction with the High Court. If the District Judge declines to transfer a case from a particular Court or grants a transfer, the High Court, being a Court of superior jurisdiction, can be approached by the unsuccessful party before the District Judge or the party who feels that the transfer has been wrongly granted, through an original application under Section 24 of the Code. The High Court, being a Court of superior jurisdiction, above the District Judge, can take an "administrative decision" so to speak, to grant a transfer, where the District Judge has refused, or to re-transfer a case where the District Judge has granted it to the same Court or some other Court. In passing any of these orders, the High Court would not be deciding any case in the sense of a *lis* or undoing an order of the District Judge in the sense that an Appellate Court or Revisional Court does, where a subordinate Court passes a judicial order, deciding a *lis* inter partes.

10. The view that I take draws much for its inspiration from the decision of this Court in **Jagdish Kumar v. The District Judge, Budaun and others8**. In the case last mentioned, the District Judge had dismissed a transfer application under Section 24 of the Code. Upon an application under the section last

mentioned being made to this Court, after the District Judge had rejected that prayer, an objection about maintainability of a second or a further application under Section 24 of the Code on the same grounds was raised before this Court by the learned Counsel for the respondents. This Court formulated two questions, which are detailed in Paragraph No. 7 of the report in **Jagdish Kumar** *(supra)* which reads :

7. The contention of the counsel for the opposite party that a second application under Section 24 of the Code on the self same ground after its rejection is not maintainable is disputed by the counsel for the applicant. From the arguments advanced by the respective counsel on this point, the following questions are formulated.-(1) whether the order rejecting or allowing an application under Section 24 of the Code is a case decided within the meaning of Section 115 of the Code and is thereby open to revision or not? (2) whether the jurisdiction of the High Court and the District Court under Section 24 of the Code is concurrent to the extent that after a decision by one Court on such application a second application on the self same cause of action to the other court is competent.

11. Though the answer to the first question formulated in **Jagdish Kumar** also has bearing on the issue involved here, but it is the second question that squarely covers the controversy. In answering the second question in **Jagdish Kumar**, D.K. Seth, J. held :

18. Now turning to the second point it may be observed that Section 24 of the Code has used an expression which clearly indicates that the power is concurrent to both the District Judge and the High Court. Inasmuch as it has used the expression that "High Court or the District Court may (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same, or (b) withdraw any suit, appeal or other proceeding pending in any court subordinate to it, and (i) try or dispose or the same; or (ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or (iii) retransfer the same for trial or disposal to the court from which it was withdrawn".

19. The jurisdiction conferred under Section 24 of the Code is concurrent does not conceive of any scope of doubt. But whether the concurrent jurisdiction means that both the jurisdiction can be availed together or one after the other. The concurrence means both the courts having jurisdiction, the parties are free to approach one or the other. Whenever concurrent jurisdiction has been conferred on the High Court and the District Court, it is provided that it one of the forum is approached, the party would be precluded from approaching the other forum. Inasmuch as in the West Bengal amendment of Section 115 of the Code by which Section 115A has been inserted. Under the said provisions both High Court and District Court have been empowered to entertain an application under Section 115 of the Code. Under sub-sections (3) and (4) thereof it has been provided that if either of the court is approached, no further revision shall be entertained between the same parties either by the High Court or the District Court as the case may be. Similar provision has also been incorporated in Section 397 of the Cr.P.C. where in sub-section (3) similar exclusion of jurisdiction by the High Court

or Sessions Court having concurrent jurisdiction has been provided. In the absence of specific prohibition or exclusion of jurisdiction, Section 24 of the Code cannot be interpreted to mean that the jurisdiction of the one court is to the exclusion of the other. But a situation may arise where the High Court having been unsuccessfully approached, a party may approach to the District Court thereafter. If such a situation is permitted, it would work out a judicial anarchy. After having unsuccessful before the District Court, a party may approach the High Court. Such position is in conformity with the system of judicial hierarchy. If the party approaches the High Court then it cannot come back to the District Court. Such an interpretation would not be in conformity with the judicial system of hierarchy.

20. But in case a party seeking transfer, is unsuccessful in the District Court whether he is precluded from challenging the said order. The answer would be available by resorting to Article 227 of the Constitution. Therefore, it cannot be said that he is precluded from challenging such an order if sufficient ground is made out for invoking such jurisdiction. Similarly if an applicant before the High Court succeeds, the aggrieved party cannot avail the concurrent jurisdiction of the District Judge thereafter on the same analogy due to which successful candidate is so prevented. The jurisdiction may not be mutually excluded but once the High Court is approached, the jurisdiction of the District Court is excluded.

21. In the case of Gorachand Das v. Bipal Das 1976 (2) Cal LJ 380, it was held that even after the District Court refused the prayer for transfer under Section 24 of the Code, the High Court may be moved for transfer.

22. Thus the out-come of the above discussion indicates that when an application for transfer before the District Court fails, the party applying may approach the concurrent jurisdiction of the High Court under the same provision but the party opposing though may apply for retransfer before the District Judge but cannot challenge the said order under Section 115 of the Code though, however, on the principle on which Article 227 of the Constitution can be exercised he may invoke the power of superintendence conferred upon the High Court by the Constitution under Article 227 of the Constitution thereof. But if the party approaches the concurrent jurisdiction of the High Court straightaway then the applicant and opposite party - both may approach the Supreme Court under Section 25 of the Code, if aggrieved by the order of the High Court. But once the High Court passes an order under Section 24 on an application of an unsuccessful applicant before the District Judge, the order of the District Judge stands overruled by implication on passing of the order by the High Court. As such in the facts and circumstances of the present case, the application under Section 24 of the Code before this Court is maintainable.

12. The decision in Jagdish Kumar was followed in **Ishtiyak Ahmad v. Smt. Meena and others9,** where it was observed :

5. The remedy under Article 227 of the Constitution of India is an extraordinarily remedy of discretionary nature and it cannot be ordinarily permitted to be invoked if the party has any alternative statutory remedy for getting the desired relief.

6. The jurisdiction under section 24, C.P.C. is concurrent jurisdiction conferred both upon the District Judge and

the High Court. Therefore, if an application under section 24, C.P.C. has been rejected, the party aggrieved may move a fresh application before the High Court under section 24, C.P.C. itself as has also been laid down by the aforesaid decision.

13. While the decision in **Jaikaran Singh** did not notice the earlier decisions in **Smt. Sunita Devi** and **Indian Oil Corporation Ltd.**, taking a contrary view, it is equally true that in **Smt. Sunita Devi** and **Indian Oil Corporation Ltd.** the very well reasoned decision in **Jagdish Kumar** was not brought to their Lordships' notice.

14. For the reasons I have already indicated, I am inclined to the view taken in **Jagdish Kumar** and **Jaikaran Singh**, but, bearing in mind the requirements of judicial discipline and the fact that there are contradictory views expressed by learned Judges of this Court sitting singly, I am of opinion that the question involved ought to be authoritatively decided by a larger Bench.

15. In the circumstances, the following question is referred for consideration by a larger Bench :

Whether against an order made by the District Court, refusing a transfer application under Section 24 of the Code of Civil Procedure, 1908 an application for transfer on the same grounds by the same party is maintainable before the High Court under Section 24 CPC?

16. Until decision of the case by larger Bench, further proceedings in Civil Appeal No. 40 of 2016, pending before the Ist Additional Civil Judge, Mainpuri shall remain stayed.

17. Let papers of this case be laid by the Registry before His Lordship the Hon'ble the Chief Justice for appropriate orders, at the earliest.

(2022)05ILR A1627
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.05.2022

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Crl. Misc. Application U/S 482 No. 9715 of 2022

Bhonu Patel ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Sri Arvind Kumar Kushwaha, Pooja

Counsel for the Opp. Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Section 156(3) - Property dispute-litigation ongoing-one of the parties has executed sale deed—it has also been executed by the purchasers-Application u/s 156 (3) treated as complaint case by the Magistrate-just and reasonable.

Application dismissed. (E-9)

List of Cases cited:

1. Lalita Kumari Vs Govt. of U.P. & ors. AIR 2014 SC 187

2. Anmol Singh Vs St. of U.P. & ors. 2021 0 Supreme(All) 10 2021 1 ADJ 400

3. Ramdev Food Products Pvt. Ltd. Vs St. of Guj. AIR 2015 Supreme Court 1742

4. Sukhwasi Vs St. of U.P. (2007) 59 SCC page 739

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard earned counsel for the applicant, learned A.G.A. for the State and perused the material on record.

2. This application U/s 482 Cr.P.C. has been filed to quash the order dated 2.2.2022 passed by Chief Judicial Magistrate, Varanasi in Case No. 1982 of 2021 (Bhonu Patel Vs. Ramnagina Yadav and others). By the impugned order the learned Magistrate has treated the application U/s 156(3) Cr.P.C. moved by the applicant as a complaint case.

3. The averments made in the application are that the plot no. 125, 175, 176, 179, 180, 183, 257 total area 1.94 acre situated in village Shahpur, Pargana Katehar, Tehsil & District Varanasi are the ancestral property of the applicant and his uncle Shyamlal son of late Sitaram. Both applicant and his uncle were cultivating on the aforesaid land for about 35 years. After the death of his uncle applicant was continuously cultivating the aforesaid plots up till now. After the death of Sitaram name of the both daughters namely Smt. Sajni and Smt. Mankeshri were mutated on the aforesaid land without any order of the competent authority with the collusion of the Lekhpal concern and name of late Shyamlal was not mutated in respect of the aforesaid land. When this fact came into the knowledge of Shyamlal, uncle of the applicant then he filed a suit under section 229-B U.P.Z.A. & L.R. Act in the year 1987 before the concerned Sub Divisional Officer but the same was dismissed against which the appeal was filed before the Commissioner, Varanasi Division, Varanasi the same was also dismissed then against the same second appeal was filed before the Board of Revenue which is still pending and interim stay order has been granted. During the continuance of the stay order granted in the aforesaid second appeal Smt. Sajni and Smt. Mankeshri executed a registered sale deed in the year 1993 in favour of Ramlal, Shyamlal, Rajendra, Mahendra all sons of Khaderan Shahu, resident of Panihari. Uncle of the applicant namely late Shyamlal executed a registered will deed on 3.4.1998 in favour of the applicant in respect of the aforesaid land. During the pendency of the aforesaid case O.P. No. 7 got a registered sale deed dated 25.5.2012 executed by Ramlal, Shyamlal, Rajendra, Mahendra all sons of Khaderan Shahu in favour of his wife Smt. Ranjita Yadav O.P. No.8 and his mother late Kalawati Devi and O.P. No. 9 got the sale deed executed in the name of his wife Suman Singh O.P. No. 10 in respect of the aforesaid plots in collusion with O.P. Nos. 11 and 12 and their names had also been mutated in the aforesaid plots. Thereafter by order dated 30.7.2015 passed by additional Sub divisional Officer Sadar, Varanasi name of the wife of O.P. No. 7 Smt. Ranita Yadav and his mother namely Kalawati Devi and O.P. No. 8 and wife of O.P. No. 9 Smt. Suman Singh and O.P. No. 10 were deleted from the revenue record in respect of the aforesaid plots. O.P. No. 7 namely Guru Prasad Yadav filed a Revision No. 2097 of 2015 (Smt. Kalawati Devi and others Vs. Shyam Lal and others) against the order dated 30.7.2015 in the Hon'be Board of Revenue U.P. at Lucknow, which is still pending. The uncle of the applicant namely Shyamlal died on 23.12.2016. The O.P. No. 2 namely Ramnagina Yadav is retired police officer. Despite knowing the fact that the name of Smt. Ranjita Yadav O.P. No. 8 and his mother-in-law namely Kalawati Devi have been deleted from the revenue record in

respect of the aforesaid land and case is pending in Board of Revenue, O.P. No. 2 to 10 got a registered sale deed executed on 28.10.2015 in the name of Smt. Asrafi Devi wife of O.P. No. 2 with intention to cause unlawful loss to the applicant. On the basis of the aforesaid registered sale deed dated 28.10.2015 O.P. No. 2 to 6 filed a mutation proceedings in the competent court but the same was rejected on 19.5.2016 ex-parte against which a restoration application was filed but the same was also dismissed on 5.3.2020. The aforesaid order has already been recorded in the Khatauni of the aforesaid plots. O.P. Nos. 2 to 11 by playing fraud got the registered sale deed dated 28.10.2015 the same is clear from the aforesaid facts. On 23.7.2021 at about 4:00 p.m. O.P. No. 2 taking the advantage of his being related to the police department, in collusion with some peoples of P.S. Chaubepur came along with O.P. Nos. 3 to 12 and 10-15 unknown persons at plot nos. 179, 180, 183, 257 with intention to take possession of the land and to cultivate the same and on making of the objection by the applicant O.P. Nos. 2 to 12 and 10-15 unknown persons started abusing the applicant by using filthy words and also started beating him then on hearing the alarm of the applicant, his son and other people came on the spot and save the applicant and thereafter opposite parties run away from there saying the applicant not to come near the land otherwise they will kill him and buried him in the land in dispute and his dead body could not be traced.

4. Learned counsel for the applicant contended that there are clear allegations in the application from which a cognizable offence is made out. Some of the accused are known but some of the accused are unknown. Without investigation their identity can not come into picture. Hence, in the circumstances the investigation is necessary. The learned Magistrate has failed to consider it and has passed the order for treating the application as a complaint case instead of registration of FIR and investigation. In the circumstances of the case the learned Magistrate was bound to order for registration of the case and investigation. Learned counsel further contended that learned Magistrate has relied upon the case law of **Sukhwasi Vs. State of U.P. (2007) 59 SCC page 739** but ignored the ruling cited on behalf of applicant which are as follows:

1. Lalita Kumari Vs. Govt. of U.P. and others AIR 2014 SC 187

2. Anmol Singh Vs. State of U.P. and others 2021 0 Supreme(All) 10 2021 1 ADJ 400

3. Ramdev Food Products Pvt. Ltd. Vs. State of Gujarat AIR 2015 Supreme Court 1742

5. Learned counsel further contended that the aforesaid rulings also support the applicant's case. The impugned order is arbitrary and illegal.

6. Learned A.G.A. contended that there is no illegality in the impugned order. It is also contended that the impugned order is revisable, hence, application U/s 482 Cr.P.C. is not maintainable. There is no averment in the application U/s 482 Cr.P.C. that the impugned order is abuse of process of court. In absence of such specific averment the application U/s 482 Cr.P.C. can not be entertained.

7. It is settled principle of law that on an application U/s 156(3) Cr.P.C. the learned Magistrate has following three options:

1. He may out rightly reject the application if he comes to the conclusion that no cognizable offence is made out.

2. If he comes to the conclusion that cognizable offence is made out and investigation is also required, he may pass the order for registration of the FIR and investigation in the matter.

3. If he comes to the conclusion that although a prima facie cognizable offence is made out but in the circumstances of the case no investigation is required, he may treat it as complaint case.

8. It is not mandatory for a Magistrate to order for registration of FIR and investigation in on each and every application moved under section 156(3) Cr.P.C. which discloses a cognizable offence. It is the discretion of the Magistrate which is to be exercised judicially and not arbitrarily.

9. The allegations made in the application U/s 156(3) Cr.P.C. clearly indicates that there is property dispute between the parties and parties are litigating the same before the competent courts and one of the party has executed sale deed. Subsequent sale deed have also been executed by the purchasers. Considering all the facts and circumstances of the case the order to treat the application U/s 156(3) Cr.P.C. as a complaint seems to be just and reasonable. Learned Magistrate has also given reasons and cited the case law in support of his finding. So it can not be said that impugned order is arbitrary or unjust.

10. The ruling cited by the learned counsel for the applicant are not applicable in the present case. The case of Lalita Kumari (supra) is on different point. It relates to the interpretation of Section 154, Section 41(1)(a), Section 41(1)(g) of Cr.P.C.

11. The facts of the case of Anmol Singh Vs. State of U.P. are different. That case was related to an offence of molestation and sexual assault. Considering the gravity and severity of the offence and the requirement of the evidence for the purpose of launching successful prosecution this court interfered in the matter and set-aside the order of treating the application as a complaint and directed the learned Magistrate to pass a fresh order.

12. In Ramdev Food Products Pvt. Ltd. Vs. State of Gujarat (supra) cited by the learned counsel for the applicant the Hon'ble Supreme Court has held that 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 issuance 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 straightway direct investigation, such a direction is issued. 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'. Subject to these broad guidelines available from the scheme of the Code, exercise of discretion by the Magistrate is guided by interest of justice from case to case."

13. Even after registration of the application as a complaint case the Magistrate has ample power during inquiry

under section 202 Cr.P.C. to direct the investigation to be made by a police officer or by such other person as he thinks fit.

14. Section 202(1) Cr.P.C. provides as follows:

"Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

15. Provided that no such direction for investigation shall be made-

(a) where it appears to be Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200."

(2022)05ILR A1631
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.04.2022

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Application U/S 482 No.14626 of 2021

Smt. Farmeeda Begum ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri S.M. Iqbal Hasan

Counsel for the Opposite Parties:
A.G.A., Sri Girish Chandra Yadav

Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - FIR-No specific allegation- Applicant is fair Price shop dealer- only allegation-charges more than the fixed price-distribute commodities in less quantity-no reference of any violation of any control order in the FIR-but section 3/7 of Essential commodities Act is imposed-not sufficient to convict the accused-Applicant-case instituted with an ulterior motive for wreaking vengeance-criminal proceeding quashed.

Application allowed. (E-9)

List of Cases cited:

1. Babubhai Vs St. of Guj., 2010 CJ(SC) 1429

2. Jahoor Vs St. of U.P. & anr.

3. St. of Haryana & ors. Vs Ch. Bhajan Lal & ors., in Civil Appeal No.5412 of 1990

4. Prakash Babu Raghubansi Vs St. of M.P., (2004) 7 SCC 482

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard Sri S.M. Iqbal Hasan, learned counsel for the applicant, Sri Girish Chandra Yadav, learned counsel for the opposite party no.2, Sri Arvind Kumar, learned AGA for the State and perused the record.

2. This criminal misc. application under section 482 Cr.P.C. has been filed to quash the entire criminal proceeding of

Case No.4907 of 2021 (State Vs. Farmeeda Begum and others), including Charge Sheet No.68 of 2021, dated 18.03.2021, arising out of Case Crime No.412 of 2020, under sections 420, 467, 468, 471, 120-B, 409, IPC and section 3/7 Essential Commodities Act, Police Station Munda Pandey, District Moradabad, as well as cognizance order dated 26.03.2021, passed by Additional Chief Judicial Magistrate, Court No.1, Moradabad.

