THE
INDIAN LAW REPORTS
ALLAHABAD SERIES

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

2022 - VOL. XI
(NOVEMBER)

PAGES 1 TO 1313

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

INDIAN LAW REPORTING COUNCIL

ALLAHABAD SERIES

****

PRESIDENT

HON'BLE THE CHIEF JUSTICE RAJESH BINDAL

******

COUNCIL

HON'BLE MR. JUSTICE SAUMITRA DAYAL SINGH

HON'BLE MR. JUSTICE JAYANT BANERJI

****

EDITORIAL PANEL

SENIOR LAW REPORTERS

1. MR. VINAY SARAN, SENIOR ADVOCATE
2. MR. SAMIR SHARMA, SENIOR ADVOCATE

JUNIOR LAW REPORTERS

1. MR. ANOOP BARANWAL, ADVOCATE
2. MR. SHESHADRI TRIVEDI, ADVOCATE
3. MS. PRIYA AGRAWAL, ADVOCATE
4. MR. ASHUTOSH MANI TRIPATHI, ADVOCATE
5. MS. NOOR SABA BEGUM, ADVOCATE
6. MR. SAROJ GIRI, ADVOCATE
7. MS. MANISHA CHATURVEDI, ADVOCATE
8. MR. ARVIND KUMAR GOSWAMI, ADVOCATE

****

JUDGES PRESENT

Chief Justice: Hon'ble Mr. Justice Rajesh Bindal	
Patna Judges:	
1. Hon'ble Mr. Justice Pritinker Diwaker	33. Hon'ble Mr. Justice Abdul Moin
2. Hon'ble Mr. Justice Manoj Misra	34. Hon'ble Mr. Justice Dinesh Kumar Singh
3. Hon'ble Mr. Justice Ramesh Sinha (Sr. Judge Lko.)	35. Hon'ble Mr. Justice Rajeev Misra
4. Hon'ble Mrs. Justice Sunita Agarwal	36. Hon'ble Mr. Justice Vivek Kumar Singh
5. Hon'ble Mr. Justice Devendra Kumar Upadhyaya	37. Hon'ble Mr. Justice Ajay Bhanot
6. Hon'ble Mr. Justice Surya Prakash Kesarwani	38. Hon'ble Mr. Justice Neeraj Tiwari
7. Hon'ble Mr. Justice Manoj Kumar Gupta	39. Hon'ble Mr. Justice Prakash Padia
8. Hon'ble Mr. Justice Anjani Kumar Mishra	40. Hon'ble Mr. Justice Alok Mathur
9. Hon'ble Dr. Justice Kaushal Jayendra Thaker	41. Hon'ble Mr. Justice Pankaj Bhatia
10. Hon'ble Mr. Justice Mahesh Chandra Tripathi	42. Hon'ble Mr. Justice Saurabh Lavania
11. Hon'ble Mr. Justice Suneet Kumar	43. Hon'ble Mr. Justice Vivek Varma
12. Hon'ble Mr. Justice Vivek Kumar Birla	44. Hon'ble Mr. Justice Sanjay Kumar Singh
13. Hon'ble Mr. Justice Attau Rahman Masoodi	45. Hon'ble Mr. Justice Piyush Agrawal
14. Hon'ble Mr. Justice Ashwani Kumar Mishra	46. Hon'ble Mr. Justice Saurabh Shyam Shamshery
15. Hon'ble Mr. Justice Rajan Roy	47. Hon'ble Mr. Justice Jaspreet Singh
16. Hon'ble Mr. Justice Arvind Kumar Mishra-I	48. Hon'ble Mr. Justice Rajeev Singh
17. Hon'ble Mr. Justice Siddhartha Varma	49. Hon'ble Mrs. Justice Manju Rani Chauhan
18. Hon'ble Mrs. Justice Sangeeta Chandra	50. Hon'ble Mr. Justice Karunesh Singh Pawar
19. Hon'ble Mr. Justice Vivek Chaudhary	51. Hon'ble Dr. Justice Yogendra Kumar Srivastava
20. Hon'ble Mr. Justice Saumitra Dayal Singh	52. Hon'ble Mr. Justice Manish Mathur
21. Hon'ble Mr. Justice Rajiv Joshi	53. Hon'ble Mr. Justice Rohit Ranjan Agarwal
22. Hon'ble Mr. Justice Rahul Chaturvedi	54. Hon'ble Mr. Justice Rajendra Kumar-IV
23. Hon'ble Mr. Justice Sunil Kumar Rai	55. Hon'ble Mr. Justice Mohd Faiz Alam Khan
24. Hon'ble Mr. Justice Jayant Banerji	56. Hon'ble Mr. Justice Suresh Kumar Gupta
25. Hon'ble Mr. Justice Rajesh Singh Chauhan	57. Hon'ble Mr. Justice Narendra Kumar Johari
26. Hon'ble Mr. Justice Irshad Ali	58. Hon'ble Mr. Justice Raj Beer Singh
27. Hon'ble Mr. Justice Saral Srivastava	59. Hon'ble Mr. Justice Ajit Singh
28. Hon'ble Mr. Justice Jahangir Jamshed Munir	60. Hon'ble Mr. Justice Ali Zamin
29. Hon'ble Mr. Justice Rajiv Gupta	61. Hon'ble Mr. Justice Vipin Chandra Dixit
30. Hon'ble Mr. Justice Siddharth	62. Hon'ble Mr. Justice Shekhar Kumar Yadav
31. Hon'ble Mr. Justice Ajit Kumar	63. Hon'ble Mr. Justice Deepak Verma
32. Hon'ble Mr. Justice Rajnish Kumar	64. Hon'ble Dr. Justice Gautam Chowdhary

65. Hon'ble Mr. Justice Shamim Ahmed
66. Hon'ble Mr. Justice Dinesh Pathak
67. Hon'ble Mr. Justice Manish Kumar
68. Hon'ble Mr. Justice Samit Gopal
69. Hon'ble Mr. Justice Sanjay Kumar Pachori
70. Hon'ble Mr. Justice Subhash Chandra Sharma
71. Hon'ble Mrs. Justice Saroj Yadav
72. Hon'ble Mr. Justice Mohd. Aslam
73. Hon'ble Mrs. Justice Sadhna Rani (Thakur)
74. Hon'ble Mr. Justice Syed Aftab Husain Rizvi
75. Hon'ble Mr. Justice Ajai Tyagi
76. Hon'ble Mr. Justice Ajai Kumar Srivastava - I
77. Hon'ble Mr. Justice Chandra Kumar Rai
78. Hon'ble Mr. Justice Krishan Pahal
79. Hon'ble Mr. Justice Sameer Jain
80. Hon'ble Mr. Justice Ashutosh Srivastava
81. Hon'ble Mr. Justice Subhash Vidyarthi
82. Hon'ble Mr. Justice Brij Raj Singh
83. Hon'ble Mr. Justice Shree Prakash Singh
84. Hon'ble Mr. Justice Vikas Budhwar
85. Hon'ble Mr. Justice Om Prakash Tripathi
86. Hon'ble Mr. Justice Vikram D Chauhan
87. Hon'ble Mr. Justice Umesh Chandra Sharma
88. Hon'ble Mr. Justice Syed Waiz Mian
89. Hon'ble Mr. Justice Saurabh Srivastava
90. Hon'ble Mr. Justice Om Prakash Shukla
91. Hon'ble Mrs. Justice Renu Agarwal
92. Hon'ble Mr. Justice Mohd. Azhar Husain Idrisi
93. Hon'ble Mr. Justice Ram Manohar Narayan Mishra
94. Hon'ble Mrs. Justice Jyotsna Sharma
95. Hon'ble Mr. Justice Mayank Kumar Jain
96. Hon'ble Mr. Justice Shiv Shanker Prasad
97. Hon'ble Mr. Justice Gajendra Kumar
98. Hon'ble Mr. Justice Surendra Singh -I
99. Hon'ble Mr. Justice Nalin Kumar Srivastava

(2022) 11 ILRA 6
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.11.2022

BEFORE

THE HON'BLE VIKRAM D. CHAUHAN, J.

Criminal Appeal No. 583 of 1982

Radha Mohan Rai ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri S.C. Srivastava, Sri A.C. Srivastava, Sri Bhupendra Pandey (A.C.), Sri M.K. Pandey, Sri Mansoor Ahmed A.C., Sri Raj Kumar Sharma, Sri Ashok Kumar Yadav A.C.

Counsel for the Respondent:
A.G.A.

Criminal Law - Criminal Procedure Code, 1973 - Section - 313 - Indian Penal Code, 1860 - Sections 34, 147, 148, 149, 307, 323 & 325 - Indian Evidence Act, 1872 – Section 134 - Criminal Appeal – Conviction and sentence - FIR - informant alleged that, the accused persons, having enemy with informant family, armed with Lathi and country made pistol assaulted upon complainant and his uncle & cousin when they are sleeping at their tube-well in night, as a result of same they had sustained injuries - Evaluation of Evidence - please taken by the accused appellant that if there were three injured persons (i.e. three eye-witnesses) but the prosecution produced only two which is highly improbable - court finds that, the testimony of PW-1 & PW-2 (two eye-witnesses) has been found to be reliable and trustworthy - failure to examine the other witnesses is inconsequential - there is no legal hurdle in convicting a person on the sole testimony of a single witness, if his version is clear and reliable, for the principle that the evidence has to be weighed and no counted - the law of evidence does not require any particular number of witnesses to be examine in proof of a given fact - appellant failed to point out any illegality, infirmity or perversity in the judgment of trial court - accordingly, appeal is dismissed. (Para - 24, 25, 41)

Appeal dismissed. (E-11)

List of Cases cited:

1. Prithipal Singh Vs St. of Pun., (2012) 1 SCC 10,

2. Mahendra Vs St. of M.P. (SC) Criminal Appeal No.30 of 2022 (Arising out of SLP(Crl.) No.6530 of 2018), decided on 5.01.2022

(Delivered by Hon'ble Vikram D. Chauhan, J.)

1. The present appeal is preferred against judgment and order dated 18.12.1981 passed by Vth Additional Sessions Judge, Ballia in Session Trial No.64 of 1981, convicting and sentencing the appellant-Radha Mohan Rai under Section 323 read with Section 149 of the Indian Penal Code and Section 147 of the Indian Penal Code on probation for two years while suspending the sentence.

2. The present appeal has been filed by two Appellant's, namely, Radha Mohan Rai (Appellant no.1) and Ram Kripal (Appellant no.2). During the pendency of the appeal, Ram Kripal (Appellant no.2) has died and the present appeal is abated in respect of Appellant no.2 by order dated 01.02.2010.

3. The prosecution case as per the first information report is to the effect that Madan Rai-informant had enmity with Ram Chhabila Rai regarding taking meals together. Radha Mohan is relative of Ram Chabila. About one month prior to the incident, Ram Chabila Rai wanted some passage to his house through the courtyard of the informant and the informant had promised Ram Chabila Rai for passage

from the eastern corner of his house but Ram Chabila Rai did not accept the same. There was a panchayat in respect of the aforesaid dispute where the informant promised Ram Chabila Rai to give him passage through the border. Radha Mohan became annoyed and in the panchayat threatened the informant by throttling his neck and stating that he will take passage after finishing the informant. The other persons present in the panchayat intervened.

4. On 27.05.1980, informant together with his cousin Virendra Rai and uncle Munni Rai were sleeping at his tubewell in Village-Mansurpur. Three accused persons together with five-six other persons came there being armed with lathi and country made pistol. There was no electricity at the tubewell but the lantern was burning. The informant was lying awaken. The accused-appellant Radha Mohan shouted what is the delay we have got all three together kill them. On the aforesaid call, all the accused persons started beating the complainant, his uncle and cousin. As a result of the same, the uncle of the complainant and cousin was badly injured. The accused persons could be recognised in the moonlight and in the light of the lantern. The other persons could be recognised after seeing them. On his alarm, some persons of the nearby vicinity arrived there and thereafter, the accused persons left thinking that the injured have died. The family members took the three injured persons to the hospital on the same night. The uncle of the complainant and the cousin were in serious condition in the hospital and after getting himself medically examined, the complainant came to the police station to lodge the first information report. The first information report was lodged on 28.05.1980 at 8:20 AM at police Station Phephna, which is 6 miles away from the place of occurrence.

5. On the basis of the aforesaid first information report, a case under Sections 147, 148, 149, 307 I.P.C. was lodged at Police Station Phephna being Case Crime No.126 of 1980.

6. The injured persons were medically examined by Dr. Arun Kumar on 28th May, 1980 am at District Hospital, Ballia.

7. After completion of investigation, Investigating Officer has submitted chargesheet against the accused persons and charges were framed on 19th September, 1981 against the accused persons under Sections 307/149/147, 323, 149, 325/149 I.P.C.

8. All the accused persons have denied the charges levelled against them and have claimed to be tried. In support of prosecution case seven witnesses were examined.

9. P.W.1-Madan Rai has stated that he has a residential house having an area of 3-4 kita and appurtenant land. He has further stated that he has a tubewell which is three furlong from his house and tubewell is on the agricultural land. He has further stated that Munni Rai is his uncle and Virendra Rai is his cousin brother. He has stated that his uncle Munni Rai is living with him and cousin Virendra also lives in the same house. The accused persons are friendly to each other and live together. He has further stated that the incident is of 2/3 months back and there was Barkhi of uncle of Ram Chhabila Rai. In the aforesaid occasion, Ram Chhabila Rai has invited for dinner. However, his uncle was not invited and as such the witness could not go on the

invitation and the aforesaid non-acceptance of the invitation has annoyed Radha Mohan and Ram Chhabila. One month prior to the incident the witness was arranging the bricks in the open field near his house when Radha Mohan and Ram Chhabila had stopped the witness from keeping the bricks as he wanted a way to his house from the aforesaid open land. With regard to the aforesaid dispute, a panchayat was held on 20th April, 1980. The witness in panchayat admitted to give way on the eastern corner of the land. However, Radha Mohan did not agree for the same. Radha Mohan in front of the panchayat caught hold the neck of the witness and abused and, thereafter, stated that he will take passage after finishing the witness. The dispute was subsided by intervention of the panchayat. On 27th May, 1980 at about 11.30 pm when the witness was at his tubewell along with his cousin Birendra and Uncle Munni Rai and were sleeping there on different cots and the lantern was burning near the tubewell and it was full moon night. The electricity was not coming on the tubewell and all the three persons were awaken. From the south, accused persons Radha Mohan, Ram Kripal and Chandrama along with 5-6 other accused persons came along with lathi and country made pistol. The witness on seeing them confronted them, then the accused Radha Mohan said to the other accused persons to kill the witness and other two persons being uncle and cousin brother as they are all together. On the aforesaid, all the accused persons started beating all of them and as a result of the same, the uncle and Birendra sustained injuries and they fell down and then accused Radha Mohan thought that they have died and as such they ran away. The accused persons have beaten the witness with lathi and the witness could identified Radha Mohan, Ram Kripal and Chandrama but did not recognize the other persons. On the distress call, accused persons ran away and the villagers came. The injured persons were serious and uncle was taken by villagers on cot and remaining injured persons were also taken to the hospital by rickshaw. The position of his uncle was serious and medical aid was provided in the hospital. In the morning, first information report was lodged, which is Ex.Ka.1. The said report was lodged at Police Station Phephna. Thereafter, the Investigating Officer went to the place of occurrence along with informant from where the blood stained soil was recovered and recovery memo was prepared and same is marked as Ex.Ka.2. He has further stated that at the place of occurrence the witness has shown the lantern to the Investigating Officer, who had seen the same and, thereafter, had given in the supurdagi of the witness and the supurdagi memo was prepared, which is Ex.Ka.3. He has further stated that the lantern is with him. However, he has not brought the same to the court.

10. P.W.2-Birendra Rai has stated that on 26th May, 1980, occurrence took place at about 11.30 pm. The sky was clear and it was a full moon night. They were sleeping near the tubewell on the cot but was away. The lantern was burning then Radha Mohan, Ram Kripal and Chandrama along with 5-6 persons came with lathi and countrymade pistol from the north side and when Madan Rai confronted them, then Radha Mohan stated to the other accused persons to kill them as they are all together and on the aforesaid, accused persons started beating with lathi. He has further stated that all the three persons were beating and as a result of beating, present witness and his uncle fell down and the accused persons thought that we have died

and as such they went away. The accused persons were beating the injured for 10 minutes and after the accused persons left, villagers came, to whom the incident was narrated and injured were taken to the hospital where the uncle was admitted and Madan Rai also sustained injuries.

11. P.W.3-Sri I.B.D. Dwivedi has stated that on 5th June, 1980 he was posted at Sadar Hospital as Radiologist and on the said date he had X-rayed the skull of Munni Rai and the X-ray was marked as Ex.I. On the basis of the X-ray, he found there was a fracture in the head and the X-ray report was marked as Ex.Ka.4.

12. P.W.4-Ram Sagar Rai has stated that he knows Madan Rai, Radha Mohan and Ram Chhabila and about 1 and ½ years from today, for the bricks and right of way a panchayat was held. He was present in the aforesaid panchayat. Madan Rai wanted to construct house on the open land and as such had kept bricks on the aforesaid land. However, Radha Mohan and Chhabila were opposing the same, they wanted right of way on the middle of the land. Madan Rai agreed to give right of way on the eastern corner of the land. In the panchayat Radha Mohan caught hold the neck of Madan Rai and stated that he will crush the neck if the way was not provided in the middle of the land. The persons there however, defused the situation. After one month at about 11.30 pm, witness was at his agricultural field and he heard some noise and the same was coming from the side of the tubewell of Madan Rai. It was a full moon night. The electricity was not there. He went there and saw that Madan Rai, Munni Rai and Birendra were injured and when the said witness asked them what has happened, Madan Rai has informed that Radha Mohan, Chandrama and Ram Kripal along with 5-6 persons have come with lathi and countrymade firearm and they have beaten the aforesaid three persons and as a result of the same, they had sustained injuries. Munni Rai was taken to the hospital on cot and Madan Rai and Birendra were given support and taken to the hospital.

13. P.W.5-Dr. Arun Kumar has medically examined the injured persons and has found the following injuries:-

Injuries of Munni Rai:-

1. Lacerated wound 6 cm X 1/2 cm X bone deep present on forehead 5 cm above eye brow. Bleeding present.

2. Lacerated wound 4 cm X 1/2 cm X bone deep present on left eye brow. Bleeding present.

3. Lacerated wound 1/2 cm X 1/2 cm on the zygamatee part of face left side. Bleeding present.

4. Lacerated wound 1/2 cm X 1/2 cm present 1 cm away from Injury no.III in the zygamatee part of face left side. Bleeding present.

5. Lacerated wound 3 cm X 1/2 cm muscle deep on the part of parietal region right side 10 cm above pinna.

Supplementary injury report of Munni Rai

Injury No.I, II, III, IV & V kept U.O.

Injury No.I is grevious and others simple vide X-ray no.183 dated 5.6.80 of District Hospital Ballia. All injuries caused by hard & blunt object.

Past x-rayed - X ray skull

Findings - Fracture parietal bone

Injuries of Virendra Rai:

1. A linear lacerated wound on middle of of scalp at the junction of both parietal region 12 cm above right pinna, 3 cm X 1/4 cm X skin deep. Blood clot present.

2. A contusion 4 cm X 4 cm at the nape of neck. Redish color

3. An abrated contusion on front of chest (L) side 5 cm X 5 cm, 4 cm below the sternoclevicular joint.

4. A linear abrasion 4 cm X 2 cm just above left nipple. Redish colour.

5. A contusion on dorsum of right hand, 3 cm X 3 cm at the junction of thumb index finger. Redish colour.

6. An abrasion 2 cm X 2 cm infront of right upper arm, 10 cm below acronioclavial joint. Redish colour.

Injuries of Madan Rai:-

1. A linear lacerated wound 2.5 cm X .5 cm X skin deep on fore head 7 cm above left eyebrow. Blood clot present.

2. An abrasion 2 cm X 2 cm on the root of front of neck left side just above sternoclavicular joint left side. Redish Colour.

3. An abrasion 2 cm X 2 cm on front of chest. Left side just below middle of left clevicle. Redish colour

4. An abrated contusion 6 cm X 6 cm on front of left upper arm 3 cm below left acronio clevicular joint. Purple coloured.

5. An abrasion 19 cm X 2 cm on back of chest right side extending from right acronio clevicular joint to 2nd thoracic vertibra centre. Redish colour.

6. A contusion 3 cm X 3 cm on dorsum of hand between thumb and index finger left side. Redish colour.

7. A contusion 3 cm X 3 cm on dorsum of hand right side, between thumb and index finger. Redish colour.

14. In support of the prosecution case the prosecution has proved the following documents :-

15. Memo of report as Ex.Ka.1, Recovery of blood stained clothes as Ex.Ka.2, Memo of lantern as Ex.Ka.3, X-ray report of Munni Rai as Ex.Ka.4, Injury report of Munni Rai as Ex.Ka.5, Injury report of Birendra Rai as Ex.Ka.6, Injury report of Madan Rai as Ex.Ka.7, Supplementary report of Munni Rai as Ex.Ka.8, First Information Report as Ex.Ka.9, Recovery Memo of Bamboo clump as Ex.Ka.10 and site plan with index as Ex.Ka.11.

16. Appellant and other accused persons in the statement under section 313 Cr.P.C. have denied the charges and stated that they have been falsely implicated due to enmity.

17. Appellant in support of his defence has examined Chandramani as D.W.1.

18. The prosecution case is to the effect that Madan Rai had enmity with Ram Chabila Rai regarding the meals together. Radha Mohan is relative of Ram Chabila. About one month prior to the incident Ram Chabila Rai wanted passage to his house through the adjoining land of the house of the informant. Informant had promised Ram Chabila Rai to give passage from the side of his house however, Ram Chabila Rai did not agree to the same. A panchayat in this respect was also held where the informant had accepted for giving passage to Ram Chabila Rai from side of the house of informant. Radha Mohan became annoyed and in the panchayat threatened informant by throttling his neck and said that he will take passage after finishing informant. The other persons present in the panchayat intervened and since then Radha Mohan is inimical to the informant.

19. On 27th May, 1980, informant and his cousin Birendra Rai and uncle

Munni Rai were sleeping near the tube well in mauja Maisurpur. At about 11:30 PM in the night Radha Mohan Rai, Ram Kripal and Chandrama Rai along with five to six other persons armed with lathi and country made pistol came to the aforesaid place. There was no electricity at the tube well but the lantern was burning. The informant was awake. When the informant saw accused persons coming, he exclaimed, on this Radha Mohan said to the other accused persons to kill the informant and his relatives and thereafter, accused persons started beating the informant, his cousin brother and uncle Munni Rai. The accused persons inflicted grievous injuries on the uncle and cousin of the informant. Informant, his cousin and his uncle has recognised the three accused persons in the moonlight and in light of lantern. On the cry of the informant, other persons in the vicinity arrived there and thereafter, the accused persons left the cousin brother and uncle thinking them to be dead. Informant's family members took injured three persons to the hospital on the same night. The condition of the cousin brother and the uncle was serious and informant after getting medically examined came to police station to lodge the first information report. The first information report was lodged on 28th May, 1980 at 8:30 AM at Police Station- Phepna, which is 6 miles away from the place of occurrence.

20. The prosecution has examined Informant-Madan Rai as P.W.1. The aforesaid witness has supported the prosecution case. Informant is the eyewitness of the alleged incident. The prosecution has further examined Birendra Rai as P.W.2. The aforesaid witness has supported the prosecution case and has stated that on 27th May, 1980 the incident has taken place at about 11:30 PM. He has stated that it was a moonlight night. He was sleeping on cot near the tube well and was awake and towards the north his cousin brother was sitting on the platform and on the south his uncle Munni Rai was lying while he was awake. Lantern was burning near the tube well. Radha Mohan, Ram Kripal Singh and Chandrama Rai along with 5 to 6 persons came armed with lathi, country made pistol from the north. On coming of the accused persons, Madan Rai asked for the reason of the accused persons to come. On the aforesaid Radha Mohan Rai stated to other accused persons to beat the informant and his cousin and uncle. The accused persons started beating all the three persons. The witness has stated that the aforesaid persons were beating with stick. On beating the said witness his uncle fell down and the accused persons thinking that the witness and his uncle has died and they left away. On the same night, the witness and his uncle was admitted in the hospital and Madan Rai also suffered injuries.

20. The prosecution has also examined Dr. I.B.D. Dwivedi as P.W.3. The aforesaid witness has stated that on fifth of June 1980 he was posted at Ballia Sadar Hospital as radiologist. He had conducted X-ray of the skull of Munni Rai. He found fracture in the front of the head. He has further proved the x-ray report, which is marked as Ex.Ka-4.

21. The prosecution has further examined Ram Sagar Rai as P.W.4. He is stated that he knows Madan Rai, Radha Mohan and Ram Chhabila. About one and 1½ year prior to the said incident there was a panchayat held for passage and bricks. He was present in the aforesaid panchayat. Madan Rai was keeping bricks in his land for construction of the house then Radha Mohan and Ram Chhabila stated that he

should remove the bricks and opened the passage. Madan Rai stated that he will need passage on the western side. In the panchayat, Radha Mohan caught hold the neck of Madan Rai and stated that he will throttle the neck if the passage not left. On the intervention of the witness and other persons, the matter was diffused. One month after the above-mentioned panchayat at about 11:30 PM witness was on his agricultural field and he heard distress call and thereafter he went towards the tube well of Madan Rai where lantern was burning. Madan Rai, Munni Rai and Birendra were injured. On query being made, it was informed by them that Radha Mohan, Ram Chhabila and other persons who were armed with stick and country made pistol have beaten the three persons with stick and as a result of the same, injuries have been sustained.

22. The prosecution in support of the prosecution case has further examined Dr. Arun Kumar as P.W.5. He submitted that on 28th May, 1980 at about 1:45 PM he was posted at District Hospital, Ballia. He has further stated that he had examined Munni Rai alias Ganesh Rai on the said date and had found injuries. He has also examined Birendra Rai who has also sustained injuries. He has further stated that on the same day he had also examined Madan Rai and had found injuries. He has further stated that he had prepared the injury report of Munni Rai, Madan Rai and Birendra and same was marked as Ex.Ka.5, Ex.Ka.6 and Ex. Ka.7.

23. The P.W.6-M.N.Pathak and Ram Paramhans Singh are the formal witness.

24. It is submitted by counsel for the appellant that the injured Munni Rai was not produced before the court and as such the case of the prosecution is highly improbable. It is submitted by counsel for the appellant that adverse inference be drawn for the non-production of the aforesaid witness has the aforesaid witness was in worse condition and was badly injured. It is to be seen that the presence of the witnesses together with the testimony of P.W.1 and P.W.2 who are the eyewitness of the alleged incident and has proved the prosecution case is sufficient to establish the prosecution case against the appellant. The testimony of P.W.1 and P.W.2 has not been shaken in the cross examination nor the counsel for the Appellant has pointed out any material contradiction which goes to the root of the prosecution case. The testimony of P.W.1 and P.W.2 has been found to be reliable and trustworthy. The aforesaid witnesses are the eyewitness of the alleged incident. The failure to examine the other witnesses is inconsequential. It is the quality of evidence and not the number of witnesses that are material. The injuries sustained by Munni Rai has been duly proved by the prosecution witness no 5.

25. In ***Prithipal Singh v. State of Punjab,*** (2012) 1 SCC 10, it was held as under :-

"49. This Court has consistently held that as a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act. But if there are doubts about the testimony, the court will insist on corroboration. In fact, it is not the number or the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence

has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value, weight and quality of evidence, rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence."

25. There is no legal hurdle in convicting a person on the sole testimony of a single witness, if his version is clear and reliable, for the principle that the evidence has to be weighed and not counted. If the testimony of a single witness is found by the court to be entirely reliable, there is no legal impediment in recording the conviction of the accused on such proof. The law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the court may classify the oral testimony into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony in respect of third category.

26. The legal position is found in the statutory provision in Section 134 of the Evidence Act, 1872, which reads:

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

27. Legal system in the country does not insist on plurality of witnesses. The Evidence Act, 1872 does not mandate that there must be particular number of witnesses to record an order of conviction against the accused. Our legal system has always laid emphasis on *value, weight and quality of evidence rather than on quantity, multiplicity or plurality* of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses, if it is not satisfied about the quality of evidence.

28. The law does not require that the prosecution must examine all the eyewitnesses cited by the prosecution. When the evidence of two eyewitnesses, PW 1 and 2 was found worthy of acceptance to prove the case, then it was not necessary for the prosecution to examine any more eyewitnesses. It is for the prosecution to decide as to how many and who should be examined as their witnesses for proving their case. Therefore, this court does not find any merit in this submission of the appellant.

29. It is further submitted by counsel for the Appellant that the only source of light at the place of alleged incident was lantern and as such it is improbable that the Appellant could have been recognised by the witnesses.

30. It is to be noted that as per the prosecution case the incident/occurrence has taken place at 11:30 PM in the night. The prosecution witnesses have stated that lantern was burning at the place of incident when the occurrence took place. Moonlight was available at the aforesaid time and the sky was clear. It is also to be noted that

accused persons and the complainant and injured were known to each other and have participated in the panchayat for resolving the dispute. The trial court has recorded a finding that the complainant and victims were well-known with the accused and that there are every chances that they will be identified by their appearance and voice also. The trial court has further recorded finding that the physical assault had taken place for a long time and there was sufficient light. On the aforesaid basis, trial court has come to the conclusion that there was sufficient opportunity for the prosecution witness/victims to have identified the accused. Learned counsel for the appellant has not been able to demonstrate the perversity in the finding recorded by the trial court. The burning of lantern at the place of occurrence has been testified by the prosecution witnesses. The victim were known to the accused persons, under such circumstances the identification of the accused persons cannot be faulted and no benefit can be granted to the appellant.

31. Learned counsel for the appellant has also submitted that the dispute/motive of the alleged incident as claimed by the prosecution is the dispute with regard to passage. The nature of dispute was not of such magnitude which would have resulted in physical assault as has been claimed by the prosecution. The prosecution case rests upon the fact that the accused Radha Mohan Rai was claiming passage from the land adjoining the house of the informant. The aforesaid land belongs to informant. In respect of aforesaid dispute, a panchayat was also held between the parties where Appellant had threatened the informant of taking land after killing the informant. The matter was defused in the panchayat by intervention of other persons. Subsequently, appellant along with the other accused persons had visited the place where the informant and other injured persons were sleeping and physically assaulted as a result of the same, informant and his cousin brother and uncle also sustained injuries. The accused persons were carrying lathi and country made pistol along with them. The demand for passage by Appellant on the land of informant and when the same was not given to the satisfaction of Appellant, he has tried to force the demand using physical assault. The nature of injury sustained by the injured persons is indicative of the fact that the accused persons had physically assaulted injured including the informant which arises out of the demand for passage from the land of informant. The motive of Appellant and other accused persons can be asserted from the attending circumstances.

32. Learned counsel for the appellant submitted that Section 149 of the Indian Penal Code is not attracted as no five persons were found to be involved in the aforesaid incident. In the present case, the trial court on the basis of the evidence has sustained the conviction of the appellant under Section 323 read with Section 149 and 147 of the Indian Penal Code. Section 141 of the Indian Penal Code defines the unlawful assembly as an assembly of five or more persons, if the common object of the present composing that assembly is to commit any offence as enumerated therein. One of the essential ingredients of the unlawful assembly is that it should comprise of more than four persons. In the present case, as per the first information report, accused Radha Mohan Rai (Appellant), Ram Kripal and Chandra Rai along with five to six other persons came with stick and country made pistol at the place of occurrence at 11:30 PM in the

night. The aforesaid case of prosecution of involvement of more than four persons in the alleged crime has been proved by P.W.1 and P.W.2. The charge in the present case was framed on 19th September, 1981 against three accused persons namely the Appellant, Ram Kripal and Chandrama. It has been stated by the prosecution witness/injured witness that they can identify the other persons who were part of the unlawful assembly on seeing them. Nothing has been brought on record to demolish the aforesaid prosecution case which is supported by reliable and trustworthy testimony of the P.W.1 and P.W.2. Under the aforesaid circumstances, apart from the three main accused persons there were 5 to 6 more persons who were involved in the alleged offence. The trial court by impugned judgment has acquitted Chandrama Rai and have convicted Appellant and Ram Kripal.

33. The Apex Court in the case of ***Mahendra v. State of M.P. (SC) Criminal Appeal No.30 of 2022 (Arising out of SLP(Crl.) No.6530 of 2018)*** decided on 5.1.2022 has observed as under:-

"The legal position in regard to essential ingredients of an offence referred to in Section 149 are settled. Section 149 prescribes for vicarious or constructive criminal liability for all members of an unlawful assembly where an offence is committed by any member of such an unlawful assembly in prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object.

It may be noted that the essential ingredients of Section 149 of Indian penal code are that the offence must have been committed by any member of an unlawful assembly , and Section 141 makes it clear that it is only where five or more persons constituted an assembly that an unlawful assembly is born, provided, of course, the other requirements of the said section as to the common object of the persons composing that assembly are satisfied. It is an essential condition of an unlawful assembly that its membership must be five or more.

At the same time, it may not be necessary that five or more persons necessarily be brought before the Court and convicted. Less than five persons may be charged under Section 149 if the prosecution case is that the persons before the Court and other numbering in all more than five composed an unlawful assembly, these others being persons not identified and unnamed."

34. It is the case of the prosecution that there are other unnamed or unidentified persons other than the one who charge-sheeted and faced trial. The appellant cannot get the benefit of acquittal of the co-accused Chandrama Rai as even excluding Chandrama Rai there were other persons were part of the unlawful assembly and such persons constitute more than four persons.

35. Learned counsel for the petitioner further submitted that the prosecution case is highly improbable on account of the fact that it is not natural to sleep in the open when the house of the injured was nearby. It is to be noted that the informant was having agricultural field nearby and tube well was also available on the agricultural field of the informant. In villages it is common to sleep near the tube well, specifically when the agricultural fields are to be irrigated. It is also common that more than one person usually sleeps on the tube

well as the tube well are situated in a lonely place on the agricultural field and to ensure safety many persons sleep as a security measure. There is nothing unnatural about the conduct of informant and injured witnesses in sleeping near the tube well in the agricultural field. It is also to be noted that the incident alleged to have in the month of May 1980. The electricity was not coming in the village at the relevant time as is stated in the testimony of the eyewitness/injured witness. Under the circumstances sleeping in the agricultural field by itself would not make the prosecution case unbelievable or improbable.

36. It is further submitted that Chandrama Rai has been acquitted by the trial court. On the basis of acquittal of Chandrama Rai, it is stated that the appellant also entitled to the aforesaid benefit. The trial court has given the benefit of doubt on account of enmity to the co-accused however there is eyewitness account of the alleged incident in which the appellant has been named by the injured witness including the informant. The incident is supported by the injuries sustained by the injured witness which has been duly proved by the prosecution witness by examining the doctor who has prepared the injury report. Nothing has been brought by the defence before the trial court which denies the complicity of the Appellant in the alleged offence. The prosecution has proved its case by reliable evidence.

37. It is to be noted that the trial court in the impugned judgement has recorded finding that the offence under section 307 of the Indian Penal Code read with Section 34 of IPC, it is not established against the accused persons. The trial court has further recorded finding that the accused persons as per the prosecution case were also carrying firearm and spears however no injury was found on the body of the injured in respect of firearm and spear and, therefore, the charge under section 307 read with section 149 of the Indian Penal Code was held to be not established.

38. The trial court has further held that the offence under section 325 read with section 149 of the Indian Penal Code cannot be maintained in the facts and circumstances of the case.

39. The accused persons were known to the complainant-informant and other injured persons and there are chances that the accused person could have been identified by their appearance and voice. It is also to be noted that the physical assault is taking place for the long time and the voice of the accused person was heard and further there was source of light at the place of occurrence which was proved by the prosecution. It is further to be seen that Madan Rai, Birendra Rai and Munni Rai were the only person who had seen the occurrence and were also the victims. There was no one else who had seen the aforesaid physical assault. Munni Rai was taken to the hospital for medical examination and treatment. All the three injured witnesses have sustained injuries and the injury report has been duly proved by the prosecution. The physical assault by the Appellant on the injured witnesses including the informant has also been proved by the prosecution by testimony of P.W.1 and P.W.2 who are the eyewitness of the alleged incident. The accused person including the appellant came along with five-six persons with the common object of committing the crime/offence and as such the trial court has committed no illegality in

convicting the appellant by impugned judgement.

40. Considering the overall circumstances and submission of learned counsel for the appellant, learned A.G.A. for the State 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 convicting the accused-respondent.

41. Learned counsel for the appellant failed to point out any illegality, infirmity or perversity in the judgment of the trial court.

42. The appeal lacks merit and is, accordingly, **dismissed.**

43. Registrar General of this Court is directed to pay an honorarium of Rs. 20,000/- to Sri Raj Kumar Sharma, learned Amicus Curiae for rendering effective assistance in the appeal.

44. Let the lower court record be transmitted back to court below along with a copy of this order.

(2022) 11 ILRA 17
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.11.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Jail Appeal No. 725 of 2017

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

Counsel for the Appellant:
From Jail, Sri Sushil Kumar Dwivedi

Counsel for the Opposite Party:
A.G.A., Sri Ram Lal Mishra

Criminal Law - Criminal Procedure Code, 1973 - Section - 313 - Indian Penal Code, 1860 -Sections 34, 299, 300, 300(4), 302 & 304 Part -I - Jail Appeal **-** against conviction & sentence - Life imprisonment with fine - quantum of punishment - offence of murder - FIR - Informant allegations that when accused (appellant) quarrel with his mother for a money matter, he assaulted on her with intention to kill her with an axe, resulted she died on the spot - Evaluation of Evidences - while considering the St.ment of accused u/s 313 Cr.P.C. into account court astonished that why the real brother (informant) standing there does not even tried to save his mother - though the St.ment u/s 313 Cr.P.C. is not a substantive piece of evidence but, it can be used for appreciating evidence led by the prosecution to accept it or reject it.**(Para -** 36, 39)

(B) Criminal Law - Criminal Procedure Code, 1973 - Section - 313 - Indian Penal Code, 1860 - Sections 34, 299, 300, 300(4), 302 & 304 Part -I - Jail Appeal **-** against conviction & sentence - Life imprisonment with fine - quantum of punishment - doctrine of proportionality - offence of murder - distinction between 'murder' and 'culpable homicide' - the judicial trend in the country has been towards striking a balance between reform and punishment - held, undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system - thus, instant appeal is liable to be party allowed - conviction u/section 302 IPC is liable to be converted into conviction u/section 304 (Part - I) IPC - and is sentenced to undergone 14 years of incarceration with remission - court maintained the fine and default sentence - direction accordingly. (Para – 45, 51, 54, 56, 60)

Appeal partly allowed. (E-11)

List of Cases cited:

1. Kusti Mallaiah Vs St. of Andhra Pradesh (2013 Vol. 12 SCC 680),

2. Amar Singh Vs St. (NCT of Delhi) (2020 Vol. 19 SCC 165),

3. Ashok Kumar Chaudhary Vs St. of Bihar (2008 Vol. 61 ACC 972 (SC)),

4. Lallu Manjhi & anr. Vs St. of Jharkhand (2003 Vol. 2 SCC 401),

5. Bikau Pandey Vs St. of Bihar (2003 Vol. 12 SCC 616),

6. Deepak Verma Vs St. of Himanchal Pradesh (2011 Vol. 10 SCC 129),

7. Neel Kumar @ Anil Kumar Vs St. of Har. (2012 Vol. 5 SCC 766),

8. Nishi Kant Jha Vs St. of Bihar (1969 vo. 1 SCC 347),

9. Veeran & ors. Vs St. of MP (2011 vol. 5 SCR 300),

10. Tukaram & ors. Vs St. of Mah. (2011 vol. 4 SCC 250),

11. B N Kavatakar & anr. Vs St. of Karn. (1994 SUPP (1) SCC 304),

12. Mohd. Giasuddin Vs St. of AP (AIR 1977 SC 1926),

13. Deo Narain Mandal Vs St. of U.P., (2004) 7 SCC 257

14. Ravada Sasikala Vs St. of A.P., AIR 2017 SC 1166

15. Jameel Vs St. of U.P., (2010) 12 SCC 532

16. Guru Basavraj Vs St. of Karnatak, (2012) 8 SCC 734

17. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323

18. St. of Pun. Vs Bawa Singh, (2015) 3 SCC 441

19. Raj Bala Vs St. of Har., (2016) 1 SCC 463,

20. Mohd. Firoz Vs St. of M.P. (2022 vol. 7 SCC 443),

21. Khokan@ Khokhan Vishwas Vs St. of Chattisgarh, 2021 LawSuit (SC) 80

22. Anversinh Vs St. of Guj., (2021) 3 SCC 12

23. Pravat Chandra Mohanty Vs St. of Odisha, (2021) 3 SCC 529

24. Pardeshiram Vs St. of M.P. (2021 vol. 3 SCC 238).

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

1. The Additional Sessions Judge/ Special Judge (E.C. Act) Fatehpur convicted the convict/appellant Puttan in Sessions Trial No. 781 of 2006 arising out of Crime No. 340 of 2006, P.S.- Kotwali, District- Fatehpur under Section 302 I.P.C. and sentenced for life imprisonment and fine to a tune of Rs.2,000/- with default sentence of simple imprisonment for 6 months, feeling aggrieved of which the convict/ appellant has preferred this appeal.

2. The factual scenario of the case according to the FIR is that on 8.9.2006 at 10.30-11.00 am when the informant Sohan Lal, his brother Puttan and mother Bhagwanti Devi were present at home, accused Puttan started abusing his mother for some money matter and when the informant intervened, he assaulted his mother Bhagwanti Devi with intention of kill her by axe and she died on spot. The accused fled away. A written report Ex.Ka-3 narrating the aforesaid facts was given to police station Kotwali, Fatehpur by the informant Sohan Lal and FIR Ex.Ka-1 was lodged on 8.9.2006 and G.D. Ex.Ka-2 was also prepared. The investigation started and

the Investigating Officer performed the inquest proceedings and inquest report Ex.Ka-7 and papers relating to the post mortem Ex.Ka-8, Ex.Ka-9, Ex.Ka-10 were also prepared, spot inspection was made by the I.O and site plan Ex.Ka-11 was prepared. Memo of recovery of plain and blood stained soil Ex.Ka-12 was also prepared. During the course of investigation, the accused was arrested and the murder weapon was recovered from his possession and recovery memo Ex.Ka-13 was also prepared. The site plan of the place of recovery Ex.Ka-4 was also prepared and after closing of the investigation charge sheet Ex.Ka-5 was submitted to the Court. Meanwhile on 9.9.2006 the autopsy of the body of the deceased was conducted by Dr. V.N. Srivastava, who prepared the autopsy report Ex.Ka-6 and found the following ante mortem injuries over the body of the deceased:

1. incised wound 9 cm x 1 cm brain deep, horizontally placed, 3 cm behind right ear with fracture of mastoid bone.

2. lacerated wound 6 cm x 4 cm brain deep just 4 cm above injury no.1 with fracture of under lining parietal bone of right side.

3. incised wound 10 cm x 4 cm x bone deep on right upper back horizontally placed along superior border of right scapula

3. It was opined by the doctor that the death occurred due to coma as a result of ante mortem head injury.

4. The accused appeared before the Court and the case being triable exclusively by the Sessions Court was committed to the Court of Sessions where charge under Section 302 I.P.C. was framed against the accused, who pleaded not guilty and claimed to be tried.

5. The prosecution in order to prove its case has relied upon oral as well as documentary evidence.

6. In oral evidence P.W.1 Sohan Lal, the informant, P.W.2 HCP. Narendra Nath Tripathi scribe of the FIR, P.W.3 Om Prakash Gautam scribe of tehrir, P.W.4 S.H.O Nand Kumar Singh 2nd I.O, P.W.5 Dr. V.N. Srivastava the witness of autopsy, P.W.6 S.I. Naki Haidar the first I.O. and P.W.7 Ranjit Kumar Singh witness of recovery of murder weapon have been examined.

7. To support the oral evidence, documentary evidence FIR Ex.Ka-1, G.D. Ex.Ka-2, written report Ex.Ka-3, site plan of place of recovery of murder weapon Ex.Ka-4, charge sheet Ex.Ka-5, autopsy report Ex.Ka-6, inquest report Ex.Ka-7, challan nash, photo nash and letter C.M.O Ex.Ka-8, Ex.Ka-9 and Ex.Ka-10 respectively, site plan Ex.Ka-11, memo of blood stained and plain soil Ex.Ka-12 and recovery memo of murder weapon Ex.Ka-13 have been produced. The murder weapon axe was also proved as material Ex.1. The F.S.L. Report 21 A is also available on record.

8. The incriminating circumstances and evidence adduced by the prosecution were put to the accused and in his statement under Section 313 Cr.P.C. the accused took a plea of false implication and denied the truthfulness of the entire evidence adduced against him by the prosecution.

9. Before analyzing the judgement rendered by the learned trial Court we deem it fit to have a glance upon the

evidence adduced by the prosecution by way of oral testimony of the witnesses as well as the documentary evidence.

10. P.W.1 Sohan Lal, the informant is the real brother of the accused. In his deposition, he has proved the prosecution case and has made a clear narration to the fact that at the time of occurrence, accused Puttan had a quarrel with his mother/deceased on the issue of sale of land, he also abused her and when the informant intervened, he got angry and brought an axe and made several blows with the axe over the deceased, who fell down and died. The accused fled away. P.W.1 has proved the written report.

11. P.W.3 Om Prakash Gautam, who is scribe of tehrir, has made statement before the Court that the said report was written by him on the dictation of P.W.1 and has proved it as Ext. Ka 3 . he has also identified his signature over the recovery memo of the murder weapon axe, which according to him the police had recovered from the possession of the accused Puttan at the time of his arrest. He has also identified the axe material Ex.1, which was produced before him at the time of evidence in the Court.

12. P.W.2 Head Cons. Narendra Nath Tripathi has proved the Chick FIR Ex.Ka-1 and G.D. Ex.Ka-2 and has stated that the FIR was lodged on the basis of the written report given by the informant Sohan Lal.

13. P.W.5 doctor V.N. Srivastava has conducted the autopsy of the body of the deceased and has proved the autopsy report as Ex.Ka-6.

14. P.W.6 S.I. Naki Haidar is the first I.O. of the case, who has proved the proceedings of the investigation and the second I.O. P.W.4 S.H.O Nand Kumar Singh has also proved the rest proceedings of the investigation and has stated that after completion of investigation charge sheet Ex.Ka-5 was submitted by him before the Court.

15. P.W.7 Ranjit Kumar is the witness of arrest of the accused by the police and the recovery of murder weapon axe from his possession. He has proved the aforesaid facts in his deposition and has also identified his signature over the recovery memo Ex.Ka-13.

16. The trial Court after making a detailed analysis of the oral as well as documentary evidence available on record and after hearing the parties at length recorded the conviction of the accused under Section 302 I.P.C. and sentenced him accordingly.

17. The appellant has assailed the impugned judgement on various grounds.

18. The Amicus Curiae has absented himself but the appeal is vehemently objected by Shri Ram Lal Mishra, learned counsel appearing for the informant as well as by learned AGA.

19. Learned A.G.A. and the learned counsel for the informant defending the impugned judgement have submitted that there is no legal flaw or factual error in the impugned judgement. The learned trial Court has analysed the evidence on record in a proper legal manner and has reached the logical end of the matter. The appeal has no force and is liable to be dismissed.

20. Heard learned counsel for the informant, learned A.G.A. and perused the record.

21. Although, Amicus Curiae is not present to argue this appeal we feel ourselves to be duty bound to consider the various aspects of the matter in the light of the evidence on record, the relevant laws and the arguments raised by the learned A.G.A. and learned counsel for the informant as well.

Ocular Evidence -

22. At the very out set, it is to be seen whether there was any other eye-witness of the occurrence except the informant and if it was so whether it was necessary for the prosecution to produce him as an ocular witness of the occurrence.

23. From the bare perusal of the FIR it is evident that no other witness except the informant has been mentioned therein. The informant has clearly mentioned in the written report that all the family members had gone to their tube-well situated at Bhikaripur and only he along with his mother (deceased) and brother (the convict) was present at home. In his deposition as P.W.1, the informant has corroborated the prosecution version. He has proved the written report Ex. Ka. 3. While going through the testimony of P.W.1, we find that no other eye-witness of the occurrence except the informant has been mentioned therein. He has clearly proved this fact that the convict was quarrelling with the deceased, his mother, in respect of sale of land and was abusing her and when P.W.1 intervened, he angrily brought axe and made blow over his mother, who fell down and died. He has also made it clear that his father and three sisters were not at home and they had gone to the tube well for work, which is 1 km. away from his house.

24. Learned A.G.A. has submitted that since no other person was present on spot except the informant, no question arises to produce any person as eye-witness of the occurrence. It has also been submitted that if the evidence of sole witness is reliable and trustworthy, the conviction can be recorded successfully in a criminal matter on the basis thereof. In the entire evidence of P.W.1, we do not find any contradictory or exaggerated statement. His deposition is quite natural and innocent and it transpires confidence.

25. The value of the testimony of the sole eyewitness was tested by the Hon'ble Supreme Court in **Kusti Mallaiah Vs. State of Andhra Pradesh (2013) 12 Supreme Court Cases 680** wherein it was laid down as follows:

"23. It has been held in catena of decisions of this Court that there is no legal hurdle in convicting a person on the sole testimony of a single witness if his version is clear and reliable, for the principle is that the evidence has to be weighed and not counted. ***In Vadivelu Thevar v. The State of Madras AIR 1957 SC 614,*** it has been held that if the testimony of a singular witness is found by the court to be entirely reliable, there is no legal impediment in recording the conviction of the accused on such proof. In the said pronouncement it has been further ruled that the law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the court may classify the oral testimony into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly

reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness. Similar view has been expressed in ***Lallu Manjhi and another v. State of Jharkhand (2003) 2 SCC 401, Prithipal Singh and others v. State of Punjab and another (2012) 1 SCC 10 and Jhapsa Kabari and others v. State of Bihar (2001) 10 SCC 94.***

26. The same view has been reiterated in **Amar Singh Vs. State (NCT of Delhi) (2020) 19 Supreme Court Cases 165** wherein it has been held as follows:

....As a general rule the Court can and may act on the testimony of single eye witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act, 1872. But if there are doubts about the testimony Courts will insist on corroboration. It is not the number, the quantity but quality that is material. The time honoured principle is that evidence has to be weighed and not counted. On this principle stands the edifice of Section 134 of the Evidence Act. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise (see Sunil Kumar V/s State (NCT of Delhi) (2003) 11 SCC 367).

27. In **Ashok Kumar Chaudhary. Vs. State of Bihar 2008 (61) ACC 972 (SC)** it has been categorically held that if the testimony of an eyewitness is otherwise found trustworthy and reliable, the same cannot be disbelieved and rejected because certain insignificant, normal or natural contradictions have been appeared into his testimony. If the inconsistencies, contradictions, exaggerations, embellishments and discrepancies in the testimony are only normal and not material in nature, then the testimony of an eyewitness has to be accepted and acted upon. Distinctions between normal discrepancies and material discrepancies are that while normal discrepancies do not corrode the credibility of a party's that the case, material discrepancies do so.

28. Since in the matter in hand the ocular version of P.W.1 is free from all embellishments, the witness falls into the category of a wholly reliable witness and as such we find no difficulty in accepting the testimony of P.W.1 as the sole witness of fact and this view also finds help from the verdict given in **Lallu Manjhi and another v. State of Jharkhand** (2003) 2 SCC 401.

Medical Evidence -

29. The prosecution has come forward with a clear case that the murder was caused with the blows of axe. As per FIR, the accused made several blows over the deceased by using the axe, which proved fatal for her. This fact not only finds place in the oral testimony of P.W.1 but it is also corroborated by the medical evidence. P.W.5, who has performed the autopsy of the deceased has find two incised wounds and one lacerated wound over the body of the deceased. He has opined that injury no.1and 3 might be caused on account of attack of sharp edge of axe. He has also opined that the death of the deceased might have been caused on 8.9.2006 at 10:30-

11:00 am. and that is the case of prosecution also. The death of the deceased was caused due to coma as a result of ante mortem head injuries as has been opined by the doctor P.W.5. The prosecution version in this way is corroborated by the medical evidence also. The learned trial Court has discussed these facts in the impugned judgement and has drawn the right conclusion.

F.I.R/ Tehrir -

30. The FIR of the case and the written report are also trustworthy piece of evidence. P.W.3, the scribe of the written report has proved this report and has categorically stated that on the dictation of P.W.1 he had written the tehrir and it was read over to the informant after being written. P.W.1 also does not dispute this fact and narrates the same. P.W.2, the scribe of Chick FIR has also proved the FIR and G.D. of the case as Ext. A1, A2 and no infirmity is found in the testimony of this witness. F.I.R is prompt and has been lodged about one and half hour after the occurrence.

Place of occurrence -

31. Place of occurrence is always a significant peace of evidence for the prosecution in order to prove its case successfully. P.W.1 on this point has stated that the house of the accused and of the informant himself are separate having a path in between the two. The toilet of the family is situated in the house of the accused and on the fateful time when he was coming from the toilet, the occurrence happened. The site plan Ex.Ka-11 contains the topography of the place of occurrence and the above mentioned statement of P.W.1 finds support from this aspect also. From the perusal of the site plan Ex.Ka-11, it appears that the boundary of the place of occurrence as disclosed by P.W.1. in his deposition is also almost the same as shown therein. The site plan shows a clear picture of the place of occurrence and all the relevant places have been clearly shown therein.

Motive -

32. So far as the motive of the crime is concerned, it is crystal clear from the perusal of the FIR itself that there was a dispute in between the convict and his mother in respect of sale of some land and in the course of argument over that issue the accused committed the offence alleged against him. Moreover, the learned A.G.A. and learned counsel for the informant have vehemently argued that since the present case rests upon the ocular testimony of P.W.1 there was no need to prove the motive of the case for the prosecution.

33. Reliance has been placed upon **Bikau Pandey Vs. State of Bihar (2003) 12 SCC 616** wherein it has been held that when the direct evidence establishes the crime, motive is of no significance and pales into insignificance.

34. There are catena of decisions on the point that in a case based upon the eye witness account, the motive loses its significance. In **Deepak Verma Vs. State of Himachal Pradesh (2011) 10 SCC 129** It has been held as under:

"...Proof of motive is not a sine qua non before a person can be held guilty of commission of crime. Motive being a matter of mind, is more often than

not difficult to establish through evidence."

35. From the analysis of the evidence on record, we do not find any possibility of false implication of the accused in the present matter. Nothing on this aspect has been put to P.W.1 while cross-examining him by the defence. P.W.1 is a reliable witness and makes a clear picture of the whole occurrence in his ocular version, hence to prove the motive to commit the crime was not necessary for the prosecution. Moreover, the factum of quarrel between the deceased and the accused over some property issue has been clearly proved by PW1, which was an instant reason of the murder as per FIR.

Relevance of statement under section 313, C.r.p.c -

36. Our attention is drawn to a significant aspect of the matter. This is a case where the real brother has lodged the FIR against his brother for the murder of his own mother. From perusal of the testimony of P.W.1, we find and we are astonished as to why the real brother, son of the deceased, standing there does not even tried to save his mother from the assault of his brother but at the same time, we have also to take the statement of the accused under Section 313 Cr.P.C. into account.

37. In **Neel Kumar alias Anil Kumar v. State of Haryana,** (2012) 5 SCC 766 Hon'ble Apex Court held as under:

"30. It is the duty of the accused to explain the incriminating circumstance proved against him while making a statement under Section 313 CrPC. Keeping silent and not furnishing any explanation for such circumstance is an additional link in the chain of circumstances to sustain the charges against him. Recovery of incriminating material at his disclosure statement duly proved is a very positive circumstance against him." (The same principle has been formulated in Aftab Ahmad Anasari v. State of Uttaranchal [(2010) 2 SCC 583 : (2010) 2 SCC (Cri) 1054 : AIR 2010 SC 773] .)

38. When we translate the aforesaid principle with its application to the facts of this case, we find that the incriminating circumstances proved against the accused have not been explained by him at all while making his statement under Section 313 Cr.P.C. When the evidence and incriminating circumstances were put to him he simply denied them. To answer some questions he has stated that he does not know about it or he has replied that he has nothing to say about it.

39. It has been held by the Apex Court that the statement of the accused under Section 313 Cr.P.C is not a substantive piece of evidence. It can be used for appreciating evidence led by the prosecution to accept or reject it. It is, however, not a substitute for the evidence of the prosecution. As held in ***[Nishi Kant Jha v. State of Bihar,*** **(1969) 1 SCC 347]** if the exculpatory part of the statement of accused is found to be false and the evidence led by the prosecution is reliable, the inculpatory part of his statement can be taken aid of to lend assurance to the evidence of the prosecution. If the prosecution evidence does not inspire confidence to sustain the conviction of the accused, the inculpatory part of his statement under Section 313 CrPC cannot be made the sole basis of his conviction.

40. In the matter in hand on the one side the prosecution has succeeded to prove its case beyond reasonable doubt on the

basis of the cogent and reliable evidence whereas on the other side no explanation has been offered by the convict regarding the incriminating circumstances and evidence proved against him in his statement under Section 313 Cr.P.C. It is also pertinent to mention here that no defence evidence has been adduced by the convict/ appellant.

41. The prosecution story also find support from the fact that the murder weapon, blood stained axe, has been recovered from the possession of the accused when he was arrested by the police. The recovery memo Ex.Ka-13 has also been proved by Ist I.O-P.W.6. P.W.3, who is the independent witness of the aforesaid recovery has also identified his signature over this memo in his deposition. It is also noteworthy that the aforesaid murder weapon axe has been produced before the P.W.3, who has proved it as material Ex.1. The place of recovery of the murder weapon has also been proved through the site plan Ex.Ka-4 by P.W.4, the second I.O.

42. The prosecution has also proved the inquest report Ex.Ka-7 wherein the *Panchas* have also opined that the death of the deceased seems to be caused due to the injuries inflicted over her body. The papers relating to the post mortem Ex.Ka-8, Ex.Ka-9 and Ex.Ka-10 have also been proved. The murder weapon and belongings of the deceased were sent for forensic test and FSL report Ext. Ka 14 also supports the prosecution case.

43. The trial Court has elaborately discussed the aforesaid points and has reached to the definite conclusion that the prosecution has succeeded to prove its case beyond reasonable doubt on the basis of the cogent, reliable, oral and documentary evidences and we concur with the same.

Murder or Culpable Homicide not amounting to murder -

44. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which reads as under:

"299. Culpable homicide: Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

45. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	Section 300
A person commits culpable homicide if the act by which the	Subject to certain exceptions culpable

death is caused is done-	homicide is murder is the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

46. From the upshot of the aforesaid discussion, it appears that the death was caused by the accused in unison and it was a homicidal death whether the same was not premeditated or premeditated, will have to be seen. From the evidence of P.W.1 it is crystal clear that the convict had no pre-meditation to do away with his mother. The quarrel took place between the two on account of sale of some land. He had not come on spot with the axe but during the course of quarrel he rushed angrily and brought the axe and made assault over his own mother. Thus the offence was committed at the spur of the moment and it cannot said that it was a premeditated cold blooded murder. Under these circumstance, it can be concluded that though the injuries over the body of the deceased were sufficient in the ordinary course of nature to have caused death, the accused had no intention to do away with the deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 IPC as reproduced herein above, offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300 which have to be also kept into mind.

47. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra, reported in** (2011) 4 SCC 250 and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka, reported in** 1994 SUPP (1) SCC 304, we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC.

Theory of Sentencing -

48. During course of argument, learned counsel for the appellant has made an alternative prayer for reduction of the sentence and has submitted that the sentence of life imprisonment awarded to the appellant by the trial Court is very harsh. He has also submitted that the appellant is languishing in jail for the past more than 15 years. Hence a prayer has been made to reduce the sentence of the convict to 10 years.

49. **In Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926],** explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

50. 'Proper Sentence' was explained in **Deo Narain Mandal vs. State of UP** [(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

51. In **Ravada Sasikala vs. State of A.P.** AIR 2017 SC 1166, the Hon'ble Supreme Court referred the judgments in **Jameel vs State of UP** [(2010) 12 SCC 532], **Guru Basavraj vs State of Karnatak**, [(2012) 8 SCC 734], **Sumer Singh vs Surajbhan Singh,** [(2014) 7 SCC 323], **State of Punjab vs Bawa Singh**, [(2015) 3 SCC 441], and **Raj Bala vs State of Haryana,** [(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The Hon'ble supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not

retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

52. Considering the facts and circumstances of the case and also keeping in view the criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

53. As discussed above, 'reformative theory of punishment' is to be adopted and for that reason, it is necessary to impose punishment keeping in view the 'doctrine of proportionality'. It appears from perusal of impugned judgment that sentence awarded by learned trial court for life term is very harsh in the light of the entirety of facts and circumstances of the case and gravity of offence. Hon'ble Apex Court, as discussed above, has held that undue harshness should be avoided taking into account the reformative approach underlying in criminal justice system.

54. Recently In **Mohd. Firoz v. State of M.P., (2022) 7 SCC 443**, the Hon'ble Supreme Court has held like this:

61......*One of the basic principles of restorative justice as developed by this Court over the years, also is to give an opportunity to the offender to repair the damage caused, and to become a socially useful individual, when he is released from the jail. The maximum punishment prescribed may not always be the determinative factor for repairing the crippled psyche of the offender.*

55. In latest decision in **Khokan Alias Khokhan Vishwas vs. State of Chhattisgarh, (2021) 2 Supreme Court Cases 365** where the facts were similar to this case, the Apex Court has allowed the appeal of the accused appellant. The decision of the Apex Court in the case of **Anversinh v. State of Gujarat, (2021) 3 SCC 12** which was related to kidnapping from legal guardian, wherein it was established that the Court while respecting the concerns of both society and victim, propounded that the twin principle of deterrence and correction would be served by reducing the period of incarceration already undergone by the accused. In our case, this is not that gruesome murder where the accused cannot be dealt with in light of all these judgments. Judgments in **Pravat Chandra Mohanty v. State of Odisha, (2021) 3 SCC 529 & Pardeshiram v. State of M.P., (2021) 3 SCC 238** will also enure for the benefit of the accused.

56. In view of the aforesaid discussions, we are of the view that appeal is liable to be partly allowed and the conviction of the appellant under Section 302 IPC is liable to be converted into conviction under Section 304 (Part-I) IPC.

57. In the facts and circumstances of the present case, while balancing the scale of retributive justice and restorative justice, we deem it appropriate to impose upon the appellant-convict the sentence of imprisonment for a period of 14 years under Section 304 Part-I instead of imprisonment for the remainder of his natural life for the offence under Section 302 I.P.C.

58. It is pertinent to mention here that the convict/accused is in jail since 16 years. We are astonished at the way that the State machinery functions as they have not even considered the case of the accused after the 14th year is over and thereby the purpose of Section 433 Cr.P.C., is frustrated which reads as follows:

"433. Power to commute sentence. The appropriate Government may, without the consent of the person sentenced, commute-

(a) a sentence of death, for any other punishment provided by the Indian Penal Code;

(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;

(d) a sentence of simple imprisonment, for fine".

59. It was brought to the notice of this Court that the convict has also a wife and three children, he is the sole earning member of the family, hence we deem it fit to substitute his punishment of life imprisonment to 14 years as it appears that he has not been even able to engage any advocate for him. This is the jail appeal pending since 2007 and very strangely after 10 years of its filing the matter has been numbered.

60. Accordingly, the appeal is **partly allowed** and the appellant is convicted for the offence under Section 304 Part-I I.P.C. and is sentenced to undergo 14 years of incarceration with remission. We maintain the fine amount and default sentence. The default sentence will start after 14 years, which would also now over.

61. The appellant shall be released immediately, if not, wanted any other offence.

62. We are thankful to Shri Ram Lal Mishra, counsel for the informant, Mr. Mohd. Furkan Khan, Law Clerk (Trainee), for ably assisting the Court.

(2022) 11 ILRA 29
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.08.2022

BEFORE

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

Criminal Misc. IV Bail Application No. 26 of 2022
In
Criminal Appeal No. 866 of 2010

Lakhanshah & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri P.K. Yadav, Sri A.K. Mishra, Sri Harish Chandra Tiwari A/C, Sri Noor Mohammad, Sri P.K. Shukla, Sri P.S. Chauhan, Sri Rajesh Kumar Singh

Counsel for the Respondent:
Govt. Advocate, Sri Lokendra Pratap Singh

Criminal Law – Criminal Procedure Code, 1973 - Section - 389 - Criminal Appeal – Bail Application - during appeal three bail application were rejected time and again - fourth Bail application - only on the ground that accused has entitle for enlargement on bail in the light of judgment of Saudan Singh's case - no new grounds are alleged except period of incarceration - accused in jail for more than 10 years - pendency of bail applications adds to the list of pending bail applications - main matter could have been heard on merits - but, the over insistence of counsel to argue the subsequent

bail application only - in the light of judgment of the Apex Court i.e. Lav Parasher @ Chinu Case, court have no other option but to dismissed the fourth bail application - further, direction to list the appeal for final hearing. (Para – 11, 12, 16, 17)

Bail Application in appeal rejected. (E-11)

List of Cases cited:

1. Saudan Singh Vs St. of U.P. (Criminal appeal No. 308/2022 decided on 25.02.2022, Supreme court),

2. Hariom Vs St. of U.P. (Special Leave to Appeal (Crl.) No. 4545/2022 decided on 18.07.2022),

3. Lav Parasher @ Chainu Vs St. of U.P. Special Leave to Appeal (Crl.) No. 1891/2022 decided on 17.05.2022).

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

1. A projection is made in the country that bail application of accused-persons who were in jail for more than 10 years are not being listed and not being heard in the High Court of Allahabad.

2. With lot of pain, we mention here that this is the fourth Bail application filed by the accused. The third bail application was filed after the paper book was ready. The paper book is prepared way back in the year 2018. The office report dated 11.7.2018 shows that the paper book has been prepared as per order of the Court. The case was put up for hearing. On 10.1.2020 on the request of counsel for appellants, matter was adjourned. On 29.1.2020, once again matter was adjourned because of the illness slip of counsel for appellants, thereafter, the third bail application was rejected and order application reads as follows:-

"Put up for hearing in the additional cause list on 25.2.2020.

This order has been passed in the presence of Shri Rajesh Kumar Singh, learned counsel for the appellant and Dr. S.B. Maurya, learned AGA."

3. Thereafter, again on 25.2.2020, much after the pandemic set into this country, the appellants counsels have absented themselves and Shri Harish Chandra Tiwari was appointed as amicus curie.

4. Thereafter, once again Shri Rajesh Kumar Singh has filed this bail application.

5. We are really at pains to convey to Shri Rajesh Kumar Singh that he may point out any single ground except incarceration and he has argued the bail application as he is arguing the main matter, namely, that one of the eye witnesses has not been examined. There is general rule assigned of firing. It was a petty offence. It is further submitted that only interested witnesses have been examined and it is lastly pointed out that for a period of 15 years the accused are in jail.

6. We note that not a single application was filed for getting the matter heard.

7. Today, though the matter is in the caption of cases in which appellants are in jail for more than 10 years, learned counsel for appellants is reluctant to argue the main matter, he has substituted five counsels and, thereafter, has appeared for both the accused.

8. One more aspect which requires to be mentioned in this appeal is that despite the fact that the appeal is listed for hearing, learned counsel does not permit the Court to decide the appeal and they claim only to argue bail application.

9. A situation would arise that the judgment of Saudan Singh (supra) is placed press into service in all the matters and the learned Advocate refuses to argue main matter though the paper book is ready. A latter judgment of the Apex Court in **Hariom v State of UP, Petition for Special Leave to Appeal (Crl.) No.4545 of 2022** decided on 18.7.2022 will not permit us to grant bail at this juncture as this is the subsequent bail application. This tendency of filing bail application subsequently despite the fact that earlier orders for prepare all the paper book, this would only add to the pendency as after accused are enlarged on bail. Counsel are reluctant to argue the matters and statistical data of Allahabad High Court shows that matters of the year 1990 are pending where the accused are on bail, similar would become the situation in latter part if such pendency is not sough out, the pendency would enough come down. In this case counsel was requested to argue the matter even he was convey that this Court may settle with costs as no new grounds are urged but in consisted that judgment of Sudan Singh (supra) be pressed into service and his accused should be enlarged on bail. We deprecate this practice which is deprecated by the Apex Court in Hariom (supra).

10. The only change in the circumstance is change of learned Advocate and is only wanting to argue for enlargement bail and press the application for enlargement on bail on the basis of the judgment of Sudan Singh (supra).

11. In our case, learned counsel for accused after getting the bail application rejected time and again has filed this bail application, therefore, the judgment in Sudan Singh (supra) cannot be made applicable to the facts of the case. A group of matters cannot be made applicable in the facts of the case.

12. The pendency of this bail application adds to the list of pending bail application though this is subsequent bail application for enlargement on bail where no new grounds are alleged except period of incarceration.

13. The main matter could have been heard on merits today itself but the over insistence of counsel to argue the subsequent bail application shows that the counsel is only wanting to argue on bail.

14. However, learned counsel insisted that we should hear the bail application on merits. The First bail application was rejected on merits holding that there are litigations going on and the appellants had fired gunshot on the deceased and two other persons were injured equally seriously however, accused Lakhanshah was released on bail.

15. The matter is ready for final disposal despite that the counsels in these matters are not ready to make their submissions on merits assailing the conviction but instead are insisting on hearing application for enlargement on accused on bail.

16. We have no other option but to dismiss this application, we are supported

our view by subsequent judgment of the Apex Court in ***Lav Parasher @ Chinu v. State of U.P.*** **in Special Leave to Appeal (Crl.) No.1891 of 2022** decided on 17.05.2022 decided by larger bench, where this practice of learned Advocates only insisting for getting the bail application heard has been deprecated as follows:-

"In the normal course, we would have granted the relief of bail, especially, after the petitioner has undergone a sentence of 12 years. In the facts and circumstances of the case, where the petitioner has not shown interest in arguing the appeal, we are not inclined to interfere with the order passed by the High Court. However, taking into account the fact that the petitioner has undergone incarceration for more than 12 years, the High Court is requested to dispose of the appeal expeditiously not later than a period of 3 months from today. In case, the appeal is not disposed of within the said period, liberty is granted to the petitioner to renew his application for bail."

17. The application for enlargement of the accused on being dismissed bail, this appeal requires to be listed on **17th of August, 2022** for final hearing before the Court taking up such matters.

(2022) 11 ILRA 32
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.11.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 5702 of 2016

Raj Kumar @ Raju ...Appellant

Versus

State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Krishna Murari Tripathi, Sri Anil Kumar, Sri Arvind Srivastava, Sri Dinesh Mishra, Sri Rajrshi Gupta, Sri Rateesh Singh, Sri Subhash Chandra Yadav, Sri Vimlesh Kumar

Counsel for the Opposite Party:
G.A.

(A) Criminal Law - Criminal Procedure Code, 1973 - Section – 161 & 313 - Indian Penal Code, 1860 - Sections 34, 299, 300, 302, 304 Part -I, 304 Part - II, 304(1), 304B & 498 - The Dowry Prohibition Act, 1961 - Sections 2 & 4 - Indian Evidence Act, 1872 -Section 106 - Criminal Appeal – Conviction & Sentence - Life imprisonment with fine - Evaluation of Evidences - offence of murder & dowry demand - FIR lodged by father of deceased with allegations that his son-in-law (accused- appellant) committed offence of strangulating the deceased for want of demanded of additional dowry - distinction between 'murder' and 'culpable homicide' - held, all the ingredients of dowry death u/s 304B IPC viz. unnatural death of deceased by strangulation within seven years of her marriage, cruelty for demand of dowry by her husband, the theory of soon before, are proved beyond reasonable doubt - conviction sustained. (Para – 17, 30)

(B) Criminal Law - Criminal Procedure Code, - Sections 161, 313 - Indian Penal Code, 1860 - Sections 34, 299, 300, 302, 304 Part -I, 304 Part - II, 304(1), 304B & 498, - The Dowry Prohibition Act, 1961 - Sections – 2 & 4, - Indian Evidence Act, - Section 106 - Criminal Appeal – Conviction & Sentence - Life imprisonment with fine - quantum of punishment - offence of murder & dowry demand - Awarding sentence cannot be exercised by arbitrary or whimsically - in the light of certain judicial pronouncement and precedents applicable in such matters and keeping in mind the Principle of proportionality, gravity of offence, manner of commission of crime, age and sex of accused - court considered that, no accused person is incapable of being reformed in view of criminal

jurisprudence in our country - the appeal is partly with modification of the sentence - order accordingly. (Para – 31, 32, 34, 38)

Appeal partly allowed. (E-11)

List of Cases cited:

1. Tukaram & ors. Vs St. of Mah., (2011) 4 SCC 250,

2. B.N. Kavatakar & anr. Vs St. of Karn., 1994 Supp1 SCC 304,

3. St. of U.P. Vs Dr. Ravindra Prakash Mittal, (1992) 3 SCC 300,

4. Raja Vs St. of Har., (2015) 11 SCC 43,

5. Devendra Singh Vs St. of Uttrakhand, AIR 2022 SC 2965,

6. Satvir Singh & ors. Vs St. of Pun., (2001) 8 SCC 633

7. Satbir Singh Vs St. of Har. (201 vol. 6 SCC 1),

8. Mohd. Giasuddin Vs St. of A.P. AIR 1977 SC 1926,

9. Ravada Sasikala Vs St. of A.P. AIR 2017 SC 1166

10. Jameel Vs St. of U.P. (2010) 12 SCC 532

11. Guru Basavraj Vs St. of Karn., (2012) 8 SCC 734

12. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323

13. St. of Punjab Vs Bawa Singh, (2015) 3 SCC 441

14. Raj Bala Vs St. of Har., (2016) 1 SCC 463

15. St. of M.P Vs Jogendra, (2022) 5 SCC 401

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

1. Heard Sri Rajrshi Gupta, learned counsel for the appellant and Sri Nagendra Kumar Srivastava, learned A.G.A. for the state.

2. This appeal challenges the judgment and order dated 4.10.2016 passed by learned Additional Sessions Judge, Court No.1, Hathras in Sessions Trial No.357 of 2014 (State vs. Raj Kumar @ Raju) arising out of Case Crime No.280 of 2014 convicting accused-appellant under Section 302 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and sentenced the accused-appellant to undergo imprisonment for life with fine of Rs.30,000/- and in case of default of payment of fine, further to undergo imprisonment for a period of six months.

3. The genesis of the case is that the deceased was married with the accused appellant Raj Kumar three years before the occurrence. It is alleged in the FIR that the appellant/ accused and his family members were demanding Rs.2 lacs as additional dowry and when the deceased showed her inability to get the same from her parents, they harassed and subjected her to cruelty. On 20.04.2014, Rs.50,000/- as additional dowry were given to the accused persons but on 21.04.2014 the sad news of her death came. The FIR was lodged on the very same day by Satyaveer, the father of the deceased. The police moved to the scene of occurrence and prepared panchayatnama, autopsy of the dead body was performed and the post mortem revealed that the death was due to strangulation.

4. The police after recording the statements of several witnesses filed charge-sheet against the three accused persons. Being summoned the accused were committed to the court of Sessions as the offences for which the accused were

charged were exclusively triable by the court of Sessions.

5. The charges were framed for commission of the offence under Section 304 B, 498 I.P.C. Read with Section 4 of D.P. Act and an alternative charge 302/34 I.P.C. was also framed against all the three accused persons, which was denied by them. They pleaded not guilty and claimed to be tried.

6. The trial started and the prosecution examined a total of 10 witnesses, who are as follows:

1.	Satyavir Singh, informant/ father of the deceased	P.W.1
2.	Premwati, mother of the deceased	P.W.2
3.	Anil Kumar, cousin of the deceased	P.W.3
4.	Rajwati, aunt of the deceased	P.W.4
5.	Sukhveer, uncle of the deceased	P.W.5
6.	Dharmendra, cousin of the deceased	P.W.6
7.	Dr. R.K. Dayal, who performed the autopsy	P.W.7
8.	Satyaveer Vyaas,witness of the inquest	P.W.8
9.	Ram Veer, witness of the inquest	P.W.9
10.	C.O. Narendra Dev, second I.O.	P.W.10

7. In support of the oral evidence following documents were filed:

1.	Written Report	Ex.Ka.1
2.	Inquest Report	Ex.Ka.2
3.	Autopsy Report	Ex.Ka.3
4.	Charge Sheet	Ex.Ka.4
5.	FIR	Ex.Ka.5
6.	Site Plan	Ex.Ka.6
7.	FIR	Ex.Ka.7
8.	Recovery Memo of Bangles	Ex.Ka.8
9.	Photo Nash	Ex.Ka.9
10.	Letter to R.I.	Ex.Ka.10
11.	Letter to C.M.O.	Ex.Ka.11

8. After the evidence was over, statement of the accused persons under Section 313 Cr.P.C. was recorded and the incriminating circumstances and the evidence against them were put to them. They have taken a defence of false implication and present accused/ appellant Raj Kumar stated that the deceased committed suicide, at the time of occurrence he was not present at home and had gone for his job. When he got informed that the door has been closed by the deceased from inside, he came back, the door lock was broken by the neighbours and they saw the deceased hanging.

9. D.W.1 Prem Singh has been produced for the defence side

10. At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the appellant as mentioned above.

11. Learned counsel for the appellant has relied on the decision in **Sanjay Maurya Vs. State of U.P., (2021) 02 ILR A473** and has contended that it is not proved that the offence under Section 302 is committed or any offence under Section 304B is proved against the accused. The case cannot be said to be proved under Section 302 of Indian Penal Code as the conviction by Trial Court with the aid of Section 106 of the Indian Evidence Act, 1872 is bad. It is further submitted that the decisions on which the trial court has placed reliance have been misread by the learned trial Judge so as to hold that accused is guilty of commission of offence

under Section 302 IPC. It is further submitted that the incident even if it is believed to have occurred and culpability of accused is proved, occurred on the spur of the moment, therefore, the accused if has to be held guilty, be convicted under Section 304(1) of the I.P.C.

12. As against this Sri N.K. Srivastava, learned counsel for the State has contended that

(i) the death occurred in the matrimonial home of the deceased;

(ii) the incident occurred within 7 years of married life. The proof of death being homicidal is proved. Despite the fact that in the statement under Section 313 Cr.P.C the accused has pleaded that he is not guilty, he has not discharged the burden cast on him to rebut the proved facts against him.

13. While considering the facts we have to consider the provisions of Section 304B IPC read with Section 302 of the Indian Penal Code. Trial Court has based the conviction with the aid of Section 106 of Indian Evidence Act, 1872. The provisions of Section 106 of Indian Evidence Act, 1872 lay as follows :-

"106. Burden of proving fact especially within knowledge.--When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustrations

(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."

14. We are of the considered opinion that Section 106 of the Indian Evidence Act, 1872 would come into play once the prosecution has discharged its duty of proving facts as per the charge to some extent on the basis of evidence. In this case, it is desirable to look into the ingredients of Section 300 of I.P.C which read as follows:-

"300. Murder.--Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or--

(Secondly) --If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or--

(Thirdly) --If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or--

(Fourthly) --If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid. Illustrations

(a) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.

(b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing

that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.

(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here, A is guilty of murder, although he may not have intended to cause Z's death.

(d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual. 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. Illustrations

(a) A, under the influence of passion excited by a provocation given by Z, intentionally kills. Y, Z's child. This is murder, in as much as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(c) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, in as much as the provocation was given by a thing done by a public servant in the exercise of his powers.

(d) A appears as witness before Z, a Magistrate, Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(e) A attempts to pull Z's nose, Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence, and kills Z. This is murder, in as much as the provocation was given by a thing done in the exercise of the right of private defence.

(f) Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder. 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. Illustration Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide. Exception 3.--Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused. Exception 4.--Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. Explanation.--It is immaterial in such cases which party offers the provocation or commits the first assault. Exception 5.--Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent. Illustration A, by instigation, voluntarily causes, Z, a person under eighteen years of age to commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death; A has therefore abetted murder."

15. Section 304B of IPC reads as under :

[304B. Dowry death. -- (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

Explanation. For the purposes 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.]"

16. The question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code or under Section 304B of IPC. It would be relevant to refer to Section 299 of the Indian Penal Code, which reads as under:

"299. Culpable homicide: Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

17. The academic distinction between "murder' and "culpable homicide not

amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
	INTENTION
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

18. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra, reported in (2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka,** reported in **1994 SUPP (1) SCC 304**, we are of the considered opinion that the offence would not be one punishable under Section 304 of the IPC.

19. It would be relevant for us to discuss the evidence of P.W.1, P.W.2, P.W.3, P.W.4, P.W.5 and P.W.6, who are family members of the deceased coupled with the fact that P.W.2, P.W.3,P.W.4, P.W.5 and P.W.6 did not support the prosecution and were declared hostile. However, in examination-in-chief, they have categorically mentioned that they got the deceased married to Raj Kumar three years before she died and in the marriage they gave dowry as per their financial condition, however denied the fact that the appellant and his family members were demanding any kind of dowry. P.W.1, the father of the deceased, has supported the prosecution version but his deposition is contradicted by the testimonies of P.W.2, P.W.3,P.W.4, P.W.5 and P.W.6, who are real mother and other family members of the deceased.

20. In cross-examination witnesses P.W.2, P.W.3, P.W.4, P.W.5 and P.W.6 have feigned ignorance as to how the I.O. had mentioned the fact of demand of Rs.2 lac in their statement under Section 161 Cr.P.C.

21. The trial Court has convicted the accused appellant under Section 302 I.P.C. with the aid of Section 106 of the Evidence Act. In such a case, which may be said to be rest on circumstantial evidence to prove the offence under Section 300 I.P.C. culpable homicide amounting to murder, there must be clinching evidence that it was the appellant alone, who was last seen with the deceased. The evidence on record shows that nobody has seen the accused

committing the offence of strangulating the deceased. The circumstances and ingredients to be proved to bring home charge under Section 302 I.P.C. in a case based on circumstantial evidence have been reiterated in a case of **State of U.P. v. Ravindra Prakash Mittal (Dr), (1992) 3 SCC 300,** the Hon'ble Apex Court has held:

"20. .....There is a series of decisions of this Court so eloquently and ardently propounding the cardinal principle to be followed in cases in which the evidence is purely of circumstantial nature. We think, it is not necessary to recapitulate all those decisions except stating that the essential ingredients to prove guilt of an accused person by circumstantial evidence are:

(1) The circumstances from which the conclusion is drawn should be fully proved;

(2) the circumstances should be conclusive in nature;

(3) all the facts so established should be consistent only with the hypothesis of guilt and inconsistent with innocence;

(4) the circumstances should, to a moral certainty, exclude the possibility of guilt of any person other than the accused."

22. It was also held in **Raja v. State of Haryana, (2015) 11 SCC 43** that the Court is required to evaluate circumstantial evidence to see that chain of events has been established clearly and completely to rule out any reasonable likelihood of innocence of accused; whether chain is complete or not, would depend on facts of each case emanating from evidence and no universal yardstick should above be attempted.

23. In the light of the aforesaid legal proposition, it has to be examined whether the chain of circumstances in this case is complete and all the circumstances lead to a certain conclusion that it was the accused only who was the author of the crime and whether there was sufficient evidence on record or only on the basis of the last seen this conclusion was drawn. The death has occurred in the matrimonial home of the deceased and that is only the circumstance which was proved by the prosecution. Considering the evidence of the witnesses and also considering the medical evidence including post mortem report, there is no doubt left in our mind that it is a homicidal death. If the decision over, which the trial Court has placed reliance to have coming to the conclusion that offence under Section 302 I.P.C. is made out, whether can be made applicable to the facts of this case as examined, the answer is in negative. However, a rebuttal evidence under Section 106 of the Evidence Act is clear the facts and offence under Section 304 B could be presumed to have been made out but not an offence under Section 302 I.P.C.

24. This takes us to the question of applicability of Section 304B of I.P.C to the facts of this case.

25. To bring home charge under Section 304 B I.P.C., the ingredients to be proved are very well settled in the catena of decisions by the Apex Court and also by this Court. Section 304B I.P.C. reads as follows:

304B. Dowry death.--

(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative

of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death. Explanation.--For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

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

26. From the above definition the following ingredients to establish the offence under Section 304B I.P.C. are as follows:

(i) the death of a woman must have been caused by burns or bodily injury or otherwise than under normal circumstances;

(ii) such death must have occurred within seven years of her marriage;

(iii) soon before her death, the woman must have been subjected to cruelty or harassment by her husband or any relatives of her husband;

(iv) such cruelty or harassment must be for, or in connection with, demand for dowry".

27. The aforesaid ingredients have been reiterated in a catena of decisions of the Hon'ble Apex Court and of this High Court also and very recently in **Devendra Singh Vs. State of Uttrakhand** AIR 2022 SC 2965 also.

28. However we examine the evidence of P.W.1 in totality, we find that the ingredients of offence under Section 304B I.P.C. are clearly established from his deposition. He is the unfortunate father of the young deceased lady. He has categorically stated in his statement that after the marriage of her daughter several time additional dowry was demanded from her daughter by her in-laws, who were not happy with the dowry already given to them. When his daughter informed him, he went to the accused persons and Rs.50,000/- were paid to them on 20.04.2014 and 21.04.2014 was the fateful day where the incident happened. This witness has also proved the written tehrir given to the police by him as Ex.Ka-1. In his cross examination he has also affirmed this fact that whenever he visited the matrimonial home of his daughter, he found her not happy. No material contradictions, exaggerated or inconsistent statement are found in the whole testimony of P.W.1. The theory of 'soon before' is also proved by his deposition as only one day before the fateful day the additional dowry was paid to the accused persons by him, which was demanded on 15.4.2014 as deceased herself told him on phone. In **Satvir Singh And Ors. Vs. State of Punjab (2001) 8 SCC 633,** it has been clarified that the expression 'soon before', here it was indicates that there must be a perceptible nexus between the infliction of dowry-related harassment and cruelty on the women and death. In **Satbir Singh Vs. State of Haryana (2021) 6 SCC 1**, it was held that the phrase *"soon before"* as appearing in Section 304-B IPC cannot be construed to mean *"immediately before"*. The prosecution must establish existence of *"proximate and live link"* between the dowry death and cruelty or harassment for dowry demand by the husband or his relatives. Needless to say that all the ingredients to establish the guilt under Section 304B I.P.C. have been clearly proved by the testimony of P.W.1.

29. D.W.1 produced to prove the plea of alibi taken by the accused/appellant has been disbelieved by the learned trial Court. He has stated that it was a case of suicide but he could not make it clear as to what was the reason of suicide committed by the deceased.

30. We come to the definite conclusion that the death was homicidal death. The judgments cited by the learned counsel for the appellant namely Sanjay Maurya (supra) would permit us to uphold our finding which we conclusively hold that the offence is not under Section 302 of I.P.C. but it is culpable homicide and was dowry death. All the ingredients of dowry death viz. unnatural death of deceased by strangulation within seven years of her marriage, cruelty for demand of dowry by her husband, the theory of soon before, are proved beyond reasonable doubt on the basis of deposition of P.W.1 and also by the medical evidence. Moreover, no material lacuna in investigation appears to be committed by the I.O.

31. While coming to the conclusion that the accused is the perpetrator of the offence, whether sentence of life imprisonment and fine is adequate or the sentence requires to be modified in the facts and circumstances of this case and in the light of certain judicial pronouncements and precedents applicable in such matters. This Court would refer to the following precedents, namely, **Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926]**, explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

32. 'Proper Sentence' was explained in Deo Narain Mandal Vs. State of UP [(2004) 7 SCC 257] by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

33. In **Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166**, the Hon'ble Supreme Court referred the judgments in **Jameel vs State of UP [(2010) 12 SCC 532], Guru Basavraj vs State of Karnatak, [(2012) 8 SCC 734], Sumer Singh vs Surajbhan Singh, [(2014) 7 SCC**

323], State of Punjab vs Bawa Singh, [(2015) 3 SCC 441], and Raj Bala vs State of Haryana, [(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The Hon'ble Supreme Court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

34. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive, this Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

35. Recent judgment of **State of M.P Vs. Jogendra, (2022) 5 SCC 401** and ratio laid in the said judgment can be followed, however, instead of seven years period undergone of imprisonment for at least 10 years would be more than relevant in the facts and circumstances of this case.

36. Having discussed the judgment threadbare and having been considered the factual data, we have come to the conclusion that the offence committed by the accused with an aid of Section 106 of Indian Evidence Act, can be said to have been under Section 304B I.P.C. for the finding mentioned herein above.

37. By going through the evidence on record it is very clear that the act of the accused-appellant was not such which cannot be substituted by giving a lessor sentence than life imprisonment. It is submitted that the accused appellant has spent about 8 and 1/2 years of incarceration, which is the enough punishment in the facts of this case. However, we are of the considered view that the punishment in this case should be 10 years of incarceration against which a period of 8 and 1/2 years is already

undergone. Accordingly, the appellant is held guilty under Section 304B I.P.C. and is sentenced to rigorous imprisonment for a period of 10 years but the fine and default sentence are maintained.

38. Accordingly, the appeal is partly allowed with the modification of the sentence and punishing section as above. Record and proceedings be sent back to the Court below forthwith.

39. A copy of this order be sent to the jail authorities for following this order and doing the needful.

40. We are thankful to Rajrshi Gupta, learned counsel for the appellant, Sri Nagendra Kumar Srivastava, learned A.G.A. and Mr. Mohd. Furkan Khan, Law Clerk (Trainee), for ably assisting the Court.

(2022) 11 ILRA 43
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.09.2022

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Matters U/A 227 No. 324 of 2007

Rukan Singh ...Petitioner
Versus
Mahendra Singh & Ors. ...Respondents

Counsel for the Petitioner:
Sri K.M. Garg

Counsel for the Respondents:
SC, Sri Raj Mohan Saggi, Sri Anil Sharma

A. Civil Law - Constitution of India-Article 227-Cutting of trees from the land of plaintiff-Plaintiff claimed for compensation-defendants admitted that they had cut away the trees but denied the ownership of plaintiff-Inevitable conclusion drawn by Trial court was that the trees of defendants were existing in their land-Appellate Court has erred in interfering with the findings of the Trial court which was in favour of plaintiff-trial court rightly observed that plot no. 1136 and 1139 had been converted to plot no. 159 which was clear from the C.H. Form 41-the finding was absolutely correct that the trees of the plaintiff alone had been cut away- If there was in any manner a slip in the drafting of the plaint and plot no. 159 was not mentioned in the pleading it did not mean that the Trial court erred in considering the evidence which was produced with regard to plot no. 159-Thus, The appellate court judgment and decree is set aside.(Para 1 to 29)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Satyadhyan Ghosal & ors. Vs Smt. Deorjin Debi & anr. (1960) AIR SC 941

2. Md. Inam Vs Sanjay Kumar Singhal & ors. (2020) 7 SCC 327

3. Sumesh Singh Vs Phoolan Devi & ors. (2009) 12 SCC 689

4. Shreepat Vs Rajendra Prasad & ors. (2000) 7 JT 379

5. Gajraj & ors. Vs Ramadhar & ors. (1975) AIR Alld 406

6. Ram Sarup Gupta(dead) by L.Rs. Vs Bishun Narain Inter College & ors. (1987) AIR SC 1242

7. Nagubai Ammal & ors. Vs B. Shama Rao & ors. (1956) SC 593

8. Katikara Chintamani Dora & ors. Vs Guatreddi Annamanaidu & ors. (1974) AIR SC 1069

9. Smt. Manjushri Raha & ors. etc Vs B.L Gupta & ors. etc (1977) AIR SC 1158

10. Joseph Peter Sandy Vs Veronica Thomas Rajkumar & anr. (2013) 3 SCC 801

11. Makhan Lal Bangal Vs Manas Bhunia & ors. (2001) JT 1 252

12. Raj. St. TPT Corp. & anr.. Vs Bajranj Lal (2014) AIR SCW 2058

13. Saurashtra Chemicals Vs Collector of Customs (1998) 8 JT 39

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

1. A Suit being Original Suit No. 28 of 1995 was filed by the applicant against the respondents and one Jeet Singh. Relief sought was that the defendants be made to pay to the plaintiff Rs. 15,000/- as costs of the trees which were cut away by them from the plaintiff's plots nos. 1136 and 1139 which were having an area of about 14 bighas. The boundaries of the plots in question were also given in the plaint. The defendants filed their written statements denying the claim of the plaintiff saying that the plaintiffs were not the owners in possession of plots nos. 1136 and 1139 and they also denied the boundaries as were given in the plaint. However, after the framing of issues the Suit was decreed on 21.2.2006. While deciding the issue no. 1, it was categorically found that the plots nos. 1136 and 1139 were in the ownership of the plaintiff and that subsequently these plots were numbered as plot no. 159 after consolidation which fact was clear from the C.H. Form - 41 (Form which the consolidation authorities issue for showing the changed number of plots).

2. The Trial Court had also concluded that the fact that from plots nos. 1136 and 1139 (which were subsequently numbered as plot no. 159) the defendants had cut away the trees, was also clear as the khasras with regard to the old plots of the fasli year 1402, 1407 and 1410 had on them trees of Siros, Eucalyptus, Shisham and Jamun while the later khasras had no trees on them. This finding was arrived at despite the fact that the defendants had come up with a case that the trees in question were standing on their plots which were numbered as plot no.169.

3. The Trial Court had decreed the Suit despite the fact that the defendants had stated that in Khasras of 1402F to 1410F, the trees of Shisham, Siras, Jamun and Eucalyptus were there in their plot.

4. The Trial Court had found that the trees in question were definitely there on the plots of the plaintiff and had been cut away by the defendants because the defendants had admitted that they had cut away certain trees and the trees on their plot no.169 were still in existence.

5. Not satisfied by the Trial Court's decree, the respondents other than Jeet Singh who had died during the pendency of the Suit, filed an Appeal.

6. Before the appellate Court, the plaintiff filed an application (17ga) on 17.10.2006 for bringing an additional issue ("क्या विवादित पेड़ युकलिप्टुस, सिरस, खसरा न. 159 में स्थित थे")

7. The plaintiff also filed an application for amending the plaint on 17.10.2006 which was numbered as 18(ka). In it he had prayed that in paragraph no. 1 the word, "Chak" be deleted and the plaintiff be permitted to write "Purana Khasra" instead. Further prayer was made that in paragraph no. 1 itself "चकबंदी में पुराने खसरा न. 1136 व 1139 से चकबंदी तथा अन्य खसरा नम्बरों से नया खसरा न. 159 बना है" be added.

8. Still further, an application was moved on 4.11.2006 for the issuance of a survey commission.

9. On 17.10.2006, the application which is numbered as 17(ga) was rejected. Thereafter on 2.11.2006, the application no. 18(ga) was also rejected and finally on 6.11.2006 the application for survey commission being application no. 20(ga) was also rejected. Thereafter, the appeal which was filed by the respondents was decided and allowed on 4.1.2007.

10. The plaintiff-applicant has filed the instant writ petition against the order dated 17.10.2006 by which the application for framing of issues was rejected; the order dated 2.11.2006 by which the amendment application was rejected and the order dated 6.11.2006 by which the application for issuing the survey commission was rejected and also for the setting aside of the judgement and decree dated 4.1.2007 by which the Appeal was allowed.

11. No Second Appeal was filed as by the amendment of the Civil Procedure Code, no Second Appeal lay for a Suit where recovery of money was not exceeding Rs.25,000/-.

12. Learned counsel for the applicant relied upon the judgements of the Supreme Court reported in **AIR 1960 SC 941 (Satyadhyan Ghosal and others vs. Smt. Deorjin Debi** and another) and **(2020) 7 SCC 327 (Mohd. Inam vs. Sanjay Kumar Singhal and others)** and has submitted that interlocutory orders which could have been earlier challenged by means of Revision could very well be challenged before this Court while challenging the judgement and decree of the First Appeal dated 4.1.2007.

13. Learned counsel for the petitioner further submitted that if the applications (17ga), 18(ka) and 20(ga) were allowed then the confusion which was there in the mind of the Appellate Court with regard to the number of plot would have been cleared and he therefore submits that the amendment application ought to have been allowed. The survey commission would also have cleared all doubts.

14. Learned counsel for the petitioner further submitted that the Appeal was a continuation of a Suit and, therefore, the amendment application by which no admission was being withdrawn or by which no right which had accrued to the defendant was being challenged ought to have been allowed. He further submitted that since the amendment application was in a Suit which was filed prior to the amendment which was brought in the Code of Civil Procedure on 1.7.2002 the amendment application ought to have been allowed as had been held in **(2009) 12 SCC 689 (Sumesh Singh vs. Phoolan Devi and others)**. The amendment application was thus not barred by the proviso to Order VI Rule 17 and that the same ought to have been allowed.

15. Learned counsel for the petitioner-applicant further submitted that issuance of the survey commission was also important as that would have cleared the cob-web in the mind of the Appellate Court and for this purpose, he relied upon the judgement reported in **2000 (7) JT 379 (Shreepat v. Rajendra Prasad & Ors.)**. He also relied upon a judgement of the Allahabad High Court reported in **AIR 1975 ALLAHABAD 406 (Gajraj and others vs. Ramadhar and others).**

16. Further, it is the case of the applicant-petitioner that if the case of the plaintiff was clear from the pleading which was to the effect that from plots nos. 1136

and 1139, the boundaries of which were given, then it mattered little that the changed plot no. 159 was not given in the plaint.

17. Learned counsel for the petitioner further submitted that when the C.H. Form 41 was present as an evidence before the Court then it was evident that the two plots numbered as 1136 and 1139 were converted to plot no. 159. He further submitted that the defendants always stated that plot no. 169 was their plot and on their plot trees which found place in the khasras of the years 1402 to 1410F were very much standing and in face of the admission of the defendants that they had cut away the trees it was only very evident that they had cut them away from the plaintiffs plots. Therefore, he submits that no interference ought to have been made by the Appellate Court.

18. Learned counsel for the plaintiff-applicant relied upon **AIR 1987 SC 1242 (Ram Sarup Gupta(dead) by L.Rs. vs. Bishun Narain Inter College and others)** and submitted that it was not desirable to place undue emphasis on form; instead he submitted that substance of pleadings should have been considered.

19. Since the learned counsel for the petitioner relied upon the paragraph no. 6 of the judgement the same is being reproduced here as under:-

"The question which falls for consideration is whether the respondents in their written statement have raised the necessary pleading that the license was irrevocable as contemplated by Section 60(b) of the Act and, if so, is there any evidence on record to support that plea. It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. **The pleadings however should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair splitting technicalities.** Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law, in such a case it is the duty of the Court to ascertain the substance of the pleadings to determine the question. **It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of the pleadings, instead; the court must find out whether in substance the parties knew the case and the issues upon which they went to trial.** Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal. In Bhagwati Prasad v. Shri Chandramaul, (1966) 2 SCR 286 : (AIR 1966 SC 735) a Constitution Bench of this Court considering this question observed:

"If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then

the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is : did the parties know that the matter in question was involved in the trial, and did they lead evidence about it ? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to reply upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another.""

20. He further relied upon a judgement of the Supreme Court reported in **1956 SC 593 (Nagubai Ammal and others vs. B.Shama Rao and others).**

21. Learned counsel for the petitioner heavily relied upon another judgement of the Supreme Court reported in **AIR 1974 SC 1069 (Katikara Chintamani Dora and others v. Guatreddi Annamanaidu and others).** The relevant portion of paragraph no. 55 which the learned counsel relied upon is being reproduced here as under :-

"We think, with all respect, that such an assumption was contrary to the well-established principle that in construing a pleading or a like petition, in this country, the court should not look merely to its form, or pick out from it isolated words or sentences; it must read the petition as a whole, gather the real intention of the party and reach at the substance of the matter."

22. A similar view which was taken in **AIR 1977 SC 1158 (Smt. Manjushri Raha and others etc. v. B.L. Gupta and others etc.)** and which was cited before me also states that "pleadings have to be interpreted not with formalistic rigour but with latitude or awareness of low legal literacy of poor people."

23. Learned counsel for the petitioner also relied upon **(2013) 3 SCC 801 (Joseph Peter Sandy vs. Veronica Thomas Rajkumar and another)** and submitted that lack of details in the pleadings cannot be a ground to reject a case for the reason that it can be supplemented through evidence by the parties.

24. Learned Senior Counsel appearing for the respondents Sri Anil Sharma assisted by Sri Raj Mohan Saggi, however, submitted that the Trial Court had exceeded its jurisdiction by concluding that plot no. 1136 and 1139 were now plot no. 159 despite the fact that there was no pleading. Learned counsel for the respondents relied upon **2001 JT (1) 252 (Makhan Lal Bangal v. Manas Bhunia & Ors)** and submitted that there is a method by which issues have to be framed and when that is not followed the Court errs. He further relied upon a judgement of the Supreme

Court reported in **2014 AIR SCW 2058 (Rajasthan State TPT Corporation and another vs. Bajranj Lal)** and submitted that finding given in the absence of necessary pleadings and supporting evidence cannot be sustained in the eyes of law and he, therefore, submitted that when in the plaint there was no averment with regard to the fact that trees were standing on plot no. 159, the Appellate Court rightly allowed the Appeal and dismissed the Suit.

25. On the same issue, learned counsel for the respondents has relied upon **1998 (8) JT 39 (Saurashtra Chemicals v. Collector of Customs)** and argued that in the absence of pleadings and evidence, if any, the case could not be considered by the authorities.

26. Having heard the learned counsel for the parties and having gone through the judgements which have been cited by them, this Court is of the view that the Appellate Court erred in interfering with the judgement and decree of the Trial Court. The Trial Court had conclusively given a finding that plot no. 1136 and 1139 the boundaries of which were given had been converted to plot no. 159 and this was also clear from the C.H. Form 41. If there was in any manner a slip in the drafting of the plaint and plot no. 159 was not mentioned then it did not mean that the Trial Court erred in considering the evidence which was produced with regard to plot no. 159.

27. When the issues were framed then clearly issue no. 5 was to the effect as to whether the plaintiff was the owner of the plots in question. The plots nos. 1136 and 1139 were involved in the case and C.H. Form No.41 had clearly stated that plot no. 1136 and 1139 were converted after consolidation into plot no. 159, therefore, there was absolutely no question that the defendants would be taken by surprise. In fact, the defendants while answering the plea that they had cut away the trees from the plaintiffs land had mentioned that yes they had cut away the trees but they had cut them away from their own land which was contained in plot no. 169. The natural conclusion, therefore, is that there was cutting of trees done by the defendants. What is more, the inevitable conclusion was also that as per the khasras of the defendants, the trees in their plots were still standing and, therefore, the finding was absolutely correct that the trees of the plaintiff alone had been cut away.

28. After having concluded that the Appellate Court had erred in interfering with the finding of the Trial Court, this Court is not giving any finding with regard to the fact as to whether the applications 17(ga), 18(ka) and 20(ga) were rightly or wrongly rejected. Suffice it to say that the orders by which these applications were rejected could have been challenged before this Court and the applicant petitioner if has challenged those orders, he has committed no wrong. However, since nothing would turn on whether they were rightly rejected or wrongly rejected, the impugned orders dated 17.10.2006, 2.11.2006 and 6.11.2006 are not being adjudicated upon.

29. The judgement and decree dated 4.1.2007 passed by the Additional District Judge, Court No.2, Bijnor, in Civil Appeal No. 25 of 2006 by which the first appeal was allowed deserves to be set aside and, therefore, is being set aside. The application under Article 227 of the Constitution of India is, accordingly, allowed.

(2022) 11 ILRA 49
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.09.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

Matters U/A 227 No. 860 of 2022 (Civil)

Neel Prasad ...Petitioner
Versus
Anoop Prasad ...Respondent

Counsel for the Petitioner:
Sri Deepak Kumar Srivastava

Counsel for the Respondent:
Sri Manish Goyal (Sr. Advocate), Sri Manish Goyal A.C., Sri Manish Goyal Amircus Curiae

A. Civil Law - Indian Trust Act, 1882-Section 34 & 1-Constitution of India, 1950-Article 227-Public religious trust-petitioner granted permission to dispose of the property of the temple for reconstruction - Trial court rightly rejected the application holding that the Act 1882 does not apply to public or private religious or charitable endowments-Petitioner's cause is noble and requires urgent relief but the remedy is not available at all in the present case.(Para 1 to 14)

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

(Delivered by Hon'ble J.J. Munir, J.)

1. Heard Mr. Deepak Kumar Srivastava, learned Counsel for the petitioner and Mr. Manish Goyal, learned Senior Advocate, who on request of the Court acted as *Amicus Curiae.*

2. This petition under Article 227 of the Constitution arises from proceedings brought before the District Judge of Gorakhpur under Section 34 of the Indian Trusts Act, 1882 (for short, 'the Act of 1882').

3. By an application under Section 34 of the Act of 1882, the petitioner, invoking the advisory jurisdiction of the Court regarding the management of trust property of the temple of Thakur Ji, has come up with a prayer for the grant of permission to dispose of the property of the temple, that is *debutter*, in order to apply the proceeds of the sale for restoration of the temple, that is said to be hundred years old and in a dilapidated condition.

4. The learned Additional District Judge, Court No.1, Gorakhpur, before whom the said application numbered as Civil Misc. Case No. 171 of 2020 came up, has rejected the same, holding that the Act of 1882 does not apply to public or private religious or charitable endowments.

5. It is against the said order that the unsuccessful applicant before the District Judge has petitioned this Court under Article 227 of the Constitution.

6. Since a purely legal question about the applicability of the Act of 1882 to a religious endowment or a trust, governing a temple, where thousands throng in faith was involved, this Court requested Mr. Manish Goyal to assist the Court as *Amicus Curiae.* Mr. Goyal readily rendered his very able assistance.

7. The applicant, Neel Prasad says that he has been the owner of a one-half share in the property shown in Schedule A to the application moved before the District Judge and has power of disposition over it. His ancestor, Rai Thakur Dayal Singh was

an issueless man with inclination towards religion. He got a temple of Thakur Dwara Ji constructed and consecrated at Village Sarhari over land shown in Schedule B to the application, where members of the public in general offer prayers *(Pooja-Archana)*. The said temple was got constructed by Rai Thakur Dayal Singh in the year 1880 and he donated for the purpose of maintenance of the said temple, as per his wish, 100 *bighas (pakka)* land. However, before Rai Thakur Dayal Singh could execute a deed of trust, gift or the other disposition in favour of the temple, he passed away. Therefore, his widow, Smt. Jaswant Kunwari and another Rai Devi Saran Lal executed a gift deed dated 29.04.1885, donating lands comprised in Schedule A to the application, then lying in Village Bhelam. In consequence, the name of Smt. Jaswant Kunwari was mutated out of the Government records and that of Thakur Ji Mandir, Sarhari was entered.

8. It is the petitioner's case that during the first and the second rounds of the consolidation operations, all that was the property of Thakur Ji Mandir, Sarhari, given in gift, remained His. The temple is for the benefit of public in general and has now turned 100 years old. It has fallen into disrepair and may collapse any time. It was, therefore, said that to save the temple from grave damage, it was necessary that fresh construction thereof be undertaken in keeping with Rai Thakur Dayal Singh's religious sentiments. An estimated expenditure of Rs. 16 lakhs in the enterprise was indicated, for which there were no funds with the temple. A prayer, therefore, was made that the property of the temple, that is *debutter*, comprising of agricultural holdings, shown in Schedule A to the application, may be permitted to be sold, the proceeds whereof would be applied for reconstruction of the temple.

9. The learned Counsel for the petitioner says that the mischief sought to be remedied is grave and emergent. Mr. Goyal, on the other hand, submits that the Act of 1882 does not apply to any kind of a religious trust, public or private.

10. Upon hearing the learned Counsel for the petitioner and Mr. Manish Goyal, the learned Amicus Curiae, this Court does find that the Act of 1882 does not apply to any kind of a religious trust. The reason is to be found in Section 1 of the Act of 1882, that reads:

"1. **Short title.**--This Act may be called the Indian Trusts Act, 1882:

Commencement.--and it shall come into force on the first day of March, 1882.

Local extent.-- It extends to the whole of India [except the State of Jammu and Kashmir] and the Andaman and Nicobar Islands; but the Central Government may, from time to time, by notification in the Official Gazette, extend it to [the, Andaman and Nicobar Islands] or to any part thereof.]

Savings.--But nothing herein contained affects the rules of Muhammadan law as to waqf, or the mutual relations of the members of an undivided family as determined by any customary or personal law, or applies to public or private religious or charitable endowments, or to trusts to distribute prizes taken in war among the captors; and nothing in the second Chapter of this Act applies to trusts created before the said day."

(emphasis by Court)

11. It is evident that the Act of 1882 does not apply at all to a public religious trust. The temple of Thakur Ji, Sarhari, which is a public religious endowment,

both by the terms of dedication and the subsequent use, where thousands repose faith in Thakur Ji, would not be governed by the Act of 1882. This is precisely what the learned Additional District Judge has held, and in the opinion of this Court, rightly so. Mr. Goyal points out that the public religious endowments are governed by the Charitable and Religious Trusts Act, 1920 and certain other legislations also apply. It is true that the petitioner's cause is noble and requires urgent relief, but the remedy he has been advised to invoke, is not available at all in the present case.

12. In the circumstances, no case for interference with the impugned order is made out.

13. The petitioner will, however, be at liberty to invoke all or any such remedy/ remedies, as may be advised to secure urgent relief, unaffected by anything said in this order or the learned District Judge's order.

14. This petition is **disposed of,** accordingly.

(2022) 11 ILRA 51
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.09.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

Matters U/A 227 No. 863 of 2022

Jamuna Ram ...Petitioner
Versus
Smt. Shanti Devi & Ors. ...Respondents

Counsel for the Petitioner:
Sri Tariq Naiyer, Sri Himanshu Kumar, Sri Deepak Pandey, Sri Zafar M. Naiyar (Sr. Advocate)

Counsel for the Respondents:
Sri Vinay Kumar Gupta, Sri Atul Dayal (Sr. Advocate)

A. Civil Law - U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972-Section 3(a)(1)-Constitution of India, 1950-Article 227-whether the petitioner upon his father's demise, inherited the tenancy along with his brother as a joint tenant-In case of a residential building, not all heirs of the deceased tenant are entitled to inherit the tenancy-the petitioner is an heir of the deceased tenant, being his son, but the revisional court finds no direct documentary evidence, such as a rent receipt or a municipal record of assessment to indicate that the tenant was ever recorded as such-the tenant lived with his father in the one room accommodation, when he passed away, along with his brother, is a matter to be established by evidence-the date of death is not on record which is material for the tenant to establish his contemporaneous ordinary residence in the demised premises at the time of his father passed away in order to succeed to a residential tenancy u/s 3(a)(1) of the Act-Moreso, rent receipt issued in the tenant's name annexed with paper book is a forged and fabricated document-The Court disapproves the tenant's conduct in doing so.(Para 1 to 23)

The writ petition is dismissed. (E-6)

List of Cases cited:

Sarla Devi Vs Pushpa Agnihotri (2008) 2 ARC 725

(Delivered by Hon'ble J.J. Munir, J.)

1. This petition under Article 227 of the Constitution is directed against the order dated 25.10.2021 passed by the Additional District Judge, Court No. 14, Kanpur Nagar in Rent Revision No. 36 of 2014, dismissing the Revision and

affirming the order of vacancy dated 01.07.2014 and release dated 30.09.2014 passed by the Rent Control and Eviction Officer, Kanpur Nagar (for short, 'the RC & EO') in proceedings under Sections 12/16 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').

2. The facts giving rise to this petition, briefly said, are that a typed written statement was presented by Smt. Shanti Devi, widow of the late Vidya Sagar, respondent no.1 to this petition, before the RC & EO, stating that she is the co-owner of House No. 74/137(1), Dhankutti, Kanpur Nagar (for short, 'the demised premises'). The demised premises, on the ground floor, has a single room with an abutting platform *(Chabutra)*, demised to one Ganga Ram. Since Ganga Ramm has built his own house, bearing House No. 2/292, Sector H, Jankipuram, Lucknow, he has shifted to Lucknow way back in the year 1998 along with his family. The demised premises are in possession of Ganga Ram's brother, Jamuna Ram. In view of the provisions of Section 12(3) of the Act, the demised premises would be deemed vacant. The said written statement submitted to the RC & EO was supported by the statements of one Ramesh Chandra Gupta and another Gopal Chandra Mishra. The RC & EO called for a report from the Rent Control Inspector.

3. The Rent Control Inspector submitted a report to the effect that the demised premises was in the tenancy of the late Mahaveer Prasad. Ganga Ram and Jamuna Ram are his sons. Both of them are, therefore, tenants. The demised premises are situate on a plot of land, which has a room and an adjoining *Chabutra*. It was also reported by the Rent Control Inspector that upon both the wives of Vidya Sagar and their sons saying that Rakesh Kumar Gupta was the owner, he tendered rent to Rakesh Kumar Gupta. Since Rakesh Kumar Gupta refused to accept the tendered rent, Jamuna Ram was depositing the same in the Court of the Civil Judge (Jr. Div.), Kanpur Nagar under Section 30(1) of the Act. The Rent Control Inspector further reported that Jamuna Ram's stand was affirmed by a certain Kamla Devi and Tara Devi. The RC & EO did not accept Jamuna Ram's case that the demised premises were let out to his father and upon his demise, both his sons Ganga Ram and himself, had inherited the tenancy.

4. It was remarked by the RC & EO that Jamuna Ram had not produced any evidence to show that the then landlord, Rameshwar Prasad Verma had issued any rent receipt in favour of his father, Mahaveer Prasad. No allotment order issued by the competent Authority in favour of Mahaveer Prasad was produced either. In the opinion of the RC & EO, the absence of evidence in support of Jamuna Ram's pleaded case of an inherited tenancy from his father, the premises were liable to be declared vacant. Accordingly, *vide* order dated 01.07.2014, vacancy was declared. This order was followed by an order of release passed by the RC & EO on 30.09.2014.

5. Both these orders were challenged by Jamuna Ram, the present petitioner and his brother Ganga Ram together, by means of Rent Revision No. 36 of 2014, instituted before the Court of the District Judge, Kanpur Nagar. The said revision was heard and dismissed by the learned Additional District Judge, Court No.14, Kanpur Nagar vide judgment and order dated 25.04.2017.

6. Dissatisfied with the concurrent orders made by the RC & EO and the learned Additional District Judge in revision, Jamuna Ram alone preferred a petition under Article 227 of the Constitution before this Court being Matter under Article 227 No. 3725 of 2017. The said petition was allowed by an order dated 11.09.2019 with a remand to the Court of Revision on the short ground that there were various evidence produced by the tenant-petitioner mentioned in the order of the RC & EO dated 01.07.2014, but neither the RC & EO nor the Judge in Revision had considered these. It was, therefore, held to be a case of non-consideration of evidence.

7. Post remand, the matter went back to the learned Additional District Judge, Court No.14, Kanpur Nagar, who after hearing parties and perusing the record, has dismissed the Revision and once again affirmed the orders of vacancy and release dated 01.07.2014 and 30.09.2014, respectively.

8. Aggrieved, this petition under Article 227 of the Constitution has been instituted by Jamuna Ram (for short, 'the tenant').

9. Heard Mr. Zafar M. Naiyar, Senior Advocate assisted by Mr. Deepak Pandey, learned Counsel for the tenant-petitioner and Mr. Atul Dayal, Senior Advocate assisted by Mr. Vinay Kumar Gupta, learned Counsel for the landlord-respondents.

10. It is submitted by Mr. Zafar M. Naiyar, learned Senior Advocate that the ration card issued on 22.11.2015, Annexure No. 13 to the petition, the Voter Card issued on 19.12.2011, part of Annexure No. 12 to the petition, School Certificates for the years prior and subsequent to 2005, Rent Receipts issued by the landlady/ landlord, part of Annexure No. 12 to the petition, School Education Certificate starting from 1976 to 1983, Water Tax Payment Receipts and Electricity Payment Receipts, along with the statements of the tenant-petitioner recorded by the Rent Control Inspector during his inspection for the determination of vacancy, clearly indicate that the petitioner's father was a tenant in the demised premises and he died leaving behind two sons, to wit, Ganga Ram, the elder son and the tenant, the younger son. The elder brother, Ganga Ram, who is an employee of State Bank of India, holds a transferable post. He has been transferred to Lucknow and stays at his place of posting. The tenant is the other joint tenant along with Ganga Ram and is entitled to live in the premises in his own right. It is urged that the Court below has acknowledged the fact that these documents have been placed on record, but has not considered all these pieces of documentary evidence, crucial to the issue, resulting in miscarriage of justice.

11. It is argued that after the death of Mahaveer Prasad, the tenant, his younger son, stayed in the demised premises and paid rent through his elder brother, Ganga Ram. Upon refusal to receive rent by the landlord, it was deposited under Section 30 of the Act. It is also argued by the learned Senior Advocate that the fact of shifting of one of the joint tenants to any other district does not create vacancy. Even if it be accepted that Ganga Ram had moved away, the tenant's right, as a joint tenant would not be annihilated. No vacancy, therefore, can be said to arise. It is emphasized that the case that after Mahaveer Prasad's demise, his elder son Ganga Ram became the tenant, is misconceived, inasmuch as on

the death of Mahaveer Prasad, the tenancy devolved upon both of his sons, including the tenant. It is argued emphatically that the earlier orders of this Court passed in Matters under Article 227 No. 3725 of 2017, have been observed in breach by the Revisional Court, who has decided, yet again, ignoring relevant and material evidence from consideration. According to the learned Senior Advocate appearing for the tenant, non-consideration of material evidence by the Judge in the Court of Revision, vitiates the order impugned.

12. Mr. Atul Dayal, learned Senior Advocate appearing on behalf of the respondent-landlords, has refuted the submissions advanced on behalf of the tenant and argued that assuming that the tenant's father, the late Mahaveer Prasad was the original tenant, the tenant would have to prove that he was residing in the demised premises at the time of his father's death in view of the provisions of Section 3(a)(1) of the Act. It is argued that there is not a solitary piece of evidence to show that the petitioner was residing in the demised premises at the time his father passed away. It is pointed out that the sale deed relating to the demised premises dated 21.06.1986, which mentions the name of the tenants, mentions Ganga Ram, but not the tenant. It is further argued that on a more pragmatic note, once it has come on record that Ganga Ram was residing in the demised premises till 1998, it is difficult to believe that the single room accommodation could have housed the two brothers and their families.

13. It is next submitted on behalf of the respondent-landlord that assuming that the tenant was a joint tenant with Ganga Ram, though evidence to the contrary is overwhelming, even then in the case of one of the two tenants acquiring another accommodation, a deemed vacancy would occur under Section 12(3) of the Act. In support of the above contention, reliance has been placed on the decision in **Sarla Devi vs. Pushpa Agnihotri, 2008 (2) ARC 725.**

14. This Court has considered the rival submissions advanced on behalf of both parties and perused the orders impugned as well as the records annexed.

15. About the High School Certificate and the Scholar Transfer Certificates that the tenant has relied upon, the Revisional Court has remarked that mention of the demised premises as the tenant's address there is of little consequence, because these documents are not documents, showing either allotment in the tenant's favour or his tenancy rights. These documents are based on information given to the School. This Court is of opinion that the Scholar Transfer Certificate relates to the period 1976 to 1983 and would show that while a student in the School, the tenant was residing with his father, Mahaveer Prasad, about whom there is documentary evidence that he was the recorded tenant in the demised premises. There are some other documents, such as a Ration Card dated 22.11.2005, Voter ID Card issued by the Election Commission of India in the year 1995, some water tax receipts issued by the Kanpur Nagar Nigam in the tenant's name for the year 2018, besides a caste certificate of the year 1978. The old documents, as already said, would show that the tenant did reside at some point of time with his father, when a young student. So far as the later documents, such as the Ration Card and even the Voter ID Card or the Water Tax Receipts are concerned, these documents can very well be believed to be

issued on the given address, because the tenant's father was a tenant in the demised premises.

16. The question is whether the petitioner upon his father's demise, inherited the tenancy along with his brother as a joint tenant? The provisions of Section 3(a) of the Act read:

"3. Definitions.--In this Act, unless the context otherwise requires--

(a) "tenant", in relation to a building, means a person by whom its rent is payable, and on the tenant's death--

(1) in the case of a residential building, such only of his heirs as normally resided with him in the building at the time of his death;

(2) in the case of a non-residential building, his heirs;

17. It would be seen that in the case of a residential building, not all heirs of the deceased tenant are entitled to inherit the tenancy. No doubt, the petitioner is an heir of the deceased tenant, Mahaveer Prasad, being his son, like his elder brother, Ganga Ram, but as remarked by the Revisional Court, there is no direct documentary evidence, such as a rent receipt or a municipal record of assessment to indicate that the tenant was ever recorded as such. To the contrary, Ganga Ram's name finds mention in the sale deed dated 21.06.1986 as the tenant in the demised premises, but not that of the tenant. In none of the municipal assessment records, the name of Jamuna Ram finds place. No doubt, in the three quinquennial house tax assessment relating to the demised premises for the year ending 1948, the years 1948 to 1953 and the years 1968 to 1973, the name of Mahaveer Prasad alone is recorded as the tenant. It appears that Ganga Ram's name is also not there in the Municipal Record, but does find mention in the sale deed dated 21.06.1986, as already said, which is one regarding transfer of title relating to the demised premises. The rent receipts, that have been issued either by the former owner and landlord or the transferee landlord, the name of the tenant shown is Mahaveer Prasad, but not the tenant's. It is true that in the absence of succession to the tenancy being recorded in the Municipal Records or a rent receipt being there, the tenant could still have proven that he had inherited the tenancy, as he says, along with his brother, Ganga Ram. But, to do that, he would have to show that he normally resided with the last recorded tenant, Mahaveer Prasad at the time of his death. Conspicuously, the tenant has not disclosed anywhere, nor has it otherwise come on record, when Mahaveer Prasad died. The date of death becomes material for the tenant, because he would have to establish his contemporaneous ordinary residence in the demised premises at the time his father passed away in order to succeed to a residential tenancy under Section 3(a)(1) of the Act. There is absolutely no evidence about the tenant's ordinary residence with his father at the time of his father's demise.

18. There are two classes of documents filed by the tenant. One relates to the period of time when he was a student-rather a school going one. Decidedly, at that time, he would have stayed with his father. But, those do not show that he was ordinarily residing with his father when he passed away. There is no presumption in the contemporaneous world that a tenant would be living in his residential premises with all his heirs, including all his sons. There has to be evidence about it. In certain situations, it can be readily established. In others, it

might require a onerous standard of proof. Here, the standard would be more onerous, because the demised premises are a one room accommodation. To establish, therefore, that the tenant lived with his father in the one room accommodation, when he passed away, along with his brother, is a matter to be established by evidence. There is no such evidence on record. As already remarked, the first step for the tenant to establish the fact was to plead and establish the date of his father's death, which is not there. The other class of documents, by which the tenant has tried to collaterally establish his residence with his father are contemporaneous documents about payment of water tax, electricity bills, ration card, all of which could be issued on the tenant's representations to the Authorities concerned. These do not show that the tenant was residing with his father when the latter passed away.

19. There is one more aspect of the matter and that is that many of these documents were sought to be brought on record before the Revisional Court through an application under Order XLI Rule 27 CPC. Amongst these documents, was the caste certificate, scholar registration, transfer certificates and a rent receipt, said to be issued in the year 1984. Some of these have been commented upon by this Court earlier in this judgment. The application to bring on record the additional evidence was rejected by the Revisional Court vide order dated 03.01.2017, but some of these documents were considered by the Revisional Court despite rejection of the said application, and, therefore, this Court has also expressed opinion with regard to them.

20. This Court also notices that along with the counter affidavit, the respondents have annexed a rent receipt, also issued in the name of Ganga Ram for the period 01.08.1987 to 13.11.1987, but there is nothing on record to show that it was on record before the Revisional Court. This Court, therefore, does not wish to comment any further about the said document. There is a very startling averment in Paragraph No. 12 of the counter affidavit, which says that a rent receipt dated 15.12.2012 issued in the tenant's name and annexed at Page No. 89 of the paper book is a forged and fabricated document. It was never placed on record before the Courts below and, therefore, not considered in any of the orders impugned. A perusal of the said receipt at Page No. 89 does show that it purports to be issued in the tenant's name by the landlord, Rakesh Kumar Gupta for the period 01.07.2012 to 30.09.2012. The rate of rent mentioned there is Rs.20/- and the total sum paid is Rs.60/-. None of the Courts below mention this document, which would have turned tables, if it were there on record before those Courts.

21. In Paragraph No. 4 of the rejoinder affidavit, where together with many other paragraphs, Paragraph No. 12 of the counter affidavit has been responded to, there is no explanation about this discordant document, which the Courts below have not mentioned. Apparently, the receipt at Page No. 89 of the paper-book relied upon by the tenant is a document of questionable character. It should not have been placed on record before this Court by the tenant. This Court disapproves the tenant's conduct in doing so.

22. In consequence of all that has been said, this Court does not find any good ground to interfere with the orders impugned.

23. This petition fails and is **dismissed with costs.**

24. The interim order dated 24.02.2022 passed by this Court is hereby vacated.

(2022) 11 ILRA 57
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.09.2022

BEFORE

THE HON'BLE AJIT KUMAR, J.

Matters U/A 227 No. 6427 of 2022 (Civil)
Alongwith other cases

Mahesh Sharma & Anr. ...Petitioners
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Kshitij Shailendra

Counsel for the Respondents:
A.S.G.I., Sri Aditiya Kumar Singh

A. Civil Law - Public Premises (Eviction of Unauthorized Occupants) Act, 1971- Petitioners are occupants of the premises as a tenant or licensee of the railways and the proceedings under the Act, 1971 were claimed to be not as per the procedure prescribed for and they appealed against the orders passed by prescribed authority- Apex Court observed in many cases that the interest of occupants should be looked into and therefore, interim order should be granted so as to not to defeat very purpose of filing the appeal-remedy of appeal which is statutory in nature can not be rendered as an empty formality- judicial approach requires that during the pendency of the appeal the operation of an order having serious civil consequences must be suspended-Nobody would doubt if unauthorized occupants are liable to be evicted but Rule of Law demands that the procedure prescribed for, must be followed.(Para 1 to 13)

The writ petitions are disposed of. (E-6)

List of Cases cited:

Mool Chand Yadav & anr. Vs Raza Buland Sugar Co. Ltd. & ors. (1983) AWC 121

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

1. Heard Sri Iqbal Ahmad and Sri Kishitij Shailendra, learned counsel for the respective petitioners appearing in this petition as well as in connected petitions and Sri P.N. Rai, Sri Aditya Kumar Singh, Sri Ajay Kumar Gautam, Sri Gyanendra Kumar Dwivedi, Sri Hridaya Narayan Mishra, Sri Ram Sarana, Sri Prahlad Singh, Sri Sukhdev Singh, Sri Ishwar Das, Sri Ajay Singh, Sri Arvind Singh, Sri Purnendu Kumar Singh, Akhilesh Kumar Mishra, Sri Ram Kinkar Shukla, Sri Shushil Kumar Pandey, Sri Pranat Chaudhari-I, Sri Ashish Tripathi, and Smt. Archana Srivastava, learned counsel appearing for the respective respondents in all the connected petitions.

2. All these petitions raise common question of law and facts and, therefore, they are being disposed by this common order.

3. The petitioners before this Court are occupants of the premises either as a tenant or licensee of the respondent-railways and the proceedings that have been drawn against them under the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (hereinafter referred to as 'Act, 1971') were claimed to be not as per the procedure prescribed for and hence they have all appealed against the orders passed by the prescribed authority.

4. It is argued before this Court that though appellate authority, namely, District Judge, Moradabad has admitted the appeals

but interim prayer for stay has been rejected on the ground that petitioners were unauthorized occupants. A legal submission has been advanced before this Court that the court of appeal was not justified in assuming their status as unauthorized occupants even before deciding the appeals. It is thus argued that holding appellants - petitioners unauthorized occupants is too harsh and amounts to frustrating the very purpose of filing the appeals.

5. Learned counsel for the petitioners have relied upon the judgment of Supreme Court in the case of **Mool Chand Yadav and another v. Raza Buland Sugar Co. Ltd. and others, 1983 AWC 121.**

6. *Per contra*, it is argued by learned counsel for the respective respondents that unauthorized occupants are said to be removed from the premises in question in compliance of the order passed by the Supreme Court passed in Special Leave Petition (Civil) Diary No (s). 19714 of 2021.

7. Having heard learned counsel for the parties and their arguments raised across the bar, I am of the view that moot question involved is as to whether the petitioners before this Court were entitled to get interim protection during the pendency of the admitted statutory appeals.

8. It is a fact admitted to the respondents Union of India and Railways that in order to get petitioners evicted from the premises in question they instituted cases under the Act, 1971.

9. The Act, 1971 itself provides for statutory remedy of appeal and hence every person if aggrieved against the order of prescribed authority is entitled to appeal against the order of eviction. The appeals being statutory one in nature have been rightly admitted for hearing, but the question remains to be considered is that if occupants get removed/ dispossessed by getting the order of eviction enforced through coercive measures pursuant to the orders which are appealed against, what purpose would be left to get the appeals heard, to wit only academic. In my considered view, this can not be the intendment of Legislature in incorporating a provision of appeal. Remedy of appeal which is statutory in nature can not be rendered as an empty formality.

10. Supreme Court has observed in so many words in the case cited (supra) that the interest of occupants should be looked into and, therefore, interim order should be granted so as to not to defeat very purpose of filing the appeal. Paragraph 4 of the order of Supreme Court runs as under:

"4. We heard Mr. S.N. Kacker, learned Counsel for the appellants, and the respondents appeared by Caveat through Mr. Manoj Swarup, Advocate. We are not inclined to examine any contention on merits at present, but we would like to notice of the emerging situation if the operation of the order under appeal is not suspended during the pendency of the appeal. If the F. A.F.O. is allowed, obviously Mool Chand Yadav would be entitled to continue in possession. Now, if the order is not suspended in order to avoid any action in contempt pending the appeal, Mool Chand would have to vacate the room and handover the possession to the respondents in obedience to the Court's order. We are in full agreement with Mr. Manoj Swarup, learned advocate for respondents, that the Court's order cannot

be flouted and even a covert disrespect to Court's order cannot be tolerated. ***But if orders are challenged and the appeals are pending, one cannot permit a swinging pendulum continuously taking place during the pendency of the appeal, Mr. Manoj Swarup may be wholly right in submitting that there is intentional flouting of the" Court's order. We are not interdicting that finding. But judicial approach requires that during the pendency of the appeal the operation of an order having serious civil consequences must be suspended. More so when appeal is admitted. Previous history of litigation cannot be overlooked. And it is not seriously disputed that the whole of the building, Hari Bhawan, except one room in dispute is in possession of the Corporation. We accordingly suspend the operation of the order dated 6th August 1982 directing the appellants to handover the possession of the room to the respondents till the disposal of the first appeal against that order pending in the High Court of Allahabad. Mr. Manoj Swarup requests that both the earlier and later Appeals should be heard together as early as possible, We order accordingly and request the High Court if it considers proper in its own discretion to hear both the appeals as expeditiously as possible in order to avoid the continuance of the boiling situation. The appeal stands disposed of. There shall be no order as to costs."***

(emphasis added)

11. Nobody would doubt if unauthorized occupants are liable to be evicted but Rule of Law demands that the procedure prescribed for, must be followed.

12. In view of the above, therefore, it would be appropriate that the admitted appeals of the defendants- petitioners are directed to be disposed of within a time bound period and until such decision, the orders of prescribed authority appealed against are put in abeyance.

13. Accordingly, all these petitions are disposed of with a direction to the appellate authority under the Act, 1971 to dispose of the pending appeals of the respective petitioners before it positively within a period of three months from today and petitioners undertake through their respective counsel to cooperate in the disposal of appeal and until such disposal, the effect and operation of the orders passed by the prescribed authority which have been appealed against, shall remain in abeyance.

(2022) 11 ILRA 59
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2022

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Matters U/A 227 No. 8844 of 2022 (Criminal)

Dalveer Singh ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Arvind Prabodh Dubey

Counsel for the Respondents:
C.S.C.

A. Constitution of India, 1950-Article 227-Indian Penal Code, 1860-Sections 419,420 & 406-petitioners with his associates made the victim to believe that he will get them employed in B.S.F.-On this pretext, he extorted money-a forged and fabricated joining letter was provided-

After investigation, I.O. submitted final report, however, the court proceed as a complaint case on the basis of protest petition-Petitioner was summoned after considering the material on record-Defect in the format or form of the protest petition or for the reason that the list of witnesses was not submitted cannot be given importance out of proportion at this stage, if done, it will tantamount to taking too technical view-Hence, no interference requires.(Para 1 to 10)

The writ petition is dismissed. (E-6)

(Delivered by Hon'ble Mrs. Jyotsna Sharma, J.)

1. Heard Sri Arvind Prabodh Dubey, learned counsel for the petitioner and learned AGA for the State.

2. This petition under Article 227 of the constitution has been filed with a request to set aside the order dated 24.09.2021 passed in Criminal Revision No. 143 of 2017 (Tarkeshwar Prasad and Others vs. State of U.P. and Others), Police Station-Cantt, District-Gorakhpur as well as order dated 03.03.2017 passed by the Chief Judicial Magistrate in Complaint Case No. 2861 of 2016 (Prakash vs. Tarkeshwar and Others) under Sections 419, 420, 406 IPC.

3. The facts relevant leading to this petition are as below.

A FIR Case Crime No. 1414 of 2010 was lodged against the petitioner and five other persons with the allegations that the informant-Prakash (respondent no. 2 in the present petition), and the petitioner Dalveer Singh were friendly with each other. Dalveer Singh and his associates made the respondents to believe that he will get them employed in B.S.F. On this pretext, he extorted different amounts from the respondent no. 2, his brother and several other victims (named in the FIR) and the money was deposited in Bank account of Dalveer Singh. They received a joining letter, which turned out to be forged and fabricated. When protested, he assured to return the money and asked them not to take any legal action lest he may not be in a position to return the same, however, after eliciting lot of time on different excuses, Dalveer Singh and his associates ultimately refused to return the amount. In this way, several persons including the informant were cheated of their hard earned lakhs of rupees. On the basis of this FIR, the investigation was conducted, however, the investigating officer was of the opinion that the real dispute was something else and submitted a final report. Against the final report, a protest petition was filed by the respondent no. 2-Prakash. The petition was ordered to be registered as a complaint case. The statement under Sections 200 and 202 Cr.P.C., were recorded and the learned trial court passed a summoning order dated 03.03.2017 under Section 419, 420, 467, 468, 471, 406, 323, 504 and 506 IPC. This summoning order was challenged by Dalveer Singh-the petitioner and one Tarkeshwar Prasad by filing a Criminal Revision No. 143 of 2017, however, the same was dismissed by order dated 24.09.2021 and the order of the trial court was affirmed. Against the order passed by the revisional court, the petitioner has come before this Court under Article 227.

4. It is contended on behalf of the petitioner that in fact respondent no. 2 took a loan of Rs. 5,00,000/- from the petitioner and he wanted to avoid its repayment, therefore, the petitioner has been falsely implicated in this case; the revisional court without appreciating the arguments of the

petitioner, dismissed the revision and affirmed the order of the trial court; the revisional court failed to see that the trial court passed the summoning order in a routine and arbitrary manner and without properly appreciating the evidence on record; the revisional court failed to appreciate the evidence collected by the investigating officer to the effect that the case of the informant was false and concocted.

5. Apart from arguing on some factual aspects of the case, two legal points have been raised. **Firstly**, that a protest petition cannot be treated as a complaint unless it fulfills the requirements of a complaint as defined under Section 2(d) of Cr.P.C., therefore, the order is bad in law. **Secondly**, that there was no list of witnesses which was must with the protest petition, therefore, the protest petition cannot be treated as a complaint and the trial court was wrong in proceeding on the basis of such complaint/protest petition.

6. It is settled law that after investigation, when a final report is submitted, the Court has several options open. Where the Court, instead of rejecting the final report, decides to proceed in the matter on the basis of protest petition treating it as a complaint, in my view, it cannot be expected from the informant that he should have foreseen such an option being adopted and he should have referred to all the facts as is required where the complainant decides to file a complaint case directly.

7. Clause (d) of Section 2 of Cr.P.C., defines the complaint as an allegation made orally or in writing to a Magistrate under this Code. No particular format of complaint has been given in the Code of Criminal Procedure. **The only requirement is that the allegations should be there and such allegations should be made with a view to mobilize the authority of the Magistrate or the Court for taking action against the offenders.** It may also be noticed that the complaint may be made orally also. It stands to reason that when a trial court is proceeding on a protest petition, there must be material, which is sufficient enough to enable the Court to proceed against the accused persons. There is no provision in law that at such stage the Magistrate is powerless to look into and evaluate the evidence as collected by the Investigating Officer. In certain cases, there may be good reasons prompting the Magistrate to not to proceed as police case. Some of the reasons may be that investigation is deficient as some of the evidence whether oral or documentary is not collected or if collected, is not appreciated in the right perspective by the Investigating Officer or the manner of questioning the witnesses may have been faulty and may be some other facts and circumstances, which cannot be enumerated or foreseen here. Further there may be instances where the Court agrees with the Police report whether it is a chargesheet or a final report partly and partly not. Now, the question may arise whether the Court, while deciding not to proceed as a Police case on the basis of protest petition instead decides to proceed as a complaint case albeit on the basis of same protest petition, transgresses its powers in taking notice of the evidence collected during the investigation? This fact cannot be under estimated that even if a final report is submitted by the Investigating Officer for some good or not so good reason, the spot inspection, the postmortem report, the medical examination report, the recovery of blood

stained earth or blood stained clothes or weapon of offence, even the FIR or any other material collected during the investigation may be of great assistance to the Courts. It may importantly be noticed that where the Magistrate proceeds in a complaint case, he has powers to order for police investigation, if required, under Section 202 Cr.P.C. In my view, if he already has such material which could have been collected, if he chose to exercise such powers under Section 202 Cr.P.C., then how can he be expected to look sideways and ignore the material already available before him. The law cannot be interpreted in such a manner so as to thwart justice. The goal of all procedural laws is attainment of justice or at least illuminate the path to attain such a goal. A police report under Section 173(2) Cr.P.C. is within his ken, as it forms part of material on record. In my firm opinion, it can be put to good use for the purpose of summoning the accused. The Courts are concerned with substantive justice rather than with the form or technicality or procedural formalities. Obviously, on the other hand, if the material before the Court, which may include the evidence collected by the Investigating Officer and other papers are deficient in some respect or which fail to give complete picture of the case, the Court may decide not to proceed. In my opinion, if the allegations, as contained in the protest petition coupled with material on record are sufficient to enable the Court to proceed, the such course of action cannot be faulted on technical grounds.

8. Section 204(2) Cr.P.C. which deals with issuing of process in criminal case is as below:-

"No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed."

As far as the lack of list of witness is concerned, it is always open for the Court to call for the same and take suitable action either refusing to proceed further or passing some other appropriate order in terms of provisions of Section 204(2) Cr.P.C.The proceeding cannot be quashed on this technicality.

9. It is settled proposition of law that while exercising supervisory jurisdiction under Article 227, the High Court will not convert itself in the Court of appeal and indulge in re-appreciation or re-valuation of evidence or correct errors of formal or technical character. The High Court may decide to intervene where non-intervention may result in travesty of justice or where such refusal would result in prolongation of the litigation. The underlying policy is that the Courts should remain within their legal bounds for the sake of orderly administration of justice. The powers, for good reasons are to be exercised sparingly when the ends of justice, in the peculiar fact and circumstances of the case, so demand.

10. In view of the scope of powers, as available under Article 227 of the Constitution, no case is made out for such interference. It may be noted that as per the allegations in the FIR, not only large amount of money was siphoned out from the victim-respondent no. 2, but it was so meticulously planned that a forged order of appointment was also issued. Though, after investigation, the Investigating Officer submitted a final report, however, the Court decided to proceed as a complaint case on the basis of protest petition. It may also be noted that the petitioner has been summoned in the case after considering the

oral statement recorded under Sections 200 and 202 Cr.P.C. and other material on record. Defect in the format or form of the protest petition or for the reason that the list of witnesses was not submitted cannot be given importance out of proportion at this stage. If done, it will tantamount to taking too technical a view. In my opinion, no ground for interference under Article 227 is made out, hence the petition is **dismissed.**

11. Let copy of this order be certified to the court concerned.

(2022) 11 ILRA 63
ORIGINAL JURISDICTION
CIVILL SIDE
DATED: ALLAHABAD 21.09.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Writ A No. 595 of 2022

Smt. Luxmi Devi & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Krishna Mohan Misra

Counsel for the Respondents:
C.S.C., Sri Jai Bahadur Singh

A. Service Law – Disciplinary Proceedings - U.P. Cooperative Societies Employees Service Regulations, 1975 - Civil Services Regulations - Article 351-A - In the absence of any provision in the Regulations governing the service of an employee providing for continuation of disciplinary proceedings after retirement, the respondent cannot continue the disciplinary proceedings after the employee's superannuation. (Para 10)

There was no provision in the U.P. Cooperative Societies Employees Service Regulations, 1975 for initiation of disciplinary proceedings against retired employees or for continuing disciplinary proceedings even when they started before retirement of the employee concerned. Late Ram Nazar Singh retired on 31.07.2018. At that time, there was no provision in the Cooperative Societies Employees Service Regulations, 1975 for initiation of disciplinary proceedings against retired employees. (Para 5)

B. The husband of the petitioner was on a non pensionable post and therefore, any Regulation which permits the respondents to initiate disciplinary proceedings for recovery from pension and other retrial dues of such an employee including Article 351-A of the Civil Services Regulations shall not be applicable. The Court also held that contesting respondent was entitled to interest on the amount payable to him. (Para 7, 12)

C. The disciplinary proceedings initiated is without jurisdiction - The St. of U.P., notified the XXII Amendment to the Regulations of 1975 but it provided the date of enforcement as the date of publication in the Gazette. Publication was made only on 27.08.2018 in the official Gazette. Hence, **no retrospective operation can be given to the Regulations and the Registrar could not have given sanction on 09.02.2021 for initiation of disciplinary proceedings against the husband of the petitioner no. 1.** (Para 11)

The amendment which was carried out in the Regulations of 1975 was notified only on 27.08.2018 and was made applicable with immediate effect. Hence no retrospective operation can be given in the case of the husband of the petitioner no. 1. The disciplinary proceedings initiated against late husband of the petitioner no. 1 is without jurisdiction as he retired on 31.07.2018 much before the amendment in the Regulation was notified with prospective effect. (Para 9, 13)

Writ petition allowed. (E-4)

Precedent followed:

1. Dev Prakash Tiwari Vs U.P. Cooperative Institutional Service Board, Lucknow & ors., (2014) 7 SCC 260 (Para 5)

2. Brahmanand Tyagi Vs St. of U.P. & ors., 2022 (8) ADJ 624 (Para 7)

3. Rajya Krishi Utpadan Mandi Parishad & anr. Vs Public Services Tribunal, U.P. & ors., 2008 (2) ADJ 11 (Para 7)

4. Bhagirathi Jena Vs Orissa St. Financial Corporation, (1999) 3 SCC 666 (Para 10)

Present petition assails order dated 16.10.2021, passed by Chief Executive Officer, Fatehpur District Cooperative Bank Ltd., Fatehpur.

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. Heard learned counsel for the petitioners and Sri Jai Bahadur Singh, learned counsel who appears on behalf of the respondent nos.2 and 3.

2. This petition has been filed by the petitioners who are the widow and son of Late Ram Nazar Singh challenging the order dated 16.10.2021 passed by the Chief Executive Officer, Fatehpur District Cooperative Bank Ltd. Fatehpur and praying for direction to be issued to the respondent-Bank to release post retiral benefits of the deceased employee with admissible interest.

3. It is the case of the petitioner that they are legal heirs of late Ram Nazar Singh who retired as a Grade-II employee of Fatehpur District Cooperative Bank Ltd. Fatehpur on 31.07.2018. At the time of his retirement, he was not placed under suspension and no charge-sheet was issued to him and no disciplinary proceedings were proposed against him. On 27.08.2018, an amendment was carried out in the U.P. Cooperative Societies Employees Service Regulations, 1975 by which Regulations 85 was amended and sub-Regulations (XI) and (XII) were added by which Rules regarding disciplinary proceedings after retirement of an employee, shall be applicable for employee of Cooperative Societies as were applicable to the retired employees of the State Government and the sanction was to be obtained not from His Excellency the Governor of U.P., but from the Registrar who was the Competent Authority to initiate disciplinary proceedings against such retired employees.

4. On 02.02.2021, the respondent-Bank appointed an Inquiry Officer and on 24.02.2021, charge-sheet was served upon the husband of the petitioner no.1. He replied to the charge-sheet but the disciplinary proceedings remained pending and the husband of the petitioner no.1 died on 02.09.2021. The inquiry report was submitted much after the death of the deceased employee on 30.09.2021. No show cause notice was issued to the deceased employee regarding proposed punishment as he was not alive and the punishment order was issued on 16.10.2021 based on the resolution of the Committee of Management dated 05.10.2021 by which it was resolved to recover an amount of Rs.11,80,363/- along with interest from the retiral dues of late Ram Nazar Singh as he was found guilty of causing loss to the Society.

5. Learned counsel for the petitioners has submitted that late Ram Nazar Singh retired on 31.07.2018. At that time, there was no provision in the Cooperative Societies Employees Service Regulations, 1975 for initiation of disciplinary proceedings against retired employees. This question has been settled finally by the Supreme Court in the judgment rendered in

Dev Prakash Tewari Vs. U.P. Cooperative Institutional Service Board, Lucknow and others, [(2014) 7 SCC 260] where the Supreme Court observed that there was no provision in the U.P. Cooperative Societies Employees Service Regulations, 1975 for initiation of disciplinary proceedings against retired employees or for continuing disciplinary proceedings even when they were started before retirement of the employee concerned.

6. It has also been argued by learned counsel for the petitioners that in case of late Ram Nazar Singh, no disciplinary proceedings were initiated before his retirement. The amendment in the Service Regulations came to be notified only on 27.08.2018 with immediate effect. They were not retrospective in nature. Hence they could not be made to apply to an already retired employee. The Inquiry Officer being appointed on 02.02.2021 and charge-sheet being served on 24.02.2021 was completely without jurisdiction. Although the respondents say in their counter affidavit that the Registrar the Competent Authority under the amended Regulations had issued an order granting sanction for initiation of disciplinary proceedings after retirement of late Ram Nazar Singh, a perusal of the order referred to in the counter affidavit as CA-1 dated 09.02.2021 would show that the Registrar had initially raised a doubt regarding the admissibility of initiation of disciplinary proceedings.

7. It has also been argued by learned counsel for the petitioners that the husband of the petitioner was on a non pensionable post and therefore, any Regulation which permits the respondents to initiate disciplinary proceedings for recovery from pension and other retiral dues of such an employee including Article 351-A of the Civil Services Regulations shall not be applicable. Learned counsel for the petitioners has placed reliance upon a coordinate Bench decision in **Brahamand Tyagi Vs. State of UP. and others [2022 (8) ADJ 624]** where the coordinate Bench had placed reliance upon a Division Bench judgment of this Court in **Rajya Krishi Utpadan Mandi Parishad and another Vs. Public Services Tribunal, U.P. and others [2008 (2) ADJ 11].**

8. It has been argued by Sri J.B. Singh, learned counsel appearing on behalf of the respondents that the Competent Authority for issuance of sanction for initiation of disciplinary proceedings against late Ram Nazar Singh, is the Registrar of the Cooperative Society and he had already given consent in the matter. A copy of such order passed on 09.02.2021 has been filed as Annexure-1 to the counter affidavit. Learned counsel for the respondents has referred to the amendment carried out in the U.P. Cooperative Societies Employees Service Regulations, 2018 by the XXII Amendment making applicable Article 351-A of the Civil Services Regulation to the employees of Cooperative Societies. It has also been argued by learned counsel for the respondents that the Regulations were amended on 27.08.2018 and in the said amendment, there was no bar for initiating disciplinary proceedings against the retired employees who had caused loss to the Cooperative Society.

9. Learned counsel for the petitioners in rejoinder has submitted that the amendment which was carried out in the Regulations of 1975 was notified only on 27.08.2018 and was made applicable with immediate effect. Hence no retrospective operation can be given in the case of the husband of the

petitioner no.1 and the judgment rendered by the Supreme Court in the case of **Dev Prakash Tewari (supra)** shall squarely applly as at the time of retirement, there was no Regulation permitting such initiation of disciplinary proceedings or their continuation.

10. This Court has carefully considered the judgment rendered by the Supreme Court in **Dev Prakash Tewari (supra)** where the Supreme Court had followed the judgment rendered by it earlier in **Bhagirathi Jena Vs. Orissa State Financial Corporation [(1999) 3 SCC 666]** where it was held that in the absence of any provision in the Regulations governing the service of an employee providing for continuation of disciplinary proceedings after retirement, the respondent cannot continue the disciplinary proceedings after the employee's superannuation.

11. The State of U.P., no doubt notified the XXII Amendment to the Regulations of 1975 but it provided the date of enforcement as the date of publication in the Gazette. Publication was made only on 27.08.2018 in the official Gazette. Hence, no retrospective operation can be given to the Regulations and the Registrar could not have given sanction on 09.02.2021 for initiation of disciplinary proceedings against the husband of the petitioner no.1.

12. This Court has also considered the Division Bench judgment in the case of **Rajya Krishi Utpadan Mandi Parishad (supra)**, while placing reliance upon the judgment rendered in **Bhagirathi Jena (supra)**, the Division Bench observed that the post of contesting respondent being non pensionable, Article 351-A of Civil Services Regulation was not applicable. After the date of superannuation, the disciplinary proceedings could not go on in the absence of any specific provision. The Court also held that contesting respondent was entitled to interest on the amount payable to him.

13. Having considered the judgments rendered by this Court and by the Supreme Court and the facts as mentioned in the pleadings on record regarding which there is no dispute, this Court is of the considered opinion that the disciplinary proceedings initiated against late husband of the petitioner no.1 is without jurisdiction as he retired on 31.07.2018 much before the amendment in the Regulation was notified with prospective effect.

14. The proceedings initiated against late Ram Nazar Singh being without jurisdiction are liable to be quashed and are quashed. The writ petition is **allowed.**

15. Consequential benefits shall be available to the petitioners. Recovery of Rs.11,80,363/- from the gratuity and other services benefits of late Ram Nazar Singh, if the same has been deducted, shall be refunded to the petitioners along with 6% compound interest as had the amount been deposited in a Bank by the petitioners on its receipt in time, they would have been entitled to bank's rate of interest on such deposit.

(2022) 11 ILRA 66
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.09.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Writ A No. 8474 of 2021

Om Pal Singh ...Petitioner
Versus
Meerut Development Authority & Ors. ...Respondents

Counsel for the Petitioner:
Sri Adarsh Singh, Sri Indra Raj Singh

Counsel for the Respondents:
C.S.C., Sri Jagannath Maurya, Sri Rajesh Kumar Pandey

A. Service Law – Recovery of excess payment - Recovery from Class-III and Class-IV employees much after the date of their retirement for any excess payment made to them during their course of service would be inequitable. (Para 5)

The Supreme Court in the case of *St. of Haryana* Vs *Jagdev Singh (infra)* has permitted recovery of excess payment to employees **if at the time of pay fixation an undertaking was given by them that the authorities would be free to recover any excess payment made to them when discovered subsequently.** (Para 8)

It is not the case of the Meerut Development Authority that any undertaking was sought from the petitioner or was given by him at the time of his initial pay fixation as far back as in 1986, when the Revenue Department's Lekhpal pay scale of Rs. 950-1,500/- was given to him, and consequently, next promotional pay scale of higher pay scale were also given to him. **The excess payment if any paid to the petitioner due to the fault on the part of the Authority themselves without any misrepresentation of fraud having been played by the petitioner cannot be now recovered from him.** (Para 9)

The impugned order of recovery is set aside. The already recovered amount shall be refunded to the petitioner…However, it shall be open for the respondent to give him revised pension as per the correct pay fixation by issuing revised Pension Payment Order. (Para 10, 11)

Writ petition allowed. (E-4)

Precedent followed:

1. St. of Punjab & ors. Vs Rafiq Masih, AIR 2015 SC 796 (Para 5)

2. Thomas Daniel Vs of Kerala, 2022 SCC Online SC 536 (Para 9)

Precedent distinguished:

1. St. of Har. Vs Jagdev Singh 2016 (14) SCC 267 (Para 8)

Present petition assails order dated 17.05.2019, passed by Officer-in-Charge (Establishment), Meerut Development Authority, Meerut and order dated 03.06.2019, passed by Finance Controller, Officer-in-Charge (Establishment), Meerut Development Authority, Meerut.

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. Heard learned counsel for the petitioner, Sri Rajesh Kumar Pandey, learned counsel appearing on behalf of the Respondents No. 1 to 3 and learned Standing Counsel appearing on behalf of the State Respondents No. 4 and 5.

2. This petition has been filed by the petitioner challenging the Order dated 17.05.2019 passed by the Respondents No.2 and the Order dated 03.06.2019 passed by the Respondent No.3.

3. It is the case of the petitioner that he was appointed on the post of Lekhpal on 16.10.1978 in Meerut Development Authority and after completing 36 years and 8 months of service, retired on 30.06.2015. The respondent no. 2 approved the grant of Gratuity, GPF and Leave Encashment dues to the petitioner by his order dated 29.06.2015. However, it appears that an audit team was constituted which conducted an audit of the Meerut Development Authority of the Financial Year 2013-14 and submitted an objection with regard to payment of excess salary to the petitioner on account of wrong pay

fixation made by the department. On account of such audit objection, it was reported that Rs. 7,08,502/- had been paid in excess to the petitioner as salary and alowgwith allowances. The total amount paid in excess came out to be Rs. 10,43,724/-. Such audit objections were directed by the Vice Chairman, Meerut Development Authority to be examined by a Committee by his order dated 31.01.2018. The Committee also submitted a report on 16.03.2019 saying that the petitioner was appointed in the Development Authority, he could not have been given the salary of Lekhpal as admissible to the Revenue Department, and therefore, recommended the audit objections to be accepted and consequent revision in pay and allowances and final pension payment order to be made and the excess payment to be recovered from the retiral dues of the petitioner. As a result of such report being submitted on 16.03.2019, an order dated 17.05.2019 was passed by the respondent no.2 directing recovery of Rs. 10,43,724/- from the Gratuity and Leave Encashment of the petitioner. Consequently, recovery was made of Rs.8,43,025/- from the Gratuity and Leave Encashment dues of the petitioner, but Rs.02,00,699/- remained to be adjusted for which a recovery order was passed on 03.06.2019 by the Respondent No.3 directing the petitioner deposit such amount of Rs.02,00,699/- in the Meerut Development Authority or else the same may be recovered by the Meerut Development Authority by other means.

4. It has been argued by the learned counsel for the petitioner that the respondent no. 1 proceeded to fix final pension of the petitioner by making amendment in the provisional pension being granted to the petitioner and reduce the amount of pension from Rs.10,075 to Rs.7,505/- retrospectively w.e.f. 01.07.2015. The petitioner is a retired Class-III employee, who has been made to suffer by the Respondents Authority without any fault on his part by recovering the excess amount paid to him from his pension, Gratuity and other retirement dues.

5. It has been argued that the Hon'ble Supreme Court in the case of ***State of Punjab and Others Vs. Rafiq Masih, AIR 2015 Supreme Court 796*** has observed that recovery from Class-III and Class-IV employees much after the date of their retirement for any excess payment made to them during their course of service would be inequitable.

6. It has also been argued by the learned counsel for the petitioner that this Court in Writ-A No. 14330 of 2019, 'Suresh Chandra vs. State of U.P. and 4 Others', relating to an identically situated Lekhpal in Meerut Development Authority had allowed the Writ Petition on 11.07.2022 by referring to the observations made by the Hon'ble Supreme Court in the case of State of *Punjab and Others Vs. Rafiq Masih* (Supra), a copy of the order dated 11.07.2022 passed by the Coordinate Bench in the case of *Suresh Chandra* has been filed by the petitioner before this Court by way of an amendment application.

7. The Meerut Development Authority in its counter affidavit has mentioned about the audit objections and the constitution of the committee by the Vice Chairman by its order dated 17.09.2018 which committee found that the then Vice Chairman by his order dated 15.11.1994, without taking any approval from the Government had implemented the pay scale of Rs. 950-1,500/- which was a pay scale of Lekhpal of Revenue Department to

Lekhpals of Meerut Development Authority actually they should have been given pay scale of Rs.825-1,200/- only. The petitioner was thereafter given promotional pay scale of Tax and Revenue Officer of the Revenue Department of Rs. 1,350-2200/- instead of promotional pay scale of Tax and Revenue Officer of the Meerut Development Authority which was only Rs.975-1,660/-. The petitioner was again granted second promotional pay scale of Naib Tehsildar of Revenue Department of Rs. 5,500-9,000/- instead of next pay scale of Rs.4,000-6,000/- as was admissible for employees of Meerut Development Authority. Such pay scales were given to the petitioner without taking sanction from the Government, therefore, the Department of Local Funds, Audit & Accounts raised an objection and recommended recovery of Rs. 07,08,502/- from the petitioner paid in excess. In consequence of the recommendations of the committee formed by the Vice Chairman and Government Order dated 20.07.2018, the Pension Payment Order of the petitioner has been revised and the amount paid in excess has been recovered from his Gratuity and Leave Encashment dues. The remaining amount is yet to be recovered, and therefore, the recovery order has been issued by the respondent no.3.

8. Learned counsel for the State Respondents has argued that the Supreme Court in the case of ***State of Haryana vs. Jagdev Singh 2016 (14) SCC 267*** has permitted recovery of excess payment to employees if at the time of pay fixation an undertaking was given by them that the authorities would be free to recover any excess payment made to them when discovered subsequently.

9. However, it is not the case of the Meerut Development Authority that any undertaking was sought from the petitioner or was given by him at the time of his initial pay fixation as far back as in 1986, when the Revenue Department's Lekhpal pay scale of Rs 950-1,500/- was given to him, and consequently, next promotional pay scale of higher pay scale were also given to him. In view of the observations made by the Supreme Court in the case of ***State of Punjab and Others Vs. Rafiq Masih(White Washer) and Others, AIR 2015 Supreme Court 796*** and also in the case of ***Thomas Daniel Vs. State of Kerala 2022 SCC Online SC 536,*** wherein the excess payment if any paid to the petitioner due to the fault on the part of the Authority themselves without any misrepresentation of fraud having been played by the petitioner cannot be now recovered from him.

10. The impugned order of recovery is ***set aside.*** However, it shall be open for the respondent to give him revised pension as per the correct pay fixation by issuing revised Pension Payment Order.

11. The Writ Petition is ***allowed*** to this extent. The already recovered amount shall be refunded to the petitioner within a period of two months from the date a copy of this order is produced before them.

(2022) 11 ILRA 69
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.11.2022

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ A No. 9789 of 2022

The U.O.I. & Ors. ...Petitioners
Versus
Subachan Ram Pr. Commissioner of Income Tax, Prayagraj & Anr.
...Respondents

Counsel for the Petitioners:
Sri Krishna Agarawal, A.S.G.I.

Counsel for the Respondents:
Sri Anil Kumar Srivastava

Civil Law - Central Civil Services (Conduct)Rules 3(i)(i), 3(i)(ii), 3(i)(iii), 3(i)(xviii) 3(i)(xxi): The substance of the charge is the acceptance of the additional evidence - judgment while holding the charge in quasi judicial -first charge-sheet was quashed by the Tribunal and also does not dispute that the second charge-sheet was issued on the same inspection report on the basis of which first charge-sheet was issued.

Writ dismissed. (E-9)

List of Cases cited:

1.U.O.I. Vs K. K. Dhawan reported in 1993 (2) SCC 56

2. Zunjarrao Bhikaji Magarkar Vs U.O.I. & others reported in 1997 (7) SCC 409

3. V.D. Trivedi Vs U.O.I. [(1993) 2 SCC 55]

4. U.O.I. Vs R.K. Desai [(1993) 2 SCC 49

5. U.O.I. Vs A.N. Saxena [(1992) 3 SCC 124

6. S.Govinda menon Vs U.O.I. [AIR 1967 SC 1274]

7. M. S. Bindra Vs U.O.I., reported in 1998 (7) SCC 310

(Delivered by Hon'ble Pritinker Diwaker, J.
&
Hon'ble Ashutosh Srivastava, J.)

1. Heard learned Assistant Solicitor General of India assisted by Sri Krishna Agrawal, learned counsel for the petitioners and Sri Anil Kumar Srivastava, learned counsel for the Respondent No.1

2. The present writ petition has been filed for quashing of the judgment and order dated 09.03.2022 passed by the Central Administrative Tribunal, Allahabad Bench, Allahabad, whereby and wherein the Tribunal has allowed the Original Application filed by the Respondent No.1 and quashed the impugned order dated 14.12.2020 bearing No.C-14011/75/2020-V & LK and held that the applicant therein/Respondent No.2 would be entitled to all consequential benefits which arise out of the quashing of the above mentioned charge-sheet.

3. Learned Assistant Solicitor General of India submitted that the Tribunal failed to consider the fact that the charge-sheet was issued in view of the gravity of the violation of the Central Board of Direct Taxes Circular while passing the order in the capacity of the Commissioner (Appeals). The learned Senior counsel contended that the act of the Respondent No.1 in the capacity of the Commissioner (Appeals) even though in his quasi-judicial capacity, clearly falls within the meaning of misconduct as construed under Central Civil Services (Classification, Control and Appeal) Rules, 1965, and is covered by the judgment rendered by the Apex Court in the case of ***Union of India Vs. K. K. Dhawan,*** wherein the Apex Court has held that any act or conduct either in the judicial or quasi-judicial capacity, which is contrary to the established law or rules, could invite action under the relevant disciplinary rules and the person concerned would be liable for the disciplinary action. The learned Senior Counsel further submitted that the allegation against the Respondent No.1, as mentioned in the Article of charges are serious in nature causing financial loss to the Government. The Charge No.1 of the article of charge clearly establishes that the

Respondent No.1 gave the tax remission to the party in litigation contrary to the CBDT Circular which expressly prohibited giving benefit of sales promotion to the pharmaceuticals companies and further points out that so far as second article of charge is concerned, the Respondent No.1 deliberately reduced number of shares below 10% held by one Anand Sagar in the Assessment Year 2011-12 by taking additional evidence. The learned Senior Counsel submitted that the Enquiry Officer was already appointed and the right course available with the Respondent No1. was to face the enquiry and absolve himself during the course of the proceedings.

4. The learned counsel for the Respondent No.1 contended that the Central Administrative Tribunal has passed a just and legal order. He further contended that the Respondent No.1 was earlier issued charge-sheet on the basis of the same inspection report which was quashed by the Tribunal in Original Application No.1466 of 2020 (Subachan Ram Vs. Union of India & Others) vide judgment and order dated 24.12.2020. Issuing second charge-sheet on the basis of the same inspection report on the verge of the retirement is clearly malicious.

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

6. We find from the records that the Respondent No.1 was issued a charge memo on 09.09.2020 while serving as Principal Commissioner of Income Tax at Prayagraj, for committing misconduct as the then Commissioner of Income Tax (Appeal) - 4, Mumbai. The said charge-sheet was assailed before the Central Administrative Tribunal, Allahabad, and the Tribunal vide judgment and order dated 24.12.2020 quashed the said charge-sheet technically and allowed the original application filed by the Respondent No.1. Thereafter, before 15 days of his retirement i.e. 14.12.2020, the second charge-sheet was issued to the Respondent No.1 on the basis of the same vigilance inspection report on which the first charge-sheet was issued. The charge-sheet was assailed before the Tribunal, which allowed the original application and quashed the charge-sheet dated 14.12.2020, against which present writ petition has been filed.

7. The learned Senior Counsel, ASGI submits as under:-

(i) The Tribunal committed mistake in entertaining the original application though the same was not maintainable before the Central Administrative Tribunal, Allahabad.

(ii) The Tribunal failed to consider the ratio of the judgment of the Apex Court rendered in ***Union of India Vs. K. K. Dhawan reported in 1993 (2) SCC 56.***

(iii) The Tribunal failed to appreciate the fact that charges leveled in the article of charges and therefore, it should have refrained from quashing the charge-sheet under judicial review.

(iv) Lastly, it is submitted that the respondent is charged for violation of Rules 3(i)(i), 3(i)(ii), 3(i)(iii), 3(i)(xviii) and 3(i)(xxi) of the Central Civil Services (Conduct) Rules, 1964. Therefore, if the conduct of the respondent could be brought within the scope of the Rules, immunity from the disciplinary action cannot be claimed.

8. In light of the above discussions, we proceed to examine the said contentions. So far as the Contention No.1,

regarding maintainability of the original application is concerned, Rule-6 of the Central Administrative Tribunal (Procedure) Rules, 1987, provides for the place of filing of the original application.

"6. Place of filing applications.--

(1) An application shall ordinarily be filed by an applicant with the Registrar of the Bench within whose jurisdiction--

(i) the applicant is posted for the time being, or

(ii) the cause of action, wholly or in part, has arisen :

Provided that with the leave of the Chairman the application may be filed with the Registrar of the Principal Bench and subject to the orders under section 25, such application shall be heard and disposed of by the Bench which has jurisdiction over the matter.

(2) Notwithstanding anything contained in sub-rule (1) persons who have ceased to be in service by reason of retirement, dismissal or termination of service may at his option file an application with the Registrar of the Bench within whose jurisdiction such person is ordinarily residing at the time of filing of the application. "

9. Rule 6 of Sub Rule 2, provides that person, who has ceased to be in service by reason of retirement may at his option file and application with the Registrar of the Bench within whose jurisdiction such person is ordinarily residing at the time of filing of the application. In the instant case the Respondent No.1 is residing in District Ballia, State of U.P., within the jurisdiction of the Tribunal, and as such the contention that the original application is not maintainable, merits no consideration.

10. The second contention that the Tribunal did not consider the ratio as laid down in K.K. Dhawan's Case also merits no consideration in as much as the decision in K K. Dhawan (Supra) was taken note of by the Apex Court in the case of ***Zunjarrao Bhikaji Magarkar Vs. Union of India & others,*** decided on 06.08.1999, reported in ***1997 (7) SCC 409*** and the Apex Court observed as under:-

"In Union of India vs. K.K. Dhawan [(1993) 2 SCC 56) respondent was working as Income Tax Officer. A charge Memorandum was served on him that it was proposed to held an inquiry against him under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965. In the statement of article of charge framed against him, it was alleged that he completed assessment of nine firms in "an irregular manner, in undue haste and apparently with a view to conferring undue favour upon the assesses concerned". An application filed by the respondent against the proposed action was allowed by the Central Administrative Tribunal and it was held that orders passed by the respondent as Income Tax Officer were quasi judicial and could not have formed the basis of disciplinary action. Charge Memorandum was, thus, set aside. The question before this Court was whether an authority enjoyed immunity from disciplinary proceedings with respect to matters decided by him in exercise of quasi judicial functions. After examining the early decisions of this Court in V.D. Trivedi vs. Union of India [(1993) 2 SCC 55]; Union of India vs. R.K. Desai [(1993) 2 SCC 49]; Union of India vs. A.N. Saxena [(1992) 3 SCC 124]and also in S. Govinda menon vs. Union of India [AIR 1967 SC 1274] this Court held as under :

"Certainly, therefore, the officer who exercises judicial or quasi judicial powers acts negligently or recklessly or in order to confer undue favour on a person is not acting as a Judge. Accordingly, the contention of the respondent has to be rejected. It is important to bear in mind that in the present case, we are not concerned with the correctness or legality of the decision of the respondent but the conduct of the respondent in discharge of his duties as an officer. The legality of the orders with reference to the nine assessments may be questioned in appeal or revision under the Act but we have no doubt in our mind that the Government is not precluded from taking the disciplinary action for violation of the Conduct Rules. Thus, we conclude that the disciplinary action can be taken in the following cases :

(i) Where the officer had acted in a manner as would reflect on his reputation for integrity or good faith or devotion to duty;

(ii) if there is prima facie material to show recklessness or misconduct in the discharge of his duty;

(iii)if he has acted in a manner which is unbecoming of a Government servant;

(iv) if he had acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers;

(v) if he had acted in order to unduly favour a party;

(vi) if he had been actuated by corrupt motive, however, small the bribe may be because Lord Coke said long ago "though the bribe may be small yet the fault is great".

The instances above catalogued are not exhaustive. however, we may add that for a mere technical violation or merely because the order is wrong and the action not falling under the above enumerated instances, disciplinary action is not warranted. Here, we may utter a word of caution. Each case will depend upon the facts and no absolute rule can be postulated."

11. Thus, it is not in dispute that the disciplinary proceedings cannot be initiated, however, for to ram an Officer with the label "doubtful integrity" as sought to be raised by the learned Assistant Solicitor General of India, as summed up in Point No.(iii) and (iv), there should be some evidence or material to reach at such a conclusion. In ***M. S. Bindra Vs. Union of India, reported in 1998 (7) SCC 310,*** the Apex Court has held as under:-

"The appellant was served with an order of compulsory retirement. His challenge to this order did not find favour with the Central Administrative Tribunal. On appeal to this Court it was observed that judicial scrutiny of any order imposing premature compulsory retirement is permissible if the order is rather arbitrary or mala fide or if it is based on no evidence. Then this Court observed as under :

"While viewing this case from the next angle for judicial scrutiny, i.e., want of evidence or material to reach such a conclusion, we may add that want of any material is almost equivalent to the next situation that from the available materials, no reasonable man would reach such a conclusion. While evaluating the materials, the authority should not altogether ignore the reputation in which the officer was held till recently. The maxim "nemo firut repente turpissimus" (no one becomes dishonest all of a sudden) is not unexceptional but still it is a salutary guideline to judge human conduct, particularly in the field of

administrative law. The authorities should not keep their eyes totally closed towards the overall estimation in which the delinquent officer was held in the recent past by those who were supervising him earlier. To dunk an officer into the puddle of "doubtful integrity", it is not enough that the doubt fringes on a mere hunch. That doubt should be of such a nature as would reasonably and consciously be entertainable by a reasonable man on the given material. Mere possibility is hardly sufficient to assume that it would have happened. There must be preponderance of probability for the reasonable man to entertain doubt regarding that possibility. Only then there is justification to ram an officer with the lable "doubtful integrity".

12. Rule 3 (i) of the Central Civil Services (Conduct) Rules, 1964 states that every government servant shall at all time:-

(i) maintain absolute integrity;

(ii) maintain devotion to duty; and

(iii) do nothing which is unbecoming of a Government servant.

(iv) commit himself to and uphold the supremacy of the Constitution and democratic values;

(v) defend and uphold the sovereignty and integrity of India, the security of the State, public order, decency and morality;

(vi) maintain high ethical standards and honesty;

(vii) maintain political neutrality;

(viii) promote the principles of merit, fairness and impartiality in the discharge of duties;

(ix) maintain accountability and transparency;

(x) maintain responsiveness to the public, particularly to the weaker section;

(xi) maintain courtesy and good behaviour with the public;

(xii) take decisions solely in public interest and use or cause to use public resources efficiently, effectively and economically;

(xiii) declare any private interests relating to his public duties and take steps to resolve any conflicts in a way that protects the public interest;

(xiv) not place himself under any financial or other obligations to any individual or organisation which may influence him in the performance of his official duties;

(xv) not misuse his position as civil servant and not take decisions in order to derive financial or material benefits for himself, his family or his friends;

(xvi) make choices, take decisions and make recommendations on merit alone;

(xvii) act with fairness and impartiality and not discriminate against anyone, particularly the poor and the under-privileged sections of society;

(xviii) refrain from doing anything which is or may be contrary to any law, rules, regulations and established practices;

(xix) maintain discipline in the discharge of his duties and be liable to implement the lawful orders duly communicated to him;

(xx) maintain confidentiality in the performance of his official duties as required by any laws for the time being in force, particularly with regard to information, disclosure of which may prejudicially affect the sovereignty and integrity of India, the security of the State, strategic, scientific or economic interests of the State, friendly relation with foreign countries or lead to incitement of an offence or illegal or unlawful gain to any person;

(xxi) perform and discharge his duties with the highest degree of professionalism and dedication to the best of his abilities.

13. The substance of the charge is the acceptance of the additional evidence and judgments given by him while holding the charge in quasi-judicial nature and that too in the year 2016-17. The learned Senior Counsel is unable to point out the illegality in the finding recorded by the Administrative Tribunal under the impugned order and also do not dispute the fact that first charge-sheet was issued on 09.09.2020 and the same was quashed by the Tribunal in Original Application No.466 of 2020 and also does not dispute the fact that the decision arrived at by the Respondent No.1 while discharging his function as Commissioner of Income Tax (Appeal) - 4, Mumbai, were upheld by higher forum and also does not dispute the fact that the second charge-sheet was issued on the same inspection report on the basis of which first charge-sheet was issued.

14. We are of the opinion that issuing the second charge-sheet on the same set of facts, in itself is malicious and that too at the verge of retirement for an event which was four year old. Thus, we are not inclined to interfere in the judgment and order passed by the Tribunal allowing the original application, quashing the impugned charge-sheet and granting the Respondent No.1 all the consequential benefits. Accordingly, the writ petition fails and is, accordingly, **dismissed.**

15. No order as to costs.

(2022) 11 ILRA 75
ORIGINAL JURISDICTION
CIVIL SIDE

DATED: ALLAHABAD 29.08.2022

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Writ A No. 12229 of 2022

Amit Kumar ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Gyan Prakash

Counsel for the Respondents:
C.S.C.

Civil Law - The U.P. Recruitment of Dependants of Government Servants Dying in Harness -Rule 5: The death of the late mother of the petitioner- his father was already employed the St. Government - presently receiving pension from the St. Government -compassionate appointment to be given where the other spouse of the deceased is not already employed in the Central Government or the St. Government or otherwise.

Petition dismissed. (E-9)

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. By this petition, the petitioner has prayed for the following relief:-

"(I) A Writ, order or direction in the nature of certiorari quashing the order dated 21.5.2022 passed by the respondent No.2 (Chief Medical Officer, Firozabad).

(II) A Writ, order or direction in the nature /of of mandamus directing the

respondent No.2 to consider the claim of the petitioner under the dying-in-harness rules for the suitable post."

3. Learned counsel for the petitioner submits that the impugned order dated 21.05.2022 passed by the Chief Medical Officer, Firozabad is arbitrary. He also submits that claim of the petitioner has wrongly been denied.

4. It is further submitted that all other legal heirs of the late Sunita Devi have given their no objection certificate in favour of the petitioner.

5. Learned Standing Counsel has opposed the petition submitting that The U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 have been framed to provide immediate relief by providing employment to one member of the aggrieved family. In this case at the time of death of the mother of the petitioner, his father was already employed in the Government service and presently after retirement he is receiving the pension and therefore on this ground the representation of the petitioner has rightly been rejected.

6. Perusal of Rule 5 of The U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 shows that compassionate appointment is given one of the family member of the deceased government employee in case a government servant dies and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government etc. Rule 5 of The U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 is extracted below:-

"[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 relaxation of the normal recruitment rules, if such person-

(i) fulfils 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 the 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 far as possible, such an employment should be given in the same department in which the deceased Government servant was employed prior to his death.]"

7. It is admitted case of the petitioner that at the time of the death of the late mother of the petitioner, his father was

already employed with the State Government. Rule 5 of The U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 shows that compassionate appointment has to be given in that circumstances where the other spouse of the deceased is not already employed in the Central Government or the State Government or otherwise. Since the father of the petitioner was already employed at the time of death of the mother of the petitioner and is presently receiving pension from the State Government, therefore, in view of the clear bar under Rule-5 of The U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974, I do not find any illegality in the impugned order dated 21.05.2022.

8. Law in this regard is clear that in case a government servant dies and his dependent applies for compassionate appointment he can only be given compassionate appointment if the other spouse of the deceased government employee is not already employed with the State Government and Central Government or any other local body etc. Since in this case it is admitted between the parties that at the time of death of the mother of the petitioner, father of the petitioner was already in government service and presently he is receiving pension.

9. The objective of compassionate appointment is to provide assistance to the bereaved family of the deceased employee who has suffered shock and financial scarcity due to sudden demise of the sole bread winner of the family.

10. The compassionate appointment is an exception to the general rule of the appointment and it is based on to provide immediate sustenance and support to the family of the deceased employee for loss of the sole bread winner of the family and to overcome the sudden crises arising out of the sudden demise of the deceased employee, however, since in this case, the deceased government employee was succeeded by his/her spouse and children including the petitioner and the spouse/husband of the deceased namely Ram Singh was a government employee and presently he is receiving pension and therefore, it cannot be said that the family of the deceased is facing scarcity due to the sudden demise of the loss of bread winner of the family. The mother of the petitioner was not sole bread winner of the family, hence, I do not find any illegality in the impugned order dated 21.05.2022. The order dated 21.05.2022 has been passed in consonance of law and particularly Rule 5 of The U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974.

11. The writ petition is devoid of merits and is accordingly dismissed.

(2022) 11 ILRA 77
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.10.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ B No. 26568 of 2016

Chandra Prakash ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ms. Pratima Singh, Sri Arun Kumar Tiwari, Sri Agni Pal Singh

Counsel for the Respondents:
C.S.C., Sri Hari Narain Singh, Sri Brij Kumar Yadav

A. Civil Law - U.P.Z.A. & L.R. Act-Section 186-Petitioner's father was granted lease for agricultural purpose and started cultivation in the alleged land but the present proceeding after 20 years has been initiated against the petitioner's father on the basis of collusive report of Lekhpal that petitioner's father was not doing cultivation and the disputed plot had been vested in the Gaon Sabha-proceeding is liable to be dropped as petitioner's father filed objection to the notice issued to him u/s 186 of the UPZA & LR Act-the provisions of Rule 168 & 169 of the Act prescribes the procedure for initiation of proceeding if the tenure holders does not appear in spite of service or publication or does not contest the notice, the Tehsildar shall declare the holdings as abandoned, if the tenure holder appears and contests the notice, the Tehsildar shall drop the proceedings-Hence, the impugned orders cannot be sustained in the eye of law and is liable to be set aside.(Para 1 to 15)

The writ petition is allowed. (E-6)

List of Cases cited:

Collector,Land Acquisition Anantnag & anr. Vs Mst. Kantiji & ors. (1987) AIR SC 1353

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

1. Heard Ms. Pratima Singh, learned counsel for the petitioner, learned standing counsel for the respondent nos. 1 to 5 and Sri Hari Narain Singh, learned counsel for respondent no.6.

2. The brief facts of the case are that petitioner belong to scheduled caste community. Petitioner's father Mewa Lal along with sixteen others, was granted lease for agriculture purpose in the year 1975 in respect to plot no.107M, area 0.256 hectare and plot no.232 M, area 0.154 hectare, the name of petitioner's father has been recorded in the revenue records, accordingly, petitioner father came in possession of disputed plot and started agriculture in the same. Petitioner was paying irrigation charges also as per provision. In the year 1994, Lekhpal submitted a report on 3.9.1994 that petitioner's father is not doing agriculture for that last two years, accordingly, recommendation was made for taking action under Rule 61, under Section 186 of the U.P. Z.A. & L.R. Act. Petitioner's father filed his objection on 14.9.1994 to the proceeding initiated under Section 186 of the U.P.Z.A. & L.R. Act, stating that he is doing agriculture in the plot in dispute and the crops are standing in the same. The Tahasildar vide order dated 8.2.1995 affirmed the Lekhpal report, cancelled the lease of petitioner's father and vested the land in favour of Gaon Sabha. Petitioners filed Revision before the Board of Revenue under Section 333 of the U.P. Z.A. & L.R. Act on 6.5.2013 against the order dated 8.2.1995, along with the stay application and prayer for condonation of delay was also made. Board of Revenue dismissed the Revision vide order dated 12.4.2016 on the ground of limitation as well as on merit and affirmed the order dated 8.2.1995. Out of 17 allottees, 9 allottees were served notice for the proceeding under Section 198 of the U.P.Z.A. & L.R. Act, 8 allottees had not been served notice. Additional Collector vide order dated 17.2.1995 passed the order against the lease holders, accordingly, the lease holders Mani Ram and Others filed revision before the Commissioner, Kanpur Region, Kanpur which was dismissed for non-prosecution vide order dated 12.31996 and restoration application was rejected

vide order dated 19.8.1999. Against the order of the Additional Commissioner, Mani Ram and Others filed revision before the Board of Revenue which was allowed vide order dated 9.8.2004, setting aside the order dated 12.3.1996 and 19.8.1999 and matter was remanded back before the Collector to decide the dispute on merit. In pursuance of the order dated 27.8.2004, passed by the Board of Revenue, the matter was heard by the Collector concerned in Case No.88 of 2005-06 (State vs. Mani Ram) in which physical verification was made and report dated 6.9.2007 was submitted before the Collector, Kanpur Dehat. The Collector vide order dated 15.4.2010 set aside the order dated 17.2.1995, dropped the notice, issued to the lease holders, Mani Ram and Others and ordered to record the name of lease holders as *bhumidhar* with transferable rights, the finding has been recorded that the crops are standing in the disputed plot and the lease was executed long back about 27 years before, as such, the proceeding for cancellation of lease is wholly illegal. On the basis of the order dated 15.4.2010, the name of the lease holders has been recorded in the revenue records. Hence, this petition on behalf of petitioner in respect of his lease against the order of Board of Revenue dated 12.4.2016 and order dated 8.2.1995 passed by Tahasildar.

3. Counsel for the petitioner submitted that petitioner's father along with 16 others, belonging to scheduled caste community was granted lease for agricultural purpose in the year 1975, petitioner's father, accordingly, started cultivation in the alleged land but the present proceeding after about 20 years has been initiated against the petitioner's father under Section 186 of the U.P.Z.A. & L.R. Act, on the basis of the alleged report of Lekhpal that petitioner's father was not doing cultivation for the last 2 years, although petitioners' father was doing cultivation continuously in the disputed plot but under impugned order, disputed plot of the petitioner's father was vested in the Gaon Sabha and the revision filed by the petitioner has been arbitrarily dismissed by passing a cryptic order on limitation as well as on merit. It is further submitted that no physical verification was done and on the basis of the collusive report of the Lekhpal only the plot in disputed has been vested in the Gaon Sabha. He further submitted that according to the provisions contained under Section 186(5) of the U.P.Z.A. & L.R. Act, proceeding was liable to be dropped as petitioner's father filed objection to the notice issued to him under Section 186 of the U.P. Z.A. & L.R. Act. He placed reliance upon Section 186 of the U.P. Z.A. L.R. Act which is as follows:-

" 186. Abandonment. - (1) Where a [bhumidhar with non-transferable rights] (other than a minor, lunatic or idiot) or asami has not used his holding for a purpose connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming for two consecutive agricultural years, [the tahsildar may, on the application of the [Gaon Sabha] or the landholder or on facts coming to his notice otherwise, issue a notice] to such [bhumidhar with non-transferable rights] or asami, as the case may be, to show cause why the holding be not treated as abandoned.

(2) The application shall contain such particulars as may be prescribed.

(3) If the tahsildar finds that the application has been duly made he shall cause to be served on the

[bhumidhar with non-transferable rights] or the asami or publish in the manner prescribed a notice in the form to be prescribed requiring him to appear and show cause on a date to he fixed why the holding be not held as abandoned.

(4) If the [bhumidhar with non-transferable rights] or the asami does not appear in answer to the notice or appears but does not contest it, the tahsildar shall declare the holding as abandoned and thereupon, except provided in [Section 172], the holding shall be deemed to be vacant land[:]

[Provided that no declaration under this sub-section shall made in respect of a holding or any part thereof, if the same has been mortgaged by the [bhumidhar with non-transferable rights] under sub-section (2) of Section 153 and the mortgage has not been fully redeemed, in which case the tahsildar shall move the Collector for the realization of the loan in such manner as may be prescribed.]

[(5) If the [bhumidhar with non-transferable rights] or asami appears to contest the notice, the tehsildar shall drop the proceedings.]"

4. He further submitted that petitioner along with 16 other persons was granted lease in 1975 and the lease of similarly situated persons after the remand order passed by Board of Revenue has been maintained by the Collector vide order dated 15.4.2010 /27.8.2010 but in respect of the petitioner, the land has been vested in the Gaon Sabha on the ground that the petitioner was not doing cultivation for the last 2 years. He further submitted that there was no discrimination among the similarly situated persons as the ground for cancellation was same against all the lease holders. Counsel for the petitioner further finally submitted that the impugned order be set aside and lease granted in 1975 be affirmed. Counsel for the petitioner placed reliance upon Section 131-B of U.P. Z.A. & L.R. Act which is as follows:-

"[131-B. *Bhumidhar* with non-transferable rights to become *bhumidhar* with transferable rights after ten years.

(1) Every person who was a *bhumidhar* with non-transferable rights immediately before the commencement of the Uttar Pradesh Zamindari Abolition and Land Reforms (Amendment) Act, 1995 and had been such *bhumidhar* for a period of ten years or more, shall become a *bhumidhar* with transferable rights on such commencement.

(2) Every person who is a *bhumidhar* with non-transferable rights on the commencement referred to in sub-section (1), or becomes a *bhumidhar* with non-transferable rights after such commencement, shall become *bhumidhar* with transferable rights on the expiry of period of ten years from his becoming a *bhumidhar* with non-transferable rights.

(3) Notwithstanding anything contained in any other provision of this Act, if a person, after becoming a *bhumidhar* with transferable rights under sub-section (1) or sub-section (2), transfers the land by way of sale, he shall become ineligible for a lease of any land vested in Gaon Sabha or the State Government or of surplus land as defined in he Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960.]

5. Counsel for the petitioner submitted that petitioner's father was granted lease in the year 1975, as such, due to operation of law as provided under Section 131-B of the U.P. Z.A. & L.R. Act,

petitioner's father became *bhumidhar* with transferable right of the plots in dispute.

6. On the other hand, the learned standing counsel as well as counsel for respondent no.5- Land Management Committee submitted that petitioner was not doing agricultural work on the land allotted to him, as such, the proceeding was rightly initiated against the petitioner and the land was rightly vested in the State. He further submitted that the revision filed by the petitioner against the order of the Collector was highly time barred, as such, the revision was rightly dismissed on the ground of limitation as well as on merit. They finally submitted that no interference is required against the impugned order and the writ petition is liable to be dismissed.

7. I have considered the arguments advanced by learned counsel for the parties and perused the record.

8. There is no dispute about the fact that petitioner along with 16 others belonging to scheduled casts community was granted lease for agricultural purposes in the year 1975 and the proceeding under Section 186 of the U.P. Z.A. & L.R. Act has been initiated after expiry of about 20 years. On the basis of the report of the Lekhpal that petitioner is not doing any cultivation work in the plot in dispute, the Tahasildar vide order dated 8.2.1995 vested the land in the Gaon Sabha. The revision filed by the petitioner against the order dated 8.2.1995 was dismissed on the ground of limitation as well as on merits. Although, in respect of the other least holders, the lease was affirmed vide order dated 15.4.2010/27.8.2010.

9. Since petitioner was granted lease in the year 1975 along with 16 others and was continuously doing cultivation work in the alleged land, as such, the vesting of land in the Gaon Sabha only on the basis of the report of Lekhpal is arbitrary. In respect of the other lease holders, the physical verification was conducted and it was found that they are cultivating in the lease land, as such, the lease under the similar circumstances executed in their favour was maintained by the Collector but in the case of the petitioner, no physical verification, etc. was done and the lease was cancelled and the land was vested in the Gaon Sabha, although in view of provisions contained under Section 186(5) of the U.P. Z.A. & L.R. Act, the proceedings was liable to be dropped. After the order dated 8.2.1995 passed against the petitioner, petitioner filed revision with delay before the Board of Revenue, praying for condonation of delay (as petitioner was approaching the authorities for redressal of his grievance under advice) but Board of Revenue has dismissed the revision on the ground of delay as well as on merit, saying that order passed by the courts below is in accordance with law.

10. So far as the delay in filing revision is concerned, the Hon'ble Supreme Court in the case, reported in **AIR 1987 SC 1353, Collector, Land Acquisition, Anantnag and Another vs. Mst. Kantiji and Others** has held that in place of deciding the dispute on technical grounds the matter should be adjudicated on merit. Paragraph no.3 of the judgment are quoted hereunder:

"The legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression

"sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-

"Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period."

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the 'State' which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even handed manner. There is no warrant for according a stepmotherly treatment when the 'State' is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinary (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file pushing and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant-non-grata status. The Courts therefore have to be informed with the

spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause". So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even handed justice on merits in preference to the approach which scuttles a decision on merits. Turning to the facts of the matter giving rise to the present appeal, we are satisfied that sufficient cause exists for the delay. The order of the High Court dismissing the appeal before it as time barred, is therefore set aside. Delay is condoned. And the matter is remitted to the High Court. The High Court will now dispose of the appeal on merits after affording reasonable opportunity of hearing to both the sides."

11. Although in the revision, there was delay of more than 10 years but the lease of the other lease holders has been ultimately maintained on the same ground, as such, discrimination to the petitioner will be illegal and will cause irreparable injury to the petitioner, as such, the interest of justice requires that petitioner's lease be also affirmed.

12. Another important aspect of the case is that Section 186 (5) of U.P.Z.A. & L.R. Act specifically provides for dropping of the proceeding under Section 186 of U.P.Z.A. & L.R. Act if the *bhumidhar* with non transferable rights or asami appears to contest the proceedings. In the present case petitioner's father appears and filed his objection even then the Tahsildar has passed the impugned order dated 8.2.1995 vesting the disputed plot in favour of Gaon Sabha. The provisions of Rule 168 & 169 of U.P.Z.A. & L.R. Rules prescribes the procedure for initiation of proceeding under Section 168 of U.P.Z.A. & L.R. Act as well as its disposal, Rule 169 (2) of U.P.Z.A. & L.R. Rules are as follows:-

"169(2) If the tenureholders does not appear in spite of service or publication of the notice as laid down in sub-rule (1), or if the tenureholder appears and does not contest the notice, the Tahsildar shall, except where the holding or any part thereof has been mortgaged under sub-section (2) of Section 153 and the mortgage has not been fully redeemed, declare the holdings as abandoned and order the annual registers to be corrected accordingly. If the tenureholder appears and contests the notice, the Tahsildar shall drop the proceedings."

13. Section 168 (5) of U.P.Z.A. & L.R. Act as well as Rule 169 (2) of of U.P.Z.A. & L.R. Rules very specifically provides for dropping of the proceedings under Section 186 of U.P.Z.A. & L.R. Act but Tahsildar has passed the impugned order for vesting the land in Gaon Sabha in spite of the fact that petitioner's father appears and filed his objection to the proceeding, as such, impugned orders cannot be sustained in the eye of law.

14. Considering the entire facts and circumstances of the case, provisions of U.P.Z.A. & L.R. Act/Rules as well as the ratio of law laid down by the Apex Court in **Land Acquisition, Anantnag and Another** (supra), the impugned order dated 12.4.2016 passed by the Board of Revenue, Allahabad Bench, Allahabad and order dated 8.2.1995 passed by the Tehsildar, Kanpur Dehat are liable to be set aside and the same are hereby set aside.

15. **The writ petition stands allowed** and respondent no.2/Collector, Kanpur Dehat is directed to record the name of

petitioner in the revenue record in respect to disputed plots within period of six weeks from the date of production of the certified copy of this order.

16. No order as to costs.

(2022) 11 ILRA 84
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.10.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ B No. 47327 of 2013

Man Singh ...Petitioner
Versus
Board of Revenue & Ors. ...Respondents

Counsel for the Petitioner:
Sri Abhishek Kumar, Dr. Shrinarayan Singh Yadav

Counsel for the Respondents:
C.S.C., Sri Arun Kumar, Sri M. Sarwar Khan, Sri Manoj Kumar Yadav, Sri Ram Sajiwan Prajapati, Sri Ramakant Tiwari, Sri Umesh Chandra Tiwari, Sri Alok Sharma

A. Civil Law - U.P. Land Revenue Act, 1901-Section 34-Since jurisdiction u/s 34 of the Act once has been exercised by trial court on the basis of evidence on record after affording opportunity of hearing to the parties as such there should be no interference against the order of trial court unless there is any error in the order but the appellate Court has illegally allowed the appeal against the order passed by trial court and remanded the matter before trial court for fresh consideration of evidence without taking into consideration the principles of merger as the order of trial court has been merged in the final order of Revisional Court by which revision filed by respondent no. 4 (daughter of deceased) has been dismissed and order of trial court has been maintained-Hence, the impugned orders are liable to set aside.(Para 1 to 15)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Paras Nath & anr. Vs DDC, Varanasi & ors. (2010) 110 RD pg 595

2. Bih. St. Govt. Sec. School Teachers Assn. Vs Bih. Edu. Service Assn & ors. (2013) AIR SC 487

3. Bhagwati Developers Pvt. Ltd. Vs Peerless General Finance Investment Co. Ltd. & ors. (2013) 5 SCC 455

4. Nanhey & anr. Vs DDC, Kanpur & ors. (1975) AWC 1

5. Shankar Ramchandra Abhyakar Vs Krishnaji Dattatraya Bapat (1970) AIR Supreme Court 1

6. Bhagwah Developers Pvt Ltd VS Peerless General Finance Investment Co. Ltd & ors. (2013) 5 SCC 455

7. Saumya Co-operative Housing Society, Alld. thru its secy. Vs St. of U.P. & ors. (2012) 115 RD 187

8. Smt. Kalawati Vs the Board of Revenue & ors. (2022) 0 Supreme All 281

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

1. Heard Mr. Abhishek Kumar, Counsel for the petitioner, Mr. Alok Sharma, Advocate, holding brief of Mr. Ram Sajiwan Prajapati and Mr. Rama Kant Tiwari, Counsel for respondent No.3 as well as learned Standing Counsel for respondent Nos.1 and 2.

2. The brief facts of the case are that Lalla Prasad had three marriages in his life time. His first wife was Dhankali.

Contesting respondent No.3- Daljeet was born from wedlock of Lalla Prasad and Dhankali. After one year of marriage Dhankali left the house of her husband accordingly Lalla Prasad solemnized his second marriage with Gaura Devi and from the wedlock of Lalla Prasad and Gaura Devi two daughters Heerawati and Bhanwati were born, who are married. Second wife Gaura died in the life time of Lalla Prasad accordingly Lalla Prasad was married with Champa @ Chameli and from the wedlock of Lalla Prasad and Champa @ Chameli, petitioner Man Singh was born. Lalla Prasad died on 23.08.2004 and after the death of Lalla Prasad, name of petitioner and respondent No.3 were recorded by the Registrar Kanoongo vide order dated 31.03.2004 in the place of Lalla Prasad in respect to village-Sidhwa and in respect to village-Mayee report under Section 34 of U.P. Land Revenue Act was filed by respondent No.3 that his name solely be recorded in the place of deceased Lalla Prasad, the cases were consolidated and registered as Case No.333 before Tehsildar (Judicial) Mariyahoo, Jaunpur, both parties adduced oral and documentary evidence in support of their cases. Tehsildar after considering the evidences adduced by both parties in detail has held vide order dated 10.07.2007 that petitioner and respondent No.3 are sons of Lalla Prasad and rejected the mutation application filed by respondent No.3 to record his name solely in the place of Lalla Prasad, the order of Registrar Kanoogo dated 31.03.2004 was maintained. Against the order dated 10.07.2007 respondent No.4 filed Revision No.380 of 2007 before Commissioner, the petitioner and respondent No.3 were impleaded as opposite parties in the revision who have contested the proceeding of revision, respondent No.3 has prayed before Additional Commissioner that revision of respondent No.4 be allowed, the Additional Commissioner vide order dated 25.02.2011 dismissed the revision filed by respondent No.4 and maintained the order of Tehsildar dated 10.07.2007. Against the order dated 10.07.2007 respondent No.3 filed an appeal under Section 210 of U.P. Land Revenue Act before Sub Divisional officer and the pandency of the revision against the same impugned order dated 10.07.2007 was brought to the notice of appellate Court (Sub Divisional officer) but appellate court vide order dated 21.03.2013 allowed the appeal filed by respondent No.3 set aside the order dated 10.07.2007 and remanded the matter for fresh decision by Tehsildar. Petitioner challenged the appellate order dated 21.03.2013 through revision under Section 333 of U.P.Z.A. & L.R. Act before respondent No.1, the revision was dismissed by respondent No.1 vide order dated 03.06.2013 hence this writ petition on behalf of petitioner.

3. This Court at the time of admission after hearing counsel for the petitioner as well as respondent No.3 passed the detailed interim order dated 06.09.2013 which is as follows:

"Heard Shri Abhishek Kumar, learned counsel for the petitioner and Shri Sarwar Khan, learned counsel for respondent no.3.

Issue notice to respondent no.4 returnable at an early date. Steps within 10 days.

Shri Manoj Kumar Yadav has accepted notice on behalf of respondent no.5 and learned Standing Counsel has accepted notice on behalf of respondents No.1 and 2. Learned counsel is permitted to implead the concerned Tehsildar as Respondent No.6 on whose behalf also the

learned standing counsel shall seek instructions.

An order came to be passed by the Tehsildar in relation to mutation of the holding on 10th July 2007, whereby the petitioner and respondent no. 3 Daljeet were both treated to be sons of the deceased tenure holder Lalla Prasad. Aggrieved the respondent no.3 filed an appeal contending that the petitioner is not the son of Lalla Prasad.

According to the pedigree as disclosed at page 30 of the paper book one Smt. Manbhawati, one of the daughters of late Lalla Prasad filed a revision against the order dated 10.7.2002 before the Additional Commissioner under SEction 2/9 of the 1901 Act for setting aside the order. The respondent no.3 Daljeet also contested the said revision and conceded that the order dated 10.7.2007 deserves to be set aside and he will have no objection to the same. This was obviously done because the respondent no.3 had also filed an appeal against the same order under SEction 210 of the 1901 Act which was pending before the Sub-Divisional Officer.

The revisional authority after assessing the entire evidence that had been considered by the Tehsildar recorded its own findings by reciting that the petitioner and the respondent no.3 are brothers and are sons of the same father namely Lalla Prasad. The revision was allowed on 25.2.2011.

It is, therefore, obvious that respondent no.3 was a party to the said proceedings before the learned Commissioner where this finding was recorded.

During the pendency of the appeal, this fact of the order of the Commissioner dated 25.2.2011 was brought to the notice of the Sub-Divisional Officer who was hearing the appeal filed by respondent no.3. The Sub-Divisional Officer without recording any finding with regard to the impact of the said order of the learned Commissioner has allowed the appeal and has set aside the order dated 10.7.2007 which had already been upheld by the learned Commissioner.

Shri Abhishek submits that the principles of merger would apply inasmuch as even though they are summary proceedings the order of the Tehsildar dated 10.7.2007 has already merged into the order dated 25.2.2011 of the superior authority under Section 219 of the U.P. of Land Revenue Act, 1901 namely the order of the learned Commissioner which has remained unchallenged. Shri Abhishek Kumar has relied upon three decisions to substantiate his submissions namely ***Paras Nath and another vs. Deputy Director of Consolidation, Varanasi and others reported in 2010 (110) RD page 595; Bihar State Govt. Secondary School Teachers Association v. Bihar Education Service Association and Ors AIR 2013 SC 487 and Bhagwati Developers Private Limited vs. Peerless General Finance Invstment Company Limited and others (2013) 5 SCC 455.***

He therefore, contends that the same will have a direct impact on the proceedings of the appeal before the Sub-Divisional Officer arising out of the same impugned order, and having not considered the same which was a relevant material, the order of the Sub-Divisional Officer is perverse. He has placed reliance upon the Full Bench decision of this Court in ***Nanhey and anor vs.Deputy Director of Consolidation, Kanpur & others reported in 1975 AWC*** *1 to urge that non-consideration of relevant material amounts to perversity.*

Prima facie, after having heard Shri Sarwar Khan who has taken the Court

to the merits of the matter, the contention of the petitioner appears to be correct.

1. All the respondents may file counter affidavit within three weeks.

Rejoinder affidavit may be filed within a week thereafter.

List thereafter.

Until further orders of the Court, all further proceedings before the Tehsildat pursuant to the remand order dated 21.3.2013 passed by the Sub-Divisional Officer shall remain stayed."

4. Counsel for the respondent No.3 has filed his counter affidavit and the petitioner has filed rejoinder affidavit. Respondent No.4 has not put in appearance although service is sufficient upon respondent No.4 as per office report dated 11.02.2019.

5. Counsel for the petitioner submitted that trial court (Tehsildar) has decided the application under Section 34 of U.P. Land Revenue Act taking into consideration each and every evidence adduced by the parties and held that petitioner and respondent No.3 are sons of late Lalla Prasad as such the case of respondent No.3 that respondent No.3 is to recorded exclusively was rejected and the judgment of trial court was maintained in revision under Section 219 of U.P. Land Revenue Act at the instance of respondent No.4 but appellate Court has illegally entertained the appeal under Section-210 of U.P. Land Revenue Act against the order of trial Court, even allowed the appeal and remanded the matter before trial court for fresh decision which is wholly illegal on the Principles of merger. He further submitted that once revisional court exercise the jurisdiction under Section-219 of U.P. Land Revenue Act by dismissing the Revision on merit and maintaining the order of trial court dated 10.07.2007 then proceeding before appellate court against the same order of trial court dated 10.07.2007 will be barred by principle of res judicata also. He further submitted that appellate order dated 21.03.2013 is perverse. He further submitted that even on merit the appellate court can not remand the matter before trial court as trial court has already decided the proceeding under Section-34 of U.P. Land Revenue Act after considering each and every evidence on record as such impugned orders be set aside and order of trial court dated 10.07.2007 be maintained.

6. He further submitted that respondent No.1 without considering the evidence available on record dismissed the petitioner's revision. Counsel for the petitioner placed reliance upon following judgment of Apex court as well as of this court on the point of principle of merger:

(1) AIR 1970 Supreme Court 1

Shankar Ramchandra Abhyakar Vs.Krishnaji Dattatraya Bapat.

(2) AIR 2013 SC 487

Bihar State Govt Secondary School Teachers Association vs. Bihar Education Service Association and others.

(3) (2013) 5 SCC 455

Bhagwah Developers Private Limited Vs. Peerless General Finance Investment Company Limited and others.

(4) 2010 (110) RD 595

Para Nath and another vs Deputy Direction of Consolidation Varanasi and others.

On the point of perversity of judgment of appellate Court Counsel for petitioner placed reliance upon **1975 AWC. 1 Nanhey and another Vs. Deputy Director of Consolidation Kanpur and others.**

On the point of maintainability of the writ petition under Article 226 of the Constitution of India against the order passed in summary proceedings under Section 34 of U.P. Land Revenue Act, 1901 Counsel for the petitioner placed reliance upon judgment of this Court reported in **2012 (115) R.D. 187 Saumya Co-operative Housing Society Allahabad through its secretary Versus State of U.P. and others** in which it is held that writ petition would be maintainable against orders which are without jurisdiction or are otherwise perverse. **Para No.17 of the judgment is relevant which is as follows:**

".....17. Coming to the issue of jurisdiction, suffice it to say that even in matters of mutation this Court in the case of Lal Cahan V. Board of Revenue, U.P. Lucknow and others, has held that a writ petition would be maintainable against orders which are without jurisdiction or are otherwise perverse. As would be seen presently, the present writ petition also falls within the same category inasmuch as the Sub-Divisional Magistrate, while passing the order dated 25.08.2008 has failed to record any provision which may empower him to act and proceed contrary to the directions of the collector contained in the order dated 24.10.2007."

7. On the other hand Counsel for respondent No.3 submitted that petitioner is not son of Lalla Prasad rather he is nephew of Lalla Prasad as such petitioner cannot succeed the property of Lalla Prasad. He further submitted that appeal filed by respondent No.3 has been rightly allowed by Sub Divisional officer as the evidence on record have not been properly considered by trial court. He further submitted that revision which was filed against the order of trial court was at the instance of respondent No.4 as such dismissal of the same will not come in the way of respondent No.3 who has filed appeal under Section 210 of U.P. Land Revenue Act and the same was rightly allowed and remanded before trial court for fresh consideration of evidence. He further submitted that writ petition filed by petitioner against the remand order passed by appellate Court arising out of summary proceeding under Section-34 of U.P. Land Revenue Act 1901 is not maintainable and liable to be dismissed. Counsel for the respondent No.3 placed reliance upon judgment of this Court in the Case of **Smt. Kalawati Vs. the Board of Revenue and others 2022 0 Supreme (All) 281** in order to demonstrate that writ petition arising out of mutation proceeding under Section 34 of U.P. Land Revenue Act is not maintainable.

8. I have considered the argument advanced by learned counsel for the parties and perused the records.

9. There is no dispute about the fact that trial court (Tehsildar) has held that mutation application filed by respondent No.3 is liable to be rejected and the order dated 31.03.2004 passed by Revenue Inspector for recording the name of petitioner as well as respondent No.3 being sons of deceased Lalla Prasad is in accordance with law, the order of trial court was maintained in Revision although at the instance of respondent No.4 (married daughter of Lalla Prasad) but in the revision respondent No.3 also contested the revisional proceeding, the order of revisional court dated 25.02.2011 has attained finality but appellate Court in appeal filed by respondent No.3 against the same, order of trial court dated 10.07.2007 has set aside the order dated 10.07.2007

and remanded the matter vide his order dated 21.03.2013 before trial court for fresh consideration in spite of the fact brought into the notice of the appellate court that revision filed against the order of trial court has already been dismissed vide order dated 25.02.2011.

10. Since jurisdiction under Section 34 of U.P. Land Revenue Act once has been exercised by trial court on the basis of evidence on record after affording opportunity of hearing to the parties as such there should be no interference against the order of trial court unless there is any error in the order but the appellate Court has illegally allowed the appeal against the order passed by trial court under Section 34 of U.P. Land Revenue Act and remanded the matter before trial court for fresh consideration of evidence without taking into consideration the principles of merger as the order of trial court dated 10.07.2007 has been merged in the final order of Revisional Court dated 25.02.2011 by which revision filed by respondent No.4 has been dismissed and order of trial court dated 10.07.2007 has been maintained.

11. Principles of Merger has been considered by the Apex Court as well as by this Court in the cases cited by learned Counsel for the petitioner, in the case of **Shankar Ram Chandra Abhyankar (Supra)** the Apex Court has held as follows in paragraph Nos. 8 and 9.

"8. Even on the assumption that the order of the appellate court had not merged in the order of the single Judge who had disposed of the revision petition we are of the view that a writ petition ought not to have been entertained by the High Court when the respondent had already chosen the remedy under Section 115 of the CPC. If there are two modes of invoking the jurisdiction of the High Court and one of those modes has been chosen and exhausted it would not be a proper and sound exercise of discretion to grant relief in the other set of proceedings in respect of the same order of the subordinate court. The refusal to grant relief in such circumstances would be in consonance with the anxiety of the court to prevent abuse of process as also to respect and accord finality to its own decisions.

9. In the result the appeal is allowed and the judgment of the division bench of the High Court is hereby set aside. The appellant shall be entitled to costs in this Court."

12. In the present case although respondent No.3 has not filed revision against the order of trial court rather respondent No.4 (daughter of deceased-Lalla Prasad) filed revision and respondent No.3 as well as petitioner contested the revisional proceeding which has resulted into dismissal of revision holding that petitioner and respondent No.3 both being sons will have right and affirmed the order of trial court dated 10.07.2007 as such principle of merger will apply.

13. So far as jurisdiction under Article 226 of the Constitution of India against the order of mutation Court under Section 34 of U.P. Land Revenue Act, 1901 is concerned in view of ratio of law laid down in **Saumya Co-operative Housing Society (Supra) and Smt. Kalawati (Supra)** in which it has been held that if the order of mutation court is without jurisdiction then interference can be made in exercise of writ jurisdiction under Article 226 of the Constitution of India. In the present case appellate order dated 21.03.2013 is without

jurisdiction as the revisional court had already dismissed the revision against the order of trial court which attained finality as such appellate court had no jurisdiction to allow the appeal against the same order of trial court.

14. Since the order of trial court dated 10.07.2007 passed under Section 34 of U.P. Land Revenue Act 1901 under which petitioner and respondent No.3 were ordered to be recorded in the revenue records in the place of deceased tenure holder as such the petitioner's claim for exclusive right can be examined in the regular suit and for that relief petitioner can avail remedy of suit for declaration of his exclusive right and title in respect to disputed plots.

15. Considering the entire facts and circumstances of the case as well as ratio of law laid down by Apex Court on the principles of merger as well as of this Court on the point of perversity and jurisdiction, the impugned order dated 03.06.2013 passed by respondent No.1 and 21.03.2013 passed by respondent No.2 are liable to be set aside and are hereby set aside. The writ petition stands allowed. No order as to costs.

(2022) 11 ILRA 90
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.09.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ B No. 49499 of 2015

Mahendra Singh & Anr. ...Petitioners
Versus
Board of Revenue & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ramesh Chandra, Sri S.C. Varma

Counsel for the Respondents:
C.S.C., Sri Amresh Singh, Sri Brijesh Kumar Verma, Sri Krishna Mohan, Sri Mohit Kumar, Sri Rajeev Misra, Sri Rajesh Kumar, Sri Rajiv Misra, Sri Shiv Nath Singh (Sr. Advocate), Sri Sher Bahadur Singh

A. Civil Law - Code of Civil Procedure, 1908- Order 47 Rule 1-U.P. Zamindari Abolition and Land Reforms Act, 1950- Section 229-B-Review-Delay of 22 years-petitioners filed two suits u/s 229-B, which got decreed-Second review application filed by State and Gaon Sabha has been allowed after 22 years of the date of judgment of the Board of revenue-Board of revenue illegally condoned and allowed application ignoring the provisions under Order 47, Rule 1, CPC-Impugned judgment of Board of revenue is set aside.(Paras 1 to 12)

B. 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 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."(Para 9)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Collector,Land Acqn. Anantnag & anr. Vs Mst. Katji & ors. (1987) AIR SC 1353

2. Esha Bhattacharjee Vs Managing Committee of Raghunathpur Nafar Academy & ors. (2013) 12 SCC 649

3. Haryana Vs Mohinder Singh & ors. (2002) JT 10 SC 197

4. Parsion Devi & ors. Vs Sumitr Devi & ors. (1997) JT 8 SC 480

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

1. Heard Sri Suresh Chandra Varma and Sri Ramesh Chandra, learned counsel for the petitioners, Sri Krishna Mohan, Sri Shiv Nath Singh, learned Senior Advocate and Sri Sher Bahadur Singh, learned counsel for respondent no.3- Gaon Sabha.

2. Brief facts of the case are petitioners filed two suits under Section 229B of U.P.Z.A. & L.R. Act on the basis of lease deed executed in their favour by the erstwhile Zamindar on 22.6.1948 in respect of Khata No.38 area 10.04 acres. Another suit was filed by Ayodhya. Suits were dismissed by the trial Court against which two appeals were filed i.e. Appeal Nos.798/312 and 398/213 *(Mahendra Singh Vs. Gaon Sabha and Others)*. Additional Commissioner vide separate judgment dated 29.8.1984 dismissed both the appeals. Petitioner no.1 as well as father of the petitioner no.2 filed two second appeals which were numbered as Second Appeal No.3 & 4 of 1984-85. Board of Revenue vide judgment and order dated 11.7.1990 allowed both the appeals and decreed both the suits. Gaon Sabha and State of U.P. were parties to the suit under Section 229B of the U.P.Z.A. & L.R. Act and they had full notice and knowledge of the entire proceeding. Gaon Sabha and State of U.P. filed Restoration Application No.229 of 2009-10 *(State Vs. Ayodhya Prasad and Others)*, learned member of Board of Revenue recorded the finding that judgment dated 11.7.1990 was not ex-parte, as such, the same should be treated as review petition and should be placed before the Division Bench of the Board of Revenue, by the same order effect and operation of the order dated 11.7.1990 has been stayed. The matter was placed before the Division Bench of the Board of Revenue and they held that matter be placed before single member as the application is not review application and it can be treated only as restoration application, accordingly, the matter was again placed before single member of the Board of Revenue. The Board of Revenue vide order dated 18.6.1996 rejected the restoration application dated 11.7.1990 filed by State and Gaon Sabha. On 19.3.2013, two review applications were filed by DGC (Revenue) which were registered as Review Application Nos.1/2012-13 and 2/2012-13. Along with review application, the application for condonation of delay and affidavit were also filed, the deponent of the affidavit filed in the support of the review application as well as delay condonation application was not pradhan of the Gaon Sabha, he was clerk of DGC (Revenue), who has filed his affidavit, review application were placed before the Division Bench of the Board of Revenue vide order dated 25.1.2013. Petitioners filed a Civil Misc. Writ Petition No.64148 of 2013 against the order of Board of Revenue dated 25.1.2013. The writ petition was disposed of by this Court vide judgment dated 25.11.2013 with direction to decide the review application within two months from the date of production of certified copy of the order. Respondent no.4, Ravindra also filed a Civil Misc. Writ Petition No.5377 of 2013 before this Court which was dismissed vide order dated 19.9.2013 with a clear finding that there is no explanation of delay of 22 years. Division Bench of the Board of Revenue vide judgment dated 15.7.2015

allowed both the review applications setting aside the order dated 11.7.1990 passed in Second Appeal Nos.3 and 4 and second appeal was restored to its original number, hence this writ petition. This Court while entertaining the writ petition at the admission stage has passed the following interim order dated 8.9.2015:

"Notice on behalf respondents- 1 and 2 has been accepted by Chief Standing Counsel, on behalf of respondent-3 has been accepted by Sri Amresh Singh as well as Sri Rajesh Kumar and on behalf of respondent-4 has been accepted by Sri Rajesh Mishra. All the respondents are granted one month's time for filing counter affidavit.

List in the week commencing 26.10.2015.

Till the next date of listing the operation of the order of Board of Revenue dated 15.07.2015 shall remain stayed and parties shall maintain status quo on the spot"

3. Learned counsel for the petitioners submitted that no sufficient cause has been shown for condonation of delay of 22 years in filing the review application against the order of Board of Revenue allowing the second appeal on merit. He further submitted that Board of Revenue has committed illegality while considering the review application taking into consideration the merit of the case also. He also submitted that none of the ground mentioned under Order 47 Rule 1 of Code of Civil Procedure was available but the Board of Revenue has allowed the highly time barred review application. He next submitted that State of U.P. and Gaon Sabha had every knowledge of the entire proceeding even they were heard by the Board of Revenue while the second appeal was allowed on merit in the year 1990, as such, the delay in filing the review application has been illegally condoned and review application has been illegally allowed by the Board of Revenue. He further submitted that Writ-B No.51377 of 2013 filed at the instance of respondent no.4 against the order dated 11.7.1990 passed by Board of Revenue was rejected vide order dated 19.9.2013. Counsel for the petitioners placed reliance upon the judgment of this Court challenged in the case of Kanpur Developement Authority Through Chairman Vs. Raksha Rani Agarwal (First Appeal Defective No.50 of 2008) dated 9.12.2015 in which the first appeal filed with delay before the High Court was dismissed on the ground of limitation, the Paragraph Nos.21 & 22 of the judgment rendered in Kanpur Development Authority (supra) are as follows:

"21.Following various earlier decisions, some of which have been referred hereinabove, includingState of Nagalandv.Lipok AO(supra) inManiben Devraj Shahv.Municipal Corporation of Brihan Mumbai,(2012) 5 SCC 157, in para 18 of the judgment, the Court said as under:

?What needs to be emphasised is that even though a liberal and justice oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the Courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost. What colour the expression ?sufficient cause? would get in the factual matrix of a given case would largely depend on bona

fide nature of the explanation. If the Court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay. In cases involving the State and its agencies/instrumentalities, the Court can take note of the fact that sufficient time is taken in the decision making process but no premium can be given for total lethargy or utter negligence on the part of the officers of the State and/or its agencies/instrumentalities and the applications filed by them for condonation of delay cannot be allowed as a matter of course by accepting the plea that dismissal of the matter on the ground of bar of limitation will cause injury to the public interest.?

"22.In our view, the kind of explanation rendered in the case in hand does not satisfy the observations of Apex Court that if delay has occurred for reasons which does not smack of mala fide, the Court should be reluctant to refuse condonation. On the contrary, we find that here is a case which shows a complete careless and reckless long delay on the part of applicants which has remain virtually unexplained at all. Therefore, we do not find any reason to exercise our judicial discretion exercising judiciously so as to justify condonation of delay in the present case."

4. On the other hand, counsel for the respondents submitted that the opportunity to State and Gaon Sabha was not properly afforded while deciding the second appeal vide judgment dated 11.7.1990, as such, when the State and the Gaon Sabha came to know about the same, the proceedings were initiated before the Board of Revenue. He further submitted that interest of the State and the Gaon Sabha is involved and the petitioners has get the order in respect of the State land so the judgment of Board of Revenue has been rightly reviewed by the subsequent order of the Board of Revenue. He placed reliance upon the judgments ***reported in AIR 1987 SC 1353 (Collector Land Acquisition, Anantnag and Others Vs. Katji and Others) & (2013) 12 SCC 649 (Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and Others).*** On the basis of aforementioned judgment of the Apex Court, counsel for the respondents submitted that liberal view should be taken in respect to the delay condonation matter and in place of rejecting the application, appeal or revision on the technical grounds, the matter should be adjudicated on merit. Counsel for the respondents further submitted that filing of Writ-B No.51377 of 2013 is the manipulation of petitioners, as such, no reliance can be placed upon the same.

5. I have considered the argument advanced by learned counsel for the parties and perused the record.

6. There is no dispute about the fact that the suit under Section 229B of U.P.Z.A. & L.R. Act filed by the petitioners were decreed in the second appeal by the Board of Revenue vide judgment and order dated 11.7.1990 after hearing the counsel for the parties. Paragraph No.5 of the judgment of Board of Revenue will be relevant for perusal which is as follows:

"5. The learned counsel for the respondent has argued that the fact as is

evident from the extracts from the Khasras and Khataunis filed by the parties, all go to show that the names of the plaintiffs have never appeared in revenue records and if some patta would have actually been executed the name of plaintiff their name must have been brought on record. The learned counsel for the respondent has further argued that evidently the land in dispute has remained recorded as Sanjar belonging to the Gaon Sabha including the revenue records pertaining to consolidation of holdings operations and there is non evidence that the plaintiffs have ever paid any land revenue for the land. In reply to the contentions of learned counsel for the appellant about the cancellation of the house the learned D.G.C. (R) has said that these contentions are irrelevant for this case nor there is any evidence for that effect."

7. Perusal of Paragraph No.5 of the judgment of Board of Revenue fully demonstrate that the judgment dated 11.7.1990 is not ex-parte against the Gaon Sabha and State. The first restoration application filed at the instance of the Gaon Sabha and State was rejected by the Board of Revenue and the second review application filed at the instance of the State and the Gaon Sabha after 22 years of the date of judgment of the Board of Revenue has been allowed, the judgment passed on merit by the Board of Revenue has been set aside. Since the Board of Revenue vide judgment dated 11.7.1990 has allowed the appeal on merit after hearing the counsel for the parties, as such, the State or Goan Sabha can challenge the judgment passed on merit by the Board of Revenue dated 11.7.1990 before the higher Court rather by way of restoration or review before the same Court even after 22 years. It is also material that respondent no.4 challenged the order dated 11.7.1990 before this Court in the year 2013 which was dismissed by this Court vide order dated 19.9.2013 although counsel for the respondents submitted that filing of Writ-B No.5377 of 2013 is the manipulation of the petitioners.

8. The Board of Revenue has arbitrarily condoned the delay in filing the review application and allowed the review application without considering the provisions contained under Order 47 Rule 1 of the Code of Civil Procedure. The provisions of Order 47 Rule 1 of the Code of Civil Procedure are as follows:

"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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant,

or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

[Explanation.?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.]"

9. The Apex Court considering the provisions of Order 47 Rule 1 of Code of Civil Procedure as adjudicated the controversy of review jurisdiction in the following cases:

1. Haryana Vs. Mohinder Singh and Others reported in JT 2002 (10) S.C. 197. *Paragraph No.5 of the judgment will be relevant which is as follows:*

"5. We have carefully considered the submissions of learned counsel appearing on either side. The division bench in the High Court, in our view, completely overstepped the limits of its review jurisdiction and on the face of it appears to have proceeded as though it is a rehearing of the whole petition which had been earlier finally disposed of. It has often been reiterated that the scope available for a litigant invoking the powers of review is not one more chance for rehearing of the matter already finally disposed of. The course adopted in this case by the High Court appears to be really what has been held by this Court to be not permissible. On this ground alone, without expressing any views on the merits of the claim, the order of the High Court dated 14.5.99 is set aside and the original order dated 14.5.1998 shall stand restored. While noticing some of the submissions made on merits by either side, we consider it appropriate to place on record that even the learned counsel for the appellant could not seriously dispute the position that the respondents would at any rate be entitled to be placed on the 'first higher standard pay scale' and that to this extent atleast, the respondents' claim would deserve consideration. The appeals are allowed in the above terms. No order as to costs."

2. Parsion Devi and Others Vs. Sumitr Devi and Others reported in JT 1997 (8) SC 480. *Paragraph No.9 of the judgment will be relevant which is as follows:*

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".

10. So far as case law cited by learned counsel for the respondent are concerned, it will be relevant to mention here that liberal view can be taken by the Court under the circumstances of the case so that matter can be adjudicated on merit. In the present case second appeal has been adjudicated once on merit vide judgment dated 11.7.1990, as such, for exercising review jurisdiction after 22 years there is no question of taking liberal view by the Court, as such, case laws cited by learned counsel for the respondents are not applicable in the present controversy.

11. Considering the ratio of law laid down by the Apex Court as well as by this

Court and the fact that judgment dated 11.7.1990 was passed on merit after hearing both the parties, the review jurisdiction exercised by the Board of Revenue after 22 years from the date of the judgment passed by the Board of Revenue on merit is wholly without jurisdiction and cannot be sustained in the eye of law. The impugned judgment and order dated 15.7.2015 passed by Board of Revenue, Allahabad in Review Application Nos. 1 and 2 of 2012-13 is liable to be set aside and is hereby set aside. The original order of Board of Revenue dated 11.7.1990 shall stand restored.

12. The writ petition is ***allowed.***

13. No order as to costs.

(2022) 11 ILRA 96
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.09.2021

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ C No. 8089 of 2021

M/s Sunray Auto Glass Pvt. Ltd., Gautam Budh Nagar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Chandra Bhan Gupta

Counsel for the Respondents:
C.S.C., Shekhar Srivastava

क. श्रम कानून – उ0प्र0 औद्योगिक विवाद अधिनियम, 1947 – धारा 6–एन – एकपक्षीय आदे ा – नोटिस तामिला – डाक की आख्या में प्राप्ति पर हस्ताक्षर अविवादित – प्रभाव – अभिनिर्धारित किया गया, डाक विभाग की स्थिति आख्या व नोटिस प्राप्त करने वाले का नाम व चल दूरभाश दर्ज होने के साक्ष्य से अविवादित हो जाता है कि नोटिस सेवायोजक को तामिल हो गया था – सेवायोजक ने नोटिस तामिल होने के बाद भी अपना पक्ष श्रम न्यायालय के समक्ष नहीं प्रस्तुत किया – हाईकोर्ट ने श्रम न्यायालय के एकपक्षीय आदे ा में कोई विधिक त्रुटि नहीं पाया। {पैरा 4 (क)}

ख. श्रम कानून – उ0प्र0 औद्योगिक विवाद अधिनियम, 1947 – धारा 6–एन – औद्योगिक विवाद के निस्तारण के दौरान धारा 6–ग का उल्लंघन सिद्ध – श्रमिक की पुनः नियुक्ति करने और उसे पूर्ण बकाया वेतन भुगतान करने हेतु श्रम न्यायालय द्वारा दिया गया आलोच्य आदे ा, कितना वैधानिक – श्रम विवाद के विचाराधीन के दौरान श्रमिक 58 वर्श की आयु पूरा कर लिया – श्रमिक द्वारा कोई अन्य कार्य न करने का कोई साक्ष्य नहीं – प्रभाव – अभिनिर्धारित किया गया, जहां धारा 6–एन का उल्लंघन हो, तब भी पुनः नियुक्ति व पूर्ण बकाया वेतन का आदे ा स्वतः पारित नहीं हो सकता है – केवल एकमु त प्रतिकर प्रदान करने का आदे ा न्यायसंगत उपाय है – हाईकोर्ट ने सेवायोजक द्वारा श्रमिक को 3 लाख रुपये की एक मु त धनरा ि ा प्रतिकर के रूप में दिए जाने का आदे ा दिया। {पैरा 4 (ख), 4 (ग) एवं 5 (क)}

रिट याचिका **आंशिक** रूप से स्वीकृत (E-1)

<u>उल्लेखित पूर्व निर्णयों की सूची</u>:–

1. पी.वी.के. क्षिडस्टीलरी लिलनिमटेड बनाम महेन्द्र राम, (2009) 5 एस.सी.सी.705

2. महक सिंह बनाम प्रसाईडिंडग आनि्सर इंडस्ट्रीयल निट्रव्यूनल, 2005 (5) ए. डब्लू.सी.5147;

3. प्रेम बहादुर दलेला बनाम उमेशरा बाली 2019(11) एन्डी्े. 697;

4. उत्तर प्रदेश शासन बनाम लेबर कोट_ यू.पी. इलाहाबाद 2002 (4) ए. डब्लू.सी.3295;

5. अरनिवन्द कुमार निमश्रा बनाम उत्तर प्रदेश शासन 2005 (5) ए. डब्लू.सी.4230;

6. वासू इन्फ्रास्ट्रक्चर प्राइवेट लिनिमटेड बनाम उत्तर प्रदेश शासन 2019 (10) एण्डी॰े. 305

7. क्षिडनिवन ण्ोरेस्ट आनिण्सर ण्ोरेस्ट क्षिडपाटऋमेंट बनाम क्षिडष्टी लेबर कनिमश्नर कानपुर रिरन व अन्य ;रिट सी. नम्बर 12954/2018 आदेश निदनांक 10.4.2018

8. रर्णवीर सिंह बनाम एक्सीक्यूनिटव इं ीनिनयर पी॰डब्लू॰डी॰, 2021 एस॰सी॰सी॰ अॉनलाइन एस॰सी॰ 670

9. उत्तराखंड शासन व अन्य बनाम राकुमार (2019) 14 एस.सी.सी. 353

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

1. <u>प्रकरण का तथ्यात्मक प्रारूपः</u>

(क) उप श्रमायुक्त, नोएडा, उत्तर प्रदेश ने आदेश दिनांक 31.12.2003 के द्वारा, अभिनिर्णय हेतु, श्रम न्यायालय द्वितीय, गाजियाबाद, को निम्न औद्योगिक विवाद प्रेषित किया, जो शासनादेश दिनांक 25.10.2007 के द्वारा श्रम न्यायालय, उत्तर प्रदेश, नोएडा, गौतम बुद्ध नगर को स्थानान्तरित किया गया:

"क्या सेवायोजको द्वारा अपने श्रमिक श्री मनीराम पाल पुत्र श्री सुखपाल पद चौकीदार कम हेल्पर की सेवायें दिनांक 16-03-98 से समाप्त किया जाना उचित तथा/अथवा वैधानिक है यदि हॉ अथवा नहीं तो श्रमिक अपने सेवायोजको से क्या अनुतोष प्राप्त करने का अधिकारी है और किस सीमा तक एवं अन्य किस विवरण सहित।"

(ख) श्रमिक पक्ष ने अपने लिखित कथन, दिनांक 18.02.2006, के द्वारा मुख्य रूप से कथन किया, कि वह विपक्षी के मौखिक आदेशाधीन दिनांक 02.05.1989, को वो चौकीदार-कम-हेल्पर के पद पर स्थायी रूप से नियोजित हुआ था परन्तु उसे दिनांक 16.03.1998 को मौखिक आदेशाधीन, उ०प्र० औद्योगिक अधिनियम 1947 की धारा 6-एन के अनुपालन किये बिना कार्य से पृथक/वंचित कर दिया गया। वो विपक्षी की एक वर्ष से अधिक की निरन्तर सेवा में 240 दिवस से अधिक की निरन्तर सेवा, "स्वच्छ सेवा रिकार्ड" के साथ पूर्ण कर चुका था तथा सेवा समाप्ति के बाद वो बेरोजगारी के कारण घोर आर्थिक संकट में रह रहा है।

(ग) सेवायोजक की ओर से लिखित कथन, दिनांक 11.02.2008 के द्वारा कथित किया गया कि, श्रमिक 02.05.1989 को हेल्पर कम चौकीदार के पद पर रू० 1794/- प्रतिमास वेतन पर नियोजित हुआ था, परन्तु उसका कार्य संतोषजनक नहीं रहा तथा इस संबंध में उसे चेतावनी भी दी गई थी। श्रमिक दिनांक 16.03.1998 से बिना किसी अनुमति व अपनी इच्छा से कार्य से विरत रहा। उसने सेवायोजक के पंजीकृत पत्र दिनांक 10.04.1998 का कोई उत्तर भी नहीं दिया, तदउपरांत रू० 1272/- का एक चैक, जिसका नम्बर 583690 था उसको एक पत्र दिनांक 12.06.1998 के संलग्न भेजा गया, परन्तु उसने उसको लेने से इंकार कर दिया। श्रमिक किसी बेहतर रोजगार मिलने के कारण अपनी इच्छा से सेवायोजक का रोजगार छोड़ कर चला गया था।

(घ) श्रमिक ने अपने प्रत्युत्तर में सेवायोजक के लिखित कथन को अस्वीकार किया व अपने लिखित कथन को दोहराया। इसी तरह से सेवायोजक ने अपने प्रत्युत्तर में श्रमिक के

लिखित कथन को अस्वीकार करते हुए अपने लिखित कथन को दोहराया।

(ड़) श्रम न्यायालय ने श्रमिक पक्ष द्वारा प्रस्तुत डाक घर की स्थिति आख्या को मानते हुए सेवायोजक को नोटिस तामील होना मान लिया गया तथा सेवायोजक पक्ष की अनुपस्थिति के कारण 11.12.2018 को सेवायोजक का अभिलेख दाखिल करने का अवसर समाप्त कर दिया। दिनांक 01.07.2019 को सेवायोजक का श्रमिक साक्षी से जिरह करने का तथा दिनांक 14.10.2019 को सेवायोजक का साक्ष्य का अधिकार भी समाप्त कर दिया गया।

(च) इन परिस्थितयों में आक्षेपित अवार्ड दिनांक 02.12.2019 पारित किया गया जिसके मुख्य अंश निम्न हैंः

"श्रमिक वादी का तर्क सुना गया उन्होने अपने तर्क में कहा कि वादी श्रमिक ने अपने कथन को अपने बयान एवं अभिलेखों से सिद्ध किया है। सेवायोजक ने पर्याप्त अवसर दिये जाने के बाद भी अपना कोई अभिलेखीय साक्ष्य प्रस्तुत नहीं किया है। श्रमिक ने अपने लिखित कथन एवं अभिलेखीय साक्ष्य में कहा है कि वह विपक्षी प्रतिष्ठान में दिनांक 02-05-1989 से चौकीदार कम हेल्पर के पद पर स्थायी रूप से नियोजित हुआ था और प्रतिवादी सेवायोजक ने दिनांक 16.03.1998 को नौकरी से निकाल दिया जिससे सिद्ध है कि उसने एक कलेन्डर वर्ष में 240 दिन से अधिक कार्य किया है। इस प्रकार मौखिक रूप से सेवाये समाप्त करना यू०पी०आई०डी०एक्ट की धारा 6 एन का उल्लंघन है। श्रमिक सेवा समाप्ति की तिथि से बेरोजगार रहा है। अतः उसे पूर्व पूर्ण वेतन व अन्य समस्त हित लाभों सहित सेवा में बहाल कराया जाये।

उक्त तर्क के परिप्रेक्ष्य में पत्रावली का अवलोकन किया गया जिससे स्पष्ट है कि श्रमिक ने अपने बयान एवं अभिलेखों से यह सिद्ध किया है कि वह दिनांक 02.05.1989 से दिनांक 16.03.1998 तक सेवायोजकों के यहां कार्यरत रहा है जो एक कलेन्डर वर्ष में 240 दिन से ज्यादा की अवधि है। वादी श्रमिक की दिनांक 16.03.1998 को प्रतिवादी सेवायोजक द्वारा बिना घरेलू जॉच किये व आरोप पत्र दिये सेवाये समाप्त की गई है जो अवैधानिक है। सेवायोजको को पर्याप्त अवसर दिये जाने के बावजूद भी श्रमिक के कथन के विपरीत ऐसा कोई साक्ष्य नहीं दिया है जिससे कि श्रमिक के कथन पर अविश्वास किया जाये। श्रमिक ने सेवा समाप्ति की तिथि से लगातार बेरोजगार रहा है का कथन किया है जो अन्यथा साक्ष्य के अभाव में सही माना जायेगा कि श्रमिक सेवा समाप्ति की तिथि से बेरोजगार है।

उपरोक्त विवेचना के आधार पर स्पष्टतः संबंधित श्रमिक की सेवाये दिनांक 16.03.1998 को अवैधानिक रूप से समाप्त की गयी है। श्रमिक वादी उक्त तिथि के बाद कही भी लाभकारी नियोजन में नहीं है। इस परिप्रेक्ष्य में श्रमिक वादी उक्त तिथि से पूर्व सेवा शर्तों लाभों के साथ पूर्ण बैकवेजेज व अन्य समस्त हित लाभों सहित सेवा में बहाल होने का अधिकारी है। तदनुसार संदर्भ श्रमिक के पक्ष में अभिनिर्णीत किया जाता है।" (रेखांकन न्यायालय द्वारा)

(छ) सेवायोजक द्वारा एक प्रार्थना पत्र दिनांक 06.03.2020 को एकपक्षीय आदेश दिनांक 11.12.2018, 01.07.2019, 14.10.2019 व अवार्ड दिनांक 02.12.2019 को अपास्त करने के लिए दाखिल किया गया, कि नोटिस सेवायोजक के अधिकृत व्यक्ति को प्राप्त नहीं हुआ था। श्रमिक द्वारा इस प्रार्थना पत्र पर आपत्ति भी दाखिल की गयी कि डाक विभाग के स्थिति आख्या द्वारा नोटिस के तामील होने की पुष्टि होती है। श्रम न्यायालय ने आदेश दिनांक 15.01.2021 द्वारा उक्त प्रार्थना पत्र को निरस्त

कर दिया कि, अवार्ड दिनांक 02.12.2019 को पारित होने के उपरान्त प्रकाशित भी हो गया, तदउपरान्त 06.03.2020 को उक्त प्रार्थना पत्र दाखिल किया गया तथा दिनांक 08.03.2018 को जो नोटिस भेजा गया था उसकी प्राप्ति को, डाक विभाग द्वारा पुष्टि किया गया कि, वो 09.03.2018 को सेवा योजक को प्राप्त भी हो गया था तथा प्राप्त करने वाले का नाम व उसका चल दूरभाष का नम्बर भी अंकित था। अतः प्रार्थना पत्र स्वीकार करने का कोई आधार नहीं रहा।

2- <u>सेवायोजक का पक्ष</u>

(क) श्री चन्द्र भान गुप्ता, प्रार्थी (सेवायोजक) के विद्वान अधिवक्ता ने कथन किया कि सेवायोजक को कभी भी नोटिस तामिल नहीं हुआ था और न हीं उस संदर्भ में कोई भी आदेश पत्रावली पर उपस्थित है। अगर दिनांक 08.03.2018 को भेजा गया नोटिस तामील हो गया होता, तो दिनांक 10.08.2018 या आगे किसी भी तिथि पर नोटिस तामील होने का आदेश पत्रावली पर अंकित होता। श्रमिक का पक्ष मात्र, उसके लिखित कथन पर मान लिया गया, जो गलत है। श्रमिक ने अपने पक्ष में कोई भी दस्तावेज, श्रम न्यायालय, के समक्ष उपलब्ध नहीं कराया। अतः श्रम न्यायालय का यह निष्कर्ष कि श्रमिक ने 240 दिन से अधिक कार्य एक कलेन्डर वर्ष में किया था, का आधार काल्पनिक व केवल अनुमान पर आधारित है।

(ख) श्रमिक के कथनानुसार उसको दिनांक 16.03.1998 को कार्य विरत करने का मौखिक आदेश पारित किया गया परन्तु श्रम न्यायालय को औद्योगिक विवाद 31.12.2003 को भेजा गया, अर्थात 5 वर्ष बाद, अतः इतने अधिक विलम्ब के कारण उस पर अभिनिर्णय नहीं लिया जाना चाहिये था।

(ग) वर्तमान में श्रमिक की आयु करीब 64 वर्ष है तथा उसका 1998 के उपरान्त निरन्तर बेरोगजार होने का कोई यथोचित कारण पत्रावली पर उपस्थित नहीं है। सेवा में पुनः नियुक्ति करने का आदेश पूर्ण रूप से गलत व अवैधानिक है तथा, पूर्ण बकाया वेतन देने का आदेश भी आधारहीन होने के कारण अपास्त होने योग्य है।

(घ) अधिवक्ता ने यह भी कथन किया कि पूर्ण बकाया वेतन न दे कर, उचित एक मूश्त प्रतिकर भी दिया जा सकता था। सेवायोजक के विद्वान अधिवक्ता ने न्यायालय का ध्यान उच्चतम न्यायालय के निर्णय **पी.वी.के. डिस्टीलरी लिमिटेड बनाम महेन्द्र राम, (2009) 5 एस.सी.सी.705** की ओर आकर्षित करवाया, जिसके अनुसार अगर श्रम न्यायालय इस निष्कर्ष पर पहुंचता है कि सेवा नियोजक ने श्रमिक की सेवायें निरस्त नहीं करी है तो विवाद की निस्तारण की प्रक्रिया वहीं रोक देनी चाहिए। इसके अतिरिक्त पुनः नियुक्ति व पूर्ण बकाया वेतन का आदेश स्वतः नहीं हो सकता है।

3- <u>श्रमिक का पक्ष</u>

(क) श्री शेखर श्रीवास्तव, विद्वान अधिवक्ता ने श्रमिक का पक्ष रखा तथा कथन किया कि डाक विभाग द्वारा जारी किये गये प्रमाण पत्र से पूर्णतः विदित है कि, सेवायोजक को नोटिस तामील हो गया था तथा वो अपनी इच्छानुसार अपना पक्ष न रखने के लिए जिम्मेदार है। श्रम न्यायालय ने श्रमिक के कथन व प्रकरण के तथ्यों को ध्यान में रखते हुए विधिक रूप से अवार्ड पारित किया है, अतः उसमें किसी भी तरह से हस्तक्षेप करने का न तो कोई आधार है न ही कोई आवश्यक्ता है। अधिवक्ता ने अपने कथन को बल देने के लिए निम्न विधिक दृष्टांत को न्यायालय के समक्ष प्रस्तुत किया; **महक सिंह बनाम प्रसाईडिंग आफिसर इंडस्ट्रीयल ट्रिव्यूनल, 2005 (5) ए. डब्लू.सी.5147; प्रेम बहादुर दलेला बनाम**

उमेशराज बाली 2019(11) ए.डी.जे. 697; उत्तर प्रदेश शासन बनाम लेबर कोर्ट यू.पी. इलाहाबाद 2002 (4) ए. डब्लू.सी.3295; अरविन्द कुमार मिश्रा बनाम उत्तर प्रदेश शासन 2005 (5) ए. डब्लू.सी.4230; वासू इन्फ्रास्ट्रक्चर प्राइवेट लिमिटेड बनाम उत्तर प्रदेश शासन 2019 (10) ए.डी.जे. 305; डिविजन फोरेस्ट आफिसर फोरेस्ट डिपार्टमेंट बनाम डिप्टी लेबर कमिश्नर कानपुर रिजन व अन्य (रिट सी. नम्बर 12954/2018 आदेश दिनांक 10.4.2018) और कथन किया कि नोटिस तामील होने के उपरान्त भी अपना पक्ष न रखने की दशा में श्रमिक के पक्ष को ध्यान में रखते हुए निर्णय देने में कोई विधिक त्रुटि नहीं है। श्रम विवाद, श्रमिक के हितों को ध्यान में रखते हुए निर्धारित करना चाहिए। मौखिक रूप से कार्य से पृथक करना विधि विरूद्ध है। डाक विभाग द्वारा दी गई स्थिति आख्या, नोटिस तामिल होने का मान्य साक्ष्य है। अगर सेवायोजक अपना पक्ष या दस्तावेज प्रस्तुत नहीं करता है तो उसके प्रतिकूल निर्णय लिया जा सकता है।

4- <u>विश्लेषण</u>

(क) उपरोक्त वर्णित दोनों पक्षों के कथन व पत्रावली के सम्यक परिशीलन से यह विदित है कि डाक विभाग की स्थिति आख्या व नोटिस प्राप्त करने वाले का नाम व चल दूरभाष दर्ज होने के साक्ष्य से यह अविवादित हो जाता है, कि नोटिस सेवायोजक को तामील हो गया था। सेवायोजक ने नोटिस प्राप्त करने वाले का हस्ताक्षर विवादित नहीं किया है। सेवायोजक ने नोटिस तामील होने के बाद भी अपना पक्ष श्रम न्यायालय के समक्ष नहीं प्रस्तुत किया, अतः श्रम न्यायालय द्वारा श्रमिक का पक्ष मान लेने में कोई विधिक त्रुटि प्रतीत नहीं होती है। अतः वर्तमान प्रकरण मेंे उ० प्र० औद्योगिक अधिनियम 1947 की धारा 6 एन का उलंघन हुआ है।

(ख) उपरोक्त तथ्यों में केवल एक बिन्दू है जो अब विचारणीय रह जाता है, कि क्या श्रम न्यायालय द्वारा श्रमिक की पुनः नियुक्ति व पूर्ण बकाया वेतन का आदेश, वर्तमान प्रकरण के तथ्य व परिस्थितियों में क्या उचित है, जबकि औद्योगिक विवाद 5 वर्ष बाद प्रेषित किया गया, श्रमिक प्रकरण के दौरान ही 58 वर्ष की आयु पार कर चुका है व ऐसा कोई ठोस साक्ष्य पत्रावली पर उपलब्ध नहीं है कि श्रमिक 1998 से 2019 व अब तक बिना किसी रोजगार के अपना जीवन यापन व्यतीत करता रहा है।

(ग) इस संदर्भ में उच्चतम न्यायालय का एक नवीन निर्णय जो **रणवीर सिंह बनाम एक्सीक्यूटिव इंजीनियर पी०डब्लू०डी०, 2021 एस०सी०सी० अॉनलाइन एस०सी० 670** के मामले में पारित किया गया है, जो वर्तमान प्रकरण के तथ्यों में पूर्णतः उपयुक्त है, जहाँ **उत्तराखंड शासन व अन्य बनाम राजकुमार (2019) 14 एस.सी.सी. 353** का आधार लेते हुए पुनः यह निर्धारित किया गया कि ऐसे प्रकरण में जहां धारा 6 एन का उल्लघंन हो तब भी पुनः नियोक्ति व पूर्ण बकाया वेतन का आदेश स्वतः पारित नहीं हो सकता है तथा उसके स्थान पर केवल एक मुश्त उचित प्रतिकर प्रदान करने का आदेश भी एक न्यायसंगत निदान हो सकता है। इस निर्णय के प्रस्तर 6 के प्रमुख अंश निम्न हैं:

<u>".....जैसा कि अनुचित व्यापार व्यवहार के होने का कोई निष्कर्ष नहीं है। ऐसी परिस्थितियों में हम सोचते है कि इस न्यायालय द्वारा प्रतिपादित सिद्धांत, जिसे राज कुमार (उपरोक्त) के निर्णय में संदर्भित किया गया है, जिसका हमने उल्लेख भी किया है, का पालन करना अधिक उपयुक्त होगा। दूसरे शब्दों में, हमारा निष्कर्ष यह है कि पुनर्नियुक्ति स्वतः नहीं हो सकती है, धारा 25 एफ का उल्लंघन स्थापित हो चुका है, अतः उपयुक्त प्रतिकर उचित निदान रहेगा।"</u>

(हिन्दी अनुवाद व रेखांकन न्यायालय द्वारा)

5- **निष्कर्ष**

(क) उपरोक्त विशलेषण के संदर्भ में यह ध्यान में रखते हुए कि श्रमिक ने सेवायोजक के साथ केवल 9 वर्ष अस्थाई सहायक के रूप में कार्य किया व 1998 से 2019, जब आवार्ड पारित हुआ व आज तक ऐसा नहीं माना जा सकता कि इन 23 वर्षों तक श्रमिक ने कोई भी कार्य या रोजगार अपने जीवन यापन के लिए नहीं किया हो या इतने ज्यादा समय तक वो पुर्ण रूप से बेरोजगार रहा हो, तथा श्रमिक की आयु वर्तमान में 64 वर्ष का होना व उपरोक्त उल्लेखित विधि का सिद्धांत कि ऐसी परिस्थिति में पुनः नियुक्ति व पूर्ण बकाया वेतन का आदेश स्वतः नहीं हो सकता है, अतः पुनः नियोक्ति व पूर्ण बकाया वेतन के आदेश के स्थान पर श्रमिक को सेवायोजक द्वारा रूपये 3 लाख एक मुश्त प्रतिकर के रूप में प्रदान करने का आदेश देना न्यायोचित व न्यायसंगत रहेगा, जो प्रार्थी (सेवायोजक) विपक्षी (श्रमिक) को इस निर्णय की तिथि से 8 सप्ताह के अन्दर उसके द्वारा सूचित बैंक खाते में अन्तरित करेगा। अतः उक्त आदेश व निर्देश दिया जाता है।

(ख) अतः वर्तमान याचिका उपरोक्त निर्देशों के साथ आंशिक रूप से स्वीकार की जाती है व आक्षेपित अवार्ड दिनांक 15.01.2021, उपरोक्त आदेश व निर्देशों के आधार पर अनुतोष का आदेश संशोधित किया जाता है।

(2022) 11 ILRA 101
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.10.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Writ C No. 14031 of 2022

Shakuntla Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Man Bahadur Singh, Sri Rakesh Pande (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Ashok Kumar Giri, Sri Ashok Kumar Tiwari, Sri Syed Ahmed Faizan, Sri Ten Singh, Sri Zaheer Asghar, Sri S.F.A. Naqvi (Sr. Advocate)

A. Constitution of India – Article 226 – Writ – Maintainability – Plea that writ is premature, how far permissible – By determining and delimitation of the wards, the impugned notification paved way for holding fresh election alongwith election of other Municipalities – Effect – Held, fresh exercise undertaken in pursuance of the impugned notification will have the effect of curtailing the duration of Municipality she is heading, she definitely has an actionable right in presenti to challenge the notification and the consequential exercise, to protect her constitutional and statutory rights – The petitioner cannot be made to wait till the notification for holding the election is published, when the stand of the respondents is clear and unambiguous in relation to the proposed election scheduled to be held in December, 2022 – High Court found no force in the contention that the petition is premature, or is based on mere apprehension. (Para 14)

B. Constitution of India – Article 243-Q, 243-R – UP Municipalities Act, 1916 – Ss. 3, 9, 10-A and 333 – Fresh election of the municipality – Five year tenure of municipalities, how far relevant – Held, duration of the Municipality, elected on 13.3.2022 would be five years from the date of its first meeting in terms of Article 243-U r/w S. 10-A of the UP Municipalities

Act – Present Municipality is entitled to run its full duration of five years from the date of its first meeting – The stand of the St. respondents that its term would expire in November, 2022 and therefore, exercise for holding general election of the Municipality is being taken to constitute a new Municipality in its place, cannot be countenanced, being in teeth of the constitutional mandate. (Para 58)

Writ petition allowed. (E-1)

List of Cases cited:-

1. Olga Tellis & ors. Vs Bombay Municipal Corporation & ors.; 1985 (3) SCC 545

2. Achhey Lal Vs V.C. Gorakhpur University; 1985 U.P.L.B.E.C. 38

3. St. of Maharashtra & anr. Vs The Jalgaon Municipal Council; 2003 (9) SCC 731

4. Keshav Dev Kushwaha Vs St. of U.P. & ors.; 2014 (9) ADJ 536

5. St. of Maharashtra Vs Deep Narain Chavan; (2002) 10 SCC 565

6. Nagar Palika Parishad Vs St. of U.P. & ors.; 2010 (3) ADJ 703

7. Smt. Mohini Sharma Vs St. of U.P; 2016 (10) ADJ 221

8. Writ C No. 25471 of 2022; Nilesh Singh Vs St. of U.P. & ors. decided on 08.09.2022

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

1. The petitioner is elected Chairperson of Nagar Palika Parishad, Siswan Bazar, District Maharajganj. She has challenged the notification dated 26.04.2022 issued by respondent no.1, the State Government, addressed to District Magistrates of 67 districts, directing them to initiate exercise for delimitation of wards in 151 Municipalities, which have been newly constituted or have undergone extension of municipal limits since the last general election. The list of such Municipalities is annexed alongwith the impugned notification. Nagar Palika Parishad, Siswan Bazar is at serial no.22. The petitioner has also prayed for a writ of mandamus restraining the respondents from initiating process for holding fresh election of Nagar Palika Parishad, Siswan Bazar, Maharajganj expected to be held by the end of the year - 2022 and from interfering in the functioning of the petitioner as Chairperson of Nagar Palika Parishad, Siswan Bazar until the expiry of the term of Nagar Palika on 31.03.2027 unless dissolved earlier.

2. The above reliefs have been claimed in the backdrop of following facts:

2(1). Siswan Bazar, District Maharajganj was initially notified as a Nagar Panchayat under Section 3 of the U.P. Town Areas Act, 1914 vide notification dated 3.02.1953. It comprised of 14 wards and the total population of the Nagar Panchayat as per census of India 2011 was 20963. The last election of Nagar Panchayat, Siswan Bazar was held on 12.12.2017, whereby the Chairperson and 14 Ward members were elected, followed by constitution of the Nagar Panchayat.

2(2). Later on, the State Government decided to create a new Municipal Council (Nagar Palika Parishad) in Siswan Bazar, Maharajganj by adding 22 revenue villages/ 17 Gram Panchayats in the existing Nagar Panchayat area and accordingly, issued a draft notification dated 10.12.2019. It was followed by a final notification dated 31.12.2019 issued under clause (2) of Article 243-Q of the Constitution of India read with Section 3 (2) of the U.P. Municipalities Act, 1916, thereby including the area mentioned in Schedule I of the notification in the

transitional area of Nagar Panchayat Siswan Bazar. Additionally, the transitional area of Nagar Panchayat Siswan Bazar, Maharajganj mentioned in Schedule II of the notification was notified as a smaller urban area (Municipal Council) to be known as Municipal Council Siswan Bazar, District Maharajganj.

2(3). It led to filing of P.I.L. No.1822 of 2020 (Anoop Kumar Pathak and another Vs. State of U.P. and others) for direction (i) to the State respondents to dissolve the erstwhile Nagar Panchayat Siswan Bazar, Maharajganj; (ii) to constitute the Municipal Council and Ward Committees and (iii) to appoint administrator in Municipal Council, Siswan Bazar, District Maharajganj. The said writ petition was disposed of by order dated 8.02.2021 with direction to the District Magistrate, Maharajganj to hold election of newly created Municipal Council, Siswan Bazar, as early as possible, however not later than three months from the date of communication of the order. The operative part of the order is as follows:-

"In the case at hand evidently with the Notification dated 31.12.2019 Municipal Council, Siswan Bazar, District Maharajganj is constituted. It was the bounden duty of the District Magistrate as early as possible make preliminary arrangements for the holding of ***first elections****. Non holding of election for over one year reflects inaction and non performance of statutory obligation, by the District Magistrate.*

In view whereof the District Magistrate, Maharajganj is directed to hold election of newly created Municipal Council, Siswan Bazar, as early as possible, however not later than three months from the date of communication of this order."

2(4). In pursuance of the above direction, the State Government vide its communication dated 2.06.2021 addressed to District Magistrate, Maharajganj directed him to appoint administrator and to initiate process for constitution of newly created Nagar Palika Parishad, Siswan Bazar by holding the elections. The District Magistrate vide order dated 8.06.2021 issued in purported exercise of power under Section 333 of the U.P. Municipalities Act, 1916 constituted a Committee of five persons to exercise the power and perform the duties and functions of newly created Nagar Palika Parishad until it is established.

2(5). At this stage, Smt. Ragni Devi, the elected Chairperson of Nagar Panchayat Siswan Bazar, challenged the order of State Government dated 2.06.2021 and the consequential order of the District Magistrate dated 8.06.2021 appointing Committee to manage the affairs of the newly created Nagar Palika Parishad by filing Writ-C No.13629 of 2021 (Smt. Ragni Devi Vs. State of U.P. and 3 others). The said writ petition was dismissed by order dated 9.08.2021, upholding both the orders.

2(6). Smt. Ragni Devi aggrieved by the order of this Court dated 8.02.2021 passed in the PIL and the order dated 9.08.2021 passed in her writ petition approached the Supreme Court by filing SLP No.4233 of 2021 and SLP No.13806 of 2021 respectively. Both the SLPs were dismissed by the Supreme Court by common order dated 17.9.2021. The Supreme Court, while upholding the decisions of this Court to hold first election of the newly constituted Municipal Council, again directed the authorities to: *"ensure that the elections for establishing the newly constituted Municipal Council Siswan Bazar, is conducted at the earliest*

and, in any case, completed within two months from today and report compliance in that behalf.

The State must ensure that all logistical support is provided to the State Election Commission to ensure that the elections are conducted by adhering to appropriate Covid-19 protocol, as would be in force at the relevant time.

If there is laxity on the part of the State in ensuring completion of the elections within two months from today, the Chief Secretary of the State of Uttar Pradesh shall be personally responsible in that behalf."

2(7). On 23.9.2021, District Magistrate, Maharajganj sent a communication to the Director, Lucknow in regard to compliance of the order of Supreme Court. While making reference to the letter of State Government dated 21.9.2021 in connection with the exercise for determining the number of wards and delimitation, he was requested to complete the said exercise under intimation to him.

2(8). On 25.9.2021, the State Government issued a notification inviting objections and suggestion to the draft order relating to delimitation as stipulated under Section 11-B (2) of the U.P. Municipalities Act, 1916. It was followed by a final notification dated 7.12.2021, thereby dividing the Nagar Palika into 25 Wards.

2(9). On 14.02.2022, the State Election Commission, U.P. in consultation with the State Government issued notification notifying the election programme for electing the chairperson and members of Nagar Palika Parishad, Siswan Bazar. In pursuance thereof, election was held on 13.03.2022 and results were declared on 15.03.2022. The petitioner was declared elected as Chairperson of Nagar Palika Parishad, Siswan Bazar and a certificate to the said effect was issued in her favour by the Returning Officer dated 15.03.2022. On 22.03.2022, the State Election Commission notified the names of chairperson and members, who were elected. On 29.03.2022, the petitioner subscribed to oath of office. On 1.04.2022, first meeting of the newly constituted Nagar Palika was held.

2(10). On 26.04.2022, the State Government issued the impugned communication addressed to District Magistrates of 57 districts on the subject relating to delimitation of wards of the newly constituted municipalities (83 Nagar Panchayats, 2 Nagar Palika Parishads and one Nagar Nigam). The said exercise was also directed to be held in 66 municipalities that had undergone change of boundaries/ extension of areas, being 66 in number (36 Nagar Pachayats + 21 Nagar Palika Parishads + 9 Nagar Nigams). This took the tally to 151 municipalities in all. The delimitation in the above municipalities was directed to be held on basis of census of the year 2011. The proposal was to be forwarded to the State Government by 5.5.2022 in the proforma prescribed by Government Orders dated 4.04.2017 and 19.07.2017. Nagar Palika Parishad, Siswan Bazar, Maharajganj is enlisted at serial no.22 in the list annexed with the communication and where the said exercise was also to be held. The petitioner, who was elected on 13.03.2022, apprehending that the impugned communication is a step towards holding fresh election and will have the effect of curtailing her term of five years has preferred the instant petition.

3. The State respondents as well as the State Election Commission U.P. have filed separate counter affidavits. In reply, the petitioner has filed separate rejoinder affidavits.

4. One Roshan Kumar has sought impleadment, alleging that he proposes to

contest the election to be held after completion of the impugned exercise relating to delimitation and is therefore interested in opposing the writ petition.

5. We have heard Sri Rakesh Pande, learned Senior Counsel assisted by Sri Man Bahadur Singh for the petitioner, Sri Ambrish Shukla, learned Additional Chief Standing Counsel for respondents no.1, 3 & 4, Sri Ten Singh for the State Election Commission U.P., Sri Ashok Kumar Tiwari, for respondent no.5 i.e. Nagar Palika Parishad through its Executive Officer and Sri S.F.A. Naqvi, learned Senior Counsel assisted by Sri Ashok Kumar Giri on behalf of the intervenor - Roshan Kumar.

6(a). Sri Rakesh Pande, learned Senior Counsel appearing on behalf of the petitioner submitted that the term of a Municipality under Article 243-U of the Constitution and Section 10-A of the U.P. Municipalities Act is five years from the date appointed for its first meeting. The first meeting of the newly constituted Nagar Palika Parishad was held on 1.04.2022 and, therefore, its five years term would expire on 31.03.2027. The impugned notification directing the District Magistrates to initiate the exercise of delimitation of wards of municipalities which were newly created/limits extended for holding fresh election, may be legal and valid where elections have not been held after the upgradation/extension of boundaries, but not in case of Nagar Palika Parishad Siswan Bazar, which was constituted as a Municipality for the first time after the election dated 13.03.2022. It was not a case of dissolution of an existing Municipality and, therefore, the tenure will be governed by clause (1) of Article 243-U and not by clause (4) which applies in case of premature dissolution on the occurrence of certain contingencies envisaged under Section 30 of the U.P. Municipalities Act, 1916.

6(b). The election held on 11.3.2021 was the first election of the newly constituted Municipality and its tenure of five years is sacrosanct by virtue of Article 243-U of the Constitution read with Section 10-A of the U.P. Municipalities Act, 1916.

6(c). In support of the above submission, he placed reliance on the decision of this Court in Ragni Devi Vs. State of U.P. and others as well as the judgement of the Supreme Court in SLP Nos.4233 of 2021 and 13806 of 2021 dated 17.09.2021, wherein this Court and the Supreme Court have held that upon creation of a new municipality i.e. Nagar Palika Parishad Siswan Bazar, the existence of predecessor municipality i.e. Nagar Panchayat, Siswan Bazar had ceased. The administrator appointed to manage the affairs of the new municipality was under mandate to hold election of newly created municipality so that the charge is handed over to it.

6(d). He further submitted that before notifying fresh election of newly constituted Nagar Palika Parishad, the exercise relating to determination of number of wards and their delimitation was duly held and this fulfilled the requirement of Section 11-A and 11-B of the U.P. Municipalities Act, 1916 and Article 243-S of the Constitution.

6(e). He further submitted that the Election Commission harbouring under some misconception issued the election notification mistakenly using the term 'bye-election', but also simultaneously referring to Section 13-G which unequivocally relates to issuance of notifications for general elections. The term of the newly constituted Municipality is protected by

constitutional mandate and cannot be shortened by wrong use of some word in the election notification. The election held in the past in which the petitioner was elected as Chairperson of the newly constituted Municipality was for all practical purposes, a general election and not a bye-election and consequently, the provisions of Article 243-U (4) cannot be pressed to curtail the constitutional guarantee.

6(f). It is also urged that there cannot be any estoppel or waiver of the rights conferred by the Constitution. Learned Senior Counsel for the petitioner has placed reliance on the judgment of the Supreme Court in **Olga Tellis and others Vs. Bombay Municipal Corporation and others1** and a Division Bench judgment of this Court in **Achhey Lal Vs. V.C. Gorakhpur University2.**

7(i). Per contra, Sri Ambrish Shukla, learned Additional Chief Standing Counsel submitted that the election held on 13.03.2021 was a bye-election and not a general election, as is also mentioned in the election notification issued by the State Election Commission dated 14.02.2022. According to him, the aforesaid notification when it refers to Section 13-G makes a reference to the power of State Election Commission to make provision with respect to issuing of orders generally on all matters relating to conduct of election (clause q). He also submitted that the notification is referable to Section 13-H of the U.P. Municipalities Act 1916 relating to issuance of election notification by State Election Commission in respect of bye-election.

7(ii). The emphasis was on the fact that the election in which the petitioner was elected as Chairperson was a bye-election and not a general election and consequently, clause (iv) of Article 243-U of the Constitution and Section 10-A (3) of the U.P. Municipalities Act, 1916 will come into play and the petitioner as well as other members elected in pursuance of the aforesaid notification shall continue in office only for remainder of the period for which the dissolved Municipality would have continued under clause (1), had it not been so dissolved. He also placed reliance on the order of Supreme Court dated 23.11.2021 passed on the application of State Election Commission U.P. in SLP filed by *Ragini Devi* whereby the Supreme Court had extended the time prescribed earlier for holding the elections.

7(iii). He further placed reliance on provisions of Section 3-A, Section 3-B (8), Section 10-A and Section 151-A of the Representation of People Act, 1950.

7(iv). He further submitted that the petitioner does not have any cause of action to file the instant petition. According to him, what has been challenged as a notification, is in fact only a communication sent by the State Government to District Magistrates of various districts where the Municipalities have undergone upgradation/expansion of boundaries to undertake the exercise of delimitation of wards. It is not an election notification, therefore, the challenge is premature and based on mere apprehension.

8. Sri Ten Singh, learned counsel for the State Election Commission U.P. as well as Sri S.F.A. Naqvi, learned senior counsel appearing for the intervenor, adopted the arguments of Sri Ambrish Shukla, learned Additional Chief Standing Counsel.

9. The questions which fall for our consideration are: -

(i) Whether the writ petition is premature, based on mere apprehension, and is liable to be dismissed in limine?

(ii) What was the effect of the notification dated 31.12.2019, issued by the

Governor, in exercise of power under Article 243-Q of the Constitution, read with Section 3 of the U.P. Municipalities Act, 1916?

(iii) What was the status of the Municipality constituted in pursuance of the election held on 13.3.2022?

(iv) Whether the term of the newly constituted Municipality is governed by clause (1) of Article 243-U or clause (4) of Article 243-U?

(v) What would be the effect of use of word "bye election" in the election notification dated 14.2.2022, issued by State Election Commission, U.P. on the status of the newly constituted Municipality?

(vi) Whether the High Court, in exercise of power under Article 226, can grant any relief to the petitioner?

10. We first proceed to examine the plea relating to writ petition being premature and based on mere apprehension. The impugned notification dated 26.4.2021, issued by the State Government, is addressed to the District Magistrates of 57 districts wherein 151 existing municipalities have either been reconstituted or their territorial limits extended since the last general elections held in the year 2017. It directs them to initiate the exercise of determination and delimitation of wards and supply the details in prescribed format appended to the GOs dated 4.4.2017 and 19.7.2017 by the stipulated date, i.e. 5.5.2022. The said exercise was to be held on basis of the data of 2011 Census.

11. Section 11-A of the Act relates to delimitation of wards and it reads thus: -

11A. Delimitation of wards.- *(1)* ***For the purpose of election of members*** *of a municipality every municipal area shall be divided into territorial constituencies to be known as wards in such manner that the population in each ward shall, so far as practicable, be the same throughout the municipal area.*

(2) Each ward shall be represented by one member in the municipality.

12. The exercise of delimitation of wards as per the above provision is held for the purpose of holding election of members of a municipality. It is a step-in-aid towards constitution of a municipality which under Section 9 comprises of the elected Chairperson (President); elected members; ex-officio members; nominated members and Chairperson of the Committees established under Section 104 of the Act.

13. In paragraph nos. 35, 36 and 41 of the writ petition, it is specifically asserted by the petitioner that the above exercise of determination and delimitation of wards was intended to be held in the newly created, upgraded and extended Municipalities, along with other urban local bodies, whose terms are expiring by end of the year 2022. It is also asserted that the said exercise was not required to be undertaken in respect of the petitioner's municipality, the election of which was held recently on 13.3.2022, after carrying out the same exercise, i.e. determination of wards and their delimitation. In paragraph 15 and 16 of the counter affidavit filed by the State, it is asserted that the exercise relating to determination of number of wards and delimitation in respect of the petitioner's municipality is being undertaken, as its term is expiring in December, 2022 and consequently, fresh elections are to be held. Same stand has been taken by the State Election

Commission, U.P. in the counter affidavit filed by it.

14. It is evidently clear that the impugned exercise for determination of wards and their delimitation in respect of Nagar Palika Parishad, Siswan Bazar, Maharajganj, was undertaken in pursuance of the impugned notification to pave way for holding of fresh elections in December, 2022, when elections of other municipalities is also scheduled to be held. As the specific case of the petitioner is that its term is upto 31.3.2027 and fresh exercise undertaken in pursuance of the impugned notification will have the effect of curtailing the duration of Municipality she is heading, she definitely has an actionable right in presenti to challenge the notification and the consequential exercise, to protect her constitutional and statutory rights. The petitioner cannot be made to wait till the notification for holding the election is published, when the stand of the respondents is clear and unambiguous in relation to the proposed election scheduled to be held in December, 2022. We thus find no force in the contention that the petition is premature, or is based on mere apprehension.

15. We now proceed to examine the issues arising in the case on merits.

16. A bird's-eye view of the relevant provisions of the Constitution, particularly Part IX-A, inserted by the Constitution (Seventy Fourth Amendment) Act, 1992, and cognate enactments which deal with Municipalities, will help in understanding and analysing the issues at hand. Part IX-A came into effect from 1.6.1993. It defines "Municipality" under Article 243-P(e), as an institution of self-government constituted under Article 243-Q.

17. Article 243-Q relates to Constitution of Municipalities and reads as follows: -

243Q. ***Constitution of Municipalities*** *-*

(1) There shall be constituted in every State,--

(a) a Nagar Panchayat (by whatever name called) for a transitional area, that is to say, an area in transition from a rural area to an urban area;

(b) a Municipal Council for a smaller urban area; and

(c) a Municipal Corporation for a larger urban area,

in accordance with the provisions of this Part:

Provided that a Municipality under this clause may not be constituted in such urban area or part thereof as the Governor may, having regard to the size of the area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as he may deem fit, by public notification, specify to be an industrial township.

(2) In this article, "a transitional area", "a smaller urban area" or "a larger urban area" means such area as the Governor may, having regard to the population of the area, the density of the population therein, the revenue generated for local administration, the percentage of employment in non-agricultural activities, the economic importance or such other factors as he may deem fit, specify by public notification for the purposes of this Part.

18. Article 243-Q envisages three levels of Municipalities to administer (i) a transitional area, that is to say an area in transition from a rural area to an urban

area, to be known as a Nagar Panchayat; (ii) a smaller urban area, to be known as a Municipal Council and (iii) a larger urban area, i.e. a Municipal Corporation. Article 243-Q(2) defines these to mean such area as the Governor may, having regard to the population of the area, the density of the population therein, the revenue generated for local administration, the percentage of employment in non-agricultural activities, the economic importance or such other factors as he may deem fit, specify by public notification for the purposes of this Part.

19. In order to carry out the mandate of the Constitution (Seventy Fourth Amendment) Act, 1992, the U.P. Municipalities Act, 1916 was amended. Section 3 of the Act provides for the Declaration etc. of the transitional areas and smaller urban areas and reads thus: -

3. Declaration etc. of transitional area and smaller urban area -

(1) Any area specified by the Governor in a notification under clause (2) of Article 243-Q of the Constitution with such limits as are specified therein to be a transitional area or a smaller urban area, as the case may be.

(2) The Governor may, by a subsequent notification under clause (2) of Article 243-Q of the Constitution, include or exclude any area in or from a transitional area or a smaller urban area referred to in sub-section (1), as the case may be.

(3) The notifications referred to in sub-sections (1) and (2)] shall be subject to the condition of the notification being issued after the previous publication required by Section 4 and notwithstanding anything in this section, no area which is, or is part of, a cantonment shall be declared to be a transitional area or a smaller urban area or be included therein under this section.

20. Section 3 is similar provision in the U.P. Municipal Corporation Act, 1957 and it reads thus: -

Section 3 - Declaration of larger urban area -

(1) Any area specified by the Governor in a notification under Clause (2) of Article 243-Q of the Constitution with such limits as are specified therein to be larger urban area, shall be known as a City, by such name as he may specify.

(2) Where, by a subsequent notification under Clause (2) of Article 243-Q of the Constitution the Governor includes any area in a city, such area shall thereby become subject to all notifications, rules, regulations, bye-laws, orders and directions issued or made under this or any other enactment and in force in the city at the time immediately preceding the inclusion of such area and all taxes, fees and charges imposed under this Act, shall be and continue to be levied and collected in the aforesaid area.

21. In the case at hand, the State Government by notification dated 31.12.2019, included the areas mentioned in Schedule-I of the Notification in the transitional area of Nagar Panchayat, Siswan Bazar, Maharajganj, and simultaneously upgraded Nagar Panchayat, Siswan Bazar, Maharajganj to the level of a Municipal Council, i.e. a smaller urban area comprising of territorial area mentioned in Schedule-II of the Notification. It is referable to the constitutional power vested in the Governor under Article 243-Q of the Constitution and Section 3 of the U.P. Municipalities Act, 1961.

22. The aforesaid exercise was called in question by *Ragini Devi*, the then Chairperson of Nagar Panchayat by way of a writ petition3 before this Court, on the ground that she was elected on 1.12.2017 and the notification issued by the State Government dated 31.12.2019 had the effect of cutting short her tenure of five years. She also called in question the order passed by the State Government dated 2.6.2021 and the consequential order of the District Magistrate dated 8.6.2021, appointing a Committee to manage the affairs of newly constituted Nagar Palika Parishad. However, the challenge was repelled by this Court by its order dated 9.8.2021, holding that the exercise undertaken in pursuance of notification issued by the State Government was referable to Section 3(1) of the Act, whereunder as noted above, the Governor is vested with the power to issue notification in terms of clause (2) of Article 243-Q of the Constitution, declaring the transitional area of a Nagar Panchayat as a Municipal Council (smaller urban area) with such limits, as are specified therein. As a necessary corollary thereof, it was held that Section 333 of the Act would come into play and the Municipal Council which was newly created, would be managed by the District Magistrate, or other officer, or committee, or authority appointed by him in this behalf, until a Municipality is established, after holding of first elections thereof.

23. Section 333 of the Act is reproduced for ready reference: -

333. Exercise by District Magistrate of Municipality's power pending establishment of Municipality *- When a new municipality is created under this Act, the District Magistrate, or other officer, or committee, or authority appointed by him in this behalf, may until a Municipality is established, exercise the powers and perform the duties and functions of the Municipality, and, he or it shall, for the purposes, aforesaid be deemed to be the Municipality :*

Provided always that the District Magistrate or such other officer, or committee, or authority shall, as early as possible, make preliminary arrangements for the holding of first elections and generally of expediting the assumption by the Municipality of its duties when constituted.

24. The relevant part from the judgment of this Court dated 9.8.2021 in Writ Petition No. 13629 of 2021 (Smt. Ragini Devi vs. State of U.P.) is reproduced below: -

As regards Section 333-A, the same deals with the consequence of the declaration of smaller urban area with the notification issued under Section 3(1) of the Act, 1916. Section 333 of the Act, 1916 makes provision for the transitional period and confers the power on the District Magistrate, or other officer, or Committee or authority appointed by him in this behalf, to exercise the power and perform the duties & functions of the Municipality, till an elected body takes over.

25. The Supreme Court while dismissing the SLP4 filed by *Ragini Devi*, endorsed the finding that although the notification dated 31.12.2019 refers to Section 3(2) of the U.P. Municipalities Act, 1916, but as a matter of fact, thereby the area in question had been upgraded to a Municipal Council and thus, the erstwhile Nagar Panchayat had ceased to exist. The

relevant observations made in this behalf by the Supreme Court are as follows: -

The argument though attractive, at the first blush, clearly overlooks the dispensation provided for under Article 243-Q of the Constitution of India. It refers to municipalities or Municipal Council areas of different types such as Nagar Panchayat, Municipal Council and Municipal Corporation, depending on the area and other factors to establish such an entity. Although, the notification refers to Section 3(2) of the Uttar Pradesh Municipalities Act, 1916 (for short, "the 1916 Act") the fact remains that the area in question has been upgraded to Municipal Council area. It is, therefore, not a case of expansion of Nagar Panchayat area as is sought to be projected by the petitioner(s).

Perhaps, keeping that in mind in another case, the High Court vide order dated 09.08.2021 in Writ Petition(C) No. 13629 of 2021 rejected the claim of the petitioner(s) therein on the finding that the Nagar Panchayat of which the petitioner(s)' claim to be elected representative had ceased to be in existence with the creation of Municipal Council (Nagar Palika Parishad) as defined in sub-Section (9-B) of Section 2 of the 1916, Act and with the creation of new municipality by virtue of the stated notification, the provision of Section 333 of the 1916 Act would follow. That view is a possible view.

26. The Supreme Court also deprecated inaction on part of the State in not holding fresh election for the newly created Municipal Council, Siswan Bazar, Maharajganj in the time frame prescribed by this Court in PIL No. 1822 of 2020. The Supreme Court issued fresh direction to the State Election Commission, U.P. to ensure holding of elections for establishing the newly constituted Municipal Council, Siswan Bazar, Maharajganj at the earliest, however not later than two months from the date of the order.

27. There are several precedents on the subject, which take the same view. We proceed to note some of those to have a better understanding of the legal implications of exercise of power under Article 243-Q of the Constitution.

28. In **State of Maharashtra and Another vs. The Jalgaon Municipal Council5,** Supreme Court considered the provisions of the Constitution (Seventy Fourth Amendment) Act, 1992 and held that the effect of exercise of power under Article 243-Q is that the predecessor Municipality ceases to exist. In consequence it was held that Article 243-U which guarantees a fixed duration of five years to a Municipality, cannot be applied to a case where the area of one description is converted into an area of another description and one description of Municipality is ceased by constituting another Municipality of a better description. In line with the said reasoning, it was also held that the statutory provisions do not contemplate a situation where the erstwhile Municipality would continue to exist, as it would result in anomaly and confusion. The relevant part from the judgment is reproduced below: -

21. Having heard the learned Counsel for the parties at length on this aspect we are of the opinion that the said hiatus is an unavoidable event which must take place in the process of conversion of Municipal Council into a Municipal Corporation. Reliance on Article 243-U by the learned counsel for the respondents in this context is misconceived. The use of

expression 'a municipality' in sub-Article (3) of Article 243-U in the context and in the setting in which it is employed suggests and means the duration of the same type of municipality coming to an end and the same type of successor municipality taking over as a consequence of term of the previous municipality coming to an end. Article 243-U cannot be applied to a case where the area of one description is converted into an area of another description and one description of municipality is ceased by constituting another municipality of a better description. Article 243-U(3) cannot be pressed into service to base a submission on that an election to constitute a municipal corporation is required to be completed before the expiry of duration of a municipal council.

The constitution of Municipal Corporation would require notification of larger urban area and a Municipal Corporation to govern it. The area shall have to be divided into wards with the number of corporators specified and reservations made. The Corporation would need to nominate councillors. The territorial limits may need to be altered. The State Election Commission cannot conduct election without specifying numbers and boundaries of wards. New rules, bye-laws etc. shall need to be framed and municipal tax structure may need to be recast. The statutory provisions do not contemplate a situation where the same area may be called a smaller and larger area simultaneously and process of constitution of Municipal Corporation being commenced and completed though the Municipal Council continues to exist. Such an action would result in anomaly and confusion if not chaos.

29. Again, a Division Bench of this Court in **Keshav Dev Kushwaha vs. State of U.P. and Others6**, relying on observations made by the Supreme Court in State of Maharashtra vs. Deep Narain Chavan7, observed as follows: -

"At the outset, it must be noted that the petition in question is not one which is filed in the public interest. The petition is by an elected member of the Nagar Palika Parishad, Firozabad. Elections to the Nagar Palika Parishad were held on 26 June 2012 and the petitioner claims an indefeasible right to hold office for a period of five years. In fact, that is the basis on which prayer (iii) seeks a mandamus to the respondents not to curtail the term of the Nagar Palika Parishad and to allow the petitioner and other elected members to continue to perform their duties. Such a submission cannot be countenanced. The elected members of the Nagar Palika Parishad had, in fact, resolved on 20 October 2011 to recommend the constitution of a municipal corporation. Be that as it may, there is no merit in the plea of the petitioner that elected members of the erstwhile Nagar Palika Parishad must continue until their term of five years comes to an end. This point is no longer res integra and is governed by a decision of the Supreme Court in ***State of Maharashtra Vs. Deep Narayan Chavan, (2002) 10 SCC 565*** *where the Supreme Court, while dealing with the provisions of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965, held as follows:*

".. under Section 341 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 when the whole of the local area comprising a municipal area ceases to be a municipal area, with effect from the date on which such local area ceases to be a municipal area, the Council constituted for

such municipal area shall cease to exist or function and the Councillors of the Council shall vacate office. Article 243-U of the Constitution unequivocally indicates that every Municipality, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer. The expression "unless sooner dissolved under any law for the time being" would bring within its sweep the provisions of Section 341 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 and therefore the moment the Corporation is constituted in accordance with law, the elected Municipal Council would cease to function and so also the Councillors, though elected will have to vacate the office..."

30. Another Division Bench of this Court in **Nagar Palika Parishad vs. State of U.P. and Others8,** dealt with the issue as follows: -

"16. Apart from what is said above, Article 243U of the Constitution of India suggests and means the duration of the same type of Municipality coming to an end and the same type of successor Municipality taking over as a consequence of term of the previous Municipality coming to and end either prior to the period of 5 years or at the end of 5 years. In other words Article 243U cannot be pressed into service in a case where the area of one description is converted into an area of another description and one description of Municipality is ceased by constituting another Municipality of a better description, that is to say that where the dissolution is fair accompli and the Municipality cannot be revived as it was before, the same cannot be termed a dissolution as envisaged under Article 243U and in such an event the provisions of Article 243U are not at all violated if an Administrator is appointed under Section 8AA."

31. The same view has been taken by this Court in **Smt. Mohini Sharma vs. State of U.P.9.** The relevant part from the said judgment is as follows: -

"18. A bare perusal of the Section 5 of U.P. Municipalities Act, 1916, would go to show that whereby a notification referred to in sub-section (2) of Section 3 the Governor includes any area in a transitional area or smaller urban area, such area shall thereby become subject to all notifications, rules, regulations, bye-laws, orders, directions, issued or made under this or any other enactment and in force throughout the transitional area or smaller urban area, at the time immediately preceding the inclusion of the area. Thus the affairs of the same will have to be governed under the provisions of U.P. Municipalities Act, 1916 and it may be true that Pradhan in question has been elected for a period of five years but once the very identity of the Gram Panchayat in question has been lost on account of inclusion of such area, then the provisions of U.P. Panchayat Raj Act, 1947, would not at all operate and same will have to be governed under the provisions of the U.P. Municipalities Act, 1916. Any other view would tantamount to diluting the provisions of Section 5 of U.P. Municipalities Act, 1916.

20. Article 243-E deals with duration of Panchayat, Article 243-U deals with duration of Municipalities and both the constitutional provisions share in common the expression "unless sooner dissolved under any law for the time being

in force". Once Governor takes a call for constitution of municipality in exercise of authority conferred under the constitution namely Article 243-Q that specifically refers to three type of municipalities i.e. Nagar Panchayat for transitional area, a Municipal Council for a smaller urban area and Municipal Corporation for a larger urban area, the moment declaration is made under Article 243-Q read with Section 3 of the U.P. Municipalities Act, 1916, by the State Government, then the said municipal body would be a sovereign body having both constitutional and statutory status. As already noted in the earlier part of the judgement, the constitutional as well as statutory provisions pertaining to 'Panchayats' would go to show that object of Part IX of the Constitution was to introduce the panchayat system at grass root level and strengthen the panchayat system by giving uniform constitutional vibrant units of administration in the rural area so that there can be rapid implementation of rural development sector. Once there is complete transformation from rural area to urban area having regard to population of area, the density of population therein, the revenue generated from local administration, the percentage of employment in non-agricultural activities, the economic importance and other factors, made by the State Government, then the said area is denoted in the notification would be out from the purview of Part IX of the Constitution and the provisions of U.P. Panchayat Raj Act, 1947 and the affairs of the said area treating the same to be urban area would be covered by the provisions of Part IX A of Constitution alongwith the provisions of U.P. Municipalities Act, 1916."

32. In **Nilesh Singh Vs. State of U.P. and 4 others10,** the effect of issuance of notification under Article 243-Q of the Constitution was considered in the context of the provisions of the U.P. Municipalities Act, 1916 and the U.P. Panchayat Raj Act, 1947. The Gram Pradhan of the panchayat area, which was upgraded to a Nagar Panchayat and as a consequence whereof he ceased to be in office, had challenged the notification. This Court in its judgment dated 8.09.2022 considered the constitutional scheme and repelled the plea holding as follows:-

"5. Constitution defines a 'Panchayat' under Article 243(d) as an institution of self-government constituted under Article 243-B, for the rural areas. Article 243-E mandates that every Panchyat, unless sooner dissolved under any law, for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer.

6. Similarly under Section 12 of the U.P. Panchayat Raj Act, 1947, the term of the Gram Panchayat is five years. Our Constitution is a living document. The Parliament while introducing the 74th Amendment, 1992 conferring constitutional status to institutions of self-Government like Panchayats and Municipalities, was alive of the reality that urbanisation is making inroads in the rural areas. The constitutional scheme envisages constitution of a Nagar Panchayat for a transitional area that is to say, an area in transition from a rural area to an urban area; Municipal Council for a smaller urban area; and Municipal Corporation for a larger urban area.

9. Under Section 3-A(2) of the Act, every Nagar Panchayat or Municipal Council constituted under sub-section (1) is a body corporate. Thus, with the issuance of the impugned notification, an entirely new body in the name of Nagar Panchayat - Haisar Bazar has come into existence. It

has a separate and distinct identity from its predecessor i.e., the Gram Panchayats whose territories have been merged in constituting the Nagar Panchayat. The provision of Article 243-E and Section 12 of the U.P. Panchayat Raj Act cannot be read in isolation but harmoniously, alongwith the other provisions of the Constitution and the Act. Under Section 333 of the Act, the District Magistrate has been invested with power to perform the functions and duties of the newly constituted Municipality until the holding of first election."

33. Having regard to the legal position enunciated above, we hold that the effect of the Notification dated 31.12.2019 was that Nagar Panchayat, Siswan Bazar, ceased to exist. The territorial limits of the erstwhile Nagar Panchayat, Siswan Bazar, was expanded by including therein 22 revenue villages/17 Gram Panchayats. A new Municipality of better description (Municipal Council), by the name Nagar Palika Parishad, Siswan Bazar, came to be constituted. This resulted in coming into being of a new entity, independent and distinct from erstwhile Nagar Panchayat. It is a body corporate in terms of Section 3-A(2) of the U.P. Municipalities Act, 1916. Thereafter, followed the exercise for its composition as provided by Article 243-R which reads thus: -

243R. Composition of Municipalities - (1) Save as provided in clause (2), all the seats in a Municipality shall be filled by persons chosen by direct election from the territorial constituencies in the Municipal area and for this purpose each Municipal area shall be divided into territorial constituencies to be known as wards.

(2) The Legislature of a State may, by law, provide--

(a) for the representation in a Municipality of--

(i) persons having special knowledge or experience in Municipal administration;

(ii) the members of the House of the People and the members of the Legislative Assembly of the State representing constituencies which comprise wholly or partly the Municipal area;

(iii) the members of the Council of States and the members of the Legislative Council of the State registered as electors within the Municipal area;

(iv) the Chairpersons of the Committees constituted under clause (5) of article 243S:

Provided that the persons referred to in paragraph (i) shall not have the right to vote in the meetings of the Municipality; (b) the manner of election of the Chairperson of a Municipality.

34. Article 243-R contemplates that all seats in a municipality shall be filled by persons chosen by direct election from the territorial constituencies in the municipal area and for this purpose, each municipal area shall be divided into territorial constituencies to be known as "wards". The legislature of a State may by law, provide for the representation in a municipality of persons having special knowledge or experience in municipal administration; the members of the House of People and the members of the Legislative Assembly of the State representing constituencies which comprise wholly or partly the municipal area, the members of the Council of State and the members of the Legislative Council of the State, registered as electors within the municipal area; the Chairpersons of the Committee constituted under clause (5) of Article 243-S. In order to carry out the constitutional mandate, the U.P.

Municipalities Act, 1916 was amended by U.P. Act No. 12 of 1994 and Section 9 thereof prescribes for the manner of Composition of Municipalities as follows: -

9. Composition of Municipality. - *(1) A Municipality shall consist of a President, who shall be its Chairperson, and, -*

(a) the elected members, whose number shall, -

(i) in the case of a Nagar Panchayat, be not less than 10, and not more than 24; and

(ii) in the case of a Municipal Council, be not less than 25 and not more than 55, as the State Government may, by notification in the Official Gazette specify;

(b) the ex-officio members, comprising all members of the House of the People and the State Legislative Assembly representing constituencies which comprise wholly or partly the municipal area;

(c) the ex-officio members, comprising all members of the Council of States and the State Legislative Council who are registered as electors within the municipal area;

(d) nominated members, who shall be nominated by the State Government, by notification in the Official Gazette, from amongst persons having special knowledge or experience in municipal administration and whose numbers shall in the case of -

(i) Nagar Panchayat, be not less than two and not more than three;

(ii) Municipal Council, be not less than three and not more than five;

(e) the Chairperson of the committees, if any, established under Section 104, if they are not members under any of the foregoing clauses :

[Provided that the persons referred to in clause (d) shall hold office during the pleasure of the State Government and they shall have the right to vote in the meetings of the Municipalities.]

Provided further that any vacancy in any category of members referred to in clauses (a) to (e) shall be no bar to the constitution or reconstitution of a municipality.

35. It is clear from the Constitutional Scheme and the statutory provisions that first step towards composition of a Municipality is to initiate exercise for holding election of the Chairperson (President) and its members. The direction of the Supreme Court and this Court to the State Election Commission, U.P. to hold elections was intended to achieve the above constitutional mandate. Indisputably, the elections of newly constituted Nagar Palika Parishad, Siswan Bazar, was held on 13.3.2022. The result of the election of twenty five ward members and Chairperson was declared on 15.3.2022. They subscribed to oath of office on 29.3.2022 and the first meeting of the newly constituted municipality was held on 1.4.2022. The above exercise aided in the composition of the Municipality in terms of Article 243-R and Section 9 of the U.P. Municipalities Act, 1916.

36. We now proceed to examine as to what would be the duration of the Municipality so constituted and composed. Article 243-U prescribes for the term of Municipalities and it reads thus: -

243U. Duration of Municipalities, etc. -

(1) Every Municipality, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting

and no longer: Provided that a Municipality shall be given a reasonable opportunity of being heard before its dissolution.

(2) No amendment of any law for the time being in force shall have the effect of causing dissolution of a Municipality at any level, which is functioning immediately before such amendment, till the expiration of its duration specified in clause (1).

(3) An election to constitute a Municipality shall be completed,--

(a) before the expiry of its duration specified in clause (1);

(b) before the expiration of a period of six months from the date of its dissolution:

Provided that where the remainder of the period for which the dissolved Municipality would have continued is less than six months, it shall not be necessary to hold any election under this clause for constituting the Municipality for such period.

(4) A Municipality constituted upon the dissolution of a Municipality before the expiration of its duration shall continue only for the remainder of the period for which the dissolved Municipality would have continued under clause (1) had it not been so dissolved.

37. Likewise, Section 10-A of the U.P. Municipalities Act, 1916 provides as under: -

10A. Term of municipality.- *(1) Every municipality shall, unless sooner dissolved under Section 39, continue for five years from the date appointed for its first meeting and no longer.*

(2) An election to constitute a municipality shall be completed, -

(a) before the expiry of its term specified in sub-section (1); or

(b) before the expiration of a period of six months from the date of its dissolution :

Provided that where the remainder of the period for which the dissolved municipality would have continued is less than six months, it shall not be necessary to hold any election under this sub-section for constituting the municipality for such period.

(3) A municipality constituted upon the dissolution of a municipality before the expiration of its duration shall continue only for the remainder of the period for which the dissolved municipality would have continued under sub-section (1), had it not been so dissolved.

(4) Notwithstanding anything to the contrary contained in any other provision of this Act, where, due to unavoidable circumstances or in the public interest, it is not practicable to hold an election to constitute a Municipality before the expiry of its term, then until the due constitution of such Municipality, all the powers, functions and duties of the Municipality shall be exercised and performed by the District Magistrate or by a Gazetted Officer not below the rank of a Deputy Collector appointed by the District Magistrate in this behalf, and such District Magistrate or Officer shall be called the Administrator, and such Administrator shall be deemed in law to be the Municipality, the President or the Committee as the occasion may require.

38. Article 243-U(1) is a constitutional guarantee, extended to every municipality to a fixed term of five years from the date appointed for its first meeting, unless sooner dissolved under any law for the time being in force. Section 10-A(1) is pari materia with the above constitutional provision and was inserted in

the statute to give effect to the constitutional mandate.

39. The contention of learned Additional Chief Standing Counsel as noted above is that Article 243-U itself draws an exception in relation to the duration of municipalities. The term of five years is subject to a municipality being dissolved under any law, as had happened in the instant case and consequently, the new municipality constituted in its place will continue only for the remainder of the period, i.e. upto December, 2022 in terms of clause (4) of Article 243-U.

40. In support of the said contention, he has placed heavy reliance on the use of word "bye-election" in the notification issued by the State Election Commission dated 14.2.2022. He further placed reliance on the order of the Supreme Court dated 23.11.2021, passed on the applications filed by the State Election Commission, seeking further time from the Supreme Court to hold the elections. It is submitted by him that the Supreme Court while extending the time limit for holding election, had approved the time frame given in para 22 of the additional affidavit filed on behalf of the State Government and wherein at Item No. 15, the election that was to be held, was described as a "bye-election".

41. Per contra, learned counsel for the petitioner, submitted that dissolution envisaged under clause (1) of Article 243-U, is that prescribed by Section 30 of the U.P. Municipalities Act, 1916 on happening of certain contingencies and not as a result of automatic dissolution of municipality, consequent to its upgradation to a higher level, inasmuch as, it results in formation of a new and distinct entity and not the continuation of the earlier municipality. He further submitted that the constitutional protection to the duration of municipality cannot be curtailed by use of any wrong word in the election notification, particularly, when the election held in March 2022 was after undertaking exercise of delimitation and reservation of constituencies.

42. Undoubtedly, Article 243-U guarantees a fixed term of five years to every municipality. The same provision however also provides that the term of a municipality can be curtailed consequent to its dissolution "under any law for the time being in force".

43. The phrase "under any law" has been defined in Concise Law Dictionary as follows: -

Under a law: *The words "under a law" signify those cases where the disqualification to stand for election is not to be found in the parliamentary statute itself but is imposed by virtue of power enabling this to be done; in other words, where it is imposed by a law made by a subordinate law making authority.*

44. According to the above definition, the phrase "under any law" refers to a law made by a subordinate law making authority and not the Parliament itself. Such law is to be found in the U.P. Municipalities Act, 1916. In fact, Section 10-A unequivocally clarifies the legal position in this behalf while referring to Section 30 of the U.P. Municipalities Act, 1916 as the relevant piece of law in respect of premature dissolution of a municipality on happening of certain contingencies. Section 30 is as follows: -

30. Power of State Government to dissolve the municipality.- *If at any time*

the State Government is satisfied that a municipality persistently makes default in the performance of duties imposed upon it by or under this Act or any other law for the time being in force or exceeds or abuses more than once its powers, it may, after having given the municipality a reasonable opportunity to show cause why such order should not be made, by order, published with the reasons therefor in the Official Gazette, dissolve the municipality.

45. Clause (4) of Article 243-U prescribes that a municipality constituted upon the dissolution of a municipality before expiration of its duration, shall continue only for remainder of the period for which the dissolved municipality would have continued under clause (1), had it not been so dissolved.

46. It is noteworthy that under Section 30, the State Government is invested with power to dissolve a Municipality on ground of persistent default on its part in performance of duties imposed upon it by or under the Act, or any other law for the time being in force, or in cases of repeated abuse of its power.

47. As the dissolution under Section 30 is based on specific charges, it has to be preceded by an opportunity of hearing. Article 243-U also refers to a dissolution of municipality which has to be preceded by an opportunity of hearing. The opportunity of hearing envisaged under the above two provisions is not the same as an opportunity provided to file objections to draft notification [Section 4(2)], before the status of a municipality is changed or its territorial limit extended in exercise of power under Article 243-Q and Section 3 of the Act. Moreover, in such cases, the municipality of one description ceases automatically upon constitution of municipality of a higher description and no separate proceeding/order is required for dissolution. This conclusively suggests that the dissolution which is spoken of in clause (1) of Article 243-U of the Constitution, is that provided under the statutory law, i.e. the U.P. Municipalities Act, 1916, or other cognate enactments. Clause (4) of Article 243-U prescribes for the same eventuality, i.e. dissolution of municipality under any statutory law in force, like Section 30 in case at hand and not where the municipality had ceased to exist as a result of a municipality of higher description being constituted in its place.

48. The reliance placed by learned Additional Chief Standing Counsel on the order of the Supreme Court dated 23.11.2021 also does not hold any ground. It seems that the order was passed on the impleadment and modification applications, filed by the State Election Commission, U.P. and the State Government, in which the State Government filed an additional affidavit pointing out that before holding the election, various statutory compliances have to be made, like exercise for undertaking reservation of seats under Section 9-A, delimitation of wards and issuance of delimitation order under Section 11-A and 11-B, preparation of electoral roll for every ward and its revision as per Section 12-B and 12-G and in which, considerable time will be consumed. The affidavit also mentions that the last general election of the local bodies in the State was held in the month of November 2017 and the existing term of the local bodies is going to expire in November 2022. Therefore, it was further asserted as follows:-

"22. That in the aforesaid background for completion of various formalities as per provisions contained in the Uttar Pradesh Municipalities Act, 1916,

the process for holding Election 2022 of Urban Local Bodies in the State, shall have to be commenced at least six months prior to November 2022 that is during the period of April - May 2022. As such it would be highly appropriate to hold the election of Municipal Council (Nagar Palika Parishad) Siswa Bazar alongwith proposed Municipal Body Election of year 2022.

23. It is needless to mention that in view of the above facts and circumstances of the case at least a minimum period of about 4 months is humbly sought for from this Hon'ble Court in ends of justice for completion of all the procedural formalities/requirements to comply with the provisions as contained in Section 9 to Section 13 of the Uttar Pradesh Municipalities Act, 1916 before conducting a free and fair election as directed by this Hon'ble Court vide its order dated 17.09.2021.

24. That it is most respectfully submitted that the process for delimitation exercise is under progress and for the aforesaid constituency and if the order for delimitation is finally issued then the said period of 4 months will be reduced by 15 days.

26. It is, therefore, most respectfully and humbly prayed that this Hon'ble court may very kindly be pleased to allow the instant Miscellaneous application no. 1720 of 2021, in the interest of justice and equity so that election of Municipal Council (Nagar Palika Parishad) Siswa Bazar may be smoothly conducted within a period of four months and pass any order or further orders as deemed fit and proper in the given facts and circumstances."

49. In paragraph 20 of the said affidavit, by way of illustration, a time schedule for taking various actions for holding the election was disclosed, which is as follows: -

"20. That in this connection it is relevant to mention here that for the purpose of compliance of the aforesaid Statutory Provisions as contained in the U.P. Municipalities Act, 1916, the procedure to be followed is a very time consuming process. To illustrate the time Schedule for various actions is shown in column 3 of the following chart: -

S. No.	Action	Requires Time
1.	To issue direction for determination/D-Limitation of various wards constituting the local body.	30 days
2.	To issue direction to the Director of a Local Body/District Magistrates, to submit a proposal for determining the number of wards.	
3.	To issue a provisional notification notifying the proposed no. of wards and D-Limitation of wards, for inviting objection to it.	
4.	The District Magistrate to get the aforesaid provisional notification published in the local newspaper for inviting objection to it.	
5.	The District Magistrate to forward the objections received against the provisional notification alongwith its comments/recommendations.	
6.	The State Govt. to scrutinize and finalize the objection received from the District Magistrate.	
7.	The State Govt. to issue final notification notifying the number and D-Limitation of wards as finalized	
8.	The State Election Commission to prepare final revised Electoral list.	For all the aforesaid work 20 days are requried.
9.	After the issuance of final notification, notifying the number and D-Limitation of wards by the State Govt., the District Magistrate to collect, after conducting the Rapid Survey, Figures regarding population of backward classes and to	10 days

	forward such figures to the State Govt.	
10.	The State Govt. to issue direction to the Director local bodies/District Magistrate for providing the details of "Reserved Wards" and "Reserved Chairman of a local body".	For the work mentioned from Serial No. 10 to 14, a total of 30 days are required.
11.	The State Govt. to notifying a provisional notification notifying details of the "Reserved Wards" and "Reserved Chairman of a Ward" for objections if any to its.	
12.	The Director local body/District Magistrate to publish the provisional notification notifying the "Reserved Wards" and then "Reserved Chairman of a local body" for inviting objections to it if any.	
13.	The State Govt. to direct D.M. to forward objections received against the provisional notification alongwith its comments/ Recommendations.	
14.	The State Govt. after scrutinizing and finalized the objections received through the District Magistrate to notify final notification of "Reserved Wards" and Reserved Chairman of a local body".	
15.	Holding of By-Elections by the State Election Commission after issuing Notification.	For the work mentioned from Serial No. 15 to 24, a total of 30 days are required.
16.	The State Election Commission to issue notification for holding Elections.	
17.	The District Magistrate/Election Officer to issue Public Notice.	
18.	The Returning Officer to issue Public Notice	
19.	To purchase and submit Nomination forms.	
20.	The Scrutiny of nomination form	
21.	Withdrawal of a candidature by a contestant.	
22.	Allotment of Symbol	
23.	To hold Election	
24.	To hold counting	

50. The Supreme Court deprecated inaction on part of the State Authorities in conducting the election within time prescribed as per order dated 17.9.2021, but having regard to the prayer of the respondents and various statutory compliances that were to be made, extended the time limit, observing thus: -

"We direct all concerned to ensure that the elections are conducted in conformity with the schedule noted herein above and that the time frame for giving effect to the said schedule commences from today.

No request for further extension on any ground will be countenanced hereafter.

We may note that we are not impressed by the submissions made by the State Election Commission as well as the State Government that to avoid duplication to election process, the subject election may be allowed to be conducted along with elections of other corporations/councils in November, 2022, or for that matter, when the Assembly elections are due in March, 2022. Instead, we direct the State Election Commission and all the duty holders to ensure that the election to the subject Municipal Council/Nagar Palika Parishad is completed as per the time schedule, referred to above, and the period therefor commences from today, as aforesaid."

51. It is apparent from the order of the Supreme Court that it specifically repelled the request made by the State Government and State Election Commission, U.P. to hold election of Nagar Palika Parishad, Siswan Bazar, Maharajganj, along with the election of other Corporations/Councils in November 2022, but rather directed them to hold election as per above time frame. The time schedule given by the State Government in para 22 of its additional affidavit was noted in the order in context of its plea that four month period was

required to make the statutory compliances. While doing so, the Supreme Court had not made any adjudication regarding nature of election to be held viz - general election or bye-election, nor any such controversy was ever raised before it. On the other hand, the additional affidavit of the State Government when read as a whole, was intended towards seeking permission to hold general election of the newly constituted Municipal Council, Siswan Bazar, Maharajganj, along with other urban local bodies scheduled in November 2022, or in alternative within four months after completing the formalities as per the time schedule given in para 20 of the affidavit. Consequently, the submission of learned Additional Chief Standing Counsel does not merit acceptance.

52. After the dissolution of Nagar Panchayat and constitution of Municipal Council, Siswan Bazar, Maharajganj, the State Government was required to notify general election for establishing the municipality in terms of Section 333 of the Act. This Court while deciding PIL No. 1822 of 2022, by order dated 8.2.2021, had also issued a direction to District Magistrate to make arrangements for **the holding of first elections.** It was upheld by the Supreme Court, consequent upon dismissal of SLP filed by *Ragini Devi*, coupled with fresh direction "to ensure that the elections for establishing the newly constituted Municipal Council, Siswan Bazar, Maharajganj, is conducted at the earliest". The State Government was thus required to notify general elections for constitution of Nagar Palika Parishad in the newly constituted Municipal Council. The said exercise was to be done by the State under Section 13-A, in consultation with the State Election Commission. As a new municipality was being constituted for the first time, it ought to have been given its full term of five years. However, the State Election Commission under some misconception, notified bye-election, while referring to its power under Section 43-C and Section 13-G of the Act. This would mean that the term of the newly elected municipality would be only for the remainder of the term of the erstwhile municipality. It was contrary to the mandate of Article 243-U(1). The election notification has to be read and interpreted in line with the constitutional ethos, or else, it would result in complete annihilation of the safeguards provided under the Constitution.

53. Section 13-H on which reliance has been placed by learned Additional Chief Standing Counsel also has no application to the facts of the instant case. It empowers the State Election Commission to fill up seat of a member when it falls vacant, or is declared vacant, or his election is declared void. In such an eventuality, the bye-election of the ward concerned is held, as would be evident from plain reading of sub-section (1) of Section 13-H, which is reproduced below:-

"13-H. Bye-elections--*(1) Subject to the provisions of sub-section (2) of Section 13-I, when the seat of a member, elected to a Municipality becomes vacant or is declared vacant or his election is declared void, the State Election Commission shall in consultation with the State Government by a notification in the Official Gazette, call upon the ward concerned to elect a person for the purpose of filling the vacancy caused before such date as may be specified in the notification and the provisions of this Act and of the Rules and Orders made thereunder, shall*

apply, as far as may be, in relation to the election of member to fill such vacancy."

54. Likewise, the submissions made by learned Additional Chief Standing Counsel placing reliance on certain provisions of the Representation of People Act, 1951 also has no relevance to the issue involved, therefore, there is no need of a detailed discussion of the said provisions.

55. It is noteworthy that both general election and bye-election is held on basis of adult suffrage. The basic difference between a general election and a bye-election lies in the procedure followed in holding such election. A general election is generally preceded by reservation of seats (Article 243 -T of the Constitution and Section 9-A); delimitation of wards (Section 11-A and 11-B); preparation and revision of electoral rolls (Section 12-B and 12-G), whereas the aforesaid exercise may or may not be done before holding a bye-election.

56. In the case at hand, all the above exercises were duly undertaken. This is evident from the illustrative chart supplied by the State Government through its additional affidavit filed before the Supreme Court in the matter of *Ragini Devi*11. It reveals that the State Government took 30 days time for completing the exercise of delimitation of wards, 20 days time for finalizing the electoral list, 30 days time for completing the exercise relating to reservation of seats. How reservation was applied to the seat of Chairperson and Members is available on the official website "http://sec.up.nic.in' of the State Election Commission, U.P. and being in public domain, we take judicial notice of the same.

57. Fundamentally, we find that all steps, which are required to be taken under law, had been followed while holding the election in question. In the ultimate analysis, we find no qualitative difference in the election that had been held except the use of terminology "bye-election' in the election notification. Otherwise, the election satisfied all the requirements of law.

58. Once we find that the election held on 13.3.2022 was after making all statutory compliances as were required under law for holding a general election, we have no hesitation in declaring that the duration of the Municipality i.e. Nagar Palika Parishad, Siswan Bazar, Maharajganj elected on 13.3.2022 would be five years from the date of its first meeting in terms of Article 243-U read with Section 10-A of the Act of the U.P. Municipalities Act. The present Municipality is entitled to run its full duration of five years from the date of its first meeting. The stand of the State respondents that its term would expire in November, 2022 and therefore, exercise for holding general election of the Municipality is being taken to constitute a new Municipality in its place, cannot be countenanced, being in teeth of the constitutional mandate.

59. It would not have been possible for us to give the above relief, had the election been conducted without the exercise of delimitation, preparation of electoral roll and application of the reservation roaster.

60. In consequence, we allow the writ petition and quash the impugned notification/communication dated 26.4.2022 in so far as it relates to Nagar Palika Parishad, Siswan Bazar,

Maharajganj enlisted at serial no.22 in the list annexed with the notification and restrain the respondents from holding fresh elections of Nagar Palika Parishad, Siswan Bazar, Maharajganj until it completes its full duration of five years from the date of its first meeting unless dissolved earlier in accordance with law.

61. No order as to costs.

(2022) 11 ILRA 124
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.09.2022

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ C No. 19260 of 2022

Babulal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vimalendra Kumar Upadhyay, Sri Kamlesh Kumar Tiwari

Counsel for the Respondents:
C.S.C., Sri Bachcha Lal Yadav, Sri Bhupendra Kumar Tripathi, Sri Jadu Nandan Yadav

A. Civil Law - UP Revenue Code, 2006 – Section 66 – UP Zamindari Abolition and Land Reform Act, 1950 – Section 198(4) – Residential lease – Granting of lease in favour of OBC candidates by playing fraud – Complaint after 46 years – Permissibility – Suo moto power, how far can be exercised – For the purposes of exercise of suo motu power upon a complaint being made in that behalf, the old and settled issues cannot be permitted to be reopened – If today the controversy regarding allotment, which is already settled, is reopened after lapse of more than 4 decades, it will cause more damage to public interest than to serve it. (Para 9 and 15)

Writ petition dismissed. (E-1)

List of Cases cited:-

1. Pyare Lal & ors. Vs Deputy Director of Consolidation, Mainpuri Camp at Etah & ors.; 200598 RD 106

2. Ramker Chauhan Vs Commissioner, Azamgarh & ors.; 2012 (8) ADJ 713

3. Jitendra Kumar @ Gopal Vs St. of U.P. & ors.; 2018 0 Supreme (All) 822

4. Yadram & ors. Vs St. of U.P. & ors.; 2019 0 Supreme (All) 2712

5. Writ C No. 22369 of 2009; Saroj Devi Vs St. of U.P. & ors. decided on 19.4.2019

6. Foreshore Cooperative Housing Society Ltd. Vs Praveen D. Desai; 2015 (128) RD 227 (SC)

7. Chhidda & ors. Vs St. of U.P. & ors.; 2019 0 Supreme (All) 1085

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

1. Heard Sri K.K. Tiwari and Sri Vimlendra Kumar Upadhyay, learned counsel for the petitioner, Sri J.N. Yadav and Sri B.L. Yadav, learned counsel for the lease holder- private respondent No. 8, Sri Bhupendra Kumar Tripathi, learned counsel for the Gaon Sabha and Sri Abhishek Shukla, learned Standing Counsel for the State respondents.

2. The petitioner before this Court has been a complainant in respect of grant of residential leases to various villagers way back in the year 1973.

3. The petitioner vide paragraph 8 to the writ petition has taken specific plea that petitioner's father was one of the eligible persons for the purposes of allotment of the residential lease upon the land which was

reserved for persons belonging to the scheduled caste, however, there are certain backward class persons who have been wholly illegally granted lease. In paragraph 8 to the writ petition it has been averred that the petitioner being harijan is entitled to have lease of the land in question. It is argued that grant of residential lease belonging to other backward caste (OBC) was an act of fraud and, therefore, the complaint even if made after lapse of 46 years, it was sufficient enough for exercise of *suo motu* power under Section 198(4) of the erstwhile U.P.Z.A. & L.R. Act, 1950 or the provisions contained under Section 66 of the U.P. Revenue Code, 2006.

4. During the course of the argument, learned counsel for the petitioner admitted that father of the petitioner got a small house constructed upon such land and the grievance is that people belonging to the OBC category are interfering with the possession of the petitioner who is now living in that house.

5. *Per contra*, it is argued by learned counsel appearing for the contesting private respondents, learned counsel appearing for the Gaon Sabha and learned Additional Chief Standing Counsel that no proceedings could be instituted after lapse of 46 years in respect of the leases granted way back in the year 1973 as the allottees have come to be settled upon the land by raising constructions of their respective houses inasmuch as petitioner was not even born in the year 1973 what to say about his being major to set up any claim of eligibility. It is also argued that nowhere it has come in the pleadings nor, in the complaint that father of the petitioner had ever put up his claim for grant of lease or made any complaint against alleged illegal allotment of residential lease. It is also argued that other complainant Rajendra Babu has never approached the Court.

6. Having heard learned counsel for the respective parties and their arguments raised across the bar and having perused the complaint made by the petitioner as well as the pleadings raised in the writ petition, I find that the sole ground taken is that the land could not have been allotted to certain persons who did belong to other backward caste. The petitioner who has approached this Court was admittedly born after the year 1973 when the allotment took place and, therefore, the respondents are justified in submitting that the petitioner could not have raised any objection to the allotment proceedings.

7. As far as the father of the petitioner is concerned, the respondents are justified in their argument that nowhere it has come that father of the petitioner ever filed complaint or pursued any matter with the authority. I also find that in the entire pleadings raised before this Court and in the complaint made before the authority concerned, no plea has been taken that father of the petitioner ever set up any claim for allotment, rather I find that during the course of argument the petitioner's counsel admitted that father of the petitioner had raised certain constructions over the abadi land which was reserved for the persons belonging to the scheduled caste.

8. The question of consideration of prayer of petitioner for holding the leases to be illegal after a lapse of nearly 46 years seems to bring about a lost situation alive as if raised at the time of allotment to reopen an issue whereas much water has already flown under the bridge ever since the initial allotment take place made in the

year 1973. The parties must have settled themselves upon the land and except for five OBC persons the allotment is not being questioned in respect of other persons who belonged to scheduled caste. The exercise of *suo motu* power in matters of allotment even if there are certain irregularities should not be opened after a long long delay upon a complaint and this aspect has come to be examined by the Court in a number of cases in the past.

9. This Court and the Supreme Court in various of their decisions have held that even for the purposes of exercise of *suo motu* power upon a complaint being made in that behalf, the old and settled issues cannot be permitted to be reopened, more especially when complainant could not have set up any claim at the time of allotment.

10. In the case of **Pyare Lal and others v. Deputy Director of Consolidation, Mainpuri Camp at Etah and others; 200598 RD 106,** the Court vide paragraph 10 has held thus:

"10. In the present case, the petitioners Nos. 1 and 2 are challenging the allotment made by Gaon Sabha in favour of respondent nos. 5 and 6. However, they can only be covered under the definition of aggrieved person if they are able to demonstrate that the decision of Gaon Sabha to allot land in favour of respondent nos. 5 and 6 wrongfully deprived them of their right of allotment of the said land or they had any title in the said land. Section 198 of the Act prescribes the order of preference to be observed while making allotment of land. ***Unless, petitioners nos. 1 and 2 demonstrate that they were applicants for allotment and higher in order of preference than respondent nos. 5 and 6 and had better claim for allotment than respondents nos. 5 and 6 and have been wrongfully and illegally deprived of their such rights, they cannot be said to be aggrieved persons. There is not even a whisper in the pleadings that the petitioners were also applicants for allotment of the land and were higher in preference than respondents nos. 5 and 6. In the absence of any such pleadings petitioner nos. 1 and 2 cannot be said to be aggrieved persons so as to maintain the proceedings for cancellation of the allotment made in favour of respondent nos. 5 and 6 and as such the writ petition filed by them is not maintainable."***

(emphasis added)

11. In the case of **Ramker Chauhan v. Commissioner, Azamgarh and others; 2012 (8) ADJ 713**, the Court vide paragraph 4 has held thus:

"4. The power to initiate proceedings for cancellation of the land is provided under Section 198(4) of the Act. As per this Section, the Collector on his own motion or on an application of any person aggrieved by an allotment of land, may cancel the said allotment if he is satisfied that the same is irregular. Sub section (5) of Section 198 provides that no order for cancellation of an allotment or lease shall be made under sub-section (4), unless a notice to show cause is served on the person in whose favour the allotment or lease was made or on his legal representatives. Clause (b) of Section 198 (6) provides that every notice to show cause mentioned in sub-section (5) may be issued in the case of an allotment of land made on or after November 10, 1980, before the expiry of a period of five years from the date of such allotment or lease or up to November 10, 1987, which ever be later.

Thus, it nowhere emerges from sub section (6) of Section 198 that any exception is provided in respect of allotments which have been made in violation of the statute. The very nature of the power exercised by the Collector under Section 198(4) is to seek cancellation of those allotment which have either been obtained irregularly or illegally. No proceeding can be initiated beyond the period of limitation as provided under the statute irrespective of the fact whether the said allotment is irregular or illegal."

(emphasis added)

12. In the case of **Jitendra Kumar @ Gopal v. State of U.P. and others; 2018 0 Supreme (All) 822,** the Court vide paragraph 7 has held thus:

"7. Having heard the learned counsel for the parties, I am of the view that the impugned orders cannot be sustained. First of all, the notice was barred by limitation. Secondly, the petitioner by an order of the State had been declared a bhumidhar with transferable rights and the cancellation of the patta was of no consequence and thirdly the ground taken for the cancellation of the patta was also not in existence. ***If the period of limitation as is prescribed under the Act of 1950 expires then no notice can be issued even if there are irregularities in the patta. Further even if a suo motu notice is to be issued by the Collector then also the question of limitation would arise and notices have to be issued well within the time prescribed by the 1950 Act."***

(emphasis added)

13. In the case of **Yadram and others v. State of U.P. and others; 2019 0 Supreme (All) 2712**, the Court vide paragraph held thus:

"5. ***Having heard learned counsel for the petitioners, learned Standing Counsel and the learned counsel for the Gaon Sabha, I am of the view that an application for cancellation of patta could be filed only within three years of the grant of the same as has been held by this Court in Writ-C No.22369 of 2009 (Saroj Devi Vs. State of U.P. & Ors.) decided on 19.4.2019.*** *Further, I hold that even if the application was filed, as has been alleged to have been filed, on 18.12.1992, the same could not be acted upon after notices were issued in the year 2006 as has been held by this Court in Suresh Giri & Ors. Vs. Board of Revenue, Allahabad & Ors.2. Limitation is a question of jurisdiction and it can be raised at any point of time as has been held by the Supreme Court in Foreshore Cooperative Housing Society Limited Vs. Praveen D. Desai (Dead) through Legal Representatives and others 2015 (128) rd 227 (SC)."*

(emphasis added)

14. Again in recent judgment of **Chhidda and others v. State of U.P. and others; 2019 0 Supreme (All) 1085**, the Court considered various aspects of the matter in relation to the power of Collector under Section 198(4) of U.P.Z.A. & L.R. Act, 1950 and the limitations prescribed under Section 198(6) of U.P.Z.A. &L.R. Act, 1950, the Court vide paragraph 15 has held thus:

"15. The said argument does not merits acceptance for the sole reason that the land in question has to be set apart for public purposes

under the U.P. Consolidation of Holdings Act. In the present case there is specific argument and document on record to establish that the consolidation of holdings proceedings pertaining to the land in question were never finalized and were dropped mid away and thus, it cannot be held that any bar as provided under Section 132 of the Act was triggered relating to the land in question. ***I am also not impressed with the arguments that in the cases which are covered by Section 132 of the Act, no limitation would apply. In this regard, it is relevant to mention that the Hon'ble Supreme Court has categorically held that where no limitation is prescribed action should be taken within a reasonable time, in the present case the proceedings were initiated after about 16 years which can never be termed as a reasonable period. The relevant observation of the Supreme Court in the case of Joint Collector Ranga Reddy District and another Vs. D. Narsing Rao and others, 2015 3 SCC 695 and held as under:***

"25. The legal position is fairly well-settled by a long line of decisions of this Court which have laid down that even when there is no period of limitation prescribed for the exercise of any power, revisional or otherwise, such power must be exercised within a reasonable period. This is so even in cases where allegations of fraud have necessitated the exercise of any corrective power. We may briefly refer to some of the decisions only to bring home the point that the absence of a stipulated period of limitation makes little or no difference in so far as the exercise of the power is concerned which ought to be permissible only when the power is invoked within a reasonable period.

31. To sum up, delayed exercise of revisional jurisdiction is frowned upon because if actions or transactions were to remain forever open to challenge, it will mean avoidable and endless uncertainty in human affairs, which is not the policy of law. Because, even when there is no period of limitation prescribed for exercise of such powers, the intervening delay, may have led to creation of third party rights, that cannot be trampled by a belated exercise of a discretionary power especially when no cogent explanation for the delay is in sight. ***Rule of law it is said must run closely with the rule of life. Even in cases where the orders sought to be revised are fraudulent, the exercise of power must be within a reasonable period of the discovery of fraud. Simply describing an act or transaction to be fraudulent will not extend the time for its correction to infinity; for otherwise the exercise of revisional power would itself be tantamount to a fraud upon the statute that vests such power in an authority.***

32. In the case at hand, while the entry sought to be corrected is described as fraudulent, there is nothing in the notice impugned before the High Court as to when was the alleged fraud discovered by the State. A specific statement in that regard was essential for it was a jurisdictional fact, which ought to be clearly asserted in the notice issued to the respondents. The attempt of the appellant-State to demonstrate that the notice was issued within a reasonable period of the discovery of the alleged fraud is, therefore, futile. At any rate, when the Government allowed the land in question for housing sites to be given to Government employees in the year 1991, it must be presumed to have known about the record and the revenue entries concerning the parcel of land made in the ordinary course of official business. In as much as, the notice was issued as late as on 31st December, 2004, it was delayed by nearly 13 years. No explanation has been

offered even for this delay assuming that the same ought to be counted only from the year 1991. Judged from any angle the notice seeking to reverse the entries made half a century ago, was clearly beyond reasonable time and was rightly quashed."
(emphasis added)

15. Thus principle has been discussed that the law of limitation has been provided in the Statute also gives accrual to the rights of other side. Metaphorically, it is true that a deep-rooted tree should ordinarily not be uprooted because the roots are so embedded inside the earth that it may have a very devastating impact on the nature's ecosystem whereas the new plants can be replanted anywhere. Similarly here also, if today the controversy regarding allotment which is already settled is reopened after lapse of more than 4 decades it will cause more damage to public interest than to serve it. So even on this count also, this Court will be reluctant in reopening an issue of allotment of the year 1973.

16. Besides above, the petitioner being a complainant must have a right on the date of allotment in question. In the year 1973, the complainant was not born and, therefore, he could not have maintained any right to get allotment of land as residential lease. Canvassing for right of father, who himself was not vigilant as he never set up any claim of his own, cannot be permitted and no such complaint at the instance of son be entertained after a lapse of four decades.

17. In such above view of the matter, therefore, I decline to interfere in the matter.

18. It is, however, open for the petitioner to apply for residential lease if Gaon Sabha proposes to do in future. Insofar as the petitioner's right to continue in a house constructed upon such land without there being any interference of third party is continued the petitioner always enjoys liberty to apply for a common law remedy.

19. Writ petition lacks merit and is, accordingly, dismissed.

(2022) 11 ILRA 129
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.11.2022

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Writ C No. 19871 of 2021

Suresh Singh Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Phool Singh Yadav, Sri Ajay Kumar

Counsel for the Respondents:
C.S.C., Sri Vijay Shankar

A. Civil Law - Arms Act, 1959 – Section 17(3) – Cancellation of arm licence – Pendency of criminal cases and enmity with other persons, how far permissible as the ground – No finding was recorded by DM that it was necessary for the security of the public peace or for public safety to revoke the licence – Effect – Duty of the cancelling authority, how can be discharged – Held, the mere existence of enmity between a licensee & anr. person would not establish the 'necessary' connection with security of the public peace or public safety – There should be some evidence of the provocative utterances of the licensee or of his suspicious movements or of his criminal designs and conspiracy in reinforcement of the evidence of enmity – The cancellation of a licence destroys a

valuable privilege of a free citizen of a free country – The District Magistrate and the Commissioner ought to fairly consider the facts and circumstances of each case and should also bear in mind the provisions of Section 17 – The law does not give them a free hand. (Para 12 and 13)

Writ petition allowed. (E-1)

List of Cases cited:-

1. Ram Murti Madhukar Vs D.M., Sitapur; 1998 (16) LCD-905

2. Ram Karpal Singh Vs Commissioner, Devi Patan Mandal, Gonda & ors.; 2006 (24) LCD 114

3. Writ-C No. 56378 of 2006; Ram Prasad Vs Commissioner & ors. decided on 07.02.2020

4. Jay Bhagwan Kanodia Vs The Commissioner & anr. decided on 26.07.2012

5. Ram Singh Vs St. of U.P. & ors. decided on 28.03.2019

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard Shri Ajay Kumar, Advocate, holding brief of Shri P. S. Yadav, learned counsel for the petitioner, Shri Vijay Shankar along-with Shri A. P. Tripathi, learned Standing Counsel for the respondent-State.

2. By means of present petition, petitioner is seeking for quashing of the order dated 05.04.2021 passed by the respondent no.2-District Magistrate, Fatehpur in Case No.00743 of 2021 under Section 17(3) of the Arms Act (State Vs. Suresh Singh Yadav) and order dated 14.07.2021 passed in Appeal No.00425/2021 under Section 18 of the Arms Act by the respondent no.3 namely Commissioner, Prayagraj Division, Prayagraj, P.S. Hathgaon, District Fatehpur.

3. Learned counsel for the petitioner submits that only ground for cancellation of armed license no.2579/DM (F)/Police Station Hathgaon, District Fatehpur NP Bore Rifle No.AB02-8281 is that three criminal cases has been registered against the petitioner namely Case Crime No.236 of 2017, under Section 3/7 Essential Commodity Act, 1955 and Case Crime No.237 of 2017, under Section 3/25 Arms Act and N.C.R.No.21 of 2018, under Section 323, 504 IPC. He further submits that there is no material on record to show that armed license granted to the petitioner has been misused or there is any danger to public safety except the allegations that criminal cases are pending against him. It is further argued that license can only be cancelled only to reasons assigned to Section (3) of Section 17 of the Arms Act, 1959.

4. In support of his submissions, learned counsel for the petitioner has placed reliance on the judgments passed by this Court in the cases of ***Ram Murti Madhukar vs. District Magistrate, Sitapur [1998 (16) LCD-905], Ram Karpal Singh vs. Commissioner, Devi Patan Mandal, Gonda and Ors. [2006 (24) LCD 114] and Ram Prasad vs. Commissioner and Ors. decided on 07.02.2020 in Writ-C No. 56378 of 2006,*** wherein it has been held that mere pendency of criminal case or apprehension of misuse of arms are not sufficient grounds for passing the order of suspension or revocation of licence under Section 17 of the Act.

5. Per contra learned Standing Counsel submits that since the petitioner is having three criminal cases registered against him, public peace and safety are in danger, therefore, the order has rightly been passed cancelling the fire arms license of the petitioner.

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

7. In the case of ***Ram Murti Madhukar (supra)***, this Court has held in paragraph no. 8 as under :-

"(8) It is also well settled in law that mere pendency of criminal case or apprehension of abuse of Arms Act, are not sufficient ground for passing of the order of suspension or revocation of licence under Section 17 of the Act. A reference in this regard may be made to the decisions of this Court in Ganesh Chandra Bhatt v. D. M. Almora, AIR 1993 All 291"

8. In the case of ***Ram Karpal Singh (supra)***, this Court has held as following in paragraph nos. 6 and 7, which are being reproduced hereunder:-

"6, Learned counsel for the petitioner had relied upon the two judgments of this Court reported in 2002 ACC; Habib v. State of U.P.

7. Para 3 of the said judgment is reproduced as under:

"Para 3: The question as to whether mere involvement in a criminal case or pendency of a criminal case can be a ground for revocation of the license under Arrns Act, has been deal with by a Division Bench in this Court reported in Sheo Prasad Misra v. The District Magistrate, Basti and others, wherein the Division Bench relying upon the earlier decision reported in Mai Uddin v. Commissioner, Allahabad, found that mere involvement in criminal case cannot be in any way affect the public security or public interest and the order canceling or revoking the .licence of fire arm has been set aside. The present impugned order also suffers from the same infirmity as was pointed out by the Division Bench in the above mentioned cases. I am in full agreement with the view taken by the Division Bench that these orders cannot be sustained and deserve to be quashed and are hereby quashed."

9. This Court in the case of ***Ram Prasad (supra)*** has held as under. Relevant paragraphs of the said judgments i.e. 16,19,22,23,24,25,28,32 and 36 are being quoted hereunder:-

"16. The matter which requires consideration is, whether on the ground of pendency of the criminal case the petitioner's fire arm licence could be cancelled and his appeal could be dismissed, notwithstanding his acquittal on 17.1.2003. It also requires consideration if the ground in the impugned orders that if the petitioner's fire arm licence remain with the petitioner, it would not be in the public interest and public security, are justified for cancellation and based on substantial material."

19. In Masiuddin Vs. Commissioner, Allahabad Division, Allahabad and another reported in 1972 A.L.J. 573 this Court held in paragraph Nos. 4 and 7 as under:

"4. After a license is granted, the right to hold the license and possess a gun is a valuable individual right in a free country. The security of public peace and public safety is a valuable social interest. Section 17 shows that Parliament had decided that neither of the two valuable interests should unduly impinge on the other Section 17 seeks to establish a fair equilibrium between the two contending interests. It says: Hear the licensee first; and then cancel the license "if necessary for the security of the public peace or for public safety". True, there is no express provision for hearing. But the nature of the

right affected, the language of Sec. 17, the grounds for cancellation, the requirement of a reasoned order and the right of appeal plainly implicate a fair hearing procedure. Jai Narain Rai v. District Magistrate, Azamgarh. While cancelling a licence, the District Magistrate acts as a quasi-judicial authority.

7. A license may be cancelled, inter alia on the ground that it is "necessary for the security of the public peace or for public safety" to do so. The District Magistrate has not recorded a finding that it was necessary for the security of the public peace or for public safety to revoke the license. The mere existence of enmity between a licensee and another person would not establish the "necessary' connection with security of public peace or public safety. There should be something more than mere enmity. There should be some evidence of the provocative utterances of the licensee or of his suspicious movements or of his criminal designs and conspiracy in reinforcement of the evidence of enmity. It is not possible to give an exhaustive list of facts and circumstances from which an inference of threat to public security or public peace may be deduced. The District Magistrate will have to take a decision on the facts of each case. But in the instant case there is nothing in his order to indicate that it was necessary for the security of the public peace or for public safety to cancel the license of the petitioner. Mere enmity is not sufficient."

22. In Chhanga Prasad Sahu Vs. State of U.P. and others reported in 1984 AWC 145 (FB), after noticing the provisions of Section 17 (3) of the Arms Act the Full Bench in paragraph 5 held as follows:

"A perusal of abovementioned provisions indicates that the licensing authority has been given the power to suspend or revoe an arms licence only if any of the conditions mentioned in sub-clauses (a) to (e) of sub-section (3) of Section 17 of Act exists." sub section (5) of Section 17 makes it obligatory upon the licensing authority to, while passing the order revoking/suspending an arms licence, record in writing the reasons therefore and to, on demand, furnish a brief statement thereof to the holder of the license unless it considers that it will not be in the public interest to do so."

In paragraph-9 it has been emphasised as under:-

"it is true that in order to revoke/suspend an arms licence, the licensing authority has necessarily to come to the conclusion that the facts justifying revocation/suspension of licence mentioned in grounds (a) to (e) of section 17 exist"

23. In Ilam Singh v. Commissioner, Meerut Division and others [1987 ALL. L.J. 416] this Court held that under Section 17(3) (b) the licencing authority may suspend or revoke a licence if it becomes necessary for the security of public peace or public safety. In this case no report was lodged against the licensee indicating that he had used the gun in the incident which led to the breach of public peace or public safety. It was held that there must be some positive incident in which the petitioner participated and used his gun which led to breach of public peace or public safety and in the absence of the use of the gun by the licencee against the security of public peace or public safety the licence of the gun could not be suspended or revoked. The relevant paragraphs 4 and 5 of the judgment in Ilam Singh (supra) are being reproduced as under:

"4. Having heard the learned counsel for the petitioner I am of the view that the submissions raised by the learned

counsel for the petitioner cannot be said to be without substance. Section 17(3) (b) of the Arms Act enacts that licensing authority may by order in writing suspend a licence or revoke the same if it becomes necessary for the security of public peace or the public safety. When once a person has been granted a licence and he acquires a gun, it becomes one of his properties. In the present case no incident of breach of security of the public peace or public sfety at the behest of the petitioner has been pointed out. Even no report was lodged against the petitioner indicating that he used his gun in the incident which led to the breach of public peace or public safety. Even though some reports might have been lodged but that could not be said to be a sufficient reason to cancel the licence."

5. There must be some positive incident in which the petitioner participated and used his gun which led to the breach of the public peace or public safety. In the absence of the use of the gun by the petitioner against the security of public peace or public safety the licence of the gun of the petitioner was not liable either to be suspended or revoked. The licensing authority as well as the Commissioner committed errors on the face of the record in cancelling the licence of the gun held by the petitioner in utter disregard of the provisions of Section 17 (3) (b) of the Arms Act. In view of these facts the impugned orders cannot be sustained and deserves to be quashed."

24. In Habib v. State of U.P. and others [2002 (44) ACC 783] this Court held that mere involvement in a criminal case cannot in any way affect the public security or public interest and the order cancelling or revoking licence of fire arm was not justified. Paragraph 3 of this judgment reads as under:

"3. The question as to whether mere involvement in a criminal case or pendency of a criminal case can be a ground for revocation of the licence under Arms Act, has been dealt with by a Division Bench of this court reported in Sheo Prasad Misra Vs. The District Magistrate, Basti and others, wherein the Division Bench relying upon the earlier decision reported in Masi Uddin v. Commissioner, Allahabad, found that mere involvement in criminal case cannot in any way affect the public security or public interest and the order cancelling or revoking the licence of fire arm has been set aside."

25. In Satish Singh v. District Magistrate, Sultanpur 2009 (4) ADJ 33 (LB), this Court elaborately explained what is detrimental to the security of the public peace or public safety and held that mere involvement in criminal case cannot in any way affect the public security or public interest. Paragraphs 6 and 7 of Satish Singh case (supra) are being reproduced as under:

"6. A plain reading of section 17 indicates that the arms licence can be cancelled or suspended on the ground that the licensing authority deems it necessary for security of the public peace or the public safety. In the present case, while passing the impugned order, neither the District Magistrate nor the appellate authority has recorded the finding as to how and under what circumstance, the possession of arms licence by the petitioner, is detrimental to the public peace or the public security and safety. Merely because criminal case is pending more so, does not seem to attract the provisions of section 17 of the Arms Act. To attract the provisions of section 17 of the Arms Act with regard to public peace, security and safety it shall always be incumbent on the authorities to record a finding that how, under what circumstances and what manner, the possession of arms licence shall be detrimental to public peace, safety

and security. In absence of such finding merely on the ground that a criminal case is pending without any mitigating circumstances with regard to endanger of public peace, safety and security, the provisions contained under Section 17 of the Arms Act, shall not satisfy.

7. Needless to say that right to life and liberty are guaranteed under Article 21 of the Constitution of India and the arms licences are granted for personal safety and security after due inquiry by the authorities in accordance with the provisions contained in Arms Act, 1959. The provisions of section 17 of the Arms Act with regard to suspension or cancellation of arms licence cannot be invoked lightly in an arbitrary manner. The provisions contained under Section 17 of the Arms Act should be construed strictly and not liberally. The conditions provided therein, should be satisfied by the authorities before proceeding ahead to cancel or suspend an arms licence. We may take notice of the fact that any reason whatsoever, the crime rate is raising day by day. The Government is not in a position to provide security to each and every person individually. Right to possess arms is statutory right but right to life and liberty is fundamental guaranteed by Article 21 of the Constitution of India. Corollary to it, it is citizen's right to possess firearms for their personal safety to save their family from miscreants. It is often said that ordinarily in a civilised society, only civilised persons require arms licence for their safety and security and not the criminals. Of course, in case the government feels that arms licence are abused for oblique motive or criminal activities, then appropriate measures may be adopted to check such mal-practice. But arms licence should not be suspended in a routine manner mechanically, without application of mind and keeping in view the letter and spirit of Section 17 of the Arms Act."

28. In Thakur Prasad Vs. State of U.P. and others reported 2013(31) LCD 1460 (LB) this Court after referring to the earlier pronouncements in the case of Ram Murli Madhukar Vs. District Magistrate, Sitapur [1998 (16) LCD 905] and Habib Vs. State of U.P., 2002 ACC 783, held in paragraphs 10 and 11 as follows:

"10. "Public peace" or "public safety" do not mean ordinary disturbance of law and order public safety means safety of the public at large and not safety of few persons only and before passing of the order of cancellation of arm license as per Section 17 (3) of the Act the Licensing Authority is under an obligation to apply his mind to the question as to whether there was eminent danger to public peace and safety involved in the case in view of the judgment given by this court in the case of Ram Murli Madhukar v. District Magistrate, Sitapur [1998 916) LCD 905], wherein it has been held that license can not be suspended or revoked on the ground of public interest (Jan-hit) merely on the registration of an F.I.R. and pendency of a criminal case."

11. Further, this Court in the case of Habib v. State of U.P. 2002 ACC 783 held as under:

"The question as to whether mere Involvement in a criminal case or pendency of a criminal case can be a ground for revocation of the licence under Arms Act, has been dealt with by a Division Bench of this Court in Sheo prasad Misra Vs. District Magistrate, Basti and Others, 1978 AWC 122, wherein the Division Bench relying upon the earlier decision in Masi Uddin Vs. Commissioner, Allahabad, 1972 ALJ 573, found that mere involvement in criminal case cannot, in any way, affect the public security or public interest and the order

cancelling or revoking the licence of fire arm has been set aside. The present impugned orders also suffer from the same infirmity as was pointed out by the Division Bench in the above mentioned cases. I am in full agreement with the view taken by the Division Bench that these orders cannot be sustained and deserves to be quashed and are hereby quashed.

There is yet another reason that during the pendency of the present writ petition, the petitioner has been acquitted from the aforesaid criminal case and at present there is neither any case pending, nor any conviction has been attributed to the petitioner, as is evident from Annexure SA-I and II to the supplementary affidavit filed by the petitioner. In this view of the matter, the petitioner is entitled to have the fire-arm licence."

32. In Ghanshyam Gupta v. State of U.P. and others [2016 (34) LCD 3035] this Court has again held that the necessary ingredients to invoke jurisdiction of the licencing authority in terms of Section 17 were clearly lacking and no finding had been returned on the basis of materials produced in that regard by the licencing authority, which must justify passing of the order of cancellation. Paragraph 9 of the said judgment is being quoted as under:

"9. In a recent decision of Lucknow Bench of this court in Surya Narain Mishra v. Stae of U.P. and others, reported in 2015 (7) ADJ 510, similar view has been taken by this Court relying upon subsequent decisions. Para-14 of the judgment is reproduced:

"14. In the case of Raj Kumar Verma v. State of U.P., 2013 (80) ACC 231 this court in paragraph No.3 held as under:-

"The ground for issue of show-cause notice, suspension and ultimately cancellation of the licence is that one and precisely one criminal case was registered against the petitioner. The District Magistrate has also held that the petitioner has been enlarged on bail. He has gone further to observe that if the licence remained intact, the petitioner, may disturb public peace and tranquility. The same findings have been given by the Commissioner, Unmindful of the fact that this Court is repeating the law of the land, but the deaf ears of the administrative officers do not ready to succumb the law of the land. The settled law is that mere involvement in a criminal case without any finding that involvement in such criminal case shall be detrimental to public peace and tranqulity shall not create the ground for the cancellation of Armed Licence. In Ram Suchi v. Commissioner, Devipatan Division reported in 2004 (22) LCD 1643, it was held that this law was relied upon in Balram Singh Vs. Satate of U.P. 2006 (24) LCD 1359. Mere apprehension without substance is simply an opinion which has no legs to stand. Personal whims are not allowed to be reflected while acting as a public servant.

36. In the present case the petitioner's licence was cancelled by the District Magistrate on the ground of pendency of criminal case against him. The petitioner was later on acquitted of the criminal case by order dated 17.1.2003. A perusal of the order of acquittal does not show the use of fire arm. After acquittal the very basis of the order of cancellation vanished. The finding of the District Magistrate as affirmed by the Commissioner, that it was not in the interest of public peace and the public security that the licence remained with the petitioner/licencee, is not based on any evidence/material, except the police reports which in their turn were in view of the pendency of the criminal case against the petitioner. On mere apprehension expressed

in the impugned orders that the petitioner would misuse the fire arm and would extend threat to the persons of the weaker section of the society, the arm licence could not be cancelled."

10. This Court in the case of ***Jay Bhagwan Kanodia Vs. The Commissioner and another*** decided on 26.07.2012 and ***Ram Singh Vs. State of U.P. and others*** decided on 28.03.2019 has held that fire arms licence can only be cancelled if it falls within sub Section (3) of Section 17 of the Act.

11. The provision of Sub-section (3) of Section 17 of the Arms Act provides various conditions for variation/cancellation or suspension of the arms licence, which is reproduced as under:-

"17.Variation, suspension and revocation of licences-

3.The licensing authority may by order in writing suspend a licence for such period as it thinks fit or revoke a licence-

(a) if the licensing authority is satisfied that the holder of the licence is prohibited by this Act or by any other law for the time being in force, from acquiring, having in his possession or carrying any arms or ammunition, or is of unsound mind, or is for any reason unfit for a licence under this Act ; or

(b) if the licensing authority deems it necessary for the security of the public peace or for public safety to suspend or revoke the licence; or

(c)if the licence was obtained by the suppression of material information or on the basis of wrong information provided by the holder of the licence or any other person on his behalf at the time of applying for it;or

(d) if any of the conditions of the licence has been contravened; or

(e) if the holder of the licence has failed to comply with a notice under sub-section (1) requiring him to deliver-up the licence."

12. A licence may be cancelled, inter alia on the ground that it is "necessary for the security of the public peace or for public safety' to do so. The District Magistrate has not recorded a finding that it was necessary for the security of the public peace or for public safety to revoke the licence. The mere existence of enmity between a licensee and another person would not establish the "necessary" connection with security of the public peace or public safety. There should be something more than mere enmity. There should be some evidence of the provocative utterances of the licensee or of his suspicious movements or of his criminal designs and conspiracy in reinforcement of the evidence of enmity. It is not possible to give an exhaustive list of facts and circumstances from which an inference of threat to public security or public peace may be deduced. The District Magistrate will have to take a decision on the facts of each case. But in the instant case there 'is nothing in his order to indicate that it was necessary for the security of the public peace or for public safety to cancel the licence of the petitioner. Mere enmity is not sufficient.

13. The Commissioner did not take into consideration the provisions of Section 17 at all. His order gives an impression of having been made in a mechanical manner. The cancellation of a licence destroys a valuable privilege of a free citizen of a free country. The District Magistrate and the Commissioner ought to fairly consider the

facts and circumstances of each case and should also bear in mind the provisions of Section 17 The law does not give them a free hand.

14. The petition is allowed. The orders of the Commissioner and the District Magistrate cancelling the petitioner's licence are quashed. The petitioner shall get costs.

(2022) 11 ILRA 137
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.10.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE JAYANT BANERJI, J.

Writ C No. 21595 of 2022

Smt. Shaila Tahir ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Udayan Nandan, Sr. Advocate

Counsel for the Respondents:
C.S.C., Sri Ashwani Kumar Sachan, Sri Saurabh Sachan, Sri Vashishtha Dhar Shukla, Sri Neeraj Tripathi (Addl. A.G.)

A. UP Municipalities Act, 1916 – Section 48 – Removal of President of Nagar Palika Parishad – Charges of wrongful withdrawal of public fund – No enquiry was held – Effect – Principle of natural justice, how far relevance – Ravi Yashwant Bhoir's case relied upon – Removal of a duly elected member/president of Municipal Council on basis of proved misconduct, is a proceeding quasi-judicial in nature. Therefore, the principles of natural justice are required to be given full play – Removal of elected person casts stigma upon him and takes away his valuable statutory rights. The result of his removal is that not only he, but his electoral college is also deprived of the representation by him – Held, once the petitioner had specifically denied the charges and prayed for proper inquiry being held, it was incumbent upon the respondents to provide all documentary evidence, hold oral inquiry giving full opportunity to the petitioner to cross-examine the complainant and other witnesses. However, that was not done – The petitioner has been removed in a casual manner, without holding proper inquiry, which could pass the test of fairness. (Para 21, 22, 47 and 48)

Writ petition allowed in part. (E-1)

List of Cases cited:-

1. Ravi Yashwant Bhoir Vs District Collector, Raigad & ors.; (2012) 4 SCC 407

2. Sanjeev Agrawal Vs St. of U.P. & ors.; 2011 (6) AWC 5502

3. Girish Chandra Srivastava Vs St. of U.P. & ors.; 2007 AWC (6) 6051

4. Umesh Baijal & ors. Vs St. of U.P. & anr.; (2004) 2 UPLBEC 1235

5. Shamim Ahmad (Dr.) Vs St. of U.P. & anr.; (2005) 1 UPLBEC 171

6. Krishna Swami Vs U.O.I.; (1992) 4 SCC 605

7. Sant Lal Gupta Vs Modern Coop. Group Housing Society Ltd.; (2010) 13 SCC 336

(Delivered by Hon'ble Manoj Kumar Gupta, J.
&
Hon'ble Jayant Banerji, J.)

1. The petitioner has challenged her removal from the post of President, Nagar Palika Parishad, Nawabganj, Bareilly by the order of respondent no. 1, i.e. Principal Secretary, Nagar Vikas, U.P. Lucknow dated 10.5.2022 and the report of District

Magistrate, Bareilly dated 6.1.2022. She has also prayed for a writ of mandamus commanding the respondents to permit her to discharge her duties as President of the Nagar Palika Parishad, Nawabganj, Bareilly.

2. The petitioner was elected as President of Nagar Palika Parishad, Nawabganj, Bareilly on 1.12.2017. A show cause notice dated 17.7.2019 was issued to her by respondent no. 1, seeking her explanation in relation to alleged wrongful withdrawal of a sum of Rs. 47,31,035/-, out of Rs. 52,40,554/-, from the funds provided by the State Finance Commission Grants. It was alleged that at the relevant time, no Executive Officer was working in the Nagar Palika and therefore, the withdrawal of the amount, amounts to a financial irregularity. It was also alleged that as a result, the safai karmees could not get their salary during Holi festival. The petitioner was called upon to reply to the said notice within seven days, along with the evidence, otherwise, proceedings for her removal would be initiated. The petitioner replied to the said notice on 27.07.2019 stating that the amount was used towards payment of arrears of salary to the employees of the Municipality and the development works executed by different firms. All the payments were made by account payee cheques. At the relevant time, Gulshan Kumar Suri was working as Executive Officer and the payments were made under the joint signatures of the petitioner and the said Executive Officer. The petitioner annexed the bank statements to prove her contention.

3. On 17.8.2019, the District Magistrate sent a communication to the State Government, mentioning various charges of misconduct on part of the petitioner and recommended for seizing her financial and administrative powers. On 18.8.2019, a show cause notice was issued to the petitioner by respondent no. 1, requiring her to submit her explanation within seven days, failing which, proceedings under Section 48(2) of the Act would be initiated against her. By same notice, respondent no. 1, exercising power under the proviso to sub-section (2) of Section 48 ceased the financial and administrative powers of the petitioner.

4. The petitioner challenged the show cause notice/order seizing her financial and administrative powers by filing a writ petition1 before this Court. An interim order was passed in the said writ petition on 24.9.2019, staying the operation of the order dated 18.8.2019, seizing the administrative and financial powers of the petitioner, while permitting enquiry in relation to removal to be concluded without being influenced by the pendency of the writ petition.

5. On 9.09.2019, the petitioner submitted a detailed reply to the show cause notice dated 18.08.2019 and categorically denied the charges levelled against her. The receipt of reply of the petitioner dated 9.09.2019 (19.09.2019) to the show cause notice dated 17.7.2019 is admitted. In reply to the first charge, the petitioner reiterated the stand taken by her in her reply dated 17.7.2019.

6. In respect of the second charge, the petitioner took a specific stand that keeping in mind the G.O. dated 12.7.2010, the payments were made on priority basis to the regular and contractual employees by issuing cheques on 31.12.2018. Cheques were encashed by the payee as per their convenience, in some case in the month of

February, 2019. The petitioner stated that she had supplied salary details along with her previous reply. However, no enquiry was held on the said issue. The petitioner also specifically denied the charge that the salary of employees was diverted to contractors. She also stated that one regular employee Sant Ram retired on 31.12.2018 and an account payee cheque was issued to clear his back wages, etc. The said cheque was encashed in 2019 from the grant received from the State Finance Commission. The petitioner admitted that a payment of Rs. 6,03,540/- was made to the contractors under joint signatures on 31.12.2018, which were encashed in 2019. According to the petitioner, these payments were in respect of urgent works got done in the past through the contractors. It was also contended by the petitioner that had these payments not been made, the functioning of the Municipality would have become difficult.

7. The petitioner also stated that salary of the employees in the month of March, 2019 on the occasion of Holi, could not be paid, as at that time, no executive officer was posted in the Municipality, under whose joint signature, payment of salaries was possible. The petitioner also specifically denied the charge that signatures on the cheques were ante-dated. She contended that the mere fact that in some cases, cheques were encashed by the payee in January and February, 2019 would not mean that the cheques were ante-dated.

8. In reply to Charge No.3, the petitioner stated that even before she took over charge as Chairman, the Government Scheme relating to disbursement of funds to the beneficiaries under the Swachh Bharat Mission was in the hands of Senior Clerk Achal Sharma and Computer Operator Anuj Kumar. They did not inform the petitioner that the second installment of Rs. 4,000/- was due and was to be transferred in the bank accounts of the beneficiaries. They also never presented the cheques for payment to the beneficiaries. The petitioner claimed that on the other hand, the town was reeling under the threat of communicable diseases and household wastes were dumped openly everywhere. To bring the conditions under control, the petitioner permitted purchase of cleaning equipments, chemical spray, tankers, dustbins, fogging machines, sewage cleaning machines, portable toilets, LED lights and the same was done according to established procedures. The petitioner was never made aware regarding the fund from which purchases and payments through cheques were made.

9. She also claimed that later when she was informed about the Swachh Bharat Scheme, she personally inspected the work got done through the contractor and found the same to be completely unsatisfactory and substandard and therefore, 50% of the bill amount was withheld with direction to the contractors to complete the work according to prescribed norms. She also alleged that she went to Lucknow and informed the Principal Secretary, Urban Development, about the said fact.

10. In respect of Charge No.4, that the husband of the petitioner misbehaved with Balbir Singh, Executive Officer, the petitioner specifically denied the same. She also refuted the allegation that he was ever pressurized to make any payment against Rules. She also specifically stated that all records of the Municipalities were kept in Nagar Palika Parishad and there was no hurdle in Government work. As regards issue relating to appointment of

Mohammad Arshad, she submitted that the matter was pending before this court, as such, she was not in position to give any reply to the same. She also specifically denied the charge that her husband had any altercation with Mahinder Pal. She alleged that the charge in this regard is actuated by political vendetta. She requested for copies of documents and opportunity of hearing.

11. On 6.1.2020, a report was submitted by the District Magistrate to the State Government in respect of four charges levelled against her by means of show cause notice dated 18.8.2019. The petitioner was again issued a show cause notice by the State Government on 14.5.2020 in respect of four charges. The case of the petitioner is that she once again submitted detailed reply to the show cause notice dated 14.5.2020 on 12.3.2021 and denied the allegations made therein, against her.

12. On 23.07.2020, the petitioner submitted an application before the State Government, stating that the report of District Magistrate dated 6.1.2020 was ex-parte and the procedure adopted by him was completely illegal and arbitrary. The petitioner prayed for an opportunity to cross examine the Additional City Magistrate, the then Executive Officer Balbir Singh, the observer, Swachh Bharat Mission, IVth Class Employee Mahender Pal, the complainant and certain other persons.

13. The case of the petitioner is that the State Government did not appoint any enquiry officer to hold oral enquiry. She requested the State Government to provide her with the relevant documents on which charges were based. However, without considering the application and the reply submitted by the petitioner and also without holding any enquiry, the Principal Secretary, Nagar Vikas, U.P. Lucknow, proceeded to pass the impugned order dated 10.5.2022, removing the petitioner from the post of President of the Municipality in purported exercise of powers conferred by Section 48(2) of the U.P. Municipalities Act, 1916. According to the impugned order, all four charges were found proved against the petitioner.

14. Sri Shashi Nandan, learned Senior Counsel for the petitioner submitted that the petitioner had been removed unceremoniously, without holding any proper enquiry. The petitioner is the Head of a Local Self-Government. She could not have been removed without holding a full-fledged enquiry. The alleged enquiry held in the instant case was a mere eyewash. The petitioner was not provided with the documents and evidences on which charges were based, despite repeated requests. She was also not given proper opportunity of hearing. Request for cross-examination was ignored in a casual manner. In case of enquiry in relation to removal of an elected representative, it should be more elaborate and thorough than the one required to be held in case of removal of a government employee. Standard of proof has to be more stringent than in case of a departmental enquiry against a government servant. In support of his submission, he placed reliance on the judgment of the Supreme Court in **Ravi Yashwant Bhoir vs. District Collector, Raigad and Others2.**

15. He also submitted that the proceedings started with issuance of notice dated 17.7.2019. It contained only one charge in relation to alleged withdrawal of amount from the bank from the funds provided by the State Finance Commission.

The said amount was alleged to have been withdrawn at a time when no executive officer was posted. However, the order of removal is based on four charges and this *ex facie* amounts to violation of the principles of natural justice.

16. He further submitted that Section 48(2) of the Act itself contemplates that after considering the explanation of the President, the State Government should hold such enquiry as it would consider necessary. In the instant case, since the charges were specifically denied and the petitioner sought opportunity to cross examine various witnesses on whose version the charges were founded, it was incumbent upon the respondents to have held oral enquiry, but which was not done in the instant case. The respondents adopted a procedure which was completely inconsistent with the principles of natural justice and therefore, the entire proceedings stand vitiated. In this regard, reliance was placed on a Division Bench judgment of this Court in **Sanjeev Agrawal vs. State of U.P. and Others3.**

17. It is also contended that the respondents merely relied on the report submitted by the District Magistrate dated 6.1.2020, in holding the petitioner guilty of the charges. The State Government did not apply its mind to the replies submitted by the petitioner, nor discussed any evidence. Therefore, the impugned order is a result of non-application of mind and in clear breach of principles of natural justice. The State Government had not given any independent findings. It is submitted that any conclusion arrived at without giving reasons is *ex facie* illegal and in derogation of the principles of natural justice.

18. Countering the submissions, Shri Neeraj Tripathi, learned Additional Advocate General, appearing for the State, submitted that the petitioner was given repeated show cause notices and fullest opportunity of hearing. The State Government also held proper enquiry through the District Magistrate. He submitted his reports from time to time and which were rightly relied upon in passing the impugned order. The impugned order itself reveals that several dates were fixed for personal hearing, but the petitioner did not avail the opportunity. The contention that the petitioner was charge sheeted only on basis of one charge while the impugned order is based on four charges is not correct. Initially, the show cause notice dated 17.7.2019 was based on a single charge. Another notice was issued on 18.8.2019, calling for the explanation of the petitioner. The said notice was based on all the four charges. The petitioner's financial and administrative powers were ceased thereby and she was given seven days time to submit her explanation to the charges mentioned in the said notice. By the said notice, the petitioner was clearly informed that in case she does not submit her reply within seven days, proceedings under Section 48(2) would be taken to its logical conclusion. He further submitted that the replies dated 12.3.2020, 14.8.2020 and 15.6.2021 were never received. According to him, the impugned order takes into consideration every aspect of the matter and as the charges against the petitioner relates to financial irregularities, this Court should decline to interfere in the matter.

19. Since a factual controversy relating to receipt of various replies said to have been submitted by the petitioner was raised, therefore, we required the respondents to produce the original records before us. In compliance of the same, the original records were placed before us and

wherein we found that the replies of the petitioner dated 12.3.2021, 14.8.2020 and 15.6.2020 were missing. Consequently, we directed the State respondent to hold an enquiry in this regard, inasmuch as, those replies were allegedly sent by registered post/speed post on the correct address. The petitioner claimed benefit of Section 27 of the U.P. General Clause Act and Section 114 of the Evidence Act. In pursuance of our order dated 12.09.2022, respondent no. 1 held an enquiry and according to the enquiry report, the alleged replies were not received. Although there is presumption of service when the document is sent by registered post/speed post at the correct address, but we find that apart from these replies, there are other detailed replies which were admittedly received by the respondents. These replies were also in relation to the same charges and cover the entire defence of the petitioner. Therefore, instead of going into the above factual dispute, we proceed in the matter by considering only the replies that were admittedly received by the respondents.

20. We first proceed to analyse the nature of the enquiry that was required to be held in the instant case. The petitioner was the elected President of Nagar Palika Parishad, Nawabganj, a 'Municipality' within the meaning of clause (e) of Article 243P of the Constitution. It is a unit of local self government. It has been accorded constitutional status with the insertion of Part IX-A in the Constitution by the Constitution (Seventy Fourth Amendment) Act, 1992 w.e.f. 01.06.1993. The Statement of Objects and Reasons as was published in the Gazette on 16.09.1991 when the Bill was introduced is as under:-

1. In many States local bodies have become weak and ineffective on account of a variety of reasons, including the failure to hold regular elections, prolonged supersessions and inadequate devolution of powers and functions. As a result, Urban Local Bodies are not able to perform effectively as vibrant democratic units of self-government.

2. Having regard to these inadequacies, it is considered necessary that provisions relating to Urban Local Bodies are incorporated in the Constitution particularly for-

(i) putting on a firmer footing the relationship between the State Government and the Urban Local Bodies with respect to-

(a) the functions and taxation powers; and

(b) arrangements for revenue sharing;

(ii) Ensuring regular conduct of elections;

(iii) ensuring timely elections in the case of supersession; and

(iv) providing adequate representation for the weaker sections like Scheduled Castes, Scheduled Tribes and women.

3. Accordingly, it is proposed to add a new part relating to the Urban Local Bodies in the Constitution to provide for-

(a) constitution of three types of Municipalities:

(i) Nagar Panchayats for areas in transition from a rural area to urban area;

(ii) Municipal Councils for smaller urban areas;

(iii) Municipal Corporations for larger urban areas. The broad criteria for specifying the said areas is being provided in the proposed article 243-0;

(b) composition of Municipalities, which will be decided by the Legislature of a State, having the following features:

(i) persons to be chosen by direct election;

(ii) representation of Chairpersons of Committees, if any, at ward or other levels in the Municipalities;

(iii) representation of persons having special knowledge or experience of Municipal Administration in Municipalities (without voting rights);

(c) election of Chairpersons of a Municipality in the manner specified in the State law;

(d) constitution of Committees at ward level or other level or levels within the territorial area of a Municipality as may be provided in the State law;

(e) reservation of seats in every Municipality-

(i) for Scheduled Castes and Scheduled Tribes in proportion to their population of which not less than one-third shall be for women;

(ii) for women which shall not less than one-third of the total number of seats;

(iii) in favour of backward class of citizens if so provided by the Legislature of the State;

(iv) for Scheduled Castes, Scheduled Tribes and women in the office of Chairpersons as may be specified in the State law;

(f) fixed tenure of 5 years for the Municipality and re-election within six months of end of tenure. If a Municipality is dissolved before expiration of its duration, elections to be held within a period of six months of its dissolution;

(g) devolution by the State Legislature of powers and responsibilities upon the Municipalities with respect to preparation of plans for economic development and social justice, and for the implementation of development schemes as may be required to enable them to function as institutions of self-government;

(h) levy of taxes and duties by Municipalities, assigning of such taxes and duties to Municipalities by State Governments and for making grants-in-aid by the State to the Municipalities as may be provided in the State law;

(i) xx xx xx

21. In **Ravi Yashwant Bhoir (supra)**, the Supreme Court held that removal of a duly elected member/president of Municipal Council on basis of proved misconduct, is a proceeding quasi-judicial in nature. Therefore, the principles of natural justice are required to be given full play and a proper opportunity of placing the defence is a must. It was also held that an elected official of a local self government holds a much higher pedestal as compared to a government servant. If a government servant cannot be removed without a full-fledged enquiry, there is no gainsaying that in case of an elected representative, holding of full-fledged enquiry is imperative in law. A more stringent procedure and standard of proof is required-

30. There can also be no quarrel with the settled legal proposition that removal of a duly elected Member on the basis of proved misconduct is a quasi-judicial proceeding in nature. (Vide: Indian National Congress (I) v. Institute of Social Welfare & Ors., AIR 2002 SC 2158). This view stands further fortified by the Constitution Bench judgments of this Court in Bachhitar Singh v. State of Punjab & Anr., AIR 1963 SC 395 and Union of India v. H.C. Goel, AIR 1964 SC 364. Therefore, the principles of natural justice are

required to be given full play and strict compliance should be ensured, even in the absence of any provision providing for the same. Principles of natural justice require a fair opportunity of defence to such an elected office bearer.

31. Undoubtedly, any elected official in local self-government has to be put on a higher pedestal as against a government servant. If a temporary government employee cannot be removed on the ground of misconduct without holding a full fledged inquiry, it is difficult to imagine how an elected office bearer can be removed without holding a full fledged inquiry.

32. In service jurisprudence, minor punishment is permissible to be imposed while holding the inquiry as per the procedure prescribed for it but for removal, termination or reduction in rank, a full fledged inquiry is required otherwise it will be violative of the provisions of Article 311 of the Constitution of India. The case is to be understood in an entirely different context as compared to the government employees, for the reason, that for the removal of the elected officials, a more stringent procedure and standard of proof is required.

22. The Supreme Court also held that removal of elected person casts stigma upon him and takes away his valuable statutory rights. The result of his removal is that not only he, but his electoral college is also deprived of the representation by him. Moreover, he also stands disqualified to contest the election for a stipulated period.

23. In the instant case, the petitioner, who is President of Municipality, would stand disqualified from contesting a re-election as President or Member for a period of five years from the date of her removal in view of Section 48 (4) of the U.P. Municipalities Act, 1916 [the removal being under clause (a) and sub-clause (vi), (vii) and clause (b) of sub-section (2) of Section 48].

24. Sub-section (2-A) of Section 48 contemplates making of such inquiry as may be considered necessary by the State Government after considering the explanation that may be offered by the President. An order of removal should be in writing and contain reasons for removal of the President from office. The said provision is quoted below for convenience of reference:-

(2-A) After considering any explanation that may be offered by the President and making such enquiry as it may consider necessary, the State Government may, for reasons to be recorded in writing, remove the President from his office.

25. In **Sanjeev Agrawal Vs. State of U.P. and others4** it was contended that sub-section (2-A) of Section 48 was deleted by subsequent amendments and is no more part of the statute. Therefore, no inquiry as per the said provision is required to be held. The argument was repelled after considering the amendments made to Section 48 from time to time. The Court relied on another Division Bench judgement of this Court in **Girish Chandra Srivastava vs. State of U.P. and others5** in holding that the said provision continue to exist and that there was error in numbering the sections while making subsequent amendments. It was concluded that the inquiry under Section 48 (2-A) is mandatory, although its nature and scope will depend on fact of each case. The relevant part of the said judgement is quoted in extenso:-

Section 48(2-A) of the U.P. Municipalities Act, 1916 contemplates that after considering any explanation that may

be offered by the President and making such enquiry as it may consider necessary, the State Government may, for reasons to be recorded in writing, remove the President from his office.

By U.P. Act No.VI of 2004 another sub-section (2-A) was added, which is to the following effect:-

"In Section 48 of the Uttar Pradesh Municipalities Act, 1916, after sub-section (2) the following sub-section shall be inserted namely: "(2A) where in an inquiry held by such person and in such manner as may be prescribed, if a President or a Vice President is prima-facie found to be guilty on any of the grounds referred to in sub-section (2), he shall cease to exercise, perform and discharge the financial and administrative powers, function and duties of the President or the Vice-President, as the case may be, which shall, until he is exonerated of the charges mentioned in the show cause notice issued to him under sub-section (2), be exercised and performed by the District Magistrate or by any other nominated by him not below the rank of the Deputy Collector."

By U.P. Act No.II of 2005, Section 48 was again amended which amendment was deemed to have come into force with effect from 27th February, 2004 which was the date on which U.P. Act No.VI of 2004 was published in the gazette. In sub-section (2) of Section 48, a proviso was inserted, which is to the following effect:-

"Provided that where the State Government has reason to believe that the allegations do not appear to be groundless and the President is prima facie guilty on any of the grounds of this sub-section resulting in the issuance of the show cause notice and proceedings under this sub-section he shall, from the date of issuance of the show cause notice containing charges, cease to exercise, perform and discharge the financial and administrative powers, functions and duties of the President until he is exonerated of the charges mentioned in the show cause notice issued to him under this sub-section and finalization of the proceedings under sub-section (2A) and the said powers, functions and duties of the President during the period of such ceasing, shall be exercised, performed and discharged by the District Magistrate or an officer nominated by him not below the rank of Deputy Collector."

Sub-section (2-A) of Section 48 as inserted on 27th February, 2004 by the Uttar Pradesh Municipalities (Amendment) Act, 2004 (U.P. Act No.VI of 2004) was omitted.

11. The submission of Sri Shashi Nandan, learned Senior Advocate, that after deletion of Section 48(2-A) now there is no provision for holding an inquiry by the State Government needs to be considered first.

12. Sub-Section (2-A) of Section 48 which was inserted by U.P. Act No.XXVI of 1964 was to the following effect, "After considering any explanation that may be offered by the President and making such enquiry as it may consider necessary, the State Government may, for reasons to be recorded in writing, remove the President from his office.". The above sub-section (2-A) of Section 48 has not been deleted by any subsequent amendment. What has been deleted by U.P. Act No.II of 2005 was sub-section (2-A) which was inserted by U.P. Act No.VI of 2004 wherein it was provided that where in an inquiry held, if a President or a Vice-President is prima-facie found to be guilty, he shall cease to exercise, perform and discharge the financial and administrative powers, functions and duties of the President or a Vice-President until he is exonerated of the charges. Sub-Section (2-A), which was inserted by U.P. Act

No.XXVI of 1964 was an entirely different provision from one which has been inserted by U.P. Act No.VI of 2004. Sub-section (2-A) of Section 48 which was inserted by U.P. Act No.VI of 2004 was with regard to cessation of financial and administrative powers of the President. The State legislature being not satisfied with the scheme of sub-section (2-A) of Section 48 as introduced by U.P. Act No.VI of 2004 came up to the same effect regarding cessation of financial and administrative powers by inserting a proviso after Section 48(2) which proviso contains more drastic provision regarding cessation of financial and administrative powers and when proviso was inserted by U.P. Act No.II of 2005, the earlier sub-section (2-A) providing for cessation of financial and administrative powers was omitted. Thus Section 48(2-A) as was inserted by U.P. Act No.XXVI of 1964 still continues in the statute which obliges the State Government to consider the explanation and to hold an inquiry in the matter.

13. A Division Bench of this Court in the case of Girish Chandra Srivastava vs. State of U.P. and others reported in 2007 AWC-6-6051, after considering the provisions of Section 48 as amended from time to time, has taken the same view which we have taken above. Following was laid down by the Division Bench in paragraph 20 of the said judgment:-

"20. In view of the aforesaid decisions, we are of the considered opinion that insertion of sub-section (2A) in Section 48 of the Act after sub-section (2) by U.P. Act No.6 of 2004, does not, in any manner, either omit or substitute the earlier sub-section (2A) of Section 48 of the Act which was inserted by U.P. Act No.27 of 1964 and the State Legislature appears to have committed a mistake in numbering the sub-section that was added by U.P. Act No.6 of 2004. However, the mistake that had occurred stood removed by the subsequent amendment made by the State Legislature in Section 48 by U.P. Act No.2 of 2005 as sub-section (2A) that was inserted in Section 48 of the Act by U.P. Act No.6 of 2004 was omitted with effect from 27.2.2004."

Thus according to scheme of Section 48 of the U.P. Municipalities Act, 1916 after issuance of show cause notice under Section 48(2), the State Government is obliged to consider the explanation and also to hold such inquiry as it may deem necessary.

26. What is nature and scope of inquiry which is required to be held under Section 48 was considered by this Court in **Umesh Baijal and others Vs. State of U.P. and another6.** It has been held that there could be cases where the charges are admitted and in which event, it would not be necessary to hold a regular inquiry and examine witnesses etc. There may be cases where the allegations are based on complaint made by certain persons. In such cases, if the State intends to rely on affidavit filed by the complainant, it has to give opportunity of hearing to the Chairperson to cross-examine the complainant. In a given case, the allegations may be of a very serious nature and which have to be proved by documentary as well as oral evidence and in such cases, full fledged inquiry would be required, as merely calling for explanation and considering the same would not meet the requirements of law. The relevant paragraphs from the said judgment are as follows:-

"13. Thus, it is evident that if a Chairman is removed under these

provisions, it would have a very serious repercussion and consequence not only on the Chairman but also on the constituency, which he represented because he is being removed from the membership also, therefore, it cannot be permissible in law to remove him without complying with the requirement of law, as required under the facts and circumstances of a particular case. Sub-section (2A) of Section 48 of the Act, 1916 provides for a procedure of removal stipulating that after considering any explanation that may be offered by the President and making such enquiry as it may consider necessary, the State Government may, for reasons to be recorded in writing, remove him. The law does not permit or give unfettered powers to the State Government for passing an order of removal of the Chairman merely after considering his explanation to the show cause. It would depend upon the facts of each case as to whether an enquiry is required. There may be a case of admission by the President himself or the case against him is of such a nature for which he can furnish no explanation or the facts of a case are so admitted or admittedly such that no explanation is required at all, in such eventuality, it will not be necessary to hold a regular enquiry and examine the witnesses etc. giving an opportunity of cross-examination of the witness. There may be a case where the State is considering the affidavits filed by certain persons complaining against the misconduct of the Chairman, if State wants to take into consideration the said affidavits and in his explanation the Chairman denies the allegations, the affidavit cannot be relied upon without giving an opportunity to the Chairman to cross-examine the deponents, as required under the provisions of Order XIX, Rule 2 of the Code of Civil Procedure, for the reason that the Code itself is nothing but codification of the principles of natural justice. The provisions of Order XIX, Rule 2 of the Code become mandatory.

39. Thus, in view of the above, it cannot be held that in each and every case, non-observance of principles of natural justice would vitiate the order. It has to be understood in the context and facts-situation of each case and requirement of statutory Rules applicable therein. However, in a given case, if the allegations are of a, serious nature and has to be proved on a documentary as well as on oral evidence, it is desirable to have a fulfledged enquiry for the reason that removal only on asking the explanation and consideration thereof, would not be sufficient to meet the requirement of law unless the facts are admitted or undeniable. It is not possible to lay down any strait-jacket formula as in what cases the fulfledged enquiry is to be held and in what cases removal is permissible on asking office bearers to furnish the explanation to the charges. It will depend on the facts of an individual case."

27. In **Sanjeev Agrawal (supra),** after considering the Division Bench judgment in **Umesh Baijal** and another Division Bench judgement in **Shamim Ahmad (Dr.) Vs. State of U.P. and another7,** it was concluded as follows:-

10. Thus, in our view, it is clear that once an explanation is submitted by the President denying the charges, it is incumbent upon the State Government to make "such enquiry as it may consider necessary" before passing an order of removal. The word "inquiry" contemplates investigation. Therefore, where the President denies the charges and offers his explanation, the State Government is

required to consider his explanation. If the State Government is satisfied with the explanation offered by the President, in that case, nothing further is required to be done other than passing a consequential order dropping the proceedings. However, if the State Government is not satisfied with the explanation, in that case, the State Government is required to enquire into the matter by holding a full-fledged enquiry.

28. In **Ravi Yashwant Bhoir Vs. District Collector, Raigad and others,** the Supreme Court also considered the issue as to whether recording of reasons is mandatory while passing an order of removal. The Supreme Court placed reliance on its previous judgements in case of **Krishna Swami Vs. Union of India8, Sant Lal Gupta Vs. Modern Coop. Group Housing Society Ltd9** and thereafter concluded by holding as follows:-

46. The emphasis on recording reason is that if the decision reveals the `inscrutable face of the sphinx', it can be its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind of the authority before the court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made. In other words, a speaking out, the inscrutable face of the sphinx is ordinarily incongruous with a judicial or quasi-judicial performance.

29. The quotation from **Krishna Swami (supra)** relied upon in the said judgment reads thus:-

"Reasons are the links between the material, the foundation for their erection and the actual conclusions. They would also demonstrate how the mind of the maker was activated and actuated and their rational nexus and synthesis with the facts considered and the conclusions reached. Lest it would be arbitrary, unfair and unjust, violating Article 14 or unfair procedure offending Article 21."

30. In **Sant Lal Gupta (supra),** it was held as follows:-

"27. It is a settled legal proposition that not only administrative but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice - delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice.

"3. The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before Courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the Court concerned had really applied its mind."

The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute

subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected."

31. The consistent judicial opinion thus is that recording of reasons in writing is not merely an attribute of the principles of natural justice but also essence of transparency and fairness in decision making process. It has been held to be a hallmark of sound and objective exercise of power. An order bereft of reasons violates Article 14 and 21 of the Constitution.

32. We now proceed to examine the contention of learned counsel for the parties in the light of the law discussed above.

33. In the instant case, the respondents initially issued a notice dated 17.07.2019 mentioning that it is in receipt of report of District Magistrate and Commissioner, Bareilly Region, Bareilly that the petitioner had misused funds under the head 'State Finance Commission'. To be precise, it was alleged that the petitioner had distributed Rs.47,31,035/- out of Rs.52,40,544/- from the State Finance Commission head. At the relevant time, no Executive Officer was posted in the Municipality. As a result thereof, the cleaning staff of the Municipality could not be paid their salary during the Holi festival. The petitioner was called upon to submit her explanation within seven days, failing which, proceedings under Section 48 would be initiated against her. The petitioner responded to the said notice by submitting her explanation on 17/27.7.2019 in which she categorically refuted the allegations and specifically raised the issue that the show cause notice was issued to her on basis of false complaint made by the candidate who had lost the election i.e. Smt. Prem Lata Rathor. She emphatically denied the charge and pleaded that the amount was spent in payment of salary/stipend of daily-wagers and safai karmis. All the payments were made by account payee cheques under joint signatures of the petitioner and Gulshan Kumar Suri, the Executive Officer posted at the relevant time. She also pleaded that all the aforesaid cheques were drawn on 31.12.2018, but were encashed by the payees in the months of January and February, 2019 as per their convenience. It was followed by another show cause notice dated 18.08.2019 which contained three more charges, as noted in foregoing part of the instant order. The petitioner was called upon to offer her explanation within seven days, failing which, further proceedings on merits will be undertaken under Section 48 (2) of the Act. Simultaneously, the financial and administrative powers of the petitioner were also ceased in exercise of powers under the proviso to Section 48 (2). The petitioner feeling aggrieved thereby filed a writ petition before this Court wherein this Court vide its order dated 24.09.2019 stayed part of the order ceasing administrative and financial powers, but permitted the respondents to conclude the inquiry in accordance with law.

34. The petitioner submitted a detailed reply on 09.09.2019 (19.09.2019). Therein, she specifically refuted all the four charges and offered detailed explanation to each charge. Therein, she also raised a

specific plea that she was not provided with the report of A.D.M. dated 17.8.2019 which formed the basis for issuing show cause notice dated 18.08.2019. She further pleaded that the respondents had illegally relied on the report of the A.D.M., Bareilly dated 17.08.2019 in issuing the notice dated 18.08.2019 without first seeking her explanation in response thereto. The petitioner sought to impress upon the respondents that they were proceeding in violation of principles of natural justice and the adverse material which formed the basis for issuing show cause notice (inquiry report and documentary evidence) was not provided to her. She again requested for the same being made available to her.

35. It seems that the explanation of the petitioner was forwarded by the State Government by its covering letter dated 18.08.2019 to the District Magistrate for submitting his comments. As a follow up, the District Magistrate submitted his comments dated 6.01.2020 to the State Government.

36. On 14.05.2020 the State Government issued another show cause notice to the petitioner in context of the comments submitted by the District Magistrate on 6.01.2020. The petitioner was asked to submit her explanation once again within seven days.

37. On 15.06.2020 the petitioner submitted an application and requested for oral hearing. On 27.07.2020 the petitioner submitted an application specifying therein the documents to be provided to her in respect of each charge.

38. On 10.5.2022 the respondents passed the impugned order. It recites that on 14.05.2020 the petitioner was issued a notice stating that on account of lock-down as a result of Covid 19 protocol in place at the relevant time, personal hearing was not possible, therefore, she was directed to submit her written reply within seven days, but the petitioner did not submit any written reply. The order further mentions various dates fixed for personal hearing subsequently and that the petitioner did not avail the said opportunity. Para 2 of the order mentions that the report submitted by the District Magistrate dated 6.01.2020, after examining the response of the petitioner, holds the petitioner guilty of various charges and thereafter the extract from the report of the District Magistrate is quoted in the impugned order. Para 3 of the order mentions that all the charges levelled against the petitioner are found proved and established in view of the report of the District Magistrate and the Additional Report (comments submitted after examining the reply of the petitioner). She has been found guilty of the grounds mentioned in clause (a) and sub-clauses (vi), (vii), (x) and (xi) of clause (b) of sub-section (2) of Section 48 of the Act and accordingly, her removal has been ordered.

39. It is clear from the facts noted above that initially the notice dated 17.07.2019 issued to the petitioner seeking her explanation contained only one charge. However, notice dated 18.08.2019 contained three more charges and the explanation of the petitioner was duly called for in response to the said notice. As such, we find no force in the submission of learned counsel for the petitioner that the order of removal is based on additional charges, in relation to which the petitioner was not called upon to show cause.

40. We now proceed to examine the plea as to whether the impugned order is

violative of principles of natural justice, as proper enquiry was not held and also bad in law, as the State Government had failed to record any independent finding of its own in relation to the charges framed against the petitioner.

41. The impugned order, as noted above, merely relies on the report of the District Magistrate and the Additional Report submitted in response to the reply of the petitioner to the show cause notice. The State Government in the entire order has not recorded any independent reasoning in arriving at the conclusion that the grounds stipulated under Section 48 (2) are made out against the petitioner. As discussed above, giving of reasons was imperative as reasons are link between the material, the foundation for their erection and the actual conclusion. Sans reasons, this Court is unable to uphold the decision as well as the decision making process.

42. The receipt of application dated 23.7.2020 to cross-examine the witnesses is admitted to the respondents. Therein, the petitioner after giving detailed explanation to different charges and specifying reasons, requested for opportunity to cross examine various persons in relation to whom, or on basis of whose version, the charges were being pressed against her. She reiterated the request made by her in her previous reply for being provided with complete set of documents and evidences in support of the charges and for being provided proper opportunity of hearing and for setting aside the ex-parte report of the District Magistrate dated 6.1.2020.

43. The petitioner by her application dated 10.8.2020, receipt of which is admitted to the respondents, demanded large number of documents.

44. It is evident from the stand taken in the counter affidavit that after receipt of replies from the petitioner, respondent no. 1 called for comments from the District Magistrate. The specific case of the petitioner is that the District Magistrate never held any enquiry, nor gave her any opportunity of hearing and submitted his report behind the back of the petitioner.

45. The report of the District Magistrate and the Additional Report submitted after examining the reply of the petitioner were only in form of an opinion which could have been considered by the State Government alongwith the defence of the petitioner and the evidence submitted by her. It was not a gospel truth nor final word. The same is not a substitute to the statutory requirement of recordal of reasons in writing by the State Government while passing an order of removal of the President in view of Section 48 (2-A) of the Act. On this ground alone, the impugned order is rendered vulnerable and is liable to be quashed.

46. We have already noted that the petitioner denied all the four charges. It is noteworthy that charge no.4 particularly related to the letters written on 8.08.2019 and 13.8.2019 by the then Executive Officer Balveer Singh in relation to pressure allegedly exerted upon him by the petitioner and her husband to facilitate certain payments. The said charge also related to certain other complaints received against the petitioner from different quarters in relation to alleged mis-behavour on part of her husband. The petitioner in general and particularly in reference to charge no.4 requested for opportunity to cross-examine the then Executive Officer Balveer Singh Yadav and certain other persons. On 27.07.2020 she demanded

various documents which formed basis for levelling the charges. The charges related to alleged misuse of funds; ante dating of cheques; alleged illegal payments to certain contractors in violation of the provisions of certain Government instructions; alleged diversion of funds.

47. Once the petitioner had specifically denied the charges and prayed for proper inquiry being held, it was incumbent upon the respondents to provide all documentary evidence, hold oral inquiry giving full opportunity to the petitioner to cross-examine the complainant and other witnesses. However, that was not done. The respondents rather adopted a peculiar procedure. After receipt of explanation of the petitioner dated 17.07.2019, they called for comments from the District Magistrate. Thereafter when the petitioner submitted another detailed reply dated 19.09.2019, once again comments are called from the District Magistrate. The State Government without holding any enquiry, merely on basis of comments submitted by the District Magistrate, proceeded to pass the impugned order for the reason that the petitioner had not submitted any reply in response to notice dated 14.05.2020 which was issued as a substitute to personal hearing on account of Covid 19 protocol being in force at the relevant time. The rebuttal of the petitioner to the charges was already there in shape of the reply dated 17.07.2019 and 9.09.2019 and therefore, there was no need of reiterating the stand once again in response to notice dated 14.05.2020. The issuance of repeated show cause notices and calling for explanations cannot be a substitute to the oral inquiry which in the facts and circumstances of the instant case was necessary to comply with the principles of natural justice as well as the requirements of statute itself.

48. We find considerable force in the submission of learned counsel for the petitioner that the petitioner, who was head of a Municipality, has been removed in a casual manner, without holding proper inquiry, which could pass the test of fairness.

49. In consequence, the writ petition succeeds and is allowed in part. The impugned order is quashed leaving it open to the State respondents to proceed in the matter afresh in the light of the observations made in the foregoing paragraphs of this order.

50. No order as to costs.

(2022) 11 ILRA 152
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.09.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ C No. 26793 of 2022

Sujit & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Vibhu Rai, Sri Abhinav Gaur, Sr. Advocate

Counsel for the Respondents:
C.S.C., Sri Rajiv Gupta (A.C.S.C.)

A. Constitution of India – Article 243-Q – UP Municipalities Act, 1916 – Sections 3 & 4 – Inclusion of villages in the transitional area of Nagar Panchayat – Final notification issued – No objection or suggestion were invited from concern villagers – Invitation of objections, how

far necessary – Held, the object of Section 4 is to provide opportunity to the general public which would include the petitioners herein, to file objections against the proposal – This is an invaluable right conferred in the general public with avowed object of strengthening their hands in all facets of local self governance – High Court quashed the impugned final notification declaring it illegal and unconstitutional. (Para 12 and 14)

Writ petition allowed in part. (E-1)

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

1. The petitioners are elected Pradhans of Gram Panchayat Bhaiswali, Sansaarpur, Sidhwapaar, Kodhari, Bailey and Kalyanpur. They have called in question notifications dated 12.12.2020, 22.7.2022 and 10.8.2022 (all issued by respondent no. 2).

2. The notification dated 12.12.2020 was a draft of a proposal intended to be issued by the Governor in exercise of powers under clause (2) of Article 243Q of the Constitution of India, read with sub-section (2) of Section 3 of the U.P. Municipalities Act, 1916 and in partial modification of previous notification dated 16th March, 1875 and other notifications issued in this behalf for inclusion of ten villages in the transitional area of Nagar Panchayat, Badahalganj, Gorakhpur. The draft proposal was notified in order to ensure compliance of Section 4 of the U.P. Municipalities Act, 1916 which is as follows: -

*"**4. Preliminary procedure to issue notification. -** (1) Before the issue of a notification referred to in Section 3, the Governor shall publish in the Official Gazette and in a paper approved by it for purposes of publication of public notices, published in the district or, if there is no such paper in the district, in the division in which the local area covered by the notification is situate and cause to be affixed at the office of the District Magistrate and at one or more conspicuous places within or adjacent to the local area concerned a draft in Hindi or the proposed notification along with a notice stating that the draft will be taken into consideration on the expiry of the period as may be stated in the notice.*

(2) The Governor shall, before issuing the notification consider any objection or suggestion in writing which it receives from any person, in respect of the draft within the period stated."

3. Section 3 of the U.P. Municipalities Act, 1916, which is also relevant for deciding the controversy, reads as follows: -

*"**3. Declaration etc. of transitional area and smaller urban area. -** (1) Any area specified by the Governor in a notification under clause (2) of Article 243-Q of the Constitution with such limits as are specified therein to be a transitional area or a smaller urban area, as the case may be.*

(2) The Governor may, by a subsequent notification under clause (2) of Article 243-Q of the Constitution, include or exclude any area in or from a transitional area or a smaller urban area referred to in sub-section (1), as the case may be.

(3) The notifications referred to in sub-sections (1) and (2) shall be subject to the condition of the notification being issued after the previous publication required by Section 4 and notwithstanding anything in this section, no area which is,

or is part of, a cantonment shall be declared to be a transitional area or a smaller urban area or be included therein under this section.

4. Article 243Q of the Constitution which confers power to the Governor to include or exclude any area, as well as power to constitute a Nagar Panchayat, a Municipal Council, or a Municipal Corporation, reads thus: -

"243Q. Constitution of Municipalities. --

(1) There shall be constituted in every State,--

(a) a Nagar Panchayat by whatever name called for a transitional area, that is to say, an area in transition from a rural area to an urban area.

(b) a Municipal Council for a smaller urban area; and

(c) a Municipal Corporation for a larger urban area, in accordance with the provisions of this Part:

Provided that a Municipality under this clause may not be constituted in such urban area or part thereof as the Governor may, having regard to the size of tile area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as he may deem fit, by public notification, specify to be an industrial township.

(2) In this article, 'a transitional area', 'a smaller urban area' or 'a larger urban area' means such area as the Governor may, having regard to the population of the area, the density of the population therein, the revenue generated for local administration, the percentage of employment in non-agricultural activities, the economic importance or such other factors as he may deem fit, specify by public notification for the purposes of this Part."

5. The Notification dated 22.7.2022 has been issued in exercise of power under clause (2) of Article 243Q of the Constitution of India, read with sub-section (2) of Section 3 of the U.P. Municipalities Act, 1916. This, provision, as would be clear from a bare perusal, confers power in the Governor to issue a subsequent notification under clause (2) of Article 243Q of the Constitution of India, thereby including or excluding any area, in or from a transitional area, or a smaller urban area. The notification gives final shape to the draft notification, thereby concretizing the proposal for inclusion of ten villages in the transitional area of Nagar Panchayat, Badahalganj, District Gorakhpur.

6. The third notification, which has been called in question, is dated 10.8.2022 and it has been issued in exercise of power under sub-section (2) of Section 3 of the U.P. Municipalities Act, 1916, read with clause (2) of Section 243Q of the Constitution. It seeks to supersede the earlier notification dated 22.07.2022 on the ground that there was typographical error in the areas specified in the Schedule to the said notification. It now seeks to include seven more villages, which were not part of draft notification under Section 4, but have been notified for the first time. These villages are Garthauli, Sansaarpur, Baswanpur, Mishrauli, Sidhawapaar, Kuraon and Mahulia Khajuha.

7. The case of the petitioners is that under the Act, before including or excluding any area in a transitional area, or a smaller urban area, in exercise of power under Article 243Q, read with Section 3 of the Act, the proposal has to be notified in

terms of Section 4, inviting suggestions and objections and after considering which, final notification is to be issued. This pre-supposes that the area, as notified in the proposal, cannot be increased, while issuing the final notification, otherwise, it will defeat the provision of Section 4 of the Act.

8. Having regard to the said submission, we passed the following order on 21.9.2022: -

"One of the contention is that as many as 7 villages which have now been notified under Section 3 of the U.P. Municipalities Act, 1916 for being included in the transitional area of Nagar Panchayat Badahalganj, Gorakhpur were not part of the notification issued under Section 4 of the Act. Consequently, the final notification is bad in law.

Sri Manish Kumar, learned standing counsel appearing for the respondents seeks time to obtain instructions.

As prayed, put up tomorrow as fresh."

9. On matter being taken up today, Sri Rajiv Gupta, learned Additional Chief Standing Counsel, appearing for the State, on basis of instructions received by him, submitted that seven villages have been included in the final notification, on basis of objections and suggestions received in pursuance of the preliminary notification under Section 3 of the Act. He further submitted that there was typographical error in the notification dated 22.07.2022, which has now been corrected by issuing notification dated 10.08.2022.

10. Learned counsel for the petitioners submitted that the same is not permissible, as it will render Section 4 of the Act redundant.

11. We find considerable force in the submission of learned counsel for the petitioners. The Governor while being invested with power to include or exclude any area in a transitional area, or a smaller urban area, in exercise of power under clause (2) of Article 243Q of the Constitution, read with Section 3 of the U.P. Municipalities Act, 1916, has to follow the procedure prescribed under Section 4, which mandates that before issuance of notification under Section 3, a draft proposal has to be published in the manner provided under Section 4, so as to apprise the general public of the inclusions/exclusions and if any person has any objection, he may file objection/suggestion. Sub-section (2) of Section 4 enjoins upon the Governor to consider the objection or suggestion received in writing from any person in respect of the draft proposal within the period stated. Sub-section (3) of Section 3 explicitly and unequivocally prescribes that 'the notifications referred to in sub-section (1) and (2) shall be subject to the condition of the notification being issued after the previous publication required by Section 4....."

12. It is implicit in the statutory provision that while issuing a final notification, the area as originally proposed to be included in the transitional area, cannot be increased in such a manner, so as to change the entire complexion and character of the preliminary notification. The object of Section 4 is to provide opportunity to the general public which would include the petitioners herein, to file objections against the proposal. The Governor exercises power under Article

243Q having regard to the factors laid down under clause (2), i.e., population of the area, the density of the population therein, the revenue generated for local administration, the percentage of employment in non-agricultural activities, the economic importance or such other factor as he may deem fit. The objection could be on any of the above aspects, apart from inclusion/exclusion. This is an invaluable right conferred in the general public with avowed object of strengthening their hands in all facets of local self governance. In the absence of these villages being part of the proposal notified under Section 4, the right to file objection has been rendered illusory making Section 4 of the Act redundant. It amounts to notifying seven villages in the transitional area without there being any previous publication, as required by Section 4. What cannot be done directly cannot be done indirectly. It is nothing but colourable exercise of power.

13. Sri Rajiv Gupta, learned Additional Chief Standing Counsel, submitted that objections were invited from the general public in respect of the proposal for inclusion of seven additional villages. However, we find no such material on record. The constitutional scheme and the provisions of the Act lays down the manner in which objections/suggestions are to be invited and for such purpose, a notification under Section 4 of the Act is required to be issued. This notification is annexure 1 dated 12.12.2020 but it does not make any proposal for inclusion of the seven villages in question. As such, we find no force in the submission of Sri Rajiv Gupta.

14. In view of what has been stated above, we are of the considered opinion that the final notification dated 10.8.2022, in so far as it includes the villages Garthauli, Sansaarpur, Basawanpur, Mishrauli, Kuraon and Mahulia Khajuha, is illegal and unconstitutional and it is quashed to that extent.

15. Although, notifications dated 12.12.2022 and 22.07.2022 are also under challenge, but no argument has been advanced in respect thereto. Consequently, the challenge to these notifications fail.

16. As a result, the petition is allowed in part.

17. No order as to costs.

(2022) 11 ILRA 156
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.08.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal U/S 372 Cr.P.C. No. 30 of 2020

Raj Narayan Singh ...Appellant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Dinesh Kumar Yadav, Sri A.R. Nadiawal, Sri Krishna Prakash

Counsel for the Opposite Parties:
G.A., Sri A.K. Pandey, Sri Ajay Pandey, Sri L.K. Pandey, Sri Rajiv Lochan Shukla

Criminal Law - Criminal Procedure Code, 1973 - Sections 372, 377, 378, 394, 394(1), 394(2) & 417 - Criminal Appeal – against acquittal - concept of Substitution & Impleadment in Criminal proceedings - during pendency of the appeal, sole appellant had died - legal heir filed an impleadment application -

Appeal is the creation of statute - there are no such provisions in Criminal Law govern by the Criminal Procedure Code to substitute or implead like in Civil Law of provisions of Code of Civil Procedure - held, neither the 'substitution application' nor 'impleadment application' would be maintainable in case of death of the appellant in Appeal against acquittal filed under section 372 Cr.P.C. - the impleadment application stands rejected - and since, the appellant had died consequently, the appeal stands dismissed accordingly. (Para - 7, 8, 10)

Appeal dismissed. (E-11)

List of Cases cited:

1. Prithvi Singh Vs St. of UP & ors. (2022 vol. 8 ADJ 29 (DB),

2. Khedu Mohton & ors. Vs St. of Bihar (1971 AIR 66 SC),

3. Jai Prasad Singh Vs St. of UP & ors. (Criminal Misc. Application (U/section 372 Cr.P.C. (Leave to Appeal) No. 15 of 2017 decided on 19.07.2022).

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Shiv Shanker Prasad, J.)

1. Heard Sri Dinesh Kumar Yadav, learned counsel for the appellant, Sri Ajay Kumar Pandey, learned counsel for accused respondents and learned A.G.A. for the State.

2. As per the death certificate annexed as Annexure No.1 to the affidavit filed in support of the impleadment application the appellant-Raj Narayan Singh son of Late Hardutt died on 20.12.2018. By this application, the son of the deceased appellant namely Yashwant Singh is seeking impleadment as appellant in place of Raj Narayan Singh to prosecute the present criminal appeal. The affidavit filed in support of the present impleadment application was sworned by him on 18.11.2019 and the present application was filed on 17.01.2020. In effect this is an application for substitution of Yashwant Singh son of Late Raj Narayan Singh, who was appellant in the present appeal. Obviously, this application was not filed immediately after death of the appellant.

3. At this stage, it would be relevant to take note of Sections 372 and 394 Cr.P.C. which are quoted as under:-

"Section 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 any other law for the time being in force.

Section 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. A coordinate Bench (of which one of us was a member) of this Court has considered the 'proviso' to Section 372 Cr.P.C. as well as provisions of Section 394 Cr.P.C. in detail in the judgement of ***Prithvi Singh Vs. State of U.P. and Ors. 2022 (8) ADJ 29 (DB),*** wherein it was held

that the appeal filed under 'proviso' to Section 372 Cr.P.C. would stand abated in case of death of appellant

5. In ***Prithvi Singh (Supra)*** in para 5 this Court has taken into account the relevant provisions of Code of Criminal Procedure, 1898, its relevant amendment by Act No. 26 of 1955, Code of Criminal Procedure, 1973 with its statements of objects and reasons, relevant provisions including Amendment Act 5 of 2009 whereby 'Proviso' to Section 372 Cr.P.C. was added.

6. The law on the Section 417 Cr.P.C., 1898, judgment of Hon'ble Supreme Court in ***Khedu Mohton and Ors. Vs. State of Bihar; 1971 AIR 66 SC,*** subsequent judgements of various High Courts on Section 372 (with proviso) i.e. after 2009 Amendment have been considered in ***Prithvi Singh (Supra).*** Para 29, 30, 31, 32, 34, 37, 38, 39, 40, 41, 42, 43, 46 and 48 of the aforesaid judgment are quoted as under:-

"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.

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.

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 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.

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."

(Emphasis supplied)

7. There is yet another aspect of the matter. The concept of substitution and impleadment is foreign to the criminal law. Appeal is the creation of statute. General provisions of appeal in criminal law are governed by the Code of Criminal Procedure. In Civil Law provisions of Code of Civil Procedure are applicable which also provides for substitution as well as for impleadment. However, there are no such provisions in the Criminal Procedure Code. Regarding the issue involved herein the only exception that may be noted in Section 394 (2) proviso and Explanation to the Section, which, as already considered in ***Prithvi Singh (Supra),*** does not cover appeal against acquittal.

8. Therefore, we find that the appellant cannot be substituted by his son even by filing an application filed as 'impleadment' application as done in the present appeal, or say that even if, the application has been filed as 'impleadment' application and not as 'substitution' application. In other words, neither substitution application, nor impleadment application would be maintainable in case of death of the appellant in appeal against acquittal filed under Section 372 Cr.P.C.

9. In ***Prithvi Singh (Supra)*** it was also considered that as provided by Section 394 Cr.P.C. even in a case of appeal against conviction only a limited right has been given for the purpose of filing substitution which too could have been filed only within 30 days and not beyond that. Whereas this is an appeal against acquittal wherein the aforesaid provision is not at all attracted.

10. While considering the judgement of **Prithvi Singh (supra),** we have rejected one substitution application filed under similar circumstance in ***Criminal Misc. Application U/S 372 Cr.P.C. (Leave to Appeal) No. 15 of 2017 (Jai Prasad Singh Vs. State of U.P. and Ors.)*** as not maintainable. Consequently, the delay condonation application filed in support of the substitution application was also rejected and the appeal was dismissed as abated.

11. Accordingly, the impleadment application filed by son of the deceased appellant stands rejected as not maintainable.

In Appeal

1. Since the appellant in the present case had died consequently, for the discussions made herein above, the appeal stands dismissed as abated.

(2022) 11 ILRA 162
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 09.11.2022

BEFORE

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

Criminal Appeal U/S 372 Cr.P.C. No. 79 of 2022

Haji Mahboob Ahmad & Anr. ...Appellants
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Khaleeq Ahmad Khan, Mohemmed Amir Naqvi, Najam Zafar, Rafat Farooqui

Counsel for the Respondents:
G.A., Shiv P. Shukla

Criminal Law - Criminal Procedure Code, 1973- Section - 2(w)(a), 24 (8), 173, 313, 372, - Indian Penal Code, 1860 - Sections 93, 114, 147, 149, 120-B, 114, 147, 153-A, 153-B, 201, 238, 295, 295-A, 297, 332, 336, 337, 338, 392, 394, 395, 427 & 505 (I) (b) - Criminal Appeal – against acquittal - two FIR - with allegations that, the disputed structure, popularly known as 'Ram Janam Bhoomi/Badri Masjid' at Ayodhya was demolished by a group of persons - definition of victim - appellants application u/section 2 (wa) and 24 (8) was rejected by trial court - which was never challenged before superior court - trial court acquitted all the accused persons - court held that, - since, the order of trial court while rejecting the applications of appellants attained finality - as such in the light of judgement of full bench court i.e. 'Manoj Kumar Singh Vs St. of UP" appellants herein cannot be treated as 'Victims' - thus, they have no locus to challenged the impugned judgment - accordingly, appeal is dismissed. **(Para - 22, 26, 27)**

Appeal dismissed. (E-11)

List of Cases cited:

1. Ashok Singhal and Acharya Giriraj Kishore Vs St. of U.P., Criminal Revision No. 492 of 2003

2. Dr. Murli Manohar Joshi Vs St. of U.P., Criminal Revision No. 482 of 2003, (2017) 7 SCC 444

3. St. Vs Pawan Kumar Pandey & ors., Lucknow in Sessions Trial No. 344 of 1994

4. St. Vs Lal Krishna Advani & ors., Case Crime No. 197 of 1992 and Sessions Trial No. 423 of 2017

5. St. Vs Lutawan & ors., Sessions Trial No. 681 of 1994

6. Manoj Kumar Singh v. St. of U.P. & ors. : 2016 (97) ACC 861

7. Miss Uma Bharti Vs St. of U.P., Criminal Revision No. 493 of 2003

8. Haji Mahboob Ahmad and Mohammad Siddiq @ Hatiz Mohammad Siddiq Vs St. of U.P. & ors., Criminal Revision No. 619 of 2003

9. St. Vs Lal Krishna Advani & ors., Criminal Case No. 768 of 2003

10. Sukhdev Singh Vs St. of Punj., 1982 (2) SCC 439

11. Balraj Vs St. of U.P., 1994 (4) SCC 29

12. Giani Ram Vs St. of Har. & ors., AIR 1995 SC 2452

13. Baldev Singh & anr. Vs St. of Pun., AIR 1996 SC 372

14. Shri Bodhisattwa Gautam Vs Miss. Subhra Chakraborty, AIR 1996 SC 922

15. Rudul Sah Vs St. of Bihar & anr., AIR 1983 SC 1086

16. St. (through Central Bureau of Investigation) Vs Kalyan Singh (Former Chief Minister of Uttar Pradesh) & ors.

17. Vinay Katiyar Vs St. of U.P., Criminal Revision No. 494 of 2003

18. Vishnu Hari Dalmia and Sadhvi Ritambhara Vs St. of U.P., Criminal Revision No. 495 of 2003

19. SAHELI, a Women's Resources Centre through Ms. Nalini Bhanot & ors. Vs Commissioner of Police, Delhi & ors., AIR 1990 SC 513

20. Ashok K. Johri VsSt. of U.P., AIR 1997 SC 610

21. Zahira Habibulla H. Sheikh & anr. Vs St. of Guj. & ors., (2004) 4 SCC 158.

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

(A) INTRODUCTION

1. Appellants, **Haji Mohboob Ahmad** and **Syed Akhlaq Ahmad**, claiming themselves to be victim, have filed the instant criminal appeal under Section 372 of the Code of Criminal Procedure, 1973 (hereinafter referred to as **''Cr.P.C**.'), challenging the judgment and order dated 30.09.2020 passed by the Special Judge (Ayodhya Matter), Lucknow in Sessions Trial No. 344 of 1994 : *State Vs. Pawan Kumar Pandey and others* arising out of Case Crime No. 197 of 1992 and Sessions Trial No. 423 of 2017 : *State Vs. Lal Krishna Advani and others,* (R.C. 8 (s)/92-S.I.U-V/S.I.C.-II, R.C. No. 1 (S)/93-S.I.C.-IV and R.C. No.2 (S)/93 along with 48 (S)/93, under Sections 147, 149, 120-B, 114 read with Section 153A, 153B, 505, 295, 295A, 395, 332/338, 201 and 505 (1) (b) of the Indian Penal Code (in short, "IPC'), whereby accused persons were acquitted.

(B) FACTUAL MATRIX

2. On 6th December, 1992, the disputed structure, popularly known as "*Ram Janam Bhoomi/Babri Masjid"* at Ayodhya was demolished by a group of persons. Consequent upon demolition of the aforesaid structure, two cases were registered on the same day i.e. (i) Crime No. 197/1992 under Sections 395, 397, 332, 337, 238, 295, 297, 153A IPC was registered by the police of Police Station Ram Janam Bhoomi, District Faizabad, against unnamed Kar Sevaks; and (ii) Crime No. 198 of 1992 was also registered by the police of Police Station Ram Janam Bhoomi District Faizabad wherein eight persons were implicated as accused under Sections 153A, 153B, 505, 147, 149 IPC. In the aforesaid cases, there were allegations of widespread commission of robbery, rioting and mischief and other minor offences by different groups of persons against the media and 47 crimes were also registered for offences punishable under Sections 392, 394, 395, 147, 427, 336, etc. The investigation of the crime registered as Case Crime No. 197 of 92 was entrusted to the Central Bureau of Investigation (C.B.I.) on 13.12.1992, upon which the CBI re-registered the case as R.C. No. 8(S)/92-SIU.V-New Delhi. However, the investigation of Case Crime No. 198 of 92 was taken over by CBCID of the State of Uttar Pradesh on 10.12.1992. On 16.12.1992, the State of Uttar Pradesh, in consultation with this Court, established a Special Court of Judicial Magistrate First Class with its place of sitting at Lalitpur, to try the case relating to Crime No. 198/1992. The CB CID of the State filed the final report under Section 173 of the Cr.P.C. After that, Crime No. 198 of 1992 had been registered against all eight accused persons named in the First Information Report, for the offences under Sections 153A, 153B, 505, 147 and 149 IPC. Thereafter, the Special Judicial Magistrate at Lalitpur took cognizance of the case on 1.3.1993.

By Notification dated 8.7.1993, the State Government, after consultation with the High Court, shifted the place of sitting of the Court of Special Judicial Magistrate from Lalitpur to Rae Barelli. By

Notification dated 26.8.1993, the Government of India, with the consent of the Government of Uttar Pradesh entrusted the investigation of Crime No. 198/92 and cases arising from same facts/transaction to the CBI. The CBI re- registered the Crime No. 198/92 as R.C. 1(s)/93 and the other 47 related cases as R.C. Nos. 2(s)/93 to 48(s)/93.

On 8.9.1993, the Government of Uttar Pradesh, in consultation with this Court, issued a Notification establishing a Special Court of Additional Chief Judicial Magistrate at Lucknow, for trial of cases arising out of demolition of the disputed structure at Ayodhya, investigated by CBI.

In the meanwhile, on 07.12.1992, appellant no.1-Haji Mahboob Ahmad had lodged separate F.I.R., bearing Case Crime No. 201 of 1992, at police station Ram Janam Bhoomi, district Faizabad alleging therein that his house and other minority communities were looted and burnt by the lakhs of Kar Sewak gathered in Ayodhya on 06.12.1992. Appellant no.2-Syed Akhlaq Ahmad had also lodged separate F.I.R., bearing Case Crime No. 216 of 1992, in police station Ram Janam Bhoomi, district Faizabad, alleging that his house and other minority communities were looted and burnt by the lakhs of Kar Sewak gathered in Ayodhya on 06.12.1992. The investigation of the aforesaid cases filed by the appellants were conducted and after due investigation, the Investigating Officer had filed charge-sheet against the accused persons in Case Crime No. 201 of 1992, whereas in Case Crime No. 216A of 1992 filed by the appellant no.2, final report was submitted on 28.04.1993. Thereafter, Case Crime No. 201 of 1992 was committed to the Court of Sessions, Faizabad vide Sessions Trial No. 681 of 1994, wherein charges were framed against the accused persons under Sections 395, 397, 436 I.P.C. and the trial of the same was commenced and ultimately, the trial Court, after hearing the parties and going through the evidence on record, acquitted the accused persons by means of the judgment and order dated 02.02.1998, which attained finality as the same has not been challenged by the appellant no.1 till date.

However, charge-sheet was filed by the C.B.I. in Case Crime No. 197 of 1992 and 198 of 1992. After that both these cases were committed to the Court of Sessions vide Sessions Trial Nos. 344 of 1994, 344 (B) of 1994, 423 of 2017, 496 of 2019 and 818 of 2020, wherein apart from other witnesses, appellants were also examined as P.W.10 and P.W.53, respectively.

During pendency of the aforesaid Sessions Trial Nos. 344 of 1994, 344 (B) of 1994, 423 of 2017, 496 of 2019 and 818 of 2020, appellants had filed application under Section 2 (wa) and Section 24 (8) of the Cr.P.C. on 21.08.2020, which was rejected by the trial Court vide order dated 25.08.2020 and the same attained finality as the same has not been challenged by the appellants further before any superior Court. After that the trial Court, after hearing the parties and going through the evidence on record, has passed the impugned judgment and order dated 30.09.2020, acquitting the accused persons from the charges levelled against them.

Feeling aggrieved by the acquittal of the accused persons by the impugned judgment and order dated 30.09.2020, the appellants have approached this Court by filing criminal revision no. 26 of 2021, which, on the request of appellants' Counsel, directed the office to treat it as an appeal filed under Section 372 Cr.P.C. and allot regular number vide order dated 18.07.2022 passed by the learned Single Judge.

In pursuance of the aforesaid order dated 18.07.2022, the office has treated the aforesaid criminal revision as an appeal filed under Section 372 of the Cr.P.C. and allotted number as Criminal Appeal U/s 372 Cr.P.C. No. 79 of 2022.

3. Heard Shri Syed Farman Naqvi, learned Senior Advocate assisted by Shri Najam Zafar, Mohammad Amit Naqvi, Shri Munwar Hussain, appearing on behalf of the appellants, Shri Arunendra, learned Additional Government Advocate appearing on behalf of respondent no.1/State, Shri Shiv P. Shukla, learned Counsel appearing on behalf of respondent no.2/C.B.I. and Shri Raghvendra Singh, learned Senior Advocate assisted by Shri Abhishek Singh, appearing on behalf of the respondent no.28, on the question of locus of the appellants to maintain the instant appeal.

(C) PRELIMINARY OBJECTION ON BEHALF OF THE RESPONDENTS

4. At the outset, Shri Shiv P. Shukla, learned Counsel for the respondent no.2/C.B.I. has raised a preliminary objection regarding the locus of the appellants to maintain the instant appeal and argued that on 06.12.1992, two F.I.Rs. were registered i.e. (i) F.I.R. No. 197 of 1992 against lakhs of unknown Kar Sewaks ; and (ii) F.I.R. No. 198 of 1992 against eight accused persons, relating to demolition of disputed structure at Ayodhya in police station Ramjanam Bhoomi, District Faizabad. Subsequently, 47 other cases relating to assault on media persons were also registered in police station Ramjanam Bhoomi, District Faizabad. He argued that the investigation of Case Crime No. 197 of 1992, Case Crime No. 198 of 1992 and 47 other cases were entrusted to the C.B.I. by the State of U.P. After completion of investigation, composite charge-sheet was filed against 49 accused persons for their complicity in the commission of various offences. The trial Court, after hearing the parties and going through the evidence on record, had passed the impugned judgment and order dated 30.09.2020, acquitting all the accused persons facing trial. He argued that appellants are only the prosecution witnesses in the Sessions Trial arising out of Case Crime No. 197 of 1992 and Case Crime No. 198 of 1992 and their depositions were recorded in the trial Court in the aforesaid Sessions Trial. His submission is that the appellants are neither complainants nor victims, therefore, they have no *locus standi* to challenge the impugned judgment and order dated 30.09.2020, hence the instant appeal is liable to be dismissed on this ground alone.

5. Learned Additional Government Advocate for the State/ respondent no.1 has adopted the aforesaid arguments of the learned Counsel for the C.B.I and in addition, he argued that separate F.I.R., bearing Case Crime No. 201 of 1992, under Sections 395, 397 and 436 I.P.C. was lodged by the appellant no.1 in police station Ramjanam Bhoomi, district Faizabad, whereas appellant no.2 had lodged separate F.I.R., bearing Case Crime No. 216A of 1992, under Sections 395, 436, 295, 297 and 153A I.P.C. at Police Station Ramjanam Bhoomi, district Lucknow. The investigation of the aforesaid cases were conducted and after due investigation, as no incriminating material was found against the accused persons in Case Crime No. 216A of 1992 lodged by the appellant no.2, hence the Investigating Officer had filed final report on 28.04.1993, whereas in Case Crime No.

201 of 1992 lodged by the appellant no.1, charge-sheet was filed against the accused persons and it was committed to the Court of Sessions vide Sessions Trial No. 681 of 1994. The trial Court, after hearing the parties and going through the evidence on record, acquitted the accused persons vide judgment and order dated 02.02.1998. He argued that both i.e. final report dated 24.04.1993 filed in the case lodged by the appellant no.2 and the judgment and order dated 02.02.1998 filed in the case lodged by the appellant no.1 had attained finality as the same were not challenged by the appellants before any superior Court. Hence the appellants have no locus to maintain the instant appeal.

6. Shri Raghvendra Singh, learned Senior Advocate appearing on behalf of respondent no.28 has also raised a preliminary objection regarding the locus of the appellants to maintain the instant appeal and has argued that in view of Section 372 of the Cr.P.C., no appeal shall lie from a judgment or order passed by a criminal Court except as provided by the Cr.P.C. or by any other law which authorises an appeal. Proviso to Section 372 of the Cr.P.C. gives a limited right to the victim to file an appeal in the High Court against any order of a criminal Court acquitting the accused or convicting them for a lesser offence or the imposition of inadequate compensation. He argued that the appellants are only the prosecution witnesses and they have no concern with the subject matter of the trial of the instant case as neither they are complainants of the case nor the injured persons nor charges as alleged by the appellants were framed in the instant case, therefore, appellants have no locus to challenge the acquittal of the accused persons from the charges levelled against them by preferring the instant appeal under Section 372 of the Cr.P.C.

7. Shri Raghvendra Singh has further placed before us the judgment of the Apex Court in **State (through Central Bureau of Investigation) Vs. Kalyan Singh (Former Chief Minister of Uttar Pradesh) and others** : (2017) 7 SCC 444 and argued that in **State (through Central Bureau of Investigation) Vs. Kalyan Singh (Former Chief Minister of Uttar Pradesh) and others (Supra),** notifications issued by the State Government for transfer of cases to the Special Court, Lucknow by clubbing all 49 FIRs including F.I.R. No. 198 of 1992 were challenged by the appellants also by filing Special Leave to Appeal (Criminal) No. 2705 of 2015, wherein the appellants' Counsel was permitted to argue the matter treating them as an intervenor only on questions of law. His submission is that during the course of challenge of notifications in the aforesaid case, the Apex Court had only heard the appellants as intervenors and the appellants were not treated as "victim' of the case, therefore, the appellants' claim that they are the "victims' of the instant case, has no substance.

8. It has further been stated by Sri Raghvendra Singh that on 07.12.1992, appellant no.1-Haji Maboob Ahmad had filed a written report, alleging therein that lakhs of Kar Sewak gathered at Ayodhya, while entering into the houses of minority communities, burnt and looted their houses including the house of appellants. On the basis of the aforesaid written report, Case Crime No. 201 of 1992 was registered. Thereafter, after due investigation, charge-

sheet dated 15.05.1993 was filed before the Court concerned. After that the case was committed to the Court of Sessions vide Sessions Trial No. 681 of 1994 : State Vs. Lutawan and others, where charges under Section 395, 397, 436 I.P.C. were framed against the accused persons. The Additional District & Sessions Judge, Faizabad, after hearing the parties and going through the evidence on record including the statement of P.W.1-Hazi Mahboob (complainant/appellant no.1 herein) as well as the statement of the accused persons recorded under Section 313 Cr.P.C., acquitted the accused persons vide judgment and order dated 02.02.1998. This judgment and order dated 02.02.1998 was not challenged by the appellant no.1 before the superior Courts and kept mum/silent for about 22 years, however, all of a sudden, appellants woke up from deep slumber on 21.08.2020 and filed an application under Section 2 (wa) and Section 24 (8) of the Code of Criminal Procedure, 1973 before the Special Judge (Ayodhya Matter), Lucknow in Sessions Trial Nos. 344/1994 and 423 of 2017, which was rejected by a common order dated 25.08.2020, however, again the same was not challenged by the appellants before the superior Court. Thereafter, impugned order dated 30.09.2020 was passed. He argued that after about four months, the appellants have filed the instant appeal, challenging the judgment and order dated 30.09.2020. His submission is that order dated 02.02.1998 passed in Sessions Trial No. 681 of 1994 in connection with the separate F.I.R. i.e. F.I.R. No. 201 of 1992 lodged by the appellant no.1 himself and the order dated 25.08.2020 passed in Sessions Trial no. 344 of 1994 and 423 of 2017 in connection with the application preferred by the appellants under Section 2 (wa) and Section 24 (8) of the Cr.P.C. have attained finality, therefore, the same can be regarded as *res judicata* in view of the dictum of the Apex Court in **State (through Central Bureau of Investigation) Vs. Kalyan Singh (Former Chief Minister of Uttar Pradesh) and others (Supra).** Hence, on this count also, appellants have no locus to maintain the instant appeal.

(D) RESPONSE TO THE PRELIMINARY OBJECTION ON BEHALF OF THE APPELLANTS.

9. Per contra, Shri Syed Farman Naqvi, learned Senior Advocate appearing on behalf of the appellants argued that Case Crime No. 201 of 1992 was lodged by the appellant no.1-Haji Mahboob Ahmed in district Faizabad, whereas appellant no.2-Syed Akhlaq Ahmad had filed Case Crime No. 216 of 1992 in relation to the burning of his house and looting his house-holds. In Case Crime Nos. 201 of 1992 lodged by the appellant no.1, investigation was concluded and charge-sheet was filed against the accused persons, however, the trial Court acquitted the accused persons by means of order dated 02.02.1998, whereas in Case Crime No. 216A of 1992 lodged by the appellant no.2 after investigation, a final report was submitted in the competent Court on 28.04.1993. He argued that in the instant case, the prosecution had examined appellant no.1-Haji Mahboob Ahmad as P.W.10 and appellant no.2-Syed Akhlaq Ahmad as P.W.53 and both of them along with other witnesses have categorically stated before the trial Court in the statements about all the facts, occurrence and their personal losses, but the trial Court erred in not considering the statements made by them and erroneously acquitted the accused persons by means of the impugned judgment and order dated

30.09.2020. He argued that neither the State Agency nor the C.B.I. has investigated the F.I.R. lodged by the appellants in a right perspective nor the State Agency or the C.B.I. has gone through the statements of the appellants recorded in the instant case as P.W.10 and P.W.53 before the trial Court nor the prosecution had placed the matter before the trial Court in right perspective, on account of which, the accused were acquitted by the trial Court. He argued that as per Section 2 (wa) of Cr.P.C. and Section 25 (8) of Cr.P.C., the appellants are the victims and as such, they have locus to challenge the impugned judgment and order passed by the trial Court.

10. Shri Naqvi has drawn our attention to the order dated 25.08.2020 passed in Sessions Trial Nos. 344 of 1994, 423 of 20017, 796 of 2019 and 818 of 2020 and argued that before passing the impugned judgment, the appellants had filed an application before the trial Court to permit them to advance oral arguments at the time of arguments as the appellants are the victims but the trial Court rejected the same vide order dated 25.08.2020. Thereafter, the appellants have collected the documents for challenging the order dated 25.08.2020 but in the meanwhile, the impugned order dated 30.09.2020 has been passed and as such, appellants did not challenge the order dated 25.08.2020, rejecting the applications filed by them under Section 2 (wa) and 25 (8) of the Cr.P.C.

11. Shri Naqvi has invited our attention to the judgment and order dated 06.07.2005 (Annexure No. RA-5) passed by the learned Single Judge of this Court in Criminal Revision No. 482 of 2003 : *Dr. Murli Manohar Joshi Vs. State of U.P.* and connected Criminal Revision No. 492 of 2003 : *Ashok Singhal and Acharya Giriraj Kishore Vs. State of U.P.,* Criminal Revision No. 493 of 2003 : *Miss Uma Bharti Vs. State of U.P.,* Criminal Revision No. 494 of 2003 : *Vinay Katiyar Vs. State of U.P.,* Criminal Revision No. 495 of 2003 : *Vishnu Hari Dalmia and Sadhvi Ritambhara Vs. State of U.P.* and Criminal Revision No. 619 of 2003 : *Haji Mahboob Ahmad and Mohammad Siddiq alias Hatiz Mohammad Siddiq Vs. State of U.P. and others* and argued that in the aforesaid criminal revisions, the order dated 19.09.2003 passed by the Special Judicial Magistrate, Raebareli in Criminal Case No. 768 of 2003 : State Vs. Lal Krishna Advani and others, whereby direction was issued to frame charge against Dr. Murli Manohar Joshi, Ashok Singhal, Vishnu Hari Dalmia, Acharya Giriraj Kishore, Miss Uma Bharti and Sadhvi Ritambhara under Sections 147, 149, 153-A, 153-B and 505 I.P.C. and discharged Shri Lal Krishna Advani of these charges, were challenged. He argued that by means of the judgment and order dated 06.07.2005, the learned Single Judge of this Court had also considered the arguments of the accused persons/ revisionists with regard to the maintainability of Criminal Revision No. 619 of 2013 filed by the private persons i.e. appellant no.1 herein and one Mohammad Siddiq alias Hafiz Mohammad Siddiq. The learned Single Judge, after great discussion on the point of the maintainability of the criminal revision filed by the appellant no.1 and one another, had opined that the criminal revision filed by the appellant no.1 is maintainable and accordingly the same was admitted. In these backdrops, his submission is that once earlier the revision filed by the appellant no.1 was declared as maintainable and his revision was admitted, therefore, the appellants in the present case

also have locus to challenge the impugned judgment and order passed by the trial Court.

12. In support of his submission, learned Senior Counsel has relied upon the judgments of the Apex Court in **Sukhdev Singh Vs. State of Punjab** : 1982 (2) SCC 439; **Balraj Vs. State of U.P.** : 1994 (4) SCC 29; **Giani Ram Vs. State of Haryana and others** : AIR 1995 SC 2452; **Baldev Singh and another Vs. State of Punjab** : AIR 1996 SC 372; **Shri Bodhisattwa Gautam Vs. Miss. Subhra Chakraborty** : AIR 1996 SC 922; **Rudul Sah Vs. State of Bihar and another** : AIR 1983 SC 1086; **SAHELI, a Women's Resources Centre through Ms. Nalini Bhanot and others Vs. Commissioner of Police, Delhi and others** : AIR 1990 SC 513; **Ashok K. Johri Vs. State of U.P.** : AIR 1997 SC 610; and **Zahira Habibulla H. Sheikh and another Vs. State of Gujarat and others** : (2004) 4 SCC 158.

13. At this stage, so far as the plea of the appellants that since in earlier revision filed by the appellants, the revision filed by the appellant no.1 and one another was declared as maintainable and the same was admitted by the learned Single Judge of this Court by means of the order dated 06.07.2005, is concerned, Shri Raghvendra Singh, learned Senior Advocate, appearing on behalf of the respondent no.28 argued that while passing the order dated 06.07.2005, the learned Single Judge had not observed that the revisionists (appellant no.1 herein and another revisionist) are the "victims' of the case, therefore, the appellants' plea in this regard has no substance and is liable to be rejected.

(E) ANALYSIS

14. We have examined the rival contentions of the learned Counsel for the parties and gone through the impugned judgment as well as material brought on record on the preliminary question raised before this Court regarding the locus of the appellants to maintain the instant appeal under Section 372 Cr.P.C.

15. Before we proceed further, it would be apt to note that word 'victim' is defined in Section 2(wa) of the Cr.P.C., which was introduced vide the Cr.P.C. (Amendment) Act, 2008 w.e.f. 31.12.2009 and the same reads as under :-

"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;

16. The meaning and purport of the aforesaid word "victim' has been considered by a Full Bench of this Court in the case of Manoj Kumar Singh v. State of U.P. & ors. : 2016 (97) ACC 861, wherein it has been held that

"70. From the discussions that have been made above, it is clear that the proviso of section 372 is an exception to the general law and same confers on a victim a right to appeal against acquittal, which is subject to the grant of leave by the Court. The first part of the definition of "victim' as given under section 2(wa) (i.e. "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), is required to be construed in its literal sense and no liberal interpretation is required. **Accordingly, only such person would be treated as "victim', who is the subject-matter of trial being direct sufferer of crime in**

terms of loss or injury caused to his own body, mind, reputation and property and such loss or injury is one of the ingredient of the offence for which the accused person has been charged and, therefore, any other person cannot be accepted as victim within the first part of section 2 (wa) for the purposes of maintaining appeal. The second part that is "includes his or her guardian and Legal Heir" would come into play when the actual sufferer is absent or suffers disability.

71. In other words, victim means the actual sufferer of offence (receiver of harm caused by the alleged offence) and no person other than actual receiver of harm can be treated as victim of offence, so as to provide him/her right to prefer appeal under the proviso of section 372, though, in his or her absence or disability, his "legal heir" or "guardian" would qualify as victim and have a right to appeal. A person who claims himself to be "guardian' or "legal heir' of actual victim (direct sufferer), would be able to maintain appeal provided he establishes his claim as such before the Court in his application by disclosing his particulars; relationship with the direct sufferer; and the grounds on which such claim of being "legal heir" or "guardian" is based. In the light of the discussion made above, the ratio of Division Bench of this Court in the case of Edal Singh (supra) is in tune with the definition of "victim' as provided under section 2(wa) of the Code of Criminal Procedure. The reference is answered accordingly.

72. Let the order as well as the record be placed before appropriate Bench dealing with the "Leave to Appeal" application." (emphasis supplied)

17. It is true that the right to appeal against the acquittal of the accused is not a mere matter of procedure but is a substantive right of the "victim'.

18. However, in the instant case, the question is whether the appellants are the victims of the case or not and they have locus to file the instant appeal under Section 372 Cr.P.C. or not.

19. The contention of the appellants is that the prosecution had examined them as P.W.10 and P.W.53, respectively, in the instant case and they had narrated all the facts, occurrence and their personal losses in their depositions before the trial Court, but even then the trial Court had erroneously acquitted the accused persons without considering the depositions of the appellants by means of the impugned judgment, therefore, the appellants being victims have every right/locus to challenge the impugned judgment and order by filing the instant appeal under Section 372 Cr.P.C.

20. To counteract the aforesaid contention of the appellants, it has been pleaded by the respondents that the appellants are only the prosecution witnesses of the case and while passing the impugned judgment and order, the trial Court had tested their depositions to the other evidences available on record and if the trial Court found the appellants' depositions were not trustworthy or reliable while considering the other evidences on record, it cannot be presumed that the appellants are the victims. They contended that allegations so levelled by the appellants were not the subject matter of the trial but the allegations of the appellants that their houses were burnt and their house-holds were looted by the unknown Kar Sewaks assembled in Ayodhya on 06.12.1992 were tested by the trial Court in a separate sessions trial i.e. Sessions Trial No. 681 of 1994 arising out of Case Crime No. 201 of 1992 filed by the appellant no.1,

wherein the trial Court, vide judgment and order dated 02.02.1998, acquitted the accused persons, however, the said judgment and order dated 02.02.1998 has not been challenged by the appellants till date. Moreso, application filed by the appellants under Section 2(wa) and 24 (8) Cr.P.C., during the pendency of Sessions Trial No. 344 of 1994 and 423 of 1994 arising out of Case Crime No. 197 of 1992 and 198 of 1992, respectively, before the trial Court, was also rejected by the trial Court vide order dated 25.08.2020, which has also attained finality as the same has not been challenged before any superior Court till date. Thus, the orders dated 02.02.1998 and 25.08.2020 can be regarded as *res judicata* and the instant appeal is liable to be dismissed on the ground of lack of locus of the appellants to file the instant appeal.

21. Undisputed facts are that impugned judgment and order has been passed by the trial Court on the charges framed in Sessions Trial Nos. 344 of 1994, 344-B of 1994, 423 of 2017, 796 of 2019 and 818 of 2020. Appellants' allegations of burning their houses and looting house-hold articles by unknown Kar Sewaks assembled in the year 1992 were not tested/ examined by the trial Court in the impugned judgment and order but the appellants for the aforesaid allegations had filed separate F.I.Rs., bearing Case Crime No. 201 of 1992, under Sections 395, 397, 436 I.P.C. and Case Crime No. 216A of 1992, under Sections 395, 436, 295, 297 and 153A IPC in police station Ram Janam Bhoomi, district Faizabad, respectively. In Case Crime No. 216A of 1992, the Investigating Officer, after due investigation, had filed final report on 28.04.1993, whereas allegations made in Case Crime No. 201 of 1992 was tried by the trial Court in Sessions Trial No. 681 of 1994 and vide judgment and order dated 02.02.1998, the trial Court acquitted the accused persons. Both i.e. final report dated 28.04.1993 submitted against the accused persons and the order of acquittal dated 02.02.1998, have not been challenged by the appellants in any superior Courts and the same attained finality. However, the prosecution had examined the appellants in Sessions Trial Nos. 344 of 1994, 344-B of 1994, 423 of 2017, 796 of 2019 and 818 of 2020 as P.W.10 and P.W.53. During pendency of these sessions trials and after recording their depositions therein, appellants had filed application under Section 2(wa) and Section 24 (8) of the Cr.P.C. on 21.08.2020 before the Special Judge (Ayodhya Matter), Lucknow, who, vide judgment and order dated 25.08.2020, rejected the aforesaid application. The appellants did not challenge the order dated 25.08.2020 (supra). Thereafter, the trial Court has passed the judgment and order dated 30.09.2020, which is impugned in the instant appeal, acquitting the accused persons from all the charges levelled against them. Now, the appellants have filed the instant appeal.

22. From the aforesaid undisputed facts and circumstances of the case, it is quite apparent that accused persons were tried by the trial Court in Sessions Trial Nos. 344 of 1994, 344-B of 1994, 423 of 2017, 796 of 2019 and 818 of 2020 for the F.I.R. lodged by the police of Police Station Ramjanam Bhoomi in Case Crime No. 197 of 1992 and 198 of 1992 and the allegations so made by the appellants were not the part of the charges upon which the accused persons were tried by the trial Court and the impugned judgment and order dated 30.09.2020 was passed, rather the allegations so made by the appellant

no.1 herein were tried in a separate Sessions Trial No. 681 of 1994 arising out of the F.I.R. lodged by him i.e. Case Crime No. 201 of 1992, under Sections 395, 397, 436 I.P.C., in which accused persons were acquitted by means of the judgment and order dated 02.02.1998, whereas in the F.I.R. i.e. Case Crime No. 216 A of 1992 lodged by the appellant no.2, final report was submitted on 28.04.1993. Therefore, in view of the judgment of the Full Bench of this Court in **Manoj Kumar Singh Vs. State of U.P. (supra),** the appellants herein cannot be treated as "victims' of the instant case. Thus, this Court is of the considered view that the appellants have no locus to challenge the impugned judgment and order dated 30.09.2020 passed by the trial Court.

23. At this juncture, it would also be apt to note that as stated hereinabove, judgment and order dated 02.02.1998 passed in Sessions Trial No. 681 of 1994 arising out of Case Crime No. 201 of 1992 lodged by the appellant no.1 and final report dated 28.04.1993 filed in Case Crime No. 216A of 1992 lodged by appellant no.2, have attained finality, therefore, this Court is of the view that both the orders dated 02.02.1998 and 28.04.1993 can be regarded as *res judicata* in view of the judgment of the Apex Court in **State Vs. Kalyan Singh and others (supra).**

24. So far as the plea of the appellants that since Criminal Revision No. 619 of 2003 was admitted by the learned Single Judge by means of order dated 06.07.2005, hence they can challenge the impugned judgment and order passed by the trial Court is concerned, it transpires from perusal of the order dated 06.07.2005 passed by the learned Single Judge that four points for adjudication of the issue of revision were framed and considered by the learned Single Judge, out of which point no.1 was that *"whether Criminal Revision No. 619 of 2003 filed by Haji Mahboob Ahmad and Mohammad Siddiq alias Hafiz Mohammad Siddiq, both private persons, is maintainable'* and while considering it, the learned Single Judge exercised the suo moto revisional powers as enshrined in him on the strength of the various dictum of the Apex Court, however, in nowhere while considering point no.1, the learned Single Judge had opined that the revisionists are the victims, hence the revision is maintainable. Thus, this Court is of the view that arguments of the learned Senior Counsel appearing on behalf of the appellants in this regard have no force and are, accordingly, rejected.

25. The judgments relied upon by the learned Senior Counsel appearing on behalf of the appellants are distinguishable from the facts and circumstances of the present case.

(F) CONCLUSION

26. Considering the facts and circumstances of the case and also taking into consideration the dictum of the Full Bench of this Court in **Manoj Kumar Singh (supra),** this Court is of the view that the appellants cannot be treated as "victims', therefore, they have no locus to maintain the instant appeal.

27. In view of the foregoing discussion, this Court is of the opinion that the instant criminal appeal filed on behalf of the appellants under Section 372 Cr.P.C., under the facts and circumstances of the case, is liable to be dismissed on the ground of non-availability of the locus of the appellants to challenge the impugned

judgment and order dated 30.09.2020 passed by the trial Court, hence the same is, accordingly, **dismissed**.

(2022) 11 ILRA 173
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.09.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE RAHUL CHATURVEDI, J.

Criminal Appeal U/S 372 Cr.P.C. No. 1273 of 2022

Smt. Munni Devi ...Appellant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Appellant:
Sri Ram Kumar Patel, Sri Nagendra Singh Gautam

Counsel for the Opposite Parties:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Section - 372 - Indian Penal Code, 1860 -Sections 201 & 302 - Scheduled Castes and Scheduled Tribes Prevention of Atrocities Act,1989 - Sections 3(2) & (5) - Criminal Appeal – against order of Acquittal – FIR - offence of murder - prosecution has tried to show during the course of trial that there was a demand of repayment of loan amount on behalf of accused persons and in that connection some hot-talk and scuffle between the accused persons - but, prosecution has utterly fails to proved the guilt of accused persons in commission of charged crime - prosecution has completely failed to prove beyond doubt that accused were committed offence - held, Appeal stands dismissed.(Para – 20, 21)

Appeal dismissed. (E-11)

List of Cases cited:

1. Rajesh Prasad Vs St. of Bihar & anr. (2022 (3) SCC 471),

2. Bannareddy & ors. Vs St. of Karn. & ors. (2018 vol. 5 SCC 790),

3. Jayamma & anr. Vs St. of Karn.(2021 vol. 6 SCC 213),

4. Sharad Birdhichand Sarda Vs St. of Mah. (1984 (4) SCC 16),

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Rahul Chaturvedi, J.)

1. Heard Shri Ram Kumar Pal, learned counsel for the appellant and Shri Kailash Prakash Pathak, learned AGA representing the State and also perused the record.

2. Present criminal appeal has been filed challenging the judgement and order of acquittal dated 15.10.2018 passed by learned Additional Sessions Judge, Court No.2/Special Judge, SC/ST Act, Kanpur Nagar in Session Trial No.601 of 2003 (State vs. Kulveer Singh), arising out of Case Crime No.77/2000, under Sections 302, 201 I.P.C. and Section 3(2)(5) of SC/ST Act, P.S. Naubasta, District Kanpur Nagar by which the learned trial Judge has acquitted the accused-respondents Kulveer Singh and Vasudev from the charges of Sections 302, 201 I.P.C. and Section 3(2)(5) of SC/ST Act.

3. Before coming to the merits of the case, it is imperative to give brief facts of the case which have given rise to the present appeal.

PROSECUTION STORY :

4. Sum and substance of prosecution case mentioned in the F.I.R., which is based

on conjectures, surmises and self-belief, that accused-respondents have committed this offence against the husband of the informant. Though from the F.I.R. it is clear that this is not a case of direct evidence but the deceased was missing since 07.01.2000 and his dead body was recovered on 22.01.2020 in a drain near Hamirpur Road Daskuwa. After getting this information, the informant reached to that place and identified the dead body. In the F.I.R. it has been mentioned that the informant has firm faith that the author of the offence are Kulveer, Kayamuddin and Vasudev are the real culprits. They used to snatch away the money from the deceased. It is also born out from the record that the deceased has taken Rs.5000/- as loan from the accused-respondents and they were insisting to repay that amount and on this score the present F.I.R. was lodged. The date and time of lodging of the F.I.R. is 25.01.2000 at 14.20 hours and it was registered as Case Crime No.77/2000, u/s 302/201 I.P.C. at Police Station Naubasta, Kanpur Nagar.

5. Inquest report was prepared on 22.01.2000. From the dead body, a pass-book of Punjab Sindh Bank and a spectacles were recovered. Thereafter the autopsy of the dead body was conducted on 23.01.2000 at around 01.30 P.M. by Dr. Satish Chandra, K.P.M. Hospital, who found three injuries over the deceased, viz, (i) bruise contusion with swelling over the left ear in front of the neck, (ii) bruise contusion in front of the neck and (iii) bruise contusion in front of the chest and just below the injury no.(ii). Brain was found congested and heart was empty. Doctor has opined that expected time of occurrence is about one week back from the said recovery, by strangulating the neck of the deceased.

6. After holding in-depth probe into the matter, whereby the police has recorded statements of as many as 10 witnesses, charge sheet has been submitted by the police on 27.07.2001 against accused Kulveer Singh, Vasudev and Kayum @ Kayamuddin u/s 302, 201 I.P.C. and Section 3(2)5 of SC/ST Act. Since all the offences are triable by the sessions, therefore, matter was committed to the session court for trial. Curiously enough the charges were also framed under the same sections against the accused-respondents.

7. In order to establish the case, prosecution has produced as many as 11 witnesses in the court for examination, namely; (i) Smt. Munni Devi, wife of the deceased and informant of the case as PW-1, (ii) Sachin Kumar as P.W.-2, (iii) Sushma as P.W.-3, (iv) Smt. Meena as P.W.-4, (v) Dr. Satish Chandra as P.W.-5, (vi) Head constable 143 Mauji Lal Mishra as P.W.-6, (vii) P.C. Mishra, Investigating Officer as P.W.-7, (viii) Shyamakant Tripathi, Investigating Officer as P.W.-8, (ix) B.N. Chaturvedi, Investigating Officer as P.W.-9, (x) Balvir Singh Chandel as P.W.-10 and (xi) H.C.1020 Mahavir Singh- P.W.-11.

8. In addition to this, prosecution has produced 10 documents which were exhibited during the trial as under :

(i) *Tehrir* as Ex. Ka-1, (ii) Letter sent by the deceased Ramesh Kumar to Senior Electricity Divisional Engineer as Ex. Ka-2, (iii) Postmortem report as as Ex. Ka-3, (iv) Chik F.I.R. as Ex. Ka-4, (v) Copy of G.d. as Ex. Ka-5, (vi) Report regarding destroyed G.D. as Ex. Ka-6, (vii) Site Plan as Ex. Ka-7, (viii) Charge sheet as Ex. Ka-8 (ix) Panchayatnama as Ex. Ka-9 and (x) Recovery of Pass Book and Spectacles as Ex. Ka-10.

9. Learned Trial Judge after recording the statements of all witnesses and looking

into the matter, eventually landed to the conclusion that the prosecution has miserably failed to establish own case or involvement of accused persons beyond any iota of doubt and consequently giving the benefit of doubt exonerated the accused persons from the charges u/s 302, 201 I.P.C. and Section 3(2)5 of SC/ST Act.

TESTIMONY OF WITNESSES

10. The Court has got occasion to peruse and analyze the testimonies of these witnesses of facts. It is necessary to have a fleeting glance on the relevant testimonies recorded during trial.

11. In order to establish the case, prosecution produced four witnesses of fact, namely Smt. Munni Devi, informant of the case who has been examined as P.W.-1, Sachin Kumar as P.W.-2, Sushma as P.W.-3 and Smt. Meena as P.W.-4. From perusal of testimony of Smt. Munni Devi (P.W.-1) indicates that she in her testimony states that her husband was working as Fitter in Electric Loco-shed Anwarganj and Kulveer Singh, Kayamuddin and Vasdev used to snatch money from him when he used to receive his salary. Not only this, her husband has taken Rs.5000/- as loan from Kulveer Singh and these persons were insisting to repay the entire loan amount. They have overpowered the deceased and wanted to have his signature over the pay slip. On 7.1.2000 her husband went to attend the duty and since then his whereabouts was not known. She along with her son kept on searching her husband without complaining to any authority. A tangent expression was made on 14.01.2000 that her husband came along with Kayamuddin and Kulveer to C.H.O. Cooperative Bank, Govind Nagar and it was given to understand that thereafter her husband was disappeared. Eventually on 22.01.2000 the informant got an information that a dead body was lying in an abundant condition near Dasu Kuwa (Naubasta) and was taken to the mortuary. At mortuary she identified the dead body as her husband. She further states that she has all reasons to believe that on account of loan amount Kulveer, Kayamuddin and Vasdev have jointly assassinated her husband, of which on 25.01.2000 F.I.R. was registered. She also states in her testimony that all three persons used to visit the place of her husband quite frequently and all of them have very congenial relationship. Under circumstances, a million dollar question arises as to why since 7.01.2000 to 22.01.2000 no action was taken by the informant. P.W.-2 Sachin almost reiterated the prosecution version toing the line of P.W.-1, except that he too has seen the deceased while going from Kath Ka Pul on 7.1.2000. P.W.-3 Smt. Sushma and P.W.-4 Smt. Meena more or less have supported the prosecution story.

12. After assessing the entire gamut of the facts and circumstances, learned Trial Judge has arrived at the conclusion that there is no material on record to persuade him to convict the named accused persons for the charges framed against them. It was found that sum and substance of entire case hinges upon the broken links of circumstantial evidence and unit of the circumstances is not complete so as to hold the accused persons guilty, beyond any iota of doubt. He found that there is no tangible last seen evidence and the doctor, who conducted the autopsy on 23.1.2000, has opined that duration of death of the deceased is one week back that too do not corroborate the time and date of the incident. After evaluating and analyzing the entire circumstances and the material on

record, the court below found that standard norms established for assessing the circumstances have not been achieved by the prosecution and the court below, therefore, has exonerated the accused-respondents from the charges u/s 302, 201 I.P.C. and Section 3(2)5 of SC/ST Act.

13. Our criminal justice dispensation system is solely dependent upon the testimonies of witnesses and when from the above mentioned testimonies it clearly comes out that none of the prosecution witnesses have proved the prosecution case beyond all reasonable doubt, then the conclusion arrived at by learned Trial Judge seems to be the more probable conclusion.

14. However, learned counsel for the appellant has tried to assail the impugned judgement by making a mention that learned trial Judge has not properly appreciated the evidence produced by the prosecution and decided the case on conjectures and surmises. He further submits that learned Trial Judge has grossly erred in disbelieving the testimony of prosecution witnesses and has given an undue importance to the version of defence. Learned Trial Judge has also not weighed and assess the prosecution witnesses in proper and perspective manner and erroneously has acquitted the accused-respondents.

LEGAL DISCUSSION :

15. The Court has got occasion to lay its hands on the latest judgements relating to scope and ambit of Sections 378 and 386 of the Code of Criminal Procedure, which speak about appeal against acquittal.

16. In the case of ***Rajesh Prasad vs. State of Bihar and another***, (2022) 3 SCC 471, while thrashing the earlier judgements, the Hon'ble Apex Court has held as under :

"24. In *Shivaji Sahabrao Bobade vs. State of Maharashtra*, (1973) 2 SCC 793, Krishna Iyer, J., observed as follows:

"6. ?.. In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents."

25. This Court in Ramesh Babulal Doshi v. State of Gujarat, (1996) 9 SCC 225, spoke about the approach of the appellate court while considering an appeal against an order acquitting the accused and stated as follows:

"7. ?.. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then and then only reappraise the evidence to arrive at its own conclusions."

The object and the purpose of the aforesaid approach is to ensure that there is no miscarriage of justice. In another words, there should not be an acquittal of the guilty or a conviction of an innocent person.

29. After referring to a catena of judgments, this Court culled out the following general principles regarding the powers of the appellate court while dealing with an appeal against an order of acquittal in the following words: (Chandrappa vs. State of Karnataka (2007) 4 SCC 415) :

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

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

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

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

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

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

17. Similarly in ***Bannareddy and others vs. State of Karnataka and others, (2018) 5 SCC 790***, the Hon'ble Supreme Court has been pleased to discuss the scope of the High Court to interfere in an appeal against an order of acquittal passed by a Trial Court, and in paragraph-10 it has been held that :

"10. Before we proceed further to peruse the finding of the High Court, it is relevant to discuss the power and jurisdiction of the High Court while interfering in an appeal against acquittal. It is well settled principle of law that the High Court should not interfere in the well reasoned order of the trial court which has been arrived at after proper appreciation of the evidence. The High Court should give due regard to the findings and the conclusions reached by the trial court unless strong and compelling reasons exist in the evidence itself which can dislodge the findings itself. This principle has further been elucidated in the case of Sambhaji Hindurao Deshmukh and Ors. vs. State of Maharashtra, (2008) 11 SCC 186, para 13, wherein this Court observed that:

"13??The High Court will interfere in appeals against acquittals, only where the trial court makes wrong assumptions of material facts or fails to appreciate the evidence properly. If two

views are reasonably possible from the evidence on record, one favouring the accused and one against the accused, the High Court is not expected to reverse the acquittal merely because it would have taken the view against the accused had it tried the case. The very fact that two views are possible makes it clear that the prosecution has not proved the guilt of the accused beyond reasonable doubt and consequently the accused is entitled to benefit of doubt."

18. In the same chain the Hon'ble Apex Court ***in Jayamma and another vs. State of Karnataka***, (2021) 6 SCC 213, has considered the law on the issue involved and observed thus :

"23. The other important reason to depart from the High Court's view re. conviction of the appellants is that the power of scrutiny exercisable by the High Court under Section 378, CrPC 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 re-appreciate the evidence, including in an appeal against acquittal and arrive at a different firm finding of fact."

19. After overall assessment of the circumstances and perusing the entire material on record we find that, there was no eye-witness of the alleged incident. This case is based purely on circumstantial evidence and though the conviction can be based on circumstantial evidence alone but for that prosecution has to establish complete chain of circumstances, which consistently points towards guilt of the accused and accused alone. After assessing the entirely of circumstances, it cannot be said firmly that accused persons are involve in the commission of offence. It is the duty of the prosecution to firmly and cogently establish the incriminating circumstances against the accused persons and from those incriminating circumstances inference of guilt of the accused could be conclusively drawn. If all the incriminating circumstances against the accused persons are taken into consideration they should be so complete that within all probability they should point towards the guilt of the accused persons, then only such circumstances may be relied upon. At this juncture it would be imperative to make a reference to the decision of the Apex Court in the case of ***Sharad Birdhichand Sarda Vs. State of Maharashtra***, AIR 1984 SC 1622, wherein the Apex Court has expatiated upon the aspect of circumstantial evidence and set forth certain guidelines in that regard, which are as under:

"152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical

but a legal distinction between 'may be proved' and 'must be or should be proved as was held by this Court in ***Shivaji Sahebrao Bobade V State of Maharashtra 1973 CriLJ 1783*** *where the following observations were made:*

certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict, and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

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

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

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence".

20. After considering the aforesaid law laid down by the Apex Court on circumstantial evidence, it emerges that conviction can be based solely on the basis of circumstantial evidence where the circumstances are fully established and the chain of circumstances is conclusively complete and the cumulative effect of all the circumstances is such which shows that only and only the accused is found guilty of committing the offence. After perusal of the evidence of the prosecution witnesses we are of the opinion that the prosecution has failed to prove its case beyond reasonable doubt and also failed to prove the evidence regarding the factum of the deceased having been last seen in the company of accused persons. In the cases of direct evidence the motive aspect pales into complete insignificance but in the cases of circumstantial evidence it serves as one of the circumstances to be reckoned against the accused in proof of the guilt. In the present case the prosecution has tried to show during the course of trial that there was a demand of repayment of loan amount on behalf of accused persons and in that connection some hot-talk and scuffle between the accused persons and the deceased also took place but as we have seen during analysis of evidence that this aspect of the case also could not be satisfactorily proved by prosecution. We therefore are of the opinion that the prosecution has utterly failed to prove the guilt of accused persons in commission of charged crime.

21. We, therefore, find that the court below has taken a plausible and possible view of the matter on appreciation of entire evidence on record, which cannot be substituted by this Court by taking a different view as per the law discussed above. We also do not find that the findings recorded by the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable, therefore, the present appeal is DISMISSED.

(2022) 11 ILRA 179
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.10.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE SYED WAIZ MIAN, J.

Criminal Appeal No. 791 of 2013

Mohammad Anwar & Anr.
...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Raghubir Singh, Sri A.C. Srivastava, Anita Singh, Sri Jata Shankar Pandey, Sri Sukhvir Singh

Counsel for the Opposite Party:
G.A.

Criminal Law - Criminal Procedure Code, 1973 - Sections - 161, 313 & 437-A - Indian Penal Code, 1860 - Sections - 34, 201, 302, 498-A & 304-B, - Arms Act, 1959 - Sections 4 & 25 - The Dowry Prohibition Act, 1961 - Sections 3 & 4 : - Criminal Appeal – Conviction & Sentence - Life imprisonment with fine - Evaluation of Evidences - offence of demand of dowry and death - FIR, registered by the informant with allegation that his daughter (deceased) was killed by her husband with the help of co-accused persons when she failed to meet their dowry demand - prosecution case merely based upon the disclosure of main accused (husband) is that he had killed the deceased and body part were concealed down in the gutter with the help of another appellant-co-accused (Gulsher) - co-accused is neither the family member nor a relative of the accused (husband) who had disclosed to the investigating officer about crime - bodies & weapon are recovered from the house of main accused - co-accused denied the disclosure St.ment in his St.ment u/s 313 - in the event of his denial, the disclosure St.ment cannot be relied and accepted - court observed that, merely on the strength of the discovery of the dead bodies and weapon, it cannot be presumed that co-accused had done any act of crime - and there is no any cogent or clinching evidence against the co-accused to hold him guilty - consequently, convicting the appellant-co-accused is hereby set-aside, but the impugned conviction order against the main accused is upheld - Appeal partly allowed - direction accordingly.**(**Para - 74, 75, 77, 80, 81, 83, 84)

Appeal partly allowed. (E-11)

List of Cases cited:

1. Shahaja @ Shahajan Ismail Mohd. Shaikh v St. of Maharashtra, 2022 Live Law(SC) 596

2. Hanumant Vs The St. of M. P., 1975 AIR 1083

3. Jaharlal Das Vs St. of Orissa, AIR 1991 SC 1388

(Delivered by Hon'ble Syed Waiz Mian, J.)

1. We have perused the record and have also heard Shri Sukhvir Singh, Amicus Curiae and Shri Om Prakash Mishra, learned A.G.A. for the State-respondents.

2. This criminal appeal has been preferred by appellants against the judgement and order dated 08.02.2003 passed by A.D.J., Court No.1, Agra in Sessions Trial No.677 of 2010, arising out of Case Crime No.35 of 2010 (State of U.P. Vs. Mohd. Anwar Painter and another), under Sections 302 read with Section 34 I.P.C.; S.T. Nos.678 & 679 of 2010, under Sections 4/25 Arms Act in Case Crime No.172 of 2010 (State of U.P. Vs. Anwar Painter) and S.T. No.679 of 2010 (State of U.P. Vs. Gulsher); S.T. No.173 of 2010, under Section 4/25 Arms Act, Police Station -Sikandra, District-Agra.

2. Convicting and sentencing the accused appellants, Anwar Painter and Gulsher on 04.02.2013 & 08.02.2013 for life imprisonment and fine of Rs.25,000/- each and in default of payment of fine, they have further to undergo simple imprisonment of three years each and also sentencing them under Sections 201 I.P.C. for three years rigorous imprisonment and fine of Rs. 10,000/- each and in default of fine, they have to further undergo 8 months each simple imprisonment.

3. Accused appellants-Anwar Painter and Gulsher have also been sentenced

under Section 4/25 Arms Act with one year each rigorous imprisonment and fine of Rs.5,000/- each and in default of payment of fine both have to further undergo 6 months each, simple imprisonment. All the sentences are directed to run concurrently.

4. Prosecution case in brief is that the informant, Smt. Salma presented an F.I.R. Paper No. Exhibit No. Ka-1 to D.I.G., Agra on 08.01.2010 and on its movement, F.I.R. Chik No.8 of 2010 case at Crime No.35 of 2010 on 16.01.2010 at 12:30 p.m., Police Station Sikandra, District Agra, was registered. The facts in the F.I.R., Exhibit No. Ka-1, unfolds that informant's daughter Ashma was married with Sonu, five years before, in which dowry was given and Rupees two lakhs were spent. After marriage, her son-in-law, Sonu, father-in-law- Anwar Painter, mother-in-law-Baby, Sister-in-law (Anjum) wife of Nazim, resident of Haryana, Chauka, and Smt. Sarbery, wife of elder brother of father-in-law (Anwar), Afsar, Anwar, resident of Ghad Teli Pada, Sarai Khawaja Police Station-Shahganj, District Agra and also Smt. Aato wife of Ali Husain resident of Mehrav Ka Nagla Teli Pada, (near Sarai Khwaja), Police Station Shahganj, District-Agra, would taunt her daughter that sufficient amount of dowry has not been given by her parents and constantly demanded motor cycle as additional dowry.

5. Informant had also presented an earlier application in the Year 2006 to S.S.P. Agra, and thereupon, police sent her daughter with Sonu but all the accused persisted to torture her mentally and physically on account of non-fulfilment of additional demand for dowry, they also threatened that if their demand was not fulfilled, she will be killed; she was trying to meet her daughter in her matrimonial house since last one month but none was found there; she met Sarvari and Afser and enquired about her daughter; they told her that after killing her daughter, Sonu, Anwar, Anju, Baby have left their houses; she approached police station to lodge the F.I.R. but that was not lodged there.

6. Upon receiving the investigation, I.O. along with police team arrested accused-Anwar Painter and Gulsher on 30.03.2010; in the hope of recovery of assault weapon in the house of Anwar, in the presence of the witnesses Maharaj, Mammu Khan, accused Anwar took them to the room of this house and at his pointing out weapon of offence (chhuri) from beneath the bed, was recovered, whereas, at the instance of coaccused (Gulsher) a chhuri (knive) from beneath the bed was also recovered; both the accused in the presence of the witnesses confessed that by means of the recovered weapons, they had killed Sonu. The details of the aforementioned recovered weapons has also been described in the memo of recovery, Exhibit Ka-2.

7. The Investigating Officer also on 08.04.2010, got recovered the dead bodies of Sonu, Ashma and Choti from under the gutter and memo of recovery of the bodies Paper No. Ka.32 was prepared.

8. During investigation, Sections 304-B, 302 and 201 I.P.C. were added and also in the light of the recovery of churi (knife), Case at Crime No.172/2010 under Section 4/25 Arms Act against Anwar and another Case Crime No. 173 of 2010 under Section 4/5 Arms Act, against coaccused- Gulsher, were registered on 30.03.2010 at 19:00 (7:00 p.m.); substance of these F.I.R.s was also entered in the G.D. Nos. 37 & 38 at 7:00 p.m.; investigation was also handed

over to another Sub-Inspector. The Investigation Officer inspected the place of recovery of weapons and prepared the site plan.

9. The Inquest Report of Smt. Ashma Exhibit No. Ka-8, Choti, Exhibit No. Ka-3 and Sonu Exhibit No. Ka-3 respectively were prepared by the Investigating Officer. Doctors who conducted the autopsy over the dead bodies of the deceased also have prepared autopsy reports which shall be discussed later.

10. The Investigating Officer, during course of the investigation, recorded the statements of informant, witnesses and accused under Sections 161 of Cr.P.C. and the evidence for offences under Sections 498- A, 302, 201, 304-B I.P.C. & Section ¾ of Dowry Prohibition Act, under Section 173 (3)(b) of Cr.P.C. against the accused Anwar Painter, Smt. Baby and Gulsher with regard to Crime No.35 of 2010 charge sheet was forwarded to the court concerned.

11. In Case Crime Nos.172/2010 & 173/2010 pertaining to Section 4/25 Arms Act, charge sheets were also forwarded against accused to the court of learned Magistrate concerned wherefrom, after completing the formalities, these criminal cases were committed to the District Court of Sessions where case pertaining to Case Crime No.35 of 2010 was registered as S.T. No.677 of 2010 whereas S.T. No.670 of 2010, 678/2010 & 689/2010 were registered in connection with Crime No.172/2010 and 173/2010 respectively.

12. The learned trial court vide order dated 15.09.2010 framed charges against the accused Anwar Painter, Smt. Baby & Gulsher for offences under Sections 498-A, 304-B read with Section 34, Section 302 read with Section 34 and Section 301 of I.P.C. and also under Section ¾ Dowry Prohibition Act and also charge under Section 4/25 Arms Act against both accused were framed. Accused denied the charges and claim trial.

13. Prosecution in order to prove its case, examined P.W.-1-Smt. Salma, happens to be informant and witnesses P.W.-2-Krishna Nandan Tiwari (Sub-Inspector), P.W.3- Mammu Khan, P.W.4-Mool Chandra Mutaina (Sub-Inspector), P.W.5-Dr. A.K.Upadhayay, P.W.6-Desh Raj Mutaina, P.W.7.-Shayam Bahadur Mutaina (C.P.), P.W.8- Yashpal Singh (Sub-Inspector), P.W.9-Dr. A.K. Mishra, P.W.10-Ashok Kumar (S.S.P.), P.W.11.Aseem Chaudhari (Investigation Officer).

14. Accused in their statements recorded under Section 313 Cr.P.C. have claimed that evidence of P.W.1, Smt. Salma is false and is the result of their enmity with her.

15. Co-accused Gulsher has also stated in his statement that chhuri (knife) was not recovered at his behest, he has no connection with the alleged incident; he has been falsely implicated in this case merely because of having acquaintance with family members of Sonu. He further stated that on account of the compromise, he has been falsely roped in this case.

16. Accused/applicant- Anwar Painter has also denied the recovery of the dead bodies of the deceased on 16.11.2012. He further said that a year before the incident, he with his wife in the search of work of labour had left his house for his matrimonial house in the State of Bihar. He

has also stated that the deceased wife of his son was of bad character; she wanted to gift his house to her parents; many strangers would come to meet her and he tried to stop them to visit his house; thereafter, some of the strangers had done his daughter-in-law to death; bodies of the deceased were not hidden by him. On behalf of the accused, witness D.W.1, Amit Chauhan was examined.

17. By the instant criminal appeal, the impugned judgement and order dated 08.02.2013, is being challenged on the ground that without cogent evidence on record, illegal order has been passed and despite the inconsistencies and contradictions in the testimonies of the witnesses, on false appreciation, surmises and wrong presumption, the impugned judgment and order in connection with S.T. No.677 of 2010 in Case Crime No.35 of 2010, under Sections 302/34, 201 I.P.C. and S.T. Nos.678 and 679 of 2010, under Sections 4/25 Arms Act, against them has been passed; the learned trial court has committed gross error in the eyes of law and also against the principle of justice.

18. Accused/applicants inter-alia, have also challenged the impugned judgment and order by saying that there is no direct, indirect or circumstantial evidence against them; the prosecution case is based on the basis of false, fabricated and unlawful evidence hence, the impugned judgment and order dated 08.02.2013, is not sustainable in the eye of law and present criminal appeal deserves to be allowed and the impugned judgment and order be accordingly set aside.

19. The learned trial court vide judgment and order dated 04.02.2013 acquitted accused Smt. Baby under Sections 498-A, 304-B read with Section 34, Section 302 read with Section 34 I.P.C. and also under Section ¾ Dowry Prohibition Act.

21. The learned trial Court has also acquitted accused Anwar Painter from the charges under Sections 498-A, 304-B read with Section 34 and Section ¾ Dowry Prohibition Act. Hence this appeal has been preferred by accused Anwar Painter and Gulsher against impugned judgment and order against their conviction and sentence for offences under Sections 302/34 & 201 I.P.C. & Section 4/25 Arms Act.

22. P.W.1, Smt. Salma, informant in her oral evidence has proved F.I.R. as Exhibit.Ka.1.

23. P.W.1 Smt. Salma, in her chief examination deposes that she had married her daughter (Aashma) five years ago with Sonu and had given dowry as per her financial capacity; about Rs.2 lakhs was spent in the marriage; after marriage, Sonu (husband), Anwar Painer (father-in-law), Smt. Baby (mother-in-law), Anju (sister-in-law/nand) Smt. Sarbery (wife of elder brother of Anwar Painter), were not satisfied with dowry and consistently demanded motor cycle as an additional dowry and subjected her daughter to torture and also would beat her; she had made a complaint to S.S.P., Agra in the Year 2006, but during Mediation and Conciliation, her daughter was persuaded by her husband to go with him, however thereafter, it is alleged that they again tortured and threatened her (Smt. Salma); threatening, her daughter would be done to death, if their demand of motorcycle is not met; she went to meet her daughter at her matrimonial house, but she did not find her; on inquiry from the neighbours, she came

to know that ten days ago, after locking the house, they with Aashma had left their house; later on she came to know that they are living somewhere in the State of Bihar. On arrest from Bihar, accused Anwar Painter and Smt. Baby confessed that her daughter, sonin- law, Sonu and grand daughter (Saleem Fatima) aged about one and half years before were killed by them; Gulsher, who is friend of Anwar Painter, was also involved in the commission of the incident; all the accused also confessed that they have killed all the three aforementioned persons and their dead bodies have been hidden in the gutter of the inlaws house.

24. P.W.1 Smt. Salma, in her cross examination, has stated that in the F.I.R., it was mentioned that Gulsher was not involved in the incident; therefore, she has not nominated Gulsher in the F.I.R. She deposed that her daughter was disable; house of Gulsher is situated adjacent to the house of Anwar Painter.

25. P.W.1 also deposed that her statement, by Sub-Inspector, was recorded in which she did not tell him that family members of Sonu would beat her daughter; she also admits that she has not witnessed Gulsher killing her son-in-law, grand daughter. She states that Smt. Baby had told her that after killing the deceased their body were thrown in the gutter; she has also admitted that she did not see accused Gulsher to hide the knife; she did not receive any phone call from Bihar; brother of Anwar Painter had told her that Anwar, Baby had absconded to Bihar. As such P.W.1 Smt. Salma, admits in her deposition that she had not witnessed the accused killing Sonu, Aashma and her grand daughter.

26. She has deposed that Daroga Ji (I.O.), had called her from Bihar; some Army men had asked her to reach over there, because all the possibilities indicated that Ashma, Sonu, Baby & Anwar Chotu have been killed; she also admits that Daroga Ji, (Investigating Officer) had not enquired about Anwar and Gulsher in her presence; and (chhuri)/knife was not got recovered from Gulsher; she has also not acknowledged that dispute existed between Gulsher and Anwar Painter; she has also denied the suggestion put to her on behalf of accused Gulsher that it would be wrong to say that he had not killed Aashma, Chotu and Sonu and she has falsely implicated him.

27. It transpires from the above, deposition of P.W.1. Smt. Salma that she has not seen the accused killing Sonu, Smt. Aashma and daughter-inlaw; her admission in her ocular evidence that she did not witness the recovery of alleged chhuri (knife) on the pointing out of Gulsher; her deposition about the demand of motorcycle as an additional dowry by the accused and on account of non-fulfilment of the demand, her daughter was subjected to mental and physical torture, has not been found credible , corroborative and trustworthy. The learned trial court for want of cogent evidence on record pertaining to offences u/s 498-A, 304-B of I.P.C. & ¾ Anti Dowry Prohibition Act has not held accused (Anwar Painter and his wife Baby) guilty, thus, has acquitted them from the charges under above mentioned offences.

28. P.W.1 Smt. Salma, in her cross examination has deposed that Anwar Painter had solemnised second marriage and out of that wedlock, they have five children and he also solemnised his third marriage and out of that marriage, he has one child. Next, she has stated that Anwar

Painter has total five children; she has denied the suggestion put to her that three months after marriage her daughter delivered a baby; accused did not make complaint to her or any one about her bad character of her daughter; she has also denied in her deposition that due to alleged bad character of her daughter, strangers would visit her and Sonu had ever raised any objection; she has also denied that in view of visits by strangers, accused Anwar and his wife had left their house for Bihar; she also admits that part of the incident occurred at the house of Anwar Painter situated at P.P.,Nagar, Police Station Sikandra. As such, Smt. Salma, has also admitted in her statement that no part of the incident was witnessed by her; her testimony with regard to the murder of daughter or son-in-law by the accused is based on hearsay; and also her admission in her cross examination to the effect that after three and half months police arrested Anwar Painter and Smt. Baby from Bihar and was brought them to Agra; Smt. Baby had told the police in Bihar that dead bodies of Aashma, Sonu and their baby aged about 1 ½ half year, after their murder were thrown in the gutter and also in her deposition, in the examination-in-chief, she has stated that accused have killed her daughter, son-in-law and grand daughter and they had hidden their dead bodies in the gutter, and on the pointing out of the accused, all the three bodies were recovered, this testimony is not only self contradictory but also inconsistent with prosecution story; Memo, Exhibit-ka.32 pertaining to the recovery of the dead bodies of the deceased and in this connection, video cassette and C.D. which were allegedly made on the date of the recovery i.e., 30.03.2010, by the Investigating Officer, does not bear either the signature or thumb impression of informant P.W.1, Smt. Salma, therefore, it is clear that recovery of the dead bodies from under the gutter of the house owned by Anwar Painter was not witnessed by her.

29. P.W.4, Nandan Tiwari, deposes in his examination-in-chief that on 30.03.2010 at 12:55, along with police team (Officer in-charge) of the police station, S.I., and other police personnel along with accused Anwar Painter and Gulsher had visited and inspected the house of accused Anwar Painter; At their instance, accused Anwar Painter and Gulsher, got retrieved the decomposed bodies out of gutter in his (Anwar Painter) house of Sonu, daughter-in-law(Aashma) and grand daughter; At the place of the recovery, A.C.M.-II was also present; all three dead bodies were separately sealed in cloth.

30. P.W.2, Krishna Nandan Tiwari, has also stated that accused Anwar Painter and Gulsher respectively had got recovered chhura (knife) from beneath the bed of room; and both accused had in their disclosure statement confessed that by these knives, they had killed the deceased.

31. P.W.2, Krishna Nandan Tiwari, Sub-Inspector, admits in his cross examination that the memo of recovery does not bear the signature of local witnesses; he also further admits that on 30.03.2010 at 12:55, relevant papers on the record having been prepared on the dictation of A.C.J.M. -II.

32. P.W.2, Krishna Nandan Tiwari, Sub-Inspector, has not been cross examined about his deposition in his examination-in-chief regarding the recovery of decomposed dead bodies of Sonu, Aashma and their daughter on the pointing out of

accused Anwar Painter and Gulsher from under the safety tank/gutter and two knives from underneath the bed and this witness has also not been confronted in his cross-examination regarding his deposition that both the accused i.e., Anwar Painter and Gulsher, after recovery of all the dead bodies of the deceased and each knife on their pointing out from the house of accused Anwar Painter and their disclosure statement that they had hidden the dead bodies of the deceased and knives, whereby they killed deceased.

33. P.W.2, Krishna Nandan Tiwari, Sub-Inspector, has proved memo of recovery of two knives Exhibit.Ka.2.; P.W.3, Mammu Khan, in his statement has supported P.W.2 Krishna Nandan Tiwari, Sub-Inspector to the effect that the recovery of dead bodies of deceased and each knief on the pointing out of the accused Anwar Painter and Gulsher were got recovered from separate places from the house of accused Anwar Painter and memo of recovery Exhibit-ka.2 on 30.03.2010 was having been prepared and signed by him and also by other witnesses.

34. P.W.3. states in his examination-in-chief that in his presence, at the instance of both the accused, dead bodies of Sonu, Smt. Aashma and Baby Choti were having been retrieved from the gutter of the house of Anwar Painter and on the pointing out of both the accused, two knives were also having been recovered from beneath the bed in the room, and both the accused had confessed that, they had assaulted the deceased with knives and killed them. Witness, P.W.3, Mammu Khan, is a relative of accused Anwar Painter and Smt. Aashma was his daughter who was married to Sonu s/o Anwar Painter; accused were known to him. He further deposes that at the place situated 10 Km away from the house of Anwar Painter on a call Gulsher had reached at the house of Anwar Painter on the date of recovery of dead bodies and weapons of crime.

35. In the presence of P.W.3, Mammu Khan, before the trial court, two pack of sealed cloth were broke open and out of these, two knives (chhuriya) were emerged and to see these knives (chhure), P.W.3,Mammu Khan, identified them and deposed that these weapons were having been recovered at the instance both the accused; the same had been sealed in his presence by Sub-Inspector and in this connection, memo of recovery of the weapons by Sub-Inspector was having been prepared and he had signed the memo; he during his deposition also identified his signature thereon and as such, knife (chhuri) as material Exhibit-ka.3 was marked and he in his statement has also described it in details.

36. P.W.3, Mammu Khan, also corroborates statement of P.W.1, Smt. Salma who has stated that Anwar Painter has married thrice; he denies the suggestion that it would be wrong to say his daughter was of bad character; he also denies that after marriage of his daughter, she had delivered a child within a span of three months; he also refuted that old lover of Aashma would often visit her house and P.W.-3 Mammu Khan, also refuses that Salma's son-in-law Sonu and Aashma would often quarrel with each other; he also denies that dead bodies of the deceased were beyond identification or dead bodies of the deceased had not got recovered in his presence; he also states in his deposition that knives also having been recovered in his presence and the weapons were not planted by the police.

37. P.W.3 also deposes that he has seen the house of Anwar Painter before the incident; once he had gone there; he further says in his evidence that he knows the difference between the chhuri and chaku; two knives (chhuriya) during his deposition in the trial court were laid before him and he has categorically said in his deposition that the assault weapons placed before him were churies not knives.

38. The testimony of P.W.3, Mammu Khan reflects that he was present on the date of the recovery of dead bodies of the deceased and churies (knives) from the house of Anwar Painter were recovered and he has also identified his signature on memo of recovery of assault weapon; in his statement he also has denied that being relative of deceased, he has adduced evidence. In his deposition there is minor inconsistency with prosecution story because he has stated in his statement that chhuri and knife are not same and one.

39. P.W.-3 in his cross-examination says that he knows that Baby was the third wife of Anwar Paniter. The suggestion put on behalf of accused, P.W.3 Mammu Khan has denied that the bodies of the deceased had not been recovered in his presence; he admits that bodies of the deceased had decomposed, however, they were identifiable. He also denies the suggestion put by the learned counsel that both chhuries were planted by police; he also denies that he is deposing against the accused because Anwar Painter is his friend.

40. The investigation of the instant case was entrusted to I.O. on 17.01.2010 and he had recorded the statement of Smt. Salma, and at her instance, he had prepared the site plan of the alleged incident in his writing; he had also recorded the statements of Ashok Rajendera and Rahman during the investigation and had come to know that informant and accused Anwar Paniter and Baby with their family members were living somewhere in Bhaglpur in the State of Bihar; he admits in his cross-examination that on his visit to the house of Anwar Painter, it was found locked and he had not broken the lock.

41. Another I.O. P.W.-4 Mool Chandra Mutaina, S.I. in his examination-in-chief says that on information received from the informer, he along with police force reached at Bijli ghar (Electricity House) which was being built at Fatehpur; Anwar Paniter, who was a labour, was apprehended from there; he was brought back to police station and he had confessed that he with his wife and other associate Gulsher had killed his son, daughter-in-law (wife of his son), grand-daughter and they had thrown their dead-bodies into the gutter of his house.

42. On the strength of statement of co-accued Anwar Painter, name of his associate, namely, Gulsher surfaced during investigation.

43. P.W.-6 Desh Raj Mutaina, I.O. further states that after confession of the accused, they went to the house of Anwar Painter to recover the deadbodies of the deceased and also the assault weapons; in respect of the alleged incident, he had intimated the Additional District Magistrate-II, Sri D.P. Singh and S.P. City Sri L. Kumar and Media persons and they also reached there; both the accused namely- Anwar Painter and Gulsher, in the presence of Magistrate had made their confession that they had killed three persons and their dead-bodies were hidden

in the gutter, and on their pointing out all three dead bodies were retrieved from the gutter. Magistrate had conducted the inquest over the bodies of the deceased and after preparing the inquest reports, the dead-bodies of the deceased were forwarded with the copies of inquest reports and other relevant documents to mortuary for post-mortem to ascertain the reason of their death. P.W. 6- during his testimony has identified the memo and on its proof, the same has been marked as Ex. Ka-2. He also says that on the basis of collected evidence Section 302 of IPC was added.

44. P.W.-6 (I.O.) in his cross-examination says that crime weapons were not placed before him; the arrest of both the accused was entered into G.D. No.24 time 12:30 dated 30.03.2010. He also states in his crossexamination that the copy of the recovery memos was not given to the accused-persons, but had got signed by them. This witness denies that alleged recovery was not made on the pointing out of both the accused and falsely have been planted.

45. P.W.-11 Aseem Chaudhari (C.O.) states in his examination-in-chief that on 02.04.2010 he was posted as Circle Officer at Police Station- Hari Parwat and in the remaining investigation pertaining to Crime No. 35 of 2010, under Sections 498-A, 304B, 302 and 201 of IPC and Section 3/4 of D.P. Act; he was partly involved and statements of witnesses Prayag Singh and Bheekam Singh, were recorded; At the instance of witness Prayag Singh, he had inspected the place of occurrence and in his writing and signature had prepared a site plan which is on record and he has also identified the said site plan. The same was marked as Ex. Ka 30. He has also deposed that he had recorded the statements of other witnesses and on the basis of collection of ample evidence against accused- Anwar Painter, Gulsher and another, he submitted the challan in his writing and signature to the court concerned.

46. P.W.-11 Aseem Chaudhari (C.O) in his cross-examination reiterates that at the instance of witness Prayag Singh, he has prepared the site plan and also recorded the statements of Bheekam Singh, Raju, Rajpal and others but none of the witnesses claimed to have witnessed the commission of incident. He has also given details of the dead-bodies, the place of the occurrence and says that he had also recorded the statement of informant Salma on 20.04.2010. He further states that he had not met Anwar Painter and Gulsher. He states that he had recorded the statements of witnesses and admits that the recovery of assault weapons and deadbodies of the deceased were not made in his presence. He further admits that the statements of the neighbor of accused Gulsher were not recorded by him. Next he denies the suggestion to the effect that he did not make any investigation and the said papers were having been prepared in his office.

47. P.W.-1, Smt. Salma about the allegation in her written F.I.R. dated 08.01.2010 Exhibit-ka.1 has deposed that since one month, she was visiting the residence of her son-in-law Sonu but did not find any one; neighbours apprised her that inmates of the house had left their house at unknown place, although, she also inquired from Smt. Sarvari and Attu, elder brother of father-in-law of her daughter. She also met Anwar to know whereabout of her daughter who told her that he along with others had killed her and Sonu.

48. Anwar Painter, Baby left their house at P.P. Nagar, Agra for undisclosed place. Accused, Anwar Painter, stated in his statement recorded 313 Cr.P.C. on 12.02.2022 that he with his wife had left his house for his matrimonial house in Bihar one year before the incident. Smt. Baby, in her statement under Section 313 Cr.P.C. stated that she was third wife of Anwar Painter, Sonu was son of first wife of Accused Painter. As such, it is also admitted to accused that Smt. Baby was the third wife of accused Anwar Painter and she was step mother of Sonu.

49. D.W.-1, in his examination-in-chief, deposed that Anwar Painter and his wife Baby in the Year 2009 had left their house in District-Agra for Bahagalpur in Bihar. Statement of D.W.-1 Amit Chauhan was recorded in the trial court on 18.01.2013. Thus, evidence of D.W.1, Amit Chauhan lends credence to statements of accused under Section 313 Cr.P.C. that Anwar Painter with his family had left his house in the Agra district for his matrimonial house to earn livelihood. Admittedly, he is a labour and poor man. There is no evidence on record to show the exact time of departure of the Anwar family for Bihar, but since retrieved bodies by the time of their recovery had decomposed, it appears that substantial period of time had passed. But, it has no adverse bearing on the merits of this case.

50. From the condition of the highly decomposed bodies, P.W.9, Dr. A.K. Mishra, has opined in his examination-in-chief that death of deceased Sonu was caused approximately three months before the post mortem which was conducted on 01.04.2010.

51. P.W.5, Dr. A.K. Upadhaya, who has also conducted autopsy on the bodies of the deceased Smt. Aashma & Baby Choti has not deposed about the approximate time of their death but it appears that all three deceased Sonu, Smt. Aashma and Baby Choti were killed in one incident.

52. It also emerges that all the bodies, at the instance of accused Anwar Painter and Gulsher and two knives were recovered from gutter and from beneath of the bed in the room of the house owned by accused Anwar Painter on 30.03.2010.

53. P.W.3- Mammu Khan has deposed in his chief examination that on the pointing out of accused Anwar Painter and Gulsher chhuri/chhura each was recovered. This witness in his cross-examination done on behalf of co-accused Gulsher has also repeated his evidence with regard to the recovery of two chhuri.

54. P.W.7 Shayam Bahadur Mutaina has stated in his examination done on behalf of Anwar Painter that recovered weapons of crime were brought and got received to him in each sealed bag; there was separate knife (chhura). He has also stated that there is difference between chhura and knife but in the recovery of memo, knives (chhura) were having been noted.

55. It emerges from the evidence P.W.3-Mammu Khan that there is consistent evidence in respect of the recovery chhura each at the instance accused Anwar Painter and Gulsher. Before the learned trial court, it was contended on behalf of accused that there is contradictory evidence with regard to weapon of offence because on the one hand; chhuri each is stated to have been recovered; On the other hand, there is evidence on record to the effect that chhuri as well as knife on the

pointing out of both the accused were having been recovered. In our opinion, there is evidence on record that chhura each was having been recovered at the instance of Anwar Painter and Gulsher. On the face value of contention put forth by the learned counsel before the learned trial court is accepted even then the evidence pertaining to the recovery of weapons, minor difference is found but all evidence has to be read in totality, as such, recovery of chhura each on the pointing out of accused Gulsher and Anwar Painter has been successfully proved by the prosecution.

56. D.W.2, Krishna Nandan Tiwari, S.I., I.O. has deposed that upon recovery of the bodies of deceased, he had prepared in his writing inquest reports and three bodies of the deceased were sealed separately in the pieces of cloth and the other related papers in this respect were also having been prepared.

57. P.W.2, Krishna Kant Tiwari, has admitted in his cross examination that inquest reports and other related papers were prepared at the dictation of A.C.M.-II, who also was present there at the time of panchayatnama of bodies of the deceased. He also admits that he was familiar with the writing and signature of A.C.M., D.V. Singh, because they were posted in the same District Agra and in the discharge of his official duty, he would off and on met him.

58. P.W.,3 Mammu Khan deposed in his statement about the inquest reports of having been prepared in his presence by police. The learned trail court in the impugned judgement and order has discussed in detail evidence of P.W.1-Smt. Salma, P.W.-2, Krishna Nandan Tiwari, P.W.11 Assem Chaudhari, I.O., and has also thoroughly evaluated all the evidence, including D.W.1 Amit Chauhan on record.

59. The learned trial court Judge has rightly opined that in view of the facts and circumstances of the instant case, time of death of all the three deceased cannot be ascertained. The learned lower court has also opined on the strength of the evidence on record that offences under Sections498-A, 304-B read with Section 34 I.P.C. and Section ¾ Dowry Prohibition Act, against Smt. Baby and also offences under Sections 498- A, 304-B read with 34 I.P.C. and Section ¾ Dowry Prohibition Act, against Anwar Painter, his wife Smt. Baby and Gulsher were not proved hence, their acquittal has been recorded.

60. The learned trial court has also placed reliance on the testimonies of prosecution witnesses with regard to disclosure statement of accused Anwar Painter and Gulsher and at their instance, recovery of all the dead bodies of the three deceased and also recovery of assault weapon from the house of Anwar Painter.

61. It has also come in the evidence that Anwar Painter and his wife had left their house for Bhagalpur after locking the gate of their house from outside.

62. The learned trial court has dwelt on the evidence of D.W. 1- Amit Chauhan and also his evidence regarding the alleged bad character of Smt. Aashma. The accused have taken defence that since Smt. Aashma was of a bad character, several people would visit her and any of such persons could have killed Sonu, Smt. Aashma and Baby Choti, but in this respect, there is only the evidence of D.W.1- Amit Chauhan, he lives near Anwar Painter, therefore, he knows them, however,

D.W.1-Amit Chauhan has not stated that he would regularly visit their house; he has also not shed light on the fact that accused would share their house hold affairs with him; D.W.1 also claims friendship with the accused. There is no iota of evidence on record that Sonu had any quarrel in his life time with his wife Smt. Aashma regarding her alleged bad character or alleged delivery of baby within a span of three months after her marriage with him. As such statement of P.W.1, Salma is inconsistent and contradictory hence it needs corroboration with regard to offences under Section 302/34.

63. Since, the dead bodies of the deceased were recovered at the instance of accused Anwar Painter and Gulsher from the gutter in the house owned by Anwar Painter and Anwar Painter with his family was living therein, therefore, presumption under Section 106 of the Evidence Act would be drawn against Anwar. It is incumbent upon accused Anwar to rebut the presumption; accused has taken the defence on many grounds but these pleas have not succeeded to render the evidence adduced by the prosecution improbable.

64. Admittedly, prosecution case is that the appellant-co-accused Gulsher is neither member or relative of the family of appellant/accused Anwar Painter; he is said to be friend of Anwar Painter; P.W.-1-Smt. Salma, had admitted in her ocular evidence that since marriage and until the death of the deceased she had only once visited the matrimonial house of her daughter; she was not having opportunity to see for herself about the nature of relationship of Gulsher with co-accused/co-appellant. P.W.-1 Salma, has admitted in her statement that prior to instant incident quarrel pertaining to the demand of dowry between her daughter and her husband and members of his family had picked up and in that connection she had moved her complaint to S.S.P. Agra, who had forwarded her complaint to the Mediation and Conciliation Centre, wherein her daughter was persuaded to go with her husband, thus, her daughter had gone with her husband Sonu to her matrimonial house; she also states in her ocular evidence that compromise between her daughter and Sonu was amicably arrived at between them.

65. Appellant/accused Gulsher, in his statement recorded under Section 313 Cr.P.C. has denied to have caused the incident and on his behalf it was also contended that the alleged recovery of chhuri / knife was planted on him. He further says in his statement under Section 313 Cr.P.C. that he had facilitated to broker compromise between Sonu and his wife and for that reason he has been falsely roped in this case.

66. It is also an admitted case of the prosecution that no witness has stated to have witnessed the appellant/accused Gulsher visiting the matrimonial house of the deceased, therefore, there is no evidence regarding his visit prior or at the time of alleged occurrence to the house of Anwar Painter.

67. It is also admitted to the prosecution that Anwar Painter on his arrest had named appellant/accused Gulsher, in commission of the alleged incident. As such, during investigation, name of appellant Gulsher appeared on the statement of co-accused Anwar Painter. Appellant/accused Anwar Painter has himself denied his involvement in the alleged incident. Evidence of the co-

accused without corroboration is of a weak kind.

68. We have seen from the above discussion that Anwar Painter with his wife, who has been acquitted from the charges levelled against her, were brought from Bihar to the house of Anwar Painter.

69. On the statement of co-accused Anwar Painter, co-appellant/coaccused Gulsher, was apprehended by the Investigating Officer. However, prosecution has adduced consistent and reliable evidence against coappellant/ co-accused Gulsher, in connection with the recovery of chhuri/ knife on his pointing out from beneath of cot in the house owned by Anwar Painter.

70. There is also reliable evidence on record against Gulsher that on his, as well as, Anwar Painter's pointing out three decomposed bodies of the deceased were retrieved from the gutter in the house of Anwar Painter.

71. Learned counsel for the defence submitted that if recovery of chhuri/ knife and decomposed bodies of the deceased is accepted on its face value to have been made at the instance of Gulsher but no such presumption against him can be made that he had killed the deceased and thereafter, he had dumped the bodies of deceased down the gutter because he was not member/relative of Anwar Painter, and was also not a friend of Anwar Painter. He was just having acquaintance with Anwar Painter.

72. There is no reliable evidence on the record that Gulsher would visit the matrimonial house of the deceased Smt. Ashma and had no direct or indirect role pertaining to the incident. He has been implicated merely because of his role in the compromise arrived at between Sonu and his wife, further, it is argued that there is no cogent and reliable evidence about his involvement in the incident and he has been implicated merely on the basis of suspicion which is inconsequential under law.

73. Hon'ble Apex Court in ***Shahaja @ Shahajan Ismail Mohd. Shaikh Vs. State of Maharashtra; 2022 Live Law (SC) 596*** has outlined the conditions necessary for applicability of Section 27 of the Evidence Act:

"that the appellant stated before the panch witnesses to the effect that "I will show you the weapon concealed adjacent the shoe shop at Parle". This statement does not suggest that the appellant indicated anything about his involvement in the concealment of the weapon. Mere discovery cannot be interpreted as sufficient to infer authorship of concealment by the person who discovered the weapon. He could have derived knowledge of the existence of that weapon at the place through some other source also. He might have even seen somebody concealing the weapon, and, therefore, it cannot be presumed or inferred that because a person discovered the weapon, he was the person who had concealed it, least it can be presumed that he used it. Therefore, even if discovery by the appellant is accepted, what emerges from the substantive evidence as regards the discovery of weapon is that the appellant disclosed that he would show the weapon used in the commission of offence."

74. In the present case there is evidence on record that accused Anwar Painter had disclosed to the Investigating

Officer that he along with Gulsher had killed the deceased and bodies of the deceased were concealed down the gutter, in the house of Anwar Painter and Gulsher also along with Anwar Painter got retrieved the bodies of the deceased out of the gutter and also at his instance concealed weapon, chhuri/ knife was recovered from beneath the cot/bed lying in the room of house owned by Anwar Painter.

75. Gusher has denied in his statement under Section 313 Cr.P.C to have made disclosure statement to the investigating officer. Even if, it is accepted, that after his arrest, he had made discloser statement, to the arresting police officer, in the event of his denial before the Court such disclosure statement cannot be relied and accepted.

76. In view of above referred judicial pronouncement, ***Shahaja @ Shahajan Ismail Mohd. Shaikh Vs. State of Maharashtra;*** merely, on the strength of the discovery of the dead bodies and chhuri/knife at the pointing out of Gulsher it cannot be suggested that he had done any act of concealment of the weapon of offence and for bodies, and it is not sufficient to infer authorship of concealment by Gulsher, who got discovered assault weapon and dead bodies of the deceased.

77. It cannot be ruled out that he could have acquired knowledge of the existence of the weapon and concealment of the dead bodies in the gutter of the house owned by the Anwar Painter through some other source also, therefore, it cannot be presumed that appellant/accused Gulsher was also the person who had concealed the dead bodies, as well as, the assault weapon, therefore, merely on the basis of the said recovery of the dead bodies and assault weapon, at his instance, it cannot be made a sole basis to presume that he had also participated in the commission of the incident and had concealed the dead bodies of the deceased along with Anwar Painter in the gutter of the house and chhuri/knife beneath the cot. Further it cannot be presumed that he had used the recovered weapon chhuri/ knife to kill the deceased.

78. Hon'ble Supreme Court in **Hanumant vs The State Of Madhya Pradesh, reported in 1975 AIR 1083,** has held that ;

"In dealing with circumstantial evidence the rules specially applicable to such evidence must be borne in mind. In such cases there is always the danger that conjecture or suspicion may take the place of legal proof and therefore it is right to recall the warning addressed by Baron Alderson to the jury in Reg v. Hodge (1) where he said :--

"The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to over- reach and mislead itself, to supply some little link that 'is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should

be such as to exclude every hypothesis but the one proposed to be proved."

79. Hon'ble Supreme Court in **Jaharlal Das vs State Of Orissa, reported in 1991 AIR 1388** has held that ;

"It may not be necessary to refer to other decisions of this Court except to bear in mind a caution that in cases depending largely upon circumstantial evidence there is always a danger that the conjecture or suspicion may take the place of legal proof and such suspicion however so strong cannot be allowed to take the place of proof. The Court has to be watchful and ensure that conjectures and suspicions do not take the place of legal proof. The Court must satisfy that the various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. Bearing these principles in mind we shall now consider the reasoning of the courts below in coming to the conclusion that the accused along has committed the offence."

80. Having regard to the facts and circumstances of the case, and for reasons stated herein above, we find that there is no cogent and clinching evidence against Gulsher to hold him guilty.

81. Resultantly, the impugned judgment and order dated 08.02.2003, passed by the learned Additional Sessions judge, Court No. 1, Agra in Sessions Trial No.677 of 2010, arising out of Case Crime No.35 of 2010 (State of U.P. Vs. Mohd. Anwar Painter and another), under Sections 302 read with Section 34 I.P.C.; S.T. Nos.678 & 679 of 2010, under Sections 4/25 Arms Act in Case Crime No.172 of 2010 (State of U.P. Vs. Anwar Painter) and S.T. No.679 of 2010 (State of U.P. Vs. Gulsher); S.T. No.173 of 2010, under Section 4/25 Arms Act, Police Station -Sikandra, District- Agra, convicting the appellant/accused Gulsher is hereby set aside, whereas, the impugned judgment and order dated 04.02.2013 and 08.02.2013 convicting and sentencing the appellant/ accused Anwar Painter is upheld.

82. Hence the appeal is **allowed** in part, insofar, it relates to appellant Gulsher. The appeal of Anwar Painter is, accordingly, dismissed.

83. Appellant/accused Gulsher, if detained in judicial custody be set at liberty forthwith, if not required in any other case.

84. The mandate of Section 437A of Cr.P.C. to be complied.

85. Let a copy of this judgment along with lower court's record be sent back to the court concerned for immediate compliance.

86. Since the appellants/accused-Anwar Painter and Gulsher are detained in jail as none of them has been enlarged on bail therefore, office is directed to inform the appellants/accused through Jail Superintendent/ District Jail/ Central Jail concerned along with copy of this judgment for information and necessary action.

(2022) 11 ILRA 194
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.11.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Jail Appeal No. 3070 of 2009

Somwati & Anr. ...Appellants

Versus

State of U.P. ...Opposite Party

Counsel for the Appellants:
From Jail, Sri Virendra Pratap Yadav, A.C.

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

Criminal Law - Criminal Procedure Code, 1973 - Sections 161, 313 & 437(a) - Indian Penal Code, 1860 - Sections 34 & 302 - Evidence Act, 1872 - Section - 24 - Jail Appeal **-** against conviction & sentence - Life imprisonment with fine - Evaluation of Evidences - offence of murder - FIR - confessional St.ment of the accused that they had killed the deceased two brothers by giving poison mixing with banana for grabbing the land which are registered in their names - confessional St.ment is the sole basis for their implication - law is settled that, extrajudicial confession by its very nature is a weak evidence and required examination with the great deal of care and caution - it must be shown not to be caused by inducement, threat or promise - court finds that, prosecution witnesses have specifically St.d that the villagers had to be tough with the accused and only thereafter the accused were made their confessional St.ment - therefore, extra-judicial confession which was made before villagers or before the police is thus not found to be corroborated from the evidence available on record - held - appellants are entitled to benefit of doubt as the prosecution has not been able to prove their guilt beyond reasonable doubt - Jail appeal allowed - directions accordingly. **(Para -** 23, 24, 26, 27, 38, 39)

Appeal partly allowed. (E-11)

List of Cases cited:

1. Jaipal Vs St. of Har., Appeal (Crl.) No. 705 of 2001, decided on 1.10.2002

2. St. of Har. Vs Jagbir Singh & anr., AIR 2003 SC 4377

3. St. of Pun. Vs Bhajan Singh & ors., AIR 1975 SC 258

4. Sharad Birdhichand Sarda Vs St. of Mah., (1984) 4 SCC 116

5. Ram Niwas Vs St. of Har., 2022 SCC OnLine SC 1007

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. This jail appeal has been instituted by the accused Somwati (since deceased) and her alleged paramour Kallu, who have been convicted vide judgment and order dated 27.9.2008, passed by Additional Sessions Judge, Court No.1, Kanpur Dehat, in Sessions Trial No.452 of 2007 and sentenced to life imprisonment under Section 302 read with Section 34 IPC, arising out of Case Crime No.223 of 2007, at Police Station Sajeti, District Kanpur Dehat.

2. The prosecution case proceeds on a written information of the Village Chowkidar, who while going to his field on 14.8.2007 at about 8.30 a.m. saw that number of villagers had gathered in front of the house of late Nanku, and when he reached there he found various villagers including Shivnandan son of Baddu, Ravindra son of Virendra Sachan, Vijay Kumar son of Ramaee, Shivram Babu son of Vidhalal, Jagroop son of Parson etc. In the hutment he found the dead body of two sons of late Nanku namely Ramchandra and Veeru. The villagers were asking their mother Somwati and her second husband Kallu as to how the incident occurred. Initially they avoided the question but later confessed that Kallu wanted to purchase a tractor for which he had to take loan by pledging agricultural land. The land, however, was in the name of the two deceased Ramchandra and Veeru, and therefore a conspiracy was hatched between them and tractor agent Jairaj Prajapati son of Ram Gopal about three days back that in the event the two sons of

accused Somwati die then their land will come in the name of accused Somwati and the loan would be easily arranged. On 13.8.2007 Jairaj met the accused, who got a dozen Banana at Ghatampur. Jairaj took the Banana aside and mixed some poisonous substance and gave the poisoned Banana to the accused with the instructions that the accused may not eat it and only give it to the two sons so that they die. Jairaj further said that in the evening he will come to verify about the development and that the Banana be given to the boys at about 6.00 O'clock. The two deceased accordingly were given the poisoned Banana who consumed it and fell unconscious. Jairaj is stated to have come and after seeing the boys stated that now their work would be done and later on account of administering poisonous substance the two boys died. In the morning the information spread about death of the two brothers and the dead bodies were found lying in the hutment. Various villagers were present and that the offence has been committed by Somwati, Kallu and tractor agent Jairaj. On the basis of such information Case Crime No.146 of 2007 was registered at Police Station Sajeti, Sub-district Ghatampur, District Kanpur Nagar. The FIR was registered at 10.20 am on 14.8.2007 and the time of occurrence of crime was mentioned as the night intervening 13/14.8.2007. The police proceeded in the matter and recovered peel of Banana, which is marked as Exhibit Ka-18.

3. The inquest followed in which the witnesses observed that the deceased have been done to death by administering poison to them by their step-father and therefore the postmortem be conducted. The bodies were sealed and sent to mortuary where their postmortem was conducted at 1.45 pm on 15.8.2007. The autopsy surgeon was of the view that death had occurred about one day prior to the postmortem and the cause of death could not be ascertained. Viscera was also preserved and later it was revealed that the cause of death was administering of poison (Aluminum Phosphide) for both the deceased. Report of Forensic Science Laboratory has been exhibited as Ka-21 and Ka-22. The investigation proceeded in the matter and ultimately a chargesheet came to be filed against the two accused Somwati and Kallu, which has been exhibited as Ka-20. The magistrate took cognizance on the chargesheet and committed the case to the court of sessions. The court of sessions charged the accused appellant of committing offence under Section 302 read with Section 34 IPC vide order dated 8.1.2008. The charges were explained in Hindi to the two accused, who pleaded not guilty and demanded trial.

4. Apart from the documentary evidence produced by the prosecution in the form of F.I.R. (Exhibit Ka-4), written report (Exhibit Ka-1), postmortem report of Ramchandra (Exhibit Ka-2), postmortem report of Veeru (Exhibit Ka-3), Forensic Science Laboratory reports (Exhibit Ka-21 & Ka-22), Panchayatnama of Ramchandra (Exhibit Ka-6), Panchayatnama of Veeru (Exhibit Ka-12) and chargesheet (Exhibit Ka-20), the prosecution also adduced first informant Devicharan (PW-1). He has supported the prosecution case and in his examination-in-chief has proved the written report on the basis of which FIR itself was registered. He has identified his signatures on the written report. As none appeared for the accused an application was given for appointment of Amicus Curiae to represent the accused. PW-1, accordingly, was cross-examined by the Amicus Curiae, who stated that he is a Chowkidar for the last 20 years and has limited learning to his credit.

He has also stated that house of accused Somwati is at a distance of 200 paces from his house and that he has shown the place of occurrence to the Investigating Officer. In the cross-examination he has denied that accused Somwati admitted administering of poison to the deceased in his presence. He, however, admitted that being the village chowkidar his signatures were obtained by the Investigating Officer.

5. PW-2 is Ravindra Sachan. He had scribed the written report on the instruction of PW-1 and has stated that report was written by him on the instructions of PW-1. He has stated that the information with regard to death of the two sons of late Nanku was received at 8.00 am in the morning and the police reached at about 12 O'clock in the afternoon. It is stated that after about 10 minutes of receiving the information of death he came to the house of the accused and found 100 persons standing in front of the house, who were enquiring about the cause of death. He has stated that accused Kallu has been living with Somwati for the last two years and while age of the elder son of Somwati was 15 years, the other son was about 13-14 years. Various persons made queries about the cause of death and the accused narrated the story every time before them. It is stated that village chowkidar was present when he arrived at the place of occurrence. He has denied the suggestion that Somwati and Kallu had not made any confession in his presence or he got a false report lodged.

6. Sudhir Katiyar (PW-3) is the autopsy surgeon, who has stated that a sealed body was brought to him at mortuary and that he conducted the postmortem at about 1.20 pm. He found brain, lungs, kidney, liver etc. to be congested. The cause of death was not clear, and therefore preserved the Viscera and had sent it for examination. He has stated that the death could have occurred a day prior to the conduct of postmortem. He has opined that death could have occurred in the intervening night between 13/14.8.2007. He further stated that death could have occurred due to poisoning.

7. PW-4 Gyan Sagar is the police constable, who has verified the check FIR. PW-5 Vijay is a resident of the village, who has verified the extra-judicial confession made by the accused of having killed the deceased, by administering them poison. He has denied that his statement was recorded by Investigation Officer earlier. He has, however, clearly stated that confessional statement was made by the two accused in his presence about the manner in which the deceased have been done to death. Sanjay Kumar has been produced as PW-6, who was the Station House Officer in Police Station Sajeti and has conducted the investigation in the present case. He has stated that investigation against accused Jairaj is still going on and he is absconding. He has also admitted that time in the case diary with regard to commencement of investigation or its closure has not been mentioned. He too has verified the confessional statement. In the cross-examination he has stated that none of the inquest witnesses have been shown as witness in the chargesheet and even the neighbours Vansh Lal and Ram Asare have also not been shown as a witness. He has further stated that Vijay Kumar had not given any statement that Somwati and Kallu had been asked questions by him, Shivnandan, Jagroop and Sangeeta and that no statement was given by them that Jairaj has called them to Ghatampur and had told that tractor could not be arranged as the land was in the name of the two deceased.

8. On the basis of evidence led by the prosecution the incriminating material were put to accused, who denied the accusation made against them. In reply to question no.17 the accused have stated that the villagers had poisoned their sons with an intent to grab their land and house.

9. The trial proceeded and the court of sessions on the basis of evidence led by the prosecution found the charges under Section 302 read with Section 34 IPC to be proved against them beyond reasonable doubt and consequently they have been convicted and sentenced to life.

10. In the present jail appeal we appointed Sri Virendra Pratap Yadav as Amicus Curiae to argue the appeal. He has submitted that this is a case of no evidence against the accused appellant, inasmuch as the confessional statement is the sole basis for their implication, which cannot be relied upon as it was not voluntary and had been obtained by exercising pressure. It is stated that the accused have not made any confession before the court and the alleged extra-judicial confession made before the villagers or before the police cannot be read in evidence. He further submits that the prosecution case is wholly improbable, inasmuch as the mother cannot be imagined to have consented to killing of her two sons only to arrange loan for purchase of tractor in favour of her paramour. He further submits that PW-5 has clearly admitted that four bigha land was in the name of accused Somwati and in the event loan was to be arranged, she could have offered her own land and it was not necessary for her to require the land held in the name of her sons for such purposes. He further submits that the villagers/pattidars could have committed the offence, inasmuch as on account of killing of the two sons, the mother landed in jail and has ultimately died during the pendency of present appeal and their land and house is now being used by others and that her entire property has been grabbed by the distant relatives Bhoora and Jairaj. An application has also been filed before the court to this effect on 27.9.2008, which is on record. Learned Amicus Curiae further submits that in the event aluminum phosphide was mixed in Banana, which had been purchased at Ghatampur at a distance of 10 kms, the smell would be such that none would come near it nor could have been consumed by the two boys. He places reliance upon a judgment of the Supreme Court in Jaipal Vs. State of Haryana, passed in Appeal (Crl.) No. 705 of 2001, decided on 1.10.2002, in order to submit that the prosecution case about administering of poison to the deceased in Banana is wholly improbable.

11. A photocopy of the Khatauni is on record of the court below, which clearly shows that Somwati was recorded over part of the land of Khata No.709 and she has moved an application that villagers Bhoora and Jairaj Kumhar have forcible encroached upon her land and are trying to grab her property. With reference to these two documents learned Amicus Curiae submits that obvious beneficiary of the offence had neither been identified by the prosecution nor have been prosecuted and instead the victims have been made accused on account of faulty investigation. Learned Amicus submits that this is a case of circumstantial evidence in which the chain of events have not been joined by the prosecution, so as to lead to hypothesis of guilt attributed to the accused appellant and as an alternative hypothesis seems more probable i.e. the distant relatives may have committed the offence to grab the land, the

conviction and sentenced of the accused based on circumstantial evidence is clearly impermissible in law.

12. Per contra, Sri Arunendra Singh, learned AGA submits that the accused appellants have rightly been convicted and sentenced in the present case, inasmuch as the extrajudicial confession made by them is proved by the statement of witnesses, who are the residents of the same village and before whom such confessions were made. He further submits that forensic report clearly shows that aluminum phosphide was present in the peel of Banana and in view of the fact that cause of death has been found to be administering of poison to the deceased, which is clearly corroborated by the testimony of the prosecution witnesses, the appeal lacks merit. He further submits that the commissioning of offence for the benefit of her paramour was otherwise possible. He also submits that the conduct of the accused also shows that the offence was committed by them, inasmuch as no attempt was made by the accused to inform the police or even attempt to save the deceased. He submits that the deceased were in the care and custody of the accused and their death could not have occurred at the spur of the moment as the process involved consumption of time during which the deceased must have expressed their pain but nothing was done to save them. He submits that in the totality of facts and circumstances of this case the implication of the accused appellant is clearly established on record and as such the appeal lacks merit.

13. We have heard learned counsel for the parties and have carefully examined the records of the present appeal as well as the original records of the court below. The material placed on record would clearly go to show that the two sons of accused Somwati were born out of her wedlock with late Nanku, who had pre-deceased his two sons. It has further come on record that co-accused Kallu was in some sort of relationship with Somwati and was living in the same house with her for last about two years. It further transpires on record that the deceased brothers were in care and custody of the accused and were living in the same house, in which the accused persons were living. It has further come on record that the two brothers have died on account of administering of poison to them and it is a case of homicidal death.

14. The motive for administering poison is the first issue that needs careful examination by this Court. As per the prosecution Kallu wanted to purchase a tractor and for such purposes he came in contact with one Jairaj, who was an Agent of the Tractor Agency at Ghatampur. Jairaj is alleged to have informed Kallu that loan for tractor cannot be arranged as the land to be mortgaged for the purpose was in the name of two brothers Ramchandra and Veeru. The further case of the prosecution is that Jairaj suggested that in the event two brothers are poisoned the land would then come in the share of accused Somwati and loan for purchase of tractor could thus be secured.

15. There is no documentary evidence brought on record to show that any application for grant of loan was ever submitted by the accused to the Tractor Agency or the Bank. The agent Jairaj, who allegedly suggested the deceased brothers to be poisoned for arranging loan, and also informed the accused that loan cannot be arranged as the land stood in the name of the two deceased, has not been produced.

Our attention has been invited to the chargesheet in which Somwati and Kallu are the only two accused against whom evidence has been collected by the prosecution upon conclusion of statutory investigation under Chapter XII of the Code of Criminal Procedure. In the chargesheet there is no narration that investigation was continuing against Jairaj or that Jairaj was absconding. Although our attention has been invited to the statement of the Investigating Officer, as per which investigation against Jairaj was continuing and he was absconding, but such bald assertion is not substantiated from the documentary evidence on record. The documentary evidence in the nature of chargesheet clearly goes contrary to the statement of Investigating Officer, inasmuch as the chargesheet was expected to contain a narration to the effect that investigation was continuing against Jairaj. The fact that no such narration is contained in the chargesheet would clearly go contrary to the prosecution case that investigation was continuing against Jairaj.

16. Presence of Jairaj for ascertaining the truth in the matter was otherwise necessary, inasmuch as the primary motive for commissioning of the offence as per prosecution is the advise of Jairaj. It is Jairaj who is said to have informed the accused that loan cannot be arranged since the land is in the name of deceased Ramchandra and Veeru.

17. At this stage, we may refer to Khatauni (record of rights), available on record, in which apart from Ramchandra and Veeru the name of Somwati is also recorded as tenure-holder over the land in question. Her share has been admitted to be half by the prosecution witness PW-5. He has further stated that the land was valued at Rs. 10,000/ to Rs. 20,000/- per bigha. The total available land in Khata No.709, held in the name of minors Ramchandra and Veeru and their mother is about 2.2530 hectare. Half of the land would thus work out to about 1.1 hectare which could be about 3 to 4 bighas. There is nothing on record to show as to what was the cost of the tractor or that how much land was required to be mortgaged for securing sufficient loan so as to purchase the tractor. There is otherwise no evidence to show that land falling in the name of Somwati was insufficient to arrange required loan warranted for purchase of tractor.

18. The prosecution case, to the contrary, is that the entire land was in the name of Ramchandra and Veeru and unless they died no land would come in the share of Somwati for being mortgaged to secure the loan. The very premise or genesis of the prosecution case, therefore, proceeds on a mistaken factual belief that no land was available with Somwati. Even otherwise, we find that no loan was applied by the accused with the Tractor Agency or with the Bank. In the event Jairaj was absconding, as is stated by the Investigating Officer, the prosecution ought to have produced any other person from the Tractor Agency to substantiate that the accused wanted to purchase a tractor or in fact had applied for loan or that such loan could not be extended to them in the absence of availability of land to be kept as mortgage. The prosecution, therefore, has failed to establish the motive for commissioning of offence on part of the appellant.

19. In the facts of the case, we also find that the accused Somwati, who is the mother of the deceased Ramchandra and Veeru has moved an application that her land has been encroached upon by villagers

in her absence. This fact has to be seen in the context of the plea taken by the accused in their statement under Section 313 Cr.P.C. that the villagers had poisoned their sons so as to grab their land and house. The defence of the accused to certain extent thus find corroboration from the letter of Somwati dated 27.9.2008, which is on record. It is otherwise the position in law that after death of the two sons and their mother the land would go to the male heir of late Nanku.

20. We find that the conspiracy to poison the deceased by administering them poison by mixing it in banana was also hatched by Jairaj against whom neither any chargesheet has been filed nor he appears to have been interrogated. This is a serious flaw in the prosecution case.

21. The prosecution case essentially rests upon the confessional statement made by the two accused that they administered poison to their sons for securing the loan to purchase a tractor. The confessional statement has not been made before the Court. The extra-judicial confession is stated to have been made before the police and also before the villagers namely PW-1, PW-2 and PW-5. PW-1, however, has not supported the plea of confession at the stage of trial. PW-2 and PW-5 are villagers, who may have had to gain since the land of deceased has been usurped by the villagers.

22. We also find from the testimony of prosecution witnesses that the accused had not voluntarily made any confession. PW-1 and other witnesses of fact have clearly stated that the villagers had to be tough with the accused for them to make the confessional statement. This clearly suggests that confession was under duress. PW-1 has otherwise admitted that hundreds of persons had gathered outside the house of late Nanku and the possibility of pressure/coercion cannot be ruled out in light of the statement of prosecution witnesses themselves.

23. The basis for implication of the accused appellant primarily is the extra-judicial confessional statement of the accused Somwati and Kallu that they had administered poison to the deceased. For a confession to be relevant in criminal proceedings it must be shown not to be caused by inducement, threat or promise (see: Section 24 of the Indian Evidence Act, 1872).

24. Learned Amicus Curiae submits that the alleged confessional statement of accused was not voluntary, as the prosecution witnesses have specifically stated that the villagers had to be tough with the accused and only thereafter the accused made their confessional statement. Submission is that the alleged confession was, therefore, obtained by exercising coercion and cannot be said to be voluntary. Learned Amicus Curiae places reliance upon a judgment of the Supreme Court in the case of State of Haryana Vs. Jagbir Singh and another, reported in AIR 2003 SC 4377, wherein the Court observed as under in Paragraph 20:-

"20. Great emphasis was laid by the learned counsel for the State on the evidence of PW 4, the Additional CJM that the accused had admitted that the signature was his. This statement is of no assistance. The witness has admitted that the statement was made before him by the accused in the presence of the police officials. The second circumstance is the alleged extra-judicial confession before PW 10. The High Court has analysed the evidence in great detail. It

is on record that the accused Jagbir was being taken to various places and at different points of time he was being pressurized to make a statement. Though the accused was claimed to have made the statement in the presence of a large number of persons, a combined reading of the evidence shows that nobody else speaks about the so-called extra-judicial confession, not even those who have been examined as PWs. Though PW 10 said that there were many persons who had heard it, no other person has stated about it. The statements of PWs 7 and 10 go to show that the accused was being interrogated by PWs and other villagers as well as his father and other relatives. Interrogation continued for about 3 days when allegedly Jagbir confessed his guilt. Though the first information report was lodged by PW 7 after knowing about the extra-judicial confession, there is no mention about this vital fact. In a given circumstance, omission to mention about the particular aspect may not render the prosecution version suspicious. But when circumstances in the present case are taken in their entirety the alleged extra-judicial confession is not believable. In order to make an extra-judicial confession a reliable evidence it has to be shown that the same was voluntary. The factual scenario as presented by the prosecution goes to show that the alleged extra-judicial confession cannot be termed to be voluntary even if it was said to have been made, as claimed. The High Court was right in discarding the alleged extra-judicial confession."

25. The evidentiary value of a extra-judicial confession came to be examined by the Supreme Court in State of Punjab Vs. Bhajan Singh and others, AIR 1975 SC 258, wherein the Court held as under in Paragraph 15:-

"15. Coming to the evidence of extra-judicial confessions, we find the same to be improbable and lacking in credence. According to Gurmej Singh and Jabarjang Singh PWs, the confessing accused came to them and blurted out confessions. They also requested these two witnesses to produce them before the police. The resume of facts given above would go to show that according to the prosecution case the murders of the three deceased persons were committed in a most heinous manner and under a veil of secrecy. Persons who commit such murders after taking precautions of secrecy are not normally likely to become garrulous after the commission of the offence and acquire a sudden proneness to blurt out what they were at pains to conceal. In any case it seems rather odd that all the three accused who had not been arrested till the morning of May 9, 1972 should be seized almost at the same time by a mood to make confession. It is significant that Surjit Singh, Charan Kaur and Jito accused had no particular relationship or connection with Gurmej Singh and Jabarjang Singh PWs. These two witnesses were also not in such a position that the abovementioned three accused would be willing to repose their confidence in them. If Surjit Singh, Charan Kaur and Jito wanted to surrender themselves before the police, we fail to understand as to why they should not themselves surrender before the police and go instead to Gurmej Singh and Jabarjang Singh and blurt out confessions before them. The evidence of extra-judicial confession in the very nature of things is a weak piece of evidence. The evidence adduced in this respect in the present case lacks plausibility and, as observed by the High Court, it does not inspire confidence."

26. Law is thus settled that extrajudicial confession by its very nature is a weak evidence and requires examination with a

great deal of care and caution. When the extrajudicial confession is attended by suspicious circumstances its credibility otherwise becomes weak. As a matter of prudence the courts normally look forward to corroboration of facts independently, before such extrajudicial confession is taken note of or is relied upon to convict an accused.

27. The attending circumstances in the form of motive is not established in the facts of the case. We further find that the villagers have actually gained on account of the implication of the accused, inasmuch as, the landed property belonging to the accused Somwati has apparently been grabbed by the villagers. The villagers, therefore, were to gain by attributing confession to the accused Somwati and Kallu. The extrajudicial confession is thus not found to be corroborated from the evidence available on record.

28. The only other material which surfaces on record is the peel of banana which is recovered from the spot and has been subjected to forensic examination wherein it is found that the banana did contain aluminum phosphide and was apparently the cause of death. It has also come on record in the report of forensic laboratory, upon examination of viscera, that aluminum phosphide was present. This evidence would at best show that the deceased were poisoned and that poisoning was the cause of death. This in itself would not lead to an inference that the poisoning was done by the accused persons. Since we find that the confession on part of accused is not supported by any independent corroboration with regard to their role in poisoning the deceased the mere report of the forensic laboratory, on its own, would not constitute any basis to implicate the accused appellant.

29. In the event the confession is ignored the prosecution case rests upon the circumstantial evidence and the prosecution has not been able to show that only hypothesis available in this case points to the guilt of the accused and that no alternative hypothesis exists in the facts of the case.

30. This is a case of circumstantial evidence and the law on the point is well settled that the prosecution must prove the complete chain of events, which points the exclusive hypothesis of guilt attributed to the accused appellant. It is also the requirement of law that the prosecution must show that alternative hypothesis does not exist on facts.

31. Before proceeding with the deliberation any further it would be appropriate to refer to the law governing the case of circumstantial evidence.

32. In Sharad Birdhichand Sarda vs. State of Maharashtra reported in (1984) 4 SCC 116, the Apex Court evolved five tests to be established by the prosecution in order to prove the guilt of accused based on circumstantial evidence. Five golden principles have been enumerated in paragraph nos. 152 to 154, which are reproduced hereinafter:-

"152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hunumant vs. The State of Madhya Pradesh. This case has been uniformly followed and applied by this Court in a large number of later decisions uptodate, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh and Ramgopal v. Stat of

Maharashtra. It may be useful to extract what Mahajan, J. has laid down in Hanumant's case (supra):

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground far a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade & Anr. V. State of Maharashtra, where the following observations were made:

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say. they should not be explainable on any other hypothesis except that the accused is guilty, (3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

33. Judgment of the Supreme Court in the case of Sharad Birdhichand Sarda (Supra) has consistently been followed and reiterated recently by the Court in the case of Ram Niwas Vs. State of Haryana reported in 2022 SCC OnLine SC 1007.

34. When we analyse the evidence on record on the above touch stone, we come to the conclusion that the prosecution has failed to prove the guilt of the accused appellant beyond reasonable doubt. It has not been proved by the prosecution that chain of events in the present case lead only to the hypothesis of guilt on part of the accused appellant and an alternative hypothesis cannot be ruled out. The accused appellant is, therefore, clearly entitled to benefit of doubt in the matter.

35. The alternative hypothesis on behalf of accused that the relatives/villagers may have administered poison as they have ultimately succeeded in grabbing their land has been probablised. We, therefore, find that an alternative hypothesis does exist in the facts of the case. Once that be so, the conviction and sentence of accused appellants based on the circumstantial evidence would clearly be impermissible.

36. Upon the evaluation of the evidence led by the prosecution, we, therefore, come to the conclusion that the prosecution has failed to establish the guilt of the accused appellants beyond reasonable doubt on the basis of which their conviction could be recorded.

37. The court below has also erred in relying upon the confessional statement without evaluating the evidentiary value of such statement in correct legal perspective. The provisions of the Evidence Act dealing with the confessional statements of the accused have not been examined by the court below while recording the guilt of the accused appellants. The judgment and order of the court below, in such circumstances, cannot be approved of.

38. For the discussions and deliberations held above, we find that the accused appellants are clearly entitled to benefit of doubt as the prosecution has not been able to prove their guilt beyond reasonable doubt.

39. Consequently, the present jail appeal succeeds and is allowed. The judgment and order dated 27.9.2008, passed by the Additional Sessions Judge, Court No. 1, Kanpur Dehat in Sessions Trial No. 452 of 2007, State vs. Somwati and another; whereby the appellants Somwati and Kallu have been convicted under section 302 r/w 34 IPC in Case Crime No.223/2007, Police Station Sajeti, District Kanpur Dehat, and sentenced to life imprisonment, is set aside. The appellant Kallu shall be released from Jail, forthwith, unless he is wanted in any other cases, subject to compliance of Section 437-A Cr.P.C. So far as accused Somwati is concerned, she has already died during pendency of the present Jail Appeal and the appeal at her instance has abated as is clear from the order dated 9.11.2022.

40. A copy of this order shall be communicated to the accused appellant in Jail through Chief Judicial Magistrate/Jail Superintendent concerned, forthwith.

41. We record our appreciation for the valuable assistance rendered by learned Amicus Curiae Mr. Virendra Pratap Yadav. He shall be entitled to his fee, which we quantify at Rs.15,000/- to be paid by the High Court Legal Services Authority.

(2022) 11 ILRA 205
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.11.2022

BEFORE

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

Criminal Appeal No. 3411 of 2018
&
Criminal Appeal No. 2819 of 2019

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

Counsel for the Appellant:
Smt. Abhilasha Singh, Sri Ravi Shankar Tripathi, Archana Singh Jadaun, Sri Chandra Jeet Singh, Sri Santosh Kumar Singh, Sri Ashotosh Yadav

Counsel for the Opposite Party:
G.A., Sri Pankaj Satsangi

Criminal Law – Criminal Procedure Code, 1973 - Sections 161, 313 & 437(a)- Indian Penal Code, 1860 - Sections 34, 147, 148, 149, 302, 323 & 506, - Arms Act, 1959 - Section - 25 - Criminal Appeal – Conviction & Sentence - Life imprisonment - Evaluation of Evidences - trial court fallen into grave error believing testimonies of PWs whom were no eye-witnesses and there where major contradiction in their testimony - held trial court did not appreciate the evidence in right perspective - accused are wrongly convicted - appeal allowed - impugned conviction set aside - appellants be released forthwith if not wanted in any other case. (Para – 21, 22, 24, 25)

Appeal allowed. (E-11)

List of Cases cited:

1. Criminal Appeal NO. 1826/2003 (Prem & ors. Vs St. of U.P.) decided on 08.04.2022,

2. Criminal Appeal NO. 429/1983 (Ram Subhag & anr. Vs St. of U.P.) decided on 09.10.2018,

3. (2004 vol 7 SCC 257),

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

1. These two criminal appeals have been preferred by the appellants against the judgement and order dated 30.05.2018, passed by Additional Sessions Judge, Court No.5, Badaun in S.T. No.519 of 2013 (State Vs. Rajnesh and others) arising out of Case Crime No.334 of 2012, under Sections 147, 148, 302/149 and 323/149 IPC, Police Station- Rajpura, District- Sambhal, whereby learned trial court convicted accused appellants Rajnesh and Vijay Pal under Section 302 r/w Section 34 IPC and sentenced each with life imprisonment and fine of Rs.10,000/- and six months simple imprisonment in case of default of fine. Trial court also convicted them under Section 323 r/w Section 34 IPC and sentenced each six months R.I. and fine of Rs.500/- and 15 days simple imprisonment in case of default of fine. Learned trial court acquitted all the other accused persons from all the charges framed against them and also acquitted accused appellant Vijay Pal of the charge under Section 25 of Arms Act. Both these appeals, being connected, are being decided together.

2. The brief facts of the case as culled out from the record are that a written report Ext. Ka.5 is submitted by informant Anek Pal at police station- Rajpura, District- Bhimnagar (Sambhal) with the averments that the in-laws' house of his brother Gauri Shankar is in Jethpura in the family of Ram Bhoop and the in-laws' house of accused Vijay Pal is also in the same village in the family of Kalyan. There is dispute going on between the families of in-laws of Gauri Shankar and Vijay Pal. His brother had gone to his in-laws' house for diffusing the dispute. Accused Vijay Pal and his in-laws took it as their insult and started silent enmity with them. Further averment is that that on 12.07.2012 at about 5:00 pm, the Rajnesh brother-in-law of accused Vijay Pal, Vijay Pal, Hari Shankar, Sher Pal, Raj Pal, Ram Khiladi and Mahesh, armed with weapons, came to the house of his brother Gauri Shankar and called him. His nephew Rama Shankar @ Pappu came out of the house. All the aforesaid accused persons got him and started beating with *lathi* and *danda*. On his hue and cry, his brother Gauri Shankar came out of the house then all the accused got Gauri Shankar and said to kill him. Then Rajnesh caught hold Gauri Shankar and Vijay Pal triggered a fire in the head of Gauri Shankar, who fell on the ground and died. Accused persons after seeing them fled away from the spot

stating that if anybody gave the evidence he will be killed.

3. On the basis of aforesaid written report, a first information report Ext.Ka.3 was registered at Police Station- Rajpura, District- Bhimnagar as Case Crime No.334 of 2012 under Sections 147, 148, 149, 302, 323 and 506 IPC. Station Officer Lakshmi Shankar took up the investigation. Statements of witnesses were recorded u/s 161 of Cr.P.C. I.O. went to the spot and prepared site-plan. Blood stained and plain earth were collected from the spot and recovery memo was prepared. Injured Rama Shankar was taken to the hospital where his medical examination was conducted and medico legal report was prepared. Inquest proceedings of the deceased were conducted and inquest report was prepared. Post mortem was conducted on the body of the deceased and doctor prepared post mortem report. During the course of investigation, the I.O. arrested the accused Vijay Pal, on whose pointing out a country made pistol (*Tamancha*) was recovered from his house, in which one empty cartridge was found in the barrel and one live cartridge was also recovered. *Tamancha* with empty cartridge were sent to Forensic Science Laboratory and report was received stating the fact that the empty cartridge was fired by the aforesaid *Tamancha*.

4. After completion of investigation, charge sheet was submitted by I.O. against accused Rajnesh, Vijay Pal, Hari Shankar, Raj Pal, Ram Khiladi and Mahesh under Section 147, 148, 149, 302, 323, 506 IPC. Accused Sher Pal, being juvenile, charge sheet was submitted against him in Juvenile Justice Board. Another charge sheet was also submitted against accused Vijay Pal, under Section 25 Arms Act after obtaining sanction from the District Magistrate. The case being triable exclusively by the Court of Sessions, the Magistrate committed the case to the Court of Sessions, where the learned Sessions Judge framed charges against all the accused persons u/s 147, 148, 302 r/w Section 149 IPC and 323 r/w Section 149 of IPC. Additional charge u/s 25 Arms Act was framed against accused Vijay Pal.

5. During the course of trial, prosecution produced following witnesses:

1.	Anek Pal	PW1
2.	Rama Shankar	PW2
3.	Raju Singh	PW3
4.	Dr. A.P. Gautam	PW4
5.	Kamal Singh	PW5
6.	Dr. S.P. Singh	PW6
7.	Lakshmi Shankar	PW7
8.	Room Singh Baghel	PW8
9.	Lakshmi Shankar Sharma	PW9

6. Apart from aforesaid oral evidence, the prosecution has filed following documentary evidence, which was proved by leading the evidence:

1.	FIR	Ext. Ka-3
2.	FIR	Ext. Ka-5
3.	Written Report	Ext. Ka-1
4.	Recovery memo of *Tamancha*, Live & Empty Cartridge	Ext. Ka-10
5.	Recovery memo of Blood Stained & Plain Earth	Ext. Ka-9
6.	Injury Report	Ext. Ka-7
7.	P.M. Report	Ext. Ka-2
8.	Vidhi Vigyan Prayogshala Report	
9.	Panchayatnama	Ext. Ka-

		13
10.	Charge sheet	Ext. Ka-12
11.	Charge sheet	Ext. Ka-19
12.	Order of District Magistrate	Ext. Ka-20
13.	Site Plan with Index	Ext. Ka-8
14.	Site Plan with Index	Ext. Ka-11
15.	Site Plan with Index	Ext. Ka-18

7. After completion of prosecution evidence, statements of accused persons were recorded u/s 313 of Cr.P.C., in which they told that false case was made out against them and false evidence is produced. Accused persons filed one document, i.e., copy of G.D. in their defense.

8. Learned trial after hearing the arguments of both the sides acquitted all the accused persons of all the charges except appellants Rajnesh and Vijay Pal, who were convicted and sentenced u/s 302 r/w Section 34 of IPC and Section 323 r/w Section 34 of IPC. Appellant Vijay Pal was acquitted of the charge u/s 25 Arms Act also. Hence, this appeal.

9. Heard Smt. Abhilasha Singh, learned counsel for the appellants and learned AGA for the State as well as perused the record.

10. Learned counsel for the appellants first of all submitted that appellants were having no motive to commit the offence as charged by prosecution. She submitted that as per prosecution case, the in-laws' house of deceased brother Gauri Shankar and in-laws' house of Vijay Pal are in the same village, where both the family members of their in-laws were having enmity with each other. It is also a case of prosecution that Gauri Shankar had gone to his in-laws' house to diffuse the enmity but this cannot be the motive to commit a brutal murder. Learned counsel also referred the statement of PW1 Anek Pal, where he has stated in his cross-examination that there was no enmity between them and accused. Hence, there was no motive with the appellants to commit the murder of deceased Gauri Shankar. Hence, motive set up by the prosecution is absolutely unbelievable.

11. Learned counsel for the appellants submitted that prosecution case cannot be believed on this ground alone that prosecution has established the case that at the time of occurrence, appellant Rajnesh caught hold the deceased and appellant Vijay Pal triggered the fire in his head. Learned counsel submitted that in such a position, the appellant catching hold the deceased could also sustain the fire arm injuries and his life could also be in danger but he did not sustain even a small injury. Moreover, so called injured eye-witness PW2 Rama Shankar has stated that Vijay Pal fired from behind which is contrary to the post mortem report. In post mortem report it is shown in ante mortem injuries that gun shot entry wound was in the left side of the head of the deceased and exit wound was on the right side. Hence, this evidence of PW2 that fire was triggered from behind falsifies his evidence and further it also falsifies the fact that deceased was caught hold by appellant Rajnesh because when bullet exited from right side of the head it should have been hit the appellant Rajnesh also, who is said to catch hold the deceased from right side.

12. Learned counsel for the appellants further submitted that prosecution case is

also falsified with the fact that although a country made pistol of .315 is said to be recovered from the house of the appellant Vijay Pal on his pointing out, which is sent to Forensic Science Laboratory, from where report was received that the empty cartridge, found in the barrel, was fired with the recovered weapon. But this recovery was found fake and trial court acquitted the appellant Vijay Pal of the charge u/s 25 of Arms Act. When this recovery of weapon was found false, the entire case comes into the dark shadow. It is also submitted that learned trial court has opined that it is not always necessary that in each case weapon is required to be recovered. If weapon is not recovered then also accused may be convicted for the offence like murder, if it is otherwise proved. Learned counsel argued that this opinion of the learned trial court may be correct but this is a case where I.O. recovers the weapon at the instance of appellant and this recovery is found fake. This fact is not properly considered by the trial court.

13. Learned counsel for the appellants vehemently submitted that prosecution has produced three witnesses of fact PW1, PW2 and PW3 and there are several contradictions in their testimony, which go to the root of the case and it is proved that no one is eye-witness. They have not seen the occurrence at all, even PW1 admits in his cross-examination that he reached to the spot after 5 minutes of the occurrence and learned trial court also did not consider him eye-witness. PW2 and PW3 were also not present on the spot, which is proved by their testimony.

14. Learned counsel for the appellants relied on the judgements of this High Court in **Criminal Appeal No.1826 of 2003 (Prem and others Vs. State of U.P.)** decided on 8.4.2022 and in **Criminal Appeal No.429 of 1983 (Ram Subhag and another Vs. State of U.P.)** decided on 09.10.2018.

15. Learned AGA opposed the submissions made by learned counsel for the appellants and contended that this is a day light occurrence and there are three eye-witnesses. There is no material contradiction in the evidence of eye-witnesses. Moreover, as per ante mortem injury in post mortem report, there is one gun shot entry wound on the left side of the face of the deceased and exit wound in the right side of the head. Prosecution case is also a case of single fire in the head of the deceased. Hence, ocular evidence is very well corroborated by the medical evidence. Learned AGA further contended that if recovery of weapon is not proved then it cannot be concluded that appellants have not committed murder of the deceased because it is not necessary to find out the weapon in each case. All the three eye-witnesses are resident of neighborhood. Hence, their presence on the spot cannot be doubted. Learned trial court has rightly convicted and sentenced both the appellants. Hence, there is no illegality in the impugned judgement which requires any interference by this Court.

16. Prosecution has set up the case that on the fateful day, both appellants Rajnesh and Vijay Pal went to the house of the deceased Gauri Shankar along with five other accused persons and called him to come out of the house. Firstly, the son of the deceased Gauri Shankar, namely, Rama Shankar came out of the house and all the accused persons started beating him by *lathi* and *danda*. On his hue and cry, the deceased Gauri Shankar came out of the

house and all the accused persons started beating him and said to kill him. Then and there, appellant Rajnesh caught hold Gauri Shankar and Vijay Pal triggered a fire in his head, due to which Gauri Shankar fell on the ground and died.

17. Prosecution produced three eye-witnesses of the occurrence, namely PW1- Anek Pal, PW2- Rama Shankar and PW3- Raju Singh. PW1- Anek Pal is brother of the deceased, PW2 Rama Shankar is son of the deceased and PW3 Raju Singh is nephew of the deceased. Hence, all the three eye-witnesses are related witnesses. Evidence of interested or related witness cannot be disbelieved on the ground that they were interested or related witnesses, but their testimony should be scrutinized with great care and caution. Keeping this proposition of law in mind, we have analyzed the evidence of all the aforesaid three eye-witnesses meticulously. For the sake of analyses of evidence, we put the case in two parts. First part- beating Rama Shankar by seven named accused persons and second part- where appellant- Rajnesh caught hold the deceased and appellant- Vijay Pal fired at his head. As far as first part is concerned, as per prosecution case when Rama Shankar, son of the deceased, came out of his house, all the seven named accused persons started beating him by *lathi* and *danda*. This Rama Shankar is produced by prosecution as PW2, he has deposed in his examination-in-chief that when he came out of the house accused persons gave him beating by lathi, *danda* and backside of *tamancha*. He has deposed in his cross-examination that his father (deceased) came out of the house after 20 minutes of his coming out and during this period, accused persons were beating him. But the medical report of Rama Shankar Ext. Ka.7 shows otherwise. In this report there are only three injuries. Injury No.1 is contusion with swelling below left knee joint, injury No.2 is contusion with swelling at right knee joint and injury No.3 is complaint of pain in body. All injuries were simple in nature. Hence, there was just two injuries to Rama Shankar, which were only contusion. There should have been serveral injuries if seven persons beat one person with *lathi*, *danda* and backside of *tamancha*, that too for a period of 20 minutes or so. It creates doubt with regard to the presence of PW2 Rama Shankar at the place of occurrence. Now the meticulous analysis of oral testimony of PW2 goes to show that in cross-examination, he has deposed that when he reached at the place of occurrence, Anek Pal and Raju Singh (PW1 and PW3) were present there. It means that PW2 reached to the spot after PW1 Anek Pal and PW1 Anek Pal says that he went to the occurrence after 5 minutes on hearing the sound of fire and before him there were lot of people at the spot and no accused was present there. The presence of PW1 was not believed by the trial court also and it held that PW1 is not the eye-witness and if PW2 Rama Shankar reached to the spot after Anek Pal then he also cannot be held to be the eye-witness. PW2 has categorically stated that he saw Raju, Anek Pal and accused persons but Anek Pal says that he did not see any accused and reached to the spot after 5 minutes of the occurrence. Hence, the presence of PW2 has also become doubtful to the great extent at the place of occurrence. Moreover, PW2 establishes this case as it was case of two fires because he says that there was one empty cartridge lying on the spot but no such empty cartridge is recovered by the I.O. on the spot. Apart from it, if we analyze the testimony of PW2 in the light of medical evidence then also it

creates doubt because PW2 has specifically stated that Rajnesh caught hold his father from the right side and appellant Vijay Pal fired from the back side but ante mortem injury No.2 in post mortem report goes to show that it was exit wound in the back side of the head of the deceased. If accused Vijay Pal would have fired from back side then there should have been entry wound in the back side of the head and not the exit wound as mentioned in post mortem report. Hence, PW2 Rama Shankar is not eye-witness and now there remains testimony of PW3 as eye-witness. At one place in cross-examination, he has deposed that when he reached to the house of deceased Gauri Shankar, no villager was there. He was alone and after that his father Anek Pal (PW1) also reached there. Further he has stated that he and his father Anek Pal (PW1) reached to the place of occurrence simultaneously. He has specifically stated that it was no so that he reached earlier than his father Anek Pal. If it was so then, as discussed above, the presence of PW1 at the place of occurrence has been found false, hence, the presence of PW3 Raju Singh is also very much doubtful and this doubt further gets strength from his statement in further cross-examination where he has deposed that he heard the sound of one fire. At that time, he was talking to his father in his house. It means that when the fire was opened to the deceased, PW3 was sitting in his house with his father and since this is case of one fire, it can safely be held that PW3 is also not the eye-witness and he has not seen the occurrence.

18. This High Court in the cases, relied on by learned counsel for the appellants, namely, **Prem and others** (supra) and **Ram Subhag and another** (supra) has held that mere consistency in the testimony of the prosecution witnesses is not the sole test of truth as even falsehood can be given an adroit appearance of truth, so that truth disappears and falsehood comes on the surface. Therefore, what the court has to look at, and assess, is whether the prosecution evidence coupled with the surrounding circumstances has a ring of truth or there arises a strong suspicion and high probability of false implication of the accused put on trial.

19. PW4 Dr. A.P. Gautam had conducted post mortem on the body of the deceased and following ante mortem injuries were found:

(i) Fire arm entry wound size 1cm x 1 cm on left side face, 7 cm anterior from tragces of left ear.

(ii) Fire arm exit wound size 2.5 cm x 2 cm on right side occipital region of head.

20. Hence, it was a case of one fire only and as discussed above, PW1, PW2 and PW3 are proved not to be the eye-witness of the occurrence and their testimony cannot be relied on, but the learned trial court although mentioned in the judgement the material contradictions in their testimony but based conviction of the appellants mainly on the basis of their statements made in examination-in-chief only. Presence of PW1 at the place of occurrence is not relied upon by the trail court, which is correct finding but presence of PW2 and PW3 is also not proved at the spot. There are several material contradictions in their testimony, denying their presence, which go to root of the matter and shatter the entire prosecution case. Since, the prosecution has produced three eye-witnesses and the presence of all

these eye-witnesses is very much doubtful rather it is proved that they were not present at the place of occurrence and have not seen any incident as alleged by prosecution, there emerges strong suspicion and high probability of false implication of the accused-appellants on the basis of enmity between the families of in-laws of deceased and appellant Vijay Pal. False implication of appellant- Rajnesh is also due to enmity. This enmity is explained by PW2.

21. After sifting the evidence as above, we are of the considered opinion that learned trial court has fallen into grave error in believing the testimony of PW2 and PW3 because it is well proved that they were not the as eye-witness. Learned trial court has not taken into consideration that material contradictions in their testimony and these contradictions are so major that they go to the very root of the prosecution case and shatter it.

22. Hence, we are of the considered view that learned trial court did not appreciate the evidence in right perspective and misread it. Appellants- Vijay and Rajnesh are wrongly convicted by trial court under Section 302 r/w Section 34 IPC and Section 323 r/w Section 34 IPC. Hence, we upturn the finding of learned trial court convicting the appellants and the appeal is liable to be allowed.

23. Accordingly, both the appeals are **allowed**.

24. Impugned judgement is set aside. Conviction and sentence of both the appellants under Section 302 r/w Section 34 IPC and Section 323 r/w Section 34 IPC is hereby set aside and appellants are acquitted of the aforesaid charges.

25. The accused-appellants be released from jail forthwith if not wanted in any other case.

26. Record and proceedings be sent back to the court below.

27. In Criminal Appeal No. 2819 of 2019 Smt. Abhilasha Singh, Advocate was appointed as Amicus Curiae as learned counsel for the appellant did not appear. She will be paid Rs.15,000/- as remuneration by the High Court Legal Services Committee.

(2022) 11 ILRA 212
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.10.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 3856 of 2015

Munna @ Parvez
...Applicant/ Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Mahesh Prasad Yadav, Sri Brijesh Sahai, Sri Mohammad Asif, Sri Ram Jatan Yadav, Sri Arun Kumar Srivastava, Sri Girish Kumar Singh

Counsel for the Opposite Party:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Sections 161 & 313 - Indian Penal Code, 1860 - Sections 34, 299, 300, 302, 304 part-I, 307, 354 Ka & 354-Gha - Indian Evidence Act, 1872 - Sections- 32 &

60- Criminal Appeal – Conviction & Sentence - Life imprisonment with fine – evaluation of evidences - offence of teasing & murder - FIR - informant alleged that accused are used to tease his daughter and date on incident they asked to her by giving mobile to call them when she denied, being angry, they tried to drag her and by sprinkled kerosene on her and set her ablaze - dying declaration - distinction between 'murder' and 'culpable homicide'- admittedly death caused by the accused was not premeditated, they had no intention to caused death - injuries were though sufficient in the ordinary course of nature to have caused death - held, instant case fall under the exception 1 and 4 to section 300 of IPC - hence, appeal is liable to be partly allowed - impugned conviction u/section 302 IPC is liable to be converted into conviction u/section 304 Part - I IPC.(Para – 43, 45, 46)

Appeal Partly allowed. (E-11)

List of Cases cited:

1. Surinder Kumar Vs St. of Pun., (2020) 2 SCC 563,

2. Bhagwan Jagannath Markad Vs St. of Mah., (2016) 10 SCC 537,

3. Dhari & ors. Vs St. of U.P., AIR 2013 SC 30,

4. Shyam Babu Vs St. of U.P., AIR 2012 SC 3311,

5. Shyamal Ghosh Vs St. of W.B., AIR 2012 SC 3539,

6. Dayal Singh Vs St. of Uttaranchal, AIR 2012 SC 3046,

7. Amit Vs St. of U.P., AIR 2012 SC 1433,

8. St. of Haryana Vs Shakuntala & ors., 2012 (77) ACC 942 (SC),

9. Bikau Pandey Vs St. of Bihar, (2003) 12 SCC 616,

10. Anil Rai Vs St. of Bihar, (2001) 7 SCC 318,

11. Deepak Verma Vs St. of H.P., (2011) 10 SCC 129,

12. Lakhan Vs St. of M. P., (2010) 8 SCC 514,

13. Krishan Vs St. of Har., (2013) 3 SCC 280,

14. Ramilaben Hasmukhbhai Khristi Vs St. of Guj., (2002) 7 SCC 56,

15. Hema Vs St., (2013) 81 ACC 1 (SC),

16. Tukaram & ors. Vs St. of Mah., (2011) 4 SCC 250,

17. B.N. Kavatakar & anr. Vs St. of Karn., 1994 SUPP (1) SCC 304,

18. Veeran & ors. Vs St. of M.P., (2011) 5 SCR 300,

19. Khokan Alias Khokhan Vishwas Vs St. of Chhattisgarh, (2021) 2 SCC 365,

20. Anversinh v. St. of Guj., (2021) 3 SCC 12,

21. Pravat Chandra Mohanty Vs St. of Odisha, (2021) 3 SCC 529,

22. Pardeshiram Vs St. of M.P., (2021) 3 SCC 238.

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

1. This Criminal Appeal has been directed against the judgment and order dated 15.7.2015 passed by the Additional Sessions Judge, Fast Track Court, Pilibhit in Sessions Trial No. 435 of 2013 (Case Crime No. 362 of 2013), P.S. Kotwali Pilibhit, District Pilibhit convicting and sentencing the appellant under Section 302 I.P.C. for life imprisonment and a fine of Rs. 10,000/-, under Section 354-ka IPC for three years rigorous imprisonment and a fine of Rs. 5,000/- and under Section 354-gha IPC for three years rigorous imprisonment and a fine of Rs. 5,000/- with

stipulation of default clause. All the sentences were directed to run concurrently.

2. Brief facts, as culled out from the record, are that a First Information Report was lodged by the informant, Zahid Khan son of Shri Puttan, resident of Veni Chaudhary, Police Station Kotwali Sadar, Pilibhit, at Police Station Kotwali Sadar, District Pilibhit with the averments that Munna, Adnan son of Dilshel Khan and Amar son of Mohd. Umar used to tease her daughter Hima by passing comments which was complained to their guardians but they did not stop their activities. On 20.5.2013, at about 8.00 p.m. when his daughter was returning from the house of her Bua in front of the gate of the house, the aforesaid Munna and others gave mobile to Hima and asked her to call to them with the said mobile but Hima did not accept the mobile, due to which being angry they tried to drag her. Angreed with Hima's protest, the aforesaid Munna and others sprinkled kerosene on her and set her ablaze. Hearing her cry, Shahid, son of the informant and Gudia, wife of Afaq and the local residents reached there and on their exhortation, the aforesaid Munna and others ran away. Information about the incident was given at Police Station Kotwali at 9.30 p.m. and the injured was hospitalized in District Hospital, Pilibhit where her dying declaration (Ext. ka-11) was recorded by the Nayab Tehsildar, Pilibhit. He also took her thumb impression over the same. Victim was conscious at the time of statement.

3. On the basis of the written report (Ext. ka-1), chik First Information Report (Ext. Ka-2) was registered at Police Station concerned on 20.5.2013 at 9.30 p.m. against Munna, Adnan and Amar at case crime no. 362 of 2013 under Sections 354-ka and 354-gha and 307 IPC.

4. Investigation of the case proceeded. During course of investigation, the Investigating Officer recorded the statement of witnesses, prepared site plan, inquest report was prepared and post mortem was performed. During the course of instigation, the victim died. After making thorough investigation, charge sheet was submitted against the accused. Concerned Magistrate took cognizance on the charge sheet. On 19.7.2013 and 13.9.2013 respectively accused Adnan and Amar were declared juvenile in conflict with law and their files were separated and sent to Juvenile Justice Board. The learned Magistrate summoned the accused Munna and committed the case to Court of Sessions, as prima facie charges were for the sessions triable offences.

5. The charges framed were under Sections 354-ka, 354-gha, 307 IPC read with Section 34 IPC and 302 IPC read with Section 34 IPC. The accused-person pleaded not guilty and wanted to be tried. Trial started and in support of its case, prosecution examined 10 witnesses, who are as follows:

1	Zahid	PW-1 (informant) (father of the deceased)
2	Rashid	PW-2 (brother of deceased)
3	Asma Bee	PW-3 (aunt of deceased)
4	Ram Chandra Sharma	PW-4 (scribe of the F.I.R.)
5	Dr. Bhagwan Das	PW-5 (who performed the post mortem

		of the deceased and and gave certificate before the dying declaration of the deceased)
6	Gandhi Lal Sharma	PW-6 (who conducted the inquest of the deceased and prepared other papers)
7	Rajeev Nigam	PW-7 (Nayab Tehsildar Sadar, Pilibhit who recorded the dying declaration of the deceased)
8	Satendra Kumar Singh	PW-8 (Investigating Officer-III)
9	Rakesh Singh	PW-9 (Investigating Officer-I)
10	Anand Kumar Verma	PW-10 (Investigating Officer-II)

6. In support of oral version, following documents were filed and proved on behalf of the prosecution:

1	Written report	Ext. A-1
2	Chik F.I.R.	Ext. A-2
3	G.D. entry	Ext. A-3
4	Post mortem report	Ext. A-4
5	Inquest report	Ext. A-5
6	Challan Nash	Ext. A-6
7	Photo Nash	Ext. A-7
8	Letter to C.M.O.	Ext. A-8
9	Letter to R.I.	Ext. A-9
10	Specimen Seal	Ext A-10
11	Dying declaration	Ext. A-11
12	Charge sheet	Ext. A-12
13	Memo of clothings of deceased	Ext. A-13
14	Site plan	Ext. A-14
15	Copy G.D.	Ext. A-15
16	Certificate before recording the dying declaration	Ext. A-16
17	Certificate after recorded the dying declaration	Ext. A-17

7. Deceased was hospitalised after the occurrence. She died on the same day of the occurrence during the course of treatment.

8. The incriminating circumstances emanating from the prosecution evidence were put to the accused. In his statement recorded under Section 313 CrPC, he denied his involvement in the incident and pleaded false implication on account of enmity.

9. The accused in his defence has examined DW-1 Ishaq Ahmad, DW-2 Fahim, DW-3 Sharfuddin and DW-4 Jalil Miyan.

10. Relying upon the aforesaid evidence adduced by the prosecution, the trial court concluded that the prosecution succeeded in proving its case beyond reasonable doubt and convicted and sentenced the accused appellant accordingly.

11. The learned counsel for the appellant assailing the findings of the trial court recorded in the impugned judgment

argued that the impugned judgment is a product of surmises and and conjectures. The trial court did not appreciate the evidence on record in a legal and proper manner and the findings are contrary to law. The impugned judgment does not appear to be fair and just conclusion of the episode which invites interference of the appellate court and deserves to be set-aside. It has also been submitted that the sentence imposed by the trial court is too severe and the accused appellant invites indulgence of the appellate court to acquit him. The dying declaration, which also formed basis of conviction, is also not legally reliable. On the aforesaid grounds it has been prayed that the accused appellant be acquitted by allowing the present appeal.

12. Per contra, learned AGA appearing for the State has contended that there is no legal or factual error in the impugned judgment and it is a result of proper appreciation of facts and evidence on record and the dying declaration is also a reliable and cogent piece of evidence. On the aforesaid grounds, dismissal of the present appeal was prayed for.

13. Heard Shri Mahesh Prasad Yadav, learned counsel for the appellant and Shri N.K. Srivastava, learned AGA for the State.

14. At the very outset, the fact which draws our attention is that the present case rests upon the eye witness account. The facts of the case find support from oral evidence as well as the dying declaration of the deceased. It is found in the F.I.R. itself and also in the oral testimonies of PW-1, father of the deceased and PW-2, brother of the deceased, that earlier from the occurrence the named accused persons including the present appellant used to passing comments upon the deceased and their mischief was complained of by the informant to their family members also. As per the F.I.R. version at the time of occurrence the appellant alongwith other two co-accused whose trial was separated and sent to the Juvenile Justice Board, tried to give mobile phone to the deceased forcibly but she refused to take it being angry of which they tried to drag her and in the course of this incident they poured kerosene oil upon the deceased and set her ablaze.

15. PW-2, the brother of the deceased, has categorically stated in his evidence that when on cry of his sister he reached the spot, he saw the appellant Munna and other co-accused Adnan and Amar surrounding his sister. Co-accused Adnan and Amar poured kerosene oil over his sister and present appellant Munna set her ablaze. At the time of occurrence his father Zahid, mother Shamshadi Begum and other neighbourers came over there. Hima ran towards the house and laid on a cot. They took her to the hospital but after some time she died. The accused fled away from the scene of occurrence. This statement finds support from the statement of PW-1, informant, who has also categorically confirmed the role of present appellant in the occurrence. PW-1 and PW-2 both have stated that the present appellant and other co-accused used to tease the deceased and when she protested on the fateful day she was set ablaze by them. The informant has also proved the written report as Ext. A-1.

16. PW-3, Smt. Asma Bee, who is a native of the same vicinity, has also corroborated the prosecution version and has stated that when on the cry of Hima she reached the spot, she saw her burning and Munna, Adnan and Amar running away

from there. PW-1 and PW-2 have also stated that when Hima laid on the cot after the occurrence she had told that Amar, Adnan and Munna had set her ablaze and they used to tease her.

17. There is nothing in the cross-examination of PW-1, PW-2 and PW-3 which can be termed as inconsistent or untrustworthy statement.

18. It has been contended by the learned counsel for the appellant that there is no independent witness of the incident and all the aforesaid three witnesses are the family members of the deceased, which makes the prosecution story suspicious.

19. We do not find ourselves in agreement with the aforesaid plea taken by the learned counsel for the appellant. The legal position in respect of a relative witness has been made clear in a catena of decisions by the Hon'ble Apex Court and by this Court also. It is well settled that the testimony of a witness in a criminal trial cannot be discarded merely because the witness is relative or family member of the victim of the offence. In such a case the Court has to adopt a careful approach in analysing the evidence of such a witness and if the testimony of the related witness is otherwise found credible the accused can be convicted on the basis of testimony of such related witness. Recently, in ***Surinder Kumar Vs. State of Punjab (2020) 2 SCC 563*** Hon'ble Supreme Court has reiterated that merely because prosecution did not examine any independent witness, would not necessarily lead to conclusion that accused was falsely implicated. The same view has been taken in ***Bhagwan JagannathMarkad Vs. State of Maharastra (2016) 10 SCC 537, Dhari & Others Vs. State of U.P., AIR 2013 SC 308, Shyam Babu Vs. State of U.P., AIR 2012 SC 3311, Shyamal Ghosh Vs. State of WB, AIR 2012 SC 3539, Dayal Singh Vs. State of Uttaranchal, AIR 2012 SC 3046, Amit Vs. State of U.P., AIR 2012 SC 1433 and State of Haryana Vs. Shakuntala & Others, 2012 (77) ACC 942 (SC).*** In view of the aforesaid case laws and the trustworthy and cogent evidence of PW-1, PW-2 and PW-3 we are of the considered view that the learned trial court did not make any illegality in relying upon the testimonies of the aforesaid witnesses.

20. PW-4, Head Constable Ram Chandra Sharma, has proved the registration of F.I.R. on the basis of written report of informant Zahid Khan. He has proved the chik F.I.R. as Ext. A-2 and G.D. as Ext. A-3 and no adversity is found in his deposition. The proceedings of inquest has been proved by PW-6 S.I. Gandhi Lal Sharma who has not only proved the inquest report but also the papers sent for the post mortem i.e. challan nash, photo nash, letter to C.M.O., letter to R.I. as Ext. A-5 to Ext. A-9 and specimen seal as Ext. A-10. No unnatural statement has been made by this witness also.

21. It is pertinent to mention here the evidence of PW-5 Dr. Bhagwan Das, who has performed the autopsy of the deceased Hima. In his deposition PW-5 has proved the Autopsy Report as Ext. A-4 and the following ante mortem injuries were found by him :

"Superficial to almost deep burn injury present over body except lower abdomen and back of head. Front scalp hair burnt. Skin peeled out at places read colour of base of burn injury."

He has also opined that death was caused due to shock and mild asphyxia as a

result of extensive burn injury over the body (in the ante mortem injury). He has further stated that the deceased was 95% burnt. She was brought to the emergency of the hospital in a burn and living condition and was referred to surgery and was examined on 20.5.2013 at 9.00 p.m. General condition of the patient was very bad and pulse was not being found and B.P. was very much low. It is noteworthy that the post mortem of the deceased was conducted on 21.5.2013 at 1.40 p.m. and the death occurred on 21.5.2013 at 5.30 a.m..

22. On the basis of aforesaid evidence, we reach the conclusion that the offence was committed by the present appellant with the aid of other co-accused by burning and the prosecution has successfully proved its case to this extent.

23. Furthermore, from the statement of PW-1, PW-2 and PW-3 it is clear that the occurrence happened on the road near the house of the informant. The topography of the place of occurrence has been clearly shown in the site plan Ext. A-14 proved by PW-9, who has stated in his deposition that on pointing out of the informant of the case he had inspected the spot and prepared the site plan. Hence, the place of occurrence is certain and we, therefore, do not find any force in the contention of the learned counsel for the appellant regarding the fixation of place of occurrence.

24. The motive of the case was also hit by the learned counsel for the appellant, who has vehemently argued that the appellant had no reason to set the deceased ablaze and there was no previous enmity between the parties. Learned AGA has opposed this plea and submitted that since the present case rests upon the evidence of eye witnesses, there is no need to prove the motive of the offence for the prosecution. We also find ourselves in support of the plea taken by the learned AGA. In **Bikau Pandey Vs. State of Bihar (2003) 12 SCC 616** it has been held that when the direct evidence establishes the crime, motive is of no significance and pales into insignificance. In **Anil Rai Vs. State of Bihar (2001) 7 SCC 318** it has been held that enmity is a double edged weapon which can be a motive for the crime as also the ground for false implication of the accused persons.

25. There are catena of decisions on the point that in a case based upon the eye witness account, the motive loses its significance. In **Deepak Verma Vs. State of Himachal Pradesh (2011) 10 SCC 129** It has been held as under:

"...Proof of motive is not a sine qua non before a person can be held guilty of commission of crime. Motive being a matter of mind, is more often than not difficult to establish through evidence."

26. Moreover, in the present case it has been fully established by the cogent and reliable evidence of PW-1 PW-2 that the accused appellant used to tease the deceased who was a young girl alongwith other co-accused persons and when they failed in their planning to give a mobile phone to her to be in regular contact with her, they set her ablaze.

27. The trial court in the impugned judgment has discussed the aforesaid points at length and has made a categorical finding that the prosecution case is fully established on the basis of cogent and reliable evidence on the aforesaid points.

28. Both sides have made their rival contentions upon the veracity of dying declaration of the deceased. PW-7 the Nayab Tehsildar, Sadar has recorded the dying declaration of the deceased on 20.5.2013. Dying-declaration was recorded by him after obtaining the certificate of mental-fitness from doctor in the hospital. After completion of dying-declaration also the said doctor has given certificate that during the course of statement, the victim remained conscious.

29. Learned counsel for the appellant has argued that dying declaration is doubtful and not corroborated by witnesses of fact, hence, it cannot be the sole basis of conviction. Legal position of dying declaration to be the sole basis of conviction is that it can be so done, if it is not tutored, made voluntarily and is wholly reliable. In this regard, Hon'ble Apex Court has summarized the law regarding dying declaration in ***Lakhan vs. State of Madhya Pradesh*** [(2010) 8 Supreme Court Cases 514], in this case, Hon'ble Apex Court held that the doctrine of dying declaration is enshrined in the legal maxim nemo moriturus praesumitur mentire, which means, "a man will not meet his Maker with a lie in his mouth". The doctrine of dying declaration is enshrined in Section 32 of Evidence Act, 1872, as an exception to the general rule contained in Section 60 of Evidence Act, which provides that oral evidence in all cases must be direct, i.e., it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.

30. The law on the issue of dying declaration can be summarized to the effect that in case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. It is also held by Hon'ble Apex Court in the aforesaid case of ***Lakhan*** (supra) that a dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by officer of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim.

31. In the wake of aforesaid judgment of ***Lakhan*** (supra), dying declaration cannot be disbelieved, if it inspires confidence. On reliability of dying declaration and acting on it without corroboration, Hon'ble Apex Court held in ***Krishan vs. State of Haryana*** [(2013) 3 Supreme Court Cases 280] that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. Hence, in order to pass the test reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence

of the accused, who had no opportunity of testing the veracity of the statement by cross-examination. But once, the court has come to the conclusion that the dying declaration was the truthful version as to the circumstance of the death and the assailants of the victim, there is no question of further corroboration.

32. In ***Ramilaben Hasmukhbhai Khristi vs. State of Gujarat,*** [(2002) 7 SCC 56], the Hon'ble Apex Court held that under the law, dying declaration can form the sole basis of conviction, if it is free from any kind of doubt and it has been recorded in the manner as provided under the law. It may not be necessary to look for corroboration of the dying declaration. As envisaged, a dying declaration is generally to be recorded by an Executive Magistrate with the certificate of a medical doctor about the mental fitness of the declarant to make the statement. It may be in the from of question and answer and the answers be written in the words of the person making the declaration. But the court cannot be too technical and in substance if it feels convinced about the trustworthiness of the statement which may inspire confidence such a dying declaration can be acted upon without any corroboration.

33. From the above case laws, it clearly emerges that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused when such dying declaration is true, reliable and has been recorded in accordance with established practice and principles and if it is recorded so then there cannot be any challenge regarding its correctness and authenticity.

34. In the present case, dying declaration of the deceased was recorded by Nayab Tehsildar, Sadar, Pilibhit after obtaining the certificate of medical fitness from the concerned doctor. This dying declaration was proved by him. This witness is absolutely an independent witness and has no grudge or enmity to the convict at all. In the dying declaration, the deceased did not unnecessarily involved the other family members of the accused appellants. She only attributed the role of burning to accused appellant, who were actual culprit.

35. Learned counsel for the appellant has also assailed the proceedings of the investigation and has argued hat the investigation has not been done in a proper manner and there are several lacunas in the investigation. Learned trial court has elaborately discussed the several aspects of the investigation of the case and has found that there is no material lacuna or omission in the investigation of the case and we concur with the same. Moreover, it is also to be kept in mind that even if the investigation of the case is faulty but the prosecution succeeds to prove its case on the basis of other cogent evidence on record, it makes no adverse affect over the prosecution case. In ***Hema Vs. State (2013) 81 ACC 1 (Supreme Court)*** it has been held by the Hon'ble Apex Court that any irregularity or deficiency in investigation by I.O. need not necessarily lead to rejection of the case on prosecution when it is otherwise proved. The only requirement is to use of extra caution. The defective investigation cannot be fatal to prosecution when ocular testimony is found credible and cogent. It may be reiterated at the cause of repetition that investigation in the present case does not suffer with any material irregularity which goes to the root of the prosecution case.

36. One specific argument has been made from the side of the appellant to the

effect that the prosecution has not disclosed the genesis of the case in truthful manner and many material facts have been concealed. It is vehemently argued that it was not a homicidal death but the deceased committed suicide by setting her ablaze herself in the house of the informant himself. DW-1, DW-2 and DW-4 have been examined from the defence side to prove the aforesaid facts. They have stated in their respective depositions that at the time of the occurrence they had seen the deceased in burning condition over the roof of Zahid, the informant. They went over there and found that Hima was lying on the bed in burning condition and they had brought her away to the hospital. They have also stated that at the time of occurrence there was a power cut in the vicinity and they live nearby the house of the accused. DW-3 has also been examined to prove the factum of power cut at the time of occurrence. He is an employee of Electricity Division, Pilibhit and on the basis of official register he has proved this fact that on 20.5.2013 there was a shut-down in mohalla Beni Chaudhary from 8.05 p.m. to 8.35 p.m..

37. Learned AGA has vehemently opposed the aforesaid plea taken by the learned counsel for the appellant and contended that the parties were known to each other as they lived in the same vicinity which is called mohalla Beni Chaudhary, Pilibhit. Even if it is presumed that there was power cut at the time of occurrence, it cannot be said that the accused and his friends could not be identified by the prosecution witnesses of fact. Moreover, deceased was seen in burning condition by PW-1, PW-2 and PW-3 and in the light of the fire itself they could easily be identified by the witnesses. Hence, the evidence of DW-3 is of no help to the convict / appellant. The attention of this Court was also drawn by the learned AGA to the fact that DW-1 has stated in his evidence that the inquest proceedings were performed before him and he had made signature over the inquest report but he has admitted that at the time of inquest he did not disclose this fact to the police that it was a suicidal case. This omission makes his deposition unreliable. Likewise, testimony of DW-2 is also not reliable. In his cross-examination he has stated that whatsoever he has stated in his examination-in-chief he had informed to the police. It is noteworthy that there is nothing on record in writing regarding this fact. So far as the testimony of DW-4 is concerned, he has not seen the occurrence and has only seen the deceased crying and burning.

38. Learned trial court has discussed the defence evidence, above mentioned, at length and found it not reliable and we concur with the same.

39. Considering the evidence of the witnesses, the medical evidence including post mortem report and also considering the dying declaration, there is no doubt left in our mind about the guilt of the present appellant.

40. However, the question which falls for our consideration is whether, on reappraisal of the peculiar facts and circumstances of the case, the conviction of the appellant under Section 302 of I.P.C. of the Indian Penal Code should be upheld or the conviction deserves to be converted under Section 304 Part-I or Part-II of the Indian Penal Code. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

*"**299. Culpable homicide**: Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is*

likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

41. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder is the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

42. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra**, reported in **(2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka**, reported in **1994 SUPP (1) SCC 304**, we are of the considered opinion that the offence would be one punishable under Section 304 part-I of the IPC.

43. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused had no intention to cause death of deceased, the injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with deceased, hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

44. In latest decision in **Khokan Alias Khokhan Vishwas vs. State of**

Chhattisgarh, (2021) 2 Supreme Court Cases 365 where the facts were similar to this case, the Apex Court has allowed the appeal of the accused appellant. The decision of the Apex Court in the case of **Anversinh v. State of Gujarat, (2021) 3 SCC 12** which was related to kidnapping from legal guardian, wherein it was established that the Court while respecting the concerns of both society and victim, propounded that the twin principle of deterrence and correction would be served by reducing the period of incarceration already undergone by the accused. In our case, this is not that gruesome murder where the accused cannot be dealt with in light of all these judgments. Judgments in **Pravat Chandra Mohanty v. State of Odisha, (2021) 3 SCC 529 & Pardeshiram v. State of M.P., (2021) 3 SCC 238** will also enure for the benefit of the accused.

45. In view of the aforesaid discussions, we are of the view that appeal is liable be partly allowed and the conviction of the appellant under Section 302 IPC is liable to be converted into conviction under Section 304 (Part-I) IPC.

46. Accordingly, appeal is partly allowed and the appellant is convicted for the offence under Section 304 (Part-I) IPC and is sentenced to undergo ten years of incarceration with remission. We maintain the fine amount and default sentence, which will start if fine is not deposited after ten years with remission.

47. Record and proceedings be sent back to the Court below forthwith.

48. This Court is thankful to learned Advocates and Mr. Mohd. Furkan Khan, Law Clerk (Trainee) of this Court for ably assisting the Court.

(2022) 11 ILRA 223
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.11.2022

BEFORE

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

Criminal Appeal No. 6577 of 2008

Shiv Kishore Tiwari @ Rajju Tiwari ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Vikas Tiwari, Sri Abhay Kumar Singh, Sri I K Chaturvedi, Sri Mahesh Prasad Yadav, Sri P.K. Shukla, Sri R.K. Pandey, Sri Shailesh Pandey, Sri V.B. Rao, Sri Kamta Prasad

Counsel for the Opposite Party:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Sections 161 & 313 - Indian Penal Code, 1860 - Section - 302- Criminal Appeal – Conviction & Sentence - Life imprisonment with fine – Evaluation of evidences - offence of murder - FIR - informant alleged that accused were calling names & abusing standing at the door of his house, when the family of the informant trying to stop him by abusing accused started abusing from his courtyard and triggered two fire from his gun in hand out of which one fire was fit the uncle of the informant, resulted the uncle was died on the spot - distinction between 'murder' and 'culpable homicide'- trial court fallen into grave error believing the testimonies of PWs whom are not the eye-witnesses and there are several material contradiction in their testimony - the report of ballistic expert is not in favour of the prosecution - held, death was homicidal death but prosecution has failed to proved the charges against the accused beyond reasonable doubt -

thus, appellant deserves to grant benefit of doubt - appeal allowed - direction accordingly. (Para – 16, 17)

Appeal allowed. (E-11)

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

1. This appeal has been preferred against the judgment and order dated 11.09.2008, passed by the learned Sessions Judge, Hamirpur, in Session Trail No.158 of 2002 State vs. Shiv Kishore Tiwari @ Rajju Tiwari arising out of Case Crime No.62 of 2002 under Section 302 IPC, Police Station- Maudaha, District- Hamirpur, whereby the appelant is convicted and sentenced for the offence under Section 302 IPC for life imprisonment with a fine of Rs.10,000/- and in defalut of payment of fine, further R.I. for one year.

2. The brief facts of the case as culled out from the record are that a written report was submitted on 01.04.2002 by informant Ashok Kumar Tiwari at Police Station- Maudaha, District- Hamirpur with the averment that on 31.03.2002 at about 9:30 pm the neighbour of the informant Shiv Kishore @ Rajju son of Swamidin Tiwari was calling names and abusing standing at the door of his house. Vedmani Diwedi, his mother Smt. Sushila Diwedi and Ashutosh Diwedi told him not to abuse and asked to go inside the house. On this, Rajju went inside the house but after some time he again started abusing from his courtyard. On this informant, his mother Smt. Meera Devi and wife Suman Lata went on the roof of their house where bulb was lighting. At that point of time, Rajju triggered one fire from the courtyard with the gun in his hand. The uncle of the informant Shri Krishan Kumar @ Munni aged about 35 years was sleeping on his roof, he wake up and asked Rajju not to abuse and fire. Grandmother of the informant Smt. Shiv Kali who used to reside with aforesaid Munni was also standing there. When uncle of informant Shri Krishan Kumar stopped Rajju from abusing, Rajju went on Atari and triggered fire from there which hit the right temple of Krishan Kumar @ Munni who fell down and died on the spot.

3. On the basis of above report, a criminal case was registered at Police Station- Maudaha, District- Hamirpur as Crime No.62 of 2002, under Section 302 IPC and investigation was started. During the course of investigation, the I.O. recorded the statements of witnesses u/s 161 Cr.P.C., visted the spot and prepared site-plan. At the time of visiting the spot, I.O. found one empty cartridge from the place of occurrence and its recovery memo was prepared. I.O. also collected blood stained and plain earth from the spot. The inquest proceedings were conducted and inquest report was prepared. The dead body of the deceased was sent for post mortem, where post mortem was conducted by the doctor and post mortem report has prepared. During the course of investigation, accused-appellant Shiv Kishore @ Rajju Tiwari was arrested and on his pointing out a single barrel gun was recovered from his house. Its recovery memo was also prepared. Recovered gun and empty cartridge were sent to Forensic Science Laboratory for seeking the report. The aforesaid report was received.

4. After completion of investigation, investigating officer submitted charge sheet against the appellant- Shiv Kishore @ Rajju Tiwari under Section 302 IPC.

5. The case, being triable exclusively by the Court of Sessions, was committed

by Magistrate to Court of Sessions. Learned trial court framed charge against the appellant under Section 302 of IPC. The appellant denied the charge and claimed to be tried.

6. Prosecution examined following witnesses:

1.	Ashok Kumar Tiwari	PW1
2.	Smt. Meera Devi	PW2
3.	Dr. Pushkar Anand	PW3
4.	Ram Autar Yadav	PW4
5.	Ram Prakash Bajpey	PW5

7. Apart from aforesaid witnesses, prosecution submitted following documentary evidence, which was proved by leading the evidence:

1.	FIR	Ex.ka.3
2.	Written Report	Ex.ka.1
3.	Recovery Memo of Empty Cartridge	Ex.ka.11
4.	Recovery Memo of Blood Stained & Plain Sand-Cement	Ex.ka.12
5.	Recovery memo of cot, mattress, quilt, mosquito net and bamboo sticks	Ex.ka.13
6.	Recovery memo of gun	Ex.ka.14
7.	P.M. Report	Ex.ka.2
8.	Report of Vidhi Vigyan Proyogshala	Ex.ka.17
9.	Report of Vidhi Vigyan Proyogshala	Ex.ka.18
10.	Panchayatnama	Ex.ka.5
11.	Charge sheet	Ex.ka.16
12.	Site plan with Index	Ex.ka.10
13.	Site plan with Index	Ex.ka.15

8. After completing the prosecution evidence, statement of appellant was recorded u/s 313 Cr.P.C., in which he denied the evidence against him and said that there was family dispute regarding partition. Hence, he was falsely implicated by the informant. No evidence was adduced by the appellant in his defense. After hearing arguments of both sides the learned Sessions Judge convicted the appellant u/s 302 of IPC and sentenced for life imprisonment and fine for Rs.10,000/-. Hence, this appeal.

9. Heard learned counsel for the appellant, Shri Vikas Goswami, learned AGA appearing on behalf of the State and perused the record.

10. Learned counsel for the appellant submitted that impugned judgement is absolutely illegal and arbitrary. Prosecution has failed to prove the charge beyond reasonable doubt. It is further submitted that the FIR was lodged on the next day of the occurrence and the delay is not explained by the prosecution witnesses. PW1 and PW2 are the only two witnesses of fact, who are interested witnesses. No independent witness is produced by the prosecution. PW1 and PW2 are not eye-witnesses. As per their evidence, they reached to the place of occurrence after sometimes of the incident. Moreover, the place from where they said to witness the occurrence is the roof, while as per the prosecution evidence, accused fired from

his courtyard and since there are high walls around the roof, it was not possible from there to witness the courtyard of the house of the accused.

11. Learned counsel for the appellant next submitted that there is no motive because it is not mentioned in the first information report to whom the accused was abusing and further the witnesses of fact have deposed that he was not abusing to any particular person. Hence, there was no reason for him to kill the deceased when even he was not abusing him. Learned counsel pointed out that as per the averment of first information report, the occurrence took place at 9:30 pm while PW1, who himself is the informant, has deposed in examination-in-chief that occurrence took place at 7:00 pm. Hence, there is material contradiction between the timing of alleged incident.

12. It is vehemently submitted by learned counsel for the appellant that a gun is said to be recovered from the house of the appellant on his pointing out and one empty cartridge was recovered from the spot. Gun and cartridge were sent to Forensic Science Laboratory from where the report was received and this report says that recovered empty cartridge was not fired by the said gun. Hence, entire prosecution case is shattered. Appellant has been falsely implicated due to previous enmity between the parties on account of family partition. Learned trial Judge has not appreciated the evidence as per legal principles and misread the evidence on record. The appellant was wrongly convicted and sentenced. Hence, the appeal be allowed.

13. Learned AGA opposed the submissions made by learned counsel for the appellant and contended that PW1 and PW2 reside in the neighbourhood of the appellant. Hence, their presence on the spot cannot be doubted. Both these witnesses are eye-witnesses and have supported the prosecution case in their testimony. With regard to the report of Forensic Science Laboratory, learned AGA submitted that ocular evidence shall be given preference to the report of the ballistic expert. The gun was recovered from inside the house of the appellant on his pointing out. It is next submitted by learned AGA that ante mortem injury in post mortem was corroborated the prosecution version. As per prosecution witnesses, fire was triggered from the distance of 2-2½ feet and blackening and tattooing was present around entry wound, which also corroborates the testimony of eye-witnesses. Hence, the learned trial Judge has rightly convicted and sentenced the appellant and there is no illegality or infirmity in the impugned judgement, which requires any interference by this Court.

14. Learned counsel for the appellant has raised the issue of delay in lodging the FIR. The occurrence is said to have taken place at 9:30 pm on 31.03.2002 and first information report was lodged on the next day at 10:00 am while the distance to the police station from the place of occurrence was 9 kms. Although, the informant has stated in his testimony as PW1 that due to fear of the appellant and want of means of travelling at night, the FIR could not be lodged just after the occurrence. Delay in lodging the FIR in every case is not fatal to the prosecution case. It shall be analysed along with other evidence on record. It is relevant to note that time of occurrence is specifically told in FIR, which is 9:30 pm while the informant Ashok Kumar Tiwari

has deposed in his cross-examination as PW1 that the occurrence took place at 7:00 pm. There is much difference between 7:00 pm and 9:30 pm. This is material contradiction in fixing the time of occurrence.

15. The prosecution has produced two witnesses of fact, namely, PW1 Ashok Kumar Tiwari and PW2 Smt. Meera Devi. Both are said to be eye-witness and they are son and mother respectively. PW2 Meera Devi has categorically deposed in her cross-examination that *"मै फायर लगने के तुरंत १० मिनट बाद गयी थी, मेरे साथ अशोक लड़का गया था तथा पड़ोस के तमाम लोग आ गए थे"*. It is important to note that she has stated that she went to the spot after 10 minutes of the occurrence and her son Ashok was also with her. This Ashok is PW1. Hence, it can be safely held that PW1 and PW2 both reached to the spot after 10 minutes of the occurrence. Hence, they both are not eye-witnesses. This above statements of PW2 is also confirmed by the testimony of PW1 Ashok Kumar, who states in his cross-examination that he went to the dead body of his uncle after 15-20 minutes of fire because for reaching to the spot, firstly he had to come out from main door of his house and then entered the house of the deceased from his main door. It is also stated by him that he did not go alone. When other people came there, he went near the dead body with them. It is admitted fact that the PW1 and deceased were neighbours. Hence, it cannot be believed that it would take 15-20 minutes to reach the house of adjoining neighbour. This statement of PW1 also suggests that he did not witness the occurrence as stated by her mother PW2 Meera Devi. Learned trial Judge does not appreciate this evidence in right perspective. In our considered opinion, PW1 and PW2 are not eye-witnesses and no other witness of fact is produced by the prosecution.

16. As per prosecution case, there were two fires by the appellant, but only one empty cartridge was recovered from the spot. Learned AGA has contended that the second empty cartridge is fallen on the ground if it is taken out from the barrel. In this regard, in our opinion, if second cartridge was not taken out from the barrel then it could have been found in the barrel when gun was recovered but as per recovery memo no empty cartridge was found in the barrel of the gun. Besides it, ballistic report is very much relevant in this case. As per prosecution case, the empty cartridge, which was found on the spot and the gun which was recovered from the house of the appellant were sent to Forensic Science Laboratory for having ballistic report. Such report is received by the court, in which ballistic expert has stated that empty cartridge was not fired by the recovered gun. Hence, it is crystal clear that the recovered empty cartridge was not fired from the gun, which is said to be recovered at the pointing out of the accused. On this score, the prosecution case is shattered and in this way clinching evidence is in favour of the accused. Learned trial Judge has opined that there was no contradiction between the evidence of PW1 and PW2. While, as discussed above, there are several material contradictions in their evidence, which go to the root of the case. Though both are proved not to be the eye-witness of the occurrence. Report of ballistic expert is not in favour of the prosecution. Hence, we are unable to subscribe the finding of the fact that fire was triggered by the accused-appellant to do away with the deceased. In criminal jurisprudence prosecution has to prove the guilt of the accused beyond all reasonable doubt, which is not done in this

case. Though, we have held that death was homicidal death but prosecution has failed to prove the charge against the accused beyond reasonable doubt and benefit of doubt is granted to the appellant. Hence, appeal is liable to the allowed.

17. Accordingly, the appeal is **allowed**.

18. Accused-appellant is acquitted of the charge framed against him u/s 302 of IPC. The fine of amount be refunded if it is already deposited by the appellant.

19. The accused-appellant be released from jail forthwith if not wanted in any other case.

20. Record and proceedings be sent back to the court below.

(2022) 11 ILRA 228
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.10.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 7777 of 2017

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

Counsel for the Appellant:
Sri Noor Muhammad, Sri Tribhal Chandra Sharma, Sri Yogesh Kumar Srivastava

Counsel for the Opposite Party:
G.A.

Criminal Law - Criminal Procedure Code, 1973 - Section - 313 - Indian Penal Code,1860 - Sections 34, 299, 300, 300(4), 302, 304 Part -I, 304 Part - II, 304-B, 307, 498-A, 504 & 506 - The Dowry Prohibition Act, 1961 - Sections - 3, 4 & 5 - Criminal Appeal – Conviction & Sentence - Life imprisonment with fine - Evaluation of Evidences - offence of demand of dowry and death - FIR - allegations that, accused (appellant) demanded dowry and threaten with dire consequences to his wife (deceased) and when demand was not fulfilled, deceased (wife) was set ablaze by her husband - ultimately she was died due to septicaemia - it is duty of every court to award proper sentence having regard to nature of offence and manner of its commission - the judicial trend in the country has been towards striking a balance between reform and punishment - distinction between 'murder' and 'culpable homicide' - held, instant case fall under the exception 1 and 4 to section 300 of IPC - hence, appeal is liable to be partly allowed - impugned conviction u/section 302 IPC is liable to be converted into conviction u/section 304 Part - I IPC. (Para – 27, 31, 33)

Appeal partly allowed. (E-11)

List of Cases cited:

1. Govindappa & ors. Vs St. of Karnataka, (2010) 6 SCC 533

2. Hansraj Vs St. of Pun., AIR 2000 SC 2324

3. Sher Singh Vs St. of Har., 2015 (88) ACC 288 (SC)

4. Gautam Manubhai Makwana Vs St. of Gujarat, Criminal Appeal No.83 of 2008, decided on 11.9.2013

5. Krishan Vs St. of Har., (2013) 3 SCC 280

6. Tukaram & ors. Vs St. of Mah., (2011) 4 SCC 250

7. B.N. Kavatakar & anr. Vs St. of Karnataka, 1994 SUPP (1) SCC 304

8. Veeran & ors. Vs St. of M.P., (2011) 5 SCR 300

9. Mohd. Giasuddin Vs St. of AP, AIR 1977 SC 1926

10. Deo Narain Mandal Vs St. of U.P., (2004) 7 SCC 257

11. Ravada Sasikala Vs St. of A.P., AIR 2017 SC 1166

12. Jameel Vs St. of U.P., (2010) 12 SCC 532

13. Guru Basavraj Vs St. of Karnatak, (2012) 8 SCC 734

14. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323

15. St. of Punjab Vs Bawa Singh, (2015) 3 SCC 441

16. Raj Bala vs St. of Haryana, (2016) 1 SCC 463

17. St. of M.P Vs Jogendra, (2022) 5 SCC 401

18. Uttam Vs St. of Mah.a, (2022) 8 SCC 576

19. Khokan@ Khokhan Vishwas Vs St. of Chattisgarh, 2021 LawSuit (SC) 80

20. Anversinh Vs St. of Gujarat, (2021) 3 SCC 12

21. Pravat Chandra Mohanty Vs St. of Odisha, (2021) 3 SCC 529

22. Pardeshiram Vs St. of M.P., (2021) 3 SCC 238

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

1. Heard Sri Yogesh Kumar Srivastava, learned counsel for the appellant and Sri Nagendra Srivastava, learned A.G.A. for the State.

2. Present criminal appeal challenges judgment and order dated 22.11.2017 passed by the Additional Sessions Judge (Fast Track Court No.2), Firozabad in Sessions Trial No. 728 of 2011 whereby the learned Additional Sessions Judge has convicted and sentenced the accused-appellant, Balveer Singh, under Section 498A of IPC for two year imprisonment along with fine of Rs.3,000/- (default sentence : two months), under Section 302 of IPC for life imprisonment with fine of Rs.10,000/- (default sentence : six months) and under Section 3/4 of Dowry Prohibition Act, 1961 for two years' imprisonment with fine of Rs.3000/-, in case of default in payment of fine further to undergo two months' simple imprisonment. All the sentences were directed to run concurrently.

3. Facts as culled out from the record are that the deceased was married with the accused-appellant before six years of the incident as per Hindu rites and rituals. There were three children born out of their wedlock. Immediately after the marriage, she was subjected to cruelty and there was demand of dowry. Several times there were settlements but the demand of dowry continued. On the day before the incident occurred i.e. 3.5.2011, the deceased was beaten and was threatened with dire consequences. In the morning, she was set ablaze. When she was set ablaze, she ran towards the locality. The neighbors doused the the fire and got the deceased admitted in S.N.M. Hospital, Firozabad from where, she was referred to Agra. On 9.5.2011, she was brought to AIIMS, Delhi. Her burn injuries ultimately turned into septicemia and she breathed her last.

4. On the basis of the complaint made by informant, father of the deceased, alleging the above incident, the First Information Report being Case Crime No. 196 of 2011 under Sections 498A, 304B, 307, 504, 506 of IPC and Section 3/4 of D.P. Act was lodged at P.S. South, District Firozabad was registered and the criminal machinery moved into motion. On

4.5.2011, the Dying Declaration was recorded. On inquiry being conducted and the investigation getting over, the charge-sheet was filed in the Court of Chief Judicial Magistrate against all the accused who were named in the F.I.R. except accused-Jhamman, who died during investigation. The matter was committed to the Court of Session as it was triable by Court of Session.

5. The learned Sessions Judge has framed the charges against the accused, Ramnath, Smt. Shanti Devi and accused-appellant, Balveer Singh under Sections 498A, 304B read with Section 34 of IPC and Section 3/4 of Dowry Prohibition Act and additional charge under Section 302 of IPC was framed against accused-appellant, Balveer Singh.

6. On being summoned, the accused-persons pleaded not guilty and wanted to be tried.

7. The Trial started and the prosecution examined 11 witnesses who are as follows:

1	Kishori Lal	PW1
2	Somwati	PW2
3	Munni Devi	PW3
4	Guddi	PW
5	Bhuri Singh	PW5
6	Praveen Kumar	PW6
7	Anurag Darshan	PW7
8	Dr. Ravi Prakash Sachan	PW8
9	N. Ram	PW9
10	Sanjay Dubey	PW 10

8. In support of ocular version following documents were filed and proved:

1	F.I.R.	Ex.Ka.12
2	Written Report	Ex.Ka.1
3	Dying Declaration	Ex. Ka.5
4	Postmortem Report	Ex.Ka.4
5	Panchayatnama	Ex.Ka.6
6	Charge-sheet	Ex. Ka.3
8	Site Plan	Ex.Ka.2

9. After the evidence of prosecution was over, Bhudev Singh was examined as C.W. 1 and the accused also led evidence and examined, Balvir Singh, D.W.1, Ram Nath, D.W.2, & Premraj, D.W.3.

10. At the end of the trial and after recording the statements of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge acquitted the accused Ramnath and Shanti Devi and convicted the accused-appellant as mentioned above.

11. It is submitted by learned counsel for the appellant that the incident occurred on the spur of moment and the accused had not premeditated to do away with the deceased and the death occurred after few days. The cause of death according to doctor who conducted the postmortem of deceased was septicemia.

12. It is further submitted by learned counsel for the appellant that conviction under Section 302 IPC is not made out as no overt act as per Section 300 IPC is made out. On the same set of evidence with which the other co-accused has been acquitted, same requires to be done in case of accused-appellant also. In alternative, it is submitted that at the most, the death can be homicidal death not amounting to murder and punishable under Section 304 II or Section 304 I of I.P.C. If the Court

decides that the accused is guilty under Section 302 of IPC, then the accused may be granted fixed term punishment of incarceration as the death is not a gruesome act on part of accused.

13. Learned counsel for the State has submitted that though it is septicemic death, the dying declaration and evidence of prosecution witnesses will not permit this Court to show any leniency in the matter. It is further submitted by learned A.G.A. that ingredients of Section 300 of IPC are rightly held to be made out by the learned Sessions Judge who has applied the law to the facts in case.

14. Before we begin our discussion sifting the testimony of witnesses, perusal of the Dying Declaration of the deceased, Ex. Ka.5, would be very relevant which is as under:

"बयान श्रीमती सुषमा देवी w/o श्री बलवीर सिंह निवासी हुमायूंपुर थाना दक्षिण जनपद फिरोजाबाद उम्र 25 वर्ष पेशा चूड़ी मजदूरी जाति राठौर

1.35 P.M.

बयान किया है कि घटना दिनांक 3.5.2011 की सुबह 6:00 बजे की है । मेरी दो बहनों की शादी थी दिनांक 30.4.2011 को शादी थी । मेरे पति ने कहा कि जा रही हो उसी तरह वापस आ जाना मैं अपने पिता के घर से आने में लेट हो गई तो दिनांक 2.5.2011 को रात्रि में मेरे पति बलबीर ने मुझे मारा पीटा । गर्दन दबा दी । फिर ड्यूटी चले गए और कह गए कि तुम मर जाना मैं वापस आए तब तक । सुबह आए तो मैं सो रही थी । कहने लगे तू अभी मरी नहीं है । मैंने कहा कि मैंने कोई बुरा काम नहीं किया है सो मर जाऊं। बलबीर मेरे पति ने कहा कि आज मैं तेरी कहानी खत्म कर दूंगा। फिर इनके द्वारा कमरे से साइकिल निकाली साइकिल गली में खड़ी कर आए। अंदर मेरे ऊपर मिट्टी का तेल डालकर पीछे से पेटीकोट में आग लगाकर भाग गए। यह मेरे पति बलवीर ने किया था। आग लगी हुई मैं अपनी बहन कांति w/o राम रामविलास के घर भागी उन्हीं लोगों ने आग बुझाई। मौ0 के लोग आगरा ले गए । अब यहां लाकर इलाज करा रहे हैं । बयान सुनकर तस्दीक किया।"

15. This shows that there was altercation between husband and wife. The husband namely appellant-herein set her ablaze in the Dying Declaration, we do not find any semblance of demanding any kind of dowry for invoking Section 498A of IPC which reads as follows:

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

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

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

16. On perusal of Section 498A of IPC, it is evident that for invoking Section 498A of IPC, demand of dowry, prior to occurrence is must and in our case that is missing. Therefore, conviction under Section 498A of IPC read with Section 4/5 of Dowry Prohibition Act, even without going by the evidence of the witnesses, cannot stand scrutiny as none of the

witnesses were present when the incident occurred. The incident occurred in the four corners of the house of the appellant but it cannot be said that there was any demand of dowry, hence, we cannot subscribe to the view taken by the learned Trial Judge.

17. This takes us to the factum whether the Dying Declaration can be relied upon or not?

18. In light of the decision in **Govindappa and others Versus State of Karnataka, (2010) 6 SCC 533** and the latest decision of the Apex Court in ***Uttam v. State of Maharashtra, (2022) 8 SCC 576,*** there is no reason for us not to accept the dying declaration and its evidentiary value under Section 32 of Evidence Act, 1872. In the present case the Dying Declaration is truthful and can be acted upon in view of the settled legal position.

19. This takes us to the factum of death of the deceased. The evidence of P.W.8 is very material for our purpose. P.W., Dr. Ravi Prakash Sachan, had performed postmortem on the dead body and had opined that death was due to septicemia. The deceased died on 19.5.2011. It was a homicidal death. The Dying Declaration has been proved by P.W.6 & P.W.7 and they have withstood the cross examination. We are not discussing their evidence in detail as we are convinced that the finding of facts as far as homicidal death is concerned is proved and we concur with the finding of trial court on that point. The decisions in **Hansraj vs. State of Punjab, AIR 2000 SC 2324 and Sher Singh vs. State of Haryana, 2015 (88) ACC 288 (SC)** which the learned Sessions Judge has relied upon, we also rely on the same.

20. The death was due to burn injuries which had turned into septicemic death.

21. This takes us to the next question whether it was a perpetrated murder or would it fall within any of the exceptions to Section 300 of IPC?

22. It would be relevant to refer to Section 299 of the Indian Penal Code, which reads as under:

"299. Culpable homicide*: Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

23. The academic distinction between "murder' and "culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts loose sight of the true scope and meaning of the terms used by the legislature in these sections, and allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be is to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done-	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done.
INTENTION	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the	(2) with the

intention of causing such bodily injury as is likely to cause death; or	intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
KNOWLEDGE	**KNOWLEDGE**
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so immediately dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

24. We can safely rely upon the decision of the Gujarat High court in **Criminal Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs. State of Gujarat)** decided on 11.9.2013 wherein the Court held as under:

"12. In fact, in the case of ***Krishan vs. State of Haryana reported in (2013) 3 SCC 280,*** *the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.*

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and the history before the doctor is consistent and seems to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene and setting him ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

15.1 Similarly, in the case of ***Maniben (supra),*** *the Apex Court has observed as under:*

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main

cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

16. In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around 30 days in the hospital and that his condition worsened after around 5 days and ultimately died of septicemia. In fact he had sustained about 35% burns. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed.

17. The conviction of the appellants - original accused under Section 302 of Indian Penal Code vide judgment and order dated 19.12.2007 arising from Sessions Case No. 149 of 2007 passed by the Additional Sessions Judge, Fast Track Court No. 6, Ahmedabad is converted to conviction under Section 304 (Part I) of Indian Penal Code. However, the conviction of the appellants - original accused under section 452 of Indian Penal Code is upheld. The appellants - original accused are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/- each in default rigorous imprisonment for six months under section 304 (Part I) of Indian Penal Code instead of life imprisonment and sentence in default of fine as awarded by the trial court under section 302 IPC. The sentence imposed in default of fine under section 452 IPC is also reduced to two months. Accordingly, the appellants are ordered to undergo rigorous imprisonment for a period of ten years and fine of Rs. 5000/-, in default, rigorous imprisonment for six months for offence punishable under section 304(I) of Indian Penal Code and rigorous imprisonment for a period of five years and fine of Rs. 2,000/-, in default, rigorous imprisonment for two months for offence punishable under section 452 of Indian Penal Code. Both sentences shall run

concurrently. The judgement and order dated 19.12.2007 is modified accordingly. The period of sentence already undergone shall be considered for remission of sentence qua appellants - original accused. R & P to be sent back to the trial court forthwith."

25. In latest decision in **Khokan@ Khokhan Vishwas v. State of Chattisgarh, 2021 LawSuit (SC) 80,** where the facts were similar to this case, the Apex Court has allowed the appeal of the accused appellant and altered the sentence. The decision of the Apex Court in the case of **Anversinh v. State of Gujarat, (2021) 3 SCC 12** which was related to kidnapping from legal guardian, wherein it was established that the Court while respecting the concerns of both society and victim, propounded that the twin principle of deterrence and correction would be served by reducing the period of incarceration already undergone by the accused. In our case, this is not that gruesome a matter where the accused cannot be granted benefit in light of judgments relating to leniency in sentencing. Decisions in **Pravat Chandra Mohanty v. State of Odisha, (2021) 3 SCC 529 & Pardeshiram v. State of M.P., (2021) 3 SCC 238** will also enure for the benefit of the accused.

26. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra,** reported in **(2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka**, reported in **1994 SUPP (1) SCC 304**, we are of the considered opinion that it was a case of homicidal death not amounting to murder.

27. From the upshot of the aforesaid discussion, it appears that the death caused by the accused was not premeditated, accused though had knowledge and intention that their act would cause bodily harm to the deceased but did not want to do away with the deceased. Hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

28. We come to the definite conclusion that the death was not premeditated. The precedents discussed by us would permit us to uphold our finding which we conclusively hold that the offence is not punishable under Section 302 of I.P.C. but is culpable homicide not amounting to murder, punishable U/s 304 (Part I) of I.P.C.

29. While coming to the conclusion that the accused is the perpetrator of the offence, whether sentence of life imprisonment and fine is adequate or the sentence requires to be modified in the facts and circumstances of this case and in the light of certain judicial pronouncements and precedents applicable in such matters. This Court would refer to the following precedents, namely, **Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926]**, explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate

rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization. Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

30. 'Proper Sentence' was explained in **Deo Narain Mandal Vs. State of UP [(2004) 7 SCC 257]** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

31. In **Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166**, the Hon'ble Supreme Court referred the judgments in **Jameel vs State of UP [(2010) 12 SCC 532], Guru Basavraj vs State of Karnatak, [(2012) 8 SCC 734], Sumer Singh vs Surajbhan Singh, [(2014) 7 SCC 323], State of Punjab vs Bawa Singh, [(2015) 3 SCC 441], and Raj Bala vs State of Haryana, [(2016) 1 SCC 463]** and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The Hon'ble Supreme Court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should

also be avoided keeping in view the reformative approach underlying in our criminal justice system.

32. Recent judgment of **State of M.P Vs. Jogendra, (2022) 5 SCC 401** and ratio laid in the said judgment can be followed, however, instead of seven years period undergone of imprisonment for at least 10 years would be more than relevant in the facts and circumstances of this case.

33. Therefore, accused-appellant is convicted for the offence punishable under Section 304 (Part I) of IPC and sentenced to 10 years' rigorous imprisonment. The fine and default sentence are maintained.

34. In view of the above, this appeal is partly allowed. The judgment and order impugned shall stand modified to the aforesaid extent. Record and proceedings be sent back to the Court below forthwith.

(2022) 11 ILRA 237
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.02.2022

BEFORE

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

First Appeal From Order No. 3251 of 2010

Smt. Anamika Bhardwaj & Ors.
...Plaintiffs/Appellants
Versus
Ashok Gulati & Ors.
...Defendants/ Respondents

Counsel for the Appellants:
Sri Hitesh Pachori

Counsel for the Opposite Parties:
Sri Anuj Srivastava

Civil Law - Motor Accident Claim - Compensation - Income - if the Income Tax Returns are there, they are the proof of the income of the deceased/injured - income of the deceased would be as per the Income Tax Returns for the Assessment Year 2006-07, namely, Rs.1,62,500/- per year - Tribunal erroneously disbelieved the Income Tax Return as it came to the conclusion that chalan of paying the tax was not filed - Tribunal's stance contradicts a beneficial legislative provision and is untenable - Tribunal did not award any compensation for future prospects hence Court granted addition of 40% towards future loss of income of the deceased as the deceased was below 40 years of age and was having his own business - deceased was survived by his widow and a minor son, hence, deduction towards personal expenses of the deceased would be 1/3rd & Multiplier would be 17 - court granted Rs.70,000/- towards non pecuniary damages on which the claimants shall also be entitled to 10% rise in every three years - interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. (Para 5,6,7,8, 10,11, 12)

Allowed. (E-5)

List of Cases cited:

1. Laxmi Devi & ors. Vs Mohammad Tabbar & anr., 2008 ACJ 0184

2. New India Assurance Co. Ltd. Vs Urmila Shukla & ors., LL 2021 SC 359

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

4. Smt. Upasana & ors. Vs National Insurance Co. Ltd. & ors. F.A.F.O. No. 1070 of 2017

5. National Insurance Co. Ltd. Vs Pranay Sethi and others, 2017 LawSuit (SC) 1093

6. A.V. Padma Vs Venugopal, Reported in 2012 (1) GLH (SC), 442

7. Smt. Hansaguri 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 Hitesh Pachori, learned counsel for the appellants, Sri Anuj Srivastava, learned counsel for the respondent and perused the record.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 17.7.2010 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.11, Agra (hereinafter referred to as 'Tribunal') in Claim Petition No. 260 of 2007 awarding a sum of Rs.4,52,000/- to the claimants as compensation for the death of their sole bread winner with interest at the rate of 6%.

3. The accident 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. It is submitted by learned counsel for the appellant that the deceased was 29 years of age at the time of accident and was having his own business namely he was the owner of M/s Sheetal Drugs Distribution. The Tribunal has considered the income of deceased to be Rs.36,000/- per annum, deducted 1/3 towards personal expenses, considered the dependency as Rs. 24,000/- per annum, granted multiplier of 17 and added Rs. 44,500/- towards non pecuniary damages.

5. Learned counsel for the appellant has taken us through the record and we are satisfied that the documentary evidence has been brushed aside by the learned Tribunal without assigning proper reasons. Income Tax Return in the name of the deceased for the Assessment Year 2006-07 which was on record demonstrates that the income of the deceased was Rs.1,62,500/- per year. The earlier Income Tax Return for the Assessment Year 2005-06 shows that the income of the deceased was Rs.1,10,150/-. There are documentary evidence namely Form 20 etc. This fact has been disbelieved by the Tribunal though the drug license and its photo copy has been filed. The name of the firm was Sheetal Medical Stores. The Tribunal has disbelieved the Income Tax Return as it came to the conclusion that chalan of paying the tax was not filed. The Tribunal came to the conclusion that the income was Rs.1,06,665/-, out of which, LIP was of 44,341/- and, therefore, the Tribunal has felt that income of the deceased was Rs.62,324/-. It was further concluded by the Tribunal that tax of Rs.19150/- was being paid but it was not clear as to how much amount he had invested and, therefore, the Tribunal disbelieved this fact. The Tribunal disbelieved investments made by the deceased in Bajaj Allianz and, therefore, held that in view of the judgment of Laxmi Devi & Others vs Mohammad Tabbar & Another, 2008 ACJ 01844 only Rs.3,000/- should be considered as his income. This is an error apparent on record as P.W.1 has categorically mentioned that her husband was in the business of medicine. Th license even according to Tribunal was dated 1.12.2002. This fact should have been considered by the Tribunal. The deceased was a young man of 29 years. The approach of the Tribunal is against the beneficial piece of legislation and cannot be accepted. This is an error apparent on the face of record which will have to be answered by this Court.

6. The Apex Court has time and again held that if documentary evidence to show income is not produced but if the Income Tax Returns are there, they are the proof of the income of the deceased/injured. The Tribunal has committed a grave error in relying on the judgment in **Laxmi Devi & Others vs Mohammad Tabbar & Another, 2008 ACJ 01844** despite the fact that there are documentary evidence proved, the Tribunal erroneously considered his income to be Rs.100/- per day.

7. Hence, we are unable to accept the submission of Sri Anuj Srivastava, learned counsel for the respondent that the income which has been considered by the Tribunal is just and proper. The finding is absolutely perverse as Tribunal is not supposed to go by the investment of the person for starting a business but the income generated by him. The income of the deceased has been proved by the oral testimony of P.W.1 and P.W.2 and Income Tax Returns. The Tribunals are supposed to take a practical view and not pedantic view. The decision in Laxmi Devi (Supra) is applied where the income is not at all proved and where there is no semblance of any earning.

8. In view of the above, we are of the view that the income of the deceased would be as per the Income Tax Returns for the Assessment Year 2006-07, namely, Rs.1,62,500/- per year.

9. It is submitted by learned counsel for the appellants that the Tribunal has not granted any amount towards future loss of income which is required to be granted. It is further submitted by learned counsel for the appellants that the amount under non-pecuniary heads and the rate of interest awarded by the Tribunal are on the lower side and are required to be enhanced in view of the latest the decisions of the Apex Court.

10. As far as grant of future prospects are concerned, Tribunal has not granted any amount for that, therefore, we grant addition of 40% should be added towards future loss of income of the deceased as the deceased was below 40 years of age and was having his own business. We are even fortified in our view by the decision of the Apex Court in **New India Assurance Company Ltd. Vs. Urmila Shukla and others, LL 2021 SC 359 & Anita Sharma v. New India Assurance Co. Ltd. (2021) 1 SCC 171**. Recent decision of the Division Bench of this Court in F.A.F.O. No. 1070 of 2017 **(Smt. Upasana And 4 Others v. National Insurance Company Ltd. And 2 Others)** decided on 11.2.2022 will also come to the aid of the appellants herein.

11. The deceased was survived by his widow and a minor son, hence, deduction towards personal expenses of the deceased would be 1/3rd as has been done by the Tribunal. Multiplier of 17 applied by the Tribunal is just and proper. The Tribunal added Rs. 45,000/- for non pecuniary damages. We see no reason why the principle enunciated by the Apex Court in **National Insurance Co. Ltd. Vs. Pranay Sethi and others, 2017 LawSuit (SC) 1093** should not be made applicable wherein the Apex Court has granted Rs.70,000/- towards non pecuniary damages. We grant Rs.70,000/- towards non pecuniary damages on which the claimants shall also be entitled to 10% rise in every three years as held by the Apex Court in **Pranay Sethi (Supra)** and, therefore, we make the figure to Rs. 1,00,000/- for non pecuniary damages.

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

i. Annual Income: Rs.1,62,500/-

ii. Percentage towards future prospects : 40% namely Rs.65,000/-

iii. Total income : Rs.1,62,500 + 65,000 = Rs.2,27,500/-

iv. Income after deduction of 1/3rd : Rs.1,51,670/- (rounded figure)

v. Multiplier applicable : 17

vi. Loss of dependency: Rs.1,51,670 x 17 = Rs.25,78,390/-

vii. Amount under non pecuniary heads : Rs.1,00,000/-

viii. Total compensation : Rs.25,78,390/-

13. As far as issue of rate of int has held as under :

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimterest 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 Courants asn to allow the interest in this matter at any rate higher than 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 reasothat 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. This Court is thankful to both the counsels for getting this old matter decided.