3. Applicant is an accused in the aforesaid case. FIR has been lodged on 21.11.2020, on the application of complainant Mohini Mishra, Supply Inspector, Tehsil Sadar Moradabad. The application addressed to the SHO/SO, Police Station Munda Pandey, District Moradabad, and it is mentioned that kindly take reference to the letter No.3814 dated 08.09.2020 of Additional Commissioner, Food & Supply Department, Moradabad, annexing the letter No.369 dated 22.06.2020 of Mr. Ashok Kumar Mishra, Deputy Secretary, Government of U.P. and letter No.256 dated 11.02.2020 of Vishal Bharadwaja, Staff Officer, Chief Secretary & Additional Director (Administration). The inquiry report of Food Cell, forwarded for necessary action. In continuation of the aforesaid you are hereby informed that the D.O. Letter No.110 dated 22.01.2020 of Mr. Dayanand Mishra, S.P. Food Cell, annexing the photocopy of the inquiry report of Mr. Umesh Chand Pandey, Police Inspector, Food Cell, dated 08.01.2022. According to inquiry report, the allegations levelled against Smt. Farmeeda Begum, was inquired by Mr. Umesh Chand Pandey, Police Inspector, Food Cell, Kanpur and according to inquiry report, Smt. Farmeeda Begum, has not properly distributed the Essential Commodities from April-2018 to July-2018, and she committed black marketing of it. The quantity of distributed commodities was determined by her own will and she has charged more price than the fixed price and has not distributed the commodities and kerosene oil. She has also committed forgery and cheating, by preparing false distribution register, false distribution certificate and false 'Farms Ka & Kha'. It is recommended that for the aforesaid act of Smt. Farmeeda Begum, a case under sections 420, 467, 468, 471, & 409, IPC and section 3/7 Essential Commodities Act, be registered against her and her agreement be cancelled. Mr. Mitra Pal Singh, the member of the Administrative Committee of Grama Panchayat, Mudiya Malookpur Mustkam, Block Munda Pandey, Tehsil and District Moradabad, in collusion with Smt. Farmeeda Begum has given a false certificate that Essential Commodities have been properly distributed, which shows his prima-facie involvement in the matter, hence case under sections 120-B, 420, 467, 468 and 471, IPC, be also registered against him. The agreement of fair price shop of Smt. Farmeeda Begum, Mudiya Malookpur, has already been cancelled on 21.05.2019 by the Sub-Divisional Magistrate, Sadar. After investigation charge sheet has been submitted.

4. Contentions of learned counsel for the applicant are that the applicant is a fair price shop dealer. She was running her shop in strict compliance by the provision of Control Orders under the supervision of three layer system i.e. distribution through camp, monitoring and checking by village Administrative Committee and third by the officials of the department. The frivolous and false complaint dated 17.07.2018 was lodged against the applicant by the rival group alleging that she has not properly distributed the commodities. Prior to this

complaint also a complaint was made against the applicant pursuant thereto the cancellation order was passed and the Hon'ble High Court was pleased to stay the cancellation order by means of order dated 21.02.2018 Consequently her agreement was restored on 12.03.2018. Within four months the second complaint dated 17.07.2018 was again filed by the rival factions. After thorough inquiry the Area Food Officer made a report dated 30.07.2018 whereby he has stated that complaint was frivolous and forged. Another complaint was made on 23.07.2018. On this complaint the Sub Divisional Officer issued a charge sheet and sought explanation from the applicant. The applicant filed reply and refuting the allegations along with evidences. Sub Divisional Officer Sadar, Moradabad considered the reply and passed order dated 10.11.2018 wherein he has mentioned that in the village day to day complaints are being made against each other, therefore, it would be proper to hold an open meeting of Villagers so that the complaint may be disposed of properly. When the repeated efforts of complainant were failed and every time after inquiry complaints were found false then Mangal Singh and Shakeel again moved a complaint in Tehsil Diwas, pursuant thereto Revenue Inspector was authorized to conduct inquiry. The complainant approached the Inspector and offered illegal gratification and prepared a forge report sitting at the house of Mangal Singh. The several photographs were available while he was hosting a break fast, the applicant made a complaint of this event to the authority and when no action was taken against the Revenue Inspector the applicant moved an application before the Head Mahila Ayog, Chief Minister of Uttar Pradesh, Commissioner Principal Secretary and District Magistrate requesting therein for proper action. Having knowledge of the complaint made by the applicant, the departmental officers become infuriated and challenged the applicant for teaching her a lesson. In compliance of the order dated 14.01.2019 applicant has filed detailed reply to the charge sheet alongwith three months distribution record on 03.01.2019. The authorities concerned instead of holding open meeting proceeded in the matter and passed the cancellation order dated 21.02.2019. Against the cancellation order the applicant has preferred a Civil Misc. Writ Petition No.8861 of 2019. The Hon'ble High Court was pleased to stay the operation of the impugned order till the next date of listing and thereafter on 25.04.2019 the writ petition was dismissed on the ground of alternative remedy. The applicant preferred an appeal before the Commissioner Moradabad Division Moradabad. During pendency of the appeal the Supply Inspector issued an order dated 06.07.2019 whereby he asked the distribution record in pursuance to some back dated order dated 29.01.2019. The applicant challenged the validity of the order by means fo writ petition No.23138 of 2019. The Hon'ble High Court was pleased to stay the order dated 06.07.2019 till the next date of listing. Meanwhile the appeal was dismissed by the Commissioner Moradabad Division Moradabad on 25.11.2019, against which the applicant has preferred a Civil Misc. Writ Petition No.21116 of 2020 before this Hon'ble Court, which is pending consideration. The respondent authorities being prejudiced and having malice against the applicant, has proceeded in the matter despite having the stay order dated 18.07.2019. Civil proceeding is pending and there is no evidence which remotely connect the applicant with black marketing. Allegations

against the applicant are general. There is no specific allegations.

It is further contended that investigating officer has annexed the record distribution as part of case diary. The investigating officer also recorded the statement of Mohd. Zaki, the person, is now a subsequent dealer appointed in place of Farmeeda and he was instrumental in the cancellation of the agreement of the shop of the applicant. He is prejudiced and not independent witness. The learned counsel also contended that neither in the FIR nor in the entire case diary there is any reference of any control order violation, hence no offence under section 3/7 of Essential Commodities Act is made out.

Learned counsel for the applicant further contended that from the impugned cognizance order it transpires that no reasoning have been given instead the order is a mechanical order, therefore, the cognizance order is illegal and liable to be quashed. The allegations against the applicant is of forgery and preparing forged distribution certificate where as the distribution was made by the applicant correctly under videography and still photograph but in spite of that due to village party politics and due to annoyance of respondent authorities the present criminal proceeding has been initiated against the applicant. Annoyed with the repeated relief granted by the High Court, criminal case has been instituted maliciously, due to reason that applicant has made a complaint to higher authorities against the revenue inspector, FIR has been lodged with ulterior motive for wreaking vengeance. It is evident that the entire proceeding against the applicant, who is lady is malicious, prejudiced and due to party politics whereas the fact of the matter is that no offence is made out against the applicant. Without collecting the expert examiner report, the investigating officer filed charge sheet, which is apparently erroneous. There is no direct evidence which indicates that the applicant has committed any crime. The present criminal proceeding is nothing but manifestly attended with malafide as the applicant has made complaint of the official, who became prejudiced against her.

Learned counsel for the applicant placed reliance on the case of **'Babubhai Vs. State of Gujarat, 2010 CJ(SC) 1429** and also on the case of **'Jahoor Vs. State of U.P. and another',** in Criminal Revision No.569 of 2021, decided on 25.10.2021.

5. Learned AGA for the State and learned counsel for the opposite party no.2 submitted that after inquiry by food cell it was found that applicant has committed irregularities in distribution of essential commodities and she has sold the Ration in black market. There are clear allegations against the applicant. The investigating officer has recorded the statements of the witnesses and has collected material evidence during the course of investigation and on the basis of credible evidence, has submitted the charge sheet. The learned Magistrate being satisfied with it has taken cognizance on it. There is no sufficient grounds to quash the charge sheet or summoning order. There is no illegality in the impugned summoning order.

6. Admittedly the applicant was a fare price shop dealer of Village Mudiya Malookpur, District Moradabad. The FIR has been lodged against her on 21.11.2020. In the affidavit filed in support of the application, the applicant has given details of various complaints and proceedings,

which has been made against her, prior to this FIR. It is specifically stated that on 17.07.2018 a complaint was lodged against her for not property distributing the commodities. Prior to this complaint, another complaint was made against her and cancellation order was passed. The High Court was pleased to stay the cancellation order, by means of order dated 21.02.2018. Consequently, her agreement was restored on 12.03.2018. It is further stated that within four months, second complaint dated 17.04.2018 was again filed by the rival, and after thorough inquiry this complaint was found frivolous and forged. Another complaint was made on 23.07.2018 and on this complaint the Sub Divisional Officer issued a charge sheet and sought explanation from the applicant. The Sub Divisional Officer passed the order dated 10.11.2018 mentioning therein that in the village day to day complaint are being made against each other, therefore, it would be proper to hold an open meeting of villagers, but no open meeting was held. Again a complaint was made on 16.10.2018 in Tehsil Diwas, which was disposed of by order dated 23.10.2018. It is further alleged that when repeated efforts of complainant failed and every time complaints were found false, then a complaint was moved in Tehsil Diwas and revenue inspector was authorized to conduct the inquiry. Complainant approached him and offered illegal gratification and prepared a forged report, setting at the house of complainant Mangal Singh. Several photographs were available hosting a breakfast. The applicant has raised these matters to the concerned authorities and when no action was taken against the revenue inspector, she moved applications before Mahila Ayog, Chief Minister of U.P. and other authorities for proper action against the revenue inspector. Having knowledge of complaint, the departmental officers became infuriated and challenged the applicant for teaching a lesson. The FIR has been lodged maliciously. In counter affidavit filed by the opposite party, the aforesaid facts have not been specifically controverted. So from the material available on record it is established that prior to lodging of this FIR, several false and frivolous complaints were filed against the applicant and ultimately inquiry was entrusted to the revenue inspector, who was approached by complainant party and applicant made a complaint against him.

7. All the allegations of the FIR are general in nature. There is no specific allegation. The only allegations of the FIR are that the fair price shop dealer, charges more than the fixed price, and distribute commodities in less quantity and when weighed at home, it weight is found less. In the statements of witnesses recorded by the instigating officer also there are almost general allegations in the nature mentioned above. Witnesses Mohd. Zaki is the persons who has got fair price shop after cancellation of the quota of accused-applicant. There is also no specific allegations that what kind of forgery has been committed by the accused-applicant and which entry is forged. In absence of specific allegations, the ofence of cheating and forgery cannot be proved. There is no reference of any violation of any control order in the FIR, but section 3/7 of Essential Commodities Act has been imposed. So, if the evidence available on record is taken on its face value as true, even then it will not be sufficient to convict the accused-applicant.

8. In case of '**State of Haryana and others Vs. Ch. Bhajan Lal and others', in**

Civil Appeal No.5412 of 1990, decided on 21.11.1990, the Hon'ble Apex Court in paragraph no.108 has laid down following norms for exercising powers under section 482 Cr.P.C.":-

"108. 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.

(i). 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.

(ii). 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 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.

(iii). 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.

(iv). Where, the allegations in the F.I.R. 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.

(v). Where the allegations made in the F.I.R. 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.

(vi). 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 oncerned Act, providing efficacious redress for the grievance of the aggrieved party.

(vii). 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."

9. The Hon'ble Supreme Court in the case of **"Prakash Babu Raghubansi Vs. State of M.P., (2004) 7 SCC 482**, in paragraph no.5 has made following observations:-

"Section 7 refers to contravention of any order made under Section 3. It is essential for bringing in application of Section 7 to show that some order has been made under Section 3 and the order has been contravened. Section 3 deals with powers to control production, supply, distribution etc. of essential commodities. Exercise of such powers, can be done by "order". According to Section 2(c) "notified order" means an order notified in the official Gazettee, and Section (CC) provides that "order" includes a direction issued thereunder."

So the Hon'ble Apex Court has propounded that for an offence under section 3/7 Essential Commodities Act, violation of any commody control order, should be there.

10. It is clear from the analysis of material on record that the criminal proceeding of this case is maliciously attended with malafide. It has been instituted with an ulterior motive for wreaking vengeance on the accused-applicant with a view to spite him due to private and personal grudge. It is also clear that, even if the evidence available on the record is taken on its face value as true, even then it will not be sufficient to convict the accused-applicant.

11. The preposition of law as laid down by Hon'ble Apex Court in the case of '**State of Haryana and others Vs. Ch. Bhajan Lal and others**'(supra) and **"Prakash Babu Raghubansi Vs. State of M.P**.(supra), are fully applicable on the present case. Keeping in view the proposition of law the facts and circumstances of the case, the present application under section 482 Cr.P.C. is liable to be allowed.

12. The criminal misc. application under section 482 Cr.P.C. is allowed and the entire criminal proceedings relating to aforementioned case is hereby quashed.

(2022)05ILR A1637
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.04.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Criminal Appeal No. 3254 of 2005

Smt. Nanhi Devi & Anr.
...Applicants (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Applicants:
Sri Subodh Kumar, Sri I.H. Ansari, Sri Udit Chandra, Sri Anurag Sharma (A.C.)

Counsel for the Respondent:
G.A., Sri Anurag Sharma (A.C.)

A. Criminal Law – Indian Penal Code, 1860 -Sections 302/34 & 201 - Conviction under. Child testimony- testimony of a child witness aged about 8 years it is trite in law that the evidence of a child witness has to be subjected to closest scrutiny and can be accepted only if the court comes to the conclusion that the child is a competent witness within the meaning of Section 18 Evidence Act. A child witness can be a competent witness provided that the St.ment of such a child witness is reliable, truthful and is corroborated by the prosecution evidence.

B. Suspicion howsoever strong may not take the place of truth. The prosecution must stand or fall on its own legs and it cannot derive any strength form the weaknesses of the defense.

C. **Criminal Law – Code of Criminal Procedure, 1973 - Section 174 -** Purpose of inquest- the object of the proceedings under

Section 174 Cr.P.C., is to investigate into and draw up a report of the apparent cause of death, whether a person has died under suspicious circumstances or an unnatural death and if so, what is apparent cause of death. The officer preparing inquest has to describe such wounds as may be found on the body of the deceased and St. in what manner by what weapon or instrument, if any, such wounds appear to have been inflicted. The position in which, the dead body was found at the spot may be a material circumstance in a particular case, as in the present case and the said position can only be ascertained from the inquest report prepared under Section 174 of the Criminal Procedure Code as the said report is the only evidence of narration of the position of the dead body found on the spot.

D. Hanging and strangulation – Difference between- Mere fracture of the hyoid bone cannot be a reason to form a conclusive expert opinion of the death caused due to strangulation as is clear from the reading of the Chapter '19' of the Text Book of Modi on Medical Jurisprudence and Toxicology (24th Edition).

E. Last Seen Evidence- Mere evidence of last seen, though an important circumstance, cannot be made sole basis for conviction of the accused in absence of any other corroborating circumstance to prove the guilt of the accused.

Appeal Allowed. (E-12)

List of Cases cited:-

1. Nathiya Vs St. Represented by Inspector of Police (2016)10 SCC 298

2. Digamber Vaishnav & anr. Vs St. of Chhattisgarh (2019)4 SCC 522

3. Jagdish & ors. Vs St. of Har. (2019)7 SCC 711

4. K. Venkatesh Warlu Vs St. of A.P. (2012)8 SCC 73

5. Alagu Pandian Vs St. of T.N. (2012)10 SCC 451

6. Shiv Shivasharappa & ors. Vs St. of Karn. (2013)5 SCC 705

7. Suresh Vs St. of U.P. (1981)2 SCC 569

8. Rameshwar Dayal Vs St. of U.P. AIR 1978 SC 1558

9. Nizam & anr. Vs St. of Raj. (2016)1 SCC 550

10. Anjlus Dungdung Vs St. of Jharkhand (2005)9 SCC 765

11. Nanhar & ors. Vs St. of Har. (2010)11 SCC 423

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

1. At the outset, it may be noted that this appeal has been argued only on behalf of appellant no. 2 Lalta Prasad son of Tara Chand as appellant no. 1 Nanhi Devi has been granted remission by the State Government and no one appears on her behalf to argue the appeal.

As the appellant no. 2 was not represented by a counsel, Sri Anurag Sharma learned Advocate has been appointed as Amicus Curiae to assist the Court. The order dated 13.1.2022 of appointment of Amicus has been intimated to the appellant no. 2 Lalta Prasad who is presently lodged in the Central Jail, Bareilly. The report of the Senior Superintendent, Central Jail, Bareilly in this regard has been received through the CJM, Pilibhit.

Heard Sri Anurag Sharma learned Amicus Curiae for the appellant no. 2 and Sri Rupak Chaubey learned A.G.A for the State respondents.

2. This appeal is directed against the judgment and order dated 19.7.2005 passed by the Additional Sessions Judge, Court No. 3, District Pilibhit in the Sessions Trial No. 537 of 2001, wherein two accused

persons namely Nanhi Devi and Lalta Prasad were convicted of the offence under Section 302 readwith Section 34 IPC and sentenced for life imprisonment with fine of Rs. 10,000/- each, as also under Section 201 IPC for rigorous imprisonment of one year with fine of Rs. 1000/- each. The default punishment was three months additional simple imprisonment for each accused. All the punishments are to run concurrently.

3. According to the prosecution story, a report in writing was submitted by the Gram Pradhan, Village Karnapur, on 31.7.2001 at about 9:30 AM, that a resident of the said village namely Taule Ram son of Totaram had committed suicide by tying a knot in his neck and postmortem of his body be conducted to make further enquiry. The said report marked as Exhibit Ka-1 had been proved by PW-1, Gram Pradhan being in his handwriting and signature.

Another report was entered in the Case Diary by the Investigating Officer, the Sub-Inspector posted in Thana Barkhera, District Pilibhit, which was allegedly received by him at the spot of the crime during the course of investigation. This report had been proved to be given by PW-2 Natthu Lal son of Lalaram and is marked as Exhibit Ka-2 bearing signature of the said witness. PW-2 stated that the said report was written by the Gram Pradhan on his dictation and after writing the same the report was read over to him and then he put his signature. As per the said report, deceased Taule Ram son of Totaram was cousin of the first informant Natthu Lal (PW-2). Nanhi Devi wife of Taule Ram was having illicit relationship with Lalta Prasad son of Tara Chand resident of the same village who used to frequently visit the house of Taule Ram. On account of their relationship, Lalta Prasad and Nanhi Devi had killed Taule Ram in the intervening night of 30/31.7.2001 by strangulation and his body was then hanged on the roof in the Khaprail by a rope. All the facts narrated therein were disclosed by Roop Lal son of deceased Taule Ram to the first informant Natthu Lal (PW-2) and his family members.

4. The record indicates that the report (Exhibit Ka-2) was stated to have received by the Investigating Officer at the spot and he proceeded to make investigation of the crime without registration of the first information report, i.e. preparation of the Check report and GD entry. The Case Diary indicates that the said report was entered in the Case Diary on the spot and it was noted by the Investigating Officer in the case diary itself that after making entry, he was proceeding with the investigation and would register the report on reaching the police station. It is an admitted fact that the report (Exhibit Ka-2) was registered as a first information report of the crime on the next day, i.e. on 1.8.2001 at about 6:30 AM, after the Investigating Officer returned to the police station, entry of which was made at GD No. 11. This report was mentioned as a supplementary report given by Natthu Lal son of Lalaram during investigation, in his deposition as PW-11, by the Investigating Officer. PW-11 has deposed that he had kept the said report in the Case Diary and, thereafter, proceeded to record the statement of the first informant Natthu Lal (PW-2) and eye-witness Roop Lal son of deceased. The Investigating Officer in his statement in the examination-in-chief submitted that he had prepared the site plan on the pointing out of Roop Lal. The inquest had commenced at about 11:00 AM and completed by 12:00 (noon). As per the entry in the Case Diary,

the report (Exhibit Ka-2) was entered in the Case Diary while proceeding to record the statement of Natthu Lal (PW-2) at about 12:30 PM. The inquest report indicates that panch witnesses though were satisfied that the death was caused due to hanging but opined that the postmortem be conducted to find out the actual cause of death. The inquest report also records that there was a lot of crowd when the officer reached the spot and the family members of deceased were wailing inconsolably. The inquest writer had expressed his opinion that the case of suicide seemed doubtful. The inquest report had been proved as Exhibit Ka-8 being in the handwriting and signature of PW-11, the Investigating Officer.

5. Exhibit Ka-4 is the recovery memo of a plastic rope wherein noose of two meters was found in the neck of the deceased and knot at the other end was found wherein a red Chunri cloth was stuck. This recovery memo had been proved by PW-11 who deposed that after recording the statement of Panch witnesses and other witnesses present on the spot including the Gram Pradhan Ram Autar, the body was sealed and sent for the postmortem. The case was registered as Case Crime No. 275 of 2001 under Sections 302 and 201 IPC against Lalta Prasad and Nanhi Devi at Rapat No. 11 at about 6:30 AM on 1.8.2001 in the General Diary and the same was copied in the Case Diary. PW-11 stated, in cross, that he had received information of suicide in the police station and did not record the statement of Ram Autar, Gram Pradhan at that point of time rather the statement of this witness was recorded at the spot. It is also admitted by PW-11 that till the inquest was completed, which took about one hour, no report was given by Natthu Lal and the report (Exhibit Ka-2) was handed over to him at about 12:10 PM and after copying the same in the Case Diary, the statements of Natthu Lal and Ram Autar were recorded. The postmortem was conducted on 31.7.2001 itself by 4:30 PM. The cause of death reported therein was asphyxia as a result of strangulation. The ante-mortem injuries found on the person of the deceased had been proved by the doctor PW-9.

On external examination, the condition of the body as noted in the postmortem report was:-

"Male body of average built muscular.....Rigor Mortis passed off, from all the four limbs. Body swollen, superficial skin peeled off from several places of body, foul smell present. Eye closed. Mouth open with Tongue protruding out"

The external and internal injuries as described in the postmortem report are:-

"(1) Ligature mark 28cm. long & 1 cm wide present horizontally around upper part of neck. Present all around except on left side back of neck & just behind left ear. It is 6cm. below chin, 4cm. below left ear and 4cm. below Right ear lobule. The ligature mark is like a groove, base of which is pale & margins are congested. There are multiple abrasion on the margins of the groove & area just below the ligature mark on front aspect of neck."

In the report, it has come up that Hyoid bone was fractured at the junction of left greater cornu with its body.

The postmortem report had been proved to be in the handwriting and signatures of PW-9 as Exhibit Ka-6.

6. As per the statement of the doctor in the examination-in-chief, the proximate time of death could be the intervening night of 30/31.7.2001. He, however, stated that there may be difference of four hours on both sides in the estimated period from death. As to the condition of the dead body as reported in the postmortem report, in cross, it was stated by the doctor that he had received the body with the police papers on 31.7.2001 at about 2:30 PM and started postmortem at about 4:30 PM. The rigor mortis normally passed on in 1½ days in the month of July, i.e. in the summer and rainy months. The ligature mark was not found present at the left side of the neck and it was not present at the back side as well. The injury on the neck was in the shape of a groove which could not be caused by Lathi but by a rope, however, on strangulation by Lathi, if the rope is tied, the mark of rope would be superimposed on the mark of Lathi. It was admitted, as indicated in the postmortem report that putrefaction of the body was started as the superficial skin was peeled off from several places. On a suggestion, PW-9 stated that the said situation could appear within 1½ day to 2 days and the death may have been caused in the intervening night of 29/30.7.2001. PW-9, the doctor, however, refuted the suggestion that the death was caused due to hanging and not by strangulation through Lathi.

7. The recovery of Lathi, the alleged murder weapon, was made from the house of the appellant Lalta Prasad. Two persons namely Devaki Nandan and Baburam had been made witnesses of the recovery of Lathi. Exhibit Ka-5, the recovery memo of Lathi was proved by PW-12, the second Investigating Officer, who had arrested appellant Lalta Prasad on 8.8.2001. The charge sheet submitted by PW-12 had been proved as Exhibit Ka-10 in his handwriting and signature. From the statement of PW-12, it is evident that the arrest of Nanhi Devi, the co-accused was made on 5.8.2001 from the house of Hetram located in another village and her statement was recorded in the police station. A perusal of the Case Diary further indicates that Nanhi Devi was found in her paternal house (Maika) and Hetram was his brother whereas the appellant Lalta Prasad was arrested from the Bus stand in the village. A recovery memo Exhibit Ka-3 of recovery of 'Dibbi' kerosene dated 14.8.2001 had been proved being in the handwriting and signature of PW-12 and the witnesses of the recovery were Natthu Lal, Kali Charan and Keshari Lal. The Exhibit Ka-3 also bears left thumb impression of child witness Roop Lal as it was stated to have been handed over to the officer by the child.

8. Amongst the witnesses of fact, PW-1 Ram Autar, the Gram Pradhan had proved the written report given by him as Exhibit Ka-1, noted above, and also proved that the Exhibit Ka-2 was the report scribed by him on the dictation of Natthu Lal (PW-2) after the child witness Roop Lal had narrated the whole story to them. This witness had not been cross-examined by the defence. PW-2 Natthu Lal proved that he was related to the deceased and stated that appellant Lalta Prasad was having illicit relationship with the wife of Taule Ram and on the date of the incident he had seen deceased Taule Ram in good condition. However, on the next morning, wife of the deceased was crying in the house that her husband had committed

suicide but later on the child Roop Lal son of the deceased had disclosed that it was a murder committed by Lalta and Nanhi Devi (wife of the deceased). The story narrated by the child witness has been extracted in the examination-in-chief by PW-2 who stated that whatever was disclosed to him by Roop Lal was written in the report Exhibit Ka-2. This witness (PW-2) was also not cross-examined by the defence.

9. PW-3 Kalicharan who is also a witness of the recovery memo (Exhibit Ka-3) the source of light (a dibbi of kerosene oil), stated in his examination-in-chief that on the fateful night at about 9:00 PM, he alongwith Komil Prasad son of Bheem Sen and Devaki Nandan was standing outside his house in the village and while they were talking they saw the appellant Lalta entering into the house of deceased Taule Ram carrying Lathi. Next day, he came to know that Taule Ram had died and his wife was screaming that her husband had committed suicide by hanging himself. Later, the son of the deceased namely Roop Lal had disclosed the murder committed by Lalta Prasad and Nanhi Devi. This witness had also proved his signature on the recovery memo Exhibit Ka-3. The dibbi of kerosene oil had been marked as Material Exhibit-1 at the instance of this witness. In cross, PW-3 stated that the house of Komil and his house were adjacent whereas the house of Devaki Nandan was about 4-5 meters towards the East. The house of Lalta Prasad was located at the eastern side and while coming to the house of deceased Taule Ram from the East, his house (i.e. of PW-3) would fall in between. PW-3 had admitted that there was no source of light where they were standing but asserted that it was a bright night and they could easily identify any passerby. PW-3, in cross, further stated that he was not on talking terms with Taule Ram and he did not use to go to his house and he was not on the talking terms with the appellant Lalta Prasad nor he had ever gone to his house as well. He stated that the appellant Lalta Prasad used to go to the house of deceased Taule Ram. On a suggestion given to this witness, he had admitted that in the village people used to carry Lathi in a routine manner. On another suggestion given to PW-3, he admitted that he had good terms with Natthu Lal, the first informant and Natthu Lal (PW-2) was an influential person in the village. On another suggestion of relationship of appellant Lalta Prasad and Nanhi Devi, PW-3 stated that since Lalta Prasad used to go to the house of Nanhi Devi, and the same according to him, was an indication of their illicit relationship. The house of Natthu Lal was located at a distance of about 4-5 meters towards the South of the house of deceased Taule Ram. It has come up in the cross-examination of this witness that the child Roop Lal was residing with Natthu Lal (PW-2) since after the incident and the entire landed property of deceased Taule Ram was in possession of Natthu Lal who was also keeping all the proceeds of the crop with him and that the deceased was having approximately 11 bighas of land. On a suggestion of enmity with appellant Lalta Prasad, this witness had categorically denied the same. He had also denied that he was giving statement under the influence of Natthu Lal.

10. PW-4 Chhotelal had proved his signature on the recovery memo of the plastic rope Exhibit Ka-4 and stated that the body of deceased Taule Ram was found hanging by the said rope and the knees of the dead body were touching the floor. This witness had also identified the rope seized by the Investigating Officer marked as

Material Exhibit-2. In cross, this witness stated that the Investigating Officer had left the village at about 12:00-1:00 PM after the postmortem of the body was conducted.

11. PW-5 Komil Prasad reiterated the version of PW-3 Kalicharan of having seen the appellant Lalta Prasad entering inside the house of deceased Taule Ram and stated that it was a moonlit night. This witness admitted, in cross, that he used to go to the house of Taule Ram but had never seen Lalta Prasad and Nanhi Devi in any objectionable state. This witness stated that they had seen Lalta entering inside the house of the deceased Taule Ram while he and Kalicharan were standing near the house of Devaki Nandan and they kept talking while standing at the same place for about two hours. Lalta came from the side of his house which was at the East. This witness (PW-5) stated that the police had interrogated him on the next day of recovery of the dead body and he was called in the police station. The appellant Lalta was doing labour work and the suggestion of enmity of PW-5 with Lalta was denied by him.

12. Devaki Nandan (PW-6) had entered in the witness-box as a witness of recovery of Lathi, proved his signature on the recovery memo Exhibit Ka-5. the Lathi was identified by him and marked as Material Exhibit-3. PW-6, in his deposition, did not say anything about having seen appellant Lalta entering into the house of deceased Taule Ram on the fateful night though he was standing with other two witnesses namely Kalicharan (PW-3) and Komil Prasad (PW-5) as stated by them.

13. PW-8 is a witness named as Gulabi son of Ugrasen who stated on oath that he knew appellant Lalta Prasad and Nanhi Devi who were residents of the same village. The deceased Taule Ram was husband of Nanhi Devi. On the fateful night, at about 11:00 PM, while he alongwith one Jhhabbu Lal was coming back from their field, as soon as they reached in front of the house of the deceased, they witnessed Lalta coming out of the house of the deceased carrying Lathi in his hand. The appellant Lalta was shaken and tying a shirt in his head while coming out of the house of Taule Ram and went towards his house. Next day, Taule Ram was found dead and later his son Roop Lal narrated the whole story of murder. In cross, this witness gave the reason of him crossing the house of Taule Ram (deceased) and stated that his house was located near the house of Taule Ram. An observation is noted at the end of the cross-examination of this witness that on a suggestion given to this witness instead of giving an answer he kept mum, though he had denied the suggestion of making a false deposition on the instructions of Natthu Lal.

14. PW-7 is the child witness. His statement was recorded by the Court after recording satisfaction that he understood the questions well and was in a position to give answers to the same. PW-7 Roop Lal stated that deceased Taule Ram was his father. On the fateful night, he was sleeping at the roof of his house in a cot alongwith his sister Brijmati. His mother, one brother Anil and another sister Dayawati were also sleeping nearby. A dibbi was lit up. His father Taule Ram was sleeping in the room on the roof. His mother had cooked 'Khichdi' in the evening and they all ate it and slept. His father and mother had a fight three days prior to the incident and his father had beaten his mother and as such

they were not on talking terms. On the fateful night, his father did not have food. After sometime, accused Lalta came on the roof while PW-7 was awake. Lalta told his father to come down with him to take woods and took his father downstairs. His mother Nanhi Devi also went behind them and PW-7 followed all of them. One dibbi was lit up at the ground floor. The appellant Lalta dragged his father in a room and threw him on the floor and then strangulated him by Lathi while sitting over his father. His mother Nanhi Devi was catching hold the legs of his father. PW-7 stated that he tried to save his father and confronted Lalta who slapped and threatened him that he would also be killed. His father then died. At that point of time, his father (deceased) was wearing a shirt and Bermuda. Then his mother changed the clothes of his father and made the dead body wear black pant and red shirt. Lalta then carried the deceased to the roof through the stairs, he and his mother both also went upstairs. His mother then gave a rope to Lalta by which their goat was being tied. Lalta then hanged his father through the rope in the Khaprail. Both the accused persons namely his mother Nanhi and Lalta, thereafter, went downstairs. PW-7 states that he, thereafter, slept and in the morning, his mother was crying that his father had committed suicide. PW-7 stated that all the above stated facts were disclosed by him to his uncle (Tau) Natthu Lal, Devaki Nandan and Ram Dayal. In cross, PW-7 stated that he came to the Court for deposition with his uncle Natthu Lal and on each date fixed, he came with him. He was studying in class IV and since after the death of his father, he was residing with his uncle Natthu Lal. PW-7 also admitted, in cross, that his father had two fields and both were in the possession of his uncle Natthu Lal who was also keeping the proceeds of the crop. A suggestion was given to this witness that he was under the control of his uncle Natthu Lal which had been denied categorically.

PW-7 stated, in cross, that on the next morning, his mother woken him up but he could not tell the time when he got up. He then stated that on the fateful day, he ate 'roti' and slept when there was a little dark. When in the morning, his mother woke him up, he saw that the dead body of his father was hanging and his mother was crying. Amongst all his siblings, PW-7 was the eldest. PW-7 had denied the suggestion that his father was taking any intoxicating substance but stated on his own that his father used to remain out of the house frequently for about two-two months. He lastly stated that the entire story was narrated by him on his own and the police personnel did not ask him to make any statement. PW-7 had denied the suggestion of false deposition made at the instance of his uncle Natthu Lal and that he did not witness anything.

15. Placing the statements of all the prosecution witnesses and the documentary evidence, it is argued by the learned Amicus that the star witness of the prosecution is a child witness namely PW-7 whose testimony is not trustworthy. The fact that the child witness was in the custody of PW-2/Natthu Lal, a relative of the deceased, shows that he was a tutored witness. This fact is further evident from the contradictions and improvements in the testimony of the child witness. PW-2 is the beneficiary of the situation as there was no one in the family of the deceased as is evident from the statement of the Gram Pradhan. After the incident, PW-2 got possession of the land owned by the deceased and was keeping the proceeds

thereof. Other three children of the deceased had become orphan and no arrangement has been made by PW-2 for securing the future of the children of the deceased. The story brought by the prosecution of strangulation by appellant Lalta by Lathi is concocted one, inasmuch as, apart from the recovery of Lathi from the house of the appellant Lalta, there is no evidence to point towards the guilt of the appellant. In the medical evidence, though there is a suggestion of the death caused by strangulation but the same cannot be said to a definite opinion as it was based merely on the fact that the hyoid bone was found fractured, which could also be the result of hanging. The position in which the dead body was found at the place of incident as is reflected from the inquest clearly suggests that it was a case of hanging. The trial court without proper appreciation of the evidence on record, solely upon opinion of the expert, had held that it was a case of death caused by strangulation and ruled out the possibility of hanging. The opinion of the expert was required to be considered in the surrounding circumstances of the case.

The witnesses of last seen produced by the prosecution to prove the involvement of the appellant Lalta are not trustworthy. They were planted at the instance of PW-2 who is the ultimate beneficiary of the whole scenario. In any case, on the mere evidence of last seen, it would be unsafe to convict the appellant.

16. Lastly placing the statement of the child witness, it is submitted that, in cross, this witness had admitted that in the morning he was woken up by his mother and then he saw his father hanging in the Khaprail while his mother was crying. This fact itself is sufficient to prove the appellant innocent, inasmuch as, the version of this witness about the occurrence becomes false and tutored one. There is no witness of last seen of the deceased alive with the appellant. There are different sets of witnesses who had deposed that they had seen appellant Lalta entering in the house of the deceased and also coming out of the same. The manner in which the prosecution had introduced witnesses for each circumstance shows that the entire prosecution story was concocted. No motive has been assigned to the appellant Lalta, except the plea of illicit relationship of Lalta with the wife of the deceased (Nanhi Devi), which the prosecution has failed to prove. The recovery of the dead body was in the house of the deceased and there is no other incriminating circumstance than the witnesses of last seen to connect the appellant (Lalta) with the crime. The entire prosecution story was carefully constructed at the instance of the relative of the deceased so as to eliminate the wife of the deceased in order to grab his landed property or as a result of his own imagination.