(2022) 11 ILRA 241
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.10.2022

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Second Appeal No. 168 of 1995

Prahlad & Anr. ...Defendants/Appellants
Versus
Sarvajeet ... Plaintiff/Respondent

Counsel for the Appellants:
Sri Ramesh Chandra, Sri C.K. Rai, Sri Fauzdar Rai, Sri Ishir Sripat, Sri J.A. Azmi, Sri O.N. Misra, Sri Rahul Sripat, Sri S.C. Verma, Sri S.S.P. Gupta, Sri Shachindra Kumar Mishra, Sri Saurabh Patel

Counsel for the Respondent:
Sri R.M. Singh, Sri A.K. Singh, Sri Dinesh Kumar Pandey, Sri Govind Krishna, Sri M.S. Chauhan, Sri R.B. Tripathi

Civil Law - Specific Relief Act, 1963 - Section 31 - Suit for cancellation of Sale deed – Evidence Act, S. 101 - Burden of proof - The expression " burden of proof " means one of two things (1) that a party has to prove an allegation before it is entitled to a judgment in its favour, or (2) that the one or the other of the two contending parties has to introduce evidence on a contested issue - The questionof onus is material only where the party on which it is placed would eventually lose if it failed to discharge the same - Where issuesare, however,joined, evidence is led and such evidence can be weighed in order to determine the issues, the question of burden becomes academic - Where evidence has been led by the contesting parties on the question in issue, abstract considerations of onus are out of place; truth or otherwise of the case must always be adjudged on the evidence led by the parties (Para 11, 12)

Plaintiff filed a suit seeking to cancel a sale deed, alleging that due to his dependency on the defendants' father, who had influence over him, and his illness, the sale deed was fraudulently executed in favor of the defendant - Trial Court put the burden on the plaintiff of proving that the plaintiff was ill on the relevant date and had put the burden of proving that consideration had passed from the defendants to the plaintiff on the defendants - Plaintiff failed to produce treating doctors - trial court found he was not ill -First appellate court reversed this decision, putting the burden on the defendants to prove no fraud or misrepresentation due to their dominant position - Held - trial court rightly placed the burden on the plaintiff & that the first appellate court wrongly shifted the burden - First appellate court's decision was set aside and the suit was dismissed.

Allowed. (E-5)

List of Cases cited:

1. Daya Shankar Vs Smt. Bachi & ors. AIR 1982 Allahabad 376

2. Narayan Bhagwantrao Gosavi Balajiwale Vs Gopal Vinayak Gosavi & ors. AIR 1960 SC 100

3. Kalwa Devadattam & ors. Vs U.O.I. & ors. (In C.A. No. 641 of 1961) 2. Kamaji 4. 4. Saremal, Firm & ors. (In C.A. No. 642 of 1961)

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

1. This second appeal has been filed by the defendant against the judgement and decree of the First Appellate Court dated 17.12.1994 by which the First Appeal of the plaintiff was allowed and the Suit of the plaintiff which was earlier dismissed by the Trial Court on 5.3.1992 was decreed. The plaintiff - Sarvajeet - (the respondent here) had filed a suit being Original Suit No. 445 of 1989 for the relief that the sale deed dated 27.9.1988 be cancelled. The Suit was based on the fact that the plaintiff was an elderly person and was dependent on the father of the defendants in whom the plaintiff had confidence and who had, therefore, the capacity to influence the decision taking capacity of the plaintiff.

2. The plaintiff further had taken a case that on the date when the sale deed was executed i.e. on 27.9.1988, the plaintiff who was suffering from cataract had acute fever and had gone to the office of the Registrar at Tehsil Sagari on the pretext that Kishori the father of the defendants would get him treated by a good doctor. It has been alleged in the plaint that instead of getting the plaintiff treated, the father of the defendants fraudulently got executed the sale deed on 27.9.1988 in favour of the defendants. The defendants in their written statements, however, took a case that the plaintiff had executed the sale deed in question with his free mind and will and on the date when he executed the sale deed, he was in sound mental condition. Further, they stated that the sale deed was executed for a proper consideration. At the Registrar Office, the plaintiff had been informed about the contents of the document and the document which he was going to put his signature on. He had understood the contents of the document and after taking full consideration he had executed the sale deed. The Trial Court had put the burden on the plaintiff of proving that the plaintiff was ill on the relevant date and had put the burden of proving that consideration had passed from the defendants to the plaintiff on the defendants. The Trial Court found the oral evidence of P.W. - 1 Ram Nagina as a heresy evidence as his evidence regarding his knowledge of the illness of the plaintiff, Sarvajeet, was through the father of the defendants himself. Further the Trial Court analysed the testimony of the plaintiff to see to his physical and mental status and went through the evidence which was brought before the Court. The plaintiff had stated in his examination in chief that, to begin with, he had got himself treated by one Dr. Tirathram and when he did not get any benefit out of his treatment he had changed the Doctor and had started taking treatment of one Doctor Yadava. When he did not get any relief from their treatment and when the defendant's father, in whom the plaintiff had full confidence and faith, suggested that he showed himself to the Doctor at Sagari, the plaintiff had readily agreed. The plaintiff had not brought in the witness box the Doctors who had treated him. However, he produced the prescriptions which were again not proved by the Doctor who had prescribed them. However, since the plaintiff had produced those prescriptions they were considered in evidence and it was found that when on the first occasion the plaintiff was given the medicines on 16.9.1988 then they were prescribed for a period of five days. Thereafter on 20.9.1988, the medicines were slightly changed and they were prescribed for three

days more. On 23.9.1988, the temperature and pulse recorded by the Doctor were normal. Therefore, it has been concluded by the Trial Court that three days after 23.9.1988, the plaintiff's physical condition was absolutely normal. There is no evidence on record, it has been stated by the Trial Court, to prove that the condition of the plaintiff deteriorated thereafter. The Trial Court also took into consideration certain facts about the family of the plaintiff which were brought on record by the defendants and was not denied by the plaintiff.

3. It was brought on record that the plaintiff had six brothers and they were all living in the neighbourhood. However, none of them appeared in the witness box to corroborate the case of the plaintiff that he was seriously ill on the date when the sale deed was executed.

4. It was also brought on record that Katuwaru, who was the son of another brother of the plaintiff, namely, Ramhit, was much loved by the plaintiff but he also never came to the witness box. The plaintiff' s love for katuwaru was to the extent that the plaintiff had got his name engraved on the top of the disputed house. The defendants had brought on record the fact that Katuwaru, the nephew of the plaintiff who was to definitely lose on account of the execution of the sale deed dated 27.9.1998 never opposed the sale deed or appeared in the witness box for the plaintiff.

5. So far as the case of the plaintiff with regard to the averment in the plaint that the plaintiff had sufficient money and he did not require the money from the sale, the Trial Court had dealt with all the evidence which was there with regard to the money being there in the account of the plaintiff. The Trial Court had found that the plaintiff had deposited in a fixed deposit Rs. 25,000/- in a Cooperative Bank at Kaptanganj on 1.10.1988. When asked as to from where this amount had come, the plaintiff had stated in his examination in chief that he had withdrawn this amount of Rs. 25,000/- from various other bank accounts. However, when asked to prove as to from which bank account the plaintiff had withdrawn Rs. 25,000/-, the plaintiff filed details of three accounts:-

I. The pass-book of Cooperative Bank Azamgarh, which account was opened on 21.9.1989. This therefore was opened after the sale had taken place.

II. The pass-book of Union Bank of India opened in 1974 and that acount revealed that the plaintiff in the year 1979 had a last closing balance of Rs. 480.05/-.

III. The another pass-book of Union Bank of India of the Month of September, 1988 showed the closing balance amount of Rs. 825.70. Thus the Trial Court concluded that Rs. 25,000/- which the plaintiff had deposited in the fixed deposit on 1.10.1988 came from nowhere else but from the sale consideration which he had got on 27.9.1988.

6. So far as the source of money which the defendants had got for the payment to the plaintiff, the defendants had explained that when their mother had died their father had got as compensation Rs. 14,000/- and this had swelled to Rs. 20,000/- and from this amount they had paid to the plaintiff the consideration money for the sale deed. The Trial Court thereafter dismissed the Suit. The First Appellate Court as stated earlier reversed the findings of the Trial Court and on

17.12.1994 and allowed the First Appeal of the plaintiff chiefly on the ground that the defendants ought to have proven that there was no fraud or misrepresentation on their part as they were in a dominating position and the plaintiff was having faith over the defendants and, therefore, it was for them to prove the correctness of the transaction.

7. The Second Appeal was admitted on the following substantial question of law on 4.8.2009 which is being reproduced here as under:-

"Whether the benefits available to a pardanashin lady can be extended to a person who is illiterate and is engaged in business activities"

8. Learned counsel for the appellant has submitted that when the plaintiff was such a person who was always actively employed in a business, though at the time of the sale deed he was not into active business; was having three bank accounts and was in a position to visit doctors independently could not be compared to a Pardanashin Lady.

9. Learned counsel for the appellant further submitted that even though the plaintiff was living with the defendants after he was not doing his business it did not mean that he depended on the defendant's father in such a manner that the latter could influence his thinking. The plaintiff was an independent person and had an identity of his own and though he was having his food etc. with the father of the defendants he always wanted an independent source of income through bank interest and, therefore, he had invested the consideration amount in a fixed deposit. There was no fiduciary relationship between the plaintiff and the father of the defendants. They relied upon **AIR 1982 Allahabad 376 (Daya Shankar vs. Smt. Bachi and others)** to bolster their arguments.

10. Further, the counsel for the appellant submitted that when the evidence had been led from the side of the plaintiff and the defendant and there was sufficient evidence on record for the Court to conclude as to whether the plaintiff was ill ; whether there was any undue influence from the side of the defendants and whether consideration was properly paid then the question as to on whom there was the burden to prove that the plaintiff was ill or not on the date of the execution of the sale deed lost all importance.

11. Learned counsel for the appellants relied upon **AIR 1960 SC 100 (Narayan Bhagwantrao Gosavi Balajiwale vs. Gopal Vinayak Gosavi and others)** and specifically relied upon paragraph no. 10 of the judgement. The relevant portion of which is being reproduced here as under:

"The expression "burden of proof" really means two different things. It means sometimes that a party is required to prove an allegation before judgment can be given in its favour; it also means that on a contested issue one of the two contending parties has to introduce evidence. Whichever way one looks, the question is really academic in the present case, because both parties have introduced their evidence on the question of the nature of the deity and the properties and have sought to establish their own part of the case. The two Courts below have not decided the case on the abstract question of burden of proof; nor could the suit be decided in such a way. The burden of proof is of importance only where by reason of not discharging the

burden which was put upon it, a party must eventually fail. **Where, however, parties have joined issue and have led evidence and the conflicting evidence can be weighed to determine which way the issue can be decided, the abstract question of burden of proof becomes academic."**

12. The relevant portion of the paragraph 11 of **AIR 1964 SC 880 (Kalwa Devadattam and others(in both the appeals) vs. 1. Union of India and others (In C.A. No. 641 of 1961) 2. Kamaji Saremal, Firm and others(In C.A. No. 642 of 1961)** which was relied upon by the appellant is also being reproduced here as under:

"The question of onus probandi is certainly important in the early stages of a case. It may also assume importance where no evidence at all is led on the question in dispute by either side; in such a contingency the party on whom the onus lies to prove a certain fact must fail. Where however evidence has been led by the contesting parties on the question in issue, abstract considerations of onus are out of place; truth or otherwise of the case must always be adjudged on the evidence led by the parties."

13. Learned counsel for the appellants further argued that whether the transaction could be said to be vitiated on the ground of undue influence when the plaintiff himself had brought on record all evidence which definitely went against him then the question of law as had been framed by the Court should be answered in favour of the appellants.

14. Learned counsel for the plaintiff-respondent Sri M.S. Chauhan, however, argued that the grounds as had been raised in the appeal did not raise any substantial question of law and, therefore, the Second Appeal should be dismissed. He further submitted that the Trial Court had erroneously shifted the burden of proving that there was illness of the plaintiff on the plaintiff. He also submitted that burden of proving that undue influence was exercised on the plaintiff was wrongly put on the defendants. Learned counsel for the plaintiff-respondent further submitted that the first appellate court had rightly concluded that when the defendants did not prove that there was no misrepresentation or fraud then the case of the plaintiff had to be believed and the suit ought to be decreed.

15. Having heard the learned counsel for the defendants/appellants Sri Rahul Sripat learned Senior Counsel assisted by Sri Saurabh Patel and Sri Ishir Sripat and Sri M.S. Chauhan, the learned counsel for the respondent, the Court is of the view that the Second Appeal deserves to be allowed. The Trial Court when had looked into the evidence on record which had been brought by the plaintiff with regard to the fact that the plaintiff was ill and undue influence was exercised by the defendant then it evaluated all the evidence in its correct perspective and had found that the plaintiff was not in any manner ill on the date of the execution of the sale deed. The Court further finds that when the plaintiff was not unwell; he could think properly and had earlier carried on his own business then even if the plaintiff was living with the defendants it could not be said that any undue influence could have been exercised on the plaintiff. What is more, the Trial Court had rightly put the burden of proving whether the plaintiff was ill or not on the plaintiff and the plaintiff definitely could

not prove that the plaintiff was in any manner ill on the date of the execution of the sale deed. The Doctors who had given the prescriptions were never produced. The prescriptions themselves told a story which was different from the case which the plaintiff was taking and also the Trial Court rightly concluded from the facts which the defendants had brought on record and had not been denied by the plaintiff that none of the other brothers of the plaintiff had come in the witness box to allege that the defendants' father had exercised undue influence. Even the nephew who was much loved by the plaintiff and whose name found place on the top of the house never came in the witness box. What is more the Court finds that, in fact, the plaintiff has not been able to prove as to from where the amount which he had deposited in the fixed deposit was earned by him. This also shows that the plaintiffs had taken the consideration and had also converted the consideration money into a fixed deposit. It appears that the plaintiff had filed a suit as an afterthought.

16. Under such circumstances, it is abundantly proved that the First Appellate Court wrongly shifted the burden on the defendants to prove that the plaintiff was not under any undue influence of the defendant's father. All the evidence which was there before the Trial Court was correctly analysed in a balanced manner by it. The First Appellate Court wrongly shifted the burden on the defendants. The Second Appeal, therefore, is allowed. The judgement and decree of the First Appellate Court dated 17.12.1994 passed by the VIth Additional District Judge, Azamgarh, is set aside. The Suit stands dismissed.

(2022) 11 ILRA 246
APPELLATE JURISDICTION

CIVIL SIDE
DATED: ALLAHABAD 11.10.2022

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Second Appeal No. 1180 of 1983

Sheo Badan ...Defendant/Appellant
Versus
Prithvi Pati & Ors. ...Plaintiffs/Respondents

Counsel for the Appellant:
Sri V.B. Khare, Sri Ashok Kumar Shukla, Sri L.P. Tiwari

Counsel for the Respondents:
Sri H.R. Mishra, Sri A.K. Mishra, Sri A.P.N. Giri, Sri Arvind Prabodh Dubey, Sri P.K. Mishra, Sri R.S. Mishra, Sri Ashok Kumar Giri

A. Civil Law - Code of Civil Procedure,1908 - Order VII Rule 3 C.P.C. - Identity of Property - Order XXVI Rule 9 C.P.C., Commissions to make local investigations - Transfer of Property Act, 1872 - Section 118 - Exchange - Plaintiff established that he had given his plot no.2573/1 measuring 11 decimals in exchange of plot no.2143 which was subsequently converted to plot no.2826/10 and then later on to 2826/11, at the time of consolidation and, therefore, he had a right over the same - As per section 118 of the Transfer of Property Act, 1872 there was a proper exchange of plot no.2573/1 (of the plaintiff) with plot no.2143 (of Ganga and Harivansh) and since at the time when the exchange had taken place i.e. in the year 1950, the plots were valued not more than Rs.100/-, there was no requirement of a written document - Lower appellate Court committed no error in law in not getting the plot in dispute demarcated by preparing a survey map and not getting the identity of the plots established - Court found that in fact there was no dispute with regard to plot

no.2826 as the document 23-Ga definitely showed that plot no.2826/10, now numbered as 2826/11, had gone to the plaintiff after an exchange with the plaintiff's plot no.2573/1 then there was absolutely no dispute with regard to the identity of the plot - the only dispute which the defendants were raising was that the plot no.2826/11 was earlier plot no.2143/1 and this the defendant/ appellant could not prove (Para 10)

B. Civil Law - U.P. Tenancy Act, 1939 - Section 53 - Exchange of land for consolidation of cultivated area - As per the provisions of section 53 of the U.P. Tenancy Act, 1939, an agricultural land could be exchanged by an agricultural land - In the instant case, the Court found that earlier the land i.e. plot no.2573/1 though was entered as abadi, it was subsequently, by the order of the Consolidation Court, changed into agricultural land therefore there was no infringement of any provision of the U.P. Tenancy Act, 1939 (Para 11)

Dismissed. (E-5)

List of Cases cited:

1. Harnam Singh Vs Bhikimbar Singh & ors. reported in AIR 1980 Allahabad 50

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

1. This Second Appeal has been filed against the judgment and decree dated 20.1.1983 passed by the Civil Judge, First, Gorakhpur in Civil Appeal No.200 of 1982.

2. The plaintiff aggrieved by the disturbance which was being caused by the defendant in his plot no.2826/11, had filed a suit being Original Suit No.53 of 1978. When the suit was dismissed, the First Appeal being Appeal No.200 of 1982 was filed. When the First Appeal was allowed, the defendants filed the instant Second Appeal.

3. Plaintiff's case was that he was in possession over 11 decimals of plot no.2826/11 which he had got in exchange from Ganga and Harivansh after he had surrendered his plot no.2573/1 to them. In effect, the case was that the plaintiff had got plot no.2826/11 (earlier 2826/10) in exchange of his plot no.2573/1. Both the plots were having areas of 11 decimals. This exchange, as per the plaintiff, had taken place in the year 1950. When on 13.4.1976, the defendants had without any authority encroached upon the land of the plaintiff, he had on various occasions written to the police and when nothing happened, the plaintiff filed the suit.

4. The plaintiff's suit was dismissed on the ground that the Trial Court found that the plaintiff had not been able to prove his case. However, the First Appellate Court had decreed the suit on the ground that the plaintiff had been able to establish that he had given his plot no.2573/1 measuring 11 decimals in exchange of plot no.2143 which was subsequently converted to plot no.2826/10 and then later on to 2826/11 and, therefore, he had a right over the same. The First Appellate Court had also found that the defendants could not prove their case as they were in effect mentioning about a plot being plot no.2143/1 which was theirs and which in no manner was the same as plot no.2143.

5. The Appellate Court had formulated three questions which were to the following effect and were to be answered by it :-

(1) Was the plaintiff bhumidhar of the plot in question ?

(2) Was the plaintiff entitled for any damages ?

(3) Whether the suit was barred by limitation ?

6. With regard to the first question, the First Appellate Court had, after dealing with all the relevant evidence before it come to a conclusion that plot no.2573/1 which belonged to the plaintiff was in fact given in exchange of plot no.2143 to Ganga and Harivansh. While arriving at this finding, the First Appellate Court had concluded on the basis of various evidence. It had found that earlier the plaintiff was the owner of plot no.2573/1 area 11 decimals. This plot, according to the First Appellate Court, was an agricultural plot and it was exchanged by plot 2143 area 11 decimals which was subsequently numbered as 2826/10 and later on was numbered as 2826/11 at the time of consolidation. It was shown that this plot had abadi but upon objections being made by Ganga and Harivansh, it was again recorded as agricultural.

7. The First Appellate Court, while dealing with the case of the defendants, had categorically held that the defendant when was mentioning about the plot, being plot no.2143/1 which in the year 1905 was divided into sub-plots numbered as 112 to 117 as being of the defendant then he was mentioning about a totally different plot. The First Appellate Court categorically held that plot no.2143/1 was never numbered as 2826/10. It has stated that the "Fard Mutabik" (exchange form) which was numbered as Paper No.68-Ga, had no mention about plot no.2143/1. The First Appellate Court also found that the defendants had no right because they had althrough stated that they were always in possession over plot no.2143/1 and that they had also by means of a sale deed purchased the same on 17.12.1977 from Ganga and Harivansh. The First Appellate Court also concluded that when the defendants althrough were in possession over the plot in question then what was the necessity of purchasing the same on 17.12.1977. The First Appellate Court, therefore, concluded that as per section 118 of the Transfer of Property Act, 1872 there was a proper exchange of plot no.2573/1 (of the plaintiff) with plot no.2143 (of Ganga and Harivansh) and since at the time when the exchange had taken place i.e. in the year 1950, the plots were valued not more than Rs.100/-, there was no requirement of a written document. It had also found that a zamindar was not barred by the requirements of the U.P. Tenancy Act, 1939.

8. While dealing with the defendants' case with regard to the document no.58-Ga, which was placed on record as evidence and which was the khatauni for the years 1333 Fasli and 1334 Fasli, it held that the document only evidenced that the Zamindar of the village was Ram Chandra Tiwari. The First Appellate Court had concluded that in 1950, when the exchange had taken place as per the document which was numbered as 23-Ga, it was clear that Ganga and Harivansh were owners of plot no.2573/1 whereas the plaintiffs were entered over plot no.2826/10. It has also been found that on this paper the factum of transfer is mentioned. With regard to document nos.36-Ga and 37-Ga which the defendants had placed on record, the Court categorically had given a finding that they were with regard to plot no.2143/1 and the defendant could not get any advantage from this paper. The Court below also had concluded that since the plaintiff and defendants were not at quarrel with regard to the fact that the land in question was not numbered as 2143/1, there was no question

of getting any survey done. It further concluded that since the defendants were althrough wanting to establish that plot no.2826/11 was a plot which had got converted from plot no.2143/1 and this fact the defendants could not establish, the defendants had no case.

9. Assailing the judgment and decree of the First Appellate Court, Sri Ashok Kumar Shukla, learned counsel for the appellant/defendant argued on the three questions of law which are as follows and which were formulated at the time of admission :-

1. whether the lower appellate Court had erred in law in not getting the plot in dispute demarcated by preparing a survey map and not getting the identity of the plots established as is a requirement under Order VII Rule 3 C.P.C. and under Order XXVI Rule 9 C.P.C.?

2. whether the exchange in favour of the plaintiff was legal ?

3. whether the land in dispute was a land appurtenant to the house of the defendant ?

10. Learned counsel for the appellant vehemently argued that when there was a question involved as to whether plot no.2826/11 was originally plot no.2143 and the defendants were coming up with various documents that the plot n o.2826/11 was earlier plot no.2143/1 which had been partitioned into plot nos.112 to 117, then survey ought to have been done. He relied upon a judgment of the Supreme Court in the case of **Sreepat vs. Rajendra Prasad & Ors.** reported in **JT 2000 (7) SC 379** and submitted that when there was a dispute with regard to the identity with regard to a plot then a survey was a must. Since upon a bare perusal of the order of the First Appellate Court this Court finds that in fact there was no dispute with regard to plot no.2826 as the document 23-Ga definitely showed that plot no.2826/10, now numbered as 2826/11, had gone to the plaintiff after an exchange with the plaintiff's plot no.2573/1 then there was absolutely no dispute with regard to the identity of the plot. In fact the only dispute which the defendants were raising was that the plot no.2826/11 was earlier plot no.2143/1 and this the defendant-appellant could not prove. The document which they had relied upon i.e. paper no.68-Ga had not mentioned about the plot no.2143 at all. Hence, the Court finds that there was no error committed by the First Appellate Court in not getting a survey conducted.

11. With regard to the second question as to whether the exchange in favour of the plaintiff was legal, the Court finds that as per the provisions of section 53 of the U.P. Tenancy Act, 1939, an agricultural land could have been exchanged by an agricultural land. However, in the instant case, the Court finds that earlier the land i.e. plot no.2573/1 though was entered as abadi, it was subsequently, by the order of the Consolidation Court, changed into agricultural land and, therefore, it can safely be said that there was no infringement of any provision of the U.P. Tenancy Act, 1939.

12. With regard to the third issue as to whether the disputed land was a land appurtenant to the house of the defendant-appellant, though learned counsel for the appellant relied upon **Harnam Singh vs. Bhikimbar Singh & Ors.** reported in **AIR 1980 Allahabad 50,** the Court finds that this judgment would not be of any help to him as the defendant-appellant had tried to

establish that the land appurtenant was plot no.2143/1 while here the land in question was plot no.2143 (later 2826/11).

13. Learned counsel for the respondents, however, stated that the substantial questions of law are not required to be dealt with as the appeal is concluded by findings of fact.

14. Under such circumstances, no substantial question of law arises for being answered in the instant Second Appeal. However, if the defendant-appellant is of the view that his plot no.2143/1 ought to be demarcated, then he shall always be at a liberty to get the plot no.2143/1 demarcated and identified.

15. The Court finds that there is no merit in this second appeal. It is, accordingly, dismissed.

(2022) 11 ILRA 250
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.09.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD. J.

Government Appeal No. 591 of 2022

State of U.P. ...Appellant
Versus
Vakil ...Accused-Respondent

Counsel for the Appellant:
Sri Shiv Kumar Pal, Sri S.A. Murtza, A.G.A.

Counsel for the Respondent:

Criminal Law - The Code of Criminal Procedure, 1973 - Section 378 (3) - Appeal in case of acquittal - No appeal under S. 378 (1) or S. 378 (2) shall be entertained except with the leave of the High Court - S. 384, Summary dismissal of appeal - Before dismissing an appeal under S. 384 CrPC, the Court may call for the record of the case - Held - It is not mandatory for the High Court to summon the lower court record, first, in every case, before deciding the application for the grant of leave, filed by the State, to institute an appeal under Section 378(3) of the Cr.P.C. - Right of the appellate court to summon the lower court record in an appropriate matter always subsists - It is within the purview of the High Court to determine, based on the facts and circumstances of each case, whether the application for grant of leave necessitates the perusal of the lower court records or not -It is not necessary for this Court to routinely call for the lower court records for consideration of applications under Section 378(3) of the Cr.P.C. in every case (Para 16) (E-5)

List of Cases cited:

1. St. of Mah. Vs Sujay Mangesh Poyarekar (2008) 9 SCC 475

2. St.of U. P. Vs Anil Kumar @ Badka & ors. (2018) 9 SCC 492

(Delivered by Hon'ble Ashwani Kumar Mishra, J. & Hon'ble Shiv Shanker Prasad, J.)

1. A short but interesting question arises in this appeal as to whether this Court, while exercising its power to grant leave to the State to institute appeal under sub-section 3 of Section 378 Cr.P.C. is required to summon the lower court record, first, before proceeding to consider the prayer made for grant of leave?

2. Section 378 Cr.P.C. provides for filing of appeal in case of acquittal by the State. Sub-section 3 of Section 378 Cr.P.C. contemplates for grant of leave for entertainment of such appeal. Sub-section 3 of Section 378 Cr.P.C. reads as under: -

"3. No appeal under Sub-Section (1) or Sub-Section (2) shall be entertained except with the leave of the High Court."

3. It is urged by Sri S. A. Murtza, learned A.G.A. for the State that the State cannot be treated differently in the matter of filing of appeal vis-a-vis the victim and since the requirement of seeking leave under Section 372 Cr.P.C. stands dispensed with by virtue of proviso added to Section 372 Cr.P.C., conferring right upon a victim to prefer appeal against the order of acquittal or convicting the accused for a lesser offence or imposing inadequate compensation, as such the State being repository of the interest of society at large must be treated at par with the victim. It is also submitted that though the Code of Criminal Procedure provides for summary dismissal of appeal yet sub-section 2 of Section 384 Cr.P.C. nevertheless provides that before dismissing an appeal, summarily, the Court may call for record of the case. Sub-section 2 of Section 384 Cr.P.C. relied upon by learned A.G.A. is extracted hereinafter:-

"(2) Before dismissing an appeal under this section, the Court may call for the record of the case."

4. It is urged that appeal is a creature of statute and Chapter XXIX of the Code provides for the procedure to be followed for its adjudication, therefore, it would be necessary for this Court to summon the lower court record first before examining the question of grant of leave. It is also urged that the refusal to grant leave results in affirmance of the order impugned in the appeal as such the decision affects the victim as his right of appeal would be adversely affected. Attention of the Court has been invited to the judgment of the Supreme Court in ***State of Maharastra Vs. Sujay Mangesh Poyarekar (2008) 9 SCC 475,*** wherein the Supreme Court observed as under in paragraph Nos. 19 to 21:-

"19. So far as an application for leave to appeal by the State is concerned, the High Court rejected it without considering the evidence of the prosecution. In the impugned order, the High Court noted that it had heard the learned Assistant Public Prosecutor. It went on to state that none of the injuries sustained by the victim was `fatal'. According to the High Court, the cause behind the assault was that the complainant-advocate was teasing the wife of the accused, who was also working in the Court.

20. It then proceeded to observe;

"The trial Court has appreciated the evidence properly and has also taken into consideration the number of complaints filed against the said advocate complainant including the apology tendered by the complainant to the President, Bar Association, Dahanu and the action taken by the Bar Council. The trial Court found inherent improbabilities in the case of the complainant and therefore acquitted the accused. The judgment of the trial Court cannot be said to be perverse. No interference is called for. Application rejected".

21. Now, Section 378 of the Code provides for filing of appeal by the State in case of acquittal. Sub-section (3) declares that no appeal "shall be entertained except with the leave of the High Court". It is, therefore, necessary for the State where it is aggrieved by an order of acquittal recorded by a Court of Session to file an application for leave to appeal as required by sub-section (3) of Section 378 of the Code. It is also true that an appeal can be registered and heard on merits by the High Court only after the High Court grants leave by allowing the application filed under sub-section (3) of Section 378 of the Code.

5. The judgment in ***Sujay Mangesh Poyarekar (Supra)*** has been followed by the Supreme Court in ***State of Uttar Pradesh Vs. Anil Kumar @ Badka and Others (2018) 9 SCC 492,*** wherein the Supreme Court observed as under in paragraph No. 5 and 11:-

"5. The State of U.P., fet aggrieved by the respondent' acquittal, filed an application for leave to appeal before the High Court under Section 378(3) of the Code. By the impugned order the High Court declined to grant leave and accordingly rejected the application made by the State. It is against this order, the State has filed this appeal by way of special leave petition in this Court.

11. We are constrained to observe that the High Court grossly erred in passing the impugned order without assigning any reason. In our considered opinion, it was a clear case of total non-application of mind to the case by the learned Judges because the order impugned neither sets out the facts nor the submissions of the parties nor the findings and nor the reasons as to why the leave to file appeal is declined to the appellant. We, therefore, disapprove the casual approach of the High Court in deciding the application which, in our view, is against the law laid down by this Court in State of Maharashtra Vs. Sujay Mangesh Poyarekar."

6. Learned State Counsel has also referred to the judgment of the Supreme Court in ***Mallikarjun Kodagali Vs. State of Karnataka and Others (2019) 2 SCC 752***, wherein the Supreme Court examined the scope of Section 372 and observed as under in paragraph Nos. 75 and 76:-

" 75. Under the circumstances, on the basis of the plain language of the law and also as interpreted by several High Courts and in addition the resolution of the General Assembly of the United Nations, it is quite clear to us that a victim as defined in Section 2(wa)of the Cr.P.C. would be entitled to file an appeal before the Court to which an appeal ordinarily lies against the order of conviction. It must follow from this that the appeal filed by Kodagali before the High Court was maintainable and ought to have been considered on its own merits.

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."

7. Section 384 of the Code provides for summary disposal of appeal and is reproduced hereinafter: -

"384. Summary dismissal of appeal.

(1) If upon examining the petition of appeal and copy of the judgment received under section 382 or section 383, the Appellate Court considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily: Provided that-

(a) no appeal presented under section 382 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same;

(b) no appeal presented under section 383 shall be dismissed except after giving the appellant a reasonable opportunity of being heard in support of the same, unless the Appellate Court considers that the appeal is frivolous or that the production of the accused in custody before the Court would involve such inconvenience as would be disproportionate in the circumstances of the case;

(c) no appeal presented under section 383 shall be dismissed summarily until the period allowed for preferring such appeal has expired.

(2) Before dismissing an appeal under this section, the Court may call for the record of the case.

(3) Where the Appellate Court dismissing an appeal under this section is a Court of Session or of the Chief Judicial Magistrate, it shall record its reasons for doing so.

(4) Where an appeal presented under section 383 has been dismissed summarily under this section and the Appellate Court finds that another petition of appeal duly presented under section 382 on behalf of the same appellant has not been considered by it, that Court may, notwithstanding anything contained in section 393, if satisfied that it is necessary in the interests of justice so to do, hear and dispose of such appeal in accordance with law."

8. So far as Section 384 of the Code is concerned it confers power upon the appellate court to dismiss an appeal summarily. The language employed by the Statute in sub-section (1) is that upon examining the petition of appeal and copy of the judgment received under Section 382 or Section 383 the appellate court considers that there is no sufficient ground for interfering it may dismiss the appeal, summarily. The proviso to sub-section 1 only provides that before such dismissal the appellant or his pleader would be given a reasonable opportunity of being heard in support of such petition. Similarly in respect of an appeal preferred under Section 383 Cr.P.C. the dismissal shall be after giving the appellant a reasonable opportunity of being heard unless the appellate court considers that appeal is frivolous or that the production of the accused in custody before the Court would involve such inconvenience as would be disproportionate in the circumstances of the case.

9. Sub-section 2 of Section 384 Cr.P.C. then provides that before summarily dismissing an appeal under Section 383 Cr.P.C. the appellate court may call for record of the case. The cojoint reading of sub-section 1 and 2 of Section 384 Cr.P.C. clearly conveys that the appellate court upon examining the petition of appeal and copy of the judgment received under Section 382 or 383 can summarily dismiss the appeal, if it considers that there is no sufficient ground for interference. The specification of the material to be relied upon in sub-section (1) for the purposes of considering the appeal for summay dismissal denotes the legislative intent that the only material which is required for consideration by the appellate authority is the petition of appeal and the copy of the judgment. Sub-section (2) only enables the appellate court to call for the records of the case even before it proceeds to summarily dismiss the appeal.

The Code vests discretion with the appellate court to summon the lower court record before summarily dismissing the appeal, or not. This discretion is to be exercised by the appellate court depending upon the requirement of lower court record for formation of opinion whether sufficient ground exists for interference in appeal.

10. The provision has been considered by the Supreme Court in ***Hanumat Das Vs. Vinay Kumar AIR 1982 SC 1052,*** wherein their Lordship observed that non summoning of lower court record in appeal against conviction is not fatal.

11. The use of expression 'may' in sub-section (2) clearly suggests that the power to summon the record is only an enabling provision and is not to be read as shall as is suggested by the learned counsel.

12. Before proceeding to examine the contention raised we would like to refer to the judgment of the Supreme Court cited at the Bar. In ***Sujay Mangesh Poyarekar (Supra)*** while considering the scope of sub-section 3 of Section 378 the Court observed that the High Court while exercising the power to grant or refuse leave must apply its mind and consider where a prima facie case has been made out or arguable points have been raised and not whether the order of acquittal would or would not be set aside. In paragraph 21 the Court clearly observed that every petition seeking leave to prefer an appeal is not required to be allowed by the appellate court nor that every appeal filed has to be admitted. The two observations are a clear pointer to the legislative intendment. Every appeal is not required to be admitted inasmuch as leave must not necessarily be granted in every matter and the exercise of power in that regard is dependent upon a prima facie assessment of the material placed before the Court so as to ascertain whether the appeal raises arguable points or not.

13. The object of incorporating provision for grant of leave has a purpose to subserve. It is not that in every matter the State is expected or required to file an appeal and even if such an appeal is routinely filed, the Court is not required to entertain every such appeal as a matter of course. The purpose of grant of leave by the High Court is that a prima facie assessment would be required to determine whether the appeal raises arguable points or not. The reason for grant or refusal to leave must be reflected from the order passed by the High Court. The Supreme Court has clearly disapproved the practice of rejection of prayer for grant of leave to file appeal by passing orders which do not reflect proper application of mind by the appellate court within the scope of powers to be exercised.

14. The observations of the Supreme Court, relied upon by the State Counsel, would not lead to an inference that just because the victim has a right of appeal as such the State must also be recognized as having right to prefer appeal against any order of acquittal or conviction for a lesser offence or imposing inadequate compensation.

15. The purpose of grant of leave is merely to embark upon a prima facie assessment so as to decide which of the matters would require examination by the appellate court. The refusal to grant leave would not mean that the order of acquittal merges in the order of the High Court. The right of the victim to file an appeal by virtue of proviso to section 372 Cr.P.C. would, therefore, not be adversely affected

by the refusal to grant leave under Section 378(3) Cr.P.C. by the High Court. The right of the victim to file an appeal in terms of proviso to Section 372 Cr.P.C. would thus stand unhindered. The above interpretation would subserve the object of provision for grant of leave to the State to file an appeal against the order of acquittal while maintaining the right of a victim to prefer an appeal under Section 372 Cr.P.C.

16. The up shot of the above deliberation is that it is not mandatory for the High Court to summon the lower court record in every case before deciding the application for grant of leave under Section 378(3) Cr.P.C. We hasten to add that the right of the appellate court to summon the lower court record in an appropriate matter always subsists. It is for the High Court to decide on the basis of facts and circumstances of each case whether the application for grant of leave requires the perusal of the lower court records or not? We, therefore, hold that it is not necessary for this Court to call for the lower court records for consideration of application under Section 378(3) Cr.P.C., in every case or as a matter of routine.

17. As prayed by Sri S.A. Murtaza, learned A.G.A., put up this case, once again, on 29.09.2022 for consideration of application by the State filed under Section 378(3) Cr.P.C.

(2022) 11 ILRA 255
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.10.2022

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE VIKAS BUDHWAR, J.

Writ-C No. 12310 of 2022
With
Writ-C No. 24798 of 2022

Suman Singh ...Petitioner
Versus
District Magistrate & Ors. ...Respondents

Counsel for the Petitioner:
Sri Abhishek Kumar, Sri Ashish Kumar Gupta

Counsel for the Respondents:
C.S.C., Sri Ajay Kumar Singh, Sri Ashish Kumar Singh, Sri Sudharshan Singh, Sri Tejas Singh

A. Civil Law – Constitution of India – Article 226 – Writ – Maintainability – Question of facts – Judicial intervention in the matter to be decided by Civil Court under the common law, extent of – Held, under Article 226 of the Constitution of India disputed questions cannot be gone into, particularly in view of the fact that though one fraction is coming up with a stand that its land has been encroached upon by other fraction, but the other fraction is disputing the same – Once the parties are claiming their right before the Civil Court while taking recourse to the remedies as available under law, then proceedings under Article 226 of the Constitution of India are not maintainable. (Para 42 and 44)

B. Civil law – Constitution of India – Article 226 – Civil Procedure Code, 1908 – O. I R. 10 and O. VI R. 17 – Writ jurisdiction – Matter though involves question of facts, but allegation made is against the St. and its functionaries – Scope of judicial interference by High Court – Held, writ jurisdiction is not the appropriate remedy – In view of the provisions contained under O. I R. 10 of the C.P.C., it is always open to prties to file appropriate application for not only impleading the St. and instrumentalities but also preferring appropriate application under O. VI R. 17 of C.P.C. for amending plaint while seeking relief of recovery of possession of their claimed land/ premises. (Para 47 and 48)

Writ petition dismissed. (E-1)

List of Cases cited:-

1. Writ C No. 4362 of 2014; Sayeed Khan Vs St. of U.P, decided on 3.11.2014 and 1.12.2014

2. Mohan Pandey & anr. Vs Usha Rani Rajgaria (SMT) & ors.; (1992) 4 SCC 161

3. Swetambar Sthanakwasi Jain Samiti & anr. Vs Alleged Committee of Management Sri R.J.I. College, Agra & ors.; (1996) 3 SCC 11

4. Roshina T. Vs Abdul Ajeez K.T. & ors.; (2019) 2 SCC 329

5. Punjab National Bank & ors. Vs Atmanand Singh; (2020) 5 SCC 256

6. Kishore Kumar Khaitan & anr. Vs Praveen Kumar Singh; (2006) 3 SCC 312

7. Ramesh Hirachand Kundanwal Vs Municipal Corporation Greater Bombay & ors.; (1992) 2 SCC 524

8. Civil Appeal No. 5522 to 5523 of 2019; Gurmit Singh Bhatia Vs Kiran Kant Robinson & ors. decided on 17.07.2019

(Delivered by Hon'ble Vikas Budhwar, J.)

1. The question which arises and falls for consideration before this Court in the present proceeding is with regard to the extent of judicial intervention in matters, where admittedly, parties are litigating their rights under the common law before the competent Civil Courts."

2. To begin with, one Smt. Suman Singh had instituted Writ-C No. 12310 of 2022, Suman Singh vs. District Magistrate, Varanasi and 7 others (hereinafter referred to as the leading petition) before this Court seeking following reliefs: -

"I. To issue a writ, order or direction in the nature of mandamus commanding the respondents to restore the possession of petitioner over her plot No. 446 area 2250 square feet situated at Village Susuwahi, Tehsil Sadar, District Varanasi from which petitioner was dispossessed illegally by the state authorities with connivance of private respondents.

II. 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.

III. To award the cost of petition in favour of the petitioner."

3. Perusal of the relief as sought in the above noted writ petition will clearly reveal that the petitioner herein had sought writ, order or direction in the nature of mandamus commanding the respondents including Smt. Manju Devi w/o Shri Gopal Prasad, Smt. Sunita Devi w/o Lalji Gupta and Sri Gopi Chandra Gupta son of Late Dukhnti Sav, to restore the possession over the plot no.446 are 2250 sq. ft. situate at village Susuwhi, Tahsil Sadar, District Varanasi, from which the petitioner claims to be dispossessed illegally by the State authorities in connivance with the private respondents.

4. So far as Writ-C No. 24798 of 2022 (hereinafter referred to as the 'connected petition') is concerned, the same has been instituted by Smt. Manju Devi w/o Shri Gopal Prasad, Smt. Sunita Devi w/o Lalji Gupta, Smt. Lali Devi w/o Gopichand Gupta and Gopi Chandra Gupta son of Late Dukhnti Sav, in which besides the State and its functionaries, the petitioner in Writ-C No. 12310 of 2022, Suman Singh vs. District Magistrate, Varanasi and 7 others (hereinafter referred to as to as 'the leading petition') has been arrayed as Respondent no.5 seeking the following reliefs: -

"I. Issue a writ, order or direction in the nature of certiorari quashing exparte

order dated 13.08.2022 passed by respondent no. 3 along with memo of delivery of possession dated 16.08.2022 (Annexure 1 to the petition).

II. Issue a writ, order or direction in the nature of Mandamus directing respondents-authorities to restore back possession of petitioners over their property being Arazi No. 446 M area 4080 sq. ft., situate in Mauza Susuwahi, Pargana Dehat Amanat, Tehsil and District Varanasi, by directing respondents-authorities to maintain statusquo ante by restoring status of the property of petitioners as stood prior to 16.08.2022 or as existed on 10.08.2022 when the order dated 10.08.2022 was passed by Hon'ble Court in Writ Petition No. 12310 of 2022.

III. Issue an appropriate writ, order or direction in the nature of mandamus directing respondents to pay compensation to the tune of Rs. 10 lakhs towards the mental, physical agony and distress suffered by the petitioner due to wrongful and illegal dispossession of the petitioner from his own property and towards raising of constructions over the property of petitioners by the respondent no. 5.

IV. Issue writ of mandamus, order or direction with this Hon'ble Court deems fit and proper in the facts and circumstances of the case.

V. Award the cost of the writ petition to the petitioners."

5. A close scrutiny of the relief as sought in the connected petition would go to show that writ, order or direction in the nature of certiorari has been sought for quashing ex-parte order dated 13.8.2022 passed by Respondent no.3 (S.D.M. Sadar, District Varanasi) along with the memo of delivery of possession dated 16.8.2022, whereby the private respondent in the connected petition being the petitioner in the leading petition Suman Singh has been handed over the portion, which is owned and possessed by the petitioner in the connected petition, which even in fact is in complete defiance of the interim injunction so passed in the suit so instituted by the petitioners in the connected petition. Further relief has been sought for directing the State respondents to restore back the possession of the petitioner over their property being Arazi no.446 M area 4080 sq. ft., situate in Mauza Susuwahi, Pargana Dehat Amanat, Tehsil and District Varanasi while restoring status quo ante by restoring status of the property of petitioners as it stood prior to 16.08.2022 or as it existed on 10.08.2022 when the order dated 10.08.2022 was passed by Hon'ble Court in the leading petition and to further compensate the petitioners while paying compensation to the tune of Rs.10 lakhs.

6. Factual matrix of the case as worded in the leading and connected petitions are to the extent that Suman Singh w/o Jai Shankar (hereinafter referred to as petitioner in leading petition) claims to have purchased land being plot no. 446 area 2250 sq. ft. situate at Village-Susuwahi, Tahsil Sadar, District Varanasi by virtue of three separate sale deeds dated 29.5.2013, 9.7.2013 and 19.10.2013.

7. The petitioner in the leading petition further claims that consequent to the execution of the above noted three sale deeds, she was put in possession of the aforesaid plot of land being plot no. 446 area 2250 sq. ft. and she was continuing with enjoyment of the said piece of land. According to the petitioner in the leading writ petition, the respondents no. 4, 5 and 6 being Smt. Manju Devi w/o Gopal Prasad, Smt. Sunita Devi w/o Lalji Gupta, Smt.

Lali Devi w/o Sri Gopichand Gupta by virtue of the sale deed dated 26.9.2014 purchased a part of the plot no.446 situate at Village- Susuwahi, Tahsil Sadar, District Varanasi admeasuring 2040 sq. ft.

8. Smt. Suman Singh, petitioner in the leading writ petition alleges that the respondents no. 4, 5 and 6 in the leading writ petition started interfering in the peaceful possession of the plot no. 446 (area 2250 sq. ft.) so owned by the petitioner, which compelled the petitioner Suman Singh to institute Original Suit No. 317 of 2018 before the Court of Civil Judge (Junior Division), Hawali, Varanasi titled as Smt. Suman Singh vs. Manju Devi and 2 others seeking relief of permanent injunction to restrain the defendants therein and the private respondents in the leading petition not to illegally dispossess the petitioner from the plot in question and to interfere in the peaceful possession of the property owned by the petitioner.

9. Records reveal that on 6.3.2018, the paper no. 6-C purported to be an application under Order 39 Rule 1 and 2 of CPC came to be decided by the Court of Civil Judge (Junior Division) Hawali, Varanasi in O.S. No. 317 of 2018, Smt. Suman Singh vs. Manju Devi and others, whereby temporary injunction was granted in favour of the petitioner in the leading writ petition restraining the defendant therein and the private respondents in the leading writ petition not to create any obstacles and hindrances over the possession of the petitioner herein till the next date of listing.

10. Pleadings further reveal that the private respondents in the leading writ petition being Smt. Manju Devi w/o Sri Gopal Prasad, Smt. Sunita Devi w/o Laljij Gupta and Smt. Lali Devi w/o Sri Gopichand Gupta instituted proceeding being O.S. No.7 of 2019 before the Court of Civil Judge (Senior Division), Varanasi (Smt. Manju Devi and 2 others vs. Smt. Suman Singh seeking relief of permanent injunction restraining the petitioner in the leading writ petition from interfering in the peaceful possession over the property, which is claimed to have been purchased by them being plot no. 446 (area 4080 sq. ft.) by virtue of sale deeds, which were two in number, dated 26.9.2015 each of 2040 sq. ft. In the said suit, an application under Order 39 Rules 1 and 2 seeking temporary injunction was also filed, in which on 3.1.2019 the Court of Civil Judge (Senior Division), Varanasi granted an ex-parte interim injunction restraining the petitioner in the leading writ petition and defendant in the suit from creating any obstacle / hindrance and restraining them from illegally encroaching and taking possession thereof.

11. On 19.1.2019, it appears that respondent no.4 in the leading writ petition being Smt Manju Devi w/o Sri Gopal Prasad preferred an application before respondent no.3 being Sub-Divisional Magistrate, Sadar, District Varanasi seeking measurement of the plot no.446 admeasuring 2040 sq. ft. situate at Village-Susuwahi, Tahsil Sadar, District Varanasi. On the said application, report was sought and the Revenue Inspector, Chitaipur, Tahsil Sadar, Varanasi submitted its report before the Lekhpal, wherein it was recited that physical inspection had been conducted and it was found that the Arazi No. 446 (area 2040 sq. ft.) is owned by the applicant Smt. Manju Devi and so far as measurement etc. is concerned, same can be done under Section 24 of the under U.P. Revenue Code, 2006.

12. Taking clue from the same, it appears that respondent no.6 in the leading writ petition being Smt. Lali Devi w/o Sri Gopichand Gupta preferred proceedings under Section 24 of the U.P. Revenue Code, 2006 for demarcation, which came to be decided in the proceedings in Case No. 17462 of 2019, Lali Devi Vs. State, wherein proceeding for demarcation under Section 24 of the U.P. Revenue Code, 2006 was forestalled on the ground that the parties had subjected themselves before the Civil Court under Common Law by filing their respective suits. Thereafter respondent no.7 being Gopi Chand Gupta husband of respondent no.6 Lali Devi in the leading petition preferred an application before respondent no.3/ Sub-Divisional Magistrate, Sadar, District Varanasi on 11.7.2020, wherein he has alleged that though they permanently reside in Bihar, however, on 20.6.2020 in the night, the husband of the petitioner herein in the leading writ petition being Jai Shankar got uprooted the gate and even in fact encroached upon the land while committing illegal acts despite the pendency of the civil suits by both the fractions and thus request was made that a suitable direction be issued to the Police Station - Lanka and Chowki Chitaipur to grant protection for undertaking construction activities and the other party be restrained from interfering in any manner whatsoever. The said application is on record as Annexure-8 at page-60 of the paper-book. On the said application, on 23.7.2020, the SDM, Varanasi submitted his report before the District Magistrate, Varanasi dated 23.7.2020 mentioning therein that the parties in question had purchased their respective pieces of plots through sale deeds and civil suit was pending before the Civil Court and a first information report had also been lodged against Jai Shankar and his wife Suman Singh being FIR No. 402 of 2020, under Sections 447, 323, 504, 506 and 427 IPC and was pending along with other criminal cases.

13. It appears from the record that respondent no.1 being the District Magistrate, Varanasi on 30.7.2020 issued a letter under his signatures addressed to SSP, Varanasi reciting the fact that criminal case was pending against the petitioner and her husband in the leading writ petition as referred to above and preventive action be taken to maintain peace and harmony.

14. On 31.8.2020, respondent no.7, Gopi Chandra Gupta son of Dukhanti Sav preferred an application before Respondent no.1/ District Magistrate, Varanasi for providing Police Force and a Team of Revenue Officers in order to remove illegal possession over the plot, which had been illegally encroached upon by the petitioner in the leading writ petition. A copy of the application dated 31.1.2020 is annexed as Annexure-11 at page 69. On the said application, the respondent no.2 being A.D.M, District Varanasi issued a communication addressed to respondent no.3 / S.D.M., Sadar, Varanasi for taking necessary action as per law.

15. Record reveals that on the basis of the application so preferred on 31.8.2020 by Sri Gopi Chandra Gupta (respondent no.7 in the leading writ petition) a communication was sent on 3.9.2020 under the signature of Respondent no.2 (Additional District Magistrate (City), Varanasi) addressed to the Respondent no.3 / S.D.M, Sadar, Varanasi. It appears that on 25.9.2020, the Revenue Inspector, Chitaipur, Sadar, Varanasi tendered his report. Thereafter an order was passed on 19.10.2020, pursuant whereto, the

possession of the petitioner over the land so owned and possessed by the petitioner was disturbed and the petitioner in the leading writ petition was dispossessed by the Police officials on 7.11.2021 and the said fact found its presence in D.G. No. 067 dated 7.11.2021, copy whereof is annexed as Annexure-13-A at page 82/83 of the paper-book.

16. The petitioner being aggrieved against her dispossession from the property in question preferred a representation on 9.11.2020 before the District Magistrate, Varanasi/ respondent no.1 and alleging non-cooperation from it, she approached the Commissioner, Varanasi Region, Varanasi on 9.11.2020. Records reveal that on 11.11.2020. The Commissioner, Varanasi Region, Varanasi sent a communication to District Magistrate, Varanasi for taking appropriate action.

17. Alleging dispossession and consequent harassment, the petitioner has filed the leading writ petition.

18. On 14.7.2022, this Court proceeded to pass the following order: -

"Supplementary affidavit filed today is taken on record.

Indisputably, two civil suits are pending between the petitioner and private respondents in respect of plot no. 446. One of the suit was filed by the petitioner against the private respondents wherein an order of ad interim temporary injunction is operating in favour of the petitioner, against the private respondents. Another suit bearing no. 7 of 2019 is pending at the behest of private respondents against the petitioner in which also there is an interim injunction order in their favour.

It seems that while the suits remain pending, private respondent no. 7 filed an application before the administrative authorities alleging violation of injunction order passed in his suit by the petitioner. It was alleged that the petitioner had taken possession of his property in defiance of the injunction order. The prayer made in the application was for ensuring removal of unauthorized possession of the petitioner. On the said application, the Naib Tehsildar made an endorsement that the application was in respect of the grievance of the private respondents relating to a dispute of possession of the subject land. There is another endorsement calling for certain report and then an order by Sub-Divisional Magistrate, Sadar, Varanasi dated 12.10.2020 directing for constitution of a revenue team under Naib Tehsildar with further direction to the police to take action in the matter. The GD entry of 7.11.2020 shows that in pursuance of the direction of Sub-Divisional Magistrate, Sadar the police acting in an adjudicatory role in respect of dispute relating to possession between the parties dispossessed the petitioner thereby seeking to restore status quo ante.

It is vehemently contended by learned counsel for the petitioner that the administrative authorities as well as the police had no jurisdiction in the matter particularly, when the dispute was pending before the civil court.

We find considerable force in the submission of learned counsel for the petitioner. Prima facie, we find that the Sub-Divisional Magistrate who has directed the police force to intervene in the matter and under which direction, the police had dispossessed the petitioner, amounts to a gross abuse of the administrative powers. There is no order of the civil court holding that there was breach of injunction order nor any direction for restoring status quo ante.

We call upon respondent no.3 to remain present in the Court along with entire record and explain by filing his affidavit that under which provision of law he had directed the police to intervene in the matter in absence of any duly constituted proceeding before him, ignoring the fact that the dispute between the parties was pending before the civil court.

We may observe that the only role of the administrative authorities could be in relation to maintenance of law and order as also rightly directed by the District Magistrate in the first instance when the application was put up before him but we find that respondent no.3 has exceeded his authority in issuing the impugned direction and getting the petitioner dispossessed.

Meanwhile, we leave it open to respondent no.3, to revisit the matter and take remedial steps, if he deems fit and proper and in which event his personal appearance will remain dispensed with and an affidavit filed to the above effect will suffice.

List as fresh on 21st July, 2022.

Sri Dilip Kesarwani, learned Additional Chief Standing Counsel will communicate the instant order to respondent no.3 for necessary compliance."

19. An affidavit was filed on behalf of Respondent no.3 being S.D.M, Sadar, District Varanasi (present incumbent), wherein the Respondent no.3 in the leading writ petition had come up with a stand that she had joined the post in question on 1.7.2022 and the order was passed by the predecessor and thus the deponent therein had sought time to revisit the matter in compliance of the above noted order.

20. However, on 21.7.2022, this Court proceeded to pass the following order:

"Sri Sudarshan Singh has entered appearance on behalf of respondents no.4 to 7.

An application supported by affidavit of the incumbent on the post of S.D.M., Sadar, Varanasi has been filed stating that she joined the post on 1.07.2022. The action impugned was taken by her predecessor in office. She has prayed for two weeks further time to revisit the matter.

By our previous order dated 14.07.2022, we had directed respondent no.3 to remain present in the Court alongwith entire record and explain by filing his affidavit that under which provision of law, he had directed the police to intervene in a civil dispute between the parties.

The present incumbent informs the Court that the earlier order was passed by Sri Pramod Kumar Pandey, who is now posted as S.D.M., Lucknow. We direct the District Magistrate, Lucknow to serve a copy of the instant order as well as previous order of this Court dated 14.07.2022 upon Sri Pramod Kumar Pandey so that the orders are duly complied with. The said officer shall file his personal affidavit in compliance of our previous order dated 14.07.2022 and will remain present in Court on the next date.

The present incumbent will file her personal affidavit disclosing therein the decision taken by her in the meantime.

Registrar (Compliance) shall communicate the instant order as well as previous order dated 14.07.2022 to the District Magistrate, Lucknow for the purpose of serving these orders upon Sri Pramod Kumar Pandey posted as S.D.M. in District Lucknow.

List as fresh on 10.08.2022."

21. A personal affidavit was filed on behalf of the SDM, Varanasi / Respondent no.3 (present incumbent) manning the post in question. In the personal affidavit, in

paragraphs- 5 to 8, the following averments were made: -

"5. That the deponent in compliance of the order dated 14.07.2022 and 21.07.2022 passed by this Hon'ble Court issued office order dated 01.08.2022 for spot enquiry/ verification in respect of the petitioner Smt. Suman Singh W/o Jaishankar Singh, constituting the team of the Revenue Officers mentioned therein along with the deponent, informing the both parties for spot enquiry/ verification fixing 03.08.2022 at 10 AM and also informed the S.O., Chitaipur, Varanasi to be present on the spot. Copy of the order dated 01.08.2022 passed by the Respondent No.3, is being annexed herewith and is marked as Annexure A-1 to this affidavit.

6. That the notices of the said spot enquiry/verification was duly served to the petitioner, Suman Singh W/o Shri Jaishankar, who refused to take notice thereof on 01.08.2022 and the Notice to Smt. Lali Devi W/o Gopichand Gupta was also informed through telephone and informed to her Karinda at spot, the copies of the said service of the Notices/information dated 01.08.2022 are annexed collectively as Annexure No.A-2 to this affidavit.

7. That the deponent reached at the spot in question on 03.08.2022 along with the Revenue Team with the Police Team and make enquiry/verification of the facts at spot Arazi Plot no. 446, Village-Susuwahi, Pargana-Dehat Amanat, Tahsil-Sadar, District-Varanasi and the spot inspection/ measurement was conducted in the presence of the petitioner and the representative of other respondents no. 4 to 6 namely, Gopichandra and in presence of the Revenue Team referred to above and the Police Team, PS-Chitaipur, Varanasi. The content of the spot inquiry report reveals the following facts:

(a) That as per the record the petitioner Smt. Suman Singh W/o Shri Jaishanker purchased land in Arazi no. 446, area-2250 sq. ft. i.e. 209.10 meter through three different sale deeds each of 750 sq. ft. through Sale Deeds dated 29.05.2013 09.07.2013 and 19.10.2013 from the Vendors thereof. The copy of the aforesaid sale deeds are annexed as Annexure Nos.A-3, A-4 & A-5 to this affidavit.

(b) That similarly the Respondents no. 4, 5 & 6 Smt. Manju Devi, Sunita Devi and Smt. Lali Devi also purchased the land forming S.M. Plot no. 446, area-4080 sq. ft. (379.18 sq. mtr.) situate at Village-Susuwahi, Pargana-Dehat Amanat, Tahsil-Sadar, District-Varanasi, through two different registered sale deeds dated 26.09.2015 each of area-2040 sq ft. i.e. 189.59) sq. mtrs. from the Vendors thereof. The copies of the said sale deeds dated 26.09.2014, are annexed as Annexure No.A-6 & A-7 to this affidavit.

(c) That according to the boundaries mentioned in the said sale deeds, towards the south of the land of petitioner Suman Singh, there is pucca Road (Rasta) and towards east, there is proposed Kachcha Rasta and towards North the land of Respondent nos. 4 to 6 are lying. The sketch Plan of the spot has been prepared at the spot showing the land (A), (B) and (C) along with the constructions.

(d) That it was found on spot enquiry, that the petitioner Smt. Suman Singh, was found in possession of the Plot no 446, area 2321.90 sq. ft. (215.71 Sq. Mtr.) along with the constructions made by her at the said land, whereas her area of the sale deed is total 2250 sq. ft. (209.03 Sq. Mtr.) only which is marked as (A) in the Sketch Plan of the spot enquiry/verification.

(e) That there is land area (610.41 sq. ft. lying towards North adjacent of the land of the Petitioner Smt. Suman Singh, marked with 'B' in the Sketch Plan.

(f) That towards the North of the said vacant land marked with 'B' the land of the Respondents no 4 to 6 along with Boundaries area-3373.59 sq ft. are lying which is marked with 'C' in the Sketch Plan.

(g) That according to the spot enquiry/ verification it has been found that the petitioner Smt. Suman Singh, who has purchased only 2250 sq. ft. (209.03 Sq. Mtr.) but she is in possession over 2321.09 sq. ft. (215.71 Sq. Mtr.) over which she has constructed multi-storied building along with Sahan and towards North of the said multi-storied building the land area 610.41 sq. ft. is lying vacant and towards North of the said land the Respondent Nos. 4 to 6 are in possession over 3373.59 sq.ft. whereas their purchased area is 4080 sq. ft.

(h) That the Petitioner and the Respondents no. 4 to 6 have approached to the Civil Court of competent jurisdiction and they have been granted interim injunctions orders with respect to their respective area of the land vice versa, which is mentioned in the spot inspection Report.

Copies of the injunction orders have already been annexed as Annexure No.2 and 4 to Writ Petition.

The copy of the spot enquiry/verification dated 03.08.2022 is annexed as ***Annexure No.A-8*** *to this affidavit.*

8. That it is respectfully stated that from the perusal of the interim injunction passed by the Civil Court dated 06.03.2018 in the Suit No.317 of 2018 filed by the petitioner it is evident that the interim injunction was with respect to area of 209.10 sq. mtr., out of the total area of the Arazi No.446 as mentioned in the plaint. Apart from the aforesaid purchased land there is land area 610.41 sq. ft. lying vacant towards North adjacent of the land of the Petitioner Smt. Suman Singh, marked with 'B' in the Sketch Plan. The petitioner is still in possession of the total area of the land in respect of which the interim injunction was granted by the Civil Court. Therefore, there is no violation of the order dated 06.03.2018 passed by the Civil Court in Suit No.317 of 2018. Under the aforesaid circumstances no further action is required by the deponent as remedial measure with regard to the land of the petitioner."

22. On 10.8.2022, the following orders were passed: -

"Sri Ajay Kumar Singh, Advocate has filed his vakalatnama on behalf of respondents no.4 to 7. The same is taken on record.

The earlier incumbent on the post of Sub-Divisional Magistrate on whose direction the petitioner was allegedly dispossessed has filed his personal affidavit. Another affidavit has been filed on behalf of the present incumbent on the said post. Both the affidavits are taken on record.

Sri M.C. Chaturvedi, learned Additional Advocate General on behalf of State Respondents prays for and is granted a week further time to file appropriate affidavits. Accordingly, the matter is adjourned for a week.

List as fresh on 18.8.2022.

In the meantime, respondent no.3 will file a better affidavit.

When the case is listed next, name of Sri Ajay Kumar Singh shall be shown in the cause list as counsel for the respondents."

23. Thereafter in compliance of the order dated 10.8.2022 passed by this Court,

the earlier incumbent, who was holding the post of SDM, Sadar, Varanasi submitted a personal affidavit dated 18.8.2022 followed by an affidavit filed on behalf of the present incumbent holding the post of SDM, Sadar, Varanasi, wherein in paragraphs 3 and 4, the following have been averred: -

"3. That it is respectfully stated that in compliance of the order dated 14.07.2022 as well as order dated 21.07.2022 passed by this Hon'bie Court the deponent revisited the matter and passed order dated 13.08.2022 directing the petitioner as well as Respondent No.4 to 6 to restore the status with regard to possession as was existing on 31.08.2020. Copy of order dated 13.08.2022 passed by the deponent, is being annexed herewith and is marked as Annexure A-1 to this affidavit.

4. That the aforesaid order passed by the deponent was duly complied with and the possession of the petitioner was restored on 16.08.2022 in the presence of the Revenue Team. The proceeding of restoration of possession has been duly signed by the petitioner. Copy of the aforesaid proceeding dated 16.08.2022, is being annexed herewith and is marked as Annexure A-2 to this affidavit."

24. As per the affidavit dated 18.8.2022 of Respondent no. 3/ S.D.M., Sadar, Varanasi, a stand has been taken that Respondent no.3 has revisited the matter while passing the order dated 13.8.2022 directing the petitioner herein and the respondent nos. 4 and 6 in the leading petition to restore status quo ante with regard to the possession as existed on 31.8.2020 and the parties were also put to liberty to get their individual rights decided under Common Law in the pending suits. Further, it has also been narrated that on spot inquiry, it was found that the petitioner in the leading petition, Smt. Suman Singh was found in possession of plot no. 446 (area 2321.90 sq. ft.) along with constructions made by her, whereas her area of sale deed is total 2250 sq. ft. (209.10 sq. meter) and thus she was in possession of excess land.

25. We have heard Shri Abhishek Kumar, learned counsel for the petitioner in the leading petition and for Respondent no.5 in the connected writ petition, Sri M.C. Chaturvedi, learned Addl. Advocate General assisted by Ms. Akanksha Sharma, Advocate for State-respondent as well as Sri Ajay Kumar Singh along with Shri Tejas Singh appearing for Respondents no. 4 to 7 in the leading petition and petitioners in the connected writ petition.

26. Since the parties in question are represented through their counsel and they have given their consent for disposal of the writ petition at the admission stage on the basis of the affidavits so exchanged between them, thus this Court is proceedings to finally decide the issue in question.

27. Undisputedly the petitioner in leading writ petition claims to be the owner of the land admeasuring 225.06 sq. mt. being plot no. 446 situate at Village Sushwahi, Tehsil Sadar, District Varanasi by virtue of three separate sale deeds dated 29.5.2013, 9.7.2013 and 19.10.2015 for an area of 750 sq. ft. each. Similarly, so far as respondent nos. 4 and 6 in the leading writ petition are concerned, they claim to have been in possession and recorded title holders of an area of 4080 sq. ft. of the aforesaid Arazi/ plot of land by virtue of two registered sale deeds dated 26.9.2015.

28. It is not under dispute that the petitioner in the leading writ petition being Suman Singh had instituted Original Suit no.317 of 2018 before the Court of Civil Judge (Senior Division), Varanasi, Smt. Suman Singh vs. Smt. Manju Devi and 2 others, in which she had obtained the interim injunction dated 06.3.2018, so much so, respondent nos. 4 to 6 in the leading writ petition had also instituted O.S. No.7 of 2019 before the Court of Civil Judge (Senior Division), Varanasi, Smt. Manju Devi and 2 others vs. Smt. Suman Singh, in which injunction had been granted on 3.1.2019 by Civil Judge (Senior Division), Varanasi.

29. As per the pleadings so set forth in both the writ petitions, it is explicitly clear that both the parties are litigating their rights before the competent court of law and as per their own saying they are possessed with injunction orders in their respective suits. Notably as discussed above at first instance, Respondent no.4 in the leading petition and petitioner no.1 in the connected writ petition sought administrative intervention before Respondent no.3 for measurement of her plot on 19.1.2019 and on 29.1.2019, Respondent no.3 informed Respondent no.4 in the leading petition and the petitioner in the connected writ petition that she should undertake proceedings for demarcation under Section 24 of the U.P. Revenue Code. Thereafter Respondent no.6 in the leading writ petition and petitioner no.3 in the connected writ petition took recourse to demarcation, however Respondent no.3 forestalled the claim for demarcation vide order dated 22.6.2022 on the ground that the matter was pending before the competent civil court and thus it was not possible to conduct the demarcation. Being unsuccessful on two occasions, Respondent no.7 in the leading writ petition, who happens to be the husband of Respondent no.6 proceeded to make an application before Respondent no.3 on 11.7.2020 with regard to grant of security to raise construction, as according to him the gates had been uprooted and encroachment had been made by the petitioners in the leading writ petition. Sub-Divisional Magistrate on the basis of the application so preferred by Respondent no.7 in the leading writ petition directed the Tahsil Authorities to submit a report and on 23.7.2020, Tehsil Authorities tendered their comments and a letter was thereafter issued by Respondent no.3 which was addressed to Respondent no.1. In the meantime, on 30.7.2020 Respondent no.1 requested the SSP, Varanasi to take preventive action against the petitioner in the leading petition, in case they had occupied and raised construction over the land owned by others. Being not satisfied with the above noted actions, the respondent no.7 again preferred an application before Respondent no.3 with a request to provide police force and a team of police officials to remove illegal possession over the land so claimed to be possessed by Respondents no. 4 to 7. Thereafter proceedings were drawn and it is being alleged that the possession of the land in question, which is claimed to be possessed by the petitioner in the leading writ petition stands delivered to the respondents. The other side of the story which is being sought to be erected by Respondent no.4 to 7 in the leading writ petition and petitioners no. 1 to 4 in the connected petition is that now in the garb of the orders passed by this Court on 14.7.2021 and 21.7.2021, the possession of the land in question was being taken away from them and was being handed over to the petitioners in the leading writ petition, putting them in possession over land which was in excess of their ownership.

30. Sri Abhishek Kumar, learned counsel for the petitioner in the leading writ petition and Respondent no.5 in the connected petition has sought to argue that the taking over of the possession on 7.11.2020 by the district administration pursuant to the application so preferred by the private respondents in the leading writ petition was without any authority of law, as once the matter itself was engaging the attention of the Civil Court in appropriate proceedings by way of suits and injunction orders were operating, then the District Administration could not have intervened in between and played an adjudicatory role. To elaborate his submission, Sri Abhishek Kumar argued that the district administration was well aware about the factum of the institution of the suit, pendency and operation of injunction orders and thus while taking resort to the proceedings of handing over the possession not only the orders of the Civil Courts were circumvented, but the administrative authorities interfered with and obstructed judicial proceedings.

31. According to Sri Abhishek Kumar, pursuant to the orders passed by this Court on 14.7.2021 and 21.7.2021, now possession had been delivered to the petitioner while passing the orders dated 13.8.2022 and 16.8.2022 and as per his instructions, the petitioner in the leading writ petition and Respondent no.5 in the connected writ petition had neither encroached nor was in possession of even a single inch of land in excess, which was claimed to be possessed by Respondents no. 4 to 7 in the leading writ petition and petitioner in the connected writ petition.

32. Sri Ajay Singh assisted by Sri Tejas Singh who appears for Respondents no. 4 to 7 in the leading writ petition and petitioners in the connected petition have argued that the writ petition so framed and instituted by the petitioner herein is not maintainable as once, admittedly, civil suits are pending inter se between the parties and injunction orders are operating, then the proper recourse for the petitioner herein was to move an appropriate application in the pending suit either by way of amendment or impleadment in that regard.

33. Sri Singh has further argued that in the guise of the orders dated 14.7.2021 and 21.7.2021 passed by this Court, now the State authorities have dispossessed Respondents no. 4 to 7 in the leading petition and the petitioners in the connected petition, while handing over the possession of the entire land so owned by them to the petitioner in the leading petition. He thus seeks not only quashing of the order dated 13.8.2022 passed by Respondent no.3 followed by delivery of possession but also seeks compensation to the tune of Rs.10 lakhs for illegal dispossession.

34. Sri M.C. Chaturvedi, learned Addl. Advocate General assisted by Ms. Akanksha Sharma has argued that consequent to the passing of order dated 14.7.2021 and 21.7.2021, possession had been delivered back to the petitioner in the leading petition as appropriate orders had been passed on 13.8.2022 and as per his instructions the petitioner in the leading petition was possessing excess land. However, now the parties in question had been directed to get their rights adjudicated in the Civil Courts.

35. This Court is conscious of the fact that in the past also contingencies had arisen wherein despite pendency of suits before the Civil Courts and operation of injunction orders at the instance of private

parties in relation to a private party, the District Administration intervened in the matter. Taking serious note of the same in Writ-C No. 4362 of 2014, *Sayeed Khan vs. State of U.P*, certain directions were issued on 3.11.2014 and 1.12.2014, and the State Government therefore proceeded to issue a Government Order dated 1.12.2014 clearly restraining the administrative authorities in interfering or adjudicating matters, which were within the domain of the civil courts. The Government Order dated 10.9.2014 is quoted hereinunder: -

"संख्या-491रिट / छः-पु-3-2014-2(94)पी /2014

प्रेषक,

आलोक रंजन,

मुख्य सचिव,

उत्तर प्रदेश शासन

सेवा में,

समस्त जिला मैजिस्ट्रेट, उ०प्र०,

समस्त वरिष्ठ पुलिस अधीक्षक / पुलिस अधीक्षक, उ०प्र० ।

गृह (पुलिस) अनुभाग-3 लखनऊ : दिनांक : 01 दिसम्बर, 2014

विषय :- निजी पक्षों (private parties) के मध्य अचल सम्पत्ति विवाद से संबंधित प्रकरणों पर प्रशासनिक अधिकारियों द्वारा विधि अनुसार कार्यवाही किये जाने के सम्बन्ध में।

महोदय,

यह संज्ञान में आया है कि निजी पक्षों (private parties) के मध्य अंचल सम्पत्ति के विवादों के कतिपय प्रकरणों, जो सम्बन्धित न्यायालय में लम्बित हैं / विचाराधीन थे तथा जिनमें न्यायालय द्वारा अंतरिम आदेश पारित है, में प्रशासनिक एवं पुलिस अधिकारियों द्वारा अपने क्षेत्राधिकार के परे जाकर आदेश पारित कर दिया गया है तथा कब्जा हस्तान्तरण भी कर दिया गया है। इस प्रकार से निर्णय लिये जाने पर मा० उच्च न्यायालय द्वारा अत्यन्त रोष व्यक्त किया गया है। इस सम्बन्ध में मा० न्यायालय ने रिट याचिका संख्या - 43827 / 2014 सईद खान बनाम् उ०प्र० राज्य व 03 अन्य (जनपद बरेली) के प्रकरण. में दिनांक 3-11-2014 को निम्नवत् आवेश पारित किया है :

Additional City Magistrate in his Affidavit has referred to the Government Orders dated 15.5.2012, 30.4.2013 and 7.6.2014 as the source of power for entering into the dispute between two private. persons in respect of immovable property and in interpreting the interim order passed by the Civil Court.

Prima facie, we are of the opinion that such reading of the Government Order by the Additional City Magistrate is wholly perverse. A Government Order deals with the removal of difficulties of citizens of this country, which they face in the matter of getting their work done in various government Organizations/Departments of Uttar Pradesh. These Government Orders do not authorize any authority of the state to enter into any private dispute of two persons.

Learned Standing Counsel is directed to obtain instructions from Chief Secretary, Government of U.P., as to whether the Additional City Magistrate in the garb of Government Orders referred to above is permitted to enter into private disputes during the "Janata Darshan" etc. or not."

2- इसके अतिरिक्त एक अन्य रिट याचिका संख्या-55049 / 2014 गौरव यादव बनाम् कमिश्नर, कानपुर भण्डल एवं 04 अन्य के प्रकरण में भी मा० न्यायालय द्वारा दिनांक 14-10-2014 को इसी प्रकार रोष प्रकट किया गया है।

3- जन समस्याओं का निराकरण शासन की सर्वोच्च प्राथमिकता है, जिसके लिए समय-समय पर दिशा-निर्देश भी निर्गत किये गये हैं। इस सम्बन्ध में यह स्पष्ट किया जाता है कि निजी व्यक्तियों के मध्य अचल सम्पत्ति के विवाद सम्बन्धी प्रकरण, जो दीवानी न्यायालय मा० उच्च न्यायालय अथवा अन्य न्यायालयों में लम्बित हैं या जिनमें मा० न्यायालय द्वारा अंतरिम

आदेश पारित हैं, में प्रशासनिक एवं पुलिस अधिकारियों द्वारा विधि अनुसार ही कार्यवाही की जायेगी और क्षेत्राधिकार से परे कोई आवेश नहीं दिया जायेगा । दीवानी प्रकृति के प्रकरणों में अधिकारिता युक्त न्यायालय ही आदेश पारित करने में सक्षम है।

4- स्पष्ट किया जाता है कि ऐसे प्रकरणों में शांति व्यवस्था बनाये रखने का दायित्व प्रशासनिक एवं पुलिस अधिकारियों पर ही है। यह भी स्पष्ट किया जाता है कि न्यायालय के आदेशों का सम्यक् अनुपालन कराना सुनिश्चित किया जाय, किन्तु सरकारी / सार्वजनिक सम्पत्ति पर अवैध कब्जा, अतिक्रमण या उसका दुरूपयोग कदापि नहीं होने दिया जायेगा । यह सुनिश्चित करने का दायित्व प्रशासनिक एवं पुलिस अधिकारियों व अन्य विभागीय अधिकारियों का होगा।

5- उक्त आदेशों का कड़ाई से अनुपालन सुनिश्चित किया जाय।"

36. Ultimately, this Court in the case of ***Sayeed Khan*** *(supra),* took notice of the Government Order. The order dated 3.12.2014 passed in Writ Petition No.43627 of 2014 is quoted hereinunder: -

"List again with the name of Shri Anil Tiwari, counsel for respondent no.5.

Shri A. K. Goel, learned Additional Chief Standing Counsel has produced the copy of the government order dated 1.12.2014 issued by the Chief Secretary of the State whereby it has been provided that in the matters pertaining to immovable property between private persons where dispute is pending before the competent Civil Court/High Court and other Courts, the Administrative Authorities like the District Magistrates and Senior Superintendents of Police should act within their authority and within the four corners of the law. It has been explained that in such matters only competent Courts have jurisdiction to pass orders. But, this order will not be applicable qua the government and public properties. A copy of the government order dated 1.12.2014 is kept on record.

In view of the order of the State Government referred to above, the Additional City Magistrate shall revisit his order dated 26.4.2014 and do the needful.

List the matter in the 2nd week of January 2015."

37. Entire gamut of the argument of the counsel for the petitioner as well as for the respondents centres around illegal action of the State and its instrumentalilties in taking possession of the land, which is claimed to be owned by it at first instance by the petitioner in the leading petition and at the second instance, the Respondent no.4 to 6 in the leading writ petition, wherein now it is being sought to be alleged that the possession, which has been handed over by virtue of the order dated 13.8.2022 and the possession memo dated 16.8.2022 to the petitioner in the leading petition is in excess of the land claimed to be owned by them.

38. This Court finds that once the parties themselves have taken the recourse to remedy under the Common Law while instituting appropriate suits before the competent court of law and have obtained injunctions, then it is for them to get their rights adjudicated while filing appropriate application under the relevant Code in the pending suit.

39. The Hon'ble Apex Court in the case of ***Mohan Pandey and another vs. Usha Rani Rajgaria (SMT) and others,*** reported in **(1992) 4 SCC 161** in paragraph 63, the following was observed: -

"It has repeatedly been held by this court as also by various High Courts that a regular suit is the appropriate

remedy for settlement of disputes relating to property rights between private persons and that the remedy under Article 226 of the Constitution shall not be available except where violation of some statutory duty on the part of a statutory authority is alleged. And in such a case, the court will issue appropriate direction to the authority concerned. If the grievance of the respondent is against the initiation of criminal proceedings, and the orders passed and steps taken thereon, she must avail of the remedy under the general law constitutional jurisdiction to be used for deciding disputes, for which remedies, under the general law, civil or criminal, are available. It is not intended to replace the ordinary remedies by way of a suit or application available to a litigant. The jurisdiction is special and extra-ordinary and should not be exercised casually or lightly. We, therefore, hold that the High Court was in error in issuing the impugned direction against the appellants by their judgement under appeal."

40. The Hon'ble Apex Court in the case of ***Swetambar Sthanakwasi Jain Samiti and another vs. Alleged Committee of Management Sri R.J.I. College, Agra and others***, reported in **(1996) 3 SCC 11** in paragraph 8, the following was observed: -

"We are of the view that the High Court not only fell into patent error but also exceeded its jurisdiction under Article 226 of the Constitution of India. Though the jurisdiction or the High Court under Article 226 of the Constitution is not confined to issuing the prerogative writs, there is a consensus of opinion that the High Court will not permit this extraordinary jurisdiction to be converted into a civil court under the ordinary law. When a suit is pending between the two parties the interim and miscellaneous orders passed by the trial court - against which the remedy of appeal or revision is available - cannot be challenged by way of a writ petition under Article 226 of the Constitution of India. Where the civil court has the jurisdiction to try a suit, the High Court cannot convert itself into an appellate or revisional court and interfere with the interim/miscellaneous orders of the civil court. The writ jurisdiction is meant for doing justice between the parties where it cannot be done in any other forum."

41. Yet the Hon'ble Apex Court in the case of ***Roshina T. vs. Abdul Ajeez K.T. and others,*** **(2019) 2 SCC 329** in paragraphs 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19, has held as under: -

"9. In our considered opinion, the writ petition filed by Respondent 1 under Articles 226/227 of the Constitution of India against the appellant before the High Court for grant of relief of restoration of the possession of the flat in question was not maintainable and the same ought to have been dismissed in limine as being not maintainable. In other words, the High Court ought to have declined to entertain the writ petition in exercise of extraordinary jurisdiction under Articles 226/227 of the Constitution for grant of reliefs claimed therein. e 10. It is not in dispute that the reliefs for which the writ petition was filed by Respondent 1 herein against the appellant pertained to possession of the flat. It is also not in dispute that one Civil Suit No. 807 of 2014 between the appellant and Respondent 1 in relation to the flat in question for grant of injunction was pending in the Court of Munsif at Kozhikode. It is also not in dispute that the appellant and Respondent

1 are private individuals and both are claiming their rights of ownership and possession over the flat in question on various factual grounds.

11. In the light of such background facts arising in the case, we are of the considered opinion that the filing of the writ petition by Respondent 1 herein against the appellant herein under Articles 226/227 of the Constitution of India in the High Court, out of which this appeal arises, was wholly misconceived.

12. The question as to who is the owner of the flat in question, whether Respondent 1 was/is in possession of the flat and, if so, from which date, how and in what circumstances, he claimed to be in its possession, whether his possession could be regarded as legal or not qua its real owner, etc. were some of the material questions which arose for consideration in the writ petition.

13. These questions, in our view, were pure questions of fact and could be answered one way or the other only by the civil court in a properly constituted civil suit and on the basis of the evidence adduced by the parties but not in a writ petition filed under Article 226 of the Constitution by the High Court.

14. It has been consistently held by this Court that a regular suit is the appropriate remedy for settlement of the disputes relating to property rights between the private persons. The remedy under Article 226 of the Constitution shall not be available except where violation of some statutory duty on the part of statutory authority is alleged. In such cases, the Court has jurisdiction to issue appropriate directions to the authority concerned. It is held that the High Court cannot allow its constitutional jurisdiction to be used for deciding disputes, for which remedies under the general law, civil or criminal are available. This Court has held that it is not intended to replace the ordinary remedies by way of a civil suit or application available to an aggrieved person. The jurisdiction under Article 226 of the Constitution being special and extraordinary, it should not be exercised casually or lightly on mere asking by the litigant.

15. In our view, the writ petition to claim such relief was not, therefore, legally permissible. It, therefore, deserved dismissal in limine on the ground of availability of an alternative remedy of filing a civil suit by Respondent 1 (writ petitioner) in the civil court.

16. We cannot, therefore, concur with the reasoning and the conclusion arrived at by the High Court when it unnecessarily went into all the questions of fact arising in the case on the basis of factual pleadings in detail (43 pages) and recorded a factual finding that it was Respondent 1 (writ petitioner) who was in possession of the flat and, therefore, he be restored with his possession of the flat by the appellant.

17. In our opinion, the High Court, therefore, while so directing exceeded its extraordinary jurisdiction conferred under Article 226 of the Constitution. Indeed, the High Court in granting such relief, had virtually converted the writ petition into a civil suit and itself to a civil court. In our view, it was not permissible.

18. The learned counsel for Respondent 1, however, strenuously urged that the impugned order[1] does not call for any interference because the High Court has proceeded to decide the writ petition on admitted facts.

19. We do not agree with the submissions of the learned counsel for Respondent 1 for the reasons that first

there did exist a dispute between the appellant and Respondent 1 as to who was in possession of the flat in question at the relevant time; second, a dispute regarding possession of the said flat between the two private individuals could be decided only by the civil court in civil suit or by the criminal court in Section 145 CrPC proceedings but not in the writ petition under Article 226 of the Constitution."

42. Moreso, this Court finds that under Article 226 of the Constitution of India disputed questions cannot be gone into, particularly in view of the fact that though one fraction is coming up with a stand that its land has been encroached upon by other fraction, but the other fraction is disputing the same. Meaning thereby the disputed questions of fact arise, which are in fact of complex nature, which require determination through oral and documentary evidence, which is not permissible in writ jurisdiction.

43. In the case of ***Punjab National Bank and others vs. Atmanand Singh***, reported in **(2020) 5 SCC 256** in paragraphs 22, 23, 24 and 25, the Hon'ble Apex Court has 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: - (SCC pp.715-16)

"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 [(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."

(emphasis supplied)

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 Corpn. v. Registrar of Trade Marks [(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."

(emphasis supplied)"

44. Applying the principles of law, so culled out in the above noted decision, inescapable conclusion stands drawn that once the parties are claiming their right before the Civil Court while taking recourse to the remedies as available under law then proceedings under Article 226 of the Constitution of India are not maintainable, as the only recourse open to the aggrieved party is to approach the civil court in the pending suit for redressal of its grievances.

45. Nonetheless, there is an additional factor, which needs to be noticed at this stage which is relatable to the fact that the question as to who is in the possession and as to what is the extent a matter is to be decided. This obviously presupposes necessary exercise which is to be undertaken while recording finding with respect to not only the three golden principles being prima facie case, balance of convenience and irreparable loss, but also with regard to the factual possession, which exists on the site in order to determine as to which of the parties either plaintiff or defendant is in possession. The aforesaid aspect of the matter was noticed by the Hon'ble Apex Court in the case of ***Kishore Kumar Khaitan and another vs. Praveen Kumar Singh,*** reported in **(2006) 3 SCC 312**, wherein in paragraphs 4, 5 and 10, the Hon'ble Apex Court as observed as under: -

"4. It is the case of the plaintiff that the suit property was leased to him by the first defendant on 17.4.1998 and that the transaction was evidenced by writing in the letter-head of Khaitan Paper Machine Limited owned by the first defendant. According to the plaintiff, there was an earlier litigation between the first defendant and one Shivanand Mishra, Shivanand Mishra claiming a tenancy over a portion of the present suit premises and at the instance of the present plaintiff, that suit was compromised, as part of the compromise a sum of Rs.2 lakhs was paid to Shivanand Mishra and Shivanand Mishra gave up his claim of tenancy. According to the plaintiff, the said sum of Rs.2 lakhs which was paid to Shivanand Mishra was advanced by him to the first defendant and it was in consideration of the same and the help rendered by the plaintiff in the matter of settling the dispute with Shivanand Mishra, that the first defendant agreed to handover possession of the suit premises to the plaintiff immediately after recovering possession from Shivanand Mishra and it was in furtherance of the promise that the tenancy agreement was executed on 17.4.1998. Thus, the plaintiff claimed that he had been put in possession of the suit property as a tenant. In derogation of the tenancy thus created in his favour, the defendants were attempting to dispossess the plaintiff forcibly and it was in that situation that the plaintiff was filing the suit for a declaration of his tenancy rights over the suit property and for a perpetual injunction restraining the defendants from interfering with his possession as a tenant. As already noticed, though the plaintiff filed an application

under Order XXXIX Rules 1 and 2 of the Code for an interim injunction restraining the defendants from interfering with his possession, the trial court did not pass an ad interim order of injunction, but only issued notices to the defendants calling upon them to show cause why the prayer for injunction shall not be granted. It is against this refusal of ad interim injunction ex parte, that the plaintiff filed the appeal before the District Court in which, on 19.6.1998, the Additional District Judge passed an ad interim ex parte order directing both the parties to maintain status quo.

5. It is necessary to notice at this stage that in an original suit of this nature, it was not appropriate for the Additional District Judge to pass an order directing the parties to maintain status quo, without indicating what the status quo was. If he was satisfied that the appellant before him had made out a prima facie case for an ad interim ex parte injunction and the balance of convenience justified the grant of such an injunction, it was for him to have passed such an order of injunction. But simply directing the parties to maintain status quo without indicating what the status quo was, is not an order that should be passed at the initial stage of a litigation, especially when one court had found no reason to grant an ex parte order of injunction and the appellate court was dealing with only the limited question whether an ad interim order of injunction should or should not have been granted by the trial court, since the appeal was only against the refusal of an ad interim ex parte order of injunction and the main application for injunction pending suit, was still pending before the trial court itself. Therefore, we are prima facie of the view that the Additional District Judge ought not to have passed an equivocal order like the one passed in the circumstances of the case. But of course, that aspect has relevance only to the extent that before ordering an interim mandatory injunction or refusing it, the court has first to consider whether the plaintiff has proved that he was in possession on the date of suit and on the date of the order and he had been dispossessed the next day. Unless a clear prima facie finding that the plaintiff was in possession on those dates is entered, an order for interim mandatory injunction could not have been passed and any such order passed would be one without jurisdiction.

.....

10. It is seen that after the remand, the parties produced some evidence. The Additional District Court set out the arguments on the side of both the parties. Then it referred to certain decisions cited by the parties. It observed that there was at least some prima facie foundation in the claim of the plaintiff that the tenancy agreement was executed by defendant No.1 and whether it was concocted out of a signed blank letter head and whether it had legal force could only be decided in the suit. It did not discuss the oral evidence that was taken pursuant to the order of remand and merely stated that it has perused the evidence. After referring to some cash memos and money receipts produced by the plaintiff, it held that they prima facie showed that the plaintiff was in possession. Then it abruptly observed that at least prima facie it is proved that the plaintiff was in possession of the suit property on 19.6.1998, the date of the passing of the order of status quo. It stated that as such his possession must be restored and it was a fit case where the court should invoke its inherent jurisdiction to order restoration of possession."

46. The above noted judgment itself clearly mandates that the courts while

granting temporary injunction under Order 39 Rules 1 and 2 of CPC are not only to adhere to the commonly known legal principles of prima facie case, balance of convenience and irreparable loss, but also to take note of the fact that while directing maintenance of status quo, finding should be recorded as to what would be the status quo while also reciting and recording the satisfaction that too prima facie with relation to the basis as well as the factors, which entitled the plaintiff to be bestowed with the benefit of the status quo. To put it otherwise, simplicitor status quo is not permissible in law, however, not only satisfaction is to be attached while granting status quo, basis has also to be indicated.

47. Now, a question arises whether in the present proceedings, adjudication can be done with relation to disputed question of facts involved when one party asserts that the other party is in excess of the possession of the land vis-a-vis the area earmarked in the sale deed and the other party is claiming that it has not encroached upon the land and constructions of the other party. Allegations also find their presence that the State and its functionaries have delivered excess possession. In the opinion of the Court, writ jurisdiction is not the appropriate remedy for resolving the said disputes as the parties can assert their claim in the pending suits.

48. In view of the provisions contained under Order 1 Rule 10 of the C.P.C. 1908, it is always open to respondent nos. 4 and 7 in the leading writ petition and the plaintiff in the Original Suit No. 7 of 2009 to file appropriate application for not only impleading the State and instrumentalities but also preferring appropriate application under Order 6 Rule 17 of C.P.C. for amending plaint while seeking relief of recovery of possession of their claimed land/premises. As a matter of fact, the plantiff is the *dominus litis* of the suit.

49. The Hon'ble Supreme Court in the case of ***Ramesh Hirachand Kundanwal Vs. Municipal Corporation Greater Bombay and others*** reported in **(1992) 2 SCC 524** in paragraphs 5, 6, 7 and 8, observed as under:

"It was argued that the Court cannot direct addition of parties against the wishes of the plaintiff who cannot be compelled to proceed against a person against whom he does not claim any relief. Plaintiff is no doubt dominus litis and is not bound to sue every possible adverse claimant in the same suit. He may choose to implead only those persons as defendants against whom he wishes to proceed though under Order I Rule 3, to avoid multiplicity of suit and needless expenses, all persons against whom the right to relief is alleged to exist may be joined as defendants. However, the Court may at any stage of the suit direct addition of parties. A party can be joined as defendent even though the plaintiff does not think that he has any cause of action against him. Rule 10 specifically provides that it is open to the Court to add at any stage of the suit a necessary party or a person whose presence before the Court may be necessary in order to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit.

Sub-rule(2) of Rule 10 gives a wide discretion to the Court to meet every case of defect of parties and is not affected by the inaction of the plaintiff to bring the necessary parties on record. The question of impleadment of a party has to be decided

on the touch stone of Order I Rule 10 which provides that only a necessary or a proper party may be added. A necessary party is one without whom no order can be made effectively. A proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding. The addition of parties is generally not a question of initial jurisdiction of the Court but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case.

The respondents do not seriously dispute the position that the second respondent is not a necessary party to the suit in the sense that without their presence an effective order cannot be passed. However, they support the view that respondent No. 2 is a proper party whose presence is necessary for a complete adjudication on the controversy. In the light of the clear language of the Rule, it is not open to the appellant to contend that a person cannot be added as defendant even in a case where his presence is necessary to enable the Court to decide the matter effectively.

The case really turns on the true construction of the Rule in particular the meaning of the words "whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit." The Court is empowered to join a person whose presence is necessary for the prescribed purpose and cannot under the Rule direct the addition of a person whose presence is not necessary for that purpose. If the intervener has a cause of action against the plaintiff relating to the subject-matter of the existing action, the Court has power to join intervener so as to give effect to the primary object of the order which is to avoid multiplicity of actions."

50. Recently in ***Civil Appeal No. 5522 to 5523 of 2019, Gurmit Singh Bhatia Vs. Kiran Kant Robinson and others decided on 17.07.2019***, the Hon'ble Apex Court in paragarph 5.2, Page 8 has observed as under:

"5.2 An identical question came to be considered before this Court in the case of Kasturi (supra) and applying the principle that the plaintiff is the dominus litis, in the similar facts and circumstances of the case, this Court observed and held that the question of jurisdiction of the court to invoke Order 1 Rule 10 CPC to add a party who is not made a party in the suit by the plaintiff shall not arise unless a party proposed to be added has direct and legal interest in the controversy involved in the suit. It is further observed and held by this Court that two tests are to be satisfied for determining the question who is a necessary party. The tests are - (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings; (2) no effective decree can be passed in the absence of such party. It is further observed and held that in a suit for specific performance the first test can be formulated is, to determine whether a party is a necessary party there must be a right to the same relief against the party claiming to be a necessary party, relating to the same subject matter involved in the proceedings for specific performance of contract to sell. It is further observed and held by this Court that in a suit for specific performance of the contract, a proper party is a party whose presence is necessary to adjudicate the controversy involved in the suit. It is further observed and held that the

parties claiming an independent title and possession adverse to the title of the vendor and not on the basis of the contract, are not proper parties and if such party is impleaded in the suit, the scope of the suit for specific performance shall be enlarged to a suit for title and possession, which is impermissible. It is further observed and held that a third party or a stranger cannot be added in a suit for specific performance, merely in order to find out who is in possession of the contracted property or to avoid multiplicity of the suits. It is further observed and held by this Court that a third party or a stranger to a contract cannot be added so as to convert a suit of one character into a suit of different character. In paragraphs 15 and 16, this Court observed and held as under:

"15. As discussed hereinearlier, whether Respondents 1 and 4 to 11 were proper parties or not, the governing principle for deciding the question would be that the presence of Respondents 1 and 4 to 11 before the court would be necessary to enable it effectually and completely to adjudicate upon and settle all the questions involved in the suit. As noted hereinearlier, in a suit for specific performance of a contract for sale, the issue to be decided is the enforceability of the contract entered into between the appellant and Respondents 2 and 3 and whether contract was executed by the appellant and Respondents 2 and 3 for sale of the contracted property, whether the plaintiffs were ready and willing to perform their part of the contract and whether the appellant is entitled to a decree for specific performance of a contract for sale against Respondents 2 and 3. It is an admitted position that Respondents 1 and 4 to 11 did not seek their addition in the suit on the strength of the contract in respect of which the suit for specific performance of the contract for sale has been filed.

Admittedly, they based their claim on independent title and possession of the contracted property. It is, therefore, obvious as noted hereinearlier that in the event, Respondents 1 and 4 to 11 are added or impleaded in the suit, the scope of the suit for specific performance of the contract for sale shall be enlarged from the suit for specific performance to a suit for title and possession which is not permissible in law. In the case of Vijay Pratap v. Sambhu Saran Sinha [(1996) 10 SCC 53] this Court had taken the same view which is being taken by us in this judgment as discussed above. This Court in that decision clearly held that to decide the right, title and interest in the suit property of the stranger to the contract is beyond the scope of the suit for specific performance of the contract and the same cannot be turned into a regular title suit. Therefore, in our view, a third party or a stranger to the contract cannot be added so as to convert a suit of one character into a suit of different character. As discussed above, in the event any decree is passed against Respondents 2 and 3 and in favour of the appellant for specific performance of the contract for sale in respect of the contracted property, the decree that would be passed in the said suit, obviously, cannot bind Respondents 1 and 4 to 11. It may also be observed that in the event, the appellant obtains a decree for specific performance of the contracted property against Respondents 2 and 3, then, the Court shall direct execution of deed of sale in favour of the appellant in the event Respondents 2 and 3 refusing to execute the deed of sale and to obtain possession of the contracted property he has to put the decree in execution. As noted hereinearlier, since Respondents 1 and 4 to 11 were not parties in the suit for specific

performance of a contract for sale of the contracted property, a decree passed in such a suit shall not bind them and in that case, Respondents 1 and 4 to 11 would be at liberty either to obstruct execution in order to protect their possession by taking recourse to the relevant provisions of CPC, if they are available to them, or to file an independent suit for declaration of title and possession against the appellant or Respondent 3. On the other hand, if the decree is passed in favour of the appellant and sale deed is executed, the stranger to the contract being Respondents 1 and 4 to 11 have to be sued for taking possession if they are in possession of the decretal property.

16. That apart, from a plain reading of the expression used in sub-rule (2) Order 1 Rule 10 CPC "all the questions involved in the suit" it is abundantly clear that the legislature clearly meant that the controversies raised as between the parties to the litigation must be gone into only, that is to say, controversies with regard to the right which is set up and the relief claimed on one side and denied on the other and not the controversies which may arise between the plaintiff- appellant and the defendants inter se or questions between the parties to the suit and a third party. In our view, therefore, the court cannot allow adjudication of collateral matters so as to convert a suit for specific performance of contract for sale into a complicated suit for title between the plaintiff -appellant on one hand and Respondents 2 and 3 and Respondents 1 and 4 to 11 on the other. This addition, if allowed, would lead to a complicated litigation by which the trial and decision of serious questions which are totally outside the scope of the suit would have to be gone into. As the decree of a suit for specific performance of the contract for sale, if passed, cannot, at all, affect the right, title and interest of Respondents 1 and 4 to 11 in respect of the contracted property and in view of the detailed discussion made hereinearlier, Respondents 1 and 4 to 11 would not, at all, be necessary to be added in the instant suit for specific performance of the contract for sale."

That thereafter, after observing and holding as above, this Court further observed that in view of the principle that the plaintiff who has filed a suit for specific performance of the contract to sell is the dominus litis, he cannot be forced to add parties against whom, he does not want to fight unless it is a compulsion of the rule of law. In the aforesaid decision in the case of Kasturi(supra), it was contended on behalf of the third parties that they are in possession of the suit property on the basis of their independent title to the same and as the plaintiff had also claimed the relief of possession in the plaint and the issue with regard to possession is common to the parties including the third parties, and therefore, the same can be settled in the suit itself. It was further submitted on behalf of the third parties that to avoid the multiplicity of the suits, it would be appropriate to join them as party defendants. This Court did not accept the aforesaid submission by observing that merely in order to find out who is in possession of the contracted property, a third party or a stranger to the contract cannot be added in a suit for specific performance of the contract to sell because they are not necessary parties as there was no semblance of right to some relief against the party to the contract. It is further observed and held that in a suit for specific performance of the contract to sell the lis between the vendor and the persons in whose favour agreement to sell is executed shall only be gone into and it is also not

open to the Court to decide whether any other parties have acquired any title and possession of the contracted property. It is further observed and held by this Court in the aforesaid decision that if the plaintiff who has filed a suit for specific performance of the contract to sell, even after receiving the notice of claim of title and possession by other persons (not parties to the suit and even not parties to the agreement to sell for which a decree for specific performance is sought) does not want to join them in the pending suit, it is always done at the risk of the plaintiff because he cannot be forced to join the third parties as party -defendants in such suit. The aforesaid observations are made by this Court considering the principle that plaintiff is the dominus litis and cannot be forced to add parties against whom he does not want to fight unless there is a compulsion of the rule of law. Therefore, considering the decision of this Court in the case of Kasturi (supra), the appellant cannot be impleaded as a defendant in the suit filed by the original plaintiffs for specific performance of the contract between the original plaintiffs and original defendant no.1 and in a suit for specific performance of the contract to which the appellant is not a party and that too against the wish of the plaintiffs. The plaintiffs cannot be forced to add party against whom he does not want to fight. If he does so, in that case, it will be at the risk of the plaintiffs."

51. In view of the aforesaid legal proposition, it is explicitly clear that respondent nos. 4 to 7 being the plaintiffs in Original Suit No. 7 of 2019 are *dominus litis* and it is always open for them to make appropriate application to implead State and its instrumentalities against whom cause of action has arisen, coupled with the fact that there action tantamounted to legal injury but also to file appropriate application seeking amendment in plaint and in the reliefs in that regard.

52. Cumulatively analyzing the present case from four corners of law, this Court finds that the present proceedings which is being sought to be invoked for the direction to grant relief in toto cannot be proceeded with in the factual backdrop of the fact that the parties being the petitioner and the respondents are themselves litigating their legal right before the competent court of law while drawing proceeding in civil suit and the proceedings admittedly are pending before the competent Civil Court. The injuctions being operative and on top of it serious disputed questions of fact are involved which not only requires deeper scrutiny into factual aspects but also requires recording of oral and documentary evidence which in the present proceedings is not permissible in view of the contested claim of the parties.

53. Accordingly, both the writ petitions are **dismissed** at the stage leaving it open to the parties to get their rights adjudicated in the respective suit so preferred by them, while preferring appropriate applications for impleadment of the parties and seeking amendment in the plaint or in the written statement as the case may be as per law. This Court has no reason to disbelieve that in case the parties prefer impleadment application in consonance with Order 1 Rule 10 of CPC and amendment under Order 6 Rule 17 of CPC for amending their pleadings, then the same shall be decided with utmost expedition, obviously subject to the roaster so maintained by the court below and subject to any legal impediment.

55. Passing of the order today may not be construed to an expression that this Court has gone into the merit of the lis, as it is always open for the competent court of law to decide the matter without being influenced or obsessed by any of the observations made hereinabove.

(2022) 11 ILRA 280
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.09.2022

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-C No. 25139 of 2022

Arun Mishra ...Petitioner
Versus
C.I.C., New Delhi & Anr. ...Respondents

Counsel for the Petitioner:
Sri Arun Mishra

Counsel for the Respondents:
Sri Ashish Mishra, Sri Chandan Sharma

A. Allahabad High Court Rules, 1952 – Ch. XXII, R. 1 – Allahabad High Court (Right to Information) Rules, 2006 – Right to information – Information regarding procedure of listing as fresh case was sought – Two cases in respect of which information was sought for, were never directed to be listed as fresh after they were first listed on board as fresh – No status-information from the website was obtained – Effect – Held, Orders of this Court are available on the official website of the High Court which can be obtained by any person by having access to the Court's official website – Rules do provide answer to the query made by the petitioner – High Court and Appellate Authority rightly rejected the application for information. (Para 26, 27 and 28)

B. Duty of the Advocate – Procedure as provided under the Rules, duty to know it – In the absence of knowledge, seeking of the information under RTI Act – Permissibility – Held, it should be duty of the every advocate of the court concerned to know procedure of presenting cases and getting cases listed on board as rules of such Court provide for. It can only be termed as unfortunate that a lawyer himself would not go through the rules and would find it more convenient to seek information under Right to Information Act, 2005 for no justifiable reason. (Para 27)

Writ petition dismissed. (E-1)

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

1. Heard Sri Arun Mishra, the petitioner in person, Sri Chandan Sharma, learned counsel appearing for respondent no. 2.

2. The petitioner before this Court claims to be a practising Advocate of this Court had presented writ petition in the category of Writ-C before registry of this Court to be placed on board before a bench concerned as a fresh case, about 4 and half years ago. The registry allotted category and number to the petition as Writ C No. 59649 of 2017 with party name Arun Mishra as petitioner and State of U.P. and one more authority as respondents. This petition was presented through counsel Mr. Mahabir Yadav and the matter was placed on board before Division Bench of this Court as fresh on 15.12.2017 and after recording a short order, this matter was directed to come up for hearing on 19th January, 2018. The order passed by Division Bench on 15.12.2017 runs as under:-

"Mr. D.S. Yadav, learned counsel holding for Mr. Mahabir Yadav, learned counsel for the petitioner, seeks short adjournment. Mr. N.I. Jafri, learned counsel submits that a caveat filed by him

on behalf of respondent No.2 has been wrongly reported, though it was filed in some other case. In the circumstances, the Registry is directed to delete his name as Advocate for respondent No. 2. His caveat is restored to file.

Petition to come up for hearing on 19.1.2018. "

(emphasis added)

3. The petitioner seems to have presented another petition with the registry in the category of Public Interest Litigation to be presented before Division Bench as per roster provided. The registry allotted code/ category and number to the writ petition as Public Interest Litigation 'PIL' No. 940 of 2019 with party name Arun Mishra as petitioner v. State of U.P. and Other four authorities as respondents. This petition was also presented through Counsel Sri Mahabir Yadav. This matter came up before Division Bench on 26.4.2019 as fresh and giving time to the learned Standing Counsel to have instructions in the matter, it was fixed 3rd May, 2019. The order passed by Division Bench dated 26.4.2019 runs as under:

"As requested, put up this matter on 3.5.2019 to enable learned Standing Counsel to seek instructions."

4. This matter bearing Writ-C No. 59649 of 2017 as per status report of the case provided under Chapter VIII Rule 30 of the Allahabad High Court Rules, 1952 (hereinafter referred to as Rules of the Court) shows that matter was listed on 19th January, 2018 and was passed over. Similarly, status report in respect of Public Interest Litigation No. 940 of 2019 shows that the matter was listed for orders on 3rd May, 2019 and then 23rd March, 2021, but was passed over. Both the matters have not been listed thereafter. Since the matters were not listed thereafter as fresh matters, the petitioner according to the averments made in the writ petition tried to get them listed as fresh, but could not succeed nor, was he able to know the listing rules and so he moved an application under Right to Information Act, 2005 read with Allahabad High Court (Right to Information) Rules, 2006 and two questions were made by him of which he needed reply :

"Question No. 1:- Procedure/rule to list (as fresh) the WPIL no. 940/2019 and writ petition no. (c) 59649/17 for hearing of Hon'ble High Court, Allahabad.

Question No. 2:- Number of cause list procured on 02.08.2019 to be distributed to Advocates by this Hon'ble High Court."

5. Petitioner was furnished with information as per the Allahabad High Court (Right to Information) Rules, 2006 in respect of question no. 1 that desired information could not be provided as it was enumerated in detail in Allahabad High Court Rules, 1952. It was further replied that the information sought by the applicant was not covered under the definition of "Information' as provided under Section 2(f) of the Right to Information Act, 2005. The petitioner/applicant was further suggested to visit official website to get further information regarding question no. 2. A detail reply given to the petitioner is reproduced as under:

"The applicant be requested to deposit the requisite fee (in the form of Demand Draft) as provided under Rule 3 and Amended Rule 4 of the Allahabad High Court (Right to Information) Rules, 2006 are stated as under:-

Rule 3: Every application shall be made for one particular item of information only.

Rule 4: Each application shall be accompanied by cash or draft or pay order drawn in favour of the Registrar General, High Court, Allahabad, or District Judge of the concerned District Court as the case might be, at the following rules:

(i) Rs. 250/- if the requested information is related to tenders documents/bids/quotations/business contract or requested information is in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is store in any electronic form.

(ii) Rs. 50/- if information is obtained other than (I) above."

6. The petitioner/applicant not satisfied with reply furnished to him under Right to Information Act, preferred appeal before the Central Information Commission and after conducting hearing in the matter and noting down written submission furnished to it by Registrar of the High Court of the Commission took following decision.

" On analysis of the facts of the case, it is noted that there is no legal infirmity in the reply furnished by the Respondent because information about general listing is available in public domain viz. The Allahabad High Court Rules. The RTI Act does not cast any obligation on the public officials to interpret the information available in public domain and provide customized replies to the information seeker. In the event the Appellant seeks information to get his matter listed, he must approach the concerned Registry to obtain case specific information, outside the purview of the RTI Act. Thus where there is an alternate efficacious established process of law available for seeking such information, public officials of the High Court cannot be compelled to answer such queries under the RTI Act. No further action is deemed necessary in this case.

The appeal is disposed of accordingly."

7. The petitioner who has appeared in person has challenged the decision of the appellate authority dated 28th September, 2021, basically relating to reply given to question no. 1. The petitioner submits before this Court that as far as reply to question no. 2 is concerned, he is not aggrieved. With regard to question no. 1 he submits that correct and true reply/information has not been furnished by the authority and even appellate authority failed to appreciate it and therefore, the authorities, were not justified in just referring to the rules. According to him High Court Rules do not provide for any procedure for listing of fresh matters as query was made, inasmuch as on the official website of the High Court, there is no such information available which may have helped the petitioner /applicant in getting the correct information about listing procedure of fresh cases of the High Court and hence he submits that the order needed to be set aside directing Information Officer of the High Court to furnish true and correct information qua query made by him in respect of listing of fresh cases which are filed/presented before registry of this Court.

8. *Per contra*, Sri Chandan Sharma, learned counsel appearing for respondent no. 2, namely Central Public Information Officer, High Court of Judicature at Allahabad, submits that Allahabad High Court Rules, 1952 contain necessary rules of procedure for presentation of fresh matters with the registry and then before

this Court as per roster assigned to the benches by the Chief Justice and, therefore, it cannot be said that the High Court Rules are silent about the same. He further submits that as far as fresh matters are concerned when they are laid before the concerned bench by the registry and if they are taken up and orders are passed then status to the cases gets assigned as per orders passed. If the concerned bench directs a particular case to continue as fresh, then such a matter is listed as fresh and if no such order is passed there is simple direction to list a case whether for order or admission or hearing then such a case would get the category of listed matters to be listed on the date fixed or as per routine. He further explains that once the matter has gone on the list, which is called as "Cause List' published under the authority of Hon'ble the Chief Justice, then such matters come on the date fixed by the Court and in the event date is not fixed in a particular matter then matter would be listed in ordinary course of listing.

9. He next submits that in order to bring out a case from ordinary course of listing, the petitioner or for that matter respondent in a case has every right to move a miscellaneous application before the bench concerned which has the roster of a particular category of cases for listing matter out of turn and direction issued by Court then matter is listed accordingly. Once the Court passes judicial order of listing of case on the cause list of this Court on a particular day or date then such case is listed on that day or date.

10. It is argued by learned counsel appearing for the High Court that there is a computer generated status information system developed in the High Court and under Chapter VIII Rule 30 of the Rules of the High Court, any person who is a party to the petition or a counsel can obtain such information by depositing the requisite fee and then computer generated slip giving correct status of the case whether fresh or listed matter in detail. However, it is argued, summary details are also available on official website of the High Court of each cases which can be obtained by any person having access to the official website of the High Court. He further submits that there is nothing confidential about status of a case whether it is a fresh or a listed matter.

11. It is also argued by learned counsel appearing for the High Court that petitioner before this Court has nowhere stated in the entire writ petition that he ever applied to get status of his cases in respect of which he had a complaint that cases were not being listed on board as fresh. He further submits that orders dated 15.12.2017 passed in Writ C No. 59649 of 2017 and order dated 26th April, 2019 passed in Public Interest Litigation 'PIL' no. 940 of 2019 go on to show that these matters were never directed to be listed as fresh matters and in such view of the matter these matters could not be listed as fresh, therefore, query made by the petitioner in respect of these two cases taking them as fresh was absolutely misplaced. However, in defence of the reply given to the petitioner/ applicant, he submits that Rules of the High Court since provided for every such information in detail as to how the matter to be presented before the registry to be placed before the Court and how the application can be filed to get the case listed otherwise in ordinary listing, no further information was required to be given to the petitioner and, therefore, information furnished by the High Court was sufficient and so the order passed by

the appellate authority and reason assigned therein cannot be faulted with.

12. Having heard learned counsel for the respective parties and their arguments raised across the bar and having gone through the pleadings made in the writ petition, information furnished to the petitioner/applicant by the Central Public Information Officer of the High Court of Judicature at Allahabad dated 07th September, 2019, the order of the appellate authority qua decision made therein two points clearly emerge for consideration:

1. Whether petitioners' two cases in respect of which he wanted to have information regarding listing of fresh cases, information sought for was correct one and relevant to his complaint ?

2. whether rules of the Court are themselves sufficient being codified rules as they provided for detail procedures for the cases to be listed on board and no specific information was needed additionally to be furnished.

In so far as first point is concerned, from the perusal of the two orders that have been quoted hereinabove in this judgment it clearly transpires that these two cases were never directed to be listed as fresh matters. Once it is a fact admitted on record that these two cases were never directed to be listed as fresh, it was out of question to list those cases as fresh on board.

13. The only issue arises how the matter to be listed. The status shows that the matters were initially listed on 19th January, 2018 and 3rd May, 2019 respectively. Public Interest Litigation Writ Petition was further listed for admission 23rd March, 2021, it appears in its ordinary course by roster but thereafter case was not listed. Now question, therefore, is, what petitioner would be doing if these cases were not on board before the concerned bench.

14. Sri Chandan Sharma has relied upon Chapter VI Rule 6 of the High Court Rules, 1952 which provides for cause list to be proposed.

15. Before coming to the above, I would first refer to Rule 5 as follows:

"Subject to the directions of the Chief Justice, the Registrar shall cause to be published from time to time a list of all cases ready and likely to be put up for hearing."

16. Now Rule 6 provides as follows:

"the Registrar shall, subject to such directions as the Chief Justice may give from time to time, cause to be prepared a cause list for each day on which the Court sits containing lists of cases which may be heard by the different Benches of the Court. The List shall also state the hour at which and the room in which each Bench shall sit."

17. Chapter VI Rule 8 provides thus:

" Case in which a date is fixed- A case in which a date has been fixed for hearing shall, so far as possible, be placed in the Cause List immediately after miscellaneous and part-heard case."

18. Chapter VIII Rule 33 provides for list of cases out of turn Chapter VIII Rule 33 of the High Court Rules, 1952 is reproduced hereunder:

"Certain applications to be laid before Chief Justice for orders.- An application for the expediting of the hearing of a case or for listing a case out of

turn or for the removal of a case to be tried and determined by the Court under Rule 4 or for the withdrawal of a case under Art. 228 of the Constitution shall be laid before the Chief Justice in respect of any other Judge or a Bench nominated by the Chief Justice in respect of any case or class of cases] for orders."

19. The provisions that are quoted hereinabove go on to indicate that in general rules provide for preparation of cause list in which cases are listed on board before particular benches. Interpretation would be that registry would be listing a case ordinarily when it is ready may be for order or admission or hearing and then as per roster under Rule 6. Rule 8 provides listing of those cases also in which date has been fixed. Chapter VIII Rule 33 of the Rules of the High Court, 1952 since provides for listing of hearing cases out of turn then those cases shall also be listed in the cause list in the event orders are passed by the concerned respective benches on application being moved in that behalf for hearing of such cases. Rules also provide for adjournment of cases on applications or otherwise on mention.

20. Having gone through these rules which lay down comprehensive and exhaustive procedure for listing of matters other than fresh, I find that sufficient guidelines are there for registry to list cases on board and it cannot be said that rules are silent and therefore, information furnished by an information officer of the High Court and decision taken by the appellate authority cannot be said to be sufficient as they referred to rules of the Court for necessary information. As the Rules of the Court are in public domain, therefore, such information shall be taken to be in public domain. Under the circumstances, such information is not required to be especially additionally furnished.

21. In so far as fresh matters are concerned, although question made by the petitioner applicant were misplaced as two cases in respect of which information was sought for those cases were never directed to be listed as fresh after they were first listed on board as fresh before the bench concerned, however, I proceed to deal with this aspect also in the larger interest of litigants and lawyers.

22. Extract of provisions as contained under Rule 1 of Chapter XXII relevant to the controversy is reproduced as under:

*"**1. Application** :- (1) An application for a direction or order or writ under Article 226 B [and Article 227] of the Constitution other than a writ in the nature of habeas corpus shall be made to the Division Bench appointed to receive applications or, on any day on which no such Bench is sitting, to the Judge appointed to receive applications in civil matters. In the latter event the Judge shall direct that the application be laid before a Division Bench for orders:*

Provided that an application under Article 226 C[and Article 227] of the Constitution questioning a judgment, decree or order made or purported to be made by revenue Courts including the Board of Revenue arising out of any proceeding under the United Provinces Land Revenue Act, 1901, or the U.P. Tenancy Act 1939, or the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, or the Uttar Pradesh Urban Areas Zamindari Abolition and Land Reforms Act, 1956, or the Jaunsar Bawar Zamindari Abolition and Land Reforms Act, 1956, or the Kumaun and Uttar Khand

Zamindari Abolition and Land Reforms Act, 1960, or any order or judgment of any authority constituted under the U.P. Consolidation of Holdings Act, 1953 including the Director of Consolidation, shall be presented to a Judge sitting alone and appointed to receive such applications and those already presented to the Division Bench shall be heard by a Single Judge. "

23. A bare reading of the aforesaid provisions as quoted hereinabove, makes it quite explicit that once a matter is presented with registry and relates to a petition under Article 226 of the Constitution , it will be placed before a bench concerned if it is available. Now once matter is placed on board before a bench concerned as fresh, immediately or in cases if daily a bench is available so naturally such a case will be first presented before concerned bench captioned as "Fresh Cases'. However, I must hasten to add that since Rule 6 of Chapter VIII, directs for listing of matter subject to direction of Chief Justice, if any, the Chief Justice has this discretionary power to assign the matter presented before the registry to be placed on board, on different dates as well, looking to the burden of work. It is for the concerned bench to further direct thereafter that a case/ cases to be listed as fresh on a particular date or to be taken upotherwise in general cause list on a date fixed or it can also direct case or cases to be listed after lapse of some time. Left over matters, which could not be heard do continue as fresh cases on board for want of specific orders.

24. Similarly again the procedure relating for presentation of appeals and applications and other matters have been prescribed under Chapter XI of the Rules of the Court. These appeals and applications are presented before the Court for admission so procedure is same that they are to be presented in the category of fresh cases, when they are presented and placed on board and when they are further directed to be listed their status will be governed by the order that may be passed by Court concerned. The defective appeals are also listed similarly. In so far original jurisdiction of the Court to try the suit is concerned that is prescribed for under Chapter XV.

25. The suit once filed is heard by a particular bench which is notified for the said purpose by the Chief Justice. Elections petitions are presented before the Registrar under Chapter XV-A of the Rules of the Court, upon representation before the Registrar, election petitioners are registered and numbered and are tried by the bench which is assigned by Chief justice to try such election petition. Similarly the procedure is prescribed for the appeal and application in criminal jurisdiction of the Court under Chapter XVII. First case is filed before the registry and registry places them on board before the Court concerned, which is assigned to it whehter criminal appeals, or revisions and/or applications. Thus a very exhaustive and detailed procedure has been prescribed for hearing of jail appeals.

26. Orders of this Court are available on the official website of the High Court which can be obtained by any person by having access to the Court's official website.

27. In view of above therefore, rules do provide answer to the query made by the petitioner applicant and petitioner applicant having admittedly not studied the rules even though he is a learned Advocate of

this Court and he having not obtained status information of the cases concerned as per procedure prescribed, is himself to be blamed. It should be duty of the every advocate of the court concerned to know procedure of presenting cases and getting cases listed on board as rules of such Court provide for. It can only be termed as unfortunate that a lawyer himself would not go through the rules and would find it more convenient to seek information under Right to Information Act, 2005 for no justifiable reason.

28. In view of above and as I have already held that reply by the High Court was justified one and that appellate authority rightly rejected the appeal holding that Rules of the High Court provide such informations, I do not find any force in the present petition and accordingly dismiss the same.

(2022) 11 ILRA 287
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.08.2022

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ-C No. 49873 of 2003

Zila Panchayat & Anr. ...Petitioners
Versus
Sri Krishna Lal Dixit ...Respondent

Counsel for the Petitioners:
Sri Anshu Chaudhary, Sri Aditya Kumar Tripathi, Sri Anil Kumar Singh

Counsel for the Respondent:
Sri Aditya Kumar Tripathi

A. Civil Law – Suit for cancellation of Sale-deed – Abatement of suit – Character of document – Void and voidable document – Distinction, how can be drawn – Smt. Dulari Devi's case relied upon – Where there is fraudulent misrepresentation as to the character of a document executed by a person, it would be a void document, but in case where there is fraudulent misrepresentation as to the contents of the document, the character of a document is voidable – Held, the documents are void documents as in the instant case there was fraudulent misrepresentation as to the character of the document and not to the contents thereof. (Para 17 and 18)

B. UP Consolidation and Holdings Act, 1953 – Section 5(2)(a) – Abatement of suit – Jurisdiction of civil court – Defendant's name is recorded in revenue record – Effect – Held, since the name of the petitioner/defendant have been recorded in the revenue record, therefore, the suit is not cognizable by civil court and is cognizable by revenue court. (Para 23)

Writ petition allowed. (E-1)

List of Cases cited:-

1. Civil Appeal No. 2998 of 1980; Smt. Dulari Devi Vs Janardhan Singh & ors.

2. Shri Ram & anr. Vs Ist A.D.J. & ors. 2001 (3) SCC 24

3. Pyarelal Vs Shubhendra Pilania (Minor) & ors. 2019 (3) SCC 692

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

1. Heard Sri Anshu Chaudhary, learned counsel for the petitioners and Sri Aditya Kumar Tripathi, learned counsel for the respondent.

2. The petitioners by means of the present writ petition have assailed the order dated 21.08.1999 passed by the Civil Judge (Senior Division), Etawah in Original Suit No.12 of 1981 (Krishna Lal Dixit Vs. Zila Parishad, Etawah and Others) whereby

application 156Ga of the petitioner to abate the suit was rejected, and order dated 24.07.2003 passed by the Additional District Judge, Court No.4, Etawah rejecting the revision of the petitioner.

3. The plaintiff/respondent instituted a suit bearing Original Suit No.12 of 1981 praying for a decree of cancellation of document dated 27.08.1951 and sale deed dated 30.09.1957. The suit was instituted on the ground that the property in dispute was owned by one Sukhi Lal and petitioner was adopted son of Sukhi Lal. It is pleaded that late Sukhi Lal had instituted a suit against plaintiff/respondent before the court of Munsif, Etawah which was dismissed, and the adoption deed of the plaintiff/respondent was held valid. The appeal preferred by late Sukhi Lal against the judgement and decree declaring the adoption deed valid was also dismissed.

4. It is further pleaded that the document dated 27.08.1951 was never executed by late Sukhi Lal and sale deed dated 30.09.1957 was also not executed by late Sukhi Lal in favour of petitioner/defendant. In paragraph 8 of the plaint, it was specifically pleaded that petitioners/defendants got their names recorded in the revenue records by playing fraud whereas they have no concern with the property in dispute and were not entitled to get their names recorded in the revenue record. In paragraph 9 of the plaint, plaintiff/respondent further pleaded that on inquiry it was found that petitioner/defendant got the document dated 30.09.1957 executed by playing fraud. It was further pleaded that no document was executed by late Sukhi Lal on 30.09.1957 and said document is forged and fabricated and was not signed by Sukhi Lal nor he had put any impression of thumb on that document.

5. The suit was contested by petitioners/defendant denying the averments made in the plaint.

6. The petitioners/defendants filed an application 156Ga alleging therein that as the village Umri, Pargana Auraiya, District Etawah in which property in dispute is situated was under consolidation operation, therefore, suit is liable to be abated under Section 5(2)(a) of the U.P. Consolidation and Holdings Act, 1953 (hereinafter referred to as 'Act, 1953') as after the notification under Section 4 of the U.P. Act, 1953 consolidation court is empowered to declare the sale deed void.

7. The aforesaid application was contested by the plaintiff/respondent by filing objection contending inter-alia that after publication of notification under Section 5(2) of the Act, 1953, the suit was instituted. The plaintiff/respondent has stated in the plaint that the documents in question are voidable, and therefore, suit before the court of Civil Judge is maintainable.

8. The trial court vide order dated 21.08.1999 accepted the objection of plaintiff/respondent in holding that documents in question are voidable in nature and held that till the said documents are set aside, the character of these documents would be voidable.

9. A revision preferred by the petitioners/defendant against the order dated 21.08.1999 was rejected by the revision court vide judgement dated 24.07.2003, who affirmed the finding of the trial court.

10. Challenging the aforesaid orders, learned counsel for the petitioners has

contended that both the courts below have erred in law in holding that as it was a specific case of the plaintiff/respondent that late Sukhi Lal had not executed the document dated 27.08.1951 and sale deed dated 30.09.1957 nor he had put any impression on the said documents, and petitioner got those documents executed by producing an impostor, therefore, documents are forged and once consolidation operation had started in the area, where property in dispute is situated, the suit for cancellation of sale deed is cognizable by consolidation court and not by civil court. In support of his contention, he has paced reliance upon the judgement of Apex Court in the case of ***Smt. Dulari Devi Vs. Janardhan Singh and Others*** passed in ***Civil Appeal No.2998 of 1980*** wherein the Apex Court has laid down distinction between void and voidable documents.

11. He has further contended that in paragraph 8 of the plaint, it has been specifically stated that petitioner/defendant's name is recorded in the revenue record, and therefore, plaintiff/respondent has to pray for declaration of title and thus, civil court has no jurisdiction to try the suit. In support of this contention, he has placed reliance upon the judgements of Apex Court in the cases of ***Shri Ram and Another Vs. Ist Additional District Judge and Others 2001 (3) SCC 24*** and ***Pyarelal Vs. Shubhendra Pilania (Minor) through Natural Guardian (Father) Shri Pradeep Kumar Pilania and Others 2019 (3) SCC 692.***

12. Rebutting the aforesaid contentions, learned counsel for the respondents has contended that the sale deed is a voidable document and as in the instant case, there was fraudulent misrepresentation, therefore, the document would fall in the category of voidable documents and shall remain in force till it is set aside, and such document can only be cancelled by competent civil court, therefore, suit is maintainable. He has further contended that consolidation operation in the area is over, and therefore, suit for cancellation of sale deed would lie before the competent civil court.

13. I have considered the rival submissions of the parties and perused the record.

14. To ascertain the question in the present case as to the nature of document whether the document is void or voidable document, it would be apposite to reproduce paragraphs 8, 9, 10 & 11 of the plaint:-

"8. यह कि वादी को यह भी मालूम हुआ कि चकबन्दी के दौरान प्रतिवादी गण ने वसाजिश चकबन्दी अधिकारी फर्जी नाम अपना चढ़वाया है और दौरान चकबन्दी, प्रतिवादीगण को अपना नाम चढ़वाने का कोई हक नही था और चकबन्दी आफिसर को कोई अख्यार डि० बोर्ड का नाम चढ़ाने का नही था जुम्ला कार्यवाही व हुक्म बावत नाम दर्ज होने कतई अवैधानिक व विथआउट ज्यूरिस्डिक्शन है और कानूनन कमफरटेबिल इन लॉ नही है और मालूम होता है कि डि० बोर्ड इटावा के कर्मचारियो ने दौरान चकबंदी धोखा देकर व साजिश चकबन्दी अधिकारी उपरोक्त डि० बोर्ड का नाम फर्जी दर्ज करवाया है उन इन्द्राजात का कोई फायदा प्रतिवादीगण नही उठा सकते हैं और उपरोक्त इन्द्राजात वादी पर काबिज पाबन्दी नही है और जुम्ला इन्द्राजात कतई ज्यूरिकेशन है और धोखा व मिसरिप्रेजेन्टेशन पर मवनीय है कोई भी नोटिस वगैरह भी चकबन्दी के दौरान वादी या सोखी लाल के नाम जारी नही हुये और न विपक्षी व सोखी लाल कोई नोटिस जारी हुयी और न किसी नोटिस की कोई तामील हुयी। और न एतराज का मौका कोई दिया गया व नीज अदालत चकबन्दी अधिकारी को

प्रतिवादीगण या डि० बोर्ड का नाम चढ़ाने का कोई हक भी नही था और न कोई अख्यार था।

9. यह कि प्रतिवादीगण के द्वारा व उनके कर्मचारी के द्वारा दस्तनदाजी देने पर वादी ने जानकारी की व जांच पड़ताल की व मुआयना वगैरह करवाया तब वादी को माह सितम्बर सन् 80 यह जानकारी हुयी कि सोखी लाल के नाम से एक फर्जी, लिखा पढ़ी अज किस्म तमलीखानामा डि० बोर्ड इटावा के हक मे 30.9.57 को तहरीर व तकमील होना जाहिर की गयी है और उसमे नम्बरान जो कव्ल चकबन्दी थे उनका जिक्र है जो तहरीर बिल्कुल गलत है व नीज प्रेसीडेन्ट डि० बोर्ड को तहरीर लिखाने का कोई हक नही था और तहरीर मजकूर भी व मुजिव कानून डि० बोर्ड एक्ट नही लिखी गयी और न लिखी जा सकती थी सोखी लाल ने कोई तहरीर 30.9.57 को डि० बोर्ड के हक मे नही लिखी है वह तहरीर फर्जी व जाली है और उस पर सोखी लाल के निशान वगैरह नहीं है बल्कि फर्जी दुसरे आदमी के है व नीज वादी को यह भी मालूम हुआ कि 27.8.51 को एक तहरीर सोखी लाल व काली प्रसाद के नाम से बतौर बैनामा वहक शिक्षा समिति भगवती गंज ऊमरी तहरीर व तकमील हुयी है जो तहरीर भी कतई नाजायज व फर्जी है और उपरोक्त तहरीर पर काशी प्रसाद व सोखी लाल के दस्तखत या निशान नही है बल्कि फर्जी आदमी के है बिव फर्ज मुहाल अगर उपरोक्त तहरीर सोखी लाल के द्वारा तहरीर होना साबित भी हो तो वह भी नाजायज है और काबिल पाबन्दी वादी नही है सोखी लाल को उपरोक्त तहरीर करने का कोई हक नही था व नीज उपरोक्त नम्बरान मे काशी प्रसाद वल्द मिश्री लाल साकिन मौजा शुशरु परगना डेरापुर जिला कानपुर का नाम फर्जी खाता मशकूर मे दर्ज था जिसका भी उनको कोई हक नही था काशी प्रसाद कभी भी नम्बरान के मालिक व काबिज नही रहे और न उनका कब्जा दखल रहा बल्कि बराबर कुल नम्बरान पर कब्जा दखल सोखी लाल का ही उनके मरते समय तक चला आया।

10. यह कि दस्तावेज मु० 27.8.51 ई० को सोखी लाल और काशी प्रसाद ने तहरीर नही किया और फर्जी है व नीज जो उपरोक्त तहरीर शिक्षा समिति भगवती गंज के हक़ मे लिखी गयी है इस किस्म की कोई समिति नहीं रही और न सोखी लाल ऐसे किसी समिति के प्रेसीडेन्ट रहे और न किसी समिति का कोई कब्जा हुआ और न कोई स्कूल बना और न कोई स्कूल चला जुम्ला इन्द्राजात व जो तहरीर मे लिखे है वह गलत व वगरज तहरीर फर्जी लिखे गये है तहरीर मसकूर से कोई कब्जा दखल शिक्षा समिति का नही हुआ कोई मुआवजा वगैरह सोखी लाल को नही मिला। गरज कि जुम्ला इन्द्राज दस्तावेज निजाई के कतई बनावटी व फर्जी है दस्तावेज उपरोक्त का कोई अमल दरामद नही हुआ और न वह कभी एक्ट अमीन हुआ।

11. यह कि दस्तावेज मु० 30.9.57 को भी सोखी लाल व दीगर मुकिर भगवती प्रसाद जिसका नाम दस्तावेज मे दर्ज है ने तहरीर नही किया और न उनके दस्तखत या निशान है बल्कि फर्जी आदमी के है व नीज़ आल्टरनेटिव मे भी अगर सोखी लाल का तहरीर होना साबित भी हो तब भी यह उज्र है कि सोखी लाल व दीगर मुकिर मुन्दर्जा दस्तावेज को तहरीर करने का कोई हक नही था व नीज़ दस्तावेज़ मजकूर मे जिस कदर रकम तहरीर की गयी है। व नीज़ जो शरायते व कान्टेंट्स लिखे गये है वह सब फर्जी व बनावटी लिखे गये है और इस किस्म की कोई रकम मुन्दर्जा दस्तावेज सोखी लाल को नही मिली। उपरोक्त दोनो दस्तावेज कतई धोखा व मिसरिप्रेजेन्टशन पर भवनीय है। उपरोक्त दोनो दस्तावेज सोखी लाल व दीगर मुकरान को पढ़कर नही सुनाये गये और न समझाये गये और न उन्होने दफतर रजिस्ट्री मे पेश किये और न उनकी रजिस्ट्री कराई और न दफ्तर रजिस्ट्री मे पढ़कर सुनाये गये व समझाये गये जुम्ला कन्डोरसमेन्ट सब रजिस्ट्रर कतई गलत वसाजिश कर्मचारी डि० बोर्ड तहरीर हुये है व नीज़ दस्तावेज कतई फिकटिसियस व शाम दस्तावेज है और कभी एक्ट अमीन नही हुये और काबिल मंसूखी के है। उपरोक्त दस्तावेज की विनाय पर कोई कब्जा दखल मालिकाना जिला बोर्ड इटावा व जिला व जिला परिषद इटावा का नम्बरान पर नही रहा। उपरोक्त दस्तावेज कन्टेस्ट बिल्कुल गलत व साजिशी लिखे गये है व नीज़ कोई कब्जा दखल सोखी लाल ने नही दिया व नीज़ दस्तावेज निजाई से कानूनन जायदाद मुन्तकिल होना नही मानी जावेगी और न एबसलूट आउनरशिप व हक जिला परिषद् क्रियेट होना मानी जावेगी।"

15. Reading of the aforesaid paragraphs discloses that it was a specific case of the plaintiff/respondent that late

Sukhi Lal had not executed the document dated 27.08.1951 and sale deed dated 30.09.1957 in favour of petitioner and petitioner/defendant got the aforesaid documents executed by producing some impostor. It is specifically pleaded in the aforesaid paragraphs, extracted above, that the document dated 27.08.1951 is forged and it was never executed by late Sukhi Lal. Similar averment has been made by the plaintiff/respondent in respect to sale deed dated 30.09.1957 in paragraph 11 of the plaint, extracted above.

16. Now, whether the character of the aforesaid documents is void or voidable, in this regard, it would be apt to reproduce the relevant extract of the judgement of the Apex Court in the case of ***Smt. Dulari Devi (supra)***:-

"In Gorakh Nath Dube, (supra), this Court held that the object of the relevant provision of the Act was to remove from the jurisdiction of any civil court or revenue court all disputes which could be decided by the competent authority under the Act during the consolidation proceedings. Questions relating to the validity of a sale-deed or a gift deed and the like had to be examined in proceedings before the statutory authorities. The Court, however, drew a distinction between void and voidable documents and said a voidable document was one which remained in force until set aside, and such a document could be set aside only by a competent civil court, and a suit for that purpose would, therefore, be maintainable. On the other hand, a claim that a transaction was void was a matter which could be adjudicated upon by the consolidation courts. This is what this Court stated:

"We think that a distinction can be made between cases where a document is wholly or partially invalid so that it can be disregarded by any court or authority and one where it has to be actually set aside before it can cease to have legal effect. An alienation made in excess of power to transfer would be, to the extent of the excess of power, invalid. An adjudication on the effect of such a purported alienation would be necessarily implied in the decision of a dispute involving conflicting claims to rights or interests in land which are the subject matter of consolidation proceedings. The existence and quantum of rights claimed or denied will have to be declared by the consolidation authorities which would be deemed to be invested with jurisdiction, by the necessary implication of their statutory powers to adjudicate upon such rights and interests in land, to declare such documents effective or ineffective, but, where there is a document the legal effect of which can only be taken away by setting it aside or its cancellation, it could be urged that the consolidation authorities have no power to cancel the deed, and, therefore, it must be held to be binding on them so long as it is not cancelled by a court having the power to cancel it. In the case before us, the plaintiffs claim is that the sale of his half share by his uncle was invalid, inoperative, and void. Such a claim could be adjudicated upon by consolidation courts."

In Ningawwa v. Byrappa & three others., (supra), this Court referred to the well-established principle that a contract or other transaction induced or tendered by fraud is not void, but only voidable at the option of the party defrauded. The transaction remains valid until it was avoided. This Court then said:

"The legal position will be different if there is a fraudulent misrepresentation not merely as to the contents of the document but as to its character. The authorities make a clear

distinction between fraudulent misrepresentation as to the character of the document and fraudulent misrepresentation as to the contents thereof. With reference to the form- er, it has been held that the transaction is void, while in the case of the latter, it is merely voidable. In Foster v. Mackinon, 1869 (4) C.P. 704, the action was by the endorsee of a bill of exchange. The defendant pleaded that he endorsed the bill on a fraudulent representation by the acceptor that he was signing a guarantee. In holding that such a plea was admissible, the Court observed:

"It (signature) is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended ..... The defendant never intended to sign that contract or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the 'actual contents' of the instrument."

(emphasis supplied)

From the facts narrated above, about which, as stated earlier, there is no dispute, it is clear that this is a case where the plaintiff appellant was totally ignorant of the mischief played upon her. She honestly believed that the instrument which she executed and got registered was a gift deed in favour of her daughter. She believed that the thumb impressions taken from her were in respect of that single document. She did not know that she executed two documents, one of which alone was the gift deed, but the other was a sale of the property in favour of all the defendants. This was, therefore, a case of fraudulent misrepresentation as to the character of the document executed by her and not merely as to its contents or as to its legal effect. The plaintiff-appellant never intended to sign what she did sign. She never intended to enter into the contract to which she unknowingly became a party. Her mind did not accompany her thumb impressions. This is a case that falls within the principle enunciated in Ningawwa v. Byrappa & three others (supra) and it was, therefore, a totally void transaction. Accordingly, as stated in Gorakh Nath Dube (supra), the suit is not maintainable by reason of the bar contained in the Act.

The High Court has, in our view, rightly held that the remedy of the plaintiff lies in the proceedings pending before the consolidation authorities and it is open to the parties to approach them for appropriate relief. In the circumstances, we see no merit in this appeal. It is, accordingly, dismissed, but we make no order as to costs."

17. In the aforesaid case, the Apex Court has drawn a distinction between void and voidable documents and has held that where there is fraudulent misrepresentation as to the character of a document executed by a person, it would be a void document, but in case where there is fraudulent misrepresentation as to the contents of the document, the character of a document is voidable.

18. Applying the aforesaid principles in the instant case, it is evident from the pleadings in the plaint, extracted above, that the case of the plaintiff/respondent is that the documents in question were never executed by late Sukhi Lal nor any impression was put by him on these documents, therefore, clearly the said documents are void documents as in the

instant case there was fraudulent misrepresentation as to the character of the document and not to the contents thereof, therefore, in the opinion of the Court, both the courts below have erroneously held that documents in question are voidable document and are not void document.

19. The record of the case also reveals that though on the date of institution of suit, the area was not under the consolidation operation, but same was brought under consolidation operation by publication of notification under Section 4 of the Act, 1953 on 01.10.1983 and consolidation operation in the area was over on 03.10.2009, therefore, since during pendency of suit, consolidation operation had commenced in the area, the suit ought to have been abated by the court below as the relief prayed for in the instant suit could be granted only by consolidation court.

20. Now in the instant case, another question cropped up as to when consolidation operation has ended in the area after publication of notification under Section 5(2)(a) of the Act, 1953 on 30.09.2009, whether petitioner is entitled to any relief, and whether the suit is cognizable by civil court. In this regard, it would be relevant to peruse the paragraph 8 of the plaint, extracted above, wherein it is a admitted case of the plaintiff/respondent that names of the petitioner/defendant have been recorded in the revenue records. In such view of the fact, learned counsel for the petitioner has urged that the suit is not cognizable by civil court and is cognizable by revenue court.

21. This Court finds merit in the aforesaid submission of learned counsel for the petitioner in view of the judgements of Apex Court in the cases of ***Shri Ram and Another (supra) and Pyarelal (supra).*** It would be apt to refer paragraph 7 of the judgement of Apex Court in the case of ***Shri Ram and Another (supra)*** which is reproduced herein below:-

"7. On analysis of the decisions cited above, we are of the opinion that where a recorded tenure-holder having a prima facie title and in possession files suit in the civil court for cancellation of sale deed having obtained on the ground of fraud or impersonation cannot be directed to file a suit for declaration in the revenue court reason being that in such a case, prima facie, the title of the recorded tenure holder is not under cloud. He does not require declaration of his title to the land. The position would be different where a person not being a recorded tenure-holder seeks cancellation of sale deed by filing a suit in the civil court on the ground of fraud or impersonation. There necessarily the plaintiff is required to seek a declaration of his title and, therefore, he may be directed to approach the revenue court, as the sale deed being void has to be ignored for giving him relief for declaration and possession."

22. The judgement of Apex Court in the case of ***Shri Ram and Another (supra)*** has been followed by the Apex Court in the case of ***Pyarelal (supra)*** wherein Apex Court placing reliance upon a case arising out Section 207 read with Section 256 of the Rajasthan Tenancy Act has held that suit is cognizable by revenue court. Paragraphs 24 to 26 of the said judgement are being reproduced herein below:-

"24. In Shri Ram v. Addl. District Judge, (2001) 3 SCC 24, a suit was filed before the civil court for the cancellation of a sale deed of an agricultural land on the

grounds of fraud and impersonation. The defendant contended that the suit is barred by Section 331 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 which reads thus:

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

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

25. The question before this Court was whether a recorded tenure-holder having prima facie title in his favour and in possession was required to file a suit in the Revenue Court, or where the civil court had jurisdiction to entertain and decide the suit seeking relief of cancellation of a void document. Upholding the jurisdiction of civil court to try the suit, a two-Judge Bench of this Court differentiated between a recorded tenure holder, and an unrecorded tenure holder with the following observations:

7. ...we are of the opinion that where a recorded tenure holder having a prima facie title and in possession files suit in the civil court for cancellation of sale deed having been obtained on the ground of fraud or impersonation cannot be directed to file a suit for declaration in the Revenue Court, the reason being that in such a case, prima facie, the title of the recorded tenure holder is not under cloud. He does not require declaration of his title to the land. The position would be different where a person not being a recorded tenure holder seeks cancellation of sale deed by filing a suit in the civil court on the ground of fraud or impersonation. There necessarily the plaintiff is required to seek a declaration of his title and, therefore, he may be directed to approach the Revenue Court, as the sale deed being void has to be ignored for giving him relief for declaration and possession.

26. Though the above principles emerge in the context of the bar under Section 331 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, the logic of the judgment extends to the bar under Section 207 read with Section 256 of the of the Tenancy Act. A recorded khatedar stands on a different footing compared to a claimant seeking a decree of their khatedari rights. A claimant seeking a decree of khatedari rights is barred from filing a suit in the civil court prior to their khatedari right being decreed by a Revenue Court when the relief sought for by the civil court includes a determination of khatedari rights."

23. As in view of the categorical averment made in paragraph 8 of the plaint, name of the petitioner/defendant have been recorded in the revenue record, therefore, the suit is not cognizable by civil court and is cognizable by revenue court.

24. In such view of the fact, the impugned orders dated 21.08.1999 and 24.07.2003 are not sustainable in law and are hereby, set aside. The writ petition is ***allowed*** with no order as to costs.

25. It is open to the plaintiff/ respondent to file suit for the relief claimed, if so, advised, before the revenue court.

(2022) 11 ILRA 295
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.09.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

Matter under Article 227 No. 56 of 2022

Smt. Tulsarani & Anr. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nand Kishor Mishra, Shilpa Ahuja

Counsel for the Respondents:
A.S.G.I., C.S.C., Sri Jai Krishna Narain Sharma, Sri Pranjal Mehrotra

A. Civil Law - National Highways Act, 1956-Section 3G(5)-Arbitration and Conciliation Act, 1996-Section 34-Commercial Courts Act, 2015-Section 2(1)(c)-Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013-Section 113(1) and 67-Compensation-Petitioner's land has been acquired for purpose of a National Highway-petitioner challenged the Statutory award for seeking enhancement-property belonging to the petitioner was compulsorily acquired under the provisions of the Act, 1956, therefore it is by no means a 'commercial dispute' within the meaning of section 2(1)(c) of the Commercial Courts Act, 2015- Thus, the Application u/s 34 of Act of 1996 would not be maintainable before Commercial Court.(Para 1 to 20)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. UOI & anr. Vs Tarsem Singh & ors. (2019) 9 SCC 304

2. Richa Bisht Vs UOI (2020) AIR Online UTR 478

(Delivered by Hon'ble J.J. Munir, J.)

1. This petition under Article 227 of the Constitution is directed against an order of the Presiding Officer, Commercial Court, Jhansi dated 28.09.2021, to the extent it directs return of Arbitration Misc. Case No. 52 of 2021 and Arbitration Misc. Case No. 2 of 2021, under Section 34 of the Arbitration and Conciliation Act, 1996, for presentation to the proper Court.

2. It is common ground between parties that the petitioners' land comprised in a part of Arazi No. 73 of Village Raimalpura, Tehsil Kulpahar, District Mahoba, was acquired by the Central Government for widening of National Highway No. 76 from 89.600 kms. to 133.520 kms. The petitioners' land in Arazi No. 73 aforesaid, which shall hereinafter be called "the land in question' was acquired through a Notification No. 2345 dated 18.08.2017, issued and published by the Central Government under Section 3(2) of the National Highways Act, 1956 (for short, "the Act of 1956'). The notification last mentioned was followed by Notification No. 3378 dated 08.12.2017, published in the Gazette Extraordinary dated 08.12.2017 of the Government of India. Under the said notifications, a total 0.7507 hectare of land was acquired in Village Raimalpura, out of which 0.6587 hectare was found to be agricultural land, while the balance 0.0920 hectare was determined as State land. The land in

question is part of the aforesaid total area of land acquired in Village Raimalpura.

3. A notification was published in two local newspapers i.e. Dainik Jagran and Times of India dated 22.12.2017, asking persons affected to produce their claims for compensation under Section 3G of the Act of 1956. The first petitioner laid claim to the land in question supported by necessary evidence before the Competent Authority under Section 3G. The Competent Authority/ Special Land Acquisition Officer, Banda passed an award dated 07.07.2018, assessing compensation for the entire land acquired in Village Raimalpura, including the land in question, on the basis that it is agricultural land. Compensation was determined, treating the land to be agricultural.

4. The petitioners, aggrieved by the award passed by the Competent Authority dated 07.07.2018, moved the Statutory Arbitrator, appointed by the Central Government under Section 3G(5) of the Act of 1956, seeking enhancement of the compensation awarded. The Statutory Arbitrator, appointed in terms of a notification dated 30.07.2020 issued by the Government of India for acquisitions made in District Mahoba, was notified to be the District Magistrate, Mahoba. The Statutory Arbitrator dealt with all objections relating to the entire land in Village Raimalpura, admeasuring 0.6587 hectare, that was found to be bhumidhari.

5. The petitioners' case relating to a higher rate compensation for the land in question was also dealt with together with those of others, who had approached the Statutory Arbitrator. The Statutory Arbitrator did not accept the petitioners' contention, as he did not for other land similarly situate that the land in question was residential in character and ought to be compensated for its acquisition at residential rates. It was held to be agricultural. In agreement with the Competent Authority, the Statutory Arbitrator/ District Magistrate, Mahoba upheld the Competent Authority's award dated 07.07.2018 by his arbitral award dated 10.12.2020 passed in Case No. 00333 of 2020.

6. The petitioners, like others, aggrieved by the Statutory Arbitrator's award, moved the Commercial Court, Jhansi under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, "the Act of 1996') with a prayer to set aside the Statutory Arbitrator's award.

7. All the applications by landholders of acquired land in Village Raimalpura, who were aggrieved by the Statutory Arbitrator's award dated 10.12.2020, were consolidated and heard together with Arbitration Misc. Case No. 51 of 2021 being treated as the leading case. The petitioners' cases are Arbitration Misc. Case Nos. 52 of 2021 and 2 of 2021.

8. The Commercial Court, Jhansi held that the Statutory Arbitrator's award could not be questioned under Section 34 of the Act of 1996 and the petitioners' remedy was to seek a reference under Section 67 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (for short, "the Act of 2013') to the Land Acquisition and Rehabilitation and Resettlement Authority, constituted under Section 51 of the Act of 2013. Accordingly, the Presiding Officer, Commercial Court, Jhansi directed return of the applications under Section 34 of the Act of 1996 under

Order VII Rule 10 CPC for presentation to the proper Court. It was further directed that in case steps were not taken to take back the applications, the applications would stand rejected under Order VII Rule 11 (d) CPC.

9. It is this order of the Presiding Officer, Commercial Court, Jhansi that the petitioners have impugned in the present petition.

10. Heard Mr. Nand Kishor Mishra, learned Counsel for the petitioners, Mr. Pranjal Mehrotra, learned Counsel appearing on behalf National Highway Authority of India, respondent no.5, Mr. Jai Krishna Narain Sharma, learned Central Government Counsel appearing on behalf of the Union of India and Mr. Sanjay Kumar Singh, learned Additional Chief Standing Counsel for respondent nos.2, 3 and 4.

11. The moot point involved in this case is whether the award of the Statutory Arbitrator passed under Section 3G(5) of the Act of 1956 can be questioned through an application under Section 34 of the Act of 1996? If yes, before which Court or Tribunal?

12. The provisions of Section 3G of the Act of 1956 read:

3G. Determination of amount payable as compensation.-(1) Where any land is acquired under this Act, there shall be paid an amount which shall be determined by an order of the competent authority.

(2) Where the right of user or any right in the nature of an easement on, any land is acquired under this Act, there shall be paid an amount to the owner and any other person whose right of enjoyment in that land has been affected in any manner whatsoever by reason of such acquisition an amount calculated at ten per cent, of the amount determined under sub-section (1), for that land.

(3) Before proceeding to determine the amount under sub-section (1) or sub-section (2), the competent authority shall give a public notice published in two local newspapers, one of which will be in a vernacular language inviting claims from all persons interested in the land to be acquired.

(4) Such notice shall state the particulars of the land and shall require all persons interested in such land to appear in person or by an agent or by a legal practitioner referred to in sub-section (2) of section 3C, before the competent authority, at a time and place and to state the nature of their respective interest in such land.

(5) If the amount determined by the competent authority under sub-section (1) or sub-section (2) is not acceptable to either of the parties, the amount shall, on an application by either of the parties, be determined by the arbitrator to be appointed by the Central Government.

(6) Subject to the provisions of this Act, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to every arbitration under this Act.

(7) The competent authority or the arbitrator while determining the amount under sub-section (1) or sub-section (5), as the case may be, shall take into consideration-

(a) the market value of the land on the date of publication of the notification under section 3A;

(b) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the severing of such land from other land;

(c) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the acquisition injuriously affecting his other immovable property in any manner, or his earnings;

(d) if, in consequences of the acquisition of the land, the person interested is compelled to change his residence or place of business, the reasonable expenses, if any, incidental to such change.

13. Upon hearing the learned Counsel for parties and perusing the impugned judgment, this Court finds that the Presiding Officer, Commercial Court may not be wrong in saying that he does not have the jurisdiction to entertain the application under Section 34 of the Act of 1996, but he is certainly wrong in thinking that the award of the Statutory Arbitrator under Section 3G(5) of the Act of 1956 cannot be challenged by an application under Section 34 of the Act, last mentioned. Sub-Section (6) of Section 3G clearly mentions that subject to the provisions of the Act of 1956, the provisions of the Act of 1996 shall apply to every arbitration under the former Act. There is nothing in the scheme of Section 3G of the Act of 1956 to exclude the application of Section 34 vis-à-vis the award of the Statutory Arbitrator, passed under Section 3G(5) of the Act of 1956. An award by the Statutory Arbitrator may be questioned before the Court of competent jurisdiction under Section 34 of the Act of 1996, like any other award by an Arbitrator.

14. This Court is of opinion that the Commercial Court was misled by the application of the provisions of the Act of 2013 relating to determination of compensation in accordance with the First Schedule, rehabilitation and resettlement in accordance with the Second Schedule and infrastructure amenities in accordance with the Third Schedule to acquisitions made under the Act of 1956, by including it in the Fourth Schedule to the Act of 2013. The said provisions of the Act of 2013 have been made applicable to acquisitions under the Act of 1956 by the Central Government issuing an order in exercise of powers under sub-Section (1) of Section 113 of the Act of 2013.

15. The provisions of the Act of 2013 have been made applicable to acquisitions under the Act of 1956 for the limited purpose of calculation of compensation and entitlement to solatium, interest etc. in order to place land oustees under both the statutes at par. It is not that the entire procedure, including remedies for determination and assailing the quantum of compensation awarded under the Act of 1956, have been subsumed by the Act of 2013 by the limited extension of certain benefits under the Act of 2013 to acquisitions made under the Act of 1956. The provisions of reference to the Land Acquisition, Rehabilitation and Resettlement Authority under the Act of 2013 for the purpose of seeking enhancement of compensation awarded available to a land oustee, would not be available to a land oustee, whose land is acquired under the Act of 1956. His remedies are confined to the four corners of Section 3G of the Act of 1956.

16. This is the clear import of the holding of their Lordships of the Supreme Court, to the understanding of this Court, in **Union of India and another v. Tarsem Singh and others, (2019) 9 SCC 304.** In **Tarsem Singh** *(supra)*, it has been held:

13. The First Schedule to the said Act provides that solatium equivalent to 100% of the market value multiplied by various factors, depending on whether the land is situated in a rural or urban area, constitutes minimum compensation package to be given to those whose land is acquired. The Fourth Schedule to this Act, to be read along with Section 105, expressly includes under Item 7, the National Highways Act, 1956. In Item 9, this Schedule also includes the Requisitioning and Acquisition of Immovable Property Act, 1952. By a Notification dated 28-8-2015 issued under Section 105 read with Section 113 of the 2013 Act, it is provided that the 2013 Act compensation provisions will apply to acquisitions that take place under the National Highways Act. The result is that both before the 1997 Amendment Act and after the coming into force of the 2013 Act, solatium and interest is payable to landowners whose property is compulsorily acquired for purposes of National Highways. This is one other very important circumstance to be borne in mind when judging the constitutional validity of the 1997 Amendment Act for the interregnum period from 1997 to 2015.

48. It is thus clear that the Ordinance as well as the notification have applied the principle contained in Nagpur Improvement Trust [Nagpur Improvement Trust v. Vithal Rao, (1973) 1 SCC 500] , as the Central Government has considered it necessary to extend the benefits available to landowners generally under the 2013 Act to similarly placed landowners whose lands are acquired under the 13 enactments specified in the Fourth Schedule, the National Highways Act being one of the aforesaid enactments. This being the case, it is clear that the Government has itself accepted that the principle of Nagpur Improvement Trust [Nagpur Improvement Trust v. Vithal Rao, (1973) 1 SCC 500] would apply to acquisitions which take place under the National Highways Act, and that solatium and interest would be payable under the 2013 Act to persons whose lands are acquired for the purpose of National Highways as they are similarly placed to those landowners whose lands have been acquired for other public purposes under the 2013 Act. This being the case, it is clear that even the Government is of the view that it is not possible to discriminate between landowners covered by the 2013 Act and landowners covered by the National Highways Act, when it comes to compensation to be paid for lands acquired under either of the enactments. The judgments delivered under the 1952 Act as well as the Defence of India Act, 1971, may, therefore, require a re-look in the light of this development. [The Defence of India Act, 1971, was a temporary statute which remained in force only during the period of operation of a proclamation of emergency and for a period of six months thereafter -- vide Section 1(3) of the Act. As this Act has since expired, it is not included in the Fourth Schedule of the 2013 Act.] In any case, as has been pointed out hereinabove, Chajju Ram [Union of India v. Chajju Ram, (2003) 5 SCC 568] , has been referred to a larger Bench. In this view of the matter, we are of the view that the view of the Punjab and Haryana High Court [Union of India v. Tarsem Singh, 2018 SCC OnLine P&H 6036] , [Jang Bahadur v. Union of India, 2018 SCC OnLine P&H 6034] , [Union of India v. Abhinav Cotspin Ltd., 2016 SCC OnLine P&H 19319] is correct, whereas the view of the Rajasthan High Court [Banshilal Samariya v. Union of India, 2005 SCC OnLine Raj 572 : 2005-06 Supp RLW 559] is not correct.

52. There is no doubt that the learned Solicitor General, in the aforesaid two orders, has conceded the issue raised in these cases. This assumes importance in

view of the plea of Shri Divan that the impugned judgments should be set aside on the ground that when the arbitral awards did not provide for solatium or interest, no Section 34 petition having been filed by the landowners on this score, the Division Bench judgments that are impugned before us ought not to have allowed solatium and/or interest. Ordinarily, we would have acceded to this plea, but given the fact that the Government itself is of the view that solatium and interest should be granted even in cases that arise between 1997 and 2015, in the interest of justice we decline to interfere with such orders, given our discretionary jurisdiction under Article 136 of the Constitution of India. We therefore declare that the provisions of the Land Acquisition Act relating to solatium and interest contained in Sections 23(1-A) and (2) and interest payable in terms of Section 28 proviso will apply to acquisitions made under the National Highways Act. Consequently, the provision of Section 3-J is, to this extent, violative of Article 14 of the Constitution of India and, therefore, declared to be unconstitutional. Accordingly, appeal arising out of SLP (C) No. 9599 of 2019 is dismissed.

17. From a reading of the principles extensively laid down in **Tarsem Singh**, it is evident that what has been made applicable by the Central Government through their order dated 28.08.2015, quoted in extenso in Paragraph No. 47 of the report in **Tarsem Singh**, is a limited application of the provisions of the Act of 2013 relating to determination of compensation, rehabilitation and resettlement and extension of infrastructure amenities. It is not a complete supplant of the provisions of the Act of 1956 by those of the Act of 2013. The Commercial Court has, in our opinion, therefore, completely gone wrong in holding that the remedy against the award passed by the Statutory Arbitrator under the Act of 1956 would not be an application under Section 34 of the Act of 1996, but a reference to the Authority constituted under Section 51 of the Act of 2013. It is held, accordingly.

18. There is another aspect of the matter. And, that is, what would be the forum before which the application under Section 34 of the Act of 1996 would lie. The petitioners thought that since it is an arbitration application, they should go to the Commercial Court, instead of the Principal Civil Court of original jurisdiction in the district. This issue fell for consideration before the Uttarakhand High in **Richa Bisht v. Union of India, AIROnline 2020 UTR 478**. It was held in **Richa Bisht** (supra)**:**

13.From the scheme of the Act, it is apparent that only a commercial dispute can be tried by a commercial Court. For a dispute to qualify as commercial dispute, it must fall within one of the clauses of Section 2 (i) (c) of the Commercial Courts Act, 2015. A dispute will not become a commercial dispute merely because it is an arbitration matter and has been dealt with separately under Sections 10 and 15(2) of the said Act.

14.Every application filed under Section 34 of the Arbitration and Conciliation Act cannot be transferred to the commercial Court under Section 15(2) of the Commercial Courts Act, 2015 and only such applications will be required to be transferred, which are relating to a commercial dispute of a specified value.

15.The dispute, which petitioners raised before learned District Judge does not fall under any clause of 8 Section 2 (1) (c) of the Act, which defines 'commercial disputes'.

16. Clause (xxii) of Section 2 (1) (c) enables the Central Government to

include any other dispute in the definition of 'commercial dispute' by notification.

17. On 03.03.2020, Mr. Manoj Kumar, learned Central Government Standing Counsel was asked to get instructions whether the Central Government has issued any notification, as contemplated under Section 2(1) (c) (xxii) of the Commercial Courts Act, 2015. He was further asked to get definite instruction as to whether the dispute arising out of land acquisition for the purpose of construction of highway has been treated as commercial dispute by any notification issued by the Central Government under Section 2(1) (c) (xxii) of the Act.

18. Today, Mr. Manoj Kumar, learned Central Government Standing Counsel, on instructions, submitted that no such notification has been issued by the Central Government under Section 2(1) (c) (xxii) of the aforesaid Act.

19. It is nobody's case that petitioners are into real estate business. Learned counsel appearing for respondent no. 2 fairly concedes that petitioners are not doing trade or business in immovable property. It is an admitted position that the property belonging to the petitioners were compulsorily acquired under the provisions of National Highways Act, 1956, therefore, Clause-vii of Section 2(1) (c) of the Commercial Courts Act, 2015 also cannot be pressed into service for treating 9 the dispute raised by the petitioners before the District Judge, as commercial dispute.

20. In view of the aforesaid discussion, this Court has no hesitation in holding that the dispute raised by the petitioners before the learned District Judge is not a 'commercial dispute', therefore, learned District Judge erred in transferring the application filed by the petitioners under Section 34 of the Arbitration and Conciliation Act to the Commercial Court, Dehradun.

19. The principles in **Richa Bisht** are squarely applicable to the facts here, because the petitioners' land has been acquired for the purpose of a National Highway. It is by no means a 'commercial dispute' within the meaning of Section 2(1)(c) of the Commercial Courts Act, 2015. For the said reason, the application under Section 34 of the Act of 1996 would not be maintainable before the Commercial Court. Thus, for reasons very different from those that have weighed with the Commercial Court in passing the order impugned, this Court concurs in the conclusions reached. It is made clear that upon return of the application under Section 34 of the Act of 1996 to the petitioners, it would be open to them, subject of course to the law of limitation, to institute proceedings, if so advised, before the Court of competent jurisdiction, entitled to hear an application under Section 34 of the Act of 1996.

20. Subject to the above clarifications, this petition is dismissed. There shall be no order as to costs.

(2022) 11 ILRA 301
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.09.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

Matter Under Article 227 No. 2725 of 2022

Gangu ...Petitioner
Versus
Smt. Alka Arora & Anr. ...Respondents

Counsel for the Petitioner:
Sri Sunil Kumar Srivastava

Counsel for the Respondents:
Prakhar Tandon

A. Civil Law - Civil Procedure Code, 1908-Order XV, Rule 5-application by landlord to strike off defence of tenant for non-deposit of rent, month by month-Petitioner had been depositing rent in the court of Civil Judge u/s 30 of the U.P. Act 1972-Petitioner was not aware of the requirement of law regarding deposit under Order XV, Rule 5, CPC-no justification for the petitioner after he had put in appearance in the suit and filed his written statement-Thus, the petitioner's defence has been rightly struck off-While depositing the amount at or before the first hearing of the suit, the tenant can deduct the amount deposited u/s 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.(Para 1 to 10)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Kedar Nath Vs Waqf Sheikh Abdullah Charitable Madursa & ors. (2015) SCC Online All 7172

2. Haider Abbas Vs ADJ & ors. (2006) 1 ADJ 197 All (DB)

3. Om Prakash Gupta Vs DJ, Mainpuri & anr. (2019) 3 AWC 2543

4. Sunil Kumar & ors. Vs Kapoor Chandra Agarwal Dharamshala Trust (2019)10 ADJ 682

(Delivered by Hon'ble J.J. Munir, J.)

1. Heard Mr. S.K. Srivastava, learned Counsel for the petitioner and Mr. Prakhar Tandon, Advocate appearing on behalf of plaintiff-respondents.

2. The petitioner is a tenant and the defendant in S.C.C. Suit No. 350 of 2018, pending before the Judge, Small Cause Court, Kanpur Nagar.

3. On an application made by the respondent-landlord under Order XV Rule 5 of the Code of Civil Procedure (for short, 'the CPC'), the learned Judge, Small Cause Court has ordered the petitioner's defence to be struck off on the ground of failure to regularly deposit rent, month by month, with the Trial Court. The order was challenged in a revision preferred to the District Judge of Kanpur Nagar, being Civil Revision No. 91 of 2021. The said revision was heard and dismissed by the Additional District Judge, Court No. 16, Kanpur Nagar.

4. Accordingly, the petitioner has instituted this petition under Article 227, asking this Court to set aside the two orders dated 08.02.2021 and 09.09.2021 passed by the Courts below and restore his defence.

5. The facts of this case, relevant for the purpose of this petition, show that there is no issue about compliance with the first part of Rule 5 of Order XV CPC, which requires deposit to be made on the first date of hearing. What had led to the petitioner's defence being struck off, is non-compliance with the part that requires monthly rent to be deposited regularly with the Court, where the suit is pending, within 7 days of the date of its accrual. Here, the petitioner claims to be depositing rent under Section 30(1) 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') in the Court of the Civil Judge (Jr. Div.), Kanpur Nagar vide Misc. Case No. 425/70/2018. Summons of the suit were received by the petitioner's wife, Kiran on 13.12.2019. On 08.03.2019, Mr. Sushil Kumar Srivastava, Advocate, instructed by the petitioner, Gangu, put in appearance on his behalf in the suit and obtained necessary copies of

the plaint etc. On the 8th April, 2019, a written statement was filed on behalf of the petitioner. Thus, the petitioner put in appearance on 8th April, 2019 and filed his written statement on 8th April, 2019. Surprisingly, however, the petitioner continued to deposit monthly rent in the Court of the Civil Judge (Jr. Div.) under Section 30 (1) of the Act for the months of April, 2019 to November, 2020, and that too, in lump sum for two months at a time. The first deposit of monthly rent in the Court, where the suit is pending, was made on 1st February, 2021. It was for the months of December, 2020 and January, 2021.

6. It is submitted by Mr. S.K. Srivastava, learned Counsel for the petitioner that the petitioner contested the suit through his Counsel and was not aware of the requirements of the law regarding deposit under Order XV Rule 5 CPC. He acted as per advice of the learned Counsel and deposited rent under Section 30 of the Act, which he did regularly. It is submitted that on account of lack of awareness of the law, he cannot be deprived of his valuable right, as valuable as his defence in an eviction suit. Reliance has been placed by the learned Counsel upon the decision of this Court in **Kedar Nath v. Waqf Sheikh Abdullah Charitable Madursa and others, 2015 SCC OnLine All 7172**.

10. In **Pramod Mehrotra and others Versus Ram Shankar Chaurasia and others, 2007(3) ARC 77**, where the amount was deposited with some delay, this Court relying upon Bimal Chand Jain (supra), held that discretion should be exercised not to strike off the defence where the entire amount has been paid with some delay.

11. Again in **Sudhir Kumar Gupta Versus Dr. S.K. Raj and another, 1998 (1) ARC 545**, the Court observed that the purpose of enacting the provision Rule 5 Order XV was not to give a lever to the landlord to get a tenant punished for insignificant lapses. The purpose was merely to ensure that the dues of the landlord are properly secured and he can get his rent regularly even though the litigation may continue.

12. In **Pyare Lal Versus Distrit Judge, Lucknow and others, 2010(2) ARC 260** wherein, the Court allowed the deposit of rent upon imposing cost.

13. In **Dr. Ram Prakash Mishra Versus Additional District Judge, Etah and another, 1999 (1) AWC 715,** it was observed that the question whether the deposit is valid or not is relevant for determining the question whether the tenant could be held to be defaulter or not in the eye of law, but so far as Order XV, Rule 5 C.P.C. is concerned, the only requirement is that the tenant has to deposit the entire amount on or before the first hearing of the suit. If the deposit has been made under section 30 of Act 13 of 1972 then it will ensure to the benefit of the tenant.

14. 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 Versus Smt. Sahodra Devi,1996(2) ARC 406).**

7. A Division Bench of this Court in **Haider Abbas v. Additional District Judge and others, 2006 (1) ADJ 197 (All) (DB),** held:

23. 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.

24. 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.

25. It, therefore, follows that the amount due to be deposited by the tenant throughout the continuation of the suit has to be deposited in the Court where the suit is filed otherwise the Court may strike off the defence of the tenant since the deposits made by the tenant under Section 30 (1) of the Act after the first hearing of the suit cannot be taken into consideration.

8. Again, in a later decision of this Court in **Om Prakash Gupta v. District Judge, Mainpuri and another, 2019 (3) AWC 2543**, it has been held:

13. The Division Bench placed reliance on the judgment of Supreme Court in Atma Ram (supra) in holding that if the tenant desires to take advantage of a beneficial provision under the Rent Control Act, he must strictly comply with the requirements thereof. 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 the said provision. Accordingly, it was held that a deposit made not in consonance with the statutory provision would not enure to the benefit of the tenant. The monthly amount required to be deposited by the tenant during pendency of the suit has to be deposited in the court where the suit is filed and not in any other Court or proceedings. It has been concluded by holding that deposit of monthly rent under Section 30 of the Act, after receipt of summons of the suit is contrary to the requirements of Order 15 Rule 5 CPC and would therefore not enure to the benefit of the tenant :-

"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. It, therefore, follows that the amount due to be deposited by the tenant throughout the continuation of the suit has to be deposited in the Court where the suit is filed otherwise the Court may strike off the defence of the tenant since the deposits made by the tenant under Section 30 (1) of the Act after the first hearing of the suit cannot be taken into consideration.

.....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." (emphasis supplied)

9. Similar view has been expressed in **Sunil Kumar and others v. Kapoor Chandra Agarwal Dharamshala Trust, 2019 (10) ADJ 682.**

10. There is absolutely no justification here for the petitioner to have deposited rent for months together before the Court exercising jurisdiction under Section 30 of the Act, after he had put in appearance in the suit and filed his written statement. The monthly rent had to be deposited in the Court, where the suit was pending in accordance with the provisions of Order XV Rule 5 CPC, within a week of accrual of rent every month. This having not been done, the petitioner's defence has been rightly struck off.

11. This Court is of opinion that no case for interference under Article 227 of the Constitution is made out.

12. This petition is, accordingly, dismissed.

13. The interim stay order dated 25.04.2022 is hereby vacated.

(2022) 11 ILRA 305
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.11.2022

BEFORE

THE HON'BLE JYOTSNA SHARMA, J.

Matter Under Article 227 No. 9112 of 2022

Indrapal Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ajay Pratap Singh, Sri Vijay Tripathi

Counsel for the Respondents:
G.A.

A. Civil Law - U.P. Panchayat Raj Act, 1947-Section 12-C r/w U.P. Kshetra Panchayats (Election of Pramukhs and Up-Pramukhs and Settlement of Election Dispute) Rules,1994-the Petitioner was aggrieved by tilting of the result against him because of alleged unfair practice adopted during the elections-An attempt has been made to give criminal color by filing application u/s 156(3) Cr.P.C., to essentially a civil dispute which could have been remedied by filing election petition-Hence, the impugned orders are within the boundaries of law.(Para 1 to 9)

The writ petition is dismissed. (E-6)

(Delivered by Hon'ble Mrs. Jyotsna Sharma, J.)

1. Heard Sri Vijay Tripathi, learned counsel for the petitioner and learned AGA for the State.

2. This petition under Article 227 of the Constitution of India has been filed challenging the order passed in Criminal Revision No. 89 of 2021 dated 17.08.2022 whereby the order passed by the trial court dated 04.10.2021 was affirmed and the revision was dismissed.

3. The facts relevant giving rise to this petition are as below:-

An application under Section 156(3) Cr.P.C. was moved on behalf of the present petitioner-Indrapal Singh before the Court of Judicial Magistrate with the allegations that in the local elections conducted for the election of Block Pramukh, Ferozabad, the opposite side used forged ballot papers; some of the ballot papers were put with forged signatures of the voters; 7 ballot papers were not found valid because of the tactics adopted by the opposite side; the collusion of the government officials, manning the elections; some of the voters were turned out forcibly for preventing them from voting; some of the persons were allowed to vote, who were actually not the voters; on some of the ballot papers, interpolation were done, so that they may be declared invalid; all this happened in collusion with government officials who are opposite side. In a nut shell, it is alleged that the malpractice of such nature were adopted by the opposite party nos. 1 to 10, that tilted the result in favor of his opponent, therefore, a case may be registered against them and be investigated upon.

4. On this application, the applicant was heard by the trial court and the application was dismissed. Two of the grounds mentioned by the trial court are that as the applicant had statutory remedy to challenge the election by filing election petition under Section 12-C of the U.P. Panchayat Raj Act, 1947 read with U.P. Kshettra Panchayats (Election of Pramukhs and Up-Pramukhs and Settlement of Election Disputes) Rules, 1994, hence, the application is not maintainable. Besides the above, the trial court relied on the Article 243(o)(b)of the Constitution of India which said that election to any panchayat shall not be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by legislature of the State. After referring to the above, the learned trial court took notice of the Rule Nos. 35 to 49 of U.P. Kshettra Panchayats (Election of Pramukhs and Up-Pramukhs and Settlement of Election Disputes) Rules, 1994 wherein provisions have been made to challenge the validity of elections of Block Pramukhs/Up-Pramukhs. In the revision, the revisional court concurred with the observations of the learned trial court and finding no error in the impugned

order dismissed the same on 17.08.2022. The aforesaid orders have been challenged before this Court now with a prayer to quash them.

5. The U.P. Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961 is an enactment, which was enacted for ensuring proper municipal governance in rural areas, decentralization of Governmental functions as well as to co-relate the powers and functions of Gram Sabha under United Provinces Panchayat Raj Act, 1947 with U.P. Kshettra Panchayat and Zila Panchayat. As far as question relating to lawful election of members of Kshettra Panchayat is concerned, Section 14(2) is as below:-

"If any question arises as to whether a person has been lawfully chosen a member of a Kshettra Panchayat or has ceased to remain eligible to be such member the question shall be referred in the manner prescribed to the Judge, whose decision shall be final and binding."

The same Act provides for some provisions under Section 264-B(1) and (2) relevant for the subject as below:-

"(1) The election to the office of an Adhyaksha, Upadhyaksha or a member of a Zila Panchayat and Pramukh, Up-Pramukh or a member of Kshettra Panchayat shall be held by secret ballot in the manner provided by rules which shall also provide for ***resolution of doubts and disputes*** *relating to the election of such Adhyaksha, Upadhyaksha, Pramukh and Up-Pramukh.*
(2) The superintendence, direction and control of the conduct of election of the office of an Adhyaksha, Upadhyaksha or a member of a Zila Panchayat and of a Pramukh, Up-Pramukh or a member of a Kshettra Panchayat shall vest in the State Election Commission."

In exercise of powers under Section 237 read with Section 264-B of the U.P. Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961, the rules have been framed relating to matter of election of Pramukhs and Up-Pramukhs which is the U.P. Kshettra Panchayats (Election of Pramukhs and Up-Pramukhs and Settlement of Election Disputes) Rules, 1994. These rules elaborately provide for conduct of election of Up-Pramukhs in Chapter 3 of the Rules. The Rules of 1994, as aforesaid also provides for elaborate procedures with regard to disputes of election of Pramukhs and Up-Pramukhs in Chapter 4. Rule 35 says that an election petition calling in question the election of Pramukhs and Up-Pramukhs may be presented to the judge at any time within 30 days from the date of declaration of the result under Rule 14 or Rule 29, as the case may be. The petitioner may claim that the election of the winning candidate was void. The judge has been empowered to exercise powers as provided in Civil Procedure Code, 1990 and to grant relief in terms of Rule 43 of the Rules of 1994. In my opinion, the provisions of the Act read with Rules of 1994 clearly indicate that the matter of election has been comprehensively dealt with by the legislature in the relevant provisions.

6. I perused the papers on record in the light of the submissions of the petitioner. The grievance of the petitioner is that despite raising a complaint to the higher authority of use of malpractices committed at the election in collusion with the government officials (who happen to be respondent nos. 2 to 8 in the present petition) and private persons (who happen to be respondent nos. 9 to 11 in the

present petition), no steps were taken at the relevant point of time to stop them; the petitioner secured 49 votes as against 59 votes secured by the elected candidate while 7 were declared invalid because of the malpractices and tactics adopted by the petitioners, hence, a FIR be lodged against them and order of the revisional court as well as the order of the trial court be quashed.

7. If an application moved under Section 156(3) is studied, it clearly shows that the applicant is aggrieved by tilting of the result against him because of alleged unfair practice adopted during the elections. The remedy available to the applicant-revisionist is thus filing of election petition. In may view, an attempt has been made to give criminal color, to essentially a civil dispute which could have been remedied by seeking appropriate remedy under the provisions of the U.P. Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961 read with the U.P. Kshettra Panchayats (Election of Pramukhs and Up-Pramukhs and Settlement of Election Disputes) Rules, 1994.

8. The Apex Court has observed in number of cases that the power conferred under Article 227 of the Constitution casts a duty on the High Court to keep the inferior Courts and Tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. It has been observed by the courts many times that where there is grave dereliction of duty and flagrant abuse of fundamental principles of law or justice and where grave injustice would be done, then, in such a situation, the Court must interfere in pursuance to the power conferred under Articles 226/227 of the Constitution of India.

9. I do not find any ground to interfere in the impugned orders in exercise of powers to this Court under Article 227 of the Constitution. The impugned orders are speaking, reasoned and within the boundaries of the law.

10. The petition is, accordingly, ***dismissed***.

(2022) 11 ILRA 308
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.11.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE SAURABH SRIVASTAVA, J.

PIL(Civil) No. 115 of 2022

Ishita Foundation Metro City ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Pushpila Bisht

Counsel for the Respondents:
C.S.C., Neerav Chitravanshi, Sanjay Singh

A. PIL-Constitution of India, 1950-Article 226-Electricity Act, 2003-Sections 62(1) r/w 86(1)(a) read with Regulation 6 of U.P. Electricity Regulatory Commission (Conduct of Business) Regulations, 2004-no evidence to show proceedings relating to determination of power tariff are vitiated-petitioner has nowhere stated as to what according to it should be the capital cost of the projects of respondent no. 4 for the purpose of determination of tariff-the representation made by the petitioner to the Regulatory Commission nowhere has it been stated or disclosed as to what should be taken to be the capital cost of the projects-if the petitioner had any objection, he must have participated in the public hearing before the Regulatory Commission and filed its objection-Instead of participating in the

public hearing and making its objections, the petitioner straightaway filed the PIL- Mr. Mohit Goyal was neither appointed by the Power Corporation as consultant to present its objection before the Commission nor was he ever engaged by the Power Corporation for the said purpose- the petitioner failed to establish the allegations made in this PIL in respect of the process of determination of tariff being vitiated on account of the vice of conflict of interest as as alleged against Mr. Mohit Goyal.(Para 1 to 68)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Dattaraj Nathuji Thaware Vs St. of Mah. & ors. (2005) 1 SCC 590

2. R & M Trust Vs Koramangala Residents Vigilance Group & ors. (2005) 3 SCC 91

3. Shivajirao Nilangekar Patil Vs Mahesh Madhav Gosavi(Dr.) & ors. (1987) 1 SCC 227

4. Indian Banks' Assn. Bombay & ors. Vs Devkala Consultancy Service & ors.(2004) 11 SCC 1

5. Akhil Bhartiya Upbhokta Congress Vs St. of M.P. (2011) 5 SCC 29

6. Vishwanath Chaturvedi (3) Vs UOI & ors. (2007) 4 SCC 380

7. St. of Uttaranchal Vs Balwant Singh Chaufal & ors. (2010) 3 SCC 402

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J. & Hon'ble Saurabh Srivastava, J.)

1. Heard Sri S.C.Misra, Senior Advocate assisted by Ms Pushpila Bisht and Sri Gagan Katyayan, learned for the petitioner, learned Standing Counsel representing the State-respondent no.1, Sri J.N.Mathur, Senior Advocate assisted by Sri Sanjay Singh, learned counsel for respondent no.2-U.P. Electricity Regulatory Commission (hereinafter referred to as "Regulatory Commission") and Dr. L.P.Misra with Sri Neerav Chitravanshi, learned counsel representing respondent no.3-U.P. Power Corporation Limited (hereinafter referred to as "Power Corporation"). We have perused the record available before us on this petition.

Prayers in the writ petition

2. By instituting proceedings of this Public Interest Litigation (PIL) under Article 226 of the Constitution of India, the petitioner, which is a Non Governmental Organization, has prayed that an appropriate writ or direction may be issued to respondent no.2-Regulatory Commission restraining it from going ahead with determination of final tariff for respondent no.4- Lalitpur Power Generation Company Limited (hereinafter referred to as "Generating Company") pursuant to public notice dated 23.11.2021. The other prayer made by the petitioner is that an appropriate writ or order or direction may also be issued to institute an independent investigation into the alleged collusion/conflict of interest in final tariff fixation of the Generating Company's 1980 MW (3x660MW) Thermal Power Project at Badagaon, District Lalitpur. The petitioner-foundation has also prayed that detail guidelines may also be issued by this Court to ensure thorough scrutiny of private/public bodies taking part in power tariff determination process.

Facts of the case as culled from the pleadings available on record and the submissions made by learned counsel representing the respective parties

3. (a) A Power Purchase Agreements were entered into between the Power Corporation and the Generating Company for sale of 100% saleble power generated by the Generating Company to the Power Corporation at a price to be determined by the Regulatory Commission on 15.06.2021.

(b) On 25.03.2019 the Generating Company filed a petition which was registered as Petition No.1431 of 2019 before the Regulatory Commission under Section 62 read with Section 86 (1) (a) of the Electricity Act, 2003 read with Regulation 6 of U.P. Electricity Regulatory Commission (Conduct of Business) Regulations, 2004. The said petition was filed by the Generating Company with a prayer to approve the final tariff for the applicable capacity of the Generating Company from respective Dates of Commercial Operation in relation to three units of the Power Projects of the Generating Company till 31.03.2019. Another relief sought was for ceiling capital cost of Rs.17,760.95 crores. The Generating Company also made certain prayers regarding additional capital expenditure beyond the Dates of Commercial Operation, recovery of taxes, duties, cess, levies and other charges and costs and expenses and also in relation to reimbursement of certain bank charges towards bank guarantees for availing certain benefits under the power policy.

(c) For the purposes of appointment of Designated Independent Agency (hereinafter referred to as "DIA") for conducting the prudence check and verification of capital cost of the Power Project of the Generating Company, after inviting bids, the respondent no.5-M/s Aquagreen Engineering Management Private Limited in consortium with respondent no.6-Bhushan Rastogi and Associates was appointed the DIA by the Regulatory Commission. The respondent no.5 in consortium with respondent no.6 functioning as DIA submitted its report regarding prudence check and verification of capital cost of the Power Project of the Generating Company on 29.10.2021 and recommended disallowance of Rs.592 crores as capital cost.

(d) On 23.11.2021 a notice was published by the Regulatory Commission intimating the general public that DIA had submitted its report to the Regulatory Commission on 29.10.2021 and that public hearing in this regard is scheduled on 17.01.2022. By the said notice, the Regulatory Commission required all the stakeholders to submit their comments/objections by 15.01.2022. On 17.01.2022 public hearing was held in which Power Corporation submitted its objections claiming dis-allowance of Rs. 5316.55 crores towards the capital cost as claimed by the Generating Company.

(e) It is said that on the basis of public hearing held on 17.01.2022, an order was passed by the Regulatory Commission on 24.01.2022 and according to the petitioner one Mr. Mohit Goyal is shown in the said order to have participated as Consultant of the Power Corporation, though participation of Mr Goyal as Consultant of the Power Corporation in the public hearing held on 17.01.2022 has been denied by the Regulatory Commission as also by the Power Corporation in their respective affidavits filed in reply to the writ petition. The order dated 24.01.2022 passed by the Regulatory Commission makes a mention that the Power Corporation, one Mr Awdhesh Verma, Adhyaksh, U.P. Rajya Vidyut Upbhokta Parishad and Sri Rama Shanker Awasthi, a consumer representative have submitted their comments and further that the Power Corporation submitted dis-allowance to the

tune of Rs.4,643 crores to the capital cost. On 10.03.2022, the Regulatory Commission made the final determination of capital cost. Vide order dated 10.03.2022, the Commission thus finally approved the capital cost of Rs.12,727.45 crores as against the capital cost of Rs.16,574.73 crores as was claimed by the Generating Company. The Regulatory Commission thus determined the final capital cost of Rs.12,727.45 crores after prudence check and verification and also considering the comments/objections raised by the various stakeholders including the Power Corporation. The final approval of the capital cost of Rs.12,727.45 crores as against the amount of Rs.16,574.73 crores as claimed by the Generating Company has resulted in dis-allowance of an amount of Rs.3,847.28 crores. It is to be further noticed that approval of the final capital cost of the Power Projects of the Generating Company at Lalitpur as Rs.12727.45 crores is said to be less than the provisionally approved capital cost of Rs.14,269 crores which was determined by means of the order dated 07.03.2018 passed by the Regulatory Commission.

(f) The Regulatory Commission after fixing the final capital cost of the Projects of the Generating Company has directed the Generating Company to file amended tariff petition for fixation of final tariff. Thus, final tariff is to be fixed which, as asserted by the Regulatory Commission, is bound to be at lower rate as compared to the provisional tariff for the reason that the final capital cost approved by the Regulatory Commission by means of the order dated 10.03.2022 is less than the capital cost which was taken into account for approving the provisional tariff. The capital cost considered by the Regulatory Commission for approving the provisional tariff was Rs.13,555 crores whereas the final capital cost approved by the Regulatory Commission is Rs.12,727.45 crores.

(g) It is also on record that the Generating Company has not filed the amended tariff petition as directed by the Regulatory Commission by means of its order dated 10.03.2022; rather against the said order an appeal under Section 111 of Electricity Act 2003 has been prepared which is said to be pending consideration before the appellate authority.

(h) It is this process of approval of the final capital cost of the Power Projects of the Generating Company which has been assailed in the writ petition by stating that the process is sham and farce for the reason that it is vitiated by and suffers from conflict of interest inasmuch as Mr Mohit Goyal is a Managing partner of respondent no.6-Bhushan Rastogi and Associates which is the part of consortium led by respondent no.5-M/s Aquagreen Engineering Management Private Limited which was appointed as DIA and it is the same Mr. Mohit Goyal who participated as Consultant of the Power Corporation in the public hearing held on 17.01.2022 wherein objections were filed by the Power Corporation against not only the capital cost as claimed by the Generating Company but also against the recommendations made by the DIA. It is thus the case of the petitioner that Mr Mohit Goyal having participated in the submission and preparation of the recommendations made by the DIA could not be part of the team of Consultants of the Power Corporation which participated in the public hearing and submitted his objections in respect of dis-allowance of capital cost as recommended by the DIA.

Case as set up by the petitioner-Foundation

4. The petitioner-foundation has asserted that the instant petition has been filed in larger public interest as the serious conflict of interest, as narrated above, in relation to participation of Mr. Mohit Goyal in the public hearing as Consultant of the Power Corporation renders the entire process of determination of capital cost of the Project of the Generating Company a sham and in fact it will ultimately result in increase of the electricity tariff which will have to be borne by the consumers at large. The petitioner has stated that it is a Non Governmental Organization and has been taking up various social welfare causes like providing basic health in rural areas and is concerned about current state of affairs in the power industry, hence the instant public interest petition has been filed by it. The petitioner has also asserted and declared in the writ petition that the petition has been preferred purely in public interest and that the petitioner does not have any personal interest direct and indirect. The petitioner further states that it is not guided by any self gain or for a gain of any other person or institution or body and further that in filing the petition, there is no motive other than the public interest. It has also been asserted and declared that outcome of the instant petition will not lead to any undue gain either to the petitioner or to anyone else associated with it and also that it will not result of any undue loss to any person or body of the persons or even to the State.

5. It has been submitted by the petitioner that in the public hearing held by the Regulatory Commission on 17.01.2022, the Power Corporation presented its objection to the DIA's report. Further assertion is that Mr. Mohit Goyal is the Managing partner of M/s Bhushan Rastogi and Associates which is involved in preparation of DIA's report. The petitioner further asserts that Mr. Mohit Goyal was present as Consultant of the Power Corporation to submit objections on behalf of the Power Corporation to the report prepared by his own firm, namely, M/s Bhushan Rastogi and Associates. It has been stated that the respondent no.5,namely, Aquagreen Engineering Management Pvt Ltd in consortium with M/s Bhushan Rastogi and Associates was appointed by the Regulatory Commission as DIA for submitting its report on the basis of prudence check and verification of the capital cost of the Projects of the Generating Company. The petitioner has further stated that it is the same Mr. Mohit Goyal, who after being part of the process of preparation of the DIA' s report participated in the public hearing as Consultant of the Power Corporation which submitted its objections to the report prepared by the DIA.

6. The apprehension expressed in the writ petition is that DIA's report recommended dis-allowance of Rs.592 crores for the capital cost of the project whereas the Power Corporation in its objection allegedly prepared with the assistance of Mr. Mohit Goyal has recommended dis-allowance of Rs.5,316.55 crores which in the understanding of the petitioner in all probability is likely to be rejected. Submission, thus, is that such rejection consequently would lead to higher public tariff undue burden of which is to be thus borne by the general public.

7. In support of his submissions that Mr Mohit Goyal participated as Consultant of the Power Corporation in public hearing held on 17.01.2022, reliance has been placed on the order dated 24.01.2022 passed by the Regulatory Commission

which is based on the public hearing held on 17.01.2022 wherein Mr Mohit Goyal has been shown to be present as Consultant of the Power Corporation.

8. Reliance has also been placed by the petitioner on the Linkedin profile wherein Mr. Mohit Goyal has been shown to be the Managing partner of the respondent no.6- M/s Bhushan Rastogi and Associates. He is also shown as a partner of another entity namely, M/s Mercados EMI.

9. It has thus been argued by Sri S.C.Misra, learned Senior Advocate that on account of involvement of Mr Mohit Goyal both with the DIA and the Power Corporation makes the entire exercise of determination of power tariff farcical on account of serious conflict of interest. It has been argued further that tariff fixation exercise undertaken by the Regulatory Commission is thus sham for the reason that the same party is involved on behalf of the DIA as also on behalf of the Power Corporation. The conflict of interest argument has, thus, been raised by the petitioner stating that once the Power Corporation has to file objection to the DIA's report, any involvement of any person connected or concerned with DIA with the Power Corporation leads to conflict of interest which ultimately affects the transparency in the process resulting in ultimate loss to the public at large who would be required to consume electricity on higher rates of the power tariff.

10. In an affidavit filed by the petitioner in support of the miscellaneous application dated 10.03.2022, it has also been asserted that Mr. Bhushan Rastogi is a Chartered Accountant and was working with Mr Mohit Goyal as Vice President (Operations) in Mohit Goyal's Company, namely, Percept 360 Degrees Consulting Limited and that M/s Bhushan Rastogi and Associates was blacklisting by the Regulatory Commission in respect of some proceedings for determination of power tariff in the year 2013-2014. It has also been stated that Mr Mohit Goyal and M/s Bhushan Rastogi and Associates have made deep and pervasive inroads in the Power Corporation and in fact they have been working and acting for the benefit of Generating Companies such as the respondent no.4- M/s Lalitpur Power Generation Company Limited.

11. The case thus put forth by the petitioner is based on argument relating to conflict of interest, as observed above, and also based on the alleged fact that the Company with which Mr. Mohit Goyal has been associated, was blacklisted by the Regulatory Commission.

12. In the light of assertion of these facts, it has thus been argued by learned Senior Advocate, Sri S.C.Misra representing the petitioner that the process of fixation of tariff, especially, the process relating to approval of final capital cost of the projects of the Generating Company as against what was projected and claimed by it is vitiated and if this process is allowed to continue, it will lead to harm the public interest inasmuch as ultimately such process would result in fixation of higher power tariff to be borne by the consumers in general. In this view, the prayer is that the Regulatory Commission be directed not to go ahead with determination of final tariff for the Generating Company and further to direct an independent investigation into the alleged collusion/conflict of interest in respect of final tariff fixation of Thermal Power Project in question.

Case put forth by the respondent no.2-Regulatory Commission in reply to the petitioner's case.

13. Sri Jaideep Narain Mathur, learned Senior Advocate representing the respondent no.2- Regulatory Commission has questioned the very maintainability of the writ petition by stating that the petition does not espouse any cause of the general public; rather it has been filed, in the garb of public interest litigation, to stall the proceedings before the Regulatory Commission for approval of final tariff of the Thermal Power Project of the Generating Company. It has further been stated by Sri Jaideep Narain Mathur, as stated in the affidavit filed in reply by the Regulatory Commission, that by means of the order passed on 05.07.2019 in the Petition No.1431 of 2019, the Regulatory Commission decided to appoint a Designated Independent Agency (DIA) on Quality and Cost based Selection (QCBS) basis. In the said process, the respondent no.5 was selected and appointed as Lead Partner in consortium with respondent no.6 as DIA for carrying out the prudence check and verification of capital cost of the project in question. It has also been stated that draft report was submitted by the DIA in the month of June, 2021 and during this presentation of the draft report several queries were raised by the Commission and certain information/clarifications were also sought from the DIA. It has further been submitted on behalf of the respondent no.2-Regulatory Commission that the DIA submitted its final report on 29.10.2021 which included reply to the queries made by the Commission on 13.08.2021. The Commission further states in the affidavit filed in reply that DIA recommended the final capital cost of the project as Rs. 15,982.52 crores and accordingly final report was made public and public notice was issued inviting comments of all the stakeholders in the public hearing which was scheduled on 17.01.2022. The Regulatory Commission in its reply has submitted that in the public hearing held on 17.01.2022 counsel and officials of the Generating Company, counsel and officials of the Power Corporation, Sri Rama Shanker Awasthi, Consumer Representative, Sri Avdhesh Verma, Adhyaksh, U.P. Rajya Vidyut Upbhokta Parishad and Sri Navin Singh from Aquagreen Projects were present. It is also stated in the affidavit filed by the Regulatory Commission that the public hearing was held through Video Conferencing and that in the said public hearing, Mr Mohit Goyal had also joined on Video Conferencing for the reason that it was an open public hearing. The affidavit further states that Mr. Mohit Goyal did not participate in the public hearing and further that the affidavit filed by the Power Corporation adequately explains the presence of Mr Goyal on its behalf. It has also been asserted in the affidavit that Mr. Mohit Goyal had not been involved on behalf of the Power Corporation in the whole process of approval of tariff for the Generating Company.

14. Sri J.N.Mathur, learned Senior Advocate has also pointed out that the petitioner though has filed this petition, however it was not present during the course of public hearing. The assertion is that if the petitioner had any genuine concerns, it was always open to it to have participated in public hearing and file objections which it desired to raise. Sri Mathur has, thus, argued that the petitioner having not participated in the public hearing and having not raised any objection before the Regulatory Commission cannot

be said to have filed this petition with bonafide intentions. It has also been stated that the only intention of the petitioner is to stall the process of approval of tariff and such an attempt by the petitioner cannot be said to be in public interest for the reason that any delay if caused in approval of tariff by the Regulatory Commission may result in burdening the electricity consumers of the State with higher cost of electricity.

15. On behalf of the Regulatory Commission, it has also been stated and argued that the capital cost as claimed and projected by the Generating Company was 16,574.73 crores whereas the DIA had recommended dis-allowance of Rs.581.40 crores. Further submissions in this regard is that the Power Corporation submitted its objection to the capital cost claiming dis-allowance of Rs.5,316.55 crores.

16. It has further been pointed out by the Regulatory Commission that the petitioner did not place any objection on record of this petition as to what should be the quantum of dis-allowance. It has also been stated that the petitioner has not made any objections as to the quantum of dis-allowance or what exactly should be the capital cost of the project in question even in its representation dated 26.02.2022, which has been sent to the Regulatory Commission by registered post on 28.02.2022 and was received in the Commission on 03.03.2022. Further submission made on behalf of the Commission that the case put forth by the petitioner is based on an assumption that Power Corporation has recommended dis-allowance of Rs.5,316.55 crores as against the capital cost of Rs.16,574.73 crores claimed by the Generating Company, which is likely to be rejected and hence such rejection will result in higher power tariff.

17. Pointing out to the fact as recorded in the order dated 10.03.2022 passed by the Regulatory Commission whereby the Commission has finally approved capital cost to the tune of Rs.12,727.45 crores after prudence check and considering the objections made by various stakeholders, it has been argued that dis-allowance to the tune of Rs.3,847.28 crores has been approved by the Commission. In these facts, submission is that the very assumption on the basis of which the writ petition has been filed falls to ground and accordingly the writ petition is liable to be dismissed for the reason that final capital cost as determined by the Regulatory Commission of Rs.12727.45 is even less than the provisionally approved capital cost of Rs.14,269 crores.

18. Sri Mathur, learned counsel representing the Regulatory Commission has also stated that in the facts and the circumstances of the present case, it cannot be ruled out that the present petition has been filed as a camouflage describing itself to be public interest litigation to linger on the proceedings of approval of the final power tariff with a view to extend undue benefit to the Generating Company as against the public interest.

19. It has also been urged by the Regulatory Commission that against the order dated 10.03.2022, the Generating Company did not file amended tariff petition; rather it has challenged the said order by filing an appeal under Section 111 of the Electricity Act and since the Generating Company itself has availed the remedy of appeal before the appellate

authority, present petition is nothing but an abuse of the process of the Court.

20. Regarding blacklisting, it has been stated on behalf of the Regulatory Commission that in relation to M/s Bhushan Rastogi and Associates and in respect of tariff determination for the financial year 2012-13, the Regulatory Commission had passed an order on 03.11.2015 whereby monetary compensation was directed to be paid by the firm to the tune of Rs.2,50,000/- which was deducted from its balance payment. It has also been stated that by means of the order dated 4/5.12.2014, respondent no.6-M/s Bhushan Rastogi and Associates was barred from participating in any future activity with the Regulatory Commission for a period of two years and as such blacklisting was for two years from the date of the said order. Further submission in this regard is that the respondent no.6 filed Writ Petition No.12395 (M/B) of 2014 before this Court which was disposed of by means of the order dated 16.12.2014 with the direction to the Regulatory Commission to treat the order dated 04/05.12.2014 as a show cause notice requiring the respondent no.6 to file response and thereafter the Commission was required to pass fresh order after affording opportunity of hearing to the respondent no.6. Submission further is that in deference to the said order dated 16.12.2014 passed by this Court and after considering the reply of respondent no.6, the Regulatory Commission recalled the order of blacklisting, however, maintained the order of monetary compensation of Rs.2,50,000/-.

21. Stating the aforesaid facts, it has been submitted by learned counsel representing the Regulatory Commission that the writ petition deserves to be dismissed as there is nothing on record which establishes participation of Mr Mohit Goyal in preparation and submission of the objections on behalf of the Power Corporation to the capital cost of the project in question as claimed by the Generating Company during the process of determination of capital cost. Submitting that the ground based on the alleged blacklisting of respondent no.6 is also not available to the petitioner in the facts as narrated above, Sri Mathur has thus prayed that the instant petition may be dismissed.

Case as submitted in reply to the petitioner by the respondent no.3-Power Corporation

22. In reply to the submissions made by learned counsel for petitioner-foundation, it has been stated on behalf of Power Corporation that the very basic premise of the writ petition regarding process of determination of tariff is based on assumptions and unfounded facts. It has also been argued by Dr. L.P. Misra representing the Power Corporation that the correct facts of the case would reveal that Mr Mohit Goyal was not engaged neither was he involved in the process of either preparation or presentation of objection on behalf of the Power Corporation to the capital cost claimed by the Generating Company and also to the report submitted by the DIA. He has further stated that the petitioner does not have any locus standi to file the present petition in the nature of public interest litigation for the reason that even as per its own averment the petitoner-foundation does not have any concern with the issue relating to electricity generation or its transmission or other functions related to electricity. It has also been stated that such functions are not within the domain of the objects and purpose of the

petitioner-NGO. Dr. Misra has further argued that the instant petition appears to be a proxy petition on behalf of respondent no.4 and against the interest of public whereby an attempt has been made to stall the process of determination of final tariff of electricity so that the objections filed by the Power Corporation against the report of DIA in respect of capital cost as claimed by the respondent no.4 may not be considered. In the submission of learned counsel representing the Power Corporation the instant petition is vexatious and is thus liable to be dismissed with exemplary cost.

23. In reply to the merit of assertions made on behalf of the petitioner, it has been submitted by the Power Corporation that on issuance of public notice dated 23.11.2021 scheduling the public hearing on 17.01.2022 the Power Corporation constituted a Committee on 30.12.2021 for the purposes of going through the report submitted by the DIA and then to finalize the comments to be presented before the Regulatory Commission and submitted its objection on the DIA prudence check and verification report regarding capital cost as claimed by the Generating Company. The Committee constituted for the said purpose comprised of (i) Director (Corporate Planning) UPPCL, (ii) Senior Adviser to Chairman of the Power Corporation, (iii) Senior Adviser to Managing Director, U.P. Rajya Vidyut Utpadan Nigam Limited and (iv) Chief Engineer (PPA) of the Power Corporation.

24. Learned counsel for Power Corporation has taken us to the order dated 30.12.2021 constituting the Committee of five members wherein it has clearly been stated that the Committee constituted in reference to the public hearing notice dated 23.11.2021 shall go through the DIA's report and then finalize the comments given to the Regulatory Commission.

25. Further submission made on behalf of the Power Corporation is that the comments/report provided by the aforesaid Committee was shared and discussed with the counsel of Power Corporation, namely, M/s Shardul Amarchand Mangaldas & Company to prepare the reply on affidavit. It is also stated that M/s Shardul Amarchand Mangaldas & Company was engaged by the Power Corporation by means of the order dated 17.06.2019 as counsel for Corporation for preparation of application/reply/counter affidavit/counter reply/rejoinder etc. and for appearance before the Regulatory Commission for effective pleadings on behalf of the Power Corporation in respect of the petition filed by the Generating Company for determination of tariff. It is also stated by the Power Corporation that with the help of M/s Shardul Amarchand Mangaldas & Company the Power Corporation filed its comments/objections before the Regulatory Commission on 13.01.2022 on affidavit against the DIA report and in its objections the Power Corporation proposed deduction of Rs.4,642.32 crores from the capital cost as claimed by the Generating Company. Further submission is that hearing was conducted by the Regulatory Commission through Video Conferencing on 17.01.2022 and a team of legal counsel of Power Corporation, namely, M/s Shardul Amarchand Mangaldas & Company participated in the hearing on behalf of the Power Corporation and presented its objections. The team of counsel which represented the Power Corporation in the public hearing comprised of Sri Ashish Gupta, counsel UPPCL, Sri Shashwat Kumar, counsel UPPCL, Sri Rahul Chouhan, counsel UPPCL, Sri Satya Jha,

counsel UPPCL and Sri Amitanshu Saxena, counsel UPPCL.

26. It has also been stated that the Committee constituted by means of the order dated 30.12.2021 further analyzed the DIA report and recommended the total dis-allowance of Rs.5,316.55 crores as against the capital cost claimed by the Generating Company and accordingly, this additional report was shared and discussed with the counsel of the Power Corporation and thereafter the additional report was also submitted in consultation/help of the M/s Shardul Amarchand Mangaldas & Company before the Regulatory Commission on 25.01.2022.

27. On behalf of the Power Corporation the submission thus is that the apprehension of the petitioner regarding conflict of interest referring to involvement of Mr Mohit Goyal as Consultant of the Power Corporation is misconceived and without any basis. It has further been stated that the Company known as "M/s Mercados Energy Markets India Private Limited' was appointed for providing regulatory support services in various public sector companies in the State of U.P. working in the field of energy by means of the order dated 17.04.2021.

28. It has been contended that one of the works under the regulatory support services is to attend public hearing on the petitions of the Generating Companies/stakeholders for determination of tariff. Sri Misra has further stated that merely because Mr Mohit Goyal, who is a Chartered Accountant and a Managing Partner of respondent no.6-M/s Bhushan Rastogi and Associates, there cannot be any legal presumption that the consortium as chosen by the Regulatory Commission through tender process shall not be working honestly, with integrity and transparently in discharge of its professional obligations. It has also been argued that scope of work assigned to M/s Mercados Energy Markets India Private Limited is to attend the public hearings before the Power Corporation and Mr Mohit Goyal is a team member of said Company and as such he might be present during the hearing before the Regulatory Commission on 17.01.2022 through Video Conferencing not particularly in respect of the present matter but in general as part of assignment to the Company appointed as Consultant. It has categorically been stated by the Power Corporation in the reply filed to the writ petition that Mr Mohit Goyal was neither consulted in the matter of preparation of objections filed before the Regulatory Commission against the report of the DIA on behalf of the Power Corporation nor has he ever represented the Power Corporation in respect of the matter in issue before any authority including the Regulatory Commission.

29. Contention of the Power Corporation further is that it is on the objections of the Power Corporation that a huge deduction of more than Rs.3000 crores towards the capital cost of the project as claimed by the Generating Company was allowed by the Regulatory Commission.

30. It has thus been argued that since final determination of the capital cost has already been made by the Regulatory Commission by means of the order dated 10.03.2022, hence the apprehension of the petitioner is incorrect and further that the writ petition itself has been rendered infructuous.

31. Submission further is that the apprehension in the mind of the petitioner also falls to ground for the reason that the DIA had

recommended dis-allowance of an amount of only Rs.592 crores whereas the dis-allowance as claimed by the Power Corporation was to the tune of Rs.5,316.55 crores as a result of which, the Regulatory Commission has determined the capital cost as Rs.12,727.45 crores which is less by an amount of Rs.3,022.30 crores as against the amount claimed by the Generating Company. This fact, according to the submission made on behalf of the Power Corporation, is indicative of the fact that the present petition has not been filed with bonafide intentions; rather it is a proxy petition on behalf of the Generating Company.

32. Another issue raised by learned counsel for the Power Corporation is that against the order of final determination of capital cost of the project in question made by the Regulatory Commission by means of the order dated 10.03.2022, a remedy under Section 111 of the Electricity Act, 2003 before the appellate tribunal is available and hence this petition need not be entertained.

33. Emphasizing on these submissions, it has been urged by learned counsel representing the Power Corporation that the instant petition is neither maintainable at the behest of the petitioner-foundation nor does it stand on merits and hence is liable to be dismissed.

Issues which fall for consideration of the Court

34. On the basis of the pleadings available on record as also the submission made by learned counsel representing the parties, the following issues emerge for our consideration.

(a) As to whether the instant petition as public interest litigation is maintainable at the behest of the petitioner-foundation,

(b) As to whether the process of determination of power tariff in respect of the project in question is vitiated on account of conflict of interest as argued by the petitioner because of alleged involvement of Mr Mohit Goyal as Consultant in preparation and presentation of objection on behalf of the Power Corporation filed before the Regulatory Commission to the report submitted by the DIA and also to the capital cost as claimed by the Generating Company, in the background of the fact that he is a Managing Partner of the respondent no.6-M/s Bhushan Rastogi and Associates which in consortium with respondent no.5 was appointed as DIA.

Consideration of the issues and findings of the Court

35. First of all, we will consider the submissions made by learned counsel representing the respective parties as regards the maintainability of the writ petition as Public Interest Litigation at the behest of the petitioner-foundation.

36. The superior courts in our country while exercising jurisdiction under Articles 32 and 226 of the Constitution of India have evolved unquestionably a laudable jurisprudence in public interest and has contributed immensely to the development of public interest litigation as a means to protect the legal and constitutional rights of the public in general leaving far behind the rigid principle of locus.

37. However, in the process of evolution of public interest litigation as an instrument to protect the basic human and fundamental rights as also other legal rights of the public at large, the Courts in India have been putting words of caution from time to time in the wake of its frequently noticed misuse. It has been found by

Hon'ble Supreme Court on more than one occasion that many a times the purity of the forum of public interest litigation is misused and PILs do not espouse any public cause; rather such proceedings are used to farther sometimes personal interest and also to serve interest of some unseen other interested party in the litigation.

38. About the word of caution in entertaining the public interest litigation, we would like to refer to the judgment of Hon'ble Supreme Court in the case of Dattaraj Nathuji Thaware vs State of Maharashtra and others, (2005) 1 SCC 590. Cautioning the Courts while entertaining a public interest litigation, Hon'ble Supreme Court observed that public interest litigation has to be used with great care and circumspection and that 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. Para 12 of the said judgment is extracted hereunder:-

*"**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 as 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."*

39. In the said case, Hon'ble Supreme Court further laid down that a Court has to be satisfied about the credentials of the person approaching the Court, the prima facie correctness of the information given by the petitioner and the information being not vauge and indefinite. Hon'ble Supreme Court further observed in the said judgment that the courts must do justice by promotion of good faith and prevent the law from crafty invasions. Paragraph 15 of the said judgment is reproduced herein:-

*"**15.**Courts must do justice by promotion of good faith, and prevent law from crafty invasions. Courts must maintain the social balance by interfering where necessary for the sake of justice and refuse to interfere where it is against the social interest and public good. (SeeState of Maharashtrav.Prabhu[(1994) 2 SCC 481 : 1994 SCC (L&S) 676 : (1994) 27 ATC 116] andA.P. State Financial Corpn.v.GAR Re-Rolling Mills[(1994) 2 SCC 647 : AIR 1994 SC 2151] .) No litigant has a right to unlimited draught on the court time and public money in order to get his affairs settled in the manner as he*

wishes. Easy access to justice should not be misused as a licence to file misconceived and frivolous petitions. [SeeBuddhi Kota Subbarao (Dr.)v.K. Parasaran[(1996) 5 SCC 530 : 1996 SCC (Cri) 1038 : JT (1996) 7 SC 235] .] Today people rush to courts to file cases in profusion under this attractive name of public interest. They must inspire confidence in courts and among the public."

40. In the case of **R & M Trust vs. Koramangala Residents Vigilance Group and others (2005) 3 SCC 91**, Hon'ble Supreme Court again observed that though the public interest litigation is undoubtedly a very useful handle for redressing the grievances of the people but unfortunately lately it has been abused by some interested persons. The Court further observed that the Courts should be very very slow in entertaining petitions allegedly filed in public interest as this jurisdiction is meant for the purpose of coming to the rescue of the downtrodden and not for the purpose of serving private ends. Paragraph 24 of the judgment in the case of **R & M Trust (supra)** runs as under:-

"24. Public interest litigation is no doubt a very useful handle for redressing the grievances of the people but unfortunately lately it has been abused by some interested persons and it has brought a very bad name. Courts should be very very slow in entertaining petitions involving public interest : in very rare cases where the public at large stand to suffer. This jurisdiction is meant for the purpose of coming to the rescue of the downtrodden and not for the purpose of serving private ends. It has now become common for unscrupulous people to serve their private ends and jeopardise the rights of innocent people so as to wreak vengeance for their personal ends. This has become very handy to the developers and in matters of public contracts. In order to serve their professional rivalry they utilise the service of the innocent people or organisation in filing public interest litigation. The courts are sometimes persuaded to issue certain directions without understanding the implications and giving a handle in the hands of the authorities to misuse it. Therefore, the courts should not exercise this jurisdiction lightly but should exercise in very rare and few cases involving public interest of a large number of people who cannot afford litigation and are made to suffer at the hands of the authorities. The parameters have already been laid down in a decision of this Court in the case ofBalco Employees' Union (Regd.)v.Union of India[(2002) 2 SCC 333] wherein this Court has issued guidelines as to what kind of public interest litigation should be entertained and all the previous cases were reviewed by this Court. It was observed as under : (SCC pp. 376-77, paras 77-80)

"77. Public interest litigation, or PIL as it is more commonly known, entered the Indian judicial process in 1970. It will not be incorrect to say that it is primarily the judges who have innovated this type of litigation as there was a dire need for it. At that stage, it was intended to vindicate public interest where fundamental and other rights of the people who were poor, ignorant or in socially or economically disadvantageous position and were unable to seek legal redress were required to be espoused. PIL was not meant to be adversarial in nature and was to be a cooperative and collaborative effort of the parties and the court so as to secure justice for the poor and the weaker sections of the community who were not in a position to protect their own interests. Public interest

litigation was intended to mean nothing more than what words themselves said viz. "litigation in the interest of the public'.

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 the 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 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 jeopardise people's right 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 counterproductive.

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-emphasise 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-emphasise the same."

41. To put forward the legal proposition that even private interest can also be treated as public interest, learned Senior Advocate Sri S.C.Mishra representing the petitioner has relied upon the following cases, (1) **Shivajirao Nilangekar Patil vs. Mahesh Madhav Gosavi (Dr.) and others, (1987) 1 SCC 227, (2) Indian Banks' Association Bombay and others vs. Devkala Consultancy Service and others, (2004) 11 SCC 1, and (3) Akhil Bhartiya Upbhokta Congress vs. State of M.P. (2011) 5 SCC 29**.

42. Sri Mishra has also relied upon the case of **Vishwanath Chaturvedi (3) vs. Union of India and others, reported in (2007) 4 SCC 380** for buttressing his argument on behalf of the petitioner that if the petitioner shows failure of public duty, the Court would be in error in dismissing the public interest litigation.

43. When we peruse the judgments cited by learned Senior Advocate Sri S.C.Mishra in the cases of ***Shivajirao***

Nilangekar Patil (supra), Indian Banks' Association Bombay and others (supra) and Akhil Bhartiya Upbhokta Congress (supra), what we find is that Hon'ble Supreme Court in the said cases has observed that in the given facts and circumstances of the case, a private litigation may assume the character of public interest litigation when some material is brought to the notice of the Court to farther the public interest. Hon'ble Supreme Court has also held in the case of ***Indian Banks' Association Bombay and others (supra)*** that in appropriate case where the petitioner might have moved a court in his private interest and for redressal of his personal grievances, the Court in furtherance of public interest may treat it as necessary to enquire the state of affairs of the subject of litigation in the interest of justice and thus a private interest can also be treated as public interest case. The judgment in the case of ***Shivajirao Nilangekar Patil (supra)*** has been relied upon by Hon'ble Supreme Court in the case of ***Akhil Bhartiya Upbhokta Congress (supra)*** wherein it has been observed that even if a person files a writ petition for vindication of his private interest but raises question of public importance involving exercise of power by men in authority then it becomes the duty of the Court to enquire into such a matter.

44. So far as the aforesaid proposition as approved by Hon'ble Supreme Court in the cases of ***Shivajirao Nilangekar Patil (supra)***, ***Indian Banks' Association Bombay and others (supra)*** and ***Akhil Bhartiya Upbhokta Congress (supra)*** is concerned, there cannot be any quarrel to such legal proposition, however the said judgments do not have any application to the facts of the present case for the reason that the instant petition has not been filed initially for vindication of any personal interest or grievance of the petitioner-foundation. The petition rather has been filed alleging that in case the process of determination of final tariff is allowed to go on, the same being vitiated, will result in increased power tariff, burden of which will have to be borne by the consumers of electricity i.e. public in general.

45. We may also refer to yet another judgment of Hon'ble Supreme Court in the case of ***State of Uttaranchal vs. Balwant Singh Chaufal and others, (2010) 3 SCC 402***, wherein the Hon'ble Supreme Court tracing the history of development of public interest litigation and also noticing its possible misuse has issued certain directions in order to preserve the purity and sanctity of public interest litigation. The said directions can be found in paragraph 181 of the report which is extracted herein below:-

"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."

46. One of the observations made by Hon'ble Supreme Court in the case of ***Balwant Singh Chaufal and others (supra)*** is that it would be appropriate for each High Court to properly formulate the rules for encouraging the genuine PILs and discouraging the PILs filed with oblique motives. It is in the light of the said observations made in para 181 (2) in the case of ***Balwant Singh Chaufal and others (supra)*** that Rule 3A in Chapter XXII in the Allahabad High Court Rules has been inserted which requires the person approaching this Court in a public interest litigation to make certain declaration.

47. Thus, from the aforesaid discussion, it is more than clear that the Courts in India have been encouraging the genuine PILs, however, they are also expected to exercise cautioned about the misuse of the PILs being filed with oblique and malafide purposes.

48. As to whether the instant public interest litigation needs to be entertained in light of the aforesaid principles laid down by Hon'ble Supreme Court as also in the case of ***Vishwanath Chaturvedi (3) (supra)***, thus, needs to be considered by this Court. In the case of ***Vishwanath Chaturvedi (3) (supra),*** the Hon'ble Supreme Court has laid down the principle that a public interest litigation filed by a political opponent can be entertained. Thus, the Hon'ble Supreme Court in the matter of PIL has been pleased to further relax the rule of locus, however while doing so the Hon'ble Supreme Court has laid down a test for entertaining a public interest litigation. In the case of ***Vishwanath Chaturvedi (supra)***, it has been held by Hon'ble Supreme Court that the ultimate test to entertain a writ petition is as to whether the allegations contained in public interest petition have any substance. Thus, the test to entertain public interest litigation at the behest of a party-petitioner, who does not have any direct grievance with the subject matter of the petition is as to whether allegations contained in such a PIL need some kind of inquiry/investigation by the Court entertaining the petition.

49. On examination of the allegations in the writ petition if the same are found to

be correct, it may result in increase of the power tariff which ultimately may affect the consumers of electricity i.e. the public in general. However, the primary scrutiny by the Court for entertaining a public interest litigation for the purposes of deciding its maintainability has to be confined to the nature of allegations and not to the veracity and correctness or otherwise of such allegations.

50. On consideration of the allegations made by the petitioner in this case, what we find is that the allegations relate to conflict of interest on account of alleged participation of the same person in preparation of the report by the DIA as also in preparation and putting forth the objection to the same DIA report before the Regulatory Commission on behalf of the Power Corporation.

51. Accordingly, having regard to the nature of allegations (without commenting, at this juncture, their veracity or correctness), we are of the opinion that the instant petition is maintainable at the behest of the petitioner-foundation.

52. Coming to the basis and grounds raised in this petition by the petitioner that the process of determination of power tariff in respect of the project of respondent no.4, is erroneous on account of the fact that the process suffers from the vice of conflict of interest, what this Court needs to determine is as to whether in the facts of the case, there is any conflict of interest which vitiates the process.

53. Submission made on behalf of the petitioner in this regard is that Mr Mohit Goyal who is a partner of respondent no.6, was appointed as DIA in consortium with respondent no.5 and as such Mr Mohit Goyal has sufficient interest in the matter for the reason that it is this consortium which acting as DIA had submitted its prudence check and verification report regarding the capital cost as claimed by the respondent no.4.

54. Contention is that Mr Mohit Goyal having participated in the preparation of DIA report as partner of respondent no.6-M/s Bhushan Rastogi & Associates, could not have been permitted to act as Consultant of the Power Corporation while preparing and presenting its objection to the DIA report in the public hearing held by the Regulatory Commission.

55. It is not in dispute that Mr Mohit Goyal is a partner of respondent no.6-Bhushan Rastogi & Associates. It is also not in dispute that respondent no.5 in consortium with respondent no.6 was appointed as DIA. Thus, the possibility of Mr Mohit Goyal as a partner of respondent no.6 cannot be ruled out in preparation of report submitted by the DIA before the Regulatory Commission, if it is established on the basis of pleadings available on record.

56. However, so far as participation of same Mr Mohit Goyal as Consultant in preparation and presentation of objection to the DIA report and also to the claim of respondent no.4 in respect of capital cost, it needs to be ascertained on the basis of pleadings available on record. The petitioner has strongly relied upon the order dated 24.01.2022 passed by the Regulatory Commission which is based on the public hearing dated 17.01.2022 wherein Mr Mohit Goyal has been shown to be present as Consultant of the Power Corporation.

57. On the other hand, the affidavit filed by the Power Corporation categorically states that services of Mr

Mohit Goyal were never hired as Consultant in the present matter. The affidavit filed by the Power Corporation rather states that on issuance of notice for public hearing, a Committee comprising of four persons which included the Director (Corporate Planning), UPPCL and other members from the Power Corporation and U.P. Rajya Vidyut Utpadan Nigam Limited was constituted to go through the DIA report and then finalize the comments to be submitted to the Regulatory Commission. The Committee was constituted by the Chairman of the Power Corporation by means of an order dated 30.12.2021 which clearly directed the Committee to go through the DIA report and then finalize the comments to be furnished to the Regulatory Commission. In the affidavit, certain other documents have been brought on record by the Power Corporation, according to which M/s Shardul Amarchand Mangaldas & Company was engaged by the Power Corporation way back on 17.06.2019 for preparation of pleadings to be filed before the Regulatory Commission and also for appearance before the said Commission on behalf of the Power Corporation in respect of the petition filed by respondent no.4 for determination of power tariff. The documents filed by the Power Corporation also show that on 17.01.2020 a team of legal counsel from M/s. Shardul Amarchand Mangaldas & Company comprising of five counsel were present before the public hearing and it is this team that presented the objections to DIA report. It is also to be noticed that even the additional objections recommending total dis-allowance of Rs.5,316.55 crores from the capital cost as claimed by the respondent no.4 was shared and discussed with M/s. Shardul Amarchand Mangaldas & Company and it was accordingly submitted before the Regulatory Commission by the counsel representing the Power Corporation.

58. The categorical submission on behalf of the Power Corporation in the affidavit filed in reply to the petition is that Mr Mohit Goyal was neither consulted in the matter of preparation of objections filed before the Regulatory Commission against the report of DIA nor did he represent the Power Corporation before any authority including the Regulatory Commission.

59. From the documents available on record, especially, the affidavit in reply filed by the Power Corporation to the averments made in the writ petition, what is clear is that the Power Corporation had constituted a team of four high level officers all working in the Power Corporation/U.P. Rajya Vidyut Utpadan Nigam Limited for the purposes of studying the DIA report and preparing the comments. The Power Corporation had also appointed M/s. Shardul Amarchand Mangaldas & Company as its Consultant for preparation of pleadings to be filed before the Regulatory Commission which will include objections to the DIA report. It appears to us that objections and pleadings in respect of DIA on behalf of the Power Corporation were prepared and filed by the team constituted by the Chairman of the Power Corporation by means of the order dated 30.12.2021 in consultation with M/s. Shardul Amarchand Mangaldas & Company.

60. Even the affidavit filed in reply to the writ petition by the Regulatory Commission categorically states that the public hearing was held through Video Conferencing and in the said hearing though Mr Mohit Goyal joined on Video

Conferencing, since it is an open public hearing, however he did not participate in the public hearing on behalf of the Power Corporation.

61. What thus is clear is that Mr Mohit Goyal might have been present during the course of public hearing before the Regulatory Commission on Video Conferencing, however, he does not seem to have participated in the said hearing on behalf of the Power Corporation. Objections to the DIA report as also to the capital cost as claimed by the respondent no.4 were prepared by the Committee constituted for the said purpose by the Chairman of the Power Corporation in consultation with the M/s Shardul Amarchand Mangaldas & Company.

62. Merely because in the order dated 24.01.2022 Mr Mohit Goyal is shown to be present would not necessarily mean that he had participated in the public hearing on behalf of the Power Corporation. There is a categorical and emphatic denial by the Regulatory Commission of any participation of Mr. Goyal in the public hearing. Mere presence through Video Conferencing during the course of public hearing would thus not necessarily lead to an indefeasible conclusion that Mr Mohit Goyal had participated on behalf of the Power Corporation in the public hearing.

63. As already observed and found above, objections to the DIA's report as also to the capital cost as claimed by the respondent no.4 were prepared by the Committee constituted by the Chairman of the Power Corporation in consultation with the Law Consultants as aforesaid and hence we do not find any material on record of this case to infer that Mr Mohit Goyal had played any role in preparation of the objections to the DIA report and to the claim of capital cost put forth by the respondent no.4 i.e. the Generating Company.

64. Having regard to the material available on record before us on this case and in view of the aforesaid discussions, we do not find ourselves in agreement with learned counsel for petitioner that the proceedings relating to determination of power tariff are vitiated because of the vice of conflict of interest on account of alleged participation of Mr Mohit Goyal in the public hearing as Consultant of the Power Corporation before the Regulatory Commission. We also notice that the petitioner in the entire writ petition has nowhere stated as to what according to it should be the capital cost of the projects of respondent no.4 for the purposes of determination of tariff. Even in the representation made by the petitioner to the Regulatory Commission nowhere has it been stated or disclosed by the petitioner as to what should be taken to be the capital cost of the projects of the respondent no.4 for the purposes of determination of power tariff in question.

65. Nothing has been shown to us which indicate that the petitioner ever participated in the public hearing pursuant to the notice issued for the said purpose by the Regulatory Commission, dated 23.11.2021. If in respect of quantum or amount of the capital cost as either claimed by respondent no.4 for its project or as recommended by the DIA, the petitioner had any objection, it would have been more appropriate for the petitioner to have participated in the public hearing before the Regulatory Commission and filed its objection. The Electricity Regulatory Commission is a statutory body and there

cannot be any presumption that in case the petitioner would have raised the objections regarding the capital cost as claimed by the respondent no.4 or it would have filed objection to the DIA report, the same would not have been considered. However, instead of participating in the public hearing and making its objections, the petitioner straightaway filed this public interest petition.

66. There is yet another reason why this Court need not interfere in this petition despite having held this public interest petition to be maintainable and the reason is that by means of the order dated 10.03.2022 the Regulatory Commission has finally approved the capital cost after prudence check and verification and considering the objections raised by the various stakeholders which has resulted in dis-allowance of certain amount from the capital cost claimed by the respondent no.4. Against the order dated 10.03.2022 passed by the Regulatory Commission, the respondent no.4 has preferred a statutory appeal under Section 111 of the Electricity Act, which is said to be pending.

67. As regards the blacklisting of respondent no.6 by the Regulatory Commission in the year 2013-14, we may only observe that pursuant to the order dated 16.12.2014 passed by this Court in Writ Petition No.12395 (M/S) of 2014 the matter was reconsidered and the order of blacklisting was recalled while maintaining the order of monetary compensation against respondent no.6. This assertion made by the petitioner loses its significance in view of the findings recorded by us above that Mr Mohit Goyal was neither appointed by the Power Corporation as Consultant to present its objections before the Electricity Regulatory Commission nor was he ever engaged by the Power Corporation for the said purpose.

68. From what has been noticed and found hereinabove, we are of the opinion that the petitioner has not been able to establish the allegations made in the writ petition in respect of the process of determination of tariff being vitiated on account of the vice of conflict of interest as alleged against Mr Mohit Goyal. In respect of this issue, we thus conclude accordingly.

Order

69. For all the reasons given above, we find that the writ petition lacks merit which is hereby **dismissed.**

70. However, there will be no order as to cost.

(2022) 11 ILRA 328
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.09.2022

BEFORE

THE HON'BLE PRITINKER DIWAKER, J.
THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Special Appeal No. 758 of 2020

State of U.P. & Ors. ...Appellants
Versus
Ram Rekha ...Respondent

Counsel for the Appellants:
Sri Subhash Rathi

Counsel for the Respondents:
Sri A.K. Sinha, Sri A.K. Sinha, Sri Abhishek Kumar Kushwaha

A. Service Law – Absorption - In the light of the Circular dated 28.3.2001 which refers to the GO dated 7.5.1999, it is found that the Circular and the GO presupposes the existence of a post. As per the GO dated 7.5.1999 the post is to be identified and the reservation applied. In the event any post remains unfilled, the same is

permitted to be carried over to the next selection. **Admittedly, the post of Cane Weaver/Chair Weaver has been created on 30.1.2015 under orders of His Excellency the Governor of the St. of U.P. and the petitioner/respondent has been appointed on 11.2.2015.** The post of Cane Weaver/Chair Weaver has thus come in existence only in the year 2015 pursuant to the proposal envisaged under the GO dated 7.5.1999 and 28.3.2001. In such view of the matter, **the learned Single Judge fell in error in directing that the petitioner shall be considered to be absorbed from the date of issuance of the order dated 28.3.2001 and shall be entitled to all the benefits admissible to a regular employee and the order of the learned Single Judge is liable to be modified.** (Para 8)

Inpugned order is modified and directions are issued that the petitioner shall be considered to be absorbed from the date of his appointment i.e. 11.2.2015 and shall be entitled to all the benefits admissible to a regular employee. (Para 9)

Special appeal allowed. (E-4)

Precedent followed:

1. U.O.I. & anr. Vs National Federation of the Blind & ors., (2013) 10 SCC 772 (Para 6)

Present special appeal assails judgment and order dated 19.02.2020, passed by learned Single Judge in Civil Misc. Writ Petition No. 70254 of 2011.

(Delivered by Hon'ble Pritinker Diwaker, J. & Hon'ble Ashutosh Srivastava, J.)

1. This intra court appeal has been filed questioning the judgment and order dated 19.2.2020 passed by the learned Single Judge in Writ-A No. 70245 of 2011 (Ram Rekha versus Principal Secretary Revenue, State of U.P. and others) whereby the writ petition has been allowed and at the same time, it has been held that the petitioner/respondent shall be considered to be absorbed from the date of issuance of the order No. 598/65/1-2001-W(4)/97 dated 28.3.2001 and shall be entitled to all the benefits admissible to a regular employee.

2. The record reveals that the writ petition giving rise to the present intra-court appeal was filed seeking issuance of a writ of mandamus commanding the respondents to create a post of Cane Weaver in District Mau in compliance of the Circular dated 28.3.2001 and provide regular appointment to the petitioner thereof and to pay him regular salary.

3. It was alleged in the writ petition that the petitioner/respondent is a 100% visually handicapped person, which has been duly certified by a certificate dated 26.6.1990 issued by the Chief Medical Officer, Faizabad, U.P., in terms of Government Order dated 7.4.1981. The petitioner has undergone training of Cane Weaver and has been issued Apprentice Cane Weaver Certificate. The petitioner was initially engaged on 5.5.1995 for one month for repairing chairs through cane weaving in the office of the District Magistrate, Mau on daily wages of Rs.35/- per day, which engagement was continued from time to time under the orders of the District Magistrate up to the year 2011. It was asserted in the writ petition that a policy decision have been taken vide Government Order dated 7.5.1999 for absorption of handicapped persons on the posts of identified Group 'C' and 'D'. A Circular dated 28.3.2001 was also issued in which it was mentioned that if the post identified for being filled up by a handicapped person could not be filled, the vacancy would be carried over to the next selection. It was also stated in the writ petition that pursuant to the Government

Order dated 7.5.1999, the post of Cane Weaver was identified for reservation of visually handicapped persons and in case, any handicapped person could not be selected or appointed on the vacancy reserved for visually handicapped person, then one vacancy would be kept aside for being filled up on priority basis by a visually handicapped person. Since, the petitioner was continuing on the post of Cane Weaver, he approached the Principal Secretary (Revenue) by way of representation in the year 2001 seeking regularization of his services. However, the regularization was declined on the ground that there was no post available. The petitioner thereafter made various other representations seeking regularization, but all efforts were in vain as the relief of regularization was refused on the ground that no post of Cane Weaver was created by the Government.

4. The writ petition of the petitioner/respondent was entertained and a detailed interim order was passed on 5.5.2014. In compliance whereof, the District Magistrate, Mau is stated to have written to the Government for creation of post and at the same time as a measure of compliance, the petitioner was directed to be engaged on minimum of pay scale for a period of one month subject to the final orders passed in the writ petition. It appears that the efforts of the petitioner bore some fruits and the Principal Secretary (Revenue) issued a Government Order dated 30.1.2015 mentioning therein that His Excellency the Governor of State of U.P., had approved of a creation of post of Class IV for the office of the Collectorate, Mau in the pay scale of Rs.5,200-20,200 with the Grade Pay of Rs.1800/- and that on the said newly created post, the petitioner will be absorbed.

5. By a second order dated 11.2.2015, the petitioner/ respondent was appointed on purely temporary post, subject to final orders passed in the writ petition filed by the petitioner.

6. The learned Single Judge by order impugned has proceeded to allow the writ petition observing that there was no denial of the district authorities or even by the Department of Revenue of the petitioner being 100% visually handicapped person or that he had been working as Cane Weaver with effect from 1995 @ Rs.35/- on daily wages. There was also no denial of the policy decision taken by the Government by issuance of Government Order dated 7.5.1999 for reserving the post of visually handicapped persons in Group 'C' and 'D' services of the State and also of the Government Order dated 28.3.2001 and proposal to create a post of Cane Weaver/Chair Weaver and for its identification as a post reserved for visually handicapped person. The learned Single Judge while allowing the writ petition has also noted the fact that the case of the petitioner/respondent was unique in the sense that although the policy decision was taken and identification of the post meant for visually handicapped person of Cane Weaver was done by the Government, but no further action was taken to implement the said policy decision taken under Government Orders dated 7.5.1999 and 28.3.2001. The learned Single Judge in terms of the ratio of the decision of the Apex Court in the case of ***Union of India and another versus National Federation of the Blind and others, (2013) 10 SCC 772*** proceeded to direct the respondent to continue with the post created for District Mau by the order dated 30.01.2015 of His Excellency the Governor of the State of U.P. and issued the impugned directions.

7. Smt. Subhash Rathi, learned counsel for the appellant while assailing the order of the learned Single Judge submits that the learned Single Judge fell in error in directing the petitioner to be absorbed from the date of issuance of the order dated 28.3.2001 inasmuch as the post in question came to be created only under orders of His Excellency the Governor of the State of U.P., dated 30.1.2015. According to her, since the post was not available on 28.3.2001, as it was created only on 30.1.2015 against which the petitioner/respondent was appointed on 11.2.2015, the services of the petitioner could not be regularized from 28.3.2001 along with all service benefits and in such view of the matter, the order of the learned Single Judge is liable to be set side or suitably modified.

8. In the opinion of the Court, the submission advanced by Smt. Rathi on behalf of the appellants has substance. Testing the submissions in the light of the Circular dated 28.3.2001 which refers to the Government Order dated 7.5.1999 filed as Annexure-12 to the writ petition, we find that the Circular and the Government Order presupposes the existence of a post. As per the Government Order dated 7.5.1999 the post is to be identified and the reservation applied. In the event any post remains unfilled, the same is permitted to be carried over to the next selection. Admittedly, the post of Cane Weaver/Chair Weaver has been created on 30.1.2015 under orders of His Excellency the Governor of the State of U.P. and the petitioner/respondent has been appointed on 11.2.2015. The post of Cane Weaver/Chair Weaver has thus come in existence only in the year 2015 pursuant to the proposal envisaged under the Government Order dated 7.5.1999 and 28.3.2001. In such view of the matter, we are of the opinion that the learned Single Judge fell in error in directing that the petitioner shall be considered to be absorbed from the date of issuance of the order dated 28.3.2001 and shall be entitled to all the benefits admissible to a regular employee and the order of the learned Single Judge is liable to be modified.

9. Accordingly, we modify the order impugned and direct that the petitioner shall be considered to be absorbed from the date of his appointment i.e. 11.2.2015 and shall be entitled to all the benefits admissible to a regular employee. The intra court appeal is allowed to the extent indicated above.

(2022) 11 ILRA 331
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.11.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Writ-A No. 2551 of 2022

Jitendra Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ajay Kumar Gautam

Counsel for the Respondents:
C.S.C., Sri Shri Kant Shukla

A. Service Law – Compassionate Appointment - Courts cannot order appointment on compassionate grounds *dehors* the provisions of the statutory regulations and instructions and that hardship of a candidate does not entitle him to compassionate appointment *dehors* the Statutory Provisions. Also, it is settled law that norms prevailing on the date of consideration of the appointment would

be the basis of considering claim for compassionate appointment. (Para 10)

Dying in Harness Rules, 1974 are not applicable to the U.P. St. Agro Industrial Corporation. Extra ordinary jurisdiction u/Article 226 of the Constitution of India cannot be exercised by this Court in the absence of any scheme for compassionate appointment prevalent in the respondents Corporation and no mandamus can be issued to the U.P. St. Agro Industrial Corporation to grant compassionate appointment to the writ petitioners therein. (Para 12, 13, 14)

Writ petition dismissed. (E-4)

Precedent followed:

1. Pankaj Singh Vs St. of U.P. & ors., Writ-A No. 8009 of 2008, decided on 21.12.2012 (Para 7)

2. Gaurav Singh Chauhan Vs St. of U.P. & ors., Writ- A No. 70690 of 2006, decided on 08.01.2013 (Para 7)

3. L.I.C. Vs Asha Ramchandra Ambedkar, 1994 (2) SCC 718 (Para 10)

4. N.C. Santosh Vs St. of Karn., 2020 (7) SCC 617 (Para 11)

5. Gajendra Singh Vs St. of U.P. & ors., Writ-A No. 3954 of 2011 (Para 12)

6. Prem Pal Vs St. of U.P. & ors., Writ Petition No. 54673 of 2005 (Para 12)

7. Jagdish Kumar Vs St. of U.P. & ors., Special Appeal No. 1737 of 2011 (Para 13)

Present petition assails orders dated 07.09.2019 and 22.09.2021, passed by Managing Director, U.P. St. Agro Industrial Corporation Ltd., Lucknow.

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. Heard learned counsel for the petitioner and Shri Shri Kant Shukla, learned counsel for the respondent nos. 2 to 4.

2. This petition has been filed challenging the order dated 07.09.2019 passed by the respondent no. 2 and also the order dated 22.09.2021 passed by the respondent no. 2, in so far as it relates to the petitioner. He has also prayed for a writ of mandamus to the respondents to produce the record of the 146th meeting of the Board of Directors dated 30.03.2000 and set aside the ban imposed on compassionate appointment and to direct the respondents to consider the case of the petitioner for compassionate appointment under Dying in Harness Rules, 1974.

3. It has been argued by the learned counsel for the petitioner that father of the petitioner late Mohar Singh died in harness while working on the post of Sales Officer in Maudaha, Chitrakoot Dham, Division Banda on 27.05.2019. The petitioner is post graduate from Rohilkhand University and is also Diploma holder in Software Technical from Private Institute. He being eligible for appointment on compassionate ground had filed an application for the same on 19.06.2019. In the said application, the financial hardships being faced by the petitioner and also his family members is mentioned. After completing all formalities for compassionate appointment, when no decision was taken thereon, the mother of the petitioner filed Writ Petition No. 17923 of 2019 which was disposed of by this Court on 16.11.2019 directing the mother of the petitioner to file a representation which should be decided by the authorities concerned by means of a reasoned and speaking order. The mother of the petitioner Smt. Savitri Devi thereafter made a fresh representation and when no heed was paid, she filed a

Contempt Application No. 3130 of 2021. After such Contempt Application was filed, the case of the petitioner had been rejected by the order dated 22.09.2021 saying that in terms of Government Order dated 22.01.2000, the scheme for compassionate appointment is not applicable to U.P. State of Agro Industrial Corporation.

4. It has been submitted by the learned counsel for the petitioner that in pursuance of Government Order dated 22.01.2000 some meeting was held by the Board of Directors on 30.03.2000 details of which have not been given to the petitioner, despite his repeated requests.

5. Shri S.K. Shukla, learned counsel for the respondents has relied upon his counter affidavit, wherein it has been stated that by means of Government Order issued by the Competent Authority dated 22.01.2000, the Scheme for compassionate appointment was withdrawn in so far as the U.P. State Agro Industrial Corporation was concerned it was running into huge losses.

6. In pursuance of such Government Order, the Board of Directors in their 146th meeting held on 30.03.2000 by Agenda No. 6 decided to do away with the Scheme of compassionate appointment.

7. The counsel for the respondents also placed reliance upon by orders passed by this Court in ***Writ A No. 8009 of 2008 (Pankaj Singh versus State of U.P. and others)*** and in ***Writ A No. 70690 of 2006 (Gaurav Singh Chauhan versus State of U.P. and Others)*** decided on 21.12.2012 and 08.01.2013 respectively, wherein the Court took note of the Government Order dated 22.01.2000 and the consequential Resolution of the Board dated 30.03.2000.

8. The counsel for the petitioner on the other hand has opposed such submissions. According to him, the petitioner's father died on 24.02.1999 and therefore, the Government Order dated 22.01.2000 shall not have retrospective operation.

9. Having considered the submissions made by the counsel for the parties at bar, this Court has to consider the question as to "*whether sitting in extra ordinary jurisdiction under Article 226 of the Constitution of India this Court can force the respondents to act against the law; or issue a writ of mandamus to grant appointment to the petitioner on compassionate ground in the absence of any scheme for such compassionate appointment being prevalent case of the respondents?"*

10. The SC in the case of ***Life Insurance Corporation vs. Asha Ramchandra Ambekar 1994 (2) SCC 718*** has held that courts cannot order appointment on compassionate grounds dehors the provisions of the statutory regulations and instructions and that hardship of a candidate does not entitle him to compassionate appointment dehors the Statutory Provisions. Also, it is settled law that norms prevailing on the date of consideration of the appointment would be the basis of considering claim for compassionate appointment.

11. Such law has been reiterated by the SC in ***N.C. Santhosh versus State of Karnataka 2020 (7) SCC 617.***

12. This Court in **Writ A No. 3954 of 2011 (Gajendra Singh versus State of U.P. and Others) and in *Writ Petition No. 54673 of 2005 (Prem Pal versus State of U.P. and others)*** as also in the case of Pankaj Singh (Supra) and Gaurav Sngh Chauhan (Supra) has considered the provisions of Government Order dated 22.01.2000 which was issued withdrawing the scheme of Compassionate Appointment on the ground of financial hardship faced by the U.P. State Agro Industrial Corporation. The Court has also considered the Resolution passed in the 146th meeting of Board of Directors. The Court came to the conclusion that in the absence of any scheme for compassionate appointment no mandamus can be issued to the U.P. State Agro Industrial Corporation to grant compassionate appointment to the writ petitioners therein.

13. This Court in ***Special Appeal No. 1737 of 2011 (Jagdish Kumar versus State of U.P. and Others)*** has also held that Dying in Harness Rules, 1974 are not applicable to the U.P. State Agro Industrial Corporation.

14. This Court is of the considered opinion that extra ordinary jurisdiction under Article 226 of the Constitution of India cannot be exercised by this Court directing the respondents to give compassionate appointment to the petitioner in the absence of any scheme prevalent in the respondents Corporation.

15. The writ petition stands dismissed.

(2022) 11 ILRA 334
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.11.2022

BEFORE
THE HON'BLE MRS. SANGEETA CHANDRA, J.

Writ-A No. 8525 of 2022

Anand Kumar Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Chandra Bhan Gupta, Sri H.R. Mishra (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Jai Bahadur Singh

A. Service Law – UP Co-operative Societies Employees' Service Regulations, 1975 – Reg. 84(1) & 85(x) – Suspension – ReinSt.ment with punishment of stoppage of 3 increments – Appeal against punishment was filed before the Registrar, not before the Board – Maintainability – Held, the punishment that was imposed, was a minor penalty and the petitioner ought to have approached the Board – Since withholding of increments is a punishment mentioned under Sub-clause (b) of Regulation No. 84, it is a minor penalty and the petitioner should have approached the Board. He wrongly filed an appeal before the Registrar/Joint Registrar/Deputy Registrar. The appeal filed by the petitioner on 06.02.2021 shall be treated as non-est. (Para 19)

Writ petition disposed of. (E-1)

List of Cases cited:-

1. Committee of Management, Krishna Sahkari Awas Samiti Ltd. & ors. Vs St. of U.P. & ors.; 2022 (3) ADJ 110

2. Kiran Singh & ors. Vs Chaman Paswan & ors.; (1955) 1 SCR 117

3. Hindustan Zinc Ltd. Vs Ajmer Vidyut Vitran Nigam Ltd.; (2019) 17 SCC 82

4. Zuari Cement Ltd. Vs Regional Director, Employees' St. Insurance Corporation, Hyderabad & ors. (2015) 7 SCC 690

5. Civil Misc. Writ Petition No. 43584 of 2007; Nand Kishor Vs St. of U.P. & ors. decided on 14.09.2007

6. Writ Petition No. 16188 of 2002; Ram Nath Pandey Vs Zila Sahkari Bank Ltd. Basti & ors. decided on 03.10.2002

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. Heard Sri H.R. Mishra, learned Senior Advocate assisted by Sri Chandra Bhan Gupta, learned counsel for the petitioner and Sri Jai Bahadur Singh, learned counsel appearing on behalf of the respondent nos.2 to 4 and the learned Standing Counsel appearing on behalf of the respondent nos.1 and 5.

2. This petition has been filed praying for a direction to be issued to the respondent no. 3, Secretary and Chief Executive Officer, District Cooperative Bank Limited, Fatehpur to make payment of salary to the petitioner as per order dated 23.10.2021 passed by the Deputy Commissioner and Deputy Registrar (Cooperative), Prayagraj Division, Prayagraj along with admissible interest thereon.

3. It is the case of the petitioner that he was posted as Branch Manager in District Cooperative Bank Ltd., Fatehpur (hereinafter referred to as "the Bank'). He was placed under suspension on 28.03.2017. The petitioner filed a writ petition, namely, Writ A No.9280 of 2020 for reinstatement and revocation of suspension order and conclusion of the disciplinary proceedings which had been going on for a long time. The Court finally disposed of the petition on 04.11.2020 by referring to Regulation 85(x) of U.P. Co-operative Societies Employees' Service Regulations, 1975 (hereinafter referred to as "the Regulations, 1975') that no employee shall ordinarily remain under suspension for more than 6 months except when suspension is made on a criminal charge on the direction of the competent Court; by observing that appropriate orders be passed by the competent Authority to conclude the matter of disciplinary proceedings within a period of 30 days from the date of order, failing which, the order of suspension shall stand revoked and the petitioner would be entitled to reinstatement and payment of salary.

4. In pursuance of the said order passed by this Court on 04.11.2020, the Committee of Management by its order dated 25.11.2020, had taken a decision to conclude the disciplinary proceedings and to reinstate the petitioner treating his suspension period as period spent on duty with a punishment of stoppage of 3 increments with cumulative effect. No salary/subsistence allowance was to be paid to the petitioner for the period in which he remained suspended. In pursuance of the decision of the Committee of Management dated 25.11.2020, the responded no.3 passed an order on 15.12.2020 and the petitioner joined his services. He however was retired on 31.01.2021. In pursuance of the impugned order, the petitioner was suffering financially and therefore, he filed Writ A No.853 of 2021 challenging the order dated 15.12.2020 and prayed for payment of salary during the suspension period. This Court disposed of the writ petition on 25.01.2021 on the grounds of remedy of filing an appeal under Regulation 86 of the Regulations, 1975. The Court also directed that in the event, the petitioner preferred an appeal before the appropriate forum, the same would be entertained on merits and dealt with in accordance with law, expeditiously.

5. After that order, the petitioner preferred an appeal. A copy of which has been

filed as Annexure-1 to the supplementary affidavit filed by the petitioner on 03.11.2022. The said appeal was preferred to the Joint Commissioner and Joint Registrar Cooperative, Prayagraj Mandal wherein the petitioner prayed that he may be given his balance emoluments as the period of suspension has already been treated by the employer to be period spent on duty and the disciplinary proceedings have concluded with no punishment. According to Sub-clause 7(a) of Regulation No. 85 of the Regulations, 1975, service rules as applicable to the State Government employees would be applicable to employees of Cooperative Society and under the U.P. Government Servant Service Rules and Financial Handbook, subsistence allowance at 75% of the basic salary is payable to an employee who remained under suspension beyond 6 months. In the case of the petitioner, he had remained under suspension for 3 years but was only paid half of basic salary as subsistence allowance. He ought to have been paid 75% i.e. 3/4 of the basic salary from the date of lapse of 6 months from the date of his suspension instead the Appointing Authority had directed withholding of all allowances and balance of salary during the period the petitioner remained under suspension. The appeal was decided by Deputy Registrar and Deputy Commissioner Cooperative, Prayagraj Mandal by order dated 23.10.2021. A copy of such order has been filed as Annexure-4 to the writ petition. The Appellate Authority set aside the order dated 15.12.2020 passed by the respondent no.3. The petitioner was reinstated and he retired on 31.01.2021. However his retiral dues as well as his salary adjusting his subsistence allowance that were already paid to him, was not being given and therefore, the petitioner filed the instant petition.

6. When the matter was taken up earlier by this Court, Sri Jai Bahadur Singh, learned counsel had appeared and this Court had passed a detailed order on 08.07.2022 which is being quoted hereinbelow:-

"Learned counsel for the petitioner is permitted to implead the Deputy Commissioner & Deputy Registrar Co-operative, U.P. Prayagraj, Division, Prayagraj as respondent no. 5 during the course of day.

Heard learned counsel for the petitioner, learned Standing Counsel for the respondent no. 1 and Sri Jai Bahadur Singh, learned counsel for the respondent nos. 2 to 5.

Learned counsel for the petitioner submitted that earlier petitioner was working as Branch Manager in District Co-operative Bank Limited, Fatehpur. Thereafter, inquiry has been initiated against the petitioner and punishment of stopping three increments have been awarded to the petitioner vide order dated 15.12.2020 . Against which, petitioner has approached this Court by filing Writ- A No. 853 of 2021, which was dismissed vide order dated 25.1.2021 on the ground of alternative remedy to file appeal. Accordingly, petitioner has preferred appeal before the Deputy Commissioner and Deputy Registrar Co-operative, U.P. Prayagraj, Division, Prayagraj-respondent no.5 in which respondent no.2 has appeared and ultimately appeal was decided in favour of him rejecting the penalty so earlier imposed upon him vide order dated 23.10.2021. He next submitted that the said order was never challenged before any Court of law. Further, respondent no.3 is not complying the order dated 23.10.2021.

Sri Jai Bahadur Singh, learned counsel for the respondent nos. 2 to 5 could not dispute the argument of learned counsel

for the petitioner, but submitted that order is without jurisdiction, therefore, same may not be complied with.

Learned counsel for the petitioner in his rejoinder argument submitted that objection so taken before this Court has never been raised by the respondent-Bank before the Appellate Authority and also not challenge the said order before any Court of law, therefore, he cannot be given any liberty to raise this objection. Once order has not been challenged before any Competent Court, that has attained finality and respondents are bound to comply the same.

Under such facts and circumstances, let an interim mandamus be issued to respondent no.3 to comply the order dated 23.10.2021 within six weeks or show cause by filing affidavit within the same time.

Put up this case as fresh on 22.8.2022."

7. In compliance of the order passed by this Court, a short counter affidavit was filed by Sri Jai Bahadur Singh raising certain objections to the jurisdiction of the Deputy Registrar and Deputy Commissioner (Cooperative), Prayagraj Mandal to decide the appeal. The matter thereafter was taken up on 19.09.2022. This Court noted the arguments made on the basis of said short counter affidavit by Sri Jai Bahadur Singh that order dated 23.10.2021 was without jurisdiction. The petitioner should have approached the UP Cooperative Societies Service Institutional Board (hereinafter referred to as "the Board') against order of punishment but he had approached an incompetent Authority that is the respondent no.5, who without jurisdiction passed the order dated 23.10.2021. When the order dated 23.10.2021 was placed before the District Administrative Committee, it had again passed a resolution on 25.04.2022 affirming its earlier resolution dated 25.11.2020 which had resolved that the suspension period shall be treated as period spent on duty but without payment of any other allowance except for subsistence allowance to the petitioner.

8. When the matter was taken up today before this Court, Sri Jai Bahadur Singh has pointed out the Regulation No. 84 of the Regulations, 1975 which relates to penalty. Regulation No.84 is being quoted hereinbelow:-

*"**84. Penalties.**- (i) Without prejudice to the provisions contained in any other regulation, an employee who commits a breach of duty enjoined upon him or has been convicted for criminal offence or an offence under section 103 of the Act or does anything prohibited by these regulations shall be liable to be punished by any one of the following penalties: -*

(a) censure,

(b) with holding of increment,

(c) fine on an employee of Category IV (peon, chaukidar, etc.).

(d) recovery from pay or security deposit to compensate in whole or in part for any pecuniary loss caused to the co-operative society by the employee's conduct,

(e) reduction in rank or grades held substantively by the employee,

(f) removal from service, or

(g) dismissal from service.

(2) Copy of order of the punishment shall invariably be given to the employee concerned and entry to this effect shall be made in the service record of the employee.

(3) No penalty except censure shall be imposed unless a show cause notice has been given to the employee and he has either failed to reply within the specified

time or his reply has been found to be unsatisfactory by the punishing authority.

(4) (a) The charge-sheeted employee shall be awarded punishment by the appropriate authority according to the seriousness of the offence:

Provided that no penalty under sub-clause (e), (f) or (g) of clause (i) shall be imposed without recourse to disciplinary proceedings.

(b) No employee shall be removed or dismissed by an authority other than by which he was appointed unless the appointing authority has made prior delegation of such authority to such other person or authority in writing.

(5) The appointing authority or person authorised by him while passing orders for stoppage of increments shall state the period for which it is stopped and whether it shall have effect of postponing future increments or promotion."

9. It has been argued that penalties given in clauses (a) to (d) of the Regulation No.84(1), the appeal is maintainable before the Board as they come under minor penalty. Clauses (e) to (g) relate to reduction of rank or grade, removal from service or dismissal from service, no appeal is provided under the Regulation, major penalties having being provided subject to approval of the Board, no appeal can be made to any of the officers and perhaps extraordinary jurisdiction under Article 226 of the Constitution alone can be availed of by the aggrieved person.

10. Sri Jai Bahadur Singh, learned counsel says that since stoppage of an increment is a minor penalty, appeal should have been preferred by the petitioner to the Board which was not done by the petitioner. He approached the Deputy Registrar/ Joint Registrar (Cooperative) in appeal. He has referred to a judgement rendered by a Coordinate bench of this Court in **Committee of Management, Krishna Sahkari Awas Samiti Limited and others Vs. State of U.P. and others [2022 (3) ADJ 110]** wherein it had been argued by learned counsel for the petitioner-Committee of Management that the order passed by the Joint Secretary Cooperative under Section 98(n) of the U.P. Co-operative Societies Act, 1965 (hereinafter referred to as "the 1965, Act') as Appellate Authority was without jurisdiction. Failure to raise the issue of jurisdiction at the stage of appeal by the Committee of Management, did not preclude the petitioner from canvassing the same before the Court as the issue of jurisdiction goes to the root of the matter. This Court had considered the Section 98(n) of the Act, 1965 and found that the order which was appealed, did not fall within the ambit of Section 98(n) of the Act, 1965 and therefore, the Appellate Authority could not annul any resolution nor cancel any order passed by the Committee of Management. Appeal being creature of the statute scope of the Appellate jurisdiction is defined and circumscribed by the statute. The Appellate Authority could not go beyond the statutory mandate of Section 98(n) of the Act, 1965. The Court observed that consent of parties would not confer the jurisdiction of appeal where none had been vested by law. Similarly, failure to raise the objection in regard to the jurisdiction to entertain the appeal, will not cure the defect of inherent lack of jurisdiction and such plea can be raised at any stage and also in collateral proceedings.

11. The Supreme Court's judgement in **Kiran Singh and others Vs. Chaman Paswan and others [(1955) 1 SCR 117]** as

reiterated in **Hindustan Zinc Limited Vs. Ajmer Vidyut Vitran Nigam Limited [(2019) 17 SCC 82]** was quoted by the coordinate Bench as also the judgement rendered in **Zuari Cement Limited Vs. Regional Director, Employees' State Insurance Corporation, Hyderabad and others [(2015) 7 SCC 690].**

12. Learned counsel for petitioner has referred a Division Bench judgement of this Court in **Nand Kishor Vs. State of U.P. and others (Civil Misc. Writ Petition No.43584 of 2007 decided on 14.09.2007)** wherein this Court was considered an order of punishment passed by the Managing Director which the writ petitioner Nand Kishor had challenged in appeal under Regulation No.86 of the Regulation, 1975. The appeal was dismissed by the Chairman. The petitioner approached the Registrar challenging the orders of the Managing Director as well as the Chairman under Section 128 of the Act, 1965. The appeal was rejected by the Joint Registrar as not being maintainable. The writ petitioner had argued before this Court that the appeal was maintainable under Section 128 of the Act, 1965 as the Board constituted under Section 122 of the Act, 1965 had framed the Regulations of 1975 and appeal to the Chairman against the order of Managing Director had been provided for. After decision in the appeal by the Chairman, in exercise of powers under Regulation No.86 of the Regulations, 1975, such order could be challenged under Section 128 of the Act, 1965 as the Act contemplates that all orders passed by the Cooperative Societies, can be cancelled in the cases provided for under the section by the Registrar. The Court observed that remedy under Section 128 of the Act, 1965 is available to an employee who is aggrieved by the order of Chairman passed in appeal as the power conferred upon the Registrar under Section 128 of the Act i.e. parent legislation is not diluted in any manner by the Regulations, 1975 framed by the Board which are in nature of subordinate legislation as reference may also be had to the definition of "Officer' as contained in Section 2-O of the Act which refers to the Chairman of the Board. The appeal/application made by the petitioner under Section 128 of the Act, 1965 was legally maintainable. The Court referred to another Division Bench judgement rendered in **Ram Nath Pandey Vs. Zila Sahkari Bank Ltd. Basti and others (Writ Petition No.16188 of 2002, decided on 03.10.2002**) reiterated the position.

13. It has been argued by learned counsel for the petitioner that even if an order was passed by the Secretory/ Chief Executive Officer in compliance of the resolution passed by the Board as in the case of the petitioner, remedy would still alive under Section 128 before the Registrar/Joint Registrar/Deputy Registrar. Hence the appeal filed by the petitioner was maintainable.

14. This Court is not convinced as in the case of the petitioner, the punishment was determined by the Committee of Management and consequential order alone was passed by the Secretary/Chief Executive Officer of the Cooperative Society.

15. This Court has now to consider whether the order passed on 15.12.2020 concluding the disciplinary proceedings of the petitioner by observing that the suspension period shall be treated as period spent on duty without any other allowance being payable to the petitioner except subsistence allowance for the said period and also imposing punishment of

withholding of 3 annual increments was a major or minor penalty.

16. It is the case of the respondent that it was a minor penalty and the petitioner ought to have approached the Board under Regulation No.86 which provides that order imposing penalty under Sub-clause (a) to (d) of Clause 1 of Regulation No.84 shall be appealable to the Authorities as mentioned in Appendix D and Appendix D mentions first appeal to be made to the Committee of Management or any other officer authorized by the Committee of Management and in case the Committee of Management has passed the order of punishment, appeal shall file to the Board i.e. Cooperative Societies Service Institutional Board.

17. It is the case of the respondent that the petitioner should have approached the Cooperative Societies Service Institutional Board as the order passed under Regulation No.84 was only for withholding of increments.

18. Learned counsel for the petitioner has argued that in case of the petitioner, withholding of 3 annual increments was with future effect and that would amount to a major penalty when no appeal would lie to the Board and in case where no appeal shall lie to the Board, Section 128 would come into play and the Registrar can be approached.

19. Since the punishment order had directed withholding of 3 annual increments would have fallen due only with effect from July of the year 2021, the punishment that was imposed, was a minor penalty and the petitioner ought to have approached the Board. This Court finds that since withholding of increments is a punishment mentioned under Sub-clause (b) of Regulation No. 84, it is a minor penalty and the petitioner should have approached the Board. He wrongly filed an appeal before the Registrar/Joint Registrar/Deputy Registrar. The appeal filed by the petitioner on 06.02.2021 shall be treated as non-est.

20. The writ petition is **disposed of** with a liberty to the petitioner to file an appeal before the Cooperative Societies Service Institutional Board against the resolution dated 25.11.2020 and the resolution dated 25.04.2022. If an appeal is preferred before the Board by the petitioner within a period of three weeks from today, it shall be considered on its merits and in accordance with law as expeditiously as possible, within a period of three months from the date a copy of the appeal and a copy of this order is produced before it.

21. A copy of the resolution dated 25.11.2020 and a copy of the resolution dated 25.04.2022 shall be served upon the petitioner within a week from its application made in this regard by the respondent no.3.

(2022) 11 ILRA 340
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.10.2022

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-B No. 356 of 2013

Deepak Kumar & Anr. ...Petitioners
Versus
Board of Revenue, U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Yogesh Kumar Singh, Sri K.R. Sirohi, Sri R.C. Singh, Sr. Advocate.

Counsel for the Respondents:
C.S.C., Nipun Singh, Sri R.G. Prasad, Sri Satyendra Kr. Singh, Sri Shiv Prakash, Sri Suresh Chandra Verma

A. Civil Law -U.P.Z.A. & L.R. Act-Section 229-B-dismissal of suit-Two village were brought under Consolidation operation in the year 1958 and no objection was filed by anybody claiming right or title on the basis of judgment of civil court dated 14.11.1953-Petitioners and contesting respondents were allotted separate chak of ½ share in respect of both the villages-Neither their right to property under Article 300-A of the Constitution can be taken away nor the rights of the co-sharers will come to an end u/s 49 of the Act, on the notification u/s 52 due to not claiming partition of his share and separate chak in his name and till there is no ouster from the joint property his right in the property will continue to exist-Moreso, the rights of the plaintiff were never extinguished no question of limitation arises- unless judgment and decree of Civil Court dated 14.11.1953 is set aside, revenue court cannot ignore the same-Thus,the matter is remanded back before trial court. (Para 1 to 24)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Pyare Lal Vs Hori Lal (1977) AIR SC 1226

2. Babu Ali (D) thru L.Rs. & ors.. Vs Dukkhi & ors. (2004) 96 R.D. 530

3. Hori Lal & anr. Vs A.D.J .Agra & ors.. (2011) 5 ADJ 330

4. Mool Chand & ors. Vs DDC & ors. (1995) AIR SC 2493

5. Ram Briksha & anr. Vs DDC & ors. (2016) 6 ADJ 356 DB

6. Pan Kumari Vs Board of Revenue U.P. Alld (2005) 99 RD 529

7. R. Rajannnna Vs S.R Venkataswamy (2014) 15 SCC 471

8. Pulavarthi Venkata Subba Rao & ors. Vs Valluri Jagannadha Rao & ors. (1967) AIR SC 591

9. Sailendra Narayan Vs St. of Ori (1956) SC 346

10. Habib Milan Vs M Ahmad (1974) A.P. 303

11. Byram Pestonji Ganwala Vs UOI (1992) 1 SCC 31

12. Jadu Gopal Chkravarty (dead) by his Lrs. Vs Pannalal Bhowmick & ors. (1978) 3 SCC 215

13. Katikara Chintamani Dora Vs Gautreddi Annamanaidu (1974) SC 1069

14. Pushpa Devi Bhagat (dead) thru L.R. Sadhna Rai, (Smt.) Vs Rajinder Singh & ors. (2006) 5 SCC 566

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

1. Heard Sri R.C. Singh, the learned Senior Counsel assisted by Sri Yogesh Kumar Singh, for the petitioners and Sri Nipun Singh, counsel for respondent nos. 12 to 22.

2. The brief facts of the case are that land pertaining of Khasara plot No.2695 area 1-1-0, Khasara Plot No.5613 area 0-18-0, Khasara Plot No. 5649 m. area-0-4-10, Kashara Plot No.5651 area 0-12-0, Khasara Plot No.5652 area 0-03-0 Khasar Plot No.5648 area 0-12-0, Khasara Plot No.5649 area 0-1-0 Khasra Plot No.5650 area 010-0, total area 4-2-0 situated at Kasba-Kandhala, Nagar Palika-Kandhala, Pargana-Kandhala, Tehsil-Kairana, District-Muzaffar Nagar (Now Shamli) belong to one Shree Ram. Land belonging to Shri Ram was also situated in village-Aldi. After death of Shree Ram names of his two sons Kishan Swarup

and Surendra Swaroop were substituted and name of KishanSwaroop and Surendra Swaroop were recorded in respect to the land situated in village-Kandhala and Aldi during consolidation operation having ½ share each but later on the name of Kishan Swaroop (grand father of petitioners) was expunged from the land in dispute on the basis of decree dated 14.11.1953 accordingly petitioners' father as well as petitioners filed a suit under Section 229-B of U.P.Z.A.&L.R. Act for declaring their share in the property in dispute on the ground that land in dispute is Sir Khud Kast ancestral property of plaintiffs as such they are entitled for the share. Defendants filed their written statement and contested the suit. Trial Court framed the issues and parties adduced evidences in support of their cases but trial court dismissed the plaintiff's suit vide judgment and order dated 23.03.2005. Against the judgment dated 23.03.2005 passed by trial court petitioners filed an appeal before Commissioner which was heard and dismissed by Additional Commissioner vide judgment dated 29.09.2007. Petitioners challenged the judgment dated 29.09.2007 before Board of Revenue through Second-Appeal which was dismissed vide judgment dated 08.10.2012 hence this writ petition.

3. Civil Suit No.44 of 1953 Surendra Prakash vs. Sri Kishan Swaroop was decided by order dated 14.11.1953 on the basis of alleged consent of the parties. The proceeding initiated by contesting respondents in the year 1964 under Section 33/39 of U.P. Land Revenue Act on the basis of the decree of civil Court was rejected by order dated 30.05.1964 holding that amaldaramad cannot be made on the basis of civil Courts decree dated 14.11.1953.

4. This petition was entertained on 07.01.2013 and following interim order was passed:

"Heard learned counsel for the petitioners and Shri S.C. Verma, who has put in appearance on behalf of respondent no. 4. He prays for and is allowed six weeks' time to file counter affidavit.

Issue notice to respondent nos. 5 to 10, who may also file counter affidavit.

Petitioners shall take steps for service of notice on the respondents by registered post within one week. Office shall issue notices returnable at an early date.

List after service of notice on respondent nos. 5 to 10.

Considering the facts and circumstances, until further orders of this Court, parties to the writ petition are directed to maintain status quo with respect to nature and possession over the land in dispute as it exists today. Both the parties are further restrained from alienating, transferring or changing the nature of the land in dispute in any manner."

5. In pursuance of the order of this Court dated 07.01.2013 contesting respondents have filed their counter affidavit along with an application for vacation of interim order. Petitioners have filed their rejoinder affidavit also.

6. Counsel for the petitioners submitted that no right was claimed before the Consolidation Court on the basis of the judgment of Civil Court date 14.11.1953 accordingly separate chaks were carved out in the name of Kishan Swaroop and Surendra Swaroop and final record under Section-27 of the U.P.C.H. Act was also prepared but courts below have filed to consider this question and dismissed the plaintiff's suit under Section 229-B of U.P.Z.A. & L. R. Act only on the basis of civil Court judgment dated 14.11.1953 which is inexecutable. He further submitted

that even the application filed by contesting respondents under section 33/39 of U.P. Land Revenue act in the year 1964 to correct the revenue entry on the basis of civil court judgment dated 14.11.1953 was rejected. He further submitted that implementation of civil Court judgment after conclusion of consolidation proceeding is not permissible in view of law laid down by Apex Court as well as by this Court in the following judgment:

(I) A.I.R. 1977 S.C 1226
Pyare Lal Vs. Hori Lal
(II) 2004 (96) R.D. 530
Babu Ali (D) through L.Rs. And others vs. Dukkhi and others
(III) 2011 (5) A.D.J. 330
Hori Lal and another vs. Additional District Judge Agra and others

7. Counsel for the petitioners further submitted that final decree in pursuance of the judgment dated 14.11.1953 has not been prepared as such the judgment dated 14.11.1953 could not be implemented although final decree if any would abate on account of Consolidation operation. On this point Counsel for the petitioners placed reliance upon the judgment of Apex court reported in ***A.I.R. 1995 Supreme Court 2493 Mool Chand and others Vs. Deputy Director of Consolidation and others.***

8. Counsel for the petitioners further submitted that courts below have illegally dismissed the suit for declaration filed by petitioners under Section 229-B of U.P.Z.A. & L.R. Act on this basis of void judgment and decree of civil court.

9. He further submitted that claim of co-tenancy is not barred nor any limitation has been prescribed for filing suit under Section 229-B of U .P.Z.A. & L.R. Act. Counsel for the petitioners placed reliance upon following judgment of this Court with respect to co-tenancy and limitation for filing suit under Section 229-B of U.P.Z.A. & L. R. Act.

(I) 2017 (6) ADJ 356 (DB)
Ram Briksha and another vs. Deputy Director of Consolidation and others.
(II) 2005 (99) RD 529
Pan Kumari vs. Board of Revenue U.P. Allahabad.

10. Counsel for the petitioners submitted that writ petition be allowed and matter be remanded before trial court for fresh adjudication of suit under section-229-B of U.P.Z.A.& L.R. Act on merit.

11. On the other hand, Counsel for the contesting respondent submitted that judgment and decree of Civil Court dated 14.11.1953 was a consent decree and the land was out of consolidation as such there was no bar of section-49 of U.P.C.H. Act for the contesting respondents rather the bar of Section-49 of U.P.C.H. Act will be for the petitioner in instituting present suit under Section-229-B of U.P.Z.A. & L.R. Act by the petitioners. He further submitted that consent decree operates as estoppel and binding unless set aside. He further submitted that proper course available to the petitioners to approach same court seeking recall of the order if the compromise or consent is the result of fraud or undue influence. Counsel for the respondent placed reliance upon the following judgments on the point of consent decree, compromise and remedy available to the party concern against the consent decree or compromise:

(I). R. Rajannnna v. S.R. Venkataswamy, (2014) 15 SCC 471

(II) Pulavarthi Venkata Subba Rao and others Vs. Valluri Jagannadha Rao and others AIR 1967 SC 591

(III) Sailendra Narayan Vs. State of Orissa, reported in AIR 1956 S.C. 346

(IV) Habib Milan Vs. M Ahmad, reported in AIR 1974 A.P. 303

(V) Byram Pestonji Ganwala Vs. Union of India, reported in (1992) 1 SCC 31

(VI) Jadu Gopal Chkravarty (dead) by his Lrs. Vs. Pannalal Bhowmick and ors, reported in (1978) 3 SCC 215

(VII) Katikara Chintamani Dora Vs. Gautreddi Annamanaidu, reported in AIR 1974 SC 1069

(VIII) Pushpa Devi Bhagat (dead) through L.R. Sadhna Rai, (Smt.) Vs. Rajinder Singh and others reported in (2006) 5 SCC 566

12. Counsel for the respondents further submitted that in rural ceiling matter the judgment and decree of Civil Court dated 14.11.1953 was relied upon and the same was accepted by the Court while allowing the appeal of contesting respondents against the state in declaration of surplus land. He further submitted that no interference is required against the impugned judgment and the writ petition filed by the petitioners is liable to be dismissed.

13. I have heard the learned counsel for the parties and perused the records.

14. There is no dispute about the fact that petitioners and contesting respondents descended from common ancestor shree Ram. During consolidation operation Kishan Swaroop (ancestor of petitioners) and Surendra Swaroop (ancestor of contesting respondents) were allotted separate chak of ½ share. So far as decree of Civil Court dated 14.11.1953 is concerned petitioners' version is that the same is fraudulent and never acted upon while the version of contesting respondents is that the decree of civil Court unless recalled or set aside cannot be ignored. The proceeding initiated under Section 33/39 of U.P. Land Revenue Act to give effect the decree of Civil Court dated 14.11.1953 in the revenue record was rejected vide order dated 30.05.1964 however subsequently, the revenue entry were corrected, hence present suit under Section 229-B of U.P.Z.A. & L.R. Act at the instance of the petitioners as well as their father which has been dismissed by all the three courts on the ground of Civil Court Judgment and decree dated 14.11.1953.

15. Since the judgment and decree of the civil Court dated 14.11.1953 alleged to be passed between the parties is the main ground on which the suit filed by the petitioners' father under Section 229-B of U.P.Z.A.& L.R. Act has been dismissed, as such first of all Court will examine the judgment of Civil Court passed on 14.11.1953 which is as follows:

"This is a suit done a mere declaration that the plaintiff is the owner of the property given in the schedule by means of the parties. The defendants who are the other co-sharers in the property have admitted the right of the plaintiff and the plaintiff has given his consent. So the court has to grant the declaration sought. But before parting with the case I would like to point out that such suits are filed with the sole object of saving stamp duty and registration for which have been payable on a deed of partition. Such a device is hardly desirable.

Order

The suit is decreed and parties shall bear their own costs. Copy of the judgment may be sent to the Inspector of Stamps and Registration Meerut circle for information."

16. Perusal of judgment of Civil Court dated 14.11.1953 reveals that suit was filed by ancestor of contesting respondents for declaration and by 9 lines order suit has been decreed on the alleged admission of defendant. It is also mentioned in the order that sole object of the suit is to save stamp duty and registration fee which would have been payable on a deed of partition such a device is hardly desirable the copy of the judgment was ordered to be sent before inspector of stamp and registration, Meerut circle but there is nothing on record, whether it was sent before inspector of stamp or not.

17. Contesting respondents have not taken steps for implementation after getting the judgment of civil court dated 14.11.1953. In the year 1964 proceeding under Section 33/39 of U.P. Land Revenue Act 1901 was initiated by the contesting respondents for expunging the name of ancestor of petitioners on the basis of civil Court judgment dated 14.11.1953, the S.D.O. vide order dated 30.05.1964 dismissed the application on the ground that amaldaramad of decree dated 14.11.1953 was neither claimed nor made in village-Aldi and Kandhala during consolidation operation.

18. It is pertinent to mention that village Kandhala and Aldi were brought under Consolidation operation some times in the year 1958 and no objection was filed by anybody claiming right or title on the basis of the judgment of civil Court dated 14.11.1953. Petitioners and contesting respondents were allotted separate chak of 1/2 share in respect to both the villages, the revenue entry in the form of C.H. 23 (part--1) have been annexed as annexure No.10 to the writ petition to demonstrate the aforementioned facts.

19. These facts fully proves that judgment of Civil Court dated 14.11.1953 has not been acted upon as such the same cannot be relied upon by the revenue Court to dismiss the suit of the plaintiff-petitioners under Section 229-B of U.P.Z.A. & L.R. Act. The suit under Section 229-B of U.P.Z.A.& L.R. Act are special type of suit which is to be decided in accordance with law as well as the suit for co-tenancy can not be rejected or dismissed ordinarily as held by this Court in Ram Briksha (supra). Para No.36, 37, 38 and 39 of the judgment rendered in **Ram Briksha (supra)** will be relevant which are as follows:-

"36. On these parameters, the issues that have been raised before us are being considered and in our considered opinion rights of the parties in a holding cannot be permitted to be defeated merely because they have not at all participated in consolidation proceedings and as to whether the bar of Section 49 of U.P. Consolidation of Holdings Act, 1953 would be attracted or not would essentially be a question of fact that can be answered on the basis of evidence adduced and to the said bar in question exceptions have to be carved out wherein suit in question would be not barred and Section 49 of U.P. Consolidation of Holdings Act, 1953 would not come into play where from the series of documents and circumstances it is reflected that planned fraud has been made to delete the plaintiffs name from the revenue

records. From the record of the consolidations, it is clearly reflected that neither the incumbent, who has proceeded to get his name recorded nor consolidation authorities have proceeded to discharge their duties faithfully in consonance with the provisions of U.P. Consolidation of Holdings Act wherein the consolidation authorities are empowered to ascertain the share of each owner if there be more owners than one and in case such an exercise has not been undertaken, then it would be a case of legal malice and it cannot be ipso facto presumed that there has been ouster from the property in question and in such a situation an incumbent, who claims his right in the property in question has got every right to regain his property based on title for the reason that the right has been sought to be defeated based on fraud and manipulation.

The provisions of Section 49 of U.P. Consolidation of Holdings Act, 1953 in such backdrop would not at all be attracted and the suit in question would not at all be prima facie barred where suit in question is filed for possession of the suit property based on property interest. The reference is answered as follows:

Issue No.I

37. Whether use of words "could or ought to have been taken" in latter part of Section 49 of the Act, compulsorily forces the co-sharers, who are living jointly, peacefully and have no grievance against their father/brother/co-sharer, whose name is recorded in representative capacity, or they were willing to live jointly, due to situation of their family, i.e. (father and minor son), (mother and minor son), (brother and minor brother) and (some co-sharer was student and had gone abroad for study and fully depends upon other co-sharers) etc., to file an objection under Section 9 of the Act for separation of his share?

A. Because of the words "could or ought to have been taken" in latter part of Section 49 of the Act, same does not compulsorily forces the co-sharers, who are living jointly, peacefully and have no grievance against their father/brother/co-sharer whose name is recorded in representative capacity or they were willing to live jointly due to situation of their family and who have not filed an objection under Section 49 of the Act for separation of their share inasmuch as under the provisions of U.P. Consolidation of Holdings Act, 1953, it is the statutory obligation cast upon the authorities and the incumbent, who has been holding the property in question in the representative capacity to get the records corrected and in case in designed manner the obligation in question has not been discharged by Consolidation Authorities as well as by the incumbent holding the property in the representative capacity, then in such a situation Section 49 of the Act would not at all be attracted and such situation would be covered under the contingency of planned fraud to drop the name of other co-sharers from the revenue records.

Issue No.II

38. Whether by operation of law, the parties can be thrown into litigation against their will/need and by not raising claim to land or partition and separation of the chak their right to property can be taken away in spite of protection available under Article 19 (1) (f) and now Article 300-A of the Constitution?

A. The answer is that a party cannot be thrown in litigation against their

will/need and by not raising claim to land of partition and separation of chak, their rights to property cannot be taken away under the protection provided for under Article 19(1)(f)/Article 300-A of the Constitution of India.

Issue No.III

39. Whether, in spite of well settled legal principle in respect of joint property, right of a co-sharer will come to an end under Section 49 of the Act, on the notification under Section 52, due to not claiming partition of his share and separate chak in his name, although, there had been no ouster from joint property?

A. The rights of the co-sharers will not at all come to an end under Section 49 of the Act, on the notification under Section 52 due to not claiming partition of his share and separate chak in his name and till there is no ouster from the joint property his right in the property will continue to exist.

The reference is accordingly answered. The Writ Petition alongwith connected matters shall now be placed before the appropriate Bench according to roster for disposal in light of this judgement."

20. On the point of maintainability of suit under Section 229-B of U.P.Z.A. & L.R. Act on the point of limitation etc. the judgment rendered in **Pan Kumari (Supra)** will be relevant, paragraph No.6 of the judgment will be relevant which is as follows:

"6. Sri R.C. Singh submits that the suit under Section 229-B was barred by limitation. In support of this contention he relies upon Section 341 of the U.P. Zamindari Abolition and Land Reforms Act, which provides that the Limitation Act would be applicable to proceedings under the U.P. Zamindari Abolition and Land Reforms Act and limitation in a suit for declaration would be governed by Article 137 of Schedule 1 of the Limiataion Act as there is no period prescribed for such a suit under the U.P.Z.A. & L.R. Act. Section 341 itself provides that the provisions of certain Acts including the Limitation Act shall apply to the proceedings under the U.P. Z.A. & L. R. Act unless otherwise provided in the U.P.Z.A. & L.R. Act. Rule 338 of the U.P.Z.A. and L.R. Rules provides that the suits, applications and Ors. proceedings specified in Appendix III shall be instituted within the time specified therein for them respectively. Recourse to the provisions of the Limitation Act would be available only if there is no provision under Rules in respect of the period of limitation for the different classes of suits or proceedings mentioned therein. In Appendix III the period of limitation provided for different classes of suits has been given. As regards suits under Section 229-B column 4, which prescribes the period of limitation for different classes of suit says "none". It would therefore be treated that there is no limitation for filing a suit under Section 229-B. Section 9 of the Civil Procedure Code provides that all suits of civil nature shall be instituted in the civil court except those, which have been accepted. A suit under Section 229-B falls within the excepted category and such suits even though they involve declaration are suits of a special character. Article 137 of the Limitation Act relied upon by Sri Singh in any case is applicable only to applications and not to suits and therefore has no play. When the rule making authority has provided different periods of limitation for

different classes of suits it would be treated that provisions prescribing period of limitation in the Limitation Act would not be applicable to suits under the U.P.Z.A. & L.R. Act. Section 189 U.P.Z.A. & L. R. Act sets out the circumstances in which the interest of a bhumidar is extinguished. Clauses (a) (aa) and (b) relate to cases where the bhumidar dies leaving no heir, or where he has let out his holding in contravention of the provisions of the Act or where the land is acquired. Sub-section (C) of Section 189 provides that where a bhumidar has lost possession the bhumidari right would extinguish when the right to recover possession is lost. In Ram Naresh Vs. Board of Revenue 1985 R.D. 444 relied upon by Sri R. C. Singh it was held that the provisions of Section 27 of the Limitation Act would be attracted to suits instituted under Section 229-B. Section 27 provides that on the determination of the period limited for instituting a suit for possession the right to such property shall be extinguished. The rule is an exception to the general rule that limitation bars the remedy but does not extinguish the right. If however a person is in possession his right can not be extinguished unless the case is covered by Clauses (a) (aa) and (b) of Sectiion 189. He can therefore seek a declaration of his right at any point of time. If a person has been dispossessed he would have to institute a suit under Section 209 U.P.Z.A. & L.R. Act. Appendix III provides the period for limitation for filing a suit under Section 209. It would follow therefore that a suit under Section 229-B would be barred by limitation the bhumidar is out of possession and his right to file a suit under Section 209 is barred by limitation. The finding of fact recorded on the question of possession is that the plaintiffs have established their continuous possession over the disputed land. The finding is not shown to be vitiated by any error. As the rights of the plaintiff were never extinguished no question of limitation arises. For the reasons given above the writ petition lacks merit and is dismissed."

21. So far as the argument advanced by learned counsel for the contesting respondents as well as case law cited by him are concerned to the effect that unless judgment and decree of Civil Court dated 14.11.1953 is recalled/set aside, revenue court cannot ignore the same cannot be accepted as the decree of civil Court dated 14.11.1953 has not been given effect to even during consolidation operation as such the petitioners' suit under Section 229-B of U.P.Z.A. & L.R. Act cannot be dismissed on the ground of Civil Court judgment dated 14.11.1953. The first appellate Court moved one step ahead and made out a third case that no evidence was produced before the trial court that shri Ram was common ancestor of the parties while there was no dispute at all that Shri Ram was common ancestor of the parties and there was evidence to that effect before the trial court as well as before this Hon'ble Court the IInd Supplementary affidavit dated 21.09.2022 filed by petitioners contain the fact as well as evidences which were filed before trial court.

22. Second Appellate Court has also failed to exercise the IInd Appellate Court jurisdiction and only on the ground of judgment of Civil court dated 14.11.1953 dismissed the second appeal.

23. Considering the entire facts and circumstances as well as case law

mentioned above the impugned judgment and decree dated 23.02.2005 passed by respondent No.3, judgment dated 29.09.2007 passed by respondent No.2 and judgment dated 08.10.2012 passed by respondent No.1 are manifestly erroneous and are liable to be set aside, the same are hereby set aside.

24. The writ petition is allowed and matter is remanded back before trial court to decide the suit filed by petitioners under Section 229-B of U.P.Z.A. & L.R. Act on merit afresh after affording proper opportunity of hearing to the parties expeditiously preferably within a period of six months from the date of production of certified copy of this order. Since petitioners were granted interim-order during pendency of the writ petition before this Court, even during pendency of the First Appeal and Second Appeal interim order was granted by courts below as such it is directed that parties shall maintain status quo with respect to nature and possession of the land in dispute and no third parties interest be created in respect to property in dispute.

25. No orders as to costs.

(2022) 11 ILRA 349
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.11.2022

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ-C No. 7524 of 2022

Dr M Ismail Faruqui ...Petitioner
Versus
Shri Adityanath ...Respondent

Counsel for the Petitioner:
In Person

Counsel for the Respondents:
--

A. Constitution of India – Article 226 – Writ – Principle of res judicata – Applicability – Earlier writ petition was withdrawn – No liberty was given to file fresh writ petition – Effect – Held, the principles of res judicata are applicable to writ petitions in the case – However, High court without testing the writ petition on the premise of res-judicata, granted the concession of considering the writ petition on merit. (Para 5)

B. Constitution of India – Article 164(4) – Representation of People Act, 1951 – Section 80 – Conduct of Election Rules, 1961 – R. 4A – Challenge to the continuance of Yogi Adityanath as the Chief Minister of Uttar Pradesh – No election petition was filed – Election of the respondent was not found improper by any competent authority – Effect – Held, the petitioner under the garb of the writ petition is actually seeking to challenge the election of the Respondent from Gorakhpur Urban Legislative Assembly – The Petitioner by filing the writ petition is trying to do something indirectly which the law prohibits him to do directly. (Para 7 and 8)

C. Constitution of India – Article 226 – Writ – Locus Standi of the petitioner – Petitioner was not registered elector in the Gorakhpur Urban Legislative Assembly – Effect – Held, the petitioner does not have any locus for filing the present writ petition – Case of Tej Bahadur Vs Narendra Modi relied upon. (Para 10)

D. Access to Justice – Misuse – Filing of frivolous petition – Permissibility – Held, no litigant has a right to unLtd. draught on the court time and public money in order to get his affairs settled in a manner as he wishes. Easy access to justice should not be misused as a licence to file

misconceived and frivolous petitions – Dr. B.K. Subbarao's case relied upon. (Para 11)

E. Constitution of India – Article 226 – Writ – Quo Warranto – Scope – Writ of quo warranto can be issued only where an appointment has not been made in accordance with the law. (Para 12)

Writ petition dismissed. (E-1)

List of Cases cited:-

1. Direct recruit class II engineering officers Association Vs St. of Mah.; (1990) 2 SCC 715

2. Nazir Ahmed Vs Emperor; (1936) SCC Online PC 41

3. Municipal Corporation of Greater Mumbai Vs Abhilash Lal & ors.; (2020) 13 SCC 234

4. Krishna Ballabh Prasad Singh Vs Sub Divisional Officer, Hilsa-Cum-Returning Officer & ors.; (1985) 4 SCC 194

5. Indrajit Barua & ors. Vs Election Commission of India & ors.; (1985) 4 SCC 722

6. Tej Bahadur Vs Narendra Modi; 2020) SCC Online SC 951

7. Dr. B.K. Subbarao Vs Mr. K. Parasaran; (1996 (7) JT 265

8. Civil Appeal no. 6706 of 2022; St. of West Bengal Vs Anindya Sundar Das decided on 11.10.2022

9. Bharati Reddy Vs St. of Karn.; (2018) 6 SCC 162

(Delivered by Hon'ble Attau Rahman Masoodi, J. & Hon'ble Om Prakash Shukla, J.)

1. The petitioner-in-person seeks liberty to correct the name of the respondent as Ajay Mohan Singh Bisht for and in place of Yogi Adityanath, the sole respondent in the present writ petition. We permit the petitioner to correct the particulars of respondent during the course of the day.

2. The prayer made in the writ petition reads as under:-

(i) Issue a writ quo warranto to the respondent very kindly questioning his continuance as Chief Minister of State of Uttar Pradesh with effect from 25.09.2022.

(ii) To pass any other appropriate order as the circumstances of the case may require; and

(iii) To allow the writ petition.

3. Apparently, the Petitioner at Para 19 of the Writ Petition has admitted that he is neither an Elector nor a candidate at the election of 322- Gorakhpur Urban Legislative Assembly constituency, from which the Respondent stands elected. It is also available from the Writ Petition that the present petition has come to be filed on the ground that (a) the respondent is a usurper of office of Chief Minister of State of Uttar Pradesh with effect from 25.09.2022 and (b) Allegedly the Respondent was not qualified to contest the election for the current legislative assembly of State of Uttar Pradesh due to violation of provisions of Rule 4 A of the Conduct of Election Rules, 1961. Thus, in a nut-shell, it has been prayed by the Petitioner for issuance of Writ of Quo Warranto against the Respondent for his continuation as Chief Minister of State of Uttar Pradesh with effect from 25.09.2022. The petitioner has also relied upon a judgment passed by the Kerala High Court in the case of Shaiju J. Kooran & Etc. V/s State Election Commission, Thirunanvanthapuram and Ors. (AIR 2003 Kerala 246), wherein election as municipal councillors and panchayat member under the Kerala Municipality Act was under challenge.

4. This court having given a thoughtful consideration to the issue in

hand, finds the present petition to be very amusing. The petitioner seems to be in a spree of filing this kind of petition as admittedly, an identical petition praying inter-alia for the same relief vide W.P (C) no. 5627 of 2022, was dismissed as withdrawn. It would be interesting to note the final order dated 29.08.2022 passed by a coordinate division bench of this Court, which inter-alia says:

"Heard the Petitioner appeared in person and learned Advocate General for the respondents - State.

After arguing at some length, learned counsel for the petitioner states that he may be permitted to withdraw the writ petition.

Accordingly, the writ petition is dismissed as withdrawn."

5. Apparently, no leave nor any liberty had been sought by the Petitioner to file the present Writ Petition. A constitutional Bench of the Hon'ble Supreme Court way back in the year 1990 has held that the principles of res judicata are applicable to writ petitions in the case of **Direct recruit class II engineering officers Association V/s State of Maharashtra, (1990) 2 SCC 715**, however this court without testing the present writ petition on the premise of res-judicata, grants the concession of considering the present writ petition.

6. Section 80 of the Representation of People's Act, 1951 inter- alia states that no election shall be called in question except by an Election Petition presented in accordance with the provisions of this part. Essentially, the sum & substance of the relief being sought by the Petitioner is on the basis of an attack to the alleged affidavit filed by the Respondent in terms of the provisions of Rule 4 A of the Conduct of Election Rules, 1961. It is the case of the petitioner that since the said affidavit was not as per the provisions of the said rules, the election of the respondent as a Member of the Legislative Assembly was not legal and consequently, even if, the respondent had been appointed as a Chief Minister of the state of Uttar Pradesh, his continuation cannot be confirmed as per law in view of Article 164(4) of the Constitution of India, which prescribes that a Minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of that period cease to be a Minister.

7. In the first blush, the argument of the petitioner seems to be very attractive, but on a deep enquiry it is apparent that the petitioner is drawing the aforesaid analogy by presuming that the election of the Respondent is not proper. The petitioner besides drawing attention of this court to the Affidavit filed by the respondent in terms of Rule 4A of the Conduct of Election Rules, 1961 has not been able to show a single document which would show that the election of the respondent has been found by any competent authority to be not proper. Having said so, this court finds that the Petitioner under the garb of the present petition is actually seeking to challenge the election of the Respondent from 322 - Gorakhpur Urban Legislative Assembly.

8. However, this court finds that the said challenge to the election can be made only by filing an Election Petition before this court as per the conditions provided in the Representation of Peoples Act, 1951. Any challenge to an election is a statutory right and is available to a person as has been prescribed under the statute only. The Petitioner has for obvious reasons not filed

the Election Petition in the present case & has chosen to file the present Writ Petition which is not permissible under the statute. In fact the Petitioner by filing the present Writ Petition is trying to do something indirectly which the law prohibits him to do directly. The principle that "if a statute requires a thing to be done in a particular manner, it should be done in that manner or not at all" articulated in **Nazir Ahmed vs. Emperor (1936) SCC Online PC 41**, has found wide spread acceptance & has also been reiterated by the Hon'ble Supreme Court recently in the judgment of **Municipal Corporation of Greater Mumbai vs. Abhilash Lal & Ors. (2020) 13 SCC 234.**

9. Further, the Petitioner claims that the provisions of Article 329 of the Constitution of India and Section 80 of the Act are not applicable herein as no Election Petition could have been filed, if at all, preferred by the Petitioner questioning the election of the Respondent on the grounds mentioned in the present Writ Petition. First and foremost as already held that the relief being sought by the Petitioner could have been granted in Election Petition only, however this court finds that the Hon'ble Supreme Court in case of Krishna Ballabh Prasad Singh vs. Sub - Divisional Officer Hilsa- Cum- Returning Officer & Ors. (1985) 4 SCC 194 has held that the process of Election comes to an end after the declaration in Form 21-C was made and the consequential formalities were completed, the bar of clause D of Article 329 of the Constitution of India came into operation thereafter and an Election Petition alone was maintainable thus the Hon'ble Supreme Court held in that case that the Writ Petition cannot be entertained. Thus, the reliance placed by the petitioner in the Shaiju J. Kooran case as mentioned supra is misplaced. This court finds it profitable to quote the observation made by the Hon'ble Supreme Court relating to the filing of the Petition under section 226 of the Constitution of India inter-alia challenging the election to the state legislature which has been sought to be similarly done in the present case. The Hon'ble Supreme Court in the case reported as **Indrajit Barua and ors. vs. Election Commission of India and ors. (1985) 4 SCC 722** at Para 6, has held inter-alia:

"These are clear authorities - and the position has never been assailed - in support of the position that an election can be challenged only in the manner prescribed by the Act. In this view of the matter, we had concluded that writ petitions under Article 226 challenging the election to the state legislature were not maintainable and election petition under section 81 of the Act had to be filed in the High Court. The act does not contemplate a challenge to the election to the Legislature as a whole and the scheme of the Act is clear. Election of each of the retuned candidates has to be challenged by filing of a separate election petition. The proceedings under the act are quite strict and clear provisions have been made as to how an election petition has to be filed and who should be parties to such election petition. As we have already observed, when election to a legislature is held it is not one election but there are as many elections as the Legislature has members. The challenge to the elections to the Assam Legislative Assembly by filing petitions under Article 226 of the Constitution was, therefore, not tenable in law."

10. The present petition is also liable to be rejected in as much as the Petitioner does not have any locus for filing the

present petition. As to who can prefer an Election Petition, section 81 of the Representation of People Act, 1950 provides that an Election Petition may be presented by (a) any elector or; (b) any candidate at such election. Further the explanation to section 81 provides that an elector means a person who was entitled to vote at the election to which the Election Petition relates. In the present case, the Petitioner has admitted that he is not an elector registered in the 322 - Gorakhpur Urban Legislative Assembly. Therefore, this court finds that the petitioner does not have any locus for filing the present writ petition as has also been held in the case of Tej Bahadur vs. Narendra Modi (2020) SCC Online SC 951, wherein the Hon'ble Apex court held that the locus for filing an Election Petition depends entirely on the question whether a particular person is an elector of the constituency or is a candidate or can claim to be a duly nominated candidate. The Petitioner fails to fall in any of the category to make the present petition maintainable.

11. The courts have also from time to time held that no litigant has a right to unlimited draught on the court time and public money in order to get his affairs settled in a manner as he wishes. Easy access to justice should not be misused as a licence to file misconceived and frivolous petitions. (See Dr. B.K. Subbarao vs. Mr. K. Parasaran, (1996 (7) JT 265) as is being sought to be done in the present case. The court cannot be oblivious to the fact that today people rush to Courts to file cases in profusion under this attractive name of public interest.

12. Further, the petitioner has failed to show from records as to how the appointment or the continuation of the respondent in the Chief Minister post is not in accordance with law. Recently the bench of HMJ D.Y Chandrachud & HMJ Hima Kohli in the case of "**State of West Bengal Vs Anindya Sundar Das**" ....., while referring to various judgments including Bharati Reddy v. State of Karnataka (2018) 6 SCC 162, observed that the issue is no longer res integra relating to the settled position that the writ of quo warranto can be issued only where an appointment has not been made in accordance with the law.

13. For all the aforesaid reason the present petition is dismissed, however since valuable time has been spent by this court on atleast two occasions, therefore this court finds it appropriate to impose an exemplary cost of Rs. 11,000/- on the petitioner, which shall be paid to State legal Services Authority Within four weeks from today.

(2022) 11 ILRA 353
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.11.2022

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ-C No. 23474 of 2016

Badri Vishal Tiwari ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Gaurav Mehrotra, Kunal Chandra Agrawal

Counsel for the Respondents:
C.S.C.

A. Civil Law - Indian Stamp Act, 1899 – Section 47-A – UP Stamp (Valuation of Property) Rules, 1997 – Rule 7(5) – Stamp deficiency – Inquiry – Scope – Solely the

ex-parte report relied upon in passing the impugned order, how far is permissible – No information from any public officer was called by the Collector – No other record or evidence was examined – Effect – Held, it is after considering the representations of the parties and examining the records and other evidences that the Collector is to determine the value of the subject matter of the instrument and the duty payable – No inquiry having been conducted by the competent authority prior to passing the impugned order, the order would be vitiated on this ground also. (Para 16, 18 and 21)

B. Stamp deficiency – Penalty, when can be imposed – Concealment of relevant fact – Relevancy – Gyan Prakash's case relied upon – Sine qua non for imposition of penalty is a finding to be recorded by the competent authority based on relevant materials that the purchaser or the person liable to pay stamp duty had concealed relevant facts in execution of the sale deed – No finding on the concealment of relevant fact – Held, the impugned order does not indicate nor records any finding by the competent authority that the purchaser had concealed relevant facts in execution of the sale deed and had the intention to evade the payment of stamp duty. As such on this ground alone the imposition of penalty on the petitioner cannot be said to be legally sustainable in the eyes of law. (Para 22 and 23)

Writ petition allowed. (E-1)

List of Cases cited:-

1. Surendra Singh & anr. Vs St. of U.P. & ors.; 2009 (27) LCD 442

2. Ram Khelawan @ Bachcha Vs St. of U.P. & anr.; 2005 All CJ 1899 U.P.

3. Gyan Prakash Vs St. of U.P. & ors.; 2019 (143) RD 185

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

1. Heard learned counsel for the petitioner and learned Standing Counsel for the respondents no. 1 to 4.

2. The instant petition has been filed praying for the following main reliefs:

"(i) issue a writ, order or direction in the nature of Certiorari quashing the impugned order dated 15.04.2005 passed by Respondent No. 3 and annexed as Annexure No.1 to the instant Writ Petition.

(ii) issue a writ, order or direction in the nature of Certiorari quashing the impugned order dated 26.02.2014 passed by the Respondent No. 2 and annexed as Annexure No. 2 to the instant Writ Petition.

(iii) Issue a writ, order or direction in the nature of mandamus commanding the respondents to refund the amount of Rs 1,64,675/- deposited by the petitioiner on 27.07.2005 through Treasury Challan-209(1) along with 12% compound interest from 27.04.2005 till the date of actual payment.

(iv) Issue a writ, order or direction in the nature of mandamus commanding the respondents not to proceed with recovery in pursuance of the aforesaid impugned order dated 26.02.2014 (as contained in Annexure-2 to this Writ Petition) or the impugned Order dated 15.04.2005 (as contained in Annexure-1 to this Writ Petition) and not to issue any consequential recovery notice/citation/certificate with respect to the land bearing Gata No. 81, Area:0.240 ½ Hectare, situated at Village Sohramau, Pargana Gausinda Parsanad, Tehsil Hasanganj, District Unnao."