The time of death is also disputed as the postmortem report indicates that rigor mortis had passed on, putrefaction of the body had begun and foul smell was present. As per the opinion of the doctor, the estimated time of death could be 1½-2 days and death could have been caused in the intervening night of 29/30.7.2001. The witnesses of last seen had also been introduced as inquest witnesses which show the zeal on the part of the Investigating Officer to solve the crime in a hurry. There is complete silence about Nanhi Devi being present in the house when the Investigating Officer reached at the spot after receipt of the report of the Gram Pradhan.

17. Reliance is placed on the decision of the Apex Court in **Nathiya vs. State**

Represented By Inspector of Police, Bagayam Police Station, Vellore1; Digamber Vaishnav and another vs. State of Chhattisgarh2 and **Jagdish and others vs. State of Haryana3** to assert that if two views are possible, the weight of evidence would tilt in favour of the accused. On the fractured evidence of the prosecution, conviction cannot be sustained.

18. Learned AGA, in rebuttal, submits that the prosecution witnesses had fixed the presence of appellant Lalta in the house of the deceased in the intervening night of 30/31.7.2001 between 9PM to 11PM. PW-3 Kalicharan and PW-5 Komil Prasad who were neighbours witnessed the accused Lalta entering in the house of the deceased at about 9:00 PM, whereas PW-8 Gulabi who was also living nearby witnessed appellant Lalta coming out of the house of the deceased carrying Lathi at about 11:00 PM. There is categorical version of the witnesses regarding the motive which was illicit relationship of appellant Lalta with the wife of the deceased namely Nanhi Devi. The child witness had described the entire occurrence in a categorical version in his examination-in-chief. His testimony cannot be discarded terming him as a tutored witness.

As regards the interest shown by PW-2 Natthu Lal, cousin of the deceased in the whole occurrence, it is submitted by the learned AGA that after death of the father of PW-7, the child witness, and arrest of his mother there was only one relative left in the village namely Natthu Lal who could have looked after the child and the landed property of the deceased. This fact, in any case, would not go against the prosecution as the evidence collected in relation to the crime at the time of the occurrence has to be seen. The medical evidence also corroborates the prosecution version that it was not a case of hanging rather the death was caused by strangulation, homicidal death had occurred in the house of the deceased, wherein presence of the appellant Lalta had been fixed by the prosecution witnesses.

19. In addition to the above, the recovery of murder weapon Lathi had also been made at the instance of appellant Lalta from his house which was proved by PW-12.

20. In the totality of the facts and circumstances of the case, it is established that the prosecution had brought the circumstances in relation to the commission of crime which when put together formed a complete chain which unerringly point towards the guilt of the accused persons Lalta and Nanhi Devi. No infirmity at all can be found in the decision of the trial court. The appeal, thus, deserves to be dismissed.

21. Having considered the submissions of the learned counsels for the parties and perused the record, we find that the prosecution case rests mainly on the evidence of the child witness namely PW-7 Roop Lal who was aged about 8 years on the date of the incident.

22. To test the submission of the learned Amicus Curiae for the appellant that the evidence of the child witness is unreliable or not trustworthy, we deem it apt to discuss the law relating to appreciation of evidence of a child witness.

23. It is trite in law that the evidence of a child witness has to be subjected to closest scrutiny and can be accepted only if

the court comes to the conclusion that the child is a competent witness within the meaning of Section 118 of the Evidence Act. A child witness, by reason of his tender age, is a pliable witness. He can be tutored easily either by threat, coercion or inducement. Therefore, the court must be satisfied that the attending circumstances do not show that the child was acting under the influence of someone or was under any threat or coercion.

24. The settled principle is that a child witness can be a competent witness provided the statement of such witness is reliable, truthful and is corroborated by other prosecution evidence. The Court in such circumstance can safely rely upon the statement of a child witness and it can form the basis for conviction as well. Further, the evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be reliable one and his/her demeanour must be like any other competent witness and that there exists no likelihood of being tutored.

The evidence of a child witness can be relied upon if the Court, with its expertise and ability to evaluate the evidence, comes to the conclusion that the child is not tutored and his evidence has a ring of truth. The Courts have consistently held that 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. There is no rule or practice that in every case the evidence of a child witness be corroborated by other evidence before a conviction can be allowed to stand but as a rule of prudence the court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable.

It is almost always safe and prudent to look for corroboration for the evidence of a child witness from the other evidence on record, because while giving evidence a child may give scope to his imagination and exaggerate his version or may develop cold feet and not tell the truth or may repeat what he has been asked to say not knowing the consequences of his deposition in the Court. [Reference **K. Venkateshwarlu vs. State of Andhra Pradesh4; Alagupandi alias Alagupandian vs. State of Tamil Nadu5; Shivasharanappa and others vs. State of Karnataka6 and Digamber Vaishnav and another vs. State of Chhattisgarh** (supra).

25. While considering the evidence of a child witness, in his legendary way, the Chief Justice Y.V. Chandrachud (as he then) in **Suresh vs. State of U.P.7** said that:-

"(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."

26. Keeping in mind the above rule of prudence, we proceed to evaluate the evidence of the child witness, PW-7, who is the star witness of the prosecution.

27. We may note that before proceeding to record the statement of PW-

7, the trial court had satisfied itself about the competence of the child witness.

28. The story narrated by the child witness (PW-7) about the occurrence in his examination-in-chief, extracted in the foregoing paragraphs of this judgment, was conveyed to his uncle Natthu Lal, Devki Nandan and Ram Dayal in the afternoon on 31.7.2001 when the Investigating Officer was present on the spot. In cross, this witness stated that he came to the Court to depose alongwith his uncle Natthu Lal (PW-2) and on each date fixed, he came with him. PW-7 was studying in Class IV and was living with his uncle (PW-2) after death of his father. It has come in the evidence that the fields of his father were in occupation of Natthu Lal (PW-2) who was keeping the proceeds of the same with him. All the expenses of PW-7 were being borne by his uncle Natthu Lal. On a suggestion, PW-7 stated that on the date of the incident, he was woken up by his mother but he did not remember the time and that on the day of the incident, he slept after eating 'roti' while there was a little dark and in the morning when his mother woke him up, he saw the dead body of his father hanging and his mother crying. Amongst all siblings, PW-7 was the eldest. He had denied that the incident narrated by him was based on the suggestion of the police and asserted that he narrated the whole story on his own. He also stated that his father was not taking intoxicating substance but he used to remain out of the house for 2-2 months. PW-7 denied the suggestion of the deposition being made at the instance of Natthu Lal.

Analysing his testimony, PW-7 is a witness who was aged about 8 years on the date of the incident. In his narration of the story about the occurrence and participation of appellant Lalta and his mother Nanhi in the crime, pertinent is to note that there apparent contradictions in his version in the examination-in-chief and cross-examination with regard to his being an eye-witness of the whole occurrence from the beginning till the end. His statement that he slept after the occurrence, i.e. after death of his father at the hands of his mother and co-accused Lalta, does not seem to be natural. For a child of 8 years seeing his father being killed and hanged by his own mother must be a moment of great shock. However, from his reaction to the whole occurrence, it cannot be assumed that he was lying. There are other circumstances which need to be appreciated to evaluate the truthfulness of the testimony of PW-7, the child witness. One of the said circumstance is the entry of appellant Lalta in the house of deceased during night hours and reason given for the deceased to accompany him to go downstairs. It is difficult to believe that on the asking of a labour Lalta, the deceased would go to bring woods alongwith him that too in the night hours when there is also a suggestion of his wife having illicit relations with Lalta. It has come in the evidence of PW-7, the child witness, that both his parents, the deceased and Nanhi Devi had a fight three days prior to the occurrence and they were not on talking terms. In a situation like this, this part of the statement of PW-7 could not be corroborated from the prosecution evidence.

The second circumstance is the narration by PW-7 that appellant Lalta had dragged his father (the deceased) in the room and threw him on the floor and then strangulated him with the Lathi while his mother was catching hold of the legs of his father and his father died. In this statement, there is no narration of any struggle or

resistance put by his father (the deceased), who was a young man of 30 years with strong built as is evident from the postmortem report. It cannot be accepted that when the deceased was awake and was not under any intoxication, why would he not resist and make efforts to save himself. The co-accused Nanhi and appellant Lalta could not be said to be persons of such a built or background that the deceased could not have fought while his child was standing besides him and fighting for him. There is a statement of the child that when he fought for his father, Lalta slapped and threatened to kill him. It is not acceptable that a father even after seeing threat to the life of his child would not react or resist. From the postmortem report, absolutely no sign of struggle or fight could be seen on the body of the deceased. It is difficult to accept that the accused persons were so strong that they could overpower the deceased to the extent that he could not show any resistance or struggle for his life or of his child. There is no mark at all of dragging of the body or any sign of throwing the deceased on the floor. No external injury was found by the doctor apart from the only ligature mark on the neck of the deceased.

Further the child witness (PW-7) stated that when his father had died, he was wearing a shirt and Bermuda and his clothes were changed by his mother and the dead body was made to wear a black pant and red shirt. It does not stand to reason as to why the clothes of the deceased would be changed by the accused persons when they were creating a scene of suicide as in that case, it would be irrelevant as to what was the deceased wearing. The narration of the dead body having been carried by the appellant Lalta on the first floor and then hanged in the Khaprail from the rope is also unacceptable. In case, the appellant with the co-accused planned to project it a case of hanging, they could have hanged the dead body anywhere in the house which was a two storey house. It is not understandable as to why would the accused take the risk of carrying the body upstairs just to hang it. There is also no sign of dragging of the deceased upstairs. A further contradiction in the statement of PW-7 is found from the postmortem report, where semi digested food was found in the small intestine of the deceased and the large intestine was full of gases and faecal matter. The statement of PW-7 that his father did not have dinner on the fateful day is, thus, belied.

29. A further perusal of the inquest report indicates the position in which the dead body was found hanging in the house. It is noted therein that the dead body was found hanging on the first floor of the house (which was a two storied house) in Khaprail from a rope. Both the hands of the deceased were towards the ground and his both legs were on the ground, folded from both the knees. The tongue of the deceased was caught between teeth and blood was coming out of the right ears and eyes. While describing the injuries on the body in the inquest report, it is noted that the body was turned over to note any signs of injury but apart from the mark of the rope on the neck, there was no other injury. The inquest was prepared by PW-11 Surendra Kr. Singh, the Investigating Officer. He has proved the inquest report as Exhibit Ka-8 being in his handwriting and signatures and stated that he had also prepared the site plan, Exhibit Ka-7 and the recovery memo, Exhibit Ka-4. Apart from these three papers, all other papers on record namely Challanlash, Photolash etc. have been admitted to be genuine documents. In the

inquest report itself, PW-11 had raised a doubt about the cause of death being suicide. It has also been noted therein that when PW-11 reached the spot, two constables of the nearest Chauki were already present there. The body was hanging in the 'Balli' of Khaprail at the first floor. There was a lot of crowd and the family members and relatives of the deceased were crying. The inquest had commenced at about 11.00 AM and ended at 12:00 PM.

30. A perusal of the case diary further indicates that the statement of the first informant (PW-2) namely Natthu Lal was recorded at 12:30 PM after making entry of the written report Exhibit Ka-2 given by him. The Parcha no. 1 of Case Diary, however, began with the information provided by the Gram Pradhan Ram Autar in writing which is Exhibit Ka-1 that Taule Ram, a resident of the village had committed suicide. It then narrates that on receiving the said information, carrying necessary papers, the Investigating Officer PW-11 came at the house of the deceased Taule Ram. Two Constables from nearest Chauki were present there and the dead body was hanging in the Khaprail. Raising suspicion about the cause of death being of suicide, body was sealed and sent for the postmortem and recovery memo of rope was prepared.

A written report was given on the spot by PW-2 Natthu Lal which was also extracted in the Case Diary and the Investigating Officer had then proceeded to record the statement of PW-2 which began at 12:30 PM. The statement of child PW-7 was recorded at 12:45 PM as evident from the Case Diary. In the entire sequence of event uptill recording of the statement of Natthu Lal (PW-2) and the child witness Roop Lal (PW-7), there is complete silence about the presence of co-accused Nanhi, wife of the deceased in the house. The Investigating Officer in the inquest noted that the family members of the deceased were wailing but in the Case Diary at Parcha No. 2, it was noted that when he looked to arrest Nanhi Devi she was not met as she had left the house clandestinely alongwith her other children.

31. As per the prosecution story, the Gram Pradhan Ram Autar who had entered in the witness-box as PW-1 went to lodge the written report about the death of Taule Ram as he had seen the wife of deceased Taule Ram wailing in her house saying that her husband had committed suicide. In his statement in chief as PW-1, the Gram Pradhan stated that as the deceased had no parents and real brothers and as no relative of the deceased went to the police station, he being the Gram Pradhan went to give information in writing. PW-1 though had not been confronted in cross but his statement in the examination-in-chief is reiteration of his first version recorded in the Case Diary (Section 161 statement). From the statement of PW-1, at least, it is evident that he was the first one to reach at the spot and he had seen the wife of the deceased wailing in her house.

32. As noted above, in the inquest, presence of wife of the deceased has not been specifically indicated though it is noted that the family members of the deceased were wailing. The prosecution version about the presence of the wife of the deceased at the time when the police reached at the spot is completely missing. Further from the extract of the inquest noted in the Case Diary as also the narration of the position of the dead body while hanging, it is noteworthy that both

the legs of the deceased were found folded from the knees while the body was hanging. Both the hands of the body were also hanging towards the ground. Apart from the ligature mark, no other injury or any sign of struggle was found on the person of the deceased as is clear from both the inquest and the postmortem report. In such a situation, looking to the position in which the dead body of the deceased was found hanging by the Investigating Officer who was the first one to reach the spot on receipt of the report of suicide, the part of the statement of PW-7 that the deceased was first killed by strangulating his neck and then his body was taken to the first floor and hanged from a rope does not seem to be correct. There is no indication in the inquest report nor it can be assumed that the legs of the dead body after the deceased was killed, were folded and tied. It cannot also be visualized that after death, both the legs of the body would be folded from the knees on its own when it was hanged on the Khaprail. We may also note that the body was hanging from a plastic rope, the possibility of it getting loose due to the weight of the dead body, resulting in the knees touching on the ground cannot be ruled out.

33. Furthermore, in cross, PW-7 stated that in the morning on 30.7.2001, he was woken up by his mother and then he saw that the dead body of his father hanging from the Khaprail and his mother was crying. PW-7 also stated that he slept early in the evening (when there was little dark) after having dinner and was woken up in the morning by his mother. His statement that his father did not have food that night is found false.

34. From the above, the narration of the story of the occurrence by PW-7 does not inspire confidence of the Court. However, before reaching at any conclusion, other evidence on record i.e. surrounding circumstances of the case are also to be appreciated.

35. At this stage, it needs to be mentioned that two witnesses PW-4 and PW-5 namely Chhotelal and Komil Prasad; respectively, stated that both legs of the deceased were folded from the knees and touching the floor while the body was hanging from the Khaprail by a plastic rope. PW-4 had been produced as witness of recovery of the rope and is not a Panch witness. He has proved his signature on the memo of recovery of rope Exhibit Ka-1 and the rope having been sealed in his presence as Material Exhibit-2.

36. We may note that the purpose of inquest, the object of the proceedings under Section 174 Cr.P.C., is to investigate into and draw up a report of the apparent cause of death, whether a person has died under suspicious circumstances or an unnatural death and if so, what is apparent cause of death. The officer preparing inquest has to describe such wounds as may be found on the body of the deceased and state in what manner by what weapon or instrument, if any, such wounds appear to have been inflicted. The position in which, the dead body was found at the spot may be a material circumstance in a particular case, as in the present case and the said position can only be ascertained from the inquest report prepared under Section 174 of the Criminal Procedure Code as the said report is the only evidence of narration of the position of the dead body found on the spot. In the instant case, the position in which, the dead body was found to be hanging is relevant to ascertain as to whether the death was caused by hanging

or the deceased was first done to death and his body was hanged.

The statement of the Investigating Officer in the inquest with regard to the position of the dead body, while it was hanging from the Khaprail roof of the house, is based on his actual observation at the spot and is admissible under Section 60 of the Evidence Act as such. While considering the impact of the statement in the inquest report, site plan, seizure list, i.e. papers prepared by the Investigating Officer at the spot, it was held by the Apex Court in **Rameshwar Dayal v. State of U.P.8** that the documents like the inquest report, seizure lists or the site plan consist of two parts:- (i) one which is admissible and; (ii) the other is inadmissible. That part of such documents which is based on the actual observation of the witness at the spot being direct evidence in the case is clearly admissible under Section 60 of the Evidence Act. Whereas, the other part which is based on the information given to the Investigating Officer or on the statement recorded by him in the course of investigation, is inadmissible under Section 162 Cr.P.C. except for the limited purpose mentioned in that section.

37. For the above discussion, we are of the opinion that the statement of the Investigating Officer with regard to the position of the dead body while it was hanging from the Khaprail by a plastic rope, i.e. both legs of the body were folded from the knees while the knees were on the ground becomes admissible in evidence and has to be read and analyzed alongwith the other evidence on record.

38. From the postmortem report, the injuries found on the person of the deceased are only ligature mark which was though horizontal but not continuous. It was present all around the neck except on the left side base of the neck and just behind the left ear. The ligature mark was in the shape of a groove, base of which was pale and margins were congested. Multiple abrasions were present on the margins of the groove and the area just below the ligature mark on the front part of the neck. The larynx and trachea were congested and hyoid bone was fractured at the junction of the left larger Cornu with its body. The opinion of the doctor that it was a death caused by strangulation, seems to have been arrived only for the reason that the hyoid bone was found fractured. It is not the case of the prosecution that the deceased was strangulated by ligature rather the use of wooden stick to compress his neck has been suggested by the prosecution. There was nothing before the doctor to opine that Lathi (wooden stick) was used to strangulate the deceased.

39. As regards the condition of the dead body, it may also be noted that the body was swollen, putrefaction had commenced as the superficial skin was peeled off from several places and foul smell was present, Eyes were closed, Mouth open with tongue protruding out. As per the observation of the Investigating Officer in the inquest as noted above, both legs were folded from the knees while the body was hanging from a plastic rope, the hands were hanging whereas the wrists were clinched, half open.

40. Considering the above part of the medico legal report (postmortem report) and the position of the dead body as per the observation of the Investigating Officer in the inquest, we are afraid to form any definite opinion as to the manner of death of the deceased, whether suicidal or

homicidal. No definite opinion can be formed as per the expert report that it was a case of strangulation by use of a wooden stick to compress the neck and then suspending the body by a rope to simulate suicide by hanging. Noticeably enough there was absolutely no mark at all of struggle or violence on the dead body. It cannot be accepted that a man of about 30 years of age could be overpowered by his wife and his paramour (the appellant) in such a manner that he could not offer any kind of resistance that too when his child of 8 years, who was fighting for him, was also threatened to be killed.

41. It is not a case of the prosecution that the deceased was first made unconscious and then killed. The abrasions on the margins of the groove or at the area just below the ligature mark on front part of the neck cannot prove it a definite case of strangulation by a wooden stick as multiple abrasions at the margins of the groove may occur due to use of a plastic rope while hanging. The pattern of the ligature mark as appeared on the neck, however, is very similar to the ligature mark as may occur in the case of hanging. In any case, no groove in the middle of the front of the neck corresponding to the wooden stick used, was found. On a suggestion to the doctor (PW-9), he had tried to explain the same that the marks of Lathi could be superimposed by the marks of the rope which may be correct but the definite opinion formed by the doctor about the death caused by strangulation with the use of wooden stick (Lathi) to compress the neck in absence of any sign of injury corresponding to the same, seems to be confusing, that too when the doctor himself says that the groove mark on the neck was typically caused by the rope and not by Lathi. It may be reiterated that the ligature mark was not continuous as it was not present on the left side back of the neck and just below the left ear. The explanation offered by the doctor that it was missing because of the hair on the back of the neck is only a guess work. Nothing in this regard is mentioned in the postmortem report. Further there is no explanation as to the ligature mark missing from the "just below the left ear". Moreover, it is not a case of strangulation by ligature. Further the fracture of left larger cornu of the hyoid bone stands explained from the knots found in the plastic rope from which the body was hanging. The recovery memo of the rope (Exhibit Ka-4) show that there was 2m. noose (फन्दा) in the plastic rope and one more knot was there at the opposite end and a red piece of chunri gote (shining) cloth was stuck in the noose (फन्दा). The abrasion on the margins of groove can be attributed to the plastic rope whereas the fracture of hyoid bone may have been caused because of the position of the knot in the rope at the time of hanging of the body. In any case, there is no definite evidence on record to prove it a case of strangulation by Lathi (wooden stick).

Besides that, the proximate time of death as estimated by the doctor cannot be fitted in the prosecution story. As per the external appearance of the dead body, rigor mortis had passed on and putrefaction of the body had commenced. The body was swollen and superficial skin was peeled off from several places with the presence of foul smell. The said external appearance of the body seem to be the reason why the doctor had opined in the postmortem report that the proximate time of death was about 1½ days, whereas from the evidence on record, it can be seen that the postmortem of the dead body was conducted within 18-20 hours of the time of death as projected

by the prosecution witnesses. This external appearance of the dead body, in view of the opinion of the doctor about the proximate time of death, also creates doubt on the prosecution story about the death caused by strangulation between 9:00PM to 11:00 PM in the intervening night of 30/31.7.2001.

42. We may record that mere fracture of the hyoid bone cannot be a reason to form a conclusive expert opinion of the death caused due to strangulation as is clear from the reading of the Chapter '19' of the Text Book of Modi on Medical Jurisprudence and Toxicology (24th Edition).

43. Now analysing the remaining evidence on record, the evidence of last seen by PW-3 Kalicharan and PW-5 Komil Prasad, we may note that Kalicharan (PW-3) stated that he alongwith Komil Prasad (PW-5) and Devaki Nandan (PW-6) was standing in front of the house of Devaki Nandan and at around 9:00 PM when they had seen appellant Lalta entering in the house of the deceased carrying Lathi. PW-3 Kalicharan had also been introduced as a witness of recovery of dibbi. He admitted that he had good relations with the first informant Natthu Lal (PW-2) and Natthu Lal was an influential person in the village. PW-5 Komil Prasad further stated that while standing at the same place, i.e. in front of the house of Devaki Nandan from where they had seen Lalta entering in the house of the deceased at around 9:00 PM, they kept on talking for two hours. These witnesses (PW-3 and PW-5) are, however, silent as to whether they had also seen Lalta coming out of the house also at around 11:00 PM as per the version of PW-8.

44. To prove the said fact, the prosecution had introduced another witness who is PW-8 Gulabi. He stated that he witnessed appellant Lalta coming out of the house of the deceased at around 11:00 PM. Further, amongst the witnesses of last seen, Devaki Nandan had also been produced as PW-6 but he had only proved the recovery of 'Lathi' from the house of Lalta and identified his signature on the recovery memo as Exhibit Ka-5. PW-6 (Devaki Nandan), in front of whose house, other witnesses of last seen were standing is completely silent about having seen Lalta entering in the house of deceased alongwith the other witnesses namely Kalicharan (PW-3) and Komil Prasad (PW-5).

45. For the above discussion, the evidence of last seen of the appellant Lalta entering and coming out of the house of deceased Taule Ram between 9:00 to 11:00 PM is not found convincing. Even otherwise, mere evidence of last seen, though an important circumstance, cannot be made sole basis for conviction of the accused in absence of any other corroborating circumstance to prove the guilt of the accused. In the circumstances brought before us, it is not possible to shift burden on the appellant Lalta to offer an explanation on the evidence of last seen of the prosecution witnesses (PW-3 and PW-5).

In a recent decision in **Nizam and another vs. State of Rajasthan9** considering the importance of theory of last seen, the Apex Court has observed that the evidence of last seen alive, undoubtedly is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty as 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.

But it is well-settled that it is not prudent to base the conviction solely on last seen theory. It was held that 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.

46. In the instant case, considering the evidence in its entirety before us, even this is doubtful that the deceased had been done to death between 9:00 PM to 11 PM as sought to be proved by the prosecution witnesses namely PW-3, PW-5 and PW-8, inasmuch as, the medical evidence does not support the ocular evidence of these witnesses about the proximate time of death. Lastly, as regards the recovery of Lathi, it is known to all that the villagers ordinary keep Lathi in their houses and often carry it while going to their fields. The proof of recovery of Lathi from the house of appellant Lalta given by PW-6 Devaki Nandan, therefore, will not add any strength to the prosecution case.

Apart from all the evidences noted above, there are other circumstances which also create doubt on the prosecution story. One of them is that the prosecution witnesses had proved that the wife of the deceased (Nanhi Devi) was present in the house when PW-1, Ram Autar, Gram Pradhan went to lodge the report (Exhibit Ka-1) of the suicide committed by her husband. The Investigating Officer reached at the spot after lodging of the said report at about 9:30 AM. In his examination-in-chief, PW-11 (Investigating Officer) stated that he reached at the spot carrying necessary papers and while doing Panchayatnama (inquest), a suspicion was raised about the death being a case of suicide. During the investigation, another written report was given by PW-2 Natthu Lal (Exhibit Ka-2) reporting murder committed by the wife in the company of the appellant Lalta. PW-11, however, is conspicuously silent about the presence of the wife of the deceased (Nanhi Devi) in the house when he reached at the spot. In the Case Diary (CD I) at page ½, where the written report given by PW-2 (Natthu Lal) was extracted by the Investigating Officer, time of which is mentioned as 12:10, in the margin by the red ink, it is noted that a search for arrest of Nanhi Devi was made but she had left her house alongwith her children clandestinely. From the Case Diary (CD IV) dated 5.8.2001, it is evident that Smt. Nanhi Devi (wife of the deceased) was arrested from the house of her brother Hetram son of late Tarachand, resident of Gram Bhoodha, which was her paternal house (Maika). The prosecution evidence, thus, is not conclusive about the presence of Nanhi Devi in her house in the morning when police had reached at the spot, though all the prosecution witnesses stated that Nanhi Devi was wailing in the morning that her husband had committed suicide. When and how Nanhi Devi had slipped from her house alongwith her children, when the entire village was collected and police was present could not be explained by the prosecution. In the inquest report also, it is mentioned that when police had reached at the spot family members of the deceased were crying. In the statement of PW-1, the Gram Pradhan, it has come that there were no immediate family members of the deceased except his wife and children. The silence of the prosecution witnesses about the circumstance in which Nanhi Devi wife of the deceased had left her house in the presence of villagers and police also creates a deep dent in the prosecution story.

47. In the entirety of the facts and circumstances of the present case, we do not find any definite evidence so as to hold

the appellant Lalta guilty for the offence of murder of deceased Taule Ram, the husband of co-accused Nanhi Devi.

48. The evidence of last seen, as discussed above, does not inspire the confidence of the Court so as to shift burden on the appellant Lalta to explain the circumstances being in his special knowledge.

49. It is settled that mere suspicion, however strong it may be, cannot take the place of proof. The prosecution must stand or fall on its own legs and it cannot derive any strength form the weaknesses of the defence. [Reference **Anjlus Dungdung vs. State of Jharkhand10 and Nanhar and other vs. State of Haryana11**].

50. No motive at all has been assigned to appellant Lalta independent to that of the co-accused Nanhi Devi. The illicit relationship of the wife of the deceased namely co-accused Nanhi Devi with the appellant is not proved. All the prosecution witnesses have stated that they had no knowledge about the relationship of appellant Lalta with the wife of the deceased and simply because Lalta used to go to the house of the deceased, they assumed such a relationship. We must also not loose sight of the fact that the deceased was a well off person, who was having around 11 Bighas of land in his name and a house which was a two storied house in the village. The couple had four children born out of the wedlock and the youngest one was about 2½ years of age whereas the eldest child was 8 years old. To the contrary, the appellant Lalta was only a labour. Even on comparison of the economic status of the appellant Lalta and the deceased, it is difficult to believe that a lady (wife of the deceased) having four children between the age of 8 to 2½ years, the young wife of a well off person in the village, would indulge in an extramarital relationship with a man who was only a labour.

What gain accused Nanhi Devi could have by killing her own husband when only immediate dispute between them was a 'Marpeet' prior to the incident is unexplained.

The motive for the offence as alleged by the prosecution is not at all convincing nor it could be proved.

51. Lastly, in this entire sequence of events, we can clearly see that the sole beneficiary of the whole situation was the first informant namely Natthu Lal (PW-2), who was cousin of the deceased, as he got possession of the landed property of the deceased. In their statement under Section 313 Cr.P.C., both the accused persons stated that they were implicated falsely at the behest of Natthu Lal namely PW-2. Natthu Lal namely PW-2 was an influential person of the village is proved by the prosecution witness Kalicharan (PW-3). The possibility of Natthu Lal (PW-2) being the master mind behind the whole prosecution story, in view of the circumstances brought before us, cannot be ruled out.

52. Be that as it may, the evidence brought forth by the prosecution may give rise to a suspicion but suspicion is not a proof of the guilt particularly when the evidence of the prosecution witnesses do not inspire confidence, for the reasons disclosed above.

53. In the entirety of the evidence on record, we find that the prosecution has not

been able to prove the guilt of appellant Lalta for the offence of murder of deceased Taule Ram beyond all reasonable doubt.

The judgment and order dated 19.7.2005 passed by the Additional Sessions Judge, Court No. 3, Pilibhit in Sessions Trial No. 537 of 2001 for conviction of the appellant No. 2 Lalta Prasad is hereby set aside.

The appellant no. 2 Lalta Prasad is in jail. He shall be released from the jail forthwith, if not wanted in any other case.

54. In so far as another appellant Nanhi Devi is concerned, she has been already granted remission by the State Government. As no one has appeared to represent her case the Court desist from forming any opinion on her case in view of the remission of her sentence. The appeal, accordingly, stands **disposed of**.

It is, however, kept open for appellant Nanhi Devi to move an application to revive her appeal for decision on the merits of the order of conviction, if she so desires.

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 within one month.

Sri Anurag Sharma learned Amicus Curiae rendered valuable assistance to the Court. The Court quantifies Rs. 15,000/- (Rupees Fifteen Thousand only) to be paid to Sri Anurag Sharma learned Advocate towards fee for the able assistance provided by him in 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)05ILR A1657
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.05.2022

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Second Appeal No. 356 of 2022

Shahti Singh Patel & Anr. ...Appellants
Versus
Veer Singh & Ors. ...Respondents

Counsel for the Appellants:
Sri Arpit Agarwal

Counsel for the Respondents:

Evidence Law - Indian Evidence Act, 1872 - Section 69- Permanent injunction sought-against defendants/respondents-to not interfere in property-on the basis of will-without seeking declaratory relief by Plaintiffs-no effort to prove execution of will-suit for permanent injunction-defective-as declaratory relief not sought and title was under cloud-which could be proved only under provision of section 69 of Act, 1872 -suit rightly dismissed.

Second Appeal dismissed. (E-9)

List of Cases cited:

1. Nirmala Verma Vs Nirmal Banerjii & ors. 2010 (1) AWC 978

2. Jeevan Bahadur Samaddar Vs Govind Charan Samaddar & ors., 2013 (120) RD 717

3. Babu Singh & ors. Vs Ram Sahai @ Ram Singh, 2008 (14) SCC 754

4. Jagdeesh Prasad Vs St. Manu/DE/0605/2015

5. Santosh Kumar Gupta Vs Harvinder Nath Gupta & ors., 1996 SCC Online All 1325

6. Bharpur Singh & ors. Vs Shamsher Singh, 2009 (3) SCC 687

7. B. Venkatamuni Vs C.J. Ayodhya Ram Singh & ors., 2006 (13) SCC 449

8. Anathula Sudhakar Vs P. Buchi Reddy (Dead) by LRs. & ors. 2008 (4) SCC 594

9. Civil Appeal No.8971 of 2010 (Kripa Ram (deceased) through Legal Representatives & ors. Vs Surendra Deo Gaur & ors.

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

1. Heard Sri Arpit Agarwal, learned counsel for the appellants.

2. This is plaintiffs' second appeal under Section 100 of Code of Civil Procedure *(hereinafter called as "CPC")* arising out of judgment and decree dated 13.03.2019 passed by District Judge, Pilibhit and judgment and decree dated 08.03.2022 passed by Civil Judge (Senior Division) arising out of Original Suit No.66 of 2012.

3. Facts, in brief necessary to appreciate the controversy in hand, are that the plaintiff filed an Original Suit No.66 of 2012 claiming relief of permanent injunction against the defendants-respondents for not interfering in the property mentioned in the plaint.

4. Case set up by the plaintiff was that a registered Will was executed on 08.07.1954 by one Smt. Ram Daulati in favour of late Ram Chandra Lal, father of the plaintiffs. The testator of the Will died in the year 1957 and since then the possession of late Ram Chandra Lal continued till his death and thereafter the plaintiffs are in possession. The plaintiffs had demolished the two storey building which was existing over the land in dispute for constructing a new house. It was on 10.03.2012, when the plaintiffs were trying to raise construction then the defendants objected and tried to take forcible possession. Hence, the suit for injunction was filed.

5. The plaintiffs filed a list of documents which included the electricity bill, the tax receipts etc. Despite, notice, the defendants did not turn up and the trial Court proceeded ex-parte, and on 13.03.2019 dismissed the suit on the ground that plaintiffs claimed to be the owner in possession on the basis of the Will deed dated 08.07.1954, which was not brought on record and only the receipts of the Nagar Palika Parishad regarding house tax and water tax were filed.

6. Against the said judgment, a Civil Appeal No.24 of 2019 was filed, the lower appellate Court framed the following points of determination under Order 41 Rule 31 of CPC, which are as under:-

"1. क्या विद्वान अवर न्यायालय द्वारा पारित किया गया प्रश्नगत निर्णय पत्रावली पर उपलब्ध साक्ष्य के विपरीत है?

2. क्या अपीलार्थी द्वारा प्रस्तुत की गयी पंजीकृत दिनांकित 08.07.1954 के आधार पर अपीलार्थी / वादीगण का कोई विवादित संपत्ति में पहुंचते है अथवा नहीं?"

7. During the pendency of the appeal, the plaintiffs-appellants filed copy of the Will deed under Order 41 Rule 27 of CPC, which was taken by the Court. The lower

appellate Court tried both the points together and found that the alleged Will dated 08.07.1954 was not proved by the appellants as required under Section 63 (C) of the Indian Succession Act, 1925 *(hereinafter called as "Act 1925")* read with Section 68 of the Indian Evidence Act, 1872 *(hereinafter called as "Act 1872")*, and further held that Section 90 of the Act of 1872 was not applicable, which was in regard to the presumption of document being 30 years old. The lower appellate Court on 08.03.2022 dismissed the appeal, hence the present appeal.

8. Sri Arpit Agarwal, learned counsel for the appellants submitted that lower appellate Court fell into the trap by holding that the case of the appellants was not covered under Section 90 and in fact, covered under Section 90-A (2) of the Act, 1872. According to him, both the sections operate in a different field, and the Will dated 08.07.1954 was a 67 years old document, and as per Section 90, the said Will should have been presumed to have been executed by the testator in favour of late Ram Chandra Lal. According to him, the lower appellate Court wrongly held that the case would fall under sub-Section 2 of Section 90-A of the Act, 1872.

9. Reliance has been placed upon the decision of Co-ordinate Bench of this Court in case of **Nirmala Verma Vs. Nirmal Banerjii and others 2010 (1) AWC 978.** Relevant paras 27 and 31 are extracted hereasunder:-

"27. The Court further finds that the lower appellate court has observed that the presumption under Section 90 of the Evidence Act was not available to the appellant on the ground that the documents filed was not 20 years old. The lower appellate court held that the lease-deed was executed on 21.2.1963 and that the suit was filed on 5.2.1973, i.e., approximately 10 years old on the date of the institution of the suit and therefore, the provisions of Section 90 and 90A of the Act was not applicable. In my opinion, the finding of the lower appellate court is not correct. For facility, Sections 90 and 90-A of the Evidence Act, as applicable in the State of U.P., reads as under :

90. Presumption as to documents thirty years old.-Where any document purporting or proved to be thirty years old, is produced from any custody which the signature and every other party of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

90-A. Presumption as to electronic record five years old:-- Where any electronic record, purporting or proved to be five years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the digital signature which purports to be the digital signature of any particular person was so affixed by him or any person authorised by him in this behalf."

31. *In* ***Manjoor Ali and Anr. v. Kishmat Ali and Ors. MANU/UP/0519/2004 : AIR 2004 Allahabad 395****, I had the occasion to deal with the provisions of Section 90 and 90A of the Evidence Act. The Court held-*

"From the aforesaid it is clear that Section 90-A(20 does not override

Section 90 of the Evidence Act. Both the sections operate in different fields. A document which is registered and which is more than 20 years old could not be admitted in evidence under Section 90-A(2) if the said document is the basis of the suit or of defence. However, the presumption, if available under Section 90, can therefore be raised by the Court even after holding that the presumption is not available under Section 90-A of the Act. Thus, I hold, that the presumption under Section 90(2) of the Evidence Act is not taken away by the provisions of Section 90-A)(2) of the Act.