3. The case set forth by the petitioner is that a plot of land was purchased by him through a registered sale deed on 10.09.2004. The land was registered as agricultural land in the revenue records and

consequently stamp duty at agricultural rates was paid. The petitioner claims to have received a show cause notice from the respondent no. 3 alleging evasion of stamp duty under the provisions of Section 47A of the Indian Stamp Act, 1899 (hereinafter referred to as the Act, 1899). It is contended that the proceedings were initiated against the petitioner on the basis of a report dated 04.10.2004 submitted by the Sub-Registrar, Hasanganj District Unnao, a copy of which is annexure 3 to the petition. The petitioner claims to have filed his reply to the show cause notice on 15.03.2005, a copy of which is annexure 7 to the petition, and the respondents no. 3 passed an order dated 15.04.2005, a copy of which is annexure 1 to the petition, whereby the petitioner had been required to pay a stamp duty of Rs 3,29,350/- alongwith penalty and interest. The penalty imposed upon the petitioner is Rs 1,64,675/-.

4. Being aggrieved the petitioner filed an appeal which has been rejected vide the order dated 26.02.2014, a copy of which is annexure 2 to the petition. Being aggrieved with both the orders, the instant petition has been filed.

5. Learned counsel for the petitioner contends that a perusal of the impugned order dated 15.04.2005 would indicate that the basis of the impugned order is the ex-parte report dated 04.10.2004 which had been submitted by the Sub-Registrar Hasanganj, District Unnao. It is contented that although the petitioner while filing his reply has indicated in paragraph 7 that on legal advice the trees standing on the plot in question could not be valued yet by no stretch of imagination can the same be said to be acceptance of the ex-parte report dated 04.10.2004.

6. He contends that the authority concerned while passing the impugned order dated 04.10.2004 has placed reliance on the said report and has not given any finding with respect to his own assessment while passing the order impugned by which the petitioner has been found to have paid less stamp duty and requiring the petitioner to pay stamp duty at the rates as indicated in the impugned order. He also contends that this aspect of the matter has not been considered by the appellate authority while rejecting the appeal filed by the petitioner.

7. Elaborating his argument learned counsel for the petitioner argues that though it is not mandatory for the competent authority to call for any information or record from any public office or for that matter any report while passing the order under the provisions of the Act, 1899 yet Rule 7(5) of the U.P. Stamp (Valuation of Property) Rules, 1997 (hereinafter referred to as the Rules 1997) specifically provides that an order is to be passed on the basis of an "inquiry' by the competent authority.

8. He contends that a perusal of the impugned order dated 15.04.2005 would indicate that no "inquiry' has been held as provided under the provisions of Rule 7(5) of the Rules 1997 and the sole basis of the order is the ex-parte report dated 04.10.2004 with which the petitioner was never confronted at any stage nor the said inspection was made in the presence of the petitioner.

9. Placing reliance on the judgement of this Court in the case of **Surendra Singh and another vs State of U.P. and others** reported in **2009 (27) LCD 442** wherein this Court had placed reliance on an earlier judgement of this Court in the case of **Ram**

Khelawan @ Bachcha vs State of U.P. and another reported in **2005 All CJ 1899 U.P**. to hold that though the report may be a relevant factor for initiation of proceedings under Section 47A of the Act, but it cannot be relied upon to pass an order under the aforesaid section in as much as the said report cannot form itself the basis of the order passed under Section 47A of the Act. He thus contends that keeping in view the law laid down by this Court in the case of **Surendra Singh (supra)** the impugned order merits to be quashed on this ground alone.

10. So far as the penalty imposed by means of the impugned order dated 15.04.2005 is concerned, reliance has been placed on the judgement of this Court in the case of **Gyan Prakash vs State of U.P. and others** reported in **2019 (143) RD 185** to contend that this Court has held that the sine qua non for imposition of penalty is the finding of the authority concerned of a deliberate attempt on the part of the purchaser or the person liable for payment of stamp duty, to have concealed the relevant facts in execution of the sale deed and the intention to evade payment of stamp duty. He contends that a perusal of the impugned order would indicate that no such findings have been arrived at by the competent authority while imposing the penalty and as such on this ground alone the imposition of penalty imposed upon the petitioner merits to be set aside.

11. On the other hand, learned Standing Counsel on the basis of the averments contained in the counter affidavit argues that a perusal of the reply that had been filed by the petitioner to the show cause notice would itself indicate that the petitioner had admitted the report and as such the authority concerned had no option but to place reliance on the report dated 04.10.2004 while passing the impugned order. He thus contends that as no objections were filed to the said report as such it cannot be said that the report was wrong and that the order impugned reflects non-application of mind and has not considered other material that might have been on record and as such there was no requirement of holding of any further "inquiry' as specified in Rule 7(5) of the Rules 1997.

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

13. From the arguments raised by learned counsel for the parties and from perusal of record it emerges that the land was purchased by the petitioner by means of a registered sale deed dated 10.09.2004. Proceedings were initiated against the petitioners under the provisions of the Act 1899 on the basis of a report dated 04.10.2004 which had been submitted by the authority which occasioned issuance of a show cause notice by the authority competent calling upon the petitioner to file his reply. The petitioner filed his reply in which he admitted that on account of legal advice the trees which were existing over the land could not be indicated. The authority concerned proceeded to pass the impugned order dated 15.04.2005 solely placing reliance over the report dated 04.10.2004 which was the basis of the initiation of the proceedings under the provisions of the Act 1899.

14. Perusal of the impugned order would indicate that no other material has been considered by the authority while passing the impugned order finding the petitioner to have paid less stamp duty and requiring the petitioner to pay the Stamp

Duty at a particular amount and also imposing penalty thereupon.

15. This Court in the case of **Surendra Singh (supra)** has held that a report on the basis of which proceedings was initiated against the provisions of the Act 1899 **may be relevant for initiation of proceedings but it cannot be relied upon to pass an order under the said Section** in as much as the said report cannot itself form basis of the order passed under Section 47A of the Act. For the sake of convenience, the relevant observation of this Court in the case of **Surendra Singh (supra)** are reproduced below:

"13. None of the authorities below besides the report of the Sub-Registrar has referred any other material in support of their orders. In Ram Khelawan @ Bachha v. State of U.P. through Collector, Hamirpur and another, 2005 (98) RD 511, it has been held that the report of the Tehsildar may be a relevant factor for initiation of the proceedings under Section 47A of the Act, but it cannot be relied upon to pass an order under the aforesaid section. In other words, the said report cannot form itself basis of the order passed under Section 47A of the Act. In the case of Vijai Kumar v. Commissioner, Meerut Division, Meerut, 2008 (7) ADJ 293 (para 17), the ambit and scope of Section 47A of the Act has been considered with some depth. Taking into consideration the Division Bench judgment of this Court in Kaka Singh v. Additional Collector and District Magistrate (Finance and Revenue), 1986 ALJ 49; Kishore Chandra Agrawal v. State of U.P. and others, 2008 (104) RD 253 and various other cases it has been held that under Section 47A(3) of the Act, the burden lay upon the Collector to prove that the market value is more than minimum as prescribed by the Collector under the Rules. The report of the Sub-Registrar and Tehsildar itself is not sufficient to discharge that burden."

16. Accordingly, when the impugned order dated 15.04.2005 is seen in the context of the law laid down by this Court in the case of **Surendra Singh (Supra)** what the Court finds is that the impugned order does not indicate about any other material having been considered by the authority concerned rather the very basis of the order impugned is the report dated 04.10.2004 which obviously cannot be relied upon while passing the impugned order.

17. At this stage the Court may also consider the provisions of Section 7(5) of the Rules 1997 which requires the competent authority to pass an order after making of an "inquiry' as specified under Rule 7 of the Rules 1997. For the sake of convenience Rule 7 of the Rules 1997 is quoted below:

"Rule 7. Procedure on receipt of a reference or when suo motu action is proposed under Section 47-A--

(1) On receipt of a reference or where action is proposed to be taken suo motu under Section 47-A, the Collector shall issue notice to parties to the instrument to show cause within thirty days of the receipt of such notice as to why the market value of the property set forth in the instrument and the duty payable thereon be not determined by him.

(2) The Collector may admit oral or documentary evidence, if any, produced by the parties to the instrument and call for and examine the original instrument to satisfy himself as to the correctness of the market value of the subject-matter of the

instrument and for determining the duty payable thereon.

(3) The Collector may:

(a) call for any information or record from any public office, officer or authority under the government or local authority;

(b) examine and record the statement of any public officer or authority under the Government or local authority;

(c) inspect the property after due notice to the parties to the instrument.

(4) After considering the representation of the parties, if any, and examining the records and other evidence, the Collector shall determine the market value of the subject matter of the instrument and the duty payable thereon.

(5) If, as a result of such inquiry, the market value is found to be fully and truly set forth and the instrument duly stamped according to such value, it shall be returned to the person who made the reference with a certificate to that effect. A copy of such certificate shall also be sent to the Registering officer concerned.

(6) If, as a result of such inquiry, the market value is found to be undervalued and not duly stamped, necessary action shall be taken in respect of it according to relevant provisions of the Act."

18. From a perusal of Rule 7 of the Rules 1997 it emerges that on receipt of reference or where action is proposed to be taken suo motu under Section 47A, the Collector shall issue a notice to the parties requiring them to show cause as to why the market value of the property set forth in the instrument and the duty payable thereon be not determined by him. The Collector may admit oral or documentary evidence, if any, produced by the parties to the instrument and may also call for and examine the original instrument to satisfy himself regarding the correctness of the market value of the subject matter of the instrument for determining the duty payable. The Collector may also call for information or records from any public office, officer or authority or examine and record the statement of any public officer or authority and inspect the property. It is after considering the representations of the parties and examining the records and other evidences that the Collector is to determine the value of the subject matter of the instrument and the duty payable.

19. Subsequently, if as a result of **such** "inquiry' as aforesaid, the market value is found to be correct then no action is required but if the instrument is found to be undervalued then necessary action has to be taken under the relevant provisions of the Act.

20. The word "inquiry' has been defined in Blacks Law Dictionary as under:

"A request for information, either procedural or substantive."

From a perusal of the definition clause as given in the Blacks Law Dictionary it emerges that an "inquiry' is a request for information either procedural or substantive.

21. In the instant case the entire action under the provisions of the Act 1899 has been initiated on the basis of the report dated 04.10.2004. The perusal of the impugned order dated 15.04.2005 would indicate that the Collector has not called for any information from any public office, has not examined and recorded the statement of any public officer and inspected the property after due notice to the parties. No other records or evidence have been examined by the competent authority as

would be apparent from the perusal of the impugned order. Thus, it is apparent that no "inquiry' as stipulated in Sub Rule (5) of the Rule (7) of the Rules 1997 has been held by the competent authority prior to passing the impugned order dated 15.04.2005 rather, as already indicated above, the basis of the impugned order is simply the ex-parte report dated 04.10.2004 which, as per the law laid down by this Court in the case of **Surendra Singh (supra)**, could not have been considered. Thus, this Court is constrained to hold that no inquiry having been conducted by the competent authority prior to passing the impugned order dated 15.04.2005, the order would be vitiated on this ground also.

22. So far as the imposition of penalty by means of the impugned order dated 15.04.2005 is concerned, this Court in the case of **Gyan Prakash (supra)** has held that the sine qua non for imposition of penalty is a finding to be recorded by the competent authority based on relevant materials that the purchaser or the person liable to pay stamp duty had concealed relevant facts in execution of the sale deed and had the intention to evade payment of stamp duty. For the sake of convenience, the relevant paragraphs of the judgement in the case of **Gyan Prakash (supra)** are reproduced below.

"38. The next aspect of the matter is the legality of the penalty which has been imposed upon the petitioner of Rs.50,000/-. In this regard, suffice would be to refer the judgment of this Court in the case of Varun Gopal vs State of U.P. and others 2015 (2) ADJ 311, wherein this Court has held as under:-

"29. Penalty can be imposed, if there is an attempt to evade stamp duty. Penalty presupposes culpability and an intention to conceal or to play fraud with authorities. Before imposing penalty, authorities must record finding based on relevant material that the purchaser or the person liable to pay stamp duty had concealed relevant facts in execution of sale deed and had intention to evade payment of stamp duty. (Asha Kapoor (Smt.) v. Additional Collector (Finance and Revenue), Ghaziabad16)."

39. Likewise this Court in the case of Smt. Sonia Jindal vs State of U.P. and others, in Writ C No.20357 of 2011 decided on 07.04.2011 has held as under:-

"There is no dispute with regard to power of the authorities under the Stamp Act to impose penalty to the extent of four times the deficiency in stamp duty. However, the question is as to what is the criteria for imposing penalty.

The purpose for imposing penalty in exercise of power under Section 47-A (4) of the Act is to dissuade persons from deliberately under valuing the instrument and from payment of insufficient stamp duty. The purpose is not to make good the loss caused due to non-payment/delay in payment of proper court fees, as the loss so caused to the exchequer has been taken ample care under Section 47-A (4-A) by requiring the person concern to pay simple interest @ 1.5% per month on the deficient stamp duty.

In the instant case, the petitioner is one time petty purchaser of immovable property and is not in business of real estate. She is not a property dealer and is not regularly purchasing or selling immovable properties. Thus, imposition of penalty upon her may not act as a deterrent to her as she is not likely to enter into any such transaction in future.

The authorities below have not recorded any finding that the petitioner has deliberately not set-forth the market

value of the property in the instrument and knowingly under valued the instrument to avoid payment of proper stamp duty. Merely for the reason that the stamp duty paid by her is found to be deficient can not by itself be a ground for imposing penalty, particularly, in the absence of any finding that there was intention to evade proper stamp duty.

Moreover, the power to impose penalty of an amount not exceeding four time the amount of the proper duty or the deficiency portion thereof is dependent upon the judicial discretion and can not be exercised in an arbitrary fashion. The authorities below have not assigned any reason for imposing penalty equivalent to the deficiency portion of the stamp duty. Therefore it can not be said to have been acted judicially.

In view of the above, the imposition of penalty can not be sustained."

40. From the aforesaid judgments, it clearly comes out that the sine qua non for imposition of the penalty is a finding to be recorded by the Collector based on the relevant material that the purchaser or the person liable to pay stamp duty had concealed the relevant facts in execution of the sale deed and had the intention to evade payment of the stamp duty.

41. In the instant case, a perusal of the impugned order dated 02.01.2015 indicates that no facts have been concealed by the petitioner while executing the sale deed. The fact of land being situated adjacent to national highway and a running petrol pump have duly been disclosed in the sale deed. Admittedly, the stamp duty has been affixed/paid at the agricultural rate for the said piece of land. In the entire order, there is no finding by the Collector as to how the petitioner concealed the relevant facts in execution of the sale deed and consequently in the absence of any such finding the imposition of penalty could not validly have been imposed and as such the imposition of penalty of Rs.50,000/- through the order dated 02.01.2015 is liable to be set-aside and accordingly is set-aside."

23. From a perusal of the impugned order dated 15.04.2005 it clearly emerges that the impugned order does not indicate nor records any finding by the competent authority that the purchaser had concealed relevant facts in execution of the sale deed and had the intention to evade the payment of stamp duty. As such on this ground alone the imposition of penalty on the petitioner cannot be said to be legally sustainable in the eyes of law and as such the impugned order merits to be set aside.

24. The aforesaid aspects of the matter have also not been considered by the appellate authority while dismissing the appeal of the petitioner vide the impugned order dated 26.02.2014.

25. Keeping in view the aforesaid discussions the petition deserves to be allowed and is **allowed**. The impugned orders dated 15.04.2005 and 26.02.14, copies of which are annexures 1 and 2 to the petition, are set aside.

26. The matter is remitted to the competent authority for passing of a fresh order in accordance with law after hearing all the parties concerned within a period of 6 months from the date of receipt of certified copy of this order.

27. Consequences to follow.

(2022) 11 ILRA 361
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.09.2022

BEFORE

THE HON'BLE AJAI TYAGI, J.

Application U/S 482 No. 7207 of 2022

Ritu Yadav & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Puneet Bhadauria

Counsel for the Opposite Parties:
G.A., Sri Ram Ashish Pandey

(A) Criminal Law - Indian Penal Code, 1860 - Sections 107 & 306 - The Code of Criminal Procedure, 1973 - Sections 156(3), 161 & 482 - Inherent power - at the stage of deciding the application u/s 482 Cr.P.C. mini trial is not permissible - when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence.(Para -20,24)

Suicide - Charge sheet, impugned cognizance , summoning order & entire proceedings - quashing of - role of applicant No.1 (wife of deceased) & applicant Nos.2, 3 & 4 (brothers & maternal uncle of applicant No.1) - distinguishable - applicant No.1 in some illicit relationship - perusal of suicide note and note writings of deceased - no iota of evidence against applicant Nos.2, 3 and 4 - no explicit or implicit role towards abetment - no offence under Section 306 IPC disclosed. **(Para-1 to 21)**

HELD:-In the absence of any specific allegation and material of definite nature or even prima facie in the FIR, statements of witnesses recorded during investigation, pointing out any such circumstances showing any such act or intention that applicant Nos.2, 3 and 4 intended to bring about the suicide of deceased, it would be travesty of justice to ask applicants to face the trial. Charge sheet, impugned cognizance and summoning order and entire proceedings quashed only against applicant No.2 ,3 & 4 and rejected to the extent of applicant No.1. **(Para-25 to 28)**

Application u/s 482 Cr.P.C. partly allowed. (E-7)

List of Cases cited:-

1. Geo Varghese Vs St. of Rajasthan & anr.,Criminal Appeal No.1164 of 2021 (S.L.P. (Crl.) No.4512 of 2019)

2. Arnab Manoranjan Goswami Vs St. of Maha. & ors., (2021) 2 SCC 427

3. Vaijnath Kondiba Khandke Vs St. of Maha. & anr., (2018) 7 SCC 433

4. St. of W.B. Vs Indrajit Kundu & ors., (2019) 10 SCC 188

5. S S Chheena Vs Vijay Kumar Mahajan & anr., 2010 (12) SCC 190

6. Ramesh Kumar Vs St. of Chhattisgarh, (2001) 9 SCC 618

7. Ude Singh & Ors. Vs St. of Har. Crl. Appeal No.233 of 2010

8. St. of U.P. & anr. Vs Akhil Sharda & ors., Criminal Appeal No.840 of 2022 with Criminal Appeal No.841 of 2022

9. St. of Karn. Vs L. Muniswamy & ors.

10. M/s.Zandu Pharmaceutical Works Ltd. & ors. Vs Mohd. Sharaful Haque & anr.,

11. Madhavrao Jiwajirao Scindia & anr. Vs Sambhajirao Chandrojirao Angre & ors.,

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

1. This application u/s 482 Cr.P.C. has been moved by applicants, namely, Ritu

Yadav, Sunil @ Guddu, Sachin @ Chhotu and Kamlesh Kumar challenging the charge sheet No.01 dated 18.01.2022 arising out of Case Crime No.419 of 2021, under Section 306 IPC, Police Station- Jaswant Nagar, District- Etawah and cognizance order passed by Additional Chief Judicial Magistrate, Court No.2, Etawah dated 15.02.2022 and entire proceedings of this case.

2. The brief facts giving rise to the aforesaid application are that a first information report was lodged at police station- Jaswant Nagar, District- Etawah on 03.10.2021 by opposite party No.2 Munni Devi with the averments that the marriage of his son Rahul Yadav was solemnized with Ritu Yadav in the year 2010. Ritu Yadav lived happily with her son only for some period. After that she started torturing her son. On 10.08.2021 Ritu Yadav, Sanjay @ Guddu, Sachin @ Chhotu, both son of Keshav Dayal and Kamlesh maternal uncle of Ritu Yadav tortured her son and scuffled with him. Aggrieved with the torture at the hands of the aforesaid persons her son Rahul Yadav has committed suicide on 24.08.2021 at about 11:00 am. During the course of investigation, a suicide note was recovered by investigating officer allegedly written by the deceased Rahul Yadav, which is enclosed as Annexure No.9. I.O. recorded the statements of witnesses under Section 161 Cr.P.C., inquest report was prepared and post mortem was conducted on the body of the deceased and post mortem report was prepared, in which ligature mark of 20cm x 01.5 cm size on the neck, above thyroid cartilage was shown as ante mortem injury. Cause of death was mentioned as asphyxia due to hanging.

3. After completion of investigation, investigating officer reached to the conclusion that the deceased had committed suicide and I.O. submitted charge sheet against all the applicants, namely, Ritu Yadav, Sunil @ Guddu, Sachin @ Chhotu and Kamlesh for the offence under Section 306 IPC. Learned Magistrate concerned took the cognizance on the aforesaid charge sheet on 15.02.2022 and summoned all the four accused persons for trial under Section 306 IPC. Aggrieved with submission of charge sheet and cognizance order, applicants moved this application under Section 482 Cr.P.C.

4. Heard Shri Puneet Bhadauria, learned counsel for the applicants, Shri Ram Ashish Pandey, learned counsel for opposite party No.2, Shri Mthilesh Kumar, learned AGA and carefully perused the record.

5. At the outset, learned counsel for the applicants submitted that applicant No.1 Ritu Yadav is wife of deceased Rahul Yadav, who has committed suicide, applicant Nos.2 and 3 are brothers of applicant No.1 and applicant No.4 is maternal uncle of applicant No.1 and no offence under Section 306 IPC is made out against any of the applicants. It is further submitted that after the death of deceased Rahul Yadav, his real brother Nishu Kumar son of Suresh Kumar informed the police of P.S. Jaswant Nagar, District- Etawah and his information was entered in G.D. of police station, which is annexed as Annexure No.3. Learned counsel for the applicants submitted that in aforesaid information, which is entered in G.D. on 24.08.2021 at 21:31, it is nowhere informed by Nishu Kumar that any of the applicants was responsible for the death of deceased and it is also specifically informed that wife of deceased had gone to house of her brothers in Delhi with children on 22.08.2021 on the eve of Raksha Bandan festival and his brother was alone in the

house. Learned counsel for the applicants vehemently submitted that the information provided by brother of deceased itself shows that at the time of alleged occurrence of suicide, applicants were not with him and wife of deceased had already gone to her brother's place in Delhi before two day. Hence, there was no reason or occasion on the part of the applicants to make any sort of abetment for compelling him to commit suicide. It is also submitted that the marriage of applicant No.1 and deceased was solemnized in the year 2011. Hence, the occurrence took place after 10 years of marriage.

6. Learned counsel for the applicants also submitted that as per averments of first information report, altercation of the deceased with applicants had taken place on 10.08.2021 while the death of the deceased occurred on 24.08.2021 i.e. after 14 days of the said altercation and first information report by mother of the deceased opposite party No.2 was lodged at police station on 03.10.2021 i.e. after nearly one and half months. This delay in lodging the FIR is nowhere explained by the prosecution.

7. Learned counsel for the applicants next submitted that in fact after the death of the deceased, his wife applicant No.1 on 22.09.2021 moved an application (Annexure No.4) against opposite party No.2 mother of the deceased and Nishu brother of the deceased under Section 156(3) Cr.P.C. for lodging FIR against them. On that application, learned court below called for report. Police submitted report on 28.09.2021 (Annexure No.5), in which it is specifically stated that after indepth inquiry, no evidence of abetment to commit suicide is surfaced. Consequently, the application moved by applicant No.1 u/s 156(3) Cr.P.C. was rejected vide order dated 06.10.2021 (Annexure No.6). Learned counsel for the applicants emphatically submitted that after rejection of aforesaid application u/s 156(3) Cr.P.C., first information report was lodged by opposite party No.2 to save skin of herself and her family and on the basis of false incident dated 10.08.2021, showing in FIR, all the applicants were implicated falsely.

8. Learned counsel for the applicants further submitted that first of all the brother of deceased Nishu Kumar did not disclose any fact with regard to the abetment on the part of the applicants, when he provided information of death of his brother to the police station, which is entered in G.D. Moreover, if for the sake of argument, the averments made in FIR are taken as true even then no case under Section 306 IPC is made. In the FIR a false incident of altercation between deceased Rahul Yadav and applicants is said to have taken place on 10.08.2021 and alleged suicide of Rahul Yadav was committed on 24.08.2021. There is nothing on record that in the interregnum period of 14 days any act of abetment is committed by any of the applicants. Apart from it, the information provided by Nishu Kumar to police station (Annexure No.3) goes to show that before two days of the death of the deceased, his wife had gone to Delhi with children on the occasion of festival of Raksha Bandan. Hence, it is admitted fact that at the time of death on 24.08.2021, none of the applicants was with the deceased.

9. Learned counsel for the applicants also submitted that a suicide note is left by the deceased, which is enclosed as Annexure No.9. Entry of suicide note is made in case diary. In entire suicide note, none of the applicants is made responsible by the

deceased. There is nothing in the suicide note to suggest that applicants were responsible for commission of suicide. Hence, on the basis of suicide note, no offence is made out against the applicants u/s 306 IPC and I.O. also has written in case diary (Annexure No.12) that nobody was held responsible by Rahul Yadav in his suicide note and nothing is written about his wife. Even then, the investigating officer submitted charge sheet against all the applicants u/s 306 IPC, which is result of poor investigation and it is abuse of process of law.

10. Learned counsel for the applicants lastly made legal argument that suicide was committed after 14 days of alleged occurrence in FIR dated 10.08.2021. Hence, there was no proximity of time and live link between the alleged occurrence within interregnum period of 14 days and there was no positive act on the part of the applicants, which can be termed as abetment. Apart from it, since it is admitted fact of prosecution that on 24.08.2021 applicant No.1 had gone to Delhi and was not with her husband, there cannot be any instigating act on the part of his wife. Hence, learned Magistrate had also taken cognizance without considering the aforesaid position of law. Hence, the submission of the charge sheet by investigating officer and impugned cognizance order passed by learned Magistrate are bad in the eye of law and liable to be quashed.

11. Learned counsel for the applicants relied on following judgements:-

(i) **Geo Varghese Vs. State of Rajasthan and another,** delivered by Hon'ble Supreme Court in Criminal Appeal No.1164 of 2021(arising out of S.L.P. (Crl.) No.4512 of 2019);

(ii) **Arnab Manoranjan Goswami Vs. State of Maharashtra and others,** (2021) 2 SCC 427;

(iii) **Vaijnath Kondiba Khandke Vs. State of Maharashtra and another** (2018) 7 SCC 433;

(iv) **State of West Bengal Vs. Indrajit Kundu and others** (2019) 10 Supreme Court Cases 188;

(v) **S S Chheena Vs. Vijay Kumar Mahajan and another** 2010 (12) SCC 190;

(vi) **Ramesh Kumar Vs. State of Chhattisgarh,** (2001) 9 SCC 618.

12. It is submitted by learned counsel for the applicants that in the aforesaid pronouncements, it is held that if there is harassment then mere harassment does not come within the purview of instigation. Learned counsel for the applicants submitted that for instigation, ingredients of Section 107 IPC should be there. In this present case, suicide of deceased had taken place after 14 days of the alleged occurrence dated 10.08.2021 in FIR and it is admitted fact on the day of suicide applicants were not there with the deceased, hence, there was no positive action on the part of the applicants, which is proximate to the time of the occurrence and ingredients of Section 107 IPC are not there.

13. Learned counsel for opposite party No.2 and learned AGA Shri Mithlesh Kumar submitted that although in suicide note (Annexure No.9) the deceased has not openly made responsible to any person by name for his death but in the background, it was mainly illicit relationship of his wife applicant No.1. Learned counsel for opposite party No.2 in this regard invited the attention of this Court towards a note written by deceased Rahul Yadav approximately before two years of his death, which is filed by way of counter affidavit by opposite party No.2 as

Annexure No.CA-2 and is part of case diary. It is clearly mentioned in this aforesaid note that his wife was having illicit relationship and she was not a lady of good character. Due to which the deceased was perturbed and that was a real abetment due to which, ultimately the deceased committed suicide. Learned counsel argued that it is not necessary that the act of abetment should be a single act, it may be a series of acts or it may be continuous abetment as in this case as the wife of deceased applicant No.1 was in illicit relationship that can be a continuous abetment for any husband. Hence, investigating officer has rightly submitted the charge sheet and learned court below has rightly taken cognizance and summoned the applicants for trial for the offence under Section 306 IPC. Learned counsel for opposite party No.2 and learned AGA submitted that at the stage of taking cognizance of the offence on submission of charge sheet, the court has to see whether any prima facie offence is made out against the accused or not and only prima facie offence is to be seen and the defence of accused is not to be considered at the stage of cognizance. Hence, there is no illegality or infirmity in the submission of the charge sheet and impugned order taking cognizance, which calls for any interference by this Court.

14. Section 306 of IPC makes abetment of suicide a criminal offence and prescribes punishment for the same. Abetment is defined under Section 107 of IPC which reads as under :-

"107. Abetment of a thing - A person abets the doing of a thing, who-

First.--Instigates any person to do that thing; or

Secondly.--Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly.--Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.--A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing. Explanation 2.--Whoever either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act."

15. The scope and ambit of Section 107 IPC and its co-relation with Section 306 IPC has been discussed repeatedly by Apex Court. In the case of **S.S.Cheena Vs. Vijay Kumar Mahajan and Anr.,** it was observed as under:-

"Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. The intention of the legislature and the ratio of the cases decided by the Supreme Court is clear that in order to convict a person under Section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and that act must have been intended to push the deceased

into such a position that he committed suicide."

16. In a recent pronouncement, a two-Judge Bench of the Apex Court in the case of **Arnab Manoranjan Goswami Vs. State of Maharashtra & Ors. 3**, while considering the co-relation of Section 107 IPC with Section 306 IPC has observed as under :-

*"47. The above decision thus arose in a situation where the High Court had declined to entertain a petition for quashing an FIR under Section 482 of the 14 (2014) 4 SCC 453 PART I 33 Cr.P.C. However, it nonetheless directed the investigating agency not to arrest the accused during the pendency of the investigation. This was held to be impermissible by this Court. On the other hand, this Court clarified that the High Court if it thinks fit, having regard to the parameters for quashing and the self restraint imposed by law, has the jurisdiction to quash the investigation —and may pass appropriate interim orders as thought apposite in law. Clearly therefore, the High Court in the present case has misdirected itself in declining to enquire prima facie on a petition for quashing whether the parameters in the exercise of that jurisdiction have been duly established and if so whether a case for the grant of interim bail has been made out. The settled principles which have been consistently reiterated since the judgment of this Court in State of Haryana Vs. Bhajan Lal (Bhajan Lal) include a situation where the allegations made in the FIR 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. This legal position was recently*reiterated in a decision by a two-judge Bench of this Court in Kamal Shivaji Pokarnekar vs. State of Maharashtra.

48. The striking aspect of the impugned judgment of the High Court spanning over fifty-six pages is the absence of any evaluation even prima facie of the most basic issue. The High Court, in other words, failed to apply its mind to a 15 1992 Supp. 1 SCC 335 16 (2019) 14 SCC 350 PART I 34 fundamental issue which needed to be considered while dealing with a petition for quashing under Article 226 of the Constitution or Section 482 of the CrPC. The High Court, by its judgment dated 9 November 2020, has instead allowed the petition for quashing to stand over for hearing a month later, and therefore declined to allow the appellant''s prayer for interim bail and relegated him to the remedy under Section 439 of the CrPC. In the meantime, liberty has been the casualty. The High Court having failed to evaluate prima facie whether the allegations in the FIR, taken as they stand, bring the case within the fold of Section 306 read with Section 34 of the IPC, this Court is now called upon to perform the task."

17. At this stage, this Court may also refer to another recent judgment of a two-Judge Bench of the Apex Court in the case of **Ude Singh & Ors. Vs. State of Haryana** on 25th July, 2019 passed in Crl. Appeal No.233 of 2010, which elucidated on the essential ingredients of the offence under Section 306 IPC in the following words:-

"16. In cases of alleged abetment of suicide, there must be a proof of direct or indirect act/s of incitement to the commission of suicide. It could hardly be disputed that the question of cause of a

suicide, particularly in the context of an offence of abetment of suicide, remains a vexed one, involving multifaceted and complex attributes of human behaviour and responses/reactions. In the case of accusation for abetment of suicide, the Court would be looking for cogent and convincing proof of the act/s of incitement to the commission of suicide. In the case of suicide, mere allegation of harassment of the deceased by another person would not suffice unless there be such action on the part of the accused which compels the person to commit suicide; and such an offending action ought to be proximate to the time of occurrence. Whether a person has abetted in the commission of suicide by another or not, could only be gathered from the facts and circumstances of each case.

16.1. For the purpose of finding out if a person has abetted commission of suicide by another; the consideration would be if the accused is guilty of the act of instigation of the act of suicide. As explained and reiterated by this Court in the decisions above-referred, instigation means to goad, urge forward, provoke, incite or encourage to do an act. If the persons who committed suicide had been hypersensitive and the action of accused is otherwise not ordinarily expected to induce a similarly circumstanced person to commit suicide, it may not be safe to hold the accused guilty of abetment of suicide. But, on the other hand, if the accused by his acts and by his continuous course of conduct creates a situation which leads the deceased perceiving no other option except to commit suicide, the case may fall within the four-corners of Section 306 IPC. If the accused plays an active role in tarnishing the self-esteem and self-respect of the victim, which eventually draws the victim to commit suicide, the accused may be held guilty of abetment of suicide. The question of mens rea on the part of the accused in such cases would be examined with reference to the actual acts and deeds of the accused and if the acts and deeds are only of such nature where the accused intended nothing more than harassment or snap show of anger, a particular case may fall short of the offence of abetment of suicide. However, if the accused kept on irritating or annoying the deceased by words or deeds until the deceased reacted or was provoked, a particular case may be that of abetment of suicide. Such being the matter of delicate analysis of human behaviour, each case is required to be examined on its own facts, while taking note of all the surrounding factors having bearing on the actions and psyche of the accused and the deceased."

18. In the backdrop of the circumstances and material on record of this case, the role of applicant No.1 (wife of the deceased) and applicant Nos.2, 3 and 4 (brothers and maternal uncle of applicant No.1) are distinguishable. Although the deceased has not named any person in suicide note to be held responsible for his act of suicide, yet it is logical to read the contention of suicide note in the light of writing notes by deceased, as filed by opposite party No.2 as Annexure No.CA-2 in his counter affidavit, which suggests that according to the deceased, his wife applicant No.1 was in some illicit relationship and this fact made him perturbed and ultimately led to commission of suicide. Hence, as a matter of fact, she had actively facilitated in the commission of suicide. What is required to constitute abetment of suicide under Section 306 IPC is that there must be an allegation of either direct or indirect act of incitement to the commission of offence of suicide. It is not always necessary that "a single act' should

constitute abetment. Abetment may be continuous by the conduct of abettor as seems in the case in hand. Every case should be examined on its own facts and circumstances and keeping in consideration the surroundings circumstances, which may have bearing on the alleged action of the accused and the pysche of the accused.

19. If this Court goes by the contents of suicide note in the light of note writings of deceased (Annexure No.CA-2) then it can be transpired that there was question of chastity of applicant No.1, which was hovering in the mind of the deceased and caused abetment continuously increasing with the passage of time. This Court is not agreeable with the argument advanced by the learned counsel for the applicants that no person is named in suicide note who can be held responsible for his death. Because whatever written in the suicide note depends upon the mental state of the person at the time of commission of suicide. Circumstances in the backdrop of the suicide note are subject to evidence which shall be led by the prosecution during the trial. Doors of evidence cannot be shut and opportunity of evidence leading to the circumstances of the death of the deceased should not be closed at the outset as in the case in hand where the contents of suicide notes and note writings of deceased, as discussed above, indicate that deceased had in so many words allegated applicant No.1, for his act to commit suicide. Hence, in the cases on which applicants have relied upon do not apply to the facts of this case at this stage because prosecution has yet to get opportunity to lead evidence.

20. Hon'ble Apex Court in Criminal Appeal No.840 of 2022 with Criminal Appeal No.841 of 2022 **State of Uttar Pradesh and another Vs. Akhil Sharda and and others** has recently held that at the stage of deciding the application u/s 482 Cr.P.C. mini trial is not permissible. Hence, the aforesaid legal position does not permit this court to quash the charge sheet, cognizance order and proceedings of this case against applicant No.1, who is wife of the deceased.

21. As far as the applicant No.2, 3 and 4 are concerned, this is admitted fact that applicant No.2 and 3 are brothers of applicant No.1 and applicant No.4 is her maternal uncle. With regard to applicant Nos.2, 3 and 4, there is no evidence on record which can show their involvement in the act of abetment. Combined perusal of the suicide note and note writings of deceased (Annexure No.CA-2) nowhere suggests that applicant No.2, 3 and 4 committed any act, either explicit or implicit, which can come within the purview of definition of abetment as contemplated under Section 107 IPC. If there is allegation in note writings of deceased against brothers of applicant No.1 that they had beaten the deceased or allegation by opposite party No.2 in FIR that on 10.08.2021, applicant Nos.2, 3 and 4 misbehaved and scuffled with the deceased, it cannot be said to be an act of abetment for committing suicide. Hence, there is no iota of evidence against applicant Nos.2, 3 and 4 even learned counsel for opposite party No.2 could not point out any explicit or implicit role of applicant Nos.2, 3 and 4 towards abetment.

22. The following observations made by the Hon'ble Apex Court in the case of **State of Karnataka Vs. L. Muniswamy & Ors.** may be relevant to note at this stage:-

"The whole some power under Section 482 CrPC entitles the High Court

to quash a proceeding when it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The High Courts have been invested with inherent power, both in civil and criminal matters, to achieve a salutary public purposes. A Court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. The Court observed in this case that ends of justice are higher than the ends of mere law though justice must be administered according to laws made by the legislature."

23. In the case of **M/s.Zandu Pharmaceutical Works Ltd. & Ors. Vs. Mohd. Sharaful Haque & Anr.,** Apex Court observed as under :-

"It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto."

24. Again in **Madhavrao Jiwajirao Scindia & Anr. Vs. Sambhajirao Chandrojirao Angre & Ors.,** Hon'ble Apex Court observed in paragraph 7 as under :-

"7. The legal position is well-settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."

25. Hence, in the absence of any specific allegation and material of definite nature, it would be travesty of justice to ask applicant Nos.2, 3 and 4 to face the trial. In the absence of any material or even prima facie in the FIR, statements of witnesses recorded during investigation, pointing out any such circumstances showing any such act or intention that applicant Nos.2, 3 and 4 intended to bring about the suicide of deceased Rahul Yadav, it would be absurd to even think that applicant Nos.2, 3 and 4 had any intention to place the deceased in such circumstances due to which he committed suicide.

26. In the light of above discussion, this Court finds no ground to continue the proceedings of this case against applicant Nos.2, 3 and 4 and put them on trial when no offence under Section 306 IPC is disclosed against them. Hence, no useful

purpose is likely to be served by allowing the criminal prosecution against them.

27. Hence, the charge sheet, impugned cognizance and summoning order and entire proceedings in pursuance thereof are hereby quashed only against the applicant No.2 Sunil @ Guddu Son of Keshav Dayal, Applicant No.3 Sachin @ Chhotu son of Keshav Dayal and Applicant No.4 Kamlesh Kumar son of Lal Singh Yadav.

28. Accordingly, this application u/s 482 Cr.P.C. is rejected to the extent of applicant No.1 Ritu Yadav and partly allowed with regard to Applicant No.2 Sunil, Applicant No.3 Sachin @ Chhotu and applicant No.4 Kamlesh Yadav.

(2022) 11 ILRA 370
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.11.2021

BEFORE

THE HON'BLE SAMEER JAIN, J.

Application U/S 482 No. 10465 of 2009

Lal Bahadur Mishra & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicants:
Sri Sumit Goyal

Counsel for the Respondents:
Govt. Advocate, Sri S.R. Verma

(A) Criminal Law - Indian Penal Code, 1860 - Sections 452, 323, 504 & 506 - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - criminal proceedings maliciously instituted with ulterior motives can be quashed while exercising the power under Section 482 Cr.P.C.(Para - 14)

FIR lodged by applicant No. 1 - against opposite party No. 2 and his family members - regarding death of his daughter - Section 156 (3) Cr.P.C. was dismissed on basis of malafide intention and ulterior motive - Applicants entered house of opposite party No. 2 - started beating him - intervention - returned back - abused and threatened - during investigation - allegation - in respect of house trespass and beating as well as of threatening - found false.**(Para - 16)**

HELD:-When during investigation, genesis of occurrence found false then ancillary incident cannot stand alone. Charge sheet filed only u/s 504 IPC & proceeding against applicants in pursuance of charge sheet is bad,is quashed. **(Para -16)**

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:-

1. St. of Haryana & ors. Vs Bhajan Lal & ors. , 1992 Supp (1) SCC 335

2. M/s. Neeharika Inrastructure Pvt. Ltd. Vs St. of Maha. & ors. ,AIR 2021 SC 1918

3. Vineet Kumar Vs St. of U.P. ,2017(5) ADJ 438 (SC)

(Delivered by Hon'ble Sameer Jain, J.)

1. Case called out in the revised list. None is present on behalf of the opposite party No. 2 even in the revised call.

2. Heard Sri Sumit Goyal, learned counsel for the applicants; Sri M.P.S. Gaur, learned AGA for the State-respondent and perused the record of the case.

3. The present Application u/s 482 Cr.P.C. was filed by the applicants for quashing the charge sheet and proceedings of Case No. 2507 of 2008 under Section 504 IPC, P.S. Barra, District Kanpur Nagar arising out of case crime No. 287 of 2007 pending before ACMM-Ist, Kanpur Nagar.

4. As per prosecution case, on 29.6.2007 FIR of the present case was lodged under Sections 452, 323, 504, 506 IPC at P.S. Barra, District Kanpur Nagar with the allegation that on 19.4.2006 at about 8 am in the morning, applicants entered in the house of opposite party No. 2 and started beating him and when neighbours intervened then they went back to their home after abusing and threatening him. After investigation, charge sheet against the applicants was filed only under Section 504 IPC. Learned Magistrate took cognizance on 2.5.2008 and issued summons to the applicants.

5. Learned counsel for the applicants contended that although initially FIR of the present case was lodged against the applicants under Sections 452, 323, 504, 506 IPC and during investigation, allegation in respect of Sections 452, 323, 506 IPC were found false and charge sheet against the applicants was submitted only under Section 504 IPC and, therefore, this fact clearly suggests that the FIR of the instant case was lodged against the applicants with malafide intention on false facts and without proper investigation, Investigating Officer submitted charge sheet against the applicants. He further contended that Section 504 IPC is non-cognizable offence, therefore, as per the explanation to Section 2(d) of Criminal Procedure Code, a charge sheet under Section 504 IPC could not be filed and neither cognizance could be taken on such charge sheet.

6. Learned counsel for the applicants further submitted that earlier on 19.4.2006, FIR was lodged by applicant No. 1 against the opposite party No. 2 and his family members under Sections 306, 504, 506 IPC in respect of death of his daughter and in this case opposite party No. 2 is facing trial. He next contended that earlier opposite party No. 2 also moved an application under Section 156(3) Cr.P.C. against the applicants in respect of the death of his own daughter of applicant No. 1, which was rejected on 11.6.2007 and after rejection of application moved under Section 156(3) Cr.P.C., opposite party No. 2 after two weeks filed FIR of the present case, on false facts.

7. Learned counsel for the applicants lastly argued that as per prosecution version, the present incident took place on 19.4.2006 while the FIR was lodged on 29.6.2007, thus, there is an inordinate delay of more than one year in lodging the FIR of the present case, therefore, on this ground alone, the impugned charge sheet as well as proceedings pending against the applicants, is liable to be quashed.

8. Per contra, learned AGA contended that prima facie FIR and the evidence collected by Investigating Officer during the course of investigation discloses offence under Section 504 IPC, therefore, neither charge sheet nor proceedings pending against the applicants should be quashed. He further contended that the charge sheet filed under Section 504 IPC can very well be treated as a complaint according to the explanation of Section 2(d) of Criminal Procedure Code and, therefore, taking cognizance on the charge sheet can very well be rectified by learned Magistrate. Learned AGA further submitted that merely on the ground of malafide intention a criminal proceeding cannot be quashed and neither delay in lodging the FIR is very material at this stage and, therefore, present application is devoid of merit and is liable to be dismissed.

9. I have given anxious consideration on the rival contentions advanced by learned counsel for the parties and perused the record of the case.

10. The scope of Section 482 Cr.P.C. has been very elaborately discussed by Hon'ble Supreme Court in case of ***State of Haryana and others Vs. Bhajan Lal*** and others reported in ***[1992 Supp (1) SCC 335]*** and in paragraph 102 enumearated 7 categories of the cases where power under Section 482 Cr.P.C. can be exercised which is quoted as follows:-

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156 (1) of the Code except under an order of a Magistrate within the purview of Section 155 (2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155 (2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

11. Very recently three Judge Bench of the Hon'ble Apex Court in ***M/s. Neeharika Inrastructure Pvt. Ltd. Vs. State of Maharashtra and others*** reported in ***[AIR 2021 Supreme Court 1918]*** also discussed the scope of Section 482 Cr.P.C. and Article 226 of Constitution of India in

very detail manner and in paragraph-23 arrived at final conclusion as under:

i) Police has the statutory right and duty under the relevant provisions of the Code of Criminal Procedure contained in Chapter XIV of the Code to investigate into a cognizable offence;

ii) Courts would not thwart any investigation into the cognizable offences;

iii) It is only in cases where no cognizable offence or offence of any kind is disclosed in the first information report that the Court will not permit an investigation to go on;

iv) The power of quashing should be exercised sparingly with circumspection, as it has been observed, in the "rarest of rare cases (not to be confused with the formation in the context of death penalty).

v) While examining an FIR/complaint, quashing of which is sought, the court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint;

vi) Criminal proceedings ought not to be scuttled at the initial stage;

vii) Quashing of a complaint/FIR should be an exception rather than an ordinary rule;

viii) Ordinarily, the courts are barred from usurping the jurisdiction of the police, since the two organs of the State operate in two specific spheres of activities and one ought not to tread over the other sphere;

ix) The functions of the judiciary and the police are complementary, not overlapping;

x) Save in exceptional cases where non-interference would result in miscarriage of justice, the Court and the judicial process should not interfere at the stage of investigation of offences;

xi) Extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice;

xii) The first information report is not an encyclopedia which must disclose all facts and details relating to the offence reported. Therefore, when the investigation by the police is in progress, the court should not go into the merits of the allegations in the FIR. Police must be permitted to complete the investigation. It would be premature to pronounce the conclusion based on hazy facts that the complaint/FIR does not deserve to be investigated or that it amounts to abuse of process of law. After investigation, if the investigating officer finds that there is no substance in the application made by the complainant, the investigating officer may file an appropriate report/summary before the learned Magistrate which may be considered by the learned Magistrate in accordance with the known procedure;

xiii) The power under Section 482 Cr.P.C. is very wide, but conferment of wide power requires the court to be more cautious. It casts an onerous and more diligent duty on the court;

xiv) However, at the same time, the court, if it thinks fit, regard being had to the parameters of quashing and the self-restraint imposed by law, more particularly the parameters laid down by this Court in the cases of R.P. Kapur (supra) and Bhajan Lal (supra), has the jurisdiction to quash the FIR/complaint;

xv) When a prayer for quashing the FIR is made by the alleged accused and the court when it exercises the power under Section 482 Cr.P.C., only has to consider whether the allegations in the FIR disclose commission of a cognizable offence or not. The court is not required to consider on merits whether or not the merits of the

allegations make out a cognizable offence and the court has to permit the investigating agency/police to investigate the allegations in the FIR;

xvi) The aforesaid parameters would be applicable and/or the aforesaid aspects are required to be considered by the High Court while passing an interim order in a quashing petition in exercise of powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India. However, an interim order of stay of investigation during the pendency of the quashing petition can be passed with circumspection. Such an interim order should not require to be passed routinely, casually and/or mechanically. Normally, when the investigation is in progress and the facts are hazy and the entire evidence/material is not before the High Court, the High Court should restrain itself from passing the interim order of not to arrest or "no coercive steps to be adopted" and the accused should be relegated to apply for anticipatory bail under Section 438 Cr.P.C. before the competent court. The High Court shall not and as such is not justified in passing the order of not to arrest and/or "no coercive steps" either during the investigation or till the investigation is completed and/or till the final report/chargesheet is filed under Section 173 Cr.P.C., while dismissing/disposing of the quashing petition under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India. xvii) Even in a case where the High Court is prima facie of the opinion that an exceptional case is made out for grant of interim stay of further investigation, after considering the broad parameters while exercising the powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India referred to hereinabove, the High Court has to give brief reasons why such an interim order is warranted and/or is required to be passed so that it can demonstrate the application of mind by the Court and the higher forum can consider what was weighed with the High Court while passing such an interim order.

xviii) Whenever an interim order is passed by the High Court of "no coercive steps to be adopted" within the aforesaid parameters, the High Court must clarify what does it mean by "no coercive steps to be adopted" as the term "no coercive steps to be adopted" can be said to be too vague and/or broad which can be misunderstood and/or misapplied.

12. As per the judgement of Hon'ble Apex Court in the case of Bhajan Lal (supra), seven categories have been narrated on the basis of which a proceeding under Section 482 Cr.P.C. can be quashed. As per category No. 7, a criminal proceeding which 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 then it can very well be quashed. These seven categories described in the case of Bhajan Lal (supra) have been approved by the Hon'ble Supreme Court in the case of M/s Neeharika Infrastructure (supra) in Conclusion No. XIV.

13. Hon'ble Apex Court in the case of ***Vineet Kumar versus State of U.P.*** reported in ***[2017(5) ADJ 438 (SC)]*** while quashing the entire criminal proceedings on the basis of category No. 7 enumerated in the case of Bhajan Lal (supra) observed in paragraph No.-39 as follows:-

39. Inherent power given to the High Court under Section 482 Cr.P.C. is with the

purpose and object of advancement of justice. In case solemn process of Court is sought to be abused by a person with some oblique motive, the Court has to thwart the attempt at the very threshold. The Court cannot permit a prosecution to go on if the case falls in one of the Categories as illustratively enumerated by this Court in State of Haryana V. Bhajan Lal. Judicial process is a solemn proceeding which cannot be allowed to be converted into an instrument of operation or harassment. When there are material to indicate that a criminal proceeding is manifestly attended with mala fide and proceeding is maliciously instituted with an ulterior motive, the High Court will not hesitate in exercise of its jurisdiction under Section 482 Cr.P.C. to quash the proceeding under Category 7 as

enumerated in State of Haryana Vs. Bhajan Lal, which is to the following effect:

"(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."

14. Therefore, it is very well settled that criminal proceedings maliciously instituted with ulterior motives can be quashed by this Court while exercising the power under Section 482 Cr.P.C.

15. In the present case, a FIR was lodged by the applicant No. 1 against the opposite party No. 2 and his family members regarding death of his daughter and for which opposite party No. 2 is facing trial and further on 11.6.2007, application moved by him against the applicants under Section 156 (3) Cr.P.C. was dismissed. Thus, it is apparent that O.P. No. 2 wanted to save his skin from the case registered by applicant No. 1 against him and his family members u/s 306 IPC in respect of the death of the daughter of applicant No. 1 and also wanted to drag applicants in that case and he with malafide intention and ulterior motive after more than one year, lodged the FIR of the present case. Therefore, on the ground of malicious prosecution, present application in view of category No. 7 of Bhajan Lal (supra) can succeed.

16. Further as per prosecution, applicants entered in the house of opposite party No. 2 and started beating him and on the intervention, they returned back and while returning, they abused and threatened him too. But during investigation, allegation in respect of house trespass and beating as well as of threatening was found false. Thus, in my considered view when during investigation, genesis of occurrence was found false then ancillary incident cannot stand alone. Therefore, chargesheet filed only u/s 504 IPC and proceeding against applicants in pursuance of that chargesheet is bad.

17. In the result, the present application u/s 482 Cr.P.C. is **allowed** and the impugned charge sheet as well as proceedings in Case No. 2507 of 2008 under Section 504 IPC, P.S. Barra, District Kanpur Nagar arising out of case crime No. 287 of 2007 pending before ACMM-Ist, Kanpur Nagar, is hereby **quashed.**

(2022) 11 ILRA 375
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.09.2022

BEFORE

THE HON'BLE SAMEER JAIN, J.

Application U/S 482 No. 11897 of 2022

Arun Pandey & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:

Sri Sudhanshu Pandey, Sri Ravi Kant Shukla

Counsel for the Opposite Parties:
G.A., Sri Dinesh Rai, Sri Maya Ram

(A) Criminal Law - Indian Penal Code, 1860 - Sections 352, 323 & 504 - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Section 2(d) - complaint - explanation to Section 2(d) Cr.P.C. - relates to investigation with regard to cognizable offences, in which, Investigating Officer is having power to investigate the matter - does not relate to investigation with regard to non cognizable offences, in which, investigation can only be carried after the order passed by the Magistrate under Section 155(2) Cr.P.C. - *explanation to Section 2(d) Cr.P.C. will be applicable only to those cases, in which, investigation was commenced for cognizable offences.* (Para -16)

Opposite party no.2 lodged NCR against applicants - application moved by opposite party no.2 under Section 155(2) Cr.P.C. - Magistrate directed to investigate the matter - charge-sheet submitted against applicants - charge-sheet discloses commission of non cognizable offences - court below took cognizance and issued summons to applicants - hence application.**(Para - 4,16)**

(B) The Code of Criminal Procedure, 1973 - FIR registered - after investigation, it appears that only non cognizable offences disclose - charge-sheet filed only with regard to non-cognizable offences - explanation to *Section 2(d) Cr.P.C. attracts* - court below shall deem charge-sheet as a complaint - police officer, who submitted charge-sheet will be deemed complainant. **(Para -16)**

(C) The Code of Criminal Procedure, 1973 - No FIR lodged - only non cognizable report registered - by order of Magistrate passed under Section 155(2) Cr.P.C. investigation conducted - charge-sheet submitted in respect of non cognizable offences - explanation to *Section 2(d) Cr.P.C. does not attract* - Magistrate will adopt general procedure of taking cognizance - no need to treat charge-sheet as complaint in view of explanation to section 2(d) Cr.P.C. **(Para -16)**

HELD:-N.C.R. lodged and after order of Magistrate passed under Section 155(2) Cr.P.C. investigation was conducted & charge-sheet was submitted and charge-sheet discloses commission of non cognizable offences. Explanation to Section 2(d) Cr.P.C. does not attract and in such matters Magistrate can take cognizance on basis of charge-sheet itself. No illegality in cognizance order. Prima facie offence made out against applicants. Enmity pending between parties proceeding pending against the applicants cannot be quashed as enmity is double edged weapon. **(Para - 19,20,21)**

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:-

Keshav Lal Thakur Vs St. of Bihar, (1996) 11 SCC 557

(Delivered by Hon'ble Sameer Jain, J.)

1. Short counter affidavit filed on behalf of the opposite party no.2 is taken on record.

2. Heard Sri Sudhanshu Pandey, learned counsel for the applicants, Sri Dinesh Rai, learned counsel for the opposite party no.2 and Dr. S.B. Maurya, learned AGA-I for the State.

3. By way of present application, applicants made prayer to quash the entire proceedings of R.N. No. 99 of 2021 (State Vs. Arun Kumar Pandey and others) arising out of N.C.R. No. 36 of 2020, under Sections 352, 323, 504 IPC, Police Station Oonj, District Bhadohi pending in the court of Judicial Magistrate-II, Bhadohi at Gyanpur as well as cognizance order dated 06.01.2021.

4. Filtering out unnecessary details, the necessary facts of the case are as:-

(i) On 15.05.2020 opposite party no.2 lodged a NCR against the applicants under Sections 352, 323, 504 IPC at Police Station Oonj, District Bhadohi vide NCR No. 36 of 2020 and on the application moved by opposite party no.2 under Section 155(2) Cr.P.C. Magistrate concerned directed to investigate the matter.

(ii) Pursuant to the order passed by Magistrate concerned under Section 155(2) Cr.P.C., investigation of the case was conducted and after investigation charge-sheet has been submitted against the applicants under Section 352, 323, 504 IPC and court below on 06.01.2021 took the cognizance and issued summons to the applicants.

5. Learned counsel for the applicants submitted that as charge-sheet in the present matter was submitted under Sections 352, 323, 504 IPC and all the offences are non-cognizable, therefore, in view of explanation to Section 2(d) Cr.P.C. cognizance order dated 06.01.2021 passed by the court below is bad. He further submitted that as per explanation to Section 2(d) Cr.P.C. if after investigation charge-sheet was submitted in respect to the non-cognizable offences then charge-sheet must be deemed to be a complaint and the police officer, who conducted the investigation shall be deemed to the complainant of the case, therefore, in such matters, proceeding can only be initiated as a complaint case but in the present matter the court did not treat the charge-sheet as a complaint and court below in routine manner took the cognizance on the charge-sheet and issued summons to the applicants, therefore, cognizance order dated 06.01.2021 is illegal.

6. Learned counsel for the applicants further submitted that the entire allegation made against the applicants in the NCR and in the statements of the witnesses are totally false and baseless and in fact applicants neither made any assault nor caused any injury. He further submitted that a dispute in respect of property is pending between the parties and in this regard a civil suit is also pending and only due to this reason opposite party no.2 implicated the applicants in the present matter, therefore, from this angle too charge-sheet filed against the applicants is bad.

7. Per contra, learned AGA and learned counsel for the opposite party no.2 submitted that there is no illegality in the summoning order dated 06.01.2021 as after perusing the entire documents available on record, court below took the cognizance and issued summons to the applicants and even if there is any irregularity in taking the cognizance then it does not vitiate the proceedings pending against the applicants. Learned AGA further submitted that from the perusal of the NCR and statements of witnesses including injured witnesses, the complicity of applicants reveals in the present matter and prima facie offences under Section 352, 323, 504 IPC are made out against them and there is also injury report of the injured on record thus there is no illegality in the charge-sheet submitted against the applicants. He further submitted that defence taken by the applicants cannot be appreciated at this stage.

8. I have heard counsel for the parties and perused the record of the case.

9. From the record, it reflects that on 15.05.2020 opposite party no.2 lodged a NCR under Sections 352, 323, 504 IPC against the applicants and after the order of Magistrate concerned passed under Section 155(2) Cr.P.C. investigation was conducted and charge-sheet was submitted against the applicants on 09.12.2020.

10. From the perusal of the charge-sheet dated 09.12.2020 it appears that it was filed against the applicants under Sections 352, 323, 504 IPC. Record further suggests that on the charge-sheet dated 09.12.2020, court below after perusing the case diary and other documents on record, on 06.01.2021 took the cognizance and issued summons to the applicants.

11. The charge-sheet of the present matter was submitted under Sections 352, 323, 504 IPC, thus it discloses commission of non-cognizable offences.

12. From the perusal of the cognizance and summoning order dated 06.01.2021 it reflects that court below on the basis of charge-sheet dated 09.12.2020 took the cognizance and did not treat the charge-sheet as complaint, therefore, question arises in view of explanation to Section 2(d) Cr.P.C. whether cognizance taken by the court below is in accordance with law.

13. Section 2(d) Cr.P.C. defines the complaint and its explanation prescribed the procedure if after investigation, charge-sheet discloses commission of non cognizable offences.

14. Section 2(d) Cr.P.C. runs as follows:-

"2 (d) complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation.- A report made by a police officer in a case which discloses, after investigation, the commission of a non- cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;"

15. From the perusal of the explanation of Section 2(d) Cr.P.C., it is apparent that if after investigation it reveals that only non cognizable offences disclose and thereafter in non cognizable offences a report is submitted under Section 173(2) Cr.P.C. then the court shall treat the charge-sheet as a complaint and the police officer who filed the report under Section 173(2) Cr.P.C. shall be deemed to be the complainant of the case.

16. Therefore, from the perusal of the explanation to Section 2(d) Cr.P.C. it is undoubtedly clear that it relates to investigation with regard to cognizable offences, in which, Investigating Officer is having power to investigate the matter and it does not relate to investigation with regard to non cognizable offences, in which, investigation can only be carried after the order passed by the Magistrate under Section 155(2) Cr.P.C. Therefore, if the FIR is registered and after investigation, it appears that only non cognizable offences disclose and charge-sheet is filed only with regard to non-cognizable offences then explanation to Section 2(d) Cr.P.C. attracts and in such cases the court below shall deem the charge-sheet as a complaint and

police officer, who submitted the charge-sheet will be deemed complainant but in cases where no FIR is lodged and only non cognizable report is registered and by the order of the Magistrate passed under Section 155(2) Cr.P.C. investigation is conducted and charge-sheet is submitted in respect of non cognizable offences then explanation to Section 2(d) Cr.P.C. does not attract and in such cases Magistrate will adopt the general procedure of taking cognizance and after taking cognizance on the charge-sheet may proceed further and in such cases there is no need to treat the charge-sheet as complaint in view of explanation to section 2(d) Cr.P.C.

17. The Apex Court in the case of **Keshav Lal Thakur Vs. State of Bihar (1996) 11 SCC 557** observed in paragraph no.3 en passant:-

"We need not go into the question whether in the facts of the instant case the above view of the High Court is proper or not for the impugned proceeding has got to be quashed as neither the police was entitled to investigate into the offence in question nor the Chief Judicial Magistrate to take cognizance upon the report submitted on completion of such investigation. On the own showing of the police, the offence under Section 31 of the Act is non cognizable and therefore the police could not have registered a case for such an offence under Section 154 Cr. P.C. of course, the police is entitled to investigate into a non-cognizable offence pursuant to an order of a competent Magistrate under Section 155 (2) Cr. P.C. but, admittedly, no such order was passed in the instant case. That necessarily means, that neither the police could investigate into the offence in question nor submit a report on which the question of taking cognizance could have arisen. ***While on this point, it may be mentioned that in view of the proviso to Section 2 (d) Cr. P.C., which defines 'complaint', the police is entitled to submit, after investigation, a report relating to a non-cognizable offence in which case such a report is to be treated as a 'complaint' of the police officer concerned, but that explanation will not be available to the prosecution here as that related to a case where the police initiates investigation into a cognizable offence - unlike the present one - but ultimately finds that only a non-cognizable offence has been made out."***

18. Thus, in view of **Keshav Lal Thakur (supra)** the explanation to Section 2(d) Cr.P.C. will be applicable only to those cases, in which, investigation was commenced for cognizable offences.

19. In case at hand, admittedly non cognizable report was lodged under Sections 352, 323, 504 IPC and after the order of the Magistrate passed under Section 155(2) Cr.P.C. investigation was conducted and charge-sheet was submitted under Section 352, 323, 504 IPC and charge-sheet discloses commission of non cognizable offences, therefore, in present matter explanation to Section 2(d) Cr.P.C. does not attract and in such matters Magistrate can take the cognizance on the basis of charge-sheet itself.

20. Therefore, from the above discussion, I find no illegality in the cognizance order dated 06.01.2021 passed by the court below.

21. Further, from the perusal of record it reflects that prima facie offence under Sections 352, 323, 504 IPC are made out against the applicants, therefore, on the

account of enmity pending between the parties proceeding pending against the applicants cannot be quashed as enmity is double edged weapon.

22. Therefore, from the discussion made above, I find no merit in the arguments advanced by learned counsel for the applicants.

23. Accordingly, the instant application is **dismissed**.

(2022) 11 ILRA 380
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.09.2022

BEFORE

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

Application U/S 482 No. 14869 of 2022

M/s Shriram Balaji Traders & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Durlabh Kumar Pandey, Sri Rajesh Chandra Dwivedi, Sri C.L. Pandey (Sr. Advocate)

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - Negotiable Instruments Act, 1881- Sections 138 &139 - The Code of criminal procedure, 1973 - Section 482 - Inherent power - complaint cannot be thrown at the threshold even if it does not make a specific averment with regard to service of notice on the drawer on a given date - when the facts have to be established by way of evidence - Court while exercising the powers under section 482 of Cr.P.C., cannot interfere with such proceedings. (Para -15,17)

Complaint under section 138 NI Act - Summoning order - quashing of - Disputed service of notice - cheque stolen - nothing on record to show cheque stolen - disputed questions of fact .

HELD:-Factum of disputed service of notice requires adjudication on the basis of evidence, which can only be done and appreciated by the trial court. No grounds for quashing of proceedings under section 138 of NI Act. - No illegality or infirmity in summoning order.**(Para -16,17,18)**

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:-

1. C.C. Alavi Haji Vs Palapetty Muhammed & anr., (2007) 6 SCC 555

2. Ajeet Seeds Ltd. Vs K. Gopala Krishnaiah, 2014 12 SCC 685

3. Bharat Barrel & Drum Manufacturing Company Vs Amin Chand Pyarelal, (1999) 3 SCC 35

4. Basalingappa Vs Mudibasappa ,(2019) 5 SCC 418

5. Ranjit Vs St. of U.P. & anr. , Application U/s 482 No. 47282 of 2019

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

1. Heard Mr. C.L. Pandey, Senior Advocate assisted by Mr. Durlabh Kumar Pandey, learned counsel for the applicants and Mr. Amit Singh Chauhan, learned AGA for the State and perused the records.

2. The present application under Section 482 Cr.P.C. has been filed to quash the summoning order dated 31.03.2021 as

well as the entire proceedings of Complaint Case No.5442 of 2020 (Sanjit Mishra Vs. M/s Shriram Balaji Traders), under Section 138 of Negotiable Instruments Act, 1881, pending in the Court of the Additional Civil Judge (J.D.)/ Judicial Magistrate, Jhansi.

3. Brief facts of the case are that the opposite party no.2 filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act') against the applicant with the allegation that the applicant having good relations with opposite party no.2, borrowed an amount of Rs. 4 lacs from the opposite party no.2 and to discharge his liability gave a cheque bearing No.264555 of State Bank of India, Branch Mandi Samiti, Jhansi of his firm M/s Shriram Balaji Traders having its account No.MCA 32292826933 dated 28.02.2020. The aforesaid cheque was presented before the District Cooperative Bank, Branch Manikchowk, Jhansi for encashment, however, the same was returned on 04.03.2020 without payment with a remark "other reasons". Thereafter, the opposite party no. 2 approached the applicant informing about the return of the check without payment and requested him to pay the amount as taken by him, on which, assurance was given by the applicant that he would contact the bank, after which, the opposite party no.2 may present the cheque for encashment. On the aforesaid verbal assurance, the cheque was presented for the second time on 07.02.2020 before the District Cooperative Bank, Branck Manikchowk, Jhansi for encashment, however, the same was returned on 09.03.2020 without payment. Thereafter, on 18.03.2020, a legal notice was sent to the applicant through advocate by registered post. Thereafter, as there was lockdown from 24.03.2020, therefore, the opposite party no.2 could not receive the information of postal details. After the lockdown was over, on 29.05.2020, the opposite party no.2 sent a letter to the senior postal superintendent, Jhansi enquiring about the service of notice and he was informed that the aforesaid notice has been served at the address mentioned on 19.03.2020. Thereafter, after the notice neither any amount was paid nor reply was submitted by the applicant, therefore, the present compliant has been filed on 18.06.2020. Subsequently, the learned Magistrate after recording the statement under Sections 200 and 202 Cr.P.C. summoned the applicant vide order dated 31.03.2021, under Section 138 of the Act.

4. Learned counsel for the applicants submits that the applicant no.2 had good relations with the opposite party no.2 and the opposite party no.2 was interested to purchase a portion of residential house of the mother of applicant no.2. In this regard, a registered agreement for sale was entered between the opposite party no.2 and mother of applicant no.2 on 08.10.2013. A sale deed was to be executed by the mother of applicant no.2 in favour of opposite party no.2 within a period of two years after payment of the consideration as agreed. As only Rs. 1,00,000/- was paid and rest of the amount could not be paid, therefore, by mutual understanding between the parties another registered agreement was executed between them on 07.10.2015. The opposite party no.2 did not pay the amount as agreed within the stipulated period, therefore, the present case has been instituted with *mala fide* intentions, in order to extract money from the opposite party no.2.

5. Learned counsel for the applicants further submits that as the opposite party no.2 used to come at the applicants' place, a

signed cheque was stolen from his drawer and the same has been used for filing the present case under Section 138 of N.I. Act, therefore, no proceedings under the relevant section of the Act is made out against the applicant. He further submits that the complaint does not mention the details as to how the opposite party no.2 managed Rs.4 lacs, to be given to the applicant. He further submits that though, the opposite party no. 2 has sent a notice dated 18.03.2020, but the service of notice has not been effected and, therefore, the complaint which has been filed on 18.06.2020, is not maintainable as the time period of 15 days cannot be calculated as to when the notice has been given to opposite party no. 2. Under the circumstances, pre-condition as contained under Section 138 N.I. Act has remained uncomplied with and, therefore according to him, proceedings are clearly not maintainable under the Negotiable Instruments Act, 1881. He further submits that there is no specific averment as to how the notice has been served upon the applicants, however, the summoning order has been passed in a mechanical manner without mentioned the mode/manner of service of notice. Hence, the same is liable to be quashed.

6. On the other hand, Mr. Amit Singh Chauhan, learned AGA for the State, submitted that it is not necessary to mention in the complaint that notice of demand was served on the accused on any given date. He further submits that once it is mentioned in the complaint that notice was dispatched under the registered cover, on the address of the accused which has not been stated to be incorrect, there would be a presumption in law with regard to service of notice. The summoning order passed by the concerned Magistrate is legal and just in the eyes of the law and at this stage, only a prima facie case is to be seen and the complaint cannot be thrown at the threshold.

7. So far as the other submission as raised by learned counsel for the applicant regarding stolen cheque, learned AGA submits that if the cheque was stolen, the applicant should have given information for the same to the Bank and also lodged an FIR regarding loss of the check. However, there is nothing on record to show that the cheque was stolen. Therefore, the learned Magistrate concerned has not committed any illegality in summoning the applicant. On the cumulative strength of the aforesaid, learned AGA for the State submits that the present application is liable to be dismissed.

8. I have carefully considered the submissions advanced by learned counsel for the parties and have also gone through the material available on record.

9. Before proceeding to consider the respective submissions of learned counsel for the parties, it is useful to extract the provisions of Section 138 of the Act, which is as under:-

"138. Dishonor of cheque for insufficiency, etc., of funds in the accounts:-

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honor the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that

bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:

PROVIDED that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation: For the purpose of this section, "debt or other liability" means a legally enforceable debt or other liability."

10. The aforesaid section deals with a cheque drawn by a person "for the discharge, in whole or in part, of any debt or other liability." The section does not say that the cheque should have been drawn for the discharge of any debt or other liability of the drawer towards the payee. Thus in complaint under Section 138 of N.I. Act, the Court has to presume that the cheque had been issued for a debt or liability. This presumption is rebuttable. However, the burden of proving that a cheque had not been issued for a debt or liability is on the accused. The applicant being holder of cheque and the signature appended on the cheque having not been denied by the Bank, presumption shall be drawn that cheque was issued for the discharge of any debt or other liability. The presumption under Section 139 is a rebuttable presumption. Before this Court refers to various judgments of the Apex Court considering Sections 118 and 139, it is relevant to notice the general principles pertaining to burden of proof on an accused especially in a case where some statutory presumption regarding guilt of the accused has to be drawn.

11. A Three Judges' Bench of the Hon'ble Apex Court in the case of ***C.C. Alavi Haji Vs. Palapetty Muhammed and Another, reported in (2007) 6 SCC 555***, has held as under:-

"14.Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement refused or not available in the house or house locked or shop closed or addressee not in station, due service has to be presumed. [Vide Jagdish

Singh Vs. Natthu Singh,3 [AIR 1992 SC 1604]; State of M.P. Vs. Hiralal & Ors.,4 [(1996) 7 SCC 523] and V.Raja Kumari Vs. P.Subbarama Naidu & Anr.,5 [(2004) 8 SCC 774]. It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved.

17.It is also to be borne in mind that the requirement of giving of notice is a clear departure from the rule of criminal law, where there is no stipulation of giving of a notice before filing a complaint. Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the Court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the Court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the G.C. Act and Section 114 of the Evidence Act. In our view, any other interpretation of the proviso would defeat the very object of the legislation. As observed in Bhaskaran case, if the "giving of notice" in the context of Clause (b) of the proviso was the same as the "receipt of notice" a trickster cheque drawer would get the premium to avoid receiving the notice by adopting different strategies and escape from legal consequences of Section 138 of the Act."

12. It is not necessary to aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, the service of notice is deemed to have been effected at the time, at which the letter would have been delivered in the ordinary course of business. In the judgment of the Apex Court in the case of ***Ajeet Seeds Ltd. vs. K. Gopala Krishnaiah,*** reported in ***2014 12 SCC 685,*** the Apex Court has held that absence of averments in the complaint about service of notice upon the accused is the matter of evidence. The paragraph nos. 11 and 12 of the said judgement are reproduced herein below:-

"10. It is thus clear that Section 114 of the Evidence Act enables the Court to presume that ***in the common course of natural events, the communication would have been delivered at the address of the addressee. Section 27 of the GC Act gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post.*** *It is not necessary to aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business.*

11. Applying the above conclusions to the facts of this case, it must be held that the High Court clearly erred in quashing the complaint on the ground that there was no recital in the complaint that the notice under Section 138 of the NI Act was served upon the accused. The High Court also erred in quashing the complaint

on the ground that there was no proof either that the notice was served or it was returned unserved/unclaimed. That is a matter of evidence. We must mention that in C.C. Alavi Haji, this Court did not deviate from the view taken in Vinod Shivappa, but reiterated the view expressed therein with certain clarification. We have already quoted the relevant paragraphs from Vinod Shivappa where this Court has held that service of notice is a matter of evidence and proof and it would be premature at the stage of issuance of process to move the High Court for quashing of the proceeding under Section 482 of the Cr.P.C. These observations are squarely attracted to the present case. The High Court's reliance on an order passed by a two-Judge Bench in Shakti Travel & Tours is misplaced. The order in Shakti Travel & Tours does not give any idea about the factual matrix of that case. It does not advert to rival submissions. It cannot be said therefore that it lays down any law. In any case in C.C. Alavi Haji, to which we have made a reference, the three-Judge Bench has conclusively decided the issue. In our opinion, the judgment of the two-Judge Bench in Shakti Travel & Tours does not hold the field any more."

13. Further the Apex Court in ***Bharat Barrel & Drum Manufacturing Company Vs. Amin Chand Pyarelal, reported in (1999) 3 SCC 35*** had considered Section 118(a) of the Act and held that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable and defendant can prove the non-existence of a consideration by raising a probable defence. In paragraph No.12 following has been laid down:-

"12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the

defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist....."

14. In its latest judgment, the Apex Court in the case of ***Basalingappa Vs. Mudibasappa reported in (2019) 5 SCC 418,*** specifically in paragraph nos. -23 and 24 has noticed as follows:-

"27. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the defendant-accused cannot be expected to discharge an unduly high standard of proof."

23. No evidence was led by the accused. The defence taken in the reply to the notice that cheque was stolen having been rejected by the two courts below, we do not see any basis for the High Court coming to the conclusion that the accused has been successful in creating doubt in the mind of the Court with regard to the existence of the debt or liability. How the presumption under Section 139 can be rebutted on the evidence of PW 1, himself has not been explained by the High Court.

24. The above Kishan Rao case was a case where this Court did not find the defence raised by the accused probable. The only defence raised was that cheque was stolen having been rejected by the trial court and no contrary opinion having been expressed by the High Court, this Court reversed the judgment of the High Court restoring the conviction. The respondent cannot take any benefit of the said judgment, which was on its own facts." *(Emphasis added)*

15. The matter regarding stolen cheque has already been dealt by this Court in the case of ***Ranjit vs. State of U.P. and another*** decided on 31.01.2020 passed in Application U/s 482 No. 47282 of 2019.

16. In view of the settled legal position, as noticed above, it is clear that the complaint cannot be thrown at the threshold even if it does not make a specific averment with regard to service of notice on the drawer on a given date. In the complaint itself, it has been mentioned about the letter of the senior postal superintendent, Jhansi, which goes to show that the notice has been served at the address mentioned on 19.03.2020, therefore, it cannot be said that the notice has not been served. The factum of disputed service of notice requires adjudication on the basis of evidence and the same can only be done and appreciated by the trial court.

17. As regards the submission made by learned counsel for the applicants regarding the facts that the cheque was stolen, the

Court is of the opinion that if the cheque was stolen, the applicant should have given information for the same to the Bank and also lodged an FIR regarding loss of the check. However, there is nothing on record to show that the cheque was stolen and the information regarding missing of cheque was also not given to the bank. However, after nearly one year, on 18.03.2022, when opposite party no.2 came to know about the said complaint under Section 138 of N.I. Act, he sent a letter to the bank regarding missing of check book, but neither the details of check has been mentioned nor any complaint has been made regarding the same earlier. All the submissions made by learned counsel for the applicant is disputed questions of fact. Therefore, when the facts have to be established by way of evidence, this Court while exercising the powers under section 482 of Cr.P.C., cannot interfere with such proceedings. Hence, no grounds are made out for quashing of the proceedings under section 138 of the Negotiable Instruments Act.

18. On the basis of discussions made herein above, this Court finds that there is no illegality or infirmity in the summoning order dated 31.03.2021 passed by the concerned court below. Therefore, no interference is required at this stage.

19. In view of the aforesaid, the application is, accordingly, **dismissed.**

(2022) 11 ILRA 387
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.09.2022

BEFORE

THE HON'BLE SAMEER JAIN, J.

Application U/S 482 No. 19772 of 2022

Moti Lal & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Ratnesh Kumar Jaiswal

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Section 498-A - Dowry Prohibition Act,1961 - Section 3/4 - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power, Section 204(2) - No summons or warrant *shall* be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed - mere non-compliance of the provisions of Section 204(2) Cr.P.C. would not vitiate further proceedings unless and until prejudice is caused or likely to be caused by not following the provisions. (Para -11,21)

Applicants summoned under Section 204(1) Cr.P.C. - summons issued without filing list of prosecution witnesses by opposite party no.2 (complainant) - trial of case at initial stage - till date applicants could not appear before court - pursuant to summoning order passed against them - if list of prosecution witnesses would be provided by opposite party no.2 (complainant) - on their appearance before court - it cannot be said, it would cause prejudice to them. **(Para - 10,22)**

(C) Words and phrases - *word 'may' or 'shall'* - mere use of word "may" or "shall" is not conclusive - it has to be decided according to the object and scheme of the Act and the contest and back ground against which the word has been used.(Para - 15)

HELD:-By non filing the list of witnesses by opposite party no.2 does not cause any prejudice to the applicants. Therefore, on the basis of non-compliance of Section 204 (2) Cr.P.C. neither proceedings pending against the applicants can be vitiated nor summoning order can be quashed. **(Para -23)**

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:-

1. Bachanan Devi & anr. Vs Nagar Nigam, Gorakhpur & anr. , 2008 (12) SCC 372

2. Dilip Kumar Basu Vs St. of W.B. & ors. , 2015 (8) SCC 744

3. Rosy & anr. Vs St. of Kerela, 2000 (2) SCC 230

(Delivered by Hon'ble Sameer Jain, J.)

1. Heard Sri Ratnesh Kumar Jaiswal, learned counsel for the applicants and Dr. S.B.Maurya, learned AGA-I, for the State.

2. The instant application has been moved on behalf of the applicants with the prayer to quash the entire criminal proceedings of Complaint Case No. 4 of 2019, under Section 498-A IPC and Section 3/4 Dowry Prohibition Act, pending in the court of Additional Civil Judge (Junior Division) Court No.5, Mirzapur as well as summoning order dated 30.9.2021.

3. The brief facts of the case for the purposes of present application are that opposite party no.2 is the wife of applicant no.3 and applicant no.1 is her father-in-law while applicant no.2 is her cousin father-in-law. Opposite party no.2 moved an application under Section 156(3) Cr.P.C. against the applicants on 11.10.2018 which was treated by the court below as a criminal complaint and after recording the statement of opposite party no.2 under Section 200 Cr.P.C. and her witnesses under Section 202 Cr.P.C. summons were issued against the applicants on 30.9.2021 under Section 498-A IPC and Section 3/4 Dowry Prohibition Act.

4. Learned counsel for the applicants submitted that he is pressing the instant application on the sole ground that without compliance of mandatory provisions of Section 204 (2) Cr.P.C. summons were issued against the applicants, therefore, summoning order dated 30.9.2021 is bad.

5. He draws the attention of the Court on the order sheet of the case which is annexed as Annexure-5 to the affidavit filed in support of the present application and submitted that the summoning order against the applicants was passed on 30.9.2021 and a week time was given to opposite party no.2 to provide the list of her witnesses. He further submitted that the order sheet dated 27.10.2021 shows that 26.11.2021 was the next date fixed and it was asked to opposite party no.2 to do pairvi, i.e., to provide the list of her witnesses and similar order was passed on 26.11.2021 and thereafter order sheet dated 16.12.2021, 14.2.2022 and 5.4.2022 shows that opposite party no.2 did not do any pairvi in this regard but in spite of that summons were issued and on 5.4.2022 bailable warrants were also issued against the applicants.

6. Learned counsel for the applicants next submitted that as per Section 204 (2) Cr.P.C. no summons or warrants shall be issued against the accused under section 204(1) Cr.P.C. until a list of prosecution witnesses has been filed and, therefore, he submitted that provisions of Section 204(2) Cr.P.C. is mandatory and no summons could be issued to applicants unless opposite party no.2 filed the list of her witnesses and, therefore, the entire proceedings as well as summoning order passed against the applicants is bad.

7. Per contra, learned AGA submitted that there is no illegality in the summoning

order issued against the applicants as provisions of Section 204 (2) Cr.P.C. is directory in nature and if the court below without complying the same issued summons to the accused persons, then it does not vitiate the proceedings. He further submitted that the list of witnesses at any time can be provided by opposite party no.2, the complainant,.

8. Learned AGA further submitted that applicants cannot said that due to non providing the list of witnesses by opposite party no.2 great prejudice would cause to them and, therefore, the instant application is liable to be dismissed.

9. I have heard learned counsel for both the parties and perused the record of the case.

10. Admittedly, applicants were summoned under Section 204(1) Cr.P.C., under Section 498-A IPC and Section 3/4 Dowry Prohibition Act although, it appears that summons were issued to them without filing the list of prosecution witnesses by opposite party no.2, the complainant. Therefore, the question arises whether on this ground proceedings pending against the applicants can be vitiated and summoning order would become illegal.

11. Section 204 Cr.P.C. deals with the issue of process and runs as follows:

"(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient
ground for proceeding, and the case appears to be-

(a) A summons-case, he shall issue his summons for the attendance of the accused, or

(b) A warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87."

12. As per Section 204 (2) Cr.P.C. unless a list of prosecution witnesses has been filed, no summons or warrants shall be issued against the accused under Section 204 (1) Cr.P.C.

13. Although, in Section 204 (2) Cr.P.C. the word"shall" is used but it does not mean that whenever there is a word"shall" has been used under any Act in respect of a provision then the provision will be mandatory one.

14. The Apex Court in the case of **Bachanan Devi and another Vs. Nagar Nigam, Gorakhpur and another** reported in **2008 (12) SCC 372** observed as:

"14. ".....Mere use of word 'may' or 'shall' is not conclusive. The question whether a particular provision of a statute is directory or mandatory cannot be resolved by laying down any general rule of universal application. Such controversy has to be decided by ascertaining the intention of the Legislature and not by looking at the language in which the provision is clothed. And for finding out the legislative intent, the Court must examine the scheme of the Act, purpose and object underlying the provision, consequences likely to ensue or inconvenience likely to result if the provision is read one way or the other and many more considerations relevant to the issue."

15. The Apex Court in the case of **Dilip Kumar Basu Vs. State of W.B. and others reported in 2015 (8) SCC 744** again observed that mere use of word "may" or "shall" is not conclusive and it has to be decided according to the object and scheme of the Act and the contest and back ground against which the word has been used.

16. Therefore, from the above judgments of the Apex Court, it is apparent that on the basis of mere word "may" or "shall", it cannot be conclusively held that "may" means directory and "shall" denotes mandatory provision rather it depends upon various factors, namely, object and scheme of the Act, the context and background against which the word "may" and "shall" has used and purpose and advantageous sought to be achieved by using these words.

17. No doubt, in Section 204(2) Cr.P.C. the word "shall" has been used by legislature but whether word 'shall' used in section 204(2) Cr.P.C. is mandatory or directory it can be decided only after considering the legislative intent coupled with the fact that whether any prejudice was caused to the accused by its violation. If any prejudice can be caused to accused by violation of section 204(2) Cr.P.C. then the provision is mandatory.

18. The legislative intent behind the provision of section 204(2) Cr.P.C. is only to provide the list of witnesses to the accused so as he can effectively defend himself during trial and this requirement can very well be fulfilled by the complainant at the time of appearance of accused before the trial court pursuant to the summons issued to him. Therefore, from the legislative intent provision of Section 204(2) Cr.P.C. appears to be non-mandatory.

19. Further, as complainant can provide the list of the witnesses to the accused at the time of his appearance before the trial court, therefore, it can not be said that non-compliance of the provisions of Section 204(2) Cr.P.C. causes prejudice to him as after obtaining the list of witnesses from complainant accused can effectively defend himself during trial. Therefore, from this angle too provision of Section 204(2) Cr.P.C. appears to be directory in nature.

20. The Apex Court in the case of ***Rosy and another Vs. State of Kerela, reported in 2000 (2) SCC 230*** in para-20 deduced certain principles with regard to Sections 200, 202 and 204 Cr.P.C. as under:

"20. Hence, what emerges from the above discussion is :

I. (a) Under Section 200 Magistrate has jurisdiction to take cognizance of an offence oa the complaint

after examining upon oath the complainant and the witnesses present;

(b) When the complaint is made in writing by a public servant acting or purporting to act in discharge of his official duties, the Magistrate need not examine the complainant and the witnesses.

(c) In such case Court may issue process or dismiss the complaint.

II. (a) The Magistrate instead of following the procedure stated above may, if he thinks fit, postpone the issue of process and hold inquiry for the purpose of deciding whether or not there is sufficient ground for proceeding against the person ac-cused. Such inquiry can be held by him or by the police officer or by other person authorised by him.

(b) However, where it appears to the Magistrate that the offence complained of is triable exclusively by the court of Sessions, the direction of investigation by the police officer is not permissible and he is required to hold inquiry by himself. During that inquiry he may decide to examine the witnesses on oath. At that stage, proviso further gives mandatory directions that he shall call upon the complainant to produce all his witnesses and examine them on oath. The reason obviously is that in a private complaint, which is required to be committed to the Sessions Court for trial, it would safeguard the interest of the accused and he would not be taken by surprise at the time of trial and it would reveal the version of the witnesses whose list is required to be filed by complainant under Section 204 (2) before issuance of the process,

(c) The irregularity or non-compliance thereof would not vitiate the further proceeding in all cases. A person complaining of such irregularity should raise objection at the earliest stage and he should point out how prejudice is caused or is likely to be caused by not following the proviso. if he fails to raise such objection at the earliest stage. he is precluded from raising such objection later."

21. From the perusal of the above judgment of the Apex Court it is undoubtedly clear that mere non-compliance of the provisions of Section 204(2) Cr.P.C. would not vitiate further proceedings unless and until prejudice is caused or likely to be caused by not following the provisions.

22. Admittedly, the trial of the case is at initial stage and even till date applicants could not appear before the court concerned pursuant to the summoning order passed against them and therefore, if list of prosecution witnesses would be provided by opposite party no.2, the complainant, on their appearance before the court concerned then from any corner it cannot be said, it would cause prejudice to them.

23. As already observed, provision of Section 204(2) Cr.P.C. is directory in nature and by non filing the list of witnesses by opposite party no.2 does not cause any prejudice to the applicants, therefore, on the basis of non-compliance of Section 204 (2) Cr.P.C. neither proceedings pending against the applicants can be vitiated nor summoning order can be quashed.

24. A Single Bench of this Court in Criminal Revision No. 2379 of 2018 in the case of **Surendra Kumar Tiwari Vs. State of U.P. and another,** decided on 10.8.2018 also discussed the issue in detail and in paragraph-9 observed as under:

"9. This court finds itself fully in agreement with the view taken by the

Bombay High Court in the above-mentioned Pramila Mahesh Shah's case in respect of the provision of Section 204 (2) and (3), that these are the provisions which are directory in nature and that the court would have to see whether breach of these provisions would cause any prejudice, which is required to be adjudged on the basis of the stage of proceedings in a particular case. At the initial stage if it is found that the accused has been summoned without providing him a copy of complaint and list of witnesses being relied upon by the complainant, the same can be directed to be provided to him within a reasonable time by the complainant as soon as the accused appears before court and that merely because the list of witnesses and a copy of complaint have not been provided as mentioned in the above provisions would by itself not vitiate the proceedings depending upon the stage of the proceedings..... "

25. Therefore, from the above discussions, I find no merit in the argument advanced by learned counsel for the applicants and the instant application is, accordingly, **dismissed.**

26. However, it would be appropriate to direct the trial court to provide a list of witnesses within a period of four weeks from the date of passing this order so as to applicants may contest the matter on merits.

(2022) 11 ILRA 392
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.09.2022 & 13.10.2022

BEFORE

THE HON'BLE GAJENDRA KUMAR, J.

Application U/S 482 No. 23383 of 2022

Amit Kumar Yadav & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Ashwani Kumar Mishra, Sri Swatantra Kumar Pandey

Counsel for the Opposite Parties:
G.A., Sri Gyan Prakash Dwivedi

(A) Criminal Law - Indian Penal Code, 1860 - Sections 498-A & 323 - Dowry Prohibition Act,1961 - Section3/4 - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power , matrimonial dispute between the husband and wife should be a quashed when the parties have resolved their entire dispute amongst themself through compromise - proceedings relating to matrimonial dispute can be quashed in exercise of power under Section-482 Cr.P.C. (Para -12)

Matrimonial dispute between husband and wife - charge sheet - quashing of - compromise – hence application u/s 482 Cr.P.C..

HELD:-Parties reached/arrived at compromise/ settlement. Conviction of opposite party remote and bleak. Continuation of the criminal proceeding despite settlement and compromise would amount to abuse of process of law.**(Para - 14,15)**

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:-

1. B.S. Joshi & ors. Vs St. of Har. & anr. , 2003 in Appeal (crl.) No.383 of 2003

2. Dr. Mohd. Ibrahim & ors. Vs St. of U.P. & ors., (2022) Law Suit (Alld) 104

3. Gian Singh Vs St. of Punj. & anr., (2012) 10 SCC 303

4. Narinder Singh & ors. Vs St. of Punj. & ors., (2014) 6 SCC 466

5. St. of M.P. Vs Laxmi Narayan & ors., (2019) 5 SCC 688

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

1. Heard Sri Ashwani Kumar Mishra, learned counsel for the applicant, Mr. Gyan Prakash Dwivedi, learned counsel for the opposite party No.2 and and Sri M.P.S. Gaur, learned AGA for the State.

2. The present Application U/S 482 Cr.P.C. has been filed with a prayer to quash the charge sheet No.484 of 2020 dated 29.09.2020 as well as summoning and cognizance order dated 30.07.2021 passed by the learned Additional Chief Judicial Magistrate-IV, Allahabad filed in Criminal Case No.322 of 2011 (State of U.P. Vs. Amit Kumar and others) arising out of Case Crime No.828 of 2019, under Sections 498-A and 323 of IPC and 3/4 of D.P. Act, Police Station-Dhoomanganj, District-Prayagraj, in view of the compromise dated 08.07.2022 executed between both the parties.

3. The brief facts of the case are opposite party No.2 (wife) had lodged an F.I.R. on 07.08.2019 under Sections 498-A, 323 IPC and Section 3/4 of D.P. Act against the applicants (Husband and his family members) alleging that marriage of applicant and opposite party No.2 was solemnized in the year 2015 with Hindu rites and rituals. From the wedlock of applicant No.1 and opposite party No.2, one baby girl was born, who is living with opposite party No.2 and the present applicant no.1. The applicants have not been satisfied with the dowry and they started beating and harassing her for non-fulfillment of additional demand of dowry. Due to refusal of demand of dowry by the opposite party No.2, applicants have beaten her, as a result, opposite party No.2 has received injuries on her body. The investigating officer after investigation has submitted charge sheet No.1 dated 29.09.2021 before the Court and the cognizance was accordingly taken on 30.07.2021. In the meanwhile, due to intervention of the relatives and well wishers of the family, opposite party No.2 and applicants have entered into compromise on 08.07.2022 outside the Court and started to live together as husband and wife along with their baby girl having no grievance with each other. The applicants have filed present Application u/s 482 Cr.P.C. to quash the charge sheet dated 29.09.2020, on the basis of compromise dated 08.07.2022. On the matter being taken up on 31.08.2022, the Court has proceeded to pass the following order:-

"Counter affidavit filed today is taken on record. Office is directed to register the same.

Heard Sri Ashwani Kumar Mishra, learned counsel for the applicants, Sri Gyan Prakash Dwivedi, learned counsel for opposite party no.2 and Sri Pankaj Srivastava, learned AGA for the State.

Learned counsel for the parties submit that the matrimonial dispute between applicant no.1 and opposite party no.2 has been settled amicably and they have decided to stay together as husband and wife.

In view of the above, let applicant no.1 and opposite party no.2 be present before this Court on the next date fixed.

Put up, as fresh, on 19.09.2022.

Till the next date of listing, no coercive action shall be taken against the applicants in Criminal Case No. 322 of 2011 arising out of Case Crime No. 828 of

2019 under sections 498-A, 323 I.P.C. and 3/4 D.P. Act, Police Station Dhoomanganj, District Prayagraj.

Learned counsel for the parties shall inform their respective clients about this order."

4. Learned counsel for the applicants submitted that proceeding of Criminal case under Sections 498-A, 323 IPC and Section 3/4 of D.P. Act be quashed as parties to dispute have entered into compromise which is evident from the compromise deed dated 08.07.2022 and which is on the record of the court below, a copy of which has been annexed as Annexure-4 to the instant application. He further submitted that applicant No.1 and opposite party No.2 along with their baby girl are living together. He further submitted that earlier opposite party no.2 had filed the application under Section 125 Cr.P.C. and complaint case No.1777 of 2019, under Section 12 of Domestic Violence Act, but due to compromise, opposite party no.2 had withdrawn the aforesaid cases; copies of the orders have been annexed as Annexue-5 to the present application. He further submitted that, in para-5 of his counter affidavit, learned Counsel for the opposite party No.2 has specifically stated that opposite party No.2 and applicant No.1 are peacefully living together as husband and wife having no grievance to each other and, as such, no useful purpose will be served to drag present proceeding further.

5. In support of his submissions, learned counsel for the applicants has placed reliance upon the following judgments, which reads as under:-

(1) B.S. Joshi & Ors vs State of Haryana & Anr. decided on 13 March, 2003 in Appeal (crl.) No.383 of 2003.

(2) Dr. Mohd. Ibrahim and others Vs. State of U.P. and others (2022) Law Suit (Alld) 104;

(3) Gian Singh Vs. State of Punjab and another (2012) 10 Supreme Court Cases 303;

(4) Narinder Singh and others Vs. State of Punjab and other (2014) 6 Supreme court cases 466 and

(5) State of Madhya Pradesh Vs. Laxmi Narayan and others (2019) 5 Supreme court cases 688.

6. In compliance of the order dated 31.08.2022, passed by a co-ordinate Bench of this Court, Mr. Amit Kumar Yadav (applicant no.1) and Smt. Mona Yadav (opposite party no.2) are present today before this Court, who are identified by Sri Gyan Prakash Dwivedi, learned counsel for the opposite party no.2.

7. On a query being made by the Court, Mr. Amit Kumar Yadav, applicant no.1 and Smt. Mona Yadav, opposite party no.2 have jointly stated that they are living peacefully together as husband and wife and giving this statement of their own free will and without any pressure.

8. Considered the submissions of learned counsel for the parties. On the point of compromise between the parties in criminal cases following case law will be relevant:

(i) B.S. Joshi & Ors vs State of Haryana & Anr. decided on 13 March, 2003 in Appeal (crl.) No.383 of 2003.

(ii) Gian Singh vs.State of Punjab and another (2012) 10 Supreme Court Cases 303

(iii) Narinder Singh and others Vs.State of Punjab and other (2014) 6 Supreme court cases 466

(iv) State of Madhya Pradesh vs. Laxmi Narayan and others (2019) 5 Supreme court cases 688.

9. In the case of B.S. Joshi **(Supra)** Hon'ble Supreme Court has held as follows:

"There is no doubt that the object of introducing Chapter XX-A containing Section 498A in the Indian Penal Code was to prevent the torture to a woman by her husband or by relatives of her husband. Section 498A was added with a view to punishing a husband and his relatives who harass or torture the wife to coerce her or her relatives to satisfy unlawful demands of dowry. The hyper-technical view would be counter productive and would act against interests of women and against the object for which this provision was added. There is every likelihood that non-exercise of inherent power to quash the proceedings to meet the ends of justice would prevent women from settling earlier. That is not the object of Chapter XXA of Indian Penal Code.

In view of the above discussion, we hold that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers under Section 482 of the Code."

10. In the case of Gian Singh **(Supra)** Hon'ble Supreme Court has held in para No.61 and 62 as follows:

"61. The position that emerges from the above discussion can be summarized thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz.: (i) to secure the ends of justice, or (ii) to prevent abuse of the process of any court. In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between thee a victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc.; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its

view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding.

62. In view of the above, it cannot be said that B.S. Joshi ,Nikhil Merchants and Manoj Sharma were not correctly decided. We answer the reference accordingly. Let these matters be now listed before the Bench(es) Concerned."

In the Case of Narinder Singh (supra) Hon'ble Supreme Court has held as follows in para No.29:

29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:

29.1. Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in a such cases would be to secure: (i) ends of justice, or (ii) to prevent abuse of the process of any court. While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not to be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for the offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases

would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore are to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delicate parts of the body, nature of weapons used, etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the Settlement and quash the criminal proceedings whereas in the latter case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge-sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come to a conclusion as to whether the offence under Section 307 IPC is committed or not a Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime."

In the case of State of Madhya Pradesh Vs. Laxmi Narayan (Supra) held as follows in para No. 15.1 to 15.4:

"15.1 That the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-

compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;

15.2. Such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;

15.3 Similarly, such power is not to be exercised for the offences under the special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender;

15.4 Offences under Section 307 IPC and the Arms Act etc. rwould fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paragraphs 29.6 and 29.7 of the decision of this Court in the case of Narinder Singh (supra) should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove"

11. Learned Counsel for both the parties are present before this Court and submitted that the charge sheet including the proceedings of the case be quashed on the basis of compromise entered into the parties.

12. Learned A.G.A. has no objection as parties to the dispute relating to matrimonial mater have entered into compromise.

13. Considering the facts of the present case as well as the principle of law laid down by Hon'ble Supreme Court as mentioned above, matrimonial dispute between the husband and wife should be a quashed when the parties have resolved their entire dispute amongst themself through compromise. There is another aspect of the case that F.I.R. has been lodged under Sections 498-A, 323 IPC and 3/4 D.P. Act, which will come under category specified **in para No.29.4 laid down by Hon'ble Apex Court in**

Narinder Singh (supra) and in category specified in para No.15.1 laid down by Apex Court in State of Madhya Pradesh vs. Laxmi Narayan and others (supra) regarding which proceedings relating to matrimonial dispute can be quashed in exercise of power under Section-482 Cr.P.C.

14. As parties have reached/arrived at compromise/settlement, and the same has also been verified by their being appeared in person in the Court so the conviction of opposite party is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

15. In view of the discussions made above, it would be unnecessary to drag these proceeding, as continuation of the criminal proceeding despite settlement and compromise would amount to abuse of process of law accordingly, the instant application under Section 482 Cr.P.C. is allowed on the basis of compromise dated 08.07.2022.

16. The proceeding of charge sheet No.484 of 2020 dated 29.09.2020 as well as summoning and cognizance order dated 30.07.2021 passed by the learned Additional Chief Judicial Magistrate-IV, Allahabad filed in Criminal Case No.322 of 2011 (State of U.P. Vs. Amit Kumar and others) arising out of Case Crime No.828 of 2019, under Sections 498-A and 323 of IPC and 3/4 of D.P. Act, Police Station-Dhoomanganj, District-Prayagraj including the entire proceedings of the case are hereby **quashed.**

Criminal Misc. Correction Application No.02 of 2022:-

1. Heard learned counsel for the parties.

2. The judgment and order dated 19.09.2022 will stand corrected as follows:-

3. In the 6th line of second paragraph and 5th line of 16th paragraph of the order dated 19.09.2022 in place of '2011' shall be read as **"2021".**

4. Accordingly, the correction application is **allowed.**

(2022) 11 ILRA 399
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.10.2022

BEFORE

THE HON'BLE DR. GAUTAM CHOWDHARY, J.

Application U/S 482 No. 29079 of 2022

Dr. Parvez Alam ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Sikandar B. Kochar

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 420 & 409 - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power -all powers necessary, which may also be incidental or implied, are available to the Magistrate to ensure a proper investigation in the matter in the sense of a fair and just investigation by the police, which power includes ordering of further investigation after submission of police report under Section 173 (2) Cr.P.C.(Para -6)

Complaint made by opposite party no.2 - against applicant - enquiry - applicant found guilty for charges pertaining to cheating, criminal breach of trust and misuse of college land - during course of trial - applicant moved an application for further investigation into the matter on the basis of documents adduced by him - application got rejected - hence before Court.**(Para -3)**

HELD:-Rejection of application for further investigation not sustainable. Further delay in concluding the trial should not stand in the way of further investigation if that helps the Court arrive at the truth and do real, substantial, and effective justice. Impugned order set aside. Matter remitted to Court below to consider and decide the matter afresh in accordance with law. **(Para -7,8)**

Application u/s 482 Cr.P.C. disposed of. (E-7)

List of Cases cited:-

Vinubhai Haribhai Malaviya & ors. Vs St. of U.P. & anr. , 2020 (3) SCC 228

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

1. Heard Sri Sikandar B. Kochar, learned counsel for the applicant, Sri Rajeshwar Singh and Sri J.P.S.Chauhan, learned A.G.A. for the State and perused the material on record.

2. The present application under Section 482 Cr.P.C. has been filed for quashing the order dated 28.07.2022 passed by learned Chief Judicial Magistrate, Bulandshahr in Criminal Case No. 5259 of 2020 (State Vs. Dr. Parvez Alam) arising out of Case Crime No. 0228 of 2020 under Sections 420, 409 I.P.C. Police Station Shikarpur, District Bulandshahr, whereby the application for further investigation of the matter on the basis of documents adduced by the applicant, has been rejected.

3. Brief facts of the case are that the applicant was the Manager of National Inter College, Shikarpur, District Bulandshahr w.e.f November 2017 till 2020, which institution is an aided institution upto High School and is unaided institution with respect to Class XI and XII. Initially a complaint was made by the opposite party no.2 against the applicant, in which, after enquiry, the applicant was found guilty for the charges pertaining to the cheating, criminal breach of trust and misuse of the college land, vide enquiry report dated 05.05.2020. On the basis of that enquiry report, the opposite party no.2 lodged a first information report dated 27.05.2020 against the applicant in Case Crime No. 0228 of 2020 under Sections 409, 420 I.P.C. The matter was entrusted for investigation which culminated in submission of charge sheet dated 15.10.2020, upon which cognizance was taken on 17.10.2020 and during the course of trial, the applicant moved an application for further investigation into the matter on the basis of documents adduced by him, however said application has been rejected vide order impugned dated 28.07.2022. It is this order, which is under challenge before this Court.

4. Learned counsel for the applicant submits that on the complaint filed by the opposite party no.2 the District Inspector of Schools, Bulandshahr conducted an enquiry, in which the applicant was found guilty, thereafter the matter was referred to the Joint Director (Education) Meerut, Zone, who issued a show cause notice to the applicant, which was specifically replied by the applicant and after considering the reply of the applicant, the Joint Director (Education), exonerated the applicant from the charges levelled against him. It is further contended that when the

applicant was discharged from the charges levelled against him, the applicant moved an application before the Senior Superintendent of Police, Bulandshahr as well as before the Investigating Officer of the Case Crime No. 0228 of 2020 to investigate the matter after considering the documents furnished by him, however the same was not considered during the investigation and charge sheet dated 15.10.2020 was submitted against the applicant under Section 409, 420 I.P.C. He further submits that the learned Magistrate while taking cognizance, failed to consider the factual and legal aspect of the matter and in a routine manner took cognizance upon the charge sheet. Thereafter, the applicant moved an application before the learned Court below to direct the Investigating Officer to further investigate the matter in light of the documents adduced by him, however the same has been illegally rejected by the learned Court below. Learned counsel has next argued that the very basis of lodging of the F.I.R. was the enquiry report dated 05.05.2020 wherein the applicant was found guilty, thereafter, the show cause notice was issued by Joint Director of Education, Meerut Zone, Meerut, which was replied by the applicant and after considering the reply, the applicant was exonerated from the charges levelled against him and therefore the basis for lodging of the FIR does not survive any more. The learned Magistrate ought to have considered the documents sought to be relied upon by the applicant so that justice may be done, therefore the impugned order is illegal, arbitrary and is liable to be quashed by this Court.

5. On the other hand, learned A.G.A. submits that after framing of charges against the applicant, the applicant moved an application only to linger on the trial, and thus the learned Court below has rightly rejected the application vide order impugned, which order is perfectly legal, just and proper and thus the same calls for no interference by this Court.

6. The Hon'ble Apex Court in the matter of ***Vinubhai Haribhai Malaviya and others Vs. State of U.P. and another reported in 2020 (3) SCC 228*** has held that all powers necessary, which may also be incidental or implied, are available to the Magistrate to ensure a proper investigation in the matter in the sense of a fair and just investigation by the police, which power includes ordering of further investigation after submission of police report under Section 173 (2) Cr.P.C. Relevant paragraphs of the aforesaid Judgement is quoted below:-

18. It is clear that a fair trial must kick off only after an investigation is itself fair and just. The ultimate aim of all investigation and inquiry, whether by the police or by the Magistrate, is to ensure that those who have actually committed a crime are correctly booked, and those who have not are not arraigned to stand trial. That this is the minimal procedural requirement that is the fundamental requirement of Article 21 of the Constitution of India cannot be doubted. It is the hovering omnipresence of Article 21 over the CrPC that must needs inform the interpretation of all the provisions of the CrPC, so as to ensure that Article 21 is followed both in letter and in spirit.

31. Hasanbhai Valibhai Qureshi v. State of Gujarat and Ors. (2004) 5 SCC 347 is an important judgment which deals with the necessity for further investigation being balanced with the delaying of a criminal proceeding. If there is a necessity for further investigation when fresh facts

come to light, then the interest of justice is paramount and trumps the need to avoid any delay being caused to the proceeding. The Court therefore held:

"11. Coming to the question whether a further investigation is warranted, the hands of the investigating agency or the court should not be tied down on the ground that further investigation may delay the trial, as the ultimate object is to arrive at the truth.

12. Sub-section (8) of Section 173 of the Code permits further investigation, and even dehors any direction from the court as such, it is open to the police to conduct proper investigation, even after the court took cognisance of any offence on the strength of a police report earlier submitted. All the more so, if as in this case, the Head of the Police Department also was not satisfied of the propriety or the manner and nature of investigation already conducted.

13. In Ram Lal Narang v. State (Delhi Admn.) [(1979) 2 SCC 322: 1979 SCC (Cri) 479 : AIR 1979 SC 1791] it was observed by this Court that further investigation is not altogether ruled out merely because cognizance has been taken by the court. When defective investigation comes to light during course of trial, it may be cured by further investigation, if circumstances so permitted. It would ordinarily be desirable and all the more so in this case, that the police should inform the court and seek formal permission to make further investigation when fresh facts come to light instead of being silent over the matter keeping in view only the need for an early trial since an effective trial for real or actual offences found during course of proper investigation is as much relevant, desirable and necessary as an expeditious disposal of the matter by the courts. In view of the aforesaid position in law, if there is necessity for further investigation, the same can certainly be done as prescribed by law. The mere fact that there may be further delay in concluding the trial should not stand in the way of further investigation if that would help the court in arriving at the truth and do real and substantial as well as effective justice. We make it clear that we have not expressed any final opinion on the merits of the case."

42. There is no good reason given by the Court in these decisions as to why a Magistrate's powers to order further investigation would suddenly cease upon process being issued, and an accused appearing before the Magistrate, while concomitantly, the power of the police to further investigate the offence continues right till the stage the trial commences. Such a view would not accord with the earlier judgments of this Court, in particular, Sakiri (supra), Samaj Parivartan Samudaya (supra), Vinay Tyagi (supra), and Hardeep Singh (supra); Hardeep Singh (supra) having clearly held that a criminal trial does not begin after cognizance is taken, but only after charges are framed. What is not given any importance at all in the recent judgments of this Court is Article 21 of the Constitution and the fact that the Article demands no less than a fair and just investigation. To say that a fair and just investigation would lead to the conclusion that the police retain the power, subject, of course, to the Magistrate's nod under Section 173(8) to further investigate an offence till charges are framed, but that the supervisory jurisdiction of the Magistrate suddenly ceases mid-way through the pre-trial proceedings, would amount to a travesty of justice, as certain cases may cry out for further investigation so that an innocent person is not wrongly arraigned as an accused or that a prima facie guilty person is not so left out. There is no warrant for such a narrow and restrictive view of the powers of the Magistrate, particularly when such powers are

traceable to Section 156(3) read with Section 156(1), Section 2(h), and Section 173(8) of the CrPC, as has been noticed hereinabove, and would be available at all stages of the progress of a criminal case before the trial actually commences. It would also be in the interest of justice that this power be exercised suo motu by the Magistrate himself, depending on the facts of each case. Whether further investigation should or should not be ordered is within the discretion of the learned Magistrate who will exercise such discretion on the facts of each case and in accordance with law. If, for example, fresh facts come to light which would lead to inculpating or exculpating certain persons, arriving at the truth and doing substantial justice in a criminal case are more important than avoiding further delay being caused in concluding the criminal proceeding, as was held in Hasanbhai Valibhai Qureshi (supra). Therefore, to the extent that the judgments in Amrutbhai Shambubhai Patel (supra), Athul Rao (supra) and Bikash Ranjan Rout (supra) have held to the contrary, they stand overruled. Needless to add, Randhir Singh Rana v. State (Delhi Administration) (1997) 1 SCC 361and Reeta Nag v. State of West Bengal and Ors. (2009) 9 SCC 129 also stand overruled.

7. In the instant case, the very basis of lodging of the F.I.R. against the applicant was the enquiry conducted by the concerned District Inspector of Schools, wherein the applicant was held guilty, later on, after submission of reply by the applicant before the Joint Director of Education Meerut Zone. Meerut, the applicant was exonerated from the charges levelled against him in the meantime, charge sheet was filed against the applicant and trial commenced. During the course of trial, the applicant moved an application with a prayer for further investigation, which has been rejected vide order impugned, which order, in the opinion of the Court, is not sustainable in view of the fact that there may be further delay in concluding the trial but that should not stand in the way of further investigation if that would help the Court in arriving at the truth and do real and substantial as well as effective justice.

8. Considering the aforesaid observations of Hon'ble Apex Court as well as the facts and circumstances of the case, the impugned order is set aside. The matter is remitted to the concerned Court below to consider and decide the matter afresh in accordance with law, preferably within a period of one month from the date of production of a certified copy of the order before it.

9. Learned counsel for the applicant undertakes that the applicant shall furnish a certified copy of the order before the concerned court below within 10 days from today.

10. It is made clear that this Court has not expressed any opinion on the merits of the case.

11. The instant application is accordingly disposed of.

(2022) 11 ILRA 403
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.09.2022

BEFORE

THE HON'BLE AJAI TYAGI, J.

Application U/S 482 No. 9643 of 2022
And
Application U/S 482 No. 5158 of 2022

Sanjay Kumar Gupta @ Sanjay Gupta ...Applicant

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Amrish Sahai

Counsel for the Opposite Parties:
G.A., Sri Aklank Kumar Jain, Sri Bhanu Pratap Dhakrey

(A) Criminal Law - Indian Penal Code, 1860 - Sections 120-B, 420, 467 & 471 - The Code of Criminal Procedure, 1973 - Sections 161 & 482 - Inherent power - Criminal liability is not vicarious liability - when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. (Para - 29,39)

Cognizance/Summoning order - quashing of - sanctioning housing loan to opposite party no.2 and his wife - Tripartite agreement executed among builder, borrower and Bank Manager - recovery citation against company - fact concealed by Branch Manager, applicant - false revenue report showing property "free from all encumbrances" prepared by applicant - no evidence on record - applicant not involved in the process of approval of project - no intention of applicant to cheat opposite party no.2 and his wife - Mens rea completely absent. **(Para - 1 to 36)**

HELD:-In the absence of any material on record, even prima facie, in the F.I.R. or statement of the informant, pointing out any such circumstances, showing any such act or intention that the applicants intended to cheat the opposite party no.2 and his wife and causing financial loss to them and in the absence of any specific allegations and material of definite nature, not imaginary or inferential one, it would be travesty of justice to ask the applicants to face the trial. Impugned summoning order and entire proceedings quashed only against applicants. **(Para - 40,41,43)**

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:-

1. Karn. Vs L. Muniswamy & ors., (1977) 2 SCC 699

2. M/s.Zandu Pharmaceutical Works Ltd. & ors. Vs Mohd. Sharaful Haque & anr. , (2005) 1 SCC 122

3. Madhavrao Jiwajirao Scindia & anr. Vs Sambhajirao Chandrojirao Angre & ors. , (1988) 1 SCC 692

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

1. Both these applications required to be decided together.

2. These applications u/s 482 Cr.P.C. have been filed seeking the quashing of summoning order dated 16.03.2021 and the entire proceedings of Misc. Case No.526 of 2020 (Abhishek Singh Vs. Prabhjeet Singh and Others), arising out of Case Crime No.501 of 2018, under Sections 120-B, 420, 467, and 471 I.P.C., Police Station Sector-49 Noida, District Gautam Budh Nagar, pending in the court of Additional Chief Judicial Magistrate-II, Gautam Budh Nagar.

3. In both the applications, applicants have challenged the cognizance/summoning order dated 16.03.2021 passed by Additional Chief Judicial Magistrate-II, Gautambudh Nagar, summoning the accused Prabhjeet Singh, Hanshraj Dinkar, Arjun Sharma, Subhashish Chaudhary and Sanjay Gupta for trial for the offences under Sections 120-B, 420, 467, 468, 471 I.P.C. after rejecting the final report no.01 of 2020, filed in pursuance of F.I.R. registered as Case Crime No.501 of 2018, which was lodged by opposite party no.2 against the accused persons.

4. Brief facts of the case giving rise to these applications are that a First Information Report was lodged by opposite party no.2 against the accused persons on

12.05.2018 with the averments that opposite party no.2 and his wife Smt. Laxmi Singh are allottee of Flat No. G 801 Tower-1 situated at plot no. GH-3 Sector 4C, Vasundhra, Ghaziabad. The aforesaid flat was allotted in favour of opposite party no.2 and his wife by builder M/S VXL Realtors Pvt. Ltd. (hereinafter referred to as "Company') having its office in New Delhi by letter no. AGB 0302 dated 30.10.2012. The owner of the company, Prabhjeet Singh told the opposite party no.2 that cost of flat is Rs.57,27,500/- for which loan shall be sanctioned by Bank of Maharashtra and there would be monthly installment of Rs.41,000/- per month. It was also assured by Prabhjeet Singh that this project is not disputed, possession of flat shall be delivered within one year and he took over the responsibility for getting the loan sanctioned by the Bank of Maharashtra, Sector 51, Noida, which has apporved his project.

5. Believing the statements made by Prabhjeet Singh, opposite party no.2 agreed and aforesaid plot was allotted to him on 30.10.2012. After that on this flat, bank sanctioned the loan of Rs.40 lacs on 22.12.2012 out of which Rs.38,10,000/- was transferred into the bank account of company by the bank vide draft no.678255 dated 10.01.2013. Opposite party no.2 had paid Rs.18 lacs as margin money and started paying the monthly installment of Rs.41,000/-. On 19.01.2018 U.P. Awas Evam Vikas Parishad and District Magistrate, Ghaziabad took-over the possession of building and sealed it, which was being constructed by Prabhjeet Singh, owner of the company, in which flat of opposite party no.2 was also situated. On 03.02.2018 when opposite party no.2 enquired, the fact came in the knowledge of opposite party no.2 that building which was being constructed by Prabhjeet Singh, was in dispute before allotment of flat.

6. U.P. Awas Evam Vikas Parishad was undertaking the proceedings of recovery of dues against Prabhjeet Singh, owner of the company, hence, directors of the company have cheated the opposite party no.2 in criminal conspiracy with the Manager of the Bank of Maharashtra. They have cheated the opposite party no.2 for Rs.66,21,000/- by way of fraud, forged documents and forged legal report. It was doubted that directors of the company in connivance with bank officers have cheated him and his wife by fabricating forged documents such as legal search report, no dues certificate etc.

7. After investigation, I.O. has submitted the final report alleging that dispute between the parties is of civil nature and no criminal liability is made out. Opposite party no.2 filed protest petition against the final report and learned Magistrate after hearing the parties, rejected the final report and summoned the accused persons namely, Prabhjeet Singh, Hansraj Dinkar, Arjun Sharma, Subhashish Chaudhary and Sanjay Gupta to face the trial.

8. Mainly aggrieved with the summoning order, both the applicants have filed separate applications under Section 482 of Cr.P.C. for quashing the impugned order and the entire proceedings of the case against them.

9. Heard Mr. Amrish Sahai, learned counsel for both the applicants, Mr. Bhanu Pratap Dhakray, learned counsel for the opposite party no.2 and learned A.G.A. for the State. Perused the record.

10. First of all, learned counsel for the applicant has submitted with regard to role

of applicant-Subhashish Chaudhary that applicant, Subhashish Chaudhary has been falsely implicated in the present case by opposite party no.2 and he was not involved in sanctioning the housing loan in question nor it was his job to sanction the housing loan. Housing loan has been sanctioned by Maha Retail Credit Hub, New Delhi (hereinafter referred to as "M.R.C.H.') and not by the branch of Bank of Maharashtra situated at Sector 51 Noida. Copy of sanction letter is annexed as Annexure No.3 to the application, which shows that there was no role of branch head in the process of sanctioning the housing loan. Loan file is forwarded by brach to M.R.C.H., New Delhi. After that, branch officer has no say in the process of sanctioning of loan.

11. It is also submitted that project of company, in which, opposite party no.2 and his wife booked the flat was already approved by the Bank of Maharashtra, therefore, there was no reason for appliant-Subhashish Chaudhary to verify the encumbrances on the project. It is mentioned in sanction letter that project is approved by the Bank. Apart from it, flat was allotted to opposite party no.2 by the builder on 30.10.2012, which is evident from the letter of allotment. After two months of allotment of flat, opposite party no.2 approached the bank for providing the housing loan. Opposite party no.2 approached the bank in the month of December, 2012, loan of Rs.40 lacs was sanctioned to him on 22.12.2012 by M.R.C.H. and not by the applicant, the then the manager of Bank of Maharashtra, Branch Sector 51, Noida. Opposite party no.2 himself informed the bank on 10.01.2013 the date of disbursal of loan that he had taken all the responsibility that may arise now or in future.

12. Opposite party no.2 started repaying the loan amount by monthly installment of Rs.41,000/- in terms of sanction letter. But later on, opposite party no.2 stopped the repayment of loan amount and he was issued legal notice on 05.01.2018, after that on 12.05.2018 the First Information Report was lodged by opposite party no.2 involving both the applicants, who had nothing to do with the sanctioning of housing loan.

13. It is further submitted by learned counsel for the applicant that in the meantime before lodgement of F.I.R., loan provided to opposite party no.2, became NPA and Branch Head filed recovery proceedings before the Debts Recovery Tribunal, Lucknow (in short "D.R.T., Lucknow") being Original Application No.222 of 2018 on 16.02.2018. The original application is still pending there. It is evident from Annexure No.11 that application was filed in D.R.T., Lucknow on 16.02.2018 and F.I.R. was lodged by opposite party no.2 on 12.05.2018 i.e. after three months of moving the debts recovery with the intention to stall the proceedings of recovery. It is also contended that Investigating Officer found no criminal liability during the course of investigation and found that dispute is of civil nature, hence, final report was submitted by I.O. on which protest petition was filed by opposite party no.2 and learned Magistrate rejected the final report and summoned the present applicants along with other co-accused persons for facing the trial.

14. Contention of applicant is that learned Magistrate did not apply judicial mind while summoning the applicants because applicant-Subhashish Chaudhary had no role in sanctioning the housing loan to opposite party no.2 and his wife. As far

as this fact is concerned that false legal search report was prepared by Subhashish Chaudhary, no such report was prepared nor it is on record. Learned Magistrate has wrongly summoned and concluded that Subhashish Chaudhary had cheated the opposite party no.2 and he was in any conspiracy with the builder and directors of the company. There is no such evidence against the applicant-Subhashish Chaudhary and he has been implicated to exert pressure for stalling the recovery of housing loan, which is public money.

15. So far as applicant-Sanjay Kumar Gupta @ Sanjay Gupta, it is submitted by learned counsel for the applicant that it is very surprising that he is made accused in F.I.R. by opposite party no.2 and more surprising that learned Magistrate also summoned him for facing the trial because the entire process of sanctioning the loan to opposite party no.2 and his wife had taken place in the month of December, 2012 and January, 2013 while the applicant-Sanjay Gupta joined in the branch of Sector 51 Noida in the year 2017. He was posted in Meerut in the year 2012 and on 24.05.2012 he was transferred by the bank to Bhopal Region. Transfer order is annexed as Annexure No.2 to the application and on 18.06.2012 he joined the office in Bhopal, joining letter is also annexed as Annexure No.2 to the application.

16. Learned counsel for the applicant has drawn the attention of this Court to the deputation order dated 09.06.2017 (Annexure No.3) by which the applicant-Sanjay Gupta was deputed as Chief Manager in branch of Sector 51, Noida with immediate effect, hence, it is amply clear that he came in the aforesaid branch on deputation on 09.06.2017 and after that permanently posted there as Chief Manager on 28.08.2017. It is also submitted that how an officer, who has joined the branch after more than four years of sanction of loan, can be held guilty. In fact, the recovery proceedings before the D.R.T., Lucknow were filed by applicant-Sanjay Gupta, therefore, to pressurise him for stalling the recovery proceedings, he was also made an accused in F.I.R. and learned Magistrate also without application of judicial mind and ignoring the aforesaid fact of his joining the branch in the year 2017, summoned him also for trial. Hence, summoning order against both the applicants is abuse of process of law and if the criminal proceedings against them are allowed to be continued will create great hardship to the applicants without their fault and without any evidence against them, therefore, criminal proceedings against them be quashed.

17. At the very outset, learned counsel for the opposite party no.2 has submitted that true facts of the matter are not argued by learned counsel for the applicant, in fact, applicant-Subhashish Chaudhary was Bank Manager when the housing loan was sanctioned to opposite party no.2 and being the Branch Manager he was actively involved in the process of sanctioning the loan. It is also submitted that builder was in nexus with the bank, the plot on which project of company was going on, was allotted to builder by U.P. Awas Evam Vikas Parishad on 19.11.2005. Builder did not pay the entire amount to U.P. Awas Evam Vikas Parishad and dispute between them had taken place in the year 2006. Builder made default in payment, several letters were issued to him by U.P. Awas Evam Vikas Parishad for demanding the amount, which was not paid by him and ultimately, on 31.12.2012 recovery citation was issued by U.P. Awas Evam Vikas

Parishad. Copy of recovery citation is annexed as Annexure CA-1.

18. It is also submitted by learned counsel for the opposite party no.2 that applicant-Subhashish Chaudhary was Bank Manager at the time of sanction of loan to opposite party no.2 and fact of recovery proceedings against the company was very well within the knowledge of Subhashish Chaudhary but he concealed this fact from opposite party no.2 and loan was sanctioned on disputed project. Tripartite agreement was executed among the builder, borrower and Bank Manager-Subhashish Chaudhary on behalf of bank. In this tripartite agreement, there is clause no.16 which says that "flat is free from all encumbrances, charges, liens, lis pendence, attachments, trusts, prior agreements, whatsoever or howsoever". In clause 17 it is also mentioned that there is no order of attachment by the Income Tax Authorities or any other authority under any law for the time being in force nor any notice of acquisition or requisition has been received in respect of the said property.

19. The tripartite agreement was executed among the parties on 10.01.2013 while the recovery citation against the company was already issued on 31.12.2012 but this fact was concealed by Branch Manager, applicant-Subhashish Chaudhary. A false revenue report showing the property "free from all encumbrances" was prepared by applicant Subhashish Chaudhary and loan was sanctioned to opposite party no.2 for grabbing his loan amount and for having wrongful gains.

20. It is further submitted by learned counsel for the opposite party no.2 that opposite party no.2 and his wife have challenged the aforesaid recovery proceedings in D.R.T., Lucknow by way of filing counter claim being Counter Claim No.02 of 2018, which is still pending for adjudication and compensation is also demanded because applicant Subhashish Chaudhary concealed important and substantial information from opposite party no.2.

21. Applicant-Subhashish Chaudhary has put his signature on agreement, hence, he cannot withdrawn himself from the terms and conditions of the aforesaid agreement. Demand draft of loan amount was directly transferred by applicant-Subhashish Chaudhary in the account of the company without handing over the possession or sale deed of flat on which loan was sanctioned. On 31.12.2012 recovery was standing against the builder/company, hence, applicant-Subhashish Chaudhary being the signatory on agreement, is fully responsible towards the loss and hard-earned money of opposite party no.2 because agreement was forged, fabricated and it was prepared so with the conspiracy between the bank and the builder.

22. Applicant-Sanjay Gupta was manager when false recovery proceedings were initiated by the bank in D.R.T., Lucknow and no action was initiated by him against erring employees of the bank.

23. In this way, both the applicants were in criminal conspiracy with the builder and they have also cheated the opposite party no.2 with the help of false and forged documents. Investigating Officer has submitted final report, which was result of wrong and poor investigation. The dispute between the parties is not of civil nature and learned Magistrate has rightly rejected the final report and

summoned both the applicants for trial along with other co-accused persons on the basis of protest petition.

24. Learned A.G.A. has submitted that there is no illegality, impropriety and incorrectness in the impugned order under challenge and also there seem to be no abuse of court's process.

25. The allegations against the applicant-Subhashish Chaudhary is that project of the company was not clear and free from all encumbrances at the time of sanction of housing loan to opposite party no.2 and this fact was well within the knowledge of applicant-Subhashish Chaudhary but this fact was not disclosed by him to opposite party no.2 and all the information regarding this fact pertaining to the recovery proceedings by U.P. Awas Evam Vikas Parishad were withheld by him. Applicant-Subhashish Chaudhary was actively involved in this crime for his personal gain and causing wrongful loss to opposite party no.2 and his wife. These allegations are levelled against the applicant-Subhashish Chaudhary on the basis of tripartite agreement among the builder, borrower and bank manager because applicant-Subhashish Chaudhary is signatory on this agreement.

26. First of all, it is to be examined by this Court whether applicant-Subhashish Chaudhary had any role in sanctioning the housing loan to opposite party no.2 and his wife. It is the case of applicant-Subhashish Chaudhary that branch manager is not sanctioning authority of housing loan and loan was sanctioned by Zonal Office of Bank of Maharashtra called as M.R.C.H., New Delhi through central processing mechanism, hence, loan in question to opposite party no.2 was also sanctioned by M.R.C.H., which is crystal clear from Annexure No.3 to the application, which is sanction letter for housing loan. This sanction letter is signed by Assistant General Manager, Assest Branch, New Delhi on behalf of M.R.C.H., meaning thereby that the applicant-Subhashish Chaudhary did not sanction the loan.

27. Now, question remains of dispute and recovery proceedings against company by U.P. Awas Evam Vikas Parishad. This is the allegation by the opposite party no.2, being the Branch Manager, applicant-Subhashish Chaudhary was having knowledge of this fact but this fact was concealed by him and agreement was executed by him with false clauses, demonstrating the project free from all encumbrances. In this regard, perusal of sanction letter goes to show that on its second page, there is column "legal search charges" in which it is mentioned N.A. (Not Applicable) and further it is mentioned "Project is approved by bank". It means that the project of the company, in which opposite party no.2 was allotted a flat, was approved by the bank, hence, when the project was already approved by the bank, the applicant-Subhashish Chaudhary was not supposed to prepare the revenue report as alleged by opposite party no.2, which is also not on the record of this Court.

28. It is alleged in para no.5 of counter affidavit that applicant-Subhashish Chaudhary, Bank Manager has prepared the false revenue report showing the property free from all encumbrances. No report is place on record, hence, it cannot be opined that applicant-Subhashish Chaudhary prepared any false revenue report, more so, it was not required on his part because the sanction letter shows that

project was approved by the bank. If the project was wrongly approved by the bank then the employees/officers who were responsible for approving the project may be held responsible but not the applicant-Subhashish Chaudhary because project was already approved when he signed the tripartite agreement on behalf of the bank on the instructions of sanction letter by M.R.C.H. because documentation was directed in the aforesaid sanction letter vide condition no.7. In this way, applicant - Subhashish Chaudhary became signatory on agreement on behalf of bank because he was only executant of documents.

29. Since the project was already approved by the bank and if it was wrongly approved then also applicant-Subhashish Chaudhary cannot be held liable because there is no such evidence on record that he was in any way involved in the process of approval of the project. Criminal liability is not vicarious liability and Subhashish chaudhary cannot be held vicariously liable if some other bank officers/employees have approved the housing project wrongfully or illegally. Learned Magistrate held him liable and summoned on the basis of tripartite agreement but learned Magistrate lost sight from the fact that he was only executant of the documents on behalf of the bank under instructions of M.R.C.H., which is a central processing unit of loan.

30. Learned Magistrate also lost sight from the fact that loan was sanctioned by the aforesaid M.R.C.H. and project was already approved by the bank as per the sanction letter. Moreover, learned Magistrate has committed grave error in impugned order by holding that the recovery proceedings at the behest of U.P Awas Evam Vikas Parishad against the project was in the knowledge of bank manager and it seems that fraud has been played upon opposite party no.2 with the conspiracy. This finding of learned Magistrate is without any evidence on record.

31. As discussed above, when the project was already approved by the bank, bank manager was not supposed to make due diligence. In the conclusion of impugned order also, learned Magistrate has opined that all the accused persons have cheated the opposite party no.2 i.e. complainant of F.I.R, deliberately in connivance and conspiracy with bank employees but role of bank officers is not assessed by learned Magistrate in right perspective because he did not take into consideration, the fact that loan was sanctioned by M.R.C.H. and project was already approved by the bank.

32. At the same time, the argument of opposite party no.2 is unsustainable that loan amount was directly transferred by the bank in the account of the company without giving possession of the flat to opposite party no.2 or execution of sale deed because the amount of loan is transferred by the bank in the account of agency/authority from which the goods or property is being purchased by the borrower. Opposite party no.2 and his wife have signed the receipt for amount of loan (Annexure No.5), in which it is clearly mentioned that draft is prepared in favour of the company. There is absolutely no evidence against the applicant-Sanjay Kumar Gupta, the loan was disbursed to opposite party no.2 by the bank in the month of January, 2013, when the applicant-Sanjay Kumar Gupta was posted in Bhopal and he has joined in the concerned branch of the bank i.e .Sector 51, Noida in the year 2017 after more than

four and half years of sanctioning of the loan. Office order of the bank dated 24.05.2012 (Annexure No.2) is the order of transferring him from Meerut to Bhopal and there is another office order of Bank of Maharashtra, Zonal Office Bhopal, which shows that applicant-Sanjay Kumar Gupta had reported at Zonal Office, Bhopal on 18.06.2012. Annexure No.3 goes to show that applicant-Sanjay Kumar Gupta was deputed as Chief Manager of the branch situated at Sector 51, Noida on 09.06.2017, meaning thereby, before 09.06.2017 the applicant-Sanjay Kumar Gupta was not posted in the aforesaid branch and at the time of entire process of disbursal of loan, the applicant-Sanjay Kumar Gupta was posted in Bhopal. Hence, he was not having any role in disbursal/sanction of loan amount to opposite party no.2. Learned Magistrate very strongly lost sight of this fact also.

33. Learned Magistrate has considered the statement of informant Abhishek Singh, recorded under section 161 of Cr.P.C in the impugned order but did not consider it with judicial mind. It is stated by informant in the statement recorded under Section 161 Cr.P.C that when the project was sealed due to default in payment by the builder to U.P. Awas Evam Vikas Parishad then he (opposite party no.2) demanded loan amount back from applicant-Sanjay Kumar Gupta and applicant threatened to deposit the amount of installments. This is the only allegation made by informant against applicant-Sanjay Kumar Gupta. Applicant could not return the money as it was wrongfully demanded by opposite party no.2. According to his statement, given to I.O., bank had already transferred the loan amount in the account of the company. In such a situation, how a bank manager could return the money to the borrower, it is beyond understanding, which is highly deplorable.

34. Learned Magistrate could not even think how the applicant-Sanjay Kumar Gupta could return the money to opposite party no.2 and an officer who had joined the branch of the bank after four and half years of disbursal of loan, can be held liable for criminal prosecution. There is no iota of evidence against applicant-Sanjay Kumar Gupta also.

35. In the backdrop of facts and circumstances and evidence on record at this stage, this Court finds no mens rea on the part of both the applicants. If the tripartite agreement is signed by applicant-Subhashish Chaudhary as discussed above, it was only part of the documentation and there was no guilty intention of mind because loan was sanctioned by M.R.C.H. and project was already approved by the bank. Hence, it cannot be transpired from the record that there was any intention of applicant-Subhashish Chaudhary to cheat the opposite party no.2 and his wife. Mens rea is completely absent.

36. There is no question of mens rea against the applicant-Sanjay Kumar Gupta also because he was not posted in that branch at the time of disbursal of loan amount to opposite party no.2 and he was transferred/deputed in that branch after four and half years of disbursal of loan amount. If he has filed recovery proceedings against the opposite party no.2 in D.R.T., Lucknow, he cannot be held liable for criminal prosecution because he did it as part of his duty and the statement recorded under Section 161 Cr.P.C given to I.O. by opposite party no.2 that he demanded his money back from applicat-Sanjay Kumar

Gupta was absolutely unfair demand which could not be met by the applicant as per the rules & regulations and procedure of the bank.

37. The following observations made by Hon'ble Apex Court in the case of State of ***Karnataka Vs. L. Muniswamy & Ors., (1977) 2 SCC 699***, may be relevant to note at this stage:-

"The whole some power under Section 482 CrPC entitles the High Court to quash a proceeding when it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The High Courts have been invested with inherent power, both in civil and criminal matters, to achieve a salutary public purposes. A Court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. The Court observed in this case that ends of justice are higher than the ends of mere law though justice must be administered according to laws made by the legislature."

38. In the case of ***M/s.Zandu Pharmaceutical Works Ltd. & Ors. Vs. Mohd. Sharaful Haque & Anr. (2005) 1 SCC 122***, Hon'ble Apex Court observed as under :-

"It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto."

39. Again in ***Madhavrao Jiwajirao Scindia & Anr. Vs. Sambhajirao Chandrojirao Angre & Ors., (1988) 1 SCC 692***, Hon'ble Apex Court observed in paragraph 7 as under :-

"7. The legal position is well-settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."

40. In the absence of any material on record, even prima facie, in the F.I.R. or statement of the informant, pointing out any such circumstances, showing any such act or intention that the applicants intended to cheat the opposite party no.2 and his wife and causing financial loss to them and in the absence of any specific allegations and material of definite nature, not

imaginary or inferential one, it would be travesty of justice to ask the applicants to face the trial. Bearing in mind, the factual aspect of the case delineated herein above and the legal principles enunciated by Hon'ble Apex Court cited above and on the basis of aforesaid discussion, this Court is of the considered opinion that the learned Magistrate was not justified in summoning the applicants namely, Shubhashish Chaudhary and Sanjay Kumar Gupta to face the trial for the aforesaid offences because no such offence is made out against them and to put them on trial and permitting the trial to continue against both the applicants would be an abuse of process of law. Even uncontroverted allegations of the prosecution do not constitute any offence against the applicants, who were bank officers, in which Sanjay Kumar Gupta had joined the particular branch of the bank after four and half years of the disbursal of loan amount to opposite party no.2 and his wife. Applicant-Subhashish Chaudhary had no role in sanctioning of loan and it was not required or supposed to verify the liability, if any, on the project because that project was already approved by the bank. There is nothing on record to show that applicant-Subhashish Chaudhary was in any way played any role in approval of the said project.

41. In the aforesaid circumstances of the case, it is deemed proper that in order to meet the ends of justice and avert the abuse of court's process the impugned summoning order dated 16.03.2021 cannot be sustained against the applicants and the proceedings of the aforesaid case be quashed forthwith against both the applicants and are hereby quashed.

42. Both the applications u/s 482 Cr.P.C. are **allowed**.

43. It is made clear that impugned summoning order dated 16.03.2021 and the entire proceedings of the aforesaid case thereof are quashed only against the applicants namely, Subhashish Chaudhary and Sanjay Kumar Gupta @ Sanjay Gupta. The observations made in this order are strictly confined to the disposal of applications u/s 482 Cr.P.C. with regard to above applicants only. Rest of the accused persons cannot take recourse of the observations made in this order in any proceedings.

44. A copy of this order be certified to the lower court forthwith.

(2022) 11 ILRA 413
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.09.2022

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Application U/S 482 No. 10328 of 2022

Irfan & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Amit Daga, Sri Krishna Kant Yadav

Counsel for the Opposite Parties:
A.G.A., Sri Paritosh Malviya

(अ) फौजदारी कानून - दण्ड प्रक्रिया संहिता, १९७३ - धारा १५४, ४८२ - अन्तर्निहित शक्तियां - भारतीय दंड संहिता, १८६० - धारा ३७६ डी /५०६,३५४ - उत्तर प्रदेश गिरोहबन्द और समाज विरोधी क्रियाकलाप (निवारण) अधिनियम, १९८६ - धारा 3(१) - अन्तर्निहित शक्तियों का उपयोग दुर्लभ प्रकरणों में ही किया जाना चाहिये, वो भी जब अभियुक्त के

विरूद्ध प्रथम दृष्टवा कोई अपराध नहीं बनता हो - आरोप सत्य है, या असत्य है यह निर्धारित करने का कर्तव्य विचारण न्यायालय को है न कि इस न्यायालय को - धारा 482 दं.प्र.सं. मे अन्तर्निहित शक्तियों का उपयोग करते हुए आरोप की सत्यता को नहीं परखा जा सकता है - अगर प्रकरण के तथ्य व पत्रावली पर साक्ष्य से प्रथम दृष्टवा धारा 3(1) गिरोहबन्द अधिनियम में वर्णित अपराध कारित होने के साक्ष्य उपलब्ध हैं तो अन्तर्निहित शक्ति का उपयोग नहीं किया जा सकता है। (पैरा - २९)

आवेदकगण के विरूद्ध दो आपराधिक मामले दर्ज - आरोप पत्र, गंभीर अपराध कारित होने के साक्ष्य - संज्ञान लिया - आवेदकगण ने पीडित का सामूहिक बलात्कार किया - उसके द्वारा प्रथम सूचना रिपोर्ट दर्ज कराने पर उसको धमकाना व उसकी लज्जा भंग करना - जाँच अधिकारी द्वारा आस-पास के माहौल का अध्ययन कर साक्ष्य लेखबद्ध किया - क्षेत्र में आतंक, भय व रोष व्याप्त - उनके विरूद्ध प्राथमिकी दर्ज कराने का साहस कोई नहीं कर पाता है।(पैरा - ३१)

निर्णय : आवेदकगण ने बलात्कार व छेड़छाड़ जैसे कृत्य करके, लोक व्यवस्था को अस्त-व्यस्त करने व अपने गिरोह के लिए अनुचित दुनियावी व भौतिक लाभ प्राप्त करने के उद्देश्य से समाज विरोधी क्रियाकलाप किये हैं, जो भारतीय दण्ड संहिता के अध्याय-16 के अधीन दण्डनीय है तथा इस कृत्य/क्रिया कलाप के कारण जनता में भय, दहशत या संत्रास भी फैला, जो धारा 2(ख)(ग्यारह) सपठित धारा 3(1) के अधीन दण्डनीय भी है, इन परिस्थितियों में अन्तर्निहित शक्तियों का उपयोग करना आपराधिक कार्यवाही को अचानक मृत्यु पहुचाने जैसा होगा जो साधारणतया नहीं किया जा सकता है। (पैरा- ३१) (पैरा- ३२)

आवेदन अंतर्गत धारा ४८२ निरस्त किया जाता है। (E-7)

<u>उद्धृत मामलों की सूची</u> :

1. तेज सिंह प्रति उत्तर प्रदेश राज्य व एक अन्यः 2019 एससीसी आनलाईन एएलएल 5083

2. पी. कासिलिंगम व अन्य बनाम पी.एस.जी. कालेज ऑफ टेक्नोलॉजी 1995 सप्ली (2) एस.सी.सी. 348

3. शारदा गुप्ता प्रति उत्तर प्रदेश शासन व अन्य, 2022 एससीसी ऑनलाइन एससी 514

4. हरियाणा राज्य बनाम भजनलाल: (1992) सप्ली 1 एससीसी 335

5. झंडू फार्मास्युटिकल वर्क्स लिमिटेड बनाम मोहम्मद शारफुल हक़: (2005)1 एससीसी 122

6. अहमद अली क्वारशी और अन्य बनाम उत्तर प्रदेश शासन : 2020 एससीसी ऑनलाइन एससी 107

7. जोसेफ सालवाराजा ए बनाम गुजरात राज्य : (2011) 7 एससीसी 59

8. सुशील सेठी और एक अन्य बनाम अरुणाचल प्रदेश शासन और अन्य: (2020) 3 एससीसी 240

9. प्रीति सराफ और अन्य बनाम दिल्ली व एनसीआर राज्य: 2021 एससीसी ऑनलाइन एससी 206

10. मेसर्स निहारिका इन्फ्रास्ट्रक्चर प्राइवेट लिमिटेड बनाम महाराष्ट्र शासन व अन्य: (2020)10 एस सी सी 118

11. सिद्धार्थ मुकेश भंडारी प्रति गुजरात राज्य सरकार: (दाण्डिक अपील सं०. 1044, 1045 और 1046 of 2022)

12. रामबीर उपाध्याय व अन्य प्रति उत्तर प्रदेश राज्य व अन्य : 2022 एस सी सी ऑनलाइन एस सी 484

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

(क) पार्श्व भूमिः-

1. आवेदक, इरफान व फहीम उर्फ फईम के विरूद्ध रविन्द्र कुमार, थाना प्रभारी, अजीम नगर, रामपुर, उत्तर प्रदेश द्वारा धारा 154 दण्ड प्रक्रिया संहिता के अंतर्गत एक प्रथम सूचना रिपोर्ट संख्या 0350 वर्ष 2020, दिनांक 27.11.2020 को उत्तर प्रदेश गिरोहबन्द और समाज विरोधी क्रियाकलाप (निवारण) अधिनियम, 1986 (संक्षेप मे गिरोहबन्द अधिनियम) की धारा 3(1) के अंतर्गत दर्ज कराई जिसका पुनरूत्पादन निम्न हैः-

"तहरीर जुबानी वादी बयान किया मैं एसओ रविन्द्र कुमार मय एक जरब पिस्टल मय 10 कार० मय हमराह का० 147 पुनीत कुमार मय एक जरब इंसास राय० मय 20 कार० मय का० 14 धर्मेन्द्र कुमार मय एक जरब इंसास राय० मय 20 कार० मय जीप सरकारी नं० यूपी 22 जी 0396 के मय चालक का० अरुण कुमार के बाद देख रेख शांति व्यवस्था, गस्त व चैकिंग पैट्रोल पम्प, बस स्टेण्ड,टेक्सी स्टेण्ड चैकिंग, वाहन चैकिंग, ढावे चैकिंग, चैकिंग संदिग्ध वाहन/व्यक्ति व भ्रमण से थाना हाजा मय अनुमोदन शुदा गैंग चार्ट गैंगलीडर इरफान पुत्र स्व० इमरान नि० गण ग्राम खेड़ा टांडा थाना अजीमनगर रामपुर के उपस्थित थाना आकर दाखिल किया जांच से अभि० गण 1. इरफान पुत्र स्व० इमरान उम्र 46 वर्ष 2. फहीम उर्फ फईम पुत्र मुमताज उर्फ कलुआ उम्र 36 वर्ष नि० गण ग्राम खेड़ा टांडा थाना अजीमनगर रामपुर द्वारा ***अपने क्षेत्र व आसपास में अपने कृत्यों से आतंक व भय व रोष व्याप्त कर रखा है जनता इनके विरुद्ध रिपोर्ट लिखाने का साहस नही कर पाती है इस गिरोह के गैंग लीडर द्वारा बलात्कार/छेड़छाड़ जैसे कृत्य करके अपने व अपने सदस्यो का भौतिक लाभ कमाना है यह गैंग समाज विरोधी क्रिया कलाप करना इनका पेशा बन गया है इनका आपराधिक इतिहास 1. मु०अ०सं० 623/2019 धारा 376डी/506 भादवि चालानी थाना कोतवाली जनपद रामपुर 2. 964/2019 धारा 354/506 भादवि चालानी थाना सिविल लाइंस जनपद रामपुर है। इनकी गतिविधियो पर अंकुश लगाया जाना अति आवश्यक है*** *इनके विरुद्ध उत्तर प्रदेश गिरोहबंद एवं समाज विरोधी क्रिया कलाप निवारण अधि० का अभियोग पंजीकृत किया जा रहा है। जो बोला वही लिखा है। रवाना शुदा अस्लाहा व कारतूस अन्दर मालग्रह रखवाकर ताला बन्द ठीक मालग्रह संतरी पहरा को दिखाया गया चावी पूर्ववत रही चार्ज थाना स्वयं ग्रहण किया।" (महत्ता प्रदान की गई)*

2. आवेदकगण के विरूद्ध गिरोह सारणी (गैंग चार्ट) व उसके अनुमोदन की कार्यवाही निम्न हैः-

"गैंग चार्ट गैंग लीडर इरफान पुत्र स्व० इमरान निवासी खेड़ा टाण्डा अजीमनगर जनपद रामपुर

	अभियुक्त का नाम व पता	वर्तमान स्थिति	उम्र	मु०अ० सं०623/2019 धारा 376डी/506 भादवि चालानी थाना कोतवाली जनपद रामपुर आरोप पत्र सं०05/2020 दिनांक 15.01.2020	मु० अ० सं० 964/2019 धारा 354/506 भादवि चालानी थाना सिविल लाईन जनपद रामपुर आरोप पत्र

						सं०82/2020 दिनांक14.03.2020
		P	J			
1	इरफान पुत्र स्व० इमरान नि० ग्राम खेडा टाण्डा थाना अजीमनगर जनपद रामपुर	P		46	✓	✓
2	फहीम उर्फ फईम पुत्र मुमताज उर्फ कलुआ नि० ग्राम खेडा टाण्डा थाना अजीमनगर जनपद रामपुर	P		36	✓	✓

श्रीमान जी,

निवेदन है कि इरफान पुत्र स्व० इमरान नि० ग्राम खेडा टाण्डा थाना अजीमनगर जनपद रामपुर ने अपना संगठित गिरोह बना रखा है। जिसका गैंग लीडर इरफान स्वयं है इस गैंग के सदस्य फहीम उर्फ फईम उपरोक्त ने अपने गिरोह के सदस्यो के साथ मिलकर महिला के बलात्कार/छेड़छाड़ जैसे अपराध कारित किये है। इस गिरोह का क्षेत्र में इतना आतंक व भय व्याप्त है कि इनके विरुद्ध कोई भी जनता का व्यक्ति न तो गवाही देने का और न ही प्रथम सूचना रिपोर्ट दर्ज कराने का साहस कर पा रहा है इस गैंग से जनता मे रोष व भय व्याप्त है। इस गिरोह द्वारा महिला के बलात्कार/छेड़छाड़ जैसे जघन्य अपराध कारित करके अपने व अपने गैंग के सदस्य के लिये भौतिक लाभ प्राप्त करने हेतु बलात्कार करना है इसका क्षेत्र में स्वतन्त्र विचरण करना जनहित में उचित नही है। अभि० गण की अपराध स्थिति गैंग चार्ट में अंकित है अभि०गण का उक्त कृत्य उ०प्र० गिरोहबन्ध एवं समाज विरोधी क्रिया कलाप निवारण अधि०1986 की धारा 3(1) के अन्तर्गत दण्डनीय अपराध है जनहित में इन अभियुक्तो के विरुद्ध कार्यवाही किया जाना आवश्यक है।

नोटः- श्रीमान जी उपरोक्त अभियुक्तो के विरुद्ध उपरोक्त मुकदमों में थाना हाजा पर पूर्व में कोई गैंगस्टर का मुकदमा पंजीकृत नही है।

अतः अनुरोध है कि गैंग चार्ट अनुमोदित करने की कृपा करें।

ह० अप० जिलाधिकारी	ह० अप० पुलिस अधीक्षक	ह० अप० वरिष्ठ पुलिस अधीक्षक	ह० अप० उप जिलाधिकारी	ह० अप० क्षेत्राधिकारी	ह० अप० थाना ध्यक्ष

3. उपरोक्त वर्णित प्रथम सूचना रिपोर्ट के अन्वेषण के दौरान थानाध्यक्ष रविन्द्र कुमार संबंधित ब्यान गवाह नईमा पत्नी मौ. तलहा व संबंधित ब्यान गवाह हसीबा पुत्री अतउर्हमान लेखबद्ध किये गये जो निम्न वर्णित किये जा रहे हैं:-

*"बयान वादी- थानाध्यक्ष रविन्द्र कुमार पुत्र स्व० हाकिम सिंह निवासी नंगला थाना सादाबाद जिला हाथरस वर्तमान तैनाती थानाध्यक्ष थाना अजीमनगर रामपुर पीएनओ 962282269 मो० नं० 8218358692 ने पूछने पर बताया कि मै दिनांक 20-10-2020 से थानाध्यक्ष अजीमनगर जनपद रामपुर के पद पर तैनात हूँ। दौराने क्षेत्र भ्रमण ज्ञात हुआ कि गैंगलीडर इरफान पुत्र स्व० इमरान नि०गण ग्राम खेड़ा टांडा थाना अजीमनगर रामपुर ने **अपने नेतृत्व में एक सुसंगठित सक्रिय गिरोह बना रखा है।** जिसका वह स्वयं गैंग लीडर है तथा अभियुक्तगण 1-*

इरफान पुत्र स्व० इमरान उम्र 46 वर्ष, 2- फहीम उर्फ फईम पुत्र मुमताज उर्फ कलुआ उम्र 36 वर्ष नि० गण ग्राम खेड़ा टांडा थाना अजीमनगर रामपुर सक्रिय सदस्य है। ***इन दोनो के द्वारा अपने क्षेत्र व आस पास से अपने कृत्यों से आतंक व भय व रोष व्याप्त कर रखा है जनता इनके विरुद्ध रिपोर्ट लिखाने का साहस नही कर पाती है इस गिरोह के गैंग लीडर द्वारा बलात्कार/छेड़छाड़ जैसे कृत्य करके अपने व अपने सदस्यों का भौतिक लाभ कमाना है यह गैंग समाज विरोधी क्रिया कलाप करना इनका पेशा बन गया है*** *इनका आपराधिक इतिहास 1- मु०अ०सं० 623/2019 धारा 376 डी/506 भादवि चालानी थाना कोतवाली जनपद रामपुर, 2- 964/2019 धारा 354/506 भादवि चालानी थाना सिविल लाइंस जनपद रामपुर है। इनकी गतिविधियो पर अंकुश लगाया जाना अति आवश्यक है इनके विरुद्ध श्रीमान् जिलाधिकारी महोदय रामपुर व उच्चाधिकारीगणों द्वारा अनुमोदित गैंग चार्ट प्राप्त कर इनके विरुद्ध उ०प्र०गिरोहबन्द समाज विरोधी क्रिया कलाप (निवारण) अधि० 1986 की धारा 3(1) के अन्तर्गत अभियोग पंजीकृत कराया गया था अभियुक्तगण उपरोक्त अर्जित धन को अपने ऐशो अराम में खर्च करते है। इनका जनता में इतना भय व आतंक व्याप्त है कि जनता का कोई भी व्यक्ति इनके विरुद्ध थाने में रिपोर्ट लिखाने व गवाही देने का साहस नही कर पाता है। इन अभियुक्तो का समाज में स्वतंत्र रहना समाज के हित में सही नही है। यही मेरा बयान है।"*

"बयान गवाह सम्बन्धित मु०अ०सं० 623/19 धारा 376 डी/506 भादवि चालानी थाना कोतवाली रामपुर व मु०अ०सं० 964/19 धारा 354/506 भादवि चालानी थाना सिविल लाईन रामपुर श्रीमती नईमा पत्नी मौ० तलहा नि० ग्राम दौकपुरी टांडा थाना अजीमनगर जनपद रामपुर ने पूछने पर बताया कि मेरा नाम नईमा है मेरे पति का नाम मौलवी तलहा तथा मै ग्राम दोकपुरी टांडा थाना अजीमनगर जनपद रामपुर की रहने वाली हूँ। मै दिनांक 16-11-2019 को दिन में समय करीब 02.00 बजे दोपहर दवा लेकर जिला अस्पताल रामपुर से अपने घर आने के लिये सड़क पर सवारी का इंतजार कर रही थी तभी मेरे गांव के इरफान पुत्र स्व० इमरान निवासी ग्राम खेडा टांडा थाना अजीमनगर जनपद रामपुर व फहीम उर्फ फईम पुत्र मुमताज उर्फ कलुआ निवासीगण ग्राम खेडा टांडा थाना अजीमनगर जनपद रामपुर एक कार मे जिसको एक व्यक्ति जिसे मै पहचानती नही थी चला रहा था मेरे पास आकर रुके और इरफान ने मुझसे पूछा कैसे खडी हो मैने घर जाने की बात उन्हे बताई तो उन्होने कहा कि हम भी घर जा रहे है चलो तुम्हे भी घर छोड़ देगे, मैने विश्वास करके उनकी गाडी में बैठ गयी उन्होने मुझे कोल्ड्रीक पिलायी जिसमें कुछ नशीला पदार्थ था और मुझे जंगल की तरफ ले गये जहाँ ईख के खेत में ले जाकर तीनो ने बारी बारी मेरे साथ बलात्कार किया तथा जान से मारने की धमकी दी मैने अपनी बहन हसीबा को उस बावत फोन से सूचना दी वो भी घरवालो को लेकर मौके पर आ गये थे जिनको मैने सारी बात बतायी उक्त घटना के सम्बन्ध में मैने 18.11.2019 को थाना कोतवाली रामपुर में रपट लिखायी थी यही मेरे बयान है। इस तरह वादिनी/पीड़िता एफ०आई०आर० को तस्दीक कर बयान दे रही है इसके उपरान्त बताया कि मै दिनांक 27.11.19 को कप्तान साहब से मिलकर कचहरी में 164 द०प्र०सं० के बयान नकल लेने के लिये गयी थी वहाँ मुझे कचहरी में इरफान उर्फ इमरान, फईम पुत्र मुमताज इनके साथ 2 व्यक्ति और थे जिन्हे मैं नही जानती थी यह लोग मुझे देखकर मेरे पीछे पीछे चल दिये नूरमहल के पास आकर इन्होने मुझे पकड़ लिया और मेरे साथ बदतमीजी कि तथा मेरी छाती पकड़ ली और मुझसे मेरे द्वारा पूर्व में लिखाये बलात्कार के मुकदमे को वापस करने को कहने लगे न करने पर जान से मारने की धमकी दी मेरे शोर मचलाने पर वे लोग भाग गये। मैने 112 नम्बर पर काल की तो वहां पुलिस आ गयी व मुझे थाना सिविल लाईन जाने को कहा फिर मै अपनी दूसरी बहन के साथ सिविल लाईन थाने गये उस दिन वहा मेरी रिपोर्ट नही लिखी गयी। दिनांक 30.11.2019 को मेरी रपट लिखी गयी दोनो मुकदमें मैने ही लिखाये है इस तरह वादिनी/पीड़िता दोनो एफ०आई०आर को तस्दीक करते हुये बयान दे रही है बयान लेखबद्ध सीडी किये जाते है।"

"बयान गवाह- मु०अ०सं० 623/19 धारा 376 डी/506 भादवि चालानी थाना कोतवाली रामपुर से संबंधित गवाह हसीबा पति अतख रहमान नि० ग्राम दौकपुरी टांडा थाना अजीमनगर जनपद रामपुर ने पूछने पर बताया कि दिनांक 16.11.2019 को मेरी बहन नईमा ने मुझे फोन से बताया था कि रामलीला

ग्राउन्ड से पास ईख के खेत में मेरे साथ बलात्कार की घटना इमरान व फईम व 01 अन्य व्यक्ति ने की है जिसकी रिपोर्ट थाना कोतवाली में दिनांक 18.11.2019 को नईमा द्वारा लिखायी गयी तथा दिनांक 27.11.2021 को नूरमहल के पास इरफान ने नईमा की बलात्कार का मुकदमा वापस लेने की धमकी दी थी और बुरी नियत से उसके पकड़ लिया था जिसकी सूचना 112 नम्बर को दी थी इसका मुकदमा दिनांक 30.11.2019 को थाना सिविल लाईन रामपुर में लिखाया था जो मैने देखा व सुना आपको बता दिया है। यही मेरी बयान है। इस तरह गवाहान एफआईआर का समर्थन करते हुये बयान दे रही है जिसे लेखबद्ध सीडी किया गया।" (महत्ता प्रदान की गई)

4. अन्वेषण के दौरान आवेदकगण/अपराधीगण से भी कई बार पूछताछ की गई जैसा की वर्तमान प्रार्थना पत्र के प्रस्तर नं० 18 मे वर्णित है।

5. जाँच अधिकारी ने अन्वेषण के उपरान्त, आरोप पत्र संख्या 191/21 दिनांक 29.07.2021, दोनो आवेदक के द्वारा गिरोह बन्द अधिनियम के धारा 3(1) के अंतर्गत अपराध कारित होने के पर्याप्त साक्ष्य मौजूद होने के कारण न्यायालय को प्रेषित की। न्यायालय द्वारा अवलोकन कर दिनांक 19.08.2021 को संज्ञान लिया गया व आदेश दिनांक 19.08.21 के द्वारा अभियुक्तगण के विरूद्ध सम्मन जारी किया गया, जो निम्न उद्दरित किया जा रहा हैः-

"19.08.21

आज यह आरोप पत्र अन्तर्गत मु०अ०सं० 350/2020 अं०धारा 3(1) जी० एक्ट थाना अजीमनगर जिला रामपुर की पुलिस द्वारा अभि०गण (1) इरफान, (2) फहीम उर्फ फईम के विरूद्ध प्रस्तुत किया गया।

केस डायरी व अन्य प्रपत्रो के अवलोकन से विदित होता है कि अभि० गण के विरूद्ध गैंग चार्ट में अभि०गण (1) इरफान (2) फहीम उर्फ फईम के विरुद्ध मु०अ०सं० 623/19 अं०धारा 376डी/506 आई०पी०सी० व अ०सं० 964/19 अं०धारा 354/506 आई०पी०सी० में अपराध दर्ज है। अतः केस डायरी व अन्य प्रपत्रो के अवलोकन से विदित है कि अभि०गण (1) इरफान (2) फहीम उर्फ फईम के विरूद्ध धारा- 3(1) जी० एक्ट में संज्ञान लेने हेतु आधार पर्याप्त है। अतः उक्त अभियुक्तगण के विरूद्ध धारा- 3(1) जी० एक्ट में संज्ञान लिया जाता है। अभि०गण द्वारा मा० उच्च न्यायालय द्वारा पारित आदेश दिनांकित 18.01.21 व 22.02.21 प्रस्तुत किया गया है। अभि०गण अद्यतन आदेश प्रस्तुत करे। अभि०गण के विरूद्ध सम्मन दिनांक 08.09.21 के लिए जारी हो।"

6. आवेदकगण ने वर्तमान आवेदन दण्ड प्रक्रिया संहिता की धारा 482 के अंतर्गत दायर किया गया है, जिसके द्वारा उपरोक्त वर्णित आरोप पत्र दिनांक 29.07.2021 व एस.एस.टी. 46/2021 (सरकार बनाम इरफान आदि), अपराध संख्या - 350/2020, अंतर्गत धारा 3(1) गिरोहबन्द अधिनियम, थाना - अजीम नगर, जिला- रामपुर, में अपर सत्र न्यायाधीश, न्यायालय -3 रामपुर द्वारा जारी सम्मन आदेश पत्र दिनाँक 19.08.21 व समस्त कार्यवाही को निरस्त करने की प्रार्थना की है।

(ख) आवेदकगण का पक्ष

7. आवेदकगण का पक्ष उनके विद्वान अधिवक्ता श्री अमित डागा ने प्रबलता से इस न्यायालय के समक्ष रखा कि यह एक विद्वेषपूर्ण कार्यवाही है। आवेदक संख्या एक पूर्व मे गाँव का प्रधान रहा है, परन्तु हाल मे हुए चुनाव में उसको हार मिली व आवेदक संख्या दो उसका रिश्तेदार है। गिरोह सारणी में उल्लेखित दोनो मामलो की शिकायतकर्ता श्रीमती नईमा के पति तल्हा एक मदरसे मे मौलवी हैं जहां और बच्चो के साथ आवेदक संख्या 3 की भतीजी भी पढ़ती थी। वहां उसके साथ उक्त मौलवी ने छेड़छाड़ की व बलात्कार की कोशिश की, जिस पर उसके विरूद्ध एक प्रथम सूचना (अपराध सं० 84 वर्ष 2019) धारा 354 ख भा.दं.सं. व 7/8 पाक्सो अधिनियम के अन्तर्गत दर्ज हुई, जिस पर आरोप पत्र (अन्तर्गत धारा 376 AB, 506 व 5एम/6 पाक्सो अधिनियम) प्रेषित हुआ व विचारण के बाद उक्त मौलवी के विरुद्ध सत्र न्यायालय द्वारा उक्त आरोपों के सिद्ध हो जाने के फलस्वरूप निर्णय व आदेश दिनांक 14.12.2020 द्वारा 20 वर्ष का सश्रम कारावास हुआ, जिसकी अपील इस न्यायालय में लम्बित है। इस कारणवश गिरोह सारणी में उल्लेखित मामलों की

शिकायतकर्ता विद्वेष रखती है, इसलिए उनके विरूद्ध दो असत्य मुकदमे दर्ज कराये हैं। विद्वान अधिवक्ता ने कथन किया कि उन दो मामलो मे आवेदकगण को जमानत मिल गई है और आरोप पत्र दाखिल किया जा चुका है।

8. श्री अमित डागा, अधिवक्ता ने आगे निवेदन किया कि वर्तमान प्रकरण मे जाँच अधिकारी ने दोनों मामलों के शिकायतकर्ता का ब्यान दर्ज किया व कई तिथियों पर आवेदकगण से पूछताछ की और जब उनको हिरासत में लेने का भय हुआ तो उन्होने एक रिट याचिका नं० 17698/2020 इस न्यायालय के समक्ष दाखिल की, जिसमें इनके विरूद्ध उत्पीड़न कार्यवाही न करने का अंतरिम आदेश पारित हुआ जो अभी भी प्रभावी है।

9. श्री अमित डागा, अधिवक्ता ने यह भी कथन किया कि अन्वेषण के दौरान आवेदकगण के विरूद्ध कोई भी विश्वसनीय और ठोस साक्ष्य संग्रहित नहीं किये गये हैं, कि आवेदकगण ने कोई गिरोह का निर्माण कर रखा है या धारा 3(1) गिरोहबन्द अधिनियम के अन्तर्गत अपराध कारित किया है। आरोप पत्र मात्र दो आपराधिक मामले के पीडित व शिकायतकर्ता के ही साक्ष्य के ब्यान पर आधारित है। कोई भी स्वतन्त्र साक्ष्य का ब्यान लेखबद्ध नही किया गया है। उक्त अपराध का संज्ञान व आवेदकगण को सम्मन भी सत्र न्यायालय ने न्यायिक मानस से नहीं किया है। पत्रावली पर कोई भी ऐसा साक्ष्य नहीं है कि आवेदकगण ने लोक व्यवस्था को अस्त-व्यस्त किया है या किसी लाभ के उद्देश्य से समाज विरोधी क्रियाकलाप किया है या जनता में दहशत, संत्रास या आतंक फैलाया हो।

10. विद्वान अधिवक्ता ने समकक्ष न्यायालय द्वारा **तेज सिंह प्रति उत्तर प्रदेश राज्य व एक अन्यः 2019 एससीसी आनलाईन एएलएल 5083** के मामले में पारित निर्णय पर भरोसा जताया जहाँ, यह निर्धारित किया गया है किः-

"XXX यह आकलन करना महत्वपूर्ण है कि अपराधी द्वारा कारित अपराध क्या अनुचित दुनियाबी, आर्थिक या भौतिक लाभ के उद्देश्य से प्रेरित और अनुबंधित है या नही। अपराध का उद्देश्य या उसका प्रयोजन निर्णायक होगा, कि गिरोहबन्द अधिनियम के प्रावधान क्या किसी वस्तुतः मामले मे अनुप्रयोग किये जाये या नही।"

"XXX जब कभी भी कोई गंभीर अपराध कारित होता है तो परिणाम स्वरूप हमेशा समाज मे किसी न किसी प्रकार का व्यवधान होता ही है वो समाज मे सामान्य व्यवधान और लोक व्यवस्था का अस्त व्यस्त होना या संत्रास अथवा आतंक का उत्पन्न होना अलग-अलग भ्रांति है। विधि एवं व्यवस्था की सामान्य समस्या को लोक व्यवस्था के व्यवधान की संवृत्ति से संयोजित नही किया जा सकता है। XXX"

(उपरोक्त अनुवाद न्यायालय द्वारा किया गया है।)

11. अन्त मे विद्वान अधिवक्ता ने कथन किया कि ऐसा कोई साक्ष्य संग्रहित नहीं किया गया है, जो आवेदकगण के विरूद्ध धारा 3(1) गिरोहबन्द अधिनियम मे वर्णित अपराध के अवयव को दर्शाता हो। अतः यह न्यायालय अपनी अन्तर्निहित शक्तियों का उपयोग करते हुए आवेदकगण के विरूद्ध दंण्डनीय कार्यवाही को निरस्त करे।

(ग) राज्य सरकार का पक्षः-

12. उपरोक्त के विपरीत, राज्य शासन का पक्ष, श्री परितोष मालवीय विद्वान अतिरिक्त शासकीय अधिवक्ता, ने पुरजोर रखा, कि आवेदकगणो द्वारा अपने क्षेत्र व आसपास में अपने कृत्यो से आतंक व रोष व्याप्त कर रखा है कि जनता इनके विरूद्ध रिपोर्ट लिखाने का साहस नहीं कर पा रही है। ये बलात्कार, छेड़छाड़ जैसे कृत्य करके अपना व गिरोह के सदस्यों को भौतिक लाभ कमाते हैं। इनकी गतिविधियों पर अंकुश लगाया जाना अति आवश्यक है, इसलिए गिरोहबन्द अधिनियम के अंतर्गत प्रथम दृष्टवा अपराध दृष्टिगोचर होता है। इनके विरूद्ध दो मुकदमा अपराध पंजीकृत हुए हैं जिनमें आरोप पत्र सामूहिक बलात्कार (धारा 376 घ) व स्त्री की लज्जा भंग (धारा 354 व 506) जैसे गंभीर अपराध में प्रेषित किया जा चुका है।

13. परितोष मालवीय, अतिरिक्त शासकीय अधिवक्ता ने यह भी कथन किया कि गिरोह सारणी मे उपरोक्त दो आपराधिक मामलों को सूचीबद्ध

किया गया है, व जाँच के दौरान उन मामलों की पीडिता का साक्ष्य भी लेख बद्ध किया गया है, कि आवेदकगण ने उसके साथ बलात्कार किया व प्रथम सूचना रिपोर्ट को वापस लेने के लिए दबाव भी डाला व लज्जा भंग भी करी और यह भी कथन किया कि इनके भय के कारण इनके विरूद्ध कोई प्रथम सूचना रिपोर्ट दर्ज कराने का साहस नहीं कर पाता है और उसने गिरोहबन्द के अन्तर्गत प्रथम सूचना रिपोर्ट के तथ्यों की पुष्टि भी की। अतः धारा 3(1) गिरोह बन्द के अवयव प्रथम दृष्टवा विद्यमान हैं तथा इस स्तर पर आपराधिक कार्यवाही को अचानक मृत्यु नही दी जा सकती है, तथा वर्तमान प्रकरण के तथ्य **तेज सिंह (पूर्व मे उल्लिखित)** से भिन्न है। जैसा कि वर्तमान प्रकरण में यह साक्ष्य संग्रहित है, कि आवेदकगण के कृत्यों के कारण जनता में दहशत है और उनके विरूद्ध प्रथम सूचना रिपोर्ट लिखाने से घबराते हैं और अगर कोई दर्ज कराता भी है तो उस पर उसको वापस लेने के लिए दबाव भी डालते हैं।

14. अतः इनके द्वारा बलात्कार व छेड़छाड़ के अपराध कारित करने के कारण लोक व्यवस्था का अस्त-व्यस्त करने के लिए समाज विरोधी क्रिया कलाप करते है जो भारतीय दंड संहिता के अध्याय 16 के अंतर्गत दण्डनीय अपराध है।

(घ) प्रासंगिक विधि प्रावधानः-

15. वर्तमान प्रकरण के लिये गिरोहबन्द की अधिनियम व भारतीय दण्ड संहिता की निम्न धाराओं का उल्लेख करना समीचीन रहेगाः-

गिरोहबन्द अधिनियम

*"2. **परिभाषा** - इस अधिनियम में, -*

(क) "संहिता" का तात्पर्य दंड प्रक्रिया संहिता, 1973 से है;

(ख) "गिरोह" का तात्पर्य ऐसे व्यक्तियों के समूह से है जो लोक-व्यवस्था को अस्त-व्यस्त करने या अपने या किसी अन्य व्यक्ति के लिए कोई अनुचित दुनियावी (टेम्पोरल), आर्थिक, भौतिक या अन्य लाभ प्राप्त करने के उद्देश्य से या तो अकेले या समूहिक रूप से हिंसा, या हिंसा की धमकी या प्रदर्शन, या अभित्रास, या प्रपीड़न द्वारा, या अन्य प्रकार से निम्नलिखित समाज विरोधी क्रियाकलाप करते हैं, अर्थात्--

(एक) भारतीय दण्ड संहिता के अध्याय 16, या अध्याय 17, या अध्याय 22 के अधीन दण्डनीय अपराध; या

(दो) संयुक्त प्रान्त आबकारी अधिनियम, 1910 या नारकोटिक ड्रग्स एण्ड साइक्रोट्रापिक सब्सटैन्सेज एक्ट, 1985 या तत्समय प्रवृत्त किसी अन्य विधि के किन्हीं उपबन्धो का उल्लंघन किसी शराब या मादक या अनिष्टकर मादक द्रव्य या अन्य मादकों या स्वापकों का अवसान या निर्माण या संग्रह या परिवहन या आयात या निर्यात, या विक्रय या वितरण या किन्हीं पौधों की खेती करना; या

(तीन) विधि सम्मत प्रक्रिया से भिन्न प्रक्रिया द्वारा स्थावर सम्पत्ति पर अध्यासन करना या कब्जा लेना, या स्थावर सम्पत्ति पर चाहें स्वयं या अन्य किसी व्यक्ति के पक्ष में हक या कब्जा के लिए मिथ्या दावा करना; या

(चार) किसी लोक सेवक या किसी साक्षी को अपने विधिपूर्ण कर्त्वयों का पालन करने से रोकना या रोकने के लिए प्रयत्न करना; या

(पाँच) स्त्री तथा लड़की अनैतिक व्यापार दमन अधिनियम, 1956 के अधीन दण्डनीय अपराध; या

(छः) सार्वजनिक द्यूत अधिनियम, 1867 की धारा 3 के अधीन दण्डनीय अपराध; या

(सात) किसी सरकारी विभाग, स्थानीय निकाय या सार्वजनिक या निजी उपक्रम द्वारा या उसकी ओर से किसी पट्टे या अधिकार के लिए, या माल के संभरण या किये जाने वाले कार्य के लिए, विधिपूर्वक संचालित किसी नीलामी मे बोली लगाने या विधिपूर्वक मांगे गये टेण्डर देने से किसी व्यक्ति को रोकना; या

(आठ) किसी व्यक्ति को अपने विधिपूर्ण कारबार, वृत्ति, व्यापार या जीविका या उससे सम्बद्ध किसी अन्य विधिपूर्ण क्रियाकलाप को सुचारू रूप से करने से रोकना या उसमें विघ्न डालना; या

(नौ) भारतीय दण्ड संहिता की धारा 171-ड के अधीन दण्डनीय अपराध, या मतदाता को अपने मताधिकार का प्रयोग करने से शारीरिक रूप से रोककर किसी विधिपूर्वक होने वाले किसी

सार्वजनिक निर्वाचन को रोकना या उसमे बाधा डालना; या

(दस) अन्य व्यक्तियों को साम्प्रदायिक साम्जस्य मे विघ्न डालने के लिए हिंसा करने के लिए उद्दीप्त करना; या

(ग्यारह) जनता में दहशत, संत्रास या आतंक फैलाना; या

(बारह) सार्वजनिक या निजी उपक्रमो या कारखानो के कर्मचारियो या स्वामियों या अध्यासियों को आतंकित करना या उन पर हमला करना और उनकी सम्पत्ति को हानि पहुंचाना; या

(तेरह) किसी व्यक्ति को इस मिथ्या व्यपदेशन पर कि उसे विदेश में कोई सेवायोजन, व्यापार या वृत्ति उपलब्ध करायी जायेगी, ऐसे विदेश मे जाने के लिए उत्प्रेरित करना या उत्प्रेरित करने का प्रयास करना; या

(चैदह) फिरौती उद्यापित करने के आशय से किसी व्यक्ति का व्यपहरण या अपहरण करना; या

(पन्द्रह) किसी वायुयान या सार्वजनिक परिवहन यानो को उसके पूर्वनिर्धारित मार्ग से जाने से पथान्तारित करना या अन्यथा रोकना;

(सोलह) धन उधार देने का विनियमन अधिनियम, 1976 के अधीन दण्डनीय अपराध;

(सत्रह) पशु का अवैध रूप से परिवहन करने और/या तस्करी करने और गोवध निवारण अधिनियम, 1955 और पशुओं के प्रति क्रूरता का निवारण अधिनियम, 1960 में प्रावधानो के उल्लंघन में कार्यों मे संलग्न होना;

(अठ्ठारह) वाणिज्यिक शोषण, बंधुआ श्रम, बालश्रम, यौन शोषण, अंग हटाने तथा दुर्व्यपार, करने, भिक्षा और समान क्रिया कलापो के प्रयोजनो के मानव दुर्व्यपार;

(उन्नीस) विधि विरूद्व क्रियाकलाप (निवारण) अधिनियम ,1966 के अधीन दण्डनीय अपराध;

(बीस) नकली भारतीय करेंसी नोटो का मुद्रण, परिवहन और परिचालन करना;

(इक्कीस) अवैध औषद्धि के उत्पादन , विक्रय और वितरण मे संलग्न होना;

(बाइस) आयुध अधिनियम, 1959 की धारा 5, 7 और 12 के उल्लंघन मे आयुध एवं गोला, बारूद के विनिर्माण, विक्रय और परिवहन में संलग्न होना;

(तेइस) भारतीय वन अधिनियम,1927 और वन्य जीव संरक्षण अधिनियम, 1972 के उल्लंघन में आर्थिक लाभ के लिए पेड़ काटना या मारना या उत्पादो की तस्करी करना;

(चैबीस) मनोरंजन और पण्यम कर अधिनियम, 1979 के अधीन दण्डनीय अपराध;

(पच्चीस) उन अपराधो मे संलग्न होना, जो राज्य की सुरक्षा लोक व्यवस्था और जीवन के रफ्तार को भी प्रभावित करते है।

(ग) "गिरोहबन्द" का तात्पर्य किसी गिरोह के सदस्य या सरगना या संगठक से है और इसके अन्तर्गत कोई ऐसा व्यक्ति भी है जो खण्ड (ख) में प्रमाणित किसी गिरोह के क्रियाकलाप के लिए, चाहे ऐसे क्रियाकलाप के किए जाने के पूर्व या पश्चात, दुष्प्रेरित करता है या उसमे सहायता देता है, या किसी ऐसे व्यक्ति को जिसने ऐसे क्रियाकलाप किये हों, संश्रय देता है;

(घ) "लाके सेवक" का तात्पर्य भारतीय दण्ड संहिता की धारा 21 मे या तत्समय प्रवृत्त किसी अन्य विधि से यथापरिभाषित लोक सेवक से है और इसके अन्तर्गत कोई ऐसा व्यक्ति भी है जो राज्य की पुलिस या अन्य प्राधिकारियों को इस अधिनियम के अधीन दण्डनीय किसी अपराध के अन्वेषण या अभियोजन या दण्ड़ मे चाहे ऐसे अपराध या अपराधी के सम्बन्ध मे सूचना या साक्ष्य देकर या किसी अन्य रीति से, विधिपूर्वक सहायता करता है;

(ड) "किसी लाके सेवक के कुटुम्ब का सदस्य" का तात्पर्य उसके माता-पिता या पति या पत्नी, और भाई, बहिन, पुत्र, पुत्री, पौत्र, पौत्री, या इनमें से किसी के पति या पत्नी से है और इसके अन्तर्गत लोक सेवक पर आश्रित या उसके साथ निवास करने वाला कोई व्यक्ति और कोई ऐसा व्यक्ति भी है जिसके कल्याण में लोक सेवक हित रखता हो।

(च) इस अधिनियम में प्रयुक्त किन्तु अपरिभाषित, और दण्ड प्रक्रिया संहिता, 1973 या भारतीय दंड संहिता मे परिभाषित शब्दो और पदों के क्रमशः वहीं अर्थ होंगे जो ऐसी संहिताओं में उनके लिए दिए गये हैं।

***3- शास्ति** -(1) किसी गिराहे बन्द को दोनो मे से किसी भांति के कारावास से ऐसी अवधि के लिए जो दो वर्ष से कम न होगी और जो दस वर्ष तक हो सकेगी और जुर्माने से भी, जो पांच हजार रूपये से कम नहीं होगा, दण्डित किया जायगाः*

परन्तु किसी गिरोहबन्द को जो किसी लोक सेवक के शरीर के प्रति या लोक सेवक के कुटुम्ब के किसी सदस्य के शरीर के प्रति कोई अपराध करता है, दोनो मे से किसी भांति के कारावास से ऐसी अवधि के लिये जो तीन वर्ष से कम न होगी और जुर्माना से भी, जो पांच हजार रूपये से कम नहीं होगा, दण्डित किया जायेगा।

(2) किसी ऐसे व्यक्ति को जो लोक सेवक होते हुये चाहे स्वयं या अन्य के माध्यम से किसी गिरोहबन्द की किसी रीति से अवैध रूप से सहायता या समर्थन, चाहे गिरोहबन्द द्वारा कोई अपराध किये जाने के पूर्व या पश्चात् करता है, या विधिपूर्ण उपाय करने से विरत रहता है या इस संबंध मे किसी न्यायालय या अपने वरिष्ठ अधिकारियों के निर्देशो को कार्यान्वित करने से जानबूझकर करता है, दोनो मे से किसी भांति के कारावास से ऐसी अवधि के लिए जो दस वर्ष तक की हो सकेगी, किन्तु तीन वर्ष से कम न होगी और जुर्माने से भी दंडित किया जायगा।"

भारतीय दंड संहिता

*"**506. आपराधिक धमकी के लिए सजा**- जो कोई भी आपराधिक धमकी का अपराध करता है, तो उसे किसी एक अवधि के लिए कारावास जिसे दो साल तक बढ़ाया जा सकता है या आर्थिक दंड या दोनों के साथ दंडित किया जा सकता है।*

***यदि धमकी मृत्यु या गंभीर चोट, आदि के लिए है** - और यदि धमकी मौत या गंभीर चोट पहुंचाने, या आग से किसी संपत्ति का विनाश कारित करने के लिए, या मृत्युदंड या आजीवन कारावास से दंडनीय अपराध कारित करने के लिए, या सात वर्ष तक की अवधि के कारावास से दंडनीय अपराध कारित करने के लिए, या किसी महिला पर अपवित्रता का आरोप लगाने के लिए हो, तो अपराधी को किसी एक अवधि के लिए कारावास जिसे सात साल तक बढ़ाया जा सकता है, या आर्थिक दंड, या दोनों के साथ दंडित किया जा सकता है।"*

*"**376D. सामूहिक बलात्संग**- जहाँ समूह को गठित करने वाले या सामान्य आशय के अग्रसारण में कार्य करने वाले एक या उससे अधिक व्यक्तियों द्वारा स्त्री से बलात्संग किया जाएगा, वहाँ यह समझा जायेगा कि उन व्यक्तियों में से प्रत्येक ने बलात्संग का अपराध कारित किया है और कठोर कारावास से, जिसकी अवधि बीस वर्ष से कम नहीं होगी, किन्तु जो आजीवन तक की हो सकेगी, जिसका तात्पर्य उस व्यक्ति के नैसर्गिक जीवन के शेष के लिए कारावास से होगा, और जुर्माने से दण्डित किया जाएगा:*

परन्तु ऐसा जुर्माना पीड़िता के चिकित्सीय खर्चों और पुनर्वास को पूरा करने के लिए न्यायोचित और युक्तियुक्त होगा:

परन्तु यह और कि इस धारा के अधीन अधिरोपित किसी जुर्माने का भुगतान पीड़िता को किया जाएगा।"

*"**354. स्त्री की लज्जा भंग करने के आशय से उस पर हमला या आपराधिक बल का प्रयोग**- जो भी कोई किसी स्त्री की लज्जा भंग करने या यह जानते हुए कि ऐसा करने से वह कदाचित उसकी लज्जा भंग करेगा के आशय से उस स्त्री पर हमला या आपराधिक बल का प्रयोग करता है, तो उसे किसी एक अवधि के लिए कारावास की सजा जो कम से कम एक वर्ष होगी और जिसे 5 साल तक बढ़ाया जा सकता है, और साथ ही वह आर्थिक दंड के लिए भी उत्तरदायी होगा।"*

(ङ) गिरोहबन्द अधिनियम की विधिः-

16. उत्तर प्रदेश गिरोहबन्द और समाज विरोधी क्रियाकलाप (निवारण) अधिनियम, 1986, एक विशिष्ट अधिनियम है, जिसको गिरोहबन्द और समाज विरोधी क्रियाकलाप को रोकने और उनका सामना करने के लिए और उनसे सम्बद्ध या अनुषांगिक विषयों के लिये विशेष उपबन्ध करने के लिए अधिनियमित किया गया है।

17. अधिनियम के शीर्षक से विदित होता है, कि यह अधिनियम गिरोहबन्द निवारण और समाज विरोधी क्रिया कलाप निवारण के लिए अधिनियमित किया गया है। इसी नाते धारा 2(ख) (परिभाषा) में "गिरोह" की परिभाषा महत्वपूर्ण हो जाती है, जो एक विस्तृत परिभाषा है, जिसमें न केवल अपराध के उद्देश्य को सम्मिलित किया गया वरन समाज विरोधी क्रिया कलाप के अंतर्गत पच्चीस भिन्न-भिन्न अधिनियम और अपराध की प्रकृति के आधार पर भी अपराध या उसके कारण होने वाले परिणाम को भी सम्मिलित किया है जो हो सकता है किसी अधिनियम मे विशिष्ट रूप से अपराध की श्रेणी मे

नही हो जैसे पूर्व मे वर्णित धारा 3(1) के (दसवें) "अन्य व्यक्तियों को साम्प्रदायिक साम्जस्य मे विघ्न डालने के लिए हिंसा करने के लिए उद्दीप्त करना;" (ग्यारहवें) "जनता में दहशत, संत्रास या आतंक फैलाना;" व (अठ्ठारहवें) "वाणिज्यिक शोषण, बंधुआ श्रम, बालश्रम, यौन शोषण, अंग हटाने तथा दुर्व्यपार, करने, भिक्षा और समान क्रिया कलापो के प्रयोजनो के मानव दुर्व्यपार।" संभवतः उपरोक्त अपराध किसी अधिनियम में परिभाषित न हों।

18. "गिरोह" को शाब्दिक अर्थ के रूप मे परिभाषित नहीं किया है, परन्तु उस शब्द का 'तात्पर्य' क्या है ऐसा वर्णित किया गया है। जैसा **पी. कासिलिंगम व अन्य़ बनाम पी.एस.जी. कालेज ऑफ टेक्नोलॉजी 1995 सप्ली (2) एस.सी.सी. 348** में निर्धारित किया गया कि तात्पर्य (means) एक सख्त नियम की परिभाषा है, जिसके कारण परिभाषा में लेख बद्ध शब्दो का अर्थ परिभाषा के द्वारा दिये गये अर्थ के अलावा अन्य कोई अर्थ प्रदान नहीं किया जा सकता है, जबकि शब्द "निहित" (Include) एक व्यापकता को दर्शाता है कि और परिभाषा का व्यापक अर्थ दिया जा सकता है।

19. उच्चतम न्यायालय ने **शारदा गुप्ता प्रति उत्तर प्रदेश शासन व अन्य, 2022 एससीसी ऑनलाइन एससी 514** के विधिक दृष्टांत में उल्लेख किया है कि यह विधि की सुव्यवस्थित व्यवस्था है कि अधिनियम के प्रावधान जैसे हैं, वैसे ही पढे व समझे जाने चाहिये। अगर अपराधी किसी गिरोह का सदस्य है और किसी समाज विरोधी ऐसे क्रियाकलापों में संलग्न है जो धारा 2(ख), गिरोहबन्द अधिनियम में वर्णित है जैसे हिंसा,धमकी या अभित्रास या प्रपीड़न या प्रदर्शन या अन्य प्रकार से लोक व्यवस्था अस्त-वयस्त करता है या किसी दुनियावी, भौतिक, आर्थिक या अन्य लाभ हेतु के उद्देश्य से समाज विरोधी क्रिया कलाप जो एक से पच्चीस तक वर्णित है, करता है तो, वो धारा 2(ख) के अंतर्गत गिरोहबन्द की परिभाषा के आधीन माना जायेगा व उसके विरूद्ध इस अधिनियम के अंतर्गत अभियोजन चलाया जा सकेगा। एक प्रथम सूचना रिपोर्ट/आपराधिक मुकदमा के आधार पर भी अभियोजन चलाया जा सकता है।

20. गिरोह की परिभाषा के अन्तर्गत किसी पूर्व में समाज विरोधी क्रिया कलाप की घटना की प्रथम सूचना रिपोर्ट की अनिवार्यता नहीं है न ही किसी प्रकार के गिरोह सारणी की भी अनिवार्यता है। इस अधिनियम के अंतर्गत अभी तक कोई नियमावली नही बनी है। तथ्यो के आधार पर मात्र यह निर्धारित करना है कि क्या क्रिया कलाप या कृत परिभाषा के आधीन है या नहीं। अगर धारा 2(ख) के खण्ड (ग्यारह) व (पच्चीस) को ध्यान से परखा जाये तो यह उन घटनाओं को भी आधीन करेगा जहाँ भय के कारण अपराधी के विरूद्ध कोई प्रथम सूचना रिपोर्ट दर्ज भी नहीं करा पा रहा है। अतः यह मत गलत नहीं होगा कि कतिपय परिस्थितियों में पूर्व में कोई अपराध दर्ज न भी हो तो भी गिरोहबन्द अधिनियम के आधीन अभियोजन की कार्यवाही की जा सकती है।

(च) उच्च न्यायालय की अन्तर्निहित शक्तियाँ :-

21. भारतीय दंड प्रक्रिया संहिता, की धारा 482, उच्च न्यायालय की अन्तर्निहित शक्तियों की व्यावृत्ति के प्रावधान के सम्बंध में है जो निम्न है ;-

"इस संहिता की कोई बात उच्च न्यायालय की ऐसे आदेश देने की अन्तर्निहित शक्ति को सीमित या प्रभावित करने वाली न समझी जाएगी जैसे इस संहिता के अधीन किसी आदेश को प्रभावी करने के लिए या किसी न्यायालय की कार्यवाही का दुरुपयोग निवारित करने के लिए या किसी अन्य प्रकार से न्याय के उद्देश्यों की प्राप्ति सुनिश्चित करने के लिए आवश्यक हो।"

22. उच्च न्यायालय की अंतर्निहित शक्तियों को इस संहिता के किसी प्रावधान से सीमित नहीं किया जा सकता है। यह वो अंतर्निहित शक्तियां हैं, जो इस संहिता के तहत किसी भी आदेश को प्रभावी करने के लिए, या किसी भी न्यायालय की प्रक्रिया का दुरुपयोग रोकने के लिए या अन्यथा सुरक्षित करने के लिए या न्याय के उद्देश्यों की प्राप्ति के लिए आवश्यक हों। यह शक्तियां इस संहिता के तहत उच्च न्यायालय

को प्राप्त नहीं हुई हैं, बल्कि यह शक्तियां उच्च न्यायालय में अन्तर्निहित हैं, जिसे संहिता के एक प्रावधान द्वारा घोषित मात्र किया गया है।

23. उच्चतम न्यायालय ने कई विधिक दृष्टांतों में यह प्रतिपादित किया है, कि इस असाधारण शक्तियों का दायरा तो व्यापक है, परंतु इनका उपयोग संयम एवम् सावधानीपूर्वक व दुर्लभ से भी दुर्लभ प्रकरण में ही किया जाना चाहिए। इसके उपयोग से किसी भी वैधानिक अभियोजन की आकस्मिक मृत्यु कारित नहीं की जा सकती है।

24. अन्तर्निहित शक्तियों का उपयोग करते हुए ये जाँचने के लिये की कोई प्राथमिकी किसी प्रथमदृष्ट्या संज्ञेय अपराध को प्रकट करती है या नहीं , उच्च न्यायालय ना तो किसी जाँच संस्था और ना ही अपीलीय न्यायालय की तरह कार्य कर सकता है। इन शक्तियों के अन्तर्गत किसी साक्ष्य की प्रमाणिता की जाँच भी नहीं की जा सकती है, क्योंकि, इसका क्षेत्राधिकार उस न्यायालय का है, जिसके द्वारा परीक्षण किया जा रहा है या किया जायेगा। अन्वेषण के दौरान या आरोप पत्र दायर होने पर उच्च न्यायालय इस पहलू को भी नहीं देख सकता है कि आरोपी की ओर से मामले में अपेक्षित मानसिक तत्त्व या आशय मौजूद था या उसका क्या बचाव है और न ही दंड प्रक्रिया संहिता की धारा 161 के तहत अभिलेखित बयानों का गंभीर आँकलन कर, आरम्भिक स्तर पर ही किसी परीक्षण को विफल किया जा सकता है।

25. उच्चतम न्यायालय ने बहुधा कहा है कि वो परिस्थितियॉ जिनके होने पर इन अन्तर्निहित शक्तियों का उपयोग किया जा सकता है, उसकी कोई संपूर्ण सूची तो नहीं बनायी जा सकती, परन्तु कुछ क्षेणियाँ उदाहरणार्थ निम्नलिखित है:-

क) जहां प्राथमिकी या शिकायत में लगाए गए आरोप को अगर उनके प्रत्यक्ष रुप में मान लिया जाये और संपूर्णता में भी स्वीकार किया जाये, तब भी, अभियुक्त के विरुद्ध प्रथम दृष्टया कोई अपराध नहीं बनता हो,

ख) जहां प्राथमिकी और संलग्न सामग्रियों (यदि कोई हो), एक संज्ञेय अपराध को उद्घाटित नहीं करते हैं, तथा दंड प्रक्रिया संहिता की धारा 156(1) के तहत पुलिस अधिकारियों द्वारा अन्वेषण करने का कोई औचित्य साबित न होता हो;

ग) जहां प्राथमिकी या शिकायत में लगाए गए अविवादित आरोप और उसके समर्थन में एकत्र किए गए साक्ष्यों से किसी भी अपराध के कृत्य का होना प्रकट नहीं होता है और आरोपी के विरूद्ध कोई भी प्रकरण नहीं बनता हो;

घ) जहां प्राथमिकी के आरोप संज्ञेय अपराध को उद्घाटित न होते हों व केवल गैर-संज्ञेय अपराध को उद्घाटित करते हों, जहां पुलिस अधिकारी द्वारा मजिस्ट्रेट के आदेश के बिना किसी भी जांच की अनुमति नहीं है, जैसा कि दंड प्रक्रिया संहिता की धारा 155(2) के तहत परिकल्पित है;

ङ)जहां प्राथमिकी या शिकायत में लगाए गए आरोप इतने असंगत और स्वाभाविक रूप से असंभव हैं जिनके आधार पर कोई भी विवेकशील व्यक्ति कभी भी न्यायसंगत निष्कर्ष पर नहीं पहुंच सकता है कि अभियुक्त के विरुद्ध कार्यवाही के लिए पर्याप्त आधार मौजूद हैं;

च)जहां किसी संहिता या संबंधित अधिनियम (जिसके तहत आपराधिक कार्यवाही शुरू की गई है) के किसी भी प्रावधान के तहत विधिक प्रक्रिया को प्रारम्भ करने या प्रचलित रखने पर विधिक निषेध लगाया गया हो, और/या जहां संहिता या संबंधित अधिनियम के प्रावधान, पीड़ित पक्ष की शिकायत के लिए प्रभावी प्रतिकार प्रदान करते हो।

छ) जहां आपराधिक कार्यवाही स्पष्टतः दुर्भावनापूर्ण हो और/या जहां कार्यवाही विद्वेषपूर्ण रूप से आरोपी से अधिक प्रतिशोध लेने के लिए, परोक्ष उद्देश्य से की जाती है और जिसका लक्ष्य, निजी और व्यक्तिगत शिकायत के कारण उसे अपमानित करना हो। आपराधिक शिकायत को तब भी समाप्त किया जा सकता है जब मामला अनिवार्य रूप से दीवानी प्रकृति का हो और उसे एक अपराधिक अपराध का रूप दिया गया हो और यदि कथित अपराध के तत्व, शिकायत में प्रथम दृष्टया भी उपलब्ध न हों। क्योंकि इस तरह की कार्यवाही प्रचलित रखने पर न्यायालय की प्रक्रिया का दुरुपयोग होगा।

(देखें :- **हरियाणा राज्य बनाम भजनलाल: (1992) सप्ली 1 एससीसी 335, झंडू फार्मास्युटिकल वर्क्स लिमिटेड बनाम मोहम्मद**

शारफुल हक़: (2005)1 एससीसी 122, अहमद अली क़ारशी और अन्य बनाम उत्तर प्रदेश शासन : 2020 एससीसी ऑनलाइन एससी 107, जोसेफ सालवाराजा ए बनाम गुजरात राज्य (2011) 7 एससीसी 59, सुशील सेठी और एक अन्य बनाम अरुणाचल प्रदेश शासन और अन्य (2020) 3 एससीसी 240, प्रीति सराफ और अन्य बनाम दिल्ली व एनसीआर राज्य: 2021 एससीसी ऑनलाइन एससी 206)

26. उच्चतम न्यायालय ने, **मेसर्स निहारिका इन्फ्रास्ट्रक्चर प्राइवेट लिमिटेड बनाम महाराष्ट्र शासन व अन्य (2020)10 एस सी सी 118** में स्पष्ट रूप से निर्धारित किया है कि, उच्च न्यायालय द्वारा, धारा 482 दं.प्र.सं या संविधान के अनुच्छेद 226 के अंतर्गत दायर याचिका को निरस्त या निस्तारण करते हुए, अन्वेषण के दौरान या धारा 173(2) दं.प्र.सं के तहत आरोप पत्र/ अन्तिम रिपोर्ट दाखिल होने तक, गिरफ़्तारी न करने या कोई अवपीड़क कार्यवाही न करने का आदेश पारित करना, न्यायसंगत नहीं है। अगर असाधारण परिस्थितियों में, किसी प्रकरण में उच्च न्यायालय का अभिमत है, कि प्रथम द्रष्टव्य, अग्रिम अन्वेषण को स्थगित करना चाहिये, तो ऐसा आदेश, संक्षिप्त ही हो परन्तु सुविवेचित/ सकारण होना चाहिए, हालांकि ऐसे आदेश न ही नियमित रुप में, न ही संयोगवश और/या न ही यंत्रवत् रूप से पारित होने चाहिए। हाल में **सिद्धार्थ मुकेश भंडारी प्रति गुजरात राज्य सरकार: (दाण्डिक अपील सं०. 1044, 1045 और 1046 of 2022)**, निर्णय दिनांकित 02.08.2022 के निर्णय में उच्चतम न्यायालय ने यह पुनरावृत्ति भी किया है।

27. आरोप सत्य है या नहीं, यह विचारण में निर्धारित किया जायेगा। केवल उन विरल मामलों को छोड़कर जहां यह स्पष्ट रुप से विदित हो जाये कि आरोप गंभीरता से विचारणीय नहीं है या कोई भी अपराध उद्घाटित नहीं करते हैं, न्यायालय, धारा 482 दं.प्र.सं. की शक्ति का उपयोग करते हुए, शिकायत के आरोप की सत्यता की जाँच नहीं करता है। (देखें: **रामबीर उपाध्याय व अन्य प्रति उत्तर प्रदेश राज्य व अन्य : 2022 एस सी सी ऑनलाइन एस सी 484**)

(छ)विश्लेषण

28. उपरोक्त तथ्यात्मक व विधिक पृष्ठभूमि में इस न्यायालय को यह निर्धारित करना है, कि पत्रावली पर उपलब्ध साक्ष्य, क्या आवेदकगण के विरूद्ध धारा 3(1) गिरोहबन्द अधिनियम के अंतर्गत प्रथम दृष्टवा अपराध दृष्टिगोचर करते हैं या नही तथा क्या परिस्थितियाँ ऐसी है कि अन्तर्निहित शक्ति के उपयोग का मामला बनता है, या नहीं।

29. जैसा कि पूर्व मे विश्लेषण किया गया है, कि अन्तर्निहित शक्तियों का उपयोग दुर्लभ प्रकरणों में ही किया जाना चाहिये, वो भी जब अभियुक्त के विरूद्ध प्रथम दृष्टवा कोई अपराध नहीं बनता हो। आरोप सत्य है, या असत्य है यह निर्धारित करने का कर्तव्य विचारण न्यायालय को है न कि इस न्यायालय को। धारा 482 दं.प्र.सं. मे अन्तर्निहित शक्तियों का उपयोग करते हुए आरोप की सत्यता को नहीं परखा जा सकता है जैसा पूर्व मे यह उल्लेखित किया है और अगर प्रकरण के तथ्य व पत्रावली पर साक्ष्य से प्रथम दृष्टवा धारा 3(1) गिरोहबन्द अधिनियम में वर्णित अपराध कारित होने के साक्ष्य उपलब्ध हैं तो अन्तर्निहित शक्ति का उपयोग नहीं किया जा सकता है।

30. सर्वप्रथम यह विचार करना है, कि आवेदकगणों ने क्या गिरोह जैसा धारा 2(ख), गिरोहबन्द अधिनियम मे परिभाषित है, का प्रथम दृष्टवा समूह बना रखा है, जो ऐसी समाज विरोधी कार्यकलापों में लिप्त हैं, जो भारतीय दण्ड संहिता के अध्याय- 16 के अधीन दण्डनीय अपराध है, या उनसे जनता मे दहशत या संत्रास फैला था एवं कृत कोई भौतिक या दुनियावी लाभ प्राप्त करने के उद्देश्य से किया गया है। जैसा पूर्व मे विश्लेषण किया गया है कि 'गिरोह' की परिभाषा विस्तृत व वृहद है और समाज विरोधी क्रिया कलाप के अन्तर्गत अन्य प्रकार से पच्चीस भिन्न-भिन्न अपराधों को सम्मिलित किया गया है जिसमे से (ग्यारह) जनता मे दहशत, संत्रास या आतंक फैलाना भी है। **तेज सिंह (पूर्व मे उल्लेखित)** मे यह अवलोकन कि "जब भी कोई गंभीर अपराध कारित होता है, तो परिणामस्वरूप हमेशा समाज मे किसी न किसी प्रकार का व्यवधान होता है" यह उक्त मामले के संदर्भ मे सही हो सकता है, परन्तु यह

समान्यीकरण करना, गिरोह बन्द अधिनियम के उद्देश्य के प्रतिकूल होगा। "लोक व्यवस्था को अस्त-व्यस्त" करना अपराध कारित होने के पश्चात उस स्थान या आस पास के वास्तविक माहौल पर आधारित होगा, जो किसी मामले के तथ्य व परिस्थितियों के मद्देनज़र होगा न ही एक घटना को एक ही दृष्टि से देखा जा सकता। शब्द 'दुनियावी', 'आर्थिक', 'भौतिक' व 'अन्य लाभ' का विस्तृत अर्थ है, जो केवल एक मामले के तथ्यों को ध्यान मे रखकर, संकुचित नहीं किया जा सकता है वो भी तब, जब विचारण नहीं हुआ हो और अन्तर्निहित शक्ति के उपयोग संदर्भित न हो। ऐसा तात्पर्य होना न केवल अनुचित है, बल्कि गिरोहबन्द अधिनियम के उद्देश्यों के प्रतिकूल भी है। अतः **तेज सिंह (पूर्व मे उल्लिखित)** का कोई लाभ आवेदकगण को नहीं मिल सकता है। आवेदकगण के अधिवक्ता का निवेदन कि पीडिता ने पूर्वाग्रह से ग्रसित होकर उनके विरूद्ध दो आपराधिक मामले दर्ज कराये हैं क्योंकि उसके पति के विरूद्ध आवेदकगण ने एक अपराध में मामला दर्ज कराया था, जिसमे उसे सजा भी दी गई है, इस स्तर पर विचारणीय नहीं है, क्योकि यह एक बचाव है अतः विचारण का विषय है।

31. वर्तमान प्रकरण में यह सर्वविदित है, कि आवेदकगण के विरूद्ध दो आपराधिक मामले दर्ज हैं, जिनमें अन्वेषण के उपरान्त आरोप पत्र, गंभीर अपराध कारित होने के साक्ष्य उपलब्ध होने के कारण प्रेषित किये जा चुके हैं, जिनका संज्ञान भी लिया जा चुका है। तथ्यों के अनुसार आवेदकगण ने न केवल पीडित का सामूहिक बलात्कार किया बल्कि उसके द्वारा प्रथम सूचना रिपोर्ट दर्ज कराने पर उसको धमकाया व उसकी लज्जा भंग भी करी तथा जाँच अधिकारी ने घटना स्थल के आस-पास के माहौल का अध्ययन कर साक्ष्य लेखबद्ध किया है, कि क्षेत्र में आतंक, भय व रोष व्याप्त है तथा उनके विरूद्ध प्राथमिकी दर्ज कराने का साहस कोई नहीं कर पाता है। इस आकलन को इस स्तर पर निराधार नही माना जा सकता है, वो भी तब, जब आवेदकगणो पर दो आपराधिक मुकदमे दर्ज हो रखे हैं, जो धारा 3(1) के अधीन दण्डनीय है। आवेदकगण ने बलात्कार व छेड़छाड़ जैसे कृत्य करके, लोक व्यवस्था को अस्त-व्यस्त करने व अपने गिरोह के लिए अनुचित दुनियावी व भौतिक लाभ प्राप्त करने के उद्देश्य से समाज विरोधी क्रियाकलाप किये हैं, जो भारतीय दण्ड संहिता के अध्याय-16 के अधीन दण्डनीय है तथा इस कृत्य/क्रिया कलाप के कारण जनता में भय, दहशत या संत्रास भी फैला, जो धारा 2(ख)(ग्यारह) सपठित धारा 3(1) के अधीन दण्डनीय भी है, इन परिस्थितियों में अन्तर्निहित शक्तियों का उपयोग करना आपराधिक कार्यवाही को अचानक मृत्यु पहुचाने जैसा होगा जो साधारणतया नहीं किया जा सकता है।

(ज) निष्कर्ष

32. अतः ऐसी कोई परिस्थिति नही है कि अन्तर्निहित शक्ति का प्रयोग किया जाये। आवेदन गुण दोष पर योग्य न होने के कारण निरस्त किया जाता है।

(2022) 11 ILRA 426
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2022

BEFORE

THE HON'BLE AJAI TYAGI, J.

Application U/S 482 No. 25531 of 2022

Rajendra Kumar ...Applicant
Versus
State of U.P. & Anr. ...Opposite Party

Counsel for the Applicant:
Ms. Samriddhi Upadhyaya, Sri Yash Dev Upadhyaya, Sri Sant Saran

Counsel for the Opposite Party:
G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Section 302 - The Code of Criminal Procedure, 1973 - Section 311 - powers of court to summon a witness or to recall or re-examine any witness already examined, Section 482 - Inherent power , An application u/s 311 Cr.P.C. must not be allowed only to fill up the lacuna in prosecution case, or of the defense -

Unfair advantage should not be given to any of the parties and the additional evidence must not be received as a disguise for re-trial - powers of judicial supretendence under Section 482 Cr.P.C. has to be exercised sparingly when there is apparent error or gross injustice in view taken by the subordinate courts.(Para - 15,17, 18)

Application u/s 311 Cr.P.C. - moved by new counsel - recalling PW1 - further cross-examination - nothing mentioned in application - what questions applicant proposes to ask from PW1 - if opportunity of further cross-examination granted - trial court rejected application - Aggrieved - hence application u/s 482 of Cr.P.C.**(Para -5,17)**

HELD:-Mere change of advocate cannot be a ground to recall the witnesses . Fair opportunity granted to the accused and opportunity cannot be given to meet out the loop-holes in evidence by way of Section 311 Cr.P.C., which may cause prejudice to either of the parties. No error in the impugned order.**(Para - 18,19)**

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:-

1. Varsha Garg Vs St. of M.P. & ors. , In SLP (Crl) No.2239 of 2022 (Criminal Appeal N0.1021 of 2022)

2. Mohanlal Shamji Soni Vs U.O.I. , (1991) Supp (1) SCC 271

3. Rajaram Prasad Yadav Vs St. of Bihar & ors. , 2013 14 SCC 461

4. AG Vs Shiv Kumar Yadav, 2015 0 Supreme (SC) 875

5. Rajendra Trehan Vs M/S HDFC Bank Ltd. ,2022 LawSuit (P&H) 1635

6. Zahira Habibulla H. Sheikh Vs St. of Guj. (2006) 3 SCC 374

7. Godrej Pacific Tech. Ltd. Vs Computer Joint India Ltd. ,(2008) 11 SCC 108

8. Manju Devi Vs St. of Rajasthan, (2019) 6 SCC 203

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

1. This application u/s 482 Cr.P.C. is moved by applicant Rajendra Kumar against the State of U.P. being aggrieved with the order passed by Additional District and Sessions Judge, Court No.1, Ghaziabad on 02.08.2022 in S.T. No.1512 of 2005 (State vs. Manmohan and others), under Section 302 IPC, Police Station- Kotwali, District- Ghaziabad, whereby the application, moved by applicant-accused Rajendra Kumar, under Section 311 of Cr.P.C. for recalling PW1 Shiv Kumar Sharma was rejected by aforesaid trial court.

2. Heard Shri Sant Saran, Advocate appearing on behalf of Ms. Samriddhi Upadhyaya, assisted by Shri Yash Dev Upadhyaya, learned counsel for the applicant and Shri Mithilesh Kumar, Learned AGA for the State.

3. Brief facts of the case giving rise to this present application are that a first information report was lodged by Shiv Kumar Sharma against Manmohan @ Bittu, Rajendra @ Pappu and Satpal @ Santo u/s 302 r/w Section 34 IPC on 05.05.2005, in which averment was made that complainant Shiv Kumar had lent his shop to Ranjeet. Manmohan, brother of Surendra Bhola, had told him to get the shop vacated. Due to this cause persons became inimical and told him that he was with their enemies. On 5.5.2005, all the three accused with one more person came to his house to see his ailing father and after that at about 8:15 pm when they were returning, he and his brother Ashok @ Billu and Arjun Sharma went to see off

them. When they reached on the road, all the three named accused with one more person dragged their country made pistols and fired at them with intention to kill. In this occurrence, the brother of complainant Ashok @ Billu sustained serious injuries and was declared dead in hospital. The scribe of the aforesaid FIR was Arjun Sharma.

4. Investigation was carried out and charge sheet was submitted by I.O. against the accused persons. Learned trial court framed charge under Section 302 r/w Section 34 IPC against all the accused persons. During trial, complainant Shiv Kumar Sharma was examined as PW1 and scribe of FIR Arjun Sharma was examined as PW2. Prosecution examined only two witnesses, namely, PW1 and PW2 as witnesses of fact and six other formal witnesses were examined. After completion of prosecution evidence, statements of accused persons were recorded under Section 313 Cr.P.C. Accused persons were given opportunity for their defence.

5. After that an application u/s 311 Cr.P.C. was moved on behalf of the accused Rajendra Kumar for recalling PW1 Shiv Kumar Sharma for further cross-examination. The aforesaid application under Section 311 Cr.P.C. was rejected by learned trial court vide impugned order dated 2.8.2022. Aggrieved with impugned order, applicant-accused Rajendra Kumar moved this application u/s 482 of Cr.P.C.

6. Learned counsel for the applicant submitted that learned trial court has rejected the application without application of judicial mind only on two grounds, firstly, that cross-examination of PW1 has already been done on behalf of the accused persons and secondly, that the sessions trial is very old and pending since the year 2005 and one of the oldest matter of the court. Learned counsel for the applicant submitted that application should not have been rejected on the ground that the case is very old because on this ground justice should not be buried. Learned counsel for the applicant relied on the decision of Apex Court in Criminal Appeal N0.1021 of 2022 **Varsha Garg Vs. State of Madhya Pradesh and others In SLP (Crl)** No.2239 of 2022. Learned counsel for the applicant further submitted that in the aforesaid Sessions trial complainant Shiv Kumar Sharma has been examined as PW1 and scribe of FIR Arjun Sharma as PW2. In his examination-in-chief PW2 Arjun Sharma supported the prosecution case but in his cross-examination he has totally retracted from his statement in examination-in-chief and has denied of being eye-witness in cross-examination by saying that he had not seen the occurrence and he had heard only the sound of firing. He has specifically deposed that he knows the accused persons by name but had not seen anyone firing due to darkness. Learned counsel for the applicant argued that in this way PW2 has not supported the prosecution case in cross-examination but the prosecution did not make any prayer to get him declared hostile. Hence, it is necessary to further cross-examine PW1 with regard to the evidence of his presence on the spot because it is deposed that he had written the report on dictation of PW1 Shiv Kumar Sharma and he had written in the report whatever was dictated to him by PW1. Hence, further cross-examination of PW1 is essential on this point.

7. Learned counsel for the applicant next submitted that PW1 Shiv Kumar Sharma has himself made self contradictory statements in his deposition. PW1 has said

in examination-in-chief that he and Arjun Sharma saved their lives by hiding behind the wall but in cross-examination he had deposed that they saved their lives by hiding behind wooden Takht. Hence, clarification of contradictions is necessary and for that purpose it is essential to recall PW1 for further cross-examination.

8. Learned counsel for the applicant submitted that these aforesaid questions and circumstances could not be asked from PW1 in cross-examination because the defence counsel was of old age and due to his advance age he could not cross-examine PW1 with regard to the aforesaid contradictions in the evidence of PW1 and PW2 and that later on the learned counsel is stopped coming to the court and accused persons changed their counsel and the new advocate moved application u/s 311 Cr.P.C. in the lower court after examining the file but the application was rejected by trial only on the ground that sessions trial is very old one and PW1 has already been cross-examined at length.

9. It is also submitted by learned counsel for the applicant that FIR is also ante time but questions in this regard was not asked from PW1 in cross-examination.

10. Learned counsel for the applicant said that at the time of disposal of application u/s 311 Cr.P.C., the trial court should have considered the essentiality of evidence for just decision of the case. It is also submitted that in the land mark judgement **Mohanlal Shamji Soni Vs. Union of India (1991) Supp (1) SCC 271** guidelines were mentioned by Hon'ble Apex Court with regard to the exercise of power under Section 311 Cr.P.C. and emphasis was laid down that essentiality of evidence of the person who is to be examined coupled with the need for the just decision of the case constitute the touchstone which must guide the decision of the court. Broad power u/s 311 Cr.P.C. are to be governed by the requirement of the justice but the learned trial court did not consider the concept of essentiality of evidence to arrive at the just decision of the case. Hence, the impugned order to set aside and trial court to be directed to recall PW1 for further cross-examination.

11. Learned AGA objected to the submissions made by learned counsel for the applicant and at the outset submitted that the application u/s 311 Cr.P.C., which was moved by applicant in the lower court, does not contain questions which are proposed to be asked from PW1. Learned AGA submitted that in the application u/s 311 Cr.P.C., the applicant has to disclose as to what questions he proposes to ask from the witness but no such question is mentioned in the application moved by accused-applicant in this case, which means that if application is allowed then it will be open to the applicant to cross-examine the witness on any ground which is not the intention of provision of Section 311 Cr.P.C. and it is not permitted. Moreover, it is not mentioned in application as to what new evidence has taken place after completion of evidence of PW1. Learned AGA made submissions that there are two parts in Section 311 of Cr.P.C. In first part "may" word is given which means that it is the discretion of the court that it may or may not allow the application and in second part "shall" word is given, which means that it shall be obligatory on the court to recall the witness if evidence appears to be essential to the just decision of the case. But in this case nothing is shown by the applicant in the application regarding the essentiality of

evidence. Learned AGA also submitted that the judgement of the Apex Court in **Rajaram Prasad Yadav Vs. State of Bihar and others** reported in **2013 14 SCC 461** has narrated several guidelines for deciding the application u/s 311 Cr.P.C. and one of the guidelines is that the exercise of the said power cannot be dubbed as filling up in a lacuna in a prosecution case unless the fact and circumstances make it apparent that the exercise of the power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

12. Learned AGA made further submission that change of the advocate is no ground for recalling any witness. Learned AGA relied on **AG Vs. Shiv Kumar Yadav 2015 0 Supreme (SC) 875** and submitted that it is clearly held by Hon'ble Apex Court in the aforesaid judgement that mere change of the counsel cannot be ground to recall the witnesses. It is also submitted that even competency of the counsel was a subjective matter and this plea cannot easily be accepted. Learned AGA submitted that the aforesaid judgement of the Apex Court is followed recently by the High Court of Punjab and Haryana in **Rajendra Trehan Vs. M/S HDFC Bank Ltd. 2022 LawSuit (P&H) 1635** and held that change of counsel is no ground for recalling of witnesses. In fact, the application u/s 311 Cr.P.C. is moved by accused-applicant to linger on the decision of the case.

13. Learned counsel for the applicant, in reply, submitted that primary factor for deciding the application u/s 311 Cr.P.C. is essentiality of evidence to arrive at to the just decision of the case and filling up the loop-holes and lacuna is merely subsidiary factor as held by Hon'ble Apex Court in **Zahira Habibulla H. Sheikh Vs. State of Gujarat (2006) 3 SCC 374** and **Godrej Pacific Tech. Ltd. Vs. Computer Joint India Ltd. (2008) 11 SCC 108.**

14. I have carefully considered the rival submissions made by the parties as well as gone through the record.

15. The nature and scope of the powers to be exercised by the court under Section 311 Cr.P.C. was elaborately considered in the case of **Rajaram Prasad Yadav v State of Bihar and another** (supra) and after considering the earlier precedents, the principles to be followed by the courts with regard to exercise of powers under the said section have been explained and enumerated. It has been stated thus:-

"14. A conspicuous reading of Section 311 Cr P C would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a prefix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case.

Section 138 of the Evidence Act, prescribed the order of examination of a witness in the court. The order of re-examination is also prescribed calling for such a witness so desired for such re-

examination. Therefore, a reading of Section 311 CrPC and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Cr.P.C. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

xxx

23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr P C read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the courts:

a) Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?

b) The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

c) If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.

d) The exercise of power under Section 311 Cr P C should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

f) The wide discretionary power should be exercised judiciously and not arbitrarily.

g) The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

h) The object of Section 311 Cr P C simultaneously imposes a duty on the court to determine the truth and to render a just decision.

i) The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

j) Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.

k) The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

n) The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

16. There is no doubt in the legal position that Court has to bear in mind the essentiality of evidence for just decision of the case while deciding the application u/s 311 Cr.P.C. as held by Hon'ble Apex Court in catena of judgements and also the duration of a case cannot displace the specific requirement of just decision after taking all the necessary and material evidence on record as held by Hon'ble Apex Court in **Manju Devi Vs. State of Rajasthan (2019) 6 SCC 203.**

17. As far as the test of essentiality of evidence is concerned, it should also be kept in mind that no prejudice is to be caused to any of the parties. I am in full agreement with the contention of learned AGA that nothing is mentioned in application u/s 311 Cr.P.C. annexed as Annexure No.6 to the affidavit as to what questions applicant proposes to ask from PW1 if opportunity of further cross-examination is granted rather it is mentioned in the aforesaid application that facts and circumstances are not be enumerated because the defense of the accused will be disclosed. It means that if opportunity is given for further cross-examination and it will be open to the applicant-accused to cross-examine the witness on any point, which may take the shape of re-trial. Moreover, in this particular case since nothing is mentioned in application u/s 311 Cr.P.C. as to on what points questions are to be asked, during the course of the argument before

this Court, learned counsel for the applicant has brought forward several contradictions in the evidence of PW1 and PW2. It is also submitted by the learned counsel for the applicant that PW2, scribe of the FIR, did not support prosecution in his cross-examination and prosecution did not request to the court for declaring him hostile. It is no concern of the accused whether prosecution is getting declared any witness hostile or not. It is the consideration of prosecution only. Learned counsel for the applicant has submitted that several self-contradictory statements have emerged in the evidence of PW1 on which questions are to be asked in further cross-examination. It is also submitted that questions are also to be asked with regard to the presence of PW2 at the scene of the occurrence when PW2 has denied the prosecution case in his cross-examination. In my opinion, all these aforesaid proposed questions or points are argumentative questions and points, which come in the category of loop-holes. Hence, the aid of Section 311 of Cr.P.C. cannot be given to the accused to fill up the loop-holes. The proposed points or questions, as told to this Court during the course of argument, do not come in the purview of essentiality of evidence. An application u/s 311 Cr.P.C. must not be allowed only to fill up the lacuna in prosecution case, or of the defense. Unfair advantage should not be given to any of the parties and the additional evidence must not be received as a disguise for re-trial as it would be if the application u/s 311 Cr.P.C. in this case is allowed. The Court has to bear in mind that opportunity of fair trial should be given to the accused, but it should also be kept in mind that the interest of victim also should not be prejudiced.

18. Learned counsel for the applicant has vehemently submitted and emphasized that all the questions and circumstances could not be put to PW1 in cross-examination because of the advance age of the counsel of the applicant-accused and application u/s 311 Cr.P.C. was moved by the new counsel. In this way, the competency of earlier counsel is also questioned by new counsel. The accused-applicant had appointed the advocate of his choice, who was given due and fair opportunity and thorough cross-examination of PW1 was conducted by him on various dates, way back in the year 2006 and 2007. No finding could be recorded that earlier advocate appointed by the accused-applicant was incompetent. Hence, in these circumstances mere change of advocate cannot be a ground to recall the witnesses. Needless to say that the powers of judicial supretendence under Article 227 of the Constitution of India and under Section 482 Cr.P.C. has to be exercised sparingly when there is apparent error or gross injustice in view taken by the subordinate courts. In the present case fair opportunity was granted to the accused and opportunity cannot be given to meet out the loop-holes in evidence by way of Section 311 Cr.P.C., which may cause prejudice to either of the parties.

19. In view of above discussion, this Court does not find any error in the impugned order and is not inclined to interefere with.

20. Accordingly, the application u/s 482 Cr.P.C. is dismissed.

21. It is made clear that observations made in this order shall be confined to the disposal of the aforesaid application u/s 482 Cr.P.C. only.

(2022) 11 ILRA 434
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.08.2022

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Civil Revision No. 303 of 2013

Pramod Khandelwal ...Revisionist
Versus
Vinod Khandelwal & Ors.
... Opposite Parties

Counsel for the Revisionist:
Sri A.K. Goyal

Counsel for the Opposite Parties:
Sri Siddhartha Srivastava

(A) Civil Law - Code of Civil Procedure,1908 - Order 7 Rule 11 - Rejection of Plaint - The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - Sections 13 (2) & 34 - plea regarding jurisdiction should be decided as preliminary issue - issue of law can be decided as a preliminary issue only where it is such that a decision does not necessitate investigation into facts - it relates either to jurisdiction of the Court or to the suit being barred under any prevailing law. (Para -21,22)

(B) Civil Law - Code of Civil Procedure,1908 - Order 14 Rule 2 - when the question of jurisdiction is exclusively involved which does not require any investigation of fact and the same can be decided on the basis of pleadings without any evidence - trial Court can decide the said issue as preliminary issue - Jurisdiction vested under Order 14 Rule 2 C.P.C. is discretionary and not mandatory. (Para - 17,19)

Sale deed executed by defendant/respondent no.1 in favour of defendant/respondent no.3 - Suit instituted by plaintiff/respondent no.1 - cancellation of sale deed - ground - exclusive owner of property in question - application filed under Order 7 Rule 11 C.P.C. by revisionist/defendant no.1- contention - sale deed has been executed under Section 13(2) of SECURITISATION ACT, 2002 - case for cancellation of sale deed - pending before the Debt Recovery Tribunal - suit before trial Court not maintainable and is barred - trial court refused to reject plaint under Order 7 Rule 11 C.P.C. - question of jurisdiction is mixed question of fact and law - power under Order 7 Rule 11 not exercisable.**(Para - 2,3,4,13,14)**

HELD:-Issue involved is a mixed question of fact and law which requires appreciation of evidence in support of the pleadings on record. Trial Court not committed any jurisdictional error in dismissing the said application. **(Para - 18)**

Revision dismissed. (E-7)

List of Cases cited:-

1. Manager, Bettiah Estate Vs Bhagwati Saran Singh & ors., 1992 (2) AWC 1233

2. Mrs. Shahnaz Husain & ors. Vs Mohd. Yunus & ors., 1993 (1) ACJ 216

3. Smt. Subhash Bhalla & anr. Vs Smt. Jai Devi & anr., 2008 All. C.J.7732010 (78) ALR 755

4. Dhampur Sugar Mills Ltd. & anr. Vs Rajeev Sinha

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

1. Heard Sri A.K. Goyal, learned counsel for the revisionist/ defendant and Sri Siddharth Srivastava, learned counsel for plaintiff/respondent no.1.

2. The plaintiff/respondent no.1 instituted a suit for cancellation of sale deed dated 30.03.2009 executed by defendant/respondent no.1 in favour of

defendant/respondent no.3. The suit was instituted on the ground that the plaintiff/ respondent no.1 is the owner of the property in dispute and sale deed has been illegally executed by the defendant/ respondent no.1 in favour of defendant/ respondent no.3.

3. In the suit, an application under Order 7 Rule 11 C.P.C. was filed by the revisionist/defendant no.1 contending *inter-alia* that the suit is barred as the sale deed has been executed under Section 13 (2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'SECURITISATION ACT, 2002') and a case for cancellation of sale deed is registered as Case No.67 of 2008 is pending before the Debt Recovery Tribunal.

4. The trial Court by order dated 01.09.2021 rejected the said application holding that the question whether the suit is barred is mixed question of fact and law, therefore, *prima facie* it appears that the power under Order 7 Rule 11 is not to be exercised in such a case.

5. After the pleadings have been exchanged, the trial Court framed as many as 12 issues. After framing of issues, the revisionist/defendant filed an application No.103Ga praying therein that the Issue Nos. 6, 7 & 10 of the suit may be decided as preliminary issues. The issues Nos. 6, 7 & 10 reads as under:-

"6. क्या वाद आवश्यक पक्षकारों के न बनाये जाने से दूषित है?

7. क्या वाद धारा 10 सी०पी०सी० के अंतर्गत स्टे होने योग्य है?

10.क्या इस न्यायालय को वाद की सुनवाई का क्षेत्राधिकार प्राप्त है?"

6. The trial Court found that the necessary party has been impleaded by the defendant/respondent no.1 and the original suit Nos.539 of 2009 & 510 of 2009 have been clubbed. So far as the question of jurisdiction framed as Issue No.10 is concerned, it is a mixed question of fact and law and can be decided with other issues. The trial Court further recorded that the application has been filed to delay the proceeding as on the last four dates the defendant/revisionist has sought time to cross-examine PW1, and thereafter the said application 103Ga was filed.

7. Challenging the aforesaid order, learned counsel for the revisionist has contended that once the question of jurisdiction arises and suit is exclusively barred by Section 34 of the SECURITISATION ACT, 2002, it is incumbent upon the trial Court under Order 14 Rule 2 C.P.C. to decide the question of jurisdiction first so that the proceedings may not prolong unnecessarily and the revisionist may not suffer harassment.

8. It is contended that from the reading of Section 34 of the SECURITISATION ACT, 2002, it is evident that suit is exclusively barred and as no question of fact is involved and only question of jurisdiction is involved, therefore, the trial Court ought to have decided the Issue No.10 as preliminary issue. He submits that provision under Order 14 Rule 2 C.P.C. which provides for decision of issue on jurisdiction is mandatory and the Court below has to follow the said provision and decide the said issue first as preliminary issue.

9. In support of his argument, he has placed reliance in the case of ***Manager, Bettiah Estate Vs. Bhagwati Saran Singh***

and other, 1992 (2) AWC 1233 & Mrs. Shahnaz Husain and Other Vs. Mohd. Yunus & Other, 1993 (1) ACJ 216 & Smt. Subhash Bhalla and another Vs. Smt. Jai Devi and another, 2008 All. C.J.773.

10. Per contra, learned counsel for the plaintiff/respondent contends that almost on identical plea, an application under Order 7 Rule 11 C.P.C. was filed wherein it was alleged that as the sale deed has been executed under Section 13(2) of the SECURITISATION ACT, 2002, therefore, the suit is barred. He submits that while deciding the application under Order 7 Rule 11 C.P.C. the trial Court has returned a specific finding that the question of jurisdiction involved in the case is a mixed question of fact and law and cannot be looked into at this stage. He submits that the finding returned by the Court below on application under Order 7 Rule 11 Cr.P.C. is binding and as the question of jurisdiction involved in the instant case is a mixed question of fact and law, therefore, the same cannot be decided as a preliminary issue and can be decided only after the parties lead evidence.

11. It is further contended that provision under Order 14 Rule 2 C.P.C. is only directory and not mandatory and the trial Court is at discretion given in the facts of the case to decide the said issue as preliminary issue or with other issues. In support of his contention, he has placed reliance upon the case reported in ***2010 (78) ALR 755, Dhampur Sugar Mills Ltd. and another Vs. Rajeev Sinha.***

12. Having considered the submissions advanced by learned counsel for the parties and perused the record.

13. It transpires from the record that the suit has been instituted by the plaintiff/respondent no.1 for cancellation of sale deed dated 30.03.2009 on the ground that he is the exclusive owner of the property in question. In the said suit, an application under Order 7 Rule 11 C.P.C. was filed contending inter alia that as the sale deed had been executed under Section 13(2) of the SECURITISATION ACT, 2002, therefore, the suit before the trial Court is not maintainable and is barred .

14. The trial Court recorded a finding that whether the suit is barred, is a mixed question of fact and law in the instant case and accordingly, it refused to reject the plaint under Order 7 Rule 11 C.P.C. The order of the trial Court dated 01.09.2021 rejecting the application under Order 7 Rule 11 has not been assailed by the revisionist and has attained finality.

15. After the pleadings have been exchanged, the issues have been framed.

16. Learned counsel for the revisionist has urged the contention only as regards the Issue No.10. He submits that the trial Court while rejecting the application of the revisionist to decide the Issue No.10 as preliminary issue recorded a specific finding that it is a mixed question of fact and law and has relied upon the order of the trial Court dated 01.09.2021 whereby the trial Court has refused to entertain the application under Order 7 Rule 11 on the same ground. The trial Court further noticed that application 103Ga has been filed only to delay the proceedings as on previous four dates defendant/revisionist has sought time to cross-examine the PW1 and instead of cross-examining the PW1, an application to decide the preliminary Issue No.10 was filed.

17. Perusal of Order 14 Rule 2 C.P.C. indicates that it is only when the question of

jurisdiction is exclusively involved which does not require any investigation of fact and the same can be decided on the basis of pleadings without any evidence, the trial Court can decide the said issue as preliminary issue. The object of incorporating such provision is manifest that if suit can be concluded on the basis of one issue, the parties should not be harassed in protracted and prolong litigation.

18. In the instant case, the finding returned by the trial Court while rejecting the application is that the issue involved is a mixed question of fact and law which requires appreciation of evidence in support of the pleadings on record. This Court finds that the trial Court has not committed any jurisdictional error in dismissing the said application.

19. This Court also in the case of ***2010 (78) ALR 755*** in Para-4 has held that jurisdiction vested under Order 14 Rule 2 C.P.C. is discretionary and not mandatory. Para-4 of the said judgement reproduced herein-below:-

"4. The short question for determination of this revision is whether the impugned order suffers from jurisdictional error and can be interfered with in this revision. In order to reach to the right conclusion, it is necessary to go through the provisions of Order XIV Rule 2 C.P.C. and as amended vide Code of Civil Procedure Amendment Act, 1976 w.e.f. 1.12.1977, which reads as under:

" Rule-2. Court to pronounce judgment on all issues (1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2) pronounce judgment on all issues.

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

"(a) the jurisdiction of the Court, or

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

It reveals from the perusal of the Order XXIV Rule 2 C.P.C., quoted above that it is within the discretion of the court to decide which issue he should decide as preliminary issue and it is not mandatory for the court to decide the issue of jurisdiction or issue relating to maintainability of the suit as preliminary issue.

Sub-rule (1) of Rule 2 mandates the Court that notwithstanding that a case may be disposed of on preliminary issue, the Court shall, subject to the provisions of Sub-rule (2), pronounce judgment on all issues. Order XXIV, Rule 2 of the C.P.C. was amended vide CPC (Amendment) Act, 1976 w.e.f. 1.2.1977 making it discretionary for the Court to decide the preliminary issues after taking evidence along with other issues. Thus, the intention of Legislature is clear that instead of prolonging the suit by first deciding a preliminary issue and thereafter deciding other issues be avoided, as far as possible. If all the issues are decided at a time that may avoid unnecessary delay and multiplicity of the proceedings in relation to the deciding the preliminary issue. "

20. Now, paras-9,10, 11, & 12 of ***Manager, Bettiah Estate*** (supra) on which reliance has been placed by the learned

counsel for the revisionist are being reproduced herein-below:-

"9. From the perusal of the amended provision of Rule 2 it will be clearly seen that now there are only two categories of issues which can be decided as preliminary issues.

Those issues of law as relate to (a) jurisdiction, of the Court or (b) to the bar to the suit created by any law for the time being in force. Apart from the above no other issue can now be decided as preliminary, a fortiori no issue of fact or a mixed issue of fact and law can be, decided as preliminary issue and consequently such issues must be left to be decided along with the rest of the issues. The object of this obviously is avoidance of piecemeal trial and abridging protracted litigation.

10. On comparison of the earlier rule and the present one will indicate that previously the categorisation was between issue of law and fact only and it was mandatory for the court to decide all issues of law in the first instance. On the contrary under the amended rule the mandate to the Court is to pronounce the judgment on all the issues raised subject to the provision of sub-rule (2), notwithstanding the fact that the disposal of one preliminary issue may result in the disposal of the whole suit. The only exception carved out by sub-rule (2) is to confer discretion upon the Court that it may dispose of an issue of law as a preliminary issue if, in its opinion, it can dispose of the whole suit subject to further limitation that the issue of law must either be as to the jurisdiction of the Court or as to the bar of any law to the suit. The use of expression "on issue of law only" has its own significance which cannot be ignored. Amended provision has thus drastically changed the earlier notion that all issues of law have to be disposed of at the initial stage before the trial. Now the Courts power to dispose of an issue of law as preliminary issue has been considerably restricted.

11. The rule however, does not give any arbitrary or unbridled power to the Court. The discretion in this regard has to be exercised in a judicious manner. In fact the discretion to try a preliminary issue of law relating to jurisdiction or bar to the suit should be exercised only when it is so clear that the decision will dispose of the suit finally and once for all without the necessity of recording any evidence. If there be any necessity to refer to any authority on the question it will suffice to mention AIR 1980 Delhi, 122, Oriental Travels Pvt. Ltd. v. State Transport Authority and AIR 1979 MP 153.

12. To sum up the legal position appears to us to be as under:

Only an issue of law can be decided as a preliminary only where it is such that its decision does not necessitate investigation into facts and it relates either to the jurisdiction of the Court or to the suit being barred under any prevailing law, and that, in the opinion of the court the decision of the issue will, result in the decision of the whole or a part of the suit. The discretion in this regard must always be exercised on the basis of sound judicial principles. It may however, be made clear that even if an issue of law can be decided as a preliminary issue as aforesaid the Court is not always bound to decide it as a preliminary issue and can in its discretion, postpone its decision also along with other issues whether of law or fact. The whole purpose behind the amended provision is to restrict piecemeal decision and unnecessary multi-tier appeals at intermediate stages on preliminary issue alone and thus avoid procrastination of litigation. The new provision justly aims at

abridging the proceeding in the suit rather than permitting prolongation thereof."

21. Reading of para-12 of the above judgement discloses that the Division Bench has categorically held that the issue of law can be decided as a preliminary issue only where it is such that a decision does not necessitate investigation into facts and it relates either to jurisdiction of the Court or to the suit being barred under any prevailing law. The said observation in the judgement supports the contention of the plaintiff/respondent no.1 and, thus, the said judgement does not come in the aid of the revisionist as the trial Court in the instant case is of the opinion that question of jurisdiction in the instant case is a mixed question of fact and law.

22. The another judgement, i.e., ***Mrs. Shahnaz Husain*** (supra) relied upon by the learned counsel for the revisionist is also of no help to the revisionist as in the said case also this Court had held that the plea regarding jurisdiction should be decided as preliminary issue. In the instant case, such proposition of law does not apply in view of the finding returned by the trial Court.

23. So far as the third judgement, i.e., ***Smt. Subhash Bhalla*** (supra) relied upon by the learned counsel for the revisionist is concerned, the same is also not applicable in the facts of the present case as in the said case, the Court was considering the scope of Order 7 Rule 11 C.P.C. and Order 14 Rule 2 (2) C.P.C.

24. Thus, for the reasons given above, this Court finds that the revision lacks merit. It is accordingly, **dismissed** with no order as to costs.

(2022) 11 ILRA 439

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.09.2022

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Crl. Misc. Application U/S 482 No. 11657 of 2022

Smt. Shiela Gupta ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Dileep Kumar Pandey

Counsel for the Opposite Parties:
G.A., Sri Swetashwa Agarwal, Sri Srijan Pandey

(A) Criminal Law - Indian Penal Code, 1860 - Sections 406, 120-B, 420, 467, 468 & 471 - The Code of criminal procedure, 1973 - Section 482 - Inherent power - when on the basis of evidence on record, prima facie a case is made out and ingredients thereof are present, Court cannot exercise inherent powers which will cause sudden death of criminal proceedings.(Para -17)

Dispute arising out of a Committee of Management of Maternity Hospital - under Jaswant Rai Churamani Trust Society - new Management Committee took over - applicant in connivance with other accused persons prepared a lease deed - misrepresenting herself to be a trustee of said hospital - delay of six years in lodging an F.I.R. **-** applicant aggrieved by criminal proceedings, charge sheet and its cognizance - hence application.**(Para - 2,3,13)**

HELD:-Prima facie case made out and ingredients thereof are present. Facts and circumstances of case do not fall under category that '' allegations are frivolous' or ''do not disclose any offence' and therefore, it does not fall under ''exceptionally rare cases' wherein

exercise of inherent powers is warranted. No ground to quash the criminal proceedings against the applicant.**(Para - 13,14,15,1617)**

Application u/s 482 Cr.P.C. rejected. (E-7)

List of Cases cited:-

1. St. of Haryana Vs Bhajan Lal , 1992 Supp (1) SCC 335

2. Zandu Pharmaceutical Works Ltd Vs Mohd. Sharaful Haque, (2005) 1 SCC 122

3. Ahmed Ali Quarashi & anr. Vs The St. of U.P. , 2020 SCC Online SC 107

4. Joseph Salvaraja A Vs St. of Guj. ,(2011) 7 SCC 59

5. Sushil Sethi & anr. Vs The St. of A.P. & ors. ,(2020) 3 SCC, 240

6. Priti Saraf & anr. Vs St. of NCT of Delhi & anr. , 2021 SCC Online SC 206

7. Sau. Kamal Shivaji Pokarnekar Vs The St. of Maha. , (2019) 14 SCC 350

8. St. of Karn. Vs M. Devendrappa , 2015 (3) SCC 424

9. I.O.C. Vs NEPC India Ltd. & ors., (2006)6 SCC 736

10. M/s Neeharika Infrastructure Pvt. Ltd Vs St. of Maha. & ors. , (2020) 10 SCC 118

11. Ramveer Upadhyay & anr. Vs St. of U.P.& anr. ,2022 SCC Online SC 484

12. Wyeth Ltd. & ors. Vs St. of Bihar & anr., Criminal Appeal No.1224 of 2022 (S.L. P. (Crl.) No.10730 OF 2018)

13. Vijay Kumar Ghai & ors. Vs St. of W.B. & ors., (2022) 7 SCC 124

14. R K Dalmia Vs Delhi Administration, (1963) 1 SCR 253

15. Sudhir Shantilal Mehta Vs C.B.I., (2009) 8 SCC 1

16. Prof. R.K. Vijayasarathy& anr. Vs Sudha Seetharamb& anr., (2019) 16 SCC 739

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

1. Dispute in the present case is arising out of a Committee of Management of Sushila Jaswant Rai Maternity Hospital, Meerut under Jaswant Rai Churamani Trust Society. Undisputedly, the applicant was appointed by a resolution of society dated 02.10.2001 as a Chairman of said hospital and she remained on the said post till 15.02.2019, thereafter, one Rajiv Kumar Gupta was appointed as a Chairman of the said hospital.

2. It is a case of complainant (one of trustee/chairman of the Trust) that said new committee came to know in July, 2020 that applicant in connivance with other accused persons prepared a lease deed by misrepresenting herself to be a trustee of said hospital and executed in favour of Shreya Medicare Private Ltd. through its Director Mridul Sharma w/o Dr. Malay Sharma and handed over major part of hospital to them and thereby caused unlawful loss to society and to hospital and unlawful gain in favour of accused persons.

3. In these circumstances, an F.I.R. was lodged by complainant against the applicant and other accused persons on 07.10.2020 bearing Case Crime No. 676 of 2020 under Sections 420, 467, 468, 471 at Police Station- Civil Lines, District- Meerut. The Investigating Officer conducted investigation and recorded statements of witnesses and came to a conclusion that there were sufficient evidence against applicant and other accused persons for committing offence under Section 420, 406 I.P.C. by applicant

and offence under Section 420, 406, 120-B I.P.C. by other accused persons, viz., Mridul Sharma and Dr. Malay Sharma, and a charge sheet was filed, whereof cognizance was taken and summons were issued to applicant and other accused persons. The applicant is aggrieved by above referred criminal proceedings, charge sheet and its cognizance and therefore she is before this Court.

4. Sri Dileep Kumar Pandey, learned counsel for applicant submitted that she is an old lady, who has served as a Chairman of hospital for a long period and acted only for benefit of hospital and trust. She became a trustee as per resolution dated 13.08.1995 and in furtherance of later resolution dated 01.10.2001, she was looking after the affairs of hospital also. Therefore, the applicant has not made any misrepresentation while executing the lease deed. The F.I.R. was filed after six years and there was no explanation for such huge delay. The purpose of lease deed was to meet out day to day expenses of hospital and therefore the purpose was for benefit of hospital and society. There was no wrongful gain to applicant or other accused or wrongful loss to hospital.

5. Learned counsel also pointed out that in the lease deed, it was also specifically mentioned that applicant was Chairman of Management of Committee of hospital at the relevant time, therefore, the applicant has not misappropriated any property nor by cheating and dishonestly, induced any person to deliver any property.

6. Learned counsel also submitted that offence under Sections 406 and 420 I.P.C. cannot go together being an antihesis.

7. The applicant has also lodged an F.I.R. against one Rajiv Gupta and others of complainant side alleging that they have manufactured fictitious documents and forged her signature and present criminal proceedings were counterblast to it. The applicant is presently 90 years old and is suffering from cancer and other old age ailments.

8. The above submissions are vehemently opposed by Sri Srijan Pandey holding brief of Sri Swetashwa Agarwal, learned counsel for opposite party No.2 that during the period of applicant, being Chairman of hospital, not only the lease was executed on throw away price but huge money was also siphoned and for that a separate F.I.R. was lodged on 17.11.2021 against applicant and other accused persons under Section 409 I.P.C.

9. He further submitted that by way of lease, the applicant and other accused persons wanted to encroach upon the property of hospital in order provide monetary benefit to other and to cause loss to the hospital as well as to the society. The hospital is situated in a posh area of Meerut city and monthly rent of Rs. 20,000/- was on very low side. Investigation has already been conducted and there are sufficient evidence that applicant along with other accused person has committed offences under Sections 420, 406 I.P.C. and ingredients thereof are prima facie made out.

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

11. Law on inherent powers of the High Court under Section 482 Criminal Procedure Code 1973 is as under :-

"(I) "Inherent Power" of the High Court under Section 482 Cr.P.C., an

extraordinary power is with purpose and object of advancement of justice, which is to be exercised "to give effect to any order under the Cr.P.C.", or "to prevent abuse of process of any Court", or "to secure ends of justice", making arena of the power very wide, yet it is to be exercised sparingly, with great care and with circumspection, that too in the rarest of rare case.

(II) It is no more res integra that exercise of inherent power could be invoked to even quash a criminal proceeding/First Information Report/complaint /chargesheet, but only when allegation made therein does not constitute ingredients of the offence/offences and /or are frivolous and vexatious on their face, without looking into defence evidence, however such power should not be exercised to stifle or cause sudden death of any legitimate prosecution. Inherent power does not empower the High Court to assume role of a trial court and to embark upon an enquiry as to reliability of evidence and sustainability of accusation, specifically in a case where the entire facts are incomplete and hazy. Similarly quashing of criminal proceedings by assessing the statements under section 161 Cr.P.C. at initial stage is nothing but scuttling a full fledged trial.

(III) There can not be any straight jacket formula for regulating the inherent power of this Court, however the Supreme Court has summarised and illustrated some categories in which this power could be exercised in catena of judgments. Some of them are ***State of Haryana Vs Bhajan Lal : 1992 Supp (1) SCC 335, Zandu Pharmaceutical Works Ltd Vs Mohd Sharaful Haque: (2005) 1 SCC 122, Ahmed Ali Quarashi and Anr Versus The State of Uttar Pradesh : 2020 SCC Online SC 107, Joseph Salvaraja A v. State of Gujarat (2011) 7 SCC 59, Sushil Sethi and another Vs The State of Arunachal Pradesh and others (2020) 3 SCC, 240, Priti Saraf and Anr Vs State of NCT of Delhi and Anr : 2021 SCC Online SC 206****. Some categories/ circumstances as illustrations but not exhaustive are : allegations made in FIR / complaint, if are taken at their face value and accepted do not prima facie constitute any offence or are so absurd and inherently improbable to make out any case or no cognizable offence is disclosed against the accused, criminal proceedings is maliciously instituted with an ulterior motive and with a view to spite the accused due to private and personal grudge, or where there is a specific legal bar engrafted in any of the provisions of the Code or in the concerned Act to the institution and continuance of the proceedings or when dispute between the parties constitute only a civil wrong and not a criminal wrong, further Courts would not permit a person to be harassed although no case for taking cognizance of the offence has been made out.*

(IV) In ***Sau. Kamal Shivaji Pokarnekar v. The State of Maharashtra : (2019) 14 SCC 350,*** *the Apex Court has laid emphasis on the principles laid down in two of its previous judgements namely,* ***State of Karnataka v. M. Devendrappa : 2015 (3) SCC 424 and Indian Oil Corporation v. NEPC India Ltd. & Ors.: (2006)6 SCC 736*** *and held that quashing of criminal proceedings is called for only when the complaint does not disclose any offence, or the complaint is frivolous, vexatious, or oppressive and further clarified that defences available during a trial and facts/aspects whose establishment during the trial may lead to acquittal cannot form the basis of quashing a criminal complaint. The criminal complaints cannot be quashed only on the ground that the allegations made therein*

appear to be of a civil nature, if the ingredients of the alleged offence are prima facie made out in the complaint.

(V) The Supreme Court in ***M/s Neeharika Infrastructure Pvt. Ltd Versus State of Maharashtra and Others : (2020) 10 SCC 118****, has categorically held that High Court is not justified in passing the order of not to arrest and or no coercive steps either during the investigation or till the final report/ charge sheet is filed under Section 173 Cr.P.C., while dismissing/disposing petition under Section 482Cr.P.C. and/or under Article 226 of the Constitution and even in exceptional cases where High Court is of the opinion that a prima facie case is made out for stay of further investigation,such order has to be with brief reasons, though such orders should not be passed routinely, casually and/or mechanically.*

(VI) Whether the allegations are true or untrue, would have to be decided in the trial. In exercise of power under Section 482 of the Cr.P.C., the Court does not examine the correctness of the allegations in a complaint except in exceptionally rare cases where it is patently clear that the allegations are frivolous or do not disclose any offence. (see ***Ramveer Upadhyay & Anr. versus State of U.P. & Anr. 2022 SCC Online SC 484****)*

(VII) A careful reading of the complaint, the gist of which we have extracted above would show that none of the ingredients of any of the offences complained against the appellants are made out. Even if all the averments contained in the complaint are taken to be true, they do not make out any of the offences alleged against the appellants. Therefore, we do not know how an FIR was registered and a charge-sheet was also filed.....It is too late in the day to seek support from any precedents, for the proposition that if no offence is made out by a careful reading of the complaint, the complaint deserves to be quashed. (See, ***Wyeth Limited & others vs, State of Bihar & another, Criminal Appeal No.1224 of 2022 (Special Leave Petition (Crl.) No.10730 OF 2018), decided on 11th August, 2022)****."*

12. The Supreme Court in the case of ***Vijay Kumar Ghai and others vs. State of West Bengal and others, (2022) 7 SCC 124*** has interpreted Sections 405, 406, 415 and 420 I.P.C. Relevant paragraphs of the judgment are quoted hereinbelow :-

"27. Section 405 of IPC defines "Criminal Breach of Trust" which reads as under: -

"405. Criminal breach of trust.-- Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

The essential ingredients of the offense of criminal breach of trust are:-

(1) The accused must be entrusted with the property or with dominion over it,

(2) The person so entrusted must use that property, or;

(3) The accused must dishonestly use or dispose of that property or wilfully suffer any other person to do so in violation,

(a) of any direction of law prescribing the mode in which such trust is to be discharged, or;

(b) of any legal contract made touching the discharge of such trust.

28. "Entrustment" of property under Section 405 of the Indian Penal

Code, 1860 is pivotal to constitute an offence under this. The words used are, "in any manner entrusted with property'. So, it extends to entrustments of all kinds whether to clerks, servants, business partners or other persons, provided they are holding a position of "trust'. A person who dishonestly misappropriates property entrusted to them contrary to the terms of an obligation imposed is liable for a criminal breach of trust and is punished under Section 406 of the Penal Code.

29. The definition in the section does not restrict the property to movables or immoveable alone. This Court in ***R K Dalmia vs Delhi Administration, (1963) 1 SCR 253*** *held that the word "property' is used in the Code in a much wider sense than the expression "moveable property'. There is no good reason to restrict the meaning of the word "property' to moveable property only when it is used without any qualification in Section 405.*

30. In ***Sudhir Shantilal Mehta Vs. CBI, (2009) 8 SCC 1*** *it was observed that the act of criminal breach of trust would, Interalia mean using or disposing of the property by a person who is entrusted with or has otherwise dominion thereover. Such an act must not only be done dishonestly but also in violation of any direction of law or any contract express or implied relating to carrying out the trust.*

31. Section 415 of IPC define cheating which reads as under: -

"415. Cheating. --Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat"."

The essential ingredients of the offense of cheating are:

1. Deception of any person

2. (a) Fraudulently or dishonestly inducing that person-

(i) to deliver any property to any person: or

(ii) to consent that any person shall retain any property;or

(b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were no so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body,mind,reputation or property.

32. A fraudulent or dishonest inducement is an essential ingredient of the offence. A person who dishonestly induces another person to deliver any property is liable for the offence of cheating.

33. Section 420 IPC defines cheating and dishonestly inducing delivery of property which reads as under: -

"420. Cheating and dishonestly inducing delivery of property. --Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

34. Section 420 IPC is a serious form of cheating that includes inducement (to lead or move someone to happen) in terms of delivery of property as well as valuable securities. This section is also applicable to matters where the destruction

of the property is caused by the way of cheating or inducement. Punishment for cheating is provided under this section which may extend to 7 years and also makes the person liable to fine.

35. To establish the offence of Cheating in inducing the delivery of property, the following ingredients need to be proved:- 1. The representation made by the person was false 2. The accused had prior knowledge that the representation he made was false. 3. The accused made false representation with dishonest intention in order to deceive the person to whom it was made. 4. The act where the accused induced the person to deliver the property or to perform or to abstain from any act which the person would have not done or had otherwise committed.

36. As observed and held by this Court in the case of ***Prof. R.K. Vijayasarathy & Anr. Vs. Sudha Seetharam & Anr., (2019) 16 SCC 739*** *the ingredients to constitute an offence under Section 420 are as follows:-*

i) a person must commit the offence of cheating under Section 415; and

ii) the person cheated must be dishonestly induced to;

a) deliver property to any person; or

b) make, alter or destroy valuable security or anything signed or sealed and capable of being converted into valuable security. Thus, cheating is an essential ingredient for an act to constitute an offence under Section 420 IPC."(emphasis supplied)

13. The Court now proceeds to deal with rival submissions. The first submission of learned counsel for applicant was that there was a delay of six years in lodging an F.I.R., therefore, it was an afterthought only to harass the applicant. No doubt that there was a delay of six years in lodging of F.I.R., however, as stated by counsel for opposite party No.2 that new Management Committee took over in the year 2019 and after going through the documents it was revealed that the lease deed was made by misrepresentation. Otherwise also, only on the ground that there was a delay in lodging of first information report, entire criminal proceedings could not be set aside ignoring the contents of F.I.R. and investigation thereof.

14. Now, the Court further proceeds to consider whether prima facie ingredients of Section 405 I.P.C. are made out or not. As referred above that ingredients of offence of criminal breach of trust are entrustment with property and thereafter dishonestly disposal of said property. Undisputedly, the applicant was a Chairman of the hospital, therefore, she along with other members of Management Committee, made an entrustment of the trust's property. Therefore, disposal of said property with dishonest intention was in violation of conditions express or implead carrying out the trust, management of hospital, when she was not authorized to execute a lease, therefore, it was in violation of express term of carrying out the trust and definitely, therefore, it would fall under the offence of criminal breach of trust.

15. There are allegations against applicant that she dishonestly executed a lease in favour of other accused only to usurp the property and to cause unlawful loss to the hospital and unlawful gain to other accused persons and the allegations were found to be true after investigation and now charge sheet has been filed. Therefore, ingredients of Sections 405 I.P.C. are prima facie made out.

16. Lastly, the Court has to see whether ingredients of Section 420 I.P.C.*(cheating and dishonestly inducing delivery of property)* are made out or not. During investigation, it has come that the applicant was not authorized to execute a lease, however, she misrepresented herself to be a trustee of hospital whereas admittedly she was a Chairman of the hospital at the relevant point of time and the lease deed was executed at throw away price without any termination clause and as such it was wrongful loss to the society and therefore, prima facie ingredients of cheating and dishonesty are present and as such offence under Section 420 I.P.C. is also prima facie made out.

17. As discussed above, when on the basis of evidence on record, prima facie a case is made out and ingredients thereof are present, this Court cannot exercise inherent powers which will cause sudden death of criminal proceedings. The facts and circumstances of present case, therefore, do not fall under category that " allegations are frivolous' or "do not disclose any offence' and therefore, it does not fall under "exceptionally rare cases' wherein exercise of inherent powers is warranted.

18. In view of above consideration and analysis, I do not find any ground to quash the criminal proceedings against the applicant and as such this application is **rejected**.

(2022) 11 ILRA 446
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 10.11.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Appl. U/s 482 No. 633 of 2018

Mahant Prasad Ram Tripathi @ M.P.R. Tripathi ...Applicant

Versus

State ...Opp. Party

Counsel for the Applicant:
Nandit Kumar Srivastava, Aishwarya Mishra

Counsel for the Opp. Parties:
Bireshwar Nath

(A) Criminal Law - Indian Penal Code, 1860 - Section 120-B - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power , The Prevention of Corruption Act, 1988 - Sections 7, 13(2) r.w. 13 (1)(d) , Section 19 - Previous sanction necessary for prosecution - distinction between - absence of sanction - raised at the inception and threshold , invalidity of the sanction - to be raised in the course of trial , Grant or refusal to grant sanction is a statutory power - valid sanction by the competent authority under Section 19 of the PC Act is sine qua non for taking cognizance for an offence against a public servant - If the sanction is held to be invalid, entire proceeding undertaken by the trial court would be void - validity of sanction for prosecution could be considered only during the trial - Internal notings on communication do not culminate into executable order. (Para - 39,46,47,48)

Complaint received from Contractor against petitioner – alleged - demanded an illegal gratification/commission/bribe from complainant - on behalf of petitioner to process the payment for the work done by contractor - contention - earlier competent authority refused sanction for prosecution against petitioner - denial of sanction was after considering material placed before competent authority - no fresh material before competent authority to issue fresh impugned sanction order dated 17th August, 2016 - which is evident from communication issued on 10th February, 2016 - second sanction order for prosecuting petitioner on same material - not legally sustainable under law - void ab initio - cognizance and summoning petitioner - null and void - being without

jurisdiction as jurisdiction goes to the root of the matter - hence application. **(Para - 4,20,21)**

HELD:-Communication dated 10th February, 2016 is internal correspondence and not an order, therefore, the petitioner cannot take advantage of the said communication to say that earlier competent authority had refused sanction for prosecution of the petitioner. Order dated 17th August, 2016 not a second order but only order of sanction for prosecution of the petitioner. Issued after application of mind. Petitioner delaying trial proceedings on one pretext or the other . No substance in the petition. **(Para - 55 to 58)**

Application u/s 482 Cr.P.C. dismissed. (E-7)

List of Cases cited:-

1. St. of H.P. Vs Nishant Sareen, (2010) 14 SCC 527

2. R.S. Nayak Vs A.R. Antulay, (1984) 2 SCC 183

3. Suresh Kumar Bhikham Vs Pradeep Ajay Bhushan Jain, (1988) 1 SCC 205

4. Nanjappa Vs St. of Karn., (2015) 4 SCC 186

5. Nanjappa Vs St. of Karn., (2015) 14 SCC 186

6. Police Vs Surya Sankaran Karri, 2006 Cri.L.J. 4598

7. Prakash Singh Badal & anr.. Vs St. of Punj. & ors., (2007) 1 SCC 1

8. Dinesh Kumar Vs A.A.I. , (2012) 1 SCC 532

9. C.B.I. Vs Pramila Virendra Kumar Agarwal & anr. , (2019) SCC OnLine SC 1265

10. Bachhittar Singh Vs St. of Punj. & anr. , AIR 1963 SC 395

11. Sethi Auto Service Station & anr. Vs D.D.A. & ors., (2009) 1 SCC 180

12. Vivek Batra Vs U.O.I. & ors. , (2017) 1 SCC 69

13. Jasbir Singh Chhabra Vs St. of Punj. , (2010) 4 SCC 192

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

1. Present petition under Section 482 Cr.P.C. has been filed for quashing of the prosecution of the petitioner in Criminal Case No.117 of 2015, State through C.B.I. versus Shashi Mohan and Anr under Section 120-B IPC, and Sections 7, 13(2) read with 13 (1)(d) of the Prevention of Corruption Act, 1988 (hereinafter referred to as "PC Act") pending before Special Judge, C.B.I., Court No.4, Lucknow.

Further prayer has been made for keeping the execution of the non-bailable warrant in abeyance till disposal of the present petition.

2. The petitioner had approached this Court earlier in a petition filed under Section 482 Cr.P.C. being petition No.116 of 2018 with the following prayers:-

"Wherefore, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to pass an appropriate order for keeping the execution of non bailable warrant in abeyance till the disposal of the pending Application for dropping of petitioner's prosecution/discharge on the ground of invalid and illegal Sanction for Prosecution, so as to meet the ends of justice.

and/or this Hon'ble Court may further be pleased to pass any other order or orders which this Hon'ble Court may deem fit & proper in the interest of justice."

3. The said petition was disposed of by this Court vide order dated 12.01.2018 which reads as under:-

"Heard learned counsel for the applicants and learned A.G.A. for the State and perused the record.

The present application under Section 482 Cr.P.C. has been filed to keep the execution and operation of the Non Bailable Warrants issued on 03.01.2018 against the applicant in Criminal Case No.117/2015 (State through C.B.I V.s Shashi Mohan and another) under Section 120-B I.P.C and Section 7 & 13 (2) read with 13(1)(d) Prevention of Corruption Act, 1988

Learned counsel for the applicant informed to this Court that said matter is listed on 24.01.2018 at learned Special Judge, C.B.I, Court No.4. Applicant is directed to appear before learned Special Judge, C.B.I, Court No. 4, Lucknow on the date fixed and till then Non Bailable Warrant dated 03.01.2018 is kept in abeyance.

With the aforesaid directions, this application is finally disposed of."

4. The petitioner was posted as Chief Executive Officer at Cantonment Board, Fatehgarh on 4th August, 2014. The instant case, RC0062015A0009 was registered by C.B.I./A.C.B., Lucknow on 9th May, 2015 against Shashi Mohan, Ward Member, Fatehgarh Cantonment Board, District Farrukhabad under Section 7 of the PC Act on the basis of complaint received from one Haider Ali working as Contractor with M/S Dilip Kumar. In the complaint, it was alleged that accused, Shashi Mohan had demanded an illegal gratification/commission/bribe of Rs.1,56,000/- from the complainant on behalf of the petitioner to process the payment for the work done by the contractor which was allotted to the contractor on 28.08.2014 in pursuance to the tendering process.

5. The complaint was marked to Mr. S.N. Srivastava. Inspector, C.B.I./A.C.B., Lucknow for verification which was discreetly verified on 9th May, 2015 in presence of independent witness, Ajit Kumar working as Office Superintendent, Office of ADEN, North Eastern Railway, Fatehgarh. During verification, the conversion held between the complainant and suspected person, Shashi Mohan was recorded in Digital Voice Recorder, transferred in CDs and marked as Q-1, which would disclose the demand of bribe by the accused, Shashi Mohan.

6. During verification of the complaint, verification memo of the verification proceedings and transcript of incriminating portion of the accused recorded was prepared mentioning that the accused, Shashi Mohan demanded bribe from the complainant of Rs.1,56,000/- on behalf of the petitioner. An additional demand of Rs.60,000/- was also made at the rate of Rs.20,000/- each on behalf of the three i.e. Shashi Mohan, Anwar Jamal whose wife Ms. Shama was a Ward Member and Shiv Kumar, whose daughter Ms Avanthi was also Ward Member.

7. On 10th May, 2015 a team comprising nine C.B.I. Officials and two independent witnesses namely, Ajit Kumar and Dharampal both from Indian Railways, the complainant and Mohd. Shakeel Qureshi, employee of the complainant assembled in Suit No.1, Officers Rest House, North Eastern Railway, Fatehgarh District Farrukhabad on 10th May, 2015 at 8:30 AM. Purpose of assembly was explained to all present and written complaint dated 7th May, 2015 of Haider Ali in Hindi version was shown and read over to all. The complainant, Haider Ali acknowledged that the said complaint was in his handwriting and bore his signatures. Verification memo disclosing the demand

of bribe by the accused, Shashi Mohan was also shown to all and every members of the team confirmed that there was demand of bribe by accused, Shashi Mohan.

8. A practical demonstration regarding use of Phenolphthalein powder and its reaction with the solution of Sodium Carbonate and water was shown before all present including the witnesses and they were explained the chemical reaction of Phenolphthalein powder with the solution to Sodium Carbonate.

9. The complainant could arrange Rs.2,00,000/- against demanded bribe amount of Rs.2,16,000/- by the accused, Shashi Mohan. Details like denomination, G.C. notes, number etc., of the aforesaid bribe amount of Rs.2,00,000/- produced by the complainant was mentioned in pre-trap memorandum dated 10th May, 2015. Phenolphthalein powder on the G.C. notes amounting to Rs.2,00,000/- was applied. Personal search of the complainant was conducted, and he was not allowed to keep anything except his handkerchief, mobile phone. Two wads of Phenolphthalein treated G.C. notes of denomination 500 amounting to Rs.1,00,000/- were kept in the right side pant pocket of the complainant while rest two wads of the Phenolphthalein treated G.C. notes of denomination 500 amounting to Rs.1,00,000/- were kept in the left side pant pocket of the complainant. He was specifically instructed not to touch the said Phenolphthalein treated G.C. notes of Rs.2,00,000/- until demanded by accused, Shashi Mohan.

10. Witness, Ajit Kumar was directed to act as shadow witness. Haider Ali disclosed that accused, Shashi Mohan does not talk freely in front of strangers. Accordingly, it was directed that Mohd. Shakeel Qureshi would accompany Haider Ali for meeting accused-Shashi Mohan. Witness, Ajit Singh would follow them discreetly keeping a visible distance and to position himself as such that he could see the transaction and overhear the conversion as far as practically possible.

11. After completion of pre-trap proceedings at about 11:00 Hours on 10th May, 2015, the aforesaid C.B.I. team along with both the independent witnesses and the complainant, Haider Ali, Mohd. Shakeel Qureshi left the Suit No.1, Officers Rest House, North Eastern Railway, Fatehgarh, for residence of Shashi Mohan at Kasim Bagh, Cantonment, Fatehgarh. Bribe amount of Rs.2,00,000/- was handed over to Shashi Mohan at around 11:15-16 A.M. on 10.5.2015, and after receiving signal from Haider Ali and the complainant, all other team members including two witnesses rushed towards the car of the complainant, where the complainant-Haider Ali and accused-Shashi Mohan were present. Haider Ali and Mohd. Shakeel Quereshi pointed towards persons sitting in the back seat of the car who was busy in counting the notes who was identified as Shashi Mohan, Ward Member, Ward No.2 Cantonment Board, Fatehgarh who demanded and accepted bribe from Hyder Ali.

12. The accused-Shashi Mohan disclosed that he demanded and accepted the bribe amount on behalf of the petitioner who was posted as Chief Executive Officer of Fatehgarh Cantonment, Anwar Jamal whose wife was a Ward Member and Shiv Kumar, whose daughter was also a Ward Member and himself. He further told that out of Rs.2,16,000/- demanded by him Rs.1,56,000/- were accepted by him on the

instance of the petitioner for onward transfer to him and rest Rs.60,000/- was to be distributed among Anwar Jamal, Shiv Kumar and himself. He also disclosed that earlier also he collected bribe for the petitioner from other contractors and had transferred it to him.

13. On being directed, Shashi Mohan made a call at Mobile No.9838919102 to the petitioner from his Mobile No.9450008078 at about 12:28 P.M. Speaker of the phone of accused-Shashi Mohan was switched on, and his conversation with the petitioner over phone was heard by all and was also recorded in blank Digital Voice Recorder. In that conversation, the petitioner initially acknowledged the words communicated to him by accused-Shashi Mohan regarding his acceptance of Rs.1,56,000/- at the rate of 6% on his behalf from Haider Ali. Later, he directed him to meet him in the office and not to talk to him over phone. Thereafter, the recorded conversation was transferred into a blank CD in presence of independent witnesses and the same was sealed, marked as Q-3 and signed by the independent witnesses. This conversation was also transferred in another CD which was marked as investigation copy Q-3 for investigation purposes.

14. Recovered amount of Rs.2,00,000/- from accused-Shashi Mohan which was handed over by the complainant, was sealed under the signature of both the independent witnesses. Hand wash of right and left hand of accused-Shashi Mohan was obtained with Sodium Carbonate water, which turned pink, sealed in two separate clean glass bottles marked LHW and RHW. In the same manner, right hand wash of the complainant was sealed in another clean glass bottle marked as CRHW.

15. Office of the petitioner was searched and file pertaining to the tender of M/S Dilip Kumar was seized in presence of witnesses.

16. Personal search of the accused-petitioner was made, and he was arrested. Search on residential premises of accused-Shashi Mohan was also carried out. Specimen voice of the accused-Shashi Mohan was obtained with his consent after being explained its purpose in presence of independent witnesses. Said recording was also transferred in Blank CD and marked as S-1, sealed and signed by all persons including independent witnesses. Specimen voice of the petitioner was also obtained as Exh.S-2. Compact disks having sample voice were sent to Central Forensic Science Laboratory, New Delhi for expert opinion and same had been received.

17. The allegation is that conversation between accused-Shashi Mohan and the petitioner would disclose that he had accepted the bribe of Rs.1,56,000/- on behalf of the petitioner. C.F.S.L. report confirmed involvement of the accused in demanding and accepting the bribe. C.B.I. after conducing the investigation filed charge-sheet under Sections 120B IPC, 7/13(2), 13(1)(d) PC Act against the accused-Shashi Mohan and the petitioner.

18. Despite the order dated 12.01.2018 passed by this Court in earlier petition filed under Section 482 Cr.P.C. No.116 of 2018 directing the petitioner to appear before the trial court on 24.01.2018 and till then the Non Bailable Warrant dated 03.01.2018 was kept in abeyance, the petitioner did not appear on 24.01.2018, but thereafter on 30.01.2018, filed another application challenging the validity of the sanction order for prosecuting him. It is

alleged that the petitioner has submitted false residential address and to evade process of law. It was found that he was not residing at his native place. Though the petitioner was not mentioned in the F.I.R. verification memo and Pre-Trap Memorandum, his role emerged during the course of investigation as co-accused. Allegedly, Shashi Mohan demanded and accepted bribe from the complainant on behalf of the petitioner in furtherance of criminal conspiracy amongst themselves.

19. Heard Mr.Nandit Srivastava, learned Senior Advocate assisted by Mr.Pranjal Krishna and Mr. Anurag Singh, learned counsel appearing for the C.B.I.

20. Main contention of Mr.Nandit Srivastava, learned Senior Advocate assisted by Mr. Pranjal Krishna, learned counsel for the petitioner is that earlier the competent authority had refused sanction for prosecution against the petitioner. This recommendation was forwarded to the Ministry of Defence. The denial of sanction was after considering the material placed before the competent authority i.e. D.G.D.E., and there was no fresh material before the competent authority to issue fresh impugned sanction order dated 17th August, 2016 (Annexure-8), which is evident from the communication issued by Director, Vigilance, Ministry of Defence, Government of India on 10th February, 2016 (Annexure-5).

21. It has been further submitted by learned Senior Advocate that second sanction order for prosecuting the petitioner on the same material is not legally sustainable under the law without there being any material/evidence before the competent authority. He, therefore, has submitted that second sanction order dated 17.08.2016 is void ab initio, and thereby rendering all the proceedings including taking cognizance and summoning the petitioner null and void being without jurisdiction as jurisdiction goes to the root of the matter.

22. In support of the aforesaid contention, learned Senior Advocate has placed reliance on the judgment in the case of State of **Himanchal Pradesh vs Nishant Sareen (2010) 14 SCC 527.**

23. Learned Senior Advocate has further submitted that issue of validity of the prosecution sanction goes to the roots of the jurisdiction of the Court under the PC Act, and if the prosecution sanction is not valid all the proceedings are *void ab initio*. In support of this submission learned Senior Advocate has placed reliance on the judgment in the case of **R.S. Nayak vs A.R.Antulay: (1984) 2 SCC 183.**

24. The question of validity of prosecution sanction can be raised at any stage and, therefore, the petitioner had raised this issue before the learned Special Judge, CBI. However, learned Judge had proceeded to take cognizance for offence against the petitioner. In support of the aforesaid contention, he has placed reliance on the judgment in the case of **Suresh Kumar Bhikham vs Pradeep Ajay Bhushan Jain (1988) 1 SCC 205** to submit that question of sanction can be considered at any stage of proceedings, and same view has been reiterated in the case of **Nanjappa vs State of Karnataka: (2015) 4 SCC 186** wherein it has been held that question regarding validity of sanction to prosecute under Section 19 of the PC Act can be raised at any stage of proceedings.

25. The competence of the Court trying the accused depends upon the

existence of a valid sanction, and if the Court finds that the sanction is invalid, the accused can get discharged. However, the competent authority may grant a fresh sanction for prosecution in accordance with law. If the trial court proceeds despite the invalidly attached to the sanction order, proceedings would be non est in the eyes of the law. However, the same shall not forbid the trial of the accused after grant of valid sanction for prosecution.

26. Further, ground to challenge the sanction order is that Director General Defence State is not the authority competent to remove the petitioner from his office, and the petitioner was appointed by his Excellency, Hon'ble the President. Since the impugned sanction order has not been issued by the Ministry of Defence, which is competent authority, therefore, sanction order is not valid and liable to be quashed.

27. Mr.Anurag Singh, learned counsel appearing for the C.B.I. opposing the petition has submitted that entire submissions made on behalf of the petitioner by the learned Senior Advocate are wholly misconceived and based on incorrect and wrong premises. He has submitted that communication dated 10th February, 2016 (Annexure-5) is not refusal of sanction to prosecute the petitioner by the competent authority but on the recommendation of the competent authority to not issue sanction for prosecution against the petitioner, matter was referred to the Central Vigilance Commission for consideration and concurrence by the Ministry of Defence which is evident from the communication itself.

28. Mr. Anurag Singh, learned counsel appearing for the C.B.I. has further submitted that as per the office memorandum dated 06.11.2006 issued by the Ministry of Personnel, Public Grievance & Pensions, Department of Personnel and Training, Government of India, Order 399/33/2006-AVD-III in cases investigated by the Central Bureau of Investigation against any public servant who is not removable from his office except with the sanction of the President, the C.B.I. forwards its final report of investigation to the C.V.C. and also simultaneously endorses a copy of the report to the administrative Ministry/Department concerned, the competent authority shall within three weeks is required to formulate its tentative view regarding the action to be taken and seek the advice of the C.V.C. in the matter.

29. The C.V.C., thereafter, would tender its advice within ten days to the concerned administrative Ministry/Department, which shall finalize its view in the matter within a week and issue orders for sanction for prosecution accordingly. If the C.V.C. on reconsideration advices, for grant of sanction, the concerned Ministry/Department will issue the requisite orders immediately. However, if the concerned Ministry/Department proposes not to accept the reconsidered advice of the C.V.C., the case will be referred to the Department of Personnel and Training for a final decision.

30. In cases in which an authority other than the President is competent to sanction prosecution, and that authority does not propose to accord such sanction, it is required to report the case to the Central Vigilance Commission and take further action after considering the Central Vigilance Commission's advice. If the

Central Vigilance Commission advises grant of sanction for prosecution but the Ministry /Department concerned proposes not to accept such advice, the case should be referred to this DOPT for a final decision.

31. Mr.Anurag Singh, learned counsel appearing for the C.B.I. has drawn attention to the amendment made in the Government of India (Allocation of Business) Rules, 1961 on 30th, September, 1986 which provide for authorities competent to grant sanction from prosecution of public servant. According to amended rules in case of a government servant sanction for prosecution for an offence is required to be accorded by the Department which is the Cadre Controlling authority for the service of which he is a member, and in any other case, by the Department in which he was working at the time of commission of the alleged offence. It is further provided that notwithstanding anything contained in the Rule, the President may, by general or special order, direct that in any case or class of cases the sanction shall be accorded by the Department of Personnel and Training.

32. Mr.Anurag Singh, learned counsel appearing for the C.B.I. has further submitted that there is no order earlier than the order dated 17th August, 2016 for refusing or accepting sanction for prosecution of the petitioner. Internal communication dated 10the February, 2016 cannot be read to be as refusal of sanction by the competent authority for prosecuting the petitioner.

33. It has been further submitted by Mr.Anurag Singh, learned counsel that when the communication dated 10th February, 2016 was addressed at that time C.F.S.L. Report regarding voice samples and conversation between accused, Shashi Mohan and the complainant and the petitioner was not received. After the C.F.S.L. report had been received, entire material was reconsidered including C.F.S.L. report and the competent authority has granted sanction, which is legal, valid, just and proper.

34. It has been further submitted that there is no substance in the arguments of learned Senior Advocate that Director General of Defence State was not a competent authority for granting or denying the sanction inasmuch as from the communication dated 10th February, 2016 it is clear that D.G.D.E. is a competent authority for granting or refusing sanction for prosecution of the petitioner and on the said communication the petitioner has placed great reliance on his submission.

35. It has been further submitted that D.G.D.E. is the competent authority to remove the petitioner from service by virtue of powers delegated to D.G.D.E. under Rule 12 of CCS (CCA) Rules, 1967 read with Recruitment Rules and, therefore, the sanction order dated 17th August, 2016 has been issued by the competent authority. It has been further submitted that the petition has no merit and substance and is liable to be dismissed.

36. I have considered the submissions of Mr.Nandit Srivastava, learned Senior Advocate assisted by Mr.Pranjal Krishna and Mr. Anurag Singh, learned counsel appearing for the C.B.I.

37. Sum and substance of the arguments of learned Senior Advocate is that once sanction for prosecution of the petitioner was refused by the competent authority after considering the material

placed by the C.B.I., which is evident from the order/communication dated 10th February, 2016, no fresh sanction on the same material could have been granted by the competent authority and even otherwise Director General of Defence State is not competent authority to grant or refuse the sanction. As the sanction is not a valid sanction, order of cognizance and further proceedings against the petitioner undertaken by Special Judge are void and illegal.

38. Communication dated 10th February, 2016 would read as under:-

"Most Urgent
By Fax
Government of India
Ministry of Defence
D (Vigilance)

New Delhi, the 10th February, 2016

Subject: Request for grant of prosecution sanction-CBI Case No.RC0062015A0009/3301 dated 16.09.2015 against Shri Shashi Mohan, Ward member and vice president of Fatehgarh Cantonment Boards and others.

This has reference to DGDE note no.109/COMF/FATEHGARH/CB/VIG/DE dated 28.08.2015 and 02.12.2016 whereby it has recommended prosecution sanction against Shri Shashi Mohan, Ward Member but denied the same against Shri MPR Tripathi, CEO Fatehgarh.

2. The matter has been examined in the Ministry and the competent authority has decided to grant prosecution sanction against Shri Shashi Mohan ward member and Vice President of Fatehgarh Cantonment Board.

3. The matter has been considered in respect of Shri MPR Tripathi, CEO and keeping in view the following facts:-

(i) Though the complainant has mentioned in the complaint that Shri Tripahti has been demanding a bribe of Rs.1.56 Lakh, it appears that no verification regarding the demand made by Shri Tripathi has been done by the CBI. It is only Shri Shashi Mohan who has mentioned during the verification of the complaint that Shri Tripathi has asked for that money.

(ii) No evidence has been furnished by the CBI that any bribe has been demanded by Shri Tripathi from Shri Haider Ali.

(iii) Nothing incriminating was found in the searches carried out by CBI soon after the trap in the office and residential premises of Shri Tripahti.

(iv) The only evidence against Shri Tripathi is an audio CD containing a short conversation between Shri Shashi Mohan and Shri Tripathi which does not appear to be conclusive.

It appears that there is no direct evidence against Shri Tripathi nor there is any evidence to suggest that he demanded money from Shri Haider Ali. No verification of the complaint by Shri Haider Ali against Shri Tripathi was done by CBI. In view of this, the competent authority has approved that there does not seem to be enough evidence available on record for grant of prosecution sanction against Shri Tripathi. Accordingly, in pursuance of Rule 11.2 Chap, VIII of Vigilance Manual, the case is being forwarded to the CVC for consideration and concurrence.

4. Further, DGDE is requested to issue necessary orders denying Prosecution sanction for Shri MPR Tripathi, CEO being the competent authority under intimation to this Ministry.

Sd/- 10.02.2016
(Atul Kumar Singh)
Director (Vigilance)

23012304"

39. It is no longer res integra that valid sanction by the competent authority under Section 19 of the PC Act is sine qua non for taking cognizance for an offence against a public servant. If the sanction is held to be invalid, entire proceeding undertaken by the trial court would be void.

40. The Supreme Court in the case of R.S. Nayak (supra) in para 19 on this issue has held as under:-

"19. Section 6 bars the court from taking cognizance of the offences therein enumerated alleged to have been committed by a public servant except with the previous sanction of the competent authority empowered to grant the requisite sanction. Section 8 of 1952 Act prescribes procedure and powers of Special Judge empowered to try offences set out in Section 6 of 1947 Act. Construction of Section 8 has been a subject to vigorous debate in the cognate appeal. In this appeal we will proceed on the assumption that a Special Judge can take cognizance of offences he is competent to try on a private complaint. Section 6 creates a bar to the court from taking cognizance of offences therein enumerated except with the previous sanction of the authority set out in clauses (a), (b) and (c) of sub-section (1). The object underlying such provision was to save the public servant from the harassment of frivolous or unsubstantiated allegations. The policy underlying Section 6 and similar sections, is that there should not be unnecessary harassment of public servant. (See C.R. Bansi v. State of Maharashtra [(1970) 3 SCC 537 : 1971 SCC (Cri) 143 : AIR 1971 SC 786 : (1971) 3 SCR 236] .) Existence thus of a valid sanction is a prerequisite to the taking of cognizance of the enumerated offences alleged to have been committed by a public servant. The bar is to the taking of cognizance of offence by the court. Therefore, when the court is called upon to take cognizance of such offences, it must enquire whether there is a valid sanction to prosecute the public servant for the offence alleged to have been committed by him as public servant. Undoubtedly, the accused must be a public servant when he is alleged to have committed the offence of which he is accused because Sections 161, 164, 165 IPC and Section 5(2) of the 1947 Act clearly spell out that the offences therein defined can be committed by a public servant. If it is contemplated to prosecute public servant who has committed such offences, when the court is called upon to take cognizance of the offence, a sanction ought to be available otherwise the court would have no jurisdiction to take cognizance of the offence. A trial without a valid sanction where one is necessary under Section 6 has been held to be a trial without jurisdiction by the court. (See R.R. Chari v. State of U.P. [AIR 1962 SC 1573 : (1963) 1 SCR 121 : (1962) 2 Cri LJ 510] and S.N. Bose v. State of Bihar [AIR 1968 SC 1292 : (1968) 3 SCR 563 : 1968 Cri LJ 1484] .) In Mohd. Iqbal Ahmad v. State of A.P. [(1979) 4 SCC 172 : 1979 SCC (Cri) 926 : AIR 1979 SC 677 : (1979) 2 SCR 1007] it was held that a trial without a sanction renders the proceedings ab initio void. But the terminus a quo for a valid sanction is the time when the court is called upon to take cognizance of the offence. If therefore, when the offence is alleged to have been committed, the accused was a public servant but by the time the court is called upon to take cognizance of the offence committed by him as public servant, he has ceased to be a public servant, no sanction would be necessary for taking

cognizance of the offence against him. This approach is in accord with the policy underlying Section 6 in that a public servant is not to be exposed to harassment of a frivolous or speculative prosecution. If he has ceased to be a public servant in the meantime, this vital consideration ceases to exist. As a necessary corollary, if the accused has ceased to be a public servant at the time when the court is called upon to take cognizance of the offence alleged to have been committed by him as public servant, Section 6 is not attracted. This aspect is no more res integra. In S.A. Venkataraman v. State [AIR 1958 SC 107, 112 : (1958) SCR 1040 : 1958 Cri LJ 254] this Court held as under:

"In our opinion, in giving effect to the ordinary meaning of the words used in Section 6 of the Act, the conclusion is inevitable that at the time a court is asked to take cognizance not only the offence must have been committed by a public servant but the person accused is still a public servant removable from his office by a competent authority before the provisions of Section 6 can apply. In the present appeals, admittedly, the appellants had ceased to be public servants at the time the court took cognizance of the offences alleged to have been committed by them as public servants. Accordingly, the provisions of Section 6 of the Act did not apply and the prosecution against them was not vitiated by the lack of a previous sanction by a competent authority."

And this view has been consistently followed in C.R. Bansi case [(1970) 3 SCC 537 : 1971 SCC (Cri) 143 : AIR 1971 SC 786 : (1971) 3 SCR 236] and K.S. Dharmadatan v. Central Government [(1979) 4 SCC 204 : 1979 SCC (Cri) 958 : (1979) 3 SCR 832 : 1979 Cri LJ 1127] . It therefore appears well-settled that the relevant date with reference to which a valid sanction is sine qua non for taking cognizance of an offence committed by a public servant as required by Section 6 is the date on which the court is called upon to take cognizance of the offence of which he is accused."

41. Further, in the case of **Nanjappa vs State of Karnataka: (2015) 14 SCC 18**6 in para 22 it has been further reiterated that Section 19 of the PC Act forbids taking of cognizance by the Court against public servant except with the previous sanction of a competent authority to grant such sanction in terms of Cause (a), (b) and (c) of Section 19(1) of PC Act.

It would be apt to extract para 22 of the said judgment:-

"22. The legal position regarding the importance of sanction under Section 19 of the Prevention of Corruption Act is thus much too clear to admit equivocation. The statute forbids taking of cognizance by the court against a public servant except with the previous sanction of an authority competent to grant such sanction in terms of clauses (a), (b) and (c) to Section 19(1). The question regarding validity of such sanction can be raised at any stage of the proceedings. The competence of the court trying the accused so much depends upon the existence of a valid sanction. In case the sanction is found to be invalid the court can discharge the accused relegating the parties to a stage where the competent authority may grant a fresh sanction for the prosecution in accordance with law. If the trial court proceeds, despite the invalidity attached to the sanction order, the same shall be deemed to be non est in the eyes of law and shall not forbid a second trial for the same offences, upon grant of a valid sanction for such prosecution."

42. It is also settled that sanction accorded by an authority not competent to accord sanction can be without jurisdiction

and nullity as held in the case of State Inspector of **Police vs Surya Sankaran Karri, 2006 Cri.L.J. 4598**.

43. Section 19 of the PC Act reads as under:-

"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,--

(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office.

(2)Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),--

(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;

(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;

(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.

4. In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings. Explanation.-- For the purposes of this section,--

(a) error includes competency of the authority to grant sanction;

(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature."

44. The Supreme Court in the case of **Prakash Singh Badal & Anr vs State of Punjab & Ors: (2007) 1 SCC 1**, while considering intent and scope of Sub-sections 3 and 4 of Section 19 of the PC Act held that error, omission or irregularity in sanction would not be fatal unless it has resulted in failure of justice. Section 19 (1) is a matter of procedure and does not go to the root of jurisdiction.

Para 29 of the aforesaid judgment would read as under:-

"29. The effect of sub-sections (3) and (4) of Section 19 of the Act are of

considerable significance. In sub-section (3) the stress is on "failure of justice" and that too "in the opinion of the court". In sub-section (4), the stress is on raising the plea at the appropriate time. Significantly, the "failure of justice" is relatable to error, omission or irregularity in the sanction. Therefore, mere error, omission or irregularity in sanction is (sic not) considered fatal unless it has resulted in failure of justice or has been occasioned thereby. Section 19(1) is a matter of procedure and does not go to the root of jurisdiction as observed in para 95 of Narasimha Rao case [(1998) 4 SCC 626 : 1998 SCC (Cri) 1108] . Sub-section (3)(c) of Section 19 reduces the rigour of prohibition. In Section 6(2) of the old Act [Section 19(2) of the Act] question relates to doubt about authority to grant sanction and not whether sanction is necessary."

45. In the said judgment, it has been further held that requirement under Section 19 is that incriminating material should be placed before sanctioning authority in order to apply his mind and take a decision for grant of sanction whether there is an application of mind or not, would depend on facts and circumstances of each case. There is a distinction between absence of sanction and the alleged invalidity on account of non-application of mind. The former question can be agitated at the threshold but the latter is a question which has to be raised during trial.

Paras 47 and 48 of the aforesaid judgment in Prakash Singh Badal's case (supra) would read as under:-

"47. The sanctioning authority is not required to separately specify each of the offences against the accused public servant. This is required to be done at the stage of framing of charge. Law requires that before the sanctioning authority materials must be placed so that the sanctioning authority can apply his mind and take a decision. Whether there is an application of mind or not would depend on the facts and circumstances of each case and there cannot be any generalised guidelines in that regard.

48. The sanction in the instant case related to the offences relatable to the Act. There is a distinction between the absence of sanction and the alleged invalidity on account of non-application of mind. The former question can be agitated at the threshold but the latter is a question which has to be raised during trial."

46. Sanction order can be challenged on several grounds such as non availability of the matter before sanctioning authority or bias of the sanctioning authority or the order of sanction having been passed by an authority etc. The Supreme Court in the case of **Dinesh Kumar v Airport Authority of India (2012) 1 SCC 532** has held that all such grounds of invalidity or illegality of sanction would fall in the category on sanction being invalid on account of non application of mind and can always be raised in the course of trial. Para 9 to 11 of the aforesaid judgment which are relevant are extracted hereunder:-

"9. While drawing a distinction between the absence of sanction and invalidity of the sanction, this Court in Parkash Singh Badal [(2007) 1 SCC 1 : (2007) 1 SCC (Cri) 193] expressed in no uncertain terms that the question of absence of sanction could be raised at the inception and threshold by an aggrieved person. However, where sanction order exists, but its legality and validity is put in question, such issue has to be raised in the course of trial. Of course, in Parkash Singh

Badal [(2007) 1 SCC 1 : (2007) 1 SCC (Cri) 193] , this Court referred to invalidity of sanction on account of non-application of mind.

10. In our view, invalidity of sanction where sanction order exists, can be raised on diverse grounds like non-availability of material before the sanctioning authority or bias of the sanctioning authority or the order of sanction having been passed by an authority not authorised or competent to grant such sanction. The above grounds are only illustrative and not exhaustive. All such grounds of invalidity or illegality of sanction would fall in the same category like the ground of invalidity of sanction on account of non-application of mind--a category carved out by this Court in Parkash Singh Badal [(2007) 1 SCC 1 : (2007) 1 SCC (Cri) 193] , the challenge to which can always be raised in the course of trial.

11. In a later decision, in Ameerjan [(2007) 11 SCC 273 : (2008) 1 SCC (Cri) 130] , this Court had an occasion to consider the earlier decisions of this Court including the decision in Parkash Singh Badal [(2007) 1 SCC 1 : (2007) 1 SCC (Cri) 193] . Ameerjan [(2007) 11 SCC 273 : (2008) 1 SCC (Cri) 130] was a case where the trial Judge, on consideration of the entire evidence including the evidence of the sanctioning authority, held that the accused Ameerjan was guilty of commission of offences punishable under Sections 7 and 13(1)(d) read with Section 13(2) of the PC Act. However, the High Court overturned the judgment of the trial court and held that the order of sanction was illegal and the judgment of conviction could not be sustained."

47. In the recent judgment in the case of **Central Bureau of Investigation vs Pramila Virendra Kumar Agarwal & Anr : (2019) SCC OnLine SC 1265**, the Supreme Court has reiterated that validity of sanction for prosecution could be considered only during the trial. Para 11 of the said judgment is extracted hereunder:-

*"**11.** Further the issue relating to validity of the sanction for prosecution could have been considered only during trial since essentially the conclusion reached by the High Court is with regard to the defective sanction since according to the High Court, the procedure of providing opportunity for explanation was not followed which will result in the sanction being defective. In that regard, the decision in Dinesh Kumar v. Airport Authority of India [Dinesh Kumar v. Airport Authority of India, (2012) 1 SCC 532 : (2012) 1 SCC (Cri) 509 : (2012) 2 SCC (L&S) 532] relied upon by the learned Additional Solicitor General would be relevant since it is held therein that there is a distinction between the absence of sanction and the alleged invalidity on account of non-application of mind. The absence of sanction no doubt can be agitated at the threshold but the invalidity of the sanction is to be raised during the trial. In the instant facts, admittedly there is a sanction though the accused seek to pick holes in the manner the sanction has been granted and to claim that the same is defective which is a matter to be considered in the trial."*

48. Grant or refusal to grant sanction is a statutory power. That power once exercised can be reviewed but the review cannot be on the same material or reconsideration of the decision for grant or refusal the sanction cannot be made on the same material. A change of opinion per se on the same material cannot be a ground for reviewing or reconsidering the earlier order refusing to grant sanction but in a

case where fresh material has been collected by the investigating agency subsequent to the earlier order and placed before the sanctioning authority and on that basis, the mater is reconsidered by the sanctioning authority and in the light of the fresh materials an opinion is formed that sanction to prosecute the public servant may be granted, such an order would not be an invalid order. The Supreme Court in the case of **State of Himanchal Pradesh vs Nishant Sareen (2010) 14 SCC 527** in para 12 and 13 has held as under:-

"12. It is true that the Government in the matter of grant or refusal to grant sanction exercises statutory power and that would not mean that power once exercised cannot be exercised again or at a subsequent stage in the absence of express power of review in no circumstance whatsoever. The power of review, however, is not unbridled or unrestricted. It seems to us a sound principle to follow that once the statutory power under Section 19 of the 1988 Act or Section 197 of the Code has been exercised by the Government or the competent authority, as the case may be, it is not permissible for the sanctioning authority to review or reconsider the matter on the same materials again. It is so because unrestricted power of review may not bring finality to such exercise and on change of the Government or change of the person authorised to exercise power of sanction, the matter concerning sanction may be reopened by such authority for the reasons best known to it and a different order may be passed. The opinion on the same materials, thus, may keep on changing and there may not be any end to such statutory exercise.

13. In our opinion, a change of opinion per se on the same materials cannot be a ground for reviewing or reconsidering the earlier order refusing to grant sanction. However, in a case where fresh materials have been collected by the investigating agency subsequent to the earlier order and placed before the sanctioning authority and on that basis, the matter is reconsidered by the sanctioning authority and in light of the fresh materials an opinion is formed that sanction to prosecute the public servant may be granted, there may not be any impediment to adopt such a course."

49. The questions which fall for consideration are that;

(i) Whether there was an order passed by the competent authority refusing grant of sanction for prosecution of the petitioner, and such an order was communicated to the C.B.I.?

(ii) Whether the order dated 17th August, 2016 is a second order by the competent authority whereby the sanction for prosecution of the petitioner was accorded and same was based on the same material which was placed before the competent authority earlier?; and

(iii) Whether the order dated 17th August, 2016 granting sanction for prosecution of the petitioner would amount to non application of mind and, therefore, is invalid ?

50. Mr.Nandit Srivastava, learned Senior Advocate has not disputed that except for the order/communication dated 10th February, 2016 there is no order of refusal of sanction by the competent authority for prosecuting the petitioner. The aforesaid communication has been extracted hereinabove. Perusal of the said communication would disclose that it was an internal communication between the Director General of Defence Estate,

Ministry of Defence and Central Vigilance Commission. In pursuance to the said communication neither a separate order was passed/issued by the competent authority nor the same was communicated to the C.B.I. refusing to grant sanction for prosecution of the petitioner. Said communication cannot be construed as order refusing sanction for prosecution of the petitioner.

51. Order dated 17th February, 2016 is the only order which was communicated to the C.B.I. and on the basis of said order cognizance has been taken by the Special Court and process had been issued against the petitioner. The judgment relied on by the learned Senior Advocate in the case of Nishant Sareen (supra) is not applicable to the facts and circumstances of the present case inasmuch as there is only one sanction order and the earlier communication on which the petitioner has heavily relied on is merely a tentative view and a departmental noting and same cannot be held to be an order.

52. Business of the Government is a complicated one and has necessarily to be conducted through the Agency of a large number of officials and authorities. Notings/communications are not the decision unless a final order is drawn up regarding granting or refusing sanction. Internal communication/noting cannot be deemed to be the orders refusing or granting sanction as held in the case of **Bachhittar Singh vs State of Punjab & Anr AIR 1963 SC 395.**

53. The Supreme Court in the case of **Sethi Auto Service Station & Anr vs Delhi Development Authority & Ors: (2009) 1 SCC 180** has held that a noting by an officer is an expression of his viewpoint on the subject. It is no more than an opinion by an officer for internal use and consideration. Internal notings are not meant for outside exposure. Internal notings on communication do not culminate into executable order. Para 14 and 15 of the said judgment which are relevant are extracted hereunder:-

"14. It is trite to state that notings in a departmental file do not have the sanction of law to be an effective order. A noting by an officer is an expression of his viewpoint on the subject. It is no more than an opinion by an officer for internal use and consideration of the other officials of the department and for the benefit of the final decision-making authority. Needless to add that internal notings are not meant for outside exposure. Notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision-making authority in the department, gets his approval and the final order is communicated to the person concerned.

15. In Bachhittar Singh v. State of Punjab [AIR 1963 SC 395 : 1962 Supp (3) SCR 713] , a Constitution Bench of this Court had the occasion to consider the effect of an order passed by a Minister on a file, which order was not communicated to the person concerned. Referring to Article 166(1) of the Constitution, the Court held that order of the Minister could not amount to an order by the State Government unless it was expressed in the name of the Rajpramukh, as required by the said article and was then communicated to the party concerned. The Court observed that business of State is a complicated one and has necessarily to be conducted through the agency of a large number of officials and authorities. Before an action is taken by the authority concerned in the name of the

Rajpramukh, which formality is a constitutional necessity, nothing done would amount to an order creating rights or casting liabilities to third parties. It is possible, observed the Court, that after expressing one opinion about a particular matter at a particular stage a Minister or the Council of Ministers may express quite a different opinion which may be opposed to the earlier opinion. In such cases, which of the two opinions can be regarded as the "order" of the State Government? It was held that opinion becomes a decision of the Government only when it is communicated to the person concerned."

54. In the case of **Vivek Batra vs Union of India & Ors : (2017) 1 SCC 69** wherein it was argued that earlier Finance Minister had referred the matter back to the Central Vigilance Commission for sanction of the prosecution of the petitioner in said case and, therefore, sanction for prosecution stood declined and grant of sanction by the successor Finance Minister would not be a valid sanction for prosecution, held that as no final order refusing sanction was issued, subsequent sanction by the new Finance Minister would not be invalid only for the reason that in administrative notings different authorities had opined differently before the competent authority took the decision in the matter. In the said judgment reliance has been placed in the case of **Jasbir Singh Chhabra vs State of Punjab : (2010) 4 SCC 192 and Sethi Auto Service Station** (supra).

55. In view of the aforesaid law, the Court is of the firm view that the communication dated 10th February, 2016 is not a final order refusing sanction for prosecution of the petitioner. There is only one order i.e. order dated 17th August, 2016 granting sanction. Communication dated 10th February, 2016 is internal correspondence and not an order, therefore, the petitioner cannot take advantage of the said communication to say that earlier competent authority had refused sanction for prosecution of the petitioner. Order dated 17th August, 2016 is not a second order but is the only order of sanction for prosecution of the petitioner.

56. Even otherwise order of sanctioning prosecution of the petitioner dated 17th August, 2016 would disclose application of mind by the authorities on the facts and material placed before it. When the tentative opinion was formed which is evident from the communication dated 10th February, 2016 at that time opinion of C.F.S.L. report about voice sample, communication between the petitioner and co-accused etc., was not on record. C.B.I. after obtaining C.F.S.L. report has placed the same before the competent authority and the competent authority thereafter issued order dated 17th August, 2016. Therefore, it cannot be said that the order dated 17th August, 2016 has been issued without application of mind or there has been non application of mind as has been submitted by learned Senior Advocate.

57. The petitioner has been delaying the trial proceedings on one pretext or the other. Earlier he has been granted an interim order by this Court vide order dated 8th February, 2018.

58. In view of the aforesaid, this Court does not find any substance in the petition which is hereby ***dismissed.***

59. Interim order, if any, stands vacated.

60. The petitioner is granted time till 21.11.2022 to appear before the trial court and apply for regular bail. In case the petitioner appears and applies for regular bail, his bail application shall be considered expeditiously in accordance with law.

(2022) 11 ILRA 463
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 19.10.2022

BEFORE

THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Appl. U/s 482 No. 75009 of 2022

Varun ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Shailendra Singh Rajawat, Akash Verma

Counsel for the Respondents:
G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 302 & 307 - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Section 207 - Supply to the accused of copy of police report and other documents - Indian Evidence Act, 1872 - Section 65-B - Admissibility of electronic records - contents of the memory card/pen-drive being electronic record must be regarded as a document - If the prosecution is relying on the same, ordinarily, the accused must be given a cloned copy thereof to enable him/her to present an effective defence during the trial.(Para - 14)

Application under Sections 231(2), 207 Cr.P.C. - rejected - trial court denied applicant the copy of C.D. - ground - process of cloning may lead to deletion of data or may also lead to tempering with the same - hence application. (Para - 16)

HELD:-C.D. is also an electronic document. Copy to be supplied to the accused under Section 207 Cr.P.C. . Supply of any such electronic document could be denied only in the exceptional case. Impugned order declining the supply of copy of CD to the applicant is not sustainable and deserves to be quashed to that extent only. (Para - 15,18)

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:-

1. P. Gopalkrishnan @ Dileep Vs St. of Kerala & anr. , (2020) 9 SCC 161 rejected

2. Sadhvi Ritumbhara Vs St. of M.P., 1996 SCC OnLine MP 261

(Delivered by Hon'ble Ajai Kumar Srivastava-I)

1. Heard Sri Shailendra Singh Rajawat, learned counsel for the applicant, Sri Rajesh Kumar Singh along with Sri Alok Saran, learned A.G.A. for the State and perused the entire record.

2. The instant application under Section 482 Cr.P.C. has been filed by the applicant for challenging the impugned order dated 09.09.2022 passed by the learned Additional District & Sessions Judge/ Special Judge (POCSO Act), Court No.11, Lakhimpur Kheri rejecting the application submitted by the applicant under Sections 231(2), 207 Cr.P.C. in Special Sessions Trial No.164 of 2019 arising out of Case Crime No.705 of 2018, under Sections 307, 302 I.P.C., Police Station Mohammadi, District Lakhimpur Kheri.

3. Learned counsel for the applicant has submitted that the C.D. regarding alleged information given by the first informant to the Investigating Officer, Ex. SA-2 is not admissible in evidence as no

certificate as required by Section 65B(4) of Indian Evidence Act has been furnished.

4. Learned counsel for the applicant has further submitted that the object behind incorporation of Section 207 Cr.P.C. is to enable the accused to defend himself properly and it is achieved only by supplying of vital documents like police report, statements of witnesses during investigation, confession etc. to the accused so that he may have notice of the charge, he is to meet and cross-examining the witnesses.

5. His next submission is that the idea behind supply of copies to the accused is, thus, to put him to a notice of what he has to meet at the inquiry or trial.

6. Learned counsel for the applicant has also submitted that the documents in terms of Sections 207 and 208 Cr.P.C. are supplied to make the accused aware of the materials which are sought to be utilized against him. The object is to enable the accused to defend himself properly.

7. His further submission is that "any other document" mentioned in clause (v) of the Section 207 Cr.P.C. includes electronic document such as C.D./ pen drive etc. which, in the instant case, learned trial court did not supply to the present applicant causing failure of justice to him. The learned Magistrate is duty bound to furnish such document to the applicant under Section 207 Cr.P.C. without any delay.

8. Learned counsel for the applicant has concluded his submission by submitting that the learned trial court below has erred in not supplying copy of C.D. without any just cause, which has caused failure of justice to the applicant. The applicant will not be able to defend himself properly and it would, thus, amount to denial of his right to defend properly.

9. Per contra, learned A.G.A. have vehemently the opposed the prayer by submitting that the learned trial court has rightly refused supply of CD. The accused/ applicant has knowledge of this fact and, therefore, it cannot be said that his right to defend himself properly is defeated in any manner by non-supplying of such electronic document.

10. His further submission is that it is a deliberate move on the part of present applicant to delay the proceeding. Therefore, no interference by this Court in exercise of its jurisdiction under Section 482 Cr.P.C. is required at this stage.

11. Having heard the learned counsel for the applicant, learned A.G.A. for the State and upon perusal of record, it appears that the first information report bearing No.0705 of 2018, under Section 307 I.P.C., Police Station Mohammadi, District Lakhimpur Kheri came to be lodged against the present applicant. The applicant was named in the aforesaid first information report. Upon conclusion of investigation, a charge sheet came to be filed against the the present applicant for the offences under Sections 307 and 302 I.P.C. Thereafter, it appears that an application dated 03.09.2022 came to be moved by the accused/ applicant under Section 231(2) read with Section 207 Cr.P.C. whereby the main prayer of the applicant was to provide him cloned copy of C.D. which, according to statement of Inspector Ram Singh Yadav PW-7, was recorded in the mobile phone by this witness when the injured/ deceased informed him that he was shot by the

accused persons. This application came to be rejected vide impugned order dated 09.09.2022 passed by the learned Additional District & Sessions Judge/ Special Judge (POCSO Act), Court No.11, Lakhimpur Kheri, on the ground that the copies of prosecution papers under Section 207 Cr.P.C. came to be supplied to the accused persons on 28.03.2019. This fact finds mentioned in the order sheet dated 28.03.2019. The case pertains to the year 2018 and is old. The C.D. has been kept in a sealed cover and has been exhibited as Ex. Ka-SA2. The learned trial court has refused to give its copy on the ground that If it is cloned, the data may get deleted and may also be tempered with causing disappearance of important evidence. Therefore, the learned trial court rejected the application dated 03.09.2022.

12. The Hon'ble Supreme Court in **P. Gopalkrishnan alias Dileep vs. State of Kerala and another** reported in **(2020) 9 SCC 161** in paras-17, 18, 21, 26, 30, 38 and 47 has held as under:-

*"**17.** On receipt of the police report and the accompanying statements and documents by virtue of Section 207 of the 1973 Code, the Magistrate is then obliged to furnish copies of each of the statements and documents to the accused. Section 207 reads thus:*

*"**207. Supply to the accused of copy of police report and other documents.**--In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following--*

(i) the police report;

(ii) the first information report recorded under Section 154;

(iii) the statements recorded under sub-section (3) of Section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of Section 173;

(iv) the confessions and statements, if any, recorded under Section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of Section 173:

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court."

As regards the statements, the first proviso enables the Magistrate to withhold any part thereof referred to in clause (iii), from the accused on being satisfied with the note and the reasons specified by the investigating officer as predicated in sub-section (6) of Section 173. However, when it comes to furnishing of documents submitted by the investigating officer along with police report, the Magistrate can withhold only such document referred to in clause (v), which in his opinion, is "voluminous". In that case, the accused can be permitted to take inspection of the document concerned either personally or through his pleader in Court. In other

words, Section 207 of the 1973 Code does not empower the Magistrate to withhold any "document" submitted by the investigating officer along with the police report except when it is voluminous. A fortiori, it necessarily follows that even if the investigating officer appends his note in respect of any particular document, that will be of no avail as his power is limited to do so only in respect of "statements" referred to in sub-section (6) of Section 173 of the 1973 Code.

18. Be that as it may, the Magistrate's duty under Section 207 at this stage is in the nature of administrative work, whereby he is required to ensure full compliance of the section. We may usefully advert to the dictum in Hardeep Singh v. State of Punjab [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] wherein it was held that : (SCC p. 123, para 47)

"47. Since after the filing of the charge-sheet, the court reaches the stage of inquiry and as soon as the court frames the charges, the trial commences, and therefore, the power under Section 319(1) CrPC can be exercised at any time after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of Sections 207/208 CrPC, committal, etc. which is only a pre-trial stage, intended to put the process into motion. This stage cannot be said to be a judicial step in the true sense for it only requires an application of mind rather than a judicial application of mind. At this pre-trial stage, the Magistrate is required to perform acts in the nature of administrative work rather than judicial such as ensuring compliance with Sections 207 and 208 CrPC, and committing the matter if it is exclusively triable by the Sessions Court."

(emphasis supplied)

21. Be that as it may, furnishing of documents to the accused under Section 207 of the 1973 Code is a facet of right of the accused to a fair trial enshrined in Article 21 of the Constitution. In Manu Sharma v. State (NCT of Delhi) [Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385] , this Court expounded thus : (SCC pp. 85-86, paras 218-21)

"218. The liberty of an accused cannot be interfered with except under due process of law. The expression "due process of law" shall deem to include fairness in trial. The court (sic Code) gives a right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights given to the accused place an implied obligation upon the prosecution (prosecution and the Prosecutor) to make fair disclosure. The concept of fair disclosure would take in its ambit furnishing of a document which the prosecution relies upon whether filed in court or not. That document should essentially be furnished to the accused and even in the cases where during investigation a document is bona fide obtained by the investigating agency and in the opinion of the Prosecutor is relevant and would help in arriving at the truth, that document should also be disclosed to the accused.

219. The role and obligation of the Prosecutor particularly in relation to disclosure cannot be equated under our law to that prevalent under the English system as aforereferred to. But at the same time, the demand for a fair trial cannot be ignored. It may be of different consequences where a document which has been obtained suspiciously, fraudulently or by causing undue advantage to the accused during investigation such document could

be denied in the discretion of the Prosecutor to the accused whether the prosecution relies or not upon such documents, however in other cases the obligation to disclose would be more certain. As already noticed the provisions of Section 207 have a material bearing on this subject and make an interesting reading. This provision not only require or mandate that the court without delay and free of cost should furnish to the accused copies of the police report, first information report, statements, confessional statements of the persons recorded under Section 161 whom the prosecution wishes to examine as witnesses, of course, excluding any part of a statement or document as contemplated under Section 173(6) of the Code, any other document or relevant extract thereof which has been submitted to the Magistrate by the police under sub-section (5) of Section 173. In contradistinction to the provisions of Section 173, where the legislature has used the expression 'documents on which the prosecution relies' are not used under Section 207 of the Code. Therefore, the provisions of Section 207 of the Code will have to be given liberal and relevant meaning so as to achieve its object. Not only this, the documents submitted to the Magistrate along with the report under Section 173(5) would deem to include the documents which have to be sent to the Magistrate during the course of investigation as per the requirement of Section 170(2) of the Code.

220. The right of the accused with regard to disclosure of documents is a limited right but is codified and is the very foundation of a fair investigation and trial. On such matters, the accused cannot claim an indefeasible legal right to claim every document of the police file or even the portions which are permitted to be excluded from the documents annexed to the report under Section 173(2) as per orders of the court. But certain rights of the accused flow both from the codified law as well as from equitable concepts of the constitutional jurisdiction, as substantial variation to such procedure would frustrate the very basis of a fair trial. To claim documents within the purview of scope of Sections 207, 243 read with the provisions of Section 173 in its entirety and power of the court under Section 91 of the Code to summon documents signifies and provides precepts which will govern the right of the accused to claim copies of the statement and documents which the prosecution has collected during investigation and upon which they rely.

221. It will be difficult for the court to say that the accused has no right to claim copies of the documents or request the court for production of a document which is part of the general diary subject to satisfying the basic ingredients of law stated therein. A document which has been obtained bona fide and has bearing on the case of the prosecution and in the opinion of the Public Prosecutor, the same should be disclosed to the accused in the interest of justice and fair investigation and trial should be furnished to the accused. Then that document should be disclosed to the accused giving him chance of fair defence, particularly when non-production or disclosure of such a document would affect administration of criminal justice and the defence of the accused prejudicially."

(emphasis supplied)

26. It can be safely deduced from the aforementioned expositions that the basis of classifying article as a "document" depends upon the information which is inscribed and not on where it is inscribed. It may be useful to advert to the exposition of this Court holding that tape records of speeches [Tukaram S. Dighole v. Manikrao

Shivaji Kokate, (2010) 4 SCC 329 : (2010) 2 SCC (Civ) 112 : (2010) 2 SCC (Cri) 826] and audio/video cassettes [Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra, (1976) 2 SCC 17] including compact disc [Shamsher Singh Verma v. State of Haryana, (2016) 15 SCC 485 : (2016) 4 SCC (Cri) 683] were "documents" under Section 3 of the 1872 Act, which stand on no different footing than photographs and are held admissible in evidence. It is by now well established that the electronic record produced for the inspection of the court is documentary evidence under Section 3 of the 1872 Act [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] .

30. Having noticed the above definitions, we may now turn to definitions of expressions "document" and "evidence" in Section 3 of the 1872 Act being the interpretation clause. The same reads thus:

*"**3. Interpretation clause.--* * ***

"Document".--"Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

Illustrations

A writing is a document;

Words printed, lithographed or photographed are documents;

A map or plan is a document;

An inscription on a metal plate or stone is a document;

A caricature is a document.

***"Evidence".--"Evidence"** means and includes--*

(1) all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;

such statements are called oral evidence;

(2) all documents including electronic records produced for the inspection of the court,

such documents are called documentary evidence."

On a bare reading of the definition of "evidence", it clearly takes within its fold documentary evidence to mean and include all documents including electronic records produced for the inspection of the court. Although, we need not dilate on the question of admissibility of the contents of the memory card/pen-drive, the same will have to be answered on the basis of Section 65-B of the 1872 Act. The same reads thus:

***"65-B. Admissibility of electronic records.**--(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.*

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely--

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether--

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say--

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it

(5) For the purposes of this section-

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or

without human intervention) by means of any appropriate equipment.

Explanation.--For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process."

This provision is reiteration of the legal position that any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a "document" and shall be admissible in evidence subject to satisfying other requirements of the said provision.

38. It is crystal clear that all documents including "electronic record" produced for the inspection of the court along with the police report and which prosecution proposes to use against the accused must be furnished to the accused as per the mandate of Section 207 of the 1973 Code. The concomitant is that the contents of the memory card/pen-drive must be furnished to the accused, which can be done in the form of cloned copy of the memory card/pen-drive. It is cardinal that a person tried for such a serious offence should be furnished with all the material and evidence in advance, on which the prosecution proposes to rely against him during the trial. Any other view would not only impinge upon the statutory mandate contained in the 1973 Code, but also the right of an accused to a fair trial enshrined in Article 21 of the Constitution of India.

47. We are conscious of the fact that Section 207 of the 1973 Code permits withholding of document(s) by the Magistrate only if it is voluminous and for no other reason. If it is an "electronic record", certainly the ground predicated in the second proviso in Section 207, of being voluminous, ordinarily, cannot be invoked and will be unavailable. We are also conscious of the dictum in Supt. & Remembrancer of Legal Affairs v. Satyen Bhowmick [Supt. & Remembrancer of Legal Affairs v. Satyen Bhowmick, (1981) 2 SCC 109 : 1981 SCC (Cri) 342] , wherein this Court has restated the cardinal principle that the accused is entitled to have copies of the statements and documents accompanying the police report, which the prosecution may use against him during the trial."

13. Adverting to the facts of this case, admittedly, the CD in which alleged statement of injured/ deceased is contained in the form of Ex. SA-2 stands exhibited during the course of evidence. So far as the contention that the said C.D. is not admissible in evidence because no certificate as required by Section 65B(4) of Indian Evidence Act is appended is concerned, the same can be seen and adjudicated by the learned court below itself at appropriate stage.

14. The Hon'ble Supreme Court in para-50 of **P. Gopalkrishnan's case (supra)**, has held as under:-

"50. In conclusion, we hold that the contents of the memory card/pen-drive being electronic record must be regarded as a document. If the prosecution is relying on the same, ordinarily, the accused must be given a cloned copy thereof to enable him/her to present an effective defence during the trial. However, in cases involving issues such as of privacy of the complainant/witness or his/her identity, the Court may be justified in providing only inspection thereof to the accused and his/her lawyer or expert for presenting effective defence during the

trial. The court may issue suitable directions to balance the interests of both sides." (emphasis supplied)

15. Therefore, in view of law laid down by the Hon'ble Supreme Court in **P. Gopalkrishnan's case (supra)**, it is clear that a C.D. is also an electronic document. Therefore, a copy of the same ought to be supplied to the accused under Section 207 Cr.P.C. The supply of any such electronic document could be denied only in the exceptional case specified in para-50 of **P. Gopalkrishnan's case (supra)** itself.

16. It appears that the learned trial court has denied the applicant the copy of C.D. on the ground that the process of cloning may lead to deletion of data or may also lead to tempering with the same which is hypothetical and without any basis. Therefore, the same cannot be sustained particularly keeping in view the fact that the object behind incorporation of Section 207 Cr.P.C. is to enable the accused to defend himself properly which is achieved by supplying of vital documents only

17. In **Sadhvi Ritumbhara v. State of M.P., 1996 SCC OnLine MP 261**, High Court of Madhya Pradesh, while deciding a criminal revision has held that a copy of alleged audio/video cassettes containing alleged objectionable speech is necessary to be given to accused.

18. In view of the aforesaid discussion, the impugned order dated 09.09.2022 passed by the learned Additional District & Sessions Judge/ Special Judge (POCSO Act), Court No.11, Lakhimpur Kheri, insofar as it declines the supply of copy of CD to the applicant is not sustainable and deserves to be quashed to that extent only.

19. Accordingly, the application under Section 482 Cr.P.C. stands **allowed** to the extent indicated above.

20. The learned trial court is directed to dispose of the application dated 03.09.2022 afresh by passing a reasoned and speaking order in strict accordance with law expeditiously particularly keeping in view the law laid down by the Hon'ble Supreme Court in **P. Gopalkrishnan's case (supra)**.

(2022) 11 ILRA 471
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.10.2022

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Appl. U/s 482 No. 8379 of 2017

Roshan Lal ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Amrendra Nath Tripathi, Deepak Kumar Pandey

Counsel for the Opp. Parties:
Govt. Advocate, Prabhat Kumar, Vimal Shukla

(A) Criminal Law - Indian Penal Code, 1860 - Sections 323, 504 & 506 - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Section 200 - Examination of complainant , Section 202 - Postponement of issue of process , Section 204 - Issue of process , The Limitation Act 1963 - Section 5 - condonation of delay , provision 131 of the Schedule of Limitation Act, 1963 - period of ninety days is the limitation for filing of any revision under the Criminal Procedure Code wherein the decree or order or sentence is sought to be revised - if a statute provides a specific mode or action

of law, the same has to be followed in the manner prescribed.(Para - 20,21)

An application under Section 156 (3) of Cr.P.C. - applicant summoned - aggrieved - criminal revision - revision time barred - instituted about delay of nine months - revisional court entertained - allowed revision - without condoning delay - remanded matter back for fresh adjudication by Magistrate concerned – hence application . **(Para -6)**

HELD:-No deeming provision for condonation of delay and delay could be condoned only when it is pleaded and prayed by the person concerned or the court taking cognizance of the relevant provision of Limitation Act 1963, decides the issue. Order passed by revisional court is erroneous, unlawful and against the settled proposition of law.Order set aside. Matter remitted back to revisional court. **(Para - 21,25)**

Application u/s 482 Cr.P.C. allowed. (E-7)

List of Cases cited:-

1. St. of U.P. Vs Gauri Shanker & ors., (1992) 29 ACC 523

2. P.K. Choudhary Vs Commander, 48 BRTF (GREF), (2008) 13 SCC 229

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. Heard Amrendra Nath Tripathi, learned counsel for the applicant, Sri Prabhat Kumar assisted by Sri Vimal Shukla, learned counsel for the opposite party no.2, Sri Aniruddha Kumar Singh, learned A.G.A.-I for the State, and perused the record.

2. Instant application has been filed by the applicant, assailing the order dated 30.6.2016 passed by the Additional District and Sessions Judge, Court No.1, District Balrampur in Criminal Revision No. 36 of 2015. He has further challenged the entire proceeding of Complaint Case No.860 of 2014 pending before the Judicial Magistrate-I, District Balrampur.

3. Factual matrix of the case is that the respondent no.2 had filed an application under Section 156 (3) of the Cr.P.C. before the Judicial Magistrate-I, District Balrampur. The respondent no.2 levelled allegation therein that the applicant executed registered agreement to sale on 27th of September 2013 with respect to Gata No.465 having area 0.202 hectare and Gata No.628 having an area 0.142 hectare situated at Village Mathura, Police Stateion Lalia, District Balrampur. The respondent no.2 has further made allegation that the sale consideration was fixed as Rs.2,40,000/- out of which Rs.2,00,000/- was allegedly given in cash at the time of execution of the said agreement and the remaining amount was allegedly agreed to be paid at the time of execution of the sale deed. The allegation is that after the aforesaid agreement, the said plot was soled out to Ms. Shaheena and Mr. Kamruddin. Further allegation is that when the complainant/revisionist went to the house of the applicant on 10th of April 2014, the applicant, who was sitting with the other accused persons, started abusing and beating her.

4. Vide order dated 22nd of May 2014, the Magistrate treated the aforesaid application as a complaint case and listed it for recording the statement of respondent no.2 under Section 200 of the Cr.P.C. The opposite party no.2 got her statement recorded under Section 200 of the Cr.P.C. Further the statements of other two witnesses were recorded under Section 202 of the Cr.P.C. by the Magistrate.

5. After recording the statement of the complainant as well as the witnesses, the

Judicial Magistrate-I, vide his order dated 25th of July 2014, issued process under Section 204 of the Cr.P.C. and summoned the applicant under Sections 323, 504, 506 of the Indian Penal Code. A categorical finding was also recorded by the Magistrate that as per the version of the complaint and the statements made under Sections 200 and 202 Cr.P.C., the case is made out only under Sections 323, 504 and 506 I.P.C. and so far as the allegation with regard to breach of the agreement and execution of the sale deed is concerned, the same was a civil dispute and no criminal offence is made out in that regard.

6. Being aggrieved by the summoning order dated 25th of July 2014, the opposite party no.2 filed a criminal revision before the learned Additional District and Sessions Judge, Court No.1, District Balrampur, which was registered as Criminal Revision No.36 of 2015. The revision was time barred as that was instituted about delay of nine months but the revisional court entertained and allowed the revision, vide order dated 30th of June of 2016 without condoning the delay in filing the said revision and remanded the matter back for fresh adjudication by the Magistrate concerned.

7. Learned counsel for the applicant submits that the revisional court has passed the order on 30th of June 2016, in most mechanical manner and, while passing the aforesaid order, no finding was recorded with regard to incorrectness or unlawfulness of the order passed by the Magistrate. He also added that the application submitted by the respondent no.2 under Section 156 (3) Cr.P.C. which was registered as a complaint case, is an abuse of process of law. He added that no offence is made out against the applicant.

8. Adding his arguments, he submits that in fact the applicant had already instituted a suit being Civil Original Suit No. 297 of 2014 for cancellation of the agreement to sale dated 27.9.2013 before the Civil Judge (Junior Division), Balrampur. The opposite party no.2 had also filed a suit being Civil Original Suit No. 244 of 2014, for cancellation of sale deed executed on 9th of April 2014 in favour of the other accused, namely, Ms. Saheena, before the Civil Judge (Junior Division), Balrampur. Both the suits are still pending consideration.

9. Referring the aforesaid argumetns, he submits that in fact the dispute between the parties is purely of civil nature and prima facie, no offence is made out against the applicant. He further added that Hon'ble Apex Court and the Hon'ble High Courts have held that if the dispute is of civil nature then criminal proceeding is nothing but an abuse of process of law. He submits that since the land in question belongs to the applicant and he had duly executed the sale deed, as such, no question arises with regard to committing cheat or fraud by the applicant and, as such, the finding recorded by the revisional court is perverse and assails illegality.

10. In support of his contentions, learned counsel for the applicant has placed reliance on the Judgment of this Court rendered in the case of **State of U.P. Vs. Gauri Shanker and others, (1992) 29 ACC 523**, and referred paras 10 & 11 of the Judgment, which are being quoted hereunder:-

"10. As pointed out by the Privy Council in Krishna Swami v. Ramaswami, AIR 1917 PC 179, normally the question of limitation affecting the competence of

appeal or revision should be determined at the stage of admission. Similarly in Sundarbai v. Collector of Belgaon, AIR 1918 PC 135 it was observed by the Privy Council that where the memorandum of appeal or revision was presented beyond the prescribed limitation, the proper order which a Judge should pass was let the notices go to the respondents. In the present case if the delay has been condoned on the date of admission or presentation, by the Division Bench and the opposite parties raise the objection about the delay, subsequently it is proper that the party may be heard. In case there was no justification for condonation of delay the application be rejected and in that event, even though that veiw appears to be not quite consistent with the settled principles, the order admitting the appeal or revision could be recalled also. But in the present case we are satisfied that the delay has been satisfactorily explained by the State of U.P. and even if on the date of admission delay was condoned without issuing notices, there was no material illegality or irregularity.

11. Matter can be reviewed from another angle. The result of refusing to condone the delay would result in a meritorious matter being thrown out at the very threshold and thereby the cause of justice would be frustrated. As compared to this asssuming the delay is condoned, the maximum that can happen is that a cause would be decided on merits after hearing the parties. In the present revision also by condoning the delay, no injustice was caused to the opposite parties and now when present application was moved, cause for delay has been scrutinised and we are satisfied that it has been correctly condoned. By condoning delay, substantial justice is done. In such matters of considerable Imagnitude, Courts need not be technical. In view of the premises aforesaid we are of the considered opinion that the expression sufficient cause under S. 5 of Limitation Act has to be scrutinised in a justice oriented manner and narrow pedantic approach need not be made. Explanation of each day's delay is not a correct formula in every case. In the present case, delay was explained satisfactorily on behalf of State and it was correctly condoned on the date of admission. Even though better course to be adopted could have been to issue notice to the opposite parties (present applicant) to show cause as to why not the delay be condoned but as the revision was essentially under the Revisionary jurisdiction of the Court which was somewhat similar to inherent jurisdiction which could be exercised even suo motu, even if delay was condoned on the date of admission itself without issuing notices to the opposite parties, we now after hearing opposite parties on the point of condonation of delay are of the view that the delay has correctly been condoned by the Division Bench conseuquently we refrain from recalling the order passed by the Division Bench condoning delay, admitting the revision and issuing process to the opposite parties (present applicant) and accordingly the application moved on behalf of opposite parties to recall the order passed by Division Bench condoning delay, admitting revision and issuing process to the oppoxsite parites is rejected."

11. Learned counsel for the applicant further placed reliance upon the Judgment of the Apex Court rendered in the case of **P.K. Choudhary Vs. Commander, 48 BRTF (GREF), (2008) 13 SCC 229** and referred paras 10 and 11 thereof, which are being quoted hereunder:-

"10. The learned Judicial Magistrate did not apply his mind on the said averments. It did not issue any notice upon

the appellant to show cause as to why the delay shall not be condoned. Before condoning the delay the appellant was not heard. In State of Maharashtra v. Sharadchandra Vinayak Dongre (1995) 1 SCC 42, this Court held: (SCC p.44, para 5)

" 5. In our view, the High Court was perfectly justified in holding that the delay, if any, for launching the prosecution, could not have been condoned without notice to the respondents and behind their back and without recording any reasons for condonation of the delay. However, having come to that conclusion, it would have been appropriate for the High Court, without going into the merits of the case to have remitted the case to the trial court, with a direction to decide the application for condonation of delay afresh after hearing both sides. The High Court however, did not adopt that course and proceeded further to hold that the trial court could not have taken congnizanc of the offence in view of the application filed by the prosecution seeking permission of the Court to file a "supplementary charge-sheet' on the basis of an "incomplete charge-sheet' and quashed the order of the CJM dated 21.11.1986 on this ground also. This view of the High Court, in the facts and circumstances of the case is patently erroneous."

11. In view of the aforesaid decision, there cannot be any doubt whatsoever that the appellant was entitled to get an opportunity of being heard before the delay could be condoned."

12. Further contention is that the revisional court has erred while passing the order dated 30.6.2016, as the direction has been given to the parties of the revision to appear before the court of Magistrate, meaning thereby the present applicant has also to appear though the Magistrate has still not applied his mind on the fact that whether any case is made out under Section 419, 420, 467, 468, and 471 of the I.P.C.

13. Thus, submissions are that since the order passed by the learned Magistrate issuing summons against the applicant was assailed before the learned revisional court with the delay of about nine months, as such, the revision court was to issue notice to the applicant and the opportunity of hearing should have been afforded to him. He submits that the revisional court neither took care of the delay and latches in filing the revision nor afforded opportunity of hearing to the applicant and, as such, the order of the revisional court assails illegality and infirmity and is liable to be set aside.

14. On the other hand, learned counsel for the State has very vehemently opposed the contention aforesaid and submits that in fact the applicant cannot be said to be prospective accused as the order dated 25th July 2014 passed by the learned Magistrate has been set aside by the Additional Sessions Judge in Revision No.36 of 2015, vide order dated 30th June 2016. He further submitted that since no process is in existence against the present applicant, as such, he is not a prospective accused and, in such view of the matter, the applicant has no locus to assail, the order passed by the revisional court.

15. Sri Prabhat Kumar, learned counsel for the opposite party no. 2 has controverted the contention of the counsel for the applicant and submitted that it is wrong to say that the opposite party no.2 while filing the revision did not file the application for condonation of delay under Section 5 of the Limitation Act 1963. In

support of his contention, he has drawn attention of this Court towards the counter affidavit dated 15th July 2021 and has referred page 7, i.e., the application for condonation of delay appended with the counter affidavit. He further added that the applicant had taken the plea before the learned Magistrate as well as the revisional court regarding the nature of the dispute but both the courts have rejected the same on the ground that the civil and criminal proceedings may run simulataneously if there are allegations disclosing the commencement of congnizable offence.

16. Adding his argument, he has submitted that under the revisional jurisdiction suo motu cognizance can be taken by the revisional court and, as such, the issue with regard to the limitation will not attract in this matter. In the instant matter, there is a prima facie case made out against the applicant under Sections 419, 420, 467, 468, 471 of the I.P.C.

17. He further submits that in the aforesaid circumstance, as per the settled proposition of law, the issue of limitation would not attract in this matter. Furthermore, the respondent had submitted the application for condonation of delay along with the revision before the revisional court and, as such, there is no illegality or infirmity in the order passed by the revisional court.

18. In rejoinder to the arguements, learned counsel appearing for the applicant submits that in fact the summon was issued, vide order dated 25th of July 2014 and as soon as the summon was issued, the applicant's case comes under the purview of prospective accused. He further added that the revisional court has recorded finding which is against the applicant. He submits that revisional court did not consider the fact that the civil suits are pending between the parties and further the land in question, which was transferrred through a registered sale deed, is of the present applicant. As such, there can be no charge with regard to cheat or forgery. The order of the revisional court indicates that as if the applicant is also to be prosecuted under Section 420, 467, 468, 471 and 406 of I.P.C. He submits that, in such view of the matter, the applicant is required to be heard before the revisional court and the order passed by the revisional court is required to be tested on the pretext of its illegality and perversity.

19. I have considered the rival submissions made by learned counsel for the parties and have also gone through the records available before this Court. The issue, which emerges for consideration before this Court, is that while exercising power under Chapter XXX of Cr.P.C., can the revisional Court proceed without condoning the delay of such revision and further without reducing the reasons in writing?

20. As per provision 131 of the Schedule of Limitation Act, 1963, the period of ninety days is the limitation for filing of any revision under the Criminal Procedure Code wherein the decree or order or sentence is sought to be revised. The point 131 of the Schedule of Limitation Act 1963 is quoted hereinunder:-

Description of applications	Period of Limitation	Time from which period begins to run

131.	To any court for the exercise of its powers of revision under the Code of Civil Procedure, 1908 (5 of 1908), or the Code of Criminal Procedure, 1898 (5 of 1898).	Ninety days	The date of the decree or order or sentence sought to be revised.

21. From bare perusal of aforequoted provision, it is evident that for filing revision, there is 90 days' limitation period from the date of decree or order or sentence, which is sought to be revised. This Court is of the considered view that there is no deeming provision for condonation of delay and delay could be condoned only when it is pleaded and prayed by the person concerned or the court taking cognizance of the relevant provision of Limitation Act 1963, decides the issue.

22. So far as the contention of the learned counsel for the opposite party no.2 with respect to the fact that since the revisional court can exercise the revisional power suo motu and, therefore, in such conditions, the application for condonation of delay or condoning the delay is not mandatory provision. When this Court examined this contention, it is evident that suo motu cognizance does not mean that the court is at liberty to ignore the statutory provision and settled proposition of law. It is well settled law that if a statute provides a specific mode or action of law, the same has to be followed in the manner prescribed.

23. This Court is also not unmindful that the criminal law is strict law and, there are far-reaching and serious consequences of the same. This Court finds that there is specific provision with respect to limitation for filing of revision against decree or order or sentence and, thus, the same cannot be overlooked while entertaining any revision or passing any order thereon. So far as revision is concerned, prior to deciding the issue of delay and laches, the issuance of notice may not be a compulsory requirement.

24. In the instant matter with respect to the application for condonation of delay in filing the revision, it is an admitted fact that there was delay of nine months but there is no single whisper in all over the finding or order passed by the revisional court, which is impugned with this application.

25. When this Court further examined the revisional order dated 30.6.2016, it is overt that learned revisional court while remitting back the matter, has erroneously directed the applicant to appear before the court of Magistrate though the order passed by the Magistrate dated 25.7.2014 was set aside. After setting aside the order dated 25.7.2014, the present applicant is neither accused nor prospective accused and, as such, he could not have directed to appear before the Magistrate unless any process is issued and, thus, this Court is of considered opinion that the order dated 30.6.2016 passed by the revisional court is erroneous, unlawful and against the settled proposition of law.

26. In view of the aforesaid submissions and discussions, the order dted

30th June 2016 passed by the Additional District and Sessions Judge is hereby set aside. The matter is remitted back to the revisional court for hearing the matter afresh, in the light of the observations made hereinabove.

27. Instant application is allowed accordingly.

(2022) 11 ILRA 478
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.10.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE SYED WAIZ MIAN. J.

Government Appeal No. 71 of 2021

State of U.P. ...Appellant
Versus
Nanhe Lal & Anr. ...Accused-Respondents

Counsel for the Appellant:
G.A.

Counsel for the Respondents:
Sri Dhananjay Singh

Criminal Law - Indian Penal Code, 1860 - Sections 302, 376, 394 & 411 - Evidence Act, 1872 – Section 3 - circumstantial evidence - in a criminal case based on the strength of circumstantial evidence, chain of circumstances must be complete and on completion of such chain only one conclusion can be drawn that it is only the accused who had committed the crime – F.I.R. version that informant daughter went to watch T.V. at accused house; she was wearing golden earrings and one locket on her neck; they out of greed, murdered the deceased by strangulation by her Dupatta and snatched jewellery from her and kept them in the Almirah placed in the room; they had thrown her dead body in the wheat field - Held - case rests on circumstantial evidence - no witness came forward to depose that they had seen the deceased going to the house of the accused to watch Television - P.W.-1, Veerpal, on whose instance First Information Report came to be lodged turned hostile and has not supported the allegations contained in his written First Information Report - P.W.-2 w/o P.W.-1 also turned hostile - independent witnesses also turned hostile and those witnesses in their cross examination have not stated any thing which may support the prosecution story - alleged recovery of articles from the Almirah of the accused is also not proved - impugned judgment and order is not erroneous or perverse and the same is sustainable in the eyes of law (Para 45, 26)

Dismissed. (E-5)

List of Cases cited:

1. Suraj Singh Vs St. of U.P., 2008 (11) SCR 286

2. C. Magesh & ors. Vs St. of Karn., Criminal Appeal Nos. 1028-1029 OF 2008, dt 30.04.2010

3. Silash Singh Kurid Vs The State 2018 Cr.L.J. 394

4. Sharad Birdhi Chand Sarda Vs St.of Mah. (1984) 4 SCC 116

(Delivered by Hon'ble Syed Waiz Mian, J.)

1. By means of this Government Appeal, on behalf of the State, challenge has been made to the validity and legality of judgment and order of acquittal dated 11.11.2020, having been passed by the learned Additional Sessions Judge, Fast Track Court, Bareilly, in connection with Session trial No. 275 of 2017, State vs. Nanhe Lal and another, arising out of Case Crime No. 89 of 2017, under Sections-302, 376, 394 and 411 I.P.C., Police Station-Bhamora, District-Bareilly.

2. Heard Shri Vikas Goswami learned A.G.A. and perused the record.

3. Brief facts emerge from the the First Information Report are that the complainant presented a written complaint at the concerned police Station, stating therein that he had solemnized marriage of his daughter with one Morpal and thereafter, on the occasion of festival of Holi she was present at her parental house on 15.03.2017; she went to the house of accused respondent to watch television but she did not return till the evening; search was made but she could not be traced out; on 16.03.2017, at about 7 a.m. dead body of daughter of informant was found in a wheat field near river.

4. On presentation of the application of complainant/informant a criminal case being Case Crime No. 89 of 2017, under Sections-302, 376, 394, and 411 I.P.C. Police StationBhamaura, District-Bareilly, came to be registered against one Nanhe Lal and his wife Smt. Nisha Devi.

5. Upon investigation, statements of informant, constable and another were recorded on 17.03.2017. In charge, Sub Inspector Ajab Singh, with police team, was patrolling in search of the accused. On reaching Devchara, they got information from the police informer that accused, who had killed the deceased, are standing at Devchara square; believing the information, I.O. Ajab Singh, along with his police team, reached at the place where accused persons were standing; upon inquiry one told his name as Nand Lal and another Nisha Devi, R/o Village Sirohi, Police StationBhamaura, District-Bareilly; they told that a criminal case, against them, is registered, at the police station. With regard to the occurrence it was apprised by the informant that his daughter went to watch T.V. at their house; accused admitted that Sunita d/o Veerpal, who lives in their neighbour, had come to their house to watch T.V.; she was wearing golden earrings (kundals) in her ears and one locket on her neck; they out of greed, murdered the deceased by strangulation by her Dupatta and snatched jewellery from her and kept them in the Almirah placed in the room; they had thrown her dead body in the wheat field on 15.03.2017 at around 12 at night; to save them, they offered the Investigating Officer and Police Team that they can get recovered the jewellery wore by the deceased; Investigating Officer and police team were brought by both the accused to their house and they opened the room in their house and the Almirah and the jewellery was got recovered from there; the recovered articles were identified by the Rajendra and Rajdulari and these articles were sealed on the spot, in the presence of the accused as well as witnesses; memo of recovery of articles was written and it was signed by all the witnesses, accused, investigating Officer and police constable etc, accompanying the investigating officer.

6. Inquest of the dead body of the deceased was conducted by the Sub Inspector, in the presence of Panchan and he prepared an inquest report, Exhibit-Ka-3, to ascertain the real cause of death of the deceased, dead body along with necessary papers were forwarded for conducting the autopsy on the dead body to District Mortuary, wherein, autopsy was conducted, and an autopsy report, Exhibit-Ka-9 by the Doctor was prepared. In this autopsy report the details have been recorded and the cause of death of the deceased has been opined as Asphyxia due to strangulation.

7. During investigation, the investigating officer has recorded the statements of rest of witnesses and accused

under Section 161 Cr.P.C.; during investigation clothes wore by the deceased and her other belongings were also taken so that scientific examination can be done and the same were forwarded to Joint Director Forensic Scientific Laboratory, Moradabad, and the office of Joint Director, Forensic Science Laboratory, has sent examination report dated 17.06.2017 (Exhibit-Ka-17) to C.O. Aonla (Bareilly) which is on record.

8. On the strength of incriminating evidence collected by the Investigating Officer, the investigating officer forwarded a police report for offences punishable under Sections 302, 376, 394 and 411 I.P.C. against the accused Nanhe Lal and Nisha Devi to the Court concerned.

9. Learned Chief Judicial Magistrate, Bareilly, upon taking cognizance in exercise of powers enshrined under Sections-190 (1) Cr.P.C. has found ample evidence under aforementioned offences against both accused and thus took cognizance and summoned the accused. After completing the formalities, the learned Chief Judicial Magistrate, vide order dated 11.08.2017 committed the criminal case which came to be registered as criminal case No. 275 of 2017 to the Court of District District and Sessions Judge, Bareilly, for necessary action.

10. In the Court of District and Sessions Judge, the said case was registered as S.T. No. 275 of 2017, which was transferred to Additional Sessions Judge, Fast Tack Court, and vide order dated 21.09.2017, charges for offences under Sections 302/34, 376, 394 and 411 I.P.C. against both the accused were framed the charges for offences under Sections 302/34, 376, 394 and 411 I.P.C. against both the accused, they denied the charges and claimed trial, hence their trial commenced.

11. In order to prove charges against the respondents, under above sections of I.P.C. the witnesses P.W.-1 Veerpal, informant who approved his written First Information Report, P.W.-2 Rajdulari, P.W.-3 Rajendra, inquest report, as exhibit Ka1-2, P.W.-5, Tejpal, also proved inquest report and also identified his signature thereon and P.W.6 Yaduveer Singh, who proved First Information Report Chik as Exhibit Ka-4 and G.D. Exhibit Ka-Kha-Ka 5, respectively, were examined

12. Thereafter, accused admitted the genuineness of prosecution papers, however, vide Court order dated 11.09.2020 C.W. 1, Sub Inspector-Ajab Singh, was summoned, who proved site plan of place of occurrence and memo of recovery of articles as Exhibit Ka-7, Exhibit-Ka-8, inquest report Exhibit-Ka 3, Foresnsic Science Laboratory report, Exhibit Ka-17, two gold earrings as material ExhibitKa-1, locket as material, Exhibit-Ka 2. Further, the accused also admitted the genuineness of the police report and other police papers as Exhibit Ka-6, to Exhibit Ka-16.

13. After closure of evidence, on behalf of the prosecution, statements of accused under Section 313 Cr.P.C. were recorded.

14. Accused Nanhe Lal and Smt. Nisha Devi stated that the evidence of P.W.-1, and recovery memo and evidence of P.W.-4, P.W. 5 are false. They further stated that the recovered articles and other belongings of the deceased were planted on account of enmity of political rivalry and they have been falsely implicated in this case and they declined to adduce any evidence in their defence.

15. Learned Additional Sessions Judge, Fast Track Court, Bareilly, vide judgment and order dated 11.11.2020 did not find sufficient evidence against the accused and extended the benefit of doubt to the accused and accordingly, acquitted them from the charges under aforementioned offences.

16. Feeling aggrieved by the judgment and order dated 11.11.2020, rendered by learned Additional Sessions Judge, Fast Track Court, Bareilly, instant Government Appeal on behalf of the State of U.P. has been preferred challenging the impugned judgment and order on the grounds that the accused respondents have committed offences of murder, rape and robbery and also stated that the robbed gold articles were recovered at the instance of accused from the Almirah kept in the room of their house and the same were handed over to the Investigating Officer and police personnel in the presence of the witnesses; learned lower Court has not properly appreciated the evidence on record and the impugned judgment and order is based on conjuncture and surmises; the trial Court despite cogent and clinching evidence against the accused has committed gross illegality and perversity by acquitting the accused, thus, the impugned judgment and order is erroneous in the eyes of law and not sustainable, therefore, it is urged that the impugned judgment and order dated 11.11.2020 be set aside and respondent/accused convicted and sentenced in accordance with law.

Analysis

17. P.W.-1 Veerpal, in his examination in chief recorded on 09.11.2017 has stated that his daughter was married to one Morpal and she had come to his house to celebrate the festival of Holi; she had gone to the house of his neighbour Nanhe Lal at about 1.00 p.m. to watch T.V. but till evening she did not return, whereupon, he searched her daughter but she could not be traced out; on the following day at about 7 O clock, her dead body was found in the wheat field near canal which flows in the western side of the village. Under suspicion, that his neighbour Nanhe Lal and his wife had murdered her daughter, he presented a written First Information Report at the concerned police station.

18. P.W.-1, Veerpal states that he has not found jewellery, which was wore by the deceased, on her dead body. In his remaining examination in chief, P.W.-1 Veerpal, was recorded before the learned Court below on 17.04.2019, wherein, he had stated that the recovered jewellery articles were not before him.

19. P.W.-1, Veerpal, in his cross examination which was on 09.11.2017 has deposed that house of the accused is opposite to his house and they enjoy good relation with them; they also exchange visits to their houses; he has not seen her daughter to have gone to house of Nanhe Lal to watch Television. On his dictation one Raj Kumar had written his First Information Report and Partibandi prior to the alleged incident was existing between Nanhe Lal and Rajkumar.

20. P.W.-1 Veerpal, next states that scribe Rajkumar is a home guard, and was posted in Police Station-Bhamora; Rajkumar, had said to him that he will write his First Information Report; he, does not know as to what is written in the First Information Report; in the First Information Report he did not read that the

murder of his daughter had taken place in his presence; he had not told Rajkumar to nominate accused Nanhe Lal and Smt. Nisha Devi; accused cannot murder his daughter; his previous statement in the Court was given due to fear of police and the statement he is giving today is true because it is not the result of any fear.

21. P.W.-1-Veerpal, who has got the First Information Report written by Rajkumar has not mentioned in the First Information Report that his daughter, in his presence on 15.03.2017 at around 1 p.m., had gone from his house, to watch television, to the house of accused Nanhe Lal; he has also not stated in his examination in chief that his daughter had gone to the house of the accused in his presence and in this connection he has specifically deposed that he merely on the basis of suspicion had named both the accused in the First Information Report; he in his cross examination has categorically denied the involvement/ complicity of both the accused in the murder of his daughter and he has deposed that accused are friendly to him and enjoys good relations with them. He has said that he can not even imagine that accused can kill his daughter. P.W.-1 Veerpal has also admitted that out of enmity existing between Raj Kumar and accused Nanhe Lal, prior to alleged incident, Rajkumar at his own has noted the name of both accused. P.W.-1 Veerpal has not cast doubt upon accused about their complicity in the alleged incident.

22. P.W.-1 Veerpal, in his entire testimony has not deposed to have seen the commission of the incident.

23. P.W.-2, Rajdulari, who is wife of P.W.-1, Veerpal and mother of the deceased states in her examination in chief that she has not seen her daughter going to the house of accused to watch Television; they had tried to search and trace out their daughter as she had not returned to their house till evening; on the following day her dead body was found in the wheat field. She also has candidly denied in her deposition that accused had killed her daughter by strangulation.

24. P.W.-2 Rajdulari, on being declared hostile was on the request of the prosecution put to cross examination, wherein, she has specifically denied that her daughter had gone to the house of accused to watch Television; however, she admits that she had not seen her daughter while she had gone out of their house; she also expresses her ignorance as to who had called her daughter but she unequivocally deposes that accused had not called her daughter.

25. P.W.-5 Rajendra, also feigns ignorance in his statement by saying daughter of his brother Veerpal had gone to the house of the accused to watch Television because on that date, he was out of the village and when he had returned on the next day he had came to know about the dead body of victim was lying in the wheat field. He also deposes that it is true that his brother on the basis of suspicion has registered the case against both accused.

26. P.W.-4 Rajkumar in his examination in chief has also stated that his house is situated at a distance from the house of Veerpal; On 16.08.2017 dead body of the deceased was found in the wheat filed.

27. Like P.W.-3 Rajendra, P.W.-4-Rajkumar, as well has turned hostile and they were also cross examined on behalf of

the prosecution but in their cross examination too, they have not supported the prosecution story against the accused.

28. P.W.-1-Veerpal, in his examination in chief, has deposed that on the pointing out of the Nanhe Lal and Smt. Nisha Devi, earrings (Kundal), which the deceased had wore on the date of occurrence and one locket was also recovered from the Almirah in the room of their house in the presence of Rajendra and his wife Rajdulari and in this respect both accused had confessed to have called his daughter and they had also confessed that they had got recovered the articles they had snatched from the deceased Daroga Ji had prepared a memo of recovery, which was not only witnessed by him but other police personnel accompanied Daroga Ji were also present.

29. P.W.-1 Veerpal, had also stated that the memo of recovery, paper No. 6Ka/A was prepared in his presence and after being readover he had signed the said paper. He also next states that the recovered jewellery was also taken by Daroga Ji, in his possession and the same was sealed at the place of recovery.

30. Due to paucity of time complete statement of P.W.-1 Veerpal could have not been recorded on 09.11.2017, therefore, for remaining statement he was again examined on 17.04.2019 and in his cross examination he contradicted his aforementioned statement given in his examination in chief by saying that on the pointing out of accused Nanhe Lal and Smt. Nisha Devi no recovery of jewellery, belongings of his daughter, was made in his presence; nor Daroga Ji had prepared recovery memo in his, or his wife, or in presence of his brother; Daroga Ji had taken their signatures and thumb impression on a plain paper.

31. He also denies that the recovered articles were sealed in his presence. He also expresses his ignorance as to how the memo of recovery came to be written, as such, P.W.-1, Veerpal, with regard to alleged recovery of jewellery and, belongings of the deceased, has given contradictory and inconsistent statement.

32. P.W.-2 Rajdulari, P.W.-3 Rajendra and P.W.-4 Rajkumar, have also made somersault over their statements stated to have been recorded by the Investigating Officer, during investigation and have stated that Daroga Ji, during investigation, did not record their statements and no recovery of jewellery etc. was made in their presence by Daroga ji, on the pointing out of the accused. These witnesses have also claimed in their ocular evidence that their signatures/ thumb impression were having been taken by Daroga Ji on a plain paper and they also deny the memo of recovery to have been written in their presence by Daroga Ji.

33. It transpires from the analysis and scrutiny of the ocular evidence of P.W.-1 to P.W.-5 that none of them have admitted to have seen the deceased, to have gone in their presence, to the house of accused to watch T.V. and have also denied that the deceased was strangulated or killed by the accused. All witnesses of facts have also categorically denied the complicity of the accused in alleged incident.

34. All the witnesses have also admitted in their ocular evidence that they are on good terms with accused.

35. Hon'ble Apex Court has observed consistently that in a criminal case based on the strength of circumstantial evidence, chain of circumstances must be complete

and on completion of such chain only one conclusion can be drawn that it is only the accused who had committed the crime.

36. In ***Suraj Singh vs. State of U.P., reported in 2008 (11) SCR 286*** the Hon'ble Apex Court has held as follows:

"The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the "credit" of the witnesses; their performance in the witness box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

37. In ***C. Magesh & Ors.v/s State of Karnataka***, Criminal Appeal Nos. 1028-1029 OF 2008, decided On 30 April 2010, the Apex Court has held as under:

"In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that "no man is guilty until proven so", hence utmost caution is required to be exercised in dealing with situations where there are multiple testimonies and equally large number of witnesses testifying before the court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses."

38. Section 27 of the Evidence Act laws down as follows:

"When any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

39. Hon'ble Apex Court in ***Silash Singh Kurid vs. The State,*** reported in ***2018 Cr.L.J. 3944*** had held that;

"Where no eye witness is available in a murder case and the case is only based on circumstantial evidence, recovery of weapon and evidence on the basis of disclosure of the accused alone would not automatically lead the conclusion that offence was also committed by the accused. Ho'ble Supreme Court further held that in fact burden lies on the prosecution to establish close link between the discovery of the material objects and its use in the commission of offence and what is admissible under Section 27 of the Evidence Act is the information leading to discovery and not any opinion formed on it by the prosecution."

40. Present case rests upon the circumstantial evidence. In the case of ***Sharad Birdhi Chand Sarda vs. State of Maharasthra (1984) 4 SCC 116,*** in paragrah 153, Hon'ble Apex Court has laid down five golden principles (Panchsheel). Para 153 is reproduced as follows:

"A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may

be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra where the following observations were made:

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

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

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

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

41. C.W.-1, Ajab Singh, Investigating Officer, deposed in support of the memo of recovery but that does not find corroboration from any witness of fact, on the contrary P.W-1 to P.W.-4 have categorically denied the alleged recovery of belonging of the deceased from the Alimarh in the room of the house of the accused. They have also deposed that their signatures, thumb impression were taken by Daroga Ji on plain paper, therefore, it is not safe and expedient in the interest of justice to place reliance upon the testimony of C.W.-1 to the extent that conviction of the accused for offences under afore stated sections could be held.

42. P.W.-1 to P.W.-4, in their cross examinations have said that it would be wrong to suggest that they are not supporting the prosecution case on account of any compromise having been arrived at between them and accused.

43. P.W.-6, H.M. 474 Yaduvir Singh, has proved First Information Report Chik and copy of GD as Exhibit Ka-4 and Ka-5 thus only the First Information Report Chik and G.D. stand proved, however, the deposition of this witness does not help to prove charges against the accused.

44. This case rests on circumstantial evidence; no witness has come forward to depose that she or he had seen the deceased going to the house of the accused-respondent to watch Television. Even P.W.-1, Veerpal, on whose instance First Information Report came to be lodged and crime was investigated has turned hostile and he has not supported the allegations in this respect contained in his written First Information Report. P.W.-2 Rajdulari w/o P.W.-1 has also turned hostile. It has also emerged from the above discussion that independent witnesses have also turned hostile and these witnesses in their cross examination have not stated any thing which may support the prosecution story. Even the witnesses, stated to have seen the alleged recovery of jewellery, said to have been worn by the deceased have not supported the prosecution story. However, the recovery memo, prepared by the Investigating Officer who stated that the alleged recovery was made, at the instance of the accused, from the Almirah in a room owned by accused. P.W.-1 is an interested

witness of fact, has not supported his evidence, declared hostile, therefore, alleged recovery of articles from the Almirah of the accused is also not proved.

45. In the light of foregoing discussion, we are of the opinion that learned trial Court has held and recorded the findings on considering each and every aspect of the case, both factual, as well as, legal. In this case, there is no worthy evidence which may connect the accused with the commission of crime except the testimony of CW-1 Ajab Sigh, I.O., thus, we find that the impugned judgment and order dated 11.11.2020, passed by the learned Additional Sessions Judge, Fast Track Court, Bareilly, in connection with Session trial No. 275 of 2017, is not erroneous or perverse and we also find that the same is sustainable in the eyes of law.

46. Accordingly, the judgment and order dated 11.11.2020, passed by the learned Additional Sessions Judge, Fast Track Court, Bareilly, in Session trial No. 275 of 2017, State vs. Nanhe Lal and another, arising out of Case Crime No. 89 of 2017, under Sections-302, 376, 394 and 411 I.P.C., Police Station-Bhamora, District-Bareilly is affirmed and upheld.

47. In the result the instant appeal is dismissed.

48. Registry to return the record to the Court below along with this order.

(2022) 11 ILRA 486
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.10.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.

THE HON'BLE SYED WAIZ MIAN. J.

Government Appeal No. 411 of 2019

State of U.P. ...Appellant
Versus
Firoj ...Accused-Respondent

Counsel for the Appellant:
G.A.

Counsel for the Respondent:

Criminal Law - Indian Penal Code, 1860 - Sections 342 & 376 - Protection of Children From Sexual Offences Act, 2012 - Sections 3 & 4 - Government Appeal, against the order of acquittal - First Information Report, under Sections 342 & 376 I.P.C. - Sections 3 & 4 POCSO Act - PW -2 victim, in her cross examination, stated that she has given her statement under the pressure of her uncle Bhole, who is younger brother of her father, as she had apprehension if she did not give that statement she would be subjected to harassment - Her uncle had also exerted pressure upon her father also - P.W.4-Dr.Isha Soni, deposed in her cross examination that victim on one hand was saying that rape was committed upon her but on the other hand she was contradicting herself by saying that no rape was committed upon her - victim's Hymen was also found intact - accused/respondent stated in his statement u/s 313 Cr.P.C. that prior to alleged incident dispute with regard to payment was existing and thus he has been falsely implicated in this case - doubt is created regarding the authenticity of the prosecution case against the accused/respondent - no worthy evidence on record to prove the charges against the accused - learned trial Court rightly appreciated the facts and circumstances of the case, no illegality or material irregularity in the impugned judgment and order and the same is sustainable in eyes of law as it does not suffers from perversity. (Para 36, 37, 38, 39)

Dismissed. (E-5)

(Delivered by Hon'ble Syed Waiz Mian, J.)

1. By means of this Criminal Misc. Leave Application, on behalf of the State, leave for filing Government Appeal, against the impugned judgment and order of acquittal of accused/respondent Firoz, dated 06.05.2019, passed by the Special Court (POCSO Act, 2012)/ VIIIth Additional Sessions Judge, Meerut, arising out of Criminal Case No. 498 of 2016, State vs. Firoz, is being sought.

2. Heard Shri Om Prakash Mishra, Learned A.G.A. for the State.

3. In brief, the prosecution story is that informant, Rajendra, informed that 3-4 days earlier his wife had gone to Sisauli. His three children, were present in his house; on 12.10.2016, her daughter Sangeeta, aged about 17 years, at about 10 p.m. had gone to drink water at the tap installed out side his house; all of a sudden accused/ respondent, having knife in his hand, came behind her and trapped her mouth and brought her in vacant room of his house, where he committed rape upon her; she informed the informant telephonically; when he come back, she narrated the entire story to him, whereafter he lodged an First Information Report, registered as Case Crime No. 267 of 2016, under Sections-342, 376 I.P.C. and Section ¾ of Protection of Children From Sexual Offences Act, 2012, at Police Station-Rohta, District-Meerut.

4. Upon entrustment, the investigating officer took over charge of the investigation and recorded the statements of the informant, accused, and of victim under Section 161; statement of victim was also got recorded under Section 164 Cr.P.C.; he also prepared site plan of the alleged place of occurrence; during investigation, the victim was put to medical examination, not only to ascertain her age but also to ascertain any mark of injury on her person and status of alleged rape.

5. Upon collecting the incriminating evidence against the accused/respondent, for offences under Sections 342, 376 I.P.C. and Section ¾ of Protection of Children From Sexual Offences Act, 2012, Investigating Officer forwarded the charge sheet under Section 173 (2) Cr.P.C. to the Court concerned. Upon receiving the charge sheet and other material, learned Court below in exercise of powers enshrined under Section 190 (2) Cr.P.C., took cognizance of the aforestated offences against the accused/respondent and accordingly summoned him.

6. Learned trial Court vide order dated 15.01.2018 charged the accused and the same were explained and read over to him; he denied the charges and claimed trial.

7. Prosecution to prove it's case, examined informant-P.W.-1 Rajendra, P.W.-2 victim-Sangeeta, P.W.3-Smt. Nirmala w/o Rajendra, P.W.-4-Dr. Isha Soni, P.W.-5 Dr. Sangeeta, P.W.6-Head Constable Police-Deepa Sharma, P.W.-7 Bhole, victim's uncle and P.W.8-investigating officer, Sub Inspector-Rajendra Singh.

8. Statements under Section 313 of Cr.P.C. of accused/respondent was also recorded. He in his statement said that the evidence of P.W.-1, P.W.-4, was false and statement of P.W.-3 victim was given under the pressure of her uncle Bhole and

the victim told about the occurrence to Doctor was also under the pressure of her uncle. He has also said that he has been falsely implicated in this case upon pressure exerted by Bhole because prior to the present case a dispute regarding transaction of money was existing between him and Bhole and due to pre-existing enmity he has been falsely implicated in this case by Rajendra, brother of Bhole. He claims that he is innocent and he denied his complicity in the crime; he declined to adduce evidence in his defence.

9. Upon hearing the submissions on behalf of the parties, and scanning the records, learned trial Court found that the prosecution has failed to prove the charges under Section 342, 376 and ¾ of Protection of Children from Sexual Offences Act, thus, trial Court did not find the accused guilty under the aforesaid sections and consequently, acquitted him.

10. On behalf of the State, leave to file Government Appeal, under Section 308 (3) Cr.P.C. is being sought on the ground that the learned trial Court has not properly appreciated the evidence adduced by the prosecution and merely on the strength of conjectures and surmises and also on basis of minor contradictions Court has recorded finding of acquittal of the accused, whereas, there is clinching evidence specifically of P.W.-7 Bhole, on record but the same has not been relied upon.

11. Learned Court below has not made proper appraisal of evidence on record and by acquitting the accused from charges under aforementioned sections, learned trial Court has grossly erred in law and hence the impugned judgment and order is not sustainable and the same deserves to be set aside by this Court and accordingly, the leave to file Government Appeal against the impugned judgment and order be granted.

12. Heard learned A.G.A. at length and perused the record.

13. At the time of alleged commission of occurrence of incident, P.W.-1 Rajendra, P.W.-7-Bhole and P.W.-3 Smt. Nirmala, were not present and in the First Information Report it is averred that at the time of instant occurrence, wife of the informant Rajendra, was staying at Sisauli, at the house of her sister. It is also not alleged in the First Information Report that the informant himself was present at his house; he has simply averred in the application Exhibit-Ka-1, that at the time of the alleged occurrence his three sons and two daughters, were present at his house. It is also alleged in the First Information Report that his daughter/ victim had apprised him about the incident telephonically, thus, the First Information Report, Exhibit-Ka-1, is based on the information allegedly, given by his daughter upon returning to his home. First Information Report, as well as, the statements of the P.W.-1- Rajendra, P.W.-3 Nirmala and P.W.-7 Bhole, who happens to be uncle of the victim are indirect evidence under the provisions of the Indian Evidence Act, need to be corroborated from the direct evidence. Direct evidence is the best evidence and obviously such evidence can form the basis of conviction of the accused, because, under law number of witnesses to prove the charge is not essential, therefore, at the outset, it is necessary to consider the deposition of victim-P.W.-2.

14. P.W.-2 victim, during investigation, has got recorded her statement under Section 161 Cr.P.C. by

Rima Chauhan, Sub Inspector and under Section 164 Cr.P.C. was recorded by the Magistrate concerned.

15. P.W.-5, Dr. Sangeeta Gupta, is said to have conducted the medical examination, prepared the medical report of victim and also recorded the statement of the victim during her medical examination. In the statement she has stated that on 13.10.2016 she was posted as Senior Consultant in the District Women Hospital and on that date victim was brought by the lady constable for her medical examination in connection with the present case; the victim had told her that she is 17 years old and she has done medical examination of the victim with the consent of the victim as well as his uncle Bhole.

16. P.W.-5, Dr. Sangeeta Gupta, further states that at the time of medical examination she had recorded the statement of the victim to the effect that the victim had told her that on 12.10.2016, at around 10 to 10:30 p.m. Firoz had not committed the incident with her; therefore no internal or external mark of injury was found on her person; she had changed her clothes; there was cut mark on her middle finger.

17. P.W.-5-Dr. Sangeeta Gupta, in her cross examination has admitted that the victim in her statement has not told her that Firoz has committed rape upon her.

18. It is recorded by P.W.-5-Dr. Sangeeta Gupta, in the statement of the victim that she at 10 p.m. went to drink water from the tap installed out side of her house; all of sudden, Firoz came from behind and trapped her mouth and brought her in the vacant room of his house and attempted to rape her; accused from his one hand was searching something in the Almirah; she got the opportunity and rescued herself and rushed back to her house.

19. In the aforesaid statement of the victim, said to have been recorded by P.W.-5, Dr. Sangeeta Gupta, it is not noted that at the time of alleged incident the accused was brandishing knife in his hand. P.W.-5 Dr. Sangeeta Gupta, has also admitted in her cross examination that with regard to alleged rape, victim did not tell her that accused had committed rape upon her.

20. P.W.-5, Dr. Sangeeta Gupta has also deposed that no sign of force being applied was found at the time of medical examination of the victim, however, she has opined that in such a scenario the sexual violence cannot be ruled out.

21. P.W.-2, victim, has stated in her examination in chief before the learned trial Court that on 12.10.2006, at around 10-10:30 p.m. when she went to drink water at the water tap installed outside of her house, Firoz appeared there; trapped her mouth and forcefully brought her to his house and committed rape upon her. She also admits that she had narrated the entire incident to her parents, who went to the house of the accused/respondent but he fled from there. She admits that she had also told to Daroga Ji about the incident and also got her statement under Section 161 Cr.P.C. recorded. As such P.W.-2, victim, has supported the averments in the First Information Report and also the testimony of P.W.-1 Rajendra, P.W.-3 Smt. Nirmala and P.W.4 and P.W.-7 Bhole. However, in the same breath P.W.-2 victim, in her cross examination, has stated that she has given her statement under the pressure of her uncle Bhole, who is younger brother of her father; Her uncle had also exerted pressure,

not only upon her, but also on her father. The aforestated statement has been given by her under fear of her uncle; She had also given her statement under Section 164 Cr.P.C. under the pressure of her uncle Bhole as she had apprehension if she did not give that statement she would be subjected to harassment.

22. It is evident from her deposition, that in her cross examination, she has not supported the prosecution case. In her examination in chief she has also admitted that the previous statement under Section 164 Cr.P.C. was also given under duress.

23. Since statement of P.W.-2 victim has been recorded on oath before the learned trial Court therefore, it has to be treated as voluntarily one.

24. P.W.-2, victim, in her cross examination has also stated that Firoz has not committed rape upon her; she also contradicts her statements given under Section 164 Cr.P.C. by saying that accused respondent had not trapped her mouth, nor he took her to the room in his house; at the time of alleged incident she was 19 years of age and on the date of examination she was aged about 21 years.

25. P.W.-2, victim, has not stated in her examination in chief that accused/respondent had made an attempt to rape her, nor in this respect she has stated in her cross examination therefore, the evidence of P.W.-5 Dr. Sangeeta Gupta, that the victim had told her that Firoz had made an attempt to rape victim is not corroborated by herself, nor in the First Information Report there is averment that Firoz made an attempt to rape the victim.

26. P.W.-2 victim, has also deposed in her cross examination that statement to Daroga Ji was also given by her, under the duress of her uncle Bhole.

27. The statement of witness, under law is required to be read as a whole. Incident is said to have occurred with the victim by accused; first information report was not lodged by her at the police station, nor, informant- P.W.-1, Rajendra, P.W.-3 Nirmala and P.W.-7 Bhole, were present at the time of incident, whereas, P.W.-7, Bhole in his examination in chief has stated that the victim is her niece and on 12.10.2016, at around 10 p.m. he was present at his house; he heard scream of her niece, who lives nearby and on hearing her shout, he came out of his house and saw her niece was weeping; on interrogation, she had narrated the entire incident to him.

28. P.W.-2 victim, has not stated in her deposition that her uncle Bhole had come on the scene of occurrence and she had narrated the incident to him. Thus, statement of P.W.-7 Bhole, in this connection is not corroborated by P.W.-2 victim.

29. P.W.-1, informant, P.W.-3 Smt. Nirmala, P.W.-7 Bhole, have stated in their respective testimony that at the time of incident accused/respondent Firoz was having knife, but victim has not stated in her statement that accused/respondent Firoz, at the time of alleged incident was wielding knife in his hand, thus, the statements of P.W.-1 Rajendra, P.W.-3 Nirmala and P.W.-7, Bhole, do not find support from the deposition of P.W.-2, victim, and being uncorroborated it in not worthy of reliance.

30. Since, P.W.-2 victim has supported the prosecution case in her examination in chief but has also candidly stated that her previous statements under Sections 161 as well as 164 Cr.P.C. and her examination in chief, were the result of pressure exerted by her uncle Bhole upon her.

31. P.W.-2 victim, admitted in her deposition that she is literate and she also discloses in her statement that at the time of alleged incident she was aged about 19 years. In the First Information Report the age of the victim is mentioned 17 years. P.W.-1 Rajendra, P.W.-3 Nirmala and P.W.-7 Bhole, has not mentioned the age of the victim in their statements. There is no documentary evidence on the record about the age of the victim. The evidence of P.W.-2 victim with regard to her age, was 19 years, at the time of alleged incident. Her deposition, has not been challenged, therefore, it appears that her statement with regard to her age, at the time of alleged incident is admitted to the prosecution.

32. P.W.-4 Dr. Isha Soni, had also carried out the medical examination of the victim in connection with the instant case on 15.10.2016, during her posting at PHC Mahila Hospital, Meerut. She states in her examination in chief that she had found victim's hymen intact. She has also proved medical report as Exhibit-Ka-3. It is also admitted to P.W.-4 Dr. Isha Soni that at the time of medical examination of the victim, she well known that she was doing medical examination of the victim second time.

33. In medical jurisprudence it is generally presumed that in case of rape of a young woman her hymen is torned. In the instant case P.W.-2 victim has stated that no rape was committed upon her. She refuses that physical violence had been caused to her by the accused. No mark of injury or violence was noted by the Doctors during her medical examination.

34. P.W.4-Dr.Isha Soni, has also deposed in her cross examination that victim was blowing hot and cold; on one hand she was saying that rape was committed upon her but on the other hand she was contradicting herself by saying that no rape was committed upon her. Therefore, self contradictory statement of victim was recorded to P.W.-4 Dr. Isha Soni, it appears that the victim was under pressure of her uncle Bhole; victim's Hymen was also found intact. It appears from above discussion that no rape was committed by the accused/respondent upon the victim P.W.-2.

35. Finding returned by the trial Court in the impugned judgment and order dated 06.05.2019, in para 32, is extracted below;

"प्रस्तुत प्रकरण में पी०डब्लू० 1 एवं पी०डब्लू० 3 तथा पी०डब्लू7 भोले के द्वारा घटना की जानकारी पीड़िता से होना कहते हुए यह कहा गया है की घटना दिनांक 12.10.16 की रात्रि करीब 10 बजे की है। इसका उल्लेख इस स्तर पर इसलिये किया जा रहा है की उपरोक्त चारों साक्षी पी०डब्लू० 1 लगायत 3 एवं पी०डब्लू० 7 में से कोई भी साक्षी घटना का चश्मदीद साक्षी नहीं है और उनके द्वारा स्वयं को घटना की जानकारी पीड़िता के माध्यम से होने की बात कही गयी है। जहां तक पीड़िता का प्रश्न है तो पीड़िता ने अपनी जिरह दिनांक 10.07.18 पृष्ठ सं० 2 एवं 3 पर स्पष्ट रूप से घटना से इन्कार करते हुए यह कहा गया है की फिरोज ने मेरे साथ कोई गलत काम (बलात्कार) नहीं किया । धारा 164 एवं 161 द ० प्र०सं० तथा न्यायालय में दिए गये बयानों के बारे में यह कहा गया है की उक्त बयान अपने चाचा भोले के दबाव में दिया गया था। मुलजिम फिरोज ने मेरे साथ कोई गलत काम नहीं किया । यह कहना गलत है की मुलजिम फिरोज मेरा मुँह दबाकर अपने कमरे मे ले गया हो। फिरोज ने कपडे उतारे और न मुँह में कपडा ठूसा ।

जिस समय यह मुक़दमा लिखाया गया था उस वक्त मेरी उम्र 19 वर्ष थी अब 21 वर्ष है। धारा 164 द ० प्र०सं० का पूरा बयान पढ़ने के बाद कहा गया है की इसमें जो बाते लिखी हैं वे सब गलत है। मेरा पुलिस वाले दरोगा सहित थाने पर जो बयान हुआ था वह भी मैने चाचा भोले के दबाव में दिया था। साक्षी सं० 4 डॉ० ईसा सोनी के द्वारा भी मेडिकल परीक्षण किया गया है और मेडिकल परीक्षण करने के उपरान्त यह कहा गया है की पीड़िता का हाईमन इन्टैक्ट था और उक्त द्वितीय मेडिकल परीक्षण दिनांक 15.10.16 को हुआ है और प्रथम मेडिकल परीक्षण डॉ० संगीता गुप्ता के द्वारा दिनांक 13.10.16 को किया गया था और उनके द्वारा भी यह कहा गया है की शरीर पर कोई बाहरी या अंदरूनी चोट नहीं थी। वह कपडे बदल चुकी थी , नहा चुकी थी। डॉक्टरी मुआयना के खाना सं० 15 अ में पीड़िता के बताये हुए कथन लिखे है। बलात्कार होना नहीं बताया था। साक्षी सं० 4 ने भी कहा है की पीड़िता बार बार कह रही थी की उसके साथ बलात्कार हुआ है फिर कह रही थी की नहीं हुआ। कहने का तात्पर्य है की दिनांक 12.10.16 को रात्रि 10 बजे घटना घटित हुई है और दिनांक 13.10.16 को पीड़िता का चिकित्सीय परीक्षण 03.00 बजे दिन में हुआ है। उस समय उसके शरीर पर कोई बाह्य या अंदरूनी चोट नहीं पायी गयी थी। दिनांक 15.10.16 को दोबारा मेडिकल परीक्षण हुआ है, उसमें भी हाईमन इन्टैक्ट था। सामान्यतः यदि किसी के साथ शारीरिक संसर्ग कारित किया जाता है तो हाईमन के फटने की सम्भाव्यता अत्यधिक रहती है। प्रस्तुत प्रकरण में यदि अभियुक्त फिरोज द्वारा जबरदस्ती पीड़िता के साथ दुष्कर्म किया गया होता तो हाईमन इन्टैक्ट नहीं होता वरन् फटा हुआ पाया जाता। साथ ही पीड़िता स्वयं ने भी न्यायालय में किये गये बयान में यह कहा है की मुलजिम फिरोज ने घटना की तिथि व समय पर उसके साथ किसी प्रकार कोई गलत काम नहीं किया न ही मुंह में कपडा ठूँसा। अन्य साक्षीगण के द्वारा भी यह कहा गया है की उन्हें घटना के बारे में पीड़िता ने बताया था। यदि पीड़िता स्वयं न्यायालय में घटना कारित होने से इंकार कर रही है तो किस प्रकार उन लोगों को घटना की जानकारी और सत्यता का ज्ञान हुआ, यह सन्देहास्प्रद प्रतीत होता है।"

36. The accused/respondent has stated in his statement under Section 313 Cr.P.C. that prior to alleged incident dispute with regard to payment was existing and thus he has been falsely implicated in this case.

37. Since victim, P.W.-2 has herself admitted that pressure was exerted by her uncle, to give evidence of alleged rape against the accused/respondent, it lends credence to the above referred statement of the accused.

38. In the backdrop of above analysis of evidence on record, doubt is created regarding the authenticity of the prosecution case against the accused/respondent. We find no worthy evidence on record to prove the charges against the accused.

39. From the above discussion, it is concluded that the learned trial Court has rightly appreciated the facts and circumstances of the case, as well as the evidence on record hence we do not find any illegality or material irregularity in the impugned judgment and order and the same is sustainable in eyes of law as it does not suffers from perversity.

40. Thus, leave to appeal is refused and in consequence the appeal stands rejected.

41. Registry to return the record to the Court below along with this order.

(2022) 11 ILRA 492
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.10.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE SYED WAIZ MIAN. J.

Government Appeal No. 434 of 2019

State of U.P. ...Appellant
Versus
Satyapal & Ors. ...Accused-Respondents

Counsel for the Appellant:
G.A.

Counsel for the Respondents:

Criminal Law - Indian Penal Code,1860 – Sections 498A, 323, 506, 376 & 406 – Dowry Prohibition Act, 1961 - Sections-3/4 - F.I.R. registred under Sections-498A, 506 I.P.C. and Sections-3/4 of D. P. Act, with allegation that Informant wedded on 30.4.2011 with Manoj - her husband died on 30.5.2013 leaving behind their daughter, aged about one year and four months - her parents had spent about six lacks rupees in her marriage but after marriage her in-laws were not happy with the dowry - After death of her husband, her brother-in-law (dewar) forcibly made physical relations with her and continued her sexual harassment including rape upon her for many years - however P. W. 1 informant in her cross examination admitted that after the death of her husband she stayed back for about 5-6 months in her matrimonial home and she was happy with the behaviour of her in-laws and other members of her family - She has not stated in her cross examination that demand of dowry was made by any member of her husband's family or any article or cash as additional dowry - Held - after the death of Manoj, P. W. 1 informant lived for a considerable time in her matrimonial house and no demand of any dowry was made nor rape was committed upon her - such allegations have been levelled on refusal by co-accused Bhagwan Das to give half of land to the informant, P. W. 1. - In previous complaint by informant P. W. 1 given at Mahila police station it was not mentioned that after the marriage her in laws and other members of their family had started to make demand for additional dowry and on non-fulfilment of demand she was subjected to torture or was constantly beaten - In the application details of dowry has not been given nor P. W. 1 has given details of dowry in her ocular evidence - leave to appeal refused - government appeal dismissed (Para 17, 18)

Dismissed. (E-5)

(Delivered by Hon'ble Syed Waiz Mian, J.)

1. Heard learned counsel for the parties.

2. This government appeal has been preferred against the judgement and order dated 30.5.2019, passed by Additional Sessions Judge, Fast Track Court No. 1, (Crimes against Women), Aligarh in Sessions Trial No. 246/2016, arising out of Case Crime No. 296/2014, P. S.-Madrak, district-Aligarh, whereby, he has acquitted the accused-respondents of the charges under Sections-498A, 506, 323, 376 and 406 I. P. C. and Sections-3/4 of D. P. Act.

3. The prosecution story in brief runs as under:

It is admitted fact that the informant was wedded on 30.4.2011 with Manoj and in that marriage her parents had spent around six lacs rupees in dowry expenses etc.; her husband Manoj, on 30.5.2013 died leaving behind their daughter, aged about one year and four months.

4. P. W. 1 in her ocular evidence has stated that on presentation of her application dated 1.11.2014 under Section 156 (3) Cr. P. C. in which the alleged incident was stated to have occurred in the month of June, 2014 present case being Case Crime No. 296 of 2014, under Sections- 498A, 506 I.P.C. and Sections-3/4 of D. P. Act, was registered at concerned police station and during her deposition she identified her application under Section 156 (3) Cr. P. C. and also

admitted her signature thereon, as such, this application was marked as Ext. Ka 1.

5. P. W. 1 in her examination-in-chief has deposed that her parents had spent about six lacks rupees in her marriage; some dowry was also given to her husband and in-laws but after marriage, they were not happy with the dowry; She with her daughter continued to live in her in-laws house; After death of her husband, Satpal, who happens to be her brother-in-law (dewar) had proposed her to marry with him and also said that he wants to lead his life with her but in-laws would taunt her that she wants to live as wife of Satpal (dewar) and both in-laws would send their son Satpal into her room and he forcibly made physical relations with her and continued her sexual harassment including rape upon her for many years till she lived there; she asked Satpal to fulfil his promise to marry her as he committed rape upon her continuously but on one or other pretext, he did not marry her; in the month of June, 2014 in the presence of her in-laws, Satpal (dewar), Yashoda sister-in-laws Neelam, Nihala and Divya, she demanded Satpal to marry her because by making false promise to marry her, he had raped her for months together, to which Nanad Divya intervened and said that marriage with Satpal is possible if she from her parents brings six-seven lacs rupees. She was also beaten and asked her to turn out from the house but she refused to leave her matrimonial house due to discord; She was forced to sit in the car and was left in the lurch out of the village. In this backdrop, she lodged F. I. R. against accused.

6. P. W. 1 informant in her entire deposition has not uttered a single word of any demand of dowry from her or any member of her family. P. W. 1 informant in her cross examination has stated that her daughter was born after one year of the marriage; she with her husband was living happily and she stayed in her matrimonial house; after three months of the death of her husband, her father and other members of family were called by the in-laws to their house and she had left her matrimonial home happily. Next she deposed that after lapse of 5-6 months, she was happily sent to her parental house and after passage of ten days in her parental house, her dewar Satpal came to take her to in-laws house; since she was ill therefore, her father took her to her matrimonial house thereafter.

7. P. W. 1 informant in her cross examination has admitted that after the death of her husband she stayed back for about 5-6 months in her matrimonial home and she was happy with the behaviour of her in-laws and other members of her family. She has not stated in her cross examination that demand of dowry was made by any member of her husband's family or any article or cash as additional dowry until the death of her husband; even she has admitted that after 5-6 months of the death of her husband she stayed in her matrimonial house happily. As such, she has not specifically stated that demand of additional dowry was made by her in-laws or any member of their family.

8. P. W. 2 Prithvi Singh who is father of the informant P. W. 1, has stated in the examination-in-chief that after the marriage of her daughter with Manoj her in-laws, nanad Neelam, Nihala and Divya, father-in-law Babu Ram demanded two lacs and fifty thousand rupees as additional dowry and on its non-fulfilment, her daughter had told him that she was subjected to harassment; he had tried to persuade the aforementioned persons but they did not budge.

9. P. W. 2 also has supported the statement of P. W. 1 informant that inlaws of her daughter had promised that they shall marry their son Satpal with her after consultation with the family members; Satpal kept her daughter as his wife; on the demand to marry her, Satpal refused and all the members of the family of deceased Manoj said that the marriage could be solemnized if in the marriage 6-7 lacs rupees are spent; Before three and half years from the date of his deposition in the trial court, family members of her husband left her daughter and grand daughter outside the village. As such, P. W. 2 in his examination-in-chief has corroborated the statement of his daughter P. W. 1.

10. Accused in their defence have stated that informant and her parents were exerting pressure to give them half of their land to which, they did not agree, hence, they have been falsely implicated in the present case. P. W. 1 informant in her cross-examination has admitted that she had moved an application with regard to the incident at Mahila Thana one month before filing application under Section 156 (3) Cr. P. C. and in the context of that application she had not told the Inspector about commission of rape upon her by Satpal (dewar). She further states that she has not told to Daroga about rape because she wanted to save her in laws. She has further admitted that at Mahila thana she had given her statement on 12.7.2014 and in her statement she had not told to Daroga that her in-laws and other family members (sasural wale) had made any demand for additional dowry or in the garb of proposal to marry with Satpal, he had committed rape upon her. The complaint made by P. W. 1 is on record as paper no. 18.

11. P. W. 1 informant has also admitted to have recorded her statement under Section 164 Cr. P. C. and relevant portion of the statement during her examination in the trial Court was read over to her and in her reply she admitted that in that statement it is not written that in-laws or members of their family made any demand for additional dowry. She also admits in her statement under Section 164 Cr. P. C. that it is also not mentioned that who used to send Satpal into her room. P. W. 2 Prithvi Singh in his examination-inchief has stated that in-laws and other family members made constant demand for two lacs and fifty thousand as an additional dowry and on its nonfulfillment her daughter was subjected to physical torture. On the other hand, in the application Ext. Ka 1 and also P. W. 1 informant in her examination-inchief has said that her in-laws and their family members used to make demand of 6-7 lacs rupees as an additional dowry.

12. P. W. 2 has admitted that within a year after her daughter's marriage with Manoj no demand for additional dowry was made . Her daughter had not made any such complaint in this regard. He also admits that before presenting application under Section 156 (3) Cr. P. C. an application by her daughter at the Mahila police station was presented and in that application it is not noted that demand of any dowry was made from him or from her daughter by inlaws or any member of her family.

13. P. W. 2 in his cross-examination has feigned ignorance that in the complaint made to Mahila police station it was not written that demand of any dowry was made and for non-fulfilment of demand of dowry her daughter would be beaten and her dewar, Satpal had committed rape upon her daughter. Further, he has also pleaded ignorance about the presentation of the

complaint at the police station by saying that he does not remember it. Again he has pleaded ignorance about the application for compromise by her daughter was presented.

14. P. W. 2 has admitted in his cross-examination that panchayat was convened but compromise could not have been arrived at between them. After the panchayat he had said that half of the land should be given to his daughter but father-in-law of his daughter did not agree to give half of his land to his daughter. She also admits that on refusal her father-in-law has said that he will keep his daughter and grand daughter and he will take care of their expenses. He also admits in his deposition that he had also proposed to her father-in-law that if he is not ready to give her share, he should marry his son with his daughter. He has also stated that her father-in-law had spurned his proposal with regard to marriage saying since informant (his daughter-in-law) is the sister-in-law (bhabhi) of his son, therefore, he cannot marry his son with his bhabhi.

15. It is evident from the evidence of P. W. 1 and P. W. 2 that not only their statements with regard to the alleged rape and demand of additional dowry are inconsistent with each other but also self contradictory because if rape was continuously committed by Satpal and demand of additional dowry was made, then such allegations should have been mentioned in the complaint of P. W. 1, informant, which was admittedly presented at Mahila police station before the application under Section 156 (3) Cr. P. C. was filed, it appears that such allegations have been made in the application Ext. Ka 1 later on, which are result of afterthought and improvement.

16. There is also contradictory evidence of P. W. 1, informant and P. W. 2 to the effect that informant was forced by her in-laws to enter into physical relationship with Satpal and also about the averment that her in-laws had promised her to marry their son Satpal with her and on such assurance, she got ready to have physical relationship with him.

17. It appears from the above discussion that after the death of Manoj, P. W. 1 informant lived for a considerable time in her matrimonial house and no demand of any dowry was made nor rape was committed upon her. Evidence regarding such allegations is admitted to have been levelled on the strength of refusal by co-accused Bhagwan Das to give half of land to the informant, P. W. 1. In previous complaint by informant P. W. 1 given at Mahila police station it was also not mentioned that after the marriage her in laws and other members of their family had started to make demand for additional dowry and on non-fulfilment of demand she was subjected to torture or was constantly beaten, therefore, such evidence of the informant and P. W. 2 is an afterthought which cannot be relied upon in view of the provisions of Evidence Act. P. W. 1 informant and P. W. 2 have also not deposed with regard to the allegations of abuse and threat.

18. In the application Ext. Ka 1 details of dowry has not been given nor P. W. 1 and P. W. 2 have given details of dowry in their ocular evidence.

19. Rest of the witnesses are formal in nature and thus have proved FIR chik, copy of G. D., site plan and charge-sheet charges cannot be proved unless there is cogent and trustworthy ocular evidence of witnesses of facts.

20. Learned trial court has evaluated the evidence on record in

detail and has fond that there are material contradictions in the deposition of informant and P. W. 2 and there is no cogent evidence on record to prove the charges for offences under Sections 498A, 323, 506, 376 and 406 I. P. C. and Sections-3/4 of D. P. Act.

21. It is incumbent upon the prosecution to prove the charges against the accused-respondent beyond reasonable doubt, which it has miserably failed.

22. We are not in agreement with the contentions raised on behalf of the State-appellant that by the impugned judgement and order trial court has not properly appreciated the evidence on record or the impugned judgement and order is perverse and erroneous in the eyes of law and is not sustainable.

23. Hence, the trial court has not erred in law by acquitting the respondents, therefore, impugned judgement and order is liable to be upheld and is accordingly upheld.

24. The leave to appeal is refused; consequently, the instant government appeal is dismissed.

25. Record of lower court along with certified copy of this order be sent to the court concerned forthwith for necessary action.

(2022) 11 ILRA 497
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.09.2022
BEFORE

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

Special Appeal Defective No. 400 of 2020 (O&M)

Om Prakash Srivastava ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Ramesh Chandra Dwivedi

Counsel for the Respondents:
Sri Ramanand Pandey, (Standing Counsel), Sri Nitin Chandra Mishra

A. Civil Law – Concealment of Material Facts - 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, maneuvering 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. (Para 17)

B. Anyone who takes recourse to method of suppression in a court of law, is, in actuality, playing fraud with the court, and the maxim *suppressio veri, expression faisi*, i.e., suppression of the truth is equivalent to the expression of falsehood, gets attracted. (Para 7)

In the present case, sole argument raised by the appellant is that the writ petition was filed by the respondents concealing material facts regarding number of cases filed by respondent no. 5-the writ petitioner claiming the same relief which had travelled up to the Hon'ble Supreme Court. Some of the writ petitions filed

subsequently were dismissed by this Court. (Para 2)

The only detail furnished by respondent no. 5 is regarding civil suit filed by present appellant in the year 2008. Only copy of the order passed by the trial court has been annexed and no any other order passed in the aforesaid civil suit. None of the order passed subsequently by the trial court was annexed. No details were furnished regarding filing of writ petitions, which were either decided or pending in this Court. (Para 3, 4)

The present appeal deserves to be allowed and the order passed by learned Single Judge deserves to be set aside on this ground alone that there was gross concealment of material facts from the Court. Considering the fact that material facts have been concealed by the writ-petitioners while filing the writ petition, the present appeal is allowed. The impugned order passed by learned Single Judge dated June 23, 2020 is set aside. (Para 5, 9)

Special appeal allowed. (E-4)

Precedent followed:

1. In abhyudya Sanstha Vs U.O.I., (2011) 6 SCC 145 (Para 6)

2. Moti Lal Songara Vs Prem Prakash @ Pappu & anr., (2013) 9 SCC 199 (Para 7)

3. ABCD Vs U.O.I. & ors., (2020) 2 SCC 52 (Para 8)

Present special appeal assails judgment and order dated 23.06.2020, passed by Hon'ble Mr. Justice Mahesh Chandra Tripathi, J. in Civil Misc. Writ Petition No. 10218 of 2020.

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

1. Order dated June 23, 2020 passed by learned Single Judge has been impugned by filing the present intra-court appeal.

2. Sole argument raised by learned counsel for the appellant is that the writ petition was filed by the respondents concealing material facts regarding number of cases filed by respondent no. 5-the writ petitioner claiming the same relief which had travelled upto the Hon'ble Supreme Court. Some of the writ petitions filed subsequently were dismissed by this Court, the details thereof furnished by learned counsel for the appellant are as under:-

"I. Civil Misc. Writ Petition No. 34874 of 2009
II. Special Appeal No. 864 of 2010
III. Special Appeal No. 1956 of 2011
IV. Special Appeal No. 1911 of 2011
V. Civil Misc. Writ Petition No. 42424 of 2014
VI. Original Suit No. 26 of 2015.
VII. Civil Misc. Writ Petition No. 47483 of 2014
VIII Special Leave to Appeal 3589 of 2018
IX. Writ-C No. 31196 of 2019
X. Special Appeal (Defective) No. 1175 of 2020"

3. Learned counsel for the respondent no. 5 tried to explain the facts stated in the writ petition. However, the only detail furnished therein is regarding civil suit filed by present appellant in the year 2008. Only copy of the order passed by the trial court has been annexed and no any other order passed in the aforesaid civil suit.

4. None of the order passed subsequently by the trial court was annexed. No details were furnished regarding filing of writ petitions, which

were either decided or pending in this Court.

5. After hearing the arguments, in our opinion, the present appeal deserves to be allowed and the order passed by learned Single Judge set aside only on the ground that there was gross concealment of material facts from the Court when the writ petition was filed. As to how a litigant who conceals material facts from the Court, has to be dealt with, has been gone through by Hon'ble the Supreme Court time and again and the consistent opinion is that he is not entitled even to be heard on merits.

6. 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)*

7. 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)

8. 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.

9. In view of above exposition of law and considering the fact that material facts have been concealed by the writ-petitioners while filing the writ petition, the present appeal is allowed. The impugned order passed by learned Single dated June 23, 2020 is set aside subject to cost of ₹ 1,00,000/-, out of which ₹ 50,000/- shall be paid by respondent no. 5 to the appellant whereas ₹ 50,000/- shall be deposited with the Mediation Centre. Costs shall be paid and deposited within a period of one month from today and compliance report submitted in Registry.

(2022) 11 ILRA 502
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.09.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE VIKRAM D. CHAUHAN, J.

Special Appeal No. 1056 of 2018

Chandra Prakash Singh
...Appellant/Petitioner
Versus
District Inspector of Schools, Kushinagar & Ors. ...Respondents

Counsel for the Appellant:
Sri Ramesh Chandra Dwivedi, Sri Dinesh Kumar Singh

Counsel for the Respondents:
C.S.C.

A. Service Law – Appointment - Payment of Salary - U.P. Intermediate Education Act, 1921 - The Uttar Pradesh High School and Intermediate College (*Payment of Salaries of the Teachers and Other Workers) Act*, 1971 - U.P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981 - In the matter of intra-court appeal arising out of writ proceedings, the Division Bench needs to consider the appeal on merits by deciding the correctness of the judgment of the learned Single Judge instead of remitting the matter to the learned Single Judge. (Para 5)

B. Merits of the present case - The petitioner claims that he was appointed in L.T. Grade after promotion of Shri Shambhu Sharan Singh from C.T. Grade to L.T. Grade. C.T. Grade was a lower grade and in case, it is accepted for a moment that the promotion of Shri Shambhu Sharan Singh from C.T. Grade to L.T. Grade was approved by the order dated 10.9.1999, which is appended as Annexure '11' to the writ petition, **vacancy, if any, would have arisen in C.T. Grade and not in L.T. Grade. The appointment of the petitioner could not be made in L.T. grade on account of promotion of the said incumbent in L.T. grade.** (Para 20, 21)

Whether the promotion or merger of Shri Shambhu Sharan Singh in L.T. Grade was approved or disapproved, in both eventuality, no post in L.T. Grade became vacant. Meaning thereby, that in case, the promotion/merger of Shri Shambhu Sharan Singh in L.T. Grade was not approved, he would have continued as C.T. Grade teacher, till he would have fulfilled the requirement of merger/promotion in L.T. Grade. (Para 23, 24)

In case his promotion/merger in L.T. Grade was approved, no vacancy would have occurred, the reason being that the C.T. Grade was a dying cadre and further recruitment in the said grade was banned. An incumbent working in C.T. Grade at the time of the issuance of the GO dated 19.2.1991 was entitled to be merged in L.T. Grade on completion of two conditions, i.e. ten years of satisfactory service on 1.1.1986 and possessing the qualification of being a trained graduate. Those who did not complete ten years of satisfactory service as on 1.1.1986 were merged later as Assistant Teacher in L.T. Grade as soon as they completed ten years of service and there occurred vacancy in L.T. Grade in promotion quota. (Para 25)

The contention of the petitioner that he was appointed against a short term vacancy of L.T. Grade after following due procedure under the Act is found misconceived. As there was no vacancy, there was no occasion for the Committee of Management to notify the same or to make selection. The entire process of selection of the petitioner/appellant as Assistant Teacher, L.T. Grade adopted by the Committee of Management of the institution is absolutely illegal. **The appointment of the petitioner is held to be *void ab initio*.** (Para 27)

Writ petition dismissed. Special Appeal dismissed. (E-4)

Precedent followed:

1. Roma Sonkar Vs Madhya Pradesh State Public Service Commission & anr., 2018 (17) SCC 106 (Para 5)

2. Radha Raizada & ors. Vs Committee of Management, Vidyawati Darbari Girl's Inter College & ors., 1994 (3) UPLBEC 1551 (Para 13)

Present special appeal challenges judgment and order dated 10.08.2018, passed by Hon'ble Mr. Justice Sudhir Agarwal, J. in Civil Misc. Writ Petition No. 30395 of 2021.

(Delivered by Hon'ble Mrs. Sunita Agarwal, .J.
&
Hon'ble Vikram D. Chauhan, J.)

1. Heard Sri Dinesh Kumar Singh learned counsel for the appellant and Sri Ram Ratan Dev Vanshi learned Standing Counsel for the State-respondent.

2. The present special appeal is preferred challenging the judgment and order dated 10th August, 2018 passed by the learned Single Judge in Writ-A No. 30395 of 2001 (Chandra Prakash Singh Vs. District Inspector of Schools And others).

3. The said order dated 10th August, 2018 was passed in the absence of the counsel for the Appellant-Petitioner in the writ proceedings and the learned Single Judge after going through the pleadings and the relief sought has simply recorded a finding that the Appellant-Petitioner has not been able to make out a case so as to justify interference of this Court by granting relief. No finding, however, has been returned on the merits of the claim of the petitioner/appellant herein.

4. The primary challenge to the order dated 10th August, 2018 is to the effect that the order has been passed ex parte and the conclusion drawn by the learned Single Judge is unsustainable in law. It is also submitted by the learned counsel for the Appellant-Petitioner that the Appellant was validly appointed on the post of Assistant Teacher in L.T. Grade in the institution in question and has been denied the payment of salary on account of illegal order passed by the respondent authority which was subject matter of challenge in the Writ Petition No. 30395 of 2001 against which the present special appeal has been preferred. The learned Single Judge has not adjudicated the claim of the petitioner.

5. The present special appeal is an intra-court appeal from a Single Bench of this Court to a Division Bench of this Court and the purpose of providing special appeal against an order of learned Single Judge is to provide another tier of screening by the Division Bench and the same would not mean that the learned Single Judge is subordinate to the Division Bench although the learned Single Judge under law of precedent and principle of finality attached to the orders of Appellate Court, is bound by the order passed by the Appellate Court. While considering the powers of a Division Bench while deciding intra-court appeal, the Hon'ble Apex Court in **Roma Sonkar Vs. Madhya Pradesh State Public Service Commission and another** has held that in the matter of intra-court appeal arising out of writ proceedings, the Division Bench needs to consider the appeal on merits by deciding the correctness of the judgment of the learned Single Judge instead of remitting the matter to the learned Single Judge. In this reference, paragraph no. 3 of the judgment of the Apex Court as aforesaid of the Apex Court is quoted hereinbelow :-

"3. We have very serious reservations whether the Division Bench in an intra-court appeal could have remitted a writ petition in the matter of moulding the relief. It is the exercise of jurisdiction of the High Court under Article 226 of the Constitution of India. The learned Single Judge as well as the Division Bench exercised the same jurisdiction. Only to avoid inconvenience to the litigants, another tier of screening by the Division Bench is provided in terms of the power of the High Court but that does not mean that the Single Judge is subordinate to the Division Bench. Being a writ proceeding, the Division Bench was called upon, in the intra-court appeal, primarily and mostly to consider the correctness or otherwise of the

view taken by the learned Single Judge. Hence, in our view, the Division Bench needs to consider the appeal(s) on merits by deciding on the correctness of the judgment of the learned Single Judge, instead of remitting the matter to the learned Single Judge."

6. Learned counsel for the Appellant as well as learned Standing Counsel for the Respondents have consented to advance arguments on the merits of the dispute as the writ petition as well as the counter affidavit have been filed along with the memo of appeal and, according to the learned counsel for the parties, all the pleadings are on record and the matter can be adjudged on the merits itself. It is to be noted that the dispute in the present case started in the year 1997 and, thereafter, the matter has been relegated to the respondent authorities for decision afresh on more than one occasion. However, the dispute has not been settled and under the circumstances when the litigant has travelled for more than two decades without the controversy being set at rest by judicial determination, it would be appropriate that the matter be considered on the merits of the dispute, specifically when both the parties have advanced argument on the merits.

7. Learned counsel for the Appellant-Petitioner submits that there is an education institution in the name of Mahatama Gandhi Inter College, Sakhawania, Kushinagar (for brevity hereinafter referred to as "institution') which is recognised under the provisions of U.P. Intermediate Education Act, 1921 and the provisions of U.P. Act No. 24 of 1971 are applicable to the said institution being an aided institution. On 1st December, 1996, a short term vacancy of teacher arose in the aforesaid institution on account of *adhoc* promotion of Sri Shambhu Sharan Singh to the next higher post in the L.T. Grade. The intimation about the vacancy was sent to the District Inspector of Schools and the vacancy was also notified on the notice board of the institution. The vacancy was later advertised in the newspaper "Aaj' on 11th December, 1996 and in another local newspaper "Watchkara'. It is further submitted that in pursuance to the abovementioned advertisement, the Appellant-Petitioner being qualified applied against the advertised vacancy. The selection committee was constituted under the provisions of the U.P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981 (hereinafter referred to as "the Order, 1981"). Interview was conducted and the Appellant-Petitioner having obtained highest quality point marks amongst the candidates who had applied against the aforesaid vacancy, had been recommended by the selection committee for appointment as Assistant Teacher in L.T. Grade on ad-hoc basis. On the basis of the recommendation made by the aforesaid selection committee, the Committee of Management in its meeting held on 30th December, 1996 had resolved to appoint the Appellant-Petitioner as Assistant Teacher in L.T. Grade on ad-hoc basis.

8. The papers with regard to the appointment of the Appellant-Petitioner along with the resolution of the Committee of Management were forwarded by the Manager of the institution to the District Inspector of Schools for his prior approval/financial sanction. When no response was received, the Committee of Management of the institution issued a formal letter of appointment on 15th January, 1997 to the Appellant-Petitioner and the Appellant-Petitioner in pursuance

to the aforesaid letter of appointment joined his duty as Assistant Teacher in L.T. Grade in the institution on 16th January, 1997. The District Inspector of Schools vide order dated 28th July, 1997 refused to grant the financial approval to the appointment of the Appellant-Petitioner. The aforesaid refusal to grant approval to the appointment of the Appellant-Petitioner by the District Inspector of Schools was on account of the fact that the Committee of Management was not having power of appointment at that point of time and as such, the appointment, as per the District Inspector of Schools, was illegal.

9. The Appellant-Petitioner being aggrieved by the abovementioned order dated 28th July, 1997 preferred Writ Petition No. 32449 of 1997 before this Court. The aforesaid writ petition was finally disposed of by the judgment and order dated 26th September, 1997 with the direction to the respondent - District Inspector of Schools to examine the matter whether there was any short term vacancy as it was not clear whether the post on which the Appellant-Petitioner was working was converted from C.T. Grade to L.T. Grade or it was a vacancy on the post which had fallen vacant or it was a short term vacancy. It was further directed that the District Inspector of Schools shall examine whether the Committee of Management had followed the procedure prescribed for the appointment.

10. Thereafter, the Appellant-Petitioner made a representation to the District Inspector of Schools along with the certified copy of the judgment and order dated 26th September, 1997 passed by this Court. The District Inspector of Schools in pursuance to the abovementioned order dated 26th September, 1997 has proceeded to pass the order dated 2nd October, 2000 granting financial approval to the appointment of the Appellant-Petitioner as Assistant Teacher in L.T. Grade. A perusal of the above-mentioned order dated 2nd October, 2000 passed by the District Inspector of Schools would show that the aforesaid approval had been granted in compliance of the order dated 26th September, 1997 passed by this Court.

11. It is submitted that the said officer who was posted as District Inspector of Schools, Kushinagar was transferred in October, 2000 and, thereafter, the new incumbent had taken charge of the post of District Inspector of Schools, Kushinagar. The new District Inspector of Schools, Kushinagar by the order dated 9th November, 2000 had stopped the salary of the Appellant-Petitioner and further directed the Manager of the institution to show cause as to why action be not taken under the provisions of U.P. Intermediate Education Act, 1921. A bare perusal of the order dated 9th November, 2000 of the District Inspector of Schools would demonstrate that the aforesaid order had been passed on the basis of the report of the enquiry committee constituted by the District Magistrate, Kushinagar wherein appointment of five Assistant Teachers in the institution had been found to be irregular and the name of the Appellant-Petitioner figured in the said list of teachers irregularly appointed.

12. The Appellant-Petitioner being aggrieved by the abovementioned order dated 9th November, 2000 passed by the District Inspector of Schools preferred Civil Misc. Writ Petition No. 5925 of 2001 before this Court. The aforesaid writ petition was finally decided by the judgment dated 16th February, 2001 and

the order dated 9th November, 2000 in so far it relates to the Appellant-Petitioner was set aside and it was directed by this Court that the copy of the enquiry report conducted by the District Magistrate shall be supplied to the Appellant-Petitioner and, thereafter, a fresh reasoned and speaking order shall be passed after giving opportunity of hearing to the Appellant-Petitioner and the Committee of Management of the institution.

13. In pursuance of the order dated 9.11.2000 passed by this Court, the District Inspector of Schools on 13th July, 2001 had passed an order recalling the earlier order dated 2nd October, 2000 according financial approval to the appointment of the Appellant-Petitioner and holding that the appointment of the Appellant-Petitioner was without any post and as such was irregular and illegal. The finding recorded by the District Inspector of Schools in the order dated 13th July, 2001 is to the effect that the Appellant-Petitioner was appointed on account of the vacancy created by ad-hoc promotion of one Sri Shambhu Sharan Singh on the post of L.T. Grade whereas the promotion of Sri Shambhu Sharan Singh was not accorded financial approval by the District Inspector of Schools and as such no vacancy was created. The order dated 13th July, 2001 further records that the vacancy in question was not advertised in widely circulated newspaper as per the Full Bench decision of this Court in the case of **Radha Raizada and others Vs. Committee of Management, Vidyawati Darbari Girl's Inter College and others.**

14. The Appellant-Petitioner being aggrieved by the order dated 13th July, 2001 preferred Writ-A No. 30395 of 2001 before this Court. The aforesaid writ petition was finally dismissed by means of the judgment and order dated 10th August, 2018, which is subject matter of challenge in the instant Special Appeal.

15. It is submitted on behalf of the counsel for the Appellant-Petitioner that while passing the order dated 13th July, 2001, the District Inspector of schools has incorrectly recorded that the financial approval to the promotion of Shambu Sharan Singh had not been granted and, therefore, no post of Assistant Teacher fell vacant. The counsel for the Appellant submits that by the order dated 10th September, 1999, financial approval was granted to the promotion of Shambu Sharan Singh and after the promotion of Shambu Sharan Singh on the post of Assistant Teacher, the post of Assistant Teacher in L.T. Grade fell vacant.

16. Learned standing Counsel appearing on behalf of the respondents submits that the District Inspector of Schools has rightly rejected the claim of the Appellant-Petitioner. It is submitted that the then District Inspector of Schools, Kushinagar Shri Kripa Lal Vishwakarma committed gross irregularity in making appointment during his tenure and complaints with regard to illegal appointment of teachers were received by the Government and the District Magistrate. As a result of those complaints, the charge of the office of the District Inspector of Schools was handed over to Shri Gyan Prakash Singh and the aforesaid incumbent to the office of District Inspector of Schools had informed the District Magistrate about the irregularities committed by the earlier District Inspector of Schools.

On the aforesaid basis, by the order dated 13th October, 2000 the District Magistrate, Kushinagar constituted a

committee for enquiry into the allegations of irregularity in the appointment of teachers by Shri Kripa Lal Vishwakarma. The aforesaid enquiry committee on the basis of the records available prima facie came to the conclusion that Shri Kripa Lal Vishwakarma, the erstwhile District Inspector of schools, made illegal/irregular appointments in 29 institutions during his tenure. The aforesaid enquiry committee also found that the appointment of the Appellant-Petitioner was also not in accordance with Law. The list of irregular appointments made by Shri Kripa Lal Vishwakarma while he was the District Inspector of Schools, Kushinagar was also forwarded by the District Inspector of Schools to the District Magistrate by his Communication dated 8th November, 2000.

It is further submitted that on account of the Government Order dated 24th June, 1993, the Committee of Management was not authorised to make appointment. It is submitted that the order of financial approval dated 10th September, 1999 (as claimed by Appellant-Petitioner) in respect of Shambhu Sharan Singh has not been brought on record by the Appellant-Petitioner and that no financial approval was granted to Shri Sambhu Sharan Singh.

He further submits that the advertisement in respect of the post in question was said to have been made on 11th December, 1996 in respect of a short term vacancy that arose on 1st December, 1996 on *adhoc* promotion of Shri Shambhu Sharan Singh to the next higher post in L.T. Grade and according to the Appellant-Petitioner, the promotion of Shri Shambhu Sharan Singh to next higher grade was approved on 10th September, 1999 and as such there was no occasion to conduct selection proceedings and issue advertisement in the year 1996 when there was no short-term vacancy.

17. Having heard learned counsels for the parties and perused the record. We may note that the claim of the petitioner/appellant in the writ petition is that he was appointed against a short term vacancy which arose on 1.12.1996 on account of adhoc promotion of the incumbent Shri Shambhu Sharan Singh to LT Grade. The contention is that the said vacancy was notified to the District Inspector of Schools and was also notified on the Notice Board of the institution. The vacancy was also advertised in two daily newspapers of wide circulation and on the interview taken by the Selection Committee constituted under the provisions of the U.P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981, the petitioner was recommended against the post having attained highest quality point marks amongst other candidates. The Committee of Management in its meeting held on 30.12.1996, accepting the recommendation of the Selection Committee, resolved to appoint the petitioner as Assistant Teacher in L.T. Grade on adhoc basis. The papers relating to appointment of the petitioner alongwith the resolution of the Committee of Management were forwarded to the District Inspector of Schools by the Manager of the institution on 31.12.1996 and were received in the office of the District Inspector of Schools on 3.1.1997. The Manager of the institution requested the District Inspector of Schools to accord financial approval of the adhoc appointment made by the Committee of Management. However, the District Inspector of Schools did not communicate its decision regarding disapproval or approval of the appointment made by the Committee within the

stipulated period. As no communication was received from the office of the District Inspector of Schools, taking it to be a case of deemed approval, formal letter of appointment was issued to the petitioner on 15.1.1997 and he had joined his duty on 16.1.1997 as Assistant Teacher in L.T. Grade.

18. In this factual background, we may take note of the communication dated 10.9.1999 appended as Annexure "11' of the writ petition (page "86' of the paper book). The said letter was issued from the office of the District Inspector of Schools, Kushinagar and is addressed to the Manager of the institution concerned. The said letter is in relation to the approval of promotion of Shri Shambhu Sharan Singh from C.T. Grade to L.T. Grade. This letter shows that Shri Shambhu Sharan Singh was working in C.T. Grade and the proposal for his promotion to L.T. Grade against 50% quota for promotion was made by the Committee of Management on 2.12.1996.

19. This approval letter has been appended with the writ petition and is relied by the petitioner to assert that the observation in the order impugned that the approval was not granted to the promotion of Shri Shambhu Sharan Singh was incorrect. The order impugned is dated 30.7.2001 which records that the appointment of the petitioner had been made in L.T. Grade against the vacancy on account of promotion of Shri Shambhu Sharan Singh in L.T. Grade on 1.12.1996, whereas no approval of the promotion of Shri Shambhu Sharan Singh was granted by the District Inspector of Schools. Resultantly, no post became vacant.

20. In view of these facts, at the outset, it may be noted that the petitioner claims that he was appointed in L.T. Grade after promotion of Shri Shambhu Sharan Singh from C.T. Grade to L.T. Grade.

21. Admittedly, C.T. Grade was a lower grade and in case, it is accepted for a moment that the promotion of Shri Shambhu Sharan Singh from C.T. Grade to L.T. Grade was approved by the order dated 10.9.1999, which is appended as Annexure "11' to the writ petition, vacancy, if any, would have arisen in C.T. Grade and not in L.T. Grade. The appointment of the petitioner could not be made in L.T. grade on account of promotion of the said incumbent in L.T. grade.

Further, C.T. Grade was declared a dying cadre in pursuance of the recommendations made by the Pay Revision Committee, 1989 by the Government Order No. 3299/15.7.1989-1(136)/89 dated 11.8.1989 for the private higher secondary schools. Further clarifications were issued on 4.9.1990 and by the Government Order dated 19.2.1991, C.T. Grade was declared a dying cadre in government higher secondary schools and Intermediate colleges. It was directed that in future, no post in C.T. Grade shall be created, as the C.T. Grade had been declared a dying cadre and further recruitment in that grade was banned. By the Government Order dated 9.1.1992, it was declared that consequent to the C.T. Grade being declared as dying cadre, all such C.T. Grade teachers, who have completed ten years of satisfactory service and subject to their being trained graduates, shall be merged as L.T. Grade teachers. Meaning thereby that if a C.T. Grade teacher had already completed ten years of satisfactory service, he would be merged as L.T. Grade, and the cut-off date fixed was 1.1.1986. For those who did not complete ten years of satisfactory service on

1.1.1986, it was directed that they would be merged as Assistant Teacher (L.T. Grade) as soon as they complete ten years of satisfactory service.

22. It seems from the order of the District Inspector of Schools dated 10.9.1999 that the incumbent working in C.T. Grade namely Shri Shambhu Sharan Singh was merged in L.T. Grade against the post available in promotion quota. A further perusal of the order impugned dated 3.7.2001 indicates that the said proposal of promotion/merger of Shri Shambhu Sharan Singh was approved.

23. Be that as it may, whether the promotion or merger of Shri Shambhu Sharan Singh in L.T. Grade was approved or disapproved, in both eventuality, no post in L.T. Grade became vacant.

24. Meaning thereby that in case the promotion/merger of Shri Shambhu Sharan Singh in L.T. Grade was not approved, he would continue as C.T. Grade teacher till he would have fulfilled the requirement of merger/promotion in L.T. Grade.

25. On the other side, in case his promotion/merger in C.T. Grade was approved, there would occur no vacancy, the reason being that the C.T. Grade was a dying cadre and further recruitment in the said grade was banned. An incumbent working in C.T. Grade at the time of the issuance of the Government Order dated 19.2.1991 was entitled to be merged in L.T. Grade on completion of two conditions, i.e. ten years of satisfactory service on 1.1.1986 and possessing the qualification of being a trained graduates. Those who did not complete ten years of satisfactory service as on 1.1.1986 were merged later as Assistant Teacher in L.T. Grade as soon as they completed ten years of service and there occur vacancy in L.T. Grade in promotion quota.

26. In view of the above, the statement in the order impugned dated 3.7.2001 that there was no vacancy on account of promotion of Shri Shambhu Sharan Singh is found to be correct. Though the said order is not happily worded but the crux of the matter is that there occur no vacancy in L.T. Grade, against which the petitioner could have been appointed, terming it as appointment against a short term vacancy.

27. In view of the above discussion, on the merits of the case, the contention of the learned counsel for the petitioner that the petitioner was appointed against a short-term vacancy of L.T. Grade after following due procedure under the Act is found misconceived. As there was no vacancy, there was no occasion for the Committee of Management to notify the same or to make selection. The entire process of selection of the petitioner/appellant as Assistant Teacher, L.T. Grade adopted by the Committee of Management of the institution is absolutely illegal. The appointment of the petitioner is held to be *void ab initio*.

The writ petition is, accordingly, **dismissed** being devoid of merits.

In the result, the appeal stands **dismissed**.

(2022) 11 ILRA 510
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.09.2022

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ-A No. 12486 of 2022

Sharad Kumar Chauhan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Seemant Singh

Counsel for the Respondents:
C.S.C., Sri Prem Prakash Yadav

A. Service Law – Compassionate Appointment - For all the government vacancies equal opportunity should be provided to all aspirants as mandated u/Article 14 and 16 of the Constitution. However, appointment on compassionate ground offered to a dependent of a deceased employee is an exception to the said norms. The compassionate ground is a concession and not a right. (Para 10)

Compassionate appointment is an exception to the general rule of appointment in the public services and is in favour of the dependents of a deceased dying in harness and leaving his family in penury and without any means of livelihood, and in such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. **The whole object of granting compassionate employment is, thus, to enable the family to tide over the sudden crisis.** The object is not to give such family a post much less a post held by the deceased. (Para 12)

In the writ petition the petitioner has not made any averment that the family of the petitioner which comprises of his father and himself has not been able to tide over the financial crisis resulting from the death of his mother in the year 2011. No averments have been made regarding the financial status of the family and himself. The petitioner has filed an affidavit of himself and his father stating that the father is 63 years of age and does farming and the petitioner is not employed in any government job. The petitioner is now 40 years of age. It is too late in the day to consider the case of the petitioner for compassionate appointment. (Para 8)

This Court is not inclined to interfere with the impugned order denying the petitioner compassionate appointment on the death of the mother of the petitioner who died-in-harness in the year 2011. If the appointment of the petitioner on compassionate grounds is now considered after 11 years of the death of the deceased employee, it would be against the very object and purpose for which appointment on compassionate grounds is provided. (Para 13)

Writ petition dismissed. (E-4)

Precedent followed:

1. Fertilizers and Chemicals Travancore Ltd. & ors. Vs Anusree K.B., Civil Appeal No. 6958 of 2022 (Para 9)

2. Director of Treasuries In Karnataka & anr. Vs V. Somyashree, (2021) SCC online SC 704 (Para 9)

3. N.C. Santosh Vs St. of Karn., (2020) 7 SCC 617 (Para 9)

4. Himachal Pradesh & anr. Vs Shashi Kumar, (2019) 3 SCC 653 (Para 11)

5. Govind Prakash Verma Vs L.I.C., (2005) 10 SCC 289 (Para 11)

Present petition assails order dated 08.07.2021, passed by Secretary, U.P. Basic Education Board, complying with order of this Court dated 03.09.2020, which directed respondent to consider petitioner's grievance. Prayer has also been made for compassionate appointment on a suitable post.

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

1. Heard Sri Seemant Singh, learned counsel for the petitioner, learned Standing Counsel for the State-Respondent No.1 and Sri Prem Prakash Yadav, learned counsel for the Respondent Nos.2, 3 & 4.

2. By means of the present writ petition, the petitioner has prayed for

issuance of a writ of certiorari quashing the impugned order dated 08.07.2021 passed by the Respondent No.2, Secretary, U.P. Basic Education Board, whereby the claim of the petitioner for compassionate appointment on a suitable post and according to his qualification has been rejected. A further prayer for mandamus commanding the respondents to grant compassionate appointment to the petitioner on the basis of the application dated 26.11.2011 and 10/14.11.2016 on a suitable post according to his qualification has also been made.

3. Learned counsel for the petitioner submits that the mother of the petitioner was appointed as Assistant Teacher in Upper Primary School, Mustafabad, Block Jaleelpur, District Bijnor on 18.09.1997 and died-in-harness on 16.11.2011. After the death of his mother, the petitioner possessing a B.Sc. Degree, filed an application dated 26.11.2011 seeking compassionate appointment on the post of Assistant Teacher before the Respondent No.4, Block Education Officer, Jaleelpur, District Jaunpur. The application of the petitioner was forwarded to the Respondent No.3, District Basic Education Officer. The petitioner again filed another application dated 10.11.2016 before the Respondent No.3, Block Education Officer. Vide letter dated 13.12.2016 the Respondent No.2, District Basic Education Officer, informed the petitioner that his second application dated 13.12.2016 is being returned, treating the same to be time barred. By the said letter, the petitioner was required to complete all the formalities and submit an application seeking compassionate appointment on a post according to his qualification through proper channel. In pursuance of the letter dated 13.12.2016, the petitioner submitted his application dated 28.07.2017, which was duly received by the Respondent No.4. When no heed was paid on the application of the petitioner seeking compassionate appointment, the petitioner preferred Writ (A) No.6802 of 2020, which was disposed of vide order dated 03.09.2020 with a direction to the Respondent No.2, to consider the petitioner's grievance and pass appropriate speaking order within a period of two months. When the order dated 03.09.2020 was not complied with the petitioner filed Contempt Application (Civil) No.4588 of 2021, which was also disposed of vide order dated 26.10.2021 directing the opposite party to consider the case of the petitioner and comply with the order passed in Writ (A) No.6802 of 2020 within six weeks. In pursuance of the order passed by Writ Court and Contempt Court, the Respondent No.2, vide his order dated 08.07.2021 considered the representation dated 10.09.2020 filed by the petitioner and rejected his claim for compassionate appointment. Being aggrieved withe the aforesaid order, the petitioner has approached this Court by way of the present writ petition.

4. On instructions, Sri Prem Prakash Yadav, learned counsel appearing for the Respondent Nos.2, 3 & 4 submits at the time of filing of first application seeking compassionate appointment the petitioner did not possess the requisite educational qualification to be appointed as Assistant Teacher, therefore, his application was rejected by the District Basic Education Officer. After five years, the petitioner again filed application dated 25.11.2016. Vide letter dated 13.12.2016 the petitioner was directed to file proper application for compassionate appointment on a prescribed format. After the letter dated 13.12.2016 issued by the respondent authority, the

petitioner failed to file proper application on a prescribed format for about four years. The petitioner again on 12.06.2020 filed application seeking compassionate appointment, which is highly belated as such the appointment of the petitioner has rightly been rejected by the respondent authorities.

5. I have heard learned counsel for the petitioner, learned Standing Counsel representing the State Respondents and Sri Prem Prakash Yadav, learned counsel representing the Respondent Nos.2, 3 & 4 and have perused the record.

6. On the perusal of the record, it is borne out that the mother of the petitioner who was employed as Assistant Teacher died in harness on 16.11.2011. The petitioner vide application dated 26.11.2011 made an application seeking compassionate appointment on the post of Assistant Teacher. The said application was turned down on the ground that the petitioner did not possess the requisite educational/essential qualification prescribed for appointment as Assistant Teacher. The petitioner did not pursue his application further and after nearly 5 years filed another application dated 10.11.2016 seeking compassionate appointment on suitable post as per qualification. This application bears the date of receipt as 25.11.2016 which has been interpreted to read 15.11.2016. The application was treated to have been filed beyond 5 years of the death of the employee and as such was forwarded to the Secretary, U.P. Basic Shiksha Parishad, Prayagraj, as he was the Competent Authority to consider the case of the petitioner for compassionate appointment. When nothing was done by the Secretary, U.P. Basic Education the petitioner filed Writ (A) No.6802 of 2020 which was disposed of vide order dated 03.09.2020 directing the Secretary, Basic Shiksha Parishad to consider the petitioner's grievance within two months through a speaking order. While disposing of the writ petition, this Court noticed that the petitioner at the relevant time was 39 year and at the time of the death of his mother was 30 years and in such view of the matter the Secretary while considering the claim was required to look into the eligibility of the petitioner for compassionate appointment and also advert to the status of the petitioner's father at the time of the death of the mother of the petitioner and whether the family was in dire financial crisis or there was availability of alternative source of bred and butter as compassionate appointment cannot be a source of backdoor entry and the only purpose is to mitigate the undue hardship caused to the family due to the death of the bread earner.

7. A perusal of the impugned order dated 08.07.2021 passed by the Secretary, Basic Shiksha Parishad, Prayagraj, reveals that the Secretary has not at all adhered to the directions of this Court dated 03.09.2020 passed in Writ (A) No.6820 of 2020 in as much as there is no discussion or finding recorded on the financial status of the family, whether the father of the petitioner was in employment or not and the claim has been rejected simply on the ground that it was not filed on proper format and was not liable to be entertained in terms of Clause 8 of the Government Order dated 04.09.2000.

8. In the writ petition the petitioner has not made any averment that the family of the petitioner which comprises of his father and himself have not been able to tide over the financial crisis resulting from

the death of his mother in the year 2011. No averments have been made regarding the financial status of the family and himself. The petitioner has filed an affidavit of himself and his father as Annexure No.4 to the writ petition stating that the father is 63 years of age and does farming and the petitioner is not employed in any government job. The petitioner is now 40 years of age. This Court in normal circumstances would have remanded the matter back to the Secretary, Basic Shiksha Parishad, Prayagraj, for decision afresh strictly in terms of the order dated 03.09.2020 passed in Writ (A) No.6820 of 2020. However, considering the age of the writ petitioner the Court is of the opinion that it is too late in the day to consider the case of the petitioner for compassionate appointment.

9. The Apex Court in a recent decision dated 30.09.2022 passed in Civil Appeal No.6958 of 2022 (Fertilizers and Chemicals Travancore Ltd. & others Vs. Anusree K. B.) while dealing with a case of compassionate appointment after 24 years from the death of the deceased employee, considering the law laid down in the case of Director of Treasuries in Karnataka and Another Vs. V. Somyashree, (2021 SCC online SC 704) after referring to the decision rendered in N. C. Santhosh Vs. State of Karnataka (2020) 7 SCC 617, summarized the principles governing the grant of appointment on compassionate grounds as under:-

"(i) that the compassionate appointment is an exception to the general rule;

(ii) that no aspirant has a right to compassionate appointment;

(iii) the appointment to any public post in the service of the State has to be made on the basis of the principle in accordance with Articles 14 and 16 of the Constitution of India;

(iv) appointment on compassionate ground can be made only on fulfilling the norms laid down by the State's policy and/or satisfaction of the eligibility criteria as per the policy;

(v) the norms prevailing on the date of the consideration of the application should be the basis for consideration of claim for compassionate appointment."

10. The Apex Court went on to observe that "as per the law laid down by this Court in catena of decisions on the appointment on compassionate ground for all the government vacancies equal opportunity should be provided to all aspirants as mandated under Article 14 and 16 of the Constitution. However, appointment on compassionate ground offered to a dependent of a deceased employee is an exception to the said norms. The compassionate ground is a concession and not a right.

11. Then again in the case of **State of Himachal Pradesh and Anr. Vs. Shashi Kumar reported in (2019) 3 SCC 653,** the Apex Court had the occasion to consider the object and purpose of appointment on compassionate ground and considered the decision in the case of **Govind Prakash Verma Vs. LIC, reported in (2005) 10 SCC 289,** particularly in paras 21 and 26, which are being reproduced hereunder :-

"21. The decision in Govind Prakash Verma [Govind Prakash Verma v. LIC, (2005) 10 SCC 289, has been considered subsequently in several decisions. But, before we advert to those decisions, it is necessary to note that the

nature of compassionate appointment had been considered by this Court in Umesh Kumar Nagpal v. State of Haryana [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138]. The principles which have been laid down in Umesh Kumar Nagpal [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138] have been subsequently followed in a consistent line of precedents in this Court. These principles are encapsulated in the following extract: (Umesh Kumar Nagpal case [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138], SCC pp. 139-40, para 2) "2. ... As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependants of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non- manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved viz. relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned."

26. The judgment of a Bench of two Judges in Mumtaz Yunus Mulani v. State of Maharashtra [(2008) 11 SCC 384] has adopted the principle that appointment on compassionate grounds is not a source of recruitment, but a means to enable the family of the deceased to get over a sudden

financial crisis. The financial position of the family would need to be evaluated on the basis of the provisions contained in the scheme. The decision in Govind Prakash Verma [Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S) 590] has been duly considered, but the Court observed that it did not appear that the earlier binding precedents of this Court have been taken note of in that case."

12. The Apex Court thus observed:-

"Thus as per the law laid down by this Court in the aforesaid decisions, compassionate appointment is an exception to the general rule of appointment in the public services and is in favour of the dependents of a deceased dying in harness and leaving his family in penury and without any means of livelihood, and in such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is, thus, to enable the family to tide over the sudden crisis. The object is not to give such family a post much less a post held by the deceased."

13. Applying the law laid down by the Apex Court in the aforesaid decisions to the facts and circumstances of the present case and considering the observations made in the aforesaid decisions and the object and purpose for which the appointment on compassionate ground is provided, the Court is not inclined to interfere with the impugned order denying the petitioner compassionate appointment on the death of the mother of the petitioner who died-in-harness in the year 2011. If the appointment of the petitioner on compassionate grounds is now considered after 11 years of the death of the deceased employee, it would be against the very object and purpose for which appointment on compassionate grounds is provided.

14. The writ petition fails and is, accordingly, **dismissed**.

(2022) 11 ILRA 516
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.09.2022

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ-A No. 15413 of 2022

Vaishali Dwivedi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ratnakar Udadhyay, Sri R.K. Ojha (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri M.N. Singh

A. Service Law – Selection – Correction in application form - Once the petitioner has not proceeded to comply with the instruction and committed error, is not entitled for any relief. Once the Commission is not at fault and action of Commission is not arbitrary, there is no occasion for this Court to interfere in such matter by permitting the candidate to appear in the Main Examination, who has admittedly not followed the instruction so given in advertisement. (Para 16, 18)

In the present case, it is clear that petitioner had the opportunity to correct her application form including category, but she did not avail

the same. Further, paragraph 14(2) of advertisement is very specific in nature, which clearly says that on submission of false/misleading information, the candidature will be cancelled and undisputedly, information so provided by the petitioner in her application form is false. (Para 11)

In paragraph 4 & 14(2) of the advertisement dated 16.3.2022, it is clearly mentioned that in case of any mistake while filling up the online application form, candidates may correct the same within the last date of submission of form. Para 14(2) of the said advertisement clearly provides that in case change of category, no application for error correction/modification shall be acceptable. (Para 7, 10, 19)

Once the instructions are mentioned in the advertisement, it is required on the part of candidate to follow the same. In case of failure for any reason on the part of candidates, cannot be a ground to grant any relief. In fact, interference at this stage by the Court would be opening of the Pandora's Box, which may derail the complete examination process causing irreparable loss to the candidates, who have followed terms and conditions of advertisement, while submitting the application form. (Para 18)

B. It is undisputed that petitioner has not challenged the notice dated 22.4.2022 (which permitted the candidates to remove the deficiency w.r.t. photographs and signatures) before the Court, therefore, he cannot be given any benefit as claimed by her. It is within the domain of Commission to grant relaxation, which shall attain finality, if not challenged by the aggrieved person. (Para 13)

Petitioner argues that the action of Commission permitting the candidates to remove the deficiency w.r.t. photographs and signatures vide notice dated 22.4.2022, is arbitrary as once the candidates have been granted an opportunity to remove the deficiencies, that should have been granted for all deficiencies and should not be confined only for two. Therefore, it is required on the part of Commission to accept her request and change her candidature from SC category to General category. (Para 5)

C. There is no dispute between the parties that benefit of reservation is given only at the stage of final result prepared after interview. Result of Preliminary and Main Examinations of all candidates are declared only under the category, which is mentioned by the candidates. (Para 12)

The argument of the petitioner that once she has informed that she does not belong to SC category, her result should have been reconsidered and in case, she has obtained more marks than the minimum cutoff marks fixed for General Category, her result should have been declared under the category of General Candidates, has no force. (Para 5, 12)

D. The petitioner cannot be permitted to derail the entire recruitment process as she chose to wait for the last date. (Para 17)

Petitioner submits that she has filled up her form on the last date, therefore, she could not avail the facility (modification/correction in application form as prescribed) so provided under the para 4 of the advertisement. (Para 5, 10)

Writ petition dismissed. (E-4)

Precedent followed:

1. Santosh Kumar Pandey Vs St. of U.P. & ors., Writ-A No. 66487 of 2015, decided on 22.12.2015 (Para 6)

2. Prabhakar Mani Tripathi Vs St. of U.P. & ors., Writ-A No. 17824 of 2019, decided on 21.11.2019 (Para 8)

3. Km. Priyanka Chaturvedy Vs St. of U.P. & ors., Writ-A No. 485 of 2022, decided on 21.03.2022 (Para 8)

Precedent distinguished:

1. Prashant Kumar Dwivedi & another Vs State of U.P. & ors., Writ-A No. 5383 of 2020, decided on 28.08.2020 (Para 6, 14)

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri R.K. Ojha, Senior Advocate holding brief of Sri Ratnakar Upadhyay, learned counsel for the petitioner and learned Standing Counsel for the respondent no.1 and Sri M.N. Singh, learned counsel for the respondent nos. 2 & 3.

2. As the facts of the case are undisputed, therefore, with the consent of parties, writ petition is decided at this stage without calling for the counter affidavit.

3. Present petition has been filed with the following prayers:-

"(i) A writ order or directing in the nature of mandamus commanding the respondent-authorities of the U.P. Public Service Commission, Prayagraj to permit the petitioner to make necessary correcting in the application form as General Category (UR) in place of SC category."

(ii) A writ, order or directing in the nature of mandamus commanding the respondent-authorities of the U.P. Public Service Commission, Prayagraj to issue admit card in favour of the petitioner for appearing in the mains combined State/Upper Subordinate Services Examination, 2022 which is going to be held on 27.9.2022."

4. Learned Senior Counsel submitted that U.P. Public Service Commission, Prayagraj *(hereinafter referred to as Commission)* has issued advertisement on 16.3.2022 inviting the application form for selection on the different posts of State Services by conducting Combined State/Upper Subordinate Services Examination, 2022 (hereinafter referred to as Examination, 2022). Pursuant to that, petitioner has filled up the application form. Examination, 2022 is having three phases i.e., Preliminary Examination, Main Examination & Interview He next submitted that petitioner belongs to General Category, but by mistake she filled up her form under the SC category and also appeared in the said examination. She was declared successful in the Preliminary Examination under SC category though she obtained more marks than the minimum cutoff marks for the General Category Candidate. He further submitted that after knowing about her mistake, she has written application to the Commission to correct her category from SC category to General category, but the same was not considered by the Commission and her candidature was rejected.

5. Learned Senior Counsel submitted that he is assailing the action of Commission on two grounds. Firstly, Commission has published notice dated 22.4.2022 permitting the candidates to remove the deficiency with regard to photographs and signatures, if any. He next submitted that action of Commission is arbitrary as once the candidates have been granted an opportunity to remove the deficiencies, that should have been granted for all deficiencies and should not be confined only for two. Therefore, it is required on the part of Commission to accept her request and change her candidature from SC category to General category. Secondly, he submitted that once the petitioner has informed that she does not belong to SC category, her result should have been reconsidered and in case, she has obtained more marks than the minimum cutoff marks fixed for General Category, her result should have been declared under the category of General Candidates. He also submitted that

petitioner has filled up his form on the last date, therefore, she could not avail the facility so provided under the para 4 of the advertisement. He lastly submitted that by the change of category, he will not be benefited in any way, therefore, her mistake has to be taken bonafide and action taken by the Commission is bad. Petitioner may be permitted to appear in the Main Examination.

6. In support of his contention, he has placed reliance upon the of judgment of this Court in the case of ***Prashant Kumar Dwivedi & another vs. State of U.P. and others*** passed in ***Writ-A No. 5383 of 2020 decided on 28.8.2020.***

7. Per contra Mr. M.N. Singh, learned counsel for the Commission vehemently opposed the submission of learned counsel for the petitioner and submitted that in paragraph 4 & 14(2) of the advertisement dated 16.3.2022, it is clearly mentioned that in case of any mistake while filling up the online application form, candidates may correct the same within the last date of submission of form. He next submitted that paragraph 14(2) of the said advertisement clearly provides that in case change of category, no application for error correction/modification shall be acceptable. It also says that on submission of false/misleading information, the candidature will be cancelled.

8. Learned counsel for the Commission further submitted that notice dated 22.4.2022 is very much clear, which permits only for removal of deficiency with regard to photograph and signatures. In case, petitioner is aggrieved with the same, it is required on her part to challenge the same, which has never been challenged, therefore, she cannot be given any benefit as argued by the learned counsel for the petitioner. So far as second submission of learned counsel for the petitioner is concerned, he submitted that as per policy decision of Commission, benefit of reservation is extended only at the stage of preparation of final result. He further clarified that result of Preliminary and Main Examinations are declared under the category mentioned by the Candidates in its application form and verification of record is only done at the time of appearance in interview. Therefore, in light of para 4 & 14(2) of the advertisement dated 16.3.2022, category of petitioner cannot be changed and further his candidature has rightly been rejected. In support of his contention, he has placed reliance upon the series of judgments of this Court in the cases of ***Santosh Kumar Pandey vs. State of U.P. and others*** passed in ***Writ-A No. 66487 of 2015*** decided on ***22.12.2015***, ***Prabhakar Mani Tripathi Vs. State of U.P. and others*** passed in ***Writ-A No. 17824 of 2019*** decided on ***21.11.2019*** and ***Km. Priyanka Chaturvedy vs. State of U.P. and other***s passed in ***Writ-A No. 485 of 2022*** decided on ***21.3.2022.***

9. I have considered the rival submissions advanced by the learned counsel for the parties and perused the advertisement as well as judgments relied by the learned counsel for the parties.

10. Facts of the case are undisputed by the parties. Paragraph 4 & 14(2) of the advertisement dated 16.3.2022 is having provision to deal with such controversy, which is subject matter before this Court and same is quoted hereinbelow:-

"4. Modify Submitted Application: If a candidate comes to know about any error/errors in the submitted

application form except in name of the examination and type of recruitment, Registered Mobile Number, E-mail ID, Aadhaar Number and such cases where prescribed fee for modified category is higher (In case of error in these entries, candidate may submit new online application with prescribed fee only as previously deposited fee will neither be adjusted nor refunded.) He/she will be given only one opportunity to modify it/them according to the following procedure before the last date of the submission of application form..... "

(2) The claim of category, subcategory, domicile, gender, date of birth, name and address will be valid only till the last date of online application. In this regard no application for error correction/modification shall be acceptable. Incomplete application form shall be summarilly rejected and no correspondence shall be entertained in this regard. On submission of false/misleading information, the candidature will be cancelled."

11. From perusal of the same, it is apparently clear that she was having opportunity to correct her application form including category, but she has not availed the same. Further, paragraph 14(2) of said advertisement is very specific in nature, which clearly says that on submission of false/misleading information, the candidature will be cancelled and undisputedly, information so provided by the petitioner in her application form is false.

12. So far as second argument of learned counsel for the petitioner about the controverting of category from SC category to General category on the basis of marks obtained in Preliminary Examination is concerned, that is also having no force. There is no dispute between the parties that benefit of reservation is given only at the stage of final result prepared after interview. Result of Preliminary and Main Examinations of all candidates are declared only under the category, which is mentioned by the candidates.

13. Further, it is undisputed that petitioner has not challenged the notice dated 22.4.2022 before the Court, therefore, he cannot be given any benefit as claimed by her. It is within the domain of Commission to grant relaxation, which shall attain finality, if not challenged by the aggrieved person.

14. I have perused the judgment of this Court in the matter of ***Prashant Kumar Dwivedi (supra)*** so relied by the learned counsel for the petitioner. From perusal of the same, it is clear that controversy in the said judgment is entirely different on facts. In that case, candidates are required to submit certificates duly countersigned by the Principal/Manager/Registrar and Joint Director of Education of the Mandal concerned and those certificates submitted by the petitioners were not countersigned by the authorities. Commission has granted extra time to such candidates to file certificate duly countersigned by the authorities mentioned hereinabove. The action of Commission was under challenged and ultimately Court has dismissed the writ petition, therefore, this judgment will not help the petitioner in the present case.

15. I have also perused the judgment of this Court in the case of ***Prabhakar Mani Tripathi (Supra)*** relied by the learned counsel for the Commission. In the said judgment, the very same dispute was

in question about the change of category and Court after considering the facts of the case, dismissed the writ petition vide order dated 21.11.2019. The said judgment is being quoted hereinbelow:-

"Heard learned counsel for the petitioner and Sri Shikhar Tandon holding brief of Sri Avneesh Tripathi, learned counsel for the U.P.Public Service Commission.

Petitioner is before this Court with a request to issue a mandamus commanding the respondents to consider the petitioner as physically handicapped category and rectify the petitioner's mistake in the column-16 and 16.3 in online form bearing Registration No. 30421315447 for the Review Officer/Assistant Review Officer(General and Special Recruitment) Examination 2017.

At the very outset, an objection has been raised by Sri Tandon that so far as the advertisement dated 30.12.2017 issued by the U.P.P.S.C., the same was unambiguous and categorical and has placed reliance upon para 14 sub clause (2), which is reproduced herein below.

"No change in category, sub-category, Date of Birth etc. is permissible after the receipt of application form in the office of the Commission. In this regard no application for error correction/modification shall be acceptable."

In this backdrop, initially on the basis of the said instructions, the petitioner has downloaded the form, filled up the same and thereafter submitted in the office of the Commission. He has again downloaded the admit card for appearing in the preliminary examination and only thereafter, the present application for correction/modification in application form has been pressed. Once, the categorical instructions were given as aforementioned, in such situation, as per terms and conditions of the advertisement, it is impermissible that thereafter, the petitioner can apply for correction in the application form.

Once an objection is being raised, the Court has proceeded to examine the record in question as well as advertisement dated 30.12.2017. Bare perusal of the advertisement especially para 14 (2), this Court is of the view once the petitioner has undergone with aforesaid process, thereafter, as per instruction, he cannot avail the relief as has been asked for and as such, the Court declines to interfere under Article 226 of the Constitution of India.

The writ petition lacks merit and is accordingly dismissed."

16. This Court in the matter of ***Santosh Kumar Pandey (Supra)*** has taken firm view that once the petitioner has not proceeded to comply with the instruction and committed error, is not entitled for any relief and dismissed the writ petition Relevant paragraph of the said judgement are quoted below:-

"To see and ensure that identity of candidate is not reflected from the Answer Sheet and there is zero humane interference, important instructions have been issued with clear cut mention that in case there is an error, following consequences would ensue. Once instructions in question are coupled with consequences, then such instructions necessarily will have to be accepted as of being mandatory in character.

.....
.....

Once such is the factual situation and the law on the subject is clear that instructions in question have to be interpreted in the context of object for which it has been framed and here, in this era of computerization, once petitioner has proceeded not to comply with the instructions and has committed error not at one place but at two places in the OMR sheet and same mistake has been repeated in attendance-sheet, then he has to blame himself and same cannot be dubbed as humane error.

Consequently, in the facts of the case, in case any directive is given to U.P. Public Service Commission to undertake such an exercise as has been prayed by the petitioner, then it would not only open flood gate, same would make way for humane intervention and give chance of manipulation and manoeuvring in the fool proof scheme prepared by U.P. Public Service Commission and any interference by us would tantamount to creating a fresh forum i.e. not provided for.

Writ petition is dismissed accordingly."

17. I have also perused the judgment of this Court in the case of ***Km. Priyanka Chaturvedi (supra).*** The said judgment was placed by the learned counsel for the Commission in reply to submission made by the learned counsel for the petitioner about the submission of application form on the last date. Court has considered this view and reject the same. Relevant paragraph of the said judgement is quoted hereinbelow:-

"The petitioner has sufficient opportunity to go about the exercise of uploading his application form for Main Examination of P.C.S.-2021. He took risk of waiting for the last date and by some misfortune, could not do so on account of vagaries of the internet, which the petitioner has alleged in the writ petition. Even otherwise, the grounds for passing the impugned order by U.P. Public Service Commission has not been denied by the petitioner in her amendment application. Further, the petitioner cannot be permitted to derail the entire recruitment process as she chose to wait for the last date.

In this view of the matter, this Court is of the opinion that the petitioner is not entitled for any relief."

18. In light of such factual position as well as law pronounced by the Courts on different occasions, this Court is of the firm view that once the instructions are mentioned in the advertisement, it is required on the part of candidate to follow the same. In case of failure for any reason on the part of candidates, cannot be a ground to grant any relief. In fact, interference at this stage by the Court would be opening of the Pandora's Box, which may derail the complete examination process causing irreparable loss to the candidates, who have followed terms and conditions of advertisement, while submitting the application form. Once the Commission is not at fault and action of Commission is not arbitrary, there is no occasion for this Court to interfere in such matter by permitting the candidate to appear in the Main Examination, who has admittedly not followed the instruction so given in advertisement.

19. So far as present case is concerned, petitioner, though having full opportunity, has not followed the instruction given in the advertisement dated 16.3.2022 to correct his category from SC

to General, therefore, she is not entitled for any relief and her candidature has rightly been rejected.

20. In view of above facts mentioned hereinabove as well as law laid by this Court, the writ petition lacks merit and is, accordingly, **dismissed**. No order as to costs.

(2022) 11 ILRA 523
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.11.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Writ - A No. 13744 of 2021

Subhramaniyam ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Abhiuday Mehrotra, Sri Shailendra, Sr. Advocate

Counsel for the Respondents:
C.S.C., Sri Ved Byas Mishra, Sri Mani Shanker Mishra

A. Service Law – Retirement – Change in Date of Birth - Class-IV Employees Service Rules, 1975 - Indian Majority Act - Just as an employee cannot be permitted to get his date of birth changed at the fag end of his service, the same rule would apply to the employer also and the date of birth could not have been changed without due inquiry and show cause notice to the petitioner. The employer cannot of its own ignore the High School Certificate which had been duly verified by the U.P. Board only on the basis of incorrect date of birth mentioned in the service records. (Para 14, 21)

Once the date of birth is entered into the service record as per the educational certificate, and accepted by the employee, the same cannot be changed. **In the case of the petitioner no request for change of date of birth in the service records was made by the petitioner. It was the respondents themselves who had issued notice of retirement and thereafter, the petitioner made a representation that his High School Certificate was already available with the Respondent Corporation** as he had submitted the same in 1997 at the time of his promotion. (Para 19)

There is a clear mention by the petitioner in writ petition that he had submitted his educational certificate in 1991 after getting a copy of High School Certificate by him on 21.03.1991. Only thereafter he was promoted in 1991 as a Class-III employee. However such a statement in the writ petition has not been denied in the counter affidavit of the respondents. **It was the duty of the respondents to correct the date of birth of the petitioner, if it had been wrongly recorded in his service record earlier, after he submitted his High School Certificate to them in 1991, and at the time of his promotion 1997 as a Class-III employee. It is not as if the petitioner had passed High School after he had joined service.** In fact he had passed High School in 1980 and he entered service in May, 1982. So it cannot said that he deliberately mentioned a wrong date of birth at the time of filling up of his High School Form for the examination. (Para 20)

B. If the writ petitioner was admitted into service below age, both parties were equally guilty; no misrepresentation of the writ petitioner is on record. The service that was rendered by the writ petitioner while still under age, was paid for by the appellant, and no more. The breach of rules on both sides cannot make the writ petitioner get born earlier. (Para 15)

Editor's note: In the present case, though the Hon'ble Court while exercising an equitable discretion has allowed the change in DOB following the observations in *Sayta Narain (Driver) (infra)* but did not follow observations regarding salary and refused the arrears of salary for the period the petitioner was not in service. (Refer Para 15)

The notice of retirement dated 28.05.2021 is set aside. **The petitioner having already retired on 30.09.2021 and having not worked for more than a year cannot be given arrears of salary on the principle of 'no work no pay'.** The petitioner shall be allowed to work up to 30.11.2024 treating his date of birth as 06.11.1964 giving him continuity of service and annual increments and pay fixation accordingly. The appropriate order for joining of the petitioner at his previous place of posting shall be passed by the Managing Director, the respondent no. 2 within four weeks from the date of receipt of copy of this Order. (Para 22)

Writ petition allowed. (E-4)

Precedent followed:

1. Raj Narain Malviya Vs Zila Panchayat, Sant Ravi Das Nagar & anr., Civil Misc. Writ Petition No. 38194 of 2000, decided on 06.09.2005 (Para 13)

2. Shiv Charan Vs Executive Officer, Nagar Palika Parishad, Lalitpur & anr., 2006 (6) ADJ 310 (Para 13)

3. U.P. Power Corporation Ltd. & anr. Vs Satya Narain (Driver) & anr., 2005 (2) ESC 246 (Allahabad) (DB) (Para 13)

Precedent cited:

1. Karnataka Rural Infrastructure Development Limited Vs T.P. Nataraja & ors., 2021 Legal Eagle (SC) 535 (Para 16)

2. Home Department Vs R. Kirubakaran, 1994 Supp (1) SCC 155 (Para 18)

3. St. of M.P. Vs Premlal Shrivas, (2011) 9 SCC 664 (Para 18)

4. Life Insurance Corporation of India & ors. Vs R. Basavaraju, (2016) 15 SCC 781 (Para 18)

5. U.P. Madhyamik Shiksha Parishad Vs Raj Kumar Agnihotri, (2005) 11 SCC 465 (Para 18)

6. St. of Uttaranchal Vs Pitamber Dutt Semwal, (2005) 11 SCC 477 (Para 18)

Present petition assails the notice of retirement dated 28.05.2021 communicating to him the date of his retirement as 30.09.2021, treating his DOB as 04.09.1961.

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

(Oral)

1. Heard Sri Shailendra, learned Senior Advocate assisted by Sri Abhiuday Mehrotra, learned counsel for the petitioner and Sri Mani Shanker Mishra, Advocate holding brief of Sri Ved Byas Mishra, learned counsel for the respondents.

2. The petitioner has challenged the notice of retirement dated 28.05.2021 communicating to him the date of his retirement as 30.09.2021, treating his date of birth as 04.09.1961.

3. It is the case of the petitioner that he was initially engaged as a daily wage employee/Peon at the Ghaziabad Office of U.P Scheduled Caste Finance and Development Corporation Limited. Later on, his appointment was made regular as per the Class-IV Employees Service Rules, 1975. At the time of his entry into service his date of birth was recorded as 04.09.1961. However, the petitioner had passed his High School in the year 1980 and when he was appointed in the year 1982, he did not posses the pass certificate, he only possesed the mark sheet of having passed High School. He received his High School pass certificate on 21.03.1991 which showed his date of birth as 06.11.1964. The petitioner was subsequently promoted as a Class-III employee on 30.08.1997 and at the time of his promotion he submitted a copy of his High School Certificate which he had

received from the U.P. High School and Intermediate Education Board in the year 1991.

4. There being an apparent discrepancy in the date of birth mentioned in his Original Service Book and in his High School passed certificate. A letter was issued on 15.10.2020 from the Head Office at Lucknow to the District Unit, Ghaziabad regarding verification of age and correct date of birth of the petitioner to which the District Unit replied on 06.11.2010. Subsequently, the Service Book of the petitioner was also sent by the District Unit of the Corporation to the Head Office on 07.01.2021. The Head Office at Lucknow issued a letter to the U.P. Board of High School and Intermediate Education to verify the High School pass certificate of the petitioner and the date of birth mentioned therein through a letter dated 01.03.2021. The Intermediate Education Board sent a copy of the report of the Principal of the Institution where the petitioner had studied and also a copy of their own records on 29.06.2021 saying that as per their records, the petitioner's date of birth is mentioned as 06.11.1964. A copy of the letter sent by the Secretary of Madhyamik Shiksha Parishad U. P., Allahabad has been filed as Annexure-10 to the petition. The report submitted by the Chitrakoot Inter College, Moradabad dated 25.05.2021 has also been annexed as Annexure-09 to the petition.

5. After verification of date of birth from the Board as well as the from the institution in which the petitioner had studied, all of sudden a notice has been issued to the petitioner on 28.05.2021 communicating date of retirement of the petitioner as 30.09.2021. Subsequently, the petitioner received a notice/letter dated 14.07.2021 from the Head Office at Lucknow asking for original High School and Intermediate Certificate, Addhar Card, PAN Card which were sent by the District Office to the Managing Director. The petitioner also represented the matter before the Managing Director at the Head Office at Lucknow through proper channel i.e. through the District Manager wherein he submitted that he had passed his High School before his appointment in the year 1980 i.e. much before his appointment in 1982 and his date of birth was mentioned as 06.11.1964. The date of birth mentioned in his service record was incorrect and he should be allowed to work till 30.11.2024. However, nothing was done in the matter.

6. It has been argued by the learned counsel appearing for the petitioner that there are two Government Orders dated 23.08.1965 and 19.01.1976 with regard to the date of superannuation of the employees, and it has been clearly mentioned therein that the same can only be decided on the basis of High School Certificate. Copies of the said Government Orders have been filed as Annexure-16 and 17 to the writ petition.

7. It has been fairly admitted by the learned counsel for the petitioner that in the absence of an interim order passed in this case, the petitioner was retired on 30.09.2021 by the respondents. However, it has also been stated that if this Court is pleased to find that injustice has been done to the petitioner it can direct the respondents to treat the date of retirement of the petitioner as 30.11.2024 and allow him to work till 30.11.2024 treating him to be wrongly retired on 30.09.2021.

8. In the counter affidavit filed by the respondent Corporation the contents of

the writ petition in so far as they relate to the date of passing of High School by the petitioner in 1980, the date of appointment of the petitioner in 1982 and his promotion in 1997 and the verification of his High School Certificate from the U. P. Board of High School and Intermediate Education and the substance of the Government Order dated 23.08.1965 and 19.01.1976 have not been denied. However, the respondents have denied the date of birth of the petitioner as according to them, the petitioner at the time of entry into service had declared his the date of birth as 06.09.1961.

9. It has been stated that the petitioner was appointed initially on daily wage basis in the District Office at Ghaziabad on 10.03.1981, thereafter, he was appointed as regular Peon in 1982 and promoted temporarily on Class-III post as Assistant Grade-III/Vasuli Sahayak by an Order dated 13.08.1997. At the time of his initial appointment, the petitioner had mentioned his date of birth as 04.09.1961 and the same was recorded not only in his service book, but also in his Employees Provident Fund Scheme Form on which entry was made by the petitioner himself and not by the respondents. All through his service tenure, the petitioner was aware that his date of birth as being mentioned in the service record was 04.09.1961 and that he was due to retire in 30.09.2021, it is only after issuance of the retirement notice to the petitioner in May, 2021 that a dispute had been created by the petitioner at the fag end of his service career, it is impermissible in view of the law settled by the Supreme Court. The counsel for the respondent Corporation has pointed out a copy of the application initially submitted by the petitioner for his appointment as a Class-IV employee which has been filed as CA-01 to the counter affidavit. In the said application the petitioner has mentioned that he had passed High School and that he was 19 years old and that he had earlier worked on daily wage basis in the office and that he had come to know that the District Office had a vacancy of Class-IV employee for which he may be considered for appointment. His case was strongly recommended and forwarded to the Managing Director of the Corporation at Lucknow by the District Manager on 25.04.1982. In the letter dated 25.04.1982 sent by the District Manager to the Managing Director Corporation mention has also been made of the fact that after permission was granted on 30.07.1981 to initiate the process for selection of Class-IV employees in existing vacancies names were invited from the Employment Exchange, Moradabad. Fourteen names were sent by the Employment Exchange and one application of the petitioner was received by hand in the office straightway making a number of applicants as fifteen and that interview was held on 27.03.1982 and that the petitioner was found most suitable as he was already High School pass and had worked for sometime on daily wage basis in the office and he knew the work that had to be performed in the office. The letter dated 22.05.1982 sent by the Managing Director of the Corporation to the District Manager giving permission for appointment of the petitioner as Regular Class-IV Employee/Messenger in the pay scale of Rs.165-250/-, had also asked the District Manager to send the educational certificates of the petitioner, his Caste Certificate, his certificate regarding his Marital Status and Certificate of Medical Fitness. A copy of letter dated 22.05.1982 has been filed at page 13 of the counter affidavit.

10. It has been argued by the learned counsel for the respondent Corporation that in all the records of the

Corporation the petitioner's date of birth has been mentioned clearly. Such records are shown periodically to the employees and they also sign on such papers circulated. No where did the petitioner ever challenge his date of birth as having been wrongly mentioned as 04.09.1961 and the reason for keeping quiet in the matter was that had the petitioner claimed that he was born on 06.11.1964 and not on 04.09.1961, then he would have been ineligible to be appointed as a Class-IV employee as the minimum age required for such post is completion of 18 years as per the Class-IV Employees Service Rules of the State Government, which the petitioner himself has filed as Annexure-02 to the writ petition. The petitioner had through out concealed his actual date of birth and at the fag end of his service tenure he had submitted his High School Certificate showing his date of birth as 06.11.1964.

11. Sri Shailendra, on the other hand, has pointed out that it is not as if the petitioner had submitted his High School Certificate showing his date of birth as 06.11.1964 only after receipt of retirement notice but the High School Certificate of the petitioner was asked for from the District Office by the Head Office at Lucknow initially in 1982, and thereafter, also at the time of his promotion as Class-III employee in 1997. All along the employers had notice of the petitioner having passed his High School in 1982 and that his recorded date of birth was 06.11.1964. In fact a verification of his date of birth and other details as mentioned in the High School Pass Certificate issued to the petitioner in March, 1991 was also got made by the Respondent Corporation from the Principal of the institution in which he had studied and also from the U.P. Board of High School and Intermediate Education.

12. It has been argued that only because of oversight the petitioner did not try and get corrected his date of birth in his original service records which continued to mention his date of birth as 04.09.1961.

13. Learned counsel for the petitioner has placed reliance upon three judgements of this Court namely:-

(i) Civil Misc. Writ Petition No. 38194 of 2000, ' Raj Narain Malviya Vs. Zila Panchayat, Sant Ravi Das Nagar & Another, decided on 06.09.2005,

(ii) Shiv Charan Vs. Executive Officer, Nagar Palika Parishad, Lalitpur and Another 2006 (6) ADJ 310,

(iii) U.P. Power Corporation Ltd. and Another Vs. Satya Narain (Driver) and Another 2005 (2) ESC 1246 (Allahabad) (DB),

14. It has been submitted on the basis of two judgements of this Court rendered by the Co-ordinate Benches and also one by the Division Bench in the case of *Sayta Narain (Driver) (Supra)* that just as an employee cannot be permitted to get his date of birth changed at the fag end of his service, the same rule would apply to the employer also and the date of birth could not have been changed without due inquiry and show cause notice to the petitioner.

15. Learned counsel for the petitioner has referred to the observations made by the Division Bench in *Sayta Narain (Driver) (Supra)* where a similar argument was raised by the appellant Uttar Pradesh Power Corporation before the Division Bench that on the basis of recorded date of birth, the entry into service of the writ petitioner was illegal as he would have joined service at the age of 15 years only whereas the minimum age requirement was

22 years and Indian Mejority Act required that he be at least 18 years when he entered service. It had also been argued that by the impugned order passed by the Writ Court directing the appellants to consider the writ petitioner as having retired on 30.09.2004, the respondent writ petitioner would be getting the benefit of nine months of salary without working. The appellants had cited several judgements before the Division Bench and the Division Bench had observed that the Court ought to exercise an equitable discretion in the matters and to judge whether it is fit and proper case for entering into the factual dispute. The Court observed that if the facts are correctly appreciated the law looks after itself. The Court observed in the paragraphs 9 & 10 as follows:-

"9. .....If the writ petitioner was admitted into service below age, both parties were equally guilty; no misrepresentation of the writ petitioner is on record. The service that was rendered by the writ petitioner while still under age, was paid for by the appellant, and no more. The breach of rules on both sides cannot make the writ petitioner get born earlier.

10. So far as the end period of the service is concerned, and the direction for payment of nine month's salary, even for this time there is nothing on record to show that the writ petitioner was not willing to work; he was prevented from working. If he was prevented from working unjustly, the writ petitioner cannot be made to suffer for the wrong of another....."

16. Learned counsel for the respondent Corporation has placed reliance upon the judgement rendered by the Hon'ble Supreme Court in the Case of ***Karnataka Rural Infrastructure Development Limited Vs. T. P. Nataraja & Others 2021 Legal Eagle (SC) 535*** where the High Court had allowed the writ petition and set aside the order of the dismissal of Suit by the Trial Court rejecting the plaint of the original plaintiff for declaring the date of birth of the employee as 24.01.1961. The High Court had directed the appellants to reconsider the representation of the original writ petitioner with respect to change of date of birth.

17. The Supreme Court was considering several civil appeals arising in similar matters where the original dates of birth recorded in the service books were sought to be changed at the fag end of the service tenure of the employees concerned. The appellant Karnataka Rural Infrastructure Development Limited had adopted the Karnataka State Servants (Determination of Age) Act, 1974 by a Resolution dated 17.05.1991, and therefore, the Rule which provided for request for change of date of birth in service record had to be made within a period of three years from the date of joining or within one year from the date of commencement of the Act of 1974 or from the date of its adoption by the appellant which was held to be mandatory.

18. The Supreme Court preferred to several of its judgements passed in earlier matters which were considered as binding precedents and quoted from ***Home Department Vs. R. Kirubakaran, 1994 Supp (1) SCC 155; State of M.P. Vs. Premlal Shrivas, (2011) 9 SCC 664; Life Insurance Corporation of India & Others Vs. R. Basavaraju (2016) 15 SCC 781; U. P. Madhyamik Shiksha Parishad Vs. Raj Kumar Agnihotri [(2005) 11 SCC 465*** and ***State of Uttaranchal Vs. Pitamber Dutt Semwal [(2005) 11 SCC 477*** , to observe

that any direction for correction of date of birth of a public servant by the Tribunal or the High Court should be issued only after great circumspection and careful inquiry as such a direction for correction of date of birth of public servant concerned has a chain reaction, in as much as others waiting for years, for their respective promotions are affected in this process. The date of birth as recorded in the service book at the time of entry into government service cannot be sought to be changed by a Government Servant after lapse of a long time of his induction into service particularly beyond the time fixed by his employer, and at the fag end of the service career.

19. However, this Court find from a perusal of the judgement rendered by the Supreme Court in the case of Karnataka Rural Infrastructure Development Limited (Supra) that the Supreme Court has repeatedly reiterated that once the date of birth is entered into the service record as per the educational certificate, and accepted by the employee, the same cannot be changed. In the case of the petitioner no request for change of date of birth in the service records was made by the petitioner. It was the respondents themselves who had issued notice of retirement and thereafter, the petitioner made a representation that his High School Certificate was already available with the Respondent Corporation as he had submitted the same in 1997 at the time of his promotion. The said High School Certificate was also got verified by the Corporation from the U. P. Board of High School and Intermediate Education and a favourable report was submitted on 29.06.2021 by the Board. As per the Rules date of birth of any employee has to be first determined on the basis of educational certificates submitted by such employee. In case no educational certificate is available then the Chief Medical Superintendent's Report regarding approximate age of the employee shall be looked into to determine his date of birth. In the case of the petitioner although he had stated in his application for appointment as Class-IV employee in 1982 that he was born on 04.09.1961, (may be for the purpose of getting the employment as he knew he would be otherwise under age, if he showed his date of birth as 06.11.1964), that fact would not detract from the principle as laid down by the Supreme Court in its various judgements that date of birth of an employee cannot be sought to be changed at the fag end of his service career.

20. This Court has noticed that in the writ petition there is a clear mention by the petitioner in paragraph -07 that he had submitted his educational certificate in 1991 after getting a copy of High School Certificate by him on 21.03.1991. Only thereafter he was promoted in 1991 as a Class-III employee. However such a statement in the writ petition has not been denied in paragraph - 08 of the counter affidavit of the respondents. It was the duty of the respondents to correct the date of birth of the petitioner, if it had been wrongly recorded in his service record earlier, after he submitted his High School Certificate to them in 1991, and at the time of his promotion 1997 as a Class-III employee. It is not as if the petitioner had passed High School after he had joined service. In fact he had passed High School in 1980 and he entered service in May, 1982. So it cannot said that he deliberately mentioned a wrong date of birth at the time of filling up of his High School Form for the examination.

21. This Court finds that just as an employee cannot claim to get his date

of birth changed at the fag end of his service tenure, the same principle would apply to the Employers as well. The employer cannot of its own ignore the High School Certificate which had been duly verified by the U.P. Board only on the basis of incorrect date of birth mentioned in the service records.

22. The notice of retirement dated 28.05.2021 is ***set aside***. The petitioner having already retired on 30.09.2021 and having not worked for more than a year cannot be given arrears of salary on the principle of 'no work no pay'. The petitioner shall be allowed to work up to 30.11.2024 treating his date of birth as 06.11.1964 giving him continuity of service and annual increments and pay fixation accordingly. The appropriate order for joining of the petitioner at his previous place of posting shall be passed by the Managing Director, the respondent no. 2 within four weeks from the date of receipt of copy of this Order.

23. The writ petition stands ***allowed***.

(2022) 11 ILRA 530
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.11.2022

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE SAURABH SRIVASTAVA, J.

Special Appeal (D) No. 255 of 2022

Zuhair Bin Saghir ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Asit Srivastava, Akhilesh Kumar Kalra

Counsel for the Respondents:
C.S.C.

A. Service Law – Institution of Open Vigilance Enquiry - U.P. Vigilance Establishment Act, 1965 - No doubt, the very purpose of issuance of the Government Orders is to safeguard the interest of the government officers from unnecessary harassment and curb the tendency of making frivolous and anonymous complaints against the government servants, however, so far as the institution of open vigilance enquiry is concerned, the procedure, is to be governed by the provisions contained in the Vigilance Manual in light of the provisions of U.P. Vigilance Establishment Act, 1965. (Para 27)

Learned Single Judge after considering the purpose and purport of the various Government Orders has referred to certain judgments of Hon'ble SC laying down the test for determination of a particular provision being mandatory or directory and **has held the Government Orders to be directory.** (Para 26)

The facts make it clear that apart from the preliminary enquiry conducted by the Senior Superintendent of Police, Moradabad, the Vigilance Establishment under the provisions of Vigilance Manual and also in terms of the provisions contained in U.P. Vigilance Establishment Act, 1965 conducted an open vigilance enquiry which was considered by the State Government at the appropriate level and accordingly a decision was taken to launch criminal prosecution into the allegations against the appellant-petitioner. (Para 23, 24)

Much emphasis has been laid by the appellant-petitioner on the GO dated 14.04.1981, which provides that in case any complaint is received against the employee or the officer, the enquiry should be conducted by an officer at least two rank higher than the officer against whom complaint is made, however, while doing so it should be kept in mind that the rank of the enquiry officer should be below the rank of

punishing authority. The said GO, will have application in case any fact finding enquiry results into the institution of any departmental proceeding. The GO, dated 14.04.1981 will have no application so far as the open vigilance enquiry is concerned. (Para 34)

B. Material is significant for instituting the open vigilance enquiry, and not the source from where such material is received by the State Government. (Para 28)

The basis for conducting open vigilance enquiry in terms of the provisions contained in Vigilance Manual and also in terms of the statutory provisions contained in U.P. Vigilance Establishment Act, 1965 **is the availability of some material before the State Government warranting such an open vigilance enquiry which would suffice and not the source of material in respect of allegations of misconduct or corruption or any other charge against the employee or officer concerned.** (Para 25)

There may be various sources of collecting and gathering relevant material on the basis of which the State Government forms an opinion whether to institute open vigilance enquiry or to institute departmental proceedings or to draw both these proceedings into the allegations available against the appellant-petitioner. The report of the fact finding enquiry is one such source. Another source may be some complaint. There may be various other sources from where the State Government may gather relevant material. However, availability of such material before the State Government is important and not as to whether such material has been received on the basis of some complaint or through fact finding enquiry or from any other source. (Para 29)

C. It is well settled, concern of the Court while exercising its jurisdiction u/Article 226 of the Constitution of India i.e. while exercising the powers of judicial review is not the decision; rather the decision making process. (Para 31)

So far as the factual aspects are concerned, it is primarily preserve of the executive and administrative authorities and unless and until there is any perversity in findings of fact arrived at by the authority concerned, any interference by this Court in exercise of its power of judicial review will be impermissible. (Para 32)

Special appeal dismissed. (E-4)

Precedent cited:

1. Kumdesh Kumar Sharma Vs St. of U.P. & ors., Judgment dated 03.01.2012, Writ Petition No. 4372 (SS) of 2011 (Para 19)

Present appeal assails order dated 18.05.2022, passed by the learned Single Judge in Writ-A No.2894 of 2022.

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J. & Hon'ble Saurabh Srivastava, J.)

(C.M.Application No. 1 of 2022)

1. Having heard the learned counsel for the appellant-petitioner, learned State Counsel and having gone through the averments made in the application seeking condonation of delay, we find that the delay in filing this Special Appeal has sufficiently been explained.

2. Accordingly, application is allowed and the delay in preferring the Special Appeal is hereby condoned.

(Oder on memo of Appeal)

3. Heard the learned counsel for the appellant-petitioner and learned counsel representing the State-respondents.

4. We have also perused the record available on this Special Appeal.

5. By instituting the proceedings of this intra-court appeal under Chapter VIII Rule 5 of the Rules of the Court, the appellant-petitioner has questioned the order dated 18.05.2022, passed by the learned Single Judge in Writ-A No.2894 of 2022, whereby the said writ petition has been dismissed.

6. At this juncture itself, we may note that by instituting Writ-A No.2894 of 2022, the appellant-petitioner had challenged the validity of the order dated 16.03.2022, passed by the State Government in the Vigilance Department whereby the representation made by the appellant-petitioner, dated 16.08.2021 pursuant to an order passed by this Court on 08.01.2020 in an earlier Writ Petition No.32018(MB) of 2019, was rejected. The prayer made in the said representation dated 16.08.2022, which has been rejected by the State Government by means of order dated 16.03.2022, was that the open vigilance enquiry conducted against him by the Vigilance Establishment and consequently the decision to initiate the criminal proceedings against him be set aside.

7. The State Government considered the said representation in compliance of the order dated 08.01.2020 passed by this Court in Writ Petition No.32018(MB) of 2019 and rejected the same. It is this order, as observed above, which was challenged by the appellant-petitioner before the learned Single Judge.

8. Before delving into the submissions made by the learned counsel for the respective parties, we may note that one complaint against the appellant-petitioner was made while he was posted as District Magistrate, Moradabad. The preliminary enquiry into the said complaint was conducted by the Senior Superintendent of Police, Moradabad which was made available to the State Government, vide his letter dated 27.04.2017. In the said enquiry report, dated 27.04.2017 submitted by the Senior Superintendent of Police, Moradabad, a recommendation was made to get an open enquiry conducted and accordingly direction was issued to the U.P. Vigilance Establishment for conducting an open enquiry. The U.P. Vigilance Establishment, having been so directed, conducted the open enquiry into the allegations against the appellant-petitioner and submitted its report on 11.05.2018 which was considered and accordingly, Vigilance Establishment recommended for instituting a criminal case against the appellant-petitioner and its investigation.

9. The recommendation made by the U.P. Vigilance Establishment was considered and accordingly the State Government at the appropriate level took a decision on 17.07.2018 for criminal investigation into the allegations against the appellant-petitioner.

10. The appellant-petitioner before filing Writ-A No.2894 of 2022 had instituted a writ petition bearing No.32018 of 2019(MB) before this Court with the prayer for quashing the open enquiry report conducted by the Vigilance Establishment. Further prayer made by the appellant-petitioner in the said writ petition was that the State Government may be directed not to initiate criminal prosecution/proceeding against him on the basis of the said open vigilance enquiry conducted on the complaint made by the complainant-Dushyant Raj Chaudhary. It was further prayed in the said writ petition that direction be issued to the State Government

to first comply with the provisions of the Government Orders dated 09.05.1997, 01.08.1997 and 24.05.2012 and only then to entertain the complaint and proceed accordingly in terms of the alleged mandatory provisions contained in the Government Order dated 24.05.2012.

11. We may notice that the primary submission made by the learned counsel for the appellant-petitioner in the said writ petition was that the complaint against him has been enquired into in derogation of the provisions contained in various Government Orders mentioned above and as such on the basis of such enquiry, neither any open vigilance enquiry could have been ordered nor any criminal prosecution could be ordered against him.

12. The aforesaid writ petition was finally disposed of by this Court by means of judgment and order dated 08.01.2020, whereby the Court had directed that the appellant-petitioner shall move a detailed representation before the Chief Secretary of the State of U.P. taking his defence and the objections against the complaint and in case any such representation is moved by the appellant-petitioner, the Chief Secretary shall examine the same and pass appropriate speaking order after considering the submissions which may be made in the representation. The Court in its order dated 08.01.2020 had also provided that the State authorities shall not proceed against the appellant-petitioner till the representation is decided.

13. In pursuance of the said order dated 08.01.2020, the appellant-petitioner submitted his representation on 16.08.2021 and the Chief Secretary of the State Government decided his representation by order dated 16.03.2022, which, as observed above, was challenged by the appellant-petitioner before the learned Single Judge in Writ-A No. 2894 of 2022.

14. The learned Single Judge after considering the case of the respective parties has dismissed the said writ petition by means of order dated 18.05.2022 which is under appeal before us.

15. As has been the case of the appellant-petitioner earlier, the primary submission of learned counsel for the appellant-petitioner is that the complaint made by the complainant against the appellant-petitioner ought to have been dealt with by the State authorities by following the provisions contained in the Government Orders, which have been referred to herein above. It has, thus, been argued that the said Government Orders being mandatory could not have been defied by the State authorities and any deviation from the said Government Orders not only vitiates the entire action initiated against the appellant-petitioner but the same also seriously prejudices him.

16. Learned counsel for the appellant-petitioner has also urged that the Chief Secretary while deciding the representation preferred by the appellant-petitioner pursuant to the order of this Court, dated 08.01.2020 has not given his own views or findings; rather he has reiterated what ever had happened earlier and as such the order passed by the Chief Secretary which was under challenge before the learned Single Judge cannot be said to be a reasoned order which was to be passed by him in pursuance of the direction issued by this Court by means of its order dated 08.01.2020.

17. It has also been argued on behalf of the appellant-petitioner that it is the admitted case of the parties that the

complaint made by the complainant against the appellant-petitioner was not accompanied by an affidavit and as such in this view of the matter either the State authorities ought to have insisted for filing of affidavit by the complainant or the complaint would not have proceeded further in absence of the affidavit, which is a mandatory requirement in terms of the Government Orders referred to herein above for enquiring into any complaint against the State Government officers, specially against Class-I officers.

18. Further submission of learned counsel for the appellant-petitioner is that certain findings were recorded by this Court in its order dated 08.01.2020 which have clearly been ignored by the Chief Secretary while passing the order dated 16.03.2022 and all these aspects of the matter have clearly not been taken into account by the learned Single Judge while dismissing the writ petition instituted by the appellant-petitioner. Accordingly, submission is that the order passed by the learned Single Judge is not sustainable.

19. Impeaching the findings recorded by the learned Single Judge to the effect that the Government Orders relied upon by the appellant-petitioner are not mandatory, it has been submitted by the learned counsel representing the appellant-petitioner that considering the purport and purpose of the said Government Orders, the provisions contained therein are mandatory and the purpose is not to cause any prejudice to the government officer against whom such unsubstantiated complaint, not even supported by an affidavit, is received. To fortify his submission, learned counsel for the appellant-petitioner relies upon a **judgment dated 03.01.2012, passed by this Court in Writ Petition No. 4372(SS) of 2011; Kumdesh Kumar Sharma Vs. State of U.P. and others**, which provides that various Government Orders issued from time to time in relation to dealing with the complaints are to be strictly followed as the purpose of such Government Orders is not only to safeguard the government officers from unnecessary harassment but also to curb the tendency of making frivolous and anonymous complaints against the government servants.

20. On the basis of aforesaid submissions, it has been prayed that the order under appeal herein passed by the learned Single Judge be set aside and the matter be remitted to the learned Single Judge for decision afresh.

21. Learned Additional Chief Standing Counsel, Sri Amitabh Rai representing the State-respondents has vehemently opposed the Special Appeal by asserting firstly that the Government Orders being relied upon by the appellant-petitioner do not contain any mandatory provisions; rather the provisions therein are directory and in certain circumstances deviation from such provisions is permissible for the State Government which has to be always vigilant over the conduct of its officers, specially in a case of complaint relating to serious of charges and corruption etc. Sri Rai has secondly submitted that so far as open vigilance enquiry is concerned, the same is conducted in terms of the provisions contained in the Vigilance Mannual of the State Government and keeping in view the provisions of U.P. Vigilance Establishment Act, 1965 which is a State Legislation enacted for the purposes of enquiring into the misconduct and other such allegations from the vigilance angle. He has, thus,

argued that in case of any open vigilance enquiry by the Vigilance Establishment, the Government Orders being referred to by the appellant-petitioner will have no application and such vigilance enquiry is to be conducted independent of the provisions contained in the Government Orders. According to Sri Rai, learned State Counsel, the procedure as per the Vigilance Mannual which is in vogue in the State of U.P. is that on receiving any complaint or on any fact coming to the notice of the State Government otherwise, an open vigilance enquiry can be ordered and report of such open vigilance enquiry is considered by the Vigilance Department in consultation with the Administrative Department and there upon at the competent level of the State Government a decision is taken either to institute departmental proceedings or to institute criminal prosecution or both. His submission, thus, is that so far as the vigilance enquiry is concerned, the Government Orders relied upon by the appellant-petitioner do not have any application. The submission, thus, is that the learned Single Judge has considered all these aspects of the matter and has come to the conclusion that there is no irregularity or illegality in the order dated 16.03.2022, passed by the Chief Secretary and hence, this Special Appeal is liable to be dismissed at its threshold.

22. We have given our thoughtful consideration to the rival submissions made by the learned counsel representing the respective parties.

23. The facts, as noticed above, make it clear that apart from the preliminary enquiry conducted by the Senior Superintendent of Police, Moradabad, the Vigilance Establishment under the provisions of Vigilance Mannual and also in terms of the provisions contained in U.P. Vigilance Establishment Act, 1965 conducted an open vigilance enquiry which was considered by the State Government at the appropriate level and accordingly a decision was taken to launch criminal prosecution into the allegations against the appellant-petitioner.

24. It is not in dispute that apart from the fact finding enquiry conducted by the Senior Superintendent of Police, Moradabad, another fact finding enquiry was conducted by a Committee constituted by the Commissioner, Moradabad Division. However, these are not the only two fact finding enquiries on the basis of which the decision to institute criminal prosecution against the appellant-petitioner has been taken, the basis of such decision rather is the open vigilance enquiry conducted by the Vigilance Establishment.

25. We are of the opinion that basis for conducting open vigilance enquiry in terms of the provisions contained in Vigilance Mannual and also in terms of the statutory provisions contained in U.P. Vigilance Establishment Act, 1965 is the availability of some material before the State Government warranting such an open vigilance enquiry which would suffice and not the source of material in respect of allegations of misconduct or corruption or any other charge against the employee or officer concerned.

26. So far as the emphasis laid by the learned counsel for the appellant-petitioner on the Government Orders referred to herein above, is concerned, we are in agreement with the findings recorded by the learned Single Judge in the order which is under appeal before us. Learned Single

Judge after considering the purpose and purport of the various Government Orders has referred to certain judgments of Hon'ble Supreme Court laying down the test for determination of a particular provision being mandatory or directory and has held the Government Orders to be directory.

27. No doubt, the very purpose of issuance of the Government Orders being relied upon by the appellant-petitioner is to safeguard the interest of the government officers from unnecessary harassment and curb the tendency of making frivolous and anonymous complaints against the government servants as laid down by this Court in the case of **Kumdesh Kumar Sharma (supra)**, however, so far as the institution of open vigilance enquiry is concerned, the procedure, in our opinion, is to be governed by the provisions contained in the Vigilance Mannual in light of the provisions of U.P. Vigilance Establishment Act, 1965.

28. As observed above, we may emphasize that for instituting the open vigilance enquiry, it is the material which is significant and not the source from where such material is received by the State Government.

29. There may be various sources of collecting and gathering relevant material on the basis of which the State Government forms an opinion whether to institute open vigilance enquiry or to institute departmental proceedings or to draw both these proceedings into the allegations available against the appellant-petitioner. The report of the fact finding enquiry is one such source. Another source may be some complaint. There may be various other sources from where the State Government may gather relevant material. However, availability of such material before the State Government is important and not as to whether such material has been received on the basis of some complaint or through fact finding enquiry or from any other source.

30. Learned counsel for the appellant-petitioner has made an attempt to take us to the factual aspects of the matter by referring to the extract of the representation dated 16.08.2021 made by the appellant-petitioner which has been reproduced in the order dated 16.03.2022 and the finding recorded by the Chief Secretary thereon.

31. As is well settled, concern of the Court while exercising its jurisdiction under Article 226 of the Constitution of India i.e. while exercising the powers of judicial review is not the decision; rather the decision making process.

32. So far as the factual aspects are concerned, it is primarily preserve of the executive and administrative authorities and unless and until there is any perversity in findings of fact arrived at by the authority concerned, any interference by this Court in exercise of its power of judicial review will be impermissible.

33. As regards the submission of learned counsel appearing for the appellant-petitioner that this Court in its order dated 08.01.2020 passed in earlier writ petition filed by the appellant-petitioner that the vigilance enquiry has been conducted without adhering to the provisions contained in the Government Orders, is concerned, we may only opine that said findings contained in the order dated 08.01.2020 will loose its impact in this case for the reason that the open vigilance

enquiry is to be regulated primarily by the provisions contained in the Vigilance Mannual and not in terms of the procedure as given in the Government Orders. Further, the order dated 08.01.2020 had directed the Chief Secretary to consider all the aspects in the matter which have been considered by him while passing the order dated 16.03.2022.

34. Much emphasis has been laid by the learned counsel representing the appellant-petitioner on the Government Order dated 14.04.1981, which provides that in case any complaint is received against the employee or the officer, the enquiry should be conducted by an officer at least two rank higher than the officer against whom complaint is made, however, while doing so it should be kept in mind that the rank of the enquiry officer should be below the rank of punishing authority. The said Government Order, in our opinion, will have application in case any fact finding enquiry results into the institution of any departmental proceeding. The Government Order, dated 14.04.1981 will have no application so far as the open vigilance enquiry is concerned for the reasons which have been elaborated above.

35. In view of the discussions made and the reasons given above, in our considered opinion, the order dated 18.05.2022, passed by the learned Single Judge in Writ-A No. 2894 of 2022 does not warrant any interference by this Court in this Special Appeal. The Special Appeal is, thus, hereby **dismissed**.

(2022) 11 ILRA 537
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.09.2022

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE AJAY BHANOT, J.

Civil Misc. Review Appl. No. 2 of 2019
in
Spl. Appl. No.1083 of 2019

Vinod Kumar ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Babu Ram Yadav, Sri Salil Krishna

Counsel for the Respondents:
C.S.C.

A. Civil Law – Nature, Scope and Ambit of Power of review - Code of Civil Procedure, 1908 - Order XLVII, Rule 1 - **The settled law is that power of review is available only when there is an error apparent on the face of the record and not on erroneous decision.** If the parties aggrieved by the judgment on the ground that it is erroneous, remedy is only questioning the said order in appeal. **The power of review u/Order XLVII, rule 1, CPC may be opened *inter alia*, only if there is a mistake or an error apparent on the face of the record, the said power cannot be exercised as is not permissible for an erroneous decision to be "reheard and corrected." A review petition has a limited purpose and cannot be allowed to be 'an appeal in disguise'.** (Para 5, 7, 9)

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. The power of review cannot be confused with appellate power which enables a superior court to correct all errors committed by a subordinate court. It is not rehearing of an original matter. A repetition of old and overruled argument is not enough to reopen concluded adjudications. (Para 5, 6)

B. The error has to be self-evident and is not to be found out by a process of reasoning. An error apparent on the face of

the record for acquiring jurisdiction to review must be such an error which may strike one on a mere looking at the record and would not require any long drawn process of reasoning. (Para 5, 7)

C. The parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction. 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. (Para 5, 6)

In the present case, the applicant is seeking review of the order passed in special appeal on the grounds that had already been taken before this court and is in fact seeking review on merits. A bare glance over the quoted grounds taken in the special appeal and in the review application would clearly reflect that in fact applicant is seeking rehearing of the appeal, which according to him was dismissed by an erroneous judgment. (Para 11, 14)

The present review application does not fall within the parameters of the Order XLVII, rule 1 C.P.C. (Para 16)

Review application rejected. (E-4)

<u>Precedent followed</u>:

1. Shri Ram Sahu (Dead) Through LRS & ors. Vs Vinod Kumar Rawat & ors., 2020 SCC Online SC 896 (Para 5)

2. Kamlesh Verma Vs Mayawati & ors., (2013) 8 SCC 320 (Para 6)

3. Sasi (Dead) Through Legal Representative Vs Arvindakshan Nair & ors., (2017) 4 SCC 692 (Para 7)

4. Haridas Vs Usha Rani Banik, AIR 2006 SC 1634 (Para 8)

5. T.P. Singh Vs Registrar/Assistant Registrar Firms & anr., 2018 (4) ADJ 782 (Para 10)

Present review application seeks review of the order dated 18.10.2019, whereby special appeal filed against the reasoned judgment of Writ Court dated 18.09.2019 was dismissed on merits.

(Delivered by Hon'ble Vivek Kumar Birla, J. & Hon'ble Ajay Bhanot, J.)

Re: Civil Misc. Review Application No.2 of 2019

1. Heard Sri Babu Ram Yadav, learned counsel for the applicant at length.

2. Present review application has been filed seeking review of the order dated 18.10.2019 whereby special appeal filed against the reasoned judgment of Writ Court dated 18.09.2019 was dismissed on merits.

3. Before proceeding further it would be appropriate to take note of Order XLVII, Rule 1 of the Code of Civil Procedure, 1908 (hereinafter referred to as the CPC) as well as scope of review as per settled law.

4. For ready reference Order XLVII, Rule 1 CPC is quoted 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 of 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 to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

[Explanation.- 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.]"

5. In ***Shri Ram Sahu (Dead) Through LRS and Others vs. Vinod Kumar Rawat and Others, 2020 SCC Online SC 896***, the Hon'ble Supreme Court has considered the law on the scope of review in detail, relevant paragraphs whereof are quoted as under:-

"26. In the case of Haridas Das vs. Usha Rani Banik (Smt.), (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.

16. In Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, AIR 1979 SC 1047, this Court held that there are definite limits to the exercise of power of review. In that case, an application under Order 47 Rule 1 read with Section 151 of the Code was filed which was allowed and the order passed by the Judicial Commissioner was set aside and the writ petition was dismissed. On an appeal to this Court it was held as under: (SCC p. 390, para 3)

"It is true as observed by this Court in Shivdeo Singh v. State of Punjab, AIR 1963 SC 1909 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."

17. The judgment in Aribam case has been followed in Meera Bhanja. In that case, it has been reiterated that an error apparent on the face of the record for acquiring jurisdiction to review must be such an error which may strike one on a mere looking at the record and would not require any longdrawn process of reasoning. The following observations in connection with an error apparent on the face of the record in Satyanarayan Laxminarayan Hegde v. Millikarjun Bhavanappa Tirumale, AIR 1960 SC 137 were also noted:

"An error which has to be established by a longdrawn 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 selfevident 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."

18. It is also pertinent to mention the observations of this Court in Parsion Devi v. Sumitri Devi, (1997) 8 SCC. Relying upon the judgments in Aribam and Meera Bhanja it was observed as under:

"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'."

27. In the case of Lily Thomas vs. Union of India, (2000) 6 SC 224, it is observed and held 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 the said decision 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 this 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 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. The 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, fin*ality 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. The dictionary meaning of the word "review" is "the act of looking, offer something again with a view to 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, this 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.

31. What can be said to be an error apparent on the face of the proceedings has been dealt with and considered by this 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 clearcut rule by which the boundary between the two classes of errors could be demarcated."

32. In the case of Parsion Devi vs. Sumitri Devi, (Supra) in paragraph 7 to 9 it is observed and held 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."

8. 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 (supra) this 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, this 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 selfevident 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.

23. 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 Act have been interpreted and limitations on the power of the civil court/tribunal to review its judgment/decision have been identified.

24. In Rajah Kotagiri Venkata Subbamma Rao v. Rajah Vellanki Venkatrama Rao (18991900) 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)

25.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."

26. In Moran Mar Basselios Catholicos v. Mar Poulose Athanasius (supra) this 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'."

27. In Thungabhadra Industries Ltd. v. Govt. of A.P. (supra) it was held that a review is by no means an appeal in disguise whereof an erroneous decision can be corrected.

28. In Parsion Devi v. Sumitri Devi (Supra) it was held as under: (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 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'. 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'."

29. In Haridas Das v. Usha Rani Banik, (supra) this 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."

`30. In Aribam Tuleshwar Sharma v. Aribam Pishak Sharma (Supra) this 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 (Supra) 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."

`31. In K. Ajit Babu v. Union of India, (1997) 6 SCC 473, it was held 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.

32. In Ajit Kumar Rath v. State of Orissa, (1999) 9 SCC 596, this 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 3031)

"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."

33. In State of Haryana v. M.P. Mohla, (2007) 1 SCC 457 this Court held as under: (SCC pp. 46566, 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."

34. In Gopal Singh v. State Cadre Forest Officers' Assn., (2007) 9 SCC 369 this 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."

35. <u>The principles which can be culled out from the abovenoted judgments are:</u>

(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 selfevident and which can be discovered by a long 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."

34. 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 which appeal is allowed but no appeal is preferred or where there is no provision for appeal against an order and decree, may apply for review of the decree or order as the case may be in the Court, which may order or pass the decree. 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. However, an order can be reviewed by a Court only on the prescribed grounds mentioned in Order 47 Rule 1 CPC, which has been elaborately discussed hereinabove. 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."

(Emphasis supplied)

6. In ***Kamlesh Verma vs. Mayawati and Others, (2013) 8 SCC 320***, the Hon'ble Apex Court in paragraphs 17 to 20 has held as under:

*"17. In a review petition, it is not open to the Court to reappreciate the evidence and reach a different conclusion, even if that is possible. Conclusion arrived at on appreciation of evidence cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto. This Court in Kerala SEB v. Hitech Electrothermics & Hydropower Ltd. (2005) 6 SCC 651 held as under: (**SCC p. 656, para 10)***

"10. ... In a review petition it is not open to this Court to reappreciate the evidence and reach a different conclusion, even if that is possible. The learned counsel

for the Board at best sought to impress us that the correspondence exchanged between the parties did not support the conclusion reached by this Court. We are afraid such a submission cannot be permitted to be advanced in a review petition. The appreciation of evidence on record is fully within the domain of the appellate court. If on appreciation of the evidence produced, the court records a finding of fact and reaches a conclusion, that conclusion cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto. It has not been contended before us that there is any error apparent on the face of the record. To permit the review petitioner to argue on a question of appreciation of evidence would amount to converting a review petition into an appeal in disguise."

*18. Review is not rehearing of an original matter. The power of review cannot be confused with appellate power which enables a superior court to correct all errors committed by a subordinate court. A repetition of old and overruled argument is not enough to reopen concluded adjudications. This Court in Jain Studios Ltd. v. Shin Satellite Public Co. Ltd. (2006) 5 SCC 501, held as under: (**SCC pp. 504-505**, paras 11-12)*

"11. So far as the grievance of the applicant on merits is concerned, the learned counsel for the opponent is right in submitting that virtually the applicant seeks the same relief which had been sought at the time of arguing the main matter and had been negatived. Once such a prayer had been refused, no review petition would lie which would convert rehearing of the original matter. It is settled law that the power of review cannot be confused with appellate power which enables a superior court to correct all errors committed by a subordinate court. It is not rehearing of an original matter. A repetition of old and overruled argument is not enough to reopen concluded adjudications. The power of review can be exercised with extreme care, caution and circumspection and only in exceptional cases.

12. When a prayer to appoint an arbitrator by the applicant herein had been made at the time when the arbitration petition was heard and was rejected, the same relief cannot be sought by an indirect method by filing a review petition. Such petition, in my opinion, is in the nature of "second innings' which is impermissible and unwarranted and cannot be granted."

19. Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction.

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" have been interpreted in **Chhajju Ram v. Neki (1921-22) 49 IA 144 , (1922)***

16 LW 37 , AIR 1922 PC 112 *and approved by this Court in* ***Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius AIR 1954 SC 526 , (1955) 1 SCR 520*** *to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in Union of India v. Sandur Manganese & Iron Ores Ltd. (2013) 8 SCC 337 , JT (2013) 8 SC 275*

20.2 When the review will not be maintainable:

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived."

(Emphasis supplied)

7. In ***Sasi (Dead) Through Legal Representative vs. Arvindakshan Nair and Others, (2017) 4 SCC 692*** the Hon'ble Supreme Court in paragraphs 6 to 9 has held as under:

"6. The grounds enumerated therein are specific. The principles for interference in exercise of review jurisdiction are well settled. The Court passing the order is entitled to review the order, if any of the grounds specified in the aforesaid provision are satisfied.

*7. In Thungabhadra Industries Ltd. v. State of A.P Thungabhadra Industries Ltd. v. State of A.P, AIR 1964 SC 1372, the Court while dealing with the scope of review had opined: (**AIR p. 1377**, para 11)*

"11. 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."

(emphasis supplied)

8. In Parsion Devi v. Sumitri Devi Parsion Devi v. Sumitri Devi, 1997 8 SCC 715, the Court after referring to Thungabhadra Industries Ltd., Meera Bhanja (Smt) v. Nirmala Kumari Choudhury (Smt). Meera Bhanja (Smt) v. Nirmala Kumari Choudhury (Smt)., 1995 1

SCC 170 and Aribam Tuleshwar Sharma v. Aribam Pishak Sharma Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, 1979 4 SCC 389, held thus: (Parsion Devi case, ***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 O****rder 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"."*

9. The aforesaid authorities clearly spell out the nature, scope and ambit of power to be exercised. The error has to be self-evident and is not to be found out by a process of reasoning. We have adverted to the aforesaid aspects only to highlight the nature of review proceedings."

(Emphasis supplied)

8. The judgment of **Haridas v. Usha Rani Banik, AIR 2006 SC 1634**, has already taken note of in the judgment of ***Shri Ram Sahu (supra).***

9. Therefore, the settled law is that power of review is available only when there is an error apparent on the face of the record and not on erroneous decision. If the parties aggrieved by the judgment on the ground that it is erroneous, remedy is only questioning the said order in appeal. The power of review under Order XLVII, rule 1, CPC may be opened inter alia, only if there is a mistake or an error apparent on the face of the record, the said power cannot be exercised as is not permissible for an erroneous decision to be "reheard and corrected." A review application also cannot be allowed to be "an appeal in disguise".

10. Same view was also expressed by a co-ordinate Bench of this Court while dealing with review application filed in the Writ Petition in the case ***T.P. Singh vs. Registrar/Assistant Registrar Firms and Another, 2018 (4) ADJ 782.***

11. We find that the learned counsel for the applicant is seeking review of the order passed in special appeal on the grounds that had already been taken before this court and is in fact seeking review on merits.

12. Learned counsel for the applicant has taken grounds D, E and F for review of the order of this Court, which are quoted as under:

"D. Because, the Hon'ble Supreme Court as well as the Hon'ble Madras High Court considered grievance of the identically situation candidates for granting notional increment after retirement of employee. Hence the applicant/appellant is also entitled for getting lost notional increment just after his retirement for the purpose of pensionary benefits according to law laid down in the case of P. Ayyamperumall vs. Registrar Central Administrative Tribunal Madras Bench which has been confirmed by order dated 23.07.2018 passed by Hon'ble Supreme Court in Special Leave Petition (Civil) diary No.(s) 22283 of 2018 (Union of India and others vs. P. Ayyamperumal).

E. Because, the benefit of last notional increment was ordered by the Hon'ble High

Curt as well as Hon'ble Supreme Court after more than four years from his retirement to P. Ayyamperumal, therefore the appellant also is entitled for getting the notional increment after his retirement.

F. Because, P. Ayyamperumal was retired on 30.06.2013 and the notional increment was ordered to him from 01.07.2013 after his retirement and after ending the relationship of master and servant by the Hon'ble Supreme Court as well as Hon'ble Madras High Court in the case of P.Ayyamperumal. Hence the appellant is also entitled for getting the benefit of last notional increment after his retirement on 30.06.2015 which fail due on 01.07.2015."

13. For ready reference, grounds B and E of the memo of Special Appeal are quoted as under:-

"B. Because, the petitioner is entitled for getting the last notional increment for the purpose of pensionery benefits in pursuance of law laid by the Hon'ble Madras High Court as well as Hon'ble Supreme Court in the case of P. Ayyamperumal vs. The Registrar, Central Administrative Tribunal and Others but the claim of the petitioner had been rejected illegally and arbitrarily by the respondent by making wrong interpretation of law laid down by the Hon'ble Supreme Court.

E. Because, just after getting knowledge of the above said order dated 15.09.2017 and 23.07.2015, petitioner/appellant without making any delay moved his representation dated 29.10.2018 before the appropriate authority and claimed his annual increment due on 01 July, 2015 in pursuance of law laid down in the P. Ayyamperumal case (supra) within three months."

14. A bare glance over the quoted grounds taken in the special appeal and in the review application would clear reflects that in fact applicant is seeking rehearing of the appeal, which according to him was dismissed by an erroneous judgment.

15. Admittedly, all such grounds were available to the petitioner before the Writ Court as well as before the Special Appellate Court.

16. We do not find that the present review application falls within the parameters of the Order XLVII, rule 1 C.P.C. and we are not satisfied with the argument advanced by the learned counsel for the applicant particularly on the strength of grounds D, E and F, which, admittedly, had already been taken before the Bench of which one of us (Justice Ajay Bhanot) was a member, review whereof is being sought.

17. Review application, accordingly, stands rejected.

(2022) 11 ILRA 551
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.11.2022

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

Writ-A No. 9256 of 2021

Devendra Kumar Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Santosh Kumar Shukla

Counsel for the Respondents:
C.S.C.

A. Service Law – Transfer – Government Order dated 18.04.2018 - Clause 3, 4(4), 5, 10 - To allow the respondents to transfer a teacher serving satisfactorily on a post only to accommodate a person seeking transfer on that post would be to permit uncontrolled arbitrariness and whimsical action to the administrative authorities. That itself is sufficient to annul the transfer of the petitioner. (Para 13)

Perusal of the GO dated 18.04.2018 reveals, it provides for mechanism to transfer teachers on their own request, only. It does not contain a general policy statement to enable transfer of teachers, on administrative considerations or generally. Even to transfer teachers on their own request, applications could be made to seek transfer to a post mentioned in the list of vacant posts only (available at various institutions at different districts), as notified and uploaded on the related website in terms of Clause 4(4) of the GO dated 18.04.2018. By virtue of Clause 4(5) of that GO, the desirous could apply for transfer only against such notified vacant posts, and no other. **No disclosure has been made in the counter affidavit as to the then existing vacancy position at different institutions at different districts,** against which one teacher, Smt. Pooja Tyagi may have applied, to be transferred. (Para 6)

Undisputedly, the post of Assistant Teacher (Mathematics) at Government Inter College, Nandgram, Ghaziabad was never vacant. The petitioner was serving at that institution from before. He had not applied for transfer. (Para 7)

In absence of any clause under the government policy allowing for transfer to be made generally, the discretion of the administrative authority to give preference to the said Smt. Pooja Tyagi, could not be exercised to dislodge the petitioner from the post on which he was working satisfactorily. No complaint or objection exists as to the working of the petitioner as Assistant Teacher (Mathematics) at Government Inter College, Nandgram, Ghaziabad. (Para 12)

B. This action (of transfer) if permitted would amount to a penalty imposed on the teacher dislodged from his settled place of posting, for no fault; without sanction of law and without initiating any disciplinary proceeding. (Para 13)

Consequently, the transfer orders dated 13.07.2021 (Nandgram to Tyodi) and 03.09.2021 (Tyodi, Ghaziabad to Anooppur, Dibai, Hapur) in so far as they seek to transfer out the petitioner from the Government Inter College, Nandgram, Ghaziabad are wholly conflicted to law. They are wholly unsustainable. Accordingly, the transfer orders are quashed. (Para 14)

Writ petition allowed. (E-4)

Present petition assails transfer order dated 13.07.2021, whereby the petitioner, who was then working as Assistant Teacher (Mathematics) at Government Inter College, Nandgram, Ghaziabad, was transferred intra-district, to Government Inter College, Tyodi, Ghaziabad.

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. Heard Shri Santosh Kumar Shukla, learned counsel for the petitioner and learned Standing Counsel for the State.

2. Originally, the present petition was filed to challenge the transfer order dated 13.07.2021 whereby the petitioner, who was then working as Assistant Teacher (Mathematics) at Government Inter College, Nandgram, Ghaziabad, was transferred intra-district, to Government Inter College, Tyodi, Ghaziabad.

3. Perusal of the aforesaid order reveals, it provided for a solitary transfer of the petitioner. There was no other or corresponding transfer contemplated or disclosed therein. Upon the petition being entertained, vide order dated 20.09.2021, it

was provided, the petitioner may not be relieved unless he has already been relieved. As a fact, the petitioner came to be relieved.

4. On 03.09.2021, another transfer order came to be passed whereby the petitioner was transferred, this time inter-district, from Government Inter College, Tyodi, Ghaziabad to Government Inter College Anooppur, Dibai, Hapur. Accordingly, the petitioner sought amendment to the writ petition. It was allowed. Order dated 03.09.2021 (annexed to the C.M. Amendment Application No. 2 of 2021), also speaks of a single transfer - of the petitioner, from Government Inter College, Tyodi, Ghaziabad to Government Inter College Anooppur, Dibai, Hapur.

5. The counter affidavit reveals, the transfer of the petitioner was not occasioned by any request of the petitioner. Rather, the initial transfer was made under the 4% Minister's quota contemplated under Clause 10 of the Government Order dated 18.04.2018, as made applicable to the academic session 2021-22. That discretion was exercised solely to accommodate one Smt. Pooja Tyagi at Government Inter College, Nandgram, Ghaziabad. She was earlier working as an Assistant Teacher at Government Higher Secondary School, Salempur Gurjar, Gautam Budh Nagar. Then, the second transfer order was occasioned on part acceptance of the objection of the petitioner being found true i.e., there did not exist any vacant post of Assistant Teacher (Mathematics) at Government Inter College, Tyodi, Ghaziabad. No other reason has been disclosed.

6. As to legality of the action/transfer order, perusal of the Government Order dated 18.04.2018 reveals, it provides for mechanism to transfer teachers on their own request, only. It does not contain a general policy statement to enable transfer of teachers, on administrative considerations or generally. Even to transfer teachers on their own request, applications could be made to seek transfer to a post mentioned in the list of vacant posts only (available at various institutions at different districts), as notified and uploaded on the related website in terms of Clause 4(4) of the Government Order dated 18.04.2018. By virtue of Clause 4(5) of that Government Order, the desirous could apply for transfer only against such notified vacant posts, and no other. No disclosure has been made in the counter affidavit as to the then existing vacancy position at different institutions at different districts, against which the said Smt. Pooja Tyagi may have applied, to be transferred.

7. Suffice to note, undisputedly, the post of Assistant Teacher (Mathematics) at Government Inter College, Nandgram, Ghaziabad was never vacant. The petitioner was serving at that institution from before. He had not applied for transfer. Second feature of that transfer policy is ? inter-se preference to be given in consideration to be made on all transfer applications. In that four categories of applicants were specified in Clauses 3 (i), (ii), (iii) and (iv) of the Government Order dated 18.04.2018. They were entitled to preferential consideration.

8. *Prima facie*, Smt. Pooja Tyagi does not appear to qualify for preferential consideration under any of those categories. While she had claimed death of both her parents and had further claimed ill-health of her mother-in-law, those facts/circumstances were not included under any of the above noted clauses to

grant preference to consider her transfer application, irrespective of her seniority position. At the same time, it may be recorded, that issue would remain relevant and material for consideration of the claim set up by Smt. Pooja Tyagi. Inasmuch as the petitioner is not aggrieved by the transfer sought by Smt. Pooja Tyagi from Government Higher Secondary School, Salempur Gurjar, Gautam Budh Nagar, no binding observation is being made with respect to that.

9. For the present purpose, Clause 5 of the Government Order dated 18.04.2018 allowed for exercise of choice of five institution/s to which an applicant may seek transfer to. In view of the Clause 4(4) of that Government Order providing for notification of vacant posts at different institutions, in different districts read with the further stipulation of "*pradarshit riktiyon*" contained in Clause 4(5) thereof, such choice could have been exercised by an applicant and acted upon by the respondents only with respect to such notified vacant post/s only and not against any post/s that was/were occupied or filled up or which may not have been notified as a vacant post.

10. Looked in that light, Clause 10 of the Government Order dated 18.04.2018 reads as below:

"जनहित में संवर्ग के प्रतिशत की सीमा तक माननीय विभागीय मंत्री जी द्वारा किसी शिक्षक / शिक्षिका को अनुरोध के आवेदनों पर स्थानान्तरित किये जाने के आदेश दिए जा सकेंगे।"

11. In view of the above, the discretion given to the administrative authority under the above noted Clause 10 of the Government Order is not an exception to the general policy but an aid to the same. That discretion could be exercised to transfer Smt. Pooja Tyagi to a notified vacant post in preference over other applicants, though she may not have been entitled to any preferential consideration under any of the four categories of Clause 3 of the Government Order dated 18.04.2018 and though she may have stood lower in seniority and therefore preference, for consideration of transfer, first.

12. In absence of any clause under the government policy allowing for transfer to be made generally, the discretion of the administrative authority to give preference to Smt. Pooja Tyagi, could not be exercised to dislodge the petitioner from the post on which he was working satisfactorily. No complaint or objection exists as to the working of the petitioner as Assistant Teacher (Mathematics) at Government Inter College, Nandgram, Ghaziabad. The petitioner never applied or consented to be transferred out from that institution. Therefore, the action taken to transfer the petitioner to accommodate Smt. Pooja Tyagi, is unauthorised and impermissible in law.

13. To allow the respondents to transfer a teacher serving satisfactorily on a post only to accommodate a person seeking transfer on that post would be to permit uncontrolled arbitrariness and whimsical action to the administrative authorities. That itself is sufficient to annul the transfer of the petitioner. Second, that action if permitted would amount to a penalty imposed on the teacher dislodged from his settled place of posting, for no fault; without sanction of law and without initiating any disciplinary proceeding.

Third, apparently, the respondents are themselves of that view, in as much as they did not seek to transfer the Assistant Teacher (Mathematics) at Government Inter College, Tyodi, Ghaziabad, to accommodate the petitioner. Rather they have transferred the petitioner to such post that was lying vacant at Government Inter College Anooppur, Dibai, Hapur. Yet, that very principle was violated while displacing the petitioner from Government Inter College, Nandgram, Ghaziabad, in the first place. That is the extent of whimsical exercise if not abuse of discretion.

14. Consequently, the transfer orders dated 13.07.2021 and 03.09.2021 in so far as they seek to transfer out the petitioner from the Government Inter College, Nandgram, Ghaziabad are wholly conflicted to law. They are wholly unsustainable. Accordingly, the transfer orders dated 13.07.2021 and 03.09.2021 transferring the petitioner from Government Inter College, Nandgram, Ghaziabad, to Government Inter College, Tyodi, Ghaziabad and from Government Inter College, Tyodi, Ghaziabad to Government Inter College Anooppur, Dibai, Hapur are quashed.

15. The petitioner be allowed to re-join the Government Inter College, Nandgram, Ghaziabad forthwith, without prejudice to the rights of Smt. Pooja Tyagi to transfer under the Government Order dated 18.04.2018. That request may be reconsidered afresh, in accordance with law, considering the observations made above. That exercise be completed within a one month from today, against prior notice to her in that regard. Meanwhile, she may continue to render service at Government Inter College, Nandgram, Ghaziabad, along with the petitioner.

16. Since the petitioner has been wholly wronged, for no fault, and has been forced to litigate, he is also found entitled to costs that are assessed at Rs. 10,000/- per month, for the period when the petitioner could not work at Government Inter College, Nandgram, Ghaziabad. Let costs be paid out by the first respondent within one month from today.

17. The petition stands **allowed** with costs as above.

(2022) 11 ILRA 555
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.10.2022

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Writ A No. 6422 of 2021

Yogendra Singh Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pratik Chandra, Sr. Advocate, Sri Ashok Khare

Counsel for the Respondents:
C.S.C., Sri Purnendu Kumar Singh

A. Service Law – Promotion - Prevention of Corruption Act, 1988: Section 13(1)(C), 13(1)(D), 13(2) - Promotion etc. cannot be withheld merely because some disciplinary/criminal proceedings are proposed to be initiated against the employee concerned.

Disciplinary proceedings can be said to be pending only when charge sheet is issued to the delinquent employee. Criminal proceedings can be said to be pending only when charge sheet is submitted by

the Investigating Officer before the competent trial court. (Para 5, 12)

B. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authority to adopt the Sealed Cover Procedure. (Para 11)

Either the employee concerned should be suspended, or Charge Sheet in disciplinary proceedings should have been issued to him, or charge sheet in Criminal Case should have been filed before the competent trial court before Sealed Cover Procedure could have been adopted. (Para 13)

In the present case, till date only investigation is being carried out by the Investigation Officer. No charge sheet has been submitted before the competent trial court. Therefore, it could not be said that any criminal proceedings are pending against the petitioner and the Order impugned has been passed on misconceived grounds. It is not disputed by the respondent that no disciplinary/departmental proceedings were initiated on the basis of alleged irregularities in the implementation of Rajiv Gandhi Rural Electrification Scheme. No charge sheet in any departmental proceeding has been served upon the petitioner. Therefore, the two requisite conditions for putting the petitioners case under Sealed Cover Procedure as per the GO dated 28.05.1997 are non-existent in so far as the petitioner is concerned. The petitioner has not been suspended at any point of time and he was working as Junior Engineer. (Para 5)

In the case of the petitioner, till the date of filing of the counter affidavit in September, 2021, Charge Sheet had not been filed by the Investigating Officer/Vigilance Officer before the competent trial court, hence, the orders impugned are set aside. (Para 14)

Writ petition allowed. (E-4)

Precedent followed:

1. U.O.I. & ors. Vs K.V. Janki Raman, 1991 (4) SCC 109 (Para 5, 13)

2. U.O.I. Vs Sangam Keshari Nayak, 2007 (6) SCC 704 (Para 12)

3. Harsh Kumar Sharma Vs St. of Pun., 2017 (4) SCC 366 (Para 12)

Present petition challenges order dated 04.02.2021 and also the consequential order dated 27.02.2021, passed by Managing Director, U.P. Power Corporation Limited, Shakti Bhawan, Lucknow with a further prayer that the respondents be directed not to interfere in the working of the petitioner as Assistant Engineer (Electricity Distribution Sub Division) Banda Rural, District-Banda and not to adopt Sealed Cover Procedure in respect of promotion of the petitioner as Assistant Engineer in the Department.

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.)

1. Heard Sri Ashok Khare, learned Senior Counsel assisted by Sri Pratik Chandra and Sri Purnendu Kumar Singh, learned counsel Singh appearing for the Respondent Nos. 2 to 5.

2. This petition has been filed by the petitioner challenging the order dated 04.02.2021 passed by the Respondent No. 2 and also the consequential order dated 27.02.2021 passed by the Respondent No. 2 with a further prayer that the respondents be directed not to interfere in the working of the petitioner as Assistant Engineer (Electricity Distribution Sub Division) Banda Rural, District-Banda and not to adopt Sealed Cover Procedure in respect of promotion of the petitioner as Assistant Engineer in the Department.

3. It is the case of the petitioner that he was appointed as a Junior Engineer initially on *Ad hoc* basis in 2007, and thereafter, confirmed on the post in

question and was transferred from place to place. Lastly he was working in the office of the Executive Engineer Electricity Distribution Division, Kanpur Dehat. A dispute arose with regard to implementation of Rajiv Gandhi Gramin Vidyutikaran Yojna 2005-2006 and the petitioner was directed by the Superintending Engineer to appear before the Inspector in-charge of Vigilance Inquiry, Sri Ajit Kumar on 29.11.2018 at Jhansi to get his statement recorded. The petitioner then came to know that a First Information Report was lodged under section 409, 420, 120-B and Section 13 (1)(C), 13(1)(D), 13 (2) of the Prevention of Corruption Act, 1988 at PS- Navabagh, District Jhansi on 05.07.2019 against 9 persons including the petitioner in respect of irregularities pertaining to implementation of Rajiv Gandhi Rural Electrification Scheme as aforesaid. While the investigation was pending, proceedings for promotion were undertaken by the department and eligibility list was issued, the petitioner's name was included in the said eligibility list. A direction was issued by the Headquarter to provide information about pendency of any disciplinary/ criminal proceedings or issuance of charge sheet if any in either of such proceedings against the officers whose name were mentioned in the eligibility list. No information was sent in so far as the petitioner was concerned. The petitioner was considered by the DPC and his name appeared in the list of selected candidates for the post of Assistant Engineer under the 40% promotion quota as evident from the order issued by the Managing Director, UPPCL on 26.10.2019. The petitioner joined as Assistant Engineer, Electricity Distribution Division, Jhinjak, Kanpur Dehat on 30.10.2019, and thereafter was directed to join the office of the Chief Engineer, Electricity Distribution Zone, Banda. The petitioner was also sent for training on 17.01.2020, and he completed his training and was directed to join at Electricity Distribution Division, Karvi-2, District Chitrakoot. The petitioner joined as Sub Divisional Officer, EDD Sub Division, Karvi-2, District Chitrakoot and was later on transferred to Electricity Distribution Sub Division, Banda Rural where he joined on 23.08.2020. The Respondent No. 2 has proceeded to pass an impugned order dated 04.02.2021 cancelling his earlier order of promotion dated 26.10.2019 and has further directed that the case of the petitioner shall be deemed to have been put under sealed cover as per the provisions of the Government Order dated 28.05.1997. Consequent to this order the petitioner has been reverted to his substantive post of Junior Engineer and the Respondent No.3 the Accounts Officer, UP Power Corporation Limited has further directed for payment of salary of the post of Junior Engineer to the petitioner, the salary that the petitioner was getting before his promotion The petitioner has joined in pursuance of the impugned order and is getting salary of Junior Engineer.

4. It has been argued by the learner Counsel appearing for the petitioner that the impugned order has been passed without giving any opportunity of hearing to the petitioner. As per clause 11 of the Government Order dated 28.05.1997, if Departmental Promotion Committee recommends the name of an employee, but before the implementation of the order of promotion, any relevant fact comes to the knowledge of the authorities, which relevant fact would have resulted in placing the case of the employee concerned under sealed cover, then the order of promotion shall not be given effect, to and the

Recommendation of the DPC shall be treated to have been placed under Sealed Cover. Since the petitioner was already promoted and then the report regarding Open Vigilance Inquiry in terms of Government Order Dated 05.07.2019 came to light, his case was not covered under Clause 11 of the Government Order dated 28.05.1997. It is not as if the petitioner was made an accused in the criminal FIR lodged against him without the knowledge of the respondent authorities. The respondent authorities including the Superintending Engineer had knowledge of Open Vigilance Inquiry and had also directed the petitioner to appear before the Vigilance Officer concerned on 27.08.2020 for recording his statement.

5. It has also been argued by Shri Ashok Khare, learned Senior Advocate that till date only investigation is being carried out by the Investigation Officer. No charge sheet has been submitted before the competent trial court. Therefore, it could not be said that any criminal proceedings are pending against the petitioner and the Order impugned has been passed on misconceived grounds. It is not disputed by the respondent that no disciplinary/departmental proceedings were initiated on the basis of alleged irregularities in the implementation of Rajiv Gandhi Rural Electrification Scheme. No charge sheet in any departmental proceeding has been served upon the petitioner. Therefore, the two requisite conditions for putting the petitioners case under Sealed Cover Procedure as per the Government Order dated 28.05.1997 are non-existent in so far as the petitioner is concerned. The petitioner has not been suspended at any point of time and he was working as Junior Engineer. The counsel for the petitioner has placed reliance upon the judgement rendered in the case of ***Union of India and Others Vs. K.V. Janki Raman 1991 (4) SCC 109*** , wherein it has been held that promotion etc. cannot be withheld merely because some disciplinary/ criminal proceedings are proposed to be initiated against the employee concerned. Disciplinary proceedings can be said to be pending only when charge sheet is issued to the delinquent employee. Criminal proceedings can be said to be pending only when charge sheet is submitted by the Investigating Officer before the competent trial court.

6. Learned Senior Counsel for the petitioner has also pointed out Clause 10 of the Government Order dated 28.05.1997 wherein it has been stated that in case of prolonged pendency of disciplinary proceedings/ criminal proceedings, the case of the employee concerned can be considered for grant of *Ad Hoc* promotion by the Departmental Promotion Committee.

7. Sri Purnendu Kumar Singh, on the basis of counter affidavit filed by the respondents, says that financial embezzlement to the tune of Rupees 1,600/- crores was found in the implementation of Rajiv Gandhi Rural Electrification Scheme in 14 Districts of Uttar Pradesh including Banda where the petitioner was posted. Initially an Inquiry was held by the Vigilance Cell of the Corporation but taking into account the seriousness of the matter the Special Secretary, Department of Energy, Government of U.P. by his letter No. 1263 dated 15.06.2015 has informed the Corporation that the matter has been taken up for Open Vigilance Inquiry by the UP Vigilance Establishment and has directed the Corporation to provide all necessary help for the proper conduct on the

Vigilance Inquiry. The Deputy Secretary, Department of Energy, Government of UP has also by his letter No. Janch-17/24-P-2-2019-Satarkta (15)/2012 dated 19.06.2019 has informed that the petitioner is one of the accused and has been found prima facie guilty of financial embezzlement.

8. It has also been submitted by Sri Purnendu Kumar Singh that the Office Memorandum No.1849 issued by the Power Corporation dated 08.10.1997 has adopted the Sealed Cover Procedure as given in the Government Order dated 28.05.1997 and it was only because of misinformation that the petitioner had been promoted and therefore the impugned order has been passed cancelling his promotion and treating the recommendations of the DPC to be kept in Sealed Cover in so far as the petitioner is concerned.

9. It has, however, not been disputed by Sri Purnendu Kumar Singh that the counter affidavit does not say whether the Investigating Officer in pursuance of the Vigilance Inquiry has filed a charge sheet against the petitioner in the competent trial court. He says that the counter affidavit was filed by the respondents in the month of September 2021 and one year has lapsed, therefore, he does not know the current situation.

10. This court feels that if and when charge sheet is filed before the competent trial court, the provisions of Government Order dated 28..05.1997 would become applicable and not before that. The prerequisites for placing the case of the petitioner under sealed cover did not exist at the time of issuance of the impugned order dated 04.02.2021 as per law settled by the Supreme Court in the case of ***Union of India and Ohers versus K.V. Janki Raman***. In the said case, the Supreme Court was considering a Government Order issued by the Government of India, Department of Personnel and Training dated 30.01.1982 where Sealed Cover Procedure was proposed to be adopted in the case of officers who are under suspension, or against whom disciplinary proceedings are pending for a long time, or a decision had been taken by the Competent Authority to initiate the disciplinary proceedings, or against whom prosecution had been launched in a Court of Law, or sanction for prosecution had been issued at the appropriate time when the DPC was being held. It was also provided in the said Government Order that after the findings are kept in sealed cover, in any subsequent DPC held thereafter, if the employee still facing disciplinary/ criminal proceedings, his case shall be considered again and the DPC shall record its finding and keep the same also in sealed cover. The Government Order dated 30.01.1982 was further modified by Government Order dated 12.01.1988, and a further guideline was issued that the same Sealed Cover Procedure was to be applied where the Government Servant is recommended for promotion by the DPC, but before he is actually promoted he is either placed under suspension or disciplinary proceedings are initiated against him or decision has been taken to initiate proceedings or criminal prosecution is launched or sanction for such prosecution has been issued, or decision to afford such sanction is taken.

11. The Supreme Court considered the question as to when for the purpose of Sealed Cover Procedure, the disciplinary / criminal proceedings can be said to have commenced, and the Court observed that it is only when Charge Memo is issued in disciplinary

proceedings or a Charge Sheet is filed in a Criminal Court it could be said that disciplinary proceedings / criminal proceedings are pending against the employee concerned. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authority to adopt the Sealed Cover Procedure. The Court also considered the contentions raised by the Counsel for the appellant (Union of India) that where there are serious allegations it takes time to collect necessary evidence and to prepare and issue a Charge Memo/ Charge Sheet and it would not be in the interest of purity of Administration to award the employee with the promotion, increment etc., but observed that such argument did not impress their Lordships. It was observed as follows:-

".....The acceptance of this contention would result in injustice to the employees in many cases. As has been the experience so far, the preliminary Investigations take an inordinately long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge-memo/charge-sheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it should not take much time to collect the relevant evidence and finalise the charges. What is further, if the charges are that serious, the authorities have the power to suspend the employees under the relevant rules, and the suspension by itself permits a resort to the sealed cover procedure. The authorities thus are not without a remedy....."

12. The judgement of the Supreme Court in K. V. Janki Raman(Supra) has been reinstated in ***Union of India Vs. Sangram Keshari Nayak 2007(6) SCC 704*** and ***Harsh Kumar Sharma Vs. State of Punjab, 2017 (4) SCC 366,*** where the Supreme Court has again held that only after charge sheet is filed, criminal proceedings can be said to be pending.

13. It is evident from the observations made by the Supreme Court in the case of K.V. *Janki Raman(Supra)* that either the employee concerned should be suspended, or Charge Sheet in disciplinary proceedings should have been issued to him, or charge sheet in Criminal Case should have been filed before the competent trial court before Sealed Cover Procedure could have been adopted.

14. In the case of the petitioner, till the date of filing of the counter affidavit in September, 2021, Charge Sheet had not been filed by the Investigating Officer / Vigilance Officer before the competent trial court, hence, the orders impugned are set aside.

15. Let consequential orders be passed by the Respondent No.2 within a period of six weeks from the date a copy of this order is produced before him.

16. The Writ Petition stands ***allowed.***

(2022) 11 ILRA 560
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.11.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

First Appeal No. 20 of 2007

Smt. Gayatri Mohapatra @ Smt. Gayatri Devi ...Defendant-Appellant
Versus
Ashit Kumar Panda ...Plaintiff-Respondent

Counsel for the Appellant:

Sri M.D. Singh Shekhar, Sri R.D. Tiwari, Sri Vaibhav Goswami

Counsel for the Respondent:
Sri K.M. Mishra, Sri A.K. Singh, Sri A.K. Rai. Sri H.R. Mishra, Sri V.K. Singh

A. Civil Law - Hindu Marriage Act, 1955 - Section 13(1)(i-b) - Divorce - Desertion - husband or wife would be entitled for a dissolution of marriage by the decree of divorce if the other parties had deserted the parties seeking the divorce for a continuous period of not less than two years immediately preceding the presentation of the petition - desertion, in its essence, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause - Court can draw an inference from the proven facts and circumstances that the deserting spouse had the intention to bring cohabitation permanently to an end, without the consent of the deserted spouse - For the deserted spouse, it was required to be proved that the act of desertion was without his consent and there was no such conduct of the deserted spouse giving reasonable cause to the spouse (deserting spouses) for leaving the matrimonial home to form the necessary intention to bring cohabitation permanently to an end – It is an unilateral act of the deserting spouse, without the consent of his/her partner and in absence of any conduct of the deserted spouse which may have lead to the act of the deserting spouse. (Para 47, 51

B. Civil Law - Hindu Marriage Act, 1955, Section 13(1)(i-b) - Divorce - Desertion - Evidence on record insufficient, to come to a conclusion even on probability that the wife deserted her husband, with the intention to bring the matrimonial relationship to an end - Rather the wife after leaving her matrimonial home on 23.11.2011 on account of the act of the husband to throw her out of the house, made efforts to resolve the matter - She even went to the house of her parents-in-law to reside there for three days in the absence of the respondent, in order to persuade them to bring the dispute to an end - She filed restitution petition, participated in the mediation proceeding showing her willingness to live with her husband - the admission of the husband that he never went to Meerut to bring back his wife after 23.11.2011 and before filing of the divorce suit, i.e. for a period of two years, gave a clear indication of the fact that the husband never wanted to patch up with his wife and his version that the wife had left her matrimonial home on her own volition, is unbelievable - family court wrongly concluded that since the wife had admitted that she was living separately from her husband from 21.11.2011, the period of two years of desertion stood proved - Mere act of withdrawal of the wife from her matrimonial home at the Air Force station, Ambala and the factum of separation of the wife for a period of two years from her husband when she was making efforts to pacify her husband with the help of the family in order to bring matrimonial harmony cannot lead to the conclusion that the wife had no intention to lead a normal married life with the husband or her act of leaving her matrimonial home was in absence of any conduct of the husband giving the wife a reasonable cause to form the necessary intention aforesaid (Para 60)

C. Civil Law - Hindu Marriage Act, 1955, Section 13(i)/(i-a) - Mental Cruelty / Physical Cruelty - Criminal case lodged by the wife cannot be a reason to grant divorce on the ground of cruelty and the Family Court acted illegally in holding that even filing of the application for maintenance under Section 125 Cr.P.C. by the wife would come within the meaning of cruelty - Family court was swayed away by the fact that the husband was a Fighter Pilot and any kind of mental disturbance caused to him would come in the way of the dedicated services of the Nation, having lost sight of the fact that the husband cannot take benefit of his own wrong by

his mere position in service - Once he had wronged his wife by not treating her well and not trying to patch up the marital discord by acting wisely in his complete matrimonial life, no indulgence can be given to the husband for the sole fact of being posted as a fighter pilot in the Indian Air Force - Conclusion drawn by the family court that the acts of wife had resulted in an act of 'cruelty' caused upon her husband contrary to the evidence on record - Findings returned by the family court on issue of Cruelty in favour of the husband set aside (Para 96)

D. Civil Law - Hindu Marriage Act, 1955, Section 13(i-b) - Divorce - "irretrievable breakdown of marriage" - High Court concluded that the matrimonial bond between the parties was beyond repair - wife 35 years of age and the husband about 39 years – Court of the view if at that juncture of their life, they are not given a second chance and are forced to live together, their lives may become miserable - matrimonial dispute which has assumed that proportion on trivial issues, seems to be beyond repairs on account of bitterness created by the acts of both the husband and the wife and their family members - parties being well educated persons if free from the matrimonial bond, may look forward to settle in their life in a better and positive way which may make them happy individuals and their lives would be constructive to our society - In the compelling circumstances of the present case, in order to give a chance to the parties to settle themselves and be relieved of a marriage which is dead, court dissolved the marriage between the parties - Regard being had to the social status and strata of the parties especially the husband, the aspirations of the wife to lead the life of the wife of an Air Force Officer, court provided a sum of Rs.1 Crore (One Crore) as permanent alimony to wife, excluding the amount already paid to the appellant wife towards interim maintenance. (Para 110, 113, 115, 117)

Allowed. (E-5)

List of Cases cited:

1. A. Jayachandra Vs Aneel Kaur AIR 2005 SC 534,

2. Vishwanath Sitram Agarwal Vs San. Sarle Vishwanath Agarwal 2012 (7) SC 288

3. K. Srinivas Vs K. Deepa 2013 (5) SCC 226

4. Samar Ghosh Vs Jaya Ghosh 2007 (4) SCC 511

5. Shamim Bano Vs Asraf Khan 2014 (7) SCC 740

6. K Srinivas Vs K. Sunita 2014 (16) SCC 34

7. Dinesh Nagda Vs Santibai AIR 2012 MP 40

8. Manisha Srivastava Vs Rohit Srivastava 2015 (2) ADJ 547

9. Devesh Yadav Vs Smt. Minal FAO-M 208 of 2013 P&H

10. Joydeep Majumdar Vs Bharti Jaiswal Majumdar 2021 SCC 3 742

11. Savitri Pandey Vs Prem Chandra Pandey 2022 (2) SCC 73

12.Dr.(Mrs.) Malathi Ravi, M.D Vs Dr. B.V . Ravi M.D

13. Vinit Saxena Vs Pankaj Pandit 2006 (3) SCC 778

14. Vishwanath Agrawal, s/o Sitaram Agrawal Vs Sarla Vishwanath Agrawal 2012 SCC (7) 288

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri M.D. Singh Shekhar, learned Senior Counsel, assisted by Sri Vaibhav Goswami, learned counsel for the defendant-appellant and Sri Vishnu Singh, learned counsel for the plaintiff-respondent.

Facts

2. Briefly stated facts of the present case are that defendant - appellant/wife married with the plaintiff - respondent/husband on 10.06.1990 as per Hindu rites and rituals. Plaintiff - respondent is an I.P.S. Officer while the defendant - appellant is a Doctor holding M.B.B.S. Degree. The father of the plaintiff - respondent was in service of the Steel Authority of India, Raurkela while father of the defendant - appellant was Additional Director General of Police, Orissa and her mother has promoted a company known as JBS Capacitors Pvt. Ltd., Bhubaneshwar. Initially, the defendant - appellant joined the service in Health Department, Aligarh, but after three or four months she left it. She became Director in the aforesaid Company promoted by her mother. Son, namely, Aparajita Issan Narayan was born on 05.06.1991 from the wedlock of the plaintiff and the defendant at SCB Medical College, Cuttack.

3. It appears that dispute between the plaintiff and the defendant arose even before their son was born which led to various incidents. Ultimately the plaintiff - respondent filed case No.260 of 2000 (Ashit Kumar Panda Vs. Smt. Gayatri Devi) under Section 13 of the Hindu Marriage Act, 1955, in the Court of Principal Judge Family Court, Meerut, for divorce. In the plaint, amongst other allegations; the plaintiff - respondent has alleged in paras 5, 9, 10, 11, 14, 15, 16, 17, 18 and 19 as under:

"5. यह कि पैटीशनर व विपक्षी के परिवारो मे आचार व विचारो को असमानता होने के कारण भी ***विपक्षी एवं उसके पिता पैटीशनर एवं उसके परिवार को अपने अनुचित प्रभाव का लाभ उठाकर तरह तरह से तंग व परेशान करते रहे है।*** *जिससे पैटीशनर अपने दाम्पत्य जीवन के सुख से वंचित हो गया है।*

9. यह कि ***विपक्षी के पिता ने पैटीशनर के पिता को तंग व परेशान करने की गरज से दिनांक 30.12.91 को गुण्डे भेजकर हमला करवाया।*** *जिसकी रिपोर्ट पैटीशनर के पिता ने सैक्टर-3 राउरकेला के थाने मे पंजीकृत करायी थी।*

10. यह कि विपक्षी ने पैटीशनर के ***पुत्र के नामकरण की रस्म भी कटक मे अपने पिता के घर पर सम्पन्न करायी जिसमे विपक्षी पैटीशनर अथवा उसके माता पिता को इस सम्बन्ध मे कोई सूचना नही दी।***

11. यह कि विपक्षी के पिता ने सन् 1991 के आखिर मे पैटीशनर के पिता के खिलाफ ***सी०बी०आई० मे मेल जोल होने के कारण झूँठे मुकदमे कायम कराने के लिये दबाव बनाया,*** *उस समय एस०पी० सी०बी०आई० भुवनेश्वर श्री प्रकाश मिश्रा तैनात थे। जिन्होने कोई सबूत न पाते हुए पैटीशनर के पिता जी के खिलाफ कोई कार्यवाही नही करी थी।*

14. यह कि विपक्षी ने वर्ष 1991 मे जब पैटीशनर की तैनाती बतौर ए०एस०पी० थी। तब कर्फ्यू के दौरान विपक्षी पैटीशनर के पास आयी और एक रात रूककर पैटीशनर पर दबाव दिया कि पैटीशनर उसे वापिस उसके पिता के घर पर छोडकर आये, पैटीशनर ने बामुश्किल छुट्टी लेकर विपक्षी को उसके पिता के घर पर छोड़कर आया।

15. यह कि पैटीशनर अब मेरठ मे पुलिस ट्रेनिंग सेन्टर हापुड़ रोड मेरठ मे तैनात है ***दिनांक 17.12.99 को विपक्षी*** *ने पैटीशनर के मकान से समस्त सामान डबल बेड, अलमारी , फ्रीज , कूलर आदि को ट्रक मे भरवाकर अपने साथ दिल्ली स्थित मकान ग्रेटर कैलाश मे ले गयी, ट्रक के साथ सामान चढवाने व उतरवाने मे कविन्द्र गौतम हैड. कांस्टेबिल, तालेवर सिंह, स्टैनो नेपाल सिंह, सी०एल०डी० राजन सिंह व वीर सिंह फोलोवर ट्रक के साथ मे गये थे व पडौसी अनन्त अग्रवाल पुत्र विनय अग्रवाल मकान सं० एल०-948 ने विपक्षी को सामान ट्रक मे भरते व ले जाते हुए देखा है।*

16. यह कि उपरोक्त परिस्थितियो मे पैटीशनर का विपक्षी के साथ साथ रहना नामुमकिन है। पैटिशनर व विपक्षी के साथ रहने पर किसी भी समय कोई भी दर्घटना घटित हो सकती है।

*17. **यह कि विपक्षी ने पैटीशनर तथा उसके माता पिता को परेशान एवं बेईज्जती करने की नियत से दिनांक 27.03.2000 को महिला थाने, सदर लखनऊ मे एक रिपोर्ट क्राईम नं० 17/2000 पर अ०धारा 498ए, 323, 506 आई०पी०सी० व ¾ दहेज एक्ट दर्ज करायी जिसमे विपक्षी ने पैटीशनर एवं माता पिता पर झूँठे बेबुनियाद आरोप लगाये। इस तथाकथित रिपोर्ट मे विपक्षी ने पैटीशनर पर चरित्र हीनता का आरोप भी लगाया जो कि सर्वथा गलत बेबुनियाद एवं कपोल कल्पित है।** विपक्षी की इस रिपोर्ट से पैटिशनर एवं उसके परिवार की समाज मे बहुत ही बेइज्जती हुयी है एवं पैटीशनर तथा उसके परिवार को मानसिक आघात भी पहुचा है। इस घटना से पैटीशनर को इतना कष्ट हुआ कि अब पैटीशनर का विपक्षी के साथ रहना कतई सम्भव नही है और विपक्षी का **यह कृत्य पैटीशनर के प्रति मानसिक क्रूरता पूर्ण है।***

*18. यह कि विपक्षी को **पैटीशनर तथा उसके परिवार के विरूद्ध झूँठी रिपोर्ट** लिखाकर भविष्य मे पैटीशनर के दाम्पत्य जीवन की एक मात्र आशा को भी समाप्त कर दिया है। अब पैटीशनर एवं विपक्षी का एक साथ रहकर दाम्पत्य जीवन यापन करना नामुमकिन है अतः उपरोक्त पैटीशन प्रस्तुत करने की आवश्यकता पैदा हुयी है।*

*19. यह कि वाद का कारण दिनांक 10.06.90 मे विपक्षी के साथ विवाह होने उसके उपरान्त **दिनांक 13.12.99 मे मेरठ से पैटीशनर के निवास से समस्त घर का सामान ले जाना एवं उसके बाद दिनांक 27.03.2000 को विपक्षी के द्वारा पैटीशनर पर चरित्र हीनता व उत्पीडन के झूठे आरोप लगाकर झूठी रिपोर्ट दर्ज कराई एवं पैटीशनर एवं विपक्षी का मेरठ शहर मे अन्तिम समय पर एक साथ निवास करने के कारण माननीय न्यायालय के क्षेत्राधिकार में आता है।** माननीय न्यायालय को उक्त वाद को सुनने एवं निस्तारण करने का पूर्णतया अधिकार है।"*

4. The defendant - appellant filed written statement in which she denied allegations. The plaintiff - respondent filed examination in chief. In his examination-in-chief he affirmed the plaint version. He produced himself in evidence for cross - examination and was cross examined by the defendant - appellant. The plaintiff - respondent also produced in evidence Sri Golak Bihari Panda (PW 2), who is his father. In his evidence on the point of cruelty the PW 2, has stated as under :-

*"8. यह कि मै शपथपूर्वक कथन करता हूँ कि उक्त दिनांक- 12.06.1990 से लेकर दिनांक- 14.06.1990 की तीन दिन की अवधि मे श्रीमती गायत्री ने अनेको बार शपथकर्ता एवं उसके परिवारजन को **यह ताना दिया कि तुम्हारे घर का स्टैण्डर्ड बहुत खराब है और आशीत कुमार का वेतन भी बहुत कम है इतने से कही अधिक तो हम अपने कर्मचारियों को बांट देते है।** ऐसी स्थिति में उसका ससुराल मे रहना किसी भी हाल मे सम्भव नही है ऐसे ताने सुनकर शपथकर्ता एवं उसकी पत्नी एवं उसके पुत्र को बड़ा ही मानसिक कष्ट पहुँचा शपथकर्ता के पड़ोस मे भी शपथकर्ता की छवि अत्यन्त खराब हो गयी।*

9. यह कि मै शपथपूर्वक बयान करता हूँ कि शपथकर्ता की पुत्र बधू श्रीमती गायत्री एम०बी०बी०एस० डाक्टर है और उसके पिता उडीसा पुलिस के सेवानिवृत्त एस०डी०जी०पी० है। श्रीमती गायत्री अपनी माता जी की कम्पनी जे०बी०एस०केपीसिटेस प्राईवेट लिमिटेड़ भुवनेश्वर स्थित कम्पनी डायरेक्टर भी है। और श्रीमती गायत्री उक्त कम्पनी के समस्त कामकाज की देखभाल करती है उक्त कम्पनी कम्प्यूटर के पार्टस बनाने का कार्य करती है। विवाह के पश्चात श्रीमती गायत्री अधिकतर समय अपने मायके मे ही रही है।

10. यह कि मै शपथपूर्वक बयान करता हू कि रेस्पोण्डेन्ट के अधिकतर समय अपने मायके मे रहने से एवं क्रूरता पूर्ण व्यवहार के कारण शपथकर्ता का पुत्र दाम्पत्य सुख से वंचित हो गया है और वह बड़े ही मानसिक कष्टो मे अपना जीवन गुजार रहा है।

11. यह कि मै शपथपूर्वक बयान करता हू कि रेस्पोन्डेण्ट श्रीमती गायत्री को अपने मायके मे ही रहते हुए एक पुत्र अपराजित ईशान नारायण का जन्म दिनांक-05.06.1991 को हुआ था और जन्म से लेकर आज तक उस पुत्र को पेटिसपर की इच्छा के विरूद्ध रेस्पोण्डेन्ट ने अपने मायके मे ही रखा हुआ है और उसकी पढाई लिखाई भी वही चल रही है रेस्पोण्डेन्ट

ने शपथकर्ता एवं उसकी पत्नी को आज तक अपने एक मात्रा पोते का मुंह भी देखने नही दिया है जिसका इतना भारी दुख शपथकर्ता एवं उसकी पत्नी को है जिसके शब्दो मे स्पष्ट करना सम्भव नही है।

12. यह कि मै शपथपूर्वक कथन करता हूँ कि समस्त भारत मे हिन्दू जाति मे यह परम्परा है कि पुत्र या पौत्र का नामकरण एवं जनेऊ संस्कार उसके पिता के घर मे सम्पन्न होता है जिसमे परिवार के सभी इष्ट मित्र एवं रिश्तेदार शामिल होकर खुशी मनाते है। परन्तु रेस्पोण्डेन्ट की क्रूरता की तब सीमा समाप्त हो गयी जब रेस्पोण्डेन्ट ने शपथकर्ता एवं उसके परिवारजनो को वगैर कोई सूचना दिये शपथकर्ता के पौत्र का जनेऊ संस्कार भी अपने मायके मे ही मना लिया। ऐसी स्थिति मे शपथकर्ता अपने पौत्र का संस्कार पूर्ण करने एवं उसको अपनी गांद मे खिलाकर उसकी मीठी-मीठी बाते सुनने से पूर्णरूप से वंचित हो गया तथा पैटिसनर आशीत कुमार जो उक्त बच्चे का प्राकृतिक पिता है वह रेस्पोण्डेन्ट के उक्त क्रूरता पूर्ण व्यवहार से पितृ सुख व दाम्पत्य सुख से भी वंचित हो गया है।

13. यह कि मै शपथपूर्वक बयान करता हूँ कि रेस्पोण्डेन्ट के पिता ने शपथकर्ता को परेशान करने की नीयत से दिनांक 30.12.1991 को गुण्डे भेजकर शपथकर्ता पर हमला भी करवाया था जिसकी रिपोर्ट शपथकर्ता ने सेक्टर-3 राउरकेला के थाने मे पंजीकृत करायी थी। इसके अतिरिक्त दिसम्बर 1991 मे ही रेस्पोण्डेन्ट के पिता ने सी०बी०आई०द्ध के जान पहचान होने के कारण शपथकर्ता को झूठी कार्यवाही मे फंसाने के लिए प्रयास किया था उस समय एस०पी०सी०बी०आई० भुवनेश्वर श्री प्रकाश मिश्रा तैनात थे जिन्होने कोई सबूत न पाते हुये शपथकर्ता के विरूद्ध कोई कार्यवाही नही की थी।

14. यह कि मै शपथपूर्वक कथन करता हूँ कि शपथकर्ता का पुत्र आशीत कुमार जब वर्ष 1999 मे मेरई मे तैनात था तब वह गम्भीर रूप से मुंह के कैन्सर से बीमार हो गया था तब रेस्पोण्डेन्ट को उसकी पूर्ण देखभाल करनी चाहिए थी परन्तु रेस्पोण्डेन्ट ने उसकी देखभाल करने के स्थान पर उससे लड़ाई झगड़ा किया और घर का समस्त घरेलू सामान जैसे डबल बेड, अलमारी, फ्रीज, कूलर आदि ट्रक मे भरवाकर दिनांक 17.12.1999 को अपने साथ दिल्ली स्थित मकान ग्रेटर कैलाश मे ले गयी थी ट्रक मे सामान भरवाने मे कविन्द्र गौतम हैड कान्स०, तालेवर सिंह, स्टैनो नेपाल सिंह, सी०एल०डी० राजन सिंह व वीर सिंह फालोवर ट्रक मे सामान भरवाकर दिल्ली साथ गये थे इनके अतिरिक्त पडोसी अनन्त अग्रवाल पुत्र श्री विनय अग्रवाल निवासी एल० 948 शास्त्री नगर मेरठ जिनकी पुलिस ट्रेनिंग सेण्टर हापुड रोड मेरठ शहर के पास पी०सी०ओ० की दुकान थी ने भी रेस्पोण्डेन्ट को ट्रक मे सामान भरवाते व ले जाते हुए देखा था।

15. यह कि मै शपथपूर्वक कथन करता हूँ कि रेस्पोण्डेन्ट ने बिना कारण तंग व परेशान करने व बेईज्जती करने की नीयत से पैटिशनर एवं शपथकर्ता एवं शपथकर्ता की पत्नी के नाम एक झूठी रिपोर्ट दिनांक- 27.03.2000 को महिला थाना सदर लखनऊ मे अन्तर्गत धारा - 498ए०/323/506 आई०पी०सी० व ¾ दहेज एक्ट की दर्ज करायी थी जिसमें रेस्पोण्डेन्ट ने शपथकर्ता एवं उसके परिवारजनो पर झूंठे, बेबुनियाद, आरोप लगाये थे। उक्त रिपोर्ट मे रस्पोण्डेन्ट ने अपने पति के विरूद्ध चरित्रहीनता का झूठा आरोप भी लगाया जो रेस्पोण्डेन्ट की क्रूरता को स्पष्ट करता है। ऐसी स्थिति में पेटिशनर व रेस्पोण्डेन्ट का साथ सात पति पत्नी के रूप मे रहना सम्भव नही रहा है।"

5. The plaintiff - respondent also filed additional affidavit in evidence in which he further narrated certain facts in paras 5 and 6 to support mental cruelty by the defendant - appellant.

6. P.W. 1 and P.W. 2 both were cross examined by the defendant - appellant on various dates.

7. In evidence, copies of First Information Report dated 27.03.2005 lodged by the defendant - appellant and various other evidence were also filed by the plaintiff - respondent. However, despite specific allegation of mental cruelty on various grounds including lodging of the false First Information Report against the plaintiff - respondent and his family members, the evidence led in this regard by

him could not be disproved by the defendant - appellant. Despite specific allegations of lodging false first information report, the defendant - appellant/wife has chosen not to lead even her oral evidence. Considering the facts and evidences on record, the Principal Judge Family Court, Meerut decreed the suit by judgement dated 16.12.2006 dissolving the marriage.

8. Aggrieved with the aforesaid judgement and decree, the defendant - appellant has filed the present appeal.

9. Perusal of the order sheet of the aforesaid appeal shows that this Court made serious efforts for amicable settlement between the parties but it failed. In this regard, it would be appropriate to reproduce the order dated 03.04.2014 as under :

"In pursuance of the order dated 24.02.2014, both the parties along with their counsel are present.

We talked to them individually and in presence of each other alongwith their counsel. We are sorry to record that all our efforts for amicable settlement between the parties have failed. Thus there is no option left but to place the appeal for adjudication on merits.

List the appeal in its turn."

Submissions of the defendant-appellant

10. (i) The plaintiff-respondent has not taken any ground of cruelty in the plaint. Therefore, the impugned judgment and decree granted by the Court below on the ground of cruelty and dissolving the marriage, is illegal.

(ii) The averments made in para no.15 of the plaint does not amount to cruelty.

(iii) The impugned order for dissolving the marriage under Section 13 of the Hindu Marriage Act, 1955 has been passed without affording opportunity of hearing to the defendant-appellant.

(iv) The application 20-Ga for summoning several police officers and staff in evidence was illegally rejected by the Court by order dated 21.11.2006.

(v) Not adding the sur-name "Panda" by the defendant-appellant, with her name or with the name of her son, does not amount to cruelty.

(vi) Even if the defendant-appellant has not filed her oral evidence yet it shall make no difference inasmuch as the PWs 1 and 2 were examined by the defendant.

Submissions of the plaintiff-respondent

11. (i) The cruelty has been well proved by the plaintiff-respondent and finding recorded in this regard in the impugned judgement are based on consideration of relevant evidences on record.

(ii) The plaintiff-respondent and the defendant-appellant are undisputedly living separately since 1999 and thus, more than 23 years have passed and they are not ready to live together. Therefore, in any view of the matter, the parties cannot be directed to live together. There is irretrievable break down and the tie of marriage cannot be restored. The decree of divorce itself was passed on 16.12.2006 and thus, about 16 years have already passed from the date of decree of divorce. Reliance is placed upon the judgment of **Supreme Court dated 13.09.2021 in Civil Appeal Nos.4984-4985 of 2021, (Sivasankaran versus Santhimeenal).**

(iii) In any view of the matter, no order for the parties to live together, should be passed on facts of the present case.

Reliance is placed upon the judgment of **Supreme Court in the case of Naveen Kohli versus Neelu Kohli, (2006) 4 SCC 558.**

Discussion and Findings

12. Brief facts of the case and the submissions of learned counsels for the parties as noted above clearly shows that the grounds for divorce taken by the plaintiff - respondent was mainly "mental cruelty". The parties have also led their evidences in this regard. It has been admitted by the learned counsel for the defendant - appellant and also as reflected from his submission No.(vi) noted above, that although the plaintiff - respondents led the oral evidence of PW - 1 and PW -2 and were crossed examined at length by the defendant - appellant but the defendant - appellant has not led any oral evidence. She has also not even filed copies of the order/judgments of trial Court in criminal cases lodged by her against the plaintiff - respondent and his family members. The plaintiff - respondent has led evidences to prove that the first information report lodged by the defendant - appellant, were based on false allegations. The defendant - appellant has not led any evidence to disprove it or to prove that the first information report lodged by her were not based on false allegation. She has not even led her oral evidence. The court below has considered the evidence on record and framed five issues out of which the issue Nos. 1 and 5 were crucial for decision on the question of divorce which are reproduced below :

"1- क्या प्रतिवादिनी ने वादी के साथ क्रूरता का व्यवहार किया है? यदि हां तो इसका प्रभाव?

5- क्या वादी के पिता द्वारा पक्षकारो के वैवाहिक जीवन मे अनावश्यक हस्तक्षेप करना व वादी के द्वारा अपने पिता के प्रभाव मे अपने वैवाहिक जीवन मे अपने दायित्वो का सही प्रकार पालन न करने के कारण प्रतिवादिनी को दाम्पत्य जीवन निर्वाह करने मे अस्मर्थ किया गया जैसा कि प्रतिवाद पत्र मे कहा गया है। यदि हां तो इसका प्रभाव?"

13. The issue nos. 1 and 5 aforequoted were collectively decided by the court below. The issue no. 1 was decided in affirmative in favour of the plaintiff. The conclusion was recorded as under :

"उपरोक्त समीक्षा के आधार पर मै इस निष्कर्ष पर पहुंचा हूँ कि याची के साथ विपक्षी द्वारा क्रूरतापूर्ण व्यवहार किया गया है और याची के माता पिता द्वारा याची और विपक्षी के परिवारिक जीवन मे कोई अनुचित हस्तक्षेप नही किया गया है तदानुसार यह वाद बिन्दु सं० -1 सकारात्मक रूप मे एवं वाद बिन्दु संख्या-5 नकारात्मक रूप से याची के पक्ष मे निर्णित किया जाता है। "

14. The aforesaid conclusion in the impugned judgment is based on the **findings recorded by the court below, briefly as under :**

(i) The plaintiff - husband has made allegations that the defendant - wife expressed her unwillingness to live with the plaintiff by alleging and insulting him that the standard of living of his and his family members is low and the salary of the plaintiff is so low that more than his salary, her parents used to distribute salary to their employees. To prove this allegation, the plaintiff - husband has filed affidavit 61 Ka, an additional affidavit 104 ka and PW 2 filed affidavit 62 Ka and additional affidavit 105 Ka supporting the plaintiff's contention but the defendant - wife neither submitted any reply to the aforesaid evidences nor produce her evidence and also could not prove the papers filed by her by list 8 Ga.

(ii) The defendant wife firstly joined service as physician in Uttar Pradesh Health Department, Aligarh, but left the service for reason that infact she was having more interest in the business of her mother. The plaintiff -respondent filed

habeas corpus Writ Petition No.22262 of 2001 (paper No.44 Ga) for custody of his son Aparajit Ishan Narayan, in which the father of the defendant - appellant filed an affidavit stating that he has better resources for protection of future of the aforesaid son and the plaintiff - respondent has not extended any affection or protection to the aforesaid child.

(iii) The PW - 1 has filed photographs 112 ka dated 19.8.1993, 43 Ka dated 06.09.1995, 114 Ka of the year 1993 and 115 Ka of the year 1995 to prove that the allegation of the defendant - appellant that the aforesaid child never remained with the plaintiff and his family members is incorrect. The aforesaid photographs were not denied by the defendant - appellant/wife.

(iv) On 17.12.1999, the defendant wife has left her matrimonial house and went to her parents home.

(v) The defendant - wife has alleged that the plaintiff husband has demanded in dowry Rs.5,00,000/- and a car and on non fulfilment of the dowry demand she was beaten by the plaintiff and for that reason she lodged crime case No.17/2000 under Section 498 A, 323, 506 I.P.C. and ¾ Dowry Prohibition Act on P.S. Mahila Thana Sadar, Lucknow on 27.03.2000 but she has not filed even copy of the FIR. The plaintiff - husband has filed photo copy of the aforesaid FIR and other papers 45 Ga, 78 Ga and 80 Ga which show that the aforesaid case crime registered as case no.210 of 2002 and is pending in the Court of 3rd Additional Chief Judicial Magistrate, Lucknow and as such no comment can be made on it.

(vi) The defendant - wife has made allegation that the plaintiff - husband is indulged in adultery with a lady Rita Rai. The plaintiff - husband has denied the allegation and got recorded his oral evidence in this regard as PW 1 and his denial was also supported by PW -2 in his evidence, but the defendant - wife has not produced any evidence. Thus, the plaintiff - husband has been able to prove that the allegation of his being characterless, made by the defendant - wife, is false. Allegations made by the defendant - wife against the parents of the plaintiff - husband were found to be incorrect.

(vii) The defendant - wife has made false complaints 78 Ga against the plaintiff - husband to his higher officers and the Director General of Police Uttar Pradesh, but she could not lead any evidence to prove the allegations.

15. So far as the submissions Nos. (i), (ii) and (v) of learned counsel for the defendant - appellant is concerned, we find that the averments made by plaintiff in paras 5, 9, 10, 11, 17 and 19 of the plaint clearly discloses the ground of cruelty.

16. So far as the submission No. (iii) made by learned counsel for the defendant - appellant that the impugned judgement for dissolving the marriage under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as "the Act 1955") has been passed without affording an opportunity of hearing to the defendant - appellant, is incorrect. Perusal of the impugned judgment shows that the defendant - appellant has appeared in the aforesaid case before the court below and not only filed her written statement but also cross examined PW - 1 and PW - 2 at length. Thus, the submission of learned counsel for the defendant - appellant that no opportunity of hearing was afforded to the defendant - appellant, is totally incorrect.

17. So far as the submission No. (iv) is concerned, we find that the defendant -

appellant has not taken any such specific grounds in the grounds of appeal.

Cruelty

18. The word "cruelty" has not been defined in the Act, 1955. It has been used in Section 13(i) (i-a) of the Act 1955 in the context of human conduct or behaviour in relation to or in respect to matrimonial duties or obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical. It may be intentional or unintentional. If it is physical, it is question of fact and degree. If it is mental, the inquiry must begin as to the nature of cruel treatment and then as to the impact of such treatment on the mind of the spouse as to whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. It is a matter of inference to be drawn by considering the nature of the conduct and its effect on the complaining spouse. These principles find mention in the law laid down by Hon'ble Supreme Court in the case of **Shobha Rani Vs. Madhukar Reddi (1988) 1 SCC 105 (paras 4, 5, 6, 7 and 18).**

19. Expressing similar view as aforesaid and following the decision in the case of Shobha Rani (supra), Hon'ble Supreme Court in the case of ***V. Bhagat v D. Bhagat (1994) 1 SCC 337 (para 16)*** broadly defined **mental cruelty**, as under :

*16. **Mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together.** The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. **What is cruelty in one case may not amount to cruelty in another case.** It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made.*

(Emphasis supplied by us)

20. In the aforesaid judgement in the case of ***V. Bhagat (supra)*** (paras 18 & 19) Hon'ble Supreme Court has referred to its earlier judgment in the case of **Chanderkala Trivedi Vs. Dr S.P. Trivedi (1993) 4 SCC 232** (paras 2 & 3), which appears to be relevant for the purposes of controversy involved in the present appeal.

21. Paras 18 and 19 of the judgement in the case of ***V. Bhagat (supra)*** is reproduced below :

*18. In Chanderkala Trivedi v. Dr S.P. Trivedi **[(1993) 4 SCC 232** : 1993 SCC (Cri) 1154 : (1993) 3 Scale 541] the husband sued for divorce on the ground of cruelty by wife. The wife filed a written statement wherein she attributed adultery to the husband. In reply thereto the husband put forward another allegation*

against the wife that she was having undesirable association with young boys. Considering the mutual allegations, R.M. Sahai, J. speaking for Division Bench, observed: (SCC p. 233, para 2)

"Whether the ***allegation of the husband that she was in the habit of associating with young boys*** *and the findings recorded by the three courts are correct or not but what is certain is that* ***once such allegations are made by the husband and wife as have been made in this case then it is obvious that the marriage of the two cannot in any circumstance be continued any further.*** *The marriage appears to be practically dead as from cruelty alleged by the husband it has turned out to be at least intimacy of the husband with a lady doctor and unbecoming conduct of a Hindu wife."*

19. It was argued on behalf of the husband that the wife has failed to establish the charge of adultery levelled against him and that the charge of adultery must be proved beyond reasonable doubt. Dealing with the argument, the learned Judge observed: (SCC pp. 233-34, para 3)

"But we do not propose to examine it as we are satisfied that the marriage is dead and the findings of fact cannot be set aside by this Court except that the appeal can be sent back to the Division Bench to decide it again which would mean another exercise in futility leading to tortuous litigation and continued agony of the parties."

(Emphasis supplied by us)

22. In the case of **Savitri Pandey v. Prem Chandra Pandey, (2002) 2 SCC 73** Hon'ble Supreme Court has explained the word "**cruelty**" and "desertion" used in Section 13(1)(i) (i-a) of the Act, 1955 as under :

"6. Treating the petitioner with cruelty is a ground for divorce under Section 13(1)(i-a) of the Act. Cruelty has not been defined under the Act but in relation to matrimonial matters it is contemplated as a conduct of such type which endangers the living of the petitioner with the respondent. Cruelty consists of acts which are dangerous to life, limb or health. Cruelty for the purpose of the Act means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury, or to have caused reasonable apprehension of bodily injury, suffering or to have injured health. Cruelty may be physical or mental. ***Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life.*** *It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other. In the instant case both the trial court as well as the High Court have found on facts that the wife had failed to prove the allegations of cruelty attributed to the respondent. Concurrent findings of fact arrived at by the courts cannot be disturbed by this Court in exercise of powers under Article 136 of the Constitution of India. Otherwise also the averments made in the petition and the evidence led in support thereof clearly show that the allegations, even if held to have been proved, would only show the sensitivity of the appellant*

with respect to the conduct of the respondent which cannot be termed more than ordinary wear and tear of the family life.

*8."**Desertion**", for the purpose of seeking divorce under the Act**, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations i.e. not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case**. After referring to a host of authorities and the views of various authors, this Court in Bipinchandra Jaisinghbai Shah v. Prabhavati [AIR 1957 SC 176] held **that if a spouse abandons the other in a state of temporary passion, for example, anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion**. It further held : (AIR pp. 183-84, para 10)*

*"For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly **two elements are essential so far as the deserted spouse is concerned : (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid.** The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce, under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case. Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. **The offence of desertion commences when the fact of separation and the animus deserendi coexist. But it is not necessary that they should commence at the same time**. The de facto separation may have commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or*

implied, of bringing cohabitation permanently to a close. The law in England has prescribed a three years' period and the Bombay Act prescribed a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decide to come back to the deserted spouse by a bona fide offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end and if the deserted spouse unreasonably refuses the offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like and other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court."

9. Following the decision in Bipinchandra case [AIR 1957 SC 176] this Court again reiterated the legal position in Lachman Utamchand Kirpalani v. Meena [AIR 1964 SC 40] by holding that in its essence desertion means the intentional permanent forsakingand abandonment of one spouse by the other without that other's consent, and without reasonable cause. For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned : (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. For holding desertion as proved the inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation.

10. To prove desertion in matrimonial matter it is not always necessary that one of the spouses should have left the company of the other as ***desertion could be proved while living under the same roof. Desertion cannot be equated with separate living by the parties to the marriage. Desertion may also be constructive which can be inferred from the attending circumstances****. It has always to be kept in mind that the question of* ***desertion is a matter of inference to be drawn from the facts and circumstances of each case.***

11. There is another aspect of the matter which disentitles the appellant from seeking the relief of divorce on the ground of desertion in this case. As desertion in matrimonial cases means the withdrawal of one party from a state of things i.e. the marital status of the party, no party to the marriage can be permitted to allege desertion unless he or she admits that after the formal ceremonies of the marriage, the parties had recognised and discharged the common obligation of the married life which essentially requires the cohabitation between the parties for the purpose of

consummating the marriage. Cohabitation by the parties is an essential of a valid marriage as the object of the marriage is to further the perpetuation of the race by permitting lawful indulgence in passions for procreation of children. In other words, ***there can be no desertion without previous cohabitation by the parties****. The basis for this theory is built upon the recognised position of law in matrimonial matters that no one can desert who does not actively or wilfully bring to an end the existing state of cohabitation. However, such a rule is subject to just exceptions which may be found in a case on the ground of mental or physical incapacity or other peculiar circumstances of the case. However,* ***the party seeking divorce on the ground of desertion is required to show that he or she was not taking the advantage of his or her own wrong****. In the instant case the appellant herself pleaded that there had not been cohabitation between the parties after the marriage. She neither assigned any reason nor attributed the non-resumption of cohabitation to the respondent. From the pleadings and evidence led in the case, it is apparent that the appellant did not permit the respondent to have cohabitation for consummating the marriage. In the absence of cohabitation between the parties, a particular state of matrimonial position was never permitted by the appellant to come into existence. In the present case, in the absence of cohabitation and consummation of marriage, the appellant was disentitled to claim divorce on the ground of desertion.*

12. No evidence was led by the appellant to show that she was forced to leave the company of the respondent or that she was thrown away from the matrimonial home or that she was forced to live separately and that the respondent had intended animus deserendi. There is nothing on record to hold that the respondent had ever declared to bring the marriage to an end or refused to have cohabitation with the appellant. As a matter of fact the appellant is proved to have abandoned the matrimonial home and declined to cohabit with the respondent thus forbearing to perform the matrimonial obligation.

(Emphasis supplied by us)

23. In recent decision in the case of **Devanand Tamuli Vs. Kakumoni Kataky (2022) 5 SCC 459 (paras 7 to 12)** Hon'ble Supreme Court explained the **principles of desertion** and interpreted the word "**desertion" to mean intentional abandonment of one spouse by the other without the consent of other and without a reasonable cause.**

24. In the case of **Parveen Mehta v. Inderjit Mehta, (2002) 5 SCC 706 (para 21)** Hon'ble Supreme Court further interpreted the words "mental cruelty" and held as under :

"21. Cruelty for the purpose of Section 13(1)(i-a) is to be taken as a behaviour by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other. ***Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case****. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the*

attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehaviour in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty. ***The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other."***

(Emphasis supplied by us)

25. In the case of **Vishwanath Agrawal v. Sarla Vishwanath Agrawal, (2012) 7 SCC 288** (paras 22 to 33) Hon'ble Supreme Court again referred to its various earlier judgements interpreted the word "cruelty" and held as under :

"22. The expression "cruelty" has an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status.

23. In Sirajmohmedkhan Janmohamadkhan v. Hafizunnisa Yasinkhan [(1981) 4 SCC 250 : 1981 SCC (Cri) 829] , a two-Judge Bench approved the concept of legal cruelty as expounded in Pancho v. Ram Prasad [AIR 1956 All 41] wherein it was stated thus: (Pancho case [AIR 1956 All 41] , AIR p. 43, para 3)

"3. ... Conception of legal cruelty undergoes changes according to the changes and advancement of social concept and standards of living. With the advancement of our social conceptions, this feature has obtained legislative recognition that a second marriage is a sufficient ground for separate residence and separate maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used.

Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which may undermine the health of a wife."

It is apt to note here that the said observations were made while dealing with the Hindu Married Women's Right to Separate Residence and Maintenance Act (19 of 1946). This Court, after reproducing the passage, has observed that the learned Judge has put his finger on the correct aspect and object of mental cruelty.

24. In Shobha Rani v. Madhukar Reddi [(1988) 1 SCC 105 : 1988 SCC (Cri) 60] , while dealing with "cruelty" under Section 13(1)(i-a) of the Act, this Court observed that the said provision does not define "cruelty" and the same could not be defined. "Cruelty" may be mental or physical, intentional or unintentional. If it is physical, the court will have no problem to determine it. It is a question of fact and degree. If it is mental, the problem presents difficulty. Thereafter, the Bench proceeded to state as follows: (SCC p. 108, para 4)

"4. ... First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. *Ultimately, it is a matter of inference to be drawn by taking into account the nature of the*

conduct and its effect on the complaining spouse. ***There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted."***

25. After so stating, this Court observed in Shobha Rani case [(1988) 1 SCC 105 : 1988 SCC (Cri) 60] about the marked change in life in modern times and the sea change in matrimonial duties and responsibilities. It has been observed that: (SCC p. 108, para 5)

"5. ... when a spouse makes a complaint about the treatment of cruelty by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. ***The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance."***

26. Their Lordships in Shobha Rani case [(1988) 1 SCC 105 : 1988 SCC (Cri) 60] referred to the observations made in Sheldon v. Sheldon [1966 P 62 : (1966) 2 WLR 993 : (1966) 2 All ER 257 (CA)] wherein Lord Denning stated, "the categories of cruelty are not closed". Thereafter, the Bench proceeded to state thus: (Shobha Rani case [(1988) 1 SCC 105 : 1988 SCC (Cri) 60] , SCC p. 109, paras 5-6)

"5. ... Each case may be different. We deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful (sic) realm of cruelty.

6. These preliminary observations are intended to emphasise that the court in matrimonial cases is not concerned with ideals in family life. The court has only to understand the spouses concerned as nature made them, and consider their particular grievance. As Lord Reid observed in Gollins v. Gollins [1964 AC 644 : (1963) 3 WLR 176 : (1963) 2 All ER 966 (HL)] : (All ER p. 972 G-H)

"... In matrimonial affairs we are not dealing with objective standards, it is not a matrimonial offence to fall below the standard of the reasonable man (or the reasonable woman). We are dealing with this man or this woman.'"

(emphasis in original)

27. In V. Bhagat v. D. Bhagat [(1994) 1 SCC 337] , a two-Judge Bench referred to the amendment that had taken place in Sections 10 and 13(1)(i-a) after the (Hindu) Marriage Laws (Amendment) Act, 1976 and proceeded to hold that the earlier requirement that such cruelty has caused a reasonable apprehension in the mind of a spouse that it would be harmful or injurious for him/her to live with the other one is no longer the requirement. Thereafter, this Court proceeded to deal with what constitutes mental cruelty as contemplated in Section 13(1)(i-a) and observed that mental cruelty in the said provision can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. To put it differently, ***mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably***

be asked to put up with such conduct and continue to live with the other party. *It was further observed, while arriving at such conclusion, that* ***regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances****. What is cruelty in one case may not amount to cruelty in another case and it has to be determined in each case keeping in view the facts and circumstances of that case. That apart, the accusations and allegations have to be scrutinised in the context in which they are made. Be it noted, in the said case, this Court quoted extensively from the allegations made in the written statement and the evidence brought on record and came to hold that the said allegations and counter-allegations were not in the realm of ordinary plea of defence and did amount to mental cruelty.*

28. In ***Parveen Mehta v. Inderjit Mehta [(2002) 5 SCC 706*** *: AIR 2002 SC 2582] , it has been held that mental cruelty is a state of mind and feeling with one of the spouses due to behaviour or behavioural pattern by the other. Mental cruelty cannot be established by direct evidence and it is necessarily a matter of inference to be drawn from the facts and circumstances of the case. "A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living." (Parveen Mehta case [(2002) 5 SCC 706 : AIR 2002 SC 2582] , SCC p. 716, para 21) The facts and circumstances are to be assessed emerging from the evidence on record and thereafter, a fair inference has to be drawn whether the petitioner in the divorce petition has been subjected to mental cruelty due to the conduct of the other.*

29. In ***Vijaykumar Ramchandra Bhate v. Neela Vijaykumar Bhate [(2003) 6 SCC 334*** *: AIR 2003 SC 2462] , it has been opined that a conscious and deliberate statement levelled with pungency and that too placed on record, through the written statement, cannot be so lightly ignored or brushed aside.*

30. In ***A. Jayachandra v. Aneel Kaur [(2005) 2 SCC 22]*** *, it has been ruled that the question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status and environment in which they live. If from the conduct of the spouse, it is established and/or an inference can legitimately be drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse about his or her mental welfare, then the same would amount to cruelty. While dealing with the concept of mental cruelty, enquiry must begin as to the nature of cruel treatment and the impact of such treatment on the mind of the spouse. It has to be seen whether the conduct is such that no reasonable person would tolerate it.*

31. In ***Vinita Saxena v. Pankaj Pandit [(2006) 3 SCC 778]*** *, it has been ruled that as to what constitutes mental cruelty for the purposes of Section 13(1)(i-a) will not depend upon the numerical count of such incident or only on the continuous course of such conduct but one has to really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude necessary for maintaining a conducive matrimonial home.*

32. In ***Samar Ghosh v. Jaya Ghosh [(2007) 4 SCC 511]*** *, this Court,*

after surveying the previous decisions and referring to the concept of cruelty, which includes mental cruelty, in English, American, Canadian and Australian cases, has observed that: (SCC pp. 545-46, paras 99-100)

*"99. ... **The human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in the other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.***

*100. Apart from this, the **concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system, etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa.** There can never be any straitjacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances...."*

*33. In **Suman Kapur v. Sudhir Kapur [(2009) 1 SCC 422 : (2009)** 1 SCC (Civ) 204 : AIR 2009 SC 589] , after referring to various decisions in the field, this Court took note of the fact that the wife had neglected to carry out the matrimonial obligations and further, during the pendency of the mediation proceeding, had sent a notice to the husband through her advocate alleging that he had another wife in USA whose identity was concealed. The said allegation was based on the fact that in his income tax return, the husband mentioned the "Social Security Number" of his wife which did not belong to the wife, but to an American lady. The husband offered an explanation that it was merely a typographical error and nothing else. The High Court had observed that taking undue advantage of the error in the "Social Security Number", the wife had gone to the extent of making serious allegation that the husband had married an American woman whose "Social Security Number" was wrongly typed in the income tax return of the husband. This fact also weighed with this Court and was treated that the entire conduct of the wife did tantamount to mental cruelty."*

(Emphasis supplied by us)

Instances of cruelty

26. The word cruelty has not been defined under the Act 1955. In the case of **Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511 (para 101)** Hon'ble Supreme Court has given certain illustrations. Some instances of human behaviour which may be relevant in dealing with the case of "mental cruelty", and held as under :

"101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of "mental cruelty". The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live

with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day-to-day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilisation without medical reasons and without the consent or knowledge of his wife and similarly, if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

27. The aforementioned illustrations given in the case of **Samar Ghosh (supra)**

have been reiterated by Hon'ble Supreme Court in the case of ***K. Srinivas Rao v. D.A. Deepa, (2013) 5 SCC 226 (para 10)*** and after referring to various judgments observed/held as under (paras 12 to 16) :

12. It is pertinent to note that in Samar Ghosh case [(2007) 4 SCC 511] the husband and wife had lived separately for more than sixteen-and-a-half years. This fact was taken into consideration along with other facts as leading to the conclusion that matrimonial bond had been ruptured beyond repair because of the mental cruelty caused by the wife. Similar view was taken in Naveen Kohli [(2006) 4 SCC 558] .

13. In V. Bhagat v. D. Bhagat [(1994) 1 SCC 337] in the divorce petition filed by the husband the wife filed written statement stating that the husband was suffering from mental hallucination, that his was a morbid mind for which he needs expert psychiatric treatment and that he was suffering from "paranoid disorder". In cross-examination her counsel put several questions to the husband suggesting that several members of his family including his grandfather were lunatics. This Court held that these assertions cannot but constitute mental cruelty of such a nature that the husband cannot be asked to live with the wife thereafter. Such pleadings and questions, it was held, are bound to cause immense mental pain and anguish to the husband.

14. In Vijaykumar Bhate [(2003) 6 SCC 334] disgusting accusations of unchastity and indecent familiarity with a neighbour were made in the written statement. This Court held that the allegations are of such quality, magnitude and consequence as to cause mental pain, agony and suffering amounting to the reformulated concept of cruelty in matrimonial law causing profound and lasting disruption and driving the wife to feel deeply hurt and reasonably apprehend that it would be dangerous to live with her husband.

15. In Naveen Kohli [(2006) 4 SCC 558] the respondent wife got an advertisement issued in a national newspaper that her husband was her employee. She got another news item issued cautioning his business associates to avoid dealing with him. This was treated as causing mental cruelty to the husband. In Naveen Kohli [(2006) 4 SCC 558] the wife had filed several complaints and cases against the husband. This Court viewed her conduct as a conduct causing mental cruelty and observed that: (SCC p. 582, para 82)

"82. ... The findings of the High Court that these proceedings could not be taken to be such which may warrant annulment of marriage, is wholly unsustainable."

16. Thus, to the instances illustrative of mental cruelty noted in Samar Ghosh [(2007) 4 SCC 511] , we could add a few more. ***Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse.***

(Emphasis supplied by us)

28. In the case of **Ravi Kumar v. Julmidevi, (2010) 4 SCC 476 (para 19)** Hon'ble Supreme Court while observing that "cruelty" in matrimonial behaviour defies any definition and its categories can

never be closed and whether the husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any pre-determined rigid formula, held as under :

"19. It may be true that there is no definition of cruelty under the said Act. Actually such a definition is not possible. In matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, sometime it may take a different form. At times, it may be just an attitude or an approach. Silence in some situations may amount to cruelty".

29. In the case of ***A. Jayachandra v. Aneel Kaur, (2005) 2 SCC 22,*** **(para 13 & 14) Hon'ble Supreme Court held as under :**

"13. The court dealing with the petition for divorce on the ground of cruelty has to bear in mind that the problems before it are those of human beings and the psychological changes in a spouse's conduct have to be borne in mind before disposing of the petition for divorce. However insignificant or trifling, such conduct may cause pain in the mind of another. But before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon to endure as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent.

14. The foundation of a sound marriage is tolerance, adjustment and respecting one another. Tolerance to each other's fault to a certain bearable extent has to be inherent in every marriage. Petty quibbles, trifling differences should not be exaggerated and magnified to destroy what is said to have been made in heaven. All quarrels must be weighed from that point of view in determining what constitutes cruelty in each particular case and as noted above, always keeping in view the physical and mental conditions of the parties, their character and social status. A too technical and hypersensitive approach would be counterproductive to the institution of marriage. The courts do not have to deal with ideal husbands and ideal wives. It has to deal with a particular man and woman before it. The ideal couple or a mere ideal one will probably have no occasion to go to Matrimonial Court. [See N.G. Dastane (Dr.) v. S. Dastane [(1975) 2 SCC 326 : AIR 1975 SC 1534]"

30. In the case of **Mangayakarasi Vs. M Yuvaraj (2020) 3 SCC 786 (para 14),** Hon'ble Supreme Court observed that **unsubstantiated allegation of dowry demand or such other allegation made by the wife against the husband and his family members which exposed them to criminal litigation and ultimately it is found that such allegation is unwarranted and without basis and if**

that act of the wife itself forms the basis for the husband to allege that mental cruelty has been inflicted on him, certainly, in such circumstance, if a petition for dissolution of marriage is filed on that ground and evidence is tendered before the original court to allege mental cruelty it could well be appreciated for the purpose of dissolving the marriage on that ground.

Irretrievable Breakdown of the Marriage

31. In the case of Nav***een Kohli v. Neelu Kohli, (2006) 4 SCC 558 (paras 66 and 91),*** Hon'ble Supreme Court observed irretrievable breakdown of marriage as a ground for divorce and held as under :

*"**Irretrievable breakdown of marriage***

*66. **Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. Because of the change of circumstances and for covering a large number of cases where the marriages are virtually dead and unless this concept is pressed into service, the divorce cannot be granted.** Ultimately, it is for the legislature whether to include irretrievable breakdown of marriage as a ground of divorce or not but in our considered opinion the legislature must consider irretrievable breakdown of marriage as a ground for grant of divorce under the Hindu Marriage Act, 1955.*

*91. Before we part with this case, on consideration of the totality of facts, **this Court would like to recommend the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act, 1955 to incorporate irretrievable breakdown of marriage as a ground for the grant of divorce.** A copy of this judgment be sent to the Secretary, Ministry of Law and Justice, Department of Legal Affairs, Government of India for taking appropriate steps."*

(Emphasis supplied by us)

32. Three judges Bench of Hon'ble Supreme Court in the case ***Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511 (paras 90 to 95)*** referred and relied upon 71st report of law commission of India which briefly dealt with concept of Irretrievable breakdown of marriage and held as under:

"90. We have examined and referred to the cases from the various countries. We find strong basic similarity in adjudication of cases relating to mental cruelty in matrimonial matters. Now, we deem it appropriate to deal with the 71st Report of the Law Commission of India on "Irretrievable Breakdown of Marriage".

*91. **The 71st Report of the Law Commission of India briefly dealt with the concept of irretrievable breakdown of marriage. This report was submitted to the Government on 7-4-1978.** In this report, it is mentioned that during last 20 years or so, and now it would be around 50 years**, a very important question has engaged the attention of lawyers, social scientists and men of affairs, should the grant of divorce be based on the fault of the party, or should it be based on the breakdown of the marriage?** The former is known as the matrimonial offence theory or fault theory. The latter has come to be known as the breakdown theory. It would be relevant to recapitulate recommendation of the said Report.*

92. In the Report, it is mentioned that the germ of the breakdown theory, so far as Commonwealth countries are concerned, may be found in the legislative and judicial developments during a much

earlier period. The (New Zealand) Divorce and Matrimonial Causes Amendment Act, 1920, included for the first time the provision that a separation agreement for three years or more was a ground for making a petition to the court for divorce and the court was given a discretion (without guidelines) whether to grant the divorce or not. The discretion conferred by this statute was exercised in a case Lodder v. Lodder [1921 NZLR 786] . Salmond, J., in a passage which has now become classic, enunciated the breakdown principle in these words:

"The legislature must, I think, be taken to have intended that separation for three years is to be accepted by this Court, as prima facie a good ground for divorce. When the matrimonial relation has for that period ceased to exist de facto, it should, unless there are special reasons to the contrary, cease to exist de jure also. In general, it is not in the interests of the parties or in the interest of the public that a man and woman should remain bound together as husband and wife in law when for a lengthy period they have ceased to be such in fact. In the case of such a separation the essential purposes of marriage have been frustrated, and its further continuance is in general not merely useless but mischievous."

93. ***In the said Report, it is mentioned that restricting the ground of divorce to a particular offence or matrimonial disability, causes injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet such a situation has arisen in which the marriage cannot survive. The marriage has all the external appearances of marriage, but none in reality.*** *As is often put pithily, the marriage is merely a shell out of which the substance is gone. In such circumstances, it is stated, there is hardly any utility in maintaining the marriage as a facade, when the emotional and other bonds which are of the essence of marriage have disappeared.*

94. ***It is also mentioned in the Report that in case the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce****, then the parties alone can decide whether their mutual relationship provides the fulfilment which they seek.* ***Divorce should be seen as a solution and an escape route out of a difficult situation. Such divorce is unconcerned with the wrongs of the past, but is concerned with bringing the parties and the children to terms with the new situation and developments by working out the most satisfactory basis upon which they may regulate their relationship in the changed circumstances.***

95. ***Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The court, no doubt, should seriously make an endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties."***

(Emphasis supplied by us)

33. In recent judgement in the case of **Munish Kakkar v. Nidhi Kakkar, (2020) 14 SCC 657,** relying upon the judgement in the case of ***S. Srinivas Kumar Vs. R. Shametha (2019) 9 SCC 409*** **Hon'ble Supreme Court granted the decree of**

divorce on the ground of irretrievable breakdown of marriage in exercise of its extra ordinary power **under Article 142 of the Constitution of India and specifically clarified that it is only this Court i.e. the Supreme Court which can do so in exercise of powers under Article 142 of the Constitution of India.** Para 19 of the judgement is reproduced below :

"19. We may note that in a recent judgment of this Court, in R. Srinivas Kumar v. R. Shametha [R. Srinivas Kumar v. R. Shametha, (2019) 9 SCC 409 : (2019) 4 SCC (Civ) 522] , to which one of us (Sanjay Kishan Kaul, J.) is a party, divorce was granted on the ground of irretrievable breakdown of marriage, after examining various judicial pronouncements. ***It has been noted that such powers are exercised not in routine, but in rare cases, in view of the absence of legislation in this behalf, where it is found that a marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably.*** *That was a case where parties had been living apart for the last twenty-two (22) years and a re-union was found to be impossible. We are conscious of the fact that this Court has also extended caution from time to time on this aspect, apart from noticing that* ***it is only this Court which can do so, in exercise of its powers under Article 142 of the Constitution of India.*** *If parties agree, they can always go back to the trial court for a motion by mutual consent, or this Court has exercised jurisdiction at times to put the matter at rest quickly. But that has not been the only circumstance in which a decree of divorce has been granted by this Court. In numerous cases, where a marriage is found to be a dead letter, the Court has exercised its extraordinary power under Article 142 of the Constitution of India to bring an end to it."*

(Emphasis supplied by us)

34. In the case of **Neha Tyagi Vs. Deepak Tyagi (2022) 3 SCC 86**, Hon'ble Supreme Court, exercising the powers under Article 142 of the Constitution of India; did not interfere with the dissolution of marriage on account of irretrievable breakdown of marriage.

35. **Thus, the principles of law for divorce under Section 13 of the Act, 1955, on the ground of cruelty, desertion or irretrievable breakdown of marriage, may be briefly summarised as under :**

(i) The foundation of a sound marriage is tolerance, adjustment and respecting one another. Tolerance to each other's fault to a certain bearable extent has to be inherent in every marriage. Petty quibbles, trifling differences should not be exaggerated and magnified to destroy married life. Too technical and hypersensitive approach in matrimonial matters would be counterproductive to the institution of marriage. Therefore, approach should be to make effort to reconcile differences as far as possible.

*(ii) The word "**cruelty**" has not been defined in the Act, 1955. It has been used in Section 13(i)/(i-a) of the Act 1955 in the context of human conduct or behaviour in relation to or in respect to matrimonial duties or obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical. It may be intentional or unintentional. If it is physical, it is question of fact and degree. If it is mental, the inquiry must begin as to the nature of cruel treatment and then as to the impact of such treatment on the mind of the spouse as to whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. It is a matter of inference to be drawn by considering the nature of the*

conduct and its effect on the complaining spouse.

(iii) The human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in the other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system. Concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system, etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa.

(vii) Instances of cruelty given by Hon'ble Supreme Court in the case of ***Samar Ghosh (supra)*** *and* ***K. Srinivas Rao (supra)*** *are not exhaustive but illustrative which have been reproduced in para 26 above.*

*(iv)****Mental cruelty*** *is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life.*

(v) What is cruelty in one case may not amount to cruelty in another case. Unlike the case of physical cruelty, mental cruelty is difficult to be established by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other.

(vi) ***First****, the enquiry must begin as to the nature of the cruel treatment.* ***Second****, the impact of such treatment on the mind of the spouse, Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.*

(viii) In the case of ***K. Srinivas Rao (supra)*** *another instance of mental cruelty was added stating that making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse.*

(ix) In ***Mangayakarasi (supra)*** *Hon'ble Supreme Court further explained the scope of cruelty stating that unsubstantiated allegation of dowry demand or such other allegation made by the wife against the husband and his family members which exposed them to criminal litigation and ultimately it is found that such allegation is unwarranted and without basis and if that act of the wife itself forms*

the basis for the husband to allege that mental cruelty has been inflicted on him, certainly, in such circumstance, if a petition for dissolution of marriage is filed on that ground and evidence is tendered before the original court to allege mental cruelty it could well be appreciated for the purpose of dissolving the marriage on that ground.

*(xi) "**Desertion**", for the purpose of seeking divorce under the Act,1955, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations i.e. not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case. If a spouse abandons the other in a state of temporary passion, for example, anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion. Two elements are essential so far as the deserted spouse is concerned : (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The offence of desertion commences when the fact of separation and the animus deserendi coexist. But it is not necessary that they should commence at the same time.*

*(xii) **Irretrievable breakdown of marriage** is not a ground for divorce under the Hindu Marriage Act, 1955. Because of the change of circumstances and for covering a large number of cases where the marriages are virtually dead and unless this concept is pressed into service, the divorce cannot be granted. Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The court, no doubt, should seriously make an endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties. The power to dissolve marriage on the ground of irretrievable breakdown is exercised in rare cases, and not in routine, in the absence of legislation in this behalf. In a recent judgment in Munish Kakkar (supra), it has been held that **it is only the Supreme Court which can dissolve marriage on the ground of irretrievable breakdown, in exercise of its power under Article 142 of the Constitution of India,** where it is found that a marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably.*

(xiii) Hon'ble Supreme Court in the case of Naveen Kohli (supra) has recommended to the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act, 1955 to incorporate irretrievable breakdown of marriage as a ground for the grant of divorce and a copy of the said judgement was sent to the Secretary, Ministry of law and justice department of

legal affairs Government of India for taking appropriate steps. In the case of Samar Ghosh (supra) Hon'ble Supreme Court referred to 71st report of Law Commission of India submitted to Government of India on 7-4-1978 in which it was mentioned that in case the marriage has ceased to exist in substance and in reality there is no reason for denying divorce. Nothing has been brought on record to indicate the steps, if any, taken by the Union of India either with respect to 71st report of Law commission of India or pursuant to the recommendation of Hon'ble Supreme Court in para 91 of the judgement in the case of Naveen Kohli (supra). ***Therefore, we remind the Union of India the recommendation made by Hon'ble Supreme Court in the case of Naveen Kohli (supra) and the 71st report of the Law Commission of India dated 7-4-1978 and request to consider it.***

36. We find from the facts noted in paras 2 to 9, the discussion in paras 12 to 17 and principle summarised in para 35 above that the plaintiff - respondent has proved mental cruelty by the defendant - appellant, before the Court below. Instances of making false complaints by the defendant appellant against the plaintiff - respondent to higher authorities, making wild allegations against the parents of the plaintiff - respondent, unproved allegation of indulgence of the plaintiff in adultery and damaging their reputation in the society, etc. leaves no manner of doubt that the court below has not committed any illegality in the impugned judgment to hold commission of mental cruelty by the defendant - appellant to the plaintiff - respondent. The impugned judgement of the court below is based on consideration of evidences on record. Thus, the impugned judgement does not suffer from any illegality.

37. For all the reasons aforestated, we do not find any merit in this appeal. The impugned judgment of the court below does not suffer from any illegality. Consequently, the appeal is **dismissed**. Pending applications, if any, stand disposed of.

38. Let a copy of this judgement be sent by the Registrar General of this Court to the Secretary, Ministry of Law and Justice, Department of Legal Affairs, Government of India to remind the Union of India in the light of the judgements referred in paragraphs 31, 32 and 35(xiii) above.

(2022) 11 ILRA 586
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.09.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

Second Appeal No. 447 of 1986

Siddiq Ahmad & Ors.
...Defendants-Appellants
Versus
Shaukat Ali & Ors.
...Defendants-Respondents

Counsel for the Appellants:
Dr. Vinod Kumar Rai, Dr. Vinod Kumar Rai

Counsel for the Respondents:
Sri D.C. Srivastava, Sri A.K. Srivastava, Sri Amit Khanna, Sri Jugal Kishori Khanna, Sri Kameshwar Rao, Sri Mahendra Narain Singh, Sri Pankaj Mishra, Sri S.K. Srivastava, Sri S.P. Lal, Sri Sanjay Kumar Singh, Sri Shrawan Kumar Pandey, Sri Vinod Kumar Singh

Muslim Law - Inheritance - law of inheritance applicable to Sunni Muslims

governed by the Hanafi School - Mulla's Principles of Mahomedan Law, Ss 28, 63 - according to Mulla's Principles of Mahomedan Law, there is exclusion of the full sister's share in the presence of a son, how low soever (Para 49)

Late Khoob Ali was the owner of the suit property - After his death, his daughters, Nasiban and Bashiran were recorded - Smt. Bashiran passed away leaving behind her, her husband Shaukat Ali, the plaintiff and son Rasheed, defendant no.2 - Partition Suit was instituted by Shaukat Ali, arraying Nasiban Bibi as defendant no.1 and Rasheed @ Kallu, Shaukat Ali's son as the second defendant - Nasiban and Bashiran, the two sisters, daughters of Khoob Ali, were held entitled to inherit a half share each in the suit property - plaintiff being Bashiran's husband, who survived her, was held entitled to Bashiran's half share, along with the parties' son, defendant no.2 - Suit was decreed for a half share in favour of the plaintiff and defendant no.2 - In Second Appeal by Nasiban/ defendant no.1 it was argued that Courts below have erred in dividing the entire half share in the suit property that Bashiran inherited from her father, between her husband, the plaintiff and son, defendant no.2 - Nasiban's share, upon Bashiran's demise, has been completely ignored - It was argued that since Smt. Nasiban was the lone full sister of Bashiran, upon the latter's death, she would inherit a half share in Bashiran's estate along with the other two heirs, that is to say, Bashiran's husband and son - Held - A sister, notwithstanding her position as a sharer, is excluded by a son, son's son how low soever and father or true grandfather - according to Mulla's Principles of Mahomedan Law, there is exclusion of the full sister's share in the presence of a son, how low soever- In the present case, the deceased Bashiran left behind her a son, besides her husband - son's presence would, therefore, exclude the right of the sister to inherit as a sharer to the extent of a one-half share by virtue of being the lone sister of Bashiran - therefore, the half share that Bashiran inherited from her father, Khoob Ali would be shared between her husband, Shaukat Ali and their son, Rasheed @ Kallu (Para 42, 45, 46, 46)

Dismissed. (E-5)

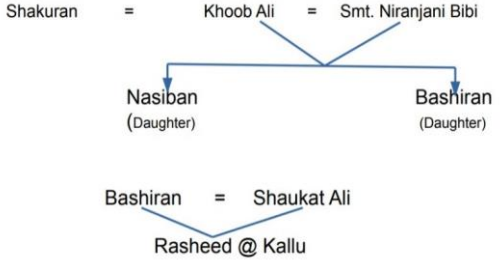
(Delivered by Hon'ble J.J. Munir, J.)

1. This is a defendant's second appeal, arising out of a preliminary decree passed in a suit for partition.

2. Original Suit No. 22 of 1976 was instituted by Shaukat Ali, arraying Nasiban Bibi as defendant no.1 and Rasheed @ Kallu, Shaukat Ali's son as the second defendant. Jogendra Nath @ Lahiri and Lallu were arrayed as defendant nos. 3 and 4 to the suit and Jamir Ahmad @ Jhamman Driver as the fifth defendant.

3. Shaukat Ali sought partition of the four houses, shown in Schedule A to the plaint. The relief of partition is confined to Shaukat Ali, defendant nos. 1 and 2. The other three defendants have been impleaded for reasons that shall be shortly indicated. The four houses set out in Schedule A to the plaint shall hereinafter be referred to as "the suit property'.

4. The plaintiff pleaded a pedigree to indicate the relationship between himself and defendant nos. 1 and 2. The said pedigree, set out in Paragraph No.1 of the plaint, is detailed below:



5. The plaintiff asserted a case that the suit property, comprising four houses together with a courtyard, is located at

Town Area Robertsganj, District Mirzapur (now District Sonbhadra). The late Khoob Ali was the owner in possession of the suit property until his demise. After his death, his widow Smt. Niranjani Bibi was recorded in the Municipal Records as the owner. After Niranjani's demise, the names of Smt. Shakuran, the other widow of Khoob Ali, besides that of his daughters, Nasiban and Bashiran were recorded. It is asserted that Shakuran, Smt. Nasiban and Smt. Bashiran - all three were recorded as owners in possession of the suit property after Smt. Niranjani. Smt. Bashiran passed away leaving behind her, her husband Shaukat Ali, the plaintiff and son Rasheed, defendant no.2, as heirs and LRs, entitled to inherit.

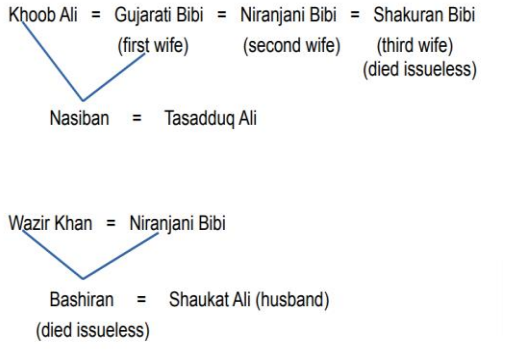
6. It is the plaintiff's case that by succession, he and defendant no.2, the plaintiff's son, together have a half share in the suit property, whereas defendant no.1, Smt. Nasiban has the other half. Specifying the shares further, it is the plaintiff's case that a one-fourth share is held by him, one half by defendant no.1 and the remainder one-fourth by defendant no.2, and all parties are in possession of the suit property, in accordance with their shares. It is the plaintiff's case that defendant no.1, Nasiban, out of the houses, comprising the suit property, has sold off two, all by herself, vide registered sale deeds dated 25.01.1969 and 29.11.1971, in favour of Jogendra Nath @ Lahiri and Lallu, defendant nos. 3 and 4 to the suit, in that order.

7. It is also the plaintiff's case that the vendees have been put in possession of the two houses, sold to them through the sale deeds aforesaid by defendant no.1, and these two houses are detailed in Schedule B to the plaint. It is asserted by the plaintiff that notwithstanding the execution of the two sale deeds under reference by defendant no.1 in favour of defendant nos. 3 and 4, the two houses sold by defendant no. 1 exclusively, are also owned by the plaintiff and defendant no.2 together, to the extent of a half share, or a one-fourth share for each of them. The plaintiff has asserted that he repeatedly expressed his wish with defendant no. 1 that he wanted her to partition the suit property, but she remained elusive. This gave rise to the cause of action necessitating the suit for partition.

8. It is the plaintiff's further case that in a part of the houses comprised in Schedule B, defendant no. 5, Jamir Ahmad stays as a tenant of the plaintiff's. Accordingly, Jamir Ahmad has been impleaded as defendant no. 5 (proforma), in order to avoid any legal objection as to non-joinder, though no relief has been claimed against him. The plaintiff claimed a decree for partition by metes and bounds, praying that the Court may partition the suit property, set out in Schedule A to the plaint, granting him a one-fourth share, to defendant no. 1 a half share, and to defendant no. 2 a one-fourth share. It was alternatively prayed that if for some reason, it be not possible to partition the suit property according to the shares claimed, the plaintiff and defendant no.2 be given their entire half share together, in the remainder of the two houses (not sold) by defendant no. 1.

9. The suit was contested by defendant no. 1, Smt. Nasiban Bibi, who put in her written statement dated 07.04.1977. She denied the plaint allegations generally and in her additional pleas, propounded a pedigree indicating the relationship of parties, very different from that pleaded by the plaintiff. The pedigree

pleaded by defendant no. 1, set out in Paragraph No. 13 of her written statement, is depicted below:



10. There is no quarrel at the instance of the first defendant to the extent that the suit property was self-acquired property of the late Khoob Ali and that during his lifetime, he remained its exclusive owner in possession. But, beyond this commonality of stance, there is a sharp digression of stand between parties about their relationship and the way the suit property devolved, including the parties' share(s) therein. According to Smt. Nasiban, defendant no. 1, Khoob Ali's first wife was Smt. Gujrati Bibi. Smt. Nasiban was born of the wedlock of Khoob Ali and Smt. Gujrati Bibi. After Smt. Gujrati Bibi passed away, Khoob Ali married a second time. His second wife was Smt Niranjani Bibi, the widow of one Wazir Khan. Smt. Niranjani Bibi brought along with her, her daughter Bashiran, then a young child, begotten of Niranjani's first husband, Wazir Khan. Smt. Bashiran is not Khoob Ali's daughter. Smt. Niranjani was never blessed with a child during wedlock with Khoob Ali. Smt. Niranjani Bibi passed away during the lifetime of Khoob Ali and he married a third time. His third wife was Shakuran Bibi.

11. It is the first defendant's case that soon after, Khoob Ali passed away, Shakuran Bibi contracted a second marriage and went away. It is also pleaded by the first defendant that Bashiran Bibi was married to the plaintiff, while still a minor. Smt. Bashiran Bibi, within a year of her marriage, suffered injury by fire and died in the year 1958. No child was born of the wedlock between the plaintiff, Shaukat Ali and Smt. Bashiran Bibi. After Bashiran Bibi's demise, the plaintiff married a woman from Varanasi. The second defendant, Rasheed @ Kallu was born of the woman from Varanasi, whom the plaintiff married after Smt. Bashiran Bibi's demise. It is, thus, the first defendant's case that the second defendant is not at all Bashiran Bibi's son and the plaintiff. It was pleaded falsely, to assert the second defendant to be so. There are then some pleas raised about the boundaries of the suit property being incorrect. But, that is not very material to the present suit.

12. The first defendant, on the basis of whatever has been recapitulated hereinabove for her pleaded case, asserted that the plaintiff and defendant no.2 are not entitled to claim any share in the suit property.

13. The next material part of the first defendant's case is her assertion that in the house tax assessment records of the Town Area Committee, Bashiran Bibi's name had been incorrectly mutated, which did not bind the first defendant at all. It is also said that after Bashiran Bibi's demise, the plaintiff made an application to the Town Area Committee, Robertsganj, seeking mutation in place of Smt. Bashiran Bibi, on the basis of a Will left by her. The plaintiff's application for mutation, as aforesaid, was rejected on 16.02.1960. The plaintiff did not take any steps consequent upon the aforesaid rejection of his claim by the Town Area Committee. The plaintiff also did

not lay any further claim to the suit property, but now has brought the present suit on the basis of a false case, that is contrary to facts and events, besides being the result of ill-advice, motivated by persons, hostile to the first defendant. It is also asserted that over Houses nos. 1 and 2, detailed in Paragraph No. 18 of the written statement, the first defendant always exercised her dominion and right of ownership, and as the owner thereof, transferred these houses to Jogendra Nath @ Lahiri, defendant no. 3 and Lallu, defendant no. 4, through sale deeds. In the remainder of the two houses, bearing nos. 3 and 4, shown in Paragraph No. 18 of the written statement, defendant no. 5 was a tenant in one i.e. House no. 3 and in House no. 4, the first defendant resides herself. It is asserted that the plaintiff had no control or dominion, much less possession, over the suit property at any time whatsoever.

14. Almost identical but separate written statements were put in on behalf of defendant nos. 3 and 4, Jogendra Nath @ Lahiri son of Daya Ram and Lallu son of Mohan, respectively.

15. In the written statement filed on behalf of defendant no. 3, Jogendra Nath @ Lahiri, apart from supporting the stand of the first defendant, it has been pleaded that defendant no. 3 is a *bona fide* purchaser for value without notice. He has purchased House No. 1, shown in Schedule B to the plaint. Likewise is the stand of the fourth defendant, Lallu.

16. On the pleadings of parties, the following issues were struck (translated into English from Hindi):

(1) Whether the plaintiff is entitled to a share of 1/2 in the disputed house?

(2) Whether the suit is undervalued and the court-fee paid insufficient?

(3) Whether the plaintiff has a right to sue?

(4) Whether the suit is barred by estoppel and acquiescence?

(5) Whether defendant nos. 3 and 4 are bona fide purchasers for value?

(6) Whether the suit is barred by limitation?

(7) To what relief, if any, is the plaintiff entitled?

17. The learned Civil Judge tried the suit and decreed it for a half share in favour of the plaintiff and defendant no.2 vide judgment and decree dated 30.08.1982.

18. Aggrieved by the said decree, Nasiban Bibi preferred Civil Appeal No. 113 of 1982 to the District Judge of Mirzapur, praying that the Trial Court's decree be set aside and the suit dismissed. The said appeal came up for hearing, upon assignment, before the Third Additional District Judge, Mirzapur on 15.11.1985. The learned Additional District Judge dismissed the appeal, but with a modification of the decree, indicated in the judgment (not the operative order) that in the final decree to be prepared, the plaintiff's share and that of defendant no. 2 should not be mixed up. The fact as to why the aforesaid modification was made to the Trial Court's decree and whether it was in accordance with the shares of parties determined by the Courts below, bearing in mind the distinct stages of the passing of a preliminary decree and preparation of the final decree would be dealt with a little later in this judgment.

19. Aggrieved by the decree passed by the Lower Appellate Court, the heirs

and LRs of Smt. Nasiban, who died pending appeal and substituted before the Lower Appellate Court, have moved this Court, invoking our jurisdiction under Section 100 of the Code of Civil Procedure, 1908 (for short, "CPC').

20. The heirs and LRs of Smt. Nasiban shall hereinafter be jointly referred to as 'the appellants'. However, any reference to Smt. Nasiban, would either be as defendant no.1 or by name. Shaukat Ali, the plaintiff to the suit and respondent no.1 to this appeal, died pending the present appeal and his heirs and LRs, to wit, Suggan wife of Shaukat Ali, Anwar, Jamshed and Parvez sons of Shaukat Ali, were substituted as respondent nos.1/1, 1/2, 1/3 and 1/4 in that order. Hereinafter, any reference to Shaukat Ali, would either be by name or as "the plaintiff'. Any reference to his heirs would be by their number in the array.

21. This appeal was admitted to hearing vide order dated 28.04.2017 on the following substantial question of law:

"Whether the courts below applied the correct principle of law while dividing the share between Shaukat Ali, the plaintiff, husband of the Bashiran Bibi and Nasiban Bibi -the defendant- who is the sister of Bashiran Bibi?"

22. The appeal was heard on the aforesaid question and it must be remarked at the outset that the question postulates not only the determination of the plaintiff's entitlement to a share in the suit property claimed, but also includes within the half share that the plaintiff claims, the one-fourth that the plaintiff says, belongs to defendant no.2.

23. Heard Dr. Vinod Kumar Rai, learned Counsel for the appellants, Mr. Amit Khanna, learned Counsel appearing on behalf of respondent No.1/1, Mr. Sanjay Kumar Singh and Mr. Shrawan Kumar Pandey, learned Counsel appearing for respondent No.8. No one appeared on behalf of the other respondents.

24. The Trial Court decided Issue No. 1 as the most substantial issue between parties, which relates to the plaintiff's claimed share in the suit property. In deciding that issue, the Trial Court went into the question as to whether Smt. Bashiran and Smt. Nasiban were sisters, born to the same parents. This question arose in the context of the defendant's plea that Smt. Nasiban was Khoob Ali's daughter, begotten of his wife, Smt. Gujrati Bibi, whereas Smt. Bashiran was a stranger to Khoob Ali's family, who had come to that household along with her mother, Smt. Niranjani Bibi, when Khoob Ali married a second time. Smt. Bashiran has been claimed to be the daughter of Smt. Niranjani Bibi, begotten of her first husband, Wazir Khan, who passed away, leaving her behind as his widow. The Trial Court opined that since it was a case set up by defendant no.1 that Bashiran was not Khoob Ali's daughter, burden lay upon her to prove the fact.