The question therefore, that arises in the present case is whether the presumption under Section 90(2) of the Act was available on the certified copy of the sale deed dated 16-5-1933 to the plaintiff. It is relevant to state here that Section 90 of the Act removes the strict rule of proof of private documents. Presumption of genuineness may be raised where the document is produced from a proper custody. However, in view of the provisions of Section 90 of the Act, it is the discretion of the Court to accept the presumption flowing from Section 90. In the present case, the mere production of the certified copy of the sale deed was not by itself sufficient to justify the presumption of the execution of the original under Section 90. The provisions of Section 90 has to be read along with Section 65 of the Act. Mere production of a certified copy of the said deed is not sufficient to draw a presumption under Section 90. It must be shown that the document produced was a copy admitted as secondary evidence under Section 65 of the Act.""

10. Reliance has also been placed upon decision in case of **Jeevan Bahadur Samaddar Vs. Govind Charan Samaddar and others, 2013 (120) RD 717**. Relevant para 18 is extracted hereasunder:-

"18. However 'presumption' under Section 90 is not obligatory on the part of the Court. The word 'may' used in both sub-sections leave it to the Court, to draw such presumption or not. Obviously, if the Court decline to raise presumption, it must be for valid reasons. The words 'may presume' has been defined in Section 4 of Act, 1872 and reads as under:

"4. "May presume"- Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it."

(emphasis added)"

11. Sri Agarwal then contended that father of the plaintiffs continued in possession over the property in dispute since 1954 till his death and thereafter the plaintiffs continued, but dispute arose after the existing building was demolished and construction was going to be raised. According to him, the Will which was registered in 1954 should be presumed to be a document executed by the testator and need not be proved in the present suit in view of provisions of Section 90. He then contended that Section 68 of the Act of 1872 will not be attracted in the present case as both the attesting witnesses are dead and it is only when the Will is put to execution, it was to be proved by one of the attesting witnesses. In the present case, as the document in question was 30 years old (in U.P. Amendment 20 years). The said Will was not required to be proved and it will be presumed to have been duly executed by the testator in favour of the propounder of the Will.

12. I have heard counsel for the plaintiffs-appellants and perused the record.

13. After perusal of record, this Court finds that the plaintiffs-appellants had filed a simplicitor suit for permanent injunction restraining the defendants from interfering in their peaceful possession on the basis of the Will deed said to have been executed on 08.07.1954 in favour of father of the plaintiffs. The Will deed was never put to execution either by the father of the plaintiffs or the plaintiffs who are said to be the propunder of the Will.

14. Before adverting to decide the present appeal, a cursory glance of provisions of Section 63 of the Act, 1925, Sections 68, 69, 90 and 90-A of the Act of 1872 are necessary for the better appreciation, which are extracted hereasunder:-

The Indian Succession Act, 1925

***"S. 63. Execution of unprivileged wills.**--Every testator, not being a soldier employed in an expedition or engaged in actual warfare, 1 [or an airman so employed or engaged,] or a mariner at sea, shall execute his will according to the following rules:--*

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence an d by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

The Indian Evidence Act, 1872

***"S. 68. Proof of execution of document required by law to be attested. --** If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:*

[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]

***S. 69. Proof where no attesting witness found.** -- If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the hand writing of that person.*

S. 90. Presumption as to documents thirty years old. -- *Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.*

ch, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

S. 90A. Presumption as to electronic records five years old. -- *Where any electronic record, purporting or proved to be five years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the 2 [electronic signature] which purports to be the 2 [electronic signature] of any particular person was so affixed by him or any person authorised by him in this behalf.*

Explanation. -- Electronic records are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they naturally be; but no custody is improper if it is proved to have had a legitimate origin, or the circumstances of the particular case are such as to render such an origin probable."

15. Chapter III of Act 1925 is in regard to the execution of unprivileged Wills. Section 63 provides the manner in which a testator shall execute his Will :-

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction,

(b) The signature or mark either of the testator, or the signature of the person signing for him, shall be placed and shall appear that it was intended to give effect to the writing as a Will,

(c) the Will has to be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark on the Will. Further, each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time.

16. Thus, the Act of 1925 prescribes the methodology for execution of a Will. The Act of 1872 is a procedural law and Section 68 provides for the proof of execution of a document which is required by law to be attested.

17. Proviso to the said Section requires that in case of proving a Will, the same has to be done through attesting witnesses. The legislature had prescribed the procedure for proving the execution of a Will through an attesting witness. But, in cases where the attesting witnesses are not available, as in the case of death or out of the jurisdiction of the Court or kept out of the way by the adverse party or cannot be traced despite diligence search. In those cases, the Will may be proved in the manner provided in Section 69 of the Act of 1872.

18. The Supreme Court in **Babu Singh and others Vs. Ram Sahai @ Ram Singh, 2008 (14) SCC 754** had the occasion to consider the effect of Sections 68 and 69 of the Act of 1872. Relevant paras 17 and 18 are extracted hereasunder:-

"17. It would apply, inter alia, in a case where the attesting witness is either dead or out of the jurisdiction of the court or kept out of the way by the adverse party or cannot be traced despite diligent search. Only in that event, the Will may be proved in the manner indicated in Section 69, i.e., by examining witnesses who were able to prove the handwriting of the testator or executant. The burden of proof then may be shifted to others.

18. Whereas, however, a Will ordinarily must be proved keeping in view the provisions of Section 63 of the Indian Succession Act and Section 68 of the Act, in the event the ingredients thereof, as noticed hereinbefore, are brought on record, strict proof of execution and attestation stands relaxed. However, signature and handwriting, as contemplated in Section 69, must be proved."

19. In the case in hand, it was a specific case of the plaintiffs that Will deed was executed on 08.07.1954 and more than 67 years have elapsed and both the attesting witnesses have died, thus Section 69 comes into play and the execution of the Will deed was required to be proved according to Section 69 by at least proving that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the Will is in the handwriting of that person. But, the plaintiffs apart from filing the Will deed dated 08.07.1954 during pendency of the appeal did not take any step to prove the handwriting of either one of the attesting witness or the executor, and solely relied upon Section 90 of the Act 1872, for presuming the document to be 20 years old, which need not to be proved.

20. The Division Bench of Delhi High Court in ***Jagdeesh Prasad Vs. State Manu/DE/0605/2015,*** in a similar circumstances, held that in case of death of attesting witnesses, Section 69 of the Act comes into play and the execution of the Will deed is required to be proved by the handwriting of one of the witnesses and the executant . Relevant Paras 13, 14 and 15 are extracted hereasunder:-

"13. The legislature was conscious of the fact that a situation may arise where both attesting witnesses have taken the train to the heaven before the testator died or before the beneficiary propounds the Will. The consciousness of the legislature can be found in Section 69 of the Indian Evidence Act, 1872, which reads as under:-

69. Proof where no attesting witness found -

If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

14. Section 69 of the Indian Evidence Act, 1872, while dealing with a situation where no attesting witness can be found, requires evidence to be led that the signatures on a document which law requires to be attested by one or more

witnesses are that of the executant with further proof that there is attestation in his handwriting by one attesting witness.

15. Law does not envisage that if both attesting witnesses to a Will have died or for some reason are not available, that would be the end of the Will. The way forward has been guided by the legislature under Section 69 of the Indian Evidence Act, 1872."

21. A Co-ordinate Bench of this Court in ***Santosh Kumar Gupta Vs. Harvinder Nath Gupta and others, 1996 SCC Online All 1325*** while deciding the testamentary suit held that in case, the attesting witnesses are dead or not available, the execution of the Will can be proved in accordance with mode prescribed under Section 69 of the Act, then Court should not raise presumption under Section 90 of the Act and admit the document in evidence, but direct the party to prove the document by leading evidence. Relevant Para 15 is extracted hereasunder:-

"15. As already discussed above, plaintiff in this case has failed to prove by cogent evidence that both the attesting witnesses are dead. The plaintiff has also failed to prove the hand writing and the signature of said attesting witnesses under Section 69 of the Evidence Act. He has not produced any relation or any such person who would depose that the attesting witnesses were dead. On the contrary, the plaintiff had tried to prove the same by his evidence and has failed to establish the said fact before this Curt. In such a situation, in my opinion, the presumption under Section 90 of the Evidence Act is not available to the plaintiff. I consequently do not find any force in the submission of Shri J. Nagar regarding the presumption about due and valid execution and attestation of the document on the ground that is is over 30 years old. In view of the aforesaid discussion I am of this opinion that the plaintiff has failed to prove the due and valid execution and attestation of the Will (A-5). Issues 1 and 2 are decided accordingly against the plaintiff."

22. Dealing with the similar situation for the execution and proving of a Will under Section 63 of the Act 1925 and Section 69 read with Section 90 of the Act 1872, the Apex Court in ***Bharpur Singh and others Vs. Shamsher Singh, 2009 (3) SCC 687,*** held that in case, the provisions of Section 68 of the Act 1872 could not be complied with, then the other provisions contained therein, namely, Section 69 and 70 would be attracted. Relevant Paras 18 and 19 are extracted hereasunder:-

"18. Respondent was a mortgagee of the lands belonging to the testatrix. He is also said to be the tenant in respect of some of the properties of the testatrix. It has not been shown that she was an educated lady. She had put her left thumb impression. In the aforementioned situation, the question, 15 which should have been posed, was as to whether she could have an independent advice in the matter. For the purpose of proof of will, it would be necessary to consider what was the fact situation prevailing in the year 1962. Even assuming the subsequent event, viz., the appellants had not been looking after their mother as has been inferred from the fact that they received the news of her death only six days after her death took place, is true, the same, in our opinion, would be of not much significance.

19. The provisions of Section 90 of the Indian Evidence Act keeping in view

the nature of proof required for proving a Will have no application. A Will must be proved in terms of the provisions of Section 63(c) of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. In the event the provisions thereof cannot be complied with, the other provisions contained therein, namely, Sections 69 and 70 of the Indian Evidence Act providing for exceptions in relation thereto would be attracted. Compliance with statutory requirements for proving an ordinary document is not sufficient, as Section 68 of the Indian Evidence Act postulates that execution must be proved by at least one of the attesting witness, if an attesting witness is alive and subject to the process of the Court and capable of giving evidence."

23. It is no doubt correct that a Will executed under Section 63 of the Act, 1925 has to be proved that it was executed, at least by one of the attesting witnesses under Section 68, the requirement of Section 63 of Act, 1925 read with Section 68 of Act, 1872 has already been considered and upheld by the Apex Court in case of **B. Venkatamuni Vs. C.J. Ayodhya Ram Singh and others, 2006 (13) SCC 449.**

24. I t is only in case where plaintiffs come up with a case that the attesting witnesses of the Will have died or not available to prove the execution of the Will as required under Section 68, then the alleged Will deed is required to be proved by the handwriting of one of the witnesses of attesting witnesses and the executant under Section 69.

25. Argument raised at bar that there was no requirement to prove the execution of Will under Section 68, as presumption in favour of the execution of Will is there, under Section 90 is a fallacy and has no merit.

26. As regards, a Will which has been executed under Section 63 of the Act 1925, the mandatory provision has been provided under Section 68 for proving its execution in case of non-compliance of Section 68, Section 69 is attracted. Reliance placed upon the decision by appellants on the decision of Nirmala Verma (Supra) is distinguishable in the present case and the same is not applicable.

27. Moreover, in that case, provisions of Section 69 of the Act 1872 were not considered. Further the relief sought in the suit is only for the permanent injunction claiming on the basis of the Will deed executed in favour of the father of the appellants. No declaratory relief has been sought by the plaintiffs for declaring their ownership/title on the basis of the Will dated 08.07.1954. The Apex Court in **Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by LRs. and others 2008 (4) SCC 594** had cleared the air in regard to the principle as to when a suit for permanent injunction will lie. Relevant Paras 13 and 21 are extracted hereasunder:-

"13. The general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, are well settled. We may refer to them briefly.

13.1) Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better

title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

13.2) Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

13.3) Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.

21. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under :

(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in ***Annaimuthu Thevar (supra)****]. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.*

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more

cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case."

28. Thus, the position, which culls out is that the permanent injunction was sought on the basis of a Will without seeking a declaratory relief by the plaintiffs nor any effort was made to prove the execution of the Will from where the plaintiffs sought to derive their title. The suit filed by the plaintiffs for permanent injunction was defective as declaratory relief was not sought and the title was under cloud, which could have been proved only by adhering to the provisions of Section 69 of the Act of 1872.

29. Thus, considering the facts and circumstances of the case, I find that no case for interference has been made out by the plaintiffs-appellants before this Court. More so, the argument that Will deed dated 08.07.1954 was to be presumed to have been executed in view of Section 90 has no merit as the plaintiffs were required to prove the execution of the Will by adverting to provisions of Section 69 of the Act 1872 by proving through the handwriting of one of the witnesses of the Will and the executant which he failed and thus, not entitled to any relief.

30. 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."

31. 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.

32. Second appeal fails and is, hereby, **dismissed**.

(2022)05ILR A1668
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.04.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ Tax No. 1085 of 2021
With
Writ Tax No. 1092 of 2021
With
Writ Tax No. 1096 of 2021

M/s Sultan Tanneries & Leather Products (P) Ltd., Deoria ...Petitioner
Versus
U.O I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rahul Agarwal

Counsel for the Respondents:
A.S.G.I., Sri Dhananjay Awasthi, Sri Sudarshan Singh

A. Civil Law - CGST Act 2017 - Court is frequently coming across writ petitions in which impugned orders reflect non-observance of principles of natural justice and eve reply submitted by assesses is not being considered by Assessing Officers under the faceless regime as well as non-faceless regime under the Act, 1961.

B. Taxpayers are important pillars of economy of the country. Their harassment not only causes jolt to the economy of the country and also employment and also comes in the way of economic policy of the Government including the policies "Ease of Doing Business". The instructions dated 23.04.2022 issued by the CBDT in exercise of powers conferred u/S 119 of the Act, 1961 and St.ment made by the Respondent No.04 in the afore quoted Para 10 of the personal affidavit dated 19.05.2022 needs to be implemented truly and effectively and, therefore, necessary mandamus needs to be issued to the respondents.

Writ Petition dismissed. (E-12)

List of Cases cited:-

1. Canon India Pvt. Ltd. Vs Commissioner of Customs 2021 SCC Online SC 200

2. Commissioner of Customs Vs Syed Ali (2011)3 SCC 537

3. Swati Menthol & allied CHEM Ltd. Vs Jt. Director, DRI (2014)(304) ELT 21(Gujarat)

4. Pahwa Chemicals (P) Ltd. Vs Commissioner of Central Excise, New Delhi (2005)2 SCC 720

5. Commissioner of Central Excise, Meerut-I & anr. Vs M/s Parman Iron Pvt. Ltd. Bijnor 2011(2) ADJ 83(DB)

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

1. These writ petitions raise common issue and questions of law, therefore, they are being decided by a common order. The Writ Tax No.1085 of 2021 (M/s Sultan Tanneries and Leather Products Vs. Union of India and others) is treated as the leading writ petition.

2. We have heard Sri Rahul Agarwal, learned counsel for the petitioner, Sri Krishna Agarwal, learned counsel for the Respondent, Directorate of Revenue

Intelligence (DRI) and Sri Amit Mahajan and Sri Ashok Singh, learned Senior Standing Counsels appearing for Central Goods and Service Tax/Central Excise, Kanpur.

3. The challenge raised in this writ petition is to the jurisdiction of the Commissioner, CGST and Central Excise, Kanpur, the Respondent No.4 to adjudicate the show cause notice dated 22.06.2011 issued by the Commissioner of Customs (Expert) Jawahar Lal Nehru, Customs House, Nhava Sheva, Tal Vran, District Raigarh, Maharashtra, Respondent No.2, under the Customs Act, 1962. The challenge is based on the premise that the Respondent No.4 is neither a proper officer nor is competent to pass any order under the Customs Act, 1962 in as much as the Respondent No.4 was merely assigned the jurisdiction by the order of the Board dated 20.11.2012 and cannot, therefore, be an officer appointed under Section 4(1) of the Customs Act, 1962. Further, the Parliament in its wisdom has enacted the Central Goods and Service Act, 2017 w.e.f. 01.07.2017 and consequent to such enactment, there remains no officer designated as "Commissioner of Customs, Central Excise and Service Tax, Kanpur". The Commissioner of CGST and Central Excise, Kanpur and "Commissioner of Customs, Central Excise and Service Tax Kanpur" are two different officers, the former being a non-existent and the later being not the "Proper Officer" under Section 2(34) or an officer appointed under Section 4(1) of the Customs Act, 1962 and thus lacking jurisdiction to adjudicate the proceedings under Section 28 of the Customs Act pursuant to the impugned show cause notice dated 22.06.2011. Accordingly, a relief to quash the further proceedings, pursuant to the show cause notice dated 22.06.2011 issued by the Respondent No.2 so far as it relates to the petitioner, has been sought. In the alternative, a direction in the nature of mandamus has been sought to direct the Respondent No.4 to proceed with the adjudication of the show cause notice only after making available the documents/evidences etc. sought to be summoned by the petitioner vide its submission dated 09.02.2021 and affording an opportunity of cross examination of the witness relied upon by the DRI.

4. The facts shorn of unnecessary details relevant for the purpose of deciding the writ petition briefly stated are that the petitioner is a company engaged in the business of manufacture and export of finished leather having IEC No.0688000932. During the period of 01.04.2006 to 30.11.2009, the petitioner exported four consignments of finished leather through Nhava Sheva Port, Navi Mumbai to different buyers in Italy. The exports were described as "finished leather made out from buffalo hides" in all the shipping bills, Invoice, Packing List and Certificate of origin. The exports were classified as "Finished Leather of all kinds" under Chapter Heading 4107 of the Schedule II (Export Policy) of ITC (HS). The exports being finished leather was free (without any restrictions) provided the leather confirmed to the specifications under Public Notice of Government of India, Ministry of Commerce dated 27.05.1992 (Public Notice No.3). The Officers of the DRI on the strength of some statements tendered before them by some quality Inspector for some Italian Buyers in India concluded that the shipments exported by the petitioner to the Italian Buyers were not of finished leather: but of Semi finished leather and the petitioner has

availed inadmissible exemption of export duly @ 60% during the period 01.04.2006 to 30.11.2009 along with inadmissible export incentives of duty drawback and DFIA Schemes. Consequently, the petitioner was served with the impugned show cause notice dated 22.06.2011 by the Respondent No.2 directing the petitioner, its Directors, its CHA's transferees of DFIA License and to whomsoever concerned to show cause as to why;

(i) Goods having declared FOB value of Rs.1,59,69,201/- should not be confiscated;

(ii) Export duty amounting to Rs. 95,81,520/- should not be recovered along with interest;

(iii) The amount of DFIA benefits availed against respective lincenses in respect of shipping Bill should not be denied and the licenses themselves may not be recommended for cancellation;

(iv) Import duty forgone of Rs.1,89,47,771/- should not be demanded and recovered along with interest and the goods so imported should not be confiscated; and

(v) Penalty should not be imposed jointly and severally under Sections 114, 114A, 114AA and 117 of the Customs Act.