25. The evidence that the Trial Court considered, was the registered sale deed dated 25.01.1969 executed by Nasiban in favour of defendant no. 3, where she has acknowledged Bashiran to be her sister and the daughter of Khoob Ali, who was married to Shaukat Ali, the plaintiff. In the opinion of the Trial Court, this recital in the sale deed was made at a time when there were no hostilities between parties. This recital in the sale deed has been regarded as an admission on Nasiban's part by the Trial Judge. It has further been opined that

Nasiban never entered the witness-box to prove her case that Bashiran was not Khoob Ali's daughter, or her sister, or to explain her admission in the sale deed.

26. The Trial Court has also concluded against defendant no.1 on the premise that since she avoided entering the witness-box, a presumption of fact would arise against her under Section 114 of the Indian Evidence Act, 1872 to the effect that if she did, and faced cross-examination, her testimony might have gone against her. The Trial Judge has also looked into the *Khasra-Abadi* relating to Town Area Robertsganj, District Mirzapur for the year 1940-41, Ex. 8, which shows that on 10th January, 1947 in place of Niranjani Bibi, the names of defendant no. 1, Smt. Nasiban, Smt. Bashiran, a minor at that time and Smt. Shakuran, Khoob Ali's widow, were mutated in the Town Area Records by succession over the suit property.

27. There are then remarks that there are no reasons to disbelieve this cogent record of rights. The Trial Judge has also observed that defendant no.1 says that she is the sole heir and LR of Khoob Ali, but the circumstance that upon Smt. Niranjani's death, who had been mutated in place of Khoob Ali, the plaintiff's wife, Bashiran, defendant no.1, Smt. Nasiban and Khoob Ali's third wife, Shakuran, who survived him, were all mutated in the record of rights by succession, does not support Smt. Nasiban's case. On these facts and circumstances, the Trial Court has inferred that both Bashiran and Nasiban are daughters of Khoob Ali, who would inherit his property. Khoob Ali's third wife went away after his demise and her civil death has been presumed by the Trial Court, because she never came back again or claimed a right.

28. Nasiban and Bashiran, the two sisters, daughters of Khoob Ali, were held entitled to inherit a half share each in the suit property. The plaintiff being admittedly Bashiran's husband, who survived her, was held entitled to Bashiran's half share, along with the parties' son, defendant no.2. Nothing was said by the Trial Court about the issue, that was also raised by defendant no. 1, that the second defendant, Rasheed was not Bashiran's son, but born to the plaintiff after Bashiran's death from a subsequent marriage to a woman from Varanasi. There is no finding recorded by the Trial Court on the said question. The Trial Court has also opined that the testimony of Nasiban's husband, who entered the witness-box in support of the case that she pleaded, is not reliable. He is a partisan witness and his evidence not dependable. To the contrary, the plaintiff, Shaukat Ali's case is well established by documentary evidence on record and the circumstances. The Trial Court, therefore, passed a decree for a half share in the suit property in favour of the plaintiff and defendant no.2.

29. The Lower Appellate Court in its concurring opinion has more or less drawn the same conclusions on the totality of evidence on record as the Trial Court. It has been opined that defendant no. 1, Smt. Nasiban, upon whom burden lay to prove the case that Bashiran was not Khoob Ali's daughter, had not led any evidence on the point. The documentary and oral evidence on the other hand, besides circumstances which include the sale deed executed by Smt. Nasiban, the mutation made in the *Khasra Abadi* relating to the year 1940-41, Ex. 8, under orders of the Town Magistrate dated 10.01.1947 in favour of Smt. Bashiran, after the death of Smt. Niranjani Bibi, in their totality have been held to

support the plaintiff's case that his wife, Smt. Bashiran was Smt. Nasiban's sister and daughter of Khoob Ali. The two sisters, therefore, inherited the suit property from Khoob Ali. The plaintiff inherited his wife's share, which is a one-half along with defendant no.2, the parties' son. The Lower Appellate Court also examined that part of defendant no.1's case, where it was said that defendant no. 2, to wit, Rasheed @ Kallu, was not Bashiran's son, but born to the plaintiff, Shaukat Ali of another woman, whom he married after Bashiran's demise. On this point, the Lower Appellate Court has opined that the burden of proving the fact, that defendant no.2 was born of a later marriage contracted by Shaukat Ali, lay upon Smt. Nasiban Bibi.

30. It is recorded by the Lower Appellate Court that the evidence offered on this point is that of Tasadduq, DW-1, who happens to be the Nasiban Bibi's husband. On the other hand, the plaintiff, Shaukat Ali, who, without doubt, is the second defendant's father, has said on oath that the said defendant was born to him and Smt. Bashiran Bibi. The Lower Appellate Court has remarked that normally the evidence of the father about the mother of his child has to be given preference and may be disbelieved, if there is some cogent and convincing evidence to the contrary. The Lower Appellate Court has refused to disbelieve the plaintiff on this point and has rather disbelieved Tasadduq, Nasiban's husband, saying that he is an interested witness. The Lower Appellate Court has, about the shares of parties, held that the plaintiff would have a one-fourth share and defendant no.2 a one-fourth share, which the defendant no.2 would be entitled to claim on payment of court-fee at the time of preparation of the final decree. Likewise, defendant no.1, Smt. Nasiban, represented by her LRs, the appellants would be entitled to her half share, which too, they can get partitioned in the final decree to be passed.

31. There is remark by the Lower Appellate Court that defendant no.1, who was in appeal before him, objected to the decree on the ground that the plaintiff could claim a share for himself and not defendant no. 2. This objection has been disposed of by saying that in a partition suit, the Court has to determine and declare the share of every co-sharer. Once the preliminary decree is passed, it is open to all the co-shares to apply for the preparation of a final decree, relating to their share, upon payment of the requisite court-fee. It is on the basis of these remarks that the Lower Appellate Court has directed that it is desirable that the final decree be drawn in favour of the plaintiff with regard to his share alone and the second defendant's share should not be mixed up with the plaintiff for the purpose of preparation of the final decree.

32. At the hearing of this appeal, it has been submitted that the Courts below have perversely concluded about the relationship of parties. It is urged on behalf of the appellants that neither is Smt. Bashiran a sister of Smt. Nasiban, as the evidence would show, nor Rasheed @ Kallu, defendant no.2, Bashiran's son. This Court finds that the Courts below, on these matters, have taken a reasonable view of the evidence on record. The findings recorded by the Courts below that Bashiran is Nasiban's sister and defendant no.2, Rasheed @ Kallu is Bashiran's son are based on evidence, from which plausible conclusions have been drawn. There is no reason for this Court to permit a re-agitation of the said issue now. No

substantial question of law on the said issue has been framed for the said reason, and this Court, at the hearing, has not been successfully persuaded by the learned Counsel for the appellants to frame any additional substantial question of law, that may permit scrutiny of the findings hereinabove referred, concurrently recorded by the two Courts below.

33. Now, the substantial question of law, on which this appeal has been admitted to hearing, is whether the Courts below have applied the correct principle of law while dividing shares between the plaintiff, Shaukat Ali, Smt. Bashiran's husband and defendant no.1, Smt. Nasiban, Bashiran's sister. It goes without saying that the substantial question of law would take within its fold the principle applied to allocate a share in the suit property to the second defendant, Rasheed @ Kallu. There is no quarrel between parties that the principles that would govern the inter se allocation of shares, would be the Mahomedan Law, an uncodified law, governing Muslims, immediately before commencement of the Constitution. The principles continue to apply so long as a competent legislature does not legislate on the subject. The principles of Mahomedan Law, governing inheritance, have not so far, received attention of the legislature and continue to apply as an uncodified body of rules, found in various sources. These have been recognized and expounded over time by Courts, including learned Commentators on the subject.

34. Dr. Vinod Kumar Rai, learned Counsel for the appellants submits that the Courts below have committed a manifest error of law in determining the share of defendant no.1, Smt. Nasiban while passing the preliminary decree for partition. It is his vehement submission that whereas partition that has to be ordered in the suit is about the property left behind by Khoob Ali, the succession, that is involved here, is about the heirs of the deceased Bashiran alone. The issue about devolution of Khoob Ali's estate is no longer open in view of the findings of fact recorded by the two Courts below. It is Dr. Rai's submission that this Court has to determine on the basis that out of Khoob Ali's estate, a half share each has gone to Smt. Bashiran and Smt. Nasiban, and upon Smt. Bashiran's demise, who would be her heirs, entitled to inherit and in what share each. The learned Counsel for the appellants, therefore, says that the half share of Smt. Nasiban stays intact with her in the hands of her heirs, that is to say, the appellants before this Court, whereas the half share in the suit property, that already vests in Smt. Bashiran, is to be regarded as unity wherein Nasiban would receive a share as an heir of her sister, Smt. Bashiran along with the plaintiff, Shaukat Ali, her sister's husband and defendant no.2, Bashiran's son. It is argued that the Courts below have erred in dividing the entire half share in the suit property that Bashiran inherited from her father, between her husband, the plaintiff and son, defendant no.2. Nasiban's share, upon Bashiran's demise, has been completely ignored from consideration by the Courts below, vitiating the decree passed by them.

35. In aid of his submissions, Dr. Vinod Kumar Rai has relied upon principles, governing allocations of shares of a Muslim intestate, amongst his/ her heirs, enunciated in the celebrated Treaties on Mahomedan Law, **The Principles of Mahomedan Law by Sir D.F. Mulla, Nineteenth Edition by M. Hidayatullah and Arshad Hidayatullah**. Learned Counsel for the appellants has drawn the

Court's attention to the three types of heirs of a Muslim intestate, that is to say, the Sharers, who are twelve in number, the Residuaries and the Distant Kindred. A reference would be made to the three classes of heirs during the course of this judgment. It is submitted by the learned Counsel for the appellants that the position of Sharers amongst the three classes of heirs is the most superior and they have to be allotted their specified share. He has referred to Section 63 of **Mulla's Principles of Mahomedan Law**, which reads:

"63. Sharers.- After payment of funeral expenses, debts, and legacies, the first step in the distribution of the estate, of a deceased Mahomedan is to ascertain which of the surviving relations belong to the class of sharers, and which again of these are entitled to a share of the inheritance, and, after this is done, to proceed to assign their respective shares to such of the sharers as are, under the circumstances of the case, entitled to succeed to a share. The first column in the accompanying table (p. 48A) contains a list of Sharers; the second column specifies the normal share of each sharer; the third column specifies : the conditions which determine the right of each sharer to a share, and the fourth column sets out the shares as varied by special circumstances.

Illustrations

Note.-- The italics in the following and other illustrations in this chapter indicate the surviving relations. It will be observed that the sum total of the shares in all the following illustrations equals unity i.e. exhausts the inheritance:--

FATHER, HUSBAND AND WIFE

(a) Father .. .. 1/6 (as sharer, because there are daughters)

Father's father .. .. .. (excluded by father)

Mother .. .. 1/6 (because there are daughters)

Mother's mother .. .. .. (excluded by mother)

Two daughters 2/3

Son's daughter .. .. .. (excluded by daughters)

(b) Husband 1/2

Father .. .. 1/2 (as residuary)

(c) Four widows .. .. 1/4 (each taking 1/16)

Father .. .. 3/4 (as residuary)"

36. The learned Counsel for the appellants has further invited the Court's attention to the Table at Page 48A of **Mulla's Principles of Mahomedan Law**, to indicate the list of shares and further show that a full sister is mentioned as a sharer at serial no. 11 of the Table. It is submitted that the normal share of the sister is a one-half and two-third, if there are two or more sisters, who inherit collectively. The submission is that since Smt. Nasiban was the lone full sister of Bashiran, upon the latter's death, she would inherit a half share in Bashiran's estate along with the other two heirs, that is to say, Bashiran's husband and son. It is mooted that out of the suit property, of which partition has to be effected, Smt. Nasiban would be entitled to her half share, inherited from her father like Smt. Bashiran, to which has to be added another share from Smt. Bashran's estate, upon the latter's demise intestate. Smt. Bashiran's husband and son would be entitled to receive a one-fourth share each out of Smt. Bashiran's estate; not out of the entire suit property left behind by Khoob Ali.

37. Going by the aforesaid division of the suit property, that is to say, the property left behind by Khoob Ali, treating it as

unity, according to the learned Counsel for the appellants, Smt. Nasiban would be entitled to total share of three-fourth, whereas a share of one-eighth each in the suit property would go to the plaintiff and defendant no.2, respectively.

38. Mr. Amit Khanna, learned Counsel appearing on behalf of respondent no.1/1, Suggan wife of Shaukat Ali submits that in the presence of the deceased Bashiran's son, Kallu, her sister would not be entitled to any share, as she stands excluded by a reputed principle in this behalf. And, that is the presence of the son.

39. We have considered the rival submissions of the learned Counsel for the parties and perused the record.

40. According to the **Mulla's Principles of Mahomedan Law** vide Section 61, the three classes of heirs of a Mahomedan intestate are spelt out thus:

"**61. Classes of heirs.-** There are three classes of heirs, namely, (1) Sharers, (2) Residuaries, and (3) Distant Kindred:

(1) "Sharers" are those who are entitled to a prescribed share of the inheritance;

(2) "Residuaries" are those who take no prescribed share, but succeed to the "residue" after the claims of the sharers are satisfied;

(3) "Distant Kindred" are all those relations by blood who are neither Sharers nor Residuaries."

41. So far as Smt. Nasiban's entitlement to a share in the late Bashiran's estate is concerned, no doubt she is a sharer. In **''Outlines of Muhammadan Law'** by Asaf A.A. Fyzee, the entitlement of the full sister to her share has been enunciated at Page 328 thus:

"(9) Full sister, (10) Consanguine sister

The full sister is not a primary heir; she is excluded by son, son's son hls, and father or true grandfather. It is to be noticed that male agnates in the descending and the ascending lines exclude her as a collateral. With the full brother and in certain cases with the daughter, she becomes a residuary.

The consanguine sister is excluded by a full brother or two full sisters, and by all the four relations who exclude a full sister. With the consanguine brother the consanguine sister becomes a residuary. With a single full sister she takes a specified share.

The full sister or consanguine sister co-existing with full brother or consanguine brother, respectively, inherit collectively as agnatic heirs, the brother taking a double share. But if there were two full sisters, the consanguine sister would be excluded.

Illustrations

(a) husband, sister: H 1/2; Si ½

(b) husband, two sisters: H 1/2; Si's 2/3 (divided equally)

(c) full sister, consanguine sister: FSi 1/2; CSi 1/6 (remainder of sisters' joint share)

(d) daughter, sister: D 1/2 (as Quranic heir); Si 1/2 (as agnatic heir)

(e) two daughters, sister: Ds 2/3 (as Quranic heirs, divided equally); Si 1/3 (as aganatic heir)

(f) daughter, two sisters: D 1/2 (as Quranic heir); Si's 1/2 (as agnatic heirs, divided equally)"

(emphasis by Court)

42. A perusal of the aforesaid enunciation would show that a sister, notwithstanding her position as a sharer, is excluded by a son, son's son how low soever and father or true grandfather. The same position of the law has been enunciated in the **Commentaries on Mahommedan Law by Ameer Ali (Syed) P.C., Fifth Edition 2007, Revised, Enlarged and Updated by Justice S.H.A. Raza and published by the Hind Publication House, Allahabad**. In Ameer Ali's Mahommedan Law, the share of the full sister has been indicated as half at Pages 1025 and 1026 in the following words:

"10. The full sister (when only one and no son, son's how low soever, father, true grandfather, daughter, son's daughter or brother, 1/2.

When two or more and no such excluder, 2/3."

(emphasis by Court)

43. There is this further principle about a full sister inheriting as an agnate or residuary, where she inherits as a residuary in another's right as it is called. This entitlement comes to a sister or the four specified females, daughters, son's daughters, the full sister and a consanguine sister, when they co-exist with certain males. The said rule is enunciated in Amir Ali's Mahomedan Law at Page 1028 as follows:

(2) **Residuaries in another's right**.- The Residuaries in another's right are those females who become residuaies only when they co-exist with cerrtain males, that is, when there happen to be males of the same degree, or who, though of a lower degree, would take as such.

These are four in number, viz.-

(a) Daughters (with sons);

(b) Son's daughters (with a son's son or a male descendant still further removed in the direct line).

This applies to the daughters of all lineal male descendants however low. For example, when there is a son's son's daughter co-existing with a son's daughter, the latter takes her half (like the daughter of the deceased), and the one-sixth goes to the son's son's daughter and so on. If there are two son's daughters, the son's son's daughter will take nothing unless she has a lineal male. descendant of the same or lower degree co-existing, such as a brother or a nephew.

(c) The full sister (with her own or full brother).

(d) The sister by the same father, or, in other words, a consanguine sister (with her brother).

When the females are of the same degree as the males (or as in the case of son's daughters or the daughters of a son's son how low soever-when they co-exist with lineal male descendants though of a lower degree), each female takes half the share of a male. For example, where there are two sons and three daughters of two brothers and three sisters, each daughters or sister, as the case may be, will take one-seventh, whilst each son or brother two sevenths.

It must be remembered, however, that many males may become, in certain contingencies, residuaries, but it does not follow that in all cases their sisters would become residuaries with them. It is only when the female is a sharer herself that, instead of taking a share, she takes as a residuary when co existing with a male residuary. For example, if a man dies leaving behind him a widow, paternal uncle, and an aunt, "be the latter by the

same father and mother, or by the same father only," the aunt, not being a sharer according to law, is not entitled to any share in the inheritance of her deceased nephew, and her brother (the uncle) takes the entire estate after allotment of the widow's share.

When there is one sister of the whole blood, and consanguine brothers and sisters, the full sister will take her half, and the residue will be divided among the half brothers and sisters in the proportion of two to one.

When there are several full sisters, they will take their two-thirds, and the remainder will be divided as above.

When the deceased leaves only a full sister and a consanguine sister, they take a moiety and one-sixth respectively, and the residue is divided among them pro rata.

When there are two or more full sisters and several consanguine sisters, but no (consanguine) half-brother, the full sisters take the whole, the consanguine sisters take nothing.

44. In case of a full sister, she takes as a residuary if there is a brother of full blood. This rule also finds mention in Fyzee's exposition, hereinabove extracted, but on the facts of the present case, it is not attracted, because Smt. Nasiban did not have a brother. It is a case where the deceased Bashiran was survived by a lone sister, a husband and a son. In the Table at Page 48A of **Mulla's Principles of Mahomedan Law**, relied upon by Dr. Vinod Kumar Rai, the position of the full sister, no doubt, is shown as a sharer at serial no. 11. In the second column, the normal share is shown in both its contingencies. In the third column, however, are mentioned the conditions, under which the normal share is inherited. In the said column, against the entry relating to a full sister, the following words occur:

When no(1) child, (2) child of a son h.l.s., (3) father (4) true grandfather, or (5) full brother.

45. Thus, according to **Mulla's Principles of Mahomedan Law**, there is exclusion of the full sister's share in the presence of a son, how low soever.

46. In the present case, it is undisputed that the deceased Bashiran left behind her a son, besides her husband. The son's presence would, therefore, exclude the right of the sister to inherit as a sharer to the extent of a one-half share by virtue of being the lone sister of Bashiran.

47. In the opinion of this Court, therefore, the half share that Bashiran inherited from her father, Khoob Ali would be shared between her husband, Shaukat Ali and their son, Rasheed @ Kallu.

48. Now, if the share inherited by Bashiran from her father, Khoob Ali is considered the unity, its division between her husband, Shaukat Ali and their son, Rasheed @ Kallu, would be governed by Sections 63 and 65 of **Mulla's Principles of Mahomedan Law**. Section 65 together with the annexed Table at Page 54A reads:

"**65. Residuaries**. If there are no Sharers, or if there are Sharers, but there is a residue left after satisfying their claims, the whole inheritance or the residue, as the case may be, devolves upon Residuaries in the order set forth in the annexed table (p. 54A).

(illustrations omitted)

TABLE OF RESIDUARIES IN ORDER OF SUCCESSION -Sunni Law

I.- DESCENDANTS:

1. SON.

Daughter takes as a residuary with the son, the son taking a double portion.

2. SON'S SON h.l.s. - the nearer in degree excluding the more remote. Two or more son's son inherit in equal shares. Son's daughter h.l.s. takcs as a residuary with an equal son's son. If there be no equal son's son, but there is a lower son's son, she takes as a residuary with him, provided she cannot inherit as a sharer [see ill. (k)]. In either case, each son's son h.l.s. takes double the share of each son's daughter h.l.s.

Note.- When the son's daughter h.I.s. becomes a residuary with a lower son's son, and there arc son's daughters h.l.s. equal in degree with the lower son's son she shares equally with them, as if they were all of the same grade [scc ill. (m)].

II.- ASCENDANTS:

3. FATHER

4. TRUE GRANDFATHER h.h.s.- the nearer in degree excluding the more remote.

III.- DESCENDANTS OF FATHER:

5. FULL BROTHER.

FULL SISTER - takes as a residuary with full brother, the brother taking a double portion.

6. FULL SISTER.- In default of full brother and the other residuaries above-named, the full sister lakes the residue if any, if there be (1) a daughter or daughters, or (2) a son's daughter or daughters h.l.s., or even if there be (3) one daughter and a son's daughter or daughters h.l.s. See Sir. pp. 24-25.

7.CONSANGUINE BROTHERS.

CONSANGUINE SISTER- takes as a residuary with consanguine brother, the brother, taking a double portion.

8. CONSANGUINE SISTER.- In default of consanguine brother and the other residuaries above-named, the consanguine sister takes the residue, if any, if there be (1) a daughter or daughters or (2) a son's daughter or daughters h.l.s. or even if there be (3) one daughter and a son's daughter or daughters h.l.s. See Sir. pp. 24-25.

9. FULL BROTHER'S SON.

10. CONSANGUINE BROTHER'S SON.

11. FULL BROTHER'S SON'S SON.

12. CONSANGUINE BROTHER'S SON'S SON.

Then come remoter male descendants of No. 11 and No. 12, that is, the son of No. 11, then the son of No. 12, then the son's son of No. 11, then the son's son of No. 12 and so on in like order.

IV.- DESCENDANTS OF TRUE GRANDFATHER h.h.s.

13. FULL PATERNAL UNCLE.

14. CONSANGUINE PATERNAL UNCLE.

15. FULL PATERNAL UNCLE'S SON.

16. CONSANGUINE PATERNAL UNCLE'S SON.

17. FULL PATERNAL UNCLE'S SON'S SON.

18. CONSANGUINE PATERNAL UNCLE'S SON'S SON.

Then come remoter male descendants of Nos. 17 and 18, in like order and manner as descendants of Nos. 11 and 12.

19. MALE DESCENDANTS OF MORE REMOTE TRUE GRANDFATHERS- in like order and

manner as the deceased's paternal uncles and their sons and son's sons."

49. Section 63 and the Table at Page 48A of the **Mulla's Principles of Mahomedan Law** show that the husband is a sharer and receives as such the normal share of one-fourth. However, according to the contingencies enumerated in Column 4, the husband's share is enlarged to a one-half, when no child or child of son, how low soever is there. In the present case, since Bashiran left behind a son, her husband's share would be one-fourth. The son's share would be the residue of a three-fourth, as he would inherit it as a residuary in accordance with Section 65 (*supra*).

50. The Courts below have erred in allocating the shares of a one-half in the estate left behind by Bashiran to the plaintiff, her husband, Shaukat Ali and the other half to the parties' son, Rasheed @ Kallu. On this basis, the Courts below have determined the share of the plaintiff and defendant no.2 in the suit property (that includes the estate of defendant no.1, Smt. Nasiban) as one-fourth each. Going by the law applicable to the allocation of shares between the plaintiff and defendant no.2 in the estate left behind by Bashiran, the plaintiff would be entitled to a one-fourth share and the parties' son, defendant no.2, a three-fourth share. This share, when applied to the entire suit property, would work out for the plaintiff to a moiety of one-eighth in the suit property and for defendant no.2, Rasheed @ Kallu, a moiety of three-eighth. The balance half share in the suit property would, of course, go to Nasiban, as rightly determined by the two Courts below.

51. The Court has determined the shares of parties as done by the two Courts below according to the law of inheritance applicable to Sunni Muslims governed by the Hanafi School in view of Section 28 of the **Mulla's Principles of Mahomedan Law** and the comments elucidating the said Section based on judicial authority. Section 28 of the **Mulla's Principles of Mahomedan Law** and the comments by the learned Commentator read:

"**28. Sunni sub-sects**.- The Sunnis are divided into four sub-sects, namely, the Hanafis, the Malikis, the Shafeis and the Hanbalis.

The Sunni Mahomedans of India belong principally to the Hanafi School.

Presumption as to Sunnism.- The great majority of the Mahomedans of this country being Sunnis, the presumption will be that the parties to a suit or proceeding are Sunnis, unless it is shown that the parties belong to the Shia sect. But the Shia law is not foreign law. It is part of the law of the land, and so no expert evidence can be led to prove it as in the case of foreign law.

As most Sunnis are Hanafis, the presumption is that a Sunni is governed by Hanafi law.

The Wahhabis are an off-shoot of the Hanbalis. Considerable groups of Mahomedans in the South of India, such as Kerala and Malabar, are Shafeis."

52. Now, the question is that for this error in working out the *inter* se share between the plaintiff and defendant no.2, should this Court interfere and vary the decree? We do not think so. No doubt, this Court is empowered under the provisions of Order XLI Rule 33 CPC to pass any order or decree, which ought to be passed, notwithstanding that all or any of the respondents or parties may not have filed an appeal or objection. The said power of

the Appellate Court, in our opinion, ought not to be exercised in this appeal to vary the shares between the plaintiff and defendant no.2, because there has not been the slightest issue between them from the Court of instance to this Court. The plaintiff and defendant no.2 have never raised any grievance about the shares allocated to them inter se by the Courts below. No arguments have been addressed on the said issue before this Court by the learned Counsel appearing for the parties.

53. The contention in this appeal has been about the *inter se* share in the suit property between the plaintiff and defendant no.2 on one hand and defendant no.1, Smt. Nasiban on the other. The preliminary decree has rightly determined the share *inter se* the plaintiff and defendant no.2 on one hand and defendant no.1, Smt. Nasiban on the other, in the suit property. The error in the shares *inter se* the plaintiff and defendant no.2, for the reason indicated, is nowhere subject matter of the present appeal and in any case, ought not to be the basis for varying the preliminary decree passed by the Courts below.

54. At this stage, reference may be made to the modification of the Trial Court's decree that the Lower Appellate Court has directed by saying that a final decree ought to be prepared in regard to the plaintiff's share alone and the share of defendant no.2 should not be mixed up with the plaintiff's, for the purpose of preparation of the final decree. In a suit for partition, the preliminary decree declares the inter se shares of parties in the suit property and nothing more. A final decree is to be prepared on an application of parties, whose shares have been declared after hearing the other parties, where the partition of property as per shares declared, is to be made by metes and bounds and specific possession delivered.

55. The direction of the Lower Appellate Court, therefore, that the plaintiff's share should not be mixed up with the defendants at the time of preparation of the final decree is superfluous in the sense that it states only the obvious. To the understanding of the Court, what the Lower Appellate Court has called a modification to the decree is no more than a remark or observation without any change, modification or variation of the Trial Court's decree and this observation came from the Lower Appellate Court in the face of an objection on behalf of defendant no.1 on the ground that the plaintiff could claim a share for himself and not defendant no.2. The objection itself was misplaced, because in the preliminary decree the entire suit property has to be partitioned, declaring the share of each co-sharer.

56. The substantial question of law framed in this appeal is answered in the terms that the share in the suit property between the plaintiff and defendant no.2 on one hand, and defendant no.1 on the other, has been rightly determined to the extent of one-half each; there is an error in allocating the shares inter se the plaintiff and defendant no.2 as one-fourth each, whereas it ought to be one-eighth and three-eighth in the suit property.

57. For the reasons indicated hereinabove, this Court does not find any good ground to interfere with the impugned decree. The appeal is **dismissed with costs throughout** payable by the heirs and LRs of defendant no.1 to the heirs and LRs of the plaintiff.

58. Let a decree be drawn up, accordingly.

(2022) 11 ILRA 602
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.09.2022

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Habeas Corpus Writ Petition No. 521 of 2022

Granth Verma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sarvesh

Counsel for the Respondents:
G.A., Sri Mahesh Narain Singh, Sri Shreyas Srivastava

Habeas Corpus-Corpus-7 year old boy-approached through his mother-alleged kidnapping of the corpus by his father-to recover the corpus-present Habeas Corpus is filed-father is one of the natural guardian-interaction with corpus reveals-he is happy alongwith his father-parties have liberty to ascertain their rights of custody of their children in accordance with Guardians and Wards Act, 1890.

Petition rejected. (E-9)

List of Cases cited:

1. Rohit Thammana Gowda Vs St.of Karn. & ors., 2022 SCC OnLine SC 937

2. Tejaswini Gaud & ors. Vs Shekhar Jagdish Prasad Tewari & ors., (2019) 7 SCC 42

3. Nil Ratan Kundu Vs Abhijit Kundu, (2008) 9 SCC 413

4. Anjali Kapoor Vs Rajiv Baijal, (2009) 7 SCC 322

5. Athar Hussain Vs Syed Siraj Ahmed & ors., (2010) 2 SCC 654

6. Syed Saleemuddin Vs Dr. Rukhsana, (2001) 5 SCC 247

7. Vahin Saxena (Minor Corpus) & anr. Vs St.of U.P. & ors. (Habeas Corpus Writ Petition No. 467 of 2021), decided on 27.08.2021

8. Shaurya Gautam (Minor) & anr. Vs St.of U.P. & ors. (Habeas Corpus Writ Petition No. 140 of 2020), decided on 10.11.2020

9. Gyanmati Kushwaha & anr. Vs St.of U.P. & ors. (Habeas Corpus Writ Petition No. 1217 of 2019), decided on 26.02.2021

10. Neelam Vs Man Singh & anr., 2015(2) RCR (Civil) 291

11. Mohd. Ikram Hussain Vs St.of U.P. & ors., 1964(5) SCR 86

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

A. GENESIS OF PRESENT WRIT OF HABEAS CORPUS

1. Corpus, a seven years old boy, has approached this Court through his mother, Smt. Ashi Verma, alleging that Corpus was kidnapped by her husband, Gaurav Verma (Respondent-3) on 02.06.2022 taking advantage of good gesture shown by mother of Corpus to allow him to meet with Corpus. Respondents-4 and 5 are father and mother of Respondent-3, who are supporting her husband and they have misbehaved with her when she alongwith Police personnel went to their place to recover the Corpus. Hence, to recover the Corpus, present Habeas Corpus Petition is filed.

B. COURT'S INTERACTION WITH CORPUS

2. The Corpus is presently staying with his father who appeared before this Court on 16.09.2022 when this Court has interacted with him and brief of the same is mentioned in the order dated 16.09.2022, when after hearing counsel for parties judgment was reserved. For reference the relevant part of said order is mentioned hereinafter:

"1. The Corpus (a 7 years old boy) appeared before this Court alongwith his father. The Court itself interacts with boy in a very cordial atmosphere. The boy is in joyable mood and enjoying Court proceedings for past an hour and responds to informal interaction in very respectful manner. He answers wisely to some general knowledge questions. The boy has no complaint with his father, though he has some minor issues with his mother and conversation ends with mature observation by Corpus that he wants to live happily alongwith his mother and father, both and agreed to a suggestion of the Court that he will hold hands of his Mummy and Papa to live happily together as a family."

C. INTER-PARENTAL CONFLICTS; ITS' EFFECT ON CHILDREN

3. "Inter-Parental Conflict and Children's Psychological Development" are now also termed as "Child Affected by Relationship Distress". It remained an important subject for research scholars and various research papers are available on research related website which have considered "loyalty conflict", "parental alienation" etc. Few of them alongwith their conclusion/observation are referred hereinafter:

I. IRE JOURNALS (ISSN 2456-8880); December, 2021: Effects of Inter-Parental Conflict on Children's Social Well-Being and the Mediation Role of Parenting Behaviour-Author Stephanie Hess-In this paper the author after research come to the conclusion *"study overall provides empirical evidence for the negative impact of inter-parental conflict on children's social well-being through a cascade of negative behavior within the family environment that spills over to the school environment. Children of parents who have frequent inter-parental conflicts perceive their mothers and fathers to be less warm and to communicate more negatively, which, in turn, leads to more peer problems and less pro-social behaviour in those children."*

II. The Journal for Child Psychology and Psychiatry, Volume 59, Issue 4, Page 374-402: Annual Research Review: Inter-parental Conflict and Youth Psychopathology: An Evidence Review and Practice Focused Update; Authors Gordon T. Harold, Ruth Sellers: The Authors after study observed, *"review highlights that frequent, intense, poorly resolved, and child-related inter-parental conflict adversely affects long-term emotional, behavioural, social, academic development, and future intergenerational/interpersonal relationship behaviours for youth."*

III. International Journal of Scientific Engineering and Research (IJSER), Volume 7, Issue 3, March 2016: Effect of Parent's Conflict on Children: Author Khoolud Alamoudi-The conclusion of paper is that, *"in conclusion, parents' conflicts damage children in many aspects, three of which are physical, psychological, and psychical effects. The impact of parents' conflicts could follow children until they grow up."*

D. RIVAL SUBMISSIONS

4. Sri Sarvesh, learned counsel for petitioner and Sri Mahesh Narain Singh,

Advocate for Respondents-3 to 5, have vehemently presented the case of their parties. There were submissions and counter submissions as well as allegations and counter allegations. The conflict between parties are like head on confrontation.

5. Learned counsel for petitioner submitted that father and mother of Corpus got married on 08.02.2010 and two sons were born out of their wedlock. Elder son is Corpus, who is seven years old and younger one is presently residing with mother. It is the case of mother that she was tortured for many years and even an attempt to murder was also made when she was thrown away from a running train. In this regard she has lodged an FIR under Sections 498A, 323, 504, 307 IPC. The Corpus was abducted and tortured. He was forced to work at hotel of his father. The family members of husband have assaulted her when she went alongwith Police personnel to recover the Corpus. The mother has also lodged FIR against her husband and family members for attempt to murder, however, it is alleged that Police personnel, under force and influence of opposite parties, have lodged FIR only under Sections 323, 504, 506 IPC, despite she has suffered injuries which were mentioned in medical examination report. She has also filed a criminal case under Section 125 Cr.P.C. for maintenance. Learned counsel further submitted that mother of Corpus was forced to sign papers of compromise, on the basis of which police submitted final report and case filed under Section 125 Cr.P.C. was also withdrawn. In support of allegations mother has made statement under Section 164 Cr.P.C., however, under the garb of compromise final report was submitted. Learned counsel has also placed reliance on certain photographs that father-in-law of petitioner had not only assaulted her but also touched her inappropriately and that the Corpus was very happy with the company of his mother, however, father has abducted him and, therefore, Corpus shall be returned back to her mother. It is also contended that the Corpus has been withdrawn from a very good school, i.e., St. Mery's Convent School and now he has been admitted in a sub-standard school.

6. Sri Mahesh Narain Singh, learned counsel for Respondents-3 to 5, has vehemently opposed the above submissions and placed counter allegation that Corpus was tortured and he was not happy with his mother, therefore, on his own sweet will he accompanied his father and presently residing happily. Compromise was entered with open eyes by parties and the mother tried to execute the same by Police personnel which was not permissible. There are video clippings to show that she was hale and hearty when she was recovered at Gwalior Railway Station. He denied the allegation of attempt to murder of the mother of Corpus. There are video clippings to show that mother and her parents were aggressor and tried to take the Corpus forcefully against his will. The Corpus is in a legal company of his father, therefore, this habeas corpus petition is not maintainable and further the mother has not lodged any FIR that her son was kidnapped.

E. LAW ON WRIT OF HABEAS CORPUS

7. "Habeas Corpus" is a Latin word which literary means "to have the body of". The High Court under Article 226 of the Constitution can issue a writ of habeas corpus to a person who has detained

another person, to produce the later body before it. The scope of writ of habeas corpus of a minor from the custody of mother as well as from father has been discussed in various judgments passed by this Court as well as Supreme Court and some of them are mentioned hereinafter:

I. Rohit Thammana Gowda vs. State of Karnataka and others, 2022 SCC OnLine SC 937:

"8. At the outset we may state that in a matter involving the question of custody of a child it has to be borne in mind that the question "what is the wish/desire of the child' is different and distinct from the question "what would be in the best interest of the child'. ***Certainly, the wish/desire of the child can be ascertained through interaction but then, the question as to ''what would be in the best interest of the child' is a matter to be decided by the court taking into account all the relevant circumstances. When couples are at loggerheads and wanted to part their ways as parthian shot they may level extreme allegations against each other so as to depict the other unworthy to have the custody of the child.*** *In the circumstances, we are of the view that for considering the claim for custody of a minor child, unless very serious, proven conduct which should make one of them unworthy to claim for custody of the child concerned, the question can and shall be decided solely looking into the question as to, "what would be the best interest of the child concerned'. In other words, welfare of the child should be the paramount consideration. In that view of the matter we think it absolutely unnecessary to discuss and deal with all the contentions and allegations in their respective pleadings and affidavits." (Emphasis supplied)*

II. Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others, (2019) 7 SCC 42:

"19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. ***Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody.*** *In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.*

20. ***In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be.*** *In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction.* ***There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature.*** *What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in*

exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus."

"26. The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.

27. After referring to number of judgments and observing that while dealing with child custody cases, the paramount consideration should be the welfare of the child and due weight should be given to child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings, in Nil Ratan Kundu, it was held as under:-

"49. In Goverdhan Lal v. Gajendra Kumar, AIR 2002 Raj 148 the High Court observed that it is true that the father is a natural guardian of a minor child and therefore has a preferential right to claim the custody of his son, but in matters concerning the custody of a minor child, the paramount consideration is the welfare of the minor and not the legal right of a particular party. Section 6 of the 1956 Act cannot supersede the dominant consideration as to what is conducive to the welfare of the minor child. It was also observed that keeping in mind the welfare of the child as the sole consideration, it would be proper to find out the wishes of the child as to with whom he or she wants to live.

50. Again, in M.K. Hari Govindan v. A.R. Rajaram, AIR 2003 Mad 315 the Court held that custody cases cannot be decided on documents, oral evidence or precedents without reference to "human touch". The human touch is the primary one for the welfare of the minor since the other materials may be created either by the parties themselves or on the advice of counsel to suit their convenience.

51. In Kamla Devi v. State of H.P. AIR 1987 HP 34 the Court observed:

"13. ... the Court while deciding child custody cases in its inherent and general jurisdiction is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae jurisdiction arising in such cases giving due weight to the circumstances such as a child's ordinary comfort, contentment, intellectual, moral and physical development, his health, education and general maintenance and the favourable surroundings. These cases have to be decided ultimately on the Court's view of the best interests of the child whose welfare requires that he be in custody of one parent or the other."

52. ***In our judgment, the law relating to custody of a child is fairly well settled and it is this: in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration***

should be the welfare and well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. *They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor." (Emphasis supplied)*

III. Nil Ratan Kundu vs. Abhijit Kundu, (2008) 9 SCC 413 (relied by counsel for petitioner):

"52. In our judgment, the law relating to custody of a child is fairly well-settled and it is this. In deciding a difficult and complex question as to custody of minor, a Court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a humane problem and is required to be solved with human touch. A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the Court must consider such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor."

"57. In our opinion, in such cases, it is not the `negative test' that the father is not `unfit' or disqualified to have custody of his son/daughter is relevant but the `positive test' that such custody would be in the welfare of the minor which is material and it is on that basis that the Court should exercise the power to grant or refuse custody of minor in favour of father, mother or any other guardian.

58. Though this Court in Rosy Jacob held that children are not mere chattels nor toys, the trial Court directed handing over custody of Antariksh `immediately' by removing him from the custody of his maternal grand-parents. Similarly, the High Court, which had stayed the order of the trial Court during the pendency of appeal ordered handing over Antariksh to his father within twenty four hours positively. We may only state that a child is not `property' or `commodity'. To repeat, issues relating to custody of minors and tender-aged children have to be handled with love, affection, sentiments and by applying human touch to the problem."

(Emphasis supplied)

IV. Anjali Kapoor vs. Rajiv Baijal, (2009) 7 SCC 322 (relied by counsel for Respondents-3 to 5):

"16. In American Jurisprudence, 2nd Edn., Vol. 39, it is stated that:

"....An application by a parent, through the medium of a habeas corpus proceeding, for custody of a child is

addressed to the discretion of the court, and custody may be withheld from the parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes the permanent interests of the child would be sacrificed by a change of custody. ***In determining whether it will be for the best interest of a child to award its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment."***

"22. Bearing these factors in mind, we proceed to consider as to who is fit and proper to be the guardian of the minor child Anagh in the facts and circumstances of this case. In the present case, the appellant is taking care of Anagh, since her birth when she had to go through intensive care in the hospital till today. The photographs produced by her along with the petition, which is not disputed by the other side would clearly demonstrate, the amount of care, affection and the love that the grandmother has for the child having lost only daughter in a tragic circumstances. She wants to see her daughter's image in her grand child. She has bestowed her attention throughout for the welfare of reminiscent of her only daughter, that is the minor child which is being dragged from one end to another on the so called perception of judicial precedents and the language employed by the legislatures on the right of natural guardian for the custody of minor child."

"26. Ordinarily, under the Guardian and Wards Act, the natural guardians of the child have the right to the custody of the child, but that right is not absolute and the Courts are expected to give paramount consideration to the welfare of the minor child. ***The child has remained with the appellant/grandmother for a long time and is growing up well in an atmosphere which is conducive to its growth. It may not be proper at this stage for diverting the environment to which the child is used to.*** *Therefore, it is desirable to allow the appellant to retain the custody of the child." (Emphasis supplied)*

V. Athar Hussain vs. Syed Siraj Ahmed and others, (2010) 2 SCC 654 (relied by counsel for Respondents-3 to 5):

"31. We are mindful of the fact that, as far as the matter of guardianship is concerned, the prima facie case lies in favour of the father as under Section 19 of the GWC Act, unless the father is not fit to be a guardian, the Court has no jurisdiction to appoint another guardian. It is also true that the respondents, despite the voluminous allegations leveled against the appellant have not been able to prove that he is not fit to take care of the minor children, nor has the Family Court or the High Court found him so. However, the question of custody is different from the question of guardianship. Father can continue to be the natural guardian of the children; however, the considerations pertaining to the welfare of the child may indicate lawful custody with another friend or relative as serving his/her interest better.

32. In Rosy Jacob v. Jacob A. Chakramakkal, (1973) 3 S.C.R. 918, keeping in mind the distinction between right to be appointed as a Guardian and the right to claim custody of the minor child, this Court held so in the following oft-quoted words:

"Merely because the father loves his children and is not shown to be otherwise undesirable cannot necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him as against the wife who may also be equally affectionate towards her children and otherwise equally free from blemish, and, who, in addition,

because of her profession and financial resources, may be in a position to guarantee better health, education and maintenance for them."

"35. Keeping in mind the paramount consideration of welfare of the children, we are not inclined to disturb their custody which currently rests with their maternal relatives as the scope of this order is limited to determining with which of the contesting parties the minors should stay till the disposal of the application for guardianship."

"42. In our opinion, as far as the question of custody is concerned, in the light of the aforementioned decisions, the personal law governing the minor girl dictates her maternal relatives, especially her maternal aunt, shall be given preference. To the extent that we are concerned with the question of interim custody, we see no reason to override this rule of Mohammedan Law and, hence, a prima facie case is found in favour of the respondents. Further, the balance of convenience lies in favour of granting custody to the maternal grandfather, aunt and uncle.

43. ***A plethora of decisions of this Court endorse the proposition that in matters of custody of children, their welfare shall be the focal point. Once we shift the focus from the rights of the contesting relatives to the welfare of the minor children, the considerations in determining the question of balance of convenience also differ.*** *We take note of the fact that respondent no.3, on record, has stated that she has no intention to get married and her plea that she had resigned from her job as a technical writer to take care of the children remains uncontroverted. We are, hence, convinced that the respondents will be in a position to provide sufficient love and care for the children until the disposal of the guardianship application.*

44. The second marriage of the appellant, though a factor that cannot disentitle him to the custody of the children, yet is an important factor to be taken into account. It may not be appropriate on our part to place the children in a predicament where they have to adjust with their step-mother, with whom admittedly they had not spent much time as the marriage took place only in March, 2007, when the ultimate outcome of the guardianship proceedings is still uncertain.

45. The learned counsel for the appellant placed reliance on the case of Bal Krishna Pandey v. Sanjeev Bajpayee AIR 2004 UTR 1 wherein the maternal grandfather of the minor contested with the father of the minor for custody of a girl aged about 12 years. The Uttranchal High court in that case gave the custody of minor to the father rejecting the contention of grandfather (appellant) that the father (respondent) after his remarriage will not be in a position to give fair treatment to the minor. However, in that case, the second wife of the father had been medically proven as unable to conceive. Hence, the question of a possible conflict between her affection for the children whose custody was in dispute and the children she might bear from the father did not arise. In the case before us, the situation is not the same and the possibility of such conflict does have a bearing upon the welfare of the children."

(Emphasis supplied)

VI. Syed Saleemuddin vs. Dr. Rukhsana, (2001) 5 SCC 247 (relied by counsel for Respondents-3 to 5):

"9. A Constitution Bench of this Court in the case of Kanu Sanyal vs. District Magistrate, Darjeeling and others (1973 (2) SCC 674) dealing with the nature

and scope of a writ of Habeas Corpus observed :

"It will be seen from this brief history of habeas corpus that it is essentially a procedural writ. It deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty. The writ is, no doubt, a command addressed to a person who is alleged to have another person unlawfully in his custody requiring him to bring the body of such person before the Court, but the production of the body of the person detailed is directed in order that the circumstances of his detention may be inquired into, or to put it differently, in order that appropriate judgment be rendered on judicial enquiry into the alleged unlawful restraint. The form of the writ employed is We command you that you have in the Kings Bench Division of our High Court of Justice immediately after the receipt of this our writ, the body of A.B. being taken and detained under your custody together with the day and cause of his being taken and detained to undergo and receive all and singular such matters and things as our court shall then and there consider of concerning him in this behalf. ***The italicized words show that the writ is primarily designed to give a person restrained of his liberty a speedy and effective remedy for having the legality of his detention enquired into and determined and if the detention is found to be unlawful, having himself discharged and freed from such restraint.*** *The most characteristic element of the writ is its peremptoriness and, as pointed out by Lord Halsbury, L.C. in Cox v. Hakes (supra), the essential and leading theory of the whole procedure is the immediate determination of the right to the applicants freedom and his release, if the detention is found to be unlawful. That is the primary purpose of the writ; that is its substance and end."*

10. This Court in the case of Gohar Begam v. Suggi Alias Nazma Begam and others (1960(1) SCR 597) dealt with a petition for writ of Habeas Corpus for recovery of a illegitimate female infant of an unmarried Sunni Muslim mother, took note of the position under the Mohammedan Law that the mother of an illegitimate female infant is entitled to its custody and the refusal to restore such a child to the custody of its mother would result in an illegal detention of the child within the meaning of Section 491 of the Criminal Procedure Code. This Court held that the dispute as to the paternity of the child is irrelevant for the purpose of the application and the Supreme Court will interfere with the discretionary powers of the High Court if the discretion was not judicially exercised. This Court further held that in issuing writs of Habeas Corpus the Court have power in the case of an infant to direct its custody to be placed with a certain person.

11. From the principles laid down in the aforementioned cases it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court. Unfortunately, the Judgment of the High Court does not show that the Court has paid any attention to these important and relevant questions. The High Court has not considered whether the

custody of the children with their father can, in the facts and circumstances, be said to be unlawful. The Court has also not adverted to the question whether for the welfare of the children they should be taken out of the custody of their father and left in the care of their mother. However, it is not necessary for us to consider this question further in view of the fair concession made by Shri M.N. Rao that the appellant has no objection if the children remain in the custody of the mother with the right of the father to visit them as noted in the judgment of the High Court, till the Family Court disposes of the petition filed by the appellant for custody of his children." (Emphasis supplied)

VII. Vahin Saxena (Minor Corpus) and another vs. State of U.P. and others (Habeas Corpus Writ Petition No. 467 of 2021), decided on 27.08.2021 (relied by counsel for Respondents-3 to 5):

"7. The writ of habeas corpus is a prerogative writ and an extraordinary remedy. ***It is writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being shown,*** *as held in Mohammad Ikram Hussain v. State of U.P. and others, AIR 1964 SC 1625 and Kanu Sanyal v. District Magistrate Darjeeling, (1973) 2 SCC 674.*

8. The object and scope of a writ of habeas corpus in the context of a claim relating to custody of a minor child fell for consideration in Sayed Saleemuddin v. Dr. Rukhsana and others, (2001) 5 SCC 247, and it was held that in a habeas corpus petition seeking transfer of custody of a child from one parent to the other, the principal consideration for the Court would be to ascertain whether the custody of the child can be said to be unlawful or illegal and whether the welfare of the child requires that the present custody should be changed. It was stated thus:

"11....it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well-settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court..."

"12. The exercise of the extraordinary jurisdiction for issuance of a writ of habeas corpus would, therefore, be seen to be dependent on the jurisdictional fact where the applicant establishes a prima facie case that the detention is unlawful. It is only where the aforementioned jurisdictional fact is established that the applicant become entitled to the writ as of right.

13. In an application seeking a writ of habeas corpus for custody of minor child, as is the case herein, the principal consideration for the Court would be to ascertain whether the custody of the child can be said to be unlawful and illegal and whether his welfare requires that the present custody should be changed and the child should be handed over in the care and custody of somebody else other than in whose custody he presently is.

14. ***Proceedings in the nature of habeas corpus may not be used to examine the question of the custody of a child. The prerogative writ of habeas corpus, is in the nature of extraordinary remedy, and the writ is issued, where in the circumstances of a particular case, the ordinary remedy provided under law is either not available or is ineffective.*** *The power of the High Court, in granting a writ, in child custody*

matters, may be invoked only in cases where the detention of a minor is by a person who is not entitled to his/her legal custody.

15. The role of the High Court in examining cases of custody of a minor, in a petition for a writ of habeas corpus, ***would have to be on the touchstone of the principle of parens patriae jurisdiction and the paramount consideration would be the welfare of the child.*** *In such cases the matter would have to be decided not solely by reference to the legal rights of the parties but on the predominant criterion of what would best serve the interest and welfare of the minor.*

16. In a given case, while dealing with a petition for issuance of a writ of habeas corpus concerning a minor child, directions may be issued for return of the child or the Court may decline to change the custody of the child, keeping in view all the attending facts and circumstances and taking into view the totality of the facts and circumstances of the case brought before the Court; the welfare of the child being the paramount consideration." (Emphasis supplied)

VIII. Shaurya Gautam (Minor) and another vs. State of U.P. and others (Habeas Corpus Writ Petition No. 140 of 2020), decided on 10.11.2020 (relied by counsel for petitioner):

"14. It was also emphasized in Nil Ratan Kundu that wishes of the minor ought to be taken into consideration, where the minor is of an age that he can express his/her intelligent choice. This is a principle embodied in Section 17(3) of Act, 1890. Bearing in mind these facts, this Court carefully interacted with the elder of the two minors, that is to say, Shaurya Gautam. He is a 10-year old boy and fairly intelligent. He informed the Court that he and his sister stay at Sri Braddhanand Bal Ashram, but he is not at all disturbed about the fact that his maternal grandmother has placed him and his sister there. He also told the Court that there is a school, which he and his sister attend. The grandmother (nani) comes over to meet Shaurya and his sister. He is emphatic that he does not wish to go back to his father or stay with him. On being asked the reason, he says that he fears for his life. He also said that he wishes to stay at the hostel. During the course of conversation, the child emotionally broke down and wept. He insisted upon staying with the hostel and refused to go back to his father. Smt. Brahma Devi Tiwari, the minors' grandmother, told the Court that she stayed alone. Her daughter and son-in-law live close by. On being asked why she does not house the children in her home, she said that she is fearful of their father. He would kidnap both of them and get her framed in a false case. It is for the said reason that she has housed the two children in the ashram. The minors' aunt, Smt. Uma Rawat, told the Court that she is a housewife. Her husband is an engineer in a US-based firm, domiciled in Dehradun. She also reiterated that they do not keep the children with them, because the father would get them implicated in some false case. The father, on being asked, denied these allegations and said that he never threatened his in-laws."

IX. Gyanmati Kushwaha and another vs. State of U.P. and others (Habeas Corpus Writ Petition No. 1217 of 2019), decided on 26.02.2021 (relied by counsel for petitioner):

"14. In the present case, the Court is deprived of knowing the wishes of the minor, because she is too young to express her intelligent choice. The minor's choice has been underscored by their Lordships in Nil Ratan Kundu and also in

the provisions of Section 17(3) of the Act of 1890, but that can have no application in the present case, where the minor is a very young child, presently aged about three years and a half. It is the circumstances and the facts on record that alone can serve as a guide in the foreshadow of settled principles about the minor's welfare to decide the question of her custody. It is not known to this Court as to what are the circumstances appearing against the mother, on the basis of which she has been charged with conspiracy in her husband's murder. This Court ought not to investigate those circumstances also, that are the concern of the court where she is facing trial, but, as matters stand, she is an accused in a case relating to her husband's murder. The fact that she is an accused is not in doubt. One consequence of this fact is that she faces a situation where she could be convicted, though the presumption of innocence is all along with her. If she were to be convicted, the minor's welfare would be thrown into disarray. It would be irreversibly unsettling and debilitating in her formative years. It may even expose her to insurmountable trauma, if she witnesses her mother, whom she is bonded with, convicted in the case of her father's murder.

15. This Court assumes that the possibility of conviction may be remote or not so remote, but the possibility is there. The existence of this possibility and the adverse impact of the event, if it were to come to pass, would far outweigh the transitory benefit the minor would derive from her mother's care and company. This facet of the matter apart, the possibility that the mother might truly be a conspirator in her husband's murder, predicates a personality which would not be beneficial for the minor in grooming her about her moral values - a very important aspect of a child's welfare. On the other hand, if the mother is innocent and she is acquitted, the loss, the minor would suffer on account of deprivation of her mother's care and custody, cannot be re-compensated, but nevertheless, it is a reverse that must be accepted for the minor's surer welfare, in preference to a contingent better, fraught with risk.

16. It is made clear that in the event the mother is acquitted by judgment based on doubt or otherwise, she would have the right to move a court of competent jurisdiction for her daughter's custody, which would then be decided in accordance with law."

X. Neelam vs. Man Singh and another, 2015(2) RCR (Civil) 291 (relied by counsel for Respondents-3 to 5):

"12. There are no two thoughts that the welfare and interest of the child is a paramount consideration for us. Apparently, the minor child is residing with her grand parents for the last almost 9 years. She is emotionally attached to them. It will be very difficult for her to change her place and stay with a family, her mother included, with whom she has no connection ever since she has started understanding things. Moreso, the minor has entered the age group where she is able to understand worldly relations to some extent and it will be very hard for her to accept separation from her grand parents. Therefore, we are of the considered view that the custody of the minor child should remain with the grand parents.

Thus, the conclusion irresistible is that the findings of learned trial Court declining the custody of the minor child to appellant Neelam deserves no intervention.

13. At the end of the matter learned counsel for the appellant prayed that appellant Neelam being mother of the

minor child be allowed visiting rights. At this juncture, we find that it will do no good except injure or exploit the emotions and sentiments of the minor child if the mother is allowed to visit her at different intervals. There have been allegations of unchastity against the appellant. She has also faced trial in a criminal case that too relating to the unnatural death of father of the minor. For that reason, the visits of mother may adversely affect the minor girl psychologically and will disturb the atmosphere and the people she is living with. The minor girl is said to be 13 years old. After another 5 years she will be a major and will attain the age of majority and will be in a position to take appropriate decision regarding maintaining relations with the mother."

F. ANALYSIS

8. Undisputedly, there are counter allegations by mother and father including serious allegation of attempt to murder, giving torture to a minor and even of administering intoxicating substance to Corpus. There are FIRs also wherein investigation is either concluded or at the stage of protest petition. The relations between father and mother appears to be strain. Presently the younger child is with mother and Corpus, who is elder child, is with father. Mother, on the one hand, disputing compromise entered before Family Court, being signed under force, but on the other hand, placed heavy reliance on Clause 5 of compromise which provides that mother shall have overall right on both child and in fact by way of this habeas corpus petition she wants to implement or execute the said clause in her favour as her case is that Corpus was kidnapped by his father under the garb of visiting right, which is a clear violation of the conditions of agreement. She has even tried to execute the same by help of Police personnel, however, it was not materialized. Even otherwise, Police authorities have no business or right to execute a compromise executed in a Court of law in absence of any specific direction by Court concerned. Both mother and father are natural guardian of their children, therefore, to hold that the Corpus is in illegal custody of his father would not be a correct approach. Both families are residing nearby. Counter allegation of torturing the Corpus cannot be decided in a habeas corpus petition only on the basis of allegations and averments made in respective affidavits. So far as allegation of attempt to murder by in-laws and husband, as alleged by mother, is concerned, the same is subject matter of investigation, therefore, at this stage to take a view by this Court will adversely affect the investigation or proceedings thereafter.

9. As referred above, a writ of habeas corpus is a prerogative writ and extraordinary remedy. It is a writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being shown.

10. In **Mohd. Ikram Hussain vs State Of U.P. & Others, 1964(5) SCR 86** it is held that, *"writ of habeas corpus is a festinum remedium and the power can only be exercised in a clear case"*.

11. As referred above, the Court has interacted with Corpus and found that the boy is happy in the company of his father and grandparents and he wants to live with his parents, i.e., father and mother both. The Corpus appears to be in healthy condition and does not appear to be under any force or being tutored. Only because the father has admitted him in another

school which allegedly to be a school of sub-standard, the Court cannot come to the conclusion that welfare of Corpus is not properly looked after by father.

12. There are contrary allegation on behalf of father also that Corpus was beaten by his mother and grandparents as and when he desires to visit his father. In absence of any evidence the Court cannot pass any final judgment to the allegations and further there are photographs of both sides that Corpus is happy alongwith his father and also with his mother, therefore, to take a judgement at this stage will only result in digging a deep valley between mother and father of Corpus.

13. As mentioned above, this Court has to take a prima facie view about the welfare of Corpus, a minor boy, which is the supreme consideration in cases concerning to custody of minor child and paramount consideration of the Court ought to be child's interest and welfare. There is no dispute that father is also a natural guardian of a minor child, as such, the Corpus is not in illegal detention or custody with his father. There is no order of any Court which has provided custody of Corpus to his mother. So far as execution of agreement is concerned, parties are at liberty to take available legal recourse. Parties are also at liberty to take legal recourse provided under Guardians and Wards Act, 1890.

14. As referred above, the Court has interacted with Corpus and does not find that his welfare is not properly looked after by his father. The Corpus is admitted in a school, namely, D.K. International School, Etawah and the Corpus has correctly answered few questions of general knowledge. Therefore, it cannot be said that presently father of Corpus is not looking after his son properly. It is also not a case of mother that her husband and family members are not financially sound. The Corpus was wearing good formal clothes and was looking hygienic.

G. CONCLUSION

15. The outcome of above analysis on facts as well as on law is that, father of Corpus is one of the natural guardian. The outcome of interaction with Corpus is that he is happy alongwith his father and has a keen interest in study. He has no complaints with his father and wishes that his parents and his younger brother stay together. The allegations and counter allegations are the part of scrutiny in police investigation. The parties have liberty to ascertain their rights of custody of their children in accordance with the provisions of Guardians and Wards Act, 1890 after exchange of pleadings and evidence. Therefore, the prayer of petitioner cannot be allowed.

H. DIRECTIONS

I. The Corpus shall remain with his father till a contrary direction, if any, is passed by any Court of Law.

II. Father shall not obstruct or object the visiting rights of mother of Corpus and he shall permit his mother to meet the Corpus on any day with prior notice as well as on each Sunday in day time at his home and father will also have similar liberty to meet his younger son at his mother's home.

III. Mother and father of Corpus are also directed not to create any ruckus

during their visit at respective houses to meet the child.

IV. The Investigating Officer is directed to organize a mediation between parties as well as, if necessary, organize a counselling session for parents also.

I. CONCLUDING REMARKS

16. As observed above, in a case of inter-parental conflict, a child may be affected by relationship distress and may develop loyalty conflict and parental alienation, therefore, parents are advised to settle their differences to fulfill the wish of Corpus which he expressed before this Court that he wants to live alongwith his younger brother father and mother as a family and wants to hold their hands to go his home alongwith his younger brother to live peacefully and happily.

J. ORDER

17. The prayers made in this habeas corpus petition are rejected and it is disposed of with above referred directions.

(2022) 11 ILRA 616
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.09.2022

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Habeas Corpus Writ Petition No. 2583 of 2017

Vinayak Tripathi (Corpus) & Anr.
...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Rajeev Ranjan Tripathi, Sri Rajiv Lochan Shukla, Sri Vijay Kumar Ojha

Counsel for the Respondents:
G.A., Sri Ashutosh Mishra, Sri Raghvendra Prakash, Sri Dhiraj Srivastava

Habeas Corpus-Petitioner is father of the corpus-natural guardian-corpus is in custody of opposite parties-they are not the parents of the child-they took undue benefit of the situation and took away the child-without permission-when Petitioner was involved in looking after his wife in hospital as she sustained burn injuries due to an accident-Custody of his son is Petitioner's legal right-no any criminal case is there against the Petitioner-Earns sufficient money to take care of corpus-Opposite parties failed to substantiate that the Petitioner no.2 (father) is not a suitable guardian-Respondents to hand over the custody of the child to the Petitioner no.2 at his residence-Opposite parties shall have access to the child for a period of four months at petitioner's residence.

Petition allowed. (E-9)

List of Cases cited:

1. Captain Dushyant Somal Vs Smt. Sushma Somal & ors.; reported in 1981(2) SCC 277

2. Tejaswini Gaud & ors. Vs Shekhar Jagdish Prasad Tewari & ors.; 2019 (3) SCC (Criminal 433)

3. Queen Bench namely Queen Vs Clarke (1857) 7 EL & BL 186: 119, ER 1217 Lord Campbell, C.J., said at p. 193

4. Manju Malini Sheshachalam Vs Vijay Thirugnanam & ors.; 2018 SCC Online Kar 621

5. Nil Ratan Kundu & anr. Vs Abhijit Kundu, (2008) 9 SCC 413

6. Gaurav Nagpal Vs Sumedha Nagpal, (2009) 1 SCC 42

7. Nil Ratan Kundu & anr. Vs Abhijit Kundu (2008) 9 SCC 413

8. Gaurav Nagpal Vs Sumedha Nagpal reported in (2009) 1 SCC 4

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. Heard Sri Vijay Kumar Ojha, learned counsel for the petitioners, Sri Dhiraj Srivastava, learned counsel for the respondent nos.3 & 4, Sri Mithlesh Kumar, learned AGA for the State and perused the record.

2. By means of this petition, the petitioner no.2 has sought writ of Habeas Corpus, directing the respondents to produce the corpus (petitioner no.1), namely, Vinayak Tripathi before this Court and further prayed that the custody of the petitioner no.1 may be handed over to the petitioner no.2.

3. At the very outset, learned counsel for the opposite party nos.3 and 4 has raised preliminary objection regarding maintainability of the instant Habeas Corpus petition. He submits that writ of Habeas Corpus cannot be issued where there is an statutory alternative remedy is available to the person aggrieved and as such if there is any grievance to the petitioner no.2, he can take the recourse of invoking the relevant provisions of Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as the "Act 32 of 1956') or he may approach the court of civil competence. Further submitted that after the death of the mother, the child is gladly living with the grand maternal parents and now his admission has got done, in a reputed school and he is pursuing his study. Adding his contention, he submits that the writ of Habeas Corpus can be issued in an event where the custody is unlawful and that can be termed as illegal detention. He argued that in the instant matter, neither the child was abducted nor that was taken away unlawfully from the lawful guardianship of his father. Further submission is that, for providing custody of a minor child, is to be examined on the ground of consideration of not only legal right of the parties but more importantly the welfare of child. In the instant matter, the child is living with the opposite party nos.3 and 4 for last 7 to 8 years and the petitioner no.2 did not make any effort or objection for his custody though admittedly, the fact was in his knowledge that the child is in custody of them. He added that at the very inception, the child was taken away by opposite party nos.3 and 4 when no one was there, to look after the child. He added that the mother of the child as well as child were ailing with serious burn injuries and the opposite party Nos.3 and 4 were looking after them. Thus, the submission is that the custody of the child with opposite party nos.3 and 4 cannot be termed as illegal detention, and therefore, the writ of Habeas Corpus would not lie in the instant matter and remedy lies elsewhere and thus, it has been prayed that instant Habeas Corpus writ petition is liable to be dismissed on this ground alone.

4. In support of his contention, the counsel for the opposite party nos.3 and 4 has placed reliance on the judgement and order rendered in the case of **Captain Dushyant Somal vs Smt. Sushma Somal and others;** reported in **1981(2) SCC 277** and has referred para 3 of the judgement which is extracted as under;

"3. There can be no question that a Writ of Habeas Corpus is not to be issued as a matter of course, particularly when the writ is sought against a parent for the custody of a child. Clear grounds must be made out. Nor is a person to be punished for contempt of Court for disobeying an order of Court except when the disobedience is established beyond

reasonable doubt, the standard of proof being similar, even if not the same, as in a criminal proceeding. Where the person alleged to be in contempt is able to place before the Court sufficient material to conclude that it is impossible to obey the order, the Court will not be justified in punishing the alleged contemner. But all this does not mean that a Writ of Habeas Corpus cannot or will not be issued against a parent who with impunity snatches away a child from the lawful custody of the other parent, to whom a Court has given such custody. Nor does it mean that despite the contumacious conduct of such a parent in not producing the child even after a direction to do so has been given to him, he can still plead justification for the disobedience of the order by merely persisting that he has not taken away the child and contending that it is therefore, impossible to obey the order. In the case before us, the evidence of the mother and the grand-mother of the child was not subjected to any cross-examination; the appellant-petitioner did not choose to go into the witness box; he did not choose to examine any witness on his behalf. The evidence of the grand-mother, corroborated by the evidence of the mother, stood unchallenged that the appellant-petitioner snatched away Sandeep when he was waiting for a bus in the company of his grand-mother. The High Court was quite right in coming to the conclusion that he appellant-petitioner had taken away the child unlawfully from the custody of the child's mother. The Writ, of Habeas Corpus was, therefore, rightly issued. In the circumstances, on the finding, impossibility of obeying the order was not an excuse which could be properly put forward."

5. Referring the aforesaid judgement, he submits that Hon'ble Supreme Court has held that the writ of Habeas Corpus is not to be issued as a matter of course unless clear grounds are made out.

6. On the other hand, learned counsel appearing for the petitioners submits that the petitioner no.2 is the father of the child namely Deepak Kumar Tripathi and thus, he is natural guardian and has preferential right to claim the custody. He submits that Section 6 of the "Act 32 of 1956', envisages the provisions that the natural guardian of a Hindu minor, in case of boy is the father and after him, the mother and thus the father can not be deprived of the custody of a minor child unless he is shown to be unfit to be guardian. He added that admittedly the child is in custody of opposite party nos.3 and 4 and they are not the parents of the child and thus onus goes upon them to prove that the child is not illegally detained. He added that, in fact, taking the undue benefit of the situation that the petitioner no.2 was very much involved in looking after her wife in hospital, as she sustained burn injuries due to an accident and thus, they have taken away the child without the cautious and proper permission of petitioner no.2 and when the petitioner no.2 asked the opposite party nos.3 and 4 to give the custody of his son, he was denied, and as such, this is clear cut a case of illegal and improper detention by the opposite party nos.3 and 4.

7. Considering the aforesaid arguments of learned counsel for the parties, the question which has drawn attention of this Court for consideration is that whether the writ of Habeas Corpus instituted by the petitioner no.2 is maintainable? Law has been settled by the Hon'ble Apex Court in the case of **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others; 2019**

(3) SCC (Criminal 433). Para 13 of the judgement extracted as under;

"13. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or ***improper detention****. The writ also extends its influence to restore the custody of a* ***minor to his guardian when wrongfully deprived*** *of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction."*

8. This question was also discussed in British Law as it was placed before the **Queen Bench namely Queen v. Clarke (1857) 7 EL & BL 186: 119, ER 1217 Lord Campbell, C.J., said at p. 193.** The Stalward British Judge while deciding the issue has held that *"But with respect to a child under guardianship for nurture, the child is supposed to be unlawfully imprisoned when unlawfully detained from the custody of the guardian: and when delivered to him, the child is supposed to be set a liberty."*

9. Further in case of **Manju Malini Sheshachalam vs Vijay Thirugnanam and others; 2018 SCC Online Kar 621,** the Hon'ble Apex Court has held in para 24 of the judgment which is read as follows;

"24. The moment respondents 1 and 2 refused to handover the custody of minor Tanishka to the petitioner the natural and legal guardian, the continuation of her custody with them becomes illegal detention. Such intentional act on the part of respondent Nos.1 and 2 even amounts to the offence of kidnapping punishable under Section 361 of IPC. Therefore, there is no merit in the contention that the writ petition is not maintainable and respondent Nos.1 and 2 are in legal custody of baby Tanishka".

10. Undoubtedly, in case of dispute regarding custody of a child, generally the remedy lies under "Act 32 of 1956' or The Guardianships and Wards Act, 1890. It is very much clear that the writ of habeas corpus is issued in a case where the detention is without any authority of law or improper detention and thus the court directs for producing the corpus. This can be issued where the detention of minor cannot be otherwise taken in the legal custody.

11. It is an admitted fact that the child is in custody of other than the parents. Further the custody was taken under a peculiar circumstances where the father of minor child was looking after the mother of the child, when she was ailing with burn injuries in hospital and could not have cautiously and improperly decided regarding the custody of the child. It seems that taking advantage of the situation, the opposite party Nos.3 and 4 had taken away the child from the possession of the petitioner no.2. It is an undisputed fact that the opposite party nos.3 and 4 are not the natural guardian and in view of the above circumstances the custody of the child with them can be termed as improper custody.

12. So far as the case of **Captain Dushyant Somal (supra)** referred by counsel for the opposite party nos.3 and 4 is concerned, there was dispute of custody

between father and the mother which are covered under the definition of the Natural guardians in the "Act 32 of 1956' and the factum is altogether different than the present matter. This case has later been considered in case of **Tejaswani Gaud (supra).**

13. After the abovesaid discussions and submissions, **this court is of the considered opinion that the instant habeas corpus petition is maintainable whereby the extraordinary remedy has sought for custody of the child. Thus, the preliminary objection taken by the counsel for the respondent nos.3 and 4 finds no force and is hereby rejected.**

14. The factual matrix of the case is, that the marriage of the petitioner no.2 was solemnized with the granddaughter of the respondent no.3 and 4 on 11.03.2012. After the marriage, the wife namely Soniya Pandey @ Soniya and the petitioner no.2 was living very happily and a son namely Vinayak Tripathi (corpus) was born from their wedlock on 31.10.2013. On 28.02.2014, an accident took place, wherein the corpus as well as the wife of the petitioner no.2 sustained burn injuries and they were immediately taken to the hospital for treatment by the petitioner no.2 and statement of the wife of petitioner no.2 was also recorded there. On 24th March, 2014, the wife of petitioner no.2 died. After death of the wife, the every rites and ritual were performed by the petitioner no.2 and, thereafter, the respondent no.3 called upon the petitioner no.2 on the pretext of the illness of grand mother-in-law and when petitioner no.2 reached over there, he was surprised to see that she was not ill and, thereafter on the next day, when he was leaving the place, the respondent no.3 refused to give back the corpus to petitioner no.2 stating therein that when he (petitioner no.2) would re-marry then they will give the corpus to him so that his son could be better nurtured.

15. In September, 2014, the respondent no.3 proposed to the petitioner No.2 to get marry with Aradhana Tripathi, who was widow and mother of a child from her first marriage and, as such, under the supervision and presence of respondent no.3 & 4 including certain respected persons of the family, the marriage was solemnized with Smt. Aradhana Tripathi on 4th March, 2015 and, thereafter, the petitioner no.2 is residing at his place at Padrauna, District-Kushi Nagar. The dispute arose when the respondent no.3 was informed that the second wife has conceived pregnancy and, thereafter, the respondent nos.3 and 4 started insisting the petitioner no.2 to get abort the fetus and threatened that if the petitioner no.2 will not agree with the aforesaid desire of the respondent nos.3 and 4, they will not return back the corpus to him. On 31.10.2015, the petitioner no.2 decided to celebrate the birthday of the corpus and intimated to the respondent nos.3 and 4 and requested to come with the corpus at the place of Hotel G-Star, Padrauna, but they refused to visit their and further denied to give the custody of the corpus to the petitioner no.2. He again requested on 22.06.2016 for performing the tonsure (Mundan) ceremony of corpus and asked him to bring to the petitioner (corpus) but they again refused and started threatening and, thus, the wife of the petitioner no.2 informed the higher Police Authorities at Kushi Nagar on 14th July, 2016. All efforts were made to get back the custody of the son of petitioner no.2, but the respondent nos.3 and 4 refused to hand over the corpus to the petitioner no.2.

16. The petitioner no.2 moved an application on 10th September, 2016 before the respondent no.2 and requested for restoring back the custody of the corpus to him. On the aforesaid application, the matter was referred before the Family Conciliation Centre and parties were required to present. The respondent no.3 was kept on avoiding to appear before the Family Conciliation Centre and, ultimately, he appeared on 06.11.2016 and refused to give the corpus into the custody of the petitioner no.2 and also denied to put his signature on the report of the Family Conciliation Center and, as such, the Family Conciliation Center sent the report to the effect that respondent no.3 is not willing to hand over the corpus to the petitioner. The report was sent to the respondent no.1 on 06.11.2016 by the Conciliation Center. On 11.11.2016, again an application was moved before the higher Authorities including the respondent no.1 making the prayer for getting back the corpus in the custody of the petitioner no.2, but that also remained in vain. Thereafter the instant petition was filed before this Court with the prayer, seeking direction to respondent no.3 and 4 to produce the corpus, namely, Vinayak Tripathi before this Court and further prayer was made that the custody of the corpus (petitioner no.1) Vinayak Tripathi, be given to natural guardian i.e. petitioner no.2.

17. Submissions of learned counsel for the petitioners are that the death of mother of the corpus was occurred due to an accident, which is also evident from the dying declaration. Since, the relations were very much affectionate with the wife of petitioner no.2 and, as such, he was in a very measurable condition after her death and, thereafter, on the desire of respondent nos.3 and 4, he decided to get re-married and, as such, the marriage has taken place. Submission is that while taking the decision of marriage, it was also in the mind of the petitioner no.2 that nurturing of his child (corpus) can best be done in case, he re-marry, but after the second marriage which was done on the desire of the respondent nos.3 and 4 and was basically organized by the respondent nos.3 and 4 and was solemanised in their presence, but later on, they conspired and denied to give the custody of the corpus to the petitioner no.2.

18. He contended that later on, when the second wife namely Aradhana Tripathi conceived the pregnancy, they advised for abortion and in case of disagreement, they threatened not to give the custody of corpus and the instant controversy cropped up due to the same.

19. Applicant's counsel further argued that as per the settled proposition of law, the father is the natural guardian and, as such, the custody of a son is his legal right. This is not a case where there is any criminal case against the petitioner or his family members and further since the petitioner no.2 (father) is alive and as such he excludes the right of any other persons with regard to the custody of corpus.

20. He next argued that the corpus would get all the conducive and ordinary comfort in the company of the petitioner no.2 as he is headmaster in the primary school and earned sufficient money so as to take care the corpus and fulfill the need of the same. Further family background of the petitioner no.2 is sound and well mannered. The whole family is educated and even the eldest brother of petitioner no.2 is teacher and elder brother is an advocate and practicing in the High Court.

21. He further added that the instant controversy arose because the wife of the present petitioner namely Sonia Pandey died due to burn accident and even after making all effort to save her life and the life of the corpus and even after providing the best treatment, could not save the life of his beloved wife and needless to say that, all the expenses incurred upon the treatment was done by the applicant. He next submitted that conduct of the respondent no.3 always remain fraudulent as at mediation centre, he refused to give the custody of the corpus. Further, he always filed forged papers with regard to the study of corpus before the Court. It is forged because when the applicant no.2 sought information under Right to Information Act, it was found that the admission of the corpus was terminated as the record could not be produced by the guardian. He has also drawn attention towards page 32 of the rejoinder affidavit dated 9th May, 2018 which is a letter of head mistress of the Prathmik Vidyalay Bahrampur First, District Mau address to Sri Deepak Kumar Tripathi (petitioner No.2).

22. He has also drawn attention of this Court that it is not a case where any charge of death of wife has ever been levelled upon the petitioner no. 2. In support of his contention, he attracted the attention at annexure 1 page 17 which is dying declaration of wife of the petitioner no.2. He submits that dying declaration is itself evident that the death occurred due to burn accident and there was no any dispute between the petitioner and his wife. He has also indicated that so far as second marriage is concerned, the same was solemnized as arrange marriage on the behest of respondent no.3 and marriage certificate also reveals that the brother-in-law has put in appearance on the certificate of marriage of the petitioner with Aradhna Tripathi. He also added that there are specific evidence regarding threat to the petitioner no.2 for termination of pregnancy of second wife as Audio Clip are available which clearly shows that dispute with regard to hand over the corpus arose as second wife conceived pregnancy.

23. In support of his contention, the counsel for the petitioners has placed reliance on a case of **Tejaswini Gaud and others (supra)** and submits that in an identical situation the Hon'ble Apex Court has directed the person, who were having unlawful custody of the child, to the father, who was working as Principal in an educational institution. He has placed reliance on para 31 and 34 of the judgement which are quoted hereinunder;

"31. In the case at hand, the father is the only natural guardian alive and has neither abandoned nor neglected the child. Only due to the peculiar circumstances of the case, the child was taken care of by the appellants. Therefore, the cases cited by the appellants are distinguishable on facts and cannot be applied to deny the custody of the child to the father.

34.The welfare of the child has to be determined owing to the facts and circumstances of each case and the court cannot take a pedantic approach. In the present case, the first respondent has neither abandoned the child nor has deprived the child of a right to his love and affection. The circumstances were such that due to illness of the parents, the appellants had to take care of the child for some time. Merely because, the appellants being the relatives took care of the child for some time, they cannot retain the custody of the

child. It is not the case of the appellants that the first respondent is unfit to take care of the child except contending that he has no female support to take care of the child. The first respondent is fully recovered from his illness and is now healthy and having the support of his mother and is able to take care of the child."

24. Referring the aforesaid judgement, counsel for the petitioners submits that the case of the present petitioners are squarely covered with the ratio of the aforesaid judgement. He added that because of the special circumstances, the child was with opposite party nos.3 and 4 and the petitioner no.2 neither abandoned the child nor he has deprived the child of his right, love and affection. He added that now the petitioner no.2 has come out of trauma and further there is female support to take care of the child, and therefore, the petitioner no.2 (father) cannot be denied, the custody of the child.

25. He submits that case in hand is an example where the father ever abandoned the child or deprived the child with his love and affection. It is because of the fact that the first wife died and for a breathing period, the child was with his grand maternal uncle and merely because of the fact that grand maternal uncle will take care of the child for some time, he cannot deny to handover the custody of the child to his natural guardian.

26. He also added that the second wife is there and as such the better care, love and affection can be poured upon the child than the maternal grand parents, who are of considerable old age persons. He further submits that petitioner no.2 is bonafide father who can have all due care to the interest of the corpus as he is headmaster and he has got entered the name of the corpus in his service records and also purchased the health insurance policy, investment plans and made nominee for 50 % of investment plan in the name of corpus.

27. He submits that as per Section 6 of "Act 32 of 1956', the father is a natural guardian and whosoever is claiming the custody of the child other than father has to proof that the custody with him is not improper. Section 6 of the Act is quoted hereinabove;

6. Natural guardians of a Hindu minor.--The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are--

(a) in the case of a boy or an unmarried girl--the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in case of an illegitimate boy or an illegitimate unmarried girl--the mother, and after her, the father;

(c) in the case of a married girl--the husband: Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section--

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi). Explanation.--In this section, the expression "father" and "mother" do not include a step-father and a step-mother.

28. Referring the aforesaid, he submits that intent of legislature is that the first and foremost right is having custody of a child is vest with the parents. This

provision has been envisaged in the aforesaid act after due care and caution by the legislature. This indicates that unless there is such situation which negates the welfare of the child in the custody of the father, the father have all right of custody of his son.

29. Thus, he submitted that the present petitioner no.2 is entitled to have the custody of his minor child and as a result, a writ of habeas corpus may be issued against the opposite party no.3 and 4 to provide the custody of minor child (corpus petitioner no.1) to the natural guardian i.e. petitioner no.2 within stipulated period of time as may be fixed by this court.

30. Per contra, learned counsel appearing for the State has opposed the contention aforesaid and submits that the situation is otherwise than it is narrated by the present petitioner no.2 in the instant petition. He submits that a suspicious fire incident took place on 28.02.2014, wherein the wife of the petitioner no.2 and child (corpus) sustained severe burn injuries and as a result the mother of the child died on 24.03.2014. He added that since then the opposite party nos.3 and 4 started care of the child in the hospital and thereafter he is living with them. He submits that the petitioner no.2 always mount pressure over the opposite party nos.3 and 4 for providing the corpus to him. He has drawn attention towards the fact that the petitioner no.2 did not visit the minor child for about three years and thereafter he suddenly started claiming the custody of the child. He pressed his contention and submits that no application under Section 12 for registration or any kind of demand or inquiry through any court of law has ever been demanded by the petitioner no.2. Further submits that the petitioner no.2 got married with Aradhna Tiwary on 4th March, 2015 just after death of his wife and from wedlock of second wife, a child was also born.

31. On the other hand, the contention of learned counsel for the opposite party nos.3 and 4 is that the child is living with the grand maternal parents since he was four months of age and father of the child got re-married and having two children out of aforesaid second marriage and if custody of the child (corpus) is been given to the petitioner no.2, the child has to face anguish of step mother and naturally welfare and interest of child would face tremendous crisis.

32. Adding his arguments, he submits that it is not claimed that the petitioner no.1 is not getting proper love and affection with his grand maternal parents and it is also not a case that he is not getting good education and thus the welfare of child is taking care of by them.

33. He added that the word "welfare or interest' of a child cannot be measured in terms of money or physical comfort but it also goes to affectionate tie with the persons concern. He submits that the petitioner no.1 (child) is living with the grand maternal parents for long period of time and as such his physical, mental and emotional growth can very well nurtured under the guardianship of opposite party no.3 and 4. The conducive interest and welfare of the minor is not a mechanical parameter and further no law can decide it. It is the situation of a child which can only indicate regarding the welfare of the minor child. He further added that the child is well comfortable with the opposite party nos.3 and 4 and further he do not want to

go with the petitioner no.2 as the petitioner no.2 and his newly wedded second wife and their sibling are very much unacquainted with the petitioner no.1.

34. In support of his contention, the counsel for the respondent nos.3 and 4 has placed reliance on a case reported in **(2008) 9 SCC 413, Nil Ratan Kundu and another vs. Abhijit Kundu** and submits that the Apex Court has held that for custody of a child, the paramount consideration is the welfare of the child.

35. He has further placed reliance on a case reported in **(2009) 1 SCC 42, Gaurav Nagpal vs Sumedha Nagpal** and submitted that the welfare of the child is not to be measured in terms of money merely because of the physical comfort of the child but tie of affection is be regarded.

36. Concluding his argument, he submits that the child does not recognize his father because of his negligence and after the death of his mother, the child is only the last living memory of her daughter. Further submits that he is studying in a reputed school and they are well off and they are willing in future to buy some property in the name of petitioner no.1 and to make some fixed deposit amounts if this Court such directs. Thus, the submission is that the prayer of petitioner no.2 for handing over the custody of the child (alleged corpus) to him is not justifiable and as such the instant habeas corpus petition deserves to be dismissed.

37. Having heard learned counsel for the parties and after perusal of material placed on record, the issue before this Court is that whether the custody of petitioner no.1 (corpus) is illegal or improper with opposite party nos.3 and 4. The petitioner no.2 admittedly being the father of the child has claimed the custody of petitioner No.1 and has tried to demonstrate that the child has illegally and improperly been detained by opposite party nos.3 and 4.

38. In the instant matter, due to an accident, the child (petitioner no.1) and the wife of petitioner no.2 got burn injuries and both were admitted in the hospital. It is also the fact that the petitioner no.2 was looking after them in the hospital and has meeted out all the expenses incurred upon the medical treatment and in support thereof has annexed certain bills and vouchers. Under these circumstance, the grand maternal parents had taken away the child for short period of time for taking care of but in the meantime, during the course of medication, the mother of child, succumbed due to injuries and naturally husband i.e. petitioner no.2 was in tremendous pain and thus for certain period of time, he could not persuade the custody of the child. This does not mean that he is not willing to look after his child. There is also one of the fact that opposite party nos.3 and 4 persuaded the petitioner no.2 to get re-marry and on their insistence the petitioner become ready for remarriage and they were also remain present at the time of marriage. It is a fact that the petitioner no.2 was always in contact with the opposite party no.3, 4 and the corpus.

39. So far as the question with regard to the better nurturing as well as caring is concerned, the petitioner is well off, as he is teacher and is getting handsome salary. Further opposite party nos.3 and 4 could not dispute the fact that the petitioner no.2 is a reputed person and his conduct and behaviour is aboveboard in the society. Admittedly, the petitioner no.2 is father of

the petitioner no.1 (corpus) and as per provisions of the "Act 32 of 1956', the father is natural guardian of a child. While enactment of the aforesaid Act, the fact regarding conduciveness, interest and welfare of the child must have been in the mind of the legislature and therefore the father was considered as Guardian and thus if any thing is said contrary to the aforesaid, the onus always lies upon the person who is saying otherwise.

40. Further while considering the contention of counsel for the opposite party nos.3 and 4, in respect with the fact that the child does not recognize his father, cannot be a ground, not to hand over the custody of such child to his father. This can also not be a ground that the child is last living memory of the daughter of grand maternal parents as the parameter which has been settled is that interest and welfare of the child is a paramount consideration for custody of a child. Further, this can also not be a ground that the child goes to a reputed school or any fixed deposit amount or any property will be executed/ transferred in the name of the minor child.

41. So far as the reliance was placed by the opposite party nos.3 and 4 on the cases of **Nil Ratan Kundu and another v. Abhijit Kundu (2008) 9 SCC 413** and **Gaurav Nagpal vs Sumedha Nagpal reported in (2009) 1 SCC 42,** those were very well considered, in case of **Tejaswini Gaud (supra).**

42. While going through the aforesaid judgement, it reveals that the factum of both the cases are altogether different than the present case. Since the dispute of the custody of the child was between the parents i.e. father and mother in the aforesaid matters, but so far as the present matter is concerned, the custody of the child is with the grand maternal parents and that too on the ground that the child is last living memory of their grand daughter, which cannot be said to be a justifiable ground. Further submission on behalf of the respondent nos.3 and 4 that they will manage and transfer certain property in the name of the corpus (petitioner no.1), which is as per settled law cannot be ground for having custody of a minor child.

43. This Court has also noticed that the grand maternal parents i.e. respondent nos.3 and 4 are of considerable old age persons and it would be very hard for them to take care of a minor child, whereas petitioner no.2 being a natural guardian and having family assistance, can look after the nurturing of the child in better way.

44. This Court is of considered opinion that subject to the exceptions, in the Indian Society, naturally a father or mother would be more affectionate than other persons including relatives and as such while enactment of the "Act 32 of 1956', the legislature respecting the customs and natural phenomenon has made provision that the father and after him, mother is the Natural guardian of a minor child. If there are situations that welfare of child is not secured with the father as there can be certain reasons, as for example, if the father is drunker; he is involved in immoral and unlawful activity; he is not able to care himself or to the child the situation would be different, but in the instant matter the respondent nos.3 and 4 has failed to substantiate the aforesaid reasons against the petitioner no.1.

45. In such situation, the onus goes upon the person who is having a custody not being a natural father to prove that

welfare of the child is not secured in the custody of natural father. In the instant matter, the respondent nos.3 and 4 has failed to substantiate that the petitioner no.2 (father) is not a suitable guardian.

46. It has also been noticed that it is not a case that the petitioner no.2 (father) did not take all care and caution after the birth of the corpus and it is due to misfortune, an accident took place, whereafter naturally the petitioner no.2 went into trauma but thereafter he is continuously trying to get the custody of his child.

47. It is decipherable from perusal of the record appended with the writ petition that the conduct and behaviour of the respondent nos. 3 and 4, so far as access of the child to his father is concerned, prima facie seems to be unexpected. It is not understandable that why the grand maternal parents are so adamant, not to give the custody of the child to his father as he does not seem to be unfit to be guardian, thus this is a best example of improper custody.

48. Resultantly, it is directed that the respondent nos. 3 and 4 shall hand over the custody of the child to the petitioner no.2, i.e. Deepak Kumar Tripathi (father) on 20th October, 2022 at his residence. Both the parties shall act upon in the interest of the child and and shall co-operate with each other.

49. Further looking into the well being of the child and making the child comfortable, the respondent nos.3 and 4 shall have access to the child for a period of four months, at the residence of the petitioner no.2, in between 10 A.M. to 5 P.M. on every Sunday of each month and the petitioner no.2 shall make it comfortable.

50. Accordingly, the Habeas Corpus writ petition is **allowed**.

51. No order as to costs.

(2022) 11 ILRA 627
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.11.2022

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE JASPREET SINGH, J.

Transfer Application (Civil) No. 121 of 2021
With
Transfer Application (Civil) No. 123 of 2021 &
No. 124 of 2021

Babu Singh & Ors. ...Applicants
Versus
Raj Bahadur Singh & Ors.
...Opposite Parties

Counsel for the Applicants:
Mr. Ashish Tripathi, Advocate

Counsel for the Opposite Parties:
Mr. Jaideep Narayan Mathur, Senior Advocate (Amicus Curiae) with Mr. Sanjay Sarin, Additional Chief Standing Counsel and Ms. Aishwarya Mathur, Advocate

A. Civil Law – Code of Civil Procedure, 1908-Section 24, 115-transfer-reference-whether fresh application u/s 24 CPC would be maintainable or the order would be revisable u/s 115 CPC and Article 227 of the Constitution of India-Since the order passed by the District Judge has been held to be a 'case decided' and the proceeding under section 24 CPC 'other proceeding' within the meaning of section 115 CPC, finality would attach to the District Judge's order once that Court is approached by a party seeking transfer within the District Judge's jurisdiction-The party aggrieved by the orders passed by the District Judge would have to move to

the High Court under section 115 CPC to set aside the order-Since orders passed on the transfer application is a 'case decided' and disposes of 'other proceeding' within the meaning of section 115 CPC, the party aggrieved by the District Judge's order cannot invoke the jurisdiction of this Court afresh u/s 24 CPC to set at naught the District Judge's determination without applying under section 115 CPC to set aside that order-The question is answered in the affirmative that order passed by the District Judge u/s 24 CPC is revisable u/s 115 CPC.(Para 38 to 43)

B. Whether another application u/s 24 CPC by the same applicant based on the same cause would be maintainable or not-the question stands answered in negative-It is held that another application u/s 24 CPC would not be maintainable before this Court without challenging the order passed by the District Judge, on the application disposed of by the district judge under section 24 CPC through a revision under section 115 CPC-Normally, the order of the district judge passed on an application u/s 24 CPC being revisable, the constitutional remedy under Article 227, though not barred, may not be invoked on the sound principle of the availability of an equally efficacious statutory alternative remedy under section 115 CPC.(Para 42,43)

The reference is answered accordingly. (E-6)

List of Cases cited:

1. Jagdish Kumar Vs The District Judge, Budaun (1998) 1 ARC 305

2. Paras Jain Vs. Izhar Ahmad & ors.. (2014) 11 ADJ 281

3. Kulwinder Kaur Vs Kandi Friends Edu. Trust & ors. (2008) 3 SCC 659

4. Prem Bakshi & ors. Vs Dharam Dev & ors. (2002) 2 SCC 2

5. Sadhna Lodh Vs NICL & ors. (2003) SC 1561

6. Ram Dhani & ors. Vs Raja Ram & ors. (2011) AIR All 121

7. Ishtiyak Ahmad Vs Smt. Meena & ors. (2016) 11 ADJ 801

8. Amit Pachauri Vs Smt. Ram Beti T.A. (Civil) No. 226 of 2016

9. Jaikaran Singh & ors. Vs Balakram & ors. (2020) 4 ADJ 543 All

10. Gorachand Das Vs Dipali Das (1976) 2 Cal LJ 380

11. Sunita Devi Vs Ram Kripal & anr (2015) 2 AWC 1543

12. IOCL Vs Ram Swaroop Bajaj T.A. (Civil) No. 34 of 2016

13. Ariamma Sachariah Vs Rose Elizabeth Kurian C.M.C. No. 94 of 2000

14. Sebastian Vs R. Prabhakaran & ors. T.A. {Civil Misc. Ptn. (MD)} No. 19 of 2011 { M.P.(MD) No. 1 of 2011}

15. M.V. Ganesh Vs M.L. Vasudevamurthy & ors. (2003) AIR Kar. 39

16. Munnangi Ramkrishna Rao Vs Vanakuru Venkata Siva Ramakrishna Prasad & ors. T.A. {Civil Misc. Ptn. (MD)} No. 492 of 2002

17. Durga Devi & anr. Vs Vijay Kumar Poddar & anr. (2010) SCC OnLine Pat 1996

18. Johra Bi & ors. Vs Jageshwar & ors. (2010) 1 MPLJ

19. Jagdish Narain Tandon & ors. Vs Onkar Nath Tandon (2017) 6 ADJ 707

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

1. On a reference made by the learned Single Judge vide order dated December 10, 2021 to a larger Bench and constitution thereof by Hon'ble the Chief Justice, on administrative side, for consideration of the

following questions, the matter has been placed before us :

"(i) Whether the order passed by District judge under Section 24 CPC is revisable under Section 115 CPC as applicable in the State of U.P.?

(ii) Whether another application under Section 24 CPC by the same applicant based on the same cause would be maintainable before the High Court, without challenging an order of the District Judge which has also been passed under Section 24 CPC under Section 115 CPC or Article 227 of the Constitution of India, as the case may be?

(iii) Whether pronouncements of this Court in the case of **Sunit Devi and Indian Oil Corporation (supra)** lay down the law correctly on the subject matter in issue or it is the decision by a Co-ordinate Benches in the case of **Jagdish Kumar and Amit Pachauri (supra)** which understand and lay down the law correctly on the issues aforesaid?"

Transfer Application (Civil) No.-121 of 2021 :-

2. It is a case in which the applicants filed an application under Section 24 of the CPC1 in the Court of District Judge, Unnao seeking transfer of Regular Suit No. 182 of 1996 (Babu Singh and others vs. Raj Bahadur Singh) from the Court of Civil Judge, Junior Division, Safipur, District-Unnao to any other Court of Civil Judge, Junior Division, Unnao. The ground for seeking such transfer was that the husband of applicant no. 1/1, who is an Advocate, is pursuing their case and on each and every date he has to go to Tehsil Safipur, which is situated at a distance of more than 30 km from Unnao. Hence, it would be convenient for him to pursue the case, if the same is transferred to Unnao. When the application was rejected by the learned District Judge vide order dated September 20, 2021 on the ground that the property in question in the suit is situated in Safipur, District-Unnao, therefore, the case cannot transferred, being aggrieved, the applicants filed the present application under Section 24 CPC before this Court seeking the relief as sought for before the Court below.

Transfer Applications (Civil) No.-123 & 124 of 2021 :-

3. In these cases, transfer of Regular Suit No. 2791 of 1996 (Babu Singh and others vs. Raj Bahadur Singh) and Regular Suit No. 367 of 2018 (Shivji Virajman Mandir through Shivnath Singh vs. Reena Singh and others) was sought respectively from the Court of Civil Judge, Junior Division, Safipur, District-Unnao to any other Court of Civil Judge, Junior Division, Unnao has been sought, on the same ground as taken in seeking transfer of Regular Suit No. 182 of 1996, by filing applications under Section 24 CPC. These applications were rejected by the learned District Judge vide order dated September 20, 2021. However, setting aside of the order dated September 20, 2021 passed by the District Judge has not been sought in both these applications filed under Section 24 CPC before this Court.

4. One of the issues which arose before the learned Single Judge was that in the event the applicant had already approached the Court below under Section 24 CPC for transfer of suit and an order was passed therein rejecting the application, whether there was any remedy available against such an order under Section 115 CPC or under Article 227 of the Constitution of India. The other issue

was as to whether the order passed by the District Judge under Section 24 CPC is to be challenged either by filing a revision under Section 115 CPC assuming the same to be maintainable or under Section 227 of the Constitution of India or the applicant could straightway file an independent application under Section 24 CPC before the High Court seeking such transfer without challenging the order of the District Judge.

5. Owing to contrary decisions and difference of opinion on the aforesaid issue, the learned Single Judge has referred the questions, as quoted in the first paragraph of this order, for consideration by a larger Bench.

6. The learned Counsel for the applicants would say in tune with the decisions in **Jagdish Kumar v. The District Judge, Budaun** and **Paras Jain v. Izhar Ahmad and others** that the order passed by the District Judge on a transfer application, rejecting it, is not a 'case decided' within the meaning of Section 115 CPC, since no rights of parties involved in the suit are decided, either finally or as an interlocutory measure. Hence, a revision under Section 115 CPC is not maintainable.

7. To this submission, the learned Amicus Curiae submitted that the expression 'case decided' employed in Section 115 CPC is not necessarily restricted in its application to rights that constitute the lis. The 'case decided' may well be something not directely related to the suit, such as proceedings for restoration under Order IX CPC. No doubt, such proceedings would have bearing of some kind on the event in the suit, but not in the terms of a decision on the lis involved, or a part thereof and as it involves adjudication thus revision would be a remedy.

8. Heard learned counsel for the parties and perused the paper book.

9. To appreciate the arguments raised by learned counsel for the parties with reference to interpretation of Sections 24 and 115 of CPC and Article 227 of the Constitution of India, we deem it appropriate to reproduce the same hereunder :

"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 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 Causes 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.

x x x x

115. Revision-(1) A superior court may revise an order passed in a case decided in an original suit or other proceeding by a subordinate court where no appeal lies against the order and where the subordinate court has-

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

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

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

(2) A revision application under sub-section (1), when filed in the High Court, shall contain a certificate on the first page of such application, below the title of the case, to the effect that no revision in the case lies to the district court but lies only to the High Court either because of valuation or because the order sought to be revised was passed by the district court.

(3) The superior court shall not, under this section, vary or reverse any order made except where,-

(i) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding; or

(ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it is made.

(4) A revision shall not operate as a stay of suit or other proceeding before the court except where such suit or other proceeding is stayed by the superior court.

Explanation I-In this section,-

(i) the expression "superior court' means-

(a) the district court, where the valuation of a case decided by a court subordinate to it does not exceed twenty five lakh rupees.

(b) the High Court, where the order sought to be revised was passed in a case decided by the district court or where the value of the original suit or other proceedings in a case decided by a court subordinate to the district court exceed five lakh rupees;

(ii) the expression "order' includes an order deciding an issue in any original suit or other proceedings.

Explanation II.-The provisions of this section shall also be applicable to orders passed, before or after the commencement of this section, in original suits or other proceedings instituted before such commencement."

x x x x

227. Power of superintendence over all courts by the High Court.-(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

(2) Without prejudice to the generality of the foregoing provision, the High Court may --

(a) call for returns from such courts;

(b) make and issue general rules and prescribe forms for regulating the

practice and proceedings of such courts; and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein:

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces."

10. The power to be exercised under Section 24 CPC is both administrative and judicial. The administrative power is exercised by the competent authority in routine for allocation of cases amongst different Courts subordinate to it or having concurrent jurisdiction with power of allocation of cases generally. No issue is raised thereof generally unless someone files an application seeking transfer of his case to some other court. This application again can be either on administrative side or judicial side. The issue which is pending for consideration before this Court is regarding the application filed by the litigant under Section 24 CPC on judicial side. If such an application is filed, the Court concerned is required to consider the same in terms of the parameters settled therefor. An application filed by a party to the litigation under Section 24 CPC can either be accepted or rejected.

PRINCIPLES OF TRANSFER OF CASES

11. The principles with respect to the transfer of case under Section 24 CPC have been dealt with by Hon'ble the Supreme Court in **Kulwinder Kaur vs. Kandi Friends Education Trust and others**. Relevant paragraphs 13, 14 and 17 of aforesaid judgment are reproduced below :

"13. Having considered rival contentions of the parties and having gone through the proceedings of the case, we are of the view that the impugned order deserves to be set aside. So far as the power of transfer is concerned, Section 24 of the Code empowers a High Court or a District Court to transfer inter alia any suit, appeal or other proceeding pending before it or in any Court subordinate to it to any other Court for trial and disposal. The said provision confers comprehensive power on the Court to transfer suits, appeals or other proceedings "at any stage' either on an application by any party or suo motu.

14. Although the discretionary power of transfer of cases cannot be imprisoned within a strait-jacket of any cast-iron formula unanimously applicable to all situations, it cannot be gainsaid that the power to transfer a case must be exercised with due care, caution and circumspection. Reading Sections 24 and 25 of the Code together and keeping in view various judicial pronouncements, certain broad propositions as to what may constitute a ground for transfer have been laid down by Courts. They are balance of convenience or inconvenience to plaintiff or defendant or witnesses; convenience or inconvenience of a particular place of trial having regard to the nature of evidence on the points involved in the suit; issues raised by the parties; reasonable apprehension in

the mind of the litigant that he might not get justice in the court in which the suit is pending; important questions of law involved or a considerable section of public interest in the litigation; "interest of justice; demanding for transfer of suit, appeal or other proceeding, etc. Above are some of the instances which are germane in considering the question of transfer of a suit, appeal or other proceeding. They are, however, illustrative in nature and by no means be treated as exhaustive. If on the above or other relevant considerations, the Court feels that the plaintiff or the defendant is not likely to have a "fair trial' in the Court from which he seeks to transfer a case, it is not only the power, but the duty of the Court to make such order.

x x x x

17. .....It is true that normally while making an order of transfer, the Court may not enter into merits of the matter as it may affect the final outcome of the proceedings or cause prejudice to one or the other side. At the same time, however, an order of transfer must reflect application of mind by the court and the circumstances which weighed in taking the action....."

SCOPE OF SECTION 115 CPC

12. The scope of Section 115 CPC was also considered by Hon'ble the Supreme Court in **Prem Bakshi and others vs. Dharam Dev and others** wherein it has been held as under :-

"6. The proviso to Sub-section (1) of Section 115 puts a restriction on the powers of the High Court inasmuch as the High Court shall not, under this section vary or reverse any order made or any order deciding a issue, in course of a suit or other proceedings except where (I) the order made would have finally dispose of the suit or other proceedings or, (ii) the said order would occasion a failure of justice or cause irreparable injury to the party against whom it is made. Under Clause (a), the High Court would be justified in interfering with an order of a subordinate court if the said order finally disposes of the suit or other proceeding. By way of illustration we may say that if a trial court holds by an interlocutory order that it has no jurisdiction to proceed the case or that suit is barred by limitation, it would amount to finally deciding the case and such order would be revisable....."

13. In **Sadhana Lodh vs. National Insurance Company Ltd. and others**, Hon'ble the Supreme Court has observed :-

".....Where a statutory right to file an appeal has been provided for, it is not open to High Court to entertain a petition under Article 227 of the Constitution. Even if where a remedy by way of an appeal has not been provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court under Section 115 of the Code of Civil Procedure. Where remedy for filing a revision before the High Court under Section 115 of CPC has been expressly barred by a State enactment, only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution....."

14. The Division Bench of this Court in **Ram Dhani and others vs. Raja Ram and others** has considered the scope of Section 115 CPC as amended in the State of Uttar Pradesh, by the Code of Civil Procedure (U.P. Amendment) Act, 2003 in detail and has held as under :

"4. A perusal, therefore, of the aforesaid amendment in Uttar Pradesh, would show that what was contained in Clause (b) of proviso to Section 115 (1) before its amendment has been reintroduced in Section 115 (3) (ii) after the amendment in the State of U.P. In the U.P. Amendment Act, 2003, the expression "order' has been set out to include "an order deciding an issue in any original suit or other proceedings.'

5. Section 2 (14) of Code of Civil Procedure, describes an "order' to mean "the formal expression of any decision of a Civil Court which is not a decree.'

The expression "decree' has been defined under Section 2 (2) to mean "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include- (a) any adjudication from which an appeal lies as an appeal from an order, or (b) any order of dismissal for default.

6. An order thus has to have the trappings of a formal expression of a decision of a Civil Court. In the Explanation contained in Section 115 of Code of Civil Procedure in the Central Act, both before and after the amendment, it is specifically set out that the expression "any case which has been decided' includes "any order made or any order deciding an issue, in the course of a suit or other proceeding.' The provision as contained in the U.P. Amendment is revision against an order in a case decided. The intent and object, therefore, of both the Central Act and as amended in the State of U.P. appear to be, that a revision will be maintainable in respect of an order in a case decided.

x x x x

12. Section 115(3) as applicable to the State of U.P., apart from providing that the Superior Court would not vary or reverse any order except where- (I) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or procedure, or (ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it is made, would also require that there must be an order and that order decides the part of the case or proceedings. These are further considerations which the Court must apply after it comes to the conclusion that it is a case decided. Thus, Section 115 (3) really would be of no assistance in deciding the issue of "order' or "case decided'."

15. Section 115 CPC, as applicable to the State of U.P., provides for remedy to any of the party to the litigation to challenge the order passed by the court below. If the subordinate court has acted in exercise of its jurisdiction illegally or with material irregularity, the superior court may revise such an order. The superior court may also vary or reverse any order in exercise of revisional powers, if the order is allowed to stand, it would occasion failure of justice or cause irreparable injury to the party against whom it is made. An order passed under Section 24 C.P.C. will also fall in that category.

16. So as to arrive at a conclusion to answer the questions referred by the learned Single Judge, we deem it appropriate to categorize the set of judgments expressing different opinions in the matter.

(A) JUDGMENTS HOLDING THAT A SECOND APPLICATION UNDER SECTION 24 CPC IS MAINTAINABLE

17. This Court in **Jagdish Kumar's case (supra)** observed as under :

"14. Thus, an order under Section 24 of the Code either allowing or refusing to transfer or withdraw a suit or proceeding is not a case decided within the meaning of Section 115 of the Code as such an order under Section 24 of the Code is not subject to revision under Section 115 of the Code.

15. Since the order is neither appellable nor revisable as is the position as observed earlier, the same can never be sacrosanct or without any remedy. Such remedy are available under different provision of law. If it is an order of District Court refusing to transfer or allowed the transfer, the party can approach for retransfer, if transferred either before the District Judge or before the High Court. If refused, the aggrieved party may approach the High Court. Similarly in case of transfers, the High Court may be approached for retransfer and in case of refusal, the party is free to approach the Supreme Court under Section 25 of the Code. Against an order passed by the learned District Judge, it is open to the party to invoke the Higher Court's power of superintendence over subordinate court conferred upon the former under Article 227 of the Constitution. Inasmuch as Article 227 of the Constitution is not frittered by any other law or statute or any qualification.

x x x x

21. 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."

18. The Judgment of **Jagdish Kumar's case (supra)** was followed by the learned Single Judge of this Court in **Ishtiyak Ahmad v. Smt. Meena and others**, wherein 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."

19. The Judgment of **Jagdish Kumar's case (supra)** was also followed by another Single Judge in **Amit Pachauri Vs. Smt. Ram Beti in Transfer Application (Civil) No. - 226 of 2016,** decided on July 13, 2016, wherein it was observed:

" The aforesaid decision nowhere lays down that once a party has approached the District Judge under Section 24 CPC, it cannot file a fresh application before the High Court, rather it specifically lays down that the jurisdiction conferred under Section 24 CPC is concurrent and that a party filing an application under Section 24 CPC before the District Judge may approach the High Court under the same provision. In view of the aforesaid facts and circumstances, there is no bar in moving an application under Section 24 CPC before the High Court for transfer of a case by the same party after losing in getting it transferred by the District Judge."

20. Another learned Single Judge in **Jaikaran Singh & others Vs. Balakram and others** has held :

"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 propriety demands 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....."

21. A Division Bench of Calcutta High Court in G**orachand Das vs. Dipali Das** decided on April 9, 1976 has observed as follows :

"9. In the last place the contention of Mr. Mukherjee on behalf of the opposite party has been that the present application is not maintainable on the ground that no revision lies against the order passed by a District Judge refusing to transfer a case under section 24, and further that the petitioner once having made an application under section 24 before the District judge and that application having failed he is not entitled to move a fresh application under section 24 before the High Court. We are unable to accept this contention of Mr. Mukherje. The language used in section 24 is :

The High Court or the District Court may, at any stage-

Transfer any suit....."

On a plain reading of the section, therefore, it cannot be said that moving an application before the District Court will preclude the petitioner from moving a fresh application before the High Court. In the case of Hari Nath Biswas v. Debendra Nath Biswas 11 C.L.J. 218 also reported in 5 I.C. 771, which is a Bench decision of this Court, it has been held that if the District Judge refuses to transfer a case under section 24 the petitioner may make a fresh

application for transfer to the High Court. The same view was also taken in Sheo Nandan Lal v. Mangal Chand, AIR 1927 Pat. 383. In this view of the matter we need not concern ourselves with the question as to whether a revisional application under section 115 of the Code is maintainable against the order passed by a District Judge refusing to transfer a suit under section 24 of the Code."

(B) JUDGMENTS HOLDING SECOND APPLICATION UNDER SECTION 24 CPC NOT MAINTAINABLE AND PETITION UNDER ARTICLE 227 OR REVISION UNDER SECTION 115 CPC MAINTAINABLE

22. This Court in **Sunita Devi Vs. Ram Kripal and another**, 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.

x x x x

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 Ramulal, 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."

23. The decision in **Sunita Devi's case (supra)** was followed by this Court in **Indian Oil Corporation Ltd. Vs. Ram Swaroop Bajaj, in Transfer Application (Civil) No. 34 of 2016,** decided on February 2016, wherein it has been observed as under :

"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. Shobhanal, 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 Nadar. 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."

24. A Division Bench of Kerala High Court in **Ariamma Sachariah vs. Rose Elizabeth Kurian in C.M.C. no. 94/2000** decided on February 26, 2004, held as under :

"8. A perusal of the provisions would show that power has been given to the District Court or the High Court to order transfers. Of course, in cases where suits or proceedings lie outside the jurisdiction of the District Court, power under Section 24 of the C.P.C. can be used only by the High Court. According to us, an interpretation of Section 24 of C.P.C. will clearly show that a party can approach the District Court or High Court for transfer of cases. That does not mean that party, who did not get favourable orders by filing petition under Section 24 of C.P.C. before the District Court can approach the High Court for the same relief.

9. The main attack is that even if the order is passed by the District Court under Section 24, the party can be allowed to approach this Court under Section 24 of the C.P.C. We are of the view that this contention cannot be accepted. According to us, the party can approach this Court under Article 227 of the Constitution to redress their grievances. If we accept the interpretation given by the learned Counsel for the petitioners that will lead to multiplicity of proceedings and waste of time.

10. In the above view of the matter, we are of the view that once an order is passed in a petition under Section 24 of C.P.C. by the District Court, that order can be challenged and the party cannot file another petition under Section

24 of C.P.C. for the same cause of action before the High Court."

25. The Madras High Court in **Sebastian vs. R. Prabakaran and others in Transfer Civil Miscellaneous Petition (MD) No. 19 of 2011 and M.P. (MD) No. 1 of 2011**, decided on March 4, 2011 has observed as under :

"12. Under this circumstance, a prime question is arisen as to whether this second petition, for the very same relief which was rejected in O.P.No.101 of 2010 by the learned Principal District Judge, Dindigul, is maintainable?

X X X X

32. On coming to the instant case on hand, the petitioner after making allegations against the learned Subordinate Judge, Palani holding Camp-Court at Kodaikanal had originally filed a transfer petition in Transfer O.P.No.101 of 2010, on the file of the learned Principal District Judge, Dindigul. That petition was dismissed. Again the petitioner has approached this Court with this transfer petition for the second time seeking the very same relief, transfer of the appeal suits in A.S. No.46 and 47 of 2009 from the file of the learned Subordinate Judge, Palani to any other Subordinate Judge's Court at Dindigul District.

X X X X

"37. Keeping in view of the fact and on considering the submissions made on behalf of both sides, this Court is not inclined to allow this petition on the ground that the second transfer petition filed under Section 24 of the Code of Civil Procedure is not maintainable, when an earlier transfer petition under Section 24 of the Code of Civil Procedure was rejected by the learned Principal District Judge, Dindigur District."

26. The Karnataka High Court in **M.V. Ganesh Prasad vs. M.L. Vasudevamurthy and others**, observed as under :

"The reliance placed by Sri Udaya Holla, learned Counsel for the petitioner in the decision reported in 1984 II LLJ 508 was in the context as to whether a second revision petition under Section 24 in itself can be filed to the High Court on the rejection of an application filed under Section 24 of C.P.C. or whether a C.R.P. under Section 115, C.P.C. can be filed. This Court had ruled that a second application under Section 24, C.P.C. does not lie when an application made under the very provision has already been dismissed by the District Court. As against such an order a revision under Section 115, Cr.P.C. can be entertained."

C. JUDGMENT HOLDING THAT SECOND APPLICATION UNDER SECTION 24 AS WELL AS REVISION UNDER SECTION 115 CPC MAINTAINABLE

27. The Division Bench of Andhra Pradesh High Court in **Munnangi Ramakrishna Rao vs. Vanakuru Venkata Siva Ramakrishna Prasad and others in Transfer Civil Miscellaneous Petition No. 492 of 2002** decided on April 21, 2003 has held as under :

"A transfer petition filed before the District Court is a "proceeding'. Since any order, either allowing or refusing to transfer a suit from one Court to another, finally disposes of the transfer petition, there can be little doubt that such order is amenable to revision both prior and subsequent to 1999 Amendment to C.P.C. Therefore, we hold that revision against an

order passed in a petition filed under Section 24 C.P.C., either allowing or refusing to transfer a suit or proceeding by the District court is maintainable. The point is answered accordingly.

x x x x

A plain reading of the above Section shows that both High Court and District Court have concurrent jurisdiction to transfer proceedings in any Court subordinate to them to another Court either suo motu or on application by any of the parties to the proceedings. There is nothing in the said Section to suggest that when the District Court is seisin of a similar application the High Court should not entertain an application for the same purpose.

x x x x

It is thus seen that both Patna and Calcutta High Courts have also taken the view that an unsuccessful party before the District Court can move a fresh application for the same purpose in the High Court, which impliedly means that he need not question the order of dismissal by the District Court either under Section 115 C.P.C. or under Article 227 of the Constitution. Therefore, we hold that a petition under Section 24 C.P.C. is maintainable even without the order of dismissal of such petition by the District Court being questioned either under Section 115 C.P.C. or under Article 227 of the Constitution of India. The point is answered accordingly."

MEANING OF WORDS ''OTHER PROCEEDINGS'

28. The moot point involved here is whether an order granting or refusing a transfer application by the District Judge is a 'case decided' within the meaning of Section 115 CPC, as amended in its application to the State of U.P. Needless to say that it would further postulate if proceedings for transfer under Section 24 CPC, culminating in the order of the District Judge either way is 'other proceeding' within the meaning of Section 115(1) of the Code. In the State of Uttar Pradesh, since there is an added sub-Section (3) of Section 115 introduced by U.P. Act No. 14 of 2003, it would also require examination whether orders made on a transfer application by the District Judge, either way pass muster under sub-Section (3) of Section 115.

29. We have given our thoughtful consideration to the matter. It is true that orders made on an transfer application do not have the effect of any kind of a pronouncement on the rights of parties involved in the suit or a part thereof, but the expression 'case decided' under Section 115 CPC employs the expression in the context of proceedings that can be best gathered from the precise phraseology of the relevant part of the statute. The relevant words in sub-Section (1) of Section 115 say: "case decided in an original suit or other proceeding....."

30. The question to be examined is whether words 'other proceeding' would mean proceedings akin to a suit, in the sense that a part of the proceedings in the suit that may decide an issue involving some kind of a determination and pronouncement about the rights of parties, subject matter of the suit or do the words 'or other proceeding' would include something so ancillary or incidental to the suit that it would involve no pronouncement at all about the rights of parties.

31. Scope of the words "other proceedings' used in Section 115 of the

CPC was considered by the Patna High Court in **Durga Devi and another vs. Vijay Kumar Poddar and another**. Relevant paragraphs of aforesaid judgment read as under :

"30. The learned counsel appearing for the revisionists would submit that civil revision is not barred if an order is passed which would tantamount to final disposal of the suit or other proceedings and the terms "other proceedings' have to be understood in their connotative expanse. Their emphasis is on the terms "other proceedings'. Regard being had to the said submission, it is obligatory on our part to appreciate what the terms "other proceedings' do convey.

31. In **Black's Law Dictionary**, Sixth Edition, the term "proceeding' has been described to mean in a general sense the form and manner of conducting judicial business before a court or judicial officer and includes all possible steps in an action from the commencement till the end.

32. In **Advanced Law Lexicon**, Third Edition, 2005, by P. Ramanatha Aiyar, the term "proceeding' has been dealt with at page 3746. The said term, as has been stated therein, signifies that a proceeding in a civil action is an act necessary to be done in order to attain a given end. It is a prescribed mode of action in carrying into effect a legal right.

33. The purpose of referring to the various law dictionaries is only to appreciate what meaning is to be placed on the terms "other proceeding.' As we have already indicated herein above, the proceeding must be akin to the suit and it should be an independent proceeding for the phrase used in the proviso to Section 115 of the Code is suit or proceeding. There are several applications which require independent adjudication relating to the maintainability of the suit and once the said adjudication is complete, there can be no doubt that the proceeding comes to an end inasmuch as it would have an effect of finally disposing of the proceeding. The two significant facts indicate that the interlocutory order passed must be such which must fit into the compartment engrafted in the restrictive spectrum of the proviso, i.e., the suit or proceeding would have been finally disposed of. It is further worth noting that the language used in the proviso in the course of a suit or "other proceeding' is of immense significance. There can be independent proceeding.

34. **Corpus Juris Secundum** deals with "proceeding' as follows :-

"Proceeding.-The terms "proceeding" and "proceedings" are discussed generally in Actions 1 h (c) and, with reference to bankruptcy, in Bankruptcy 1. The terms have been held to be synonymous with "ease" see Actions 1 (b) (1), and "cause" see Actions 1 (e) (1), and also have been held synonymous with or have been distinguished from, "action", "judgment", "process", "prosecution", and "suit" see Actions 1 h (1)(b)."

35. In **Words & Phrases, Permanent Edition, Volume 34**, published by West Publishing Co., the term "proceeding' used in the provision has to be tereated as akin to the suit and it has to have the colour and character of an independent proceeding.

36. The acid test which is to be applied is that if by termination of such a proceeding an independent cause of action is put at naught, the application for revision would be maintainable. The interlocutory orders made in the course of hearing of a suit or proceeding is not amenable to revisional jurisdiction if such an order does not put an end to the suit or proceeding and as we have already indicated, the

proceeding has to have an independent character. Emphasis in the present provision is whether the order in favour of a party applying for revision would have given finality to the suit or other proceeding. If the answer is "yes', then the revision is maintainable and if the answer is in negative, the revision is not maintainable. The test that is required to be applied in every case so as to find an outcome is whether the order is interim in nature of finally disposes of the suit or other proceeding.

'

32. Further, in **Johra Bi and others vs. Jageshwar and others**, Madhya Pradesh High Court has held in para 20 as under :-

"20. The question still subsist what is the meaning to be given to "other proceedings". In our opinion, there is no reason to restrict the meaning of "proceeding" akin to the suit. There may be proceedings parallel to the suit which may be independent proceedings. The phrase used in proviso to section 115 is suit or proceeding. Proceeding has to be given wide meaning. Some light is thrown by the explanation added to section 141, Civil Procedure Code is applicable to proceeding under Order 9, Civil Procedure Code also.

Several applications which require independent adjudication before filing of suit as to maintainability of suit before its registration can be "proceeding" within proviso to section 115(1) Civil Procedure Code, therefore, once an application is decided revision would be maintainable if would have an effect of finally disposing off the "proceeding" though it has no effect on the suit at that point of time. Proceedings may also arise from the suit itself and those may be the proceedings within the meaning of proviso to Section 115(1) of Civil Procedure Code."

33. This Court in **Jagdish Narain Tandon and others vs. Onkar Nath Tandon**, it was held:

"6. Remedy of revision as provided under Section 115 C.P.C. for Uttar Predesh is from an order passed in a case decided in an original suit or other proceeding by a subordinate Court where no appeal lies against that order. Order of Additional District Judge, passed in revision under Section 115 C.P.C. was further challenged in revision under Section 115 C.P.C. before this Court in M/s. Jupiter Chit Fund (Pvt.) Ltd. v. Dwarika Dinesh Dayal, AIR 1979 All. 218 (FB). Full Bench of this Court relying upon earlier Full Bench decision of this Court in Har Prasad Singh v. Ram Swarup, AIR 1973 All 390 (FB), held that the phrase "cases arising out of original suit" does not include decisions of appeals or revisions. The phrase "other proceeding" refers to the proceedings of original nature and cannot include decisions of appeal or revision. The phrase "other proceeding" have to be read ejusdem generis with the words original suit. It was held that revision under Section 115 C.P.C. is not maintainable from revisional order of subordinate Court. This judgment of Full Bench has been affirmed by Supreme Court in Vishesh Kumar v. Shanti Prasad, AIR 1980 SC 892, holding that we are of opinion on the first question that the High Court is not vested with revisional jurisdiction under Section 115 of the Code of Civil Procedure, over a revisional order made by the District Court under that section."

34. The pronouncement of this Court in **Jagdish Narain Tandon's case (supra)**

was in the context of an issue whether an order passed by the Appellate Court during the course of the appeal against one of the parties could be revised under Section 115 CPC. The remarks of this Court, therefore, that the phrase 'other proceeding' have to be read *ejusdem generis* with the words 'original suit' are not a pronouncement about the character of the 'other proceeding', vis-à-vis the impact of these on the rights of parties involved in the suit, but that, that the 'other proceeding' should also be ones taken in the exercise of original jurisdiction as contradistinguished from the appellate jurisdiction. The principle in **Jagdish Narain Tandon's case (supra),** notwithstanding the invocation of the *ejusdem generis* principle to hold that 'other proceeding', is to be understood in the context of a suit, in no way suggests that 'other proceeding' must be akin to a suit in the sense that the *lis* involved in the suit itself or a part thereof must be decided thereby. The principle in Jagdish Narain Tandon, for all that it means, is that "other proceeding' in Section 115 CPC, must be akin to a suit in the sense that the proceedings are original; not appellate or revisional.

35. The question, what "other proceeding' in the context of Section 115 CPC would mean, is well elucidated by the decision of the Patna High Court in **Durga Devi's case (supra)** and the Madhya Pradesh High Court in **Johra Bi's case (supra).**

36. The order passed on a transfer application by the District Judge under Section 24 CPC, in our opinion, is "other proceeding' within the meaning of Section 115 CPC, because the proceedings, though ancillary to the suit, are judicial in nature, where the Court has to consider grounds for transfer urged by one party and opposed by the other, together with the material on record. The Court then proceeds to decide whether the suit, appeal or whatever the nature of the cause, ought to be heard by one Court or the other. The outcome may not have any direct impact on the lis involved in the suit, appeal or other kind of proceedings, subject matter of the transfer application, but a decision is to be judicially arrived at by the District Judge after due application of mind and hearing parties. It is in this sense that a transfer application is "other proceeding' and the order passed thereon a "case decided', because the order passed on the transfer application by the District Judge disposes it of finally. Since the order passed on a transfer application by the District Judge under Section 24 CPC is, for very obvious reasons, not an order passed by the District Court in the exercise of its appellate or revisional jurisdiction, a revision to the High Court under Section 115 (1) CPC, as amended by U.P. Act No. 31 of 2003 and earlier by U.P. Act No. 31 of 1978, would not be barred.

37. We are, therefore, not in agreement with the law laid down in **Jagdish Kumar's case (supra)** and **Paras Jain's case (supra),** insofar as those decisions hold that against an order passed by the District Judge disposing of a transfer application, a revision to this Court would not be maintainable. To that extent, we overrule the said decisions.

MERITS

38. From the facts of the case, it is evident that the application was rejected by the Court below recording a categorical finding that the property in question in the suit is situated in Safipur, District-Unnao

and the Civil Judge, Junior Division, Safipur has the jurisdiction to hear the matter in respect of any civil dispute within that area, hence, the case cannot be transferred. The party moved a fresh application before this Court under Section 24 CPC. In the light of these facts, the issue came to be considered as to whether fresh application under Section 24 CPC would be maintainable or the order would be revisable under Section 115 CPC and Article 227 of the Constitution of India. There is another facet of the matter. In case, the application is allowed by the Court below, the opposite party may have grievance against the order passed by the court below allowing the application for transfer of the case raising argument that the parameters laid down therefor have been violated. In such an eventuality, the party aggrieved may have to challenge that order in the next higher court and a fresh application under Section 24 CPC, as such, may not be maintainable as the validity of the order has to be examined by the next higher court.

39. The position cannot be left anomalous in the sense that in one eventuality where an application filed by a party under Section 24 CPC is rejected, he can file a fresh application for transfer of a case to the next higher court under Section 24 CPC, whereas, in case, the application is accepted, the party aggrieved will have remedy to challenge the order passed in the next higher court. There has to be uniformity to the remedies available against the order passed by the court below.

40. Since the order passed by the District Judge has been held by us for reasons indicated to be a "case decided' and the proceedings under Section 24 CPC "other proceeding' within the meaning of Section 115 CPC, finality would attach to the District Judge's order once that Court is approached by a party seeking transfer within the District Judge's jurisdiction. The party aggrieved by the orders passed by the District Judge would have to move this Court under Section 115 CPC to set aside the order. Since orders passed on the transfer application is a "case decided' and disposes of "other proceeding' within the meaning of Section 115 CPC, the party aggrieved by the District Judge's order cannot invoke the jurisdiction of this Court afresh under Section 24 CPC to set at naught the District Judge's determination without applying under Section 115 CPC to set aside that order.

41. Some very distinctive reasons, based on interpretation of the expression "the High Court or the District Court" occurring in sub-Section (1) of section 24 CPC, have been given in the decision of this Court in **Sunita Devi's case (supra).** The word "or' in the expression above mentioned has been construed as disjunctive and not conjunctive. To reach that conclusion, the phraseology employed in the analogous provisions of Section 407 Cr.P.C. has also been considered, which expressly provides for remedy to the unsuccessful applicant before the Sessions Judge in a plea for transfer of a criminal case to approach this Court. The absence of a similar provision under Section 24 CPC has been viewed by this Court to suggest that the power under Section 24 can be invoked by a party once and the determination made by the District Judge binds both parties.

42. For the reasons indicated in **Sunita Devi's case (supra)** and whatever we have said above, we are of opinion that unless an order passed by the District Judge

on an application under Section 24 CPC is challenged through appropriate proceedings, the party aggrieved by the District Judge's order cannot further invoke the jurisdiction of this Court under Section 24 CPC to undo the District Judge's order. Since the order of the District Judge under Section 24 CPC has been found to be revisable by us, there is no reason why a person aggrieved by the District Judge's order under Section 24 CPC would have his remedy under Article 227 of the Constitution, though that remedy cannot be held barred as it embodies the constitutional powers of this Court to superintend Courts and Tribunals subordinate. Nevertheless, in the face of availability of a statutory remedy under Section 115 CPC, the usual principle eschewing the invocation of a constitutional remedy would apply.

43. In view of what we have held above, our answers to the questions referred are these:

(i) The question is answered in the affirmative and it is held that an order passed by the District Judge under Section 24 CPC is revisable under Section 115 CPC as applicable in the State of U.P.

(ii) The question stands answered in the negative and it is held that another application under Section 24 CPC by the same applicant based on the same cause of action would not be maintainable before this Court without challenging the order passed by the District Judge, on the application disposed of by the District Judge under Section 24 CPC through a revision under Section 115 CPC. Normally, the order of the District Judge passed on an application under Section 24 CPC being revisable, the constitutional remedy under Article 227, though not barred, may not be invoked on the sound principle of the availability of an equally efficacious statutory alternative remedy under Section 115 CPC.

(iii) The question is answered by holding that the law laid down by this Court in **Sunita Devi's case (supra)** and **Indian Oil Corporation's case (supra)** lay down the law correctly on the subject matter in issue and the decision in **Jagdish Kumar's case (supra)** and **Amit Kumar Pachauri's case (supra)** do not lay down the correct law.

44. The reference is answered, accordingly.

45. Let the papers be placed before the appropriate Bench according to the Roster.

(2022) 11 ILRA 645
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.11.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

Second Appeal No. 955 of 1996

Ram Karan & Anr. ...Appellants
Versus
Uma Shanker & Anr. ...Respondents

Counsel for the Appellants:
Sri N. Lal, Sri Anirudh Kumar Upadhyay, Sri C.P. Dwivedi, Sri S.P. Srivastava

Counsel for the Respondents:
Sri Ramakant Tiwari, Sri Dinesh Kumar Pandey, Sri H.S.N. Tripathi, Sri P.S. Tripathi, Sri Ramakant Tiwari, Sri Umesh Chandra Tiwari

A. Civil Law - Code Of Civil Procedure, 1908 - Section 96 - Order 41 Rule 31 - First Appeal - It is a settled position of law

that an appeal is a continuation of the proceedings of the original court - Ordinarily, the appellate jurisdiction involves a rehearing on law as well as on fact and is invoked by an aggrieved person -The appellate court has jurisdiction to reverse or affirm the findings of the trial court - findings of fact based on conflicting evidence arrived at by the trial court must weigh with the appellate court, more so when the findings are based on oral evidence recorded by the same Presiding Judge who authors the judgment - This does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge - As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact (Para 23, 24)

B. Civil Law - Evidence Act,1872 - Identity of property - Sale deed between third parties - Relevance - boundaries of properties in a sale deed between third parties is relevant evidence to show that a person is the owner of the property indicated in the boundaries - recitals in a sale-deed though between third parties were evidence of the fact that a person was the owner of the property indicated as boundary (Para 38)

C. Civil Law - Code Of Civil Procedure, 1908 - Suit - Court's finding - Third case – Trial court must base its findings on the evidence produced before it by the parties - The enquiry by the court is restricted to the evidence on record and the case pleaded by the parties - Court is not allowed to conjecture a third case for parties, and if it does, its determination would be illegal - without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded - court can consider such a case not specifically pleaded, only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on that basis and had led evidence on that case - Where neither party puts forth such a contention, the court cannot make out such a case not pleaded, suo motu as the court is not permitted to conjecture and surmise - A case is a statement of facts by a party, backed by evidence, entitling it to a right that can be established before a Court of law and the remedy secured - however, mere process of reasoning or appreciation of evidence cannot be dubbed as a third case (Para 32, 33, 35)

The Trial Court considered the evidence of witnesses, carefully analyzed the boundaries shown in the two sale deeds, together with circumstances on record and the geographical location, to reach a plausible conclusion that the suit property was, the plaintiffs' courtyard - both those documents were not at all considered by the Lower Appellate Court - Lower Appellate Court, by failing to consider and refer to the documentary evidence that the Trial Court did, failed to reverse categorical findings recorded by the Trial Court about the location and identity of the suit property - Appellate Court was not right, in the absence of a manifest illegality demonstrable in the Trial Court's view in interfering with the Trial Court's opinion - the Lower Appellate Court's judgment set aside and that of the Trial Court restored (Para 44)

Allowed. (E-5)

List of Cases cited:

1. Malluru Mallappa (Dead) through Legal Representatives Vs Kuruvathappa & ors., (2020) 4 SCC 313

2. Santosh Hazari Vs Purushottam Tiwari (Deceased) by LRs, (2001) 3 SCC 179

3. Madhusudan Das Vs Narayanibai (Deceased) by LRs & ors., (1983) 1 SCC 35

4. Valarshak Seth Apcar Vs Standard Coal Co., Ltd. & ors., AIR 1943 PC 159

5. Deb Narayan Halder Vs Anushree Halder (smt), (2003) 11 SCC 303

6. Bachhaj Nahar Vs Nilima Mandal & anr., (2008) 17 SCC 491

7. Hari Lal Vs Amrik Singh & anr., AIR 1978 All 292

(Delivered by Hon'ble J.J. Munir, J.)

1. This is a plaintiffs' appeal, who had a vacillating fortune before the Courts below in a suit instituted for the relief of permanent prohibitory injunction.

2. Original Suit No. 455 of 1984 was instituted by Ram Karan son of Ishwar Dutt Tripathi and Dadhich Chand son of Ram Karan against Uma Shanker and Paras Nath on 08.08.1984, claiming a permanent prohibitory injunction to the effect that the defendants be restrained from interfering with the plaintiffs' possession in part of their *abadi* and *Sahan* (Courtyard), denoted by letters C D E M in the plaint map or disturbing the *Neem* tree standing there.

3. The two plaintiffs were the original appellants here. Of them, Ram Karan died pending appeal and is represented on record by his heirs and LRs, who are appellant nos. 1/1, 1/2, 1/3, 1/4, 1/5, 1/6 and 1/7. Appellant no. 1/3 is on record as appellant no.2. All the appellants shall hereinafter be collectively referred to as "the plaintiffs'. However, in case of individual reference, the concerned plaintiff shall be referred to by his name. The two defendants to the suit, Uma Shanker and Paras Nath were in the same order arrayed as respondent nos. 1 and 2 to this appeal. Both the defendant-respondents have died pending appeal and are represented on record by their heirs and LRs, as entered in the cause title of the appeal. Any reference hereinafter to the two defendant-respondents collectively shall be as "the defendants', but in case of individual reference, Uma Shanker, defendant no. 1, now represented by his LRs, shall be referred to as "Uma Shanker'. Likewise, Paras Nath, defendant no. 2, now represented by his LRs, in case of individual reference, shall be referred to by his name.

4. The plaintiffs' case is that their ancestral house, the present house that they live in, stands over the site it has been and also over the site to its north, where the house of Shri Narain stood and that their door has always been oriented both to the west and the north. Also, their *Sahan* (Courtyard) has existed both to the north and the west of their house. To the south-west stands Uma Shanker's *abadi*. Westward of Uma Shanker's *abadi*, the plaintiffs' *Sahan* extends up to the houses of Jamuna, Udairaj and Khaderan. It is the plaintiffs' case that the entirety of their property, which they have referred to as *abadi*, is denoted in the plaint map by letters A B C D E F A.

5. It is also the plaintiffs' case that Krishnadev, a collateral, sold his share in their favour, whereas another collateral Shri Narain entered into a compromise with them. In consequence, the property shown by letters A B C D E F A came to the plaintiffs' exclusive ownership and possession. The plaintiffs have been using the aforementioned property for their residence and the household establishment over time. The aforesaid property includes the plaintiffs' house, *Dalan* (verandah), and *Neem* trees. It is said that the various activities of living, associated with the rural

way of life went about for the plaintiffs in this property. It is particularly said that for the past 2-3 years, the cattle, that were tethered over a part of the said property, have been moved to another place by the plaintiffs, but they have complete dominion and use of the suit property, denoted by letters C D E M. A *Neem* tree stands over the said land. The part of the property denoted by letters C D E M shall hereinafter be referred to as "the suit property'.

6. It is also the plaintiffs' case that Uma Shanker's property is located to the east of the line ED and which has a higher elevation compared to the suit property. The defendants' house was earlier a *kachcha* construction, which in course of time, they have demolished and replaced by a *pucca* house, comprising just two rooms, secured by an enclosure (*Hata*). To the south of a part of the suit property is located one Shiv Murat Tiwari's *abadi*, in the southern part whereof, Shiv Murat has his house. Shiv Murat Tiwari has sold off his house and *abadi* to Manikraj, and Manikraj, in turn, has sold it to Paras Nath, defendant no. 2.

7. The plaintiffs assert that their property denoted by letters A B C D E F A is in their complete title, dominion and possession, including the constructions standing thereon and the *Neem* trees as well. The defendants have neither been in possession of the suit property nor have their ancestors ever been in its occupation. According to the plaintiffs, the defendants have conspired and filed a collusive suit, where Uma Shanker, defendant no.1, sued Paras Nath, defendant no.2 *vide* O.S. No. 61 of 1982, claiming right over a part of the property that is the plaintiffs', including the suit property (*Sahan*). The plaintiffs made an application for impleadment in the said suit, but it was rejected by the Court by an order dated 27.07.1984. It is the plaintiffs' case that after rejection of the impleadment application, the defendants conspiring amongst themselves are attempting to encroach upon a part of the plaintiffs' *Sahan*, that is to say, the suit property and further trying to usurp the *Neem* trees standing there. It is on the said cause of action that the suit for permanent injunction giving rise to this appeal was instituted.

8. The defendants entered appearance and put in separate written statements. So far as Paras Nath (defendant no.2) is concerned, his stand and defence loose all significance, because a compromise and adjustment of the suit was entered into between parties in terms of the memorandum of compromise dated 04.02.1986. The said compromise was verified by the Trial Judge, after due identification of parties, on 24.05.1986. The suit between the plaintiffs and Paras Nath, therefore, stood disposed of in terms of the compromise dated 04.02.1986. The suit has, thus, proceeded between the plaintiffs and Uma Shanker (defendant no.1) alone.

9. Uma Shanker filed his written statement dated 30.10.1985 on 08.11.1985. Uma Shanker contested the plaintiffs' claim and in the additional pleas asserted that no cause of action arose to the plaintiffs to institute the present suit. It was pleaded that the plaintiffs' verandah (*Dalan*) is oriented lengthwise, north to east and to its south all *abadi* that is located, is neither the plaintiffs' nor in their possession. It has never been so. The plaint map was denied. It was also pleaded that the plaintiffs, Krishnadev and Shri Narain belong to the same bloodline and their ancestral house at

present is located to the north of Uma Shanker's house. It faces the west and is so since the time of the parties' ancestors. It is also asserted that in the house standing over the suit property, Shri Narain lived in the northern portion and in the southern the plaintiffs and Ram Krishna lived. However, after the plaintiffs bought Ram Krishna's share, he has a two-third share in that house in its southern portion. The northern one-third of the plaintiffs' house is Shri Narain's. It was also denied that there is a verandah or a door to the south of the plaintiffs' house. To the contrary, at the time the plaintiffs' verandah was constructed, there were two doors located on its northern face. The plaintiffs' household is located elsewhere for a long period of time and their courtyard is located to the north of the verandah, and to the west of the plaintiffs' house. The rest of the land shown by letters C D E M belongs to Uma Shanker since the time of his ancestors.

10. It is also Uma Shanker's case that to the west of the line MC, as shown in the plaint map, Uma Shanker's house and *Sahan* has always been in existence. Uma Shanker's house aforesaid is ancestral and faces the west. Its courtyard (*Sahan*), extends to the houses of Udairaj and Khaderan in the east and Uma Shanker has been in possession of the said property since the time of his ancestors. He is still in possession. Two *Neem* trees stand in Uma Shanker's property aforesaid. It is also Uma Shanker's case that his ancestral house, which was dilapidated in course of time, collapsed, and, therefore, he constructed a house in its place, moving a little towards the west and south, facing the west. Most of this house has been constructed, where telltale remains of the old house are still in existence. It is also Uma Shanker's case that to the south of the suit property lies Uma Shanker's land, where he has his living. It is asserted by Uma Shanker that the plaintiffs and Paras Nath, defendant no.2, are in collusion and the two threatened Uma Shanker, though not said about what specifically the threat was. It led Uma Shanker to institute Suit No. 61 of 1982, which by the time the written statement was filed, was pending trial. The suit was asserted to be undervalued and the court-fee paid insufficient. The suit was also asserted to be barred by Sections 38 and 41 of the Specific Relief Act, 1963, besides the principle of estoppel. The suit was said to be barred by limitation and not maintainable.

11. On the pleadings of parties, the Trial Court framed the following issues (translated into English from Hindi):

(1) Whether the plaintiffs are the owners in possession of the property in dispute?

(2) Whether the suit is undervalued and the court-fee paid insufficient?

(3) Whether the suit is barred by Sections 38/41 of the Specific Relief Act?

(4) Whether the suit is barred by Section 115 of the Evidence Act?

(5) Whether the suit is barred by time?

(6) To what relief is the plaintiffs entitled?

12. The plaintiffs filed for their documentary evidence, a copy of the sale deed, marked as Ex. 1, whereas Uma Shanker filed a copy of the decree, marked as Ex. Ka-1, besides the sale deed marked as Ex. Ka-2 on behalf of the defendants.

13. The plaintiffs examined Ram Chandra as PW-1 and Dadhich as PW-2,

whereas the defendant examined Munshi as DW-1 and Uma Shanker (defendant no.1) as DW-2.

14. It must be remarked here that for reasons to be found in the Trial Court's judgment, the Trial Court has considered some documentary evidence, but opined that it is not binding on parties. That evidence has, therefore, been regarded as circumstantial by the Trial Court. All other evidence that has been considered is parole evidence of witnesses produced by parties. The Trial Judge, on an evaluation of the oral evidence led by both sides, as well as some documents which have been regarded as circumstantial in nature, has found for the plaintiffs on preponderance of probability. The Trial Judge inferred in favour of the plaintiffs primarily because of the existence of the door opening into the suit property form the plaintiffs' verandah facing the south. There is much quarrel between parties that this door was opened pending suit. The Trial Judge also depended for his finding on the boundaries of a contiguous property mentioned in the sale deed, executed between third parties in the year 1959, Ex. Ka-2. He also looked into another sale deed of the same property, Ex. 1.

15. The Lower Appellate Court, on an evaluation of the evidence of witnesses, reached a contrary conclusion, reversed the Trial Court and dismissed the suit. However, the Lower Appellate Court has not considered in the least documents that the Trial thought were circumstances to be taken into account to find on the matter in issue.

16. Aggrieved, the plaintiffs have instituted this appeal from the appellate decree. It was admitted to hearing *vide* order dated 07.11.1996 by this Court, but without formulating the substantial question/ questions of law involved. This is not to say that the memorandum of appeal did not carry the proposed questions. Accordingly, this Court *vide* order dated 27.04.2022 proceeded to formulate the following substantial questions of law:

(i) Whether the Lower Appellate Court can set aside findings of fact recorded by the Trial Court, where the findings are based on appreciation of oral evidence alone?

(ii) Whether the Lower Appellate Court has committed a manifest illegality in considering a third case not pleaded by the parties to the effect that there was no way for the appellants to access the land in dispute - a courtyard (sahan) and on that basis, setting aside the findings recorded by the Trial Court?

(iii) Whether the Lower Appellate Court pronounced upon the character and ownership of land in dispute as the appellants' courtyard (sahan) without taking into consideration the two sale deeds which the Trial Court had considered to reach a different conclusion?

17. This appeal has, accordingly, been heard on the aforesaid substantial questions.

18. Heard Mr. Anirudh Kumar Upadhyay, learned Counsel for the plaintiffs and Mr. Ramakant Tiwari, Advocate appearing on behalf of the defendants.

19. In order to put the record straight, it is clarified that out of the three heirs and LRs of Uma Shanker, defendant no.1, the defendants' interest has been represented by his sons Jai Prakash and Om

Prakash, for whom Mr. Ramakant Tiwari has appeared and defended this appeal. Like the Courts below, there has been no contest on behalf of Paras Nath and his heirs and LRs in tune with the compromise before the Trial Court.

20. So far as the first substantial question of law is concerned, it is submitted by the learned Counsel for the plaintiffs that the evidence of PW-1, who is the plaintiff's son and that of Ram Chandra, the then Pradhan of the Village, has been misconstrued by the Lower Appellate Court, to hold that the suit property is part of the defendants' courtyard and not the plaintiffs. Likewise, the evidence of the two witnesses for the defendants, DW-1 and DW-2 Uma Shanker has been misconstrued. The evidence of these witnesses was considered by the Trial Court to reach a reasonable conclusion based on preponderance of probability. The suit property was, in fact, the plaintiffs' courtyard. The Trial Court had considered the evidence of witnesses, together with circumstances on record and the geographical location, to reach a plausible conclusion. This conclusion, amongst other matters, was based on the fact that the plaintiffs' door opening out from their verandah, faces the suit property, which showed it to be a part of the plaintiffs' courtyard (*Sahan*). It has been noticed by the Trial Court that the aforesaid door in the verandah is affixed facing the south, where it opens into the suit property. The Trial Court has noticed the statement of DW-2, where he has accepted the fact that to the north of the suit property is the plaintiffs' verandah (*Dalan*), and further that a door opening to the south in that verandah exists. The Trial Court has also noticed that in the testimony of Uma Shanker, DW-2, it has been acknowledged that the suit property lies to the west of the defendants' *abadi*. From this acknowledgment, amongst others, it has been concluded that Uma Shanker's *abadi* lies to the east of the suit property. The further conclusion drawn from the said fact, in togetherness with others, is that the suit property belongs to the plaintiffs and a part of his courtyard (*Sahan*). It is not part of Uma Shanker's courtyard.

21. The Lower Appellate Court has taken a contrary view of the evidence by considering the particular geographical features of the suit property to find that in case the suit property is regarded as the plaintiffs' courtyard (*Sahan*), where he tethers his animals etc., the only door leading to it would be through his verandah. This has been regarded as an impossibility. The Lower Appellate Court has considered the evidence of the four witnesses to reach a diametrically opposite conclusion, holding the suit property a part of Uma Shanker's courtyard (*Sahan*); not the plaintiffs'.

22. It is argued by the learned Counsel for the plaintiffs that the two Courts below have opined, without prejudice to the plaintiffs' case, that there was some documentary evidence also considered by the Trial Court, considering evidence entirely oral, comprising the testimony of two witnesses on each side, produced by both the parties. It is argued by the learned Counsel that in a case that turns entirely on oral evidence, the Trial Court's view generally ought not to be disturbed by the Appellate Court, because the Trial Court had the advantage of hearing witnesses and watching their demeanour. It is submitted, therefore, that the Appellate Court was not right, in the absence of a manifest illegality

demonstrable in the Trial Court's view of the oral evidence, in interfering with the Trial Court's opinion, based on appreciation of oral evidence alone.

23. The learned Counsel appearing for Uma Shanker (defendant no.1) has opposed the aforesaid submission and says that the Lower Appellate Court has thoroughly considered every part of the oral testimony of witnesses to reach a contrary conclusion from that of the Trial Court, taking a better view of the evidence. It is argued that the Lower Appellate Court, being a Court of fact, has coextensive jurisdiction with that of the Trial Court to consider the entire evidence on record, both on questions of fact and law and hold differently. It is emphasized that a Court of First Appeal has jurisdiction, as wide as that of the Trial Court, to judge issues of fact and law, which cannot be fettered by the subtle consideration about the Lower Appellate Court's disadvantage in not watching the witnesses, which the Trial Court had. Learned Counsel for Uma Shanker in support of his contention has placed reliance upon the law laid down by the Supreme Court in **Malluru Mallappa (Dead) through Legal Representatives v. Kuruvathappa and others, (2020) 4 SCC 313**, where it has been held:

"12. In *Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat [Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat*, (1969) 2 SCC 74] it was held thus : (SCC pp. 77-78, para 5)

"5. ... In the well-known work of *Story on Constitution* (of United States), Vol. 2, Article 1761, it is stated that the essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted and does not create that cause. The appellate jurisdiction may be exercised in a variety of forms and, indeed, in any form in which the legislature may choose to prescribe. According to Article 1762, the most usual modes of exercising appellate jurisdiction, at least those which are most known in the United States, are by a writ of error, or by an appeal, or by some process of removal of a suit from an inferior tribunal. An appeal is a process of civil law origin and removes a cause, entirely subjecting the fact as well as the law, to a review and a retrial."

13. It is a settled position of law that an appeal is a continuation of the proceedings of the original court. Ordinarily, the appellate jurisdiction involves a rehearing on law as well as on fact and is invoked by an aggrieved person. The first appeal is a valuable right of the appellant and therein all questions of fact and law decided by the trial court are open for reconsideration. Therefore, the first appellate court is required to address itself to all the issues and decide the case by giving reasons. The court of first appeal must record its findings only after dealing with all issues of law as well as fact and with the evidence, oral as well as documentary, led by the parties. The judgment of the first appellate court must display conscious application of mind and record findings supported by reasons on all issues and contentions [see : *Santosh Hazariv. Purushottam Tiwari [Santosh Hazari v. Purushottam Tiwari*, (2001) 3 SCC 179] , *Madhukar v. Sangram* [*Madhukar v. Sangram*, (2001) 4 SCC 756] , *B.M. Narayana Gowda v. Shanthamma* [*B.M. Narayana Gowda v. Shanthamma*, (2011) 15 SCC 476 : (2014) 2 SCC (Civ) 619] , *H.K.N. Swami v. Irshad Basith* [*H.K.N. Swami v. Irshad Basith*, (2005) 10 SCC 243] and *Sri Raja Lakshmi Dyeing*

Works v. Rangaswamy Chettiar [*Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar*, (1980) 4 SCC 259]].

14. A first appeal under Section 96 CPC is entirely different from a second appeal under Section 100. Section 100 expressly bars second appeal unless a question of law is involved in a case and the question of law so involved is substantial in nature.

15. Order 41 Rule 31 CPC provides the guidelines for the appellate court to decide the matter. For ready reference Order 41 Rule 31 CPC is as under:

"31. Contents, date and signature of judgment.--The judgment of the appellate court shall be in writing and shall state—

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled;

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein."

16. In *Vinod Kumar v. Gangadhar* [*Vinod Kumar v. Gangadhar*, (2015) 1 SCC 391 : (2015) 1 SCC (Civ) 521] this Court has reiterated the principles to be borne in mind while disposing of a first appeal, as under : (SCC p. 395, para 15)

"15. Again in *B.V. Nagesh v. H.V. Sreenivasa Murthy [B.V. Nagesh v. H.V. Sreenivasa Murthy*, (2010) 13 SCC 530 : (2010) 4 SCC (Civ) 808] , this Court taking note of all the earlier judgments of this Court reiterated the aforementioned principle with these words : (SCC pp. 530-31, paras 3-4)

"3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state:

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court [*H.V. Sreenivasa Murthy v. B.V. Nagesha*, 2008 SCC OnLine Kar 837] to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide *Santosh Hazari v. Purushottam Tiwari* [*Santosh Hazariv. Purushottam Tiwari*, (2001) 3 SCC 179] , SCC p. 188, para 15 and *Madhukar v. Sangram [Madhukar v. Sangram*, (2001) 4 SCC 756] , SCC p. 758, para 5.)'"

17. In *Shasidhar v. Ashwini Uma Mathad [Shasidhar v. Ashwini Uma Mathad*, (2015) 11 SCC 269] , it was held as under : (SCC p. 277, para 21)

"21. Being the first appellate court, it was, therefore, the duty of the High Court [*Shasidhar v. Ashwini Uma Mathad*, 2012 SCC OnLine Kar 8774] to decide the first appeal keeping in view the scope and powers conferred on it under Section 96 read with Order 41 Rule 31 of the Code mentioned above. It was unfortunately not done, thereby, causing prejudice to the appellants whose valuable right to prosecute the first appeal on facts and law was adversely affected which, in turn, deprived them of a hearing in the appeal in accordance with law."

24. Upon considering the submissions advanced by the learned Counsel for parties, this Court finds that no doubt there is a well acknowledged principle that the Trial Court's opinion on issues or the suit itself, which turns entirely on oral evidence, should not be lightly disturbed by the Appellate Court, unless it be manifestly illegal or perverse. This principle is particularly important when the finding turns on the credibility of a witness. Deference to the Trial Court's opinion in a case founded on oral evidence is based on the consideration that the Trial Court had the advantage of hearing and watching the witness, which the Appellate Judge did not have. Therefore, unless the conclusions of the Trial Court are based on a wholesome misreading of evidence, conjecture, surmise or the result of perverse reasoning, the Appellate Court should not generally interfere. This rule is, of course, confined to those cases where the findings are based entirely on parole evidence, without there being any documentary evidence, bearing on the case/ issues. The principle is well elucidated by the following the remarks of the Supreme Court in **Santosh Hazari v. Purushottam Tiwari (Deceased) by LRs, (2001) 3 SCC 179**:

"15. ..... Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate court for shirking the duty cast on it. While writing a judgment of reversal the appellate court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial court must weigh with the appellate court, more so when the findings are based on oral evidence recorded by the same Presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact. (See *Madhusudan Das v. Narayanibai* [(1983) 1 SCC 35 : AIR 1983 SC 114]) The rule is -- and it is nothing more than a rule of practice -- that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lie, the appellate court should not interfere with the finding of the trial Judge on a question of fact. (See *Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh* [AIR 1951 SC 120]) ....."

25. There is an older decision by the Supreme Court in **Madhusudan Das v. Narayanibai (Deceased) by LRs and others, (1983) 1 SCC 35**, where the principle under reference has been stated thus:

"8. ..... At this stage, it would be right to refer to the general principle that, in an appeal against a trial court decree, when the appellate court considers an issue turning on oral evidence it must bear in mind that it does not enjoy the advantage which the trial court had in having the witnesses before it and of observing the manner in which they gave their testimony. When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate court should permit the findings of fact rendered by the trial court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the trial court or there is a sufficient balance of improbability to displace its opinion as to where the credibility lies. ....."

26. The principle under reference is also acknowledged by the Privy Council in **Valarshak Seth Apcar v. Standard Coal Co., Ltd. and others, AIR 1943 PC 159**, where it has been held:

"They treated the plaintiff as a witness whose testimony should not be believed, and accepted as accurate the evidence of Fairhurst and Wills. In their Lordships' opinion, the High Court on appeal was not justified in this case in taking a different view of the plaintiff's credibility from that adopted by the trial Judge. McNair J., enumerates a series of points upon which he bases his view that the plaintiff's evidence is such that reliance cannot be placed upon it, but they are just the sort of points as to which the only person who can effectively form an opinion and draw conclusions is the trial Judge who has the witness before him. He alone knows the demeanour of the witness; he alone can appreciate the manner in which the questions are answered, whether with honest candour or with doubtful plausibility, and whether after careful thought, or with reckless glibness. He alone could form a reliable opinion as to whether the plaintiff had emerged with credit from a cross-examination, lasting the greater part of two days, which was to a great extent repetitious, and sometimes offensive."

27. There is no doubt about the principle that where oral testimony alone is the basis for the findings, the Trial Judge is entitled to respect enough that he is not generally disturbed by the Court of Appeal unless his reasoning be manifestly illegal, perverse or one that misses out some decisive part of the testimony, on which he forms opinion. But, the aforesaid principle is set in the context of a postulate that the Trial Judge is one, who has heard the witnesses and authored the judgment. If in a case, which is quite common place these days and was so even at the time when the present suit was tried and decided, the author of the judgment in the Trial Court is different from the Judge, who heard the witnesses, the rule under reference would loose all significance. Therefore, in a case where a party attempts to sustain the judgment passed by a Trial Judge and reversed in appeal, which turns entirely on appreciation of oral evidence and nothing else, based on the principle under reference, it has to be demonstrated for a fact that the Trial Judge was the same person, who heard the witnesses and wrote

the judgment. Ideally speaking, a Trial Judge writing a judgment, who has not heard witnesses in the case is an anathema for the most essential character of the Trial Judge, different from all other Judges in the higher rungs of the judicial hierarchy, is the fact that the Trial Judge is one who has heard witnesses. In civil cases, the application of this principle nowadays is truncated to hearing the witnesses on cross-examination alone, as the examination-in-chief after Amendment Act No. 22 of 2002 (w.e.f. 1-7-2002) is on affidavit. However, the present case is one which arose much before the Amendment Act and the entire testimony is by witnesses, who appeared in the dock.

28. On a perusal of the record, this Court finds that the judgment by the Trial Court, that is to say, the Court of the Sixth Additional Munsif, Jaunpur was delivered by Mr. Mukteshwar Prasad. A closer perusal of the order-sheets show that Mr. Mukteshwar Prasad appears to have taken over charge of the Court of the Sixth Additional Munsif in the month of July, 1989 and heard arguments for the first time on 15.07.1989, after three adjournments in July. He heard further arguments on 17.07.1989 and reserved judgment to be delivered on 19.07.1989. Delivery of judgment was deferred to 21.07.1989, when it was, in fact, delivered by the Trial Judge. A further perusal of the order-sheet shows that testimony of the four witnesses, that is to say, the two PWs and the two DWs, was recorded on 02.11.1988 and 04.05.1989. It appears from a perusal of the order-sheet that until the end of May, 1989, the Presiding Officer, incumbent in the Court of the Sixth Additional Munsif, Jaunpur, was a person different from Mr. Mukteshwar Prasad and it is he who heard the witnesses. The learned Judge, before whom evidence concluded on 09.05.1989, fixed the suit for address of arguments on 25.05.1989, a date when he was on leave. The suit was further adjourned to 26.05.1989 for arguments and then to 30.05.1989. On 30.05.1989, it was adjourned to 10.07.1989, again for the address of arguments by parties. It appears that incumbency in the Court of the Sixth Additional Munsif, Jaunpur changed hands after the summer recess in the month of June, 1989, and in July, Mr. Mukteshwar Prasad heard arguments by Counsel. Therefore, the Trial Judge does not appear to be the person who had heard witnesses in this case. Learned Counsel for the parties could not point out anything to show that Mr. Mukteshwar Prasad indeed heard the witnesses and the record appears to indicate otherwise.

29. The Substantial Question of Law No. (i) is, therefore, answered in the negative in terms that generally the Appellate Court cannot set aside findings recorded by the Trial Court, where the findings are based on appreciation of oral evidence alone, but it is a rule of prudence and sound practice, subject to known exceptions. It would not apply to a case at all, where the Trial Judge is a person different from the one, who has heard witnesses; it applies only to cases where the Trial Judge, who authors the judgment, is the same person, who hears witnesses.

30. This takes the Court to the next substantial question of law involved.

31. It is argued by the learned Counsel for the plaintiffs that the Lower Appellate Court has committed a manifest error of law, going to the root of the matter, by carving out a third case, which none of the parties pleaded. And that third case is

that the Lower Appellate Court has held that there was no way whatsoever for the plaintiffs' animals to move in and out of the suit property except through the door on the southern face of the verandah, opening into the suit property. It is argued that this was a case which none of the parties pleaded. Learned Counsel for Uma Shanker has, however, defended the aforesaid finding and submits that it does not constitute a third case.

32. What constitutes a third case, is to be found in the observations of the Supreme Court, albeit in the context of a matter under Section 125 Cr.P.C. In **Deb Narayan Halder v. Anushree Halder** (smt), (2003) 11 SCC 303, it has been opined:

"20. ..... The court is not permitted to conjecture and surmise. It must base its findings on the evidence produced before it by the parties. The enquiry by the court is restricted to the evidence on record and the case pleaded by the parties. It is not permissible to the court to conjecture and surmise and make out a third case not pleaded by the parties only to answer the query such as the one posed to us."

33. There is some further elucidation of the principle to be found in a broader context in **Bachhaj Nahar v. Nilima Mandal and another, (2008) 17 SCC 491**. In **Bachhaj Nahar** (*supra*), it has been held:

"17. It is thus clear that a case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contain the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. As the very requirements indicate, this should be only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. The principles laid down in *Bhagwati Prasad* [AIR 1966 SC 735] and *Ram Sarup Gupta* [(1987) 2 SCC 555 : AIR 1987 SC 1242] referred to above and several other decisions of this Court following the same cannot be construed as diluting the well-settled principle that without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. Another aspect to be noticed, is that the court can consider such a case not specifically pleaded, only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on that basis and had led evidence on that case. Where neither party puts forth such a contention, the court cannot obviously make out such a case not pleaded, suo motu."(emphasis by Court)

34. Here, what is criticized as a third case, is not indeed a case at all. A case is a statement of facts by a party, backed by evidence, entitling it to a right that can be established before a Court of law and the remedy secured. For instance, a case by the plaintiff in a suit for declaration and injunction regarding immovable property that he is the title-holder in possession on the basis of a registered sale deed, is a case

in the sense that the term is understood. If the plaintiff were to say that he is entitled to the declaration and injunction, because he is owner of the suit property in possession by virtue of a Will, it is a different case. If the defendant were to contest the plaintiff's case, saying that the suit property belongs to him on the basis of a right that the defendant has got under a testamentary disposition by the last recorded owner of the property, it would be the defendant's case. In this illustration, if the Court were to find and hold, without any pleading to that effect by either party, that the plaintiffs are owners in possession of the property involved in the suit on the basis of adverse possession, it would be a classical instance of a third case. The Court is not allowed to conjecture a third case for parties. And if it does, its determination would be illegal.

35. Here, what the Lower Appellate Court has done is to opine on a relevant fact as understood under Section 3 of the Indian Evidence Act, necessary to determine the fact in issue, which is whether the suit property is the plaintiffs' courtyard (*Sahan*) or Uma Shanker's. In order to find on the aforesaid fact in issue, the Lower Appellate Court has taken into consideration oral evidence as well as circumstances. One of the circumstances that the Lower Appellate Court has noticed is that the suit property, in its opinion, has no ingress or egress for the plaintiffs to let in and take out their cattle, except through the door placed on the southern face of the verandah. From this fact, it has been inferred that since animals possibly cannot be brought into or taken out of the suit property through the door in the verandah, the plaintiffs' case on this part of it is not convincing. What, therefore, the plaintiffs assail as a third case is a finding on a relevant fact, a minor part of the inquiry to reach its conclusions by the Lower Appellate Court on the fact in issue. After all, the process of reasoning or appreciation of evidence cannot be dubbed as a third case. It is small feature in a broader inquiry and nothing more.

36. Substantial Question of Law No. 2 is, therefore, answered in the negative.

37. About the third substantial question of law involved, it is submitted by the learned Counsel for the plaintiffs that the Trial Court has taken into consideration two sale deeds, Ex. 1 and Ex. Ka-2. Ex. 1 has been executed by Shiv Murat in favour of Manikraj, whereas Ex Ka-2 is a sale deed by Manikraj in favour of Paras Nath (defendant no.2). In the sale deed, Ex. 1, the vendor, Shiv Murat has shown boundaries of the property sold by him, which acknowledges the plaintiffs' courtyard as one of the boundaries. The sale deed shows as its northern boundary *'Sahan Darwaja Ishwar Dutt'*, as recorded by the Trial Court. Ishwar Dutt is the first plaintiff, Ram Karan's father. Likewise, the sale deed (Ex. Ka-2) executed by Manikraj in favour of Paras Nath, shows on the northern boundary the house of Ram Karan, plaintiff no.1. About the sale deed (Ex. 1), it has been remarked by the Trial Court that it shows that Shiv Murat, way back in the year 1959, considered the suit property as the plaintiffs' courtyard (*Sahan*). After so much of consideration bestowed to these documents, the Trial Court has remarked that these boundaries are not binding on the parties and further that since there is no documentary evidence on record, the boundaries shown in the sale deeds (Ex. 1 and Ex. Ka-2) are to be regarded as circumstantial evidence. The Lower Appellate Court has not at all

referred to these documents, and opined only on the basis of parole evidence.

38. This Court is of opinion that the Trial Court has erred in thinking that Ex. 1 and Ex. Ka-2, the two sale deeds are not documentary evidence, but circumstantial. The boundaries of properties in a sale deed between third parties is relevant evidence to show that a person is the owner of the property indicated in the boundaries. In this connection, reference may be made to the decision of this Court in **Hari Lal v. Amrik Singh and another, AIR 1978 All 292**, where referring to older decisions, it was held:

"15. Learned counsel then urged that the court below erred in relying on the pleadings in Suit No. 193 of 1949 which was not inter partes. In our opinion the pleadings were admissible in evidence under Section 13 of the Indian Evidence Act. It was then urged that the two sale-deeds Exts. 18 and 19 where the house in dispute was mentioned as the boundary of the properties transferred by Sita Ram were also admissible. In *Mst. Katori v. Om Prakash* (AIR 1935 All 351) it was held that recitals in a sale-deed though between third parties were evidence of the fact that a person was the owner of the property indicated as boundary. Recitals of the boundaries in documents of title not inter partes have been held to be admissible under sections 11 and 13 of the Evidence Act. See *Rangayyan v. Innasimuthu Mudali* (AIR 1956 Mad 226) and *Natwar v. Alkhu* ((1913) 11 All LJ 139)."**(emphasis by court)**

39. The Trial Court with reference to the two sale deeds, Ex. 1 and Ex. Ka-2, has recorded the following finding:

"वादीगण ने प्रदर्श सं.- 1 नकल वयनामा प्रस्तुत किया है। इस वयनामा ने जो चौहद्दी दी गई है उसमें वयशुदा भूमि के उत्तर सहन दरवाजा ईसरदत्त लिखा है। ईसरदत्त वादी गण के खानदान का है। उक्त वयनामे में पारसनाथ बाकी भूमि का वयनामा हुआ था। वादीगण उक्त प्रपत्र से यह सिद्ध करना चाहते हैं कि पारस नाथ की आबादी के उत्तर विवादित भूमि है जो ईसरदत्त की सहन है। इसी प्रकार प्रतिवादीगण ने भी प्रदर्श क-2 नकल वयनामा प्रस्तुत किया है। यह वयनामा भी प्रदर्श-1 वाली भूमि के सम्बन्ध में हुआ है। इसमें वयशुदा भूमि के उत्तर रामकरन का मकान लिखा है। वास्तव में प्रदर्श-1 वयनामा शिव मूरत ने मानिकराज के पक्ष में किया। उसी भूमि को प्रदर्श- क-2 वयनामा द्वारा मानिकराज ने पारसनाथ के पक्ष में पुनः वय किया। शिवमूरत ने जो चौहद्दी प्रदर्श-1 में दिया उससे विवादित भूमि के दक्षिण ही वयशुदा जमीन होगी। क्योंकि शिवमूरत ने विवादित भूमि को वादी गण की सहन मानकर अपने वयनामा में चौहद्दी लिखाया। किन्तु जब मानिकचन्द ने पुनः उसी भूमि का वयनामा पारसनाथ के पक्ष में किया तो उसमें चौहद्दी में उत्तर तरफ रामकरन का मकान दिखा दिया। अर्थात् क-2 वयनामा में विवादित भूमि भी वयशुदा भूमि मान ली गई। हालांकि ये दस्तावेज तथा इनमें दी गई चौहद्दी पक्षकारों पर बाध्यकारी प्रभाव नहीं रखेगी और न ही चौहद्दी साक्ष्य में सुसंगत ही होगा किंतु इससे यह तो स्पष्ट है ही कि विवादित भूमि को शिव मूरत 1959 में वादीगण की सहन समझता था। चँकि पत्रावली पर कोई प्रलेखीय साक्ष्य मौजूद नहीं है, अतः इसे एक परिस्थिति-जन्य साक्ष्य माना जा सकता है।"

40. This Court is of opinion that the Trial Court has carefully analyzed the boundaries shown in the two sale deeds and held on that basis that the suit property is the plaintiffs' courtyard. The Trial Court's remark that way back in the year 1959, Shiv Murat regarded the suit property as the plaintiffs' courtyard (*Sahan*), is of immense moment. This is so because way back in the year 1959, hostilities had not commenced between parties and the sale deed executed by Shiv Murat in favour of

Manikraj, Ex. 1 is an impartial and dependable record of the *inter se* geographical location of the plaintiffs' and the defendant's properties, including the suit property. The Trial Court, however, as already remarked, has erred in regarding these sale deeds as circumstantial evidence. These are documents and dependable ones at that. However, what is of utmost relevance to the substantial question of law under consideration is the fact that both these documents have not at all been considered by the Lower Appellate Court. The Lower Appellate Court has rendered opinion bereft of reference to the documentary evidence, which the Trial Court thoroughly considered in reaching its conclusion. The Trial Court's remark that the sale deeds are not documents, but circumstantial evidence, is legally unsound and of no consequence. At the same time, the Lower Appellate Court, by failing to consider and refer to the documentary evidence that the Trial Court did, has failed to reverse categorical findings recorded by the Trial Court about the location and identity of the suit property.

41. In this view of the matter, the Lower Appellate Court's judgment cannot be regarded as a valid and effective reversal of the Trial Court's judgment rendered after consideration of all relevant evidence.

42. Substantial Question of Law No. 3 is, therefore, answered in the affirmative.

43. Since the Lower Appellate Court has not effectively reversed the Trial Court's judgment and set aside its findings, based, amongst others, on documentary evidence that the Lower Appellate Court has completely ignored, the Lower Appellate Court's judgment deserves to be set aside and that of the Trial Court restored.

44. In the result, this Second Appeal **succeeds** and is **allowed with costs throughout**. The impugned decree passed by the Lower Appellate Court is set aside and that of the Trial Court restored.

(2022) 11 ILRA 660
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.09.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

Second Appeal No. 1698 of 1990

Ramanand Pandey ...Appellant
Versus
Hira Lal ...Respondent

Counsel for the Appellant:
Sri S. Chatharjee, Sri Santosh Kumar, Sri Satya Deo Ojha, Sri Saurabh Srivastava

Counsel for the Respondent:
Sri Akhileshwar Mishra, Sri Aniruddh Kumar, Sri S.N. Tripathi

Civil Law - Code of Civil Procedure, 1973 - Sections 125 (3) & 421 - Enforcement of an order of maintenance u/s 125(3) Cr.P.C. - it is open to a Magistrate to enforce an order of maintenance, passed u/s 125 Cr.P.C., by issuing a warrant to the Collector to recover the same as arrears of land revenue - It is the discretion of the Magistrate, either to issue a warrant for the levy of the amount by attachment and sale of movables of the defaulter under Section 421(1)(a) of the Code, or to issue a warrant to the Collector, authorizing him to realize the amount as arrears of land revenue - It is open to issue both kind of warrants

simultaneously - conjoint reading of the provisions of Sections 125(3) and 421(1) of the Code shows that it is open to the Magistrate to enforce an order of maintenance that remains uncomplied with, for every breach of it, by the issue of a warrant for levying the amount due in the manner provided for levying fines - Section 421(1) gives two options to the Magistrate: firstly, under Clause (a) of sub-Section (1) of Section 421, he may issue a warrant for levying of the amount by attachment and sale of any movable property belonging to the offender - In the context of maintenance proceedings, the provision would bear reference to the person in default of the maintenance order in place of the offender - Secondly, the Magistrate may issue a warrant to the Collector of the district, authorizing him to realize the amount as arrears of land revenue from the movable or immovable property, or both, belonging to the defaulter - Sub-Section (3) of Section 421 obliges the Collector, whenever a warrant is issued to him, to recover any amount, that qualifies for a fine, as arrears of land revenue in accordance with law, treating the warrant to be a recovery certificate issued under the law relating to land revenue recovery. (Para 23, 24, 26)

Dismissed. (E-5)

List of Cases cited:

1. Om Parkash Vs Vidhya Devi, 1991 SCC OnLine P&H 387

2. Ramakrishnan T.K. VsC.N. Subhadra & anr. , 2009 SCC OnLine Ker 6397

(Delivered by Hon'ble J.J. Munir, J.)

1. This is a plaintiff's appeal, arising out of a suit for declaration and permanent prohibitory injunction.

2. The facts giving rise to this appeal are these:

The plaintiff-appellant, Rama Nand, who shall hereinafter be referred to as the "plaintiff', instituted O.S. No. 390 of 1985 in the Ex-Court of Munsif Havali, Varanasi, seeking a declaration to the effect that the proceedings of revenue sale dated 04.12.1982 and the sale letter based on it relating to land, detailed at the foot of the plaint, be declared void and a decree of permanent injunction granted, restraining the defendant-respondent, Hira Lal (for short, "the defendant') from interfering with the plaintiff's possession over the suit property or changing its nature and character.

3. The plaintiff's case is that Smt. Usha Devi brought proceedings against him under Section 125 Cr.P.C. in the Court of the Metropolitan Magistrate, Kanpur Nagar seeking award of maintenance. In the maintenance case aforesaid, the Magistrate passed an *ex parte* order, granting maintenance to Smt. Usha Devi on 13.01.1982. The *ex parte* maintenance order dated 13.01.1982 was passed against the plaintiff. The plaintiff, upon coming to know of the *ex parte* order, made an application to the Metropolitan Magistrate, Kanpur Nagar, seeking to set aside the sale. The Magistrate on 17.05.1982 allowed the plaintiff's application and set aside the *ex parte* maintenance order dated 13.01.1982. In the meantime, on the basis of the *ex parte* maintenance order dated 13.01.1982, the defendant, in connivance with the Tehsildar and Naib Tehsildar, Varanasi, brought the plaintiff's immovable property, detailed at the foot of the plaint (for short, 'the suit property') to sale on 04.12.1982. The plaintiff's wife applied for the recovery of dues under the *ex parte* maintenance order. The plaintiff did not know anything about the revenue sale held, creating rights in favour of the defendant.

4. It is the plaintiff's case that after the maintenance order dated 13.01.1982 had been set aside on 17.05.1982, sale of the plaintiff's property on 04.12.1982 was one made without jurisdiction, as there was no maintenance order in existence then to execute. It was also pleaded that the proceedings of the revenue sale are vitiated, because there was no proclamation by beat of drum, nor proceedings taken in accordance with law. The sale is fraudulent and illegal. The further case is that the defendant, on the basis of the revenue sale concluded in his favour, is moving to forcefully dispossess the plaintiff.

5. The defendant put in a written statement, pleading that he had purchased the suit property in the revenue sale held, wherein there was no illegality or irregularity. The defendant on 04.12.1982, upon payment of sale consideration, that was fetched in the auction proceedings, purchased the suit property *bona fide*. He had paid a total consideration of Rs.10,000/-. The proceedings of the auction sale have been confirmed and the sale certificate issued in favour of the defendant. The legality or irregularity in conducting the sale cannot be questioned before the Civil Court. The defendant never connived with Smt. Usha Devi nor did he procure a judgment, based on any kind of conspiracy with Smt. Usha Devi, or got the revenue sale held in furtherance of any conspiracy, as alleged by the plaintiff. The Tehsildar and the Naib Tehsildar did not take proceedings of the revenue sale in a manner that is bogus or fraudulent. The defendant, Hira Lal never had knowledge of the fact about the maintenance order passed *ex parte* under Section 125 Cr.P.C. against the plaintiff being set aside. The further case is that even if the order of maintenance *ex parte* was set aside, the revenue sale held on 04.12.1982, cannot be set aside, because the defendant is a *bona fide* purchaser for value without notice and further the auction sale has been confirmed.

6. The defendant has averred that the plaintiff did not object to the auction proceedings before the Revenue Authorities. The Court has no jurisdiction to set aside the auction sale. The mutation order has been made on the basis of the auction sale directing mutation of the defendant's name over the suit property on 11.01.1985, whereagainst the plaintiff had objected. His objections were, however, rejected on 30.01.1985. The suit is barred by limitation. The suit property is in the ownership possession of the defendant. The suit is barred by the provisions of Section 331 of the U.P. Z.A. & L.R. Act and the Civil Court has no jurisdiction to try the suit.

7. On the pleadings of parties, the following issues were struck (translated into English from Hindi):

(1) Whether on the grounds set forth in the plaint, the proceedings of auction sale dated 04.12.1982 are illegal and void?

(2) Whether the plaintiff is entitled to the relief of injunction?

(3) Whether this Court has no jurisdiction to try the suit?

(4) Whether the suit is undervalued and the court-fee insufficient?

(5) To what relief is the plaintiff entitled to?

8. Before the Trial Court, the plaintiff examined himself as PW-1 and one Bechan Mishra as PW-2. The plaintiff in his documentary evidence filed three documents *vide* a list, bearing Paper No. 8-

Ga, one document *vide* list, bearing Paper No. 33-Ga, another three documents *vide* Paper No. 53-Ga and two more documents *vide* list, bearing Paper No. 60-Ga.

9. The defendant examined himself as DW-1. In his documentary evidence, he filed some 11 documents *vide* list, bearing Paper No. 17-Ga, another 9 documents *vide* list, bearing Paper No. 37-Ga and 14 more documents *vide* list, bearing Paper No. 123-Ga.

10. The issue, about the jurisdiction of the Civil Court to try the suit, was not pressed before the Trial Court on 24.12.1987, and the issue of valuation was decided on 28.05.1986. These issues were dealt with at interlocutory stages and a record of determination thereof forms part of the Trial Court's judgment. It was Issue No.1, that was the substantial issue, on which event in the suit would turn. The Trial Court in its judgment has blamed the conduct of the plaintiff in not communicating the order dated 17.05.1982, setting aside the *ex parte* maintenance order dated 13.01.1982 to the Collector, Varanasi, as the reason why the revenue sale was held and the impugned sale certificate issued in the defendant's favour. The Trial Court also held that the defendant was a *bona fide* purchaser for value without notice, whose rights ought to be protected. Nevertheless, the Trial Court held that the proceedings of the sale held on 04.12.1982 were illegal and void, but the decree of the Trial Court would be effective only upon the plaintiff paying the defendant a sum of Rs.10,000/- together with interest at the rate of 18% per *annum* from the date of the auction sale in the defendant's favour. The suit was, therefore, decreed in part *vide* judgment and decree dated 22.04.1989 passed by the 12th Additional Munsif, Varanasi with a conditional injunction that the injunction would become effective after the plaintiff paid the entire sum of Rs.10,000/- together with interest as directed.

11. Upon the defendant's appeal carried to the District Judge of Varanasi, being Civil Appeal No. 119 of 1989, the learned 9th Additional District Judge, Varanasi *vide* his judgment and decree dated 14.05.1990, allowed the appeal, set aside the Trial Court's judgment and decree dated 22.04.1989, and dismissed the suit. There was a cross-objection also preferred by the defendant before the Lower Appellate Court, which too was dismissed.

12. Dissatisfied with the judgment and decree passed by the Lower Appellate Court, the plaintiff has moved this Court, invoking our jurisdiction under Section 100 of the Code of Civil Procedure.

13. This appeal was admitted to hearing *vide* order dated 09.11.1990, without any substantial question of law being formulated. Before proceeding with the hearing, therefore, based on the submissions of parties, particularly, the learned Counsel for the appellant, this Court formulated the following substantial question of law vide order dated 26.02.2020:

Whether it is open to a Magistrate to enforce an order of maintenance passed under Section 125 Cr.P.C. by forwarding a recovery certificate to the Collector, and to recover the sum of money due under the maintenance order as arrears of land revenue?

14. Heard Mr. S.D. Ojha, learned Counsel for the plaintiff-appellant and Mr.

S.N. Tripathi, Advocate holding brief of Mr. Akhileshwar Mishra, learned Counsel for the defendant-respondent.

15. The Lower Appellate Court went into wholesome detail of evidence bearing on the issues of fact and law involved and held that a copy of the order dated 17.05.1982, setting aside the *ex parte* maintenance order dated 13.01.1982, had not been produced in evidence by the plaintiff. Rather, there is a record of a later order dated 20.09.1982, again ordering *ex parte* maintenance, which bears Paper No. 34-Ga. The Lower Appellate Court also took note of some orders made by this Court in Criminal Misc. Application No. 264 of 1983, where the auction sale of the suit property in execution of the *ex parte* maintenance order, which was then awaiting recall, was challenged. The Lower Appellate Court has recorded that the said 482 Application was rejected by this Court *vide* order dated 22.10.1983 and a certified copy of the order was on record as Paper No. 26-Ga. This Court too has found on record a document, marked Ex. A1.

16. The Lower Appellate Court has held further that the plaintiff has urged a case that proceedings of the auction were illegal, but if that were so, the plaintiff had the right to move the Revenue Authorities and get the sale set aside. This has not been done. The case of a conspiracy between the plaintiff's wife and the defendant has too been disbelieved by the Lower Appellate Court in the absence of the slightest of evidence. What has further been observed is that if the plaintiff's case of the *ex parte* maintenance order being set aside is believed, though there is no evidence about it, the defendant is a *bona fide* purchaser. The auction sale in his favour has been confirmed. In such circumstances, the consequence of the sale, even if it were set aside, would not be to deprive auction purchaser of his rights in the suit property.

17. The Lower Appellate Court has also recorded facts to the effect that pursuant to the sale certificate, the defendant's name has been mutated in the revenue records, of which certified copies are on record. There are also records of *Khasra* across a period of three years, showing recorded possession in favour of the defendant. There are also irrigation receipts brought on record to show that the defendant is in possession.

18. It is on all these findings that the Lower Appellate Court has reached the conclusion that it did.

19. Mr. S.D. Ojha, learned Counsel for the plaintiff at the hearing before this Court has but logically confined himself to the substantial question of law, on which this appeal has been admitted and heard. He submits that it was not open to the Magistrate, who had the execution of the *ex parte* maintenance order before him, to enforce it by forwarding a recovery certificate to the Collector. As such, all proceedings taken by the Revenue Authorities at Varanasi, pursuant to the recovery certificate issued by the Magistrate for enforcement of the *ex parte* maintenance order, are without jurisdiction.

20. Mr. S.N. Tripathi, Advocate holding brief of Mr. Akhileshwar Mishra, learned Counsel for the defendant submits that there is jurisdiction under the law available to the Magistrate to issue a recovery certificate to the Collector by virtue of the provisions of Section 125(3) Cr.P.C.

21. Upon hearing the learned Counsel for parties with reference to the substantial question of law involved, this Court thinks that a reference to the provisions of Section 125(3) Cr.P.C. is necessary. Section 125(3) Cr.P.C. reads:

125. Order for maintenance of wives, children and parents.--(1) x x x x

(2) x x x x x

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.--If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) x x x x

(5) x x x x

(emphasis by Court)

22. Now, the manner of levying fines under the Code of Criminal Procedure finds place in Section 421(1) of the said Code. Section 421 reads:

421. Warrant for levy of fine.--(1) When an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may—

(a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;

(b) issue a warrant to the Collector of the district, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter:

Provided that, if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless, for special reasons to be recorded in writing, it considers it necessary so to do, or unless it has made an order for the payment of expenses or compensation out of the fine under Section 357.

(2) The State Government may make rules regulating the manner in which warrants under clause *(a)* of sub-section (1) are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

(3) Where the Court issues a warrant to the Collector under clause *(b)* of sub-section (1), the Collector shall realise

the amount in accordance with the law relating to recovery of arrears of land revenue, as if such warrant were a certificate issued under such law:

Provided that no such warrant shall be executed by the arrest or detention in prison of the offender.(emphasis by Court)

23. A conjoint reading of the provisions of Sections 125(3) and 421(1) of the Code shows that it is open to the Magistrate to enforce an order of maintenance that remains uncomplied with, for every breach of it, by the issue of a warrant for levying the amount due in the manner provided for levying fines. Section 421(1) gives two options to the Magistrate: firstly, under Clause (a) of sub-Section (1) of Section 421, he may issue a warrant for levying of the amount by attachment and sale of any movable property belonging to the offender. In the context of maintenance proceedings, the provision would bear reference to the person in default of the maintenance order in place of the offender. Secondly, the Magistrate may issue a warrant to the Collector of the district, authorizing him to realize the amount as arrears of land revenue from the movable or immovable property, or both, belonging to the defaulter. Sub-Section (3) of Section 421 obliges the Collector, whenever a warrant is issued to him, to recover any amount, that qualifies for a fine, as arrears of land revenue in accordance with law, treating the warrant to be a recovery certificate issued under the law relating to land revenue recovery.

24. It is the discretion of the Magistrate, before whom an application for enforcement of the maintenance order comes up, either to issue a warrant for the levy of the amount by attachment and sale of movables of the defaulter under Section 421(1)(a) of the Code, or to issue a warrant to the Collector, authorizing him to realize the amount as arrears of land revenue. It is open to issue both kind of warrants simultaneously also. Acknowledgment of the Magistrate's power to simultaneously issue both kind of warrants or either of them, under Section 421(1)(a) or 421(1)(b) is there, albeit in a different context in **Om Parkash v. Vidhya Devi, 1991 SCC OnLine P&H 387**. In **Om Parkash** (*supra*), it has been held:

4. .....

The perusal of the above-quoted section 421 reveals that there are two methods for levying fine and the Court has been empowered to opt for either of these two modes or both at one and the same time. One of these modes provided under sub-section (1)(a) is to issue a warrant for levy of the amount by attachment and sale of movable property belonging to the offender and the other being issuance of a warrant to the Collector authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both. In the case in hand, the trial Court had not resorted to any of these coercive measures for the recovery of the arrears of maintenance allowance although it is mentioned in the impugned order of the trial Court that the husband is a man of means. Thus, legally the impugned order of the trial Court being not sustainable calls for quashment.

25. Again, the principle that the Magistrate, before whom a maintenance order comes for enforcement, can simultaneously issue both kind of warrants under Sections 421(1)(a) and 421(1)(b) of the Code, was wholesomely endorsed by the Kerala High Court in **Ramakrishnan**

T.K. v. C.N. Subhadra & another, 2009 SCC OnLine Ker 6397, where it was held:

15. The express language of Secs. 421(1)(a) and (b) Cr. P.C. is that either or both of the following ways (ie., issue a warrant for attachment of movable and issue of a warrant to the Collector to attach the movable and immovable properties) can be resorted to by the court. I find the said submission to be very impressive. This court in *Nithiyanandan and Kuttappan* had no occasion to consider that question. The express language employee by the Code makes it very clear that when it comes to levy of fines the court is no obliged to resort to both the methods under Secs. 421(1)(a) and (b) Cr. P.C. Either of the two or both can be pursued by the court in its discretion.

26. Here, the plaintiff questions the jurisdiction of the Magistrate to issue a warrant to the Collector for the recovery of the amount of maintenance in default as arrears of land revenue, because he says that the Magistrate had no such power. The said proposition is only stated to be rejected. The provisions of Section 125(3) and Section 421 read conjointly are a complete answer to the plaintiff's denial of jurisdiction with the Magistrate to issue a warrant to the Collector for recovering the defaulted maintenance as arrears of land revenue.

27. The substantial question of law framed is, accordingly, answered in the **affirmative** and **it is held that the Magistrate has power to enforce an order of maintenance passed under Section 125 Cr.P.C. by issuing a warrant to the Collector to recover the same as arrears of land revenue.**

28. No other point was pressed.

29. The appeal fails and is **dismissed with costs**.

30. Let a decree be drawn up, accordingly.

(2022) 11 ILRA 667
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.11.2022

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE JAYANT BANERJI, J.

Appeal U/S 37 OF Arbitration & Conciliation Act 1996 No. 94 of 2022

HBA Offshore Pte. Ltd. ...Appellant
Versus
Samsung Heavy Indus. India Pvt. Ltd. U.P. ...Respondent

Counsel for the Appellant:
Sri Vinayak Mithal, Sri Zoeb Cutleruywala, Sri Manish Goyal(Sr. Counsel).

Counsel for the Respondents:
Sri Kartikeya Saran, Sri Shashi Nandan

A. Civil Law - Arbitration and Conciliation Act, 1996-Sections 37, 9 & 11(4)-maintainability of-section 9 application was rejected-learned court below held that the LOI was not concluded agreement, and that under a contract which is determinable at any event provided in the LOI, the action of the parties cannot be enforced through the Court and the same is barred by provisions of section 14(d) of the Specific Relief Act, 1963 and after the LOI was held to be null and void the respondents had entered into a contract with third party which is before the filing of the application u/s 9 of the Act-All pleas and contentions are left open for being raised before the arbitral tribunal as provided in the LOI itself-

appellant failed to demonstrate any plausible ground for grant of an interim injunction as envisaged in section 9 of the Act, 1996-as per section 9(2) of the Act, 1996, there is a mandate for commencement of arbitral proceedings within a period of ninety days from the date of of an order under sub-section (1) of Section 9.(Para 1 to 62) (E-6)

List of Cases cited:

1. Bhaurao Dagdu Paaralkar Vs St. of Mah. & ors. (2005) 7 SCC 605

2. Dresser Rand S.A. Vs Bindal Agro Chem Ltd & K.G. (2006) 1 SCC 751

3. Sundaram Finance Ltd. Vs NEPC India Ltd.(1999) 2 SCC 479

4. Firm Ashok Traders & ors. Vs Gurumukh Das Saluja & ors. (2004) 3 SCC 155

5. Sara Int. Ltd. Vs Arab Shipping Co.(P.) Ltd.(2009) SCC OnLine Del 122

6. South Eastern Coalfields Ltd & ors. Vs S. Kumar's Asso. AKM (JV) (2021) 9 SCC 166

7. Rickmers Verwaltung GMBH Vs IOC (1999) 1 SCC 1

(Delivered by Hon'ble Jayant Banerji, J.)

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 arises out of the order dated 26.8.2022 passed by a learned Judge on an application filed by the appellant under Section 9 of the Arbitration and Conciliation Act, 19961 (Arbitration & Conciliation Application u/s 11(4) No.-98 of 2022, HBA Offshore Pte. Ltd. Vs. Samsung Heavy Industries Limited India), whereby that application was dismissed.

BACKGROUND:

2. As it appears in the appellant's affidavit, the respondent floated a tender/RFQ (request for quote) for their project-provision of Accommodation Work Barge2, with associate services required during the Hook-up and commissioning of RUBY FPSO for Reliance Industries Limited at MJ Field, in the block KG-DWN-98/3 (KG-D6), in the Bay of Bengal, East Coast of India on 23.2.2022. At the bidding stage, the appellant, inter alia, offered a Floatel Vessel called "Nor Goliath'3 to the respondent and also submitted all technical documents and certificates pertaining to the said vessel to the respondent. Telford Marine DMCC4 is the disponent owner of "Nor Goliath' which was to provide the said vessel to the respondent through the appellant. Based on the request of the respondent, the appellant also obtained a confirmation letter from Telford pertaining to the said vessel and also provided the preliminary mobilization plan of the said vessel from Walvisbay, Namibia to UAE and from UAE to Kakinada, India. The respondent issued a Letter of Intent5 on 28.4.2022 to the appellant regarding the work of AWB on the terms and conditions set out in the LOI. The LOI authorized the appellant to commence the work including the detailed design pedestal and gangway foundation, including procurement of material, fabrication of pedestal and gangway foundation and installation of gangway pedestal6. The LOI was valid and binding till 14.5.2022 and was to be superseded by a full-fledged contract, that is, the General Conditions of the Contract and all exhibits thereto7, under which the appellant was required to continue to perform the work at the date of execution of GCC, upon the parties reaching an agreement on the outstanding terms and conditions.

3. Under the LOI, the appellant was to make provision for AWB (Nor Goliath) retrofitted with electric-hydraulic telescopic personnel transfer gangway from another vessel namely, Telford 25 to Nor Goliath. This installation activity was required to be carried out at UAE. After the installation of gangway, the respondent was required to inspect Nor Goliath and any observation and comments during the inspection were to be satisfactorily resolved by the appellant to make the said vessel "fit for purpose' before it departed from UAE to Kakinada, India.

4. The appellant submitted to the respondent a contracting commitment letter dated 9.5.2022 from Telford. By this letter, Telford acknowledged that it was committed to provide Nor Goliath for the duration of the project and operate jointly in India with the appellant to support the respondent for AWB with associated services during hook-up and commissioning of RUBY FPSO at MJ Field, in the block KG-DWN-98/3 (KG-D6), in the Bay of Bengal, East Coast of India, subject to the terms of the LOI.

5. The appellant, by an e-mail dated 11.5.2022 sought extension from the respondent of the timeline/LOI till 20.5.2022. The appellant was granted the extension and the binding of the LOI was extended from 14.5.2022 to 20.5.2022 by means of a letter dated 13.5.2022 sent by the respondent. The letter of the respondents recorded that all other terms and conditions of the LOI would remain unchanged. A second extension of the LOI/timeline was sought by the appellant from the respondent till 31.5.2022. The respondent issued a letter to the appellant granting the extension and extending the binding of the LOI uptil 31.5.2022. This letter of the respondent also recorded that all other terms and conditions of the LOI would remain unchanged.

6. By a letter dated 22.5.2022, the appellant requested the respondent to issue a revised LOI duly incorporating the critical open items as was requested by Telford. In response, the respondent by a letter of 25.5.2022 acknowledged the list of critical open items and offered meeting the appellant at its Noida office on 26.5.2022 to discuss and conclude the open item and finalize the contract.

7. The aforesaid meeting took place on 25.5.2022 and 26.5.2022 at Noida office of the respondent and various activities/items in furtherance of the work and GCC to be executed were discussed between the appellant and the respondent including the scheduled mobilization of Nor Goliath at Kakinada. As per the revised plan, Nor Goliath was to be mobilized from Cape Town to Batam, Indonesia, where vessel modification works to be carried out, and, thereafter to arrive at Kakinada for the project. This schedule was revised due to change in the schedule of gangway donor vessel T-25. It is stated in the application that as per the revised plan, Nor Goliath was to reach Kakinada around 22.8.2022. The minutes of the meeting held on 26.5.2022 were exchanged between the parties which were on the basis of the discussion held between them on 25.5.2022 and 26.5.2022. It is stated that a detailed and productive meeting was again held on 30.5.2022 between the appellant and the respondent at Noida office of the respondent in which majority of the terms were amicably resolved, that is to say, out of 18 items activities which was open, the appellant and the respondent mutually agreed and closed 15 items. It is further

stated that at the end of the meeting, the only open/pending items were (a) increase in mobilization fee (b) Covid cost and (c) IGST refund.

8. It is stated that neither during the joint meeting held on 30.5.2022 nor in the letter dated 31.5.2022 issued by the respondent was there any discussion or reference with respect to the validity of the LOI expiring on 31.5.2022.

9. The appellant, by letter dated 2.6.2022 did not agree to the proposal communicated by the respondent regarding the aforesaid three open/pending items and submitted, on the request of the respondents, a break down of additional mobilization cost of USD 1 million. In response thereto, the respondent issued a letter on 3.6.2022, expressing its difficulty to the proposal of the appellant with respect to the mobilization payment schedule for mobilization fee. The respondent offered a corporate guarantee as against the appellant's proposal for offering Stand by Letter of Credit8. By its letter, the respondent conveyed its commitment on payment of mobilization fee and again asked the appellant to review and confirm its acceptance on the proposal set out by the respondent in the said letter for taking steps towards execution of the GCC in furtherance of the LOI.

10. The appellant and the respondent had a virtual meeting on 6.6.2022 to discuss the draft SBLC circulated by the appellant in furtherance to closing the issue pertaining to mobilization fee. The respondent by e-mail on 6.6.2022 sent the draft SBLC with its comment on the basis of the discussion held at the virtual meeting. By e-mail dated 7.6.2022, the respondent also sought details of the swift code of the bank concerned, details of beneficiaries etc. It is stated that detailed meetings were held on 8.6.2022 and 9.6.2022 between the representatives of the appellant and the respondent at Noida office of the respondent. The appellant sent e-mails to the respondents on 12.6.2022 and 14.6.2022 and since no response was forthcoming from the respondents a reminder e-mail was sent on 16.6.2022.

11. The appellant received an e-mail from the respondents on 19.6.2022 stating that as the validity of the LOI had expired without any agreement on GCC and all the exhibits, the LOI stood null and void. Being aggrieved by the action of the respondent and declaring LOI null and void the aforesaid application under Section 9 of the Act of 1996 was filed seeking the following reliefs:-

"It is, therefore, MOST RESPECTFULLY PRAYED that pending the commencement and completion of the Arbitral proceedings between the Petitioner and the Respondent under the Letter of Intent dated 28 April 2022, as extended from time to time (either expressly or by implication and conduct of parties) and for a period of 90 days thereafter, the Hon'ble Court may be pleased to:

I. Issue an appropriate order or direction of granting an injunction exercising the powers conferred upon it under Section 9 of the Arbitration and Conciliation Act, 1996 restraining the Respondent by itself or through its group, parent, subsidiary, holding, affiliate companies, servants and/or agents from entering into, awarding/executing, implementing the contract for provision of Accommodation Work Barge (AWB), with associate services required during the Hook-up and Commissioning of RUBY

FPSO for Reliance Industries Limited at MJ Field, in the block KG-DWN 98/3 (KG-D6), in the Bay of Bengal, East Coast of India, with a third party, for which the LOI was awarded in favour of the Applicant, and/or pass such order and further order as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case, otherwise, the applicants will suffer an irreparable loss and injury.

II. Issue an appropriate order or direction granting an ad interim relief ex parte and/or otherwise in terms of Prayer (1) above;

III. Award the costs of the present petition in favour of the Applicant and against the Respondent; and

IV. Issue such further appropriate orders or direction which this Hon'ble Court may deem fit in the facts and circumstances of the present case in the best interest of justice, equity and good conscience."

12. In its counter affidavit, the respondent stated that under the terms of LOI the award of final contract was subject to agreement of GCC and had to be discussed and closed before 14.5.2022. In the meeting of 26.5.2022, the appellant proposed a total 18 deviations from the originally agreed terms. The parties tried to conclude and reach agreement on the deviations proposed but despite efforts and substantial opportunities granted to the appellant, the parties were not able to reach consensus on all the proposed deviations. After lapse of extended timeline, the respondent finally informed the appellant on 19.6.2022 that LOI has expired without an agreement on GCC and LOI stands null and void. The respondent has already awarded a contract to a third party, namely, Bhambani Shipping Limited, on 27.6.2022. The aforesaid application under Section 9 of the Act of 1996 is infructuous and the remedy for the appellant, if any, lies in invoking arbitration. No steps have been taken by the appellant to initiate arbitration which shows their malafide intent. It is stated that LOI expired by efflux of time upon non-fulfillment of the condition precedent which provided that the LOI to award work would be binding on the parties only upon fulfillment of the condition precedent on or before 14.5.2022 by a formal confirmation letter which was admittedly never fulfilled. The contract being determinable in nature, no injunction can be granted. No injunction can be granted to prevent breach of a contract, the performance of which cannot be specifically enforced and the contract being determinable cannot be specifically enforced. It is stated that the LOI was not a concluded contract and thus no rights arise therefrom and, therefore, no injunction can be sought consequent to its termination. It is submitted that the appellant belatedly raised 18 fresh demands/deviations post issuance of LOI out of which, the respondent was, bonafide, negotiating to agree on some, even though they were substantially different and the main reasons which were attributed to the non-agreement on the terms of the GCC were, inter alia, as follows:

"(a) Increase in the mobilization fee by USD $ 1,000,000 beyond the agreed mobilization fee in LOI.

(b) Payment in foreign currency at Singapore account, which the respondent could not have made in view of Reserve Bank of India guidelines.

(c) Issue of SBLC (Stand by letter of credit) in favour of appellant's bank instead of the appellant itself so that appellant can secure loan from his banker and in case of non-payment by the appellant of the loan

amount, respondent's SBLC shall be invoked.

(d) Covid cost shall be paid in addition to contract value with 15% mark-up.

(e) Cost for refund of Duty Draw back of the IGST paid on the AWB importation shall be paid in addition to contract value with 15% mark-up.

(f) Issue of contract in favour of new entity, (HBC RUBY PTE LTD. Singapore, special purpose vehicle) and parent company guarantee was not from the financially sound parent."

13. While considering the application under Section 9 of the Act of 1996, the learned Judge, after considering the record and the arguments raised on behalf of the parties, observed that there were number of contentious issues which remained unresolved between the parties in meetings held during the extended period, that is, on 26.05.2022 and 30.05.2022. The Court held that the LOI was not a concluded agreement, and that under a contract which is determinable at any event provided in the LOI, the action of the parties cannot be enforced through the Court and the same is barred by provisions of Section 14(d) of the Specific Relief Act, 19639. The learned Judge further held that after the LOI was held to be null and void on 19.06.2022, the respondents had entered into a contract with third party on 27.06.2022 which is before the filing of the application under Section 9 of the Act of 1996 and, therefore, the application is not maintainable and the only remedy available to the applicant-company is for invocation of the arbitration clause. It was further held that the applicant (the appellant) cannnot claim any relief due to the contract having been made and entered on 27.06.2022 executed on a stamp paper dated 06.04.2022.

SUBMISSIONS OF THE LEARNED COUNSEL

14. On behalf of the appellant, it has been urged that where there is a case of fraud, injunction can be granted. Learned counsel has drawn attention of the Court to e-mails of 7.6.2022 (enclosed with the supplementary affidavit) sent on behalf of the appellant to the officials of the respondent alongwith drawings to demonstrate that the additional information regarding AWB was being supplied to the respondent even after 31.5.2022. Learned counsel has also referred to a report of 11.6.2022 made by a representative of the respondent in respect of survey done on 10.6.2022 of AWB, in which the overall condition of vessel of Nor Goliath was found to be good. Learned counsel has further referred to e-mails dated 3.6.2022 and, 11.6.2022, a letter of 11.6.2022 and, another e-mail of 12.6.2022 in an attempt to demonstrate that outstanding matters were attempted to be resolved with all earnestness.

15. It is stated that malafide conduct of the respondent and fraud played by it would vitiate all the acts done by the respondent towards awarding the contract dated 27.6.2022 to a third party, Bhambhani Shipping Limited, thereby making the said contract null and void. It is stated that LOI was declared as null and void on 19.6.2022 arbitrarily, unilaterally and wrongfully given the fact that the appellant and respondent were on the verge of finalizing and executing the GCC in furtherance of the LOI. Within a week from declaring the LOI to be null and void, the respondent discussed, negotiated, finalized and even executed a full-fledged contract with Bhambhani Shipping on 27.6.2022. The RFQ was floated by the respondent in

March 2022 and the discussion between appellant and the respondent extended for a period over a month before LOI was executed on 28.4.2022. Post execution of LOI and commencement of works as provided under LOI, the respondent and the appellant discussed and negotiated other terms for a month and a half before they could execute the GCC and all exhibits. It was submitted that for a contract of such nature and quantum, it was practically impossible for the respondent and Bhambhani Shipping to negotiate, finalize and execute the contract in such a short span of time. The fraud on part of the respondent is sought to be demonstrated as follows:-

(i) The contract entered into between the respondent and Bhambhani Shipping on 27.6.2022 was on e-stamp paper issued on 6.4.2022 which hinges towards the fact that the respondent was negotiating 'parallelly' with Bhambhani Shipping and in order to give contract to Bhambhani Shipping circumvented the appellant by wrongfully and without any basis declaring the LOI null and void. Telford, which was engaged by and introduced to the respondent by the appellant, colluded with the respondent to provide their services and vessel, Nor Goliath, for the purposes of project, whereas, the bid of Bhambhani Shipping for the tender floated by the respondent at the relevant time was with regard to a vessel that was non-compliant as it did not meet the requirements as was desired for the purposes of performing the works for the project.

(ii) If the respondent genuinely wanted to award contract to a third party after declaring the LOI null and void, the respondent could have floated a fresh tender and invited fresh bids which was not done.

(iii) The appellant was continuing with its discussion with the respondent even after 31.5.2022 in good faith, and conduct of the respondent at that point of time did not give the appellant any reason for doubting its intentions. Several actions were taken by the appellant and the respondent even after 31.5.2022 in furtherance of their obligations under the LOI to achieve closure and execution of GCC.

16. It is contended that place of installing the gangway on the AWB was changed from UAE to Batam, Indonesia. Reference was made to letter issued by Telford on 29.3.2022 (Annexure-1 to the affidavit) to show that detailed engineering was needed to be done on the AWB after issuance of LOI and preliminary mobilization plan was attached giving a timeline. Further reference is made to the letter dated 9.5.2022 issued by Telford in favour of the appellant, committing to provide the vessel for the duration of project and operate jointly in India with the appellant-HBA Offshore Pte. Ltd. to support the client, the respondent-Samsung Heavy Industries Pvt. Ltd. To support his contention that fraud is a ground to grant injunction, learned counsel has referred the judgement of the Supreme Court in **Bhaurao Dagdu Paralkar Vs. State of Maharashtra and others**10. To buttress his argument that LOI was a concluded contract, learned counsel referred to judgement of Supreme Court in **Dresser Rand S.A.Vs. Bindal Agro Chem Ltd and K.G.**11. It has further been urged that LOI was not determinable in nature.

17. Learned counsel for the appellant in support of his contention that injunctive relief would be available where fraud is present, has referred to an article on

injunction under the heading of 'Fraud and Deceit' appearing in Volume 37 of the Second Edition of American Jurisprudence, wherein it is stated that equity can enjoin the enforcement of all obligations fraudulently procured, and that equity will intervene in a proper case to restrain proceedings at law where, by reason of fraud, complete and adequate relief would be had at law. Further, the learned counsel has referred the Chapter on injunction (Volume-42, Second Edition of American Jurisprudence) to contend that equitable remedy of specific performance, and that by injunction against breach of a contract have much in common - the jurisdiction exercised is in substance the same, and the same general rule apply in one case as in the other. Moreover, reference has been to pages 49 and 51 of a book titled 'Estoppel by Conduct and Election' published by Thomson / Sweet & Maxwell (South Asian Edition 2013) to contend that, firstly, silence or inaction conveys a representation if it involves the breach of a legal duty to make some disclosure or take some action, and, secondly, there was a duty cast on the respondent under the LOI and the ongoing negotiations to inform the appellant of any parallel negotiations. It was a case of misrepresentation and negligence on part of the respondent in its failure to inform the appellant about parallel negotiations with a third party while it was continuing to negotiate with the appellant under the LOI, and therefore, the respondent is estopped from proceeding with the contract entered into between it and a third party. Under the circumstances misrepresentation itself would amount to fraud entitling the appellant to temporary injunction.

18. It is contended by learned counsel for the respondent, that firm positions of both the parties were at complete variance with each other and also at "deviance post LOI' as recorded in the minutes of meeting dated 26.5.2022. Since, there was no final consensus on all the issues, some being critical to the finalization of the contract, the LOI could not be treated as a completed contract and no injunction could be granted. The aforesaid newly incorporated company had no relationship with the appellant in favour of whom the LOI was awarded and commitment letter was issued by the vessel owner. It is stated that the inspection of vessel held on 10.6.2022 was an initial inspection before departure of AWB. As regard the additional deviation raised by the appellant to issue SBLC by the respondent in banker's name instead of appellant's name, the respondent tried to fulfill this deviation but failed as the respondent's bank had refused to issue SBLC in the name of the appellant's banker.

19. The learned counsel for the respondent has stated that the LOI was declared null and void by the communication dated 19.06.2022 and the application under Section 9 of the Act of 1996 was filed on 28.06.2022 to injunct the respondent from entering into another contract with a third party. It was on 27.06.2022 that a new contract was entered into between the respondent and Bhambani Shipping and, therefore, it is contended that the maintainability of the application under Section 9 of the Act of 1996 is itself questionable. The learned counsel has contended that the scheme of the Act of 1996 itself dictates a proximity in point time between filing of application under Section 9 and initiation of arbitration proceedings. It is contended that despite being well aware of the LOI being declared null and void on 19.06.2022 and that a new contract being entered into by the

respondent with the third party on 27.06.2022, the appellant has chosen only to seek a relief from this Court under Section 9 of the Act 1996, rather than initiate arbitration proceedings as provided in the LOI itself. It is contended that, admittedly, though the binding of LOI was extended twice, all other terms and conditions as originally contained in the LOI remained unchanged. The learned counsel has referred to the judgments of the Supreme Court in the cases of **Sundaram Finance Ltd. vs. NEPC India Ltd.**12 and **Firm Ashok Traders & Ors. vs. Gurumukh Das Saluja & Ors.**13 to contend that when an application under Section 9 is filed before the commencement of the arbitration proceedings, there has to be a manifest intention on part of the applicant to take recourse to arbitral proceedings. Viewed in this light, it is contended, there is no manifest intention on part of the appellant to initiate arbitral proceedings. It is stated that the relief sought in the application filed under Section 9 is exhausted. It is further stated that the third party concerned namely, Bhambani Shipping has acted upon the contract executed between it and the respondent; and, after installation of the gangway at Batam, Indonesia, the vessel has arrived at Kakinada on 16.09.2022. The learned counsel has referred in detail to the provisions of the LOI and the 'condition precedent' contained therein which provides that the LOI shall be binding on the parties only on fulfilment of the condition precedent of the GCC being agreeable on or before 14.05.2022 by a formal confirmation letter. While referring to Annexure-12 of the affidavit filed in support of the stay application, the learned counsel has contended that it is a letter dated 22.05.2022 sent by the appellant to the respondent whereby the respondent was required to issue a revised LOI incorporating the 'Open Items'. A categorical statement was made by the appellant in the letter of 22.05.2022 that pending receipt of the revised LOI incorporating the 'Open Items', the appellant regretted that they were unable to proceed based on the respondent's current binding offer dated 20.05.2022. It was also mentioned in the said letter that time is of essence. The learned counsel has referred to minutes of the meeting dated 26.05.2022 (that is enclosed as Annexure-14 to the affidavit) between the appellant and the respondent which disclosed the firm position of the respondent.

20. Further reference was made to the minutes of the meeting dated 30.05.2022 (Annexure-16 to the affidavit) between the appellant and the respondent to contend that the issue of increase in mobilization of fee by which the appellant had demanded one million US dollars by reason of change in schedule/route/hike in bunker etc. was open. It is stated that the dispute arose due to no agreement regarding the mobilization fees and the appellant did not seek any further extension. It is stated that breach of the terms of the LOI was made by the appellant and as such the LOI expired. The contention is that though the letter of 19.06.2022 issued by the respondent declared the LOI null and void, the validity of the arbitration clause therein continues to exist. It is stated that the so-called inspection report that is being referred to by the appellant is not a report after installation of the gangway as envisaged in the LOI, but is a preliminary report regarding the condition of the AWB.

ANALYSIS:

21. The sole point for determination is whether the appellant is entitled to an

injunction under Section 9 of the Act of 1996 in view of the facts and circumstances of the present case.

22. Section 9 of the Arbitration and Conciliation Act, as amended by Act No.3 of 2016, reads as follows:-

"9. Interim measures, etc. by Court. [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 a 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."

23. The principles for grant of an injunction, as provided under the Act of 1963, would apply to the present case. Sections 9 to 25 fall under Chapter II of the Act of 1963. Section 10 of the Act of 1963 deals with cases in which specific performance of contract would be enforceable and it reads as follows:-

"10. Specific performance in respect of contracts.- The specific performance of a contract shall be enforced by the court subject to the provisions contained in sub-section (2) of section 11, section 14 and section 16."

Section 11 of the Act of 1963 pertains to specific performance of contract connected with trusts. Section 16 pertains to personal bars to relief, which, in the present case is not material. Sections 14 reads as follows:-

"14. Contracts not specifically enforceable.- The following contracts cannot be specifically enforced, namely:-

(a) where a party to the contract has obtained substituted performance of contract in accordance with the provisions of section 20;

(b) a contract, the performance of which involves the performance of a continuous duty which the court cannot supervise;

(c) a contract which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms; and

(d) a contract which is in its nature determinable."

It is pertinent to refer to the provisions of Section 17 of the Act of 1963 which are as follows:-

17. Contract to sell or let property by one who has no title, not specifically enforceable.--(1) A contract to sell or let any immovable property cannot be specifically enforced in favour of a vendor or lessor--

(a) who, knowing himself not to have any title to the property, has contracted to sell or let the property;

(b) who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt.

(2) The provisions of sub-section (1) shall also apply, as far as may be, to contracts for the sale or hire of movable property.

Sections 38 and 41 of the Act of 1963 read as follows:-

"38. Perpetual injunction when granted.-(1) Subject to the other provisions contained in or referred to by this Chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

(2) When any such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II.

(3) When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases, namely:

(a) where the defendant is trustee of the property for the plaintiff,

(b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(c) where the invasion is such that compensation in money would not afford adequate relief;

(d) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

.....

41. Injunction when refused.--An injunction cannot be granted--

(a)to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;

(b)to restrain any person from instituting or prosecuting any proceeding in a court not sub-ordinate to that from which the injunction is sought;

(c)to restrain any person from applying to any legislative body;

(d)to restrain any person from instituting or prosecuting any proceeding in a criminal matter;

(e)to prevent the breach of a contract the performance of which would not be specifically enforced;

(f)to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;

(g)to prevent a continuing breach in which the plaintiff has acquiesced;

(h)when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;

(ha) if it would impede or delay the progress or completion of any infrastructure project or interfere with the continued provision of relevant facility related thereto or services being the subject matter of such project.

(i)when the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the court;

(j)when the plaintiff has no personal interest in the matter."

Clause (a) of the proviso (Uttar Pradesh Amendment) to sub-rule (2) of Rule 2 of Order 39 of the Code of Civil Procedure, 190814 prohibits the grant of temporary injunction where no perpetual injunction could be granted in view of the provisions of Sections 38 and 41 of the Act of 1963.

24. It is admitted to the parties that by a communication dated 19.06.2022, the respondent informed the appellant that the LOI had expired without an agreement of GCC and the LOI stands null and void. The LOI dated 28.04.2022 reads as follows:-

"To : HBA Offshore Pte. Ltd. (Singapore)

Attn. : Mr. Hasan Basma

Date : 28th April 2022

Subject: Letter of Intent to Award the Work

Dear Sir,

Intent

By this Letter of Intent (LOI), Samsung Heavy Industries India Pvt. Ltd., a company registered under the Companies Act, 1956 of the Republic of India and having its registered office at Logix Cyber Park, Wing-B, 1st Floor, C-28 & 29, Sector 62, Noida 201301, Uttar Pradesh, India (hereinafter called the "Contractor") expresses its firm intention to award the following Work of Accommodation Work Barge (AWB) to:

HBA Offshore Pte. Ltd. (UEN No. 201502262C), a company incorporated under the laws of the Singapore and having its registered office at 77 Science Park Drive, #02-03 Cintech III Building, 118256 Singapore (hereinafter referred to as "Subcontractor").

Contractor and Subcontractor are hereinafter referred to individually as a "Party" and collectively as the "Parties."

Work

The Subcontractor's scope of work ("Work") includes, but is not limited to the following:

(a) Provision of Accommodation Work Barge (AWB), namely "Nor Goliath" retrofitted (IMO 9396933) with electric-hydraulic telescopic personnel transfer gangway; (b) Accommodation Work Barge shall be a minimum DP-3. The AWB will normally remain stationed along-side RUBY FPSO at MJ Field, east coast offshore India.

(c) AWB shall have minimum capacity to provide accommodation for 250 Contractor's personnel apart from Marine crew and Catering & Housekeeping crew.

(d) The AWB shall also be equipped with suitable hardware and software for working in "Reference follow target mode system" in tandem with the Turret moored weather vanning FPSO, without disconnecting.

(e) Subcontractor shall provide retractable with 36 Meter electric-hydraulic telescopic (Marine Aluminium) personnel transfer gangway with the AWB for safe and easy transfer of personnel to FPSO.

(f) Subcontractor shall be responsible for maintaining 90% gangway connection throughout the offshore campaign.

Purpose of this LOI

While Contractor and Subcontractor are negotiating the outstanding terms and conditions of the Work, this LOI authorizes Subcontractor to immediately commence the Work to avoid any delay to the schedule of Work including Detailed Design Pedestal & Gangway Foundation, including Procurement of Material, Fabrication of Pedestal & Gangway Foundation and Install Gangway Pedestal. This LOI shall be superseded by a full-fledged contract under which the Subcontractor shall continue to perform the Work ("Contract") at the date of execution of such Contract upon the Parties reaching an agreement on the outstanding terms and conditions.

Reference Documents

(a) General Conditions of Contract and the Exhibits provided by Contractor to Subcontractor at the time of floating the Request for Quote (RFQ) currently under negotiation.

(b) Subcontractor's Quotation reference number: HBA-11000-77-10-BID-006-R6 received via e-mail dated 21 April, 2022 and subsequent email dated 26th April, 2022 (timing 18:45).

Offer Price

Subcontractor has submitted a quotation for completion of the Work (the "Offer") as per below:

S No	Description	UOM	Total Rate in US$ including WHT (A)	WHT @ 4.368 % IN US$(B)	Cost US$ (C=A-B)
1.	Mobilization Cost including fuel	LS	6,971,516	304,516	6,667,000
2.	Demobilization Cost including fuel	LS	1,634,556	71,397	1,563,159
3.	ODR rates	Per day	172,014	7,514	164,500
4.	Standby rates	Per day	137,611	6,011	131,600

Notes:

1. The above rates are inclusive of WHT @ 4.368%. In case of any change in the WHT rate from 4.368%, the above rates shall be adjusted accordingly.

2. The following deduction will apply, in case the following services are not available on accommodation work barge:

a. Internet @ 4MBPS - $500/day.

b. Helideck-10% of operating day rate.

3. Accommodation work barge shall depart from Walvisbay, Namibia and Subcontractor shall install retractable 36 Meter electric-hydraulic telescopic gangway from other vessel namely Telford 25 to "Nor Goliath". This installation activity shall be carried out at UAE.

Post Installation of gangway, Company / Contractor shall inspect the accommodation barge. Any observation and comments during the inspection are to be satisfactorily resolved by the Subcontractor to make the accommodation work barge "fit for purpose", before departure of vessel from UAE to Kakinada.

4. Subcontractor shall refund demobilization fees to Contractor if

accommodation work barge is remobilized and deployed by Subcontractor Group at any location within Indian territorial waters, Indian contagious zone or Indian exclusive economic zone or for any other operator within 90 days after demobilization under the Contract.

Contractor intends to accept such offer subject to condition precedent and formal signing of contract agreement by Contractor and Subcontractor.

Firm Charter period with extensions

120-days Firm Period with an option to extend the period by 2X30 days plus 4X15 days.

Acceptance and Performance of Work

1. Subcontractor is to confirm its acceptance of this LOI by signing in duplicate by a duly authorized officer, retaining one copy and returning the other copy to Contractor within COB of the 28th day April 2022.

2. Subcontractor to confirm and commit the vessel "NOR Goliath" availability for the duration of "Firm Charter Period with Extension" as indicated above, with commitment letter from vessel owner.

Condition precedent

1. General Condition of Contract and all the exhibits shall be agreeable as circulated at the time of floating of RFQ dated 22nd March 2022, read together with Exception and deviation as discussed during bid clarification meetings till 27th April 2022.

This Letter of Intent to Award the Work shall be binding on the parties only upon the fulfillment of the above condition precedent on or before 14th May 2022 by a formal confirmation letter.

Governing Law and Dispute Resolution

This LOI shall be interpreted and in all respects shall be governed and construed in accordance with the laws of India. Any claims, disputes or differences arising out of or in connection with this LOL shall be finally settled by arbitration in accordance with the then-current Arbitration Rules of Singapore International Arbitration Centre. The seat of arbitration shall be Singapore.

Upon such acceptance of this LOI, Subcontractor shall commence the Work immediately on the 28th day of April 2022, including Detailed Design of Pedestal & Gangway Foundation. Contractor shall start sharing its documents for performance of Work by Subcontractor."

25. Given the scope of the work of the Sub-contractor, that is, the appellant, the LOI authorised the appellant to immediately commence the work to avoid any delay to the schedule of work. Under the heading of "Purpose of this LOI", it is mentioned that the LOI shall be superseded by a full-fledged contract under which the appellant shall continue to perform the work at the date of execution of such contract upon the parties reaching an agreement on the outstanding terms and conditions. The LOI refers to the offer price of the appellant submitted through a quotation for completion of the work. In the "Notes" appended thereto, it is agreed that the Contractor, that is, the respondent, "intends" to accept the "offer" subject to condition precedent and formal signing of contract agreement by the appellant and the respondent. The **'condition precedent'** provides that the GCC shall be agreeable as

circulated at the time of floating of RFQ dated 22.03.2022 read together with exception and deviation as discussed during bid clarification meetings till 27.04.2022 and that LOI to award the work shall be binding on the parties **only upon the fulfilment of the above condition precedent on or before 14.05.2022 by a formal confirmation letter.** Under the heading of Governing Law and Dispute Resolution, it is provided that the LOI would be interpreted and, in all respects, shall be governed and construed in accordance with laws of India. Any claims, disputes or differences arising out of or in connection with the LOI shall be finally settled by arbitration in accordance with the then-current Arbitration Rules of Singapore International Arbitration Centre and the seat of arbitration shall be at Singapore.

26. It is an admitted fact that under the LOI the appellant had to make provision of AWB, namely "Nor Goliath" that required retrofitting with electric-hydraulic telescopic personnel transfer gangway. The fact that the AWB was a vessel of which a third party, namely, Telford, was the disponent owner, is also admitted. The entire scope of work of the appellant was related to this AWB which fact is reflected in the LOI. Though the minutes of the meetings dated 11.05.2022 and 17.05.2022 (Annexure 4 and 8 respectively) refer to the appellant and Telford as 'sub-contractor', there is no signature of Telford on the minutes. Telford has also not been referred to in the LOI at all. Telford is admittedly the disponent owner of the AWB. In **Sara International Ltd. v. Arab Shipping Co. (P) Ltd.**15 the court referred to 'disponent owner' as a term which, according to the Maritime dictionary, means a person or company which has commercial control over a vessel's operation without owning the ship. The respondent has been referred to as the Contractor in the LOI and the appellant as the Sub-contractor. A bare reading of the LOI evinces that under the contract (GCC) contemplated thereunder, respondent was primarily to hire the AWB from the appellant. A contract to hire movable property cannot be specifically enforced in favour of a vendor or lessor who, knowing himself not to have any title to the property, has contracted to sell or let the property. This is the mandate of Section 17 of the Act of 1963. Therefore, the appellant is not entitled to specific performance of the LOI.

27. For considering the submission raised by the learned counsel for the appellant that the LOI is a concluded contract, reference needs to be made to the following terms of the LOI :

(i) As stated above, under the heading of 'Purpose of this LOI' the LOI was to be superseded by a full-fledged contract under which the respondent (sub-contractor) was to continue to perform the work at the date of execution of such contract upon the parties reaching an agreement on the outstanding terms and conditions.

(ii) Under the heading of 'Offer Price', after noting the price quotation submitted by the appellant, four points are mentioned under the sub-head of notes, whereafter a categorical condition has been provided as follows:-

"Contractor intends to accept such offer subject to condition precedent and formal signing of contract agreement by Contractor and Sub-contractor".

(iii) Under the heading of 'Condition precedent', it is mentioned that GCC shall be agreeable as circulated at the time of floating of RFQ dated 22.03.2022, read

together with exception and deviation as discussed during bid clarification meetings till 27.04.2022. It is further stated that the LOI to Award the Work shall be binding on the parties only upon the fulfillment of the above condition precedent on or before 14.05.2022 by a formal confirmation letter.

Thus, it is clear from the aforementioned provisions of the LOI that the LOI was to be superseded by the GCC and the LOI was further subject to the condition precedent as mentioned above. It is important to mention here that the GCC was circulated at the time of floating of RFQ dated 22.02.2022, but the same has not been brought on record or produced by the appellant.

28. The learned counsel has made reference to the case of **Dresser Rand** to urge that the LOI was a concluded contract and has drawn attention of this Court specifically to paragraph nos. 39 and 40 thereof which reads as follows:-

"39. It is now well settled that a letter of intent merely indicates a party's intention to enter into a contract with the other party in future. A letter of intent is not intended to bind either party ultimately to enter into any contract. This Court while considering the nature of a letter of intent, observed thus in *Rajasthan Coop. Dairy Federation Ltd. v. Maha Laxmi Mingrate Marketing Service (P) Ltd. [(1996) 10 SCC 405] : (SCC p. 408, para 7)*

"The letter of intent merely expressed an intention to enter into a contract. ... There was no binding legal relationship between the appellant and Respondent 1 at this stage and the appellant was entitled to look at the totality of circumstances in deciding whether to enter into a binding contract with Respondent 1 or not."

40. It is no doubt true that a letter of intent may be construed as a letter of acceptance if such intention is evident from its terms. It is not uncommon in contracts involving detailed procedure, in order to save time, to issue a letter of intent communicating the acceptance of the offer and asking the contractor to start the work with a stipulation that the detailed contract would be drawn up later. If such a letter is issued to the contractor, though it may be termed as a letter of intent, it may amount to acceptance of the offer resulting in a concluded contract between the parties. But the question whether the letter of intent is merely an expression of an intention to place an order in future or whether it is a final acceptance of the offer thereby leading to a contract, is a matter that has to be decided with reference to the terms of the letter. Chitty on Contracts (para 2.115 in Vol. 1, 28th Edn.) observes that where parties to a transaction exchanged letters of intent, the terms of such letters may, of course, negative contractual intention; but, on the other hand, where the language does not negative contractual intention, it is open to the courts to hold that the parties are bound by the document; and the courts will, in particular, be inclined to do so where the parties have acted on the document for a long period of time or have expended considerable sums of money in reliance on it. Be that as it may."

29. Therefore, the terms of the LOI have to be looked into to ascertain whether the LOI is merely an expression of an intention to place an order in future or whether it is a final acceptance of the offer thereby leading to a contract. The court observed that the terms of a LOI may negative contractual intention; but, on the other hand, where the language does not negative contractual intention, it is open to

the courts to hold that the parties are bound by the document; and the courts will, in particular, be inclined to do so where the parties have acted on the document for a long period of time or have expended considerable sums of money in reliance on it. However, it is pertinent to note, the Supreme court did not treat the letters of intent to be a concluded contract.

30. It is pertinent to mention here that in the case of **Dresser Rand,** the Supreme Court was considering two letters of intent issued on a letter head of a company other than the purchaser company in respect of a contract that was to be entered into between the parties which was referred to as "General Conditions of Purchase'. The aforesaid observation of the Supreme Court was made during its consideration of the question "Whether Letters of Intent dated 12.6.1991 contain an Arbitration Agreement'. In paragraphs nos. 42 and 43 of the judgement, the court held as follows:-

"42. When all the terms of the letter of intent are harmoniously read, what is clear is that letters of intent merely required the supplier to keep the offer open till 31-8-1991 with reference to the price and delivery schedule. They also made it clear that if the purchase orders were not placed and letter of credit was not opened by 31-8-1991, dr was at liberty to alter the price and the delivery schedule. In other words, the effect of letters of intent was that if the purchase orders were placed and LCs were opened by 31-8-1991, dr would be bound to effect supply within 15½ months, at the prices stated in the letter of intent. Therefore, it may not be possible to treat the letters of intent as purchase orders.

43. Even if we assume that the letters of intent were intended to contracts for supply of machinery in accordance with the terms contained therein, it may only enable dr to sue for damages or sue for the expenses incurred in anticipation of the order and opening of LC. But that will not be of any assistance to contend that there was an arbitration agreement between the parties."

(emphasis supplied)

31. In the case of **South Eastern Coalfields Limited and others Vs. S. Kumar's Associates AKM (JV)**16, a letter of intent was issued awarding the contract for a total work of Rs 387.40 Lacs. The letter of intent directed the respondents to mobilise equipment for executing the work to handle minimum allotted cu.m. per day and directed to "commence the work immediately'. The respondent was called upon to deposit performance security deposit for a sum total to 5 % of annualized contract amount within 28 days. The letter of intent provided that the work order would be issued and the agreement would be issued at the area office and that agreement may be concluded within 28 days as per provisions of the tender document. In pursuance of the letter of intent, the respondent mobilised resources at site but due to machinery breakdown the work had to be suspended for reasons beyond the control of the respondent. After issuance of show cause notice the work awarded to the respondent was terminated and the work was got executed by another contractor. The Supreme Court noted the terms of the letter of intent as well as the Notice inviting Tender. While referring to the judgement in **Dresser Rand**, the Court observed that there is little doubt over the proposition that an LOI merely indicates a party's intention to enter into a contract with the other party in future. The court held that no binding relationship between

the parties at this stage emerges and the totality of the circumstances have to be considered in each case. The Court also observed that in the case of D**resser Rand,** on a holistic analysis it was held that the LOI could not be interpreted as a work order.

32. In the present case, there has been exchange of numerous correspondence and meetings, some of which were in respect of technical aspects of the AWB. There is no material on record to conclusively demonstrate what all work was actually done on the AWB by the appellant which was to be provided to it by Telford. Admittedly, the gangway was not installed on the AWB during the currency of the LOI. To show that substantial costs has been incurred by the appellant, the learned counsel has placed for our perusal a single page document enclosed as Annexure No. 33 to the affidavit (page 166) reflecting certain figures in US dollars that is, purportedly, a quantification of expenses incurred by the appellant. Pertinently, it has not been pointed out whether this document was part of the record before the learned Judge whose order is under challenge in the present appeal. In any view of the matter, this document does not bear any title or date, nor is it stamped nor signed. Reference of this document is in paragraph no. 47 of the affidavit in which it is stated as follows:-

"That the Appellant has incurred substantial costs for the work done after the issuance of the LOI for the Project. A true copy of the List of Expenses is being filed herewith and marked as ANNEXURE No. 33 to this affidavit."

33. The averments regarding expenses are vague and the document of the so called expenses also cannot be given credibility for the reason that it is undated, unstamped, unsigned and without any title. It is pertinent to mention here that in paragraph no. 56 of the affidavit filed in support of the application under Section 9 of the Act of 1996 filed before the learned Judge, merely a vague statement had been made that :

"the applicant had diligently work hard since the LOI was signed and accepted in April, 2020. The applicant has also already incurred substantial costs towards the said project. The applicant has already incurred actual costs to the tune of about USD 2,500,000. The effect of the respondent contracting out by declaring the LOI null and void will cause grave prejudice, irreparable injury and severe further monetary losses and damages to the applicant.'"

No corresponding enclosures were shown to have been filed. Thus, even in the affidavit filed in support of the application u/s 9 of the Act of 1996 before the learned Judge, the averments regarding expenditure are vague and unsubstantiated.

34. It would be pertinent to refer to the contents of paragraph no. 57 of the affidavit filed by the appellants before the learned Judge which reads as under:-

"57. That the LOI dated 28.04.2022 was a partial contract executed between the Applicant and the Respondent, as it authorised the Applicant to immediately commence the work to avoid any delay to the schedule of the work including Detailed Design Pedestal & Gangway Foundation, including Procurement of material, Fabrication of Pedestal & Gangway Foundation and Install Gangway Pedestal (Work). The Respondent, upon execution

and acceptance of the LOI, was also required to commence sharing its documents for performance of the Work by the Applicant. The LOI was to be subsequently superseded by a full-fledged contract i.e. the GCC and all exhibits thereto, under which, the Applicant was required to continue to perform the Work at the date of execution of GCC, upon the Applicant and the Respondent reaching finalizing the final details of the outstanding terms and conditions. Therefore, the Applicant has a right to enforce its rights under the LOI dated 28.04.2022, as extended from time to time (either expressly or by implication and conduct of parties)."

(emphasis supplied)

35. Thus, the observations made by the Supreme Court in the case of **Dresser Rand** are of no help to the appellant in the facts and circumstances of the instant case. Therefore, it has been correctly held by the learned Judge that the LOI is not a concluded contract between the parties, and that it is determinable. This, however, has no bearing on the current validity of the arbitration clause mentioned therein.

36. Another submission raised by the learned counsel for the appellant requires consideration, that the correspondence between the parties after 31.05.2022 reflects that the terms of the GCC were being discussed which were in the process of being finalised, and therefore, contract came into existence between them through correspondence as well as in view of the meetings that had taken place between the representatives of the parties.

37. As reflected in the aforementioned statements and submissions made on behalf of the appellant, the binding of the LOI was extended twice, the second one being till 31.5.2022, but it was provided in the letters communicating the extensions that all other terms and conditions originally contained in the LOI would remain unchanged. That is to say, the respondent's intention to accept the 'offer' of the appellant being subject to 'condition precedent' and formal signing of contract agreement by the appellant and respondent, remained unchanged and intact.

38. It was by the letter dated 22.05.2022 of the appellant (Annexure No.12), which was in response to an email of the respondent dated 20.05.2022 extending the binding of the LOI till 31.05.2022, that the appellant asked the respondent to issue a revised LOI duly incorporating the 'Open Items', the list of which was attached to that letter of 22.05.2022. The appellant made a categorical statement in that letter that pending receipt of the revised LOI incorporating the 'Open Items', it regretted that it was unable to proceed based on the appellant's current binding offer dated 20.05.2022. It would be pertinent to quote the letter dated 22.05.2022 sent by the appellant to the respondent alongwith an Appendix-1 enclosed thereto.

"Our Ref : HBA-21015-LTR-SHI-0002

Date : 22 May 2022

Samsung Heavy Industries India Pvt. Ltd.

Logix Cyber Park, Wing-B, 1st floor,

C-28 & 29, Sector-62,

NOIDA-201301 (U.P.) INDIA

Dear Sir/Madam,

SUBJECT: RESPONSE TO CONTRACTOR LETTER SN2333-SHI-HBA-SE-LTR-0003

Thank you for your letter (email dated 20th May 2022, reference SN2333-SHI-HBA-SE-LTR-0003) offering to extend the validity of your Letter of Intent (LoI) to award the work till 31st May 2022.

We note that whilst you acknowledge our letter dated 20 May 2022 and our critical open items list therein, your "binding" offer of extension is on the same terms and conditions as per your original letter of intent (LOI) dated 28th April 2022. We request you to issue a revised LOI duly incorporating the open items, the list of which is attached herewith as Appendix 1 - Open Items.

Owners' insistence on incorporating the said open items in the revised LOI is imperative and critical to manage project risk, satisfy mandatory financier's requirements and maintain vessel availability. Further delays to the issuance of the revised LOI, only aggravate this risk and increase the exposure and financial liabilities in a volatile and unpredictable market.

We urge contractor to address our critical point list in the LOI and commit to negotiate the remaining open legal and commercial items in good faith As time is of essence, we respectfully and humbly attach a draft extension letter for your consideration. A face-to-face meeting should then be held asap to facilitate the finalisation of the contract. We are on standby for face-to-face meeting starting 23rd May (Monday).

Meanwhile, pending receipt of the revised LOI, incorporating the open items, we regret that we are unable to proceed based on your current binding offer dated 20 May 2022. A face-to-face meeting at your Noida Office will be constructive and fruitful after all the critical and open items of the LOI are duly addressed, accepted in principle and revised letter of extension is issued not later than 23rd May 2022 close of business (COB) in India.

Thank you

Yours Faithfully,

for HBA OFFSHORE PTE. LIMITED/HBA RUBY PTE. LTD

Name : Hassan Basma

Position: Chief Executive Officer

APPENDIX 1-CRITICAL OPEN CONTRACTUAL / COMMERCIAL ITEMS as requested by Owners

1. **FIRM CHARTER PERIOD**: We have discussed with the Owners and the firm charter period of 120 days which was flatly rejected by the Owners as they have an option for longer term projects. Owners will accept a firm charter period of 150 days subject to agreement on the below open items.

2. **EXTENSION NOTICE:** Kindly appreciate that the marine vessel of such high-end configuration as of Nor Goliath are high in demand worldwide. For better planning the charters, an advance notice of 30 days prior to execution of extension would be desirable. We propose that in addition to 30 days' notice. However, Contractor can reconfirm the extension on 14th day or later prior to expiry of the charter period.

3. **PAYMENT GUARANTEE**: For a seamless service with commercial comfort, security of payment is necessary. Request for Corporate Guarantee was towards that objective. However, to close this matter amicably with Contractor, we propose commitment letter in any other form and manner to be discussed and agreed such as side letter jointly agree on the contract working mechanism.

5. **MOBILISATION FEE**: Mobilization of Vessel requires immediate

funds. The mobilization fee milestone proposed are as follows :

US$3.5m - upon signing of the Contract, against Bank Guarantee of an equivalent amount, US$3.5m.

Further, HBA shall raise an invoice of US$2.75m upon departure of vessel from Cape Town which shall be payable immediately upon (1st working day) vessel arrival in Kakinada, India.

The remaining mobilization fee shall be payable within three working days upon the vessel custom clearance in Kakinada, India.

6 **OVERALL LIMITATION OF LIABILITY** - Whilst our original offer was 20% overall cap to liability, we however as to conclude the contract matters, are agreeable to 25% of the Contract value as overall cap.

7 **LIQUIDATED DAMAGES**: Subcontractor originally requested or 1% per day to the max of 5% of the mobilization fees. We may be agreeable to 4% per day to max of 20% of mobilization fees subject to a grace period to be discussed & agreed.

OTHER ITEMS : Other outstanding / additional issues related to payment, invoicing, COVID, force majeure, reduced rates, suspension etc are to be discussed and agreed after closure of critical open items as listed above, to maintain this offer."

39. In reply to the aforesaid, the respondent wrote a letter dated 25.05.2022, which is as follows:-

"To, HBA Offshore Pte. Ltd.

Attn. Mr. Hassan Basma

Date 25th May 2022 Your Ref.: Nil dated 11 May 2022

Total Page 1 Our Ref.: SN2333-SHI-HBA-SE-LTR-0004

Title KG D6 RUBY FPSO

Subject : Letter of Intent to Award the Work

Dear Sir,

Contractor writes with reference to Subcontractor's letter : HBA-21015-LTR-SHI-0002 dated 22 May 2022 which is in response to Contractor's letter: SN2333-SHI-HBA-SE-LTR-0003 dated 20 May 2022.

Contractor has noted 'Appendix 1-Critical open contractual / commercial items as requested by owners' as attached in Subcontractor's referred letter and wishes to inform that there are some other pending items like a) Invoicing / Taxes, b) Catering / Laundry Services, c) Change in Contract Entity d) Window Mechanism etc. as indicated via Contractor's email dated 19th May 2022 (Refer to Attachment #1).

Contractor reiterates that change in the 'Firm Charter period with extensions' mentioned in the LOI (i.e. "120-days Firm Period with an option to extend the period by 2 x 30 days plus 4 x 15 days") shall not be considered and requests Subcontractor to maintain the same in line with earlier acknowledgement and agreement of LOI dated 28 April 2022. Other pending/open items including contract document, can be discussed towards signing of Contract.

Subcontractor may visit Contractor's Noida office on Thursday the 26th May 2022 for face to face meeting to discuss and conclude open items and to finalize the Contract accordingly.

Sincerely yours,

Joonho Min

Managing Director

Samsung Heavy Industries India Pvt. Ltd."

40. Thereafter, two meetings were held on 26.05.2022 and 30.05.2022 and the recorded minutes therein are as follows:-

Meeting: Nor Goliath-Post LOI meeting

Date: 26 May 2022, Time: 10:00AM-4:30PM (IST)

MOM Ref no.: SN2333-SHI-HBA-SE-MOM-001

1. Minutes of the Meeting

Parties have discussed the following and expressed their firm positions as below

S. No	Deviation post LOI	HBA's Firm Position	SHI's Firm Position
1.1	Firm Period of 150 Days	150 Days + extension	120 Days + extension as per Signed LOI
1.2	Schedule Mobilization of AWB at Kakinada	HBA has submitted their Mobilisation Plan to reach Kakinada around 22 Aug-22.	Window Mechanism from 5-Aug 2022 to 25-Aug-2022
1.3	Increase in Mobilization Fee	USD 1(One) Million in the Mobilization Fee by reason of change in schedule/ route/hike in bunker cost etc.	Mobilization Fee to be maintained as per Signed LOI
1.4	Window Mechanism	Mutually agreed. Control of call down mechanism with HBA	Window Mechanism shared to be followed and it shall be regulated by Contractor only.
1.5	Zero Rate	Zero Rate will be applicable in the event that the ongoing work have come to standstill and the personnel/ equipment etc are removed from the vessel for the reasons attributable to HBA Reduced Rate Mechanism: 75% of ODR	Zero Rate Condition shall be as follows as agreed by the parties earlier: 1. Loss of DP (Function lower than DP2) 2 Gangway is not connected to FPSO for reasons attributable to subcontractor 3. AWB not meeting minimum safe manning on board as per the AWB minimum safe manning certificate. 4. Accommodation facilities on AWB are not habitable 5. During inspection of AWB or equipment provided by Subcontractor on AWB by Government Authority. Zero rate

			shall only be applicable in the event, government authority inspection leads to disconnection of the gangway due to fault or noncompliance of the Subcontractor. 6. In case of confiscation of AWB by government authority due to fault or non-compliance of Subcontractor.			agreement regularize the change in contracting entity. - Financial documents of the PCG Company
				1.7	Extension Notice	HBA proposed 30 days' notice with reconfirmation on 14 days. To be mutually agreed.	14 days notice period to be retained in line with earlier agreement.
				1.8	Overall Limit of Liability	HBA increase limit from 20% to 25% of contract value	HBA to maintain at least 50% of the contract value
1.6	Contract Entity change	- HBA Ruby Pte. Ltd. shall be contracting entity - HBA will share the organization structure. - HBA will provide PCG from HBA International Pte Ltd.	Contractor will analyse the entity change matter on receipt of complete organogram, rationally between companies and the following: - HBA to provide HBA Holding Pte. Ltd. - Tri Party	1.9	Liquidated damages	HBA increased to 4% per day of Mob fees to maximum to 20% of the Mob fees in good faith HBA is however proposing a grace period of 5 days before imposing	No grace period is permissible.

		LD	
1.10	Suspension/ Termination	Payment Period: 30 days from Invoice submission. Grace period: 12 days from the payment period Suspension Period: Rights to HBA to suspend the work post 42 days (Payment period + Grace Period) for 5 days. ODR shall be payable during suspension period of 5 days. Termination: Right to terminate the contract by HBA post suspension of 5 days.	No right to HBA for Suspension. Termination rights after 30 days post expiry of Payment period of 30 days as agreed by the parties earlier.
1.11	Mutual Indemnity Agreement	HBA will propose a format for mutual indemnity to be signed by SHI, HBA, Telford (operator), Goliath (bond holders)	Telford and Goliath has no direct relationship with SHI, hence cannot sign with mutual indemnity.
1.12	Invoice	Noted. To be verified with Tax Consultant	GST Tax Invoice from project office in USD and payment to FCNR account in USD.
1.13	Payment Schedule Mobilization Fee	USD 3.5 Million upon signing of Contract immediately subject to submission of Bank Guarantee of equivalent amount and GST invoice from the HBA Project office. USD 2.75 Million upon departure	Payment terms as agreed by the parties earlier as below: USD 1 Million upon AWB departure from Africa. USD 1 Million upon arrival at UAE. USD 4 Million upon arrival at Kakinada. Balance after Custom Clearance.

		from Cape Town and payment will be within 1st working day upon arrival in India. Balance Payment after Custom clearance of AWB.			come to standstill and the personnel/ equipment etc are removed from the vessel	by the parties as below: 1. First 15 days of Force Majeure - Zero rate 2. From 16th day till 45th day of Force Majeure-80% of ODR 3. From 46th day of Force Majeure-80% of ODR
				1.16	COVID cost	Our proposal is based on the cost towards Covid-19 related protocols required as per prevailing GoI guidelines. HBA's position on covid: i. current prevailing conditions there are no covid restrictions / requirements to comply ii. in the event of any future	Included in ODR
1.14	Payment Guarantee	HBA propose for Parent Company Guarantee OR payment of two months Charter duration OR side letter (Format shared by HBA) to be signed by HBA/SHI/ Telford and Goliath	Will check and revert on the same.			
1.15	Force Majeure	Provided that the ongoing work have	Payment during Force Majeure as agreed earlier			

		regulations on covid, any cost implications shall be borne by SHI on a cost plus basis. HBA's responsibility for covid shall be for their personnel only			ng HBA about the food quality and their services. SHI will provide a separate written indemnity undertaking to HBA to undertake the catering contract.	
1.17	Catering Service	HBA agree to have a contract with Sodexo (as suggested by contractor) at the rate negotiated by Contractor on cost plus basis. GST on Sodexo invoice shall be considered as cost to subcontractor and will be back charged to Contractor. Contractor will be indemnifyi	Agreed except the mark up rate.		Mark-up-15% (HBA to check for mark-up %)	
				1.18	IGST refund	Will Assist in getting refund to the best of its ability. HBA will engage their consultant to assist the tax refund on behalf of SHI. HBA shall not be contractually obliged to obtain the tax refund for SHI.	Part of Contractual obligation.

Meeting: Nor Goliath -Post LOI meeting

Date: 30 May 2022, Time: 11:00AM-5:30PM (IST)

MOM Ref no.: SN2333-SHI-HBA-SE-MOM-002

1. Minutes of the Meeting

Parties have discussed the following and expressed their firm positions as below:

S No	Deviation post LOI	HBA's Firm Position	SHI's Firm Position	Status
1.1	Firm Period of 150 Days	120 Days + extension	120 Days + extension as per Signed LOI	Closed
1.2	Schedule Mobilization of AWB at Kakinada	HBA agrees to SHI Window Mechanism from 12-Aug-2022 to 25-Aug-2022	Window Mechanism from 12-Aug-2022 to 25-Aug-2022	Closed
1.3	Increase in Mobilization Fee	USD 1(One) Million in the Mobiliz ation Fee by reason of change in schedul e/ route/hi ke in bunker etc.	Mobiliz ation Fee to be maintai ned as per Signed LOI	Open
1.4	Window Mechanis m	Control of call down of mechan ism with SHI.	Modifie d Windo w Mechan ism is as given below with concept of arriving on any time between 72 hours.	Closed

Window Mechanism agreed between SHI & HBA:

Window No.	When	Window	By
1.	Contract Award	12 August 2022 - 25 August 2022	Contractor

2.	45 days prior to the first date of the Window #1(i.e. 27 June 2022)	10 days inside above window #1	Contractor				
3.	30 days prior to the first date of the Window #2	7 days inside above window #2	Contractor				
4.	15 days prior to the first date of the Window #3	5 days inside above window #3	Contractor				
	7 days prior	3 days inside	Contract or to the first date of the Window #4				
1.5	Zero Rate	Zero Rate will be applicable in the event that the ongoing work have come to stands	Zero Rate Condition shall be as follows as agreed by the parties earlier: 1. Loss of DP (Function lower than DP2) 2 Gangway is not connected to FPSO for reasons attributable to subcontractor 3. AWB not meeting minimum safe manning on-board as per the AWB minimum safe manning certificate. 4.Accommodation facilities on AWB are not habitable 5. During inspection of AWB or equipment provided by	Closed. SHI agrees on HBA's position.			

		till and the personnel/equipment etc. are removed from the vessel or the reasons attributable to HBA Reduced Rate Mechanism: 75%	Subcontractor on AWB by Government Authority. Zero rate shall only be applicable in the event, government authority inspection leads to disconnection of the gangway due to fault or noncompliance of the Subcontractor. 6. In case of confiscation of AWB by government authority due to fault or non-compliance of Subcontractor.	
1.6	Contract Entity change	- HBA Ruby Pte. Ltd. shall be contracting entity - HBA will share the organization structure. - HBA will provid	Contractor will analyse the entity change matter on receipt of complete organogram, rationally between companies and the following: - HBA to provide HBA Holding Pte. Ltd. - Tri Party agreement regularize the change in contracting entity. - Financial documents of the PCG Company	Closed. SHI agreeson HBA's position. SHI recommend tri-par

		e PCG from HBA International Pte Ltd.	ty agreement.			l be by 14 days' notice.	
1.7	Extension Notice	HBA proposed 30 days' notice for first extension of 30 days. And rest all extension wil	14 days notice period to be retained in line with earlier agreement.	Closed. SHI agrees on HBA's position.	1.8	Overall Limit of Liability	HBA increase limit from 20% to 25% of contract value	HBA to maintain at least 50% of the contract value.	Closed. SHI agrees on HBA's position.
					1.9	Liquidated damages	HBA increased to 4% per day of	Agreed. LD to be 4% per day of Mob fees to maximum to 20% of the Mob fees.	Closed. SHI agre

		Mob fees to maximum to 20% of the Mob fees in good faith.		esson HBA's position.	12 days from the payment period Suspension Period: Rights to	on.
1.10	Suspension / Termination	Payment Period: 30 days from Invoice submission. Grace period:	No right to HBA for Suspension. Termination rights after 30 days post expiry of Payment period of 30 days as agreed by the parties earlier.	Closed. SHI agreesson HBA's positi	HBA to suspend the work post 42 days (Payment period + Grace Period	

) for 5 days. ODR shall be payable during suspension period of 5 days. Termination: Right to terminate the contract by HBA post suspension of 5 days.				
1.11	Mutual Indemnity Agreement	HBA will propose a format for mutual indemnity to be signed by SHI & HBA.	SHI to check with HQ legal team for proper alignment.	Agreed in principal and to be checked with HQ legal.

1.12	Invoice	Noted and HBA agree for payment in project office's FCNR account in USD.	GST Tax Invoice from project office in USD and payment to FCNR account in USD.	Closed	diately subject to submission of Bank guarantee of equivalent amount and
1.13	Payment Schedule Mobilization Fee	USD 3.5 Million upon signing of Contract time	SHI agreed on the payment schedule for Mobilization Fee	Closed	GST invoice from the HBA Project office. USD 2.7

			5 Million upon departure from Cape Town and payment will be within 1st working day upon arrival in India. Balance Payment after Custom clearance.	
1.14	Payment Guarantee	HBA propose for Parent Company Guarantee or 2 months Charter duration OR side letter (Format	SHI to check with HQ legal team for proper alignment.	Closed. It is linked with 1.11, if indemnity is provided the

		shared by HBA) to be signed by HBA/ SHI/Telford and Goliath. It is linked with 1.11, if indemnity is provided then payment guarantee is not required.	no payment guarantee is not required.		
1.15	Force Majeure	Provided that the ongoing work have come to stands till and the personnel / equipment etc. are removed fro	Payment during Force Majeure as agreed earlier by the parties as below: 1. First 15 days of Force Majeure - Zero rate 2. From 16th day till 45th day of Force Majeure- 80% of ODR 3. From 46th day of Force Majeure-80% of ODR	Closed SHI agrees on HBA's position.	

		m the ves sel.			A's pos itio n on
1.1 6	COVID cost	Ou r pro pos al is bas ed on the cos t to wa rds Co vid -19 rel ate d pro toc ols req uir ed as per pre vai lin g G OI gui del ine s. HB	Included in ODR	O p e n	CO VI D: 1. cur ren t pre vai lin g co ndi tio ns the re are no CO VI D res tric tio ns/ req uir em ent s to co mp ly. 2. in the eve nt of

		any future regulations on COVID, any cost implications shall be borne by SHI on a cost plus 15% basis. 3. HBA's responsibility for COVID shall be for their personnel only.		
1.17	Catering Service	HBA agree to have contract with Sodexo (as suggested by contractor) @ negot	Agreed except the mark up rate.	Closed. SHI agrees on HBA's position.

iat
ed
by
Co
ntr
act
or
on
cos
t
plu
s
bas
is.
GS
T
on
So
de
xo
inv
oic
e
sha
ll
be
co
nsi
der
ed
as
cos
t to
sub
co
ntr
act
or
an
d
wil
l
be
bac
k

cha
rge
d
to
Co
ntr
act
or.
Co
ntr
act
or
wil
l
ind
em
nif
yin
g
ab
out
the
foo
d
qu
alit
y
an
d
the
ir
ser
vic
es.
SH
I
wil
l
pro
vid
e a
sep
ara
te
ret

		urn ind em nit y un der tak ing to HB A to un der tak e the cat eri ng co ntr act. Ma rk-up-15 %			bes t of its abi lity . HB A wil l en ga ge the ir co nsu lta nt to ass ist the tax ref un d on be hal f of SH I. HB A sha ll not be co ntr act ual ly obl
1.1 8	IGST refund	HB A wil l ass ist in get tin g ref un d to the	Part Contractual obligation.	of	O p e n

ige
d
to
obt
ain
the
tax
ref
un
d
to
SH
I.
HB
A
sha
ll
cha
rge
the
sa
me
to
SH
I
on
cos
t
plu
s
15
%
bas
is.

41. Thereafter, while referring to the letter dated 31.05.2022 sent by the respondent to the appellant under the subject "the Letter of Intent to Award the Work", the appellant, by a letter dated 02.06.2022, wrote as follows:-

"Date : 02/06/2022
Our Ref: HBA-21015-LTR-SHI-0002

Samung Heavy Industries India Pvt. Ltd.
Logix Cyber Park, Wing-B, 1st floor,
C - 28 & 29, Sector-62,
NOIDA-201301 (U.P.) INDIA

SUBJECT: SUBCONTRACTOR'S RESPONSE TO CONTRACTOR'S LETTER UNDER SUBJECT "THE LETTER OF INTENT TO AWARD THE WORK" DATED 31st MAY 2022

We wish to thank by Samsung Heavy Industries India Pvt. Ltd. (the "Contractor") for the letter of Intent to Award (LOI) dated 31st May 2022, in favor of HBA Offshore Pte Ltd or nominee (the "Subcontractor"), (letter reference number SN2333-SHI-HBA-SE-LTR-0005) and the Minutes of meeting dated 30th May 2022 (Ref: SN2333-SHI-HBA-SE-MOM-002)

Subcontractor rejects Contractor's letter as follows:

1. Mobilization Fees - The requirement for additional USD 1 (one) million is due to the delay in award of the contract in a fast changing and rising inflation market. As a prudent Subcontractor and to assist Contractor and Company maintain the now critical schedule, Subcontractor has had to rearrange the delivery plans to suit these changes and pay additional reservation fees. Meanwhile the Gangway donor vessel has been redeployed for new charter and hence vessel owners are forced to dismantle the gangway immediately and store ashore at Batam. The vessel "Nor Goliath" is now required to relocate from Cape Town to Batam in order to install the gangway on board. The breakdown associated cost has been provided vide our email dated "31st May 94052022" as attached.

2. Payment Schedule-As per the guidance received from our tax lawyers

Nangia Andersen, the time frame for setting up Project Office (PO) in India including GST registration, PAN, bank accounts etc., is likely to be in excess of 4 to 6 weeks after contract signing hence, payment of proposed initial part mobilization fees via Project Office (PO) is unlikely to be completed prior required mobilization of the Nor Goliath. The Subcontractor would like to highlight that the total cost for mobilization of the vessel to Kakinada is in excess of USD 7 Million.

3. Refund of Duty drawback - The Subcontractor reiterates that the cost and the responsibility for such activities are outside the scope of the services offered by the Subcontractor. This activity shall be undertaken by the Contractor.

4. COVID-Currently the Government of India/Competent Authority does not call for any COVID related restrictions for marine crew arriving in India. However additional COVID related preventive measures, specifically instructed by the Company or the Contractor or any future COVID related requirements shall be implemented by the Subcontractor on Cost plus basis.

The Subcontractor proposes as follows:

a. The Subcontractor urges Contractor to accept the additional mobilization (USD 1 Million) towards cost due to reasons beyond our control. Failure to do so promptly will escalate the mobilization cost further.

b. The Subcontractor proposes to receive Stand by Letter of Credit (SBLC) equivalent to full mobilization value from Contractor's bank as per the mutually agreed format, valid until arrival of vessel in Kakinada Port, India. The Subcontractor is willing to cooperate for mobilization and must have an non revocable Stand by Letter of Credit (SBLC) in order to make necessary arrangement through internal financing to facilitate payment of the mobilization cost incurred for Contractor's Project. In such case no advance payment will be required from the Contractor until the vessel is physically available in Indian waters.

The Subcontractor urges the acceptance of above open items by the contractors as soon as possible and not later than COB 2nd June 2022 followed by formal mutually agreed SBLC format by COB 3rd June 2022. The proposed Vessel inspection at Cape Town on 4-6th June 2022 is subject to agreement being reached on the open items. Any delays in Vessel's inspection will adversely impact the arrival schedule at Kakinada port.

Attachment 1: Email dated "31st May 2022"; Subject: Additional mob cost breakdown.

Should you need any further assistance, please do not hesitate to contact us.

Thank you.
Yours Faithfully,
for HBA OFFSHORE PTE. LTD. / HBA RUBY PTE. LTD.
Name : Hasan Basma
Position : Chief Executive Officer"

42. By the letter dated 03.06.2022, the respondent replied to the appellant's letter dated 02.06.2022 as follows:-

"To, HBA Offshore Pte. Ltd.
Attn. Mr. Hassan Basma
Date 25th May 2022 Your Ref.: HBA-21015-LTR-SHI-0002

Total Page 1 Our Ref.: SN2333-SHI-HBA SE-LTR-0006

Title KG D6 RUBY FPSO

Subject Letter of Intent to Award the Work

Dear Sir,

Contractor writes with reference to Subcontractor's letter : HBA-21015-LTR-SHI-0002 and HBA-21015 LTR-SHI-0002 REV dated 02nd June 2022, which was in response to Contractor's letter: SN2333-SHI HBA-SE-LTR-0005 dated 31st May 2022.

Contractor wishes to highlight that Contractor has accepted and closed most of the deviation items raised by Subcontractor post signing of LOI (e.g. Zero Rate, Mobilization Window, Extension Notice, Mutual Indemnity, Contract Entity Change, Overall Liability. LD etc.) and via referred letter, Contractor has identified only 4 (four) items for Subcontractor's acceptance.

However, Subcontractor has almost maintained its position for all these 4 (four) Items. Contractor is hereby clarifying his difficulties in accepting these items:

1. Mobilization Fee: This additional Mobilization Fee of 1M USD is introduced by Subcontractor due to change in gangway installation location after finalization of overall price and acceptance of LOI. Hence, it is not acceptable to such sudden change of increase in Mobilization Fee as it has been already approved previously by the relevant project stakeholders including Company.

However, considering project benefit and assistance to Subcontractor's request, Contractor is willing to discuss further with Subcontractor and Contractor is under discussion with Company for an amicable resolution.

2. Payment Schedule for Mobilization Fee: Contractor has already clarified that based on Subcontractor's demand, Contractor is ready to pay 3.5M USD against Mobilization Fee anytime, upon receipt of tax invoice with BG from Subcontractor's Project Office.

However, in case, Subcontractor still proposes to receive Mobilization Fee together on arrival of AWB to Kakinada, Subcontractor may kindly note that Subcontractor's demand of SBLC from Contractor in lieu of any advance is difficult, as it is not a process normally allowed by Contractor.

Under the above restriction and compliance issue, in order to provide Contractor's commitment that Contractor will pay to Subcontractor immediately on successful arrival of AWB to India, Contractor will provide a corporate guarantee with his full commitment.

Based on the above, Subcontractor is requested to understand the same and manage it either by expediting Project Office opening OR by proceeding with Contractor's corporate guarantee.

3. COVID Cost : Contractor appreciates Subcontractor's understanding and decision to absorb such cost associated with COVID in the Mobilization Fee.

4. Refund of Duty Drawback: The activities for refund of duty drawback amount is completely related to the re-exportation process and usually managed by the CHA and tax consultant. As Subcontractor is performing the duties of importation and exportation of AWB on Contractor's behalf, Subcontractor shall undertake this refund of duty drawback application to ensure timely refund, as a part of its work scope. However, Subcontractor will not be anyway responsible for the amount of refund, as it is based on the actual days of AWB's stay in India. Hence, Subcontractor

is requested to facilitate duty drawback refund process and arrange the refund as a part of its contractual obligation absorbing associated cost if any.

Hope the above convey Contractor's full commitment on payment and Subcontractor is requested to review and confirm its acceptance on the above for further necessary action for award of contract.

Sincerely yours,

Joonho Min

Managing Director

Samsung Heavy Industries India Pvt. Ltd."

43. On page 130 of the paper-book of the appellant is an email dated 07.06.2022 sent on behalf of the respondent to the appellant, which reads as follows:-

"Dear Mr. Vinayak,

As requested by phone call, please reply below 2 questions urgently so as to move forward from our end.

1. Swift Code of Oversea-Chinese Banking Corporation limited.

2. Please let us know SBLC from surety Company from our side is OK to your side.

Best regards

Yong Seob, Kim

Reliance PM(IC)_Deputy IC Project Manager

Mob: 01033992096 E-Mail: ys11.kim@samsung.com"

44. An email dated 08.06.2022 (page 133 of the paper-book) has been sent on behalf of the respondent to the appellant regarding issuance of SBLC which reads as follows:-

"Mr. Sudha,

As discussed, please note that we are considering issuance of SBLC from the following bank:

SBLC Issuance bank: Credit Agricole Corporate & Investment Bank

Bank Branch: Credit Agricole CIB, Seoul Branch

Swift Code: CRLYKRSE

Issuance of SBLC from Bank to Bank is not physically possible as per the issuing bank and SBLC can be issued only to HBA as per the commented format.

Hope you can manage your fund requirement using such SBLC from us.

Please review and provide your acceptance urgently to proceed.

Regards,

Palas Majumder

Jt. General Manager/Project Control Manager (IC)

Samsung Heavy Industries India Pvt. Ltd."

45. Further, another email of 08.06.2022 was subsequently sent to the various recipients of both the parties sending a link for a meeting for discussion on SBLC. Another email of 11.06.2022 (page 139) was sent on behalf of the appellant to the respondent attaching a letter with advance bank guarantee provided by the appellant to the respondent in order to urgently resolve the outstanding matter of mobilization payment.

46. It is reflected from the aforesaid that in the last meeting that took place on 30.05.2022, all the deviations post LOI were considered and the status of most of the deviations proposed were "closed" as the respondent agreed on the appellant's position. However, in respect of three material issues/deviations, the matter was still "open", namely increase in

mobilization fee, COVID cost and IGST refund. The deviation suggested regarding mutual indemnity agreement was agreed in principal by the respondent which was to be checked with the legal department of its Headquarters. With regard to the deviation in respect of payment guarantee, though the issue was closed, it was stated that it is linked with mutual indemnity agreement deviation, and if the said indemnity is provided, then payment guarantee is not required.

47. By means of email/letter dated 02.06.2022, in response to the respondent's letter dated 31.05.2022, the appellant raised its objections with regard to the issues of mobilization fee, payment schedule, refund of duty draw-back and Covid cost. Further, the appellant proposed as follows :-

"a. The Subcontractor urges Contractor to accept the additional mobilization (USD 1 Million) towards cost due to reasons beyond our control. Failure to do so promptly will escalate the mobilization cost further.

b. The Subcontractor proposes to receive Stand by Letter of Credit (SBLC) equivalent to full mobilization value from Contractor's bank as per the mutually agreed format, valid until arrival of vessel in Kakinada Port, India. The Subcontractor is willing to cooperate for mobilization and must have an non revocable Stand by Letter of Credit (SBLC) in order to make necessary arrangement through internal financing to facilitate payment of the mobilization cost incurred for Contractor's Project. In such case no advance payment will be required from the Contractor until the vessel is physically available in Indian waters."

48. The aforesaid letter was replied by the respondent on 03.06.2022. With regard to the mobilization cost, the respondent expressed its willingness to discuss the issue further for an amicable resolution. In respect of the payment schedule for mobilization fee, an alternative solution was proposed by the respondent. With regard to the Covid cost, the decision of the appellant to absorb such cost in the mobilization fee was appreciated by the respondent. With regard to refund of duty draw-back, the onus was put on the appellant to facilitate duty draw-back refund process and arrange the refund as a part of its contractual obligations absorbing associate cost, if any.

49. Even as reflected in the email of 11.06.2022 sent by the appellant to urgently resolve the outstanding matter of mobilization payment, it is evident that the issue of mobilization payment had not been closed by the parties. Under the facts and circumstances. narrated above, it cannot be said that there was full and complete meeting of minds between the parties that could assume the character of agreement having come into existence between them through correspondence. The issues of mobilization payment and other "open" issues were undoubtedly material terms on which there was evidently no meeting of minds between the parties. In the case of **Rickmers Verwaltung GMBH vs. Indian Oil Corporation**17, it was held as follows:-

"13. In this connection the cardinal principle to remember is that it is the duty of the court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the court is not empowered to create a contract for the parties by going outside the clear

language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn. Unless from the correspondence, it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that an agreement had come into existence between them through correspondence. The court is required to review what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. **The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence.**

14. From a careful perusal of the entire correspondence on the record, we are of the opinion that no concluded bargain had been reached between the parties as the terms of the standby letter of credit and performance guarantee were not accepted by the respective parties. In the absence of acceptance of the standby letter of credit and performance guarantee by the parties, no enforceable agreement could be said to have come into existence. The correspondence exchanged between the parties shows that there is nothing expressly agreed between the parties and no concluded enforceable and binding agreement came into existence between them. Apart from the correspondence relied upon by the learned Single Judge of the High Court, the fax messages exchanged between the parties, referred to above, go to show that the parties were only negotiating and had not arrived at any agreement. There is a vast difference between negotiating a bargain and entering into a binding contract. After negotiation of bargain in the present case, the stage never reached when the negotiations were completed giving rise to a binding contract. The learned Single Judge of the High Court was, therefore, perfectly justified in holding that clause 53 of the charter party relating to arbitration had no existence in the eye of law because no concluded and binding contract ever came into existence between the parties. The finding recorded by the learned Single Judge is based on proper appreciation of evidence on the record and a correct application of the legal principles. We find no merit in this appeal. It fails and is dismissed with costs."

(emphasis supplied)

50. Therefore, it is held that the correspondence and meetings between the parties after 31.5.2022 do not create a binding and concluded contract between them that would entitle the appellant to an injunction.

51. On record (page no.147 of the paper-book) is an email of 12.06.2022 sent on behalf of the appellant to the respondent informing that MWS inspection onboard Nor Goliath was successfully completed on 10.06.2022 at Cape Town. It is pertinent to mention here that this inspection was not the inspection contemplated in the LOI which was to take place after installation of the gangway.

Thereafter, by the communication dated 19.06.2022 sent by the respondent to the appellant, it was informed that as validity of the LOI has expired without any agreement of GCC and all the exhibits, LOI stands null and void.

52. As far as the aspect raised by the appellant that fraud is a ground to grant injunction, it is pertinent to mention here that admittedly, time was the essence of the LOI which is reflected in the aforequoted letter dated 22.05.2022 of the appellant. The "condition precedent" was required to be fulfilled on or before 14.5.2022 by a formal confirmation letter. As reflected above, the negotiation and exchange of correspondence between the parties extended beyond 14.5.2022. The binding of LOI was extended twice by the respondent, second one making the binding of LOI valid till 31.5.2022. In each of the aforesaid two extensions, to the binding of LOI granted by the respondent, it was categorically mentioned that other term and condition of LOI remained intact.

53. The quotation for completion of work submitted by the appellant was intended to be accepted by the respondent subject to "condition precedent" and formal signing of contract agreement between the appellant and the respondent. As reflected above, till 11.6.2022 the parties had failed to reach an agreement on all materials terms of deviation that were suggested by the appellant.

54. Evident it is from the minutes of the meeting dated 30.5.2022, from the letter dated 2.6.2022 sent by the appellant, and the letter dated 3.6.2022 sent by the respondent in response, and even the subsequent correspondence, that bonafide effort was made by the respondent to accommodate the deviations proposed by the appellant but on the issues of mobilization fee, payment schedule for mobilization fee and, refund of Duty Drawback, the respondent had clearly conveyed its reservations and hence, accommodation on part of appellant was requested. The last paragraph of the letter dated 3.6.2022 sent by the respondent is again being quoted below which is as follows:

"Hope the above convey Contractor's full commitment on payment and Subcontractor is requested to review and confirm its acceptance on the above for further necessary action for award of contract."

55. Further, the aforementioned e-mails dated 7.6.2022 and 8.6.2022 sent on behalf of the respondent to the appellant pertain to issuance of Stand by Letter of Credit (SBLC) to be issued on behalf of the respondent which, apparently pertains to the contentious issue of payment schedule of mobilization fee appearing in the aforementioned letters dated 2.6.2022 and 3.6.2022.

56. As regards the contention that the contract entered into between the respondent and Bhambhani Shipping on 27.6.2022 was on e-stamp paper issued on 6.4.2022 which 'hinges' towards the fact that the respondent was negotiating 'parallelly' with Bhambhani Shipping, the same has no substance. A copy of the contract made on 27.06.2022 was filed alongwith the counter affidavit of the respondent before the learned Judge. Neither was that contract challenged nor was the third party made a party in the proceedings before the learned Judge. There appear to be two e-stamp papers both dated 06.04.2022 which were purchased by the respondent, one for Rs. 500/= and the other for Rs. 100/=. The name of the third party does not appear in the columnar form in either of them. It is not an unknown practice for persons to procure stamp papers in advance for purpose of various

deeds and conveyances likely to be executed by them. No malafide can be attributed to the respondent merely due to the prior date of purchase of the e-stamp papers.

57. Moreover, there is no material on record to conclude that the respondent was undertaking any parallel negotiations with the third party. Further, there is nothing on record to support the appellant's contention that the third party, Bhambani Shipping, had offered in its bid, pursuant to the tender floated by the appellant, a vessel that was 'non-compliant'. The respondent itself is a contractor, having secured a contract from Reliance Industries Limited for provision of AWB with associated services during Hook-up and Commissioning of RUBY FPSO, and, it can be presumed, it had its own time constraint. On failure of parties herein to reach an agreement on GCC, the respondent was well within its rights to look for and pursue options for fulfillment of its contract with Reliance Industries Limited. Merely because the negotiation continued beyond 31.5.2022 between the parties would not amount to extension of the binding of the LOI or extending the time period for fulfillment of "condition precedent", indefinitely.

58. Under the facts and circumstances noted above, there is no doubt that both parties were trying to reach an agreement in bonafide manner and trying to negotiate and resolve the deviations suggested by the appellant which were standing in the way of a concluded contract i.e. GCC, which was "condition precedent" mentioned in the LOI. The fact that the parties failed to arrive at a consensus during business negotiations with regard to deviation suggested by the appellant does not, prima facie, lead to a conclusion that fraud had been committed by the respondent.

59. For any interim injunction to be granted in favour of the appellant, the pleadings and material on record should be able to demonstrate that there exist tenable grounds for interference by the Court on each of the grounds of prima facie case, balance of convenience and irreparable loss. The appellant has failed to demonstrate a prima facie case in its favour for grant of interim injunction. Admittedly, the LOI stands nullified and voided in view of the communication dated 19.6.2022 and the contract having already been awarded to a third party, namely, Bhambhani Shipping Limited, on 27.6.2022, which third party is not a party in the present proceedings, the balance of convenience also does not exist in favour of the appellant. Further, the appellant has failed to demonstrate what irreparable injury or loss would be caused to it which cannot be compensated in terms of money if an interim injunction is not granted. Clause (b) and (c) of sub-section (3) of Section 38 of the Act of 1963 grants discretion to the Court to grant an injunction where there exists no standard for ascertaining the actual damage caused or likely to be caused by the invasion on part of the defendant of the plaintiff's right to, or enjoyment of property and/or where the invasion is such that compensation in money would not afford adequate relief. As referred hereinabove, enclosed as Annexure-33 to the affidavit filed by the appellant is a quantification of expenses stated to have been incurred by the appellant in furtherance of the LOI. Therefore, the appellant can be compensated in terms of money. An efficacious remedy of arbitration is already provided in the LOI itself. The LOI cannot be specifically enforced, as has been held hereinabove.

60. It may, however, be mentioned here that an application under Section 9(1) of the Act of 1996 would be maintainable before or during arbitral proceedings or at any time after making of the arbitral award but before it is enforced in accordance with Section 36 unless, in view of the provisions of Section 9(3) once the arbitral tribunal has been constituted, the Court finds that circumstances exist which may not render the remedy provided under Section 17 of the Act of 1996 efficacious. Therefore, though such an application would accordingly be maintainable at any of the three stages mentioned in Section 9(1), however, an applicant would not be entitled to relief where the breach of an obligation arises from a contract, the performance of which cannot be specifically enforced. This issue has been considered only to explain the aspect of maintainability that was dealt with by the learned Judge.

61. It is pertinent to consider the argument raised by the learned counsel for the respondent that when an application under Section 9(1) is filed before the commencement of the arbitration proceedings, there has to be a manifest intention on part of the applicant to take recourse to arbitral proceedings. The judgments of **Sundaram Finance Ltd.** and **Firm Ashok Traders (supra)**, that have been referred to by the learned counsel for the respondent, were in respect of proceedings initiated prior to insertion of sub-sections (2) and (3) of Section 9 of the Act of 1996 by means of Act No.3 of 2016. As quoted above, sub-section (2) of Section 9 provides that 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. In light of sub-section (2) of Section 9 of the Act of 1996, there is a mandate for commencement of arbitral proceedings within a period of ninety days from the date of an order under sub-section (1) of Section 9. However, the period of ninety days provided by the provision may be extended by the Court for such further time as it may determine under the facts and circumstances of that case. Be that as it may, a party invoking Section 9 of the Act of 1996 must be ready and willing to go to arbitration as held in **Arcelor Mittal Nippon Steel India Ltd. vs. Essar Bulk Terminal Ltd**.18

62. In view of the facts and circumstances of the case, it is open for the appellant to raise any claim, dispute or differences between it and the respondent by resorting to arbitration as provided in the LOI itself. In that event, the arbitral tribunal shall decide the dispute and differences between the parties, uninfluenced by any observation made in this judgment. All pleas and contentions are left open for being raised before the arbitral tribunal. However, the appellant has failed to demonstrate any plausible ground for grant of an interim injunction as envisaged in Section 9 of the Act, 1996. This appeal lacks merit and is, accordingly, **dismissed**.

(2022) 11 ILRA 714
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.11.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Criminal Misc. Bail Application No. 6700 of 2021

Roop Singh Yadav **...Applicant**

Versus

C.B.I. **...Opp. Party**

Counsel for the Applicant:
Ratnesh Chandra, Purnendu Chakravarty, Sunil Kumar

Counsel for the Opp. Party:
Anurag Kumar Singh

Bail- Indian Penal Code, 1860 - Sections 409, 420,467, 468, 471 & 34 Prevention of Corruption Act, 1988 - Sections 7 & 13- Allegation-corruption and large scale irregularities committed in implementation of the Project "Gomti River Front Development-Accused-was Executive Engineer from the very beginning till 31st December, 2016-did not get the centage charge amounting to Rs. 14.42 Crores deposited-of work done during his tenure-Inquiry Committee opined-Applicant is responsible for not depositing the centage charge-unqualified and un-experienced companies were chosen -whole tendering process was an eye wash.

Bail rejected. (E-9)

List of Cases cited:

1. St.of Kerala Vs Raneef, (2011) 1 SCC 784

2. Sidhique Kappan Vs St.of U.P.), Petition for Special Leave to Appeal (Crl.) No.7844 of 2022

3. Raj Kumar Yadav Vs St.Thru CBI/ACB, Lucknow, 2022 SCC OnLine All 249

4. Y.S. Jagan Mohan Reddy Vs Central Bureau of Investigation, (2013) 7 SCC 439

5. St.of Bihar & anr. Vs Amit Kumar @ Bachcha Rai, (2017) 13 SCC 751

6. Rohit Tandaon Vs Directorate of Enforcement, (2018) 11 SCC 46

7. Serious Fraud Investigation Office Vs Nittin Johari & anr., (2019) 9 SCC 165

8. Chenna Boyanna Krishna Yadav Vs St.of Mah. & anr., (2007) 1 SCC 242

9. Kalyan Chandra Sarkar Vs Rajesh Ranjan @ Pappu Yadav & anr., (2004) 7 SCC 528

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

1. The present application under Section 439 of The Code of Criminal Procedure, 1973 (hereinafter referred to as "CrPC") has been filed, seeking bail in Criminal Misc Case No.181 of 2021 (CBI Vs. Roop Singh Yadav and others), arising out of FIR No.RC0062017A0026, lodged at Police Station CBI/ACB, Lucknow under Sections 120-B read with Sections 420, 467, 468 and 471 of The Indian Penal Code, 1860 (hereinafter referred to as "IPC") and Section 13 (2) read with Sections 13(1)(d) of the Prevention of Corruption Act, 1988 (hereinafter referred to as "PC Act") and substantive offences, pending in the Court of Special Judge, Anti-Corruption, CBI (West), U.P., District Lucknow.

2. This bail application has been filed after the learned Special Judge, Anti-Corruption, CBI (West), Lucknow has rejected the bail application of the accused-applicant vide order dated 14.06.2021.

3. Initially, on 19.06.2017 an F.I.R. , at Crime No.0831 of 2017 was lodged under Sections 409, 420, 467, 468, 471 and 34 IPC and Sections 7 and 13 PC Act at Police Station Gomti Nagar, Lucknow, U.P. on the subject matter i.e. corruption and large scale irregularities committed in implementation of the Project "Gomti River Front Development" .

4. The State Government decided to handover the investigation to the CBI vide request letter dated 21.07.2017 sent by Mr. Arvind Kumar, Principal Secretary, Home, Government of U.P. The CBI took over the investigation and regular case got registered, as mentioned above.

5. The case pertains to corruption, irregularities, fraud and criminal intent in implementation of "Gomti River Channelization Project" and "Gomti River Front Development" implemented by the Department of Irrigation, Government of U.P.

6. A large number of irregularities in implementation of the Project to earn Crores of rupees illegally by committing fraud, forgery and corruption came to light and the government, initially, appointed an Inquiry Committee headed by a retired High Court Judge vide order dated 04.04.2017 issued by His Excellency, the Governor of U.P.

7. The said Committee included Justice Alok Kr. Singh, Former Judge of this Court, as Chairman and two members, Prof. U.K. Chaudhary, retired from I.I.T., B.H.U, Varanasi, who is an expert in Reverine Engineering, and Professor, A.K. Garg, from Faculty of Finance, I.I.M, Lucknow, as experts.

8. The said Committee submitted its detailed report dated 16.05.2017, pointing out several gross irregularities, misuse of powers and positions etc. committed by the officers/officials in implementing the said Project and causing huge loss to the State Exchequer.

9. Before the work was started, the concerned Minister, heading the Irrigation Department, Principal Secretary, Irrigation Department and the Senior Engineers of the said Department visited China, Japan, Malaysia, Singapore, Sough-Korea and Austria. An estimate of Rs. 747.49 Crores was submitted by the Irrigation Department to the Government on 04.02.2015, which was approved by the Cabinet on 17.03.2015.

10. A High Level Task Force, under the Chairmanship of Chief Secretary, which also included Principal Secretary of the Irrigation Department, was constituted on 25.03.2015. From 08.05.2015 to 22.02.2017, 23 meetings of this Task Force took place. A revised estimate of Rs.1990.24 Crores was submitted by the Irrigation Department to the Government. However, the Cabinet, after taking opinion from Finance & Expenditure Committee, approved the budget for the said project at Rs.1513.51 Crores which was communicated by the Government to the Irrigation Department on 25.07.2016.

11. In the revised plan, the time limit of two years was fixed, though in earlier plan no time limit was fixed. Thus, the work ought to have been completed by March/April, 2017 inasmuch as first budget of the Project was approved in March/April, 2015. For such a huge Project, involving thousands crores of rupees, no consultancy firm/company was appointed.

12. The Committee, during its inquiry, took statements from Junior Engineers to Chief Engineers of the Department, Professors of I.I.T., Gandhinagar, Delhi and Roorki, Senior Vice-Chairman and Consultant of Gammon India, Proprietors and Consultants of M/s KK Spun and M/s Charoo Consultancy, Associated Directors and Associate of A.E. Com, Member Secretary of the Pollution Control Board and Chairman of S.E.E.A.A. The Committee was required to give its finding on following five points.

"i. Verification of budget/cost of the project of Gomti River Channelization Project;

ii. Responsibilities were to be fixed of the persons for spending 95% of the budget

on the Project, but the work was completed only upto 60%;

iii. Suitability/appropriateness of the Project for environment protection;

iv. Position of payment in accordance with the rules against the sanctioned items; and

v. Financial irregularities committed in implementation of the said Project."

13. The Committee opined that centage charge @ 6.875%, which came around 100 Crores, was not deposited. The Projected started in March/April, 2015 and after one year i.e. on 04.05.2016, the Engineer, In-charge in implementing the Project requested the High Level Task Force to waive 100 Cores as centage charge.

14. The High Level Task Force placed the matter before the Cabinet, however, the Cabinet rejected the proposal and vide letter dated 15.03.2017 Government intimated to the Chief Engineer and Head of Department that in view of the government orders, the deposition of centage charges was a must. It was further directed that after taking the necessary action, the Government should be informed accordingly.

15. The Committee found that no centage charge was deposited from March 2015 to December 2015 and during this period, the present accused-applicant, Roop Singh Yadav was the Executive Engineer, in-charge of the project. First time, in January, 2017 centage charge amounting to Rs. 14.42 Crores could get deposited by the then Executive Engineer in respect of works done during his tenure.

16. The accused-applicant was Executive Engineer from the very beginning till 31st December, 2016 and he did not get the centage charge amounting to Rs. 100 Crores deposited. The accused-applicant admitted before the Committee that centage charges were not deposited in anticipation of waiver from the Government. Even after the Government refused the waiver of the centage charges, centage charges were not deposited.

17. The Committee further opined that excluding amount for centage charges, labour-cess, maintenance charge and preliminary work, total Rs. 1314 Crores was allotted for different items of the Project. However, against Rs.1314 Cores, Rs.1384 Crores had been spent. Thus, Rs. 72 Crores more was spent than what was sanctioned. The Committee was of the opinion that it was the accused-applicant who was responsible for not depositing the centage charges as per the government order as it was the responsibility of the concerned Executive Engineer.

18. The Committee further recorded the finding that the unqualified and un-experienced companies were chosen and whole tendering process was a complete eye-wash and bogus. The companies were chosen in per-determined manner for the work and for this, the present accused-applicant, who was also looking after the additional work of Superintending Engineer, was responsible and he only accepted the tenders in a mala fide and motivated manner, against the principles of just, fair and valid procedure. The payments were made for some items more than 100 times than the sanctioned budget for such items and for this also, the Committee found the present accused-applicant responsible. The Committee further found that work progress was extremely wanting despite spending more

than sanctioned amount. In this gigantic corruption, the accused-applicant's involvement has been detailed vividly by the said Committee.

19. The CBI, in its charge-sheet, has found that the present accused-applicant, in pursuance to the decision taken by the High Level Task Force for construction of intercepting trunk drains on both banks of Gomti River, a note was put up by the accused-applicant, who was the then Executive Engineer for construction of the intercepting trunk drain on both banks of Gomti River in Lucknow city at an estimated cost of Rs. 230 Crores referring to the recommendation of the Chief Engineer's Committee. In spite of the prevalence of e-procurement system during the relevant period, the accused-applicant proposed that e-procurement system should not be followed as many experienced contractors registered with the department would not be be able to take part in the tender process thereby depriving the benefit of competitive rates. The accused-applicant proposed to get the work done through the registered contractors of the department, and the said proposal was approved by Mr. S.N. Sharma, the then Chief Engineer on 06.08.2015. Mr. S.N. Sharma, the then Chief Engineer was not authorized to approve NIT for the work of intercepting trunk drain as only the Chief Minister was authorized to enhance the scope of the work and the project cost.

20. The CBI, in its investigation, further revealed that NIT in respect of the work of intercepting trunk drain was published in 7 newspapers on 11.08.2015. Tenders were to be submitted by 'AA' category of contractors, registered with the Irrigation Department till 20.08.2015 i.e. the date of opening of tender by the Tender Committee in presence of the tenderers.

21. The tender date was extended twice, first time upto 29.08.2015 and second time upto 07.09.2015 to accommodate L-1 i.e. M/s K.K. Spun Pipes Private Limited and L-2, M/s Brand Eagles Longjian JV which were not registered with the Irrigation Department earlier and were registered only on the last date of submission of tender and its opening i.e. 07.09.2015. These two firms stood L-1 and L-2. It has been alleged that both the said firms did not fulfill the eligibility qualifications at the time of submitting the tender and investigation revealed that the name & style of M/s K.K. Spun Pipes Private Limited had been changed as M/s K.K. Spun India Limited. The conditions were relaxed to make M/s K.K. Spun Pipes Private Limited as eligible and a note was put up on 21.08.2015 by the accused-applicant to allow the manufacturers also to participate in the tendering process along with the registered contractors. The said note was to change eligibility the conditions of NIT which was already published. The said note was approved by the then Chief Engineer, Mr. S.N. Sharma even though he was not authorized to approve any relaxation pertaining to the registration of the contractors in terms of the relevant government orders. Any such relaxation could have been accorded only with the approval of the government. This relaxation in the tender conditions was not even published in any newspaper and only a notice was put up on the notice board of the office of the Irrigation Department.

22. The CBI further found that after relaxation of tender conditions, three parties, namely, (1) M/s K.K. Spun Pipes Private Limited, (2) M/s Brand Eagle Longjian JV; and (3) M/s Patel Engineering Limited were shown to have purchased the tender forms on 26.08.2015. All these firms

were not registered with the Irrigation Department but tenders were given to them and the tender conditions were relaxed by the aforesaid note in order to facilitate them to participate in the tendering process and award the contract to M/s K.K. Spun Pipes Private Limited. It is stated that fake sale of tender documents was made to M/s Patel Engineering Limited on the same day. The tenders were sold by Mr. Raj Kumar Yadav, co-accused, who made en entry "sold by me to M/s Patel Engineering Limited" in his own hand-writing under his signatures. L-1 and L-2 firms applied for registration on 04.09.2015 and were registered on 07.09.2015 i.e. last date of submission of tender and opening of the tender .

23. It is alleged that pursuant to criminal conspiracy, Mr. Himanshu Gupta, Director, M/s K.K. Spun Pipes Private Limited vide his letter dated 26.08.2015 addressed to the Superintending Engineer, XII Circle illegally authorized his representative, Mr. Surjeet Srivastava, Company Secretary to purchase the tender documents even though the company was not registered with the Irrigation Department and was not eligible to participate in the tendering process. Similarly, vide his letter dated 25.08.2015, Mr. Badri Shreshtha, Senior Adviser of M/s Brand Eagles Longjian JV had illegally authorized his representative, Mr. Shahid to purchase the tender documents even though the company was not registered with the Irrigation Department and was not eligible to participate in the tender. It was a cartel formation between M/s M/s K.K. Spun Pipes Private Limited and M/s Brand Eagle Longjian JV. The bank guarantee of Rs.4.6 Crores of the L-2 firm i.e. M/s Brand Eagle Longjian JV was made from the bank account of the L-1 company, M/s M/s K.K. Spun Pipes Private Limited. On 03.09.2015, these companies executed a sub-contract agreement in which it was agreed that M/s Brand Eagles Longjian JV was intending to bid for the work of construction of intercepting trunk drain and pass-on the entire work to M/s K.K. Spun Pipes Private Limited for execution and in lieu thereof, M/s K.K. Spun Pipes Private Limited agreed to provide bank guarantee of Rs. 4.6 Crores for the bid contract.

24. The investigation conducted by the CBI also revealed that in order to award the work to M/s K.K. Spun Pipes Private Limited forged documents of the 3rd company, M/s Patel Engineering Limited were used in order to fulfill the quorum of three parties. The documents used in the tender documents of M/s Patel Engineering in the work of intercepting trunk drain were photocopies of documents submitted by the said company during its participation in tender procedure for work of construction of Diaphragm wall earlier. The company, M/s Patel Engineering Limited had denied having purchased/submitted the tender documents for the work of intercepting trunk drain.

25. The present accused-applicant directed Mr. Raj Kumar Yadav, the then Junior Assistant in the office, to show the sale of tender documents to M/s Patel Engineering Limited and put up forged papers. It is the accused-applicant, who put up forged papers on behalf of M/s Patel Engineering Limited by obtaining photocopies from the earlier tenders submitted by M/s Patel Engineering Limited for other work. No earnest money was found deposited by M/s Patel Engineering Limited, and it had also not filled the rates in the tender documents. The present accused-applicant was master-mind and responsible for this forgery to favour of cartel of M/s K.K. Spun Pipes Private

Limited and M/s Brand Eagles Longjian JV.

26. The investigation further revealed that the bid of M/s Patel Engineering Limited was rejected on technical grounds and rates of M/s Brand Eagles Longjian JV and M/s K.K. Spun Pipes Private Limited were found to be L-2 and L-1 respectively. After opening of the tender on 07.09.2015, the rates were written on the comparative chart by said Raj Kumar Yadav on dictation of the present accused-applicant. The bids were not evaluated by Technical Evaluation Committee and despite being not qualified, the present accused-applicant invited M/s K.K. Spun Pipes Private Limited to execute the agreement. An agreement was executed between M/s K.K. Spun Pipe Private Limited and the present accused-applicant in the capacity of Superintending Engineer for completion of construction of intercepting trunk drain at an estimated cost of Rs.285.69 Crores within the stipulated period of one year. Against already high cost of Rs.285.69 Crores, the payment of Rs.337.32 Crores was made to M/s K.K. Spun Pipes Private Limited without obtaining any approval for the cost escalation from the Chief Minister or the Cabinet or any approval for increasing the length of the intercepting trunk drain from 27 kilometers to 32.8 kilometers. The accused-applicant did not obtain performance guarantee of Rs.5.77 Crores from M/s K.K. Spun Pipes Private Limited before execution of the agreement and he obtained earnest money of Rs.14.28 Crores instead of Rs.28.57 Crores, which was 50% of the earnest money.

27. The investigation had disclosed the commission of offences by Roop Singh Yadav, present accused-applicant, Raj Kumar Yadav, Himanshu Gupta and Kavish Gupta, Directors of M/s K.K. Spun Pipes Private Limited, Badri Shreshtha, Senior Adviser, M/s Brand Eagles Longjiyan JV, besides M/s K.K. Spun Pipes Private Limited punishable under Section 120-B read with Sections 420, 467, 468 and 471 IPC and Section 13(2) read with Sections 13(1)(d) PC Act and substantive offences thereof.

28. Heard Mr. Harshveer Pratap Sharma, learned Senior Counsel, assisted by Mr. Purnendu Chakravarty, learned counsel, appearing for the accused-applicant, as well as Mr. Anurag Kumar Singh, learned counsel, assisted by Mr. Akhilendra Singh, learned counsel, appearing for the respondent - CBI, and perused the entire record.

29. On behalf of the accused-applicant, Mr. Harshveer Pratap Sharma, learned Senior Counsel has submitted that the accused-applicant is in jail since 20.11.2020; investigation is complete and charge-sheet has been filed. It has been further submitted that the work of intercepting trunk drain done by M/s K.K. Spun Pipes Private Limited is of very good quality and leakages had been found at joint of barrel no. 14 and 18 in the length of 28 kilometers intercepting trunk drain. Only recovery of Rs.6,38,150/- under clause 18(A) of the contract has been recommended to be recovered from the contractor M/s K.K. Spun Pipes Private Limited. It has been further submitted that the investigation against co-accused is still pending and conclusion of the trial will take a long time. The accused-applicant cannot be kept in jail till the trial gets concluded inasmuch as there is no likelihood of completion of the trial at an early stage.

30. On behalf of the accused-applicant, the learned Senior Counsel, has further submitted that the accused-applicant is not keeping good health and his further

detention is neither desirable nor in the interest of justice. It has been further submitted that the delay in trial itself is an important factor for consideration while granting bail. Looking at the long custody of the accused-applicant, the accused-applicant may be enlarged on bail.

31. To buttress his submission, the learned Senior Counsel, appearing for the accused-applicant has placed reliance upon the judgment in the case reported in ***(2011) 1 SCC 784 (State of Kerala Vs. Raneef as*** well as judgment and order dated 9th September, 2022 passed by the Supreme Court in ***Petition for Special Leave to Appeal (Crl.) No.7844 of 2022 (Sidhique Kappan Vs. State of Uttar Pradesh).***

32. On behalf of the respondent - CBI, it has been submitted by Mr. Anurag Kumar Singh that the bail application of co-accused has already been rejected by this Court vide judgment and order dated 29th April, 2022 reported in ***2022 SCC OnLine All 249 (Raj Kumar Yadav Vs. State Thru CBI/ACB, Lucknow).*** It has been further submitted that the accused-applicant's involvement in commission of the irregularities, fraud and forgery has been found in four items i.e. (1) construction of diaphragm wall (2) construction of intercepting trunk drain, (3) construction of rubber dam and (4) preparation of vision document involving amount of Rs. 1055 Crores, covering 12 agreements executed under 4 NITs during 2015-16 and the accused-applicant has been signatory of those agreements. It has been further submitted that in this gigantic fraud and corruption, the accused-applicant has been one of the main architects in looting the public money in the name of Gomti River Channelization Project and Gomti River Front Development. Public money amounting to Rs.337.32 Crores had been transferred by the accused-applicant to a firm without requiring authorization by the competent authority and he has caused loss of huge proportions to the State Exchequer. The economic crimes of such mammoth scale and width are craftily planned and executed. It is well settled that economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. While granting bail, the Court has to keep in mind the nature of accusations, magnitude and gravity of offence and nature of evidence in support of accusations. The Supreme Court in the case reported in ***(2013) 7 SCC 439 (Y.S. Jagan Mohan Reddy Vs. Central Bureau of Investigation)*** has opined in paragraphs 34 and 35 as under:-

"34. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep-rooted conspiracies and involving huge loss of public funds need 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.

35. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations."

33. The Supreme Court in the case reported in ***(2017) 13 SCC 751 (State of***

Bihar and another Vs. Amit Kumar alias Bachcha Rai) in paragraphs-9 and 13, while considering the bail application of an accused involved in economic offence of huge magnitude, has held as under:-

"9. We are conscious of the fact that the accused is charged with economic offences of huge magnitude and is alleged to be the kingpin/ringleader. Further, it is alleged that the respondent-accused is involved in tampering with the answer sheets by illegal means and interfering with the examination system of Bihar Intermediate Examination, 2016 and thereby securing top ranks, for his daughter and other students of Vishnu Rai College, in the said examination. During the investigation when a search team raided his place, various documents relating to property and land to the tune of Rs 2.57 crores were recovered besides Rs 20 lakhs in cash. In addition to this, allegedly a large number of written answer sheets of various students, letterheads and rubber stamps of several authorities, admit cards, illegal firearm, etc. were found which establishes a prima facie case against the respondent. The allegations against the respondent are very serious in nature, which are reflected from the excerpts of the case diary. We are also conscious of the fact that the offences alleged, if proved, may jeopardise the credibility of the education system of the State of Bihar.

13. We are also conscious that if undeserving candidates are allowed to top exams by corrupt means, not only will the society be deprived of deserving candidates, but it will be unfair for those students who have honestly worked hard for one whole year and are ultimately disentitled to a good rank by fraudulent practices prevalent in those examinations. It is well settled that socio-economic offences constitute a class apart and need to be visited with a different approach in the matter of bail [Nimmagadda Prasad v. CBI, (2013) 7 SCC 466 : (2013) 3 SCC (Cri) 575; Y.S. Jagan Mohan Reddy v. CBI, (2013) 7 SCC 439 : (2013) 3 SCC (Cri) 552] . Usually socio-economic offence has deep-rooted conspiracies affecting the moral fibre of the society and causing irreparable harm, needs to be considered seriously."

34. In the case reported in **(2018) 11 SCC 46 (Rohit Tandaon Vs. Directorate of Enforcement)** the Supreme Court has again reiterated the consistent view that economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences, affecting the economy of the country as a whole. Paragraphs-21 and 22, which are relevant, are extracted hereunder:-

"21. The consistent view taken by this Court is that economic offences having deep-rooted conspiracies and involving huge loss of public funds need 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. Further, when attempt is made to project the proceeds of crime as untainted money and also that the allegations may not ultimately be established, but having been made, the burden of proof that the monies were not the proceeds of crime and were not, therefore, tainted shifts on the accused persons under Section 24 of the 2002 Act.

22. It is not necessary to multiply the authorities on the sweep of Section 45 of the 2002 Act which, as aforementioned, is no more res integra. The decision in Ranjitsing

Brahmajeetsing Sharma v. State of Maharashtra [Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, (2005) 5 SCC 294 : (2005) SCC (Cri) 1057] and State of Maharashtra v. Vishwanath Maranna Shetty [State of Maharashtra v. Vishwanath Maranna Shetty, (2012) 10 SCC 561 : (2013) 1 SCC (Cri) 105] dealt with an analogous provision in the Maharashtra Control of Organised Crime Act, 1999. It has been expounded that the Court at the stage of considering the application for grant of bail, shall consider the question from the angle as to whether the accused was possessed of the requisite mens rea. The Court is not required to record a positive finding that the accused had not committed an offence under the Act. The Court ought to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. The duty of the Court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. Further, the Court is required to record a finding as to the possibility of the accused committing a crime which is an offence under the Act after grant of bail."

35. Again, in the case reported in ***(2019) 9 SCC 165 (Serious Fraud Investigation Office Vs. Nittin Johari and another)***, the Supreme Court has held that stringent view should be taken by the Court towards grant of bail with respect to economic offences. Paragraphs 24, 25, 26 and 27 of Serious Fraud Investigation Office Vs. Nitin Johari and another's case (supra) are extracted hereunder:-

" 24. At this juncture, it must be noted that even as per Section 212(7) of the Companies Act, the limitation under Section 212(6) with respect to grant of bail is in addition to those already provided in CrPC. Thus, it is necessary to advert to the principles governing the grant of bail under Section 439 of CrPC. Specifically, heed must be paid to the stringent view taken by this Court towards grant of bail with respect of economic offences. In this regard, it is pertinent to refer to the following observations of this Court in Y.S. Jagan Mohan Reddy [Y.S. Jagan Mohan Reddy v. CBI, (2013) 7 SCC 439 : (2013) 3 SCC (Cri) 552] : (SCC p. 449, paras 34-35) "34. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep-rooted conspiracies and involving huge loss of public funds need 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. 35. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations." This Court has adopted this position in several decisions, including Gautam Kundu v. Directorate of Enforcement [Gautam Kundu v. Directorate of Enforcement, (2015) 16 SCC 1 : (2016) 3 SCC (Cri) 603] and State of Bihar v. Amit Kumar [State of Bihar v. Amit Kumar, (2017) 13 SCC 751 : (2017) 4 SCC (Cri) 771] . Thus, it is evident that the above factors must be taken into account while determining whether bail should be granted in cases involving grave economic offences.

25. As already discussed supra, it is apparent that the Special Court, while considering the bail applications filed by

Respondent 1 both prior and subsequent to the filing of the investigation report and complaint, has attempted to account not only for the conditions laid down in Section 212(6) of the Companies Act, but also of the general principles governing the grant of bail.

26. In our considered opinion, the High Court in the impugned order has failed to apply even these general principles. The High Court, after referring to certain portions of the complaint to ascertain the alleged role of Respondent 1, came to the conclusion that the role attributed to him was merely that of colluding with the co-accused promoters in the commission of the offence in question. The Court referred to the principles governing the grant of bail as laid down by this Court in Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra [Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, (2005) 5 SCC 294 : 2005 SCC (Cri) 1057] , which discusses the effect of the twin mandatory conditions pertaining to the grant of bail for offences under the Maharashtra Control of Organised Crime Act, 1999 as laid down in Section 21(4) thereof, similar to the conditions embodied in Section 212(6)(ii) of the Companies Act. However, the High Court went on to grant bail to Respondent 1 by observing that bail was justified on the "broad probabilities" of the case.

27. In our considered opinion, this vague observation demonstrates non-application of mind on the part of the Court even under Section 439 CrPC, even if we keep aside the question of satisfaction of the mandatory requirements under Section 212(6)(ii) of the Companies Act."

36. Mere languishing in jail, during trial, cannot be a ground for granting bail if the conspiracy and fraud is of very high magnitude. The Supreme Court in the case of State of Bihar and another Vs. Amit Kumar alias Bachcha Rai (supra) in paragraph-8 has held as under:-

"8. A bare reading of the order impugned discloses that the High Court has not given any reasoning while granting bail. In a mechanical way, the High Court granted bail more on the fact that the accused is already in custody for a long time. When the seriousness of the offence is such the mere fact that he was in jail for however long time should not be the concern of the courts. We are not able to appreciate such a casual approach while granting bail in a case which has the effect of undermining the trust of people in the integrity of the education system in the State of Bihar."

37. The Court has to take into consideration while considering the bail application, nature of offence and the Court should refuse the bail if the offence is serious and is of huge magnitude, particularly, in economic offences. Corruption is a menace which is eating the vitals of economy of this country. Thousand of Crores of public money is looted by corrupt people in the system. Offence of the magnitude, as in the present case could not have been committed without involvement of the high-ups in the Government. The accused-applicant was enjoying the patronage and blessings of high-ups in the Government, which is evident from the forgery and fraud committed by him while allocating the work to ineligible persons, who allegedly committed corruption in conspiracy with others. The sentence provided under Section 467 IPC is upto life and, therefore, this Court is of the view that two years imprisonment is not as such which itself

would warrant this Court to grant bail to the accused-applicant.

38. It is well settled that when the gravity of offence alleged is severe, mere period of incarceration or the fact that the trial is not likely to be concluded in near future cannot jointly entitle the accused-applicant to be enlarged on bail. The Supreme Court in the case reported in ***(2007) 1 SCC 242 (Chenna Boyanna Krishna Yadav Vs. State of Maharashtra and another)*** in paragraph-16 has held as under:-

"16. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the appellant has committed offences under Section 3(2) or Section 24 of MCOCA. What is to be seen is whether there is a reasonable ground for believing that the appellant is not guilty of the two offences, he has been charged with, and further that he is not likely to commit an offence under MCOCA while on bail. As noted above, the circumstance which has weighed with the High Court to conclude that the appellant had the knowledge of the organised crime syndicate of Telgi, printing fake stamps, etc. and these were being sold under the protection of the appellant and hence he had abetted an organised crime, is the alleged conversation between him and Telgi in January 1998, after the kidnapping incident. In our view, the alleged conversation may show the appellant's acquaintance with Telgi but may not per se be sufficient to prove the appellant's direct role with the commission of an organised crime by Telgi, to bring home an offence of abetment in the commission of organised crime falling within the ambit of Section 3(2) of MCOCA and/or that he had rendered any help or support in the commission of an organised crime whether before or after the commission of such offence by a member of an organised crime syndicate or had abstained from taking lawful measures under MCOCA, thus, falling within the purview of Section 24 of MCOCA. It is true that when the gravity of the offence alleged is severe, mere period of incarceration or the fact that the trial is not likely to be concluded in the near future either by itself or conjointly may not entitle the accused to be enlarged on bail. Nevertheless, both these factors may also be taken into consideration while deciding the question of grant of bail."

39. The Court is required to balance the individual interest viz.a.viz the interest of the society while considering the bail plea. No right is an absolute right and reasonable restriction can be placed on them. Mere long incarceration in jail as under-trial is not sufficient ground to enlarge an accused on bail if the facts & circumstances of the case and interest of the society do not warrant for enlarging the accused-applicant on bail. The Supreme Court in the case reported in ***(2004) 7 SCC 528 (Kalyan Chandra Sarkar Vs. Rajesh Ranjan alias Pappu Yadav and another)*** has held that three years incarceration would not itself entitle the accused-applicant to be released on bail nor the fact that the trial is not likelihood to be concluded in near future would be sufficient for enlarging the accused-applicant on bail considering the gravity of offence. Paragraph-14 of the said judgment, which is relevant, is extracted hereunder:-

"14. We have already noticed from the arguments of learned counsel for the appellant that the present accused had earlier made seven applications for grant

of bail which were rejected by the High Court and some such rejections have been affirmed by this Court also. It is seen from the records that when the fifth application for grant of bail was allowed by the High Court, the same was challenged before this Court and this Court accepted the said challenge by allowing the appeal filed by the Union of India and another and cancelled the bail granted by the High Court as per the order of this Court made in Criminal Appeal No. 745 of 2001 dated 25-7-2001 [Rajesh Ranjan v. State of Bihar, (2000) 9 SCC 222] . While cancelling the said bail this Court specifically held that the fact that the present accused was in custody for more than one year (at that time) and the further fact that while rejecting an earlier application, the High Court had given liberty to renew the bail application in future, were not grounds envisaged under Section 437(1)(i) of the Code. This Court also in specific terms held that the condition laid down under Section 437(1)(i) is sine qua non for granting bail even under Section 439 of the Code. In the impugned order it is noticed that the High Court has given the period of incarceration already undergone by the accused and the unlikelihood of trial concluding in the near future as grounds sufficient to enlarge the accused on bail, in spite of the fact that the accused stands charged of offences punishable with life imprisonment or even death penalty. In such cases, in our opinion, the mere fact that the accused has undergone certain period of incarceration (three years in this case) by itself would not entitle the accused to being enlarged on bail, nor the fact that the trial is not likely to be concluded in the near future either by itself or coupled with the period of incarceration would be sufficient for enlarging the appellant on bail when the gravity of the offence alleged is severe and there are allegations of tampering with the witnesses by the accused during the period he was on bail."

40. Considering the magnitude of corruption, prima facie, involvement of the accused-applicant in commission of the offences in furtherance of the criminal conspiracy and the fact that Three Members Committee, headed by Former Judge of this Court, and the CBI, in their inquiries/investigation, have clearly found the accused-applicant's involvement in huge corruption, forgery, fraud and misusing his official position, this Court does not deem it appropriate to enlarge the accused-applicant on bail at this stage and, therefore, the bail application is hereby **rejected**.

(2022) 11 ILRA 726
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 21.11.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Misc. Bail Application No. 13486 of 2022

Shakuntala Devi alias Madhuri ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Hom Narayan Awasthi

Counsel for the Opp. Party:
G.A.

Bail - Indian Penal Code-, 1860 - Sections 498-A, 304-B & 506 - Dowry Prohibition Act, 1961 - Section 3/4-Applicant is mother in law of the deceased -General allegations-no specific allegation-Applicant living separate-cause of death-Asphyxia due to ante mortem hanging only with one ligature mark-no other

injury-period of detention and unlikelihood of early conclusion of trial-and absence of convincing material.

Bail Granted. (E-9)

List of Cases cited:

Geeta Mehrotra Vs St.of U.P., (2012) 10 SCC 741

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Shri Hom Narayan Awasthi, learned counsel for the applicant, Mrs. Kiran Singh, learned AGA-1 for the State and perused the material available on record.

2. The applicant **Shakuntala Devi Alias Madhuri** has moved the present bail application seeking bail in case crime No. 360 of 2021, under Sections 498-A, 304-B and 506 I.P.C. and Section 3/4 of Dowry Prohibition Act, Police Station Khairighat, District Bahraich.

3. Learned counsel for the applicant submits that first information report has been lodged with delay of about five days without giving any plausible explanation. The applicant is innocent and has falsely been implicated in the present case due to mala fide intention. The applicant is mother-in-law of the deceased. The marriage of applicant?s son and deceased was solemnized on 25.02.2020. The relation between the deceased and the son of the applicant was cordial except some minor dispute which always happens between husband and wife. As per the version of FIR general allegation regarding additional demand of dowry in the form of Rs. two lacs and a Maruti Car and causing cruelty to the deceased was made against the applicant and her other family members named in the FIR and no specific allegation for the same was made against the applicant or her family members named in the FIR. Prior to the alleged incident no any complaint was ever made either by the deceased or her parents to any of the authorities regarding additional demand of dowry or causing cruelty to the deceased by the applicant or her family members named in the FIR.

4. Learned counsel for the applicant further submits that applicant was living separately from the deceased and his son, as is evident from the Parivar Register, copy of which is annexed as Annexure No. 2 to this bail application. The applicant could never be the beneficiary of the additional demand of dowry in the form of one Maturti Car and Rs. 2 lac cash. The deceased was a short tempered lady and was annoyed with her husband as her husband was spending money in the medical treatment of his father and was not fulfilling her lavish wishes, that is why the deceased was living under stress and mental depression and on the date of incident the deceased committed suicide by hanging herself with sari from the hook installed in ceiling of the room. The husband of the deceased informed the son of the complainant namely Satyam on phone about the alleged incident.

5. Learned counsel for the applicant further submits that at the time of inquest of the corpse of the deceased, the family members of the complainant and the applicant were present. The post mortem of the deceased was conducted. The cause of death of deceased was Asphyxia due to ante mortem hanging only with one ligature mark and except one ligature mark there is no any other injury found on the body of the deceased.

6. Learned counsel for the applicant further submits that the deceased

committed suicide by hanging herself. In support of his argument, learned counsel of the applicant placed reliance upon the extract of Modi?s Medical Jurisprudence wherein definition of hanging has been described and as per the post mortem report of the deceased it is almost identical to the definition of hanging given in Modi?s Jurisprudence. Learned counsel for the applicant submit that since as per the Modi?s jurisprudence and as per the post mortem report of the deceased they both are identical, it it is a case of hanging and not of murder or strangulation.

7. Learned counsel for the applicant has relied upon the judgment of Hon'ble Apex Court in the case of **Geeta Mehrotra Vs. State of U.P., (2012) 10 SCC 741** and has submitted that these facts have also been taken cognizance by the Apex Court whereby the Court stated that there are large number of false and frivolous cases lodged against the entire family members of the husband and submitted that there are general allegations against the applicants and, therefore, giving benefit of the judgment of Apex Court in the case of **Geeta Mehrotra (supra)** the applicant is entitled to be released on bail.

8. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that she is ready to cooperate with the process of law and shall faithfully make herself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon her. It has also been pointed out that the applicant is not having any criminal history and is in jail since 14.09.2022 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

9. Learned A.G.A.-1 while opposing the prayer for bail of applicant submitted that the death of the deceased had occurred within seven years of her marriage and she was being subjected to cruelty in lieu of demand of dowry, therefore, the applicant is not entitled to be released on bail.

10. After perusing the record in the light of the submissions made at the Bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, considering the fact that the applicant is mother in law of the deceased and was living separately from the deceased and his son as is evident from the Parivar Registrar (Annexure No.2) and she cannot be the beneficiary of the additional demand of dowry in the form of Maruti Car and cash amount of Rs 2,00,000/-; there is general allegation made in the FIR against the applicant and her other family members named in the FIR regarding additional demand of dowry and causing cruelty to the deceased and no specific allegation for the same has been made to the applicant; nor prior to the alleged incident any complainant regarding demand of dowry or causing cruelty to the deceased was made either by the deceased or her family members to any of the authorities against the applicant or her family members; and as per the post mortem report of the deceased, the cause of death is asphyxia due to ante

mortem hanging with one ligature mark; thus there appears to be force in the arguments as advanced by the learned counsel for the applicant that the definition given in Modi?s Medical Jurisprudence regrading hanging and the injury mark given by the doctor in the post mortem report it appears to be a case of hanging and not of strangulation or murder and further considering the larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the cases of **Geeta Mehrotra (supra) and Dataram Singh Vs. State of UP and another, reported in (2018) 3 SCC 22**, this Court is of the view that the applicant may be enlarged on bail.

11. The prayer for bail is granted. The application is allowed.

12. Let the applicant, **Shakuntala Devi Alias Madhuri** involved in Case Crime No. 360 of 2021, under Sections 498-A, 304-B and 506 IPC and Section 3/4 of Dowry Prohibition Act, Police Station Khairighat, District Bahraich be enlarged on bail on her executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date fixed in the court below and her personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

(3) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

(4) The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

(5) In case, the applicant misuses the liberty of bail and in order to secure her 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 her in accordance with law, under Section 174-A of the Indian Penal Code.

(6) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court default of this condition is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of his bail and proceed against her in accordance with law.

(7) The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

(8) 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.

13. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

14. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merit of the case.

(2022) 11 ILRA 730
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2022

BEFORE

THE HON'BLE AJAY BHANOT, J.

Criminal Misc. Bail Application No. 16961 of 2022

Anil Gaur @ Sonu @ Sonu Tomar ...Applicant

Versus

State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Nanhe Lal Tripathi, Sri Satish Kumar Mishra

Counsel for the Respondents:
G.A.

Legal Aid-Applicant-economical deprived class-abandoned by near and dear ones after his imprisonment-no effective pairokar-directions issued to SLSA to devise a scheme to identify prisoners- who are unable to file bail application-or unable to effectively prosecute their pending bail application-to provide legal aid to them-Jail authorities - duty-to prevent "undue long detention of prisioners-under Regulation 439 (a)of the U.P. Jail Manual-nodirect evidence against the Applicant-no motive-case of circumstantial evidence-recovered items were planted-no independent witness to the recovery.

Bail allowed. (E-9)

List of Cases cited:

1. Mohammad Giasuddin Vs St.of Andhra Pradesh, (1977) 3 SCC 287

2. Sunil Batra (II) Vs Delhi Administration, (1980) 3 SCC 488

3. Sheela Barse Vs St.of Mah., (1987) 4 SCC 373

4. Nilabati Behera (Smt) @ Lalita Behera (Through the Supreme Court Legal Aid Committee) v. St.of Orissa and Ors, (1993) 2 SCC 746

5. Shabnam Vs U.O.I. & ors., (2015) 6 SCC 702

6. Gobardhan Singh & anr.Vs St.of U.P, 2013 SCC Online All 13141

7. Bachchey Lal Vs St.of U.P. , 2014 SCC Online All 15093, 2014 SCC Online All 14128, 2014 SCC Online All 14986

8. Junaid Vs St.of U.P., 2021 (6) ADJ 511

9. Ajeet Chaudhary Vs St.of U.P. & anr., (2021) 1 ADJ 559

10. Queen-Empress Vs Pohpi & ors. , 1891 SCC Online All 1

11. Hussainara Khatoon & ors. (IV) Vs Home Secretary, St.of Bihar, Patna, (1980) 1 SCC 98

12. Madhav Hayawadanrao Hoskot Vs St.of Mah. & ors.

13. Sukh das Vs Union Territory of Arunachal Pradesh

14. St.of Andhra Pradesh Vs Challa Ramkrishna Reddy, (2020) 14 SCC 126

15. Chhotey Vs St.of U.P. in Criminal Misc. Bail Application No.5328 of 2018

16. Rajnish v. St.of U.P. in Criminal Misc. Bail Application No.20805 of 2022

17. Mahesh Chandra Shukla Vs St.of U.P. in Criminal Misc. Bail Application No.17940 of 2022

18. Vikas Dwivedi Vs St.of U.P. in Criminal Misc. Bail Application No.22375 of 2020

19. V. Ramu Vs St.of U.P. in Criminal Misc. Bail Application No.17912 of 2019

20. Khatri & ors. (II) Vs St.of Bihar & ors., (1981) 1 SCC 627

21. Madhav Hayawadanrao Hoskot Vs St.of Mah., (1978) 3 SCC 544

22. Suk das Vs Union Territory of Arunachal Pradesh, (1986) 2 SCC 401

23. St.of Andhra Pradesh Vs Challa Ramkrishna Reddy, AIR 2000 SC 2083

24. K.H.Nazar Vs Mathew K.Jacob & ors., (2020) 14 SCC 126

25. U.O.I. Vs +Prabhakaran Vijaya Kumar & ors., (2008) 9 SCC 527

26. Allahabad Bank & anr. Vs All India Allahabad Bank Retired Employees Assc., (2010) 2 SCC 44

27. Bharat Coop. Bank (Mumbai) Ltd. Vs Coop. Bank Employees Union, (2007) 4 SCC 685

28. Re-inhuman conditions in 1382 jails' (Writ Petition (Civil) No.406 of 2013),

(Delivered by Hon'ble Ajay Bhanot, J.)

1. The judgement is being structured in the following conceptual framework to facilitate the discussion:

I Introduction

II Submissions of learned counsels

III Prisoners' rights

IV Right of bail

V Legal aid:

- A. Constitutional Law Backdrop
- B. Statutory Scheme of LSA Act, 1987
- C. Instances and Consequences of denial of legal aid
- D. NLSA Scheme for Legal aid
- E. Summation

VI Conclusions & Directions

VII Order on bail application

VII Appendix I

I. Introduction

1. Shri Nanhe Lal Tripathi, learned counsel assisted by Shri Satish Kumar Mishra, learned counsel for the applicant predicates his submissions on merits by contending that the applicant's inability to access legal aid raises legal and constitutional issues which directly affect the right of bail and the personal liberty of the applicant. Members of the Bar also submit that this problem is faced by many prisoners. The issue regarding the scope and right of legal aid to prisoners arises in the circumstances of this case, but also transcends the facts of this case.

2. While discharging judicial functions in bail determination this Court is not denuded of its status as a constitutional court. The court is under a constitutional obligation to address various legal and constitutional issues which impact the grant of bail if they arise in the facts of a case. Forgotten humanity in jails has been brought in full glare of the judicial process. In these facts and circumstances the court cannot abdicate its constitutional role, and turn a blind eye to their suffering.

II. Submissions of learned counsels

3. Shri Nanhe Lal Tripathi, learned counsel assisted by Shri Satish Kumar Mishra, learned counsel for the applicant makes the following submissions:

A. The applicant belongs to a economically deprived class of citizenry, who was abandoned by his near and dear ones after his imprisonment. He has no effective pairokar to conduct his case.

B. The applicant did not have access to legal aid to file his bail applications in a timely manner before the trial court as well as this Court.

C. Denial of legal aid delayed recourse to the legal remedy of bail, and caused unjustified incarceration.

D. Right of the applicant to legal aid is a fundamental right and is also a statutory right vested in him by the Legal Services Authorities Act, 1987.

4. Learned members of the Bar also made submissions on the issue of legal aid and pointed out various other instances where under trials in cases of heinous crimes could not approach the courts for consideration of bail applications in a timely manner due to lack of legal aid. Shri Rishi Chaddha, learned A.G.A. and Shri Paritosh Kumar Malviya, learned A.G.A. have assisted the Court on behalf of the State.

Learned counsels at the Bar have called attention to the statutory provisions of the Legal Services Authorities Act, 1987, rulings of constitutional courts and the jail manual, which will be discussed in the narrative.

III. Prisoners' Rights

"Prison and the authorities conspire to rob each man of his dignity"1.

5. Stephen William Hawking in his book "The Grand Design" relates an incident where keeping fish in bowls was banned in Italy. The sponsor of the measure demonstrated that fish in spherical bowls develop a distorted vision with passage of time. Prison conditions which are not under constitutional watch will degrade human life and distort human vision.

6. India's long freedom struggle seared the experience of oppressive prison regimes and steeled the resolve to improve prison conditions.

7. Constitutional courts have fortified certain inviolable fundamental rights of prisoners. The discussion will profit by referencing some authorities. While examining conditions of jailed prisoners, the Supreme Court in **Sunil Batra v. Delhi Administration and Ors.**2, acknowledged the restricted fundamental rights of prisoners but found in no uncertain terms that "Part III of the Constitution does not part company with the prisoner at the gates, and judicial oversight protects the prisoners' shrunken fundamental rights, if flouted, frowned upon or frozen by the prison authority." Further"...The operation of Article 14, 19 and 21 may be pared down for a prisoner but not puffed out altogether." Finally the following proposition was entrenched in the body of case laws relating to fundamental rights of prisoners."56...So the law is that for a prisoner all fundamental rights are an enforceable reality, though restricted by the fact of imprisonment."

8. **Hussainara Khatoon and others (I) v. Home Secretary, State of Bihar**3 recognized the right of speedy trial of a prisoner flowing from Article 21 of the Constitution of India "to be implicit in the broad sweep" of Article 21 of the Constitution. Other facets of fundamental rights of prisoners have been propounded in **Mohammad Giasuddin vs. State of Andhra Pradesh**4, **Sunil Batra (II) v. Delhi Administration**5, **Sheela Barse v. State of Maharashtra**6, **Nilabati Behera (Smt) alias Lalita Behera (Through the Supreme Court Legal Aid Committee) v.**

State of Orissa and Ors7, and **Shabnam v. Union of India and others**8.

9. This Court in **Gobardhan Singh and another v. State of U.P**.9 noted the abject conditions of a large number of forgotten "nameless" prisoners and set forth:

"This is not just an isolated case. We realize that there are a large number of such cases of forgotten "nameless" prisoners who have become "ticket numbers" and are languishing in jails for prolonged periods of time, as under trials (UTs) or as convicted prisoners whose appeals are pending almost interminably before Higher Courts, who may or may not have filed bail applications and who have become very old, or are ailing from an incurable disease, or who may even have become immobile or have lost any capacity to commit a further crime. The complainant (if any) has lost any interest in prosecuting them or in keeping them in jail any longer. Usually the families of such accused have been destroyed, or reduced to such abject poverty, as happens when a family member contracts a serious disease, that they cannot pay counsel's fee or incur the recurring unavoidable expenditures in Court offices to get applications and affidavits prepared or the matters listed, and the bail or case disposed of. The relatively luckier children and dependents may perhaps have been provided with a roof over their heads by a grudging relative, or they may have been placed in a State or private run children's home. Others may simply have been abandoned to the street. The daughters in the family may not have been married off, and may be getting exploited by some social deviant in the family or outside. Keeping such prisoners in jail any further, in the already overcrowded jails, serves no useful purpose and is an unnecessary burden on the State and the tax payer."

10. The concerns expressed in **Gobardhan Singh (supra)** were followed up by commensurate action in **Bachchey Lal v. State of U.P.**10 by issuing various directions for ameliorating the conditions of prisoners and upholding their rights.

11. Constitutional courts have consistently protected the dignity and rights of prisoners in jails.

IV. Right of bail

12. The right of bail is acknowledged as a statutory right, but is also seen in the perspective of constitutional liberties by good authorities in point. Various facts of the right to seek bail were examined by this Court in **Junaid Vs. State of U.P**.11 and **Ajeet Chaudhary Vs. State of U.P. and another**12

13. The aforesaid authorities establish the undeniable linkage between right of bail and fundamental right to personal liberty. Every prisoner has a fundamental right to file an application for bail before the competent court as per law and without delay.

V. Legal Aid: A. Constitutional Law Backdrop

14. Liberty was assured to all citizens in the constitutional text, but justice is dear to many citizens in the real world. Inalienable constitutional rights are severed by compelling socio economic realities. Poverty, social exclusion and lack of legal aid impede the course of justice. Article 39A of the Constitution of India removes the barriers in redeeming the preamble

promise of securing justice for all citizens. Article 39A of the Constitution of India underscores the importance of providing legal aid to serve equal justice to all citizens and states so:

"39A. EQUAL JUSTICE AND FREE LEGAL AID.

The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

15. Free legal aid is today enshrined as a statutory right in the Legal Services Authorities Act. Free legal aid was earlier exalted as a fundamental right by constitutional law. Holdings of constitutional courts form the backdrop of the Legal Services Authorities Act. Allahabad High Court had pioneered the concept of legal aid as intrinsic to a fair trial in the fabled dissent of Hon'ble Syed Mahmood J in **Queen-Empress v. Pohpi and others**13. Denial of legal aid causes violation of fair, reasonable and just procedure, unjustified incarceration, and curtailment of liberty. Articles 14 and 21 of the Constitution of India are engaged in these circumstances.

16. In this regard reference can be made profitably to the following holdings in **Hussainara Khatoon and others (IV) v. Home Secretary, State of Bihar, Patna**14made after referencing Article 39A of the Constitution of India:

"7.....This Article also emphasises that free legal service is an inalienable element of 'reasonable, fair and just' procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. The right to free legal services is, therefore, clearly an essential ingredient of 'reasonable, fair and just, procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and theneeds of justice so required, provided of course the accused person does not object to the provision of such lawyer."

17. The need to rescue the credibility of the legal system and restore the faith of the common man in the justice system was emphasized in following terms:

"9. We may also take this opportunity of impressing upon the Government of India as also the State Governments, the urgent necessity of introducing a dynamic and comprehensive legal service programme with a view to reaching justice to the common man. Today, unfortunately, in our country the poor are priced out of the judicial system with the result that they are losing faith in the capacity of our legal system to bring about changes in their life conditions and to deliver justice to them. The poor in their contract with the legal system have always been on the wrong side of the law. They have always come across "law for the poor" rather than "law of the poor". The law is regarded by them as something mysterious and forbidding-always taking something away from them and not as a positive and constructive social

device for changing the socio economic order and improving their life conditions by conferring rights and benefits on them. The result is that the legal system has lost its credibility for the weaker sections of the community. It is, therefore, necessary that we should inject equal justice into legality and that can be done only by dynamic and activist scheme of legal services. ....We would strongly recommend to the Government of India and the State Governments that it is high time that a comprehensive legal service programme is introduced in the country. That is not only a mandate of equal justice implicit inArticle 14and right to life and liberty conferred by Article 21, but also the compulsion of the constitutional directive embodied in Article 39A."
(emphasis supplied)
True then, true now.

18. The courts too have a duty to ensure that prisoners appearing in criminal proceedings have access to legal aid. Courts cannot remain mute spectators when legal aid is denied to prisoners in legal proceedings before them.

19. The trial courts stand at a vantage point in these matters and are best circumstanced to understand the need of legal aid of the prisoners appearing before them.

20. The Supreme Court in **Khatri and others (II) v. State of Bihar**15 **and others** recognized pervasive legal illiteracy in the country and cast an obligation on trial judges to bring about the fruition of the rights of prisoners to free legal aid in the following terms:

"But even this right to free legal services would be illusory for an indigent accused unless the magistrate or the Sessions Judge before whom he is produced informs him of such right. It is common knowledge that about 70 per cent of the people in the rural areas are illiterate and even more than that percentage of people are not aware of the rights conferred upon them by law. There is so much lack of legal awareness that it has always been recognised as one of the principal items of the programme of the legal aid movement in this country to promote legal literacy. It would make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and it would fail of its purpose. The magistrate or the sessions judge before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. Unfortunately, the judicial magistrates failed to discharge this obligation in the case of the blinded prisoners and they merely stated that no legal representation was asked for by the blinded prisoners and hence none was provided. We would, therefore, direct the magistrates and Session Judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State. Unless he is not willing to take advantage of the free legal services provided by the State, he must be provided legal representation at the cost of the State."

Prophetic words which fell on institutions with short memories.

21. The aforesaid propositions are entrenched in the body of judicial precedents as is evident from readings of

Madhav Hayawadanrao Hoskot v. State of Maharashtra16 **and Suk das v. Union Territory of Arunachal Pradesh**17 **and State of Andhra Pradesh v. Challa Ramkrishna Reddy**18.

22. The right to free legal aid, responsibility of the trial courts and the Government is stated in Section 304 of the Code of Criminal Procedure:

"**304. Legal aid to accused at State expense in certain cases.-(1)**Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.

(2)The High Court may, with the previous approval of the State Government, make rules providing for-

(a)the mode of selecting pleaders for defence under sub- section (1);

(b)the facilities to be allowed to such pleaders by the Courts;

(c)the fees payable to such pleaders by the Government, and generally, for carrying out the purposes of sub- section (1).

(3)The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub- sections (1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before Courts of Session."

V. Legal Aid: B. Statutory Scheme of LSA Act, 1987

23. The need for a specific statute and independent statutory authorities to provide "free legal and competent legal services (to the weaker sections of the society) to ensure that the opportunities of securing justice are not denied to any citizens by any reason of economic and other disabilities", was acknowledged by the legislature when it enacted the Legal Services Authorities Act, 1987 (hereinafter referred to as the "Act", 1987).

24. The Act is a welfare legislation. Settled canons of statutory interpretation will guide the court in construing the provisions of the Act. Cases in point settle the proposition that welfare legislations are liable to be interpreted liberally to ensure that beneficent measures contemplated by the legislature reach eligible persons.

25. The proposition will be reinforced by authorities. **K.H.Nazar v. Mathew K.Jacob and others**19 held that:

"Provisions of a beneficial legislation have to be construed with a purpose-oriented approach. The Actshould receive a liberal construction to promote its objects.6 Also, literal construction of the provisions of a beneficial legislation has to be avoided. It is the Court's duty to discern the intention of the legislature in making the law. Once such an intention is ascertained, the statute should receive a purposeful or functional interpretation."

[Also see: **Union of India v. Prabhakaran Vijaya Kumar and others20, and Allahabad Bank and another v. All India Allahabad Bank Retired Employees Association**.21]

26. Relevant provisions of the Act are discussed in the paragraphs that follow. Section 2 of the Act is the definition clause. Section 2 (aaa), section 2(c) and section 2(g) of the Act define "court", "legal service" and "scheme" respectively.

27. Section 2(aaa) is extracted below:

"Section 2 (aaa). "court" means a civil, criminal or revenue court and includes any tribunal or any other authority constituted under any law for the time being in force, to exercise judicial or quasi-judicial functions."

28. The definition of the word "court" is exhaustive. The vast reach of the provision envisages all proceedings pending before various courts and legally constituted tribunals and authorities where a lis can be instituted, and rights of citizens will be engaged and adjudicated as per law. Trial courts, revising courts and appellate courts alike come within the purview of the provision.

29. Section 2(c) of the Act reads as under:

"**Section 2(c)**. legal service" includes the rendering of any service in the conduct of any case or other legal proceeding before any court or other authority or tribunal and the giving of advice on any legal matter."

30. The provision contains an inclusive definition of "legal service" and recognizes various collateral services which are integral to providing fruitful legal aid in the conduct of legal proceedings or giving legal advice. The wide ambit of the provision ensures that legal aid is not curbed by a constricted understanding, and legal services are rendered effectively.

31. The construction of the words "means" and "includes" used in the definition clauses in section 2(aaa) and section 2(c) is assisted by this iteration in **Bharat Coop. Bank (Mumbai) Ltd. v. Coop. Bank Employees Union**22 by holding thus:

"When in the definition clause given in any statute the word "means" is used, what follows is intended to speak exhaustively. The use of the word "means" indicates that the "definition is hard and fast definition, and no other meaning can be assigned to the same. On the other hand, when the word "includes" is used in the definition, the legislature does not intend to restrict the definition. It makes the definition enumerative and not exhaustive. That is to say, the term defined will retain its ordinary meaning but its scope would be extended to bring within its matter, which in its ordinary meaning may or may not comprise."

32. Section 2(g) of the Act reads as under:-

"Section 2(g). scheme" means any scheme framed by the Central Authority, a State Authority or a District Authority for the purpose of giving effect to any of the provisions of this Act."

33. The provision imparts statutory flavour to the schemes framed by various authorities under the Act. This creates enforceable rights in favour of the recipient and enhances efficacy of the schemes for legal aid.

34. Section 3 and Section 3A constitute National Legal Services Authority and the Supreme Court Legal Services Committee respectively.23 I

35. Section 6 constitutes the State Legal Services Authority. Section 8A and Section 9 constitute High Court Legal Services Committee and District Legal Services Authority respectively.24ii

36. Section 7 of the Act which defines the functions of the State Authority has a direct bearing on the controversy and is being reproduced below:

"Section 7. Functions of the State Authority-(1) It shall be the duty of the State Authority to give effect to the policy and directions of the Central Authority.

(2) Without prejudice to the generality of the functions referred to in sub- section (1), the State Authority shall perform all or any of the following functions, namely,-

(a) give legal service to persons who satisfy the criteria laid down under this Act;

(b) conduct Lok Adalats, including Lok Adalats for High Court cases;

(c) undertake preventive and strategic legal aid programmes; and

(d) perform such other functions as the State Authority may, in consultation with the Central Authority, fix by regulations."

37. Among other functions the statute unequivocally enjoins upon the State Authority to give legal aid to persons who satisfy the criteria laid down under this Act, and to undertake "preventive and strategic legal aid programmes". The power to undertake legal aid programmes by creating various schemes and procedures is guided in broad and conceptual terms, and not by a minutely detailed framework.

38. The meaning of "strategic" in Oxford dictionary is "forming part of a long-term plan or aim to achieve a specific purpose." The meaning of "preventive" is "designed to prevent something from occurring." The words "strategic" and "preventive" in Section 7 are of wide import which envisage the State Legal Services Authority to independently and proactively create schemes to provide legal aid and prevent miscarriage of justice.

39. Entitlement to legal services is provided for in Chapter IV. Section 12 of the Act25iii contains the criteria for giving legal services. Section 12(e) of the Act is germane to the controversy and is extracted below:-

"Section 12(e) a person under circumstances of underserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster."

40. The eligibility criteria for giving legal services under Section 12(e) is broad based.

The breadth of the provision manifests the legislative intent to reach out to the last person at the bottom of the social heap. The section contemplates to give legal aid to persons who suffer from deprivation and exclusion caused by circumstances of want which are not of their making.

Under the provision persons facing circumstances of "undeserved want" become entitled for legal services. The phrase "undeserved want" is generic in nature. The word "such as" precedes the examples of "undeserved want" described in the section. The instances of "undeserved want" depicted in the provision are illustrative and not exhaustive, and are in the nature of externalities i.e. adverse circumstances over which a person has no control and which prevent recourse to justice.

The phrase "undeserved want" in the statute is not a fixed concept but an

evolutionary exercise. The State Legal Services Authority is mandated to enquire whether the circumstances of a person being considered for legal aid fall within the sweep of "undeserved want".

41. The entitlement to legal services of persons who satisfy any of the criteria laid down in Section 12 of the Act is vested by virtue of Section 13 of the Act.

"Section 13. Entitlement to legal services.-(1) Persons who satisfy or any of the criteria specified in section 12 shall be entitled to receive legal services provided that the concerned Authority is satisfied that such person has a prima-facie case to prosecute or to defend.

(2) An affidavit made by a person as to his income may be regarded as sufficient for making him eligible to the entitlement of legal services under this Act unless the concerned Authority has reason to disbelieve such affidavit."

42. A conjoint reading of various provisions detailed above establishes that for grant of aid the legislature has made no distinction between persons who are imprisoned for heinous offences or non heinous crimes. Further, eligible persons are entitled to legal services at any stage of proceedings (whether pre trial, trial or appeal or revisional) which he or she is prosecuting or defending. (**Ref: Rajoo alias Ramakant Vs. State of Madhya Pradesh**26).

43. Under the scheme of the Act the Legal Services Authorities also have to suo moto initiate the process of identifying classes of persons who face circumstances of "undeserved want", educate them on their right to legal aid, frame schemes, determine the nature of legal services required in the case, and give them requisite legal services.

44. The statute envisages that the arms of law are long enough to reach injustice. The constitution ensures that the arms of courts are strong enough to serve justice.

45. In light of the scheme of the Act thus discussed, I hold that persons who cannot file bail applications before the competent court due to these reasons.

(a) they do not have resources to do so,

(b) have been abandoned by friends and family after their incarceration,

(c) do not have any pairokar,

(d) have not been educated of their right to move a bail application without delay; are victims within the scope of "undeserved want".

46. Such class of persons are entitled to legal services, the nature of which has to be decided by the statutory authorities.

47. Similarly there are persons who fail to file bail applications before the trial court in a timely manner after their detention, or do not expeditiously approach the High Court for bail after the rejection of their bail applications by the trial court. The said cases prima facie fall within the ambit of "undeserved want", subject to enquiry by the State Legal Services Authority or the District Legal Services Authority.

V. Legal Aid: C. Instances and Consequences of denial of legal aid

48. The applicant was in jail since 06.12.2017. He was able to file a bail application before the trial court in 2019

i.e. after a delay of more than one year. The bail application was rejected on 04.06.2019 by the trial court. He could approach this Court for bail only in the year 2022 i.e. three years after the trial court refused him bail.

49. The applicant was delayed in taking recourse to legal remedies and securing justice because of financial penury, lack of legal awareness, absence of pairokar and denial of legal aid.

50. This case is not a one off. While sitting in bail jurisdiction, I noticed a number of cases where bail applications were filed after inordinate delays because the prisoners did not have access to legal aid. The other category of cases was where bail applications could be filed but lay unattended in the cold storage of the Registry. In the latter cases lack of funds and absence of pairokars led to ineffective prosecution causing indefinite delays in hearing.

And so the prisoners wait resigned to their fate.

51. Some like cases which were pointed out by the members of the Bar.

[I. Rajnish v. State of U.P. in Criminal Misc. Bail Application No.20805 of 2022, II. Chhotey vs. State of U.P. in Criminal Misc. Bail Application No.5328 of 2018, III. Mahesh Chandra Shukla v. State of U.P. in Criminal Misc. Bail Application No.17940 of 2022, IV. Vikas Dwivedi v. State of U.P. in Criminal Misc. Bail Application No.22375 of 2020 and V. Ramu Vs. State of U.P. in Criminal Misc. Bail Application No.17912 of 2019]

52. In **Rajnish (supra)** the applicant was in jail since 26.04.2011. The first bail application was filed by the applicant before the trial court 11 years after his imprisonment. The trial had not concluded when the applicant was enlarged on bail by this Court on 06.08.2022. While granting bail the Court was constrained to hold:

"This is the first bail application which has been moved by the applicant before this Court. The applicant belongs to the bottom heap of humanity and unfortunately forgotten class of citizens. He did not have the resources to engage a counsel nor was he given to access to legal aid for these long years. Constitutional promise of securing justice has been denied to him.

However, it is for all instruments of governance, the trial courts, the police authorities, the legal services authorities to introspect and bring about necessary systemic corrections with the conviction that such a state of affairs will not be repeated. Never again. The District Legal Services Authority in the State of Uttar Pradesh shall draw up a list of prisoners who are incarcerated for long period and examine whether they have not been able to move bail applications due to penury and lack of access to legal aid. Corrective measures should accordingly be taken. Legal aid workshop should be conducted in every jail in the State of Uttar Pradesh to ensure that such grievances are promptly redressed."

(emphasis supplied)

53. In **Ramu (supra)** the applicant was in jail since 14.02.2008. The first bail application was rejected by this Court on 15.11.2008. The applicant was able to file the second bail application before the High Court in 2019 i.e. more than 11 years after the rejection of first bail application by this Court. Thereafter, further three years delay occurred in hearing of the bail due to

applicant's inability to file listing application and effectively prosecute them. The trial had not concluded when the bail was granted by this Court on 16.07.2022.

54. In **Chhotey (supra)** the applicant was in jail since 22.02.2014. The first bail application of the applicant was rejected by this Court on 19.08.2014. The second bail of the applicant was filed more than three years after the rejection of first bail application by this Court. Further four years delay happened as the applicant lacked resources to file listing applications and prosecute them effectively.

55. It is noteworthy that in **Chhotey (supra)** the trial proceedings came to a halt in the year 2012 when the records of the trial court were transmitted to this Court. During eight years of imprisonment of the applicant the trial was at a stand-still. While granting bail to the applicant on 16.03.2022 in Chhotey (supra) this Court made these observations :

"The comments of the trial judge indicate that the records of the case were transmitted to this Court in compliance of the orders passed on 12.09.2012. In the comments sent by trial judge it is further stated that in the absence of the records the Sessions Trial No. 956 of 2013 (State Vs Chhotey) cannot proceed. Without availability of original documents including the case diary the applicant could not be charged by the trial court. As per the comments of the trial court various communications were sent by the trial court on 28.03.2014, 27.09.2014, 14.01.2020, 15.01.2021, 04.08.2021 to the High Court. However the records have not yet been transmitted to the trial court. From the aforesaid submissions as well as the records available before this Court it appears that the applicant has been in detention since 22.02.2014 but has not been charged by the trial court till date. The trial against the applicant is yet to commence."

(emphasis supplied)

Denial of legal aid was highlighted in the aforesaid order.

56. In **Vikas Dwivedi (supra)** the applicant was in jail since 05.03.2013. The applicant was able to file the bail application before the trial court more than four and half years after his imprisonment. He could file the first bail application before this Court more than six months after the rejection of his bail by the trial court. The first bail application of the applicant was rejected by this Court on 17.05.2018. The second bail of the applicant was filed more than two years after the rejection of first bail application by this Court. Thereafter, further two years of delay was occasioned due to lack of resources to file listing applications and prosecute the same effectively. When the applicant was granted bail by this Court on 17.02.2022 the trial had not concluded.

57. In **Mahesh Chandra Shukla (supra)** the applicant was in jail since 12.07.2009. The fourth bail was filed nine years after the rejection of the third bail. Trial had not concluded when bail was granted by this Court on 29.08.2022.

58. Many of the aforesaid bail applications were delayed second or subsequent bail applications before this Court.

The grounds for second or subsequent bail applications can be promptly advised to prisoners only when they have regular and unimpeded access to legal aid.

59. The failure of justice in the said cases was occasioned by poverty, social exclusion, legal illiteracy, impersonal administration and denial of legal aid.

Exactions of poverty are more severe than punishments in law. For them the glorious dawn of the 75th year of independence has lost the sheen of freedom's ideals and the substance of the republic's promise.

60. Injustice is the birthmark of a slave nation. Justice is the birthright of a free people and our constitution says they shall have it.

The resolve of the "people of India" to secure justice for all citizens was embedded in the Constitution of India.

61. All stakeholder institutions have to pause and reflect. The judiciary too have to turn the searchlights inwards. The courts have the power to judge, but cannot escape the judgement of the nation's collective conscience. Independence of judiciary is strengthened by honest introspection and self correction.

62. The Bar of the Allahabad High Court spoke for prisoners who had lost their voice, and worked tirelessly without thought of remuneration or expectation of reward. The learned counsels uphold the highest traditions of the profession, and shine light on the hallowed heritage of this Court.

63. Shri Ajay Kumar Pathak, learned counsel, Shri Saurabh Yadav, learned counsel, Shri Anil Kumar Srivastava, learned counsel, Ms.Ushma Mishra, learned counsel and Shri Ashish Kumar Singh, learned counsel and Shri Rishi Chaddha, learned A.G.A. and Shri Paritosh Kumar Malviya, learned A.G.A. in the aforesaid cases respectively deserve fullest appreciation. In such matters, Shri N.I. Jafri, learned Senior Counsel assisted by Ms. Nasira Adil, learned counsel, Ms. Gunjan Jadhwani, learned counsel, Shri Omar Zamin, learned counsel and Shri Rajrshi Gupta, learned counsel have unconditionally volunteered to take up the causes. The learned counsels have always assisted the Court competently. They researched painstakingly and argued with ability.

V. Legal Aid: D. NLSA Scheme for Legal Aid

64. The plight of prisoners who suffer long incarcerations due to interminable delays in the criminal justice system was noticed by the Supreme Court. In '**Re-inhuman conditions in 1382 jails' (Writ Petition (Civil) No.406 of 2013**)27 various directions were issued by the Supreme Court on 24.04.2015 to the National Legal Services Authority (NLSA), and the Ministry of Home Affairs (MHA) to set up Under Trial Review Committees (UTRCs) in every district. Functioning of the UTRCs improved consequent to directions of the Supreme Court issued on various dates.

65. The campaign for release of prisoners gained force momentum after a scheme was initiated by the National Legal Services Authority to commemorate the 75th year of independence. The programme is being implemented with full vigour in the State of Uttar Pradesh by the State Legal Services Authority in conjunction with the District Legal Services Authority.

The cases like that of the applicant and in issue before this Court are not covered by the said scheme.

V. Legal Aid: E. Summation

66. In summation legal aid is a catalyst to redeem the preamble promise of justice and remains a bulwark for protection of fundamental rights.

67. The rights to file a bail without delay, and access to legal aid of an eligible prisoner are intertwined. They cannot be separated. The right of moving a bail application becomes illusory and personal liberty remains a distant dream, if the right to legal aid of an entitled prisoner is not effectuated.

68. Fresh breeze of fundamental rights shall blow through the stone walls that a prison make. Iron bars of jails cannot hold back the glad tidings of equal justice.

VI. Conclusions & Directions

69. Anonymity of a prisoner imposed by isolation cannot suppress the identity of a citizen created by the Constitution. Fundamental rights of prisoners paired with statutory duties of the State Legal Services Authority cast an obligation on the SLSA to devise a scheme (I) to identify prisoners who are undertrial for various crimes including heinous offences and have not applied for bail before the trial court in a timely manner after their imprisonment, (II) to identify prisoners who are facing trials for various crimes including heinous offences but have failed to file bail applications before the High Court in an expeditious time frame after rejection of their bail application by the trial court, (III) to identify prisoners who are facing trials in various offences including heinous crimes but are unable to file subsequent bails before the High Court after rejection of earlier bail application by this Court, (IV) to identify prisoners who are unable to effectively prosecute their pending bail applications in various offences including heinous crimes causing delays in hearing, (V) to ascertain whether inability of the said prisoners to expeditiously file or effectively prosecute bail application is caused by factors comprehended under Section 12 read with Section 13 of the Act, (VI) to approach prisoners who qualify for legal aid, educate them on their rights of filing bail applications without delay, and determine the nature of legal aid needed by them, (VII) to provide legal aid and facilitate filing of bail applications of such prisoners in a timely manner before the competent courts, (VIII) to facilitate counsels in getting necessary instructions, relevant documents, office support for filing the bail applications. (IX) to facilitate effective prosecution of bail applications by the counsels who should take out measures for listing of bails and hearing of matters.

70. This exercise of identification of prisoners, determination of their eligibility for legal aid and giving legal aid should be an established procedure in jails which should be undertaken on a continuous basis and without any break by the District Legal Services Authority.

71. The jail authorities too have responsibilities in this regard. The duties of jail officials to prevent "undue long detention of prisoners are stated in Regulation 439(a) of the U.P. Jail Manual. [**Ref: the U.P. Jail Manual**28 iv]

72. The jail authorities as well as concerned State authorities are directed to cooperate with the State Legal Services

Authority and the District Legal Services Authority and ensure effective implementation of the schemes framed by the State Legal Services Authority.

73. This scheme will have the added benefit as delayed trials or pending appeals will come to the notice of the High Court for appropriate directions as per law.

74. Following suggestions for effective implementation for the said scheme may be considered :

A. To create a comprehensive programme with SOPs for legal aid to prisoners accused of various crimes including heinous offences who have not filed bail applications before the High Court within a period of one year after rejection of bail by the trial court. The said period of one year is only suggestive. The said period has to be determined by the State Legal Services Authority.

B. To create a comprehensive programme with SOPs for giving legal aid to prisoners accused of committing various crimes including heinous offences who have not been able to move bail applications before the trial court six months after imprisonment. The said period of six months is only suggestive. The said period has to be determined by the State Legal Services Authority.

C. The State Legal Services Authority may suggest to the High Court to decide an appropriate procedure for filing of bail applications on behalf of the undertrial prisoners, and particularly those who do not have any pairokars.

D. Legal aid counsels may be given appropriate directions to take measures for listing and early hearing of bail applications.

E. Filing of subsequent bail applications in case the first bail application is rejected by the High Court.

F. The jail authorities and District Legal Services Authority shall maintain the list of all prisoners which shall contain these details. Date of imprisonment, date of filing of bail application before the competent court, date of grant/rejection of bail application by the trial court, the date of grant/rejection of bail application by the High Court, date of conviction and latest status of pending bail applications. Efforts should be made to make updated ordersheets of courts, likely dates of listing available online in jails.

G. Regular intimation of the status of the case to the prisoners. Take regular feedback from prisoners including those who have been given legal aid.

VII. Order on bail application

75. By means of this first bail application the applicant has prayed to be enlarged on bail in Case Crime No. 880 of 2017 at Police Station Neodiya, District Jaunpur under Section 302 IPC. The applicant is in jail since 06.12.2017.

76. The bail application of the applicant was rejected by learned Additional District & Sessions Judge, Jaunpur on 04.06.2019.

77. Sri Nanhe Lal Tripathi, learned counsel assisted by Sri Satish Kumar Mishra, learned counsel for the applicant contend that the applicant has been falsely implicated in the instant case. The applicant was not named in the FIR. There is no direct evidence against the applicant and he had no motive to commit the murder. At best it is a case of circumstantial evidence. The recovered items were planted on the

applicant by the police authorities only to burnish their professional credentials. There is no independent witness to the recovery. The recovered items cannot be connected with the offence. The applicant was not last seen in the company of the deceased at a time proximate to the death of the latter. The time of death opined in the post mortem report contradicts the prosecution case. The chain of incriminating circumstances against the applicant is neither complete nor reliable. The applicant has explained part of his criminal history. The learned counsel reiterates the ground of denial of legal aid causing prolonged imprisonment.

78. Learned AGA points out two more criminal cases registered against the applicant while he was in jail.

Rejoining the issue, learned counsel for the applicant submits that the aforesaid cases could not be disclosed as the applicant does not have any effective parokar to take details of the case. However on the basis of instructions from the applicant and from the record of learned AGA, learned counsel for the applicant submits that the applicant was falsely implicated in the aforesaid cases when he raised his voice against the excesses of jail authorities and demanded legal aid.

79. Shri Rishi Chaddha, learned A.G.A for the State could not satisfactorily dispute the aforesaid submissions from the record.

80. The applicant was granted interim bail on 18.08.2022 by this Court.

81. Let the applicant- **Anil Gaur @ Sonu @ Sonu Tomar** be released on bail in the aforesaid case crime number on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court below. The following conditions be imposed in the interest of justice:-

(i) The applicant will not tamper with the evidence during the trial.

(ii) The applicant will not influence any witness.

(iii) The applicant will appear before the trial court on the date fixed, unless personal presence is exempted.

(iv) The applicant shall not directly or indirectly make inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court to any police officer or tamper with the evidence.

VIII. Appendix

i. Appendix I

Chapter II

The National Legal Services Authority

"[3. Constitution of the National Legal Services Authority.--(1) The Central Government shall constitute a body to be called the National Legal Services Authority to exercise the powers and perform the functions conferred on, or assigned to, the Central Authority under this Act.

(2) The Central Authority shall consist of--

(a) the Chief Justice of India who shall be the Patron-in-Chief;

(b) a serving or retired Judge of the Supreme Court to be nominated by the President, in consultation with the Chief Justice of India, who shall be the Executive Chairman; and

(c) such number of other members, possessing such experience and qualifications, as may be prescribed by the

Central Government, to be nominated by that Government in consultation with the Chief Justice of India.

(3) The Central Government shall, in consultation with the Chief Justice of India, appoint a person to be the Member-Secretary of the Central Authority, possessing such experience and qualifications as may be prescribed by that Government, to exercise such powers and perform such duties under the Executive Chairman of the Central Authority as may be prescribed by that Government or as may be assigned to him by the Executive Chairman of that Authority.

(4) The terms of office and other conditions relating thereto, of members and the Member-Secretary of the Central Authority shall be such as may be prescribed by the Central Government in consultation with the Chief Justice of India.

(5) The Central Authority may appoint such number of officers and other employees as may be prescribed by the Central Government, in consultation with the Chief Justice of India, for the efficient discharge of its functions under this Act.

(6) The officers and other employees of the Central Authority shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the Central Government in consultation with the Chief Justice of India.

(7) The administrative expenses of the Central Authority, including the salaries, allowances and pensions payable to the Member-Secretary, officers and other employees of the Central Authority, shall be defrayed out of the Consolidated Fund of India.

(8) All orders and decisions of the Central Authority shall be authenticated by the Member-Secretary or any other officer of the Central Authority duly authorised by the Executive Chairman of that Authority.

(9) No act or proceeding of the Central Authority shall be invalid merely on the ground of the existence of any vacancy in, or any defect in the constitution of, the Central Authority."

"Section 3A. Supreme Court Legal Services Committee.-(1) The Central Authority shall constitute a committee to be called the Supreme Court Legal Services Committee for the purpose of exercising such powers and performing such functions as may be determined by regulations made by the Central Authority.

(2) The Committee shall consist of -

(a) a sitting Judge of the Supreme Court who shall be the Chairman; and

(b) such number of other members possessing such experience and qualifications as may be prescribed by the Central Government, to be nominated by the Chief Justice of India.

(3) The Chief Justice of India shall appoint a person to be the Secretary to the Committee, possessing such experience and qualifications as may be prescribed by the Central Government.

(4) The terms of office and other conditions relating thereto, of the members and Secretary of the Committee shall be such as may be determined by regulations made by the Central Authority.

(5) The Committee may appoint such number of officers and other employees as may be prescribed by the Central Government, in consultation with the Chief Justice of India, for the efficient discharge of its functions.

(6) The officers and other employees of the Committee shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the Central Government in consultation with the Chief Justice of India."

ii. Appendix II

Chapter III
State Legal Services Authority

"Section 6.Constitution of State Legal Services Authority.- (1) Every State Government shall constitute a body to be called the Legal Services Authority for the State to exercise the powers and perform the functions conferred on, or assigned to, a State Authority under this Act. State Legal Services Authority

(2) A State Authority shall consist of-

(a) the Chief Justice of the High Court who shall be the Patron-in-Chief;

(b) a serving or retired Judge of the High Court to be nominated by the Governor, in consultation with the Chief Justice of the High Court, who shall be the Executive Chairman; and

(c) such number of other members, possessing such experience and qualifications as may be prescribed by the State Government, to be nominated by that Government in consultation with the Chief Justice of the High Court.

(3) The State Government shall, in consultation with the Chief Justice of the High Court, appoint a person belonging to the State Higher Judicial Service, not lower in rank than that of a District Judge, as the Member Secretary of the State Authority, to exercise such powers and perform such duties under the Executive Chairman of the State Authority as may be prescribed by that Government or as may be assigned to him by the Executive Chairman of that Authority:

Provided that a person functioning as Secretary of a State Legal Aid and Advice Board immediately before the date of constitution of the State Authority may be appointed as Member-Secretary of that Authority, even if he is not qualified to be appointed as such under this sub-section, for a period not exceeding five years.

(4) The terms of office and other conditions relating thereby, of members and the Member-Secretary of the State Authority shall be such as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

(5) The State Authority may appoint such number of officers and other employees as may be prescribed by the State Government in consultation with the Chief Justice of the High Court, for the efficient discharge of its functions under this Act.

(6) The officers and other employees of the State Authority shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

(7) The administrative expenses of the State Authority, including the salaries, allowances and pensions payable to the Member-Secretary or any other officer of the State Authority shall be defrayed out of the consolidated fund of the State.

(8) All orders and decisions of the State Authority shall be authenticated by the Member Secretary or any other officer of the State Authority duly authorized by the Executive Chairman of the State Authority.

(9) No act or proceeding of a State Authority shall be invalid merely on the ground of the existence of any vacancy in, or any defect in the constitution of, the State Authority."

"8A. High Court Legal Services Committee.-(1) The State Authority shall constitute a committee to be called the High Court Legal Services Committee for every High Court, for the purpose of exercising such powers and performing such functions as may be determined by regulations made by the State Authority.

(2) The Committee shall consists of-

(a) a sitting Judge of the High Court who shall be the Chairman; and

(b) such number of other members possessing such experience and qualifications as may be determined by regulations made by the State Authority.

to be nominated by the Chief Justice of the High Court.

(3) The Chief Justice of the High Court shall appoint a Secretary to the Committee possessing such experience and qualifications as may be prescribed by the State Government.

(4) The terms of office and other conditions relating thereto, of the members and Secretary of the Committee shall be such as may be determined by regulations made by the State Authority.

(5) The Committee may appoint such number of officers and other employees as may be prescribed by the State Government in consultation with the Chief Justice of the High Court for the efficient discharge of its functions. \

(6) The officers and other employees of the Committee shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the State Government in consultation with the Chief Justice of the High Court."

"Section 9. District Legal Services Authority-(1) The State Government shall, in consultation with Chief Justice of the High Court, constitute a body to be called the District Legal Services Authority for every District in the State to exercise the powers and perform the functions conferred on, or assigned to, the District Authority under this Act.

(2) A District Authority shall consist of-

(a) the district Judge who shall be its Chairman; and

(b) such number of other members, possessing such experience and qualifications, as may be prescribed by the State Government, to be nominated by that Government in consultation with the Chief Justice of the High Court.

(3) The State Authority shall, in consultation with the Chairman of the District Authority, appoint a person

belonging to the State Judicial Service not lower in rank than that of a Subordinate Judge or Civil Judge posted at the seat of the District Judiciary as Secretary of the District Authority to exercise such powers and perform such duties under the Chairman of that Committee as may be assigned to him by such Chairman.

(4) The terms of office and other conditions relating thereto, of members and Secretary of the District Authority shall be such as may be determined by regulations made by the State Authority in consultation with the Chief Justice of the High Court.

(5) The District Authority may appoint such number of officers and other employees as may be prescribed by the State Government in consultation with the Chief Justice of the High Court for the efficient discharge of its functions.

(6) The officers and other employees of the District Authority shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

(7) The administrative expenses of every District Authority, including the salaries, allowances and pensions payable to the Secretary, officers and other employees of the District Authority shall be defrayed out of the Consolidated Fund of the State.

(8) All orders and decisions of the District Authority shall be authenticated by the Secretary or by any other officer of the District Authority duly authorized by the Chairman of that Authority.

(9) No act or proceeding of a District Authority shall be invalid merely on the ground of the existence of any vacancy in, or any defect in the constitution of, the District Authority."

iii. Appendix III

Chapter IV
Entitlement To Legal Services

12. Criteria for giving legal services.-- Every person who has to file or defend a case shall be entitled to legal services under this Act if that person, is--

(a)a member of a Scheduled Caste or Scheduled Tribe;

(b)a victim of trafficking in human beings or beggar as referred to in Article 23 of the Constitution;

(c)a women or a child; 1[(d) a person with disability as defined in clause (i) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996);] 1[(d) a person with disability as defined in clause (i) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996);]"

(e)a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or

(f)an industrial workman; or

(g)in custody, including custody in a protective home within the meaning of clause (g) of section 2 of the Immoral Traffic (Prevention) Act, 1956 (104 of 1956) or in a juvenile home within the meaning of clause (j) of section 2 of the

Juvenile Justice Act, 1986 (53 of 1986) or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act, 1987 (14 of 1987); or 2[(h) in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government, if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court.] 2[(h) in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government, if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court.]"

(h) in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government, if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court.]"

iv. Appendix iv

Jail Manual

"439(a) Whenever an undertrial prisoner is detailed in jail for an undue long period the Superintendent shall address the District Magistrate or the Sessions Judge, as the case may be, with a view to the speedy disposal of his case or the exercise by him of the power of releasing the prisoner on bail."

(2022) 11 ILRA 750
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.10.2022

BEFORE

THE HON'BLE SIDDHARTH, J.

Criminal Misc. Bail Application No. 18458 of 2022

Sanjeev @ Kallu Sethiya ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Shiv Shankar Gupta, Sri Arun Kumar Shukla, Sri Prakash Chandra Srivastava, Sri Ram Kishor Gupta

Counsel for the Opp. Party:
G.A., Sri Rajiv Lochan Shukla

Bail-Indian Penal Code, 1860 - Sections 302 & 149 -Eight persons implicated for murder-two fire arm injuries found on deceased-accused named are above five in numbers—only because they were more in numbers-offence alleged cannot be considered to be made at this stage-it appears a case of sudden provocation -all members of alleged unlawful assembly cannot be held liable for offence committed by one or two accused-no witness from accused side.

Bail granted. (E-9)

List of Cases cited:

1. Mariadasan & ors. Vs St. of T. N., 1980 SCC (Crl.) 523

2. Puran Vs St. of Raj., 1975 SCC (Crl.) 750

3. Sherey & ors. Vs St. of U.P., 1991 SCC (Crl.) page 1059

4. Kumer Singh Vs St. of Raj. anr., 2021 (4) Crimes (SC) Mah 461

5. St.of Bihar Vs P.P. Sharma, 1992 Supp (1) SCC 222, at page 258

6. Babubhai Vs St. of Guj., (2010) 12 SCC 254 : (2011) 1 SCC (Cri) 336, at page 268

7. Vinay Tyagi Vs Irshad Ali, (2013) 5 SCC 762, at page 792

8. Amitbhai Anilchandra Shah Vs CBI, (2013) 6 SCC 348 : (2014) 1 SCC (Cri) 309, at page 383

9. Manohar Lal Sharma Vs Prinicipal Secy., (2014) 2 SCC 532 : (2014) 4 SCC (Cri) 1, at page 553

10. Dinubhai Boghabhai Solanki Vs St. of Guj., (2014) 4 SCC 626 : (2014) 2 SCC (Cri) 384, at page 643

11. Rajiv Singh Vs St. of Bihar, (2015) 16 SCC 369, at page 397

12. Suresh Chandra Jana Vs St. of W.B., (2017) 16 SCC 466, at page 480

13. Nirmal Singh Kahlon Vs St. of Pun., (2009) 1 SCC 441 : (2009) 1 SCC (Cri) 523, at page 455

14. Babubhai Vs St. of Guj., (2010) 12 SCC 254 : (2011) 1 SCC (Cri) 336, at page 272

15. Azija Begum Vs St. of Mah., (2012) 3 SCC 126, at page 128

16. Amerika Rai Vs St.of Bihar, 2011(4) SCC 677 and Ramchandran Vs St. of Kerala, 2011(9) SCC 257

17. Subal Ghorai & ors. Vs St. of W. B., 2013(4) SCC 607

18. Roy Fernandes Vs St. of Goa, 2012(3) SCC 221

19. Haramant Laxmappa Kukkadi Vs St. of Karn., 1994(1) SCC 736

20. Dataram Singh Vs St. of U.P. & anr. reported in (2018) 3 SCC 22

21. Satendra Kumar Antil Vs C.B.I., passed in S.L.P (Crl.) No. 34 of 37 5191 of 2021

(Delivered by Hon'ble Siddharth, J.)

1. Heard Sri P. C. Srivastava, learned counsel for the applicant; Sri Rajiv Lochan Shukla, learned counsel for the informant; learned A.G.A. for the State and perused the material on record.

2. In the first information report eight persons, including the applicant, have been implicated for causing the offence of attempt to murder, rioting armed with deadly weapons and forming illegal assembly for prosecution of a common object of murder. There is allegation in the first information report that uncle of informant, Mukesh Agarwal, was sitting on pavement of his house and talking to one, Swadesh, when co-accused, Deepesh Sethiya, came on his Scorpio car and co-accused, Shubham Tamrakar, came out of the car and directed one car standing to be removed and he started abusing. Co-accused, Akhilesh Vishwakarma was also with him. The father of the informant on hearing the noise came out. At the same time other brothers of Deepesh Sethiya, namely, Rakesh Kumar, Vinod Kumar, Manish Kumar, Manoj Sethiya, Kallu @ Sajiv Sethiya etc., came out. Deepesh Sethiya and Rakesh Kumar fired which did not hit any one and in the commotion which followed every one tried to protect themselves from Sethiya brothers. All the accused persons fired on the father of informant, Ashok Agarwal and uncle of the informant, Mukesh Agarwal. Ashok Agarwal, the father of the informant, suffered number of injuries and the uncle of the informant suffered injuries in his leg. Subsequently, father of the informant, Ashok Agarwal, died and implication of the accused persons was also made under Section 302 I.P.C in addition to earlier implication under Sections 147, 148, 149,

307, 302, 504 I.P.C, Section 7 Criminal Law Amendment Act.

3. Learned counsel for the applicant submitted that the father of the informant and his uncle both sustained injuries. On the body of the father of informant following injuries were found :-

(a) Septic shock with abdominal sepsis with acute kidney injury.

(b) Status post exploratory laparotomy.

(c) Alleged history of firearm injury on abdomen and right thigh.

(d) Hemoperitoneum with multiple jejunal perforation due to firearm injury.

4. In the statement of the informant, Aman Agarwal, recorded under Section 161 Cr.P.C., no specific role was assigned to the applicant. The role of firing was assigned to co-accused, Deepesh and Rakesh. In the statement of eye-witness, Amit Agarwal, also he assigned general role to all the accused persons. The injured, Mukesh Agrawal, also did not assigned any specific role to the applicant in his statement recorded by Investigating Officer.

5. Learned counsel for the applicant submits that applicant has been falsely implicated in this case along with his co-accused brothers, including, Deepesh Sethiya and Rakesh Sethiya, who were assigned the role of firing but it did not hit any one. He has submitted that the entire family has been falsely implicated in this case for ulterior motives. Applicant is in jail since 15.06.2021 and has no criminal history to his credit.

6. Learned counsel for the applicant has relied upon the judgement of the Apex Court in the case of **Mariadasan and others Vs. State of Tamil Nadu, 1980 SCC (Crl.) 523** and has submitted that the Apex Court held in this case that where sudden heated altercation and fight between two parties occurred and deceased tried to intervene, was assaulted on the spur of moment, no unlawful assembly can be said to have been formed at any time with common object of assaulting and killing the deceased. He has further relied upon the judgement of Apex Court in the case of **Puran Vs. State of Rajasthan, 1975 SCC (Crl.) 750**, wherein the Apex Court held that in the case of sudden and free fight constructive liability cannot be imposed as per Section 149 I.P.C. Reliance has also been placed on the judgement of the Apex Court in the case of **Sherey and others Vs. State of U.P., 1991 SCC (Crl.) page 1059**, wherein the Apex Court held that where number of accused armed with lethal weapons attacked the victim, it shows that they were members of unlawful assembly with common object of committing murder but the other accused mentioned in an omnibus way who were armed with lathis cannot be implicated without attributing any overt acts to anyone of them and medical evidence ruling out any injury by lathis such accused cannot be convicted. He has submitted that in the first information report two co-accused namely, Deepesh and Rakesh, are stated to have made firing and thereafter omnibus allegations have been made that all the eight accused fired on the deceased and injured his brother which will not make all of them liable for punishment under Section 149 I.PC.

7. Learned for the informant has vehemently opposed the bail application. He has relied upon the judgement in the case of **Kumer Singh Vs. State of Rajasthan and another, 2021 (4) Crimes**

(SC) Mah 461 and has argued that in this case the Apex Court set aside the order passed by the High Court granting bail to the accused without considering the facts of the case, nature of allegation, gravity of offence and role attributed to the accused. The Apex Court held that High Court did not consider whether the accused is alleged to be part of unlawful assembly. Merely because he was armed with lathi cannot be a ground for release him on bail. Such an order passed by the High Court was set aside. He has relied upon the judgement of this court in the case of **Mahfooj Alam Vs. State of U.P. , wherein the judgment of Kumer Singh (Supra)** was relied by this Court.

8. Learned AGA has opposed the prayer for bail but could not dispute the above submissions.

9. This court after hearing rival contentions finds that the facts of this court are not disputed. The only point requires to be decided is whether the applicant has been assigned any overt role in the incident and can be considered to be member of unlawful assembly formed for the purpose attaining the common object of committing the offence of murder and attempt to murder. Whether the constructive liability provided under Section 149 I.P.C can be considered to have been extended to them regarding the alleged crime.

10. At the stage of consideration of bail application the court is required to rely upon the material collected by the Investigating Officer during the course of his investigation. The investigation of criminal cases is rarely fair and the report of the investigation officer under Section 173(2) are mostly one-sided and against the procedure of fair investigation.

11. Before proceeding further to decide the issue in hand, the basis of charge-sheet and the manner of investigation by police in a case involving cognizable offences needs consideration.

12. Investigation and charge-sheet form the genesis of the Criminal Trial. Charge-sheet is the outcome of investigation. Under Section 157 of the Code of Criminal Procedure, the procedure of investigation in criminal cases has been incorporated. It requires the intimation of information to the police officer on the commission of a crime. The investigation includes all the procedures which are done by the police officer under the Code for the collection of evidence. The police on registration of FIR shall upon perusal of the facts of the case decide the line of investigation i.e., whether there is circumstantial evidence or eyewitnesses. Circumstantial evidence is the something which is a chain of circumstances that lead to the crime for example previous animosity, threats, last seen theory. It is basically connection of various circumstances to the crime. On the other hand, eyewitnesses are those who have seen the incident take place.

13. The police officer who is pursuing the investigation is empowered to require the attendance of the witnesses. The witnesses shall be such who are acquainted with the facts and circumstances of the case. The powers have been conferred under Section 160 of the Code. The provisions of Section 160 of the Code explicitly mention that no male below fifteen years or a woman shall be called to attend at any other place than the place where she resides.

14. The non-compliance of summons under Section 160 of the Code is

punishable under Section 174 of the Code. The person who is required to appear when served summons does not do so shall be liable to simple imprisonment up to one month or with a fine up to INR 500 or both. The section only requires the attendance of the witnesses and furnishing of relevant information about them. The police officer cannot insist upon the witnesses for the production of documents before him. The order which requires the attendance of a person needs to be in written form.

15. The most crucial part of the investigation lies in the examination of witnesses. The statements made by them can hold a person guilty. The police officer who is investigating the case has been empowered to conduct witness examination. The witnesses are bound to answer the questions which are related to the case truly. Section 161 lays down the procedure for the examination of witnesses by the police.

16. The investigating officer shall examine the persons who are acquainted with the facts of the case. It is the duty of the investigating officer to record the statements of the eyewitnesses without any delay. After examining the witnesses, it is required by the police officer to write down the statement made by the witness. There should be no delay on the part of the police officer investigating the case in examining the witnesses. In the event of a delay of the examination of the witness, the onus lies on the investigating officer for explaining the reasons for the delay.

17. When the delay has been properly explained, it does not have any adverse impact upon the probable value of a particular witness. The police officer while examining the witnesses is not bound to reduce the statements made into writing. It is preferred that the statements should be written or the substance of the whole examination should be written down at least. The recorded statements are required to be noted down in the case diary maintained under Section 172 of the Code.

18. A police officer or the investigating officer has been empowered under section 165 of the Code to search the premises whenever he feels necessary or has reasonable grounds to believe the same. The investigating officer or the officer-in-charge conducts the search when he believes that there are sufficient or reasonable grounds to pursue the same. The search is conducted when there is an absolute necessity for the same. Section 93(1) of the Code of Criminal Procedure provides for the grounds under which a warrant for search shall be issued. Moreover, the search has to be recorded in the diary otherwise it becomes illegal.

19. The investigating officer would go to the locality where the offence was committed and get two people called the "Panchas'. The evidence given by the Panchas is of paramount importance. They sign a document called the Panchnama which contains the evidence collected out of the search. It is signed by them which validates the search and the procedure adopted during the investigation.

20. Panchnama has not been defined anywhere in the law. However, it is a document which holds great value in criminal cases. The Panchnama states things which were found at a particular place and at a particular time. After this, a memorandum of the search is prepared by the investigating officer or the officer-in-charge. It needs to be submitted to the

Magistrate. The police officer-in-charge or the investigating officer who has a valid warrant is to be allowed to conduct the search of a place. Force may be used if he is not allowed to do so. The search is not just only of the premises but also of a person. If it is a female, a female officer shall search her with utmost decency. The search of the closed place or of a person has to be made before two respectable persons of the society. These respectable persons are known as the "Panchas'. They need to sign the document validating the search. However, the Panchas need not necessarily be called as witnesses.

21. Under Section 47 of the Code, the search of a place can be conducted by the police when they have to arrest a person. The police can break in and enter if they are not being allowed in the place. There is also an allowance for no-knock break-in to take place: this is done to take the person by surprise. The basic objective of conducting a search is to find evidence which may help in solving the case.

22. Section 91 of the Code of Criminal Procedure states that whenever a Court or the officer-in-charge of a police station feels that a document or some other thing is necessary for the purpose of the investigation, such Court may issue summon or the officer may in writing, order the person in whose possession the document is to be produced. The document shall be produced at the date and time specified in the summons served to the person. This section does not apply to a person who is accused and on trial.

23. The Court cannot issue a summons for the production of a document or a thing by the accused. This is because it will become self-incrimination under Article 20(3) of the Constitution of India.

24. Under section 92 of the Code, if a document or other thing or a parcel is in the custody of a postal or telegraph authority, and the Magistrate whether Judicial or Executive, any of the Courts wanted that that document for the purpose of investigation, such Magistrate or the Court may order the authority to produce the document before them.

25. Section 173 of the Code requires the investigating officer to file a report before the Magistrate after the collection of evidence and examination of witnesses are done with. This section requires that each and every investigation shall be completed without any unnecessary delay.

26. The report under Section 169 of the Code can be referred to as the Closure Report. Closure report is the one in which it is stated that there is not enough evidence to prove that the offence has been committed by the accused. Once the closure report is filed before the Magistrate, he may accept and the report the case as closed, direct a further investigation into the case, issue a notice to the first informant as he is the only person who can challenge the report or he may directly reject the closure and take cognizance of the case.

27. A charge sheet is a final report prepared by the investigation or law enforcement agencies for proving the accusation of a crime in a criminal court of law. The report is basically submitted by the police officer in order to prove that the accused is connected with any offence or has committed any offence punishable under any penal statute having effect in India. The report entails and embodies all the stringent records right from the commencement of investigation procedure

of lodging an FIR to till the completion of investigation and preparation of final report. Section 173 of the Code of Criminal Procedure, 1973 provides for report of the police officer. Filing of the Charge-Sheet indicates the end of investigation.

28. The purpose of a charge-sheet is to notify a person of criminal charges being issued against them. After the charge-sheet is filed, the person against whom the charge-sheet has been filed comes to be known as an accused. The filing of charge-sheet with the magistrate indicates commencement of criminal proceedings.

29. The U.P. Police Regulation 107 and 108 detail the procedure required to be followed by the Investigating Officer as follows:-

107. An Investigating Officer is not to regard himself as a mere clerk for the recording of statements. It is his duty to observe and to infer. In every case, he must use his own exprt observations of the scene of the offence and of the general circumstances to check the evidence of witnesses, and in cases in which the culprits are unknown to determine the direction in which he shall look for them. He must study the methods of local offenders who are known to the police with a view to recognizing their handiwork, and he must be on his guard against accepting the suspicions of witness and complaints when they conflict with obvious inferences from facts. He must remember that it his duty to find out the truth and not merely to obtain convictions. He must not prematurely commit himself to any view of the facts for or against any person and though he need not go out of his way to hunt up evidence for the defence in a case in which he has satisfactory grounds for believing that an accused person is guilty, he must always give accused persons an opportunity of producting defence evidence before him, and must consider such evidence carefully if produced. Burglary investigations should be conducted in accordance with the special orders on the subject.

108. The first step of the Investigating Officer should be to note in the case diary prescribed by Section 172 of the Code of Criminal Procedure the time and place at which he has received the information on which he acts and to make in the diary a copy of the first information report. When beginning his investigation, he must note in the diary the time and place at which he begins. He should then inspect the scene of the alleged offence and question the complainant and any other person who may be able to throw light on the circumstances. At an early stage of the investigation, he should consult the village crime note-book to learn of any matter recorded there which may have a bearing on the case.

30. A perusal of the aforesaid regulations shows that for the Investigating Officer, the accused and the complainant are equal at the time of conducting investigation. He has to consider the case of both the parties and thereafter, arrive at a fair conclusion regarding the investigation into the allegations made against the accused. He is not required to simply prove that the allegations in the F.I.R are correct and should necessarily collect evidence to implicate the accused, justifying his implication. This was done when the country was under colonial rule but it appears that even after independence the police investigation is still the same. Its aim is only to justify the implication. Rarely the statements of the accused side are recorded by the investigating officers of police.

31. What is fair investigation has been considered by the Hon'ble Supreme Court in number of judgements, considered hereinbelow:-

1) **State of Bihar v. P.P. Sharma, 1992 Supp (1) SCC 222, at page 258** :

48. From this perspective, the function of the judiciary in the course of investigation by the police should be complementary and full freedom should be accorded to the investigator to collect the evidence connecting the chain of events leading to the discovery of the truth, viz., the proof of the commission of the crime,. Often individual liberty of a witness or an accused person are involved and inconvenience is inescapable and unavoidable. The investigating officer would conduct indepth investigation to discover truth while keeping in view the individual liberty with due observance of law. At the same time he has a duty to enforce criminal law as an integral process. No criminal justice system deserves respect if its wheels are turned by ignorance. It is never his business to fabricate the evidence to connect the suspect with the commission of the crime. Trustworthiness of the police is the primary insurance. Reputation for investigative competence and individual honesty of the investigator are necessary to enthuse public confidence. Total support of the public also is necessary.

2) **Babubhai v. State of Gujarat, (2010) 12 SCC 254 : (2011) 1 SCC (Cri) 336, at page 268 :**

32. The investigation into a criminal offence must be free from objectionable features or infirmities which may legitimately lead to a grievance on the part of the accused that investigation was unfair and carried out with an ulterior motive. It is also the duty of the Investigating Officer to conduct the investigation avoiding any kind of mischief and harassment to any of the accused. The Investigating Officer should be fair and conscious so as to rule out any possibility of fabrication of evidence and his impartial conduct must dispel any suspicion as to its genuineness. The Investigating Officer "is not to bolster up a prosecution case with such evidence as may enable the court to record conviction but to bring out the real unvarnished truth". (Vide R.P. Kapur Vs. State of Punjab AIR 1960 SC 866; Jamuna Chaudhary & Ors. Vs. State of Bihar AIR 1974 SC 1822; and Mahmood Vs. State of U.P. AIR 1976 SC 69).

3) **Vinay Tyagi v. Irshad Ali, (2013) 5 SCC 762, at page 792** :

48. What ultimately is the aim or significance of the expression "fair and proper investigation' in criminal jurisprudence? It has a twin purpose. Firstly, the investigation must be unbiased, honest, just and in accordance with law. Secondly, the entire emphasis on a fair investigation has to be to bring out the truth of the case before the court of competent jurisdiction. Once these twin paradigms of fair investigation are satisfied, there will be the least requirement for the court of law to interfere with the investigation, much less quash the same, or transfer it to another agency. Bringing out the truth by fair and investigative means in accordance with law would essentially repel the very basis of an unfair, tainted investigation or cases of false implication. Thus, it is inevitable for a court of law to pass a specific order as to the fate of the investigation, which in its opinion is unfair, tainted and in violation of the settled principles of investigative canons.

4) **Amitbhai Anilchandra Shah v. CBI, (2013) 6 SCC 348 : (2014) 1 SCC (Cri) 309, at page 383 :**

58.9. Administering criminal justice is a two-end process, where guarding the ensured rights of the accused under Constitution is as imperative as ensuring justice to the victim. It is definitely a daunting task but equally a compelling responsibility vested on the court of law to protect and shield the rights of both. Thus, a just balance between the fundamental rights of the accused guaranteed under the Constitution and the expansive power of the police to investigate a cognizable offence has to be struck by the court. Accordingly, the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences. As a consequence, in our view this is a fit case for quashing the second F.I.R to meet the ends of justice.

58.10. The investigating officers are the kingpins in the criminal justice system. Their reliable investigation is the leading step towards affirming complete justice to the victims of the case. Hence they are bestowed with dual duties i.e. to investigate the matter exhaustively and subsequently collect reliable evidences to establish the same.

5) Manohar Lal Sharma v. Prinicipal Secy., (2014) 2 SCC 532 : (2014) 4 SCC (Cri) 1, at page 553 :

26. One of the responsibilities of the police is protection of life, liberty and property of citizens. The investigation of offences is one of the important duties the police has to perform. The aim of investigation is ultimately to search for truth and bring the offender to book.

27. Section 2(h) of the Code of Criminal Procedure (for short "the Code") defines investigation to include all the proceedings under the Code for collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by the Magistrate in this behalf.

28. In H.N. Rishbud, this Court explained that the investigation generally consists of the following steps : (AIR p. 201, para 5)

(1) Proceeding to the spot;

(2) ascertainment of the facts and circumstances of the case;

(3) discovery and arrest of the suspected offender;

(4) collection of evidence relating to the commission of the offence which may consist of the examination of :

(a) various persons (including the accused) and the reduction of statement into writing, if the officer thinks fit;

(b) the search of places and seizure of things, considered necessary for the investigation and to be produced at the trial;

(5) formation of the opinion as to whether on the materials collected, there is a case to place the accused before a Magistrate for trial, if so, take the necessary steps for the same for filing necessary charge-sheet under Section 173 Cr.P.C.

6) **Dinubhai Boghabhai Solanki v. State of Gujarat, (2014) 4 SCC 626 : (2014) 2 SCC (Cri) 384, at page 643** :

48. Undoubtedly, the essence of criminal justice system is to reach the truth. The underlying principle is that whilst the guilty must not escape punishment; no innocent person shall be punished unless the guilt of the suspect/accused is established in accordance with law. All suspects/accused are presumed to be innocent till their guilt is proved beyond reasonable doubt in a trial conducted according to the procedure prescribed

under law. Fair, unbiased and transparent investigation is a sine quo non for protecting the accused. Being dissatisfied with the manner in which the investigation was being conducted, the father of the victim filed the petition seeking an impartial investigation.

7) **Rajiv Singh v. State of Bihar, (2015) 16 SCC 369, at page 397** :-

79. The investigating agency as the empowered mechanism of the law enforcing institution of the State is entrusted with the solemn responsibility of securing the safety and security of the citizens and in the process, act as the protector of human rights. The police force with the power and resources at its disposal is a pivotal cog in the constitutional wheel of the democratic polity to guarantee the sustenance of an orderly society. It is usually the first refuge of one in distress and violated in his legal rights to seek redress. The police force, thus is bestowed with a sacrosanct duty and is undisputedly required to be impartial, committed and relentless in their operations to unravel the truth and in the case of a crime committed, make the offender subject to the process of law. The investigating agency, thus in the case of a probe into any offence has to maintain a delicate balance of the competing rights of the offenders and the victim as constitutionally ordained but by no means can be casual, incautious, indiscreet in its approach and application. A devoted and resolved intervention of the police force is thus an assurance against increasingly pernicious trend of escalating crimes and outrages of law in the current actuality.

80. As a criminal offence is a crime against the society, the investigating agency has a sanctified, legal and social obligation to exhaust all its resources, experience and expertise to ferret out the truth and bring the culprit to book. The manifest defects in the investigation in the case demonstrate an inexcusable failure of the authorities concerned to abide by this paramount imperative.

81. This Court, amongst others, in Amitbhai Anilchandra Shah vs. Central Bureau of Investigation and another (2013) 6 SCC 348, while underlining the essentiality of a fair, in-depth and fructuous investigation had observed that investigating officers are the kingpins in the criminal justice system and reliable investigation is a leading step towards affirming complete justice to the victims of the case. It was ruled that administering criminal justice is a two-end process, where guarding the ensured rights of the accused under the Constitution is as imperative as ensuring justice to the victim. It was held that the daunting task, though a compelling responsibility, is vested on the court of law to protect and shield the rights of both. That a just balance between the fundamental rights of the accused guaranteed under the Constitution and the expansive power of the police to investigate a cognizable offence has to be struck by the Court was emphatically underlined. We are left appalled by the incomprehensible omissions of the investigating agency in the instant case and we would expect and require that the authorities in-charge of ensuring fair, competent and effective investigation of criminal offences in particular would take note of this serious concern of the Court and unfailingly take necessary remedial steps so much so that these observations need not be reiterated in future entailing punitive consequences.

8) **Suresh Chandra Jana v. State of W.B., (2017) 16 SCC 466, at page 480** :-

34. The last aspect is regarding the defective investigation and prosecution. If a

negligent investigation or omissions or lapses, due to perfunctory investigation, are not effectively rectified, the faith and confidence of the people in the law enforcing agency would be shaken. Therefore the police have to demonstrate utmost diligence, seriousness and promptness. [refer Ram Bihari Yadav v. State of Bihar & Ors., (1998) 4 SCC 517].

35. The basic requirement that a trial must be fair is crucial for any civilized criminal justice system. It is essential in a Reportable society which recognizes human rights and is based on values such as freedoms, the rule of law, democracy and openness. The whole purpose of the trial is to convict the guilty and at the same time to protect the innocent. In this process courts should always be in search of the truth and should come to the conclusion, based on the facts and circumstances of each case, without defeating the very purpose of justice.

32. The Hon'ble Supreme Court has held in number of cases that fair investigation, which precedes filing of charge-sheet, is a fundamental right under Article 21 of the Constitution of India. Therefore, it must be fair, transparent and judicious. A tainted and biased investigation leads to filing of a charge-sheet which is infact based on no investigation and therefore, the charge-sheet filed in pursuance of such an investigation cannot be held to be legal and in accordance with law. Some of such observations are as follows :-

1**) Nirmal Singh Kahlon v. State of Punjab, (2009) 1 SCC 441 : (2009) 1 SCC (Cri) 523, at page 455**

:

28. An accused is entitled to a fair investigation. Fair investigation and fair trial are concomitant to preservation of fundamental right of an accused under Article 21 of the Constitution of India. But the State has a larger obligation i.e. to maintain law and order, public order and preservation of peace and harmony in the society. A victim of a crime, thus, is equally entitled to a fair investigation. When serious allegations were made against a former Minister of the State, save and except the cases of political revenge amounting to malice, it is for the State to entrust one or the other agency for the purpose of investigating into the matter. The State for achieving the said object at any point of time may consider handing over of investigation to any other agency including a central agency which has acquired specialization in such cases.

2) **Babubhai v. State of Gujarat, (2010) 12 SCC 254 : (2011) 1 SCC (Cri) 336, at page 272 :**

45. Not only fair trial but fair investigation is also part of constitutional rights guaranteed under Articles 20 and 21 of the Constitution of India. Therefore, investigation must be fair, transparent and judicious as it is the minimum requirement of rule of law. The investigating agency cannot be permitted to conduct an investigation in a tainted and biased manner. Where non-interference of the court would ultimately result in failure of justice, the court must interfere. In such a situation, it may be in the interest of justice that independent agency chosen by the High Court makes a fresh investigation.

3) Azija Begum v. State of Maharashtra, (2012) 3 SCC 126, at page 128 :

12. In the facts and circumstances of this case, we find that every citizen of this country has a right to get his or her

complaint properly investigated. The legal framework of investigation provided under our laws cannot be made selectively available only to some persons and denied to others. This is a question of equal protection of laws and is covered by the guarantee under Article 14 of the Constitution.

13. The issue is akin to ensuring an equal access to justice. A fair and proper investigation is always conducive to the ends of justice and for establishing rule of law and maintaining proper balance in law and order. These are very vital issues in a democratic set up which must be taken care of by the Courts.

33. This country has inherited the present police system from the British Government. The main objective of British rule was to maintain status quo by using the police force as effective weapon to put down any challenge to its authority by iron hand. The police had to take repressive measures on account of the directions of the British Government. The investigation was accordingly carried out keeping in view the direction of the government and their object of ruling this country. Charge-sheets were submitted accordingly which were not the result of free and fair investigation. The fundamental rights of the people of the country were not in existence and the Criminal Procedure Code was designed in a manner which was not in accordance with the rights of the people of this country before independence. The code no where clearly provides that the investigating officer shall necessarily record the statements of witnesses of both the sides, viz., the accused and the informant / complainants, while conducting the investigation into an alleged offence.

34. After India became independent, it became a welfare state from the police state of the Britishers. The legislations which were framed after independence were in conformity with the fundamental rights of the people of this country. In the welfare state, the role of the police became more difficult in view of deteriorating law and order situation, communal riots, political turmoil, student unrest, terrorist activities, increase in white-collar crimes, etc. The police force, in addition to the aforesaid new challenges, came under stress and strain. Long hours of duty in connection with law and order situation, V.I.P duty, etc., left the police with lesser time to properly investigate the cases. Under the pressure of work, police started mechanical investigation of the crimes entrusted to it for free and fair investigation. The investigating officer is subjected to pressure by the influential persons of society to give report as per their command. The influence of money in conducting investigation is quite evident and it is a very big hurdle in the free and fair investigation of a crime and case. It was suggested by number of Law Commission Reports that the investigation wing of the police should be separated from the law and order wing but it has not materialized as yet. The separation of investigation wing from law and order wing has its hazards. If they are separated it would be difficult to control law and order situation time the mischief mongers and the criminals will not tear the law and order wing of the police, once it is clear to them but the investigation of the case after report is lodged will be done by different wing of police. This is the practical drawbak in separation of the wings of police at local level. The investigating officer is also under pressure of Senior Officers, who do not favourable see any departure from established practice of justifying implication of an accused by collecting

evidence in this regard. They feel it safe to justify implication of an accused by submitting investigation reports against the accused, except in few cases, where they or their political patron is interested otherwise.

35. Therefore, it is clear that the Court has to be cautious in considering the bail applications filed by the accused before and after submission of charge-sheet. There are number of impediments in the way of Investigating Officer in submission of charge-sheet after free and fair investigation as considered hereinabove.

36. Right to liberty is sacrosanct and guaranteed under Article 21 of the Constitution of India. Under Article 14 of the Constitution of India, there is equal protection of law to everyone, informant/complainant and accused, alike. During investigation stage or during trial stage, "presumption of innocence of accused" is intact and it is so till he is convicted either under Section 255 Cr.P.C. (summons case), Section 248 Cr.P.C. (warrant case) or under Section 335 Cr.P.C. (sessions case). Only when he is convicted, presumption of innocence gets replaced by a judgement of conviction.

37. Section 149 I.P.C is one of the most misused, misinterpreted and misleading provision of the present times so far as the investigation by the Investigating Officers of police or any other investigating agency of crime is concerned. The edifice of Section 149 I.P.C stands on substratum of Sections 141 I.P.C, 142 I.P.C and 143 I.P.C. Chapter VIII of the IPC provides for offences against the public tranquillity. Section 141 I.P.C defines unlawful assembly to be an assembly of five or more persons. They must have a common object, amongst others, to commit any mischief or criminal trespass, or other offence. Section 142 I.P.C postulates that whoever being aware of facts which render any assembly an unlawful one, intentionally joins the same would be a member of the same. Section 143 provides for punishment of being a member of unlawful assembly.

38. Section 149 I.P.C provides for constructive liability to every person of an unlawful assembly. If an offence is committed by any member thereof in prosecution of common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object. Formation of unlawful assembly having its common object and knowledge of common object are matters of fact which are required to be proved by the prosecution beyond all reasonable doubt for securing conviction of an accused under Section 149 I.P.C. There cannot be any straight jacket formula to arrive at a finding as to who was the member of unlawful assembly and for which object the same was formed. It can be inferred and proved by the cogent evidence only.

39. Section 149 I.P.C has following three essentials (i) there must be unlawful assembly; (ii) commission of offence may be by any member of unlawful assembly; (iii) such offence must have been committed in prosecution of the common object of the assembly, or must be such as member of the assembly knew to be likely to be committed.

40. Only when these three elements are satisfied an implication /conviction under Section 149 I.P.C may be sustained and not otherwise. The law of vicarious

liability under Section 149 I.P.C is crystal clear that even mere presence in unlawful assembly, but with an active mind, to achieve the common object, makes a person vicariously liable for the act of unlawful assembly as held by the Apex Court in the case of **Amerika Rai Vs. State of Bihar, 2011(4) SCC 677 and Ramchandran Vs. State of Kerala, 2011(9) SCC 257**. Ramchandran (supra) in paragraph 25 to 27 relying upon earlier judgement held as follows :-.

25. Regarding the application of Section 149, the following observations from **Charan Singh v. State of U.P., (2004) 4 SCC 205**, are very relevant:

"13. ... 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. ... 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...."

26. In Bhanwar Singh v. State of Madhya Pradesh, (2008) 16 SCC 657, this Court held:

"Hence, the common object of the unlawful assembly in question depends firstly on whether such object can be classified as one of those described in Section 141 IPC. Secondly, such common object need not be the product of prior concert but, as per established law, may form on the spur of the moment (see also Sukha v. State of Rajasthan AIR 1956 SC 513). Finally, the nature of this common object is a question of fact to be determined by considering nature of arms, nature of the assembly, behaviour of the members, etc. (see also Rachamreddi Chenna Reddy v. State of A.P. (1999) 3 SCC 97)".

27. Thus, this court has been very cautious in the catena of judgments that where general allegations are made against a large number of persons the court would categorically scrutinise the evidence and hesitate to convict the large number of persons if the evidence available on record is vague. It is obligatory on the part of the court to examine that if the offence committed is not in direct prosecution of the common object, it yet may fall under second part of Section 149 IPC, if the offence was such as the members knew was likely to be committed. Further inference has to be drawn as what was the number of persons; how many of them were merely passive witnesses; what were their arms and weapons. Number and nature of injuries is also relevant to be considered. "Common object" may also be developed at the time of incident.

41. The concept of constructive liability must not be so stretched as to lead to false implication of innocent person or if

general allegations are made against large number of accused, the Court has to be cautious unless reasonable direct and indirect circumstances lend assurance to the prosecution case that all the accused shared common object of unlawful assembly and hence their implication / conviction not be justified, as held by the Apex Court in the case of **Subal Ghorai and others Vs. State of West Bengal, 2013(4) SCC 607**. Ready reference to paragraph 53 would be relevant :-

53. But this concept of constructive liability must not be so stretched as to lead to false implication of innocent bystanders. Quite often, people gather at the scene of offence out of curiosity. They do not share common object of the unlawful assembly. If a general allegation is made against large number of people, Court has to be cautious. It must guard against the possibility of convicting mere passive onlookers who did not share the common object of the unlawful assembly. Unless reasonable direct or indirect circumstances lend assurance to the prosecution case that they shared common object of the unlawful assembly, they cannot be convicted with the aid of Section 149 of the IPC. It must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all stages. The court must have before it some materials to form an opinion that the accused shared common object. What the common object of the unlawful assembly is at a particular stage has to be determined keeping in view the course of conduct of the members of the unlawful assembly before and at the time of attack, their behaviour at or near the scene of offence, the motive for the crime, the arms carried by them and such other relevant considerations. The criminal court has to conduct this difficult and meticulous exercise of assessing evidence to avoid roping innocent people in the crime. These principles laid down by this Court do not dilute the concept of constructive liability. They embody a rule of caution."

42. Apex Court has also cautioned that when there is sudden action by one member in the assembly, all are not liable. In the case of **Roy Fernandes Vs. State of Goa, 2012(3) SCC 221**, it was held that a group attack on the victim is not the only decisive factor to infer common object of the unlawful assembly. It would be useful to refer to paragraph 27 to 33 in this context :-

27. This Court has in a long line of decisions examined the scope of Section 149 of the Indian Penal Code. We remain content by referring to some only of those decisions to support our conclusion that the appellant could not in the facts and circumstances of the case at hand be convicted under Section 302 read with Section 149of the IPC.

28. In **Chikkarange Gowda & Ors. Vs. State of Mysore [AIR 1956 SC 731]** this Court was dealing with a case where the common object of the unlawful assembly simply was to chastise the deceased. The deceased was, however, killed by a fatal injury caused by certain member of the unlawful assembly. The court below convicted the other member of the unlawful assembly under Section 302 read with Section 149 IPC. Reversing the conviction, this Court held:

"9. It is quite clear to us that on the finding of the High Court with regard to the common object of the unlawful assembly, the conviction of the appellants for an offence under Section 302 read with Section 149 Indian Penal Code cannot be

sustained. The first essential element of Section 149 is the commission of an offence by any member of an unlawful assembly; the second essential part is that the offence must be committed in prosecution of the common object of the unlawful assembly, or must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object.

In the case before us, the learned Judges of the High Court held that the common object of the unlawful assembly was merely to administer a chastisement to Putte Gowda. The learned Judges of the High Court did not hold that though the common object was to chastise Putte Gowda, the members of the unlawful assembly knew that Putte Gowda was likely to be killed in prosecution of that common object. That being the position, the conviction under Section 302 read with Section 149 Indian Penal Code was not justified in law."

29. In **Gajanand & Ors. Vs. State of Uttar Pradesh [AIR 1954 SC 695],** this Court approved the following passage from the decision of the Patna High Court in Ram Charan Rai Vs. Emperor [AIR 1946 Pat 242]:

"Under Section 149 the liability of the other members for the offence committed during the continuance of the occurrence rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. Such knowledge may reasonably be collected from the nature of the assembly, arms or behavior, at or before the scene of action. If such knowledge may not reasonably be attributed to the other members of the assembly then their liability for the offence committed during the occurrence does not arise".

30. This Court then reiterated the legal position as under:

"9.....The question is whether such knowledge can be attributed to the appellants who were themselves not armed with sharp edged weapons. The evidence on this point is completely lacking. The appellants had only lathis which may possibly account for Injuries 2 and 3 on Sukkhu's left arm and left hand but they cannot be held liable for murder by invoking the aid of Section 149 IPC. According to the evidence only two persons were armed with deadly weapons. Both of them were acquitted and Sosa, who is alleged to have had a spear, is absconding. We are not prepared therefore to ascribe any knowledge of the existence of deadly weapons to the appellants, much less that they would be used in order to cause death."

31. In **Mizaji and Anr. Vs. State of U.P. [AIR 1959 SC 572]** this Court was dealing with a case where five persons armed with lethal weapons had gone with the common object of getting forcible possession of the land which was in the cultivating possession of the deceased. Facing resistance from the person in possession, one of the members of the assembly at the exhortation of the other fired and killed the deceased. This Court held that the conduct of the members of the unlawful assembly was such as showed that they were determined to take forcible possession at any cost. Section 149 of IPC was, therefore, attracted and the conviction of the members of the assembly for murder legally justified.

32. This Court analysed Section 149 in the following words:

"6. This section has been the subject matter of interpretation in the various High Court of India, but every case has to be decided on its own facts. The first part of

the section means that the offence committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. It is not necessary that there should be a preconcert in the sense of a meeting of the members of the unlawful assembly as to the common object; it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under section 149 if it can be held that the offence was such as the members knew was likely to be committed. The expression 'know' does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of section 149. Similarly, if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to be committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all."

33. In Shambhu Nath Singh and Ors. Vs. State of Bihar [AIR 1960 SC 725], this Court held that members of an unlawful assembly may have a community of object upto 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.

As a consequence, the effect of Section 149 of the Indian Penal Code may be different on different members of the same unlawful assembly. Decisions of this Court Gangadhar - Behera and Others Vs. State of Orissa [2002 (8) SCC 381] and Bishna Alias Bhiswadeb Mahato and Others Vs. State of West Bengal [2005 (12) SCC 657] similarly explain and reiterate the legal position on the subject.

43. Common object has to be ascertained from the member-ship, weapon used and the nature of injuries as well as other circumstances as held by the Apex Court in the case of **Haramant Laxmappa Kukkadi Vs. State of Karnataka, 1994(1) SCC 736.**

44. In the present case this court finds that out of three ingredients discussed above, third ingredient for constituting offence under Section 149 I.P.C is not satisfied in this case. The allegations clearly prove that dispute took place all of a sudden regarding parking of car and from the allegations on record it does not appears that all the accused persons had common object of causing the murder of the deceased and attempt to murder of his brother and had formed unlawful assembly knowing that such offence is likely to be committed. The dispute took place all of a sudden wherein two co-accused were involved. The injuries do not prove that any indiscriminate firing was made by all the accused persons. The injury caused to the injured was on his leg and will not constitute offence under Section 307 I.P.C.

In the first information report no weapon used in the alleged offence was assigned to the applicant but allegation of firing was made against to him along with co-accused. As per judgements of Apex Court in the case of **Ramchandran (supra) and Bhanwar Singh (Supra)**, nature of arm used is one of the necessary ingredients for considering the common object of the accused who had formed unlawful assembly.

45. Keeping the above facts, this court at the time of consideration of the bail application of an accused implicated for committing offence under Section 149 I.P.C. must place reliance on the material collected by the investigating officer. The court has to consider the case on its merit and there cannot be any straight jacket formula for the same, as stated earlier formation of unlawful assembly having its common object and knowledge of any object are matters of fact and the court should apply its independent mind keeping in view the position of the criminal investigation and the rule of prudence and probability keeping in view the totality of facts and circumstances of the case.

46. This court has come across number of cases of bail where ingredients for constituting offence under Section 149 I.P.C were clearly made but accused was not implicated under Section 149 I.P.C. Conversely court has also come across cases where the allegation in the first information report and the statements of the witnesses clearly did not proved the presence of the necessary ingredients for constituting offence under Section 149 I.P.C but accused was implicated for the same. Court should be cautious of relying upon the Section 149 I.P.C while considering bail application. The investigating officer apply mostly section 149 I.P.C as it suits them.

47. In view of the above factual position emerging from the record the applicant cannot be said to be rightly implicated under Section 149 I.P.C for the alleged offences. Two fire arm injuries were found on the body of the deceased, Once on abdomen and on on thigh of the deceased. The accused named are above five in numbers, therefore, only because they were more in numbers the offence alleged cannot be considered to be made out against them at this stage. It appears to be case of sudden provocation and all the members of the alleged unlawful assembly cannot be held liable for the offence committed by any one or two accused named in the first information report. More so because in this case also the investigating officer of police has not recorded the statement of a single witness from the accused side. All the statements recorded by the investigating officer are of the informant side for justifying the implication of all the accused. The version of accused side, as usual, is missing. Therefore, on the basis of one-sided and flawed investigation the implication of the applicant under Section 149 I.P.C cannot be justified. It could have been done after considering the versions of both sides by the investigating officer, which he was required to do as per law, but he has again miserably failed in performance of his legal duty. The three ingredients for constituting the offence under Section 149 I.P.C discussed in paragraph 12 of this judgement could have been ascertained only after considering the evidence of both sides by the investigating officer and not on the basis of one sided evidence collected by way of illegal investigation. In short, after considering the evidence lead before the

trial court only definite opinion can be formed regarding commission of offence under Section 149 I.P.C. At the time of consideration of bail application of an accused, it would be unsafe to deny bail to an accused, implicated for committing offence under Section 149 I.P.C considering the state of investigation of crime by investigating agency in the state.

48. Respectfully concurring with the ratio of cases cited at the bar but in the light of above consideration, keeping in view the nature of the offence, evidence, complicity of the accused, submissions of the learned counsel for the parties, larger mandate of the Article 21 of the Constitution of India, considering the dictum of Apex Court in the case of **Dataram Singh Vs. State of U.P. and another reported in (2018) 3 SCC 22** and **recent judgment dated 11.07.2022 of the Apex Court in the case of Satendra Kumar Antil vs. C.B.I., passed in S.L.P (Crl.) No. 5191 of 2021** and considering 5-6 times overcrowding in jails over and above their capacity by the under trials in this State and without expressing any opinion on the merits of the case, which may interfere with the discretion of the trial court, the Court is of the view that the applicant has made out a case for bail. The bail application is allowed.

49. Let the applicant, **Sanjeev @ Kallu Sethiya, involved in Case Crime No.279 of 2021**, under Sections 147, 148, 149, 307, 302, 504 I.P.C and Section 7 Criminal Law Amendment Act, Police Station Mauranipur, District- Jhansi be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to following conditions. Further, before issuing the release order, the sureties be verified:-

(i) The applicant shall not tamper with the evidence or threaten the witnesses.

(ii) 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.

(iii) The applicant shall remain present before the Trial Court on each date fixed, either personally or as directed by the Court. In case of his absence, without sufficient cause, the Trial Court may proceed against him under Section 229-A of the Indian Penal Code.

(iv) In case the applicant misuse the liberty of bail during trial and in order to secure his 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 him in accordance with law under Section 174-A of the Indian Penal Code.

(v) 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.

50. In case of breach of any of the above conditions, the complainant is free to

move an application for cancellation of bail before this court.

51. Identity, status and residence proof of the applicant and sureties be verified by the court concerned before the bonds are accepted.

52. The trial court is directed to conclude the trial against the applicant as expeditiously as possible, preferable within a period of one year as per Section 309 Cr.P.C from the date of production of certified copy of this order.

53. Registrar (compliance) is directed to communicate this order to the court concerned within a week.

(2022) 11 ILRA 769
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.09.2022

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE MRS. SADHNA RANI (THAKUR), J.

First Appeal No. 212 of 2018

Smt. Sneha Pandit ...Appellant
Versus
Shri Tarun Pandit ...Respondent

Counsel for the Appellant:
Sri Siddharth Khare

Counsel for the Respondent:
Shri Amit Krishna, Sri Alok Tiwari, Sri Anil Sharma

A. Civil Law - Hindu Marriage Act, 1955 - Section 13(1)(ib) - Divorce on the ground of desertion - Desertion, in its essence, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause - Court on the basis of acts, conduct and expression of intention by the parties, both prior to and subsequent to the actual acts of separation, can draw an inference from the proven facts and circumstances that the deserting spouse had the intention to bring cohabitation permanently to an end, without the consent of the deserted spouse - For the deserted spouse, it is required to be proved that the act of desertion was without his consent and there was no such conduct of the deserted spouse giving reasonable cause to the spouse (deserting spouses) for leaving the matrimonial home to form the necessary intention to bring cohabitation permanently to an end (Para 51)

B. Civil Law - Hindu Marriage Act, 1955 - Section 13(1)(ib) - Divorce on the ground of desertion - Mere act of withdrawal of the wife from her matrimonial home at the Air Force station, Ambala and the factum of separation of the wife for a period of two years from her husband when she was making efforts to pacify her husband with the help of the family in order to bring matrimonial harmony cannot lead to the conclusion that the wife had no intention to lead a normal married life with the husband or her act of leaving her matrimonial home was in absence of any conduct of the husband (respondent) giving the wife (appellant) a reasonable cause to form the necessary intention aforesaid (Para 60)

C. Civil Law - Hindu Marriage Act, 1955 - Section 13(1)(ib) - Divorce on the ground of mental cruelty - before the conduct can be called cruelty, it must touch a certain pitch of severity - It is for the Court to weigh the gravity - It has to be seen whether the conduct was such that no reasonable person would tolerate it - Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by

mere silence, violent or non-violent (Para 70)

D. Civil Law - Hindu Marriage Act, 1955 - Section 13(1)(ib) - Divorce on the ground of mental cruelty - criminal case lodged by the wife cannot be a reason to grant divorce on the ground of cruelty and the family court had acted illegally in holding that even filing of the application for maintenance under Section 125 Cr.P.C. by the wife would come within the meaning of cruelty - apart from moving the application for maintenance and seeking restitution of conjugal rights, the appellant wife did not initiate any criminal proceeding nor insituted any adverse legal action against her husband so as to put her relations in peril, till the divorce suit was filed by the respondent - conclusion drawn by the family court that all the abovenoted acts of wife had resulted in an act of 'cruelty' caused upon her husband is, contrary to the evidence on record (para 96)

E. Civil Law - Hindu Marriage Act, 1955 - Section 13 - Divorce - Irretrievable break down of marriage - decree of divorce cannot be granted unless grounds as indicated u/s 13 of the Act' 1955 are established - Irretrievable break down of marriage is not a ground for divorce under the Act' 1955 - In the instant case, both spouses (wife aged about 35 yrs old & the husband 39yrs), came from respected families and were well-educated - bitterness developed between them and their families due to the ongoing legal battles - husband consistently refused to live with his wife - Considering the whole issue from human angle, physiological point of view of both the spouses, Court concluded that the matrimonial bond was beyond repair - there was no chance of their coming together or living together again - It was held that given their education and background, if they are freed from the marital bond, they may have a chance to lead happier and more constructive lives - refusing to severe the marital tie does not serve the sanctity of marriage - Such a situation may lead to mental cruelty of both the individuals and hamper positive progress and ultimate happiness in life - Under those compelling circumstances, their marriage was dissolved and parties give a chance to move on from this dead relationship (Para 109, 110, 111, 112, 113, 114, 115)

F. Civil Law - The Hindu Marriage Act, 1955 - Section 25 - Permanent alimony and maintenance- Appellant, wife of an Air Force Officer, couldn't pursue her career due to her husband's resistance & due to marital obligations - she completed her B.Tech and pursued further education during their two-year separation but the legal battle with her husband prevented her from finding a job - Court held wife is entitled to permanent alimony - Given the husband's social status & the aspirations of the appellant wife to lead the life of the wife of an Air Force Officer, Court held that she deserves Rs. 1 Crore as permanent alimony, in addition to what she has already received as interim maintenance (Para 116, 117)

G. The Family Courts Act, 1984 - Role of family court judges - Role of family court judges is not only of adjudicators but they are facilitators in matrimonial disputes where perception of a judge about gender issues plays a major role in his decisions - Family Court judges have to be gender sensitive - To evolve as a Family Court judge, a person has to be gender neutral, gender sensitive, open to the social changes to have a mature thinking - Court recommend that gender sensitization program be especially designed and held for the Family Court Judges in the State of U.P. (Para 125)

Allowed. (E-5)

List of Cases cited:

1. A. Jayachandra Vs Aneel Kaur AIR 2005 SC 534

2. Vishwanath Sitram Agarwal Vs San. Sarle Vishwanath Agarwal 2012 (7) SC 288

3. K. Srinivas Vs K. Deepa 2013 (5) SCC 226

4. Samar Ghosh Vs Jaya Ghosh 2007 (4) SCC 511

5. Shamim Bano Vs Asraf Khan 2014 (7) SCC 740

6. K Srinivas Vs K. Sunita 2014 (16) SCC 34

7.Dinesh Nagda Vs Santibai AIR 2012 MP 40

8.Manisha Srivastava Vs Rohit Srivastava 2015 (2) ADJ 547

9. Devesh Yadav Vs Smt. Minal FAO-M 208 of 2013

10. Joydeep Majumdar Vs Bharti Jaiswal Majumdar 2021 SCC 3 742

12 Dr.(Mrs.) Malathi Ravi, M.D Vs Dr. B.V . Ravi M.D 2014 (7) SCC 640

13. Vinit Saxena Vs Pankaj Pandit 2006 (3) SCC 778

14. Vishwanath Agrawal, s/o Sitaram Agrawal Vs Sarla Vishwanath Agrawal 2012 SCC (7) 288

(Delivered by Hon'ble Mrs. Sunita Agarwal, J. & Hon'ble Mrs. Sadhna Rani (Thakur), J.)

1. This is wife's appeal against the divorce decree prepared pursuant to the judgment and order dated 21.2.2018, passed by the family court in a suit instituted under Section 13 of the Hindu Marriage Act' 1955 (hereinafter referred as Act' 1955), namely the Matrimonial Petition No. 1614 of 2013, by the respondent-husband.

Introduction:-

2. The divorce petition was filed on 27.11.2013 on the grounds of cruelty and desertion. As per the statement therein, the parties got married on 22.11.2009 and at the time of marriage, the respondent/petitioner was working as a Fighter Pilot in the Indian Air Force and was posted as Flight Lieutenant in Badmer, Rajasthan. It was stated therein that for few days after marriage, the appellant went to stay with the respondent to the place of his posting but she could not adjust herself. The appellant wife was studying the B.Tech (Electronics and Instrumentation Engineering) course at the time of marriage and with the inspiration of the respondent husband, she could complete her studies. But after getting the degree, the appellant started pressurizing the respondent to allow her to take up a job in the NCR namely Delhi/Noida/Gurgaon region. It was further stated in the divorce petition that the family members of the appellant and the appellant herself were clearly informed by the respondent husband at the time of marriage itself, that she would not be allowed to take up any employment because of the nature of the job of the respondent and the appellant-wife and her family members had agreed to the said condition put before marriage. It was contended therein that while putting pressure to take up employment in a place like Delhi/Noida/Gudgaon, the appellant wife became annoyed and started quarreling frequently with the respondent. With a view to get the respondent dismissed from services of the Indian Air Force, the appellant started complaining to higher Officials of the Force and this attitude of the appellant had resulted in undermining the position of the respondent and he had suffered indignation. The appellant started committing cruelty both physically and mentally upon the respondent. On account of the ill-behaviour of the appellant, the respondent who was working as a Squadron Leader, Flying MIG-21 and other

fighter jet, started suffering mentally and physically and did not remain in the position to discharge his responsibilities to his full potential and devotion in the interest of the Nation. All efforts made by the respondent/petitioner and his family members to pacify the appellant went in vain and she remained adamant with her demands. On account of her attitude only, the appellant could not conceive (bear a child) and the respondent and his family members had suffered mental stress also due to the said reason.

3. On 23.11.2011, while the respondent/petitioner was on duty, in his absence, the brother of the appellant and one more person came to their house at Ambala Cantt. and, in execution of their pre-conceived plan, all valuables, jewellery, clothes, cash, diamond sets, F.D., ATM cards, bank passbooks etc. were collected by the appellant and she started making preparations for going to her parent's home at Meerut. At that point of time, on an intimation given by the wife of an Officer who was a neighbour, the respondent came to his house from the duty at around 2:00 P.M. and saw that the appellant alongwith the above two persons had already kept her luggage in a car and was ready to go to Meerut. All efforts made by the respondent to persuade the appellant (wife) proved futile and the appellant started misbehaving with him, remained adamant and left the respondent (husband) as against his wishes to go to her parent's home. The information of this incident was given by the respondent to his parents, who also went to the house of the appellant at Meerut and tried to persuade her. It was stated that the appellant refused to listen to anyone and remained adamant on her demand that she wanted to take up a job in Delhi/Noida/Gudgaon area and if the respondent wished he could leave his job to live with her, which was not possible for the respondents.

4. It was further stated in the petition that after 23.11.2011, despite best efforts made by the respondent and his family members to persuade the appellant and her family members, no possible solution could come out and the appellant remained adamant and refused to discharge her marital obligations. It is finally stated that on account of the above attitude of the appellant, her behavior, use of abusive language, the respondent had suffered severe mental stress and indignation at the hands of the appellant which undermine his position in front of his superiors, resulting in mental cruelty committed upon him. Due to the attitude of the appellant, the respondent could not undertake examination for promotion and his promotion got delayed. By the action and behaviour of the appellant, respondent had suffered severe mental stress which came within the meaning of 'cruelty' under the legal parlance. For her personal motives, the appellant had deserted the respondent for a period of more than two years which also fell within the meaning of 'cruelty'.

5. It was further contended therein that despite all efforts made by the respondent, the appellant did not agree to grant divorce by mutual consent and hence, the respondent was constrained to file the divorce petition. The cause of action for filing the divorce suit arose on 22.11.2009 when the appellant while living with the respondent had committed cruelty on him by all means and started pressurizing him to agree to her demand to take up a job in NCR and also on 23.11.2011 when she had left for her paternal home along with her brother as against the wishes of the

respondent and lastly on 25.11.2013 when she had refused to live with the respondent.

6. The appellant in her written statement had denied all the allegations levelled in the divorce petition and only accepted the factum of marriage. The plea of desertion had been categorically denied with the assertion that the appellant had filed a restitution petition under Section 9 of the Hindu Marriage Act before the competent court registered as Case No. 993 of 2013, which was pending and in the Mediation proceedings also, the appellant had expressed her wishes to go along with the respondent and live with him as his wife. It was further stated therein that the appellant was still ready and willing to live with the respondent and discharge her wifely duties.

7. It was further contended that in the month of February, 2013, both the parties spent time together as husband and wife and mental as well as physical relationship were established between them. On 5.7.2013, the appellant went to her in-law's house and stayed there till 8.7.2013 in an effort to save her marriage. But she was left by the said relatives of the respondent at her paternal home giving her assurance that they would call her very soon. It was stated in the written statement by the appellant-wife that she was always ready and willing to live with the respondent and discharge her responsibilities, even after 23.11.2011 and the plea of desertion without any cause or reason on her part was false.

8. A disclosure had been made therein that the appellant-wife had lodged a criminal case under Section 498-A, 323, 504, 506, 377 I.P.C. and 3/4 of D.P. Act on account of ill behaviour of the respondent and physical assault made on her, which was registered as Case Crime No. 84 of 2014 at the Mahila Police Station, Meerut. However, she was ready and willing to forgive the respondent and live with him as his wife.

Opinion of the Family Court:-

9. Three witnesses were examined before the family Court, respondent-husband as PW-1, appellant-wife as DW-1 and mother of the appellant as DW-2. Various documentary evidences were filed by both of the parties in support of their stand before the family court.

10. The family court on the basis of the pleadings of the parties framed following issues for determination:-

(i) Whether the marriage solemnized between the parties is liable to annulled on the ground of cruelty by the defendant appellant?

(ii) Whether the defendant had deserted the plaintiff without any reason?

(iii) Whether the plaintiff respondent is entitled to any other relief?

11. On issue no.1, the family court concluded that the act of the appellant wife in making complaint to higher officials of the Air force, the assertive behaviour of the wife pressuring the respondents frequently to go out of the Air Force station, her act of filing of the criminal cases against the respondent husband and institution of the case under Section 125 Cr.P.C. despite getting maintenance from the department making a reckless allegations against the respondent that he was not appearing in the case under Section 9 of the Hindu Marriage Act' 1955, false allegations levelled against the husband of unnatural sexual assault, the allegations of SMS of other girls on the

mobile set of the respondent and character assassination of the respondent on the part of the wife amounted to mental cruelty. In such a situation, it was not possible for the respondent husband to spend his life with the appellant wife. The issue No.1 on the ground of cruelty by the wife had been decided in favour of the plaintiff respondent.

12. While coming to the aforesaid conclusion, the family court has discussed that the unreasonable demand of the wife to go out of Air Force Station as against the disciplined life of a Squadron leader and insisting to take up job at places like Delhi, Noida and Gurgaon (NCR) became a vindictive act on the part of the wife which had resulted in causing physical and mental cruelty to the husband. It was also noted that when the respondent husband did not accede to unreasonable demand of the appellant wife, she in order to get him dismissed from service made complaints to higher officials of the respondent which had resulted in derogation of the position of the husband and undermined his dignity.

13. It was also noted by the family court that the wife had filed a criminal case under Section 498-A, 323, 504, 506, 377 IPC and Section ¾ D.P. Act making reckless and false allegations against her husband. A petition under Section 9 of the Act' 1955 was also filed by the wife with the aim to make out a case against the husband. On the final report submitted by the Investigating Officer in the criminal case lodged under Section 498-A and Dowry Prohibition Act, a protest petition was filed by the respondent wife whereupon re-investigation was ordered by the competent court. The Investigating Officer again submitted a final report, whereafter, another protest petition was filed by the wife. False cases under the Domestic Violation Act and Section 125 Cr.P.C. were filed though the appellant wife was getting interim maintenance from the department, itself. The allegations made in the first information report lodged by the appellant wife were taken note of by the family court to record a finding that the appellant wife had failed to establish the allegations made by her and all those acts of the wife had caused mental agony to the respondent plaintiff. The respondent being a Squadron Leader in the Air Force could not discharge his duties properly as his mental peace was shattered at the hands of his wife.

14. On issue No.2 about desertion, it was recorded by the family court that the appellant admitted that she had left the place of posting of the respondent husband on 21.11.2011 alongwith her brother Mohit Dixit and cousin Sushil Sharma. In a complaint filed by the appellant wife to the superior officers of the Air Force Officer, it was stated that the marital discord between the parties was of such nature that no reconciliation was possible between them. As a result of it, the department had ordered for payment of interim maintenance to the appellant wife. It is, thus, recorded by the family court that once the wife herself went to the senior Air Force Officer making a statement that marital discord between them was irreparable, her statement that she had discharged her marital obligation up till February 2013 was contradictory. The act of the appellant wife in going to the place of posting of the respondent in January 2016 after filing of the divorce petition was viewed with suspicion by the family court to record a finding that there was no justification for the appellant wife to go to the place of posting of the respondent

husband when she herself was making allegations of assault by her husband by filing a criminal case against her husband. The said act of the appellant wife was aimed to fulfill her other ulterior motives. It was concluded that there was no reason to accept that by doing so, the appellant wife was making an effort for reconciliation and, moreover, there was no possibility of both the parties living together.

15. It was, thus, concluded by the family court that in view of the admission of the appellant wife that she was residing separately w.e.f 21.11.2011, the period of two years of desertion on the part of the wife, at the time of filing of the divorce petition on 27.11.2013 having been completed, desertion on the part of wife was proved. The issue No.2 with regard to the desertion by the wife was, thus, concluded in favour of the respondent husband.

16. With the aforesaid findings, a decree of dissolution of marriage wef 21.02.2018 was passed by the family court giving permanent alimony of Rs.25 lacs to the respondent wife.

Submissions of the Counsels for the appellant:-

17. Challenging the findings returned by the family court, Sri Siddharth Khare learned counsel for the appellant submits that the respondent husband had filed the divorce petition on the trivial issues. The allegations of cruelty were reckless in nature and the family court had ignored that the respondent himself was causing cruelty on his wife and was trying to take advantage of his own wrong by filing the divorce petition. It was argued that the allegations in the divorce petition that the respondent husband encouraged the appellant wife to complete the B.Tech course and the appellant was adamant to undertake an employment in Delhi, Noida, Gurgaon (NCR) against the wishes of the respondents are itself contradictory. Further contention in the divorce petition that the respondent at the time of marriage itself, made it clear that the appellant wife would not take up employment after marriage is a reflection of male chauvinism. The only allegation against the appellant wife was that she was pressing hard and insisting to take up employment outside the Air Force Center.

18. The contention is that the allegations in the divorce petition of the complaint made by the appellant wife to the Senior Officers of the Air Force could not be proved by the respondent husband, rather the truth is that on 23.11.2011, the appellant wife was thrown out of her matrimonial house at Ambala Cantt by the respondent husband. She had to call her brothers who could reach in the evening to rescue her as the respondent did not allow the appellant to enter inside the house. It is argued that the appellant wife has taken a categorical stand that she made all efforts of reconciliation by meeting her in-laws and even went to stay with them for three days in July 2013, but the respondent did not meet her before the divorce petition was filed by him. It is then argued that the allegations in the divorce petition that the first information report under the Dowry Act and Section 498-A IPC was lodged on false allegations and the act of the appellant wife in filing protest petitions against the final reports twice had caused cruelty, is nothing but a whimsical approach of the family court in dealing with the entire issue with pre-determined mind and pre-conceived approach against the appellant.

19. The submission is that the respondent husband, in his cross-examination, had admitted that he did not make any effort for reconciliation and never visited his wife after 23.11.2011 who was living with her parents at Meerut till the matter was brought before the family court in the divorce petition. The contention is that this is a classic case of desertion of the wife by her husband on some trivial issues and then filing the divorce petition on false allegations of cruelty. It is argued that the conclusion drawn by the family court both on the grounds of cruelty and desertion cannot be sustained. The appeal is liable to be allowed while setting aside the divorce decree granted by the family court.

20. Reliance is placed on the decision of this Court in First Appeal No.31 of 2007 to submit that the element of 'cruelty' cannot be found from the allegation made in the divorce petition. Mere trivial quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty. It is argued that there is no instance of any act or conduct of the appellant wife which could be said to have caused injury to the mental health of the plaintiff.

21. The contention is that in absence of any pleadings in the plaint, the divorce could not be granted on the ground of commission of cruelty because of the allegation of false criminal proceedings instituted by the wife against the husband. The contention is that there is absolutely no allegation in the divorce petition which amounts to cruelty by the wife.

Submissions of the Counsel for the respondent:-

22. Sri Amit Krishna learned counsel for the respondent, in rebuttal would submit that the respondent was constrained to file divorce petition in November 2013 when all efforts of reconciliation between the parties failed. The respondent and his family members met the appellant and her family members on several occasions after 23.11.2011 when she had left the house of the respondent at Ambala. Many efforts were made by the family members for reconciliation between the fighting couple but the appellant remained adamant on her demand and was not ready to discharge her matrimonial obligations. The act of the appellant in making complaints to Senior Officials in the Air Force had caused bitterness in the mind of the respondent. This act of the wife had seriously hampered the career prospects of the respondent and his image/status was brought down in the eyes of his seniors. He argued that on 23.11.2011, the wife had left her matrimonial house at Ambala alongwith his brother and a relative in the presence of the respondent husband and did not accede to his request to stay with him. She had also filed the criminal case on false allegations of demand of dowry and other atrocities wherein final reports were submitted twice by the Investigating Officer and protest petition on both the occasions were filed by the wife just to harass the respondent husband.

23. It is, thus, argued that the stand of the wife that she was ready and willing to reside with her husband to discharge her matrimonial obligations runs contrary to the stand taken by her in filing the criminal cases. The allegations in the criminal cases caused mental agony to the respondents so much so that restoration of marriage is totally unworkable which has seized to be effective and would be a greater source of

misery for the parties. The marriage between the parties had broken down irretrievably and there is no chance of their coming together or living together again. As an instance of mental cruelty, it is submitted by the learned counsel for the respondent that the act of the wife in pressurizing the respondent to allow her to take up jobs in NCR (Noida, Delhi, Gurgaon) and to reside outside the Air Force Station, caused mental agony to the husband who had made it clear in the beginning of the alliance itself that being a fighter pilot he has to stay at the Air Force Station and according to the norms of social life of an Air Force Officer, the appellant his wife, had to stay with him.

24. The complaints made by the wife to Senior Officials of the Indian Air Force had resulted in harassment and torture to the husband as his character and reputation at his workplace was brought down. Making such complaints is sufficient to constitute mental cruelty caused by the wife. The career prospects of the respondent had been seriously hampered as he could not get promotion in time. The respondent was, thus, constrained to file the divorce petition and, thereafter, the appellant in order to harass him moved the Air Force department for interim maintenance with the assertion that marital cord between them was completely broken. At the same time, she filed a criminal case under the Dowry Act, 498-A, 323, 504, 506 & 377 IPC on reckless and false allegations. Her complaint was found false and a final report was submitted by the Investigating Officer on 17.04.2015. The appellant filed a protest petition wherein an order for re-investigation was passed. Again a final report was submitted on 02.02.2016 by the Investigating Officer when protest petition was filed by the wife. A case under Section 9 of the Act' 1955 was also filed by the appellant in the year 2013 wherein she had admitted that there was no relationship of husband and wife between them from 23.11.2011 onwards and the couple had never lived together thereafter. The contention is that the act of the appellant in filing application under Section 125 Cr.P.C. seeking for maintenance though she was already receiving maintenance from the department; lodging of the false FIR; filing protest petitions after submission of final reports by the Investigating Officer, on one hand, and moving petition under Section 9 of the Act' 1995, on the other, shows her dubious character. Her statement that she was ready and willing to forgive all previous issues and would live with the respondent peacefully cannot be substantiated from her conduct and actions.

25. It is further pointed out that the appellant went to the Air Force Station in January 2016 without any reason and tried to enter forcibly in the house of the respondent when a report was given to the Superintendent of Police and the Commanding Officer, Air Force by the respondent. It is, thus, argued that consideration in the totality of the conduct and behaviour of the wife clearly established that she had caused mental cruelty upon her husband by making unreasonable demands, complaints to the Senior Officials, filing of false criminal cases and then pressurizing the respondent to live with her, and make out a clear case of mental cruelty caused by the wife. The result is that it is not possible for the respondent to continue with the matrimonial relationship in the circumstances like this. The respondent, a wronged party, cannot be expected to continue with the matrimonial relationship

and there is enough justification for him to seek separation.

26. Reliance is placed on the judgement of the Apex Court in **A. Jayachandra vs. Aneel Kaur**1, **Vishwanath Sitram Agarwal Vs. San. Sarle Vishwanath Agarwal**2, **K. Srinivas vs K. Deepa**3, to submit that the mental cruelty as discussed in the aforesaid decisions has to be culled out on consideration of complete matrimonial life of the parties. The illustrations given by the Apex Court in **Samar Ghosh vs Jaya Ghosh**4 have been taken note of therein to record as to what may amount to mental cruelty. The submission is that the circumstances of the present case are all covered in the decisions noted above and having gone through the same, it can be safely concluded that the act of the appellant caused mental cruelty to the respondent.

27. Further judgements of the Apex court in **Shamim Bano vs Asraf Khan**5, **K Srinivas Vs. K. Sunita**6; D**inesh Nagda Vs. Santibai**7, **Manisha Srivastava Vs. Rohit Srivastava**8; and a judgement of the High Court of Delhi in the Family Court Appeal, dated 10.03.2022 have been placed before us to assert that false complaints of demand of dowry or any criminal nature results in harassment and torture to the husband and can be construed as mental cruelty within the meaning of Section 13 (1) (ia) of the Act' 1955. Further the decision in Devesh Yadav S. Smt. Minal9 of the High Court of Punjab & Haryana and the Apex Court judgement in Joydeep Majumdar vs Bharti Jaiswal Majumdar10 have been pressed into service to argue that derogatory complaints made by the wife affecting the career progress of the husband amounted to cruelty.

Analysis of Evidence:-

Allegations from marriage to separation between 22.11.2009 till 23.11.2011.

28. Having heard learned counsel for the parties and perused the record, we may note certain factual aspect of the matter at the outset. There is no dispute between the parties that their marriage was solemnized on 22.11.2009 and at the time of marriage, the respondent was a fighter pilot in the Indian Air Force and was posted as Flight Lieutenant in Badmer, Rajasthan. Both the parties lived together till 23.11.2011 at different places of the posting of the respondent. Though the allegations of the respondent is that the wife lived with him reluctantly and was adamant to take up employment at a place like Delhi, Noida and Gurgaon (NCR) after she had completed B.Tech course. The respondent also stated that the wife was studying B.Tech at the time of marriage and she could complete the course after marriage with the support of the respondent.

29. Though there are assertions in the divorce petition that the wife being annoyed by the denial of the respondent to permit her to take jobs in NCR, started making complaints to the higher officials of the Air Force, with the aim and object of getting the respondent removed from service but there is not a single instance of any oral or written complaint made by the wife to Senior Air Force officers prior to 23.11.2011, i.e. during the period when she was living with the respondent at the Air Force station. The averments in this regard in the affidavit of the respondent filed in his examination in chief are vague.

30. In cross, the respondent as PW-1 stated that his wife made false complaints while staying at the Air Force Station

Uttarlai and then stated that it was an oral complaint. He further admitted that no written complaint was given by the wife at the Air Force Station Uttarlai. On a further query, he stated that on the oral complaint of the wife, no written explanation was called from him by his senior officers. He also admitted, in cross, that there is no mention of the oral complaint made by the wife at the Air Force Uttarlai either in the divorce petition or in his affidavit filed in the examination in chief. A suggestion was, thus, given to the respondent that the statement with regard to the oral complaint made by the wife was made only to give colour to the case. Apart from the bald allegation of one such complaint, no specific allegation of any complaint made by the wife before 23.11.2011 when she had allegedly left her matrimonial home on her own volition, was made or proved by the respondent.

31. As regards the allegations of the respondent that the wife after completion of B.Tech course was adamant to take up a job at NCR, it may be noted that the statement in this regard has been categorically denied by the wife in her written statement and stated in the examination in chief that after marriage she was residing with her husband at the place of his posting and as a result of it, her visits to Meerut were very few. She was discharging wifely duties and obligations.

32. In cross, the appellant stated that the respondent was posted in Uttarlai, Rajasthan, she went to live with him and undertook a job for three months inside the Air Force centre with the consent of her husband. When her husband was transferred to Ambala she had quit the job. In the entire cross-examination of the appellant, she has not been confronted on her alleged demand to take up employment in NCR namely Delhi, Noida and Gurgaon after completion of the B.Tech course. The stand of the respondent in the complaint that the dispute between them after marriage began on account of the demand raised by the wife to undertake employment outside the Air Force Station, especially in NCR, could not be established by the respondent. As per the respondent, the appellant left her matrimonial home on 23.11.2011. Prior to 23.11.2011, since after marriage, only allegations against the appellant was that she was not agreeable to stay with her husband (respondent) at the place of his posting, at the Air Force Station and being B.Tech qualified she was insisting to take up employment, leaving the respondent alone at the Air Force Station, though categorical clarification was given by the respondent at the time of the marriage that looking to his status, the wife would not allow to do job after marriage. The assertion of the respondent is that when the respondent refused to accede to the request of his wife/appellant to go outside the Air Force Station to take up a job, she started making his life hell and made complaints to higher officials of the Indian Air Force. The family members and the respondent himself tried to persuade the appellant but she did not listen to anyone. For this part of the allegations made by the respondent, from the above analysis of the evidence on record which is oral, none of the allegations noted above could be proved by the respondent.

33. The relationship, however, took an ugly turn on 23.11.2011, when the appellant went to her paternal house alongwith her brother and cousin. The stand of the respondent in the divorce petition is that on the said day, i.e. on 23.11.2011 while the respondent was on

duty, in his absence, the appellant alongwith his brother Mohit Dixit and one other person, in a planned manner collected all valuables, jewelry, clothes, cash, diamond set, FD, ATM card, bank pass book and started making preparation to go to Meerut to her parent's home. The respondent got information through a neigbour and reached at his house at around 02.00 PM. He then saw that the appellant alongwith his brother and another person was ready to go to Meerut and her entire luggage was kept in the car. The respondent did his best to persuade the appellant not to leave him but she started misbehaving with the appellant in front of other people collected on the spot and did not listen to anyone and left her matrimonial home in order to desert the respondent against his wishes. Narrating the incident occurred on 23.11.2011, the appellant wife, however, stated that her husband had deserted her since 23.11.2011 without any reason and the respondents refused to keep her with him as his wife.

34. In her cross-examination, the appellant stated that on 23.11.2011 she was in the house of her husband (her matrimonial home) at Ambala till evening. Her husband was on duty but came home early. She called her brother Mohit Dixit and cousin Suhil Sharma as her husband threw her out of the house and despite repeated requests, he did not allow her to enter inside the house. She called her brother through telephone in the afternoon and her brother and cousin reached around evening. On further confrontation, the appellant as DW-1 stated that when she made the telephone call, her husband already came back from the duty and threw her out of the house.

Allegations of desertion by wife after 23.11.2011:-

35. The debate, thus, is as to whether the appellant wife had left the respondent husband on her own volition, or she was thrown out of her matrimonial home. In this regard, it may be noted that according to the respondent, soon after the appellant had allegedly left her matrimonial home on 23.11.2011, he gave information of the incident to his parents at Meerut. They also tried to persuade the appellant but the appellant and her parents insisted that the appellant would take up an employment in Delhi, Noida, Gurgaon and if the respondent wished he could live with her after leaving his job, which was not possible for the respondent.

36. The respondent then gave an information to the Air Force Commanding Officer about the incident of his wife leaving his home by moving an application on 25.11.2011, within two days of the wife leaving his home. The said application is on record as paper no.45 Ga/2 and 45Ga/3. In the said application, the respondent stated about the incident which happened on 23.11.2011 at his place of residence when his wife Mrs. Sneha Pandit had gone to her father's home alongwith her brother Mohit Dixit who came to take her. He then stated therein that he wanted to place it on record that he was unaware of the activity which was planned by his wife and Mohit Dixit. The respondent was not told about the arrival of his brother-in-law Mohit Dixit who also did not speak to him when the respondent reached his home from his workplace at about 02.00 PM. He found that his wife was ready to leave after packing up all her bags with Mr. Mohit Dixit. The respondent then stated that he tried and requested his wife to stay back because he wanted to live with her. His own brother-in-law and sister also came and tried to persuade the appellant to stay

back but she did not listen to anyone and left with her brother. The respondent then stated that he wanted to bring to the notice of the Commanding Officer by writing that letter that his wife had taken away all her clothes, valuables, Sarees, Gold Jewelry of 200 grams and one diamond set of Rs.2,50,000,/- SBI F.D. of 3,50,000/-; ATM card and cheque book and passbook of SBI account wherein balance at that point of time was Rs.25,000/- and Rs. 5000/- in cash which was kept for household expenditure.

37. The respondent lastly stated in the said application that the involvement of the appellant and his brother-in-law and planned activity of the said kind proved hindrance in his effort to lead a happy married life. This application lastly noted that the above noted information was for the kind intimation to the Commanding Officer and for future record.

38. We may further note that the father of the respondent namely Ram Gopal Sharma also moved an application dated 29.11.2011 before the Assistant Police Commissioner, Ambala Cantt. The statements therein are that he was father of Tarun Pandit (the respondent) who was Fighter Lieutenant in the Air Force posted at Ambala Air Force Station. His daughter-in-law Sneha Pandit/appellant herein was not acceding to any suggestion or request of the family members and was making all efforts to harass them. She was fighting on trivial issues and did not trust her husband. They were making efforts for the last two years to improve the relationship between his son and her wife but his daughter-in-law Sneha Pandit was not ready to listen to anyone. The complainant Ram Gopal Sharma stated therein that he was residing at Meerut and on 28.11.2021, when he came to meet his son he got to know about the incident occurred on 23.11.2011, where his daughter-in-law had left her matrimonial home after packing all valuables, clothes and cash. The submission therein is that the son of the complainant, namely the respondent herein, made all efforts to persuade his wife and brother-in-law but they did not listen to her. An apprehension was then raised by Ram Gopal Sharma that after reaching Meerut, his daughter-in-law /appellant herein would make a false complaint in order to harass them and hence he brought the facts to the knowledge of the police authority. The record further indicates that the said complaint was consigned to record with the report dated 27.01.2012 wherein it was noted that no untoward incident was reported to have occurred on 23.11.2011, in the investigation conducted by the police officials after lodging of the complaint.

39. We may further note that within two years of the incident dated 23.11.2011, when the appellant wife had allegedly left her matrimonial house on her own volition, the respondent moved an application on 13.01.2013 to the concerned officers at the Air Force Station, seeking for allotment of a proper living-in-accommodation. It is stated in the said application that on account of some personal problem, it was not possible for him to stay in a living-out-accommodation. Living-out-accommodation for our record is an accommodation for the married couple whereas living-in-accommodation is an accommodation for a single person.

40. While all that was happening between the couple, the respondent PW-1 stated in his deposition that he moved the application for leaving the "living out accommodation" and allotment of "single

officer accommodation" on 30.01.2013, since the appellant had refused to come and live with him at the Air Force Station for about two years, inspite of the best efforts made by him.

41. In the cross-examination, PW-1 was put to cross on the averments made by him in paragraph No.'11' of the affidavit filed in his examination in chief. The respondent (PW-1) admitted that he had never talked to the appellant for compromise after 23.11.2011. He then stated that since he had to remain on duty, his parents had a talk of compromise and kept on their efforts to reconcile between the couple for about two years. All meetings in that regard were held at Meerut and he could know the outcome of those meetings through his parents. On further confrontation, the respondent admitted that whatever was stated in paragraph No.'11' of the affidavit in the examination-in-chief was correct and he never met the appellant to talk about any compromise. He also admitted in the same breath, that he did not talk to his wife before filing of the divorce petition and straightway went to the Court. He further admitted that the talk about the divorce by way of mutual consent was made only after the divorce suit was filed and he did not talk to his wife about the divorce prior to the institution of the divorce suit.

42. While explaining his conduct in writing the letter dated 25.11.2011 to the Commanding Officer, the respondent (PW-1) stated that he wanted to keep his wife with him on 23.11.2011, 24.11.2011 and 25.11.2011 and with that view of the matter, the said letter was sent. The suggestion that the said letter was written for his own protection, was denied by PW-1 (respondent). The respondent also admitted that he did not provide any maintenance to his wife after 23.11.2011 till October 2013.

43. The respondent further denied that he lived with his wife in January or February 2013 and also denied that he ever went to the house of his wife at Noida in those months and they had cohabited.

44. The appellant, on the other hand, made a categorical statement that her husband had deserted her on 23.11.2011 when she objected to the ill behaviour of her husband, both physical and mental. The appellant also filed a petition under Section 9 of the Act' 1955 in order to save her marriage. It was further stated by the appellant in her examination-in-chief, that on 05.07.2013, she went to the house of her in-laws, parents of the respondent, at Meerut with a view to save her marriage and stayed there for a period of three days from 05.07.2013 till 08.07.2013, in the absence of her husband. However, on 08.07.2013, the family members of the respondent sent the appellant to her parent's house saying that they would talk to the respondent and then call her within 2-3 days. No-one called or came to call the appellant since thereafter. She stated that the respondent had deserted her without any reason or reasonable cause and rather she was the one who had made all efforts to save her marriage.

45. In the cross-examination, DW-1, the appellant, on confrontation, further stated that she came to Meerut alongwith her brothers as her husband refused to keep her. She then stated that the report of the said incident was not given by her at the police station Ambala Cantt rather the Commanding Officer of the Air Force Station who was present on the spot was

intimated. She categorically stated that she was deserted by her husband and the assertion that she had left her matrimonial home alongwith her brothers on her own volition was incorrect.

46. From the pleadings and the evidence led by the parties, though it remains a debatable issue as to who (amongst the couple) was at fault but the fact remains that after the appellant had left her matrimonial home in the company of her brothers on 23.11.2011, the respondent had never met her nor made any effort to persuade her to rejoin him. No legal remedy for restoration of the matrimonial cord was initiated by the respondent. The assertion made by the respondents about the efforts made by him to persuade his wife in his divorce petition and the affidavit in the examination-in-chief was put to him in the cross-examination and he admitted categorically that he never met the appellant nor went to Meerut where the appellant was living with her parents after 23.11.2011. The statement of the respondent that all efforts made by him after 23.11.2011 to resolve the dispute between him with his wife with the help of his family members in his petition and the affidavit is, thus, found to be false. The respondent soon after the expiry of the period of two years and five days from the date of the incident dated 23.11.2011, the day of alleged desertion by the wife, had filed the divorce petition under Section 13 of the Act' 1955 in the Family Court at Meerut on 27.11.2013. There is no whisper in the divorce petition that the respondent made any effort to meet his wife at Meerut or made any effort for reconciliation before filing of the divorce petition with his affidavit dated 27.11.2013. The assertion in the divorce petition that further cause of action arose on 25.11.2013 for filing the divorce petition when the appellant refused to live with him, was, thus, proved to be false.

Law of desertion:-

47. Section 13(1)(ib) of the Act' 1955 provides for grant of divorce on the ground of desertion for a continuous period of not less than two years immediately preceding the presentation of the petition. The provision stipulates that the husband or wife would be entitled for a dissolution of marriage by the decree of divorce if the other parties had deserted the parties seeking the divorce for a continuous period of not less than two years immediately preceding the presentation of the petition.

48. To deal with the concept of desertion, the Apex Court in **Savitri Pandey Vs. Prem Chandra Pandey**11 has stated that:-

"Desertion", for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations, i.e., not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act

complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case. After referring to host of authorities and the views of various authors, this Court in Bipinchandra Jaisinghbhai Shah v. Prabhavati [AIR 1957 SC 176] held that if a spouse abandons the other in a state of temporary passions, for example, anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion."

49. The desertion, in its essence, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. For the act of desertion so far as the deserting spouse is concerned, two essential conditions must be there (i) the factum of separation and (ii) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential as far as the deserted spouse is concerned: (i) the absence of consent, and (ii) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid.

50. It was observed by the Apex Court in **Dr.(Mrs.) Malathi Ravi, M.D vs Dr. B.V . Ravi M.D**12 that for holding desertion as proved the inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation.

51. Meaning thereby, the Court on the basis of acts, conduct and expression of intention by the parties, both prior to and subsequent to the actual acts of separation, can draw an inference from the proven facts and circumstances that the deserting spouse had the intention to bring cohabitation permanently to an end, without the consent of the deserted spouse. For the deserted spouse, it was required to be proved that the act of desertion was without his consent and there was no such conduct of the deserted spouse giving reasonable cause to the spouse (deserting spouses) for leaving the matrimonial home to form the necessary intention to bring cohabitation permanently to an end. In simple words, it can be described to be an unilateral act of the deserting spouse, without the consent of his/her partner and in absence of any conduct of the deserted spouse which may have lead to the act of the deserting spouse.

Findings on the issue of desertion:-

52. In light of the law relating to the concept of desertion, in the factual matrix of the instant case, having noted each and every circumstance brought on the record, we find that the evidence on record is insufficient, to come to a conclusion even on probability that the wife deserted her husband, the respondent, with the intention to bring the matrimonial relationship to an end. The allegations of the respondent that his wife/appellant had left her matrimonial house without his consent and in absence of his conduct giving reasonable cause to the wife to leave her matrimonial home, could not be proved by the respondent in the present case. Rather the situation looks otherwise. The wife after leaving her matrimonial home on 23.11.2011 on account of the act of the respondent (as per her contention) to throw her out of the house, made efforts to resolve the matter. She even went to the house of her parents-

in-law to reside there for three days in the absence of the respondent, in order to persuade them to bring the dispute to an end. She filed restitution petition under Section 9 of the Act' 1955, participated in the mediation proceeding showing her willingness to live with her husband. Since the allegations of the appellant was that she was thrown out of her matrimonial home by the respondent and then she called her brother to go to Meerut, the admission of the respondent that he never went to Meerut to bring back his wife after 23.11.2011 and before filing of the divorce suit, i.e. for a period of two years, gave a clear indication of the fact that the respondent never wanted to patch up with his wife and his version that the wife had left her matrimonial home on her own volition, thus, seems to be unbelievable.

53. The family court has committed illegality in twisting the entire evidence and ignoring the version of the respondent, in returning a finding of act the of desertion by the appellant wife, while deciding the said issue in favour of the respondent husband. The discussion made by the family court to return the findings on issue No.2 that the appellant wife had deserted her husband without any reasonable cause, is capricious and whimsical. Mere fact that the appellant had moved an application before the officers of the Air Force seeking interim alimony after filing of the divorce suit by the respondent could not have been viewed against the wife. As regard the statement about the marital discord between them having been reached at such level that no reconciliation was possible, it was the statement recorded in the order dated 15.09.2014 passed by the Air Force Officer on the application for maintenance. The application moved by the wife, however, has not been brought on record.

54. Further act of the wife in going to the place of the posting of the respondent in January 2016, after filing of the divorce petition has been viewed against her. The family court had recorded without any basis that the said act of the wife was aimed at some ulterior motive as she had already filed criminal complaint against her husband and family members. The family court had also concluded that since the wife had admitted that she was living separately from her husband from 21.11.2011, the period of two years of desertion stood proved.

55. The above act of the wife rather shows that she was making efforts to meet her husband even after filing of the divorce suit. The respondent, to the contrary, wrote a letter to the Commanding Officer on 28.01.2016 stating therein that he came to know that his wife Smt. Sneha had arrived at the Air Force Station Kalaikunda on 25.01.2016 without any intimation to him and he had apprehension that his wife came to stay at the Air Force Station, Kalaikunda with the intention to file further complaints of criminal cases which she had filed earlier. The respondent further stated therein that any act of the wife to come and stay with him would also interrupt the separation period and weaken his case for divorce. He had no faith or trust on his wife after separation of more than four years and did not want to have any kind of meeting or interaction and definitely could not agree to stay together with her. Prayer was made in the said application that the wife (Mrs. Sneha Pandit) be requested to leave Air Force Station, Kalaikunda as soon as possible or else the respondent would not be responsible for any misdeeds of his wife which she intended while staying inside the Air Force Station, Kalaikunda.

56. The respondent had also filed a complaint before the Superintendent of Police, Paschim Medinipur, West Bengal, on 30.01.2016 leveling allegations of harassment and act of forceful breaking into his house on the part of the appellant. It was stated therein that in the morning on 29.01.2016 at about 06.00 AM, appellant Mrs. Sneha Pandit had tried to break into the house of the respondent forcibly, causing mental harassment to him and creating pubic nuisance at the Air Force Station, Kalaikunda. It was also stated therein that the respondent wanted to end his relationship and was waiting for the decision of the Court where the divorce petition was pending. He further requested to lodge the criminal complaint against appellant Mrs. Sneha Pandit because of her intentions being malign.

57. The action of the respondent in sending letter to the Commanding Officer on 25.11.2011, intimating the incident occurred on 23.11.2011, act of his father Ram Gopal Sharma in lodging the criminal complaint on 29.11.2011 before the Assistant Police Commissioner, Ambala Cantt on apprehension, the application moved by the respondent on 30.01.2013 (within two years of the incident) for allotment of a single officer accommodation i.e. living-in-accommodation clearly shows that the respondent sine the beginning of the incident dated 23.11.2011 had no intention to live with his wife. The appellant had admitted in her cross-examination that she had given the entire details of the incident orally to the Commanding Officer who was present on the spot. However, after she had left, the respondent presented his side of story by writing a letter after two days. Not only this, the father of the respondent who admittedly was in Meerut on 23.11.2011, came to Ambala to lodge a criminal complaint at the police station Ambala Cant on 29.11.2011 leveling allegations against the appellant raising an apprehension that she would make a false complaint to implicate all of them. The fact of the matter is that no complaint was lodged by the wife till the divorce suit was filed for about two years after said incident is on record.

58. It, thus, seems to us that the trivial dispute between the couple took an ugly turn on 23.11.2011 when the wife left her matrimonial home alongwith her brothers. The respondent instead of trying to resolve the issue taking benefit of the situation made criminal complaint against his wife. It is the admission of the respondent that he did not make any effort to bring back his wife. There is absolutely no disclosure of any such instance prior to 23.11.2011 which made it impossible for the couple to live together.

59. Further action of the respondent in making a reckless complaint of the act of harassment and forcibly breaking into his house on 13.01.2016 on the part of the appellant, when she visited the Air Force Station Kalaikunda in January 2016 with an aim to talk to him, on an apprehension that the appellant would lodge another false complaint or do something adverse to malign his image, reflects the mindset of the respondent that he was never inclined to patch up with his wife like a wise persons as he is trying to project himself.

60. In any case, taking into consideration of the acts, conduct and expression of intention by the parties from their acts and conducts, both anterior and subsequent to the actual act of separation, no inference can be drawn for holding that the appellant wife had left her matrimonial

home on 23.11.2011 with the intention to bring the cohabitation permanently to an end. Mere act of withdrawal of the wife from her matrimonial home at the Air Force station, Ambala and the factum of separation of the wife for a period of two years from her husband when she was making efforts to pacify her husband with the help of the family in order to bring matrimonial harmony cannot lead to the conclusion that the wife had no intention to lead a normal married life with the husband or her act of leaving her matrimonial home was in absence of any conduct of the husband (respondent) giving the wife (appellant) a reasonable cause to form the necessary intention aforesaid.

61. From the analysis of the evidence on record, the allegations of 'desertion' as enshrined under Section 13 (1) (ib) to seek divorce have not been established. The finding on the issue No.2 as recorded by the family court are liable to set aside being perverse, contrary to the evidence on record.

Issue of cruelty:-

62. On the issue no.1 of 'cruelty' alleged to have been caused by the wife, the finding is that the wife had caused mental cruelty to the respondent by her conduct, action and inaction and with the lodging of the criminal cases after filing of the divorce suit. The question would be whether a decree of divorce on the ground of mental cruelty can be granted, in the facts and circumstances of the case.

Law of cruelty:-

63. Before proceeding to deal with the factual aspects on the issue of mental cruelty, it would be apposite to note the concept of 'mental cruelty' as discussed by the Apex Court in a series of decisions ranging from the year 2006. In **Vinit Saxena vs. Pankaj Pandit**13 while dealing with the issue of mental cruelty the Apex Court held as follows:-

"It is settled by catena of decisions that mental cruelty can cause even more serious injury than the physical harm and create in the mind of the injured appellant such apprehension as is contemplated in the Section. It is to be determined on whole facts of the case and the matrimonial relations between the spouses. To amount to cruelty, there must be such wilful treatment of the party which caused suffering in body or mind either as an actual fact or by way of apprehension in such a manner as to render the continued living together of spouses harmful or injurious having regard to the circumstances of the case.

Each case depends on its own facts and must be judged on these facts. The concept of cruelty has varied from time to time, from place to place and from individual to individual in its application according to social status of the persons involved and their economic conditions and other matters. The question whether the act complained of was a cruel act is to be determined from the whole facts and the matrimonial relations between the parties. In this connection, the culture, temperament and status in life and many other things are the factors which have to be considered".

64. In **Samar Ghosh (supra)**, the Apex Court had given certain illustrations wherefrom inference of mental cruelty can be drawn. The Court has observed that illustrative example given therein were not exhaustive. It would be apposite to reproduce some of the illustrations:-

"(i) On consideration of complete matrimonial life of the parties, acute

mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

Xxxxxxxxxxxx

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

xxxxxxxxxx

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

xxxxxxxxxx

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

xxxxxxxxxxxx

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

65. Speaking about the concept of mental cruelty, the Apex Court in **Samar Ghosh (supra)** has also observed thus:-

"Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances."

66. In **Vishwanath Agrawal, s/o Sitaram Agrawal Vs. Sarla Vishwanath Agrawal**14 while dealing with the mental cruelty, it was opined thus:-

"The expression ''cruelty' has an inseparable nexus with human conduct or human behaviour. It is always dependent

upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status."

67. In **K. Srinivas Rao (supra)** while dealing with the instance of mental cruelty, the Court added certain other illustrations to the illustrations given in the case of **Samar Ghosh (supra)**. The relevant extract of observations therein are relevant to be noted herein:-

"Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse."

68. In **Malathi Ravi, M.D (supra)** taking note of the various decisions of the Apex court, while discussing the concept of 'mental cruelty' it was observed that mental cruelty and its effect cannot be stated with arithmetical exactitude. It varies from individual to individual, from society to society and also depends on the status of the persons. What would be a mental cruelty in the life of two individuals belonging to particular strata of the society may not amount to mental cruelty in respect of another couple belonging to a different stratum of society. The agonized feeling or for that matter a sense of disappointment can take place by certain acts causing a grievous dent at the mental level. The inference has to be drawn from the attending circumstances.

69. It was observed in **A. Jayachandra (supra)** that to constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct, taking into consideration the circumstances and background has to be examined to reach at the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such an extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

70. It was observed therein that the Court dealing with the petition for divorce on the ground of cruelty has to bear in mind that the problems before it are those of human beings and the psychological changes in a spouse's conduct have to be borne in mind before disposing of the petition for divorce. However insignificant or trifling, such conduct may cause pain in the mind of another. But before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the Court to weigh the gravity. It has to be seen whether the

conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon to endure as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent.

(i) Allegations of cruelty in the divorce petition:-

71. In the instant case, in the divorce petition, the respondent stated that he had suffered mental agony, torture and distress on account of the demand of the appellant to allow her to take up a job in the NCR i.e. places like Delhi, Noida and Gurgaon, after the wife had completed her B.Tech course. It was stated by the respondent that the appellant and her family members were initially conveyed clearly at the time of marriage itself, that the appellant (wife) would not be permitted to take up any employment in the interest of the family and looking to the status of the respondent being employed in the Air Force. However, when the appellant insisted and the respondent denied, the wife started quarreling with him and in a planned manner with a view to get the respondent dismissed from service of the Air Force, she made complaints to his higher officials, as a result of which, the respondent had suffered indignation and his image had been sullied before his colleagues and superiors and on account of her own conduct, the appellant could not conceive (bear a child) which also caused severe mental pain to the respondent as also his family members.

72. Considering these allegations in the divorce petition, when the respondent was put to cross about the allegations of complaints made by the wife, he stated that an oral complaint was made by his wife at the Air Force Utarlai that the respondent had physically assaulted here and fought with her. He stated that the parents of the appellant were informed of that conduct and he intimated to his parents as well. When further confronted, the respondent admitted that no written complaint was made by his wife and on the oral complaint made by her, his written explanation was not called by his superior officials. He also admitted that he did not specify in his petition or the affidavit filed in the examination-in-chief about the oral complaint made by the wife at the Air Force Station Uttarlai.

73. From this part of the cross-examination of the respondent, atleast it is evident that he could not bring on record any specific instance of complaints made by his wife namely the appellant herein in support of his pleadings in the divorce petition. The plea of the respondent that the act of his wife in making false complaints in a planned manner to his Senior Officers had resulted in mental agony to him, thus, could not be proved by any evidence much less cogent evidence.

74. As regards the allegation of demand raised by the wife to take up employment outside the Air Force Station after completion of the B.Tech course, in his cross-examination, the respondent had admitted that his wife also took the job of teaching while he was posted at the Air Force Station Uttarlai for sometime, while

she was residing with him. He then admitted that the appellant was free to take up any employment while residing with him but stated that she wanted to live separately outside the Air Force Station to take up a job after completion of the B.Tech course. However, no specific time, year or month could be narrated by the respondent, in his cross-examination, as to when the appellant had raised such a demand but averred that she (wife) started fighting with him for that reason soon after marriage.

75. The appellant wife, on the other hand, in her cross, stated that at the time of marriage, her husband/respondent herein was posted as Flight Lieutenant in the Air Force and was posted in Uttarlai, Rajasthan. Soon after marriage, she went to Uttarlai to live with her husband and did a job for three months with the consent of her husband but when he was transferred to Ambala, she left the job and came with her husband. From the statement of the parties, it may be inferred that the appellant wanted to be economically independent or engage herself. She even took a job of teaching for a short period of three months while living with the respondent at the Air Force Uttarlai, Rajasthan, but it cannot be assumed from any of the circumstances brought before us that she was insisting to take up employment elsewhere after completion of the B.Tech course. Not a single instance of the wife having applied for such a job during the period when she was living with the respondent, could be narrated by the respondent in his deposition. The allegation of the respondent that insistence of the wife to take up employment elsewhere outside the Air Force station just to live separately from the respondent had caused rift between them soon after marriage and the said act had resulted in mental agony to the respondent, thus, is not substantiated from the evidence on record.

76. Even otherwise, such trivial dispute resulting in quarrel between spouses, even if existed, it is a rift which happened in day-to-day married life and cannot amount to cruelty. Even if it is accepted for a moment that the appellant had aspirations to be an independent person even after marriage and was insisting to take up employment after completion of B.tech course, the situation could have been dealt by the respondent more wisely. Instead of controlling his wife, quarreling on the issue, the respondent could have cajoled his wife to rationalize his point of view so as to convince her not to leave him alone just to earn some money.

77. Be that as it may, no such instance is before us to draw any inference that any such effort was made by the respondent husband which went in vain and the appellant wife did not listen to his wisdom rather the statement in the divorce petition in this regard reflects male-chauvinistic attitude of the respondent husband when he goes on to say that his wife and her family were categorically told in the beginning of the alliance at the time of marriage itself, that the wife would not be allowed to take up any employment, meaning thereby that she could not think of being an economically independent person.

78. Leaving this issue as it is, without much deliberation on the approach of the respondent husband about the dispute, we proceed to examine other allegations of cruelty made against the appellant.

79. Another contention of the respondent in the divorce petition was that

the wife could not conceive (could not bear a child) on account of her indifferent attitude and malicious behaviour, which also added to mental trauma to the respondent as well as his family. In this regard, suffice it to note that apart from the bald pleading and reiteration of the said allegation in the affidavit filed in the examination-in-chief in a casual manner, no evidence whatsoever has been brought on record to even demonstrate that the respondent had ever consulted any doctor to know the real problem. Moreover, the couple stayed together barely for two years after marriage and if during such a short period, wife did not conceive, it was nothing unusual and the said situation cannot be attributed to the conduct or behaviour of the wife as alleged by the respondent.

80. Now coming to the incident dated 23.11.2011, there are contradictory versions of both the parties and as discussed in the foregoing paragraphs, the respondent could not prove the act of desertion by the wife/appellant herein. The statement of mental cruelty caused by the wife on account of her act of desertion, therefore, cannot be substantiated. To the contrary, the conduct of the respondent after 23.11.2011 in giving intimation in writing to the Commanding Officer on 25.11.2011 about the act of his wife of leaving his home and further the action of his father in going to Ambala and lodging a criminal complaint at the police station Ambala Cantt on 29.11.2011 based on his apprehension, further shows that the respondent himself did not intend to remove the differences between him and his wife. The averments of the respondent in the divorce petition as also in the affidavit filed in the examination-in-chief that the respondent and his parents had tried to persuade the appellant to forget all differences and live with the respondent are proved to be false. The conduct of the respondent and his father in lodging a criminal complaint at the police station and the admission of the respondent that he did not make any effort for reconciliation and did not even meet or talk to his wife after she had left his home, had resulted in widening of the rift between the parties and has increased the bitterness between them.

81. The next contention of the respondent husband is that on account of the attitude and ill treatment of his wife, he was so much disturbed mentally that his promotional prospects were seriously hampered. The contention is that he could not get promotion on account of the false complaints lodged by his wife with his Senior officials and further he could not complete the promotional course in the year 2011 because his wife had left him without any reason. In this regard, we may note that the respondent in the course of his cross examination, had admitted that he was not given promotion prior to 2014 as he was not qualified and the 'Qualified Instructor course' was completed by him in the year 2014. He admitted that his name was not in the list of selectees for promotional course as he did not fulfill the eligibility criteria. The respondent then reiterated that he had mentioned in the divorce petition and his affidavit that he could not undertake the promotional course on account of the mental tension because of the conduct of his wife.

82. As noted above, the respondent could not prove that his wife had made any complaint before his superior officers prior to the filing of the divorce petition. In view of his admission that he was not qualified for promotional course prior to the year

2014, the assertion in the divorce petition that the promotional prospects of the respondent were hampered due to the conduct and behaviour of his wife are proved to be false. The said ground appears to have been taken in the divorce petition on legal advise and later reiterated in the affidavit filed by the respondent in his examination-in-chief, in order to prove his case which he failed to establish in the cross examination. The divorce petition, thus, proved to have been filed on incorrect facts and false pleas. The family court has erred in taking into consideration of the averments made in the divorce petition as gospel truth, ignoring the evidence on record.

(ii) Additional grounds of cruelty:-

83. Now coming to the additional ground taken by the family court for granting the decree of divorce, the criminal cases filed by the wife after 23.11.2011, when she allegedly had left her matrimonial home on her own. Relevant is to note that the petition under Section 9 of the Act' 1955 was filed by the wife in the year 2013. It was categorically stated by the appellant wife that the respondent husband was not appearing in Section 9, restitution matter and after two and a half months of filing of the petition under Section 9, the appellant wife filed application seeking interim maintenance under Section 125 Cr.P.C. On confrontation, the appellant stated that she was constrained to file the application under Section 125 Cr.P.C. as the respondent was not appearing in the petition under Section 9 of the Act' 1955. The appellant was confronted in the course of cross examination about her act of filing the petition under Section 9 of the Act' 1955 and Section 125 Cr.P.C., but the categorical statement made by her that the respondent husband was not appearing in Section 9 matter, which was filed prior to filing of the divorce petition, could not be disputed. It has come on record that the application under Section 125 Cr.P.C. was filed in October 2013, and it is admitted by the respondent, in cross, that from the date of alleged desertion, i.e. from 23.11.2011 till October 2013, he did not provide any maintenance to his wife. It was also admitted by the respondent, in cross, that the copy of the application for maintenance given by the wife in the department was provided to him. It is pertinent to note that till 27.11.2013, when the respondent filed the divorce petition, no criminal case was lodged by the wife except the application for maintenance under Section 125 Cr.P.C. and on this fact when the respondent was put to cross, he admitted the same but reiterated that false complaints were made by the wife in his department, which he could not prove.

(iii) Conduct of the husband:-

84. On the other side, looking to the conduct of the respondent, it may be noted that his father made a criminal complaint to the police on 29.11.2011 and when the appellant was confronted about the said complaint, he stated that on 23.11.2011, when his wife had left his home, his father was called in the evening and the entire incident was narrated to him. His father came to Ambala on the very next date, i.e. 24.11.2011.The respondent, however, gave a vague answer when confronted as to whether his father stayed from 24.11.2011 till 29.11.2011, the date of the complaint to the police, but it was admitted by him that on the date of the complaint, i.e. 29.11.2011, his father was in Ambala and he made the complaint to the Police

Commissioner. The respondent then stated, in cross, that the complaint was not transcribed by his father in his presence as he was on duty and further stated that he got the copy of the complaint lodged by his father before the Police Commissioner, Ambala on 29.11.2011 and it was also read over to it. He then stated that he did not find any mistake in the complaint made by his father. The suggestion that the complaint was lodged by his father in defence was though denied but from the averments made in the said complaint brought on record as paper No.45-Ga1/4 and 45-Ga 1/5, it is evident that the father of the respondent pleaded the case of his son that his daughter-in-law, the wife of his son, had left her marital home without any reason and against the wishes of his son. The father of the respondent in his complaint further raised an apprehension that his daughter-in-law and her family members may lodge false cases against him and his son, which otherwise proved to be false. The respondent also admitted that he wrote the letter to the Commanding Officer on 25.11.2011 narrating the incident occurred on 23.11.2011, when his wife had left Ambala, and stated that he did so in order to put everything on record for future.

85. From the conspectus of the above facts, at-least, it is evident that the father and son were having something in mind that they created evidence for their protection for future soon after the appellant allegedly left her marital home, though no criminal complaint was filed by the wife till the year 2014, much after filing of the divorce petition by the respondent.

(iv) Conduct of the wife:-

86. Coming to the criminal case lodged by the wife under the Dowry Prohibition Act and Section 498-A IPC, the said case was filed by the appellant wife on 06.05.2014 and it was an admission of the respondent, in cross, that prior to the filing of the said criminal case, only a complaint was filed by the wife in the Mahila Thana in December 2013 but from 23.11.2011 when the wife had allegedly left her matrimonial home till December 2013, no criminal case was lodged by the wife.

87. Thus, analyzing the conduct of the wife from the beginning, we may note that the appellant wife has proved that she did not make any complaint to the senior officers of the Air Force against her husband nor did she filed any complaint in the police station rather the criminal complaint made by the respondent and his father were proved to be false. After the wife came back from the house of her husband in the year 2011, it was her categorical stand that she started her studies while living in Noida at the house of her sister and completed M. Tech course in the year 2014. After 2014, she was doing coaching for higher studies and the entire expenses of her education and daily needs were borne by her father. It was categorical statement of the appellant, in cross, she belonged to a middle class family. The petition under Section 9 of the Act' 1955 was filed by her at Noida while she was residing there. Section 125 Cr.P.C. application was filed after about two and a half months of filing of the petition under Section 9 of the Act' 1955 as the respondent was not coming forward in the said petition.

88. When paper No.45Ga/8 was shown to the appellant, in cross, she admitted that she filed the application for maintenance in the department wherein the said order dated 15.09.2014 was passed.

She then stated that the said order was passed after hearing both the parties and she did not challenge the said order. When the averments in the order dated 15.09.2014 were put to her wherein it was recorded that in her application dated 20.12.2013, the appellant had stated that the marital discord between them had reached beyond reconciliation, she categorically replied that no such statement was made by her in the application dated 20.12.2013 rather it was own assessment of the officer who had mentioned the said fact in the order on account of the stand taken by the respondent. The fact of the matter is that though the appellant was confronted about her statement in the application dated 20.12.2013 seeking maintenance from the department but the said application was not brought on record by the respondent rather he had heavily relied upon the statement in the order dated 15.9.2014 (Paper No.45 Ga/8) to put the said statement in the mouth of the appellant.

89. Be that as it may, it is evident that apart from moving the application for maintenance and seeking restitution of conjugal rights, the appellant wife did not initiate any criminal proceeding nor insituted any adverse legal action against her husband so as to put her relations in peril, till the divorce suit was filed by the respondent on the allegations which have been proved to be false and concocted.

(v) Criminal cases lodged by the wife:-

90. About lodging of the criminal case under Section 482 Cr.P.C., when confronted, the appellant stated that she had filed the criminal case in May 2014 narrating the incident which occurred with her. On submission of the final report, protest petition was filed by her wherein re-investigation was ordered. She again filed a protest petition on submission of the final report which was pending in the court of the Chief Judicial Magistrate on the date of her cross-examination in this case. On the suggestion that the appellant filed the criminal case and protest petitions twice in order to harass the respondent and his family members and get them punished, she responded that she did so in order to make them realize they had wronged her. She, however, maintained the stand that the Investigating Officer did not make a proper investigation and did not go to Ambala to make a proper enquiry and further stated that nothing wrong had been mentioned by her in the first information report lodged against the respondent and his family members.

91. A further perusal of the contents of the first information report indicates that the appellant had narrated her plight and stated that the incident of physical assault upon her was intimated to the Senior officials when she was medically treated at the Air Force Station. Even the respondent had tendered an apology before the Commanding Officer at the Air Force, Ambala for the incident occurred on 25.10.2011. She further narrated an incident occurred outside the Mahila Thana on 06.04.2014 when she and her father were abused by her husband and father-in-law. She further stated therein that on 05.07.2013, her father had left to her in-law's house at Prabhat Nagar, Meerut where she stayed there for a period of three days but on 08.7.2013 but her-in-laws had thrown her out after abusing her. It may be noted that during the course of the cross-examination of the appellant, she was not confronted on the allegations of the incident of physical assault narrated by her in the first information report, though the

cross-examination of the appellant wife was made in the year 2017. She was also not confronted about her narration of the incident occurred on 06.04.2014 outside the Mahila Thana. About the statement made by her having been stayed in the house of her in-laws from 05.07.2013 till 08.07.2013, the respondent husband had showed his ignorance. The parents of the respondent with whom, the appellant had allegedly resided from 05.07.2013 till 08.07.2013 did not come forward to confront her.

92. In any case, legal remedy availed by the appellant in filing a criminal case on the allegations made in the first information report as noted above, cannot be said to be a ground to conclude that the act of the wife in lodging the criminal case under the Dowry Act and 498-A had caused mental cruelty to her husband, the respondent herein, for the only reason that final reports were submitted by the Investigating Officer and the appellant wife had filed protest petitions twice challenging the investigation made by the police.

(vi) Subsequent events:-

93. As regards the domestic violence case, it was filed on 05.04.2016 when all doors of reconciliation knocked by the appellant were closed. It was categorical statement of the appellant that she went to the Air Force Station Kalaikunda, West Bengal on 25.01.2016 in order to save her marriage and the suggestion that all her moves after leaving her husband's home were part of a pre-conceived plan was denied. When confronted, the appellant stated that she went to the above noted place of posting of the respondent but came back when the respondent told his senior officers that he would not meet her. She admitted that she made efforts to patch up but came back on account of the refusal of the respondent to talk to her. She gave certain papers to the concerned officers as a proof of being the wife of the respondent. The respondent husband, on the other hand, admitted that on 25.01.2016, his wife did not come to meet him rather she came to the Air Force Station, Kalaikunda, West Bengal, where he was posted. His wife stayed for five days at the Air Force Station and he did not meet her in those five days. The respondent had shown ignorance about the fact that his wife had expressed her wishes to meet him and stated that the department informed him that his wife came there and was staying in the Guest House. He then gave an explanation that he did not meet his wife because of the pendency of the divorce suit though there were other reasons to meet her.

94. Having noted the admission of the respondent that he did not meet his wife nor his wife came to him when she stayed for five days at the Air Force Station Kalaikunda West Bengal, we are required to note the contents of the complaint filed by the respondent on 30.01.2016, on the 5th day when his wife had already left the Air Force Station. As per the contents of the said report submitted to the Superintendent of Police, Pachchim Medinipur, West Bengal, the appellant broke into the house of the respondent in the morning on 29.01.2016 in order to forcibly enter inside the house and thereby caused mental harassment to him and created public nuisance in the Air Force Station Kalaikunda. We may note that there is no narration of this incident, during cross, by the respondent when he was confronted about his complaint on the visit of his wife at the Air Force Station, Kalaikunda, West Bengal. What was the

date of the complaint given to the police, was not brought in the Court. From the analysis of the conduct of the respondent and his action in making criminal complaint at the police station on 30.01.2016, after his wife had already left the Air Force Station, Kalaikunda, West Bengal, it is evident that it was a calculated move of the respondent to create evidence against his wife. It could not be proved by the respondent that the appellant wife had submitted any complaint against the respondent husband when she visited the Air Force Station, Kalaikunda, West Bengal during the pendency of the divorce suit. It is proved that she only met some senior officers of the department.

Findings on the issue of cruelty:-

95. Apart from the facts noted above from the record, there is nothing against the appellant. The family court has erred in returning a finding that the appellant made complaints to the Senior officers of the Air Force aimed to get the respondent dismissed from service while holding that the appellant had thereby caused mental cruelty to her husband by her conduct and behaviour. The reasoning given by the family court that the appellant wife was adamant to take up a job in Noida, outside the Air Force Station, was bereft of evidence. Lodging of the criminal complaint by the wife cannot be viewed against her so as to reach at the conclusion that by lodging the criminal complaint, the wife had traumatized the respondent and his entire family.

96. As discussed above, the criminal case lodged by the wife cannot be a reason to grant divorce on the ground of cruelty and the family court had acted illegally in holding that even filing of the application for maintenance under Section 125 Cr.P.C. by the wife would come within the meaning of cruelty. It seems that the family court was swayed away by the fact that the respondent husband was a Fighter Pilot posted as Squadron Leader in the Air Force and any kind of mental disturbance caused to him would come in the way of the dedicated services of the Nation, having lost sight of the fact that the respondent husband cannot take benefit of his own wrong by his mere position in service. Once he had wronged his wife by not treating her well and not trying to patch up the marital discord by acting wisely in his complete matrimonial life, no indulgence can be given to the respondent for the sole fact of being posted as a fighter pilot in the Indian Air Force. The conclusion drawn by the family court that all the abovenoted acts of wife had resulted in an act of 'cruelty' caused upon her husband is, thus, contrary to the evidence on record. The findings returned by the family court on issue No.1 in favour of the petitioner/respondent herein are, thus, liable to set aside.

Relief:-

97. Now the question remains as to the relief to which the appellant wife is entitled to.

98. From the statement of the husband, their marriage was arranged and was solemnized with the approval of both the families. Soon after the marriage, they stayed together for about 3-4 months at the place of posting of the husband at the Air Force Station, Uttarlai, Badmer, Rajasthan. As per the husband, they could not stay together peacefully even during this short period of 3-4 months after marriage and his statement is that the wife was adamant to go out to take up employment and that was

the reason for their differences, which is not acceptable as it is admitted by the husband that the wife had completed B.Tech course only in the year 2010 whereas their marriage was solemnized in November 2009. During their short stay at Badmer, Rajasthan, the wife also went to Meerut to undertake examination for the B.Tech course. During the posting of the husband at the Air Force Station, Uttarlai, Badmer, Rajasthan soon after marriage, certain dispute had occurred between them and as per the statement of the wife in the first information report, she was treated at the Air Force Station hospital on 31.03.2010. Again an incident had occurred in February 2011 wherein wife had suffered certain injuries and was treated at the Air Force Station, at the place of the posting of the husband. The respondent was confronted, in cross, about those incidents and he showed ignorance about the treatment of his wife on 01.04.2010 at the Air Force Station, Uttarlai. The respondent also showed ignorance about the incident occurred in February 2011 as narrated in the first information report. He, however, had categorically denied the suggestion that he had assaulted his wife after consuming liquor.

99. The differences between the spouses had ultimately resulted in the incident occurred on 23.11.2011, when the appellant had left her marital home alongwith her brothers in the presence of the respondent husband. Both the spouses are levelling allegations against each other shifting responsibility for the marital discord, but it is difficult to accept that the fault lies only with the appellant wife. In the matter before us, it seems that during the short period of two years of their marital life, both the spouses were facing issues of compatibility. The allegations of wife are of physical assault by the husband, whereas husband seems to be aggrieved by the stubborn attitude, conduct and behaviour of the wife. They could not live peacefully and happily even during the short period of two years soon after marriage. It further seems to us that the respondent husband was under influence of his parents. The role of his father in going to Ambala and lodging a report at the P.S. Ambala Cantt, soon after the wife had left her matrimonial home alngwith her brothers, reflects dominating and reckless behavour of an elder member in the family of the husband. The husband states that after two years of separation he realized that adjustment was not possible and as such talked about mutual divorce with the wife who refused the request. The husband admitted that he never met his wife after she had left him on 23.11.2011. He never went to meet his wife or her parents, never called her. The statement of the husband that his parents made efforts for reconciliation by talking to the parents of his wife and the wife herself who was staying at Meerut proved to be incorrect. Looking to the attitude of the father of the respondent, it is difficult to accept that he acted as a bridge between his son and daughter-in-law and made any efforts to remove their differences. The respondent husband showed his ignorance about the visit of his parents to his wife's home at Meerut though both the families were residing in the same city. Rather categorical stand of the husband is that his wife went from his home without his consent and, as such, he did not make any effort to bring her back. He stated that two years of marriage was not a good experience for him so he did not bring his wife back and waited for another two years to file the divorce petition. The husband stated that the wife had opportunity to come back to him during the initial two

years of separation but firmly stated that he was not ready to keep his wife in any circumstance. No legal remedy was availed by the husband to bring back his wife and he categorically stated during his cross-examination that he was never ready to keep the appellant Sneha Pandit as his wife. He never met her personally from the date of the separation till the date of the institution of the divorce suit, as he needed divorce at any cost.

100. From the statement of the wife, it seems that the father of the respondent namely the father-in-law went to the mediation center during reconciliation proceedings. The wife categorically stated that her father in law was instrumental in institution of the divorce petition and he was doing pairvi in the matter . The respondent had filed a petition under Article 227 of the Constitution of India in the year 2016, itself for expeditious disposal of the divorce petition. The certified copy of order dated 11.04.2016 passed by this court directing the family court to decide the divorce petition is on record.

101. The respondent husband in his cross-examination has categorically stated that he did not make any effort to bring back his wife after 23.11.2011 as she left on her own volition without his consent and thereafter she lodged cases against him and also moved an application for maintenance. He however, admitted that during the period of two years, the appellant wife had only moved an application before the department to seek maintenance and also that no maintenance was given by him during the period of two years of separation.

102. It is clear that the dispute between the parties assumed alarming proportions with the passage of time and it seems that no one in the family made efforts to make the warring couple see reason. No effort was made at the early stage of the dispute to help the couple, before the wife filed the complaint under the Dowry Act, 498-A, in a desperate attempt to save her marriage. She was not counselled by any independent person or responsible elder of the family. Mediation proceedings between the parties failed on account of adamant stand of the respondent husband that he would not keep his wife at any cost. The husband did not even participate in the mediation proceeding and sent his father. Whereas the wife was always ready to go to with her husband and was making efforts in that direction by going to his parent's home and his place of posting to meet him even after criminal and civil cases were filed by both the parties. It seems to us that the criminal case was filed by the wife, in desperation, in order to bring her husband to the negotiation table. Her said attempt also failed as final reports were submitted twice in favour of the husband. The situation, however, turned against her each time and she had lost every battle with her husband, failed in every attempt to save her marriage, she never got any level-playing field, to bring her husband to the negotiation table, who refused to meet her at any cost.

103. We may not be misunderstood in saying that the fault lies only with the respondent husband but the sequence of the events of the present case portrays a clear picture that in the matrimonial dispute both the spouses were at fault but no one even elders in the family had helped them to overcome their differences and the way the appellant wife had approached the problem, it turned against her.

104. The cause of misunderstanding between the spouses was trivial but could not be sorted out. The records indicates that

the wife was barely 22 years of age at the time of marriage and husband was 25 years. They have consumed their prime period of progress and happiness in life in the litigation before the Court. They could live together only for two years soon after their marriage that too with great difficulty. The appellant wife and the respondent husband are staying apart from 23.11.2011, thus, they are living separately for more than 10 years, in their total period of 12 years of matrimonial life. This separation has created a distance between the two which may not be bridged if we refuse to grant divorce.

105. In recent decades, women have moved forward in various areas of their lives and are competing with men despite many obstacles. New opportunities in education, politics, and employment caused many to define new roles for women. In our Indian society, the women performs not only the role of wife, partner, mother, manager of the home but also hold key positions as Adminstrator, Economist, Disciplinarian, Teachers, Doctor, Artist. The ever evolving human desire drives the development of men and women alike. Over the past 60 yeas, we have witnessed a conspicuous change in human desires. Women wish to be less and less involve in household management and child care and are increasingly expanding their involvement in other areas of society. At the same time, the world is pushing towards greater equality and women assume roles and responsibilities previously only filled by men as the world becomes more independent, it demands the intervention of women, asking the women to put their unique qualities into practice. A women is capable of holding on to a large number of tasks as well as carry them out successfully. Women and men are also different in their attitude but the mutual completion of each other qualities is the key to build a healthy society in the new era. The integration of women in the leadership of society and other system on human life is becoming necessary. The maternal qualities of women are expanding from the personal home to the global home. In this changing world, where the gender roles began to shift and change, where the man of the family is not necessarily the bread winner while the woman is the house wife, confining men and women in their fixed role inside their home, often led to this type of dispute.

106. In this changing world, in the case before us, we are feeling pain to note that a 22 years old girl who was doing B.tech course, was married off by her parents giving her a dream to live as the wife of a fighter pilot.

107. The parents of the girl did not allow her to complete even her graduation course and in the arrange marriage she was told by her husband that she would not be allowed to take up employment, a pre-condition for marriage. A 22 years old girl who was not even graduate might not be ready to take up the responsibilities of a marriage which became onerous for her with the attitude of her husband who takes credit even in his wife finishing B.Tech course. The young girl was not free to even express her aspirations to her husband, who was made incharge of her life. The independence of a young girl was, thus, curtailed brutally both by her parents and the husband. The husband also cannot be faulted as he was brought up in such an atmosphere where he was tutored that his wife would have to obey him. The aspirations of the young girl and the attitude of her husband being in conflict

had been the cause of differences and disputes on trivial issues. The differences arose because of compatibility issues between two adults who came from different social background. At that moment, elders in the family were required to play a mature role in saving their relationship to bring harmony between two warring young persons. However, father of the husband namely (father-in-law) of the wife, behaved completely in an immature way. Instead of helping his son and daughter-in-law to overcome the crisis, he had taken the dispute to another level by lodging police complaint at a time when actually there was no serious dispute between the couple. While acting defensive as per his own explanation, the act of father of the husband ignited a trivial dispute to assume an alarming proportion. As far as the husband is concerned, he had his own ego when he stated categorically that since his wife had left (his house) on her own, she could have returned back "on her own" within two years before filing of the divorce petition and, thus, sought to explain as to why he never went to meet his wife or to talk to her to bring her back with him. This attitude of the husband is a typical example of male chauvinism.

108. Keeping this attitude consistent, in the year 2017, the husband made a statement in the Court that he was not ready to keep his wife in any circumstance and needed divorce at any cost.

109. Looking to the entire matrimonial life of two individuals before us, while dealing with the problems they faced in a short period of their conjugal life and thereafter, considering the whole issue from human angle, physiological point of view of both the spouses, it can be concluded that the matrimonial bond is beyond repair. It is one of those cases where refusing to severe the marital tie does not serve the sanctity of marriage as in such case the marriage becomes a fiction though supported by a legal tie. Such a situation may lead to mental cruelty of both the individuals and hamper positive progress and ultimate happiness in life. We are alive of the legal position that irretrievable break down of marriage is not a ground for divorce under the Act' 1955. We are also conscious of the law that the wrongdoer cannot take benefit of his own wrong. We are also conscious that being the first appellate court, the decree of divorce cannot be granted unless grounds as indicated under Section 13 of the Act' 1955 are established.

110. However, we cannot oblivious of the fact that both the spouses who are well educated, belong to well respected families had suffered a lot on account of their own attitude and behaviour. Though the husband had refused to keep his wife with him and his stand was consistent throughout but it cannot be said that it is only he who was at fault. The parties being well educated persons if free from the matrimonial bond, may look forward to settle in their life in a better and positive way which may make them happy individuals and their lives would be constructive to our society.

111. At this juncture, we are constrained to record our dissatisfaction in the manner in which the Family Court Judge had dealt with the entire issue. The approach of the Family Court Judge in dealing with the matter shows complete lack of sensitivity and reflects chauvinist attitude of the Presiding Officer. The way the judgement has been written reflects the male chauvinist belief of the Presiding Officer so much so that he could not see the

basic human problem of compatibility in the attitude and behaviour of two individuals.

112. The one-sided approach of the family court judge had closed the doors of reconciliation between the parties. Had he acted in a neutral manner with progressive attitude, it was possible that the parties could see reasons when the matrimonial litigation was at the premature stage, bitterness between them might not have escalated to this level. The gender neutral approach of the family Court judge was much needed to deal with the matrimonial issues impartially. But his answer to the problems of the couple had again wronged the appellant wife who was blamed by the family Court for all her deeds and acts, ignoring the acts of the husband and his family members.

113. The appellant wife must be 35 years of age as of now and the husband is about 39 years. We are of the considered view that if at this juncture of their life, they are not given a second chance and are forced to live together, their lives may become miserable. The matrimonial dispute which has assumed this proportion on trivial issues, seems to be beyond repairs on account of bitterness created by the acts of both the husband and the wife and their family members.

114. The Apex Court in **K. Srinivas Rao (supra)** has taken note of its previous decisions to observe that the courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the Court's verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried-up there is hardly any chance of their springing back to life on account of artificial reunion created by the Court's decree. It was noted therein that the divorce petition was pending for eight years and a good part of the lives of both the parties had been consumed in litigation, yet the end was not in sight. In such circumstance, the Apex Court in V. Bhagat vs D. Bhagat 1994 (1) SCC 337 had observed that irretrievable break down of marriage is not a ground by itself, but, while scrutinizing the evidence on record to determine whether the grounds alleged are made out and in determining the relief to be granted, the said circumstance can certainly be borne in mind.

115. In the course of fighting litigation in different Courts the parties lost their "young days of happiness and prosperity." In the compelling circumstances of the present case, though we do not find any convincing ground taken in the divorce petition filed by the husband to grant the decree of divorce to him, but in order to give a chance to the parties to settle themselves and be relieved of a marriage which is dead, we are of the view that the marriage between the parties deserves to be dissolved.

116. But before concluding so, we are required to consider that the appellant wife who have lost employment opportunities after completion of the B.Tech course because of the resistance of her husband, who himself could not give her a peaceful comfortable life, is entitled to permanent alimony. A well educated girl who got married to an Air Force Officer at the age of barely 22 years must have a lot of dreams to lead the comfortable and secured life of the wife of an Air Force Officer. The

wife though had completed B.Tech course in the year 2010 but could not take up any job due to marital obligations. During the period of separation of two years, she had studied M.Tech course and also took coaching for higher education but could not take any employment for becoming an economically independent person due to her energies being consumed in the litigation with her husband. The husband had wronged his wife in filing the divorce petition on false grounds.

117. Regard being had to the above circumstances and social status and strata of the parties especially the husband, the aspirations of the appellant wife to lead the life of the wife of an Air Force Officer, we found it justified to provide a sum of Rs.1 Crore (One Crore) as permanent alimony to wife, excluding the amount already paid to the appellant wife towards interim maintenance. We hope and trust that the alimony fixed by us may help the appellant wife to purchase a decent house for herself and stand on her own legs to become a useful member of the society.

118. The total amount of alimony shall be deposited by the respondent husband within a period of six months from the date of the judgement, in two installments of Rs.50 lacs each, before the Principal Judge, Family Court at Meerut and the money shall be released in favour of the wife soon after the deposits on an application moved by her.

119. We are conscious that we are granting decree of divorce to the couple in the peculiar facts and circumstances of the case taking a pragmatic view in order to give them a chance to lead a peaceful and happy life in future and an opportunity to the wife to be economically independent with the permanent alimony which she receives from her husband. We hope and trust that the parties may now put an end to their dispute and look forward to a positive life in future.

120. We are making it clear that this judgement has been given in the peculiar facts and circumstances of the case on an analysis of complete matrimonial life of the parties though we are convinced that the appellant wife was not solely at fault. This judgement thus, shall not be treated as a precedent or guidance by the family court to grant decree of divorce on the ground of irretrievable break down of marriage. We have done so as both the parties are well educated and belong to a well-off family and they still have a chance to settle in their lives in a better way if are separated without any social stigma.

121. With the aforesaid directions, we annul the marriage between the parties granting them the decree of divorce.

122. The divorce petition No.1614 of 2013 is hereby allowed.

123 The appeal is disposed of, accordingly.

124. No order as to cost.

125. Before parting with this judgement, we find it imperative to put on record that the role of family court judges is not only of adjudicators but they are facilitators in matrimonial disputes where perception of a judge about gender issues plays a major role in his decisions. The Family Court judges have to be gender sensitive. To evolve as a Family Court judge, a person has to be gender neutral, gender sensitive, open to the social

changes to have a mature thinking. In this evolution process, according to us, gender sensitization program can play an important role. We, therefore, recommend that gender sensitization program be especially designed and held for the Family Court Judges in the State of U.P. The High Court Family Court Sensitization Committee may consider the issue to take it further. The Registrar General is directed to place the matter before the committee.

(2022) 11 ILRA 804
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.10.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

Second Appeal No. 734 of 2012
&
Second Appeal No. 733 of 2012

Anand Prakash Sharma ...Appellant
Versus
Jashwant Singh & Ors. ...Respondents

Counsel for the Appellant:
Sri Manish Chandra Tiwari, Sri B.N. Upadhyaya, Sri Chandan Sharma, Sri M.K. Rajvanshi, Sri Nitin Sharma, Sri Sanjay Kumar Srivastav, Sri Akshay Pratap

Counsel for the Respondents:
Sri Santosh Kr. Srivastava, Sri B.N. Agrawal, Smt. Alka Srivastava

A. Civil Law - Code of Civil Procedure, 1908 - Order XXIII Rule 1(4) CPC - Order 2 Rule 2 - Withdrawal of suit - Whether once a suit is dismissed and withdrawn, without permission to file fresh suit, is barred under Order XXIII Rule 1(4) and Order II Rule 2(C) C.P.C - As per Order XXIII Rule 1(4), where the plaintiff withdraws from a suit, without the permission of Court to institute a fresh suit for the subject-matter, he shall be preclude from instituting any fresh suit in respect of such subject-matter or such part of the claim - Held - Supreme court decision in Vallabh Das case propounds the principle that a subsequent suit, based on a different cause of action, though may be related to the same property or may be the same rights, may constitute a different *subject matter* from the previous litigation - The expression "subject matter" is not defined in the Civil Procedure Code - That expression includes the cause of action and the relief claimed - Unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said, that the subject-matter of the second suit is the same as that in the previous suit - All that is required to dispel the bar under Order XXIII Rule 1(4) or Order II Rule 2 CPC is that the subsequent suit should be based on a *different cause of action* than the one involved in the earlier suit - A suit withdrawn without permission to file a fresh suit, does not bar the subsequent suit *if the two suits are not based on the same cause of action*, even though the earlier suit relates to the same property between the same parties (Para 44, 45)

On 04.07.1996 there was an attempt to trespass on a property of Jaswant by Anand Prakash – therefore on 08.07.1996 Jaswant instituted a suit for permanent injunction i.e. Suit O.S. No. 737 of 1996 - However, the suit was unconditionally withdrawn on 03.04.1997 when the threat ended - After a short break, after the first suit had been withdrawn, on 20.06.1997 Anand Prakash actually trespassed on the property, encroaching and building on it - After attempts to reach a peaceful settlement failed, O.S. No. 1162 of 1998 was instituted by Jaswant, for a declaration of title based on the sale certificate by the Revenue Authorities in favour of Jaswant Singh and mandatory injunction - It was argued by Anand Prakash that the suit brought on the same cause of action (i.e. O.S. No. 1162 of 1998) is barred by the principle of res judicata & that the subsequent suit is also barred by Order II Rule 2 CPC, because Jaswant Singh, in his earlier suit being out of possession, asked for an injunction

simplicitor, instead of seeking the substantial relief of declaration and recovery of possession that he ought to have done - Held - in the absence of a plea being raised, and particularly, an issue being framed about the suit being barred either under Order XXIII Rule 1(4) or under Order II Rule 2 CPC, the parties did not have opportunity to lead evidence on the point – Merely because the original suit was withdrawn by Jaswant, without permission to file a fresh suit, does not bar the subsequent suit brought by Jaswant Singh either under Order XXIII Rule 1(4) CPC or under Order II Rule 2, because the two suits are not based on the same cause of action, even though the earlier suit relates to the same property between the same parties - the cause of action in the two suits are distinct and different, they have arisen at different points of time; although closely placed. (Para 41, 45)

Dismissed. (E-5)

List of Cases cited:

1. Sarguja Transport Service Vs State Transport Appellate Tribunal, M.P. Gwalior & ors., (1987) 1 SCC 5

2. Vallabh Das Vs Dr. Madan Lal & ors., (1970) 1 SCC 761

3. K.V. Shivakumar & ors. Vs National Institute of Mental Health and Neuro Sciences & ors., 2016 SCC OnLine Kar 8037

4. Kasarapu Sujatha & anr. Vs Veera Velli Veera Somaiah, 2007 SCC OnLine AP 676

(Delivered by Hon'ble J.J. Munir, J.)

1. Both these Second Appeals arise out of a common judgment, but separate decrees passed in two connected Civil Appeals, which, in turn, have arisen from suits inter partes relating to the same subject matter that are in the nature of cross-suits. This judgment will dispose of both the appeals.

2. Second Appeal No. 733 of 2012 has been preferred by the plaintiff of Original Suit No. 273 of 1998 against the defendants of the said suit, whereas Second Appeal No. 734 of 2012 has been preferred also by the same man, Anand Prakash Sharma, but in his capacity as defendant no.1 to Original Suit No. 1162 of 1998, instituted by the first defendant to Original Suit No. 273 of 1998. Effectively, both the suits were contested between Anand Prakash Sharma and Jaswant Singh. While Anand Prakash Sharma's suit being O.S. No. 273 of 1998 was dismissed, Jaswant Singh's suit being O.S. No. 1162 of 1998 was decreed by the Trial Court, also by a common judgment, but separate decrees. The suits were consolidated and tried together, with O.S. No. 273 of 1998 as the leading case. Most of the evidence of parties was recorded in the leading suit. Civil Appeal No. 9 of 2005 was preferred by Anand Prakash Sharma against the judgment and decree dated 17.03.2005 passed in O.S. No. 273 of 1998, whereas the other appeal being Civil Appeal No. 10 of 2005, was also preferred by Anand Prakash Sharma, but from the judgment and decree dated 17.03.2005 passed in O.S. No. 1162 of 1998. Both the appeals were consolidated and heard together by the Additional District Judge (Special), Baghpat with Civil Appeal No. 9 of 2005 being treated as the leading case. The learned Additional District Judge dismissed both the appeals by a common judgment, but separate decrees dated 28.05.2012.

3. Second Appeal No. 734 of 2012 has been preferred by Anand Prakash Sharma from the decree passed in Civil Appeal No. 9 of 2005. He has preferred Second Appeal No. 733 of 2012 from the decree passed in Civil Appeal No. 10 of 2005. Both the appeals have been admitted

to hearing by this Court vide separate orders dated 30.04.2014 on the same substantial question of law, which reads:

"Whether once a suit no. 737 of 1996 in between Jashwant Singh v. Anand Prakash Sharma an others on same facts circumstances dismissed and withdrawn after filing of written statement without permission to file fresh suit is clearly barred under Order XXIII Rule 1(4) and Order II Rule 2(C) C.P.C."

4. Heard Mr. Akshay Pratap, Advocate holding brief of Mr. Chandan Sharma, learned Counsel for the appellants and Mr. B.N. Agrawal, learned Counsel for the respondents in both the appeals.

5. In order to appreciate the substantial question of law involved, it is imperative to refer to the facts that have given rise to these appeals.

6. Anand Prakash Sharma, the plaintiff of O.S. No. 273 of 1998, who shall hereinafter be referred to as "the plaintiff' for the sake of convenience, unless the context requires otherwise, instituted O.S. No. 273 of 1998 aforesaid against Jaswant Singh son of Ram Swarup, Krishnapal Singh son of Pirthi Singh and Yogesh Sharma son of Bool Chand, with allegations that he is the owner in possession of the house depicted at the foot of the plaint by letters अ ब स द, situate at Village Patti Wajidpur, Gandhi Road, Qasba Baraut, Pargana and Tehsil Baraut, District Meerut. The house aforesaid has been assessed to tax and assigned Municipal Premises No. 17/302B. The plaintiff is paying house tax relating to the said house, since the year 1989, to the Nagar Palika Baraut. The plaintiff and Smt. Maya Devi, wife of Rajendra Kumar, had purchased the land/ plot, whereon the house last mentioned stands, from Jagannath son of Dhoom Singh, a resident of Village Patti Wajidpur, District Baghpat vide registered sale deed dated 12.08.1987. Later on, he purchased the half share of Smt. Maya Devi in the land subject matter of O.S. No. 273 of 1998 (for short, "the suit property') vide registered sale deed dated 11.03.1996. As such, the plaintiff has become the sole owner of the suit property, including the house constructed thereon.

7. It is the plaintiff's case that on the plot of land purchased as aforesaid, he got a house constructed, wherein no one else has got any share or interest. The defendants to the suit, that is to say, Jaswant Singh, Krishnapal Singh and Yogesh Sharma are quarrelsome persons and intend to forcibly grab the suit property together with the plaintiff's house standing thereon. The plaintiff asked the defendants to desist from doing so, but they did not relent. The last time the plaintiff asked the defendants from interfering with his possession over the suit property, they refused. This happened on 11.07.1996.

8. The plaintiff got his plaint amended vide order dated 15.12.1997 to say that upon the defendants filing their written statement, he came to know that the defendants, in connivance with the former Sub-Divisional Officer of Baraut, R.S. Chahar, got an auction sale of the suit property in their favour, that was in excess of the property mortgaged by Jagannath Prasad in favour of the Uttar Pradesh Financial Corporation (for short, "the UPFC') and also different from the said property. The mortgaged property that was auctioned in favour of the defendants is very different from the suit property, which shows the revenue sale claimed by the

defendants to be bogus, void and non est. Defendant no. 1 to the suit, Jaswant Singh, who shall hereinafter be referred to as the defendant, unless the context requires otherwise, was alleged to have, in the past, instituted a suit for permanent injunction against the plaintiff being O.S. No. 737 of 1996, which he unconditionally withdrew vide order dated 03.04.1997 passed by the Civil Judge (Sr. Div.), Meerut. It was pleaded, therefore, that the suit brought on the same cause of action (i.e. O.S. No. 1162 of 1998) is barred by the principle of res judicata.

9. It is also the plaintiff's case that the sale certificate issued in favour of the defendant does not adversely affect the plaintiff's right in House No. 17/302B, which is a part of House No. 12/298. It was also averred that looking to the background of the sale certificate being issued in favour of the defendant, the plaintiff is entitled to a declaration of his rights. A permanent injunction was sought to the effect that the defendant to the suit be restrained, by a permanent injunction, from interfering with the plaintiff's possession and title over house bearing No. 17/302B, as described at the foot of the plaint by letters अ ब स द, situate at Town Baraut, Gandhi Road, Qasba Baraut, Pargana and Tehsil Baraut, District Meerut, or endeavouring to dispossess him therefrom. A declaration was sought (by amendment vide order dated 15.12.1997) to the effect that the sale certificate dated 13.06.1996 issued by the Sub-Divisional Officer, Baraut, R.S. Chahar, in favour of the defendant and registered in the Office of the Sub-Registrar on 14.06.1996, being one in relation to a property different from that mortgaged by Jagannath son of Dhoom Singh in favour of the UPFC, is void and non est, which has no effect on the plaintiff's exclusive right and title in House No. 17/302B, situate at Gandhi Road, Qasba Baraut.

10. A joint written statement was filed on behalf of all the three defendants to the suit under reference, saying that the plaintiff was not the owner of the suit property and the suit had been instituted on the foot of incorrect facts. The suit property and that abutting it is a part of Khasra No. 472/1, Khewat No. 25, admeasuring 3 biswa, 15 biswansi, situate at Village Wajidpur. Devendra, Narendra and Jainendra, all sons of Lala Raghubir Singh, were owners in possession of the entire land, comprising the Khasra last mentioned. The entire area of land comprising the Khasra last mentioned was purchased by Jagannath son of Dhoom Singh from Devendra vide registered sale deed dated 20.07.1960. In consequence, Jagannath became the sole owner in possession of the said Khasra shown by letters अ ब स द (the suit property).

11. Devendra Kumar son of Jagannath took a loan from the UPFC in the year 1986, for the repayment whereof, Jagannath stood guarantor. As part of the guarantee, he mortgaged the suit property on 09.09.1986 with the UPFC. There was default in repayment of the loan that Devendra Kumar had taken. In consequence, the UPFC caused the suit property to be sold through public auction, held by the Sub-Divisional Officer, Baraut on 09.09.1994. The defendant purchased the suit property in the said auction being the highest bidder. The S.D.O. accepted the bid and issued a sale certificate in his favour, that was registered. Possession of the suit property was also delivered to the defendant. The plaintiff, however, mala fide attempted to encroach upon a part of the suit property on 04.07.1996, that is denoted

in the map annexed to the written statement by letters अ क ख ग. The defendant complained to the Police, on account of which the plaintiff was not successful in his endeavour to encroach. It was on this account that the defendant instituted O.S. No. 737 of 1996 for a permanent injunction against the plaintiff, restraining him from interfering with his possession in the suit property. Later on, since the plaintiff retracted and the threat of encroachment ceased, the defendant withdrew O.S. No. 737 of 1996. After withdrawal of Suit No. 737 of 1996, evil design made itself bold with the plaintiff again, and on occasion, he encroached into the suit property and constructed a room, a verandah and a boundary wall, denoted by letters अ क ख ग in the map, annexed to the written statement. The said encroachment was done taking advantage of the defendant's weakness in reporting the trespass. The plaintiff then commenced action.

12. It is the defendant's further case that after mortgaging the suit property denoted in the written statement by letters अ ब स द with the UPFC, Jagannath son of Dhoom Singh had no interest to convey in the plaintiff's favour or Smt. Maya Devi's, or anyone else's. The plaintiff and all others knew about the fact that the suit property had been mortgaged by Jagannath with the UPFC. The execution of the sale sale deed conveying the suit property by Jagannath in favour of the plaintiff or Smt. Maya Devi, after he had mortgaged it on 09.09.1986, is of no consequence and does not confer any right or title upon him/ them. It is then pleaded by the defendant that the plaintiff's case that the property shown in the written statement by letters अ क ख ग has been assessed to house tax by the Nagar Palika as House No. 17/302 is not part of the suit property, but another appurtenant house, is incorrect, which the plaintiff, by clever manoeuvre has got a subdivision assigned and entered in his name. It does not confer any benefit upon the plaintiff. The entire property, that has been shown at the foot of the plaint by letters अ ब स द, has one house Premises No. 12/298, Gandhi Road, Baraut, entered in the name of Jagannath Prasad son of Dhoom Singh. Later on, the said house has been numbered as 12/337, also entered in the name of Jagannath Prasad son of Dhoom Singh. Still later, the said house has been assigned No. 17/303 and at that stage, the name of Jagannath Prasad son of Dhoom Singh has been mutated out and that of the defendant (Jaswant Singh) entered in the house tax assessment record by the Municipal Board. It is the defendant's case that part of the suit property shown by letters अ क ख ग is in illegal occupation of the plaintiff. Besides, the entire suit property is entirely owned by the defendant and that the defendant is taking separate steps to dispossess the plaintiff.

13. Upon the pleadings of parties, in O.S. No. 273 of 1998, the following issues were framed by the Trial Court (translated into English from Hindi):

(1) Whether the plaintiff is the owner in possession of property shown by letters अ ब स द at the foot of the plaint?

(2) Whether the sale certificate dated 13.06.1986 in favour of defendant no.1, for the reasons given in the plaint, is inoperative and void? If yes, its effect?

(3) To what relief is the plaintiff entitled?

14. A number of documents were filed on behalf of the plaintiff as well as the defendant, which need not be recapitulated, as the summary of these is set out in copious detail in the judgments of the two Courts below.

15. On behalf of the plaintiff, the plaintiff, Anand Prakash Sharma, examined himself as PW-1, one Kaluram as PW-2 and Phool Singh as PW-3. On behalf of the defendants, defendant Jaswant Singh testified in the dock as DW-1, Bhopal Singh as DW-2 and Ramjan as DW-3. A commission in the suit was also issued and the Commissioner's report is available on record as Paper No. 36-Ga1, together with the annexed map.

16. Original Suit No. 1162 of 1998 was instituted by Jaswant Singh, the defendant against Anand Prakash Sharma, the plaintiff, Smt. Maya Devi and Janeshwar with a case that the owner in possession of the house denoted by letters अ ब स द in the map annexed to the plaint, giving rise to the suit under reference, was one Jagannath son of Dhoom Singh. The plot of land, on which the house stood, had an area of 567 square yards or 3 biswa 15 biswansi. M/s. Shiv Shakti Oil Udyog, Gandhi Road, Baraut secured a loan from the UPFC and for the repayment of the said loan, Jagannath Prasad stood guarantor. He mortgaged his property last mentioned on 09.09.1986 in favour of the UPFC, executing the necessary documents. M/s. Shiv Shakti Oil Udyog could not repay the loan advanced by the UPFC, in consequence of which the UPFC issued a recovery certificate against M/s. Shiv Shakti Oil Udyog and the guarantor, Jagannath Prasad. In execution of the recovery certificate, Jagannath Prasad's property, above described, was sold in a public auction by the revenue authorities. The said property, according to the defendant, is the subject matter of O.S. No. 1162 of 1998, instituted by him against the plaintiff, Anand Prakash Sharma and others. It is the defendant's case that he purchased the suit property subject matter of O.S. No. 1162 of 1998 at the public auction held on 09.09.1994, making the highest bid of Rs. 2,01,000/-, which was accepted. The entire sum of money was deposited with the Authorities. The auction sale in favour of the defendant was confirmed by the Sub-Divisional Officer, Meerut.

17. Upon securing the requisite stamp papers from the defendant, the Sub-Divisional Officer executed a sale certificate in his favour on 08.02.1996, which was registered with the Sub-Registrar, Baraut on 13.06.1996. The defendant received the registered sale certificate from the Sub-Registrar's office. It is also the defendant's case that the Sub-Divisional Officer, after execution and registration of the sale certificate, delivered actual physical possession on 04.07.1996 over the suit property subject matter of O.S. No. 1162 of 1998.

18. It is necessary to mention at this junction that the property, subject matter of O.S. No. 1162 of 1998 and that subject matter of O.S. No. 273 of 1998, instituted by the plaintiff, for all intents and purposes, is the same property. The distinction, that the plaintiff has attempted to carve out between the two, stands negatived by the findings of fact recorded by the two Courts below, that are no longer in issue in the present appeal. Thus, the property subject matter of O.S. No. 1162 of 1998 shall, in keeping with its description given in the earlier part of the judgment, be mentioned as the suit property hereinafter.

19. It is the defendant's case that no sooner he was delivered possession by the

Sub-Divisional Officer over the suit property on 04.07.1996, the plaintiff, along with some antisocial elements attempted to trespass and encroach upon a part of the suit property denoted in the plaint map by letters क ख ग घ, which the defendant resisted. He reported the matter to the Police also. The plaintiff withdrew and went away threatening that he would take possession of the suit property at an opportune time. The defendant claims to have inquired of the plaintiff as to how he lays claim to a part of the suit property denoted by letters क ख ग घ, whereupon it was revealed by the plaintiff that he had a sale deed dated 12.08.1987 in his favour executed by Jagannath Prasad and another by Smt. Maya Devi, defendant no.2 to O.S. No. 1162 of 1998. He asserted that he was the sole owner in possession of the said property. It is pleaded that the entire suit property was mortgaged by Jagannath Prasad on 09.09.1986 in favour of the UPFC in order to offer security for the loan availed by M/s. Shiv Shakti Oil Udyog and upon default, the entire suit property was caused to be sold in a revenue sale by the UPFC in realization of its overdues. It was in this sale, as already stated, that the defendant has purchased the suit property. It is then the defendant's case that the plaintiff forcibly occupied a part of the suit property, denoted by lettersक ख ग घ on 20.06.1997, taking advantage of the defendant's weakness in reporting the trespass. The efforts made by the defendant before the Sub-Divisional Officer to recover possession, forcibly taken by the plaintiff, did not yield result.

20. It is the defendant's case that the part of the suit property denoted by letters क ख ग घ, an area of 65 square yards, is in the illegal occupation of the plaintiff. He has refused to vacate the same despite demand. Some part of it, the plaintiff claimed to have purchased from Smt. Maya Devi and it is for this reason that the defendant has impleaded Smt. Maya Devi as defendant no.2 to O.S. No.1162 of 1998.

21. The defendant Jaswant Singh, in O.S. No. 1162 of 1998 claimed a declaration to the effect that on the basis of the sale certificate dated 08.02.1996, registered on 13.06.1996, he is the owner of the suit property (denoted by letters अ ब स द). A mandatory injunction was claimed against the plaintiff, besides Smt. Maya Devi and Janeshwar, to the effect that out of the suit property, the part denoted by letters क ख ग घ, the defendants to the suit, be ordered to withdraw from occupation of the said land, part of the suit property, and in case of failure to do so, the defendant (Jaswant Singh) be put in possession of the above mentioned part of the suit property through the process of Court, after expelling the plaintiff (Anand Prakash) and the other two defendants to the present suit.

22. The suit was contested by filing a written statement, more or less on the same terms as the case of the plaintiff (Anand Prakash) set out in his plaint, giving rise to O.S. No. 273 of 1998.

23. On the pleadings of parties, in O.S. No. 1162 of 1998, as many as fourteen issues were framed, that read (translated into English from Hindi):

(1) Whether the plaint is undervalued?

(2) Whether the court-fee paid is insufficient?

(3) Whether the plaintiff's suit is liable to be stayed under Section 10 CPC?

(4) Whether the plaintiff on the basis of the public auction dated 09.09.1994 is the owner in possession of the house in

question, denoted in the map by letters अ ब स द?

(5) Whether the land shown by letters क ख ग घ, part of the property denoted by letters अ ब स द, has been encroached upon (by the defendant) (sic) on 20.06.1997?

(6) Whether defendant no.1, on the basis of the sale deeds dated 12.08.1987 and 13.09.1996, is the owner in possession of the disputed house, as averred in Paragraph No. 20 of the written statement?

(7) Whether the land on which the disputed house stands is different from that mortgaged by Jagannath and not part of House No. 12/298, as averred in Paragraph No. 22 of the written statement?

(8) Whether the plaintiff's suit is barred by res judicata, as averred in Paragraph No. 22 of the written statement?

(9) Whether the S.D.O., Baraut, in order to extend unlawful gain to the plaintiff, has sold 567 square yards of land in place of the mortgaged land, 95 feet in length and 49 feet in width, admeasuring 497 square yards? If yes, its effect?

(10) Whether the auction sale dated 09.09.1994 has not been confirmed and the suit is premature? If yes, its effect?

(11) Whether defendant no.1 is entitled to the benefit of being a bona fide purchaser and in continuous adverse possession, as averred in Paragraph No. 30 of the written statement?

(12) Whether the suit is barred by the principles of acquiescence and estoppel?

(13) Whether the defendant is entitled to special costs?

(14) To what relief is the plaintiff entitled to?

*(15) Whether the suit is barred by limitation?

(*Issue No. 15 does not find record in the judgments passed either by the Trial Court or the Appellate Court, but a perusal of the order-sheet dated 01.08.2002 in O.S. No. 1162 of 1998 shows that the said issue was framed by the Presiding Officer below the type-written issues, numbered as Issue No. 14 erroneously; it should have been numbered as '15')

24. The Trial Court took up for decision Issue No. 1 of O.S. No. 273 of 1998 and Issues Nos. 4, 6, 8 and 9 of O.S. No 1162 of 1998 together. The issues under reference deal with the substantial part of the dispute between parties, where the Trial Court has concluded that the land, that Anand Prakash claims to be in his ownership possession, cannot be accepted because on the basis of the public auction dated 09.09.1994, Jaswant Singh is proven to be its owner. It was also opined that the sale deed dated 12.08.1987, claimed by Anand Prakash in his favour, does not confer any right, title or interest upon him. The sale certificate registered in favour of Jaswant Singh on 13.06.1996 was held by the Trial Court, on a consideration of oral evidence, including that of the witnesses of Anand Prakash, to be valid, who testified that the auction sale was held, wherein they had participated. Issues Nos. 1, 2 and 3 in O.S. No. 1162 of 1998 were answered by the Trial Court in favour of Jaswant Singh. It was held that the suit is not liable to be stayed under Section 10 CPC, because both the suits have been consolidated and tried together.

25. On Issue No.7, where Anand Prakash introduced a case that the land mortgaged by Jagannath Prasad, was different from the one he had built his house upon, and that Anand Prakash's house is not part of House No. 12/1998, it was held, upon a comparison of boundaries of the property mentioned in the affidavit by Jagannath at the time of mortgaging it,

with those of the suit property, that it was the same property, which was mortgaged and later on sold in auction for the realization of its dues by the UPFC that Jaswant Singh purchased.

26. In consequence of its findings on the various issues, the Trial Court dismissed O.S. No. 273 of 1998 brought by Anand Prakash against Jaswant Singh and others with costs, whereas O.S. No. 1162 of 1998, instituted by Jaswant Singh against Anand Prakash and others, was decreed with costs. It was declared that on the basis of the sale certificate dated 08.02.1996, registered on 13.09.1996, Jaswant Singh was the owner of the suit property (denoted by letters अ ब स द). A mandatory injunction was issued, ordering Anand Prakash to vacate the land denoted by letters क ख ग घ, that was part of the suit property, and deliver possession to Jaswant Singh, and upon failure to do so, Jaswant Singh would be entitled to recover actual and physical possession of the said property through process of Court.

27. The Lower Appellate Court, in hearing the appeal, formulated three points for determination. These read (translated into English from Hindi):

(1) Whether the plaintiff (Anand Prakash) had any right to purchase the property denoted by letters अ ब स द, which he claims to have done through the sale deed of the year 1987?

(2) Whether the property mortgaged by Jagannath with the UPFC in the year 1986, included the disputed land, denoted by letters अ ब स द or not?

(3) Whether Anand Prakash after execution of the sale certificate in favour of Jaswant is still owner in possession of the disputed land shown by letters अ ब स द?

28. It must be remarked at the outset that though the Lower Appellate Court has wholesomely dealt with the substantial issues arising between parties under the points of determination framed, these are somewhat unhappily worded. But, that does not detract, in any manner, from the substance of determination made on the issues arising between parties. Though writing a judgment of affirmation, the Lower Appellate Court has examined evidence threadbare with reference to each point of determination covering all the issues, arising in the suit.

29. The Lower Appellate Court has opined, upon a careful comparison of the boundaries of the suit property purchased by Jagannath from its erstwhile owner, Devendra son of Raghubir way back in the year 1960 through a registered sale deed as also the subsequent sale deeds executed that there was no property with Jagannath in the vicinity, apart from that bearing Khasra No. 472/1, admeasuring 3 biswa 15 biswansi or 567 square yards, which he mortgaged with the UPFC. That finding of fact about the identity of the suit property and its auction sale at the behest of the UPFC by the S.D.O. has been recorded concurrently by the Courts below, where a valid sale has been found to have taken place in favour of Jaswant Singh. The later sale deed executed by Jagannath in favour of Anand Prakash and Maya Devi and the one by Maya Devi, transferring her half share, purportedly purchased through the sale deed of 1987, in favour of Anand Prakash, have been held to be void, because Jagannath lost all title to the suit property as he mortgaged it with the UPFC, which later on brought it to sale for the realization of its loan overdues through public auction. On the other hand, the proceedings of the auction in favour of Jaswant Singh have

been found to be fully established by both documentary and oral evidence on record. These questions need not detain this Court in the present appeal, which has been admitted to hearing on the substantial question of law, indicated hereinabove.

30. The learned Counsel for the appellants has submitted and attempted to show that the property, that was purchased by Anand Prakash and Maya Devi through the sale deed of 1987 from Jagannath, was one that Jagannath purchased from a certain Shekhar Chandra Jain. It was not Jagannath's property purchased from Devendra son of Raghubir way back in the year 1960, that he subsequently mortgaged with UPFC. These are issues not open in this appeal, which the Lower Appellate Court, in any case, on a careful analysis of the documentary and oral evidence, has answered for the defendant and against the plaintiff.

31. So far as the substantial question of law involved in this appeal is concerned, learned Counsel for the plaintiff has submitted that Anand Prakash was always in possession of the suit property since 1987 i.e. since the execution of the sale deed in his favour by Jagannath. Therefore, aggrieved by the perpetual interference with his possession by Jaswant Singh, he instituted Suit No. 273 of 1998 for a permanent injunction to restrain him from interfering with it and for declaring the sale certificate registered on 13.06.1986 null and void. In the aforesaid suit, Jaswant Singh filed his written statement on 14.05.1998, where he took a plea that possession of the suit property was delivered to him by the Sub-Divisional Officer on 04.07.1996, but the same was illegally taken by the plaintiff. However, the date of trespass has not been indicated, despite the incident occurring months before the institution of O.S. No. 273 of 1998 by Anand Prakash. It is submitted that in O.S. No. 1162 of 1998 instituted by Jaswant Singh, it is pleaded that the possession was illegally taken by Anand Prakash on 20.06.1997, which happens to be 11 months before filing of his written statement in O.S. No. 273 of 1998. It is argued that it is quite evident that the date of the alleged possession being illegally taken by Anand Prakash was concocted to create an artificial cause of action and seek remedy through O.S. No. 1162 of 1998.

32. It is next submitted that on the same cause of action, Jaswant Singh had earlier instituted O.S. No. 737 of 1996, seeking permanent injunction to the effect that Anand Prakash and the other defendants to that suit be restrained from interfering with his possession over the suit property, that is to say, the house as per boundaries shown at the foot of the plaint, giving rise to the said suit. Later on, this suit was withdrawn by Jaswant Singh on 03.04.1997, without leave of the Court. It is argued that Jaswant Singh instituted O.S. No. 737 of 1996, which he withdrew without leave and then maliciously instituted O.S. No. 1162 of 1998 on the same cause of action. It has been emphatically argued that cause of action in both the suits is one and the same and the first suit being withdrawn without liberty, O.S. No. 1162 of 1998 is barred by the provisions of Order XXIII Rule 1(4) and Order II Rule 2 CPC.

33. It is precisely on the last limb of the submission that the substantial question of law that is involved in this appeal was formulated. The other ancillary submissions made may also be relevant to some extent in order to judge whether on

the facts a case of bar to the trial of O.S. 1162 of 1998 under either of the provisions of law can be inferred.

34. In support of his contention that the subsequent suit brought by Jaswant Singh is barred under the law, learned Counsel for the appellants has relied on the decision of the Supreme Court in **Sarguja Transport Service v. State Transport Appellate Tribunal, M.P. Gwalior and others, (1987) 1 SCC 5**, where it has been held:

"7. The Code as it now stands thus makes a distinction between "abandonment" of a suit and "withdrawal" from a suit with permission to file a fresh suit. It provides that where the plaintiff abandons a suit or withdraws from a suit without the permission, referred to in sub-rule (3) of Rule 1 of Order XXIII of the Code, he shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. The principle underlying Rule 1 of Order XXIII of the Code is that when a plaintiff once institutes a suit in a court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subject-matter again after abandoning the earlier suit or by withdrawing it without the permission of the court to file fresh suit. Invito beneficium non datur -- the law confers upon a man no rights or benefits which he does not desire. Whoever waives, abandons or disclaims a right will loose it. In order to prevent a litigant from abusing the process of the court by instituting suits again and again on the same cause of action without any good reason the Code insists that he should obtain the permission of the court to file a fresh suit after establishing either of the two grounds mentioned in sub-rule (3) of Rule 1 of Order XXIII. The principle underlying the above rule is founded on public policy, but it is not the same as the rule of res judicata contained in Section 11 of the Code which provides that no court shall try any suit or issue in which the matter directly or substantially in issue has been directly or substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. The rule of res judicata applies to a case where the suit or an issue has already been heard and finally decided by a court. In the case of abandonment or withdrawal of a suit without the permission of the court to file a fresh suit, there is no prior adjudication of a suit or an issue is involved, yet the Code provides, as stated earlier, that a second suit will not lie in sub-rule (4) of Rule 1 of Order XXIII of the Code when the first suit is withdrawn without the permission referred to in sub-rule (3) in order to prevent the abuse of the process of the court."

35. On behalf of the respondent, it is submitted that in O.S. No. 737 of 1996 and O.S. No. 1162 of 1998, the cause of action and the relief claimed are different. O.S. No. 737 of 1996 was instituted by Jaswant Singh for a permanent injunction to restrain the defendants to that suit, including Anand Prakash, from interfering with Jaswant Singh's possession over the suit property, whereas O.S. No. 1162 of 1998 was instituted by Jaswant Singh against Anand Prakash and the other defendants to the suit for a declaration to the effect that on the basis of the sale certificate registered on 13.06.1996, he be declared the owner of the

suit property (denoted by letters अ ब स द) and a mandatory injunction directing the defendants, including Anand Prakash issued to handover possession of the land denoted by letters क ख ग घ in the plaint map, part of the suit property, denoted by letters अ ब स द, in respect whereof, the declaration has been claimed.

36. In support of his contention, learned Counsel for the defendant has placed reliance upon a decision of the Supreme Court in **Vallabh Das v. Dr. Madan Lal and others, (1970) 1 SCC 761**, where, in the context of a bar under Order XXIII Rule 1(4) CPC, it has been observed:

"5. Rule 1 of the Order 23, Code of Civil Procedure empowers the courts to permit a plaintiff to withdraw from the suit brought by him with liberty to institute a fresh suit in respect of the subject-matter of that suit on such terms as it thinks fit. The term imposed on the plaintiff in the previous suit was that before bringing a fresh suit on the same cause of action, he must pay the costs of the defendants. Therefore we have to see whether that condition governs the institution of the present suit. For deciding that question we have to see whether the suit from which this appeal arises is in respect of the same subject-matter that was in litigation in the previous suit. The expression "subject-matter" is not defined in the Civil Procedure Code. It does not mean property. That expression has a reference to a right in the property which the plaintiff seeks to enforce. That expression includes the cause of action and the relief claimed. Unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said, that the subject-matter of the second suit is the same as that in the previous suit. Now coming to the case before us in the first suit Dr Madan Lal was seeking to enforce his right to partition and separate possession. In the present suit he seeks to get possession of the suit properties from a trespasser on the basis of his title. In the first suit the cause of action was the division of status between Dr Madan Lal and his adoptive father and the relief claimed was the conversion of joint possession into separate possession. In the present suit the plaintiff is seeking possession of the suit properties from a trespasser. In the first case his cause of action arose on the day he got separated from his family. In the present suit the cause of action, namely, the series of transactions which formed the basis of his title to the suit properties, arose on the death of his adoptive father and mother. It is true that both in the previous suit as well as in the present suit the factum and validity of adoption of Dr Madan Lal came up for decision. But that adoption was not the cause of action in the first nor is it the cause of action in the present suit. It was merely an antecedent event which conferred certain rights on him. Mere identity of some of the issues in the two suits do not bring about an identity of the subject-matter in the two suits....."

(emphasis by Court)

37. It must be remarked at once that Anand Prakash has not at all got an issue framed either in O.S. No. 273 of 1998 that he instituted or the other suit instituted by Jaswant Singh, being O.S. No. 1162 of 1998 to the effect whether the subsequent suit instituted by Jaswant Singh, that is to say, O.S. No. 1162 of 1998 was barred by the provisions of Order XXIII Rule 1(4) CPC or Order II Rule 2 CPC, in consequence of the earlier suit for injunction instituted by Jaswant Singh i.e.

O.S. No. 737 of 1996, being withdrawn unconditionally. Not only this issue was not raised, but also this point does not seem to have been argued before both the Courts below. The plea that Anand Prakash raised was one of the bar of res judicata in answer to Jaswant Singh's O.S. No. 1162 of 1998, because of the withdrawal of his earlier O.S. No. 737 of 1996. This plea was indeed argued before the Lower Appellate Court also and repelled on the ground that mere withdrawal of the earlier suit, without an adjudication of the issues involved, does not operate as a bar under Section 11 CPC. It is for the first time before this Court that Anand Prakash has raised a plea of the subsequent suit brought by Jaswant Singh to be barred by the provisions of Order XXIII Rule 1(4) CPC, or in the alternate, under Order II Rule 2.

38. This Court, nevertheless, proceeds to examine the substantial question involved. It has been asserted on behalf of Jaswant Singh that he instituted the suit for permanent injunction, because after possession was delivered to him by the Authority on 04.07.1996, Anand Prakash made an attempt to encroach into a part of the suit property (denoted by letters अ ब स द), shown in the map of the plaint giving rise to O.S. No. 1162 of 1998 by letters क ख ग घ. The said effort was thwarted and the matter reported to the Police. Later on, when the threat at the hands of Anand Prakash ceased, the suit for injunction was withdrawn vide order 03.04.1997. Subsequently, Anand Prakash encroached into the suit property on 20.06.1997 and constructed over a part of the same denoted by letters क ख ग घ in the plaint map annexed to the plaint of O.S. No. 1162 of 1998, necessitating the institution of that suit for declaration and recovery of possession, by a mandatory injunction, from the trespasser.

39. This plea raised on behalf of Jaswant Singh, in the context of the substantial question, has been resisted by Anand Prakash with the learned Counsel appearing on his behalf, pointing out that in the written statement that was filed by Jaswant Singh in the suit instituted by Anand Prakash, prior in point of time, it was stated by Jaswant Singh that possession of the suit property was delivered to him by the Authority on 04.07.1996 and the same was illegally encroached into by Anand Prakash. However, the exact date of the trespass and encroachment has not been indicated, despite the incident occurring months before institution of the suit by Anand Prakash, that is to say, O.S. No. 273 of 1998. The written statement aforesaid was filed on 14.05.1998 in the suit last mentioned and the act of trespass and dispossession are said to have taken place on 13.06.1996. It is urged, therefore, that the absence of the date of the alleged trespass and encroachment by Anand Prakash, make the cause of action set up in the subsequent suit instituted by Jaswant Singh, clearly one that is artificially created to obtain relief, that is otherwise barred with the unconditional withdrawal of the earlier suit brought by Jaswant Singh under Order XXIII Rule 1(4) CPC. Also for the same reason, it is urged on behalf of Anand Prakash that the subsequent suit is barred by Order II Rule 2 CPC, because Jaswant Singh, in his earlier suit being out of possession, asked for an injunction simplicitor, instead of seeking the substantial relief of declaration and recovery of possession that he ought to have done. He has, therefore, brought the present suit, splitting the cause of action,

which attracts the bar under Order II Rule 2 CPC.

40. This Court finds that in the absence of a plea being raised, and particularly, an issue being framed about the suit being barred either under Order XXIII Rule 1(4) or under Order II Rule 2 CPC, the parties did not have opportunity to lead evidence on the point. Therefore, the Court is left to judge the worth of the substantial question, going by the pleadings and the record on the face of it. This Court finds that O.S. No. 737 of 1996 was instituted on 08.07.1996 after the attempted trespass on 04.07.1996, and unconditionally withdrawn on 03.04.1997, once the threat ceased. After a short lull, Anand Prakash revived his efforts to trespass and according to Jaswant Singh, trespassed into a part of the suit property on 20.06.1997 i.e. after the first suit was withdrawn. This necessitated the institution of O.S. No. 1162 of 1998 on 07.12.1998. The fact that in the written statement filed by Jaswant Singh in answer to Anand Prakash's O.S. No. 273 of 1998 on 14.05.1998, the date of the accomplished trespass on 20.06.1997 has not been disclosed, cannot be a clincher in Anand Prakash's favour, because he never raised the point before the Courts below and led evidence to show that in fact, he trespassed prior to 20.06.1997 and was in possession when Jaswant Singh withdrew his earlier O.S. No. 737 of 1996 on 03.04.1997. No inference can be drawn against Jaswant Singh about the truth of his case of accomplished trespass on 20.06.1997 merely by the fact that he did not disclose that date in the written statement that he filed in answer to Anand Prakash's O.S. No. 273 of 1998. The first suit, that was instituted on occasion about a threatened invasion of Jaswant Singh's rights by Anand Prakash, was a suit for permanent injunction to protect possession. Once the emergent threat ceased to exist, the suit was withdrawn as the cause of action disappeared. The threat that necessitated the institution of the suit re-surfaced on 20.06.1997, after the withdrawal of the first suit on 03.04.1997 by Jaswant Singh, with Anand Prakash accomplishing his earlier threat by trespassing into the suit property, encroaching a part thereof and constructing upon it. After a period of time, when an amicable settlement to cause the trespasser to withdraw failed, O.S. No. 1162 of 1998 was instituted on the substantial cause of action for a declaration of title based on the sale certificate by the Revenue Authorities in favour of Jaswant Singh and mandatory injunction, directing the trespasser i.e. Anand Prakash to withdraw his illegal possession within a specified time, failing which, the encroachment was sought to be removed through process of Court.

41. In the opinion of this Court, the cause of action in the two suits are distinct and different. They have arisen at different points of time; may be closely placed. In the nature of things, it is not difficult to accept this kind of a happening because on concluded findings of fact recorded by the two Courts below, Jaswant Singh is a purchaser of the suit property, which is all that comprises Khasra No. 472/1, admeasuring 3 biswa, 15 biswansi (567 square yards). It is also a concluded finding of fact recorded by the two Courts below concurrently that Anand Prakash's vendor, Jagannath had no other property, except Khasra No. 472/1 in the locale. This property had been purchased by Jagannath long back in the year 1960 that he mortgaged in favour of the UPFC to secure a loan availed by his son. Upon default by Jagannath's son, this property was put to

sale by the UPFC through the Revenue Authorities and purchased in a public auction by Jaswant Singh. Thus, all that Jaswant Singh owned, comprises the suit property, which passed from Jagannath to his hands because of attachment of the same in proceedings for the recovery of loan overdues as arrears of land revenue by the State Authorities, at the instance of the UPFC and an auction sale, where Jaswant Singh purchased it. On facts, the Courts below have not found any other property in the area to belong to Jagannath that he could have privately sold to Anand Prakash. In the background of these concluded facts, as already remarked, a case of attempted trespass, a retreat and then an accomplished trespass by Anand Prakash is not difficult to infer, which in any case the two Courts of fact below have concurrently found.

42. Once the earlier suit brought by Jaswant Singh was based on a different cause of action, the subsequent suit, as already remarked, would not be barred by Order XXIII Rule 1(4) CPC and a fortiori by the provisions of Order II Rule 2, either. In this connection, reference may be made to the decision of a Division Bench of the Karnataka High Court in **K.V. Shivakumar and others v. National Institute of Mental Health and Neuro Sciences and others, 2016 SCC OnLine Kar 8037**, where it has been held:

"117. The suit O.S. 2457/2003 is filed for a decree of permanent injunction restraining the defendants from interfering with the plaintiff's possession and enjoyment of the suit schedule property. The cause of action for the said suit was a threat of interference by way of putting up construction of the plaint schedule property by taking up a housing project under a joint venture. The cause of action for the present suit is the denial of plaintiff's title and a finding in the earlier proceedings that plaintiff is not in possession. Therefore, the plaintiff was constrained to file the present suit for declaration of title and for possession. Therefore, the subject matter of both the suits are totally different. The cause of action for both the suits are totally different. Even though the plaintiff withdrew the earlier suit without seeking leave of the Court to file a fresh suit and in fact filed the present suit during the pendency of the earlier suit, the bar contained in Order XXIII Rule 1 (4) of CPC is not attracted to the present suit. Therefore, the present suit is not hit by Order XXIII Rule 1 (4) CPC as contended by the defendants. There is no merit in the said contention and the Trial Court was justified in holding that the bar contained in Order XXIII Rule 1 (4) is not attracted to the present suit."

43. To the same effect is the holding of the Andhra Pradesh High Court in **Kasarapu Sujatha and another v. Veera Velli Veera Somaiah, 2007 SCC OnLine AP 676**. The decision in Kasarapu Sujatha (supra) is very close on facts to the cause of action here. It was held in **Kasarapu Sujatha**, thus:

34. At the cost of repetition I may state that the earlier suit O.S. No. 168 of 1986 filed by the respondent/plaintiff is only for injunction simplicitor and whereas the subsequent suit O.S. No. 169 of 1994 is for declaration of title, injunction and for recovery of a part of the extent over which structures exist. The respondent/plaintiff asserted that the cause of action for filing the subsequent suit arose in the month of September, 1993 when the appellants/defendants attempted to trespass and put up some constructions. Though the

appellants/defendants pleaded that they put up constructions much earlier to 1993, they did not place any material to speak of the structures being in existence prior to 1993. Added to that the first appellant/first defendant who claims to have got Ac. 1.20 guntas towards her share in family settlement did not choose to enter into box to speak out her case. DW. 1 is the husband of the first defendant. He did not place any material on record to show that structures exist as on the date of filing of the suit were made prior to 1993. The trial Court and the lower appellate Court on thorough appreciation of the material brought on record came to the conclusion that the appellants/defendants failed to establish of their putting up constructions over a part of the land soon after the alleged family settlement pending disposal of O.S. No. 440 of 1980. In view of the above discussion, I find that the subsequent suit of the respondent/plaintiff is not barred either under Order 2 Rule 2 or Order 23 Rule 1 of CPC.

44. The decision in **Vallabh Das (supra)** relied upon by Jaswant Singh, in essence, propounds the principle that a subsequent suit based on a different cause of action, may be related to the same property or may be the same rights, may constitute a different subject matter from the previous litigation. All that is then required to dispel the bar under Order XXIII Rule 1(4) or Order II Rule 2 CPC is that the subsequent suit should be based on a different cause of action than the one involved in the earlier suit.

45. In view of what this Court has found, the substantial question of law is answered in the manner that O.S. No. 273 of 1998, Jaswant Singh vs. Anand Prakash, that was withdrawn without permission to file a fresh suit, does not bar the subsequent suit brought by Jaswant Singh either under Order XXIII Rule 1(4) CPC or under Order II Rule 2, because the two suits are not based on the same cause of action, even though the earlier suit relates to the same property between the same parties.

46. In the result, both the appeals fail and are **dismissed with costs throughout**. Let separate decrees be drawn up in both the appeals, accordingly.

(2022) 11 ILRA 819
REVISIONAL JURISDICTION
CIVIL SIDE
DATED:LUCKNOW 10.11.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Civil Misc. Review Application Defective No. 100 of 2022

M/S Concept Cars Ltd. ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Sunil Kumar Chaudhary, Abhishek Dhaon

Counsel for the Respondents:
--

A. Civil Law (PIL) - Code of Civil Procedure, 1908 - Section 114-review-Government land in a fraudulent and dishonest manner was allotted for charitable purpose which was sold to its own trustees by the trust vide sale deed in a gross contravention of the provisions of Section 92 of C.P.C. and the provisions of the Indian Trust Act, the two sale deeds itself were nullity and void ab initio, the review-applicant can not claim any right and title on the said null and void sale deeds-the review applicant failed to show how the sale deeds were valid and conferred a legal title over the land in

favour of his two worthy sons who are the Directors of the review-applicant-no right and title would get conferred on the review-applicant as its occupation on the land in question would be nothing but an encroachment of the Government land-the exception carved out by the Board of Revenue in its order runs contrary to the findings recorded by the Board of Revenue itself and such an order cannot be taken note of in view of the detailed findings recorded by this Court in the judgment and order under review-Hence, the Court does not find any ground to review the judgment.(Para 13 to 30)

B. Section 101 of the U.P. Revenue Code, 2006 empowers the Sub-Divisional Officer for exchange of land, but this power does not extend to the land of the Gram Sabha, which is a public utility land and in which no bhumidhari right can be accrued. (Para 19) (E-6)

List of Cases cited:

1. Gaurav Jain Vs U.O.I. & ors. (1997) 8 SCC 114

2. Abdul Farooq Vs Municipal Council, Perambalur & ors. (2009) 15 SCC 351

3. Phool Singh Vs St. of U.P. & ors. CMWP No. 44407 of 2020

4. Prem Singh & ors. Vs Birbal & ors. (2006) 5 SCC 353

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

Order on C.M. Application No.1 of 2022

Heard.

This application seeks condonation of delay in filing the review application.

Reasons indicated in the affidavit filed along with the review application are sufficient.

Application is allowed and the delay in filing the review application is condoned.

Order on Memo of Review Application

1. The present review application has been filed seeking review of the judgment and order dated 5.7.2022 passed by this Court in Public Interest Litigation (PIL) No.7472 of 2021, Sharad Kumar Dwivedi Vs. State of U.P. and others, with a prayer to recall the aforesaid judgment and order and restore the Public Interest Ligation Petition to its original number and decide the same afresh after impleading the review-applicant as party to the proceedings.

2. This review application has been filed after the judgment and order dated 29.7.2022 was passed by the Division Bench of this Court in Special Appeal No.330 of 2022, M/s Concept Cars Limited Vs. State of Uttar Pradesh and others. Paragraph 10 of the aforesaid judgement reads as under:-

*"**10. Conclusion:***

For what has been narrated herein above, our indefeasible conclusion, in the facts and circumstances of the case, is that it will neither be appropriate nor in the interest of justice to pronounce any judgment on the issues discussed and considered by the learned Single Judge in the judgment and order under appeal herein, unless the judgment and order dated 20.06.2022 passed by the Board of Revenue and its impact on the issues involved in the case are considered and decided by the learned Single Judge.

Order

Accordingly, this Special Appeal is disposed of with the liberty to the appellant

to approach the learned Single Judge by way of seeking review of the judgment and order under appeal. While filing the review petition, it will be open to the appellant to take all the grounds which may be available to it under law.

There will be no order as to costs."

3. Against the said order of the Division Bench, the review-applicant has approached the Supreme Court in Special Leave Petition (Civil) Diary No.26721 of 2022, which got dismissed by the Supreme Court vide order dated 30.8.2022.

4. In brief, the grounds which have been taken in the review application, are that the judgment and order dated 5.7.2022 contains direction for removal of illegal encroachment in terms of the order dated 4.6.2021 passed by the District Judge, whereby the District Magistrate set aside the resumption order dated 30.1.1987 and directions were issued for initiating eviction proceedings in terms of Section 67 of the U.P. Revenue Code, 2006. The said order was set aside by the Board of Revenue in its judgment and order dated 20.6.2022 and, therefore, the order of the District Magistrate dated 4.6.2021 was not in existence at the time of passing of the judgement and order under review dated 5.7.2022.

5. The review-applicant was not a party in the Public Interest Litigation and the order of the Board of Revenue dated 2.8.2021, by which Revision No.1351 of 2021 filed by Ram Chandra Rajwar, Manager of the review-applicant, M/s Concept Cars Limited impugning the order dated 4.6.2021 passed by the District Magistrate, was disposed of on the very first day with direction to the State Government to consider the request of the revisionist for exchange of land in question and till such consideration, status-quo was directed to be maintained. The validity of the order of the Board of Revenue dated 2.8.2021 could not have been challenged in the Public Interest Litigation.

6. It has been further submitted that in view of the prayers made in the Public Interest Litigation, inquiry was conducted by the District Magistrate and, thereafter, no further orders were required to be passed and, this Court while passing the judgment and order dated 5.7.2022 had travelled beyond the prayers made in the Public Interest Litigation. The enabling provisions of Section 101 of the U.P. Revenue Code, 2006 which permit exchange of public land was not placed before this Court. The Government Order dated 9.5.1984 permitting the resumption of land for being allotted to private entities, has also not been considered in the said judgement and order under review dated 5.7.2022.

7. Sri S.C. Mishra, learned Senior Advocate assisted by S/Sri Sunil Kumar Chaudhary and Abhishek Dhaon, learned counsel for the review-applicant has placed reliance on several judgments to submit that the review-applicant was an independent corporate entity and is a necessary party and without the review-applicant being heard, the impugned judgment and order under review could not have been passed. He has pressed in service the following judgements in support of his contention:-

1. Prabodh Verma Vs. State of U.P. (1984) 4 SCC 251 (page 273 and para 28);

2. Ramrao Vs. All India Backward Class Bank Employees Welfare Assn. (2004) 2 SCC 76 (Page 86-87, para 27);

3. Dattatreya Vs. Mahaveer, (2004) 10 SCC 665 (page 673, para 10);

4. Santosh Sood Vs. Ganjendra Singh (2009) 7 SCC 314 (page 318, paras 14, 15, 17 and 18);

5. Janata Dal Vs. H.S. Chowdhary, (1991) 3 SCC 756 (page 767, para25);

6. Nivedita Sharma Vs. Cellular Operators Assn. of India (2011) 14 SCC 337 (page 343, para 12);

7. Kansing Kalusing Thakore Vs. Rabari Maganbhai Vashrambhai (2006) 12 SCC 360 (page 366, para 24);

8. Udit Narain Singh Malpaharia Vs. Addl. Member, Board of Revenue, 1963 Supp.(1) SCR 676:AIR1963 SC 786;

9. Chief of the Army Staff Vs. Daya Shanker Tiwari, (2003) SCC OnLine All 829 (para 9);

10. Ram Swarup Vs. S.N. Maira (1999) 1 SCC 738 (page 740, para 3);

11. Swapna Mohanty Vs. State of Odisha (2018) 17 SCC 621 (page 625, para 12);

12. Jagtu Vs. Suraj Mal, (2010) 13 SCC 769 (paras 5 and 6);

13. State of Assam Vs. Union of India (2010) 10 SCC 408 (page 412, paras 15, 16 and 23);

14. Aron Salomon Vs. A. Salomon and Co. Ltd., (1897) AC 22;

15. R.F. Perumal Vs. H. John Deavin, AIR 1960 Mad. 43; and

16. Civil Appeal Nos.5755-5756 of 2011, Moreshar Yadaorao Mahajan Vs. Vyankatesh Sitaram Bhedi (D) thru LRs and others, decided on 27.9.2022

8. He has, therefore, submitted that the review-applicant may be impleaded as party-respondent and the impugned judgment and order be recalled and the entire Public Interest Litigation should be re-heard.

9. On the other hand, Sri Abhinav N. Trivedi, learned Chief Standing Counsel assisted by Sri Yogesh Kumar Awasthi, learned Standing Counsel has submitted that the grounds taken in the review application are wholly misconceived and the review application has no merit and substance, and it deserves to be rejected in view of the detailed findings recorded by this Court in the judgment and order dated 5.7.2022 under review.

10. The detailed facts have been noted in the judgement and order dated 5.7.2022 under review and, therefore, for the sake of brevity, the same are not repeated in the present order.

11. The review-applicant is none other than a company incorporated by the trustees of the Gyan Yog Charitable Trust. In the meeting of the Board of the Trust dated 20.9.2009, Sri Surya Vardhan Agarwal (Treasurer) and Yash Vardhan Agarwal (Trustee), who are the sons of Sri Sanjeev Agarwal, Chairman/President of the Trust and one of the Directors of the review-applicant were present, and it was resolved to part away certain portion of the Government's land and consequently, the sale deed dated 9.6.2010 was executed in favour of Sri Surya Vardhan Agarwal and Yash Vardhan Agarwal. Thus, if the veil is lifted, the real character of the review-applicant would get revealed and it is nothing but an alter ego as the same trustees are the Directors of the review-applicant.

12. Sri Sanjeev Agarwal, who is one of the Directors of the review-applicant, had filed the pleadings in the Public Interest Litigation, in which the judgement and order dated 5.7.2022 under review was passed. He was representing not only the

trust, but the review-applicant also, which would be evident from the several affidavits and the pleadings filed by Sri Sanjeev Agarwal in dual capacity as the Managing Director of the Trust and the Director of the review-applicant.

13. This Court has taken note of these facts in the judgement and order under review that how in a fraudulent and dishonest manner the Government land, which was purportedly allotted for charitable purposes, was sold to its own trustees by the trust vide sale deed dated 9.6.2010 in a gross contravention of the provisions of Section 92 of the Code of Civil Procedure and the provisions of the Indian Trust Act. The two sale deeds dated 9.6.2010 and 1.7.2020 were void ab initio and were nullity in the eyes of law. If the sale deeds itself were nullity and void ab initio, the review-applicant can not claim any right and title on the said null and void sale deeds. The review-applicant has not been able to show in the review application that the sale deeds dated 9.6.2010 and 1.7.2020 were valid and conferred a legal title over the land in favour of the two worthy sons of Sri Sanjeev Agarwal, who are the Directors of the review-applicant. When the sale deeds are null and void ab initio, no right and title would get conferred on the review-applicant as its occupation on the land in question would be nothing but an encroachment of the Government land.

14. In respect of the dated 2.8.2021 passed by the Board of Revenue, this Court has taken note of the said order in paragraphs 15 to 18 of the judgment and order dated 5.7.2022. It would be apt to extract the aforesaid paragraphs herein-under:-

15. During the pendency of this writ petition, another revision bearing No.1351 of 2021 came to be filed by Ram Chandra Razwar, the Manager of the Concept Carts Limited under Section 210 of the U.P. Revenue Code, 2006 impugning the order dated 4.6.2021 passed by the District Magistrate, Hardoi. Interestingly, while the writ petition was pending on the subject matter and the High Court was in seisen of the subject matter, the Board of Revenue proceeded to decide the said revision and passed the order dated 2.8.2021. Two very interesting aspects of the order dated 2.8.2021 are to be taken note of. The Board of Revenue in paragraph eight of the said order held that the preliminary objection raised by the counsel for the complainant and the Standing Counsel for the revenue regarding maintainability of the revision on behalf of the Concept Cars Limited or its Manager had force. It was said that the Manager of the Concept Cars Limited and the Concept Cars Limited itself had no right file and maintain the revision challenging the validity of the order dated 4.6.2021 passed by the District Magistrate, Hardoi and, therefore, the Board of Revenue accepted the preliminary objection raised regarding the maintainability of the revision. It was observed that if the revisionist was so advised, he could become the party in the revision filed on behalf of the Trust impugning the order dated 4.6.2021, but the revision on behalf of the Manager of the Concept Cars Limited/Concept Cars Limited would not be maintainable. Despite the said finding on the preliminary objection, the Board of Revenue held that the prayer of the revisionist i.e. Manager of the Concept Cars Limited regarding exchange of the land in question with some other land being offered on behalf of the revisionist/Concept Cars Limited in exercise of powers under Section 161 of the U.P.Z.A. & L.R. Act and under Section 101 of the U.P. Revenue

Code, 2006 would be required to be considered.

16. This Court is of the considered view that the Board of Revenue has incorrectly held that the land in Gata No.1175 was not recorded as "public utility land' though the same was recorded as "Jangal Dhak' and was a public utility land as per the provisions of Para A-124 of the U.P. Land Records Manual. The Board of Revenue held that since the said land was not a public utility land, therefore, the said land could be exchanged with some other land of equal value and there would not be any legal hurdle in doing so. The Board of Revenue thus, directed the Sub-Divisional Magistrate, Sadar, Hardoi to make inspection of the lands, which are being offered by the revisionist/Concept Cars Limited in exchange of the land in Gata No.1175, and take possession of the land offered by the revisionist in exchange of the land in Gata No.1175 of the area, which would be 10% more than the area of Gata No.1175. It has been further held that the said order of exchange would be subject to the final outcome of Revision No.1146 of 2021 filed by the Trust. It has been ordered that that the revisionist would file an affidavit before the Sub-Divisional Magistrate and will undertake that in case the order dated 4.6.2021 is affirmed, the revisionist should not claim any right in respect of the land being offered in exchange of the land in Gata No.1175, and in future if it was found that the land offered in exchange of land in Gata No.1175 had any defect of ownership, then the revisionist would be liable to compensate for the loss, if any. It has been ordered that the revisionist would file the undertaking along with application within a period of two weeks before the Sub-Divisional Magistrate and the Sub-Divisional Magistrate has been directed to make inspection of the land in Gata Nos.1143, 1167 Cha and 846, which are being offered in exchange and then out of the three gatas, the most valuable land should be accepted in exchange. After taking possession of the said land, the possession should be handed over to the Gram Sabha. It has been further directed that all this should be completed within a period of six weeks. It has been ordered that for a period of two months or from the date of taking possession of the land offered in exchange of Gata No.1175, status-quo in respect of the possession of Gata No.1175 shall be maintained.

17. Thus, on one hand the Board of Revenue held that the revision on behalf of the Manager of Concept Cars Limited or by the Concept Cars Limited itself was not maintainable, and on the other hand, it allowed the prayer of the revisionist/Manager of the Concept Cars Limited for exchange of the land. This Court finds the approach of the Board of Revenue wholly illegal, unjustified and against the judicial propriety inasmuch as when the High Court was in seisen of the matter, the Board of Revenue had no business to proceed with the matter. Further, after holding that the revision was not maintainable, the Board of Revenue had allowed the prayer of the revisionist/Manager of the Concept Cars Limited in a most illegal and uncalled for manner. The Board of Revenue has overreached its jurisdiction and this Court deprecates the way the order has been passed to favour a private party in a non-maintainable proceeding. This Court holds that the order passed by the Board of Revenue dated 2.8.2021 is wholly illegal, non est and without jurisdiction. The authorities are directed not to take any action in pursuance of the order dated 2.8.2021 passed by the Board of Revenue.

18. After Revision No.1146 of 2021 was filed by the Trust against the order darted 4.6.2021, the Trust filed a recall application before the District Magistrate, Hardoi praying to recall the order dated 4.6.2021. However, the District Magistrate vide order dated 31.1.2022 rejected the said application for recall on the ground that against the order dated 4.6.2021, a revision had already been filed by the Trust being Revision No.1146 of 2021 before the Board of Revenue and, therefore, the recall application was not maintainable. Against the said order dated 31.1.2022, the Trust has filed another Revision bearing No.511 of 2022 before the Board of Revenue and the Board of Revenue vide interim order dated 9.3.2022, admitted the said revision and strangely enough stayed the orders dated 4.6.2021 and 31.1.2022 passed by the District Magistrate, Hardoi. The Board of Revenue appears to be extra generous and benevolent towards the revisionist. The approach of the Board of Revenue is anything but judicial.

15. Once the Board of Revenue held that the revision was not maintainable on behalf of the review-applicant, no further direction could have been issued. In any view of the matter, direction for removal of illegal encroachment from the Government land is independent of the aforesaid observations made in paragraphs 15 to 18 of the judgement and order darted 5.7.2022 under review.

16. In respect of the orders of the Board of Revenue dated 2.8.2021 and 20.6.2022 and the order dated 4.7.2021 passed by the District Magistrate, this Court in exercise of its plenary jurisdiction under Article 226 of the Constitution of India while dealing with the issue of public importance regarding land grabbing by the trustees and transferring the same to themselves for erecting commercial establishment, has passed the order to prevent the perpetuity and illegality after taking note of the fraud committed by the trustees in occupying the Government land ostensibly taken for public purpose and then transferring it to themselves for commercial venture.

17. This Court has passed the judgement and order dated 5.7.2022 in Public Interest Litigation in respect of the Gram Sabha land, which is the jurisdiction assigned to this Court as per the roster. While exercising the jurisdiction of the Public Interest Litigation, this Court is not bound to limit itself to the prayers made in the Public Interest Litigation, and it is always open to the Court to take judicial notice of fraud, illegality, cheating and grabbing of the public land and, therefore, contention of the learned counsel for the review-applicant that this Court has travelled beyond the scope of the Public Interest Litigation, is wholly misconceived. This Court can take the facts suo motu.

18. The Supreme Court in the cases of ***Gaurav Jain Vs. Union of India and others,*** (1997) 8 SCC 114 (Paragraph 51) and in ***A. Abdul Farooq Vs. Municipal Council, Perambalur and others***, (2009) 15 SCC 351 (Paragraph 33) held that strict rules of pleadings are not necessarily to be adhered by the Court even after it is found that the petitioners are busy bodies.

19. In respect of the ground taken under Section 101 of the U.P. Revenue Code, 2006 that the State Government may consider for exchange of the public land, this Court has considered the scope of the said Section in the judgement and order under review in paragraphs 50 and 59(4), which would read as under:-

"50. The land which was a public utility land, was resumed and allotted in favour of a private person, Late R.S Agrawal, Ex-IAS officer by the then District

Magistrate in purported exercise of the power under Section 117(6) of the U.P.Z.A. & L.R. Act, 1950 for charitable purpose and now it is being used for commercial purposes, therefore, such a land cannot be exchanged in any manner. Even otherwise, under Section 101 of the U.P. Revenue Code, 2006 the land in which bhumidhari rights cannot get accrued, cannot be exchanged.

59. In view of the aforesaid discussion, answers to the questions formulated above are as under:-

(i). .....

(ii). .....

(iii). .....

(vi). As discussed above, in respect of the public utility land, no bhumidhari right can be accrued. The land recorded as "Jangal Dhak', is a public utility land and under Section 132 of the U.P.Z.A. & L.R. Act, 1950, no bhumidhari right could not have been created in respect of the land in question. Section 101 of the U.P. Revenue Code, 2006 empowers the Sub-Divisional Officer for exchange of land, but this power does not extend to the land of the Gram Sabha, which is a public utility land and in which no bhumidhari right can be accrued. Therefore, no exchange is possible in respect of the land in question."

20. In a recent judgment of this Court in ***Civil Misc. Writ Petition No.44407 of 2012, Phool Singh Vs. State of U.P. and others, decided on 21.1.2020*** in paragraph 9, it has been held that the provisions of Section 161 of U.P.Z.A.&L.R. Act, 1950, which is in pari materia to Section 101 of U.P. Revenue Code, 2006, has not been envisaged for being used as a tool or measure to camouflage, over come, legalise or legitimize an illegality. Paragraph 9 of the aforesaid judgement is extracted hereunder:-

"9. On a more fundamental place, the provisions made in Section 161 of the 1950 Act are principally aimed at respective parties arriving at a mutually acceptable position that is beneficial to both. It essentially enables the Gaon Sabha to effectively manage its land bank and use it to the optimal in public interest. At the same time it also facilitates the landowner or the bhumidhar to enter into a settlement which is beneficial to both parties. Notwithstanding the above, Section 161 is not envisaged to be a tool or measure to camouflage, overcome, legalise or legitimise an illegality. It is not meant to be a used as an instrument or device to regularise or validate an illegality. It cannot possibly be viewed as a provision enabling a usurper or encroacher of public utility land to attempt to legalise wrongful possession. As this Court reads that provision, it primarily appears to put in place a mechanism to interchange land inter parties. It is principally a reciprocal arrangement. It clearly does not and cannot in law be countenanced in law as being a provision aimed at curing an illegality or according ipso facto approval to an illegal act of usurpation or encroachment. It is not entitled to be viewed as either endorsing or legitimizing an illegality. Section 161 is essentially aimed at enabling a party to switch, barter or exchange land to the mutual benefit of both parties. A party cannot first encroach, trespass or intrude and then claim a right to exchange. It is clearly not a provision aimed at legalizing an encroachment. A person who has encroached or trespassed upon land cannot subsequently turn around and seek condonation of that act or infraction by seeking an exchange. A person seeking an exchange must be one who is in lawful possession of land which is offered in exchange. Viewed in any other

light, the provision may be abused as a devise to accord legitimacy upon an act which is illegal and unlawful. The institution which appears to have encroached upon public utility land cannot take shelter of an application purported to have been made under Section 161 of the 1950 Act. In any case the pendency of a purported application for exchange cannot confer any benefit to the petitioner here."

21. The other ground taken by the review-applicant is that while passing the judgement and order dated 5.7.2022, the Government Order dated 9.5.1984 which permitted resumption of Gram Sabha land for being allotted to public entities was not considered. In terms of the provisions contained in paragraph seven of the Government Order dated 9.5.1984, the allotment in favour of a private entity is permissible only for a specific period. The order of resumption dated 30.1.1987 would make it evident that no such period was prescribed and secondly, the trust was never vested with the authority to alienate and sell the land mentioned in the order of resumption dated 30.1.1987, that too to its own trustees for commercial establishment.

22. It is a well settled proposition of law that a review is neither an opportunity of re-hearing nor it can be disguised as an appeal. The review-applicant, which is nothing but an alter ego of the trust, has failed to demonstrate that even if it would have been given an opportunity for the sake of being heard in the Public Interest Litigation, what pleadings or documents could have been placed before the Writ Court, which could have reversed the directions contained in the judgment and order dated 5.7.21022.

23. The Board of Revenue is under supervisory jurisdiction of the High Court and, therefore, it is always open for the High Court to scrutinize any order passed by the Board of Revenue in the Public Interest Litigation, which has direct bearing of the issues involved in the Public Interest Litigation. This Court has taken judicial notice of the proceedings pending before the Board of Revenue prior to its judgement dated 20.6.2022 in paragraphs 15 and 16 of the judgment and order dated 5.7.2022, which have been extracted herein before.

`24. The Board of Revenue vide order dated 20.6.2022 had directed for vesting of the land in the Gram Sabha, which was resumed vide order of the District Magistrate dated 30.1.1987. However, without any plausible rhyme or reason, an exception has been carved out on the basis of the very transactions of the land in favour of the trustees, which are null and void ab initio. If the sale deed are null and void, even its cancellation by a Suit is not necessary as held by the Supreme Court in the case of ***Prem Singh and others Vs. Birbal and others***, (2006) 5 SCC 353 (Paragraph 16).

25. So far the ground taken by the learned counsel for the review-applicant that the judgement of the Board of Revenue dated 20.6.2022 was not placed before this Court before delivering the judgement and order dated 5.7.2022 under review is concerned, the judgment and order pronounced by the Constitutional Court will have precedence and binding authority over the order passed by a revenue authority/board.

26. The Board of Revenue knowing fully well that the Public Interest Litigation is going and the judgement has been reserved, proceeded to pass the order dated

20.6.2022 favouring the trustees/review-applicant against the judicial propriety. This Court has noted on the favourable disposition of the Board of Revenue towards the Board of Trustees in the judgment and order dated 5.7.2022. The Board of Revenue in its order dated 20.6.2022 has treated vesting of the land in the Government simply as an encroachment. The case is not of simple encroachment, but it is a case of fraud and cheating besides encroachment. This Court while dealing with the facts had detailed in the judgment and order, did not deem it fit to carve out an exception in favour of the trust or the trustees and, as mentioned above, the review-applicant is nothing but an alter ego of the trust inasmuch as the trustees are the Directors and the land in question was sold by trust to its trustees. The exception carved out by the Board of Revenue in its order dated 20.6.2022 runs contrary to the findings recorded by the Board of Revenue itself and such an order can not be taken note of in view of the detailed findings recorded by this Court in the judgment and order dated 5.7.2022 under review.

27. Sri Sanjeev Agarwal had filed caveat in the Public Interest Litigation. In the counter affidavit filed on 5.6.2021, Sri Sanjeev Agarwal in paragraph 3 had stated that he was a Director of Concept Cars Limited, review-applicant and the same has also been stated in paragraph 7 of the said affidavit, but he never raised objection regarding impleadment of the review-applicant in the Public Interest Litigation. Pleadings have also been made regarding the review-applicant in some of the affidavits filed on behalf of Sanjeev Agarwal. Paragraphs 43 to 46 of the affidavit dated 1.2.2022 filed on behalf of Sri Sanjeev Agarwal, Managing Director of the Trust and the Director of the review-applicant, would read as under:-

"43. That subsequently Shri Yash Vardhan Agarwal had leased out the land purchased by him to one M/s Concept Cars Ltd. Vide lease deed dated 24.09.2010. A copy of the lease deed dated 24.09.2010 is filed as Annexure A-22 to this affidavit.

44. That subsequently M/s Concept Cars Ltd. Has constructed a full/fledged showroom over the property Plot No.1175 by including part of the property Plot No.1167 also (which was the private property of the company aforesaid) as it was the adjoining property with common boundary towards northern side of the property Plot No.1175.

45.That the construction was made after due sanction of the Development Authority.

46. That the property in dispute is situated in an area which is covered by the provisions of Regulation of Building Operation Act, 1961, therefore, M/s Concept Cars Ltd. has moved an application before the prescribed authority of R.D.O. for sanction of map.

Since the area involved for the purposes of raising construction was greater than the limit available for the prescribed authority under R.B.O. as such the matter was forwarded to the Chief Town Planner, Lucknow under the guidelines issued by the Ministry of Urban Development and Planning and it was ultimately sanctioned by the office of Chief Town Planner, Lucknow finding the title of M/s Concept Cars Ltd. Valid."

28. In the affidavit filed on behalf of Sri Sanjeev Agarwal on 23.3.2022, the order dated 2.8.2021 passed by the Board of Revenue in Revision No.1351 of 2021 filed on behalf of the review-applicant has

been brought on record in the Public Interest Litigation.

29. Thus, it is evident that Sri Sanjeev Agarwal was not only representing the trust, but he was also representing the review-applicant herein and in view thereof, I do not find any substance in the submission of the review-applicant that the review-applicant got prejudiced as it was not made a party in the Public Interest Litigation.

30. In view of the aforesaid discussion, this Court does not find any ground to review the judgment and order dated 5.7.2022 and, therefore, the same is ***rejected***. However, no order as to costs.

31. The District Magistrate, Hardoi and all authorities are directed to implement the judgement and order dated 5.7.2022 under review within a period of fifteen days from today.

(2022) 11 ILRA 829
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.10.2022

BEFORE

THE HON'BLE OM PRAKASH SHUKLA, J.

Writ-A No. 25 of 2022
alongwith other connected cases

Jyoti Kumari & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Alok Mishra

Counsel for the Respondents:
C.S.C., Gaurav Mehrotra

Law of precedents-Petitioners are working as Health Worker (Female)/ ANM (Auxiliary Nurse Midwife) on contract basis-challenging G.O.-to the extent it grants approval to the U.P. Subordinate Service Selection Commission for holding two-level/phase examination system for Group "C" post of Health Worker (female)-All issues raised-decided by this Court in one matter or the other-issues are no longer res integra-Single judge of a High Court is ordinarily bound to accept as correct judgments of Courts of coordinate jurisdiction and of Division Benches and of Full Bench.

W.P. dismissed. (E-9)

List of Cases cited:

1. Sant Lal Gupta & ors. Vs Modern Cooperative Group Housing Society Ltd. and Ors., (2010)13SCC336

2. St.of Punjab & anr. Vs Devans Modern Breweries ltd. & anr., (2004) 11 SCC 26

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

1. Heard Sri Alok Mishra, learned counsel for the petitioner, Sri Gaurava Mehrotra, learned counsel for the respondent, Sri Utsav Mishra, learned counsel for the Uttar Pradesh Subordinate Service Selection Commission and Ms. Shagun Srivastava, learned State Law Officer.

2. The petitioners in the present bunch of petitions claims to have been working on the post of Health Worker (female)/ANM (Auxiliary Nurse Midwife) in different districts of the state of Uttar Pradesh on contract basis and have sought to challenge the legality & validity of the Government order dated 20.11.2020, to the extent it grants approval to the Uttar Pradesh Subordinate Services Selection Commission for holding two-level/phase examination system for Group "C" post including the post of Health Worker (female).

3. A challenge has been sought to be laid to the advertisement dated 25-05-2021, whereby a Preliminary Eligibility Test (PET) has been conducted for all those desirous candidates seeking employment in any Group "C" Post in the state of Uttar Pradesh. A further challenge is also made to the advertisement dated 15-12-2021, whereby only those candidates had been found to be eligible for applying for the main examination for the post of Health Worker (Female), who had earlier appeared in the PET.

4. Suffice to say, the Petitioners have filed the present writ petition praying for the following reliefs:

(I) to issue a writ, order or direction in the nature of certiorari quashing the impugned advertisements dated 25.5.2021 and 15.12.2021 issued by the opposite party no. 3, contained as Annexure Nos. 1 & 2 respectively to this writ petition, to the extent the same pertains to the selection of Health Worker (Female).

(ii) to issue a writ, order or direction in the nature of mandamus commanding the opposite parties not to give effect to the impugned advertisements dated 25.5.2021 and 15.12.2021 issued by the opposite party no. 3, contained as Annexure Nos. 1 & 2 respectively to this writ petition, to the extent the same pertains to the selection of Health Worker (Female);

(iii) to issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 10.8.2021 as well as the impugned Government order dated 20.11.2020, to the extent it grants approval to the Commission for holding two-level/phase examination system for Group-C post, issued by the opposite party no. 1 i.e. the State Government, contained as Annexure Nos. 3 & 4 respectively to this writ petition.

(iv) to issue a writ, order or direction in the nature of mandamus commanding the opposite parties not to give effect to the impugned order dated 10.8.2021 as well as the impugned Government order dated 20.11.2020 to the extent it grants approval to the Commission for holding two-level/phase examination system for Group-C post, issued by the opposite party no. 1 i.e. the State Government, contained as Annexure Nos. 3 & 4 respectively to this writ petition.

(v) Or in the alternative, to issue a writ, order or direction in the nature of mandamus commanding the opposite parties to permit the petitioners to appear in written test in pursuance of the impugned advertisement dated 15.12.2021 for the main examination for the post of Health Worker (Female) keeping in view the letter of the State Government dated 7.7.2021, contained as Annexure No. 11 to this writ petition, and ignoring the impugned order dated 10.8.2021 issued by the State Government, contained as Annexure No. 3 to this writ petition.

(vi) to pass such other or direction, which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case in favour of the petitioners.

(vii) allow the writ petition with the costs in favour of the petitioners.

5. It is the case of the petitioners that the said PET being conducted by the Uttar Pradesh Subordinate Services Selection Commission is in complete violation of the Uttar Pradesh Medical Health and Family Welfare Department, Health workers and Health Supervisors (Male & Female) Non-gazette service Rules, 2018 relating to experience relaxation, direct recruitment etc. The petitioners have also grounded their writ petition on the order dated 10.08.2021 passed by the state government,

wherein, although the state government rejected the proposal of the Health Department for exemption/relation of the PET for the post of Health Worker (female) as selection process has already commenced, but has allegedly assured that the said proposal shall be considered in future and as such it has been alternatively prayed that permission may be granted to the petitioners to appear in the written test in pursuance to the advertisement dated 15.12.2021 for the post of Health worker(female).

6. Notice was issued to the respondents and a counter-affidavit has been filed by the additional chief secretary, department of Medical, Health & family Welfare, Government of Uttar Pradesh, seeking dismissal of the present writ petition on three grounds:

A. The last date of submission of online application forms etc. in advertisement dated 15.12.2021 was 05-01-2022 and the last date of amendment in any such applications was 12-10-2022.

B. The female health workers who are presently working in the department on contract basis are given weightage of 15 numbers and 5 years of age relaxation on the basis of their experience as provided in the Uttar Pradesh Medical Health and Family Welfare Department, Health workers and Health Supervisors (Male & Female) Non-gazette service Rules, 2018.

C. Similar writ petition being Writ-A 96 of 2022 (Smt. Mridul and 15 others) had been filed in the present court, wherein a coordinate bench has passed a detailed order dated 04.02.2022 while dismissing the said writ petition. Further, even an intra-court appeal preferred being Special Appeal No. 74 of 2022 has also been pleased to dismiss the said special appeal vide an order dated 09-03-2022.

7. This court has given its anxious thoughts to the issue involved in the present writ petition and finds that the issue in the present case has been already dealt with earlier by a coordinate bench of this court, as has been rightly pointed by the Ld. Counsel for the respondents. The said judgment dated 04.02.2022 squarely applies to the four corners of the facts of the present case. The said judgement can be profitably curled in as follows:

"..... The Court may, first of all, refer to the Uttar Pradesh Medical, Health and Family Welfare Department Health Workers and Health Supervisors (Male and Female) Non-Gazetted, Service Rules, 2018 (hereinafter referred to as "the Rules, 2018').

Part-V of the said Rules deals with the procedure for recruitment. As per Rule 14 contained therein the appointing authority is required to determine the number of vacancies to be filled during the course of the year of recruitment etc and the number of vacancies to be filled through the Commission are required to be intimated to it. Rule 15(a) of the Rules, 2018 reads as under: -

"15. (a) Direct recruitment to the Posts of Health Worker (Male) and Health Worker (Female) shall be made in accordance with the Uttar Pradesh direct recruitment to Group "C' Posts (Mode and Procedure), Rules, 2015, as amended from time to time."

Clause (b) and (c) of Rule 15 of the Rules, 2018 deal with weightage to a person who is working as Auxiliary Nurse Midwife on contract basis which is not relevant for the purposes of this case.

In view of Rule 15 (a) of the Rules, 2018 direct recruitment to the posts of Health Worker (Female) is to be made in accordance with the Uttar Pradesh Direct Recruitment to Group "C' Posts (Mode and Procedure), Rules, 2015, (hereinafter referred to as "the Rules, 2015') as amended from time to time. The Court may, therefore, straightaway referred to these Rules of 2015. Rule 8(1) of the Rules, 2015 deals with the procedure for direct recruitment and it reads as under:-

"8(1) The procedure for direct recruitment, the syllabus, marks of written examination/interview and the rules relating thereof shall be such as prescribed by the Commission from time to time with the approval of the Government."

Now, as per Rule 15 (a) of the Rules, 2015 Procedure for Direct Recruitment etc shall be such as prescribed by the Commission from time to time with the approval of the Government.

Now, in this very context, the Court may refer to U.P. Subordinate Services Selection Commission (Procedure & Conduct of Business), Regulation, 2015 (hereinafter referred to as "the Regulation, 2015') which have been made by the U.P. Subordinate Services Selection Commission, with the prior approval of the State Government, in exercise of powers conferred by Section 16 and 23 of the U.P. Subordinate Services Selection Commission Act, 2014.

Now, Regulation 6 of the said Regulation, 2015 deals with the procedure for selection of candidates. The Regulation 6 of the Regulation, 2015 is quoted hereinbelow: -

"(1) The Commission shall make selection of candidates examination or by interview or by both through objective or other form of test in accordance with the provisions of the relevant service rules/regulations.

(2) The Commission may with the prior approval of the Government, hold a combined competitive examination for a group of posts and may also take a preliminary test or examination for screening of candidates.

(3) The Commission shall advertise the vacancies through the Print media or Electronic media or both and invite applications from eligible candidates. Manner of inviting application forms includes online submission of application forms through Internet as prescribed by the Commission. Applications received in response to advertisement shall be scrutinized by the office in the manner determined from time to time.

(4) In making selection by competitive examination or interview including preliminary examination or test, the Commission may take recourse to modern testing aids including the use of computers at one or more stages of selection viz the stages of receipt and processing of applications, issue of call letters, evaluation of answer books, issue of interview letters and processing of results under the close supervision of one or more officers of the Commission to be nominated by the Chairperson.

5) Notwithstanding anything to the contrary contained in relevant Service Rules or Government orders regarding recruitment, the Commission may hold preliminary examination/screening test for finding out suitable candidates for admission to main examination or interview, as the case may be.

(6) Preliminary examination shall mean screening test to be conducted by the Commission with the purpose of finding out suitable candidates in required proportion as fixed by the Commission in each category, reserved and unreserved for admission to the main examination or interview, as the case may be.

(7) Preliminary examination shall be conducted in the manner prescribed in the

Uttar Pradesh Direct Recruitment through Public Service Commission Preliminary Examination Rules, 1986 as amended from time to time, which is deemed to be adopted for the said purpose. The marks obtained by the candidates in the preliminary examination/screening test shall not be counted for determining final order of merit.

(8) The Commission shall fix the place, dates and time of examination which includes preliminary examination/ screening test and main examination, as the case may be.

(9) The centers of examinations shall be fixed with prior approval of the Commission.

(10) All arrangements for such examinations shall be made by the Controller of Examination cum Joint Secretary in consultation with the Secretary and in accordance with such directions as may be issued by the Commission in that behalf."

On a bare reading of the above quoted Regulation 6, it is clear that the Commission is empowered to take a preliminary test or examination for screening of candidates with the prior approval of the Government. Sub-regulation (5) of the Regulation 6, in fact, goes on to state that notwithstanding anything contained in relevant service rules or government orders regarding recruitment, the Commission may hold preliminary examination/ screening test for finding out suitable candidates for admission for main examination or interview, as the case may be.

Sub-regulation (6) of Regulation 6 says that the preliminary examination shall mean screening test to be conducted by the Commission with the purpose of finding out suitable candidates in required proportion as fixed by the Commission in each category, reserved and unreserved for admission to the main examination or interview, as the case may be.

Sub-regulation (7) of Regulation (6) says that preliminary examination shall be conducted in the manner prescribed in the Uttar Pradesh Direct Recruitment through Public Service Commission Preliminary Eligibility Test Rules, 1986 as amended from time to time, which is deemed to be adopted for the said purpose.

The marks obtained by the candidates in the preliminary examination/ screening test shall not be counted for determining final order of merit.

Thus, the only argument raised by Sri A.P. Srivastava, learned counsel for the petitioner that there is no provision for holding a preliminary test is belied from the provisions quoted hereinabove. It is not his case that prior approval of the Government has not been taken before holding such preliminary test, nevertheless, as informed by Sri Mehrotra such prior approval has been taken and is referred in the letter of the Commission dated 22.07.2021.

This apart, learned counsel for the Commission also informs the Court that though the petitioners have annexed a letter of Additional Chief Secretary, Medical & Health dated 07.07.2021 requesting the Commission to do away with the provision for Preliminary Eligibility Test for the post of Health Workers (Female) for which the Auxiliary Nurse Midwife are eligible for being considered, what the petitioners have not disclosed is that based on this, the Commission had sought guidance from the Karmik Department of the State Government vide its letter dated 22.07.2021 and Karmik Department of the State Government informed the Commission with a copy of the decision to the Additional Chief

Secretary, Medical & Health that the proposal of the department for doing away with the preliminary eligibility test cannot be accepted at this stage when the selection/ examination has already been set in motion.

Be that as it may, in view of the discussion already made, as no other ground has been pressed by learned counsel for the petitioner before this Court and there is a provision under which the preliminary test could be held by the Commission, the post being within the purview of the Commission and there being no dispute in this regard, the petition fails and is dismissed."

8. Further, this court has been informed that an intra-court appeal had been filed against the aforesaid order of the Ld. Coordinate bench, which was also dismissed vide an order dated 09.03.2022 passed in Special Appeal No. 94 of 2022, wherein the Hon'ble Division bench has by upholding the Judgment passed by the Ld. Single Judge has inter-alia concluded:

"....For the reasons disclosed and discussion made above, we are in complete agreement with the judgment passed by the learned Single Judge which is under challenge herein. The special appeal is, thus, dismissed."

9. The Ld. Counsel for the petitioner has also argued that the facts of the aforesaid decided case are at variance to the facts of the present petition. According to him, there are several petitioners who have crossed the age of 40 years, which was the maximum age limit prescribed in the PET advertisement and as such according to him, in case the age relaxation on account of the past services rendered by them as per rule 10 of the service rules, 2018 would had been made available to them in the impugned advertisement dated 25.05.2021, these petitioner's very well would had participated in the said PET. It is the submission of the Ld. Counsel that these petitioners were not allowed to submit their application form in pursuance to the said advertisement, which was in violation of the service rules, 2018. The Ld. Counsel in his written submission has tried to substantiate the aforesaid ground by submitting that even the commission has admitted its error and as such a clarification has been inserted in the advertisement issued on 28.06.2022, wherein it has been clarified under clause 6.3 that those candidates, whose age stands lapsed can also apply in the PET taking advantage of the age relaxation available to them as per the service rules, 2018. Thus, it is the submission of the Ld. Counsel that the impugned PET did not provide for the age relaxation as is being provided in the present PET advertisement, which clearly shows that the impugned advertisement was violative of the service rules, 2018.

10. On the other hand, the Ld. Counsel for the respondent/Commission submits that the PET in furtherance to the impugned advertisement was conducted on 24.08.2021 and the results were declared on 28.10.2021 and the score was valid for one year. It is the specific stand of the Ld. Counsel that the petitioner's, who have consciously and knowingly chosen not to appear for the PET examination, which was widely published, cannot be permitted to challenge the same at this belated stage when the result stood declared on 28.10.2021 and even the advertisement for the main examination stood published as on 15.12.2021. The Ld. Counsel articulated his argument on the basis that the validity of holding the PET examination by the Uttar

Pradesh Subordinate Service Selection Commission for selection on the post of Health Worker (Female) stands settled by various judgements of this court, including:

i. Judgment dated 04.02.2022 passed in Writ A 96 of 2022 (Smt. Mridul and Others V/s State of U.P & Ors.), which was upheld vide order dated 09.03.2022 in Special Appeal No. 74 of 2022.

ii. Judgment dated 07.05.2022 passed in Special Appeal No. 332 of 2022 (Neetu Singh and Others V/s State of U.P and Others)

iii. Judgment dated 29.04.2022 passed in Writ A 2460 of 2022 (Vijay Laxmi and Others V/s State of U.P & Ors.), which was upheld vide order dated 07.05.2022 in Special Appeal No. 193 of 2022.

iv. Judgment dated 26.05.2022 passed in Writ A 3079 of 2022 (Smt. Anju Devi & 171 Others V/s State of U.P & Ors.), which was upheld vide order dated 09.06.2022 in Special Appeal No. 300 of 2022.

11. This court is also in complete agreement with the reasoning and discussion given by the Ld. Single Judge and the Hon'ble Division Bench of this Court in Judgment dated 04.02.2022 passed in Writ A 96 of 2022 (Smt. Mridul and Others V/s State of U.P & Ors.), which was upheld vide order dated 09.03.2022 in Special Appeal No. 74 of 2022. Further, as far as the specific argument of the Ld. Counsel of the petitioner that his contention relating to the relaxation of age in view of rule 10 of the service rules, 2018 is concerned, this court finds that this court in Judgment dated 07.05.2022 in Special Appeal No. 193 of 2022 (Vijay Laxmi and Others V/s State of U.P & Ors.), has already dealt the said aspect vividly at paragraph 8,9 and 10 as follows:

"8. The appellant-petitioners had assailed the Advertisement dated 25-05-2021 and 15-12-2021 mainly on the ground that the maximum age prescribed in the Advertisement violates the provision contained in Rule 10 of the Uttar Pradesh Medical, Health and Family Welfare Department Health Workers and Health Supervisor (Male and Female) non-Gazetted, Service Rules, 2018 (hereinafter referred to as "Rules of 2018"), which provides as under:-

"A candidate for direct recruitment must have attained the age of eighteen years and must not have attained the age of more than forty years 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. Provided further that the upper age limit for such candidates who was 4 working as auxiliary Nurse Midwife in the medical, Health and Family Welfare Department, by the government, Uttar Pradesh on contract basis and who possess the qualification prescribed in the rule-8(2) of these rule shall be greater by such number of completed years of services as they have rendered on contract basis subject to be maximum of five years for enabling them to become eligible for being considered for direct recruitment."

9. The learned counsel for the appellant-petitioners contended that as per the second Proviso appended to the aforesaid Rule 10 of the Rules of 2018, Health Worker (Female) are entitled to get a relaxation in the upper age limit of the number of completed years of service rendered on contractual basis, upto the

maximum of 5 years. He submitted that paragraph-6 of the Advertisement dated 25-05-2021 provides that a candidate who has completed the age of 40 years, will not be eligible for appearing in PET and this condition violates Rule 10 of the Rules of 2018.

10. Rejecting the aforesaid submission, the learned Single Judge held that a perusal of Condition No. 6 of the Advertisement reveals that it specifically mentions that a candidate would be entitled to get relaxation in the upper age limit as per the Regulations / Government Orders issued from time to time. It further clarifies that a candidate, who has qualified the PET, would be entitled to get relaxation in the age limit as per the service Rules applicable to the concerned post. Therefore, the submission of the Appellants-petitioners, that the advertisement provides for the upper age limit of 40 years which violates Rule 10 of the Rules 2018, is unacceptable as paragraph-6 of the Advertisement clearly states that relaxation in upper age limit would be admissible as per the relevant service rules / Government Orders."

12. Thus, this court is of the considered opinion that all the issues raised by the petitioner stands decided by this court in one matter or the other and the issues raised are no longer res integra. Moreover, this court cannot be oblivious of the law of precedents, which forms the foundation of administration of Justice and it has been held time and again that a single Judge of a High Court is ordinarily bound to accept as correct judgments of Courts of coordinate jurisdiction and of Division Benches and of the Full Benches of his Court. The reason of the rule which makes a precedent binding lies in the desire to secure uniformity and certainty in the law. The Hon'ble Supreme court in the case of **Sant Lal Gupta and Ors. vs. Modern Co-operative Group Housing Society Ltd. and Ors**., (2010)13SCC336, held that it was neither desirable nor permissible by the coordinate Bench to disapprove the earlier judgment and take view contrary to it. A coordinate bench cannot comment upon the discretion exercised or judgment rendered by another coordinate bench of the same court. The rule of precedent is binding for the reason that there is a desire to secure uniformity and certainty in law. A bench must follow the decision of a coordinate bench and take the same view as has been taken earlier. The earlier decision of the coordinate bench is binding upon any latter coordinate bench deciding the same or similar issues. If the latter bench wants to take a different view than that taken by the earlier bench, the proper course is for it to refer the matter to a larger bench.

13. To the same effect is the judgment of the Apex Court reported in the **State of Punjab and another versus Devans Modern Breweries ltd. and another, (2004) 11 SCC 26**, wherein paragraph 339 laid down the following: -

"339. Judicial discipline envisages that a coordinate Bench follow the decision of an earlier coordinate Bench. If a coordinate Bench does not agree with the principles of law enunciated by another Bench, the matter may be referred only to a Larger Bench. (See Pradip Chandra Parija v. Pramod Chandra Patnaik, (2002) 1 SCC 1 followed in Union of India Vs. Hansoli Devi, (2002) 7 SCC 273. But no decision can be arrived at contrary to or inconsistent with the law laid down by the coordinate Bench. Kalyani Stores (supra) and K.K. Narula (supra) both have been rendered by the Constitution Benches. The

said decisions, therefore, cannot be thrown out for any purpose whatsoever; more so when both of them if applied collectively lead to a contrary decision proposed by the majority."

14. In view of the above, this court does not find any merits in the present writ petition and as such the same is accordingly dismissed in the above terms. There shall be no order as to costs.

(2022) 11 ILRA 837
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.11.2022

BEFORE

THE HON'BLE RAJNISH KUMAR , J.

Writ-A No. 1842 of 2012

Abhay Nath Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Amitabh Misra

Counsel for the Respondents:
C.S.C.

Financial hand Book -Rule 54-A r/w R.53(1) & (2)-claim for arrears of salary denied-Petitioner suspended in departmental proceedings-was dismissed -challenged in Writ-Writ Petition allowed-liberty for fresh inquiry-but no fresh inquiry initiated-Petitioner reinstated-arrears of salary for the period of dismissal denied-unreasonable and non speaking-Petitioner entitled to 75 % of arrears of slaray with interest of 6 % per annum. (E-9)

List of Cases cited:

1. U.O.I. Vs Madhusudan Prasad; (2004) 1 SCC 43

2. Commissioner, Karnataka Housing Board Vs C. Muddaiah; (2007) 7 SCC 689

3. Kishori Lal Vs Chairman Board of Directors, Aligarh Gramin Bank (Allahabad); 2011 (3) All LJ 73

4. Brajesh Kumar Shukla Vs St.of U.P. & ors.; 2019 (1) UPLBEC 798 / 2018 (6) All WC 6481

5. Yadunandan Singh Vs St.of U.P. & ors.; 2018 (1) UPLBEC 454 / 2018 (2) All WC 1594

6. Prayag Narain Dubey (P.N. Pandey) Vs U.P.S.R.T.C. through Regional Manager & anr.; 2018 (8) ADJ 561.

7. Pradeep S/o Rajkumar Jain Vs Manganese Ore (India) Limited & ors.; (2022) 3 SCC 683

8. Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) & Ors; (2013) 10 SCC 324

9. Gowramma C (Dead) By LR's Vs Manager (Personnel) Hindustan Aeronautical Limited & anr.; 2022 SCC Online SC 310 (Civil Appeal Nos.1575-1576 of 2022)

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

1. Heard Shri S.K. Gaur, Advocate holding brief of Shri Amitabh Mishra, learned counsel for the petitioner and Shri Ran Vijay Singh, learned Additional Chief Standing Counsel.

2. By means of the present writ petition the petitioner has challenged the order dated 25.08.2011, contained in annexure no.1 to the writ petition, to the extent it denies the arrears of salary for the period w.e.f. 26.12.1997 to 15.06.2009. The petitioner has further prayed for a direction to the opposite parties to pay the arrears of salary for the said period in accordance with Rule 54-A read with Rule 53(1) & (2) of the Financial Hand Book, Vol.-II, Part-II

to IV (here-in-after referred as Financial Hand Book) alongwith interest.

3. The facts, relevant for disposal of the instant writ petition, are that the petitioner was suspended in contemplation of departmental proceedings for the alleged misconduct by means of the order dated 12.09.1997. Thereafter the petitioner was dismissed from service by means of the order dated 26.12.1997 passed by the Superintendent of Police, Gonda, invoking the provisions of Rule 8(2)(b) of the Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules-1991 (here-in-after referred as Rules of 1991). The petitioner challenged the order of dismissal as well as the suspension order, before this Court, in Writ Petition No.919 (S/S) of 1998; Abhay Nath Singh Vs. State of U.P. and Others. The writ petition was allowed by means of the judgment and order dated 17.04.2009 and the respondents were directed to allow the petitioner to work on the post, which he was holding prior to the order of dismissal and shall be paid salary and allowances as admissible to him. The operative portion of the order dated 17.04.2009 is extracted here-in-below:-

"Accordingly, the writ petition is allowed. The orders dated 26.12.1997 and 12.09.1997 passed by the Superintendent of Police, Gonda, are hereby set-aside. The opposite parties are directed to allow the petitioner to work on the post which he was holding prior to the order of dismissal and shall be paid salary and allowances as admissible to him.

However, the above order will not prevent the respondents from initiating departmental enquiry against the petitioners, if they so desire."

4. In pursuance to the aforesaid order, the petitioner was allowed to join. Though it was provided in the aforesaid order dated 17.04.2009, while allowing the writ petition, that the above order will not prevent the respondents from initiating departmental enquiry against the petitioners, if they so desire but admittedly no departmental enquiry has been held against the petitioner. The petitioner was reinstated into service on the post which he was holding at the time of dismissal i.e. the post of Constable and he was posted in the office of Superintendent of Police, Gonda.

5. While reinstating the petitioner by means of the order dated 16.06.2009 in compliance of the judgment and order dated 17.04.2009, it was provided that so far as the arrears of salary are concerned, a separate order would be passed in that regard. Since no decision was being taken, the petitioner approached this Court by means of Writ Petition no.1352 (S/S) of 2011; Abhay Nath Singh Vs. State of U.P. and Others. The writ petition was disposed of with direction to the opposite party no.3 i.e. the Superintendent of Police, Gonda to consider the representation of the petitioner with regard to the arrears of salary and dispose of the same by passing a reasoned and speaking order in accordance with law. In pursuance thereof a show cause notice dated 03.07.2011 under Rule 54-A, Vol.-II, Part-II to IV of Financial Hand Book was issued and served on the petitioner, a copy of which is annexed as annexure no.2 to the writ petition. The petitioner submitted his reply to the show cause notice dated 11.07.2011. After considering the reply of the petitioner, the impugned order dated 25.08.2011 has been passed, by means of which the salary of the petitioner has been fixed but arrears of salary for the period of dismissal of the petitioner have been denied

on the principle of "No Work, No Pay", a copy of which is annexed as annexure no.1 to the writ petition, which has been challenged by the petitioner in this writ petition.

6. Learned counsel for the petitioner submitted that the petitioner was dismissed from service invoking the provisions of Rule 8(2)((b) of the Rules of 1991 without recording any satisfaction and reason as to why it was not reasonable and practicable to hold the enquiry. Therefore, the said order was quashed by this Court and liberty was granted to hold a fresh enquiry. However no enquiry has been held, therefore the petitioner is entitled for arrears of salary for the period of dismissal w.e.f. 26.12.1997 to 15.06.2009 in accordance with the Financial Hand Book and even otherwise because the petitioner was ready to work but he was not allowed due to illegal orders.

7. Learned counsel for the petitioner relied on **Union of India Vs. Madhusudan Prasad; (2004) 1 SCC 43, Commissioner, Karnataka Housing Board Vs. C. Muddaiah; (2007) 7 SCC 689, Kishori Lal Vs. Chairman Board of Directors, Aligarh Gramin Bank (Allahabad); 2011 (3) All LJ 73, Brajesh Kumar Shukla Vs. State of U.P. and 2 Others; 2019 (1) UPLBEC 798 / 2018 (6) All WC 6481, Yadunandan Singh Vs. State of U.P. and Others; 2018 (1) UPLBEC 454 / 2018 (2) All WC 1594 & Prayag Narain Dubey (P.N. Pandey) Vs. U.P.S.R.T.C. through Regional Manager and Another; 2018 (8) ADJ 561.**

8. Per contra, learned Standing Counsel submitted that the petitioner has not discharged any Government work during the period of dismissal, therefore he is not entitled for arrears of salary for the said period. The impugned order has rightly been passed denying the arrears of salary for the period of dismissal. There is no illegality or error in the impugned order. The writ petition is misconceived and liable to be dismissed with cost.

9. I have considered the submissions of learned counsel for the parties and perused the records.

10. There is no dispute among the learned counsel for the parties, so far as the facts of the case as disclosed above are concerned. The only dispute is regarding payment of arrears of salary for the period of dismissal. Thus issue to be adjudicated upon in this case is as to whether the petitioner is entitled for the arrears of salary for the period of dismissal w.e.f. 26.12.1997 to 15.06.2009 or not on the principle of "No Work, No Pay" and if he is entitled, then to what amount.

11. The petitioner was dismissed from service by means of the order dated 26.12.1997 under Rule 8(2)(b) of Rules of 1991. The dismissal of petitioner was set-aside by this Court by means of the judgment and order dated 17.04.2009 passed in Writ Petition No.919 (S/S) of 1998; Abhay Nath Singh Vs. State of U.P. and Others. The liberty for fresh enquiry was granted but admittedly no enquiry has been held.

12. Rule 54-A of the Financial Hand Book provides the conditions under which a Government Servant is entitled for the pay and allowances of the period of dismissal. Rule 54-A of Financial Hand Book is extracted here-in-below:-

"54-A.(1)- Where the dismissal, removal or compulsory retirement of a Government servant is set-aside by the

Court of law and such Government servant is reinstated without holding any further enquiry, the period of absence from duty shall be regularized and the Government servant shall be paid pay and allowances in accordance with the provisions of sub-rule (2) or (3), subject to the directions, if any, of the Court.

[(2)(i) Where the dismissal, removal or compulsory retirement of the Government servant is set-aside by the Court solely on the ground of non-compliance with the requirements of Clause (1) or Clause (2) of Article 311 of the Constitution, and where he is not exonerated on merits, and no further enquiry is proposed to be held, the Government servant shall, subject to the provisions of sub-rule (7) of the Rule 54, be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled had he not been dismissed, removed or compulsory retired, as the competent authority may, as the competent authority may determine, after giving notice to the government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period (which in no case shall exceed sixty days from the date on which the notice has been served) as may be specified in the notice.]

(ii) The period intervening between the date of dismissal, removal or compulsory retirement including the period of suspension preceding dismissal removal or compulsory retirement, as the case may be, and the date of judgment of the court shall be regularized in accordance with the provisions contained in sub-rule (5) of Rule 54.

(3) If the dismissal removal or compulsory retirement of a Government servant is set aside by the court on the merits of the case, the period intervening between the date of dismissal removal or compulsory retirement including the period of suspension preceding such dismissal, removal, or compulsory retirement, as the case may be, and the date of reinstatement shall be treated as duty for all purpose and he shall be paid of the full pay and allowances for the period, to which he would have been entitled, had he not been suspended, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be.

(4) The payment of allowances under sub-rule (2) or sub-rule (3) shall be subject to all other conditions under which such allowances are admissible.

(5) Any payment made under this Rule to a Government Servant on his reinstatement shall be subject to adjustment of the amount, if any earned by him through an employment during the period between the date of dismissal, removal or compulsory retirement and the date of reinstatement. Where the emoluments admissible under this Rule are equal to or less than those earned during the employment elsewhere, nothing shall be paid to the Government servant."

13. The aforesaid Rule 54-A(1) of Financial Hand book provides that where the dismissal, removal or compulsory retirement of a Government servant is set-aside by the Court of law and such Government servant is reinstated without holding any further enquiry, the period of absence from duty shall be regularized and the Government servant shall be paid pay and allowances in accordance with the provisions of sub-rule (2) or (3), subject to the directions, if any, of the Court. Sub Rule (2) of the Rule 54-A provides that where the dismissal, removal or

compulsory retirement of the Government servant is set-aside by the Court solely on the ground of non-compliance with the requirements of Clause (1) or Clause (2) of Article 311 of the Constitution of India and where he is not exonerated on merits and no further enquiry is proposed to be held, the Government servant shall subject to the provisions of sub-rule (7) of the Rule 54, be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled had he not been dismissed, removed or compulsory retired, as the competent authority may determine after giving notice to the government servant of the quantum proposed and after considering the representation, if any, submitted by him. Sub-rule (7) of Rule 54 provides that the amount determined under the proviso to sub-rule (2) or under sub-rule (4), shall not be less than the subsistence allowance and other allowances admissible under Rule 53. Sub-rule (7) of Rule 54 is extracted here-in-below:-

"(7) The amount determined under the proviso to sub-rule (2) or under sub-rule (4), shall not be less than the subsistence allowance and other allowances admissible under rule 53."

14. The payment of allowances under sub-rule (2) or (3) shall be subject to all other conditions under which such allowances are admissible as per sub-rule (4) and any amount earned by the Government servant by any employment during the period between the date of dismissal, removal or compulsory retirement and reinstatement shall be adjusted as per sub-rule (5) of Rule 54-A.

15. In the present case the provisions of Sub-rule (4) of Rule 54 are attracted because the dismissal has been set-aside on account of violation of Article 311 (2) of the Constitution of India. Sub-rule (4) of Rule 54 is extracted here-in-below:-

"54.[(4) In cases other than those covered by sub-rule (2) [including cases where the order of dismissal, removal or compulsory retirement from service is set aside by the appellate or reviewing authority solely on the ground of non-compliance within the requirements of clause (1) or clause (2) of Article 311 of the Constitution and no further inquiry is proposed to be held], the Government servant shall, subject to the provisions of sub-rules (6) and (7), be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal removal or compulsory retirement, as the case may be, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection, within such period (which in no case shall exceed sixty days from the date on which the notice has been served) as may be specified in the notice.]"

16. The Rule 53 of Financial Handbook is extracted here-in-below:-

"53. (1) A government servant under suspension or deemed to have been placed under suspension by an order of the appointing authority shall be entitled to the following payments, namely:-

(a) a subsistence allowance at an amount equal to the leave salary which the government servant would have drawn if he had been on leave on half average pay or on half pay and in addition, dearness

allowance, if admissible on the basis of such leave salary:

Provided that where the period of suspension exceeds three months, the authority which made or is deemed to have made the order of suspension shall be competent to vary the amount of subsistence allowance for any period subsequent to the period of the first three months as follows:-

(i) the amount of subsistence allowance may be increased by a suitable amount, not exceeding 50 per cent of the subsistence allowance admissible during the period of first three months, if, in the opinion of the said authority, the period of suspension has been prolonged for reasons to be recorded in writing, not directly attributable to the government servant;

(ii) the amount of subsistence allowance may be reduced by a suitable amount not exceeding 50 per cent of the subsistence allowance admissible during the period of the first three months, if, in the opinion of the said authority, the period of suspension has been prolonged due to reasons, to be recorded in writing, directly attributable to the Government servant;

(iii) the rate of dearness allowance will be based on the increased or, as the case may be, the decreased amount of subsistence allowance admissible under sub-clauses (i) and (ii) above.

(b) Any other compensatory allowance admissible from time to time on the basis of pay of which the Government servant was in receipt on the date of suspension:

Provided that the government servant shall not be entitled to the compensatory allowances unless the said authority is satisfied that the government servant continues to meet the expenditure for which they are granted.

(2) No payment under sub-rule (1) shall be made unless the Government servant furnishes a certificate that he is not engaged in any other employment, business, profession or vocation:

Provided that in the case of a Government servant dismissed or removed from service, who is deemed to have been placed or to continue to be under suspension from the date of such dismissal or removal and who fails to produce such a certificate for any period or periods during which he is deemed to be placed or to continue to be under suspension, he shall be entitled to the subsistence allowance and other allowances equal to the amount by which his earnings during such period or periods, as the case may be, fall short of the amount of subsistence allowance and other allowances that would otherwise be admissible to him; where the subsistence and other allowances admissible to him are equal to or less than the amount earned by him, nothing in this proviso shall apply to him.

(This amendment shall be deemed to have come into force with effect from December 26, 1981)."

17. Rule 53(1)(a) provides that a Government servant under suspension shall be entitled for a subsistence allowance at an amount equal to the leave salary which the Government servant would have drawn if he had been on leave on half average pay or on half pay and in addition, dearness allowance, if admissible on the basis of such leave salary. Proviso to Rule 53(1)(a) provides that where the period of suspension exceeds three months, the subsistence allowance shall be varied and as per sub-rule (i) to the proviso the subsistence allowance may be increased by 50 percent of the subsistence allowance during the period of the first three months. As such a government servant, under suspension, is entitled to half of the salary

for the first three months and where it exceeds three months for the salary upto 75 per cent for the next three months and so on. Therefore a government servant, on reinstatement, on account of setting-aside of the dismissal on the ground of non-compliance with the requirement of Clause (1) or Clause (2) of Article 311 of the Constitution of India and not on merit and where no further enquiry held, shall be entitled arrears of pay and allowances for the period of dismissal which shall not be less than the subsistence allowance and other allowances admissible under rule-53. However it would be subject to adjustment of amount earned by him during the period between the date of dismissal etc. and the date of reinstatement as per sub-rule (5) of Rule 54-A. However it would be subject to direction, if any, of the Court as per Rule 54-A(1), therefore the Court may direct for payment of any amount as may be determined by it looking to the facts and circumstances of the case.