5. By order dated 20.11.2012 issued by the Board, the Respondent No.3 was appointed as Common Adjudicating Authority. However, the matter was kept pending and on 13.01.2020 a notice came to be issued by the Superintendent CGST and Central Excise, Kanpur Intimating the date of personal hearing before the Respondent No.3. The petitioner on receipt of the Notice is stated to have filed a detailed objection alleging incompetence of the Respondent No.4 to adjudicate the matter in terms of Section 32(4) of the Customs Act, which objections are stated to be pending. Besides, the above objections the petitioner is stated to have filed detailed written submissions dated 09.02.2021 with request to be made available all documentary evidences and for affording opportunity to cross examine which too is stated to be pending consideration with the respondents.

6. The counsel for the petitioner has assailed the show cause notice dated 22.06.2011 as also the entire proceedings consequent thereto principally on the following grounds:-

(i) The Respondent No.4 has no authority in law to adjudicate the show cause notice dated 22.06.2011 and the Respondent No.2 has no authority in law to issue the impugned show cause notice dated 22.06.2011.

(ii) The Respondent No.2 is not competent to issue show cause notice under Section 75 of Customs Act read with Rule 16 of the Drawback Rules, 1995.

(iii) Proposal for confiscation and imposition of penalties consequential to demand under Section 28 and 75 of Customs Act and Rule 16 of Drawback Rules, 1995 are bad in law

(iv) The demand of export duty is not sustainable on merits.

(v) The demand of import duty is not sustainable on merits.

(vi) Section 28AAA of the Customs Act cannot be invoked.

(vii) Once the authorisation was issued by DGFT with open eyes, the respondents cannot question the benefits extended under the authorisations.

(vii) The show cause notice is otherwise bad in law.

Submissions of the Petitioner:

7. It is vehemently contended by Sri Rahul Agarwal, learned counsel appearing on behalf of the writ petitioner that order under Section 28 of the Customs Act and Rule 16 of the Drawback Rules can be passed only by a "Proper Officer" as defined under Section 2(1) of Customs Act while adjudication of confiscation and penalties can be done by an "Adjudicating Authority" as defined under Section 2(34) of the Customs Act. Section 3 of the Customs Act provides for classes of Officers of Customs which includes Commissioner of Customs etc. and the Respondent No.4 does not fall under any of the class of officers specified under the said section. Section 4 of the Customs Act confers power on the Board to appoint such persons as it thinks fit to be the officer of Customs but no notification under Section 4 has yet been issued notifying the Respondent No.4 as an officer of Customs. Likewise under Section 6 of the Customs Act, the Central Government is empowered to entrust either conditionally or unconditionally, to any officer of the Central Government or State Government or a local authority any functions of the Board or any officer of Customs under the Act but till date no such notification has been issued by the Central Government entrusting the Respondent No.4 with any function of the Officer of Customs.

8. He further submits that the Respondent No. 4 was earlier appointed as "Commissioner of Central Excise" under the Central Excise Act, 1944 and upon the enactment of the Central Goods and Services Tax Act, 2017 (CGST Act), the Respondent No. 4 will be deemed to be an officer appointed under CGST Act by virtue of Section 3 of the CGST Act and thus cannot be called a ""Proper Officer"" or "adjudicating authority" under the Customs Act. Consequently, the assumption of jurisdiction to proceed under the impugned notice is wholly without jurisdiction and without authority of law. Reliance has been placed upon Para 22 of the decision of the Apex Court in ***Canon India Private Limited versus Commissioner of Customs (2021 SCC Online SC 200)*** to buttress the above submissions wherein the Apex Court held that the Notification No. 40 of 2021 dated 02.05.2021 as invalid having been issued by an Authority which had no power to do so in purported exercise of powers under a section which does not confer any such power. The Para No. 22 of the decision is quoted here-under:

"If it was intended that officers of the Directorate of Revenue Intelligence who are officers of Central Government should be entrusted with functions of the Customs officers, it was imperative that the Central Government should have done so in exercise of its power under Section 6 of the Act. The reason why such a power is conferred on the Central Government is obvious and that is because the Central Government is the authority which appoints both the officers of the Directorate of Revenue Intelligence which is set up under the Notification dated 04.12.1957 issued by the Ministry of Finance and Customs officers who, till 11.5.2002, were appointed by the Central Government. The notification which purports to entrust functions as proper officer under the

Customs Act has been issued by the Central Board of Excise and Customs in exercise of non-existing power under Section 2 (34) of the Customs Act. The notification is obviously invalid having been issued by an authority which had no power to do so in purported exercise of powers under a section which does not confer any such power."

9. Reliance is also placed upon the decision of the Apex Court in the case of ***Commissioner of Customs versus Sayed Ali [2011 (3) SCC 537]*** to emphasis the point that it is only such Customs Officer who have been assigned the specific function of assessment and reassessment of duty in the jurisdictional area where the import concerned was effected, who are competent to issue notice under Section 28 of the Act. In the case at hand, the Respondent No. 2 is not the person who was assigned the specific function of assessment and reassessment of duty and as such, is not the "Proper Officer" having jurisdiction to issue notice under Section 28 of the Act.

Submissions of the Respondents:

10. Per contra, Sri Ashok Singh, learned Senior Standing Counsel for the District Taxes in opposition to the writ petition submits that in view of the orders of the Board dated 10.11.2012, 09.06.2015 and 17.10.2018 read with the queries made by the Principal Chief Commissioner, CGST and Central Excise, Lucknow dated 31.05.2018 and the order of the Board dated 28.11.2019, the Respondent No. 4 has the jurisdiction to adjudicate the impugned show cause notice.

11. Sri Amit Mahajan, learned Senior Standing Counsel for direct taxes who has appeared in Writ Tax No. 1096 of 2021 submits that the Notifications above mentioned have been considered by the Gujrat High Court in ***Swati Menthol & Allied Chem. Ltd.*** versus Jt. Dir., DRI, [2014 (304) ELT 21 (Guj.)], and in view of the judgment of the Gujrat High Court, the writ petition has no merit and is liable to be dismissed.

12. Sri Krishna Agarwal, learned counsel for the respondent-DRI, in opposition to the writ petitions, submits that the DRI Officers and Customs, in view of the Notification No. 31/1997 (N.T.) dated 07.07.1997 and Notification No. 15/2002-Customs (N.T.) dated 07.03.2002 (as amended) issued under Section 4 (I) of the Customs Act, 1962 appointing the Commissioner of Customs, Central Excise and Service Tax, Kanpur as officer of Customs, such officers are the "Proper Officer"s within the meaning of Section 2 (34) of the Customs Act, 1962 and in such view of the matter, the DRI Officer are competent to issue notices for adjudication under Section 28 of the Customs Act, 1962. He further submits that in view of the law laid down by the Hon'ble Supreme Court in the case of ***Canon India Private Limited versus Commissioner of Customs (2021 SCC Online SC 200),*** the jurisdiction has been conferred by the statute upon the officers of DRI which cannot be taken away either by any law or by any judgment. Reliance is placed upon the decision of the Hon'ble Supreme Court in the case of ***Pahwa Chemicals (P) Ltd. versus Commissioner of Central Excise, New Delhi [2005 (2) Supreme Court Cases 720].*** He further submits that the reliance placed by the counsel for the petitioners upon the decision in the case of Canon India Pvt. Ltd. (supra) is completely misplaced as neither the aforementioned

notifications nor the provisions of Section 28 (11) of the Customs Act, 1962 have been considered therein. He goes on to submit that Sub Section (11) of Section 28 of the Customs Act, 1962 was inserted by Act No. 14 of 2011 w.e.f. 16.9.2021 which provides that notwithstanding anything to the contrary contained in any judgment, decree or order of any Court of Law, Tribunal or other Authority, all persons appointed as officers of Customs under sub-Section (1) of Section 4 before the 6th day of July, 2011 shall be deemed to have and always had the power of assessment under Section 17 and shall be the power of assessment under Section 17 and shall be deemed to have been and always had been proper officers for the purpose of Section 28. He thus submits that the submissions of the learned counsel for the petitioner are without substance and contrary to the relevant provisions and notifications and as such do not merit consideration and the writ petitions warrant outright dismissal.

Discussion and Findings:

13. We have carefully considered the rival contentions of learned counsel for the respective parties and have perused the record. The short questions that call for consideration in these bunch of writ petitioners are firstly, as to whether in the facts of the case, the impugned show cause notice issued by the Respondent No.2 is valid in law and the Respondent No.2 is possessed of the jurisdiction to issue the same and secondly, as to whether the Respondent No.4 has the jurisdiction to adjudicate the show cause notice issued by the respondent No.2.

14. In order to answer the questions aforesaid, it would be apt to consider certain provisions of the Customs Act, 1962 and refer to circulars and Notifications issued by the CBE & C. Section 2(34) of the Customs Act, 1962 defines the term "Proper Officer" as under:-

"2(34) "proper officer", in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the [Principal Commissioner of Customs or Commissioner of Customs]"

15. The term "Proper Officer" is used at various places under the Act, under Section 17 it is "Proper Officer" who can verify the self-assessment of goods and examine or test any imported goods or exported goods as may be necessary. Likewise under Section 18 it is the "Proper Officer" who may undertake the exercise of provisional assessment and direct the importer to pay difference in duty or furnish security as deemed fit for provisional release of the goods. Section 28 of the Customs Act pertains to recovery of duties not levied or short-levied or erroneously refunded and provides for a complete mechanism for recovery of duties not levied or short-levied or erroneously refunded or any interest has been paid, part paid or erroneously refunded in which case "Proper Officer" shall serve a notice on the person chargeable with the duty or interest requiring to show cause why he should not pay the amount specified in the notice. The period of limitation prescribed for issuance of the notice is one year in normal cases and extended period in cases of collusion, willful misstatement or suppression of facts is five years.

16. As noticed herein above, that under Section 2(34) of Customs Act, 1962 a "Proper Officer" is defined as a person in relation to any function to be performed

under the Act to mean the Officer of Customs who is assigned those functions by the Board or Commissioner of Customs. Thus, the "Proper Officer" is a person, who has been assigned functions by the Board or the Commissioner of Customs in relation to such functions to be performed under the Act.

17. The Apex Court in the case of **Commissioner of Customs vs. Sayed Ali, reported in 2011 (265) ELT 17 (SC)** has held that it is only the officers of Customs, who are assigned the functions of assessment working under the jurisdiction of Collectorate/Commissionerate within whose jurisdiction Bills of entry or baggage declaration had been made and the consignment having been cleared will have jurisdiction to issue notice under Section 28 of the Act. In the said case, the assessee who was engaged in the business of carpet manufacturing and export was charged with the misuse of the Export Pass Book Scheme by selling goods cleared duty free in the open market or selling the pass book in premium in violation of the restrictions imposed on such sale. Investigation was conducted by the Marine and Preventive Wing of Customs and the Assistant Collector of Customs (Preventive), Mumbai, issued show cause notice alleging violations of the provisions of Section 111(d) of the Customs Act. At an appellate stage, the Collector (Appeals) though set aside the order passed by the Assistant Collector, granted liberty to the Department to re-adjudicate the case after issuing proper show cause notice. Fresh notice was issued under Section 28 (1) of the Customs Act by the Collector of Customs (Preventive) which was questioned on the ground of jurisdiction of the Collector of Customs (Preventive) to proceed in the matter. It was in this background that the Apex Court rendered its decision holding that only such Custom Officers who have been assigned the specific functions of assessment and reassessment of duty either by the board or the Commissioner of the Customs in terms of Section 2(34) in the jurisdiction at area where the import concerned has been affected, who is competent to issue notice under Section 28 of the Act.

18. Perhaps since the decision of the Hon'ble Supreme Court in the case of **Sayed Ali (Supra)** would upset large number of pending and even concluded proceedings, the Legislature in its wisdom introduced sub-Section (11) of Section 28, which provides as under:-

"(11) Notwithstanding anything to the contrary contained in any judgment, decree or order of any Court of law, Tribunal or other authority, all persons appointed as officers of Customs under sub-section (1) of section 4 before the sixth day of July, 2011 shall be deemed to have and always had the power of assessment u/s 17 and shall be deemed to have been and always had been the proper officers for the purposes of this section."

19. The Board in its ***Circular dated 23.09.2011***, in connection with the newly added sub-Section (11) of Section 28, clarified as under:-

*" *** **** ****

2. Further, as a prospective remedial measure, in terms of Section 2(34) of the Act, 1962, the Board issued Notification No. 44/2011-Customs (N.T.) dated 6-7-2011. By virtue of this notification, officers of Directorate General of Revenue Intelligence (DRI),

Commissionerates of Customs (Preventive), Directorate General of Central Excise Intelligence (DGCEI) and Central Excise Commissionerates were assigned the functions of the 'proper officer' for the purposes of Sections 17 and 28 of the said Act.

*** **** ***

4. Accordingly, as per the amended Section 28 of the Customs Act, 1962, show cause notices issued prior to 6-7-2011 by officers of Customs, which would include officers of Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence (DRI), Directorate General of Central Excise Intelligence and similarly placed officers stand validated since these officers are retrospectively recognized as 'proper officers' for the purpose of Sections 17 and 28 of the said Act.

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*** **** ***

5. In this regard it may also be noted that in terms of Notification No. 44/2011-Customs (N.T.) , dated 6-7-2011 the officers of DRI and DGCEI are 'proper officers' for the purposes of Section 28. However, it is hereby directed by the Board that these officers shall not exercise authority in terms of clause (8) of Section 28 of the said Act. In other words, there shall be no change in the present practice and officers of DRI and DGCEI shall not adjudicate the show cause notices issued u/s 28 of the said Act."

20. A perusal of the aforesaid ***notification dated 23.09.2011*** issued by the Board would show that sub-Section (11) would operate notwithstanding anything contrary to the judgment, decree or order of any Court and all persons appointed as officers of the Customs under sub-Section (1) of Section 4 before the 6th Day of July, 2011 would be deemed to have always had the power of assessment under Section 17 and should be deemed and always should be considered as proper officers for the purpose of the said section.

21. In the context of the inquiry, whether the Respondent No.2 can be stated to be an "Proper Officer", we may refer to the different notifications of the Central Board of Excise and Customs, which have been placed before us for consideration.

22. ***Notification dated 07.07.1997 provided as under:-***

"..... In exercise of the powers conferred by sub-section (1) of section 4 of the Customs Act, 1962 (52 of 1962) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 38/63-Customs, dated 1st February, 1963 the Central Government hereby appoints the following persons to be the Officers of Customs, namely:-

1. Appraisers, Examiners, Superintendent Customs (Preventive), Preventive Officers, Women Searchers, Ministerial Officers and Class IV Officers in the Customs Department in any place in India.

2. Superintendents, Inspectors, Women Searchers, Ministerial staff and Class IV staff of Central Excise Department, who are for the time being posted to a Customs port, Customs airport,

Land-Customs station, Coastal port, Customs preventive post, Customs Intelligence post or a Customs warehouse.

3. Superintendents, and Inspectors of Central Excise Department in any place in India.

4. All Officers of the Directorate of Revenue Intelligence.

5. All Officers of the Narcotics Control Bureau.

6. All Intelligence Officers of the Central Economic Intelligence Bureau.

23. Under ***Notification dated 07.03.2002,*** the Government of India appointed officers mentioned in Column No. 2 of the table, notification dated 07.03.2002 provided as under:-

"S.O. (E). - In exercise of the powers conferred by sub-section (34) of Section 2 of the Customs Act, 1962 (52 of 1962), the Central Board of Excise and Customs hereby assigns the functions of the proper officer to the following officers mentioned in column (2) of the Table below, for the purposes of Section 17 and Section 28 of the said Act, namely:-"

Sr. No.	Designation of the Officers
1.	Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Revenue Intelligence.
2.	Commissioners of Customs (Preventive), Additional Commissioners or Joint Commissioners of Customs (Preventive), Deputy Commissioners or Assistant Commissioners of Customs (Preventive).
3.	Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Central Excise Intelligence.
4.	Commissioners of Central Excise, Additional Commissioners or Joint Commissioners or Central Excise, Deputy Commissioners or Assistant Commissioners of Central Excise.

[F. No.437/143/2009-Cus.IV]
(Vikas)
Under Secretary to the
Government of India"

24. ***Notification dated 06.07.2011 provides as under:-***

"S.O. (E) - In exercise of powers conferred by sub-section (34) of Section 2 of the Customs Act, 1962 (52 of 1962), the Central Board of Excise and Customs hereby assigns the functions of the proper officer to the following officers mentioned in column (2) of the Table below, for the purposes of Section 17 and Section 28 of the said Act, namely:-

Sl. No.	*Designation of the officers*
1.	*Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Revenue Intelligence*

2.	*Commissioners of Customs (Preventive), Additional Commissioners or Joint Commissioners of Customs (Preventive), Deputy Commissioners or Assistant Commissioners of Customs (Preventive).*	
3.	*Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Central Excise Intelligence*	
4.	*Commissioners of Central Excise, Additional Commissioners or Joint Commissioners or Central Excise, Deputy Commissioners or Assistant Commissioners of Central Excise.*	

[F. No.437/143/2009-Cus.IV]
(Vikas)
Under Secretary to the Government of India"

25. Under the ***Notification dated 02.05.2012*** the Central Board of Excise and Customs assigned various officers mentioned in Column No. 2 of the Table corresponding functions mentioned in column No. 3 thereof. Relevant portion of the Table reads as under:-

Sl. No.	*Designation of the officers*	*Functions under Section of the Customs Act, 1962*
***	***	
4.	*Deputy Director or Assistant Director in the Directorate General of Revenue Intelligence and Directorate General of Central Excise Intelligence*	*(i) Section 28B; and (ii) Section 72*
***	***	
6.	*Intelligence Officer in the Directorate General of Revenue Intelligence and Directorate General of Central Excise Intelligence*	*(i) Section 37; (ii) Section 100; (iii) Section 103; (iv) Section 106; (v) Section 106A; (vi) Sub-sections (1) and (3) of Section 110; (viii) Section 144; and (ix) Section 145*
***	***	

26. A perusal of the ***notification dated 02.05.2012***, however, reveals that officers of the Directorate of Revenue Intelligence (DRI) have not been assigned specific function of adjudication under Section 28 of the Customs Act.

27. The question, however, as to whether by virtue of the ***notifications dated 07.07.1997, 07.03.2002 and 06.07.2011***, the DRI would have the authority to act under Section 28 of the Customs Act and whether by virtue of the decision of the Hon'ble Supreme Court in the case of Sayed Ali (Supra) this position would be altered. It is evident from the notification dated 07.07.1997 that all officers of the DRI are appointed as officers of the Customs under the notification dated 07.03.2002. The officers of the Directorate

of Revenue Intelligence have been given jurisdiction over the whole of India.

28. The Government of India, Ministry of Finance (Department of Revenue) Central Board of Excise and Customs vide order dated 20.11.2012 issued in terms of ***Notification No.15/2002-Customs (N.T.) dated 07.03.2002*** (as amended) issued orders as under:-

F.No.437/17/2011- Cus. IV
Government of India
Ministry of Finance
(Department of Revenue)

Central Board of Excise & Customs

New Delhi, dated the 20th November, 2012.

ORDER

In terms of Notification No. 15/2002-Customs (N.T.) dated 07.03.2002 (as amended) issued under sub-section (1) of section 4 of the Customs Act, 1962 (52 of 1962), the Board hereby assigns the Show Cause Notices mentioned in column (2) of the Table below, issued by the authorities mentioned in column (3) in the case of parties mentioned in column (4) to the Commissioner of Customs, Central Excise and Service Tax, Kanpur for the purpose of adjudication.

Table

1	*2*	*3*	*4*
S.No	*Show Cause Notice No. and date*	*Issuing Authority*	*Party Name*
1.	*DRIF.No./VIII/DRI/LZU/26/26/2008/Allahabad/33 dated 04.04.2011*	*Additional Director General, Directorate of Revenue Intelligence, Lucknow Zonal Unit - Lucknow.*	*M/s Allahabad Tannery Kanpur*
2.	*DRI F.No/VIII/DRI/LZU/26/26/2008/Crescent dated 04.04.2011*	*Additional Director General, Directorate of Revenue Intelligence, Lucknow Zonal Unit - Lucknow.*	*M/s Crescent Tanners Pvt. Ltd., Kanpur*
3.	*DRI F.No.VIII/DRI/LZU/26/26/2008/Iqbal dated.05.04.2011*	*Additional Director General, Directorate of Revenue Intelligence, Lucknow Zonal Unit - Lucknow.*	*M/s Iqbal Leathers Limited, Kanpur*
4.	*DRI F.No/VIII/DRI/LZU/26/26/2008/Model Exims dated 06.04.2011*	*Additional Director General, Directorate of Revenue Intelligence, Lucknow Zonal Unit - Lucknow.*	*M/s Model Exims, Kanpur*
5.	*DRI F.No/VIII/DRI/LZU/26/26/2008/Allied Leather dated.07.04.2011*	*Additional Director General, Directorate of Revenue Intelligence, Lucknow Zonal Unit - Lucknow.*	*M/s Allied leather Finishers Pvt. Ltd., Kanpur*

6.	*DRI F.No.VIII/DRI/LZU/26/26/2008/Seema dated.08.04.2011*	*Additional Director General, Directorate of Revenue Intelligence, Lucknow Zonal Unit - Lucknow.*	*M/sSeema Exports, Kanpur*
7.	*DRI F.No.VIII/DRI/LZU/26/26/2008/Homera Dt. 11.04.201*	*Additional Director General, Directorate of Revenue Intelligence, Lucknow Zonal Unit - Lucknow.*	*M/s Homera Tanning Industries Pvt. Ltd., Kanpur*
8.	*DRI F.No.VIII/DRI/LZU/26/26/2008/Super/292-304 Dt. 21.04.2011*	*Additional Director General, Directorate of Revenue Intelligence, Lucknow Zonal Unit - Lucknow.*	*M/s Super Tannery Ltd., Kanpur*
9.	*DRI F.No.VIII/DRI/LZU/26/26/2008/Everest Dt. 26.04.2011*	*Additional Director General, Directorate of Revenue Intelligence, Lucknow Zonal Unit - Lucknow.*	*M/s Everest Tannery Pvt. Ltd. Kanpur*
10.	*C.No.VIII/HQ/10/ACE/Adj./742/11/2779 Dt. 13.05.2011*	*(a) The Commissioner of Customs (Export) IGI Airport New Delhi*	*M/s Alig Tannery, Kanpu*
		DRI/F.No.VIII/DRI/LZU/26/26/2008/Alig S/6-B-Misc 46/2011-CFS(M)(X) both Dt. 09.05.2011	*(b) The Commissioner of Customs New Customs House, Mumbai.*
11.	*DRI/F.No.VIII/DRI/LZU/26/26/2008/Penza S/10-Misc 6/2011-12Adj(X) both Dated 20.05.2011*	*Commissioner (Export), JawaharLal Nehru Custom House, Nhava Sheva, Tal Urran, District Raigarh, Maharashtra-400707.*	*M/s Penza Leathers,, Kanpur*
12.	*C.No.VIII/HQ/10/ACE/Adj./754/2011/4435Dt.01.07.2011 F.No.S-10/Misc/10/2011-12Adj(X) DRI F.No.VIII/DRI/LZU/26/26/2008 Sunrise both Dt.02.06.2011*	*The Commissioner of Customs (Export), Air Cargo Export, New Custom House, New Delhi.*	*M/s Sunrise Overseas, Kanpur*
	F.No.S-6-B-Misc-65/2011CFS	*The Commissioner of*	

	(M)(X)/417 VIII/DRI/LZU/26/26/2008 Sunrise both Dt.02.06.2011	*Customs (Mulund CFS & General), Mumbai.*	
13.	*F.No.S-10/Misc./14/2011-12 Adj (X) VIII/DRI/LZU/26/26/2008/Indian/704 both Dt.13.06.2011*	*The Commissioner of Customs Export, JawaharLal Nehru Custom House, Nhava Sheva, Tal Ura, District Raigarh, Maharashtra-400707.*	*M/s Indian Tanning Industries, Kanpur*
14.	*F.No.S-10/Misc.-14/1/2011-12 Adj(X) VIII/DRI/LZU/26/26/2008/The Const/779 both Dt.22.06.2011*	*The Commissioner of Customs (Export), JawaharLal Nehru Custom House, Nhava Sheva, Tal Ura, District Raigarh, Maharashtra-400707.*	*M/s The Construction and Industries Ltd.,*
	c.No.VIII/(6)/ICD/Cus/K	*(b)The Assistant*	

	NP/ 197/2000 Dt.23.06.2011	*Commissioner (Customs) ICDChakeri, Kanpur*	
15.	*F.No.S-10/Misc./14/02/2011-12-12 Adj(X) VIII/DRI/LZU/26/26/2008/Sultan/738 both Dt.22.06.2011*	*The Commissioner of Customs (Export), JawaharLal Nehru Custom House, Nhava Sheva, Tal Ura, District Raigarh, Maharashtra-400707.*	*M/s Sultan Leather and Tanneries Products Ltd.*
16.	*DRI.F.No.VIII/DRI/LZU/26/26/2008/KCK/Exports/1340to1354 Dt. 26.08.2011*	*Additional Director General, Directorate of Revenue Intelligence, Lucknow Zonal Unit - Lucknow.*	*M/s Hides International Limited Kanpur (erstwhile M/s KCK Exports Ltd. Kanpur).*
17.	*DRI F.No.VIII/DRI/LZU/26/26/2008/Upper India /1272 to 1283 Dt.11.08.2011*	*Additional Director General, Directorate of Revenue Intelligence, Lucknow Zonal Unit - Lucknow.*	*M/s Upper India Tannery Pvt., Kanpur*

18.	*DRI F.No.VIII/DRI/LZU/26/26/2008/Superhouse Dt. 09.09.2011*	*Additional Director General, Directorate of Revenue Intelligence, Lucknow Zonal Unit - Lucknow.*	*M/s Superhouse Ltd.,*
19.	*DRI F.No.VIII/DRI/LZU/26/26/2008/Penza /1259 to 1268 Dt.26.09.2011*	*Additional Director General, Directorate of Revenue Intelligence, Lucknow Zonal Unit - Lucknow.*	*M/s Penza Tanning Ind. Pvt. Ltd., Kanpur*
20.	*DRI F.No.VIII/DRI/LZU/26/26/2008/Hafeez/ 1935-1940 Dt.09.12.2011*	*Additional Director General, Directorate of Revenue Intelligence, Lucknow Zonal Unit - Lucknow.*	*M/s Hafeez Sons Tannery Pvt. Ltd., Kanpur*
21.	*DRI F.No.VIII/DRI/LZU/26/26/2008/Homera Dt.12.01.2012*	*Additional Director General, Directorate of Revenue Intelligence, Lucknow Zonal Unit - Lucknow.*	*M/s Homera Tanners Pvt. Ltd. Kanpur*
22.	*DRI F.No.VIII/DRI/LZU/26/26/2008/Saba /2252-2257 Dt.22.02.2012*	*Additional Director General, Directorate of Revenue Intelligence, Lucknow Zonal Unit - Lucknow.*	*M/s Saba Exports, Kanpur*
23.	*DRI F.No.VIII/DRI/LZU/26/26/2008/Tanners/ 2727 to 2732 Dt.02.04.2012*	*Deputy Director, Directorate of Revenue Intelligence, Lucknow Zonal Unit – Lucknow.*	*M/s Tanners India, Kanpur*
24.	*DRI F.No.VIII/DRI/LZU/26/26/2008/Best/ 2278 to 2383 Dt.24/04/2012*	*Additional Director General, Directorate of Revenue Intelligence, Lucknow Zonal Unit - Lucknow.*	*M/s Best Tanning Industries (P) Ltd., Kanpur*

(M. V. Vasudevan)
Under Secretary to the Government of India
F.No.437/17/2011- Cus. IV

29. Then again the Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise and Customs vide Circular dated 09.06.2015 regarding appointment of common adjudicating authority it was directed as under:-

Circular No. 18/2015- Customs
F.No. 450/145/2014- Cus IV
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise and Customs

New Delhi, Dated: 09.06.2015

To

All Chief Commissioner of Customs / Customs (Preventive)

All Chief Commissioners of Customs and Central Excise

All Commissioners of Customs

All Commissioners of Customs and Central Excise

Sir / Madam,

Subject: Appointment of common adjudicating authority -regarding

Reference is invited to Notification No 60/2015-Customs (N.T.), dated 04.06.2015 whereby the power to appoint common adjudicating authority in cases investigated by DRI upto the level of Commissioner of Customs have been delegated to Principal Director General of Directorate of Revenue Intelligence in terms of section 152 of the Customs Act, 1962. This notification was issued in the interest of expediting decision making with resultant benefits to both trade and revenue in terms of faster settlement of outstanding disputes. These appointments were done hitherto by the Central Board of Excise and Customs under sections 4 and 5 of the Customs Act 1962.

2. In the light of the aforementioned notification, all cases of appointment of common adjudicating authority in respect of cases investigated by DRI will be handled by Principal DG, DRI. In this regard, the Board has prescribed the following guidelines for Principal DG, DRI:

(a) The following cases initiated by DRI shall be assigned to Additional Director General (Adjudication), DRI:

(i) Cases involving duty of Rs.5 crores and above;

(ii) Group of cases on identical issues involving aggregate duty of Rs.5 crores or more;

(iii) Cases involving seizure value of Rs.5 crores or more;

(iv) Cases of over-valuation irrespective of value involved; and

(v) Existing DRI cases with erstwhile Commissioner (Adjudication)

(b) Cases other than at (a) above involving more than one Customs Commissionerate would be assigned to the jurisdictional Commissioner of Customs on the basis of the maximum duty evaded;

(c) Cases other than at (a) above involving a single Customs Commissionerate would be assigned to the jurisdictional Commissioner of Customs;

(d) Non-DRI cases pending with erstwhile Commissioner (Adjudication) would be assigned to Additional Director General (Adjudication), DRI;

(e) Past DRI cases pending for adjudication with jurisdictional Commissioners of Customs would continue with these officers;

(f) Remand cases would be decided by the original adjudicating authority.

3. All other cases of appointment of common adjudicator i.e. other than the cases mentioned in paragraph 2 above would continue to be dealt by the Board. This would include cases made by Commissionerates or cases made by DRI wherein the adjudicating officer is an

officer below the level of Additional Director General (Adjudication), DRI.

4. Board has also decided that all the pending cases where common adjudicating authorities have not been appointed so far or where the common adjudicating authorities have been appointed but adjudications have not been done should be disposed of expeditiously in terms of aforementioned guidelines. However, while doing so in regard to the latter category of cases, Principal DG, DRI will take into consideration the fact whether or not personal hearings have taken place and the stage of passing the adjudication order. This is to ensure that cases about to be finalized are not reallocated to another adjudicating authority thereby defeating the objective of expediting the finalization of disputes.

5. Difficulty faced, if any, may be brought to the notice of the Board at an early date.

Yours faithfully
(Pawan Khetan)
OSD (Customs IV)

30. Further, vide ***Circular dated 17.10.2018*** the Government of India, Ministry of Finance, Department of Revenue (Central Board of Indirect Taxes and Customs) issued clarification as under:-

F.No.437/17/2011-Cus-IV
Government of India
Ministry of Finance
Department of Revenue
(Central Board of Indirect Taxes and Customs)
****

New Delhi, the 17th October, 2018

To,

The Principal Chief Commissioner,
GST & Central Excise,
Lucknow Zone
7-A, Ashok Marg,
Lucknow-226001

Sir,

Sub: Clarify jurisdiction of the 24 cases related with the Customs wherein the SCNs issued by DRI, Lucknow and other port authorities - reg.

Please refer to you letter C.No. V(30) CCO/LKO/ Tech/ Adj./08/ 2018 dated 31.05.2018 on the subject cited above.

In this regard, it is brought to your notice that the Commissioner of Customs, Central Excise & Service Tax, Kanpur, appointed as an officer of Customs to adjudicate the cases vide CBEC order dated 20.11.2012 continues to be an officer of Customs to adjudicate the cases assigned to him. Further, Board's circular no. 18/2018-Customs dated 09.06.2015 lays down that past DRI cases pending for adjudication with the jurisdictional Commissioner of Customs continues with these officers.

In view of the above, you are requested to direct the concerned officer to expedite adjudication proceedings.

Yours faithfully,
(Zubair Riaz)
Director (Customs)

31. As noted, the notification for the purpose of Section 2(34) of the Customs Act assigns functions of the proper officer to the various officers including those under the Directorate of Revenue Intelligence, such as Additional Director, Joint Director, Deputy Director and Assistant Directors for the purposes of Sections 17 and 28 of the Customs Act.

32. From the perusal of the aforesaid notifications circulars and clarifications issued from time to time it is more than apparent that the Respondent No.2 had the jurisdiction to issue impugned show cause notice and the Respondent No.4 has the jurisdiction to adjudicate the same. The show cause notice under Section 28(1) could be issued by the "Proper Officer". A "Proper Officer" is one, who is defined in Section 2(34) as the officer of Customs, either by the Board or by the Commissioner of Customs, who is assigned specific functions.

33. In such view of the matter, we find substance in the submissions made by the learned counsel representing the respondents and, accordingly, hold that the Respondent No.2 had the jurisdiction to issue impugned show cause notice. At the same time we hold that the Respondent No.4 has the jurisdiction to adjudicate the show cause notices. Our conclusion is supported by the decision rendered by the High Court of Gujarat in the case of ***Swati Menthol and Allied Chemical Ltd. Vs. Joint Director, Directorate of Revenue Intelligence***, reported in ***2014 (304) ELT 21 (Gujarat).***

34. The relief nos. a and b, as claimed by the petitioner, cannot be granted and the same are declined. So far as the alternative relief claimed by the petitioner for issuance of mandamus directing the Respondent No.4 to proceed with the adjudication of the show cause notice only after making available the documents/evidence etc. and also affording an opportunity to cross examine the witnesses whose testimony is stated to have been relied upon during the investigation by the Directorate of Revenue Intelligence is concerned, similar relief was considered and repealed by this Court in the case of ***Commissioner of Central Excise, Meerut-I and another Vs. M/s Parmarth Iron Pvt. Ltd., Bijnor (Special Appeal No.741 (D) of 2010 decided on 29.11.2010,*** reported in ***2011(2) ADJ 83 (DB)***. The conclusion of the learned Division Bench in paragraph 16 and 17 is quoted below:-

"16. We, therefore, have no hesitation in holding, that there is no requirement in the Act or Rules, nor do the principles of natural justice and fair play require that the witnesses whose statements were recorded and relied upon to issue the show cause notice, are liable to be examined at that stage. If the Revenue choose not to examine any witnesses in adjudication, their statements cannot be considered as evidence. However, if the Revenue choose to rely on the statements, then in that event, the persons whose statements are relied upon have to be made available for cross examination for the evidence or statement to be considered.

17. We are, therefore, clearly of the opinion that there is no right, procedurally or substantively or in compliance with natural justice and fair play, to make available the witnesses whose statements were recorded, for cross examination before the reply to the show cause notice is filed and before adjudication commences. The exercise of

cross-examination commences only after the proceedings for adjudication have commenced."

35. We are in full conferment with the view taken by the Coordinate Bench in the aforesaid case. Admittedly, in the instant case, the proceeding for adjudication are yet to commence. In such view of the matter, the ratio of the case of ***Commissioner of Central Excise, Meerut-I (Supra)*** is squarely applicable to the case of the present writ petitioner.

36. In view of the above discussion, we find that the petitioner is not entitled to any of the relief claimed in the writ petition. The writ petition is devoid of merit and is, accordingly, **dismissed.**

37. Since the leading Writ (Tax) No.1085 of 2021 has been dismissed, therefore, the Writ (Tax) No.1092 of 2021 and Writ (Tax) No.1096 of 2021 are also **dismissed.**