18. Sub-rule (ii) of Rule 54-A (1) provides that the period intervening the date of dismissal etc. including the period of suspension preceding it and the date of judgment shall be regularized in accordance with the provision contained in sub-rule (5) of the Rule 54. Sub-rule (5) of Rule 54 provides as to how the period of absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement can be regularized by different kind of leaves.

19. The dismissal of the petitioner, by means of the order dated 26.12.1997 under Rule 8(2)(b) of Rules of 1991, has been quashed by this Court by means of the judgment and order dated 17.04.2009 passed in Writ Petition No.919 (S/S) of 1998 on account of violation of proviso(b) to Article 311(2) of the Constitution of India and no enquiry has been held despite liberty granted by this Court. Proviso (b) to Article 311 (2) provides; where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied for some reason, to be recorded by that authority in writing, it is not reasonable to hold such enquiry. Therefore the case of the petitioner falls under sub-rule(2) of Rule 54-A, which provides that where the dismissal order is set-aside on the ground of non-compliance with the requirements of Clause (1) and Clause (2) of Article 311 of the Constitution of India and where he is not exonerated on merits and no further enquiry is proposed to be held, the Government servant shall, subject to the provisions of sub-rule (7) of the Rule 54, be paid such pay and allowances as the competent authority may determine, had he not been dismissed from service. Sub-rule (7) of Rule 54 provides that the amount determined under the proviso to sub-rule (2) or under sub-rule (4), shall not be less than the subsistence allowance and other allowances admissible under Rule 53.

20. While reinstating the petitioner, in compliance of order passed by this Court on 17.04.2009 passed in Writ Petition No.919 (S/S) of 1998, by means of the order dated 16.06.2009, it was provided that the decision in regard to the salary of the said period shall be taken separately. However the decision was not taken, therefore the petitioner approached this court by means of the Writ Petition No.1352 (S/S) of 2011, which was disposed of by means of the order dated 11.03.2011 with direction to consider the representation of the petitioner with regard to the arrears of salary and dispose of the same by reasoned and speaking order in accordance with law. Thereafter, the

respondent no.3 i.e. the Superintendent of Police, Gonda gave a show cause notice dated 03.07.2011 to the petitioner under Rule 54-A of the Financial Hand Book as to why for the period of dismissal w.e.f. 26.12.1997 to 15.06.2009, the leave without pay may not be sanctioned to the petitioner. In response thereof the petitioner submitted his detailed explanation dated 11.07.2011. Thereafter the decision has been taken by means of the order dated 25.08.2011, which has been challenged in this writ petition.

21. Perusal of the impugned order dated 25.08.2011 indicates that it has been passed without considering the grounds raised in the explanation submitted by the petitioner and by a non speaking and non reasoned order, merely stating that, since the petitioner has not discharged any Government work during the period of dismissal the arrears of salary have been denied on the principle of "No Work, No Pay". This Court is of the view that the impugned order is not tenable in the eyes of law for the reasons that it was passed in violation of direction issued by this Court and the explanation submitted by the petitioner and the provisions of Rule 54-A of Financial Hand Book, under which the show cause notice was given and other relevant provisions of Financial Handbook, while passing the impugned order, under which the petitioner is entitled for arrears of salary which may be determined.

22. In the case of **Union of India Vs. Madhusudan Prasad (Supra)**, the learned Single Judge of the High Court had held that the respondent was entitled to get salary for the period he was out of service. The said order was affirmed by the Division Bench of the High Court, therefore SLP was filed by the Union of India. The SLP has been dismissed noticing that the respondent was removed from the service without following the principles of natural justice and the relevant facts were considered by the learned Single Judge and Division Bench and ordered for payment of the back wages. The paragraph-6 is extracted here-in-below:-

"6. The above case was concerning an employee, proceeded, who was found guilty in an enquiry but the report was not furnished to the employee and show cause notice was not served on him. In view of the facts and circumstances of the case, the Court directed appropriate order should be passed regarding the back wages. In the instant case the appellate authority directed reinstatement of the respondent and held that he was not entitled to get back wages for the period he was out of service. If may be noticed that the respondent was removed from services without any enquiry and he was not even given show cause notice prior to his dismissal from service. There was fault on the part of the employer in not following the principle of natural justice. These relevant facts were considered and the learned Single Judge and also the Division Bench ordered the payment of back wages. We do not think this is a fit case where the Fundamental Rule 54 could have been invoked by the authorities. We find no merit in the appeal. The appeal is accordingly dismissed."

23. In the case of **Commissioner, Karnataka Housing Board Vs. C. Muddaiah (Supra),** the Hon'ble Supreme Court has held that the Court, in a given case, may hold that the person was willing to work but was illegally and unlawfully not allowed to do so and direct the Authority to grant him all benefits considering 'as if he had worked' therefore

it can not be contended as an absolute proposition of law that no direction of payment of consequential benefits can be granted by a Court of Law. The relevant paragraph 34 is extracted here-in-below:-

"36. We are conscious and mindful that even in absence of statutory provision, normal rule is 'no work no pay'. In appropriate cases, however, a Court of Law may, nay must, take into account all the facts in their entirety and pass an appropriate order in consonance with law. The Court, in a given case, may hold that the person was willing to work but was illegally and unlawfully not allowed to do so. The Court may in the circumstances, direct the Authority to grant him all benefits considering 'as if he had worked'. It, therefore, cannot be contended as an absolute proposition of law that no direction of payment of consequential benefits can be granted by a Court of Law and if such directions are issued by a Court, the Authority can ignore them even if they had been finally confirmed by the Apex Court of the country (as has been done in the present case). The bald contention of the appellant-Board, therefore, has no substance and must be rejected."

24. A coordinate Bench of this Court, in the case of **Kishori Lal Vs. Chairman Board of Directors, Aligarh Gramin Bank (Allahabad) (Supra)**, has held that the principle of "No Work, No Pay" can not be applied ignoring the fact that work has not been performed by employee concerned not on account of himself but for the circumstances created by employer and if applied would amount to confer a premium upon employer of a fault of his own and this would amount to allowing him (employer) to take advantage of his own wrong, which is not permissible in law, particularly in a court of equity and justice and held the petitioner is entitled for consequential benefits with cost. The relevant paragraphs 59 to 64 are extracted here-in-below:-

"59.Now coming to another important aspect about relief. It is not the case of respondents that petitioner was gainfully employed elsewhere during the period he was out of job. On the contrary, as a result of illegal order of dismissal, petitioner and his entire family must have suffered a social stigma as also financial hardships. It is quite conceivable that this ignominy is faced by the entire family of petitioner. No amount of money can compensate this social humiliation, illegal torture an out classed attribute of neighbour and other difficulties. It must have been faced by petitioner and his entire family throughout. An attempt to provide consequential benefits to petitioner by this Court is only a meager compensation for huge loss, which basically cannot be compensated in terms of money. The departmental authorities, in fact must be much more careful and vigilant when they initiate disciplinary proceedings against an employee concerned on certain charges so that effective procedural requirement is observed in words and spirit. They must also ensure that a person should not be unnecessarily harassed as that affects not only individual bread earner but the entire family. This Court can take judicial cognizance of the fact that higher rank officials and employees, if face a small delay in payment of salary, become restless and even resort to ob serve strike etc. That being so the severest punishment of dismissal compel the employee and his entire family to stand in a situation of starvation and also denuded the other

facilities like health, education, clothing etc, which virtually, if not a death in terms of medical precision, something near to it. Normally the employers, to wriggle out such circumstances, try to invoke principle of ''No work No Pay' ignoring the fact that work has not been performed by employee concerned not on account of himself but for the circumstances created by employer. Such a principle in a case like this, if applied would amount to confer a premium upon employer of a fault of his own. This would amount to allowing him (employer) to take advantage of his own wrong, which is not permissible in law particularly in a court of equity and justice. It is against all canons of justice. It is always open to employer concerned to cover up loss, which it may sustain towards making of payment to such an employee by recovering such amount from those officials who defied statutory requirement as also the procedure and pass illegal order. Instead of penalizing a poor employee, who has no option but not to render service to employer pursuant to illegal order passed by employer the accountability should be shouldered by the responsible officer/authority.

60.Moreover the concept of gainful employment would be attracted provided employment is easily available. The Court cannot shut its eyes of extraordinary unemployment prevailing in the country. The people having high qualifications are searching menial employment having limited employment avenues. In such circumstances to suggest that a dismissed employees could have got a gainful employment is nothing but a day dreaming.

61.This aspect can be looked into from another different angle. In these days of extraordinary unemployment it is inconceivable to think that dismissed or removed employee may get easily an alternative employment. Merely because he has been able to survive all through, it cannot be conceived that he was in gainful employment during all this periods. We do not know whether he survived at the charity or support extended by his relatives, friends, neighbour or by selling his household goods or spending his savings or losing ornaments of his wife or that he survived by incurring debt in the hope of getting success one day in the case challenging order of punishment and then to discharge debt liability.

62.It would not be proper on the part of this Court into enter in this arena of wild goose chase. Only this much is sufficient that he was not unwilling to work but the employer having created a situation where he was compelled not to work, hence ought not be punished despite of winning the case by denying arrears of salary.

63.It is also well known that whenever an order of dismissal or removal is challenged, normally Courts do not grant interim orders and the reason behind is that it amounts to grant of final relief. That being so, in the end when incumbent is successful in demonstrating that order is illegal, if he is denied salary on the ground that he did not work for which judiciary is also responsible, it would be condemning a indefansable litigant for no fault of his own and also for certain reasons which are wholly beyond his control. If this would not be a travesty of justice then what else can be.

64.It is in these facts and circumstances and considering the various aspects of the matter, this Court is of considered view that dismissal of petitioner from service having been found wholly illegal, and it is also having been seen that he was denied work on the post in question by employer in a wholly illegal manner, petitioner should be given relief of reinstatement with benefit of continuity of

service with all consequential benefits including arrears of salary. This would be in consonance with the principle that an employee has no right to work but only right to claim salary. In absence of anything to show that employee himself was unwilling to work, principle of "No Work No Pay" ought not to be applied in such a case."

25. A coordinate Bench of this Court, in the case of **Brajesh Kumar Shukla Vs. State of U.P. and 2 Others (Supra)**, has held that The principle of 'no work no pay' stands attracted in a situation where an employee has refused to discharge duties of his own volition and without any restraint of the employer. It primarily applies to a situation where the employee consciously and voluntarily fails or refuses to discharge duties and the termination of employment is an act affected solely by the employer and in this situation it can not be said that the employee has failed to discharge duties without justifiable cause. The relevant paragraph-11 is extracted here-in-below:-

"11. The principle that needs recognition and reiteration is that the principle of 'no work no pay' cannot have an ipso facto or automatic application to a case of termination. Once the order of termination comes to be set aside by a Court or Tribunal, it is incumbent upon the Disciplinary Authority to take an informed decision with respect to the manner in which the period during which the order of termination operated would be liable to be treated. The decision to deprive an employee of emoluments and other benefits cannot be arrived at solely on the application of the principle of "no work no pay". While arriving at a decision in this respect, it would be incumbent upon the Disciplinary Authority to consider various factors such as the length of the period during which the order of termination operated, whether the enquiry proceedings were delayed on account of non cooperation of the employee concerned, the nature of the misconduct which is ultimately found to be proved, the severity of the punishment which comes to be imposed upon the original order of termination being modified or the grounds which led to the order of termination or punishment being set aside. The Disciplinary Authority would be acting within its jurisdiction in evaluating whether the punishment order was set aside on a technicality, an infraction of principles of fair play or on merits. There would thus have to be a holistic and comprehensive consideration of the above and other germane factors which would guide the ultimate decision that the Disciplinary Authority takes in this regard."

26. Similar view has been taken by this Court, in the cases of **Yadunandan Singh Vs. State of U.P. and Others (Supra) and Prayag Narain Dubey (P.N. Pandey) Vs. U.P.S.R.T.C. through Regional Manager and Another (Supra).**

27. The Hon'ble Supreme Court in a recent judgment, in the case of **Pradeep S/o Rajkumar Jain Vs. Manganese Ore (India) Limited and Others; (2022) 3 SCC 683**, by means of the judgment and order dated 10.12.2021, relying on leading case on the issue of "No Work, No Pay" in the case of Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) & Others.; (2013) 10 SCC 324 and considering many other judgments of the Hon'ble Supreme Court, has held that it is, undoubtedly, true when the question arises as to whether the backwages is to be given and as to what is to be the extent of

backwages, these are matters which will depend on the facts of the case as noted in Deepali Gundu Surwase and in a case where it is found that the employee was not at all at fault and yet, he is visited with illegal termination or termination is actually activised by malice, it may be unfair to deny him the fruits of the employment which he would have enjoyed but for the illegal / malafide termination. It has further held that the effort of the Court must be to then to restore the status quo in the manner which is appropriate in the facts of each case. The relevant paragraph 12 of the judgment is extracted here-in-below:-

"12. It is, undoubtedly, true when the question arises as to whether the backwages is to be given and as to what is to be the extent of backwages, these are matters which will depend on the facts of the case as noted in Deepali Gundu Surwase (supra). In a case where it is found that the employee was not at all at fault and yet, he was visited with illegal termination or termination which is actually activised by malice, it may be unfair to deny him the fruits of the employment which he would have enjoyed but for the illegal / malafide termination. The effort of the Court must be to then to restore the status quo in the manner which is appropriate in the facts of each case. The nature of the charges, the exact reason for the termination as evaluated and, of course, the question as to whether the employee was gainfully employed would be matters which will enter into the consideration by the Court."

28. The Hon'ble Supreme Court, in the case of **Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) & Ors; (2013) 10 SCC 324,** after considering the two earlier three judges benches of the Hon'ble Supreme Court concluded as follows:-

"38. The propositions which can be culled out from the aforementioned judgments are:

38.1. In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

38.2. The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

38.3. Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averments about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

38.4. The cases in which the Labour Court/Industrial Tribunal exercises power

under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and / or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

38.5.) The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the concerned Court or Tribunal will be fully justified in directing payment of full back wages. In such cases, the superior Courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The Courts must always be kept in view that in the cases of wrongful / illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

38.6. In a number of cases, the superior Courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer, i.e., the employee or workman, who can ill afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited (supra).

38.7. The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal (supra) that on reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three Judge Benches referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman.

29. The Hon'ble Supreme Court, in another recent judgment and order dated 23.02.2022, in the case of **Gowramma C (Dead) By LR's Vs. Manager (Personnel) Hindustan Aeronautical Limited and Another; 2022 SCC Online SC 310 (Civil Appeal Nos.1575-1576 of 2022),** considering the aforesaid case of **Deepali**

Gundu Surwase (Supra) has held that if the employee is not at all at fault and she was kept out of work by reasons of the decision taken by the employer, then to deny the fruits of her being vindicated at the end of the day would be unfair to the employee and in such circumstances, no doubt, the question relating to alternative employment that the employee may have resorted to, becomes relevant. The relevant paragraph- 13 is extracted here-in-below:-

"13. The most important question is whether the employee is at fault in any manner. If the employee is not at all at fault and she was kept out of work by reasons of the decision taken by the employer, then to deny the fruits of her being vindicated at the end of the day would be unfair to the employee. In such circumstances, no doubt, the question relating to alternative employment that the employee may have resorted to, becomes relevant. There is also the aspect of discretion which is exercised by the Court keeping in view the facts of each case. As we have already noticed, this is a case where apart from the charge of the employee having produced false caste certificate, there is no other charge. Therefore, we would think that interests of justice, in the facts of this, would be subserved, if we enhance the back wages from 50% to 75% of the full back wages, which she was otherwise entitled. The appeals are partly allowed. The impugned judgments will stand modified and the respondents shall calculate the amount which would be equivalent to 75% of the back wages and disburse the amount remaining to be paid under this judgment within a period of six weeks from today to the additional appellants."

30. Adverting to the facts of the present case, the petitioner was dismissed from service by means of the order dated 26.12.1997 under Rule 8(2) (b) of Rules of 1991 which was set-aside by means of the judgment and order dated 17.04.2019 passed in Writ Petition No.919 (S/S) of 1998 on account of violation of Article 311(2)(b) of Constitution of India with a liberty for fresh enquiry, but admittedly no fresh enquiry has been held. The impugned order in regard to the payment of arrears of salary for the period of dismissal has been passed without considering the detailed explanation dated 11.07.2011 submitted by the petitioner in response to the show cause notice dated 03.07.2011 issued under Rule 54-A of the Financial Handbook. The impugned order has been passed merely stating that the petitioner is not entitled for any arrears of salary on the principles of 'No Work, No Pay' as he has not discharged any Government work during period of dismissal, therefore the impugned order has been passed not only in violation of the direction issued by this Court for passing a reasoned and speaking order in Writ Petition No.1352 (S/S) of 2011 but without considering and in violation of Rule 54-A and other relevant provisions of Financial Hand Book also under which the petitioner is entitled for arrears of salary, therefore this Court is of the view that the impugned order is not sustainable in the eyes of law and is liable to be set-aside to the extent it denies the arrears of salary of the period of dismissal w.e.f. 26.12.1997 to 15.06.2009 and in view of the aforesaid discussion it is held that the petitioner is entitled to arrears of salary for the aforesaid period of absence on account of dismissal of petitioner, which has been quashed and no further enquiry has been held.

31. In view of above and considering the over all facts and circumstances of the case, this Court deems it appropriate to

determine the amount of arrears of salary for the period of absence instead of directing to reconsider the matter as the matter is old. Since the petitioner has not discharged the Government work during the period w.e.f. 26.12.1997 to 15.06.2009 the petitioner is entitled for 75% of the salary as arrears of salary for the period w.e.f 26.12.1997 to 15.06.2009 with interest at the rate of 6% per annum till the date of payment.

32. With the aforesaid observations and directions the writ petition is **allowed.** No order as to costs.

(2022) 11 ILRA 851
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.10.2022

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ -A No. 6999 of 2022

Shivam Kumar Dwivedi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Anshuman Pandey, Jyotindra Prakash Pathak, Laxmi Kant Pathak

Counsel for the Respondents:
C.S.C.

Dying in Harness Rules, 1974-Rule 5-on death of his mother-Petitioner sought compassionate appointment-rejected-Petitioner's father is working in the Labour Department in Government of U.P. -subsequently retired and is receiving pension-Petitioner's case falls under the category who are ineligible for appointment on compassionate grounds-no benefit can be given-if one spouse was in previous employment of th & e St.government-then the legal heir would not be eligible for grant of compassionate appointment-

Held, *the word used in Rule 5 that the spouse should not be "employed under Central or St.Government" also include persons who have retired or "were in employment of Central or St.government."* **(para 22)**

W.P. dismissed. (E-9)

List of Cases cited:

1. St.of H. P. & anr. Vs Shashi Kumar, 2019 (3) SCC 653

2. St.of U.P. & ors. Vs Premlata, 2022 (1) SCC 30

3. Fertilizers and Chemicals Travancore Ltd. & ors. Vs Anusree K.B., 2022 SCC OnLine SC 1331

4. V. Sivamurthy Vs St.of Andhra Pradesh & ors., 2008 13 SCC 730

5. St.of Karn. Vs Appa Balu Ingale, 1995 Supp. (4) SCC 469

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard Sri Laxmi Kant Pathak, learned counsel for petitioner as well as learned Standing Counsel for the respondents.

2. Learned counsel for petitioner has submitted that the mother of the petitioner Smt. Durgawati Dwivedi was working on the post of Senior Assistant in Government Polytechnic, Pratapgarh died in harness on 24.09.2021. She survived by her husband Sri Prem Kumar Dubey, one son (petitioner) and one daughter.

3. On death of Smt. Durgawati Dwivedi, the petitioner moved an application for appointment under dying in Harness Rules, 1974 claiming appointment on compassionate ground. His application has been rejected by means of impugned order dated 23.08.2022 passed by Director, Technical Education, Uttar Pradesh on the

ground that the father of the petitioner, Prem Kumar Dubey was working in the Labour Department in Government of U.P. and has subsequently retired and is receiving pension from the State Government.

4. It has further been stated that in terms of rule 5 of Dying in Harness Rules, it is provided that in case the spouse of the deceased Government servant is an employee of the Central Government or a State Government then he or she shall not not be eligible for the the benefit under the Dying Harness Rules, 1974.

5. Assailing the order dated 23.08.2022, learned counsel for petitioner has submitted that the father of the petitioner is a retired employee and is no longer in employment and consequently Rule 5 of Dying Harness Rules, 1974 would not be applicable in the facts of the present case. He further submits that petitioner was totally dependent on his mother and was not dependent on his father and for the reasons also he has while assailing the order dated 23.08.2022 sought a direction for appointment on compassionate grounds under Dying in Harness Rules, 1974.

6. Learned Standing Counsel on the other hand submits that the very purpose of Rule 5 is that a person who is already in government service would be receiving remuneration from the State government and subsequent to his retirement would be receiving pension and consequently a legal heirs of such a person cannot be held to be the destitute so as to give the benefit of dying in Harness Rules.

7. He further submits that in various judgment of the Apex Court as well as by this Court, it has repeatedly been held that the purpose of Rules of 1974 are only provide succor to the immediate family of the sole bread earner who has died in harness so as to prevent destitution to the entire family. It is for this very purpose of Rule 5 of Rules, 1974, it is provided that in case the spouse is employed with the State or Central Government then such a person would not be eligible for appointment under Dying in Harness Rules, 1974.

8. It is stated that undoubtedly the father of the petitioner was a government servant and he has retired and presently receiving pension which should be sufficient to support him and his family and consequently no such claim can be made by the petitioner that the family has fallen into destitution.

9. He submits that Rule 5 should be purposely interpreted in such a manner so as not defeat the purpose of statute and hence submits that there is no infirmity in passing of the impugned order. He further submits that there is no material adduced by the petitioner to support the contention made by him in the petition.

10 I have heard rival contention of the parties.

11. It is noticed that the mother of the petitioner was working on the post of Senior Assistant in Government Polytechnic, Pratapgarh died in harness on 24.09.2021. The father of the petitioner was also a government servant and working in the Labour Department and admittedly he is receiving pension.

12. The petitioner moved an application under Rules of 1974 for compassionate appointment being the son

of deceased government servant and his application has been rejected by the impugned order on the ground that his father was also in government service and his claim for appointment is barred by Rule 5 of Rules of 1974.

13. Rule 5 of the Dying in Harness Rules, 1975 are quoted hereinbelow:-

"Rule 5 of U.P. Recruitment of Dependant of Government Servant Dying in Harness Rules, 1974 where it is provided that *"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."*

14. It is relevant to refer here the various judgments of Hon'ble Supreme Court with regard to the purpose and object behind appointing persons of the deceased government employee on compassionate grounds.

15. Hon'ble the Supreme Court in the case of **State of Himachal Pradesh and another Vs. Shashi Kumar, 2019 (3) SCC 653**, held as under:-

"18. While considering the rival submissions, it is necessary to bear in mind that compassionate appointment is an exception to the general rule that appointment to any public post in the service of the State has to be made on the basis of principles which accord with Articles 14 and 16 of the Constitution. Dependants of a deceased employee of the State are made eligible by virtue of the Policy on compassionate appointment. The basis of the policy is that it recognizes that a family of a deceased employee may be placed in a position of financial hardship upon the untimely death of the employee while in service. It is the immediacy of the need which furnishes the basis for the State to allow the benefit of compassionate appointment. Where the authority finds that the financial and other circumstances of the family are such that in the absence of immediate assistance, it would be reduced to being indigent, an application from a dependent member of the family could be considered. The terms on which such applications would be considered are subject to the policy which is framed by the State and must fulfill the terms of the Policy. In that sense, it is a well-settled principle of law that there is no right to compassionate appointment. But, where there is a policy, a dependent member of the family of a deceased employee is entitled to apply for compassionate appointment and to seek consideration of the application in accordance with the terms and conditions which are prescribed by the State.

19. The policy in the present case which was formulated on 18 January 1990 categorically speaks of providing employment assistance to dependents of government servants who have died while in service, "leaving their families in indigent circumstances". The Policy, in other words, is designed to meet the needs of those families where the death of a

government servant has left them in indigent circumstances, requiring immediate means of subsistence. The policy recognizes in Paragraph 10 that the benefits which are received by a family on account of welfare measures are required to be considered. Among them, the policy stipulates that family pension and death gratuity are required to be taken into account in assessing the financial circumstances of the family. The Policy does not preclude the dependants of a deceased employee from being considered for compassionate appointment merely because they are in receipt of family pension. What the Policy mandates is that the receipt of family pension should be taken into account in considering whether the family has been left in indigent circumstances requiring immediate means of subsistence. The receipt of family pension is, therefore, one of the considerations which is to be taken into account. Paragraph 10(c) of the Policy sets out the measures provided by the State which have a bearing on the financial need of the family.

21. The decision in Govind Prakash Verma (supra) has been considered subsequently in several decisions. But, before we advert to those decisions, it is necessary to note that the nature of compassionate appointment had been considered by this Court in Umesh Kumar Nagpal Vs. State of Haryana4. The principles which have been laid down in Umesh Kumar Nagpal (supra) have been subsequently followed in a consistent line of precedents in this Court. These principles are encapsulated in the following extract:

"2. ...As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependants of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non-manual and manual 4 (1994) 4 SCC 138 categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest

posts by making an exception to the rule is justifiable and valid since it is not discriminatory. ***The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved, viz., relief against destitution.*** *No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned."*

16. Hon'ble the Supreme Court in the case of **State of Uttar Pradesh and others Vs. Premlata, 2022 (1) SCC 30**, held as under:-

"8. While considering the issue involved in the present appeal, the law laid down by this court on compassionate ground on the death of the deceased employee are required to be referred to and considered. In the recent decision this court in Civil Appeal No.5122 of 2021 in the case of the Director of Treasuries in Karnataka & Anr. vs. V. Somashree, had occasion to consider the principle governing the grant of appointment on compassionate ground. After referring to the decision of this court in N.C. Santhosh vs. State of Karnataka and Ors. reported in (2020) 7 SCC 617, this Court has summarized the principle governing the grant of appointment on compassionate ground as under:

(i) that the compassionate appointment is an exception to the general rule;

(ii) that no aspirant has a right to compassionate appointment;

(iii) the appointment to any public post in the service of the State has to be made on the basis of the principle in accordance with Articles 14 and 16 of the Constitution of India;

(iv) appointment on compassionate ground can be made only on fulfilling the norms laid down by the State's policy and/or satisfaction of the eligibility criteria as per the policy;

(v) the norms prevailing on the date of the consideration of the application should be the basis for consideration of claim for compassionate appointment.

9. As per the law laid down by this court in catena of decisions on the appointment on compassionate ground, for all the government vacancies equal opportunity should be provided to all aspirants as mandated under Article 14 and 16 of the Constitution. However, appointment on compassionate ground offered to a dependent of a deceased employee is an exception to the said norms. The compassionate ground is a concession and not a right.

9.1 In the case of State of Himachal Pradesh and Anr. vs. Shashi Kumar reported in (2019) 3 SCC 653, this court had an occasion to consider the object and purpose of appointment on compassionate ground and considered decision of this court in case of Govind Prakash Verma vs. LIC reported in (2005) 10 SCC 289, in para 21 and 26, it is observed and held as under: "21. The decision in Govind Prakash Verma [Govind Prakash Verma v. LIC, (2005) 10 SCC 289, has been considered subsequently in several decisions. But, before we advert to those

decisions, it is necessary to note that the nature of compassionate appointment had been considered by this Court in Umesh Kumar Nagpal v. State of Haryana [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930] . The principles which have been laid down in Umesh Kumar Nagpal [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930] have been subsequently followed in a consistent line of precedents in this Court. These principles are encapsulated in the following extract:

(Umesh Kumar Nagpal case [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930] , SCC pp. 13940, para 2) "2. ? As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependants of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in nonmanual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved viz. relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned." "26. The judgment of a Bench of two Judges in Mumtaz Yunus Mulani v. State of Maharashtra [Mumtaz Yunus Mulani v. State of Maharashtra, (2008) 11 SCC 384 :

(2008) 2 SCC (L&S) 1077] has adopted the principle that appointment on compassionate grounds is not a source of recruitment, but a means to enable the family of the deceased to get over a sudden financial crisis. The financial position of the family would need to be evaluated on the basis of the provisions contained in the scheme. The decision in Govind Prakash Verma [Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S) 590] has been duly considered, but the Court observed that it did not appear that the earlier binding precedents of this Court have been taken note of in that case."

17. Hon'ble the Supreme Court in the case of **Fertilizers and Chemicals Travancore Ltd. and Others Vs. Anusree K.B., 2022 SCC OnLine SC 1331**, held as under:-

"18. Thus, as per the law laid down by this Court in the aforesaid decisions, compassionate appointment is an exception to the general rule of appointment in the public services and is in favour of the dependents of a deceased dying in harness and leaving his family in penury and without any means of livelihood, and in such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is, thus, to enable the family to tide over the sudden crisis. The object is not to give such family a post much less a post held by the deceased."

18. The exclusion of the person whose one of the parents is employed has been done for the purpose that such a member of the family of the deceased would not fall into destitution on death of the Government Servant as he has the spouse of the Government Servant, who himself/herself is a government employee is surviving and consequently the family should not fall into destitution and hence for appointment of such person has been kept out of the purview of the Dying in Harness Rules, 197.

19. Needles to say that the father of the petitioner was pensioner and was previously in the employment of the State government and this Court is not convinced by the Statement made by the petitioner that he was supported only by his mother. It has been admitted by him that his parents had not been divorced and they were living together till the death of the mother of the petitioner and there is no material available on record to indicate that the petitioner was supported solely by his mother and there is no evidence available that they were living separately .

20. Hon'ble the Supreme Court in the case of **V. Sivamurthy Vs. State of Andhra Pradesh and others, 2008 13 SCC 730** has summarized the principles relating to compassionate appointment as follows:-

"9. The principles relating to compassionate appointments may be summarized thus :

(a) Compassionate appointment based only on descent is impermissible. Appointments in public service should be made strictly on the basis of open invitation of applications and comparative merit, having regard to Articles 14 and 16 of the Constitution of India. Though no other mode of appointment is permissible,

appointments on compassionate grounds are well recognised exception to the said general rule, carved out in the interest of justice to meet certain contingencies.

(b) Two well recognized contingencies which are carved out as exceptions to the general rule are :

(i) appointment on compassionate grounds to meet the sudden crisis occurring in a family on account of the death of the bread-winner while in service.

(ii) appointment on compassionate ground to meet the crisis in a family on account of medical invalidation of the bread winner.

Another contingency, though less recognized, is where land holders lose their entire land for a public project, the scheme provides for compassionate appointment to members of the families of project affected persons. (Particularly where the law under which the acquisition is made does provide for market value and solatium, as compensation).

(c) Compassionate appointment can neither be claimed, nor be granted, unless the rules governing the service permit such appointments. Such appointments shall be strictly in accordance with the scheme governing such appointments and against existing vacancies.

(d) Compassionate appointments are permissible only in the case of a dependant member of family of the employee concerned, that is spouse, son or daughter and not other relatives. Such appointments should be only to posts in the lower category, that is, class III and IV posts and the crises cannot be permitted to be converted into a boon by seeking employment in Class I or II posts."

21. Hon'ble the Supreme Court in the case of **State of Karnataka Vs. Appa Balu Ingale, 1995 Supp. (4) SCC 469** has held as under:-

"Judge must be a jurist endowing with the legislator's wisdom, historian's search for truth, prophet's vision, capacity to respond to the needs of the present, resilience to cope with the demands of the future and to decide objectively disengaging himself/herself from every personal influence or predilictions. Therefore, the Judges would adopt purposive interpretation of the dynamic concepts of the Constitution and the Act with its interpretative armoury to articulate the felt necessities of the time."

22. The Court has also considered the fact that appointment on the ground of descent is violative of the constitutional provisions and specifically barred under Article 16 of the Constitution of India and it is only exception carved out the said Rules the appointment is given on compassionate grounds and consequently the Court was of the opinion that the Rules have to be strictly construed. This Court is of the considered view that Rule 5 which provides for ineligibility for appointment on compassionate grounds for certain category of the persons and the case of the petitioner clearly falls under the exclusionary clause provided under Rule 5 and consequently no benefit of the same can be given to the petitioner. In case any interpretation where the benefit is granted to the petitioner, then it would run clearly contrary to the specific mandate provided in Rule 5 of Rules, 1974 and consequently such a direction cannot be given by this Court in exercise of powers under Article 226 of the Constitution of India.Though the word used in Rule 5 of Rule of 1974 that the spouse should not be "employed under Central or State Government" but will not only include persons who are in employment at the time of death of the Government Servant but also persons who

have retired or "were in employment of Central or State Government".

23. The benefit of employment on compassionate ground is available to a limited section of persons who are specifically included in the Rule of 1974. The purpose of grant of appointment has been clearly culled by various judgments of the Supreme Court and such appointment is provided to prevent destitution. Though the mother of the petitioner working in government service died in harness, but her husband was also on in government service in the Labour Department and had retired prior to death of his wife. After the retirement he is receiving pension.

24. This court is of the considered view that if the spouse of the deceased government servant is receiving pension then it cannot be said that the family would fall into destitution as the pensioner father can very well take care of the petitioner, and hence he cannot claim benefit of compassionate appointment under Rule of 1974, and his claim would be deemed to be included in Rule 5 of Rule of 1974

25. In light of the above and specially considering the fact that a specific provisions under said rules, dis-entitles the petitioner for appointment under Rules, 1974, no such direction sought by the petitioner can be granted.

26. In the aforesaid circumstances, this Court is of the consider view that in Rule 5 of Rules, 1974 even if one of the spouse was in previous employment of the State government , then the legal heir would not be eligible for grant of compassionate appointment and consequently this Court does not find any infirmity in the impugned order dated order 23.08.2022 and consequently the writ petition bereft of merits and is accordingly dismissed.

(2022) 11 ILRA 859
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.11.2022

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ-A No. 1000145 of 2009

Babulal Chawdhary ...Petitioner
Versus
Prescribed Auth./Addl. Civil Judge & Ors. ...Respondents

Counsel for the Petitioners:
Madhur Kant Srivastava

Counsel for the Respondents:
C.S.C, Bireshwar Nath

Civil Law - Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Application was filed u/s 21 of the Act-for release of two shops under the tenancy of the Petitioner-civil suit also filed -for permanent injunction-stay order granted-despite interim order-both shops were demolished-Application u/s 29-A was filed by the Petitioner for direction to the landlord/respondent to reconstruct the shops or to permit the Petitioner to reconstruct-application rejected-Section 29-A -does not provide for filing of an application for re-building of a demolished building under tenancy - application not maintainable-no illegality in impugned order.

W.P. dismissed . (E-9)

List of Cases cited:

1. M.S. Grewal & anr. Vs Deep Chand Sood & ors.-AIR 2001 SC 3660

2. The St.of Punjab & anr. Vs Shamlal Murari & anr.-AIR 1976 SC 1177

3. M/s Shaha Ratansi Khimji and sons Vs Proposed Kumbhar sons Hotel P. Ltd. & ors. - AIR 2014 SC 2895.

4. Trust Jama Masjid Waqf No.31 Vs Lakshmi Talkies & ors. - (2010) 9 SCC 78

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

1. Heard Sri Madhur Kant Srivastava, learned counsel for the petitioner, and Sri Bireshwar Nath, learned counsel, assisted by Sri R.K. Singh Raj, learned counsel for respondents no.2 and 3.

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

"(i) Issue a writ, order or direction in the nature of certiorary quashing the order passed by opposite party no.1 dated 23.09.2009 contained in Annexure No.1 in P.A. Case No.1/2004 "Buddhi Lal and another vs. Babulal Chawdhary", rejecting the application moved by the petitioner under Section 29 of U.P. Act 13 of 1972 of the writ petition.

(ii) Issue a writ, order or direction in the nature of mandamus commanding the opposite parties to allow reconstruction of the tenement in dispute within the stipulated and reasonable time granted by this Hon'ble Court."

3. The case set forth by the petitioner is that in the year 2004 an application under Section 21 of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as the 'Act, 1972') was filed by respondent/landlord before the Prescribed Authority praying for release of two shops under tenancy of the petitioner. The said application was registered as P.A. No.1 of 2004. Written statement was filed by the petitioner. It is contended that a civil suit was also filed by the petitioner for permanent injunction in which a stay order was granted on 01.03.2004, a copy of which is Annexure-4 to the petition. However, despite existence of the said interim order both the shops were demolished by the respondent/landlord. The petitioner claims to have lodged a first information report on 01.08.2005 against the respondent/landlord but in a petition filed by the landlord, a stay order was granted by this Court whereby the arrest of the respondent/landlord was stayed. Subsequently a charge sheet was filed in the said criminal case in which again the landlord/respondent is said to have approached this Court in which certain orders were passed.

4. Be that as it may, an application was filed by the petitioner under Section 29-A of the Act, 1972 on 06.08.2005, a copy of which is Annexure-6 to the petition. The said application was filed in the pending application under Section 21 of the Act, 1972 filed by the respondent/landlord namely case P.A. No.1 of 2004. The prayer in the said application was for a direction to be issued to the landlord/respondent to reconstruct the shops under tenancy of the tenant or to permit the tenant to reconstruct the shops. The landlord filed his objections to the said application and the learned court below vide impugned order dated 23.09.2009, a copy of which is Annexure-1 to the petition, rejected the application. Being aggrieved, instant petition has been filed.

5. The contention of learned counsel for the petitioner is that when the aforesaid case under Section 21 of the Act, 1972 was filed and there was a stay order that had been granted by the Civil Court in favour of the petitioner in the suit for permanent injunction

filed by him as such in order to frustrate the said stay order the shops were got demolished by the respondent/landlord. As the said shops had been demolished during the pendency of the aforesaid application before the Prescribed Authority as such an application under Section 29-A of the Act, 1972 was filed. He contends that once a mischief was sought to be created by the landlord/respondent in the matter inasmuch as the shops in dispute were themselves demolished by the landlord/respondent for which a first information report was lodged as such it was in the fitness of things that the Prescribed Authority should have allowed the said application and should have either directed the landlord/respondent herein to reconstruct the shops or in the alternative to have permitted the petitioner to reconstruct the said shops. He contends that the said application has been rejected by the Prescribed Authority vide impugned order dated 23.09.2009 primarily on two grounds namely (a) in the Commissioner's report which has been called for it emerges that the shops were demolished on account of being an encroachment, and (b) that an application under Section 29 of the Act, 1972 should have been filed separately.

6. So far as ground (a) is concerned, it is contended that nowhere in the Commissioner's report, a copy of which has been filed as Annexure -12 to the petition, it comes out that the shops were demolished on account of being an encroachment. So far as ground (b) is concerned, it is contended that there is no provision for filing of a separate application, as such, the court below has patently erred in rejecting the said application.

7. Learned counsel for the petitioner has placed reliance on Section 29-A of the Act, 1972 to contend that an application in such circumstances would be perfectly maintainable before the Prescribed Authority and as such the learned court below has patently erred in law in rejecting the said application. In support of his argument, reliance has been placed on the judgments of the Apex Court in the cases of **M.S. Grewal and another vs. Deep Chand Sood and others-AIR 2001 SC 3660, The State of Punjab and another vs. Shamlal Murari and another-AIR 1976 SC 1177, and M/s Shaha Ratansi Khimji and sons vs. Proposed Kumbhar sons Hotel P. Ltd. and others - AIR 2014 SC 2895.**

8. No other argument has been raised.

9. On the other hand, Sri Bireshwar Nath, learned counsel appearing for respondent no.2 and 3, assisted by Sri R.K. Singh Raj, on the basis of averments contained in the counter affidavit argues that as the said shops in tenancy of the petitioner were an encroachment as such the Nagar Panchayat had published a public notice on 03.06.2005, a copy of which is Annexure CA-2 to the counter affidavit and thereafter had demolished the said encroachment. It is also contended that in the first information report that had been lodged by the petitioner a final report has been submitted on 13.06.2006, a copy of which is Annexure CA-3 to the counter affidavit, from a perusal of which it emerges that the Investigating Officer has recorded that there was an encroachment which has been removed by the authorities concerned and that the petitioner, for the purpose of getting insurance claim, has lodged the first information report. He also argues that the Act, 1972 provides for filing of a separate application and as such there is no infirmity in the order passed by the Prescribed Authority.

10. Responding to the same, learned counsel for the petitioner contends that he has filed a rejoinder affidavit as well as supplementary affidavit dated 28.03.2009 whereby he had brought on record that after the aforesaid final report had been submitted by the authorities, the petitioner had filed his protest application and thereafter the respondents/landlord had been summoned against which they had approached this Court by filing an application under Section 482 Cr.P.C. No.2360 of 2009 in re: Mahadev Prasad vs. State of U.P. and others and this Court has passed an order on 10.04.2017, a copy of which is Annexure SA-1 to the supplementary affidavit. Placing reliance on the certificate dated 31.03.2006, which has been issued by the Nagar Panchayat, Bachhrawan, a copy of which is Annexure-10 to the petition, learned counsel for the petitioner contends that Nagar Panchayat has itself indicated that no house or building was demolished in the encroachment drive conducted by them. He thus contends that it is apparent that the said shops were demolished by the landlord/respondents themselves and not by the Nagar Panchayat.

11. Heard learned counsel for the contesting parties and perused the records.

12. From the arguments as raised by the learned counsel for the contesting parties and perusal of the record, it emerges that an application under Section 21 of the Act, 1972 was filed in the year 2004 by the respondents/landlord which was registered as PA No.1 of 2004. The case was filed before the Prescribed Authority praying for release of two shops under the tenancy of the petitioner herein. During pendency of the aforesaid case itself, the petitioner claims to have filed a civil suit for permanent injunction against the landlord/respondents in which an interim injunction was granted on 01.03.2004. During pendency of the case before the Prescribed Authority, the shops were demolished. There is a dispute as to whether the shops were demolished by the Nagar Panchayat or by the landlord/respondents themselves inasmuch as the petitioner claims that the same were demolished by the landlord while placing reliance on the certificate issued by the Nagar Panchayat while at the same time the contention of landlord/respondents is that they were demolished on account of demolition drive that had been carried out by the Nagar Panchayat which is apparent from a perusal of the Final Report submitted by the Investigating Officer dated 13.06.2006. However, as the same is a disputed question and the proceedings are still pending before the Prescribed Authority, the Court is not going into that aspect of the matter and the same may also not be relevant considering the discussion on ground (b).

13. After the shops were demolished, the petitioner filed an application under Section 29-A of the Act, 1972 praying for a direction to be issued to the landlord/respondents to either have the shops reconstructed or a permission be granted to the petitioner for reconstruction of the said shops. The application has been rejected by the Prescribed Authority vide impugned order dated 23.09.2009 on two grounds as have already been enumerated above.

14. So far as the ground (a) is concerned, as already indicated above, as the proceedings are still pending before the Prescribed Authority the Court is not going into that aspect of the matter as the

discussion may not be relevant considering the discussion on ground (b).

15. So far as ground (b) is concerned namely that an application under Section 29-A of the Act, 1972 was not maintainable and the petitioner should have filed a separate application, for the said purpose, the Court would have to consider the provisions of Section 29-A read with Sections 29, 28 and 26 of the Act, 1972.

16. For the sake of convenience, Section 26 of the Act, 1972 is reproduced as under:-

*"**26. Certain obligations of the landlord and tenant**-- (1) No landlord shall without lawful authority or excuse cut off, withhold or reduce any of the amenities enjoyed by the tenant.*

(2) The landlord shall be bound to keep the building under tenancy windproof and waterproof and, subject to any contract in writing to the contrary, carry out periodical whitewashing and repairs.

(3) Subject to any contract in writing to the contrary, no tenant shall, whether during the continuance of the tenancy or after its determination, demolish any improvement effected by him in the building or remove any material used in such improvement, other than any fixtures of a movable nature.

1[Explanation. The expression material used in such improvement includes the writing of an electrical fitting or a pipe pertaining to any water connection.]

(4) The landlord shall give to the tenant a receipt for rent payable to and received by him."

Section 28 of the Act, 1972 reads as under:-

*"**28. Enforcement of landlord's obligation regarding repairs, etc.** - (1) If the landlord fails to carry out whitewashing or repairs as required by sub-section (2) of Section 26, the tenant may, by notice in writing, call upon him to carry out the same within one month from the date of service of such notice.*

(2) Where the cost of the requisite whitewashing or repairs is likely to exceed the amount of 2[two months' rent] in a year, then the tenant in his notice shall also intimate to the landlord his willingness to pay enhanced rent in accordance with the provisions of Section 6:

[* *]*

(3) If the landlord fails to comply with the notice, the tenant may himself carry out the whitewashing or repairs at a cost not exceeding 4[two months' rent] in a year and deduct the amount from the rent, and in any such case he shall furnish the account of the expenditure incurred to the landlord.

(4) Where the tenant claims that the building requires whitewashing or repairs to such extent that the cost thereof is likely to exceed the amount of 1[two months' rent] in a year, hereinafter in this section referred to as major repairs , and the landlord either declines his responsibility to carry out the same or fails to comply with the notice, the tenant may apply to the prescribed authority for an order under sub-section (5).

(5) The prescribed authority on receiving an application under sub-section (4) may, after giving an opportunity of hearing to the parties

(a) either reject the application; or

(b) require the landlord to carry out the requisite major repairs within such period as may be specified in the order, and on his failure to do so, permit the tenant to carry out those repairs at a cost

not exceeding such amount (which shall not be more than the amount of two years' rent) and within such period as may be specified in the order.

(6) Where in pursuance of an order under sub-section (5) any major repairs are carried out by the tenant, he shall furnish an account of the expenditure to the prescribed authority, which shall certify the amount recoverable by the tenant, and thereupon such amount, unless paid or otherwise adjusted by the landlord, may be deducted by the tenant from the rent in monthly instalments not exceeding twenty-five per cent of one month's rent, and in any such case, the enhancement of rent under Section 6 shall come into effect only from the month following the month in which the cost is fully recovered by the tenant.

(7)- No appeal or revision shall lie from any order of the prescribed authority under sub-section (5) or sub-section (6), which shall be final."

Section 29 of the Act, 1972 reads as under:-

"29. Special protection to tenants of buildings destroyed by collective disturbances, etc. *(1) Where in consequence of the commission of mischief or any other offence in the course of collective disturbances, any building under tenancy is wholly or partly destroyed, the tenant shall have the right to re-erect it wholly or partly, as the case may be, at his own expenses within a period of six months from such injury:*

Provided that if such injury was occasioned by the wrongful act or default of the tenant he shall not be entitled to avail himself of the benefit of this provision.

(2) Where in consequence of fire, tempest, flood or excessive rainfall, any building under tenancy is wholly or partly destroyed the tenant shall have the right to re-erect or repair it wholly or partly, as the case may be, at his own expense after giving a notice in writing to the landlord within a period of one month from such injury:

Provided that the tenant shall not be entitled to avail himself of the benefit of this provision

(a) if such injury was occasioned by his own wrongful act or default; or

(b) in respect of any re-erection or repair made before he has given a notice as aforesaid to the landlord or before the expiration of a period of fifteen days after such notice, or if the landlord in the meantime makes an application under Section 21, before the disposal of such application; or

(c) in respect of any re-erection or repair made after the expiration of a period of six months from such injury or, if the landlord has made any application as aforesaid, from the disposal thereof.

(3) Where the tenant, before the commencement of this Act, has made any re-erection or repair in exercise of his rights under Section 19 of the old Act, or after the commencement of this Act makes any re-erection in the exercise of his right under sub-section (1) or sub-section (2),

(a) the property so re-erected or repaired shall be comprised in the tenancy;

(b) the tenant shall not be entitled, whether during the tenancy or after its determination, to demolish the property or parts so erected or repaired or to remove any material used therein other than any fixtures of a movable nature;

(c) Notwithstanding, anything contained in sub-section (2) of Section 2, the provisions of this Act shall apply to the building so re-erected:

Provided that no application shall be maintainable under Section 21 in respect of

any such building on the ground mentioned in clause (b) of sub-section (1) thereof within a period of three years from the completion of such re-erection."

Section 29-A of the Act, 1972 reads as under:

***"29-A. Protection against eviction to certain classes of tenants of land on which building exists. (1)**- For the purposes of this section, the expressions tenant and landlord shall have the meanings respectively assigned to them in clauses (a) and (j) of Section 3 with the substitution of the word land for the word building .*

(2) This section applies only to land let out, either before or after the commencement of this section, where the tenant, with the landlord's consent has erected any permanent structure and incurred expenses in execution thereof.

(3) Subject to the provisions hereinafter contained in this section, the provisions of Section 20 shall apply in relation to any land referred to in sub-section (2) as they apply in relation to any building.

(4) The tenant of any land to which this section applies shall be liable to pay to the landlord such rent as may be mutually agreed upon between the parties, and in the absence of agreement, the rent determined in accordance with sub-section (5).

(5) The District Magistrate shall on the application of the landlord or the tenant determine the annual rent payable in respect of such land at the rate of ten per cent per annum of the prevailing market value of the land, and such rent shall be payable, except as provided in subsection (6) from the date of expiration of the term for which the land was let or from the commencement of this section, whichever is later.

(6)(a) In any suit or appeal or other proceeding pending immediately before the date of commencement of this section, no decree for eviction of a tenant from any land to which this section applies, shall be passed or executed except on one or more of the grounds mentioned in sub-section (2) of Section 20, provided the tenant, within a period of three months from the commencement of this section by an application to the court, unconditionally offers to pay to the landlord, the enhanced rent of the land for the entire period in suit and onwards at the rate of ten per cent per annum of the prevailing market value of the land together with costs of the suit (including costs of any appeal or of any execution or other proceedings).

(b) In every such case, the enhanced rent shall, notwithstanding anything contained in subsection (5), be determined by the court seized of the case at any stage.

(c) Upon payment against a receipt duly signed by the plaintiff or decree-holder or his counsel or deposit in court of such enhanced rent with costs as aforesaid being made by the tenant within such time as the court may fix in this behalf, the court shall dismiss the suit, or, as the case may be, discharge the decree for eviction, and the tenancy thereafter, shall continue annually on the basis of the rent so enhanced.

(d) If the tenant fails to pay the said amount within the time so fixed (including any extended time, if any, that the court may fix or for sufficient cause allow) the court shall proceed further in the case as if the foregoing provisions of this section were not in force.

(7) The provisions of this section shall have effect, notwithstanding anything to the contrary contained in any contract or instrument or in any other law for the time being in force.

Explanation. For the purposes of sub-section (6) where a case has been decided against a tenant by one court and the limitation for an appeal therefrom has not expired on the date immediately before the commencement of this section, this section shall apply as it applies to pending proceedings and the tenant may apply to that court for a review of the judgment in accordance with the provisions of this section."

17. From perusal of Section 26 of the Act, 1972 it emerges that there are certain obligations of the landlord and tenant per which no landlord shall withhold or reduce any of the amenities enjoyed by the tenant; the landlord is bound to keep the building under tenancy windproof and waterproof and, subject to any contract in writing to the contrary, carry out periodical whitewashing and repairs.

18. Section 28 of the Act, 1972 provides for enforcement of landlord's obligations regarding repairs i.e. if the landlord fails to carryout whitewashing or repairs as required by sub-section (2) of Section 26 of the Act, 1972, the tenant may, by notice in writing, call upon him to carry out the same within one month from the date of service of such notice and where the cost of the whitewashing or repairs is likely to exceed a certain amount, then the tenant, in his notice, shall also intimate to the landlord his willingness to pay enhanced rent. Where the landlord fails to comply with the notice, the tenant may himself carry out the whitewashing or repairs at a certain cost and deduct the amount from the rent. In case of major repairs if the landlord declines to carryout the same or fails to comply with the notice the tenant may apply to the Prescribed Authority for an order under sub-section (5). The Prescribed Authority on receiving an application under sub-section (4) of this Section i.e. for carrying out major repairs may either reject the application or require the landlord to carryout requisite major repairs within such period as may be specified in the order or permit the tenant to carry out such repairs

19. Section 29 of the Act, 1972 gives special protection to tenants of buildings destroyed by collective disturbances i.e where in consequence of the commission of mischief or any other offence, in the course of collective disturbances, any building under tenancy is wholly or partly destroyed, the tenant shall have a right to re-erect it wholly or partly at his own expense within a period of six months from such injury. However, in case of fire, tempest, flood or excessive rainfall if a building under tenancy is wholly or partly destroyed the tenant shall have the right to re-erect or repair it wholly or partly at his own expense after giving a notice in writing to the landlord within one month from such injury.

20. Section 29-A of the Act, 1972, gives protection against eviction to certain classes of tenants of land on which building exists. The said provision of law gives the liability of the tenant to pay the landlord such rent as may be mutually agreed upon between the parties or in the absence thereto the rent determined in accordance with sub-section (5). The said Section also provides for the liability of the tenant upon failure to pay the amount.

21. Thus, from a perusal of Section 29-A of the Act, 1972, it is clearly apparent that in case of demolition of a building under tenancy, no application can be filed by the tenant praying for direction to the

landlord for reconstruction of the building or for the tenant to be granted permission to carryout reconstruction. Thus, it is apparent that once Section 29-A of the Act, 1972, itself does not provide for filing of an application for re-building of a demolished building under tenancy consequently the application filed by the petitioner under the provisions of Section 29-A of the Act, 1972 was clearly not maintainable and as such there is no illegality or infirmity in the order impugned dated 23.09.2009.

21. Even if the provisions of Section 28 read with Section 26 of the Act, 1972 are considered and the word 'repair' as indicated in Section 28 of the Act, 1972 is seen in the context of Section 26 of the Act, 1972, the said 'repairs' as used in Section 28 of the Act, 1972 would only be confined to the provisions of Section 26(2) of the Act, 1972 whereby the landlord is required to keep the building under tenancy windproof and waterproof and, subject to any contract in writing to the contrary, carry out periodical whitewashing and repairs. It is not the case in the present matter that the landlord had failed to carry out any whitewashing, repairs or had failed to keep the shops under tenancy windproof or waterproof rather the shops itself have been allegedly demolished.

22. Incidentally, the Apex Court in the case of **Trust Jama Masjid Waqf No.31 vs. Lakshmi Talkies and others - (2010) 9 SCC 78** while considering the provisions of Section 29-A of the Act, 1972 has held that for applicability of Section 29-A of the Act, 1972, two conditions must be satisfied namely (i) that the land alone has been let out, and (ii) that permanent structure has been constructed by the tenant with landlord's consent incurring his own expenses.

23. In the instant case, it is not the case of the petitioner that the two conditions were fulfilled namely that it is only the land that had been let out to the tenant/petitioner rather from the facts on record, it clearly emerges that two shops were let out to the petitioner. Further it is not the case of the petitioner that the shops were constructed by the tenant/petitioner with the landlord's consent incurring his own expenses. Consequently, the provisions of Section 29-A of the Act, 1972 are clearly not applicable upon the tenant/petitioner in the facts of the instant case.

24. So far as the judgments, as have been referred by the learned counsel for the petitioner are concerned, none of the judgments deal with the provisions of Section 29-A of the Act, 1972 and thus have no applicability in the facts of the case already enumerated above.

25. Keeping in view the aforesaid discussion, no case for interference is made out. Accordingly, the petition is **dismissed**.

(2022) 11 ILRA 867
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.09.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

First Appeal From Order No. 1140 of 2014

The New India Assurance Co. Ltd., Civil Lines, Allahabad & Ors. ...Appellants
Versus
Smt. Lajjawati & Ors. ...Respondents

Counsel for the Appellants:
Sri Rahul Sahi

Counsel for the Respondents:

Ms. Kamini Pandey, Sri Anand Pandey

A. Civil Law - Tort - Motor Accident claim - Motor Vehicles Act, 1988 - Section 173 - Enhancement of compensation - Just Compensation - Issue - whether on an appeal by the insurer, compensation to be awarded, can be enhanced without there being a cross-appeal or objection preferred by the claimant ? - Held - It is well-settled that in the matter of insurance claim compensation in reference to the motor accident, the court should not take hyper technical approach and ensure that just compensation is awarded to the affected person or the claimants - High Court can enhance the compensation awarded by the Tribunal even in the absence of a cross-objection or an appeal preferred by the claimants - In the instant case in appeal by the Insurance Company, challenging an award of the Motor Accident Claims Tribunal High Court enhanced compensation awarded. (Para 24)

B. Tort - Motor Accident claim - Appreciation of Evidence - Interested Witness - Credibility - Submission of Insurer that Tribunal's finding is primarily based on the testimony of, PW-2, who claims to be an eye-witness of the accident, was also employed in the same department as the deceased and, therefore, the Tribunal ought not to have accepted his testimony - Held - submission of the insurer that the testimony of PW-2 is unreliable for the reason that he is an employee of the same department as the deceased, is utterly unacceptable - There is no principle of law or one of prudence by which in a case of tort, like a motor accident, a fellow employee of the victim, serving the same department, is to be doubted for his word, about the circumstances attending the accident. (Para 18)

C. Motor Accident claim - Motor Vehicles Act, 1988 - Section 173 - Determination of Compensation - Age - Insurer argued that the age of the deceased has been wrongly determined by the Tribunal at 54 years, going by the entry in his service record - In her testimony PW-1 stated that she got married in 1974, at which time her husband was 20 years old - accident occurred in 2011, therefore as per arithmetic calculations deceased age would have been 57 years - Held - best evidence about the deceased's age is the entry in his service-book - in the postmortem report, the age of the deceased has been estimated to be 55 years, which supports the age recorded in his service book - PW-1 in her cross-examination said that she does not know her husband's date of birth - deceased's recorded date of birth in his service record, much corroborated by the medico-legal evidence, cannot be disbelieved. (Para 22, 23)

D. Motor Accident claim - Motor Vehicles Act, 1988 - Section 173 - Determination of Compensation - Income - No deduction of Compensatory Allowances - Every allowance, that the deceased receives towards his remuneration, would count as his income - All that can be deducted is whatever goes out of the deceased's hands as levies of the State, like income tax or any sum of money, that would not enure to his benefit, if he were alive - deductions made as contributions to funds etc. are not liable to be deducted from the deceased's income - allowances and perquisites received by an employee during service not to be deducted from his annual income while working out the claimants' dependency i.e. HRA (House Rent Allowance), CCA (City Compensatory Allowance) and medical allowance should be taken into consideration in calculation of the income of the deceased - However, deduction towards EPF and GIS should also not have been made in calculating the income of the deceased - Tribunal deducted whatever the deceased received towards CCA and MCA, during the year, from his annual income - That deduction ordered by the Tribunal, not at all justified - Tribunal erred in deducting a sum of 6,600/- from the annual income of the deceased. (Para 27, 28, 29)

E. Motor Accident claim - Motor Vehicles Act, 1988 - Section 173 - Uttar Pradesh Motor Vehicles Rules, 1998, Rule 220-A(3) - Determination of Compensation - Future Propsects - deceased is entitled to future prospects as he was a permanent employee in government service - Future prospects, are to be determined in accordance with Rule 220-A(3) of the Uttar Pradesh Motor Vehicles Rules, 1998 - deceased was aged more than 50 years. He was 54 - claimants are entitled to add on account of future prospects 20% of the deceased's salary in reckoning his income and the consequent loss of dependency (Para 32)

F. Motor Vehicles Act, 1988 - Section 166 - Motor Accident - Death case - Compensation - Loss of consortium - loss of consortium is not confined to the widow alone, but the parents too are entitled to be compensated for the loss of filial consortium - the widow is entitled to spousal consortium and the deceased's father to filial consortium - Parental Consortium is awarded to the children who lose the care and protection of their parents in motor vehicle accidents - A child, who has advanced into matured adulthood, is married or otherwise in the mainstream of life, would not be entitled to compensation under that head - Held - Adult employed sons of the deceased are not entitled to anything on account of loss of consortium - Claimant's entitlement under the conventional heads = Loss of Estate + Funeral Expenses + Dependents' consortium (15,000 + 15,000+ 40,000 x 2) ₹1,10,000/- (Para 35, 36, 38)

Allowed. (E-5)

List of Cases cited:

1. Oriental Insurance Co. Ltd. Vs Meena Variyal & ors., (2007) 5 SCC 428

2. Oriental Insurance Co. Ltd. Vs Premlata Shukla & ors., (2007) 13 SCC 476

3. Smt. Gaura Devi & ors. Vs Shahzad Khan & ors., 2013 (1) AWC 914

4. Ranjana Prakash & ors. Vs Divisional Manager& anr., (2011) 14 SCC 639

5. National Insurance Co. Ltd. Vs Pranay Sethi & ors., (2017) 16 SCC 680.

6. Magma General Insurance Co. Ltd. Vs Nanu Ram @ Chuhru Ram & ors., (2018) 18 SCC 130

7. Surekha & ors. Vs Santosh & ors., 2020 SCC OnLine SC 1312

8. Sunil Sharma & ors. Vs Bachitar Singh & ors., (2011) 11 SCC 425

9. Sarla Verma (Smt.) & ors. Vs Delhi Transport Corp. & anr., (2009) 6 SCC 121

10. Smt. Ganpat Devi Vs Istiyaq Ahmad & anr., F.A.F.O. No. - 614 of 2010 decided on 10.08.2022

11. Smt. Shanti Devi & ors. Vs Anil Awasthi @ Anil Kumar Awasthi& anr., F.A.F.O. No. 866 of 2011, decided on 30.05.2022

12. Jiuti Devi & ors. Vs Manoj Kumar Rai & ors., 2022 SCC OnLine All 46

(Delivered by Hon'ble J.J. Munir, J.)

This is an appeal by the Insurance Company, challenging an award of the Motor Accident Claims Tribunal/ the Additional District Judge, Court No.9, Mathura dated 09.01.2014, awarding compensation to the claimant-respondents, on account of a fatal motor accident, where one Heera Singh Chaudhary lost his life.

2. The facts giving rise to this appeal are thus:

According to the claimant-respondents, who are respondent nos.1 to 5 to this appeal and shall hereinafter be called 'the claimants', Heera Singh Chaudhary was a Junior Engineer with the Department of Irrigation, Government of U.P. posted at Etah. On 04.09.2011 for the purpose of tail-feed work, he was supervising the removal of shrubs, garbage etc., blocking water passage under the culvert, situate at the Khitauli Turn on the Amapur-Sahwar Road, Etah. At about 2:30 p.m., a truck bearing Registration No. UP-80F-9381, driven negligently and at a high speed, approached from the Etah side. It hit Heera Singh Chaudhary and ran him over. In consequence, Heera Singh Chaudhary sustained grievous injuries and was conveyed for medical aid to the Sahwar Hospital, but declared dead by the doctors there. His dead body was subjected to autopsy at Etah. Since the accident had occurred within the local limits of Police Station Sahwar, District Kashiram Nagar, Case Crime No. 323 of 2011, under Sections 279, 337, 338, 304A IPC, was registered there.

3. It is the claimants' further case that the deceased Heera Singh Chaudhary was an able bodied and healthy man. He was employed with the Department of Irrigation as a Junior Engineer. He was drawing a monthly salary of ₹52,041/-, which was the source of livelihood for the family. The entire family, that is to say, the claimants, who are dependents of Heera Singh Chaudhary, have plunged into a financial crisis and their future turned bleak. Accordingly, the claimants have preferred the present claim.

4. It is further pleaded that the accident occurred on account of the offending vehicle being driven at a high speed and negligently by its driver, Kaptan Singh, opposite party no.1 to the claim petition and respondent no.7 here. He shall hereinafter be called 'the driver'. Smt. Mithilesh Kumari, opposite party no.2 to the claim petition, was the registered owner of the offending vehicle at the time of the accident. She is respondent no.6 to this appeal. She will hereinafter be called 'the owner'.

5. The offending truck was insured with the New India Assurance Company Limited, Saukh Adda, Mathura through its Branch Manager (hereinafter referred to as "the insurers') under a policy valid from 22.01.2011 to 21.01.2012. It is the claimants' case that they are entitled to a total compensation of ₹65 lakhs, together with interest @ 12% per annum on account of the fatal motor accident, payable by the opposite parties to the claim petition, that is to say, the owner, the insurers and the driver, jointly and severally.

6. The claimants, accordingly, instituted the claim petition under Section 166 of the Motor Vehicles Act, 1988 (for short, 'the Act') before the Motor Accident Claims Tribunal/ District Judge, Mathura as they are residents of Mathura, a fact on account of which the Tribunal at Mathura had territorial jurisdiction.

7. The Insurers put in a written statement, denying the allegations in the claim petition and by way of additional pleas, came up with a case that they are not the insurers of the offending vehicle bearing Registration No. UP-80F-9381, unless the original policy was produced. It was further pleaded that in case the existence of the policy were confirmed, the insurers reserve their rights to file an additional written statement. It was also pleaded that the claim petition was bad on account of copies of the FIR, the Postmortem Report, the Site-plan,

the charge-sheet, the technical report etc. not being presented along with the claim petition. The insurers further denied the fact that the offending vehicle was involved in the accident and put the claimants to strict proof of the fact. It was also pleaded that it was expected of the owner and the driver that they would produce the route-permit, the Driving Licence, the Fitness Certificate, Registration Certificate etc. and prove these, and that in the absence of these documents being produced and proved, the claimants had no right to recover from the insurers. It is the insurers' further case that the owner and the driver have violated the terms of the policy. There is a further plea that the driver of the offending vehicle did not hit the deceased Heera Singh Chaudhary and that the said vehicle has been involved in the accident without basis. The further plea is that the FIR lodged by the deceased's wife is wrong and the insurers deny the accident. It was also the insurers' case that the entire fault/ negligence was that of the deceased, Heera Singh Chaudhary and the insurers are not liable to compensate on that account. Moreover, the compensation demanded was inflated and exaggerated.

8. The owner filed a separate written statement and did a wholesome denial of the claimants' case. In the additional pleas, it was urged that neither the offending vehicle operated by the driver was involved in the accident, that happened on 04.09.2011 at 2:30 p.m. at Khitauli Canal Bridge, P.S. Shahwar, District Kashiram Nagar, nor the deceased Heera Singh Chaudhary sustained injury in consequence of the accident, caused by the offending vehicle. It was pleaded that without prejudice to the owner's case that the accident never happened involving the offending vehicle, there was no rash or negligent operation by the driver. The owner further pleaded that the claimants' case that the deceased was aged 54 years or that he was a Junior Engineer with the Department of Irrigation, earning a sum of ₹52,041/- per month was wrong, false and concocted. The compensation claimed was not at all due and burden lay entirely upon the claimants to establish the facts. The owner further pleaded that the claimants were not dependents of the deceased nor his legal representatives. The owner was not liable to pay any compensation, as claimed. The petition was not properly drawn up, verified or presented. It was not maintainable. The claimants had not filed the necessary papers, that were mandatory under the Motor Vehicle Rules, entitling them to maintain the claim petition. The further plea was that the owner had, for the offending vehicle on the date of accident, a Registration Certificate, a valid insurance, Fitness Certificate, route-permit, a paid up tax etc. The driver had a valid driving licence to operate the offending vehicle bearing Licence No. RT4396/ Aligarh/ 85, valid from 01.12.2008 to 30.11.2011 and 31.03.2012 to 30.03.2015. The licence was further endorsed as LMV (P.E.) + HGV (P.E.) and that it was in force on the date of accident. The offending vehicle on the date of accident, was insured by the insurers vide Policy No. 3213231100200006364, valid from 22.01.2011 to 21.01.2012, offering a comprehensive cover. In substance, therefore, the liability, if any, lay on the shoulders of the insurers.

9. The driver did not appear to contest the claim petition nor did he file a written statement.

10. Upon the pleadings of parties, the following issues were framed (translated into English from Hindi):

(1) Whether on 04.09.2011 at 2:30 p.m. when Heera Singh Chaudhary for the

purpose of tail-feed work, was supervising clearance of shrubs and garbage under the culvert, located at the Khitauli Turn on the Amapur-Shahwar Road, a truck bearing (Registration) No. UP-80F-9381 approaching from the side of Etah, driven negligently at a high speed, hit Heera Singh Chaudhary, the front wheel running him over and causing his death?

(2) Whether on the date of accident, the driver of the truck bearing (Registration) No. UP-80F-9381, held a valid and effective driving licence?

(3) Whether on the date of accident, truck bearing (Registration) No. UP-80F-9381, was insured with opposite party no.1, the New India Insurance Company (sic) Assurance Company Limited?

(4) Whether the petitioners were entitled to any relief from the opposite parties? If yes, how much and from which opposite party?

11. The documentary evidence led on behalf of the claimants has been listed in the judgment of the Tribunal and no useful purpose would be served by a repetition thereof. However, the relevant documents would be referred to wherever appropriate during course of this judgment. The claimants examined Smt. Lajjawati, the deceased's widow as PW-1, one Mausam Ali (an eye-witness) as PW-2 and Pratap Singh Chauhan, a Senior Clerk in the Department of Irrigation, Etah as PW-3.

12. The opposite parties put in, by way of documentary evidence, a photostat copy of the insurance policy, the driver's driving licence, a photostat copy of the registration certificate, a photostat copy of the goods permit, a copy of the fitness certificate, Paper No. 17ग/5. No oral evidence was produced on behalf of any of the opposite parties before the Tribunal.

13. Heard Mr. Rahul Sahai, learned Counsel for the insurers, Ms. Kamini Pandey, learned Counsel appearing on behalf of claimants and perused the record. No one appears on behalf of the owner.

14. Mr. Rahul Sahai, learned Counsel for the insurers has urged that the Tribunal has gone wrong in holding that negligence of the driver was proved. He submits that the Tribunal's finding is primarily based on the testimony of one Mausam Ali, PW-2, who claims to be an eye-witness of the accident. It is urged that the eye-witness was also employed in the same department as the deceased and, therefore, the Tribunal ought not to have accepted his testimony without due caution. It is also urged that at the time of the accident, PW-2 was looking in the opposite direction and, therefore, his testimony is of no significance about the involvement or the negligence of the offending vehicle. It is also said in criticism of the Tribunal's judgment by Mr. Sahai that it is a settled proposition of the law that the *factum* of negligence is a sine qua non for a claim under Section 166 of the Act to succeed. In a very candid stance on behalf of the insurer, the learned Counsel says that the testimony of PW-2 may have some relevance, so far as the *factum* of accident and involvement of the offending vehicle is concerned, but his testimony would not be relevant insofar as the issue of negligence goes. It is emphasized that PW-2 was facing the other side and the accident took place with his back to the mishap. As such, negligence cannot be said to be duly proved.

15. It is next submitted that apart from these factors, extrinsic to the testimony of the witness that have bearing upon it, the testimony of PW-2 does not inspire confidence. It is emphasized that the

witness has stated that he was standing under the culvert, whereas the deceased was standing over it. The evidence of PW-2, therefore, cannot be relied upon, insofar as the offending vehicle's negligence is concerned. Reliance in this connection has been placed upon the decision of the Supreme Court in **Oriental Insurance Co. Ltd. v. Meena Variyal and others, (2007) 5 SCC 428.** In **Meena Variyal** *(supra)*, it has been held:

27. We think that the law laid down in *Minu B. Mehta v. Balkrishna Ramchandra Nayan* [(1977) 2 SCC 441 : (1977) 2 SCR 886] was accepted by the legislature while enacting the Motor Vehicles Act, 1988 by introducing Section 163-A of the Act providing for payment of compensation notwithstanding anything contained in the Act or in any other law for the time being in force that the owner of a motor vehicle or the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of the motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be, and in a claim made under sub-section (1) of Section 163-A of the Act, the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle concerned. Therefore, the victim of an accident or his dependants have an option either to proceed under Section 166 of the Act or under Section 163-A of the Act. Once they approach the Tribunal under Section 166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section 163-A of the Act, the compensation will be awarded in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle.

16. Reliance has further been placed on the decision of the Supreme Court in **Oriental Insurance Company Limited v. Premlata Shukla and others, (2007) 13 SCC 476** and the decision of a Division Bench of this Court in **Smt. Gaura Devi and others vs. Shahzad Khan and others, 2013 (1) AWC 914.**

17. Ms. Kamini Pandey, learned Counsel appearing on behalf of the claimants, on the other hand, submitted that the testimony of PW-2 is a clear, accurate and dependable account by an eye-witness, who was doubtlessly there at the time of the accident. The evidence of PW-2, read as a whole, clearly establishes not only the *factum* of accident, but the solitary negligence of the driver of the offending vehicle.

18. We have considered the submissions of the learned Counsel for parties on the issue in hand. So far as the testimony of PW-1 is concerned, it is not of any relevance, insofar as the *factum* of accident or the negligence of the offending vehicle goes. She is not an eye-witness. In the opinion of this Court, the proof of negligence hinges on the testimony of PW-2, Mausam Ali. It must be said at once that the submission on behalf of the insurers that the testimony of PW-2 ought to be approached with caution, almost suggesting it to be unreliable for the reason that he is an employee of the same department as the deceased, is utterly unacceptable. There is no principle of law or one of prudence by

which in a case of tort, like a motor accident, a fellow employee of the victim, serving the same department, is to be doubted for his word, about the circumstances attending the accident.

19. So far as PW-2 is concerned, he is a very natural witness since he was a part of the team of employees of the Irrigation Department, detailed to the work of tail-feed being undertaken on the fateful day under the stewardship of the deceased. The said witness was part of his workforce. The witness in his cross-examination has introduced himself as a *Seenchpal* and has apparently denied a suggestion that he was a Mate. No doubt, he has said that his face and that of Heera Singh was not towards the road and that he did not see the offending vehicle approach, but the evidence is clear on the point that he was working at the site of accident, commanding the labour-force, at a distance of 5 feet from the spot where the deceased was standing at the time when he fell victim to the accident. The witness has clearly specified the registration number of the vehicle. He has consistently remained unwavering in his stand that it was the offending vehicle that caused the accident. In the opinion of this Court, the evidence of the witness has to be read as a whole. Contrary to what the insurers say that the witness could utter falsehood, because of some kind of an "imagined bias' for a colleague, the witness's account has the assurance of his presence on the date, time and place of accident. He was assuredly detailed to the same duty as the deceased, albeit in a different and subordinate role. His presence on the spot has the credit of Government records from the Irrigation Department. About the witness looking in another direction when the accident happened, is too slender a circumstance to believe that he would not have seen what he has said in his testimony relating to the accident and the tort committed by the offending vehicle. A man standing 5 feet away from the site of a fatal motor accident, even if he were looking the other way, would naturally become cognizant in the split of a second to look in the right direction when the mishap occurred. Quick shift of attention at a distance, as small as 5 feet, about a happening this big, is good enough to credit the witness with being a truthful witness of whatever he has said in his testimony, relating to the accident. The witness has decidedly reported the offending vehicle to be involved in the accident and said that it was the vehicle's negligence that caused the mishap that day. There is not the slightest reason to take a different view from the Tribunal on this score. In the opinion of this Court by the sound standard of preponderant probability, the negligence of the offending vehicle is well established. The authorities relied upon by Mr. Sahai, all binding for the principle that they lay down, are not attracted to the facts of this case at all for the reasons that we have indicated. It is held, accordingly.

20. The other issue is about the quantum of compensation on which learned Counsel for both parties have vied to sway this Court in favour of their stand. Mr. Sahai has argued that the age of the deceased has been wrongly determined by the Tribunal at 54 years, going by the entry in his service record. He submits that the deceased was aged 57 years at the time of accident. To the above end, learned Counsel for the insurers has drawn this Court's attention to the testimony of PW-1, where it is said that she got married in the year 1974 and at that time, her husband was aged about 20 years. It is argued that the

accident happened in the year 2011 and, therefore, the arithmetical calculation would safely place the deceased's age at 57 years. It is urged that in view of the aforesaid testimony of PW-1, the deceased's wife and one of the claimants, the Tribunal ought to have ignored the deceased's date of birth recorded in the service-book. It is also argued by the learned Counsel for the insurers that in no event can this Court enhance the compensation awarded by the Tribunal in the absence of a cross-objection or an appeal preferred by the claimants. In aid of the aforesaid submission, Mr. Sahai has placed reliance upon a decision of the Supreme Court in **Ranjana Prakash and others v. Divisional Manager and another, (2011) 14 SCC 639. In Ranjana Prakash** *(supra)*, it has been held:

7. This principle also flows from Order 41 Rule 33 of the Code of Civil Procedure which enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. Order 41 Rule 33 of the Code can however be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief. For example, where the claimants seek compensation against the owner and the insurer of the vehicle and the Tribunal makes the award only against the owner, on an appeal by the owner challenging the quantum, the appellate court can make the insurer jointly and severally liable to pay the compensation, along with the owner, even though the claimants had not challenged the non-grant of relief against the insurer. Be that as it may.

8. Where an appeal is filed challenging the quantum of compensation, irrespective of who files the appeal, the appropriate course for the High Court is to examine the facts and by applying the relevant principles, determine the just compensation. If the compensation determined by it is higher than the compensation awarded by the Tribunal, the High Court will allow the appeal, if it is by the claimants and dismiss the appeal, if it is by the owner/insurer. Similarly, if the compensation determined by the High Court is lesser than the compensation awarded by the Tribunal, the High Court will dismiss any appeal by the claimants for enhancement, but allow any appeal by the owner/insurer for reduction. The High Court cannot obviously increase the compensation in an appeal by the owner/insurer for reducing the compensation, nor can it reduce the compensation in an appeal by the claimants seeking enhancement of compensation.

21. On the other hand, Ms. Kamini Pandey, learned Counsel for the claimants has argued that the compensation has been rightly assessed, taking the deceased's age as 54 years. The deceased, according to her, was 54 years 2 months and 3 days on the date of accident. It is urged that the best evidence about the deceased's age is the entry in his service-book and there is no reason to doubt the same. It is also the claimants' contention that in the postmortem report, the age of the deceased has been estimated to be 55 years, approximately. This assessment of age for the deceased supports the record of it in his service-book. It is particularly argued that

the deceased is entitled to future prospects as he was a permanent employee in government service. Reliance in support of the grant of future prospects has been placed on the decision of the Supreme Court in **National Insurance Company Limited v. *Pranay Sethi* and others, (2017) 16 SCC 680**. It is further argued that the claimants have been under-compensated under the conventional heads by the Tribunal. Learned Counsel for the claimants, in this regard, has placed reliance upon the guidance of the Supreme Court in **Magma General Insurance Company Limited v. Nanu Ram alias Chuhru Ram and others, (2018) 18 SCC 130.** It is submitted by Ms. Kamini Pandey that each of the claimants is entitled to compensation for loss of consortium in the sum of ₹40,000/- and the claimants are also entitled to compensation towards loss of estate and funeral expenses in the sum of ₹15,000/-, respectively.

22. As regards the compensation to be awarded, there is no difficulty in considering the plea for reduction thereof, since the appeal is one by the insurers. There is no dearth of jurisdiction with this Court to reduce the awarded compensation, provided a case is made out by the insurers. It, however, requires some consideration whether in the absence of an appeal or a cross-objection by the claimants, it is open to this Court to enhance the compensation awarded, should this Court reach a conclusion in favour of enhancing it.

23. So far as the question of reducing the compensation is concerned, this Court may say at once that the submission of the learned Counsel for the insurers that the age of the deceased is not 54 years, leading to application of a higher multiplier, is not at all acceptable. The deceased was a government servant, who had an authoritative record of his age, maintained by his employers in his service records. There is no reason to disbelieve the record of the deceased's age in his service-book. A copy of his service-book is available on record as Paper No. 29ग/3. The original of the service-book was produced before the Tribunal and the copy thereof filed was proved by PW-3, Vishnu Pratap Singh Chauhan, Senior Clerk in the office of the Executive Engineer, Irrigation Department. The service-book clearly shows the deceased's recorded date of birth as 01.07.1957. This clearly works out to the deceased being aged 54 years 2 months and 3 days on the date he died as a result of the accident. The postmortem report also estimates the deceased's age at about 55 years. This evidence is indeed enough to hold the deceased's age to be 54 years. The fact that PW-1 in her cross-examination has said that the deceased was aged 20 years at the time the witness and the deceased were married in the year 1974, cannot be relied upon to draw a different conclusion about the deceased's age. The reason is that PW-1 in her cross-examination also says that she does not know her husband's date of birth. She has also said that she also does not know her own date of birth. It is also said that her father-in-law had read up to Class-V and was not gainfully employed. Though she has said that she has read up to Class-VIII, the overall educational and socio-economic background of parties would not lead this Court to expect a very accurate account from the witness about the deceased's age on the date of the parties' marriage or even the year when the parties were married. On the basis of the estimated dates given out by PW-1, the deceased's recorded date of birth in his service record, much corroborated by the medico-legal evidence, cannot be disbelieved. The

contention of the learned Counsel for the insurers on this score is, therefore, not worthy of acceptance.

24. There is no other serious contention apart from the age related variation in the applicable multiplier, urged on behalf of the insurers to reduce the awarded compensation. It is, thus, evident that no case for reducing the awarded compensation is made out. This poses the question before the Court, which Mr. Sahai has argued very vociferously, whether on an appeal by the insurer, compensation to be awarded, can be enhanced unless there be a cross-appeal or objection preferred by the claimant? This Court has already noticed the authority which the learned Counsel for the insurers has pressed in aid of the aforesaid submission with much vehemence. It is the law laid down by the Supreme Court in **Ranjana Prakash**. No doubt, the law laid down in **Ranjana Prakash** specifically holds what the learned Counsel for the insurers canvasses, but the principle there does not appear to be the ruling precedent any longer. The aforesaid change in judicial opinion is evident from the pronouncement of the three Judge Bench of their Lordships of the Supreme Court in **Surekha and Others v. Santosh and Others, 2020 SCC OnLine SC 1312.** In **Surekha** *(supra)*, it has been held:

2. This appeal takes exception to the judgment and order dated 04.01.2019 passed by the High Court of judicature at Bombay, Bench at Aurangabad in First Appeal No. 2564 of 2016, whereby the High Court, even though agreed with the stand of the appellants that just compensation amount ought to be Rs. 49,85,376/- (Forty-Nine Lakh Eighty-Five Thousand Three Hundred Seventy-Six Only), however, declined to grant enhancement merely on the ground that the appellants had failed to file cross-appeal.

3. By now, it is well-settled that in the matter of insurance claim compensation in reference to the motor accident, the court should not take hyper technical approach and ensure that just compensation is awarded to the affected person or the claimants.

25. In working out the compensation, what is essential to be reckoned is the monthly income of the deceased. There is a well proven salary certificate from the deceased's employers, who are a department of the State. The certificate is on record as Paper No. 29 - ग / 9. It shows the gross monthly income of the deceased to be a figure of ₹52,041/-. The net income has been shown as ₹44,941/- per *mensem*. The total deductions include GPF, GIS and GVR, all of which are in the nature of made to funds/ Group Insurance etc. The deduction to be discounted from the income is one towards income tax, which is a figure of ₹3000/- per month. There is also on record a copy of the deceased's Form-16 submitted by the employer to the Income Tax Authorities for the Assessment Year 2011-12 (corresponding to the Financial Year 2010-11). A perusal of Form-16 relating to the deceased shows that the total income tax deposited is a sum of ₹45,500/- only. The said form shows that for 11 months, a sum of ₹3000/- has been deducted at source and in the 12th month, for the Assessment Year 2011-12, a sum of ₹12,900/- has been deducted. Thus, the Tribunal has determined the income tax deduction from the deceased's annual income at a figure of ₹45,500/-. The said deduction towards income tax is unexceptionable.

26. The Tribunal has worked out the compensation on the basis of a gross month salary of ₹52,041/-. This figure has been made the foundation to determine the

annual income of the deceased at a figure of ₹6,55,065/-. From the said sum of money, income tax has been deducted.

27. Now, from the said annual income of the deceased, the Tribunal has deducted a sum of ₹45,500/- towards income tax, which meets our approval, as already said. But, in addition to the deduction from the annual income on account of income tax, the Tribunal has further deducted a sum of ₹550/- per month, that is to say, a sum of ₹6,600/- for the year. This deduction has been made on the basis that the deceased was receiving a sum of ₹200/- per month towards City Compensatory Allowance (CCA) and a sum of ₹350/- per month towards MCA. The monthly sum of CCA and MCA works out to ₹550/- and adds up to an annual figure of ₹6,600/-. The Tribunal has been of opinion that these allowances are payments personally received by the deceased, that he would be utilizing during service. Since these sums would have been utilized by the deceased, the Tribunal has thought it proper to deduct whatever the deceased received towards CCA and MCA, during the year, from his annual income. This deduction ordered by the Tribunal, in our opinion, is not at all justified. Every allowance, that the deceased receives towards his remuneration, would count as his income. All that can be deducted is whatever goes out of the deceased's hands as levies of the State, like income tax or any sum of money, that would not enure to his benefit, if he were alive. For the said reason, deductions made as contributions to funds etc. are not liable to be deducted from the deceased's income and the Tribunal has not done that.

28. The question whether allowances and perquisites received by an employee during service ought to be deducted from his annual income while working out the claimants' dependency, fell for consideration of the Supreme Court in **Sunil Sharma and others v. Bachitar Singh and others, (2011) 11 SCC 425. In Sunil Sharma** *(supra),* it was observed:

(a) Computation of income

6. In *National Insurance Co. Ltd. v. Indira Srivastava* [(2008) 2 SCC 763 : (2008) 1 SCC (Cri) 550 : (2008) 1 SCC (Civ) 744 : AIR 2008 SC 845] S.B. Sinha, J. has observed that: (SCC p. 767, para 9)

"9. The term "income' has different connotations for different purposes. A court of law, having regard to the change in societal conditions must consider the question not only having regard to pay-packet the employee carries home at the end of the month but also other perks which are beneficial to the members of the entire family. Loss caused to the family on a death of a near and dear one can hardly be compensated on monetary terms."

7. His Lordship also stated that if some facilities were being provided whereby the entire family stood to benefit, the same must be held to be relevant for the purpose of computation of total income on the basis of which the amount of compensation payable for the death of the kith and kin of the applicants was required to be determined. This Court held that: (*Indira Srivastava case* [(2008) 2 SCC 763 : (2008) 1 SCC (Cri) 550 : (2008) 1 SCC (Civ) 744 : AIR 2008 SC 845] , SCC p. 768, para 12)

"12. ... superannuation benefits, contributions towards gratuity, insurance of medical policy for self and family and education scholarship were beneficial to the members of the family."

8. This Court clarified that by opining that: (*Indira Srivastava case*

[(2008) 2 SCC 763 : (2008) 1 SCC (Cri) 550 : (2008) 1 SCC (Civ) 744 : AIR 2008 SC 845] , SCC p. 771, para 17)

" "just compensation' must be determined having regard to the facts and circumstances of each case. The basis for considering the entire pay-packet is what the dependants have lost [in view of] death of the deceased. It is in the nature of compensation for future loss towards the family income."

and that: (*Indira Srivastava case* [(2008) 2 SCC 763 : (2008) 1 SCC (Cri) 550 : (2008) 1 SCC (Civ) 744 : AIR 2008 SC 845] , SCC p. 772, para 19)

"19. The amounts, therefore, which were required to be paid to the deceased by his employer by way of perks, should be included for computation of his monthly income as that would have been added to his monthly income by way of contribution to the family as contradistinguished to the ones which were for his benefit. We may, however, hasten to add that from the said amount of income, the statutory amount of tax payable thereupon must be deducted."

9. In *Raghuvir Singh Matolya v. Hari Singh Malviya* [(2009) 15 SCC 363 : (2010) 2 SCC (Cri) 546 : (2009) 5 SCC (Civ) 631] this Court has observed that dearness allowance and house rent allowance should be included for computation of income of the deceased.

10. In the present case, Haryana Women Development Corporation Ltd. certified that the deceased had drawn her salary for the month of July 2006 as under:

Basic pay	*Rs*	*7100*
DP	*Rs*	*3550*
DA	*Rs*	*2556*
HRA	*Rs*	*885*
CCA	*Rs*	*200*
Medical Allowance	*Rs*	*250*
Gross Total	*Rs*	*14,541*
Deduction		
EPF	*Rs*	*780*
GIS	*Rs*	*30*
Computer Advance	*Rs*	*500*
Total Deduction	*Rs*	*1310*

Net Payable = Rs 14,541 − Rs 1310 = Rs 13,231

11. Based on the aforementioned judgments, we are of the view that deductions made by the Tribunal on account of HRA, CCA and medical allowance are done on an incorrect basis and should have been taken into consideration in calculation of the income of the deceased. Further, deduction towards EPF and GIS should also not have been made in calculating the income of the deceased.

(emphasis by Court)

29. This Court is of opinion that the Tribunal erred in deducting a sum of ₹6,600/- from the annual income of the deceased.

30. There is no quarrel about the fact that the Tribunal has correctly made a deduction of 1/3rd from the deceased's income on account of personal expenses, bearing in mind the law laid down in **Sarla Verma (Smt.) and others v. Delhi Transport Corporation and another, (2009) 6 SCC 121**. This proceeds on the basis that the deceased's elder son, Rajesh Singh was not a dependent, as the Tribunal has found. The deceased's dependents were his widow, Smt. Lajjawati, his younger son, Arun Singh and his father Shiv Ram Singh, a senior citizen, aged 78 years. The rule regarding deduction towards personal

expenses has been laid down in **Sarla Verma** *(supra)* thus:

42. We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the table above (prepared by applying *Susamma Thomas* [(1994) 2 SCC 176 : 1994 SCC (Cri) 335] , *Trilok Chandra* [(1996) 4 SCC 362] and *Charlie* [(2005) 10 SCC 720 : 2005 SCC (Cri) 1657]), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years.

31. The dependents of the deceased being found to be three souls, the Tribunal has rightly directed deduction towards personal expenses of a 1/3rd out of the deceased's income. Likewise, the Tribunal has correctly applied the multiplier of '11' in this case, because the deceased was aged 54 years and going by the law laid down in Paragraph No.42 of the report in **Sarla Verma**, the multiplier of '11' has to be applied in the case of a deceased, where he is in the age group of 51-55 years. Thus, the Tribunal's opinion on the applicable multiplier is also correct.

32. The other issue that is involved is whether the claimants are entitled to add anything towards future prospects of the deceased, and if yes, how much. In view of what I have held in **F.A.F.O. No. - 614 of 2010, Smt. Ganpat Devi v. Istiyaq Ahmad and another, decided on 10.08.2022,** the claimants in this case are certainly entitled to add to the dependency what they have lost on account of future prospects of the deceased. Future prospects, as held in **Smt. Ganpat Devi** *(supra)* are to be determined in accordance with Rule 220-A(3) of the Uttar Pradesh Motor Vehicles Rules, 1998 (for short, 'the Rules of 1998'). Rule 220-A(3) of the Rules of 1998 reads:

220-A. Determination of Compensation-

(1) X X X

(2) X X X

(3) The future prospects of a deceased, shall be added in the actual salary or minimum wages of the deceased as under-

(i)	Below 40 years of age	:	50% of the salary
(ii)	Between 40-50 years of age	:	30% of the salary
(iii)	More than 50 years	:	20% of the salary
(iv)	When wages no sufficiently proved	:	50% towards inflation and price index

33. Here, the deceased was aged more than 50 years. He was 54. Therefore, the claimants are entitled to add on account of future prospects 20% of the deceased's salary in reckoning his income and the consequent loss of dependency. The Tribunal has not taken into reckoning future prospects of the deceased in working out the dependency. To this extent, the Tribunal has committed a manifest error.

34. Likewise, the Tribunal has awarded under the conventional heads, a sum of ₹5000/- to the widow for the loss of consortium and ₹4000/- towards funeral

expenses. This Court is afraid that the award of compensation under the conventional heads does not accord with the law at all. In this regard, there is a very different quantification to be done after the decision of the Supreme Court in **Pranay Sethi** and further elucidated in **Magma General Insurance Co. Ltd.** *(supra)*. I had occasion to consider the question of entitlement under the conventional heads in the foreshadow of the guidance in **Pranay Sethi and Magma General Insurance Co. Ltd., in F.A.F.O. No. 866 of 2011, Smt. Shanti Devi and others v. Anil Awasthi @ Anil Kumar Awasthi and another, decided on 30.05.2022. In Smt. Shanti Devi** *(supra),* it was held:

28. Again, so far as the conventional heads are concerned, this Court is of opinion that far less than what is to be awarded for the loss of estate, loss of consortium and funeral expenses has been directed by the Tribunal. Moreover, loss of consortium is not confined to the widow alone, but the parents too are entitled to be compensated for the loss of filial consortium. The two minor children are entitled to compensation on account of loss of parental consortium. In this regard, the holding of the Constitution Bench in **Pranay Sethi** is again of much relevance, where it is observed:

"48. This aspect needs to be clarified and appositely stated. The conventional sum has been provided in the Second Schedule to the Act. The said Schedule has been found to be defective as stated by the Court in Trilok Chandra *[UP SRTC v.* Trilok Chandra, *(1996) 4 SCC 362]* . *Recently, in Puttamma v. K.L. Narayana Reddy [Puttamma v.K.L. Narayana Reddy,* (2013) 15 SCC 45 : (2014) 4 SCC (Civ) 384 : (2014) 3 SCC (Cri) 574] it has been reiterated by stating : (SCC p. 80, para 54)

"54. ... we hold that the Second Schedule as was enacted in 1994 has now become redundant, irrational and unworkable due to changed scenario including the present cost of living and current rate of inflation and increased life expectancy."

49. As far as multiplier or multiplicand is concerned, the same has been put to rest by the judgments of this Court. Para 3 of the Second Schedule also provides for general damages in case of death. It is as follows:

"3. General damages (in case of death):

The following general damages shall be payable in addition to compensation outlined above:

(i)	Funeral expenses	₹ 2000
(ii)	Loss of consortium, if beneficiary is the spouse	₹ 5000
(iii)	Loss of estate	₹ 2500
(iv)	Medical expenses - actual expenses incurred before death supported by bills/vouchers but not exceeding	₹15,000

50. On a perusal of various decisions of this Court, it is manifest that the Second Schedule has not been followed starting from the decision in Trilok Chandra *[UP SRTC v.*Trilok Chandra, (1996) 4 SCC 362] and there has been no amendment to the same. The conventional damage amount needs to be appositely determined. As we notice, in different cases different amounts have been granted. A sum of Rs 1,00,000 was granted towards consortium inRajesh [*Rajesh v. Rajbir Singh*, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] . The justification for grant of consortium, as we find fromRajesh [*Rajesh v. Rajbir Singh*, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] , is founded on the observation as we have reproduced hereinbefore.

51. On the aforesaid basis, the Court has revisited the practice of awarding compensation under conventional heads.

52. As far as the conventional heads are concerned, we find it difficult to agree with the view expressed in Rajesh[*Rajesh v. Rajbir Singh*, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] . It has granted Rs 25,000 towards funeral expenses, Rs 1,00,000 towards loss of consortium and Rs 1,00,000 towards loss of care and guidance for minor children. The head relating to loss of care and minor children does not exist. Though*Rajesh* [*Rajesh v. Rajbir Singh*, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] refers to *Santosh Devi [Santosh Devi v. National Insurance* Co. Ltd., (2012) 6 SCC 421 : (2012) 3 SCC (Civ) 726 : (2012) 3 SCC (Cri) 160 : (2012) 2 SCC (L&S) 167] , it does not seem to follow the same. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs 15,000, Rs 40,000 and Rs 15,000 respectively. The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years. We are disposed to hold so because that will bring in consistency in respect of those heads."

29. The principles governing award of compensation under conventional heads, particularly with regard to award for loss of consortium, have been laid down by the Supreme Court in **Magma General Insurance Company Ltd. v. Nanu Ram alias Chuhru Ram and others, (2018) 18 SCC 130.** In Magma General Insurance Company Ltd. *(supra)*, it has been held:

"21. A Constitution Bench of this Court in *Pranay Sethi[National Insurance Co. Ltd. v. Pranay Sethi,* (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] dealt with the various heads under which compensation is to be awarded in a death case. One of these heads is loss of consortium. In legal parlance, "consortium" is a compendious term which encompasses "spousal consortium", "parental consortium", and "filial consortium". The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse : [*Rajesh v. Rajbir Singh*, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149]

21.1. Spousal consortium is generally defined as rights pertaining to the relationship of a husband-wife which

allows compensation to the surviving spouse for loss of "company, society, cooperation, affection, and aid of the other in every conjugal relation". [Black's Law Dictionary(5th Edn., 1979).]

21.2. Parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training".

21.3. Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.

22. Consortium is a special prism reflecting changing norms about the status and worth of actual relationships. Modern jurisdictions world-over have recognised that the value of a child's consortium far exceeds the economic value of the compensation awarded in the case of the death of a child. Most jurisdictions therefore permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to the parents is a compensation for loss of the love, affection, care and companionship of the deceased child.

23. The Motor Vehicles Act is a beneficial legislation aimed at providing relief to the victims or their families, in cases of genuine claims. In case where a parent has lost their minor child, or unmarried son or daughter, the parents are entitled to be awarded loss of consortium under the head of filial consortium. Parental consortium is awarded to children who lose their parents in motor vehicle accidents under the Act. A few High Courts have awarded compensation on this count [Rajasthan High Court in *Jagmala Ram v. Sohi Ram*, 2017 SCC OnLine Raj 3848 : (2017) 4 RLW 3368; Uttarakhand High Court in *Rita Rana v. Pradeep Kumar*, 2013 SCC OnLine Utt 2435 : (2014) 3 UC 1687; Karnataka High Court in *Lakshman v. Susheela Chand Choudhary*, 1996 SCC OnLine Kar 74 : (1996) 3 Kant LJ 570] . However, there was no clarity with respect to the principles on which compensation could be awarded on loss of filial consortium.

24. The amount of compensation to be awarded as consortium will be governed by the principles of awarding compensation under "loss of consortium" as laid down in*Pranay Sethi* [*National Insurance Co. Ltd. v. Pranay Sethi*, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] . In the present case, we deem it appropriate to award the father and the sister of the deceased, an amount of Rs 40,000 each for loss of filial consortium."

30. It must be noted that under Rule 220-A(4) of the Rules of 1998, compensation or damages under the non pecuniary heads or the conventional heads have been stipulated. But, these are disadvantageous to the claimants and do not confer better or greater benefit upon them in comparison to liquidated figures laid down in ***Pranay Sethi*.** The figures under the conventional heads have been arrived at, bearing in mind the price index, falling bank interest, escalation of rates in different cases. There is a provision for 10% upward revision to be done in a span of three years. By contrast, the Rules of 1998, that have been amended to bring in Rule 220-A more than ten years ago, in the year 2011, cannot serve as a realistic index to award compensation under the conventional heads. The determination of

compensation in ***Pranay Sethi*** would, therefore, be applicable. The revised and dynamic determination of compensation payable under the conventional heads stipulated in ***Pranay Sethi*** would prevail over that under the Rules of 1998. It is held, accordingly.

(emphasis supplied)

35. In view of the guidance in **Pranay Sethi** and **Magma General Insurance Co. Ltd.** and the way entitlement under the conventional heads has been determined in **Smt. Shanti Devi,** the question would arise as to who, amongst the claimants, would be entitled to compensation on account of loss of consortium. There is no doubt that the widow is entitled to spousal consortium and the deceased's father to filial consortium, going by the principles in **Magma General Insurance Co. Ltd.** But, so far as the two sons of the deceased are concerned, this Court is of opinion that they are not entitled to anything on account of loss of consortium. A distinction has to be made between children who are minors on one hand and adults on the other. I had occasion to consider the issue in **Jiuti Devi and others v. Manoj Kumar Rai and others, 2022 SCC OnLine All 46,** where it was held:

39. Loss of consortium, that includes parental consortium, unlike dependency, is not some tangible economic loss. It is an emotional loss to the next of kin of the deceased-victim of a motor accident. In case of parental loss, it causes a particular deprivation to minors and young children, about whom it is said by the *Supreme Court in United India Insurance Co. Ltd. v. Satinder Kaur alias Satwinder Kaur*, to borrow the words of their Lordships, "Parental Consortium is awarded to the children who lose the care and protection of their parents in motor vehicle accidents".

40. To the understanding of this Court, the impact of loss of parental consortium upon the deceased's children, in the very nature of that loss, is dependent upon the children's age. The loss of parent is a disheartening and emotional event for the child at any age of his maturity, but by the nature of the principle governing award of compensation under the head of parental consortium, the deprivation, that is suffered by a child or a minor, appears to be the determinative and entitling fact. A child, who has advanced into matured adulthood, is married or otherwise in the mainstream of life, would not be entitled to compensation under that head.

36. The two sons of the deceased, Arun Singh and Rajesh are adults. Rajesh Singh is a married man and has two children. He was married 5-6 years ago, reckoned from the time that PW-1 testified before the Tribunal. He was aged 34 years at the relevant time and employed with the B.S.A. College. The younger son, Arun Singh, who was aged 20 years at the relevant time and reading to earn his B.Tech. Degree, is also an adult. In the opinion of this Court, the two adult sons of the deceased are not entitled to any compensation on account of loss of consortium on the principle laid down in **Jiuti Devi.**

37. It goes without saying that the claimants would be entitled to a sum of ₹15,000/- towards loss of estate and a like sum towards funeral expenses.

38. There is no good ground to accept the insurers' appeal, but this Court is of opinion that the award passed by the Tribunal is required to be revised, in

accordance with the settled principles, so that the claimants may be awarded just compensation. Accordingly, the award stands revised and redetermined as stipulated below:

Sl.	Particulars	Amount
(i)	Monthly Income of the deceased	₹52,041/-
(ii)	Monthly Income + Future Prospects (monthly income x 20%) = 52,041+ 10,408	₹62,449/-
(iii)	Annual Income of the deceased = (62,449 x 12) - Income Tax = 7,49,388 - 45,500	₹7,03,888/-
(iv)	Annual Dependency = Annual Income - one-third deduction towards personal expenses of the deceased = 703,888 - 2,34,629	₹4,69,259/-
(v)	Total dependency = Annual Dependency x Applied Multiplier = 4,69,259 x 11	₹51,61,849/-
(vi)	Claimant's entitlement under the conventional heads = Loss of Estate + Funeral Expenses + Dependents' consortium (15,000 + 15,000+ 40,000 x 2)	₹1,10,000/-
(vii)	Total Compensation = Total Dependency + Claimant's entitlement under the conventional heads	₹52,71,849/-

39. Accordingly, the impugned award passed by the Tribunal is **modified** and the compensation awarded **enhanced** to a total sum of ₹52,71,849/- (Rupees Fifty Two Lac, Seventy One Thousand, Eight Hundred and Forty Nine only). The compensation would carry Simple Interest at the rate of 7% per *annum* from the date of institution of the claim petition, until realisation. However, the sum of money already deposited (paid or invested in terms of the impugned award or interim orders of this Court) shall be adjusted.

40. This appeal is **disposed of** in terms of the above orders.

(2022) 11 ILRA 885
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 14.10.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Misc. Bail Application No. 11345 of 2022

Suraj Verma ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Anand Prakash Pandey, Desh Raj Chaurasiya

Counsel for the Opposite Party:
G.A.

Indian Penal Code, 1860 - Section 363- Initially F.I.R. lodged against unknown persons-no whisper about the Applicant in the F.I.R.-statement u/s 161 Cr.P.C. recorded after the dead body was recovered-false story made by the complainant- after taking an overall view - period of detention already undergone -nature of evidence and absence of any convincing material to indicate tampering with the evidence-in F.I.R.-no whisper regarding complicity of the Applicant-no external injury found on body-deceased recovered from well-case of suicide.

Bail Application allowed. (E-9)

List of Cases cited:

Dataram Singh Vs St.of U.P. & anr., reported in (2018) 3 SCC 22

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Counter affidavit filed on behalf of State is taken on record.

2. Heard Shri Anand Prakash Pandey, the learned counsel for the applicant, Shri Alok Kumar Vyas, the learned A.G.A. for the State and perused the record.

3. The applicant, **Suraj Verma**, has moved the present bail application seeking bail in Case Crime No. 280 of 2022, under Section 306 I.P.C., Police Station Lalganj, District Pratapgarh.

4. Learned counsel for the applicant submits that applicant is innocent and has falsely been implicated in the present case due to enmity and property dispute situated in the same village.

5. Learned counsel for the applicant initially F.I.R. was lodged under Section 363 I.P.C. in unknown. There is no any whisper about the applicant in the F.I.R. and even though F.I.R. was lodged after two days of the alleged incident of missing of minor daughter of complainant, that too, without any plausible explanation of delay.

6. Learned counsel for the applicant further submits that statement of the complainant under Section 161 Cr.P.C. was recorded on 26.05.2022 after the dead body of the victim was recovered from a well wherein he developed his case and false story has been made that applicant and the victim were in relation and false promise of marriage was made by the applicant with her, and when the applicant had refused to marry with the victim then she committed suicide.

7. Learned counsel for the applicant further submits that entire case is built up by the complainant after the legal advice and afterthought. No such incident, as alleged by the complainant in his statement recorded under Section 161 Cr.P.C., took place.

8. Learned counsel for the applicant further submits that in the postmortem of the deceased no external injury was found on her entire body and cause of death was found to be asphyxia due to ante mortem drowning.

9. Learned counsel for the applicant further submits that reference of mobile No. 9935885772 which was given by the complainant in his statement recorded under Section 161 Cr.P.C. does not belong to the applicant and he never talked with the deceased on her mobile as alleged by the complainant. The Investigating Agency also failed to collect any evidence against the applicant regarding alleged mobile number and there is no proof that the said number belongs to the applicant. It is also a case of the applicant that the said mobile number and simcard was never recovered from the possession of application. Further the case of applicant is that he was neither having any love affair with the deceased, nor he has made any promise of marriage with the deceased. The victim has never moved any complaint to any authority that application was in relation with her on giving false promise of marriage and now he had refused for the same. The entire story was developed by the complainant after recovery of dead body of the deceased from the well, otherwise there must be some whisper in the F.I.R. regarding the relation of applicant with the deceased. The main dispute regarding false implication of applicant is that there is a land dispute between the family members of the applicant and the deceased. The said land is adjacent to each other, which is evident

from Khatauni of the property, which fact has been stated in para-11 of the affidavit filed in support of the bail application.

10. Learned counsel for the applicant further submits that it is also a case of the applicant that earlier the mother of the deceased had also threatened the mother of the applicant that she will implicate the applicant in a case, regarding which mother of applicant has moved an application on 19.10.2021 before the concerned police station on 19.10.2021, copy of which has been filed as Annexure-6 to the affidavit filed in support of the bail application.

11. Learned counsel for the applicant further submits that statements of interested witnesses cannot be said to be reliable as they have given false statement in support of the prosecution case. The age of the deceased was in between 17 years and 22 days on the date of occurrence as per her educational certificate.

12. Learned counsel for the applicant further submits that applicant has never abetted the victim to commit suicide. From perusal of F.I.R. and from the statement of complainant and other witnesses no case under Section 306 I.P.C. is made out. Even prosecution has failed to proof that case under Section 306 I.P.C. is made out as the essential ingredients for proving the said provisions are not fulfilled either on perusal of the F.I.R. or on perusal of statements of complainant and witnesses. The entire prosecution story is false and fabricated and has been cooked up with malafide intention, therefore, the applicant is entitled to be released on bail by this Court sympathetically.

13. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It has also been pointed out that the accused is not having any criminal history, which fact has been stated in para-18 of the affidavit filed in support of the bail application. The applicant is in jail since 04.06.2022 and that in the wake of heavy pendency of cases in the Court, there is blinking chances of any early conclusion of trial as till date not a single witness has been examined.

14. Learned A.G.A. while opposing the prayer for bail.

15. After perusing the record in the light of the submissions made at the Bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, considering the fact that in the F.I.R. there is no whisper regarding complicity of applicant; in his statement recorded under Section 161 Cr.P.C. after the dead body of the victim was recovered from a well the complainant developed his case by stating that applicant and the victim were in relation and false promise of marriage was made by the applicant with her, and when the applicant had refused to marry with the victim then she committed

suicide; in the postmortem of the deceased no external injury was found on her entire body and cause of death was found to be asphyxia due to ante mortem drowning; reference of mobile No. 9935885772 which was given by the complainant is also not belong to the applicant, he never talked with the deceased on her mobile as alleged by the complainant and the Investigating Agency also failed to collect any evidence against the applicant regarding alleged mobile number and there is no proof that the said number belongs to the applicant and the said mobile number and simcard was never recovered from the possession of applicant; the entire story was developed by the complainant after recovery of dead body of the deceased from the well, otherwise there must be some whisper in the F.I.R. regarding the relation of applicant with the deceased; there appears force in the submission of the learned counsel for the applicant that main dispute regarding false implication of applicant is that there is a land dispute between the family members of the applicant and the deceased, which is evident from Khatauni of the property, which fact has been stated in para-11 of the affidavit filed in support of the bail application; it is also a case of the applicant that earlier mother of the deceased had also threatened the mother of the applicant that she will implicate the applicant in a case, regarding which mother of applicant has moved an application on 19.10.2021 before the concerned police station on 19.10.2021, copy of which has been filed as Annexure-6 to the affidavit filed in support of the bail application; prosecution has failed to proof that case under Section 306 I.P.C. is made out as the essential ingredients for proving the said provisions are not fulfilled either on perusal of the F.I.R. or on perusal of statements of complainant and witnesses; and considering the larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of **Dataram Singh vs. State of UP and another**, reported in **(2018) 3 SCC 22,** this Court is of the view that the applicant may be enlarged on bail.

16. The prayer for bail is granted. The application is allowed.

17. Let the applicant, **Suraj Verma**, involved in Case Crime No. 280 of 2022, under Section 306 I.P.C., Police Station Lalganj, District Pratapgarh, be enlarged on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date fixed in the court below and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

(3) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

(4) The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

(5) In case, the applicant misuses the liberty of bail and in order to secure his presence proclamation under Section 82 Cr.P.C. is issued and the applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(6) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge

and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court default of this condition is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of his bail and proceed against him in accordance with law.

(7) The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

(8) 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.

18. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

19. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merit of the case.

(2022) 11 ILRA 889
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 14.10.2022

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Misc. Bail Application No. 11656 of 2022

Abbu Sahma ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Farooq Ayoob, Km. Pooja Tiwari

Counsel for the Opposite Party:
G.A.

Bail-Indian Penal Code, 1860 - Sections 304 & 308 -Applicant is the organizer of *nautanki* in the village-He arrived at the place and started unloading explosive substance and articles of nautanki programme from his own vehicle-but in rush of doing so-explosion took place in the vehicle-three persons sustained injuries- one died-unlikelihood of early conclusion of trial-and absence of any convincing material-no role assigned to the Applicant in the FIR in causing the explosion.

Bail granted. (E-9)

List of Cases cited:

Dataram Singh Vs St.of U.P. & anr., reported in (2018) 3 SCC 22

(Delivered by Hon'ble Shamim Ahmed, J.)

1. Heard Km. Pooja Tiwari, learned counsel for the applicant as well as learned AGA for the State and also perused the material placed on record.

2. By means of the present bail application, the applicant- Abbu Sahma seeks bail in Case Crime No. 163 of 2022, under Sections 304, 308 IPC and section 5 Explosive Substances Act, Police Station Dariyabad, District Barabanki, during the pendency of trial.

3. Learned counsel for the applicant submits that an FIR was lodged on 23.5.2022 by the complainant S.I. Suresh Chandra Mishra against the applicant and coaccused Sultan alleging therein that when on 22.5.2002, In charge out post Dariybad Sub Inspector Surendra Mishra alongwith some constables was on foot patrol from the outpost in the town of Dariyabad, he received information through mobile phone that explosion has been done in the vehicle

in village Saraishah Alam, in which three persons have seriously been injured. On that information, he alongwith his force team reached on spot and saw that three persons in vehicle No. UP 41 T6010 Tata 407 were suffering from serious injuries on account of explosion. Thereafter, they were brought to CHC Mathuranagar for their treatment and during the course of treatment one injured Raju died. It is further alleged therein that that coaccused Sultan had his own marriage and after getting married he came to his village with his wife. On the occasion of happiness of marriage, coaccused Sultan wanted to get nautanki exhibited in his village. He said to the applicant who was owner of the nautanki to come to the village and organize an nautanki party, upon which the applicant after loading explosive substances and articles of nautanki programme in his own vehicle reached at village Saraishah Alam at about 19:00 O'clock alongwith Raju, Banwari Lal, Dhannu and Ayub. Co-accused Sultan asked the accused applicant to quickly unload the articles and start the nautanki programme very soon. Due to this rush in unloading the articles, an explosion took place in the vehicle and three persons sustained injuries who were taken to CHC where injured Raju was declared died by doctor and other two injured namely Banwari Lal and Dhannu was referred to District Hospital. Due to negligence of applicant and coaccused Sultan the alleged incident occurred.

4. Learned counsel for the applicant further submits that the applicant is innocent and has falsely been implicated in the present case. The applicant has no role in causing the alleged explosion. The ammunition (explosive substance) which is used on the occasion of marriage was kept in the vehicle and the applicant and nautanki team were also going in the said vehicle. The injured were also doing drama in Nautanki and the explosion was caused due to unavoidable circumstances. Thus there is no role of the applicant or any other coaccused person named in the FIR for causing the alleged explosion. It is a case of accident and the death was unintentional, for which the applicant is not responsible, even though the statements of the independent witnesses were recorded in which they have also stated that it is case of accident and there was no involvement of the applicant in causing the alleged explosion. As per the post mortem examination report of deceased cause of death is due to shock and hemorrhage as a result of ante mortem blast injuries.

5. Learned counsel for the applicant further submits that there is vast material contradiction in the statements of the independent witnesses and the version of FIR. As per the version of FIR and the statements of the independent witnesses no specific role has been assigned to the applicant. No incriminating article has been recovered from the possession of the applicant or at his pointing out. The statement of injured namely Dhannu has neither been recorded under section 161 Cr.P.C. nor has been made witness of charge sheet.

6. Learned counsel for the applicant referred to the statement of one independent witness Askgar Ali under section 161 Cr.P.C. who was working as Joker in Nautanki, in which he stated that coaccused Shiv Kumar who was also working in Nautanki team had kept Baruud in his bag and while dragging articles in hurried manner, the Baruud suddenly exploded, due to which the alleged incident

occurred. It is a case of accident and as per his statement no role has been assigned to the applicant.

7. Learned counsel for the applicant submits that the role of applicant was of carrying the explosive substance in his vehicle and while unloading the nautanki articles from the vehicle the ammunition (explosive substances) kept in the vehicle blasted. Thus it is a case of accident.

8. Learned counsel for the applicant submits that, coaccused Shiv Kumar, who is identically placed and similar allegation has been levelled as of the applicant, has already been granted bail by a coordinate bench of this Court vide order dated 8.8.2022 in Criminal Misc. Bail Application No. 7885 of 2022 and the case of the present applicant is not on the worse footing than that of the said co-accused, has already been granted bail by this Court , thus the bail application of the applicant may also be considered by this Court sympathetically and the applicant is also entitled for the benefit of the same and to be released on bail.

9. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the applicant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. The applicant undertakes that in case he is released on bail, he will not misuse the liberty of bail and will cooperate in trial. It has also been pointed out that the accused is not having any criminal history and he is in jail since 24.5.2022 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

10. Learned AGA opposed the prayer for bail and submitted that due to action of the applicant the blast took place and one person died but did not dispute the fact that on similar allegation coaccused Shiv Kumar has already been granted bail by a coordinate bench of this Court.

11. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, considering the fact that the applicant and three injured person including deceased were sitting in the vehicle and the explosive substances and nautanki articles were kept in the vehicle, while unloading the nautanki articles the explosive substances blasted, as per the version of FIR and the statements of the independent witnesses no role has been assigned to the applicant in causing the explosion and it is a case of accident; there is vast material contradiction in the statements of the independent witnesses and the version of FIR; on similar allegation the aforesaid coaccused has already been granted bail by a coordinate bench of this Court, therefore, the case of the present applicant also does not appear to be on the worse footing than that of the aforesaid coaccused, thus the bail application of the present applicant is being considered by this Court sympathetically and further considering the larger mandate of

Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of **Dataram Singh Vs. State of U.P. and another, reported in (2018) 3 SCC 22,** this Court is of the view that the applicant may be enlarged on bail.

12. The prayer for bail is granted. The application is allowed.

13. Let the applicant Abbu Sahma involved in Case Crime No. 163 of 2022, under Sections 304, 308 IPC and section 5 Explosive Substances Act, Police Station Dariyabad, District Barabanki, be released on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date fixed in the court below and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

(3) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

(4) The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

(5) 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.

(6) The applicant shall remain present in person, before the trial court on the date 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.

(7) The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

(8) 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.

14. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of the applicant's bail.

15. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

(2022) 11 ILRA 892
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.10.2022

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ A No. 9535 of 2022
Alongwith other cases

Smt. Anupam Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri V.K. Agnihotri

Counsel for the Respondents:
C.S.C., Sri Chandan Kumar, Sri Vikram Bahadur Singh

Rule 153 (I) of Chapter XIII of the U.P. Fundamental Rules in Financial Handbook Volume-II, Part 2 to 4, Maternity Benefit Act,1961: The writ petitioners-who are working as Assistant Teachers in Primary Schools managed by the Uttar Pradesh Basic Education Department-the online maternity leave application has been turned down on the ground "not admissible"-Second maternity leave cannot be granted where there is difference of less than two years between the end of the first maternity leave and grant of second maternity leave-The admissibility of leave to a women with regard to second pregnancy which would be governed by the Maternity Benefit Act, 1961 and not Rule 153 (1) of the Financial Handbook Volume II to IV.

W.P. allowed. (E-9)

List of Cases cited:

1. Service Single No.32394 of 2019 (Smt. Richa Shukla Vs State of U.P. through Addl. Chief Secretary Basic Education Lko & others)

2. Renu Chaudhary Vs St. of U.P. & ors. reported in 2022 (2) ADJ 14

3.Municipal Corpn. of Delhi Vs Female Workers (Muster Roll), (2000) 3 SCC 224

4.Hindustan Antibiotics Ltd. Vs Workmen [AIR 1967 SC 948 :(1967) 1 SCR 652 : (1967) 1 LLJ 114]

5. Yusuf Abdul Aziz Vs St. of Bombay [AIR 1954 SC 321 : 1954 SCR930]

6. Dr. Rachna Chaurasiya Vs St.of U.P. & ors. [2017(11) ADJ 399 (DB)]7.Anshu Rani Vs St. of U.P. & ors., Writ-A No. 3486 of 2019

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

1. These writ petitions raise common questions of law and facts and thus are being decided together by a common order. The writ petitioners, who are working as Assistant Teachers in Primary Schools managed by the Uttar Pradesh Basic Education Department, have approached this Court assailing the orders passed by the competent authority / District Basic Education Officer whereby and whereunder the sanction of maternity leave for 180 days has been turned down by stating that the same is not admissible/ or on the ground that the period of 2 years have not elapsed from the date of the expiry of the last maternity leave granted to them under the proviso to Rule 153 (I) of Chapter XIII of the U.P. Fundamental Rules in Financial Handbook Volume-II, Part 2 to 4.

2. In order to adjudicate the legal issue involved the facts of writ petition No. 9535 of 2022 are being considered.

3. The writ petitioner was appointed as Assistant Teacher at Primary School Dhakatal Mahewa District Etawah vide appointment letter dated 28.6.2016. The petitioner gave birth to a male child on 4.1.2021. Thereafter, the petitioner again became pregnant and applied for maternity leave online on 17.6.2022. The online maternity leave application of the petitioner has been turned down on the ground "not admissible" by the impugned order dated 23.6.2022. It is contended by learned counsel for the petitioner that rejection of the maternity leave to the petitioner by the impugned order is patently illegal as no reasons whatsoever has been disclosed by the District Basic Education Officer in turning down the maternity leave to the

petitioner. He submits that the maternity leave is the right of a women employee during pregnancy and cannot be turned down in the manner as has been done by the respondents. Learned counsel has placed reliance upon a decision of the co-ordinate Bench dated 11.12.2019 passed in ***Service Single No. 32394 of 2019 (Smt. Richa Shukla versus State of U.P. through Addl. Chief Secretary Basic Education Lko & others)*** to submit that maternity leave to the petitioner therein was refused by orders dated 13.11.2019 and 27.11.2019. The Court proceeded to quash the orders dated 13.11.2019 and 27.11.2019 allowed the writ petition and issued a writ of mandamus directing the respondent No. 4 therein to consider the case of the petitioner for grant of maternity leave. Learned counsel for the petitioner accordingly submits that petitioner is equally circumstanced and is also entitled to the relief as extended to the petitioner of Service Single No. 32394 of 2019.

4. Shri Chandan Kumar, learned Standing Counsel, in opposition, to the writ petition submits that the claim of the writ petitioner for maternity leave has been turned down as the same is not admissible on the ground that period of two years has not elapsed from the date of expiry of the last maternity leave granted to the petitioner under the proviso of Rule 153 (1) of Chapter XIII of U.P. Fundamental Rules in Financial Handbook Volume-II, Part 2 to 4. He further submits that the controversy involved in the present writ petition has been settled by a co-ordinate Bench of this Court in the case of ***Renu Chaudhary versus State of U.P. and others reported in 2022 (2) ADJ 14*** wherein the Court has proceeded to hold that the petitioner therein who is an Assistant Teacher employed with an Institution established and maintained by the Uttar Pradesh Basic Education Board is governed by the Service Rules applicable to teachers of Primary Schools maintained by the Board and other Rules including rules that apply regarding grant of leave. An employee of the Institution run and managed by the U.P. Basic Education Board is not an employee of an establishment to which the Maternity Act applies. There is no conflict between the second proviso to Rule 153 of the Fundamental Rules and the Maternity Act which does not apply to the establishment of the Basic Education Board or the schools maintained by it. The restriction on the Right to Maternity Leave of a female Government servant with regard to the birth of her child would be reckoned with reference to the number of children living at the time she applies for maternity leave irrespective of the fact whether the two children living were born before or after she entered the Government Service. Shri Chandan Kumar thus prays that the petitioner herein is not entitled to claim parity to the decision passed in Service Single No. 32394 of 2019 and the writ petition is liable to be dismissed.

5. The rival contentions fall for consideration.

6. I have heard the learned counsel for the parties at length and have perused the record.

7. Learned counsel for the respondent has placed heavy reliance on the decision of the co-ordinate Bench of this Court in the case of ***Renu Chaudhary (supra)*** to non suit the petitioner. Having gone through the aforesaid decision, I find that the decision proceeds on the premise that the Maternity Benefit Act, 1961 is not applicable to the establishment of the Basic

Education Board or the Schools maintained by it. The decision further rules that there is clearly no conflict between the second proviso to Rule 153 of the Rules and the Maternity Benefit Act, 1961. Rather no question of any conflict with the Maternity Benefit Act, 1961 can be said to arise with the leave rules i.e. the Fundamental Rule 153 as the Maternity Benefit Act, 1961 is not applicable to the case of the petitioner. On the other hand, the learned counsel for the petitioner has placed reliance also upon a decision of a co-ordinate Bench of this Court passed in ***Service Single 32394 of 2019 Smt. Richa Shukla (supra)*** wherein the decision proceeds on the assumption that the Maternity Benefit Act, 1961 applies to the case of the petitioner and has an overriding effect in view of the Section 27 of the Maternity Benefit Act, 1961.

8. The moot question in the opinion of the Court is thus regarding the applicability of the Maternity Benefit Act, 1961 to the case of the petitioner. There is no dispute with regard to the applicability of the Fundamental Rules i.e. Rule 153 (1) of Chapter XIII of U.P. Fundamental Rules in Financial Handbook Volume-II, Part 2 to 4. The parties are at variance only with regard to the applicability of the Maternity Benefit Act, 1961.

9. In consonance with the provisions of Article 42 contained in Part IV of the Constitution of India, the Parliament has promulgated the Maternity Benefit Act, 1961. Since Article 42 specifically speaks of "just and humane conditions of work and maternity relief", the validity of an executive or administrative action in denying maternity benefit has to be examined on the anvil of Article 42 which, though not enforceable at law, is nevertheless available for determining the legal efficacy of the action complained of.

10. The provisions of Financial Handbook Volume II to IV on the other hand were made by the Governor in exercise of his powers under Section 241(2)(b) of the Government of India Act, 1935 and are continuing in force on the strength of the provisions contained in Article 13 of the Constitution of India. The Financial Handbook contains rules which governed the services of the person serving in connection with the affairs of a province, and are at best in the nature of executive instructions, and are clearly not in the category of "an enactment" made by the legislature.

11. To attract the provisions of Article 254 of the Constitution the first requirement is that both the laws should be enactments of the respective legislatures, that is, one of the laws should be a enactment of the Parliament while the second should be a law made by the State legislature. The Maternity Benefit Act 1961 has been enacted by the Parliament while the provisions of the Financial Handbook Volume II to IV are at best executive instructions.

12. The Supreme Court in the case of ***Municipal Corpn. of Delhi v. Female Workers (Muster Roll), (2000) 3 SCC 224*** has looked into the various provisions of the Constitution for the finding the source and power to legislate with respect to the Maternity Benefit Act, 1961, and observed as under:-

"6. Not long ago, the place of a woman in rural areas had been traditionally her home; but the poor illiterate women forced by sheer poverty now come out to seek various jobs so as to overcome the economic hardship. They also take up jobs which involve hard physical

labour. The female workers who are engaged by the Corporation on muster roll have to work at the site of construction and repairing of roads. Their services have also been utilised for digging of trenches. Since they are engaged on daily wages, they, in order to earn their daily bread, work even in an advanced stage of pregnancy and also soon after delivery, unmindful of detriment to their health or to the health of the new-born. It is in this background that we have to look to our Constitution which, in its Preamble, promises social and economic justice. We may first look at the fundamental rights contained in Part III of the Constitution. Article 14 provides that the State shall not deny to any person equality before law or the equal protection of the laws within the territory of India. Dealing with this article vis-à-vis the labour laws, this Court in Hindustan Antibiotics Ltd. v. Workmen [AIR 1967 SC 948 : (1967) 1 SCR 652 : (1967) 1 LLJ 114] has held that labour to whichever sector it may belong in a particular region and in a particular industry will be treated on equal basis. Article 15 provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Clause (3) of this article provides as under:

"15. (3) Nothing in this article shall prevent the State from making any special provision for women and children."

7. In Yusuf Abdul Aziz v. State of Bombay [AIR 1954 SC 321 : 1954 SCR 930] it was held that Article 15(3) applies both to existing and future laws.

8. From Part III, we may shift to Part IV of the Constitution containing the Directive Principles of State Policy. Article 38 provides that the State shall strive to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice, social, economic and political shall inform all the institutions of the national life. Sub-clause (2) of this article mandates that the State shall strive to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities.

9. Article 39 provides, inter alia, as under:

"39. Certain principles of policy to be followed by the State.--

The State shall, in particular, direct its policy towards securing--

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood;

*(b)-(c)****

(d) that there is equal pay for equal work for both men and women;

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

*(f) ***"*

10. Articles 42 and 43 provide as under:

"42. Provision for just and humane conditions of work and maternity relief.--The State shall make provision for securing just and humane conditions of work and for maternity relief.

43. Living wage, etc., for workers.--The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or cooperative basis in rural areas."

11. It is in the background of the provisions contained in Article 39, specially in Articles 42 and 43, that the claim of the respondents for maternity benefit and the action of the petitioner in denying that benefit to its women employees has to be scrutinised so as to determine whether the denial of maternity benefit by the petitioner is justified in law or not.

12. Since Article 42 specifically speaks of "just and humane conditions of work" and "maternity relief", the validity of an executive or administrative action in denying maternity benefit has to be examined on the anvil of Article 42 which, though not enforceable at law, is nevertheless available for determining the legal efficacy of the action complained of.

13. Parliament has already made the Maternity Benefit Act, 1961. It is not disputed that the benefits available under this Act have been made available to a class of employees of the petitioner Corporation. But the benefit is not being made available to the women employees engaged on muster roll, on the ground that they are not regular employees of the Corporation. As we shall presently see, there is no justification for denying the benefit of this Act to casual workers or workers employed on daily-wage basis.

13. Apart from the provisions contained in the Chapter IV of the Constitution of India it is also noticed that entry 24 of List III of VII Schedule specifically provide for maternity benefits for ready reference entry 24 is as under:-

"24. welfare of labour including conditions of work, Provident fund employers liability workmen's compensation, invalidity and old age pension and maternity benefit."

14. In light of the above, this Court is of the considered opinion that the Maternity Benefit Act 1961 has been enacted by the Parliament on a subject which finds mention in entry 24 of list III, and it was totally within its competence to make such an enactment. Even if the State legislature were to make such a law, overriding the provisions contained in the Maternity Benefit Act then the said Act would be reserved for accent of the President and would be enforceable only after obtaining such an accent as provided in article 254 (2) of the Constitution of India.

15. In order to appreciate the respective contentions of the learned counsel for the parties, it would be apt to reproduce the relevant provisions of the Maternity Benefit Act, 1961 as also the relevant provisions of the Financial Handbook, particularly, Rule 153 which are as under:

Section 3(h) of 1961 Act "maternity benefit" means the payment referred to in subsection (1) of section 5. Section 5 of 1961 Act reads as under:-

"5. Right to payment of maternity benefit.-

(1) Subject to the provisions of this Act, every woman shall be entitled to, and her employer shall be liable for, the payment of maternity benefit at the rate of the average daily wage for the period of her actual absence, that is to say, the period immediately preceding the day of her delivery, the actual day of her delivery and any period immediately following that day.

(2) No woman shall be entitled to maternity benefit unless she has actually worked in an establishment of the employer from whom she claims maternity benefit,

for a period of not less than [eighty days] in the twelve months immediately preceding the date of her expected delivery:

Provided that the qualifying period of [eighty days] aforesaid shall not apply to a woman who has immigrated into the State of Assam and was pregnant at the time of the immigration.

(3) The maximum period for which any woman shall be entitled to maternity benefit shall be [Twenty six weeks of which not more than eight weeks] shall precede the date of her expected delivery:-

Provided that the maximum period entitled to maternity benefit by a woman having two or more than two surviving children shall be twelve weeks of which not more than six weeks shall precede the date of her expected delivery:

[Provided further that] where a woman dies during this period, the maternity benefit shall be payable only for the days up to and including the day of her death: [Provided also that] where a woman, having been delivered of a child, dies during her delivery or during the period immediately following the date of her delivery for which she is entitled for the maternity benefit, leaving behind in either case the child, the employer shall be liable for the maternity benefit for that entire period but if the child also dies during the said period, then, for the days up to and including the date of the death of the child.

(4) A woman who legally adopts a child below the age of three months or a commissioning mother shall be entitled to maternity benefit for a period of twelve weeks from the date the child is handed over to the adopting mother or the commissioning mother, as the case may be]

(5) In case where the nature of work assigned to a woman is of such nature that she may work from home, the employer may allow her to do so after availing of the maternity benefit for such period an on such conditions as the employer and the woman may mutually agree]"

16. Section 6 of 1961 Act reads as under:-

"6. Notice of claim for maternity benefit and payment thereof.-

(1) Any woman employed in an establishment and entitled to maternity benefit under the provisions of this Act may give notice in writing in such form as may be prescribed, to her employer, stating that her maternity benefit and any other amount to which she may be entitled under this Act may be paid to her or to such person as she may nominate in the notice and that she will not work in any establishment during the period for which she receives maternity benefit.

(2) In the case of a woman who is pregnant, such notice shall state the date from which she will be absent from work, not being a date earlier than six weeks from the date of her expected delivery.

(3) Any woman who has not given the notice when she was pregnant may give such notice as soon as possible after the delivery.

(4) On receipt of the notice, the employer shall permit such woman to absent herself from the establishment during the period for which she receives the maternity benefit.

(5) The amount of maternity benefit for the period preceding the date of her expected delivery shall be paid in advance by the employer to the woman on production of such proof as may be prescribed that the woman is pregnant, and the amount due for the subsequent period shall be paid by the employer to the woman within forty-eight hours of production of

such proof as may be prescribed that the woman has been delivered of a child.

(6) The failure to give notice under this section shall not disentitle a woman to maternity benefit or any other amount under this Act if she is otherwise entitled to such benefit or amount and in any such case an Inspector may either of his own motion or on an application made to him by the woman, order the payment of such benefit or amount within such period as may be specified in the order.

17. Section 27 of 1961 Act reads as under:-

27. Effect of laws and agreements inconsistent with this Act.- (1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law or in the terms of any award, agreement or contract of service, whether made before or after the coming into force of this Act: Provided that where under any such award, agreement, contract of service or otherwise, a woman is entitled to benefits in respect of any matter which are more favourable to her than those to which she would be entitled under this Act, the woman shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that she is entitled to receive benefits in respect of other matters under this Act.

(2) Nothing contained in this Act shall be construed to preclude a woman from entering into an agreement with her employer for granting her rights or privileges in respect of any matter which are more favourable to her than those to which she would be entitled under this Act.

18. Section 28 of 1961 Act reads as under:-

*"**Power to make rules.-** (1) The appropriate Government may, subjected to the condition of previous publication and notification in the Official Gazette, make rules for carrying out the purposes of this Act.*

19. **Rule 153 of the Fundamental Rules**

*"**153.** Maternity leave on full pay which a female government servant, whether permanent or temporary, may be drawing on the date or proceeding on such leave may be granted to her by the head of the department or by a lower authority to whom power may be delegated in this behalf subject to the following:--*

(1) In cases of confinement the period of maternity leave may extend up to the end of three months from the date of the commencement of leave:

Provided that such leave shall not be granted for more than three times during the entire service including temporary service:

Provided also that if any female government servant has two or more living children, she shall not be granted maternity leave even though such leave may otherwise be admissible to her. If, however, either of the two living children of the female government servant is suffering from incurable disease or is disabled or crippled since birth or contracts some incurable disease or becomes disabled or crippled later, she may, as an exception, be granted maternity leave till one more child is born to her subject to the overall restriction that maternity leave shall not be granted for more than three times during the entire service.

Provided further that no such leave shall be admissible until a period of at least two years has elapsed from the date

of expiry of the last maternity leave granted under this rule.

(2) In cases of miscarriage, including abortion, the period of maternity leave may extend up to a total period of six weeks on each occasion, irrespective of the number of surviving children of the female Government servant concerned, provided that the application for leave is supported by a certificate from the Authorised Medical Attendant: ***NOTE****--(1) Deleted.*

NOTE*--(2) In the case of a person to whom the provisions of Employees. State Insurance Act, 1948, apply, leave salary payable under this rule shall be reduced by the amount of benefit admissible under the said Act for the corresponding period.*

NOTE*--(3) Abortion induced under the Medical Termination of pragnancy Act, 1971, should also be considered as a case of "abortion' for the purpose of "granting' "Maternity leave' under this rule."*

20. A perusal of Section 3(h) of 1961 Act, clearly reveals that maternity benefit means the payment referred to in sub-section (1) of Section 5 of 1961 Act. Section 5 of 1961 Act stipulates that every woman shall be entitled to and an employer shall be liable for the payment of maternity benefit at a certain rate. Sub-section (3) of Section 5 of 1961 Act provides that the maximum period for which any woman shall be entitled to maternity benefit shall be 26 weeks. Section 6 of 1961 Act provides that any woman employed in an establishment and entitled to any maternity benefit under the provisions of 1961 Act may give notice in writing to her employer stating that her maternity benefit be paid to her or to such person as she may nominate in the notice. Sub-section (4) of Section 6 of 1961 Act provides that on receipt of the notice, the employer shall permit such woman to absent herself from the establishment during the period for which she receives the maternity benefit.

21. A perusal of the aforesaid provisions of 1961 Act thus indicate that a woman would be entitled to give notice in writing for grant of maternity benefit and on receipt of notice the employer shall permit such woman to absent herself from the establishment during the period for which she receives the maternity benefit. The 1961 Act does not contain any such stipulation of the time difference between grant of maternity benefit for the first and second child as stipulated in Rule 153 (1) of the Financial Handbook. Section 27 of 1961 Act categorically provides that the provisions of 1961 Act shall have effect notwithstanding anything inconsistent therewith contained in any other law whether made before or after coming into force of 1961 Act. The proviso to Section 27 of 1961 Act provides that in case a woman is entitled to benefits in respect of any matter which are more favourable to her than those to which she would be entitled under 1961 Act, the woman shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that she would be entitled to receive benefits in respect of other matters under 1961 Act, meaning thereby that additional benefits that a woman would be entitled in terms of 7 agreement or contract of service would be admissible to her notwithstanding anything contained in 1961 Act. Thus, it is the additional benefits which have not been precluded but in case there is anything contrary or inconsistent to the provisions of 1961 Act pertaining to maternity benefit then it would be the 1961 Act which would be applicable."

22. So far as the applicability of the provisions of the Maternity Benefit Act, 1961 is concerned, a Division Bench of this Court in the case of ***Dr. Rachna Chaurasiya versus State of U.P. and others [2017 (11) ADJ 399 (DB)]*** while considering the grant of maternity leave/child care leave to a Doctor employed as Associate Professor in MLB Medical College, Jhansi in Para 23, 24 and 25 of the decision observed as under:-

"23. The aforesaid decision of the Central Government has been adopted by the State of U.P. for its employees vide Government Order dated 08.12.2008 and 24.03.2009. Subsequently, certain modifications being made by the Central Government, the same was also adopted by the State Government vide Government Order dated 11th April, 2011. The aforesaid Government Order is being reproduced hereunder.

''प्रेषक,
वृन्दा सरूप,
प्रमुख सचिव,
उ0प्र0 शासन।

सेवा में,
समस्त विभागाध्यक्ष एवं प्रमुख कार्यालयाध्यक्ष,
उत्तर प्रदेश।

वित्त (सामान्य) अनुभाग–2 लखनऊ : दिनांक : 11 अप्रैल, 2011

विषयः– महिला सरकारी सेवकों को बाल्य देखभाल अवकाश की अनुमन्यता।

महोदय,

उपर्युक्त विषयक कार्यालय ज्ञाप संख्या–जी–2–2017/दस–2008–216–79, दिनांक 08–12–2008 तथा कार्यालय ज्ञाप संख्या जी–2–573/दस–2008–216–79, दिनांक 24–3–2009 द्वारा प्रदेश की महिला सरकारी सेवकों को केन्द्र सरकार की महिला कर्मचारियों की भांति बाल्य देखभाल अवकाश की सुविधा कतिपय शर्तों के अधीन प्रदान की गयी थी। चूंकि भारत सरकार द्वारा उक्त शर्तों में कतिपय संशोधन किए गए हैं अतः सम्यक् विचारोपरान्त श्री राज्यपाल महोदय संदर्भगत शासनादेशों में उल्लिखित शर्तो को निम्नवत् संशोधित करने की सहर्ष स्वीकृति प्रदान करते हैं:–

(1) संबंधित महिला कर्मचारी के अवकाश लेखे में उपार्जित अवकाश देय होते हुए भी बाल्य देखभाल अवकाश अनुमन्य होगा।

(2) बाल्य देखभाल अवकाश को एक कलेण्डर वर्ष के दौरान तीन बार से अधिक नहीं दिया जायेगा।

(3) बाल्य देखभाल को 15 दिनों से कम के लिए नहीं दिया जायेगा।

(4) बाल्य देखभाल अवकाश को साधारणतया परिवीक्षा अवधि के दौरान नहीं दिया जायेगा, ऐसे मामलों को छोड़कर जहॉ अवकाश देने वाला प्राधिकारी परिवीक्षार्थी की बाल्य देखभाल अवकाश की आवश्यकता के बारे में पूर्ण रूप से संतुष्ट न हो। इसे भी सुनिश्चित किया जायेगा कि परिवीक्षा अवधि के दौरान अवकाश दिया जा रहा है तो इस अवकाश की अवधि कम–से–कम हो।

(5) बाल्य देखभाल अवकाश को अर्जित अवकाश के समान माना जायेगा और उसी प्रकार से स्वीकृत किया जायेगा।

2– यदि किसी महिला कर्मचारी द्वारा दिनांक 08.12.2008 के कार्यालय ज्ञाप के जारी होने के पश्चात बाल्य देखभाल के प्रयोजन हेतु अर्जित अवकाश लिया गया है तो उसके अनुरोध पर उक्त अर्जित अवकाश को बाल्य देखभाल अवकाश में समायोजित किया जा सकेगा।

3– शासनादेश संख्या जी–2–2017/दस–2008–216–79, दिनांक 08–12–2008 तथा शासनादेश संख्या जी–2–573/दस–2009–216–79 दिनांक 24–03–2009 इस सीमा तक संशोधित समझे जायेंगे।

4– संगत अवकाश नियमों में आवश्यक संशोधन यथासमय किये जायेंगे।

भवदीया,
(वृन्दा सरूप)
प्रमुख सचिव, वित्त।''

24. From a perusal of the aforesaid Government Orders, it is clear that the State Government has adopted same policy as is enforced by the Central Government for grant of Maternity Leave as well as Child Care Leave to its employees.

25. Maternity benefit is a social insurance and the Maternity Leave is given

for maternal and child health and family support. On a perusal of different provisions of the Act, 1961 as well as the policy of the Central Government to grant Child Care Leave and the Government Orders issued by the State of U.P. adopting the same for its female employees, we do not find anything contained therein which may entitle only to women employees appointed on regular basis to the benefit of Maternity Leave or Child Care Leave and not those, who are engaged on casual basis or on muster roll on daily wage basis."

23. Then again a learned Single Judge in the case of ***Anshu Rani versus State of U.P. and 2 others, Writ-A No. 3486 of 2019*** following the dictum of the Division Bench in the case of ***Dr. Rachana Chaurasiya (supra)*** in Para 13 of the decision observed as under:-

"13. The maternity leave is a social insurance. The maternity leave is given for maternal and child health and family support. From perusal of the different provisions of the Maternity Benefit Act, 1961 as amended in the year 2017 as well as the policy of the Central Government to grant child care leve and Government orders issued by the State Governments in the State of U.P. adopting the same for its female employees, I am of the firm opinion that the female employees of the State of U.P. are entitled for the benefits of the maternity leave as contained in the Maternity Benefit Act 1961 as amended by the Maternity Benefit (Amendement) Act, 2017."

24. Thus the State of U.P. in exercise of powers granted under Section 28 has already issued Government Order dated 8.12.2008 and 24.3.2009 adopting the provisions of the Maternity Benefits Act, 1961 for the benefit of its employees. Further, the modifications made by the Central Government have also been adopted by the State of U.P. in its Government Order dated 11.4.2011 reproduced hereinabove. Once the provisions of the Maternity Benefit Act, 1961 has been adopted by the State of U.P. as held by this Court then the said Act of 1961 would apply with full force irrespective of the provisions contained in the Financial Handbook which is merely an executive instruction and would in any case be subsidiary to the legislation made by the Parliament.

25. In conclusion it can safely be said that the Maternity Benefit Act, 1961 has been enacted by the Parliament in exercise of powers under Entry 24 in List-III of the Seventh schedule of the Constitution of India and to secure the goals stated in Articles 38, 39, 42 and 43 of the Constitution of India and also to give effect to the provisions contained in Article 15 (3) of the Constitution. The provisions of Financial Handbook are merely executive instructions and would be subsidiary to the Act of the Parliament and in case of any inconsistency, the statutory enactment framed by the Parliament would prevail and hence, the provisions of the Maternity Benefit Act, 1961 would prevail over the provisions of the Financial Handbook and consequently, the provisions of Rule 153 (1) of the Financial Handbook Volume II to IV are read down with regard to the admissibility of leave to a women with regard to second pregnancy which would be governed by the Maternity Benefit Act, 1961 and not Rule 153 (1) of the Financial Handbook Volume II to IV. The State Government already having adopted the provisions of the Maternity Benefit Act, 1961 as recorded by the Division Bench of

this Court and followed by the Single Bench in the case of ***Anshu Rani versus State of U.P. passed in Writ-A No. 3486 of 2019,*** it is clear that the provisions of the Maternity Benefit Act, 1961 would prevail over any law.

26. In the case at hand the maternity leave so applied by the petitioner has been rejected simply by stating "Anumanya Nahi". Learned cousnel for the respondents has submitted that the petitioner is not entitled to the maternity leave in terms of the restriction imposed by the second proviso of Rule 153(1) of the Financial Handbook to the effect that second maternity leave cannot be granted where there is difference of less than two years between the end of the first maternity leave and grant of second maternity leave. Admittedly, the first maternity leave of the petitioner was availed and she gave birth to a male child on 4.1.2021. The petitioner became pregnant again and applied again for maternity leave on 11.6.2022. The second maternity leave to the petitioner has been refused by the impugned order. However, once the 1961 Act does not contain any such stipulation, the Basic Education Officer manifestly erred in rejecting the leave to the petitioner more particularly when Section 27 of the 1961 Act provides that it is the 1961 Act which would be applicable notwithstanding anything in consistent contained in any other law or contract of service.

27. In the light of the above discussion, the writ petition is allowed. The order impugned dated 23.6.2022 in the writ petition is set aside. The District Basic Education Officer concerned is directed to pass appropriate orders for sanctioning the maternity leave to the petitioner within a period of two weeks from the date of service of certified copy of the order upon him.

(2022) 11 ILRA 903
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.10.2022

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ A No. 26789 of 2012

Siya Ram Verma ...Petitioner
Versus
Pooranmal Verma & Ors. ...Respondents

Counsel for the Petitioner:
Sri Narendra Singh, Sri T.P. Singh

Counsel for the Respondents:
Sri Rajiv Lochan Shukla, Sri Manas Bhargava

Civil Law - Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972- Section 21(1)(b) Tthe petitioner has questioned the correctness of the judgment of the Prescribed Authority in holding the building to be in a dilapidated condition-the two technical reports were placed before the Prescribed Authority -one favors landlord and other one favors tennant-both rejected by prescribed authority and directed advocate commissioner's report-inspection by the advocate commissioner without taking help of any technical expert - the petitioner objected against the report of advocate commissioner and prescribed authority did not considered his objection-while granting an application under Section 21(1)(b) of Act No. 13 of 1972 would be to come to a definite finding as to whether the building has really arrived in such a dilapidated condition-Matter is remitted to the Prescribed Authority.

W.P. allowed. (E-9)

List of Cases cited:

1.Amar Nath Tandon Vs G.K. Bhargava, 1987-AWC-2-877

2.Shamim Ahmad Vs D. J., Etah & ors., 2000 (2) A.R.C.

3. Ram Prasad Vs Smt. Shashi Chaurasiya, 2018 (3) A.R.C. 743

4. Harbans Lal Vs Jag Mohan Saran,1985 AWC 903.

5. Amar Nath Tandon Vs G.K. Bhargava, 1987 AWC-2-877

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

1. Heard Sri T.P. Singh, learned Senior Advocate assisted by Sri Narendra Singh, learned counsel for the petitioner and Sri Manas Bhargava, learned Advocate holding brief of Sri Rajiv Lochan Shukla, learned counsel for the respondents.

2. By means of this petition filed under Article 226 of the Constitution, the petitioner has questioned the correctness of the judgment of the Prescribed Authority in holding the building to be in a dilapidated condition so as to release the same in favour of landlord under Section 21(1) (b) of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter to be referred as 'Act No. 13 of 1972').

3. It is argued on behalf of the petitioner before this Court that the two technical reports were placed before the Prescribed Authority, one in favour of landlord and the other one in favour of tenant. The Prescribed Authority rejected both the reports and directed Advocate Commissioner's report. The Advocate Commissioner did submit a report before the Prescribed Authority after conducting inspection without the help of any technical expert and just only on the basis of visual inspection made by him while he inspected the building. This report was neither supported by any map made for the said purpose, nor the report was accompanied by any photograph of the building, and hence petitioner filed a detailed objection to the Advocate Commissioner's report questioning the authenticity of report itself. This objection remained pending consideration before the Prescribed Authority while the matter was finally heard, whereas, the objection submitted over report remained pending for orders.

4. It is submitted by learned counsel for the petitioner that the objection of the petitioner against the report of Advocate Commissioner was earlier directed to be considered at the stage of final hearing of the case. However, it is argued that when the matter was finally heard and decided, the Prescribed Authority did not even consider the objection filed by the petitioner to the Advocate Commissioner's report and he straight away relied upon the said report to conclude and hold that the building was in a dilapidated condition. A legal argument therefore, advanced is that in the absence of consideration of the objection filed to the report, recording a finding that building in question was in a dilapidated condition on the basis of such a disputed report is a case of gross impropriety on the part of authority concerned while exercising quasi judicial power and therefore, the order passed by the Prescribed Authority deserved to be held unsustainable. In support of his argument, learned counsel for the petitioner has relied upon a judgment of this Court in the case of ***Amar Nath Tandon v. G.K.Bhargava, 1987-AWC-2-877.***

5. *Per contra*, learned counsel for the respondent landlord submits that once the

two technical reports available with the court were rejected being in contradiction of each other, the Court was left with no other option but to appoint the Advocate Commissioner to obtain a report of the fact condition of the building in question on the spot. He submits that a report of Advocate Commissioner is not required to be proved as such and a consideration of the objection to the report would be sufficient enough. He submits that the court can proceed to believe the report on facts and decide as to whether the building is in dilapidated condition or not. In support of his argument, he has placed reliance upon a judgment of this Court in **Shamim Ahmad v. District Judge, Etah and others, 2000 (2) A.R.C. 543** and another judgment of this Court in **Ram Prasad v. Smt. Shashi Chaurasiya, 2018 (3) A.R.C. 743.**

6. Having heard learned counsel for the respective parties and their arguments raised across the bar, I find the moot legal question involved in the case to be, as to whether the Advocate Commissioner's report was worth reliance, more especially in the face of the fact that a detailed objection to the same had been filed and so how far court was justified in not discussing the objection in its order while arriving at a finding of fact absolutely based upon an Advocate Commissioner's report.

7. The relevant fact that needed consideration in the present case while granting an application under Section 21(1)(b) of Act No. 13 of 1972 would be to come to a definite finding as to whether the building has really arrived in such a dilapidated condition that it is not worth human living and if immediate repair or in case if demolition of the structure is not carried out it may cause fatal injuries to the inhabitants of the building.

8. Ordinarily, neither the court, nor the lawyers as such could have that technical skill and expertise to reach by themselves to a definite view regarding condition of a building without visiting the spot with a team of technical experts and therefore, in such situation report of technical expert of the field concerned, should have been obtained, no matter that the reports earlier placed were contradictory to each other. It is well within the jurisdiction of the Court to call for a fresh report from the technical expert by requiring parties to accord their consent for the same.

9. In the instant case, what I find is that instead of resorting to the above action, the court proceeded to appoint Advocate Commissioner to submit a report. A simpliciter appointment of Advocate Commissioner to call for a report qua the condition of a building in the present case resulted in submission of report of Advocate Commissioner based on mere observation by his eyes. Interestingly this report was not even supported by photographs taken on the spot so as to form a definite view that what was there observed in the report was the correct observation. Hence, a detailed objection was correcting filed by the other side questioning the report. Whether a report would be admissible in evidence or otherwise a mere reliance can be placed could be a relevant factor but once the objection has been taken to the report, the court was hide bound in law to dispose of those very objections before proceeding to rely upon the report. It would definitely be a case of gross impropriety and needed immediate arrest in my exercise of power

under Article 227 of the Constitution of India. If the court instead of discussing the objection, straightaway proceeded to believe the Advocate Commissioner's report to record a finding of fact that building was in a dilapidated condition, it does not appeal to common sense which is a must for dispensation of justice.

10. In my above view I find support from the judgment of this Court cited by learned Senior Advocate in the case of Amar Nath Tandon *(supra)*, wherein, vide para 10 the court has held thus:

"10. Sri Rajendra Nath Saxena, Advocate, was appointed as Commissioner who after executing the commission submitted his report dated 18.3.81 (Annexure-13) with which the maps prepared by him were also annexed. the petitioner was not satisfied with the report and, therefore, he raised objections (contained in Annexure-14) in which the extent of the accommodation shown by the commissioner was disputed and it was pleaded that the commissioner's report was liable to be rejected. The Prescribed Authority without disposing of the objections on merits passed the order as under:- "Let the Commissioner's report Ga-24 be confirmed subject to objection Ga-26". ***A perusal of the judgment passed by the Prescribed Authority as also by the appellate court indicates that the report of the commissioner has been relied upon in recording concurrent findings as to the extent of accommodation in occupation of the landlords, as also in occupation of the petitioner without adverting to the objections filed by the petitioner. The objections remained undisposed of and the commissioner's report was clindly relied upon not only by the Prescribed Authority but also by the appellate court. The Prescribed Authority by order dated 27th April, 1981 himself had confirmed the report "subject to objections." It was, therefore, his duty to have considered the objections at the time of the hearing of the case and to dispose of those objections on merits before proceeding to rely upon the report. This having not been done, the report of the Commissioner was not available for consideration.*** *The Supreme Court in a recent decision in Harbans Lal v. Jag Mohan Saran, 1985 AWC 903 has held that unless the objections against the commissioner's report are disposed of, the report does not become final and cannot be taken into consideration. In view of this decision the report of the Commissioner contained in Annexure-14 was not, as observed earlier, available for consideration either by the Prescribed Authority or by the appellate court."*

(Emphasis added)

11. In so far as the judgment cited by learned counsel for the contesting respondent is concerned, I find that in the case of **Shamim Ahmad** *(supra)*, the Court was more concerned with the issue where the application for Commission was rejected and which had not been appealed against. This is not an issue before this Court, nor this point has ever cropped up before the court below while deciding the matter. The question of issuance of Commission is not a point in issue here and therefore, the judgment is distinguishable on facts and in my considered view it is not of any help to the respondents.

12. In so far as the judgment in the case of **Ram Prasad** *(supra)* is concerned in that case there was a Engineer's report available before the court and there was an affidavit also filed in support thereof that the building may have collapsed at any

point of time. The report as was discussed and believed in the said case, was rightly so done but here I do not find any such report available from any technical expert. Judgment is therefore, again distinguishable on facts being in particular set of facts of that case and so is of no help to contesting respondents.

13. Sri Manas Bhargava very fairly concedes at this stage that the objection filed by the petitioner had remained undisposed of even at the stage of final hearing of the mater while the court proceeded to believe that Advocate Commissioner's report that was seriously objected.

14. In such above view of the mater, therefore, I am not able to sustain the findings returned by the trial court as well as the findings returned by the court of appeal confirming the findings of the Prescribed Authority on the issue whether the building was in a dilapidated condition and deserved release under Section 21(1)(b) of Act No. 13 of 1972. Both the orders are hereby set aside.

15. Matter is remitted to the Prescribed Authority to be decided afresh after considering the objections of the petitioner to the Advocate Commissioner's report and disposing of the same first. It is further provided that it would be more desirable if the court proceeds to call for an expert report in respect of the condition of the building in question so that proper adjudication of the point is done for considering the application for release under Section 21(1)(b) of Act No. 13 of 1972.

16. Both the parties shall appear on or before 25.11.2022 before the Prescribed Authority. The Prescribed Authority shall thereafter proceed to decide the matter finally in the light of observations made herein above and also by giving full opportunity of hearing to the contesting parties, as expeditiously as possible, preferably within a period of three months from the date of production of certified copy of this order. It is further provided that in the meanwhile, the petitioner would continue to pay rent as he has been paying till now.

17. With the aforesaid observations and directions, this petition stands **allowed** with no order as to cost.

(2022) 11 ILRA 907
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.10.2022

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Misc. Bail Application No. 7858 of 2022

Pavan Kumar Agrawal ...Applicant (In Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Samir Srivastava, Sri Ankit Agarval, Sri Ravitendra Pratap Singh Chandel, Sri Som Veer

Counsel for the Opposite Parties:
G.A., Sri Krishna Agarawal

Criminal Law - Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 52 A-Applicant's elder brother holds a license to 'Sell, stock, exhibit or offer for sale, or distribute by wholesale, drugs other than those specified in Schedule C, C(1) and X' and runs medical store-by another license -authorized to deal in drugs specified in Schedule C and C(1)

excluding those who specified in Schedule 'X'-elder brother does not keep good health and Applicant looks after the business-substances recovered during the raid were medicines manufactured by established manufacturing companies-bills were shown -holds license-procedure u/s 52A has not been followed-confessional statement not admissible in evidence-no criminal history.

Bail allowed. (E-9)

List of Cases cited:

1. Mohd. Sahabuddin Vs St.of Assam, (2012) 13 SCC 491

2. Vibhor Rana Vs U.O.I., 2021 SCC OnLine All 908

3. Makhan Singh Vs St.of Har., (2015) 12 SCC 247

4. Khet Singh Vs U.O.I., (2002) 4 SCC 380

5. Noor Aga Vs St.of Pun., (2008) 16 SCC 417

6. U.O.I. Vs Mohanlal, (2016) 3 SCC 379

7. St.of Punjab Vs Baldev Singh, (1999) 6 SCC 172

8. Tofan Singh Vs St.of T.N., (2021) 4 SCC 1

9. Taylor Vs Taylor (1875) 1 Ch D 475

10. Nazir Ahmad Vs King Emperor, AIR 1936 PC 253

11. U.O.I. Vs Rattan Mallik, (2009) 2 SCC 624

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

1. Heard Sri Ankit Agarval Advocate, the learned Counsel for the applicant and Sri Krishna Agarawal Advocate, the learned counsel representing the Central Bureau of Narcotics (which will hereinafter be referred to as "C.B.N.').

2. The instant application has been filed seeking release of the applicant on bail in C.B.N. Case Crime No. 04 of 2021, under Sections 21/22/25/28/30/35 of Narcotic Drugs and Psychotropic Substances Act, 1985 (which will hereinafter be referred to as "the Act'), Police Station C.B.N. New Delhi.

3. On 26-10-2021, the officers of C.B.N. had conducted a search at the premises of M/s G. M. Traders and it is alleged that various narcotic and psychotropic drugs were recovered from the premises and the applicant was arrested from the premises.

4. In the affidavit filed in support of the bail application it has been stated that the applicant's elder brother Lakshman Agrawal holds a license to "Sell, Stock, Exhibit or offer for sale, or distribute by wholesale, drugs other than those specified in Schedule C, C (1) and X' and he is running his medical store in the name and style of "M/s G. M. Traders' and by means of another license, he has been authorised to deal in drugs specified in Schedule C and C(1), excluding those who specified in Schedule "X'.

5. It has further been stated in the affidavit that Sri. Lakshman Agrawal does not keep good health and, therefore, the applicant looks after his business.

6. It has further been stated in the affidavit that the applicant is innocent and he has been falsely implicated in the present case; that the applicant has no criminal history and he is languishing in jail since 27-10-2021.

7. The C.B.N. has filed a counter affidavit stating that 31456 capsules of Tramadol, 158 injections and 800 tablets of Clonazepam, 9400 injections of

Pentazocine, 1368 bottles of Codeine Syrup, 30 tablets of Diazepam, 216 injections of Buprenorphine and 580 tablets of Chlordiazepoxide were recovered in the search conducted at three premises of M/S G.M. Traders on 26-10-2021 and the applicant was arrested at 08:00 hours on 27-10-2021.

8. It has been stated in the counter affidavit that in his voluntary statement recorded under Section 67 of the NDPS Act, the applicant has admitted that he has resorted to illegal sale and stock of illicit NDPS medicines.

9. A copy of the complaint filed by the C.B.N. has been annexed with the supplementary counter affidavit in this Court in which the lists of recovered medicines have been mentioned. All the substances recovered during the raid were medicines manufactured by established manufacturing companies that had been purchased by the applicant and bills in respect of the same were shown to the officers of C.B.N., except Tramadol and Buprenorphine.

10. It has further been stated in the complaint that the statement of several persons were recorded during investigation from which it appeared that the medicines had been purchased by M/s G. M. Traders on proper bills as per the provisions of law in this regard.

11. Although numerous documents have been annexed with the copy of the complaint filed before this Court, a questionnaire issued by the Court of Special Judge, NDPS Act has been annexed with the supplementary counter affidavit, stating that no document has been filed by C.B.N. along with the complaint.

12. Section 2 of the NDPS Act defines narcotic drugs and manufactured drugs as follows: -

"(xiv) "narcotic drug" means coca leaf, cannabis (hemp), opium, poppy straw and includes all manufactured drugs;

(xi) "manufactured drug" means--

all coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate;

any other narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare to be a manufactured drug,

but does not include any narcotic substance or preparation which the Central Government may, having regard to the available information as to a decision, if any, under any International Convention, by notification in the Official Gazette, declare not to be a manufactured drug;

13. Since NDPS is a Special Act providing stringent punishments for special offences, the first thing to be seen would be whether the provisions of the Act are applicable in the present case. For that, the CBN has to establish that the substances recovered were "narcotic drugs'. Although the CBN has filed a supplementary counter affidavit running into 900 pages, no declaration issued by the Central Government under Section 2 (xi) of the Act has been placed on record.

14. One of the medicines recovered is Corex T Cough Syrup and it has been alleged in the counter affidavit that it contains Codeine and, therefore, it is a manufactures drug and hence it is a

narcotic drug. However, the composition of Corex T, or of any other medicine recovered, has not been placed on record.

15. Codeine is mentioned at Serial No. 132 of Schedule H appended to the Drugs and Cosmetics Rules, 1945, and, therefore, it is a drug.

16. On 14-11-1985 the Government of India had issued a notification No. 826(E) dated 14.11.1985 and S.O. 40(E) dated 29-01-1993 containing the list of narcotic drugs and Entry 35 thereof is as follows:--

"Methyl morphine (commonly known as "Codeine') and Ethyl morphine and their salts (including Dionine), all dilutions and preparations ***except those which are compounded with one or more other ingredients and containing not more than 100 milligrams of the drug per dosage unit and with a concentration of not more than 2.5% in undivided preparations and which have been established in Therapeutic practice****."*

(emphasis supplied)

17. As per the aforesaid Notification, if any drug contains not more than 100 milligrams of Methyl Morphine, which is commonly known as Codeine, per dosage unit, and in that drug Codeine is compounded with one or more other ingredients and if in the drug the concentration of Codeine is not more than 2.5% in undivided preparations and the drug has been established in Therapeutic practice, will not be a "Manufactured Drug" and, therefore, it will not be a "Narcotic Drug". It is not the case of C.B.N. that Corex T Cough Syrup contains pure Codeine without compounding it with any other substance, or that the drug concentration of Codeine in Corex T cough syrup exceeds 2.5%. Therefore, Corex T might not be a manufactured drug.

18. Similar is the case of other medicines and there is nothing on record to establish that those fall within the purview of the definition of "manufactured drugs' under the NDPS Act.

19. The other drugs recovered contain Tramadol Hydrochloride, which is mentioned at serial no. 507, Clonazepam, which is mentioned at serial no. 125, Chloradiazepoxide, which is mentioned at serial no. 105, Diazepam, which is mentioned at serial no. 147, Pentazocine which finds place at serial no. 392 of the Schedule H appended to the Drugs and Cosmetics Rules. Buprenorphine and Pentazocine is also contained in some of the drugs and those find place in Schedule H1 appended to the aforesaid Rules.

20. Sri. Krishna Agarwal has relied upon the following passage from the decision of the Hon'ble Supreme Court in **Mohd. Sahabuddin v. State of Assam**, (2012) 13 SCC 491, wherein the Hon'ble Supreme Court was deciding an appeal against an order passed by the High Court denying bail to a person accused of transporting huge quantity of some drugs without any documents: -

"12. As pointed out by us earlier, since the appellants had no documents in their possession to disclose as to for what purpose such a huge quantity of Schedule H drug containing narcotic substance was being transported and that too stealthily, it cannot be simply presumed that such transportation was for therapeutic practice as mentioned in the Notifications dated 14-11-1985 and 29-1-1993. Therefore, if the

said requirement meant for therapeutic practice is not satisfied then in the event of the entire 100 ml content of the cough syrup containing the prohibited quantity of codeine phosphate is meant for human consumption, the same would certainly fall within the penal provisions of the NDPS Act calling for appropriate punishment to be inflicted upon the appellants. Therefore, the appellants' failure to establish the specific conditions required to be satisfied under the abovereferred to notifications, the application of the exemption provided under the said notifications in order to consider the appellants' application for bail by the courts below does not arise.

In Mohd. Sahabuddin, the drugs were being transported by the accused stealthily without any documents whereas in the present case the drugs had been purchased by M/s G. M. Traders, from various suppliers through valid invoices. Therefore, the aforesaid case is distinguishable on facts.

21. Moreover, the Notification dated 14-01-1985 uses the words "established in therapeutic practices" and not the words "for therapeutic practice". The phrase "for therapeutic practice" has been interpreted by a Division Bench of this Court in **Vibhor Rana versus Union of India,** 2021 SCC OnLine All 908, in the following manner: -

"41. The expression "established in therapeutic practice" has not been interpreted in any previous decision. It is a basic rule of interpretation that the words used in the statute should be given there simple and natural meaning and neither any word should be added nor should any word be ignored while interpreting any provision. When the Government has used the expression "established in therapeutic practice" these words cannot be altered so as to read it as "used for therapeutic purposes". The phrase "established in therapeutic practice" apparently means that the compound in question has been established to be a drug in accordance with the therapeutic practices followed for establishment of new drugs."

22. In **Makhan Singh v. State of Haryana**, (2015) 12 SCC 247 while dealing with a case under the Narcotic Drugs and Psychotropic Substances Act, the Supreme Court reiterated that *"...It is a well-settled principle of the criminal jurisprudence that more stringent the punishment, the more heavy is the burden upon the prosecution to prove the offence."*

23. All the substances recovered are branded medicines manufactured by established manufacturing companies. The composition of none of the medicines has been placed on record to establish that these fall within the purview of "manufactured drugs' and the provisions of the Act are applicable to the recoveries made from the applicant.

24. If the substance recovered fall within the purview of the Act, the procedure laid down by the legislature in Section 52 A of the Act to be followed upon seizure of any narcotic drug or psychotropic substance regarding preparation of inventory, collection of samples, taking photographs etc. has to be followed. The CBN has not placed any material with the counter affidavit to indicate that the any empowered officer has made an application to any Magistrate for the purposes mentioned in Section 52 A and that the Magistrate has allowed the application. Therefore, at this stage, prima facie it appears that the procedure

prescribed in Section 52 A of the Act has not been followed in the present case.

25. In exercise of the powers conferred by Section 52 A (1) of the Act, the Government of India, Ministry of Finance (Department of Revenue) has issued a Standing Order No. 1/89 dated 13th June, 1989, laying down procedure for collection of samples etc. Section II of the Standing Order No. 1/89 reads as under:--

"Section II General Procedure for Sampling, Storage, etc.

2.1. Sampling and classification, etc. of drugs. All drugs shall be properly classified carefully weighed and sampled on the spot of seizure.

2.2. Drawal of samples. All the packages/containers shall be serialy numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses Panchas and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot.

2.3. Quantity to be drawn for the sampling.-- The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances, save in the cases of opium, ganja and charas (hashish) where a quantity of 24 grams in each case is required for chemical test. The same quantities shall be taken for the duplicate sample also. The seized drugs in the packages/containers shall be well mixed to make it homogeneous and representative before the sample (in duplicate) is drawn.

3.1. Preparation of inventory.-- After sampling, detailed intentory of such packages/containers shall be prepared for being enclosed to the panchnama. Original wrappers shall also be preserved for evidentiary purposes.

(Emphasis supplied)

26. In **Khet Singh v. Union of India,** (2002) 4 SCC 380, the Hon'ble Supreme Court held that: -

"10. The instructions issued by the Narcotics Control Bureau, New Delhi are to be followed by the officer-in-charge of the investigation of the crimes coming within the purview of the NDPS Act, even though these instructions do not have the force of law. They are intended to guide the officers and to see that a fair procedure is adopted by the officer-in-charge of the investigation."

27. In **Noor Aga v. State of Punjab,** (2008) 16 SCC 417, the Hon'ble Supreme Court held that: -

"89. Guidelines issued should not only be substantially complied with, but also in a case involving penal proceedings, vis-à-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.

90. Recently, this Court in State of Kerala v. Kurian Abraham (P) Ltd.

(2008) 3 SCC 582, following the earlier decision of this Court in Union of India v. Azadi Bachao Andolan (2004) 10 SCC 1, held that statutory instructions are mandatory in nature.

91. The logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance with these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution."

28. In **Union of India v. Mohanlal**, (2016) 3 SCC 379, the Hon'ble Supreme Court held that: -

"12. Section 52-A(1) of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. The Central Government has in exercise of that power issued Standing Order No. 1 of 1989 which prescribes the procedure to be followed while conducting seizure of the contraband. Two subsequent standing orders one dated 10- 5-2007 and the other dated 16-1-2015 deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing order that prescribes the procedure for conducting seizures. Para 2.2 of Standing Order No. 1 of 1989 states that samples must be taken from the seized contraband on the spot at the time of recovery itself....

* * *

15. It is manifest from Section 52-A(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.

16. 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.

* * *

31. To sum up we direct as under:

31.1. No sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, the same shall be forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52-A(2) of the

Act, which shall be allowed by the Magistrate as soon as may be required under sub-section (3) of Section 52-A, as discussed by us in the body of this judgment under the heading "seizure and sampling". The sampling shall be done under the supervision of the Magistrate as discussed in Paras 15 to 19 of this order.

31.2. The Central Government and its agencies and so also the State Governments shall within six months from today take appropriate steps to set up storage facilities for the exclusive storage of seized narcotic drugs and psychotropic and controlled substances and conveyances duly equipped with vaults and double-locking system to prevent theft, pilferage or replacement of the seized drugs. The Central Government and the State Governments shall also designate an officer each for their respective storage facility and provide for other steps, measures as stipulated in Standing Order No. 1 of 1989 to ensure proper security against theft, pilferage or replacement of the seized drugs.

31.3. The Central Government and the State Governments shall be free to set up a storage facility for each district in the States and depending upon the extent of seizure and store required, one storage facility for more than one districts.

31.4. Disposal of the seized drugs currently lying in the Police Malkhanas and other places used for storage shall be carried out by the DDCs concerned in terms of the directions issued by us in the body of this judgment under the heading "disposal of drugs"."

29. However, there is nothing on record to indicate that an application was filed before the Magistrate seeking permission to draw representative samples in his presence, that the samples were actually drawn and the correctness of the list of samples so drawn was certified by the Magistrate as mandated by the legislature in Section 52 A and as directed by the Hon'ble Supreme Court in Mohanlal (Supra).

30. In **State of Punjab v. Baldev Singh**, (1999) 6 SCC 172, the Hon'ble Supreme Court held that: -

"Prosecution cannot be permitted to take advantage of its own wrong. Conducting a fair trial for those who are accused of a criminal offence is the cornerstone of our democratic society. A conviction resulting from an unfair trial is contrary to our concept of justice. Conducting a fair trial is both for the benefit of the society as well as for an accused and cannot be abandoned. While considering the aspect of fair trial, the nature of the evidence obtained and the nature of the safeguard violated are both relevant factors. Courts cannot allow admission of evidence against an accused, where the court is satisfied that the evidence had been obtained by a conduct of which the prosecution ought not to take advantage particularly when that conduct had caused prejudice to the accused."

31. In **Tofan Singh v. State of T.N.,** (2021) 4 SCC 1, the Hon'ble Supreme Court reiterated that: -

"55. Given the stringent provisions of the NDPS Act, together with the safeguards mentioned in the provisions discussed above, it is important to note that statutes like the NDPS Act have to be construed bearing in mind the fact that the severer the punishment, the greater the care taken to see that the safeguards provided in the statute are scrupulously followed."

32. The principle that where the law prescribes a manner for doing a thing, the

thing has to be done in that manner or not at all, was propounded in **Taylor versus Taylor** (1875) 1 Ch D 475 and it was followed by the Privy Council in **Nazir Ahmad versus King Emperor,** AIR 1936 PC 253 and it has consistently been followed since then. What prima facie appears at this stage is that the procedure prescribed by Section 52 A of the Act and by the Standing Order No. 1 of 1989 issued by the Central Government and the guidelines issued by the Hon'ble Supreme Court in **Mohanlal** (Supra) have not been followed in the present case, which vitiates the prosecution.

33. It has further been held in Tofan Singh (Supra) that: -

"158.1. That the officers who are invested with powers under Section 53 of the NDPS Act are "police officers" within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

158.2. That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act."

Therefore, the confessional statements of the applicant cannot be used in the trial.

34. In **Union of India v. Rattan Mallik**, (2009) 2 SCC 624, the Hon'ble Supreme Court explained the principles applicable in grant of Bail in offences under the NDPS Act as follows:--

"11. Section 37 of the NDPS Act, as substituted by Act 2 of 1989 with effect from 29-5-1989 with further amendment by Act 9 of 2001 reads as follows:

"37. Offences to be cognizable and non-bailable.-

(1) Notwithstanding anything contained in the Criminal Procedure Code, 1973 (2 of 1974),

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless--

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and Page 11 of 15

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section

(1) are in addition to the limitations under the Criminal Procedure Code, 1973 (2 of 1974), or any other law for the time being in force on granting of bail."

It is plain from a bare reading of the non obstante clause in Section 37 of the NDPS Act and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Criminal Procedure Code, 1973, it is also subject to the restrictions placed by clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the

other twin conditions viz. (i) the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds". The expression "reasonable grounds" has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn, points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence (vide Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798). Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.

We may, however, hasten to add that ***while considering an application for bail with reference to Section 37 of the NDPS Act, the court is not called upon to record a finding of "not guilty". At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail****. The satisfaction of the court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail."*

(Emphasis supplied)

35. Analyzing the facts of the present case for the purpose of deciding the applicant's claim for bail in light of the aforesaid law, I find the following facts to be relevant for deciding the application for grant of bail to the applicant: -

(i) The drugs in question have been manufactured by established manufacturing companies and the same had been purchased by M/s G. M. traders from various suppliers with proper documentation;

(ii) The proprietor of M/s G. M. Traders Lakshman Prasad holds license to deal in the drugs recovered and the applicant being his younger brother, claims to have been looking after his business because of his illness;

(iii) The drugs in question are mentioned in Schedule H and Schedule H 1 appended to the Drugs and Cosmetics Rules and at this stage, there is nothing on record to even prima facie indicate that the same are narcotic drugs;

(iv) No material has been placed on record to indicate that the procedure prescribed in Section 52 A of the Act has been followed in the present case

(v) The confessional statement of the applicant is not admissible in evidence in view of the law laid down by the Hon'ble Supreme Court in Tofan Singh (Supra);

36. The aforesaid facts raise doubts against the prosecution case and it give rise to a reasonable ground for prima facie satisfaction at this stage that the applicant may not be held guilty of the alleged offences.

37. The applicant has no criminal history and, therefore, there is no ground to

believe that in case the applicant is released on bail, he would again indulge in committing similar offences.

38. Moreover, nothing has been placed on record which may give rise to a reasonable apprehension that in case the applicant is released on bail, he would influence the witnesses.

39. No other material has been placed by the respondent C.B.N., which may indicate that the applicant is not entitled to be released on bail.

40. In view the aforesaid discussion and without making any observations on merits of the case, I am of the view that the applicant is entitled to be released on bail pending conclusion of the trial. The bail application is accordingly allowed.

41. Let the applicant - **Pavan Kumar Agrawal**, be released on bail in C.B.N. Case Crime No. 04 of 2021, under Sections 21/22/25/28/30/35 of Narcotic Drugs and Psychotropic Substances Act, 1985, Police Station C.B.N. New Delhi, on his furnishing a personal bond and two reliable sureties each of the like amount to the satisfaction of the court concerned subject to following conditions:--

(i) The applicant will not tamper with the evidence during the trial.

(ii) The applicant will not influence any witness.

(iii) The applicant will appear before the trial court on the dates fixed, unless personal presence is exempted.

(iv) The applicant shall not directly or indirectly make inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court to any police officer or tamper with the evidence.

42. In case of breach of any of the above conditions, the prosecution shall be at liberty to move an application before this Court seeking cancellation of bail.

(2022) 11 ILRA 917
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.10.2022

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Revision No. 743 of 2022

Irfan Ahmad (Juvenile) ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Aftab Alam

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - The Juvenile Justice (Care and Protection of Children) Act, 2015 - Section 102 - Revision, Indian Penal Code, 1860 - Sections 376, 504 & 506 - The Protection of Children From Sexual Offences Act, 2012 - Section 3/4, The Schedule Castes And The Schedule Tribes (Prevention of Atrocities) Act , 1989 - Section 3(2)(v) - Revisional jurisdiction is only applicable in exceptional situations where the justice delivery system requires interference to correct manifest illegalities or prevent a gross miscarriage of justice - It is not an appellate forum for scrutinizing evidence or exercising the jurisdiction simply due to the factum of another view - in the event of justice failure, the Revisional power's applicability remains unaltered. (Para - 11)

(B) Criminal Law - Indian Penal Code, 1860 - Section 375 - Rape - extent of penetration is immaterial and that the perineum is part of the private parts, which sheathes the urethra - even if the penetration was very slight and was not into vagina, the same will bring the act within the definition of rape - *word of caution* - whether the act fell within the definition of rape, should be left to be decided by the court concerned when the matter is brought before it for hearing afresh.(Para -14, 15)

Informant filed an F.I.R. - alleging a 7-year-old girl was attacked by a juvenile - case was heard by Juvenile Justice Board - final report was accepted - protest petition dismissed - case was challenged in Criminal Appeal - order was set-aside - case was directed to be heard and decided afresh - minor accused has come in revision through his natural guardian/father. **(Para - 4)**

HELD:- Appellate court's findings/observations are not perverse, incorrect, or illegal and cannot be interfered with by the Court's revisional jurisdiction under section 102 of the Juvenile Justice Act, 2015.**(Para -16)**

Revision dismissed. (E-7)

List of Cases cited:-

Jagannath Choudhary Vs Ramayan Singh, 2002 SCC (Cri) 1181

(Delivered by Hon'ble Mrs. Jyotsna Sharma, J.)

1. Heard Sri Aftab Alam, learned counsel for the revisionist and learned A.G.A. for the State. None appears on behalf of the respondent no.2 despite service of notice.

2. Perused the record.

3. This criminal revision has been filed under section 102 of the Juvenile Justice (Care and Protection of Children) Act, 2015 challenging the order dated 15.01.2022 passed by Additional Sessions Judge/Special Judge (POCSO Act), Azamgarh in a Criminal Appeal No.80 of 2017 by which the order of the Juvenile Justice Board dated 19.01.2017 was set-aside and the matter was remanded by the appellate court for deciding it afresh in a matter arising out of Case Crime No.17 of 2016, under sections 376, 504, 506 I.P.C. and section 3/4 POCSO Act and section 3(2)(v) of SC/ST Act, Police Station-Mubarakpur, District- Azamgarh.

4. Relevant facts leading to this revision are as below:-

Informant- Indrawati lodged an F.I.R. alleging that her daughter, aged about 7 years, was playing in front of her house with other kids of the locality; the juvenile took away her daughter in a cabin/housing a tube-well and ravished her; she started bleeding and cried in pain; hearing her screams, other children came and apprehended him at the spot; the informant also reached at the place of occurrence; however, the accused escaped, threatening them; the victim was medically examined; blood was spotted in her private parts; after collection of the evidence a final report was submitted by the Investigating Officer; thereafter, on the protest petition moved by the informant, the matter was heard by the Juvenile Justice Board, where the final report was accepted and the protest petition was dismissed vide order dated 19.01.2017; challenging the aforesaid order, Criminal Appeal No.80 of 2017 was preferred before the Special Judge (POCSO Act)/Children Court, Azamgarh; after hearing both the sides, the order of Juvenile Justice Board was set-aside with a direction to Juvenile Justice Board to hear and decide the matter

afresh, keeping in mind the observation of the appellate court. Against the above order of the appellate court dated 15.01.2022, the minor accused has come in this revision through his natural guardian/father.

5. The very first submission of learned counsel for the revisionist is that the order passed by the Juvenile Justice Board was well reasoned, speaking and was passed on appreciation of evidence available and other facts and circumstances of the case; the appellate court without any good reasons took a different view of the matter; it is a principle of law that where two views are possible, the one favouring the accused is to be preferred; but the appellate court did not adhere to the established principles of law and gave the decision in a one sided and arbitrary manner; the Juvenile Justice Board as well as the appellate court relied on doubtful evidence and also ignored the fact that the prosecution story was improbable; the appellate court ignored the material contradictions in the statements of the witnesses. The final report under section 169 Cr.P.C. was submitted by the Investigating Officer of the rank of Deputy Superintendent of Police, on sufficient grounds; the protest petition was dismissed by the Juvenile Justice Board after considering all the aspects including statements of witnesses, medical report, statement of the Doctor and a detailed order was passed; however, the appellate court passed its order dated 15.01.2022 in a casual and routine manner; hence, the order of the appellate court is liable to be set-aside.

6. First, I perused the order of the Juvenile Justice Board. Passing a very detailed order, the Juvenile Justice Board in a sequential manner referred to each one of parcha nos. I, II, IIA, IIB, III, IIIA, IV, IVA, V, VI, VII, VIII and IX and also made certain observations about the medical reports of the accused as well as the victim and thereafter observed that the conclusion drawn by the Investigating Officer is correct and is based on the evidence collected; therefore, the final report is accepted and the protest petition is dismissed.

7. I went through the order passed by the appellate court, which is under challenge in this revision; after referring to well-settled principles of law as regard the options available to the court concerned regarding final report, the appellate court proceeded to refer to the statements of the victim, aged about 7 years, wherein she supported the prosecution version and said *"when I was playing with other kids of the locality, the accused called me and carried me of to near by tube-well cabin; I made a noise, then my sister Sushmita and others rescued me"*. The appellate court also referred to the statement of the victim recorded under section 164 Cr.P.C., wherein she reiterated the same statement adding that she was subjected to sexual assault. The appellate court, thereafter referred to the statement of Sushmita, sister of the victim, who supported the prosecution version and stated that on hearing screams of her younger sister, she rushed to the tube-well room and found the juvenile in the act; he (juvenile) was beaten then and there and the girl was rescued; the appellate court also referred to the statement of mother of the victim, who stated that she also reached at the spot after hearing the noise; the accused escaped from their clutches threatening them; she also stated that her daughter was bleeding from her private parts. After referring to the aforesaid statements of three witnesses, the

appellate court, in my view, rightly observed that the Juvenile Justice Board dismissed the protest petition, ignoring the statements of three prosecution witnesses of facts; as far as medical evidence is concerned, the appellate court while noticing the fact of presence of blood on perineum in the medical examination of the victim, also observed that even if hymen was found intact, commission of sexual assault cannot be ruled out. In my view, such an observation is not perverse or incorrect.

8. Before I proceed further, I am inclined to refer to the most vehement argument put-forth before this Court; it is contended that the medical evidence is not only contradictory, but is also suspicious in character, therefore, no reliance ought to have been placed by the appellate court on it.

9. The medical examination of the victim was done after few hours of the incident in which hymen was found intact, no external injury and spermatozoa found in the vaginal smears but blood was found on perineum. It may be noted that this is not the case of prosecution that the accused was caught after the act rather the case is that he was caught in the act. My view is that necessary inference can be drawn in these circumstances and probability of sexual assault cannot be ruled out however whether it amounted to rape or attempt thereof, is for court concerned to decide. The opinion given by the appellate court in this regard cannot be categorized as perverse; the appellate court also rightly took note of the injuries found on the person of juvenile in the light of prosecution case that he was caught in the act at the spot and was beaten by the people gathered there.

10. I minutely perused the impugned order; the appellate court relied on the evidence given by the three prosecution witnesses of fact; mother of the victim, sister of the victim, who caught the accused in the act and who reached the spot on hearing screams of her seven years old sister and the victim herself as well as her medical report and as also the injuries of the accused, who as per prosecution version was beaten by the persons gathered there and drew a conclusion that the order of the Juvenile Justice Board is against the law and facts and therefore set it aside.

11. The Hon'ble Apex Court in **Jagannath Choudhary vs. Ramayan Singh, 2002 SCC (Cri) 1181**, while dealing with the powers of the revisional court held as below:-

"It is not to be lightly exercised but only in exceptional situations where the justice delivery system requires interference for correction of a manifest illegality or prevention of a gross miscarriage of justice. In Nosibolla, Logendranath Jha and Chinnaswamy Reddy as also in Thakur Das v. State of M.P., this Court with utmost clarity and in no uncertain terms recorded the same. It is not an Appellate forum wherein scrutiny of evidence is possible; neither the Revisional jurisdiction is open for being exercised simply by reason of the factum of another view being otherwise possible. It is restrictive in its Application though in the event of there being a failure of justice there can be said to be no limitation as regards the applicability of the Revisional power."

12. It may be noted that while exercising jurisdiction under section 397 Cr.P.C., the High Court is empowered to

satisfy itself as to correctness, legality or propriety of any finding given by the courts below. While under section 102 of the Juvenile Justice Act, the High Court is empowered to call for record of any proceeding to satisfy itself as to legality or propriety of any order and pass such order in relation thereof as it thinks fit. Two words, legality and propriety, are common in the revisional powers as exercisable under section 397 Cr.P.C. and as exercisable by the High Court under section 102 of the Juvenile Justice Act, 2015 both. Thus, it is clear that the principles underlying the exercise of revisional powers under section 397 Cr.P.C. are also applicable to a large extent when the revisional powers have to be exercised under section 102 of the Juvenile Justice Act, 2015.

13. The Juvenile Justice Board though referred to the statements of the witnesses supporting the prosecution case, but did not relied on them instead relied on the evidence given by the witnesses who were essentially not the witnesses of the fact and also gave importance to the fact of lack of any external injury, absence of spermatozoa in pathological test and the fact of finding the hymen intact. In my view, the appellate court gave good reasons for not finding the order of the Juvenile Justice Board sustainable on facts and on law. In these circumstances, the approach of the appellate court in giving a different view cannot be called improper or illegal.

14. A submission has also been made before this Court that this case does not fall under the definition of section 375 I.P.C. Confronting this submission, learned A.G.A. has drawn the attention of this Court to the offence of rape as defined under section 375 I.P.C., which said that:-

"375. Rape- A man is said to commit "rape" if he-

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person."

15. It is important to notice that the extent of penetration is immaterial and that the perineum is part of the private parts, which sheathes the urethra. Hence, even if the penetration was very slight and was not into vagina, the same will bring the act within the definition of rape. However, I add a word of caution here that whether the act fell within the definition of rape, should be left to be decided by the court concerned when the matter is brought before it for hearing afresh.

16. On the basis of above discussion, I am of the view that the findings/observations given by the appellate court are not perverse, incorrect or illegal and the same is not liable to be interfered in exercise of revisional jurisdiction of this Court under section 102 of the Juvenile Justice Act, 2015.

17. Accordingly, present revision is **dismissed** at this stage.

18. Copy of the order be transmitted to the court concerned.

(2022) 11 ILRA 921
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.11.2022

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Revision No. 1514 of 2009

Fida Hussain ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:

Sri Pradeep Kumar Shukla

Counsel for the Opposite Parties:
Govt. Advocate, Sri Rajneesh K. Srivastava, Smt. Priyanka Srivastava

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 - Revision - Indian Penal Code, 1860 - Section 302 - murder - 'five golden principles' or to say' constitute the panchsheel of the proof of a case based on circumstantial evidence' - (1) circumstances from which the conclusion of guilt is to be drawn should be fully established - circumstances concerned must or should and not may be established - (2) fact so established should be consistent only with the hypothesis of the guilt of the accused - (3) circumstances should be of conclusive nature and tendency - (4) They should exclude every possible hypothesis except that one to be proved - (5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. (Para - 42)

(B) Criminal Law - administration of justice in criminal cases - involves adopting the view that is most favorable to the accused, if there are two possible views on the evidence, based on the accused's guilt or innocence. (Para - 36)
(C) Evidence Law - Motive must be proved in a case of circumstantial evidence - But in relation to criminal trials based circumstantial evidence only - prosecution should prove motive as well if it's case is based on circumstantial evidence. (Para - 45)

Revision against acquittal of respondent no.1 – informant (P.W.-1) gave self-contradictory statement regarding time, writing and lodging of F.I.R. - witnesses not seen the occurrence - falsely shown as eyewitnesses - no injury of fire arm - no injury of dagger in the shape of punctured wound - No F.S.L. Report in respect of blood stained and plain soil produced - not proved beyond reasonable doubt that deceased was actually killed on the alleged place of occurrence. **(Para - 9, 14, 20, 47)**

HELD:- Motive in this case is not grave or acceptable, and it appears to be unreasonable and insufficient to commit the alleged crime. No independent witness examined in support of the alleged motive. Trial Court rightly acquitted the accused persons. **(Para - 46,48)**

Revision dismissed. (E-7)

List of Cases cited:-

1. Rambraksh Vs St. of Chhatisgarh, AIR 2016 SC 2381

2. Tomaso Bruno Vs St. of U.P., (2015) 7 SCC 178

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

4. Thaman Kumar Vs St. of U.T. of Chandigarh, (2003) 6 SCC 380

5. Niranjan Prasad Vs St. of M.P., 1996 CrLJ 1987 (SC)

6. Uma Shankar Chaurasia Vs St. of U.P., 2004 (50) ACC 152 (All... LB) (DB)

7. St. Govt. of NCT of Delhi Vs Sunil, (2001) 1 SCC 652

8. Sunil Kundu Vs St. of Jharkh., (2013) SCC (Cri) 427

9. Chanali Maddilety Vs St. of A.P. (20110 SCC (Cri) 445

10. Devatha Venkata Swamy @ Ramgaiah Vs Public Prosecutor H.C., 2004 SCC (Cri) 963

11. Maruti Rama Naik Vs St. of Maha., 2003 0 Supreme (SC) 863

12. Kali Ram Vs St. of H.P. (1973) 2 SCC 808;

13. St. of Raj. Vs Raja Ram (2003) 8 SCC 180;

14. Chandrappa & Ors Vs St. of Karn., 2007 4 SCC 415:

15. Upendra Pradhan Vs St. of Orissa, (2015) 11 SCC 124 and

16. Golbar Hussain & Ors. Vs St. of Assam & anr. (2015) 11 SCC 242

17. St. of U.P. Vs Satish, (2005) 3 SCC 114

18. Hanumant Govind Nargundkar Vs St. of M.P., AIR 1952 SC 343

19. Sharad Birdichand Sards Vs St. of Maha., AIR 1984 SC 1622; (1984) 2 SCC 116

20. Nathiya Vs St. Rep. By I.P., Bagayam P.S., Vellore, Crim. Appeal No. 1015/2010

21. Sujit Biswas Vs St. of Assam, (2013) 12 SCC 406

22. Raja @ Rajendra Vs St. of Har. (2015) 11 SCC 43

23. Ganpat Singh Vs St. of M.P., (2018) 2 SCC (Cri) 159

24. Sampath Kumar Vs I.P. Krishnagiri, AIR 2011 SC 1249

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

1. None appeared for the revisionist. Heard learned A.G.A. and perused the material available on record. Since the criminal revision can not be dismissed in default, hence this revision is being decided on merit.

2. This revision has been preferred against the judgment and order of acquittal passed in S.T. No. 630 of 2005 (State Vs. Ram Chandra and Others) arising out of Case Crime No. 333 of 2004 under Section 302 I.P.C. Police Station- Bhuta, Bareilly, by Additional Sessions Judge Court No. XI, Bareilly on 9.1.2009.

3. In brief, the revision has been filed on the grounds that Additional Session Judge has not considered all the facts and circumstances and acquitted respondent no.1 which is not correct in the eyes of law. He has not passed the judgment in accordance with criminal law, hence, the impugned judgment be set aside and revision be allowed.

4. In brief facts of the case are that informant- revisionist (P.W.-1) Fida Hussain lodged an F.I.R. that on 14.7.2004, he along with his sons Pappu @ Israr (deceased), Iqbal (P.W.-2) and one Noor Hasan was sitting near pumping set. In the night at about 8:30 p.m. Bihari son of Khandari came there and asked the deceased to go to Mirzapur with him. As soon as deceased reached near the sugarcane field of Mohan Lal, informant heard voice of deceased and sound of fire. He with his son Iqbal Hussain and Noor Hasan rushed there and saw accused Ram Chandra, Uma Charan, Ram Autar and Bihari had surrounded his son Pappu and killed him by assaulting with Gupti (dagger) and country made pistol, thereafter, accused persons ran towards jungle. The incident was witnessed and accused were recognized in the light of torch. On this written complaint, an F.I.R. was lodged at 10:00 p.m. in Police Station Bhuta. Yashpal Singh, was appointed as I.O. of the case who started investigation. He copied chick F.I.R., G.D., statement of scribe, statement of the informant in the night and on next date i.e. 15.7.2004 inspected the place of occurrence and prepared map (Ex. Ka-12), appointed punch and conducted inquest (Ex. Ka-5) prepared papers for post-mortem and sent dead body for autopsy. He also took blood stained and plain soil and prepared recovery memo (Ex. Ka-11). He also prepared recovery memo of torch (Ex. Ka-17); copied post mortem report (Ex. Ka-2);

arrested accused persons and recorded their statements and recovered a countrymade pistol of 12 bore with empty cartridges in its barrel on 16.7.2004 on the pointing out of the accused Ram Chandra and prepared its recovery memo (Ex. Ka-13); lodged F.I.R. at Crime No. 337 of 2004 under Section 25 of the Arms Act against accused Ram Chandra and submitted charge-sheet (Ex. Ka-16) under Section 302 I.P.C.

5. P.W.-7, S.I. Charan Singh, investigated the case under Section 25 Arms Act and copied chick F.I.R., G.D., statement of scribe and accused Ram Chandra, inspected the place of recovery and prepared map (Ex. Ka-18) and got prosecution sanction from District Magistrate (Ex. Ka-19) and submitted charge-sheet (Ex. Ka-20). Accused persons denied the charges and sought trial.

Prosecution examined following witness:-

P.W.-1	Fida Hussain, Informant
P.W.-2	Iqbal
P.W.-3	Ramesh Chandra- Scribe
P.W.-4	Dr. Arvind Agrawal
P.W.-5	Constable/Clerk Chandrapal
P.W.-6	S.I. Yashpal Singh- I.O.,
P.W.-7	S.I. Charan Singh
P.W.-8	S.I. Pyare Lal

Prosecution submitted following documentary evidence;

Ex. Ka-1	Tehrir
Ex. Ka-2	Post-mortem report
Ex. Ka-3	Chick F.I.R.
Ex. Ka-4	Chick report
Ex. Ka-5	Inquest report
Ex. Ka-6	Specimen Seal
Ex. Ka-7	Police Form No. 13
Ex. Ka-8	Photo Nash
Ex. Ka-9	Letter to C.M.O.
Ex. Ka-10	Letter to R.I.
Ex. Ka-11	Recovery Memo
Ex. Ka-12	Map
Ex. Ka-13	Recovery memo country made pistol.
Ex. Ka-14	Map
Ex. Ka-15	Recovery Memo
Ex. Ka-16	Charge-sheet under Section 302 I.P.C.
Ex. Ka-17	Recovery memo of Torch
Ex. Ka-18	Map regarding place of recovery
Ex. Ka-19	Prosecution sanction u/s 25 of Arms Act.
Ex. Ka-20	Charge-sheet

6. After closure of the prosecution evidence, statement of the accused persons were recorded wherein they denied the charges and offence and claimed that false case and evidence have been adduced; I.O. has falsely investigated the matter. However, no evidence was produced in defence.

7. Learned trial Court has discussed the oral, documentary evidence as well as case laws and concluded that the F.I.R. is anti timed, I.O. and witnesses have made material improvements in the case and after obtaining post mortem report concluded that the injuries caused to the deceased can not be caused from the dagger and fire-arm; witnesses have not seen the occurrence and on the basis of suspicion and enmity, accused persons have falsely been implicated.

8. It would be better to decide the revision discussing the grounds taken by the learned trial Court separately.

9. According to the learned trial Court, the F.I.R. is anti timed. In this case, as per the F.I.R., the occurrence took place at 8: 30 p.m. on 14.7.2004. The distance of police station from the place of occurrence is 7 km. The F.I.R. was lodged at 10:00 p.m. In this regard, statements of witnesses and documentary evidence have been considered. The written complaint was reduced in writing by Ramesh Chandra of the village and after listening the informant put his mark on it and produced it in the police station and got a case registered at 10:00 p.m. In examination-in-chief, P.W.1 has deposed that the F.I.R. was written in village and he went police station with written complaint but in cross-examination this witness has admitted that when dead body was taken from Mirzapur to the police station, Ramesh also went with him. The dead body was removed after 2-3 hours from the spot meaning thereby the dead body remained on the place of occurrence at least up to 10:30 p.m. He again deposed that dead body was got up when the police reached the spot. It is also established that before lodging the F.I.R. the police had reached on the spot. Contrary to the statement of examination-in-chief this witness deposed that the Tehrir was reduced in writing by Ramesh Chandra sitting at the police station. This witness admits that the police station is about 7 to 7.5 km. away from Mirzapur (place of occurrence) contrary to the previous statement this witness again deposed that when he prepared the written complaint, the corpus was at police station. He further deposes that the Tehrir was written outside the police station and dead body was on the spot and he had gone alone to lodge the report. Thus, informant P.W.-1 has given self contradictory statement regarding time, writing and lodging of F.I.R.

10. **P.W.-3, Ramesh Chandra**, scribe, has also admitted that when he had written the complaint, the police had already reached on the spot. The learned trial Court opined that from the above statement it is established that before lodging the F.I.R. the police had reached on the spot. The informant P.W.-1, has also admitted that the dead body remained on the spot for 2-3 hours after the occurrence, thus, it is impossible for the informant to lodge the F.I.R. going 7-7.5 km away at 10:00 p.m. He cannot remain present same time at two places. Learned trial Court concluded that from the above statements it is established that the dead body was lying on the spot upto 11:00 p.m. P.W.-1 has also admitted in cross-examination that he went to police station with other persons carrying dead body of his son and the dead body had been sealed at the police station. In this respect statement of P.W.2 Iqbal, brother of the deceased, is also relevant. In cross-examination he deposed that after two and a half hours dead body was taken in a covered state keeping the same on lathi. The police had also reached on the spot, thereafter, the dead body was taken to the police station. The statement of this witness was recorded after 15 days while he was very much present at his house being the real son of the informant and real brother of the deceased.

11. From the aforesaid discussion, it is established that the F.I.R. was not lodged before reaching the police station and when they reached police station only then the F.I.R. was lodged making it ante-timed after consultation with police. Since the crime number and sections are also mentioned in the inquest report, therefore, it is obvious that the inquest proceeding was shown conducted after lodging the F.I.R., therefore, it was not possible for the I.O. to conduct the inquest proceeding on spot but in inquest report (Ex. Ka-5) the

I.O. has shown that the inquest was conducted at the place of occurrence on 15.7.2004 between 6:30 a.m. to 8:00 a.m. and according to Panchan the deceased was killed by firearm. Thus, it is also established that the inquest proceeding was not conducted on the spot as shown in Ex. Ka-5. Thus, the lodging of F.I.R. after making it ante-timed and convenient for the prosecution is established.

12. The fact that the F.I.R. is anti-timed is not the sole realm to discard the prosecution case but if it seems that it was done with malafide intention to falsely implicate the accused persons and to show some persons as eyewitnesses, then the prosecution case gets corrupted, incorrect and impure.

13. The learned trial Court has concluded that the accused persons had another ground that the witnesses of fact P.W.1 and P.W.2 have not seen the occurrence, they are not the real witness and they are the interested witness being real father and brother of the deceased.

14. In F.I.R., the informant has said that the accused persons killed the deceased by attacking with Gupti (dagger) and Tamancha (country made pistol) but the post-mortem report shows that there were six cut wounds, two lacerated wounds, one contusion and one injury of rubbing. Though the autopsy doctor has deposed that injury no. 1, 2, 4, 5 and 9 to 10 may occur from the attack of Gupti and sharp edged weapon and injury no. 3 & 6 may occur from the attack of blunt object but it is well known fact that from the attack of Gupti only punctured wound may occur and no cut wound shall occur. Informant P.W.-1, father of the deceased has deposed that after hearing the noise, he reached on the spot with his son, P.W.-2, Iqbal Hussain, saw that Umacharan had put foot on the neck of the deceased and Bihari had pressed his neck, Ram Chandra had caught his legs and Ram Autar was beating by the butt of the licensed gun and Uma Charan was assaulting from dagger. P.W.2 has also deposed about the attack in the same manner as alleged by P.W.1, Fida Hussain. According to him, when they exhorted, accused persons ran away on the road of Gualdiya by making fire. It is noteworthy that as per version of F.I.R., fire arm was also used in killing the deceased whereas this fact is not established from the medical evidence. Thus from beginning to the end of inquest proceeding the case of the prosecution was that the deceased was killed by firearm. After first recording of the statement under Section 161 CrP.C., the I.O. again recorded the statement of witness under Section 161 Cr.P.C. to make the case in conformity with medical evidence. But P.W.1 has also deposed that Ram Autar had gun in his hand, Ram Chandra and Uma Charan had country made pistols and by using these fire arms they killed the deceased and ran away towards the jungle. This witness has also deposed that accused persons had killed the deceased by firing at him. If we scrutinize oral and documentary evidence together, we find that deceased was not killed by fire arm and there was no injury of fire arm on the person of deceased. Hence, it is concluded that the witnesses have not seen the occurrence and they are falsely shown as eyewitnesses.

15. In **Rambraksh Vs. State of Chhatisgarh, AIR 2016 SC 2381 and Tomaso Bruno Vs. State of Uttar Pradesh, (2015) 7 SCC 178**, it has been held that-

"Improvement made by witness in its statement made to the Court than what was made to the I.O. u/s 161 CrPC not to be relied on. "

16. In ***Rohtash Vs. State of Haryana, (2012) 6 SCC 589,*** it has been held that-

" If the P.Ws had failed to mention in their statements u/s 161 CrPC about the involvement of an accused, their subsequent statement before court during trial regarding involvement of that particular accused cannot be relied upon. Prosecution cannot seek to prove a fact during trial through a witness which such witness had not stated to police during investigation. The evidence of that witness regarding the said improved fact is of no significance."

17. Generally, if there is inconformity between the ocular and medical evidence, the ocular evidence shall prevail over the medical evidence but if medical evidence is true and correct after the examination/autopsy of the deceased and the oral evidence does not inspire confidence and does not corroborate the medical evidence and the presence of the witnesses is doubtful, the prosecution version may be disbelieved and discarded. In this case medical evidence does not say two possibilities, it says only one possibility that the deceased was killed by sharp edged weapon and the blunt object whereas as per the prosecution witness the deceased was killed by using a dagger and fire arm, if witnesses had seen the occurrence, there would have been punctured wounds and fire arm injuries but such injuries were not found by the doctor during the course of autopsy. Therefore, it is concluded that in case where the F.I.R. had been lodged making it ante-timed and I.O. tried his best for making the case in conformity with the medical evidence and the I.O. has recorded the statement of the witnesses afresh then it can safely be concluded that the act of the I.O. is not an independent and impartial act and he has not collected the evidence but has created the evidence to ensure the conviction of the accused persons.

18. In ***Thaman Kumar Vs. State of Union Territory of Chandigarh, (2003) 6 SCC 380,*** it is held that

" 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 t 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".

19. Thus, this Court is of the opinion that this case falls in first category about which it may legitimately be referred that oral evidence regarding injuries having been caused from a particular weapon is not trustworthy. Hence, it is concluded that the witnesses have not seen the occurrence and they are falsely deposing in evidence .

In ***Niranjan Prasad Vs. State of M.P., 1996 CrLJ 1987 (SC),***

" in murder trial, testimony of eye-witnesses was that the deceased and injured were assaulted with sharp cutting weapons but their testimony was not corroborated with medical evidence showing deceased having been injured by blunt object (weapon) only. Post Mortem Report showing that the deceased had not injury which could be caused by a sharp cutting weapon and, indeed, he had sustained only one injury which could be caused, according to the doctor by a blunt weapon only. Keeping in view the sharp contrast in between the ocular testimony and the medical evidence" .

20. The principle laid down in this case totally fits in this case. According to the witnesses the deceased was killed by using a dagger and fire arm while there is no injury of dagger in the shape of punctured wound and there is no injury of fire arm. Hence, there was no occasion for the learned trial Court to convict the accused persons.

21. Even in inquest (Ex. Ka-5) punch/witness have said that the deceased appear to be died due to fire-arm injuries. Thus, it is again established that till the time of inquest, the prosecution was of the opinion that the deceased was killed by fire arm injury. While no injury of fire arm was found in the post mortem report.

22. In ***Uma Shankar Chaurasia Vs. State of U.P., 2004 (50) ACC 152 (All... LB) (DB)*** and ***State Govt. of NCT of Delhi Vs. Sunil, (2001) 1 SCC 652***, it has been held that-

"when there is conflict between the injury report and Post Mortem Report, the Post Mortem Report should be preferred over the injury report."

23. In ***Sunil Kundu Vs. State of Jharkhand, (2013) SCC (Cri) 427***, it has been held that -

"General rule is that when there is a cogent and reliable ocular evidence, it will have primacy over medical evidence. However when eye-witness account is totally inconstant with medical evidence and there is reason to believe that improvements were made in Court to bring prosecution case in conformity to post-mortem notes. The contradictions between oral and medical evidence cannot be ignored. In this case major lacuna in prosecution case was that alleged use of fire arms by the accused was not proved as no fire arm injuries were found on deceased. Hence accused were held entitled to benefit of doubt. "

24. In ***Chanali Maddilety Vs. State of A.P. (20110 SCC (Cri) 445,***

"Accused AI and A2 alleged to have used stone and stick. The deceased suffered 13 incised and stab wounds. No injury was caused by blunt object like stick or stone. As injuries did not correspond to the weapons allegedly used by A1 and A2. The Trial Court acquitted the accused A1 and A2.

25. In ***Devatha Venkata Swamy @ Ramgaiah Vs. Public Prosecutor High Court, 2004 SCC (Cri) 963,***

" The witness in his evidence clearly stated that the appellant pierced the forehead of the deceased once, but the medical report shows that the injuries caused to the forehead of the deceased was by the use of a blunt weapon and that too by repeated blows. So there was direct conflict between the medical evidence and ocular evidence. Hence the prosecution case was not believed. "

26. Consequently this Court concludes that according to the I.O. and the witnesses of the fact the deceased was killed by fire arm while as per the medical report, the injuries were caused by sharp edged weapon and blunt object, hence, post mortem report would prevail and in view of the report and evidence of the post mortem doctor, the evidence of the alleged eye-witnesses is false, incorrect and untrustworthy.

27. The I.O., **P.W.-6- Yashpal Singh**, has admitted that informant in his statement under Section 161 Cr.P.C. that accused persons had killed his son by fire arm but after receiving the post mortem report, he again recorded the statement of informant. Statement of P.W. 2, Iqbal Hussain, was also recorded only after receiving post mortem report. This witness in his cross-examination has accepted that statement of the informant was recorded in the night of 14.7.2004. Informant has also accepted in his cross-examination that first of all he had stated to the I.O. that accused persons had killed his son from gun and country made pistol. He has also accepted that he had instructed the scribe Ramesh Chandra regarding killing of the deceased by firing from the gun. It has already been concluded that the F.I.R. is ante-timed and it is again concluded that the I.O. has tried his best to make the case in conformity with the post mortem report and accordingly he recorded the statement of witnesses of the fact. This finding also find support from the statement of the informant-P.W.-1, given to the I.O. first time on the date of occurrence. Further, the statement of the informant was recorded by the I.O. on 29.7.2004 after receiving the post-mortem report only to make the prosecution case in accordance of the injuries but even then he could not succeed. Thereafter, making an improvement, the informant- P.W.1 also changed his evidence and in the Court he deposed that the deceased was killed by sharp edged weapon and blunt object. Learned trial Court has found the illegal and unacceptable improvement and this Court also is in agreement with the finding of the learned trial Court.

28. It is also noteworthy that P.W.4, Dr. Arvind Agrawal, in his cross-examination has insisted that dagger is a thin and long weapon. Cut wound present on the dead body may occur only from the sharp edged weapon like *Gadasha or Tabal* or sword.

29. It is noteworthy that when P.W.2, Iqbal Hussain, was very much present on the spot and at his house then why his statement was not recorded along with the

statement of the informant and why statement was recorded after 15 days on 29.7.2004. This witness also deposed in the same manner like the informant that the deceased was killed by dagger and butt part of the gun while as per P.W.4 all the injuries were caused from sharp edged weapon like tabal, Gadasha, sword and by using blunt object.

30. In ***Maruti Rama Naik Vs. State of Maharashtra, 2003 0 Supreme (SC) 863,*** it has been held that -

"In this case P.W.-3, injured, had not named the appellants as assailants in his statement to the police despite opportunity to record his evidence after one day's delay his statement was recorded. It was held that without corroboration the evidence of this witness was not liable to be relied on. P.W.-4 was the close friend of the deceased but he did not inform the police or anybody else and he went to his workplace. There was unexplained delay in recording his statement."

31. Hence, statement of witness was not relied upon.

32. Thus, in the same manner the evidence of P.W.-2 is also not reliable and trustworthy.

33. Accused Ram Chandra has also been charged for Section 25 of the Arms Act. According to the prosecution version a country made pistol and empty cartridges used in commission of crime were recovered from his possession on 21.7.2004. Learned trial Court has concluded that if the accused Ram Chandra was arrested from public place like Faiznagar Tiraha and confessed to get the country made pistol recovered used in commission of the crime and if the same was recovered near the sugarcane farm then why no public witness was taken and why the declaration of the accused was not recorded. More so, the country made pistol is not connected from commission of crime as there is no firearm injury to the deceased. So far as licensed gun of the accused is concerned, if it was used in the crime and the licensed gun was taken into custody, why the procedure to cancel the license was not initiated is also questionable.

34. The I.O. of the 25 Arms Act is the subordinate to the S.H.O., P.W.-6, Yashpal Singh, hence, he was having no option but to submit the charge-sheet against the accused Ram Chandra without obtaining any F.S.L. report. Thus, this Court is of the opinion that the learned trial Court has rightly concluded that the F.I.R. is anti-timed and there is illegal and unnatural improvements by the I.O. and the witnesses of fact have not witnessed the incident, they were not present on the spot, therefore, their statement is not consistent.

35. In the F.I.R. the informant has put a motive that deceased did not listen to the accused that is why the accused have killed him. This fact is not explained by the prosecution and it can not be a ground to kill a person by another. There is no need to prove the motive if there is direct evidence. Though motive and mens-rea may arise at any point of time even at the time of occurrence also. There is some importance of motive in cases of circumstantial evidence though if chain of the circumstances is complete, there is no need to prove the motive but in this case it is not proved that the witnesses of fact were present on the spot, therefore, there is variation in their statement and there is

contradiction between the ocular and the medical evidence. That's why evidence of the witnesses of fact does not inspire confidence in the mind of the Court, hence, their evidence has been rejected. Thus the case remains a case of circumstantial evidence. In that case the prosecution is duty bound to prove the motive and that the chain of the circumstances is complete. As per the F.I.R. it is not a case of circumstantial evidence. Neither motive nor extra judicial confession nor last seen or recovery of any incriminating item has been proved.

36. Another golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocent, the view which is favourable to the accused should be adopted. ***(See: Kali Ram Vs. State of H.P. (1973) 2 SCC 808; State of Rajasthan Vs. Raja Ram (2003) 8 SCC 180; Chandrappa & Ors Vs. State of Karnataka, 2007 4 SCC 415: Upendra Pradhan Vs. State of Orissa, (2015) 11 SCC 124 and Golbar Hussain & Ors. Vs. State of Assam & Anr. (2015) 11 SCC 242).***

37. Direct evidence means that from which the existence of a given thing or fact is proved either by its actual production, or by the testimony or admissible declaration by someone who has perceived it. In the case of circumstantial evidence certain facts are proved, from which the existence of a given fact is inferred. The two forms are equally admissible. " Superiority of the former is that whilst it contains fallibility of assertion and perception as source of error the latter has in addition, fallibility of inference. " Circumstantial evidence must always be direct, i.e. the facts from which the existence of fact in issue is to be inferred must be proved by direct evidence."

38. Addressing the context of circumstantial evidence, Ian Dennis in the treatise " The Law of Evidence" has propounded:

" Where the case against the accused depends wholly or partly on inferences from circumstantial evidence, factfinders cannot logically convict unless they are sure that inferences of guilt are the only ones that can reasonably be drawn. If they think that there are possible innocent explanations for circumstantial evidence that are not" merely fanciful", it must follow that there is a reasonable doubt about guilt. There is no rule, however, that judges must direct juries in terms not to convict unless they are sure that the evidence bears no other explanation that guilt. It is sufficient to direct simply that the burden on the prosecution is to satisfy the jury beyond reasonable doubt, or so that they are sure.

39. The very high standard of proof required in criminal cases minimizes the risk of a wrongful conviction. It means that someone whom, on the evidence, the fact finder believes is " probably" guilty, or "likely" to be guilty will be acquitted, since these judgments of probability necessarily admit that the fact finder is not "sure". It is generally accepted that some at least of these acquittals will be of persons who are in fact guilty of the offences charged, and who would be convicted if the standard of proof were the lower civil standard of the balance of probabilities. Such acquittals are the price paid for the safeguard provided by the "beyond reasonable doubt" standard against wrongful conviction. "

40. In ***State of U.P. Vs. Satish, (2005) 3 SCC 114,*** it has been laid down that:

"There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touchstone of law relating to circumstantial evidence laid down by this court as far back in 1952."

41. Thus, one of the earliest cases, where the proposition related to circumstantial evidence has been laid down is **Hanumant Govind Nargundkar Vs. State of M.P., AIR 1952 SC 343.**

42. The principle enunciated therein has been reiterated in a catena of judgments of the Hon'ble Apex Court and specifically mention may be made of ***Sharad Birdichand Sards Vs. State of Maharashtra, AIR 1984 SC 1622; (1984) 2 SCC 116.*** The conditions precedent in the words of the Hon'ble Court before conviction could be based on circumstantial evidence must be fully established. The conditions are:

1. The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established.

2. The fact so established should be consistent only with the hypothesis of the guilt of the accused.

3. The circumstances should be of conclusive nature and tendency.

4. They should exclude every possible hypothesis except that one to be proved.

5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

These conditions have been called as the 'five golden principles' or to say' constitute the panchsheel of the proof of a case based on circumstantial evidence.'

43. Recently, in ***Nathiya Vs. State Rep. By Inspector of Police, Bagayam Police Station, Vellore, (Crim. Appeal No. 1015/2010, date of judgment 08.11.2016),*** the Hon'ble Court has approvingly referred to ***Sujit Biswas Vs. State of Assam, (2013) 12 SCC 406 and Raja @ Rajendra Vs. State of Haryana (2015) 11 SCC 43.*** The proposition laid down is to the effect that in scrutinizing the circumstantial evidence, a court is required to evaluate it to ensure that the chain of events is established clearly and completely, to rule out any reasonable likelihood of the innocence of the accused. Whether the chain is complete or not would depend on facts of each case emanating from the evidence and no universal yardstick should ever be attempted.

44. More recently in ***Ganpat Singh Vs. State of Madhya Pradesh, (2018) 2 SCC (Cri) 159,*** it has been reiterated that circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. The circumstances taken cumulatively, should form a change so complete, that there is no escape from the conclusion, that within all human probability, the crime was committed by accused and they should be incapable of explanation on any hypothesis other than that of guilt of accused and inconsistent with his innocence.

45. ***Motive must be proved in a case of circumstantial evidence :*** But in relation

to criminal trials based circumstantial evidence only, the Supreme Court has, in the cases noted below, laid down different law on the point of motive and has clarified that prosecution should prove motive as well if it's case is based on circumstantial evidence.

46. In view of ***Sampath Kumar Vs. Inspector of Police Krishnagiri, AIR 2011 SC 1249,*** in this case the motive is neither grave nor acceptable and it appears to be unreasonable and insufficient to commit the alleged crime. No independent witness has been examined in support of the alleged motive.

47. No F.S.L. Report in respect of blood stained and plain soil has been produced and it is not proved beyond reasonable doubt that deceased was actually killed on the alleged place of occurrence.

48. Thus, from all the four corners this Court is also of the opinion that the learned trial Court has rightly acquitted the accused persons. Hence, revision lacks merit and is liable to be dismissed.

49. Accordingly, the revision is **dismissed.** Lower Court's record be sent back along with a copy of this judgment.

(2022) 11 ILRA 933
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.09.2022

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Revision No. 3712 of 2022

Ravi Shankar ...Revisionist

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Harish Chandra Mishra

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 323, 406, 420, 452, 467, 468, 471, 504 & 506 -The Code of Criminal Procedure, 1973 - Section 397/401 - Revision - Using statutory language does not necessarily mean deception was practiced - Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure though criminal prosecution should be deprecated and discouraged. (Para -9, 11)

Revisionist's application under Section 156(3) - drafted not on basis of real facts but on basis of legal advice - accused/opposite party closely related to applicant/revisionist - forming a business partnership - 'ikrarnama' supports their partnership - applicant's application does not suggest deception or false facts were used to defraud him of money - no evidence of false documents or fabricated tenders - dispute arose during their business transactions - application under Section 156(3) drafted to give it a criminal color - statutory language used to prove deception - fabricated stories to bring matter within the jurisdiction of court. **(Para - 10,11)**

HELD:- Court finds no offense under Sections 406, 420, 467, 468, 471, and that ingredients of other sections have been deliberately inserted to confound and to mislead the courts. Dispute is likely civil, and the revisionist's attempt to criminalize it. Such attempt must fail. No illegality, impropriety or irregularity in the impugned order. Revision liable to be dismissed. **(Para - 12)**

Revision dismissed at admission stage. (E-7)

List of Cases cited:-

1. Randheer Singh Vs St. of U.P. & ors., Criminal Appeal No. 932 of 2021

2. Paramjeet Batra Vs St. of Uttarakhand, (2013) 11 SCC 673

3. Uma Shankar Gopalika Vs St. of Bihar & anr., (2005) 10 SCC 336

4. Robert John D'Souza & Ors . Vs Stephen V. Gomes & anr., 2015 (9) SCC 96

5. Mitesh Kumar J. Sha Vs St. of Karn. & ors., Criminal Appeal No. 1285 of 2021

6. M/s I.O.C. Vs M/s. NEPC India Ltd & ors.

(Delivered by Hon'ble Mrs. Jyotsna Sharma, J.)

1. Heard Sri Harish Chandra Mishra, learned counsel for the revisionist and Sri O.P. Mishra, learned AGA for the State.

2. This criminal revision has been filed against the order dated 16.08.2022 passed by the Special Judge, SC/ST Act, Jhansi in Criminal Misc. Case No. 334 of 2022 refusing to order registration of case against the opposite parties on an application moved under Section 156(3) Cr.P.C. by the applicant-Ravi Shankar.

3. This matter is being finally decided without issuing notice to the respondent no. 2.

4. The relevant facts in brief are that the applicant/present revisionist had moved an application under Section 156(3) Cr.P.C. against Ashish Kushwaha and two unknown persons with the allegations that Ashish Kushwaha, married the applicant's wife's sister and became his *'saadu bhai'* thus has been able to set up friendly relations with him. He lured the revisionist to enter into partnership with him. The accused made him believe that he has been making huge profits by getting tenders in his favour worth Rs. 2,17,00,000/-. He assured him to earn a good amount of money if he participated in his business venture; the applicant/revisionist could not detect his dishonest and fraudulent intention initially and therefore, he invested a total amount of Rs. 15,00,000/- on different dates, however, later on, he came to know that all the tenders and quotations were false and fabricated; he asked the applicant/revisionist to meet him at a hotel in Jhansi in this connection; he also called him at a place in Lucknow where he was threatened with his life. On 01.02.2022, Ashish Kushwaha came to his place in his motor car, indulged in name calling and forcibly made him sign some stamp papers and also assaulted the applicant/revisionist.

5. The main contention of the revisionist is that the learned court below wrongly held that the place of occurrence fell within District-Etawah and not within District-Jhansi; that the court below ignored the facts mentioned in the application under Section 156(3) Cr.P.C., showing that a big amount of money was grabbed from the revisionist with a dishonest intention; he was, on false pretext, cajoled him to enter into partnership with the respondent no. 2 with an eye on his money; the impugned order has been passed on the basis of conjectures, surmises and being arbitrary should be set aside with the direction to lodge the FIR against the respondent no. 2 under Sections 420, 467, 468, 471, 452, 323, 504, 506, 406 IPC and Section 3(1)(10) of the SC/ST Act.

6. In nutshell, the allegations are that the applicant/revisionist was lured to enter into a business transaction with a dishonest intention and that he has been defrauded of

Rs. 15,00,000/- and was assaulted when the applicant/revisionist protested against him.

7. The matter was heard and was dismissed by an order dated 16.08.2022. Against the order of dismissal, the applicant/revisionist has come in revision before this Court.

8. Before I proceed further, it shall be useful to refer to some precedents with regard to nature of dispute, as is before this Court. In ***Criminal Appeal No. 932 of 2021 (Randheer Singh vs. State of U.P. and Others) decided on 02.09.2021***, the case before the Supreme Court was that one Arjun Dev and his wife Bela Rani allegedly executed a registered power of attorney of their bhumidhari plot in favour of one Rajan Kumar, who, on the basis of this power of attorney, executed sale deeds in favour of the appellant and his family members and their name was mutated in the revenue records. However, during mutation proceedings, one Ms. Beena Shrivastava unsuccessfully filed an objection before the Nayab Tehsildar. Thereafter, she filed a suit for cancellation of power of attorney but that was dismissed; the order of dismissal was challenged in an appeal before the High Court, which was partly allowed; she went for further remedies by filing a Special Leave Petition (Civil) but she remained unsuccessful vide orders passed in 2016. The appellant filed civil suit against Beena Shrivastava for injunction which was granted in his favour. The unsuccessful party brought some new persons in picture and a FIR came to be lodged in September 2017, which was challenged before the High Court of Judicature at Allahabad under Article 226, and was disposed of by the High Court with the direction that the petitioners shall not be arrested till submission of Police report, though, the investigation shall go on and shall be brought into logical end.

In the above factual matrix of the case, the Supreme Court relied on the judgment in ***Paramjeet Batra vs. State of Uttarakhand; (2013) 11 SCC 673.*** The Apex Court referred to findings given in ***Paramjeet Batra (supra) in Randheer Singh (supra)*** as below:-

"Whether a complaint discloses a criminal offence or not depends upon the nature of facts alleged therein. Whether essential ingredients of criminal offence are present or not has to be judged by the High Court. A complaint disclosing civil transactions may also have a criminal texture. But the High Court must see whether a dispute which is essentially of a civil nature is given a cloak of criminal offence. In such a situation, if a civil remedy is available and is, in fact, adopted as has happened in this case, the High Court should not hesitate to quash the criminal proceedings to prevent abuse of process of the court."

The Hon'ble Apex Court in the same case also referred to observation made in ***Uma Shankar Gopalika vs. State of Bihar and Another***; (2005) 10 SCC 336, wherein it was observed that as no offence under Sections 420 and 120 IPC was made out and the dispute was of purely of civil nature, hence, the remedy lay before the civil court.

The Apex Court further referred to observation made in ***Robert John D'Souza & Ors . v. Stephen V. Gomes & Anr.; 2015 (9) SCC 96 in Para 31 of Randheer Singh (supra)*** as below:-

"12. As far as the offence of cheating is concerned, the same is defined in Section 415 IPC, for which the punishment is provided under Section 420 IPC. Section 415 reads as under:

"415. Cheating.?Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived

to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat'.

Explanation.?A dishonest concealment of facts is a deception within the meaning of this section."

Illustrations

***

"From the above language of the section, one of the essential ingredients for the offence of cheating is deception, but in the present case, from the contents of the complaint it nowhere reflects that the complainant was deceived or he or anyone else was induced to deliver the property by deception. What was done, was so reflected in the resolutions, and sale deeds.

****

46. The court must ensure that criminal prosecution is not used as an instrument of harassment or for seeking private vendetta or with an ulterior motive to pressurise the accused. On analysis of the aforementioned cases, we are of the opinion that it is neither possible nor desirable to lay down an inflexible rule that would govern the exercise of inherent jurisdiction. Inherent jurisdiction of the High Courts under Section 482 CrPC though wide has to be exercised sparingly, carefully and with caution and only when it is justified by the tests specifically laid down in the statute itself and in the aforementioned cases. In view of the settled legal position, the impugned judgment cannot be sustained."

16. In view of the above discussion and the facts and circumstances of the case, we are of the view that none of the offences for which the appellants are summoned, is made out from the complaint and material on record. We further find that it is nothing but abuse of process of law on the part of the complainant to implicate the appellants in a criminal case after a period of twelve years of execution of registered sale deeds in question, who is neither party to the sale deeds nor a member of the Society. Therefore, we allow the appeal and set aside the orders passed by the High Court and that of the courts below. Accordingly, the order passed by the Magistrate summoning the appellants in the criminal complaint filed by Respondent 1, in respect of the offences punishable under Sections 406, 409 and 420 IPC, also stands quashed."

Eventually, the Apex Court observed that the criminal proceedings were being taken recourse as a weapon of harassment against the purchasers and that the FIR read with chargesheet did not disclose any offence and allowed the appeal and quashed the proceedings against the appellant.

9. The Apex Court in ***Criminal Appeal No. 1285 of 2021 (Mitesh Kumar J. Sha vs. State of Karnataka and Others)*** referred to the judgment of itself rendered in ***M/s Indian Oil Corporation Vs. M/s. NEPC India Ltd & Ors.*** in Para 41 and 42 as below:

"41. "....."14. While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law,

should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law."

42. It was also observed:-

"13. While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors?.There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure though criminal prosecution should be deprecated and discouraged."

10. Now I come back to the facts of this case. From perusal of the application moved under Section 156(3) by the revisionist, it becomes more than obvious that it has been drafted not on the basis of real facts but on the basis of legal advice. This is not disputed that the accused/opposite party Ashish is closely related to the applicant/revisionist and that they entered into business partnership. The 'ikrarnama'/deed of agreement dated 08.10.2021 referred to in the application under Section 156(3), a copy whereof is on record, shows that they have been partners for carrying on business of their firm. It will be useful to reproduce the words in the 'ikrarnama' paper no. 19A available on record, which is as below:-

1- यह कि उभय पक्ष एक दूसरे को सगे साढू होने के कारण सगे रिस्तेदार है एवं घनिष्ट परिचित है व दोनो पक्ष फर्म निर्मला बायो फूलेक्स फिस० शीट एण्ड फूट फार्मिक फर्म में साझेदार/ पार्टनर आधे आधे लाभ हानि के है। उक्त फर्म इटावा उ०प्र० में है।

2- यह कि प्रथम पक्ष दिनांक 07/10/2021 को इटावा को झाँसी आये और पूर्व में ही तय द्वितीय पक्ष से० 4,00,000/- (चार लाख रुपया) नगद प्राप्त करने के लिये तय तिथि पर झाँसी आये और नगद रुपया 4,00,000/- रू० अपनी गाड़ी के अन्दर गाड़ी सं० यू०पी० 60 एफडी 8457 मारूति बलेजर के अन्दर दोपहर के समय द्वितीय पक्ष से प्राप्त किये। उक्त रुपया प्रथम पक्ष ने द्वितीय पक्ष से दिनांक 08/10/2021 को नगद प्राप्त किये। यह तहरीर आज दिनांक 08/10/2021 को जजी झाँसी में स्वेच्छा से की गयी वक्त पर काम आवे।"

11. There is nothing to suggest that deception was ever practiced on the applicant for execution of this 'ikrarnama' or that any false facts were introduced in that paper to defraud the applicant of his money. There is no material to even faintly suggest that any false document was ever executed or that tenders were false and fabricated. It is not made clear in what manner the papers were false or fabricated. From the application, prima facie, it appears that some dispute arose in course of their business or financial or monetary transactions. There are sufficient indicators to show that dispute, if any, between the two sides is essentially of a civil nature. The application under Section 156(3) has been drafted to give it a criminal colour by using such words as 'छल, कपट, बदनीयती'. Using statutory language is not sufficient to draw the conclusion that there has actually been a deception practiced upon him for siphoning of money from the revisionist with malafide and dishonest intention. It also appears that the stories have been cooked up to bring the matter within the jurisdiction of court's at Jhansi.

12. In my view, prima facie, no offence much less under Sections 406, 420, 467, 468, 471, are made out and that ingredients of rest of the Sections 452, 323, 504, 506 IPC and Section 3(1)(10) of the SC/ST Act have been inserted deliberately to confound and to mislead the courts. At the most probably the dispute, if any,

between them is of civil nature and the revisionist has unsuccessfully tried to give it a cloak of criminality. Such an attempt must fail. I do not find any illegality, impropriety or irregularity in the impugned order and thus revision is liable to be **dismissed.**

13. The revision is, accordingly, **dismissed** at the stage of admission.

(2022) 11 ILRA 938
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.11.2022

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Revision No. 656 of 2022

Minor 'X'. ...Revisionist (In Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Abhishek Kumar, Sri Anjani Kumar Rai

Counsel for the Opposite Parties:
G.A., Ms. Aaarti Agrawal, Sri Vinay Kumar Singh

(A) Criminal Law - The Juvenile Justice Act, 2015 - Section 102 - Revision , Section 15 - Preliminary assessment into heinous offences by Board , Indian Penal Code, 1860 - Sections 307, 342, 452, 354, 326k, 326kh, 302, 376 & 511 - The Protection of Children From Sexual Offences Act, 2012 - Sections 7/8 , The Schedule Castes And The Schedule Tribes (Prevention of Atrocities) Act , 1989 - Section 3(2)5 - Opinion of a child psychologist or other professional dealing in child psychology or child psychiatry is mandatorily to be taken unless the Board comprises any such member.(Para -12)

(B) The Juvenile Justice Rules Model Rules, 2016 - Rule 10A - Board is empowered to take the assistance of psychologist/psychiatrist and other experts who had experience of working with the children under difficult circumstances - "the ability to understand the consequences of the offence" - consequences of the offence could be numerous and manifold which cannot be just linked to a framework - for this purpose, the overall picture as also future consequences with reference to the facts of the case are required to be constantly analysed by the Board. (Para - 9)

FIR against revisionist-accused person - harassed a 16-year-old girl - matter before Juvenile Justice Board - age determination inquiry - declared a juvenile - appealed - order was affirmed - hence revision - Juvenile submitted an application to Board - for psychologist/psychiatrist examination - request rejected - questions - assess individual's mental capacity and understanding of act's consequences - unclear if any board members are professionals in child psychology - appellate court concurred with Juvenile Justice Board's assessment - stating court did not independently evaluate facts. **(Para - 4,11,12)**

HELD:-Record does not indicate that opinion of professional experts on two counts i.e., the mental capacity to commit the crime and ability to understand the consequences of the act have been elicited at any stage. Impugned orders set aside. Matter of preliminary assessment remanded to the Juvenile Justice Board for expeditious proceedings. **(Para - 12,13)**

Revision disposed of. (E-7)

List of Cases cited:-

Barun Chandra Thakur Vs Master Bholu & anr. , Criminal Appeal No. 950 of 2022

(Delivered by Hon'ble Mrs. Jyotsna Sharma, J.)

1. It appears that name of the revisionist-juvenile has been disclosed in the memo of revision. This fault from the side of revisionist escaped detection by the Registry. The concerned Registry is directed to delete the name of the revisionist-minor from the title of the revision as fed and shown in the data on official website and represent him as "Minor 'X'.

2. Heard Sri Abhishek Kumar, learned counsel for the revisionist and Ms. Aaarti Agrawal assisted by Sri Vinay Kumar Singh, learned counsel for the State-respondent. None appears for the respondent no. 2 despite service of notice.

3. This criminal revision has been filed challenging the order dated 11.08.2021 passed by the Juvenile Justice Board, Azamgarh and further challenging the order dated 23.12.2021 passed by the Special Judge, POCSO Act, Azamgarh in Criminal Appeal No. 51/2021 affirming the order of the Juvenile Justice Board whereby it was ordered that the child in conflict with law shall be tried as an adult in terms of provisions of Section 15 of the Juvenile Justice Act, 2015 for criminal case arising out of Case Crime No. 40 of 2018 under Sections 307, 342, 452, 354, 326k, 326kh, 302, 376, 511 IPC, Sections 7/8 POCSO Act and Section 3(2)5 of SC/ST Act, Police Station Nizamabad, District-Azamgarh.

4. Facts relevant for the purpose of this revision are as below:

A FIR was registered against the revisionist-accused person with the allegations that he used to harass the daughter, aged about 16 years, of the informant; the girl was compelled to change her mobile number. On 07.05.2018, the accused came to his house and asked from his daughter about the new number; when she refused to give the same, he locked the victim in the room and set her ablaze after pouring kerosene oil. She sustained 91% of the burn injuries and thereafter, succumbed to it. The matter came before the Juvenile Justice Board; the age determination inquiry was conducted by the Juvenile Justice Board on 19.09.2020 and he was declared a juvenile aged about 17 years 4 months on the date of the occurrence. Thereafter, the Juvenile Justice Board proceeded to conduct an inquiry under Section 15 of the Juvenile Justice Act, 2015 and came to a conclusion that the juvenile should be tried as an adult and transmitted the matter to the Sessions Court by an order dated 11.08.2021. Against the aforesaid order of the Juvenile Justice Board, an appeal was preferred on behalf of the juvenile accused before the Special Judge, POCSO Act, Appeal No. 51 of 2021 and the same was dismissed and the order of the Juvenile Justice Board was affirmed by the order dated 23.12.2021. Now, the juvenile has come in revision under the provisions of Section 102 of the Juvenile Justice Act, 2015 challenging the order dated 11.08.2021 passed by the Juvenile Justice Board as well as the order dated 23.12.2021 passed by the appellate Court.

5. It is contended on behalf of the revisionist that the impugned orders are arbitrary and bereft of cogent reasons and have been passed by non-application of mind; the grounds raised by the revisionist before the appellate court below have not been considered and no finding have been recorded thereon. It was incumbent upon the courts below to take assistance of psychologist/psychiatrist or other experts

before deciding the appeal but no such measure was taken; the social investigation report clearly showed that the juvenile had no criminal tendencies; no adverse opinion was expressed by the people of the locality against the juvenile about his conduct, character and behaviour, but those facts have been ignored; the question and answers, which were put to the juvenile for the purpose of inquiry under Section 15 of the Act does not show that the accused had any intended mind or physical capacity to commit the crime and understand the consequences of his act. As the mental and physical capacity have not been fairly determined, therefore, the orders are not sustainable.

6. The provisions of Section 15 of the Act are as below:

"(1) In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of subsection (3) of section 18:

Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts.

Explanation.--For the purposes of this section, it is clarified that preliminary assessment is not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence.

(2) Where the Board is satisfied on preliminary assessment that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure, 1973 (2 of 1974):

Provided that the order of the Board to dispose of the matter shall be appealable under sub-section (2) of section 101:

Provided further that the assessment under this section shall be completed within the period specified in section 14."

7. In support of the arguments, put-forth by the revisionist, the judgment of the Apex Court in ***Barun Chandra Thakur vs Master Bholu and Another in Criminal Appeal No. 950 of 2022 decided on 13.07.2022*** has been referred to.

8. I went through the above judgment.

9. The Apex Court in Para-62 observed that it was obligatory on the part of the Board to conduct preliminary assessment on four counts, as mentioned under Section 15 of the Act, however, there being no guidelines as to how the Board shall conduct such assessment, therefore, it has to largely depend upon its own wisdom. Thereafter, the Apex Court noticed the provisions of Rule 10A of the Juvenile Justice Rules Model Rules, 2016in Para-64 of the judgment observing that the Board is empowered to take the assistance of psychologist/psychiatrist and other experts who had experience of working with the children under difficult circumstances. The Apex Court did not agree with the opinion that the mental capacity and ability to understand the consequences of the offences were one and the same. The Apex Court said that it shall include not only immediate consequences

but also the far reaching consequences. While dealing with the phrase "the ability to understand the consequences of the offence", the Apex Court observed in Para-68 that the consequences of the offence could be numerous and manifold which cannot be just linked to a framework; and for this purpose, the overall picture as also future consequences with reference to the facts of the case are required to be constantly analysed by the Board.

10. The Apex Court observed as below in Para nos. 75 and 79 of the judgment:-

"75. It is to be noted that child psychology is a specialised branch of development psychology, its genesis is based on the premise that children and adults have a different thought process. The individualised assessment of adolescent mental capacity and ability to understand the consequences of the offence is one of the most crucial determinants of the preliminary assessment mandated by section 15 of the Act, 2015. The report of the preliminary assessment decides the germane question of transferring the case of a child between 16 to 18 years of age to the Children's Court. This evaluation of ''mental capacity and ability to understand the consequences' of the child in conflict with law can, in no way, be relegated to the status of a perfunctory and a routine task. The process of taking a decision on which the fate of the child in conflict with law precariously rests, should not be taken without conducting a meticulous psychological evaluation.

79. Therefore, looking to the purpose of the Act, 2015 and its legislative intent, particularly to ensure the protection of best interest of the child, the expression "may" in the proviso to Section 15(1) thereof and the requirement of taking assistance of experienced psychologists or psycho-social workers or other experts would operate as mandatory unless the Board itself comprises of at least one member who is a practicing professional with a degree in child psychology or child psychiatry. Moreover, in case the Board, in view of its own composition with at least one member, who is a practicing professional with a degree in child psychology or child psychiatry, chooses not to take such assistance, it would record specific reasons therefore."

11. On perusal of the impugned orders, it is revealed that an application was moved by the juvenile requesting the Juvenile Justice Board to get himself examined by a psychologist/psychiatrist, however, it appears that this specific request was not accepted. I perused the impugned order passed by Juvenile Justice Board. It appears that though, the Juvenile Justice Board put some questions with the objective of assessing his mental capacity and the capacity to understand the consequences of the act, however, it is not clear that any of the members of the Board was a professional in child psychology. I also went through the order of appellate Court. The appellate Court was aware of the fact that such an application was moved and aware of the fact that the same has been dismissed. The appellate Court concurred with the conclusion drawn by the Juvenile Justice Board regarding physical, mental capacity and the ability to understand the consequences of his act, as expressed by the Juvenile Justice Board. The appellate Court did not assess the facts and circumstances coming before it on its

own and has simply gone with the view of the Juvenile Justice Board.

12. It does not appear from the material on record that the opinion of professional experts on two counts i.e., the mental capacity to commit the crime and ability to understand the consequences of the act have been elicited at any stage. As held by the Apex Court, opinion of a child psychologist or other professional dealing in child psychology or child psychiatry is mandatorily to be taken unless the Board comprises any such member, hence, it can safely be said that the impugned orders have been passed not strictly in accordance with law. The matter of preliminary assessment requires reconsideration for which it shall be appropriate that the matter be remanded to the Board to decide it afresh in the light of the observations of the Apex Court.

13. The impugned orders dated 23.12.2021 and 11.08.2021, are therefore hereby set aside. The matter of preliminary assessment is remanded to the Juvenile Justice Board. As the incident pertains to May 2018, hence, the Juvenile Justice Board is directed to conduct the proceedings of preliminary assessment expeditiously and preferably within a month of receipt of this order.

14. Accordingly, this revision is **disposed of.**

15. The order of this Court be certified to the Juvenile Justice Board concerned immediately.

16. The Registry is directed to circulate the order of the Apex Court passed in ***Barun Chandra Thakur vs Master Bholu and Another in Criminal Appeal No. 950 of 2022 decided on 13.07.2022,*** for compliance.

(2022) 11 ILRA 942
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.10.2022

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Revision No. 1036 of 2022

X (Minor) ...Revisionist/Accused (In Jail)
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Satendra Singh

Counsel for the Opposite Parties:
G.A., Sri Mukesh Kumar Maurya

(A) Criminal Law - The Juvenile Justice (Care and Protection of Children) Act, 2015 - Section 102 - revision , Section 12(1) - bail to juvenile - Indian Penal Code, 1860 - Sections 376AB - The Protection of Children From Sexual Offences Act, 2012 - Section- 5M/6 - Bail for juveniles is not mandatory in all cases - it can be denied if the court believes it would defeat the ends of justice - Juvenile Justice Act differentiates offenses into petty, serious, and heinous categories - end of justice is a crucial consideration in juvenile cases. (Para - 7)

(B) The Juvenile Justice Act, 2015 - Section 3 - Courts to adhere to Section-3's general principles as a guiding factor when exercising their powers - child's best interest, demands of accused & victim's family.(Para - 8)

(C) The Juvenile Justice Act, 2015 - "ends of justice" - holistic view - seen through three angles - child's welfare and betterment, demands of justice to victim and her family & concerns of society at

large - court must rely on its own robust sense of justice to ensure best interests of child, victim, and society.(Para 8)

Girl of very tender age of 6 years - violent sexual assault by a boy of merely 15 years - enticed in a well planned manner by offering her sweets - trauma and shock caused to an innocent girl - no understanding and inkling of act - resentment caused to members of her family - Challenging order passed by Juvenile Justice Board & Special Judge (POCSO Act) - in Criminal Appeal - affirming order of Juvenile Justice Board - declined bail to juvenile - hence revision.**(Para - 8)**

HELD:- Juvenile Justice Board is directed to expedite the hearing and conclude it promptly.**(Para - 9)**

Revision dismissed. (E-7)

(Delivered by Hon'ble Mrs. Jyotsna Sharma, J.)

1. Heard Sri Satendra Singh, learned counsel for the revisionist and learned A.G.A. for the State. None appeared on behalf of the informant/respondent no.2.

2. Perused the record.

3. This criminal revision has been filed under section 102 of the Juvenile Justice Act challenging the order dated 06.12.2021 passed by Juvenile Justice Board, Mainpuri and also challenging the order dated 10.02.2022 passed by Special Judge (POCSO Act), Mainpur in Criminal Appeal No. 24 of 2021 affirming the order of the Juvenile Justice Board and declining bail to the juvenile in a matter arising out of Case Crime No.162 of 2021, under sections 376AB I.P.C. and section- 5M/6 POCSO Act, Police Station- Elau, District- Mainpuri.

4. Contentions of the revisionist are as below:-

The orders impugned are arbitrary, unjust and have been passed against settled principles of law and against the mandate of section 12 of the Juvenile Justice Act; the assumptions of the courts below that in case he is released on bail, he shall be exposed to physical, moral and psychological danger and that the ends of justice shall stand defeated are based on no evidence whatsoever; the bail has been declined without any cogent reasons and on surmises and conjectures; there is nothing on record to show that the juvenile was in company of criminals before the arrest; he himself is having no criminal history; the case against him is false; this conclusion is baseless that the parents are not having any control over the revisionist. The bail has been declined on the basis of gravity of the offence, which is against the settled principles of law.

5. In this case, an F.I.R. was lodged by the mother of the victim with the allegations that when her daughter, aged about 6 years, was playing outside her house below the shed, the accused juvenile, aged about 15 years, lured her on the pretext of giving toffee and took her behind a hut and committed rape on her. Her daughter started bleeding profusely; she was brought to the house by her cousin; when they went to the parents of the juvenile to complain against him, his mother thrashed him (juvenile), the victim was given first aid and was referred to for higher medical assistance, where she was examined again under sedation. 1 cm tear was found in fourchette and she was bleeding. Finding the accused as juvenile, the matter was brought before the Juvenile Justice Board; his age was found about 12 years and 10 months in an age determination inquiry done on 05.10.2021; the social investigation report was called,

wherein it was observed by the District Probation Officer that the boy requires strict control and supervision. The bail to the juvenile was declined by the Juvenile Justice Board and the appeal preferred on behalf of the juvenile was also dismissed.

6. Section 12(1) of the Juvenile Justice (Care and Protection of Children) Act, 2015 deals with the matters of bail to the juvenile:-

"When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person."

In continuation thereof, there is a proviso, which says that:- ***such person shall not be so released, if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.***

7. Thus, it is clear that bail to a juvenile is not must in all cases as it can be denied for certain reasons. The law does not say that once a person is found a juvenile, he should be released on bail notwithstanding other facts and circumstances of the matter. It may be noted that the bail can also be denied if juvenile's release, in the opinion of the Court, would defeat the ends of justice. The phrase ends of justice is undoubtedly a meaningful phrase bringing within its sweep many factors including the nature of the crime and the merits of the matter, though ordinarily, as has been held in number of cases, the merits of the case or the nature of the accusations are not to be considered. At the same time, there may be other facts and circumstances which cannot simply be passed over by the court concerned. As far as the nature of the offence is concerned, the Juvenile Justice Act itself differentiates between offences falling into three categories, i.e., petty, serious and heinous offences. If the Justice Justice Act, 2015 is studied, it becomes quite clear that the cases falling in different categories on the basis of classification into petty, serious and heinous have been dealt with differently. It can safely be remarked that the scheme of the Act takes into consideration the nature of the offence as well. The need for dealing the matters of heinous offences in a more sensitive manner have been brought into focus by the courts of law, time and again, through various judgements. Infact, the courts as well as the legislature have always been sensitive to this aspect of the matter.

8. Whenever, a Court of law decides to exercise his powers under the provisions of Juvenile Justice Act, 2015, the general principles as enumerated in Section- 3 of the Act have to be kept in mind as guiding factor. On one hand, all decisions regarding the child should be based on primary consideration of best interest of the child, on the other hand, the demands of justice of the other side cannot be simply shrugged off. The concern of the victim's family and the larger interest of the society cannot be

dealt with in a contemptuous manner. In succession to aforesaid observations, the policy of the act must be brought into focus. Very importantly it may be noted that the scheme of the Act has a twin approach, i.e., reformatory as well as retributive to certain extent. When dealing with bail grant or refusal thereof, the ends of justice may compel the Court to strike a balance between competing and often conflicting demands of justice of both the sides, i.e., the accused and the victim. When viewing the case from this angle, the nature of the crime, the methodology adopted, the manner of commission and the evidence available may assume ample significance. Moreover, the aim and object of this act, is to achieve not only the welfare and betterment of a juvenile by extending to him services of reformatory nature, so that he can be brought back to main stream of society as a person of healthy mind, but also to address the concerns of society at large at this stage. This aim cannot be achieved unless a holistic view of the matter is taken. In my opinion, to give meaning to the phrase "ends of justice', the matter of bail has to be seen literally through a prism having three angles, i.e., firstly, the angle of welfare and betterment of the child itself, i.e., best interest of the child, secondly, the demands of justice to the victim and her family and thirdly, the concerns of society at large. And in the end, the court has to depend upon its own robust sense of justice.

8. In this case, a girl of very tender age of 6 years was put to violent sexual assault by a boy of merely 15 years. She was enticed in a well planned manner by offering her sweets. The trauma and shock caused to an innocent girl, who had no understanding and inkling of the act with which she had to go through and the resentment which was caused to the members of her family, can easily be understood.

9. In view of the above, the present criminal revision is **dismissed**. However, the Juvenile Justice Board is directed to expedite the hearing and conclude the same at the earliest.

10. Copy of the order be certified to the court concerned.

(2022) 11 ILRA 945
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.07.2022

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Criminal Revision No. 1714 of 2022

X (Minor) & Anr. ...Revisionists
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionists:
Sri Jai Prakash Singh

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 – Revision - Indian Penal Code, 1860 - Section 228-A - Disclosure of identity of the victim of certain offences , etc. , Section 363 - kidnapping , Section 366 - Kidnapping ,abducting or inducing woman to compel her marriage , etc. - The Juvenile Justice (Care and Protection of Children) Act, 2015 - section 37 - Orders passed regarding a child in need of care and protection - welfare and safety of child in need of care and protection is the legal responsibility of the Board/Child Welfare Committee and the Magistrate/

Committee must give credence to her wishes - a minor cannot be detained in Government Protective Home against her wishes - a minor has a right to keep her person and even the parents cannot compel the detention of a minor against her will unless there is some other reason for it - minor cannot be detained against her will or at the will of her father in a Protective Home. (Para - 14,15,17)

Order passed by Child Welfare Committee - victim 'x' was directed to be kept in Rajkiya Bal Grih (Balika) - second revisionist (mother of victim) aggrieved by order - instant criminal revision - for setting aside order - for handing over the custody of 'X' to her - victim has expressed her desire to go with her mother - Mother of victim also willing to keep victim with her. **(Para -3,10)**

HELD:-Court finds it appropriate in the interest of justice to hand over the custody of the victim to her mother after considering the statements of victim and her mother. Impugned order passed by Child Welfare Committee set aside. Victim placed in the custody of her second revisionist mother, who must provide her in court whenever her personal appearance is required. **(Para -18,19,20)**

Revision allowed. (E-7)

List of Cases cited:-

1. Ravi Shankar @ Baba Vishwakarma Vs St. of M.P., (2019)9 SCC 689

2. Kalyani Chowdhary Vs St. of U.P., 1978 Cr.L.J. 1003

3. Pushpa Devi @ Rajwanti Vs St. of U.P., (1995)1 JIC 189

4. Raj Kumari Vs Superintendent, Women Protection Home, Meerut & anr., 1998 Cr.L.J. 654

5. Seema Devi @ Simran Kaur Vs St. of H.P., 1998 (2) Crimes 168

6. Km. Rachna & anr. Vs St. of U.P., AIR 2021 All 109 (FB)

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

1. In view of the provisions of Section 228-A of Indian Penal Code and the mandate of Hon'ble Supreme Court in the case of **Ravi Shankar alias Baba Vishwakarma Vs. State of Madhya Pradesh, (2019)9 SCC 689** the victim herein after referred to as "X'.

2. Heard learned counsel for the revisionist and Shri S.K. Pal, learned Government Advocate assisted by Shri Anirudh Sharma, learned Additional Government Advocate representing the State.

3. Being aggrieved and dissatisfied by the order dated 24.1.2022 passed by the Child Welfare Committee, Kasganj whereby the victim 'x' was directed to be kept in Rajkiya Bal Grih (Balika), Swaroop Nagar, Kanpur, the second revisionist, who is the mother of the victim has approached this Court by filing this criminal revision for setting aside the aforesaid order and also for handing over the custody of 'X' to her.

4. The facts that formed the bedrock of this revision are that on 27.11.2021, second revisionist, who is the mother of 'X' lodged the FIR under Sections 363 and 366 IPC in respect of missing of her daughter. During investigation, victim was recovered on 16.1.2022 from Patiyali Railway Station, Kasganj and she was produced before the Child Welfare Committee, Kasganj where her statement was recorded on 22.1.2022 in which she has expressed her desire to go with her mother and also refused for her medical examination, but the Child Welfare Committee, Kasganj vide impugned order dated 24.1.2022

instead of giving the custody of the victim "X' to her mother, has sent her to Rajkiya Bal Grih (Balika), Swaroop Nagar, Kanpur.

5. Second revisionist has filed an application before the Child Welfare Committee, Kasganj stating therein that she is the mother of the victim. The victim is minor aged 15 years and she is unable to understand her pros and cons and that she may be given in her custody. During her counselling by the Child Welfare Committee, Kasganj, the victim has expressed her desire to go with her mother.

6. However, the Child welfare Committee, Kasganj vide order dated 24.1.2022 has directed the victim to be kept in Rajkiya Bal Grih (Balika), Swaroop Nagar, Kanpur on the ground that the mother of the victim is living in Delhi to earn her livelihood and the victim is living with her maternal uncle and in the circumstances proper care of the victim can be taken in her house.

7. Vide order dated 07.7.2022, second revisionist was directed to appear before this Court. Learned Additional Government Advocate was also directed to ensure the presence of revisionist "X', the victim before this Court.

8. Pursuant to the order of this Court second revisionist is present before this Court.

9. Victim 'X' has also been produced before this Court by Head Constable 75 Vikas Yadav P.N.N 062910040 and Lady Constable 20, Sapna Kumari P.N.N. No. 212911109 of police station Patiyali, Kasganj. Personal affidavit of Shri B.B.G.T Murthy, presently posted as Superintendent of Police, Kasganj has been filed, which is taken on record.

10. On query by this Court, the victim has expressed her desire to go with her mother. Mother of the victim is also willing to keep the victim with her.

11. The only question for consideration before this Court is whether a victim can be kept in a protective home against her wishes.

12. This issue has time and again been considered and settled by this Court in catena of judgements.

13. In **Kalyani Chowdhary Vs. State of U.P.,** 1978 Cr.L.J. 1003, a Division Bench of this Court has held that no person can be kept in the protective home unless she is required to be kept there either in pursuance of the Suppression of Immoral Traffic and Women and Girls Act, or under some other law permitting her detention in such a home. It is admitted that the case does not fall under this Act, no other law has been referred to. In such cases, the question of minority is irrelevant as even a minor cannot be detained against her will or at the will of her father in a Protective Home.

14. In **Pushpa Devi alias Rajwanti Vs. State of U.P.** (1995)1 JIC 189, this Court has held that in any event, the question of age is not very material in the petition of the nature of Habeas Corpus as even a minor has a right to keep her person and even the parents cannot compel the detention of a minor against her will unless there is some other reason for it.

15. In **Raj Kumari Vs. Superintendent, Women Protection Home, Meerut and another,** 1998 Cr.L.J. 654, a Division Bench of this Court after considering series of judgement held that it

is well settled view of this Court that even a minor cannot be detained in Government Protective Home against her wishes.

16. In **Seema Devi alias Simran Kaur Vs. State of Himachal Pradesh,** 1998 (2) Crimes 168, the Himachal Pradesh has held as under:

"There is no provision of law, which permits a Court to give such a direction even in a case of minors when it is against their will. Even if the petitioner is only a minor aged about 15 years, her wishes should be ascertained before placing her in the custody of any person or institution. In this case, she had categorically stated before the additional chief judicial magistrate that she would not live with her parents and she wanted to live with her husband the 1st accused in the case. The additional chief judicial magistrate should have given credence to her wish and only directed her custody to be with the 1st accused and not with the Nari Niketan."

A Division Bench of this Court after considering the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 as well as the law laid down by various Court has referred the following question to Hon'ble the Chief Justice for being decided by the Larger Bench of this Court:

"(1) xxxxxxxxxxxxxx

(2) xxxxxxxxxxxx

(3) Under the Scheme of the Juvenile Justice (Care and Protection of Children) Act, 2015, the welfare and safety of child in need of care and protection is the legal responsibility of the Board/Child Welfare Committee and as such, the proposition that even a minor cannot be sent to Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home against his/her wishes, is legally valid or it requires a modified approach in consonance with the object of the Act ?"

17. The Larger Bench of this Court in the case of **Km. Rachna and another Vs. State of U.P.,** AIR 2021 All 109 (FB) after considering plethora of judgements of this Court as well as other High Court, has answered the question in the following words:

"Under the J.J. Act, the welfare and safety of child in need of care and protection is the legal responsibility of the Board/Child Welfare Committee and the Magistrate/ Committee must give credence to her wishes. As per Section 37 of the J.J. Act the Committee, on being satisfied through the inquiry that the child before the Committee is a child in need of care and protection, may, on consideration of Social Investigation Report submitted by Child Welfare Officer and taking into account the child's wishes in case the child is sufficiently mature to take a view, pass one or more of the orders mentioned in Section 37 (1) (a) to (h).

18. In view of the verbose discussion as well as considering the statements made by the victim and her mother, this Court feels it appropriate in the interest of justice to hand over the custody of the victim to her mother.

19. Accordingly, impugned order dated 24.1.2022 passed by the Child Welfare Committee, Kasganj is hereby set aside. The revision is allowed.

20. The victim is given in the custody of her mother (second revisionist) with the

condition that whenever personal appearance of the victim is required before the court concerned in case No. 307 of 2021, under Section 363, 366 IPC, police station Patiyali, district Kasganj, she shall produce her in court.

(2022) 11 ILRA 949
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.10.2022

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Criminal Revision No. 2622 of 2022

Ahamad Ali & Anr. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Sunil Kumar

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 – Revision - Section 319 - Power to proceed against other persons appearing to be guilty of offence, Indian Penal Code, 1860 - Section 302, 506 , The Juvenile Justice (Care and Protection) Act, 2015 - unamended Section 18 (new section 23) - No joint proceedings of child in conflict with law and person not a child - juveniles in conflict with law are to be tried and proceeded with by the Juvenile Justice Board in accordance with the provisions of the Act and the other accused persons, who are not juveniles, are to be tried by regular court - Even Juvenile Justice Board in exercise of the power conferred in Section 319 Cr.P.C. for summoning the additional accused may summon either suo moto or an application filed by the prosecution. (Para -22)

Application preferred by State under Section 319 Cr.P.C. - allowed by Juvenile Justice Board - revisionists were summoned to stand trial - revisionists at the time of alleged incident were major - hence instant criminal revision - question before Court - whether the Juvenile Justice Board can use its powers under Section 319 of Cr.P.C. to summon the accused for trial. **(Para - 2,14,18)**

HELD:- Power under Section 319 of the Cr.P.C. can be exercised by the Juvenile Justice Board and if the summoned accused is found to be not a juvenile, his trial can be separated and such person can be sent for trial to the regular court of competent jurisdiction. No interference in order passed by Juvenile Justice Board. Board directed to proceed in accordance with law. **(Para -24,25)**

Revision dismissed. (E-7)

(Delivered by Hon'ble Shree Prakash Singh, J.)

1. Heard Sri Sunil Kumar, learned counsel for the revisionists, Sri Mithilesh Kumar, learned AGA for the State and perused the record.

2. Instant criminal revision has been preferred against the impugned order dated 26.05.2022 passed by the Juvenile Justice Board, Bulandshahar in Criminal Case No. 140 of 2015 (State vs Saleem @ Julla) arising out of Case Crime No.819 of 2015, under Section 302, 506 IPC, Police Station-Khurza Nagar, District Bulandshahar, whereby the application preferred by the State under Section 319 Cr.P.C. dated 28.10.2021 was allowed by the Juvenile Justice Board, Bulandshahar and the revisionists were summoned to stand trial under Sections 302, 506 IPC.

3. Factual matrix of the case is that first information report was lodged on 13.08.2015 in Case Crime No. 819 of 2015,

under Sections 302, 506 IPC, Police Station Khurza Nagar, District Bulandshahar against Saleem @ Julla, Mauseem and Ahmad Ali by the complainant Buniyad Khan.

4. Learned counsel for the revisionists submits that accused Saleem @ Julla son of Yaseen preferred an application before the Juvenile Justice Board, Bulandshahar for declaration as juvenile claiming himself of 16 years and 2 month on the date of incident. After holding the prescribed inquiry, the Juvenile Justice Board vide order dated 01.09.2016 declared Saleem @ Julla as juvenile conflict.

5. The opposite party no.2 challenged the order dated 01.09.2016 before the sessions judge vide Juvenile Appeal No. 111 of 2016 (Buniyad Khan vs State of U.P. and after adjudicating the aforesaid appeal, the Sessions Judge, Bulandshahar vide order dated 28.11.2016 rejected the appeal.

6. Accused Saleem @ Julla was enlarged on bail by the Sessions Judge, Bulandshahar vide order dated 28.11.2016 passed in Criminal Appeal No.120 of 2016.

7. Investigation of the case was concluded and the charge sheet dated 30.08.2015 bearing charge sheet No.368 of 2015 was filed against Saleem @ Julla under Sections 302, 504 IPC. Further trial of the case No.140 of 2015 (State vs Saleem @ Julla) commenced before the Juvenile Justice Board, Bulandshahar. During the course of trial, PW 1 Buniyad Khan, PW 2 Shakir Khan, PW 3 Harun were examined and their deposition were recorded before the trial court/Juvenile Justice Board, Bulandshahar. The aforesaid witnesses in their deposition stated the complicity of the revisionists in the commission of offence.

8. He next submits that an application dated 28.10.2021 under Section 319 Cr.P.C. was filed before the trial court with a prayer to summon the revisionists to face the trial along with accused Saleem @ Julla. The Juvenile Justice Board, Bulandshahar vide impugned order dated 26.05.2022 allowed the application preferred under Section 319 Cr.P.C. and summoned the revisionists to face the trial under Sections 302, 506 IPC and directed to place the file of the revisionists before the competent court of jurisdiction and directed for appearance of the revisionists before the Chief Judicial Magistrate, Bulandshahar on 7.06.2022.

9. Learned counsel for the revisionists has vehemently challenged the impugned order on the ground that Juvenile Justice Board, Bulandshahar has not vested with any jurisdiction to exercise the power conferred under Section 319 Cr.P.C. and on this score, the order passed by the Juvenile Justice Board, Bulandshahar suffers from manifest illegality and is liable to be set aside.

10. He further submits that order passed by the Juvenile Justice Board is without jurisdiction and is also suffered from jurisdictional error. It has further been submitted that the Juvenile Justice Board does not have any power to summon any accused under the provision of Code of Criminal Procedure. Further in the investigation, no involvement of the revisionists were found by the investigating officer, in the alleged offence, therefore, the name of the revisionists were dropped from the charge sheet.

11. He next added that the impugned order passed by the Juvenile Justice Board

is without jurisdiction and against settled proposition of law. He further submits that impugned order has been passed in mechanical manner and the Juvenile Justice Board failed to appreciate that no strong or credible evidence available against the revisionists to summon the revisionists to face trial.

12. Per contra, learned AGA for the State opposed the contention aforesaid and submits that the impugned order passed by the Juvenile Justice Board, Bulandshahar is well within the jurisdiction and the Juvenile Justice Board is competent to exercise the power conferred under Section 319 Cr.P.C. and the impugned order does not suffer from any illegality or perversity and therefore, the present revision is liable to be dismissed.

13. Having heard learned counsel for the respective parties and perused the records .

14. The question, which has come for consideration and determination by this Court is, whether the Juvenile Justice Board can exercise powers conferred under Section 319 of Cr.P.C. and can summon the accused to face the trial.

15. Before discussing the issue as well as the submissions of the counsels, it is necessary to reproduce the Section 103 of the Juvenile Justice (Care and Protection) Act, 2015. The Section 103 is quoted hereinbelow;

Section 103 : Procedure in inquiries, appeals and revision proceedings (1) Save as otherwise expressly provided by this Act, a Committee or a Board while holding any inquiry under any of the provisions of this Act, shall follow such procedure as may be prescribed and subject thereto, shall follow, as far as may be, the procedure laid down in the Code of Criminal Procedure, 1973 (2 of 1974) for trial of summons cases.

(2) Save as otherwise expressly provided by or under this Act, the procedure to be followed in hearing appeals or revision proceedings under this Act shall be, as far as practicable, in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974).

16. In the present case, as discussed above, the revisionists were named in the FIR but after investigation their names have been dropped from the array of the accused and charge sheet was filed only against Saleem @ Julla. Thereafter, cognizance was taken by the Juvenile Justice Board and trial of the case was commenced. During the course of trial, the PW 1, PW 2 and PW 3 were examined and their testimony were recorded before the trial court. The witnesses named above in the respective testimony have deposed the complicity and involvement of the revisionists in commission of offence of murder.

17. After the deposition of PW 1, PW 2 and PW 3, an application dated 28.10.2021 under Section 319 Cr.P.C. was preferred by the opposite party no.2 before the Juvenile Justice Board and adjudicating upon the aforesaid application, the Juvenile Justice Board, Bulandshahar summoned the accused to face the trial under Section 302, 506 IPC and since revisionists were major hence their files were separated and was ordered to place before the court of competent jurisdiction and revisionists were directed to appear before the Chief Judicial Magistrate, Bulandshahar on 07.06.2022.

18. It is admitted fact of the case that the revisionists at the time of alleged incident were major.

19. Before adverting to the submissions of the counsels, it is necessary to examine Section 4 of the Code, which provides that all the offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions contained in the code. Sub-section (2) of Section 4 further provides that all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force, regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. According to the provisions of the Code, after registration of a case against the accused, the police is required to investigate into the matter and submit the charge sheet under Section 173 Cr.P.C., thereafter the competent court took cognizance of the offence under Section 190(1)(b) of the Code and to proceed with the case for trial where the materials collected during investigation are to be translated into legal evidence. Further, according to the different provisions of the Code, two or more persons, if they have committed the same offence in the course of the same transaction, are to be charged and tried together. This is so provided under Clause (a) of Section 223 of the Code but during trial, if some incriminating evidence comes against a person, who has not been shown to be an accused in the charge sheet submitted under Section 173 Cr.P.C., the trial court has been empowered under Section 319 Cr.P.C. to summon the said person as an additional accused. For appreciation of the issue involved in this case, Section 319 Cr.P.C. is reproduced, herein, below:-

"Section 319. Power to proceed against other persons appearing to be guilty of offence- (1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1), then-

(a) the proceedings in respect of such person shall be commenced afresh, and witnesses re- heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

20. From bare perusal of the aforesaid provision, it is clear that Section 319 Cr.P.C. empowers a Court to proceed against any person not shown as an accused if it appears from the evidence that such person has also committed an offence for which he can be tried together with the

accused and in that very situation, in view of the above provision, it is the duty of the court to summon such person as an accused, to face trial with the accused already committed in that case. Therefore, both justice and convenience require that cognizance against the newly summoned accused should be taken in the same case and in the same manner as against the accused.

21. As stated abovesaid, is the situation, when a normal trial is conducted, in a court but under the provisions of Juvenile Justice (Care and Protection of Children) Act, only the juvenile Justice Board has been empowered to deal exclusively with all proceedings under the Act relating to the juvenile in conflict with law. The unamended Section 18 (new section 23) deals with a situation where a juvenile has been charged with the offence and is produced before a Board, the Board shall hold the inquiry in accordance with the provisions of the Act and make such order in relation to the juvenile as it deems fit. The relevant provision of the Act, Section 18 (new section 23), is reproduced hereinbelow for better appreciation of the issue:

"Section 18.- No joint proceeding of juvenile and person not a juvenile- (1) Notwithstanding anything contained in Section 223 of the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, no juvenile shall be charged with or tried for any offence together with a person who is not a juvenile.

(2) If a juvenile is accused of an offence for which under Section 223 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, such juvenile and any person who is not a juvenile would, but for the prohibition contained in sub-section (1), have been charged and tried together, the Board taking cognizance of that offence shall direct separate trials of the juvenile and the other person."

Section 23 of the Juvenile Justice (Care and Protection of Children) Act, 2015 is reproduced hereinunder;

Section 23. No joint proceedings of child in conflict with law and person not a child.-: (1) Notwithstanding anything contained in section 223 of the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, there shall be no joint proceedings of a child alleged to be in conflict with law, with a person who is not a child.

(2) If during the inquiry by the Board or by the Children's Court, the person alleged to be in conflict with law is found that he is not a child, such person shall not be tried along with a child.

22. From the plain reading of sub-section(1) of Section 23, it is clear that no juvenile shall be charged with or tried for any offence together with a person, who is not a juvenile but sub-section (2) of the said Act clearly stipulates that if a juvenile is accused of an offence, such juvenile and any person, who is not a juvenile would, but for the prohibition contained in sub-section (1) have been charged and tried together, the Board taking cognizance of that offence shall direct separate trials of the juvenile and the other person. Thus, it is clear from the aforesaid provision that juveniles in conflict with law are to be tried and proceeded with by the Juvenile Justice Board in accordance with the provisions of the Act and the other accused persons, who are not juveniles, are to be tried by regular court. Even if a juvenile and an accused, who is not a juvenile, are required to be

charged and tried together, their case is also to be separated and the other person, who is not a juvenile, is required to be referred by the Juvenile Justice Board to the regular court having jurisdiction for his trial. In a case where the accused is a juvenile, like in the instant case, and the proceeding with regard to the said offence is going on before the Juvenile Justice Board, while proceeding against the said accused, the Juvenile Justice Board finds from the evidence, which has come on record during proceedings before it, that any person other than the juvenile in conflict with law before him is also involved in that very offence, in my opinion, the Juvenile Justice board will not be silent expectator or without power to summon the said accused. Even Juvenile Justice Board in exercise of the power conferred in Section 319 Cr.P.C. for summoning the additional accused may summon either suo moto or an application filed by the prosecution.

23. The summoning of the additional accused is like taking cognizance of the offence against an accused and then to summon him to be charged with and tried along with other accused. Obviously as in the case at hand, additional accused, if summoned on the basis of incriminating evidence coming against him, is not a juvenile, in view of Section 23 (2) of the Act, 2015 (section 18(2) of old Act) he cannot be charged and tried with by the Juvenile Justice Board and his trial is to be separated as required under sub-section (2) of Section 23 of the Act.

24. Hence, after the submissions and discussions above, this court is of considered opinion that the power under Section 319 of the Cr.P.C. can be exercised by the Juvenile Justice Board and if the summoned accused is found to be not a juvenile, his trial can be separated and such person can be sent for trial to the regular court of competent jurisdiction.

25. Resultantly, no ground is made out to interfere in the order dated 26.05.2022 passed by Juvenile Justice Board, Bulandshahar in Criminal Case No. 140 of 2015 (State vs Saleem @ Julla). The Juvenile Justice Board is directed to proceed in accordance with law.

26. The instant revision is devoid of merit, and is hereby, **dismissed**.

(2022) 11 ILRA 954
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.01.2020

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Crl. Revision No. 17 of 2009

Kashi Prasad ...Revisionist
Versus
State of U.P. ...Opp. Party

Counsel for the Revisionist:
S.P. Maurya, Arvind Kumar Srivastava, Nagendra Mohan

Counsel for the Respondent:
G.A., Bal Keshwar Srivastava, Sushil Kumar Singh

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 – Revision - Indian Penal Code, 1860 - Sections 147, 148, 149, 323, 324, 504, 506, 307 & 302 - prosecution owes a duty to explain serious and grievous injury on the accused during the course of incident which gives rise to prosecution of the accused - If the prosecution has failed to explain the injuries on the accused, the case of the prosecution becomes doubtful as the prosecution has not come out with

true facts regarding genesis of the incident/occurrence - non explanation of the injuries sustained by the accused at the time of occurrence or in the course of transaction/occurrence is a very important circumstance - mere non explanation of injuries by the prosecution may not affect the prosecution case if evidence is clear, cogent and creditworthy. (Para - 20, 25)

Accused suffered severe injuries in a case - Two interested witnesses were examined - no independent one was present - prosecution's case was not proven by trustworthy witnesses - injuries were not mentioned in the FIR or charge-sheet. **(Para -24)**

HELD:-Trial Court rightly assumed that prosecution did not come out with truth regarding genesis of the occurrence. Prosecution case had become doubtful. Trial Court had rightly not believed in the prosecution story and acquitted the accused. Trial court has not committed any significant errors in law or facts, or has not correctly appreciated the evidence. **(Para -24)**

Revision dismissed. (E-7)

List of Cases cited:-

1. Onkarnath Singh Vs St. of U.P., (1975) 3 SCC 276

2. Lakshmi Singh Vs St. of Bihar, (1976) 4 SCC 394

3. St. of Karn. Vs Jinappa Payappa Kudachi, 1994 Supp (1) SCC 178

4. Takhaji Hiraji Vs Thakore Kubersing Chamansing, (2001) 6 SCC 145

5. Rizan Vs St. of Chhattisgarh, (2003) 2 SCC 661

6. Padam Singh Vs St. of U.P., (2000) 1 SCC 621

7. M.P. Vs Mishrilal, (2003) 9 SCC 426

8. Dashrath Singh Vs St. of U.P., (2004) 7 SCC 408

9. Bishna Vs St. of W.B., (2005) 12 SCC 657

10. Nagarathinam Vs St., (2006) 9 SCC 57

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

1. The present revision is directed against the judgment and order dated 12.12.2018 passed by the Addl. Sessions Judge, Court No.9, Sultanpur in Sessions Trial No.243 of 1998 under Sections 147, 148, 149, 323, 324, 504, 506, 307, 302 IPC, Police Station Kadipur, District Sultanpur.

2. The facts of the case in brief are that on the basis of a complaint given by the complainant, P.W.1, an FIR at Case Crime No.243 of 1999 under Sections 147, 148, 149, 307, 323, 504, 506 IPC came to be registered against the accused-respondents with allegations that accused, Gurudeen on 04.07.1999 at 4:00 P.M. snatched sickle from the wife of the complainant and started assaulting her by kicks and fits. On commotion and alarm raised by the wife of the complainant, Smt Shakuntala w/o Santram, Ramdeo, Rambhadal, Smt Imla, Santram, Kesh Kumari, Jiana w/o Karia (deceased), Smt Kamla, Smt Rampati, Smt Karona w/o Jhuri rushed to save the wife of the complainant. At the same time, accused, Male Singh, Rangeele, Sache Lal, Akhilesh Kumar and brother-in-law of Rangeeley arrived there armed with gun and country made pistol, dharia and lathi. They started assaulting all the persons from the complainant side. The aforesaid incident was witnessed by Bakheru s/o Jairam and other residents of the village. Smt Jiana died in the hospital and thereafter, offence under Section 302 IPC was added. It is said that on the same day i.e. 05.06.1999 the other injured were examined. Investigating

Officer, Mujahid Ali, P.W.7 conducted the inquest of the cadaver of the deceased on 05.07.1999 at 9:00 A.M. Postmortem was conducted on the same day.

3. The Investigating Officer after completing the investigation filed charge-sheet against six accused named in the FIR under Sections 147, 148, 149, 302, 307, 323, 504 and 506 IPC. Charges were framed against the accused. Accused adjusted charges and claimed to be tried.

4. Prosecution to prove its case examined P.W.-1 Kashi Prasad, the complainant, P.W.-2 Santram, the injured witness, P.W.-3 Dr. Anil Kumar Gupta, P.W.-4 Dr.V.N. Tiwari, P.W.-5 Inspector R.K.Singh, P.W.-6 Inspector Jitendra Singh Parihar and P W.-7 S.I. Mujahid Ali.

Defence produced medical report of injuries caused to the accused, Gurudeen in the incident and examined Dr. V.N. Tiwari who proved injury report of Gurudeen.

5. Trial Court after marshalling evidence came to the conclusion that FIR was not true account of the incident but was written after deliberation and employing legal brain inasmuch as the complainant's son was lawyer practicing in the Tehsil Court where the complaint was alleged to have been scribed by one Ram Tirath. Trial court was also of the view that in the FIR place of incident was not mentioned. However, P.W.-1, the complainant in his cross examination said that the incident took place near the house of Ramdeo and said that he gave the statement to that effect to the investigating officer. The Investigating Officer in his examination specifically said that the complainant in his statement under Section 161 Cr.P.C. did not tell him the place of incident neither he tried to ascertain from the complainant, the place of incident. P.W.-1 in his further cross examination said that the incident took place near a primary school and his tube well would be 1 km from the place of incident. Even in the site map (Exh.Ka25), place of incident was shown near primary school which was 50 ft., away from the house of Ramdeo. In view thereof, Trial Court concluded that the prosecution had failed to prove the exact place of incident.

6. Trial Court also came to the conclusion after analyzing the evidence on record that P.W.-1 was not an eyewitness. P.W.-1 said that he went out of his house at 3:30 P.M. and he did not know when his wife, Rajdei went out from the house on the same day. Rajdei was the person with whom the accused, Gurudeen had altercation and it was alleged that he snatched the sickle from her and assaulted her. P.W.-2 in his statement said that on the date of incident he was not with P.W.-1 and he met him on the next day in the hospital. He also said that he did not know where P.W.-1 was at the time of incident.

7. P.W.-1 in his statement further said that he did not receive any injury in the incident whereas in his medical report (Exh.Ka-16) a lacerated wound was mentioned. Rajdei was not examined with whom it was alleged that altercation of the accused, Gurudeen took place and she was assaulted. It was also said that she received gun shot injuries in the incident. Her medical report (Exh.Ka-8) would show that she received only one injury and she did not have any other injury though it was alleged that she was beaten up by sickle and kicks and fists. Rajdei was an important witness regarding the genesis of the incident which was withheld by the

prosecution. It was also said that the witnesses' residences were away from the place of incident and, therefore, it became the duty of the prosecution to explain how they arrived at the place of incident from a distance of 0.5-1 km. Trial Court was also of the view that there were glaring contradictions between the statements of the witnesses and medical report and did not believe that the deceased gave statement under Section 161 Cr.P.C. before death to the Investigating Officer.

8. According to P.W.-1, deceased, Jiana Devi became unconscious and was taken to the hospital in that state. P.W.-2 in his statement said that his mother became unconscious after receiving gun shot injuries and thereafter, she did not regain consciousness and, therefore, under these circumstances recording of her statement under Section 161 Cr.P.C. is neither believable nor credible. Trial Court was also of the opinion that inquest proceedings and injury report of the accused were suspicious and doubtful. Trial Court further held that accused, Gurudeen had received nine injuries and injury Nos.1 to 3 were not superficial. Prosecution was under duty to explain the injuries caused to the accused. In view of the non explanation of the injuries of the accused, Gurudeen by the prosecution, prosecution case became incredible and doubtful. The prosecution did not come with true and correct facts.

9. In view of the aforesaid, it was held that the prosecution had failed to prove the case against the accused beyond reasonable doubt. Trial Court in view of the aforesaid findings had acquitted all the accused of the charges.

10. Heard Mr. Sushil Kumar Singh, Advocate assisted by Mr. Balkeswar Srivastava, learned counsel appearing for accused-respondents and learned A.G.A for the State. No one has put in appearance on behalf of the revisionist.

11. This case was listed on 17.10.2019 when counsel for the revisionist sought adjournment on the ground of his ill health. The case was adjourned and directed to be listed on 24.10.2019 peremptorily. Thereafter, case was listed on 24.10.2019, 07.11.2019, 14.11.2019, 19.11.2019, 02.12.2019, 11.12.2019, 16.12.2019, 06.01.2020 but the learned counsel for the revisionist did not put in appearance on any of the aforesaid dates despite the case having been listed peremptorily.

12. Mr.Sushil Kumar Singh, learned counsel for the respondents-accused has submitted that in exercise of the revisional power by the High Court under Section 397/401 Cr.P.C., it can call for record from any of the inferior criminal courts and examine correctness, legality, propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior court, and to pass appropriate order(s). Revisional power of the High Court is to see that justice is done in accordance with recognized rules of criminal jurisprudence and that its subordinate courts do not exceed the jurisdiction or abuse the power vested in the Cr.P.C. or to prevent abuse the power of process of the inferior court or to prevent miscarriage of justice.

13. When revision is filed against the order of acquittal, High Court can interfere where findings arrived at by the trial Court are without considering the material evidence on record or where the trial court has wrongly turned down evidence which

the prosecution wished to produce. He has further submitted that in revision against acquittal reappreciation of the evidence in High Court is not permissible. Revisional Court can interfere in order of acquittal when there is legal infirmity or patent illegality in conduct of the trial by the lower Court.

14. He has further submitted that there is material contradiction in the FIR and the evidence. The prosecution failed to explain nine injuries on the accused, Gurudeen and did not come out with correct genesis of the case. There being material contradictions between P.W.-1 and P.W.-2 and the testimony of ocular witness and medical evidence, Trial Court rightly held that the prosecution had failed to prove the case against the accused beyond reasonable doubt.

15. He has, therefore, submitted that in case like this where the accused had received nine injuries and there was no mention either in the FIR or in the charge-sheet in respect of the injuries suffered by accused, Gurudeen, non explanation of the injuries caused to the accused, Gurudeen by the prosecution had been rightly held to be fatal to the prosecution case by the Trial Court. He has, therefore, submitted that this Court in exercise of powers vested under Section 397/401 Cr.P.C. should not interfere with the findings recorded by the Trial Court inasmuch as the findings arrived at by the Trial Court are neither perverse nor palpably wrong. There was no error or defect in law or procedure or appreciation of the evidence and, therefore, there is no ground to interfere with the well reasoned judgment and order of acquittal passed by the Trial Court. He has, therefore, submitted that this Court should dismiss the revision.

16. I have considered the submissions advanced by learned counsel for the accused-respondents and perused lower Court record and impugned judgment and order carefully.

17. Prosecution case is that Gurudeen had commented on Rajdei that where was Indira Gandhi going and this led to altercation and Gurudeen started assaulting Rajdei snatching sickle from her and giving her kicks and fists blows. Rajdei was not examined. A number of persons from the complainant side got collected at the place of incident to rescue, Rajdei. Accused, Gurudeen had lodged a cross case at Case Crime No.243-A of 1999 under Sections 147, 149, 323, 504, 506, 308 IPC. He was examined on the same day i.e. 04.07.1999 by Dr.B.N. Tiwari who noticed following injuries on the body of Gurudeen:-

"(i) one lacerated wound on skull 4 cm x .5 cm x scalp deep bleedings present; 10 cm above from occipital probability

(ii) one lacerated wound on skull 2 cm x .5 cm x scalp deep; 5 cm away towards right injury No.(i)

(iii) one contusion on occipital protuberance 3 cm x 2 cm red in color.

(iv) one lacerated wound on right face 2 cm x .5 cm x skin deep; 1.5 cm below from right eyelid

(v) one abrasion on left shoulder 2 cm x 3.5 cm.

(vi) one red contusion on right shoulder 13 cm x 2.5 cm.

(vii) one red contusion of right arm 6 cm x .5 cm; 4 cm above from elbow front

(viii) one red contusion on left arm 11 cm x 2 cm; 8 cm below from left shoulder joint

(ix) one red contusion in front of right thigh 10 cm x 2.5 cm; 10 cm above from right knee joint."

18. Some of the injuries particularly injury Nos.1 to 3 were grievous in nature and Dr.V.N.Tiwari who examined him had said that the injuries were fresh in nature which could have been caused by hard object like lathi and those injuries would have been caused at around 4:00 P.M. on 04.07.1999.

19. Specific suggestion was put to P.W.-2 that he and others from the complainant side assaulted the accused, Gurudeen by lathi in which he received grievous injuries on his head and other parts of the body. On alarm being raised by accused, Gurudeen, other persons reached there and in order to save him one shot was fired which hit the deceased, Jiana, and other persons received pallet injuries.

20. It is well settled law that prosecution owes a duty to explain serious and grievous injury on the accused during the course of incident which gives rise to prosecution of the accused. If the prosecution has failed to explain the injuries on the accused, the case of the prosecution becomes doubtful as the prosecution has not come out with true facts regarding genesis of the incident/occurrence.

21. The Supreme Court in the case of ***Onkarnath Singh v. State of U.P.*, (1975) 3 SCC 276** in para 36 has held as under:-

"36.Such non-explanation, however, is a factor which is to be taken into account in judging the veracity of the prosecution witnesses, and the court will scrutinise their evidence with care. Each case presents its own features. In some cases, the failure of the prosecution to account for the injuries of the accused may undermine its evidence to the core and falsify the substratum of its story, while in others it may have little or no adverse effect on the prosecution case. It may also, in a given case, strengthen the plea of private defence set up by the accused. But it cannot be laid down as an invariable proposition of law of universal application that as soon as it is found that the accused had received injuries in the same transaction in which the complainant party was assaulted, the plea of private defence would stand prima facie established and the burden would shift on to the prosecution to prove that those injuries were caused to the accused in self-defence by the complainant party. For instance where two parties come armed with a determination to measure their strength and to settle a dispute by force of arms and in the ensuing fight both sides receive injuries, no question of private defence arises."

22. The Supreme Court in the case of ***Lakshmi Singh v. State of Bihar*, (1976) 4 SCC 394** in para 12 has held as under:-

"12.PW 8 Dr S.P. Jaiswal who had examined Brahmdeo deceased and had conducted the post-mortem of the deceased had also examined the accused Dasrath Singh, whom he identified in the court, on April 22, 1966 and found the following injuries on his person:

"1.Bruise 3″ × ½ ″ on the dorsal part of the right forearm about in the middle and there was compound fracture of the fibula bone about in the middle.

2.Incised wound 1″ × 2 mm × skin subcutaneous deep on the lateral part of the left upper arm, near the shoulder joint.

3.Punctured wound 1/2″ × 2 mm × 4 mm on the lateral side of the left thigh about 5 inches below the hip joint.

According to the doctor Injury 1 was grievous in nature as it resulted in

compound fracture of the fibula bone. The other two injuries were also serious injuries which had been inflicted by a sharp-cutting weapon. Having regard to the circumstances of the case there can be no doubt that Dasrath Singh must have received these injuries in the course of the assault, because it has not been suggested or contended that the injuries could be self-inflicted nor is it believable. In these circumstances, therefore, it was the bounden duty of the prosecution to give a reasonable explanation for the injuries sustained by the accused Dasrath Singh in the course of the occurrence. Not only the prosecution has given no explanation, but some of the witnesses have made a clear statement that they did not see any injuries on the person of the accused. Indeed if the eyewitnesses could have given such graphic details regarding the assault on the two deceased and Dasain Singh and yet they deliberately suppressed the injuries on the person of the accused, this is a most important circumstance to discredit the entire prosecution case. It is well settled that fouler the crime, higher the proof, and hence in a murder case where one of the accused is proved to have sustained injuries in the course of the same occurrence, the non-explanation of such injuries by the prosecution is a manifest defect in the prosecution case and shows that the origin and genesis of the occurrence had been deliberately suppressed which leads to the irresistible conclusion that the prosecution has not come out with a true version of the occurrence. This matter was argued before the High Court and we are constrained to observe that the learned Judges without appreciating the ratio of this Court in Mohar Raiv.State of Bihar[AIR 1968 SC 1281 : (1968) 3 SCR 525 : 1968 Cri LJ 1479] tried to brush it aside on most untenable grounds. The question whether the Investigating Officer was informed about the injuries is wholly irrelevant to the issue, particularly when the very doctor who examined one of the deceased and the prosecution witnesses is the person who examined the appellant Dasrath Singh also. In the case referred to above, this Court clearly observed as follows:

"The trial court as well as the High Court wholly ignored the significance of the injuries found on the appellants. Mohar Rai had sustained as many as 13 injuries and Bharath Rai 14. We get it from the evidence of PW 15 that he noticed injuries on the person of Mohar Rai when he was produced before him immediately after the occurrence. Therefore the version of the appellants that they sustained injuries at the time of the occurrence is highly probabilised. Under these circumstances the prosecution had a duty to explain those injuries ... In our judgment the failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true. Further those injuries probabilise the plea taken by the appellants."

This Court clearly pointed out that where the prosecution fails to explain the injuries on the accused, two results follow: (1) that the evidence of the prosecution witnesses is untrue; and (2) that the injuries probabilise the plea taken by the appellants. The High Court in the present case has not correctly applied the principles laid down by this Court in the decision referred to above. In some of the recent cases, the same principle was laid down. InPuran Singhv.State of Punjab[(1975) 4 SCC 518 : 1975 SCC (Cri) 608] which was also a murder case, this Court, while following an

earlier case, observed as follows: [SCC p. 531 : SCC (Cri) p. 621, para 20]

"InState of Gujaratv.Bai Fatima[(1975) 2 SCC 7 : 1975 SCC (Cri) 384] one of us (Untwalia, J.) speaking for the Court, observed as follows: [SCC p. 13 : SCC (Cri) p. 390, para 17]

In a situation like this when the prosecution fails to explain the injuries on the person of an accused, depending on the facts of each case, any of the three results may follow:

(1) That the accused had inflicted the injuries on the members of the prosecution party in exercise of the right of self-defence.

(2) It makes the prosecution version of the occurrence doubtful and the charge against the accused cannot be held to have been proved beyond reasonable doubt. (3) It does not affect the prosecution case at all.

The facts of the present case clearly fall within the four-corners of either of the first two principles laid down by this judgment. In the instant case, either the accused were fully justified in causing the death of the deceased and were protected by the right of private defence or that if the prosecution does not explain the injuries on the person of the deceased the entire prosecution case is doubtful and the genesis of the occurrence is shrouded in deep mystery, which is sufficient to demolish the entire prosecution case."

It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:

"(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case."

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. In the instant case, when it is held, as it must be, that the appellant Dasrath Singh received serious injuries which have not been explained by the prosecution, then it will be difficult for the court to rely on the evidence of PWs 1 to 4 and 6, more particularly, when some of these witnesses have lied by stating that they did not see any injuries on the person of the accused. Thus neither the Sessions Judge nor the High Court appears to have given due consideration to this important lacuna or infirmity appearing in the prosecution case. We must hasten to add that as held by this Court inState of Gujaratv.Bai Fatima[(1975) 2 SCC 7 : 1975 SCC (Cri) 384] there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. The present, however, is certainly not such a case, and the High Court was, therefore, in error in brushing aside this serious infirmity

in the prosecution case on unconvincing premises."

23. The Supreme Court in the case of ***State of Karnataka v. Jinappa Payappa Kudachi*, 1994 Supp (1) SCC 178** in para 6 has held that normally non explanation of injuries on the accused persons would mean that the prosecution has not come out with whole truth particularly regarding the genesis of the occurrence and the prosecution evidence should be rejected.

Para 6 of the aforesaid judgment reads as under:-

6.The effect of non-explanation by the prosecution about the injuries on the accused persons depends on the facts and circumstances of each case. Normally if there is such non-explanation, it may at the most give scope to argue that the accused had the right of private defence or in general that the prosecution evidence should be rejected as they have not come out with the whole truth particularly regarding the genesis of the occurrence. In the instant case, the occurrence took place in the bus itself at the Bastwad cross. A-1 to A-6 admitted their presence and also admitted their participation. The evidence of the injured witnesses amply establishes that these six accused participated in the occurrence causing the death of the three deceased persons and causing serious injuries to PWs 1, 3, 4 and 6.

24. The Supreme Court in the case of ***Takhaji Hiraji v. Thakore Kubersing Chamansing*, (2001) 6 SCC 145** has held that when the accused sustain injuries in a same occurrence, prosecution is obliged to explain the injury. However, the Court has to be satisfied of the existence of two conditions before non explanation of the injuries on the persons of the accused may affect the prosecution case. Two conditions are (i) that the injury on the person of the accused was of a serious in nature; (ii) that such injuries must have been caused at the time of occurrence in question.

Para 17 of the said judgment reads as under:-

"17.The first question which arises for consideration is what is the effect of non-explanation of injuries sustained by the accused persons. InRajender Singhv.State of Bihar[(2000) 4 SCC 298 : 2000 SCC (Cri) 796] ,Ram Sunder Yadavv.State of Bihar[(1998) 7 SCC 365 : 1998 SCC (Cri) 1630] andVijayee Singhv.State of U.P.[(1990) 3 SCC 190 : 1990 SCC (Cri) 378] , all three-Judge Bench decisions, the view taken consistently is that it cannot be held as a matter of law or invariably a rule that whenever the accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so the prosecution case should be disbelieved. Before non-explanation of the injuries on the persons of the accused persons by the prosecution witnesses may affect the prosecution case, the court has to be satisfied of the existence of two conditions: (i) that the injury on the person of the accused was of a serious nature; and (ii) that such injuries must have been caused at the time of the occurrence in question. Non-explanation of injuries assumes greater significance when the evidence consists of interested or partisan witnesses or where the defence gives a version which competes in probability with that of the prosecution. Where the evidence is clear, cogent and creditworthy and where the court can distinguish the truth from falsehood the mere fact that the injuries on the side of the accused persons are not explained by the prosecution cannot by itself be a sole basis to reject the testimony of the prosecution

witnesses and consequently the whole of the prosecution case."

25. Thus, non explanation of the injuries sustained by the accused at the time of occurrence or in the course of transaction/occurrence is a very important circumstance. But mere non explanation of injuries by the prosecution may not affect the prosecution case if evidence is clear, cogent and creditworthy. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy which outweighs the effect of the omission on the part of prosecution to explain the injuries as held by the Supreme Court in the case of ***Rizan v. State of Chhattisgarh (2003) 2 SCC 661***.

23. Similar view has been taken by the Supreme Court in the following cases:-

(i) (2000) 1 SCC 621Padam Singh v. State of U.P., (2000) 1 SCC 621;

(Ii) (2003) 9 SCC 426 M.P. v. Mishrilal;

(iii) (2004) 7 SCC 408Dashrath Singh v. State of U.P.;

(iv) (2005) 12 SCC 657 Bishna vs State of West Bengal; and

(v) (2006) 9 SCC 57Nagarathinam v. State

24. In the present case, the accused, Gurudeen received grievous injuries in the occurence. Two witnesses who were examined, were interested witnesses. No independent witness was examined. The case of the prosecution was not proved by leading cogent and trustworthy witnesses. Non explanation of the injuries on the person of accused, Gurudeen became important and assumed significance. Neither in the FIR nor in the charge-sheet, the injuries were mentioned. Thus, the Trial Court rightly assumed that the prosecution did not come out with truth regarding genesis of the occurrence. The prosecution case had become doubtful and, therefore, Trial Court had rightly not believed in the prosecution story and acquitted the accused.

25. Considering the limited scope of the power under Section 397/401 Cr.P.C., I do not find that the Trial Court has committed palpable error of law or facts or it did not rightly appreciated the evidence. In view thereof, the present revision fails and is hereby ***dismissed***.

(2022) 11 ILRA 963
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.08.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Crl. Revision No. 111 of 2008

Vishnu Kumar Agarwal ...Revisionist
Versus
State of U.P. & Ors. ...Opp. Party

Counsel for the Revisionist:
Prabhu Ranjan Tripathi

Counsel for the Opp. Parties:
Government Advocate

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 – Revision - Section 452 - Order for disposal of property at conclusion of trial, Indian Penal Code, 1860 - Sections 394, 411 - once the accused from whom the silver was recovered had disclaimed stolen silver, then there should not have any reason to not return the said silver to the complainant from whom it belongs. (Para -10)

Revisionist (complainant in FIR) - filed an application under Section 452 Cr.P.C. after trial - accused acquitted - for release of 28 kgs of silver - allegedly looted from him - silver was recovered from accused (acquitted) - recovered silver was made case property - silver to be released in favor of revisionist - court not required to consider ownership under Section 452 Cr.P.C..**(Para - 2,9)**

HELD:-Question of ownership not required to be considered when the facts are not in dispute that on the FIR being registered by the revisionist/complainant, the silver was recovered from the accused who had not claimed ownership after acquittal. View of two courts below incorrect on facts and law. Impugned orders quashed. **(Para - 12,13)**

Revision allowed. (E-7)

List of Cases cited:-

Mahesh Kumar Vs St. of Raj., 1990 Sup 2 SCC 451

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

1. Present criminal revision under Section 397/401 Cr.P.C. has been filed against the judgment and order dated 11.10.2006 passed by learned District Judge, Barabanki in Criminal Appeal No.18 of 2006, Vishnu Kumar Agarwal vs State of U.P.

Further prayer has been made for quashing of the order dated 06.06.2006 passed by Additional Chief Judicial Magistrate, Court No.6, Barabanki by which learned Chief Judicial Magistrate had dismissed revisionist?s application under Section 452 Code of Criminal Procedure, 1973.

2. The revisionist was the complainant in FIR registered at Case Crime No.270 of 2002 under Sections 394 and 411 IPC, Police Station Ramnagar, Barabanki. After charge-sheet was filed, trial of the said offence was conducted in Criminal Case No.208 of 2005. On 03.09.2005, the accused were acquitted in the said case after conclusion of the trial. The revisionist after conclusion of the trial filed an application under Section 452 Cr.P.C. for releasing 28 Kgs silver, which was allegedly looted from him for which the Case Crime No.270 of 2002 under Sections 394, 411 IPC was registered at Police Station Ramnagar, District Barabanki. This silver was allegedly recovered from the accused who faced trial and acquitted and recovered silver was made case property. The revisionist in the said application stated that on 16.09.2002 said silver was robbed by the accused from him, and same was recovered from the accused and, therefore, after conclusion of the trial the same should be released in his favour.

3. The Learned Magistrate, however, rejected the said application vide impugned order dated 06.06.2006 on the ground that the revisionist was given opportunity to produce documents regarding his ownership and sales tax certificate to show his ownership over the seized silver. The revisionist filed photocopy of some documents but from the said documents his ownership was not proved and, therefore, the learned trial court rejected the application for releasing the said silver in his favour.

4. Aggrieved by the said order, the revisionist had filed Criminal Appeal No.18 of 2006 before the learned District Judge, Barabanki.

5. Learned Appellate Court vide impugned order dated 11.10.2006 held that

the revisionist did not support the prosecution case in his evidence as P.W.-2. He was declared as hostile witness. He said that he did not recognize the persons who had robbed him. He did not recognize the accused-Meharbaan Singh and Vijay Bahadur Yadav who were present in the Court and said that they were not present when incident took place nor they committed the loot. He also said that no seizure memo was prepared in his presence of the silver which was allegedly recovered. When the silver was shown to him in the police station at that time two accused present in the court were not there. The police did not tell him that from where and from whom the silver was recovered.

6. Learned Appellate Court considering the aforesaid stand of the revisionist during trial of the case held that the revisionist was not telling the correct facts and, therefore, the revisionist could not be believed that he was owner of said silver. He also could not file any proof/document regarding his document over the silver in question. Despite given time by the learned Magistrate, he could not produce any document that he registered with the Sales Tax Department.

7. In view thereof, learned Appellate Court held that since revisionist could not file any document to prove his ownership over the silver, which was allegedly recovered by the police and therefore, the said silver was to be escheated to the State.

8. Heard learned counsel for the revisionist and learned A.G.A. for the State.

9. Learned counsel for the revisionist submits that it is not in dispute that it was the revisionist who lodged the FIR in question alleging that he was robbed of 28 kgs silver and same silver was recovered by the police which became the case property. He has further submitted that after conclusion of the trial even if the accused were acquitted, silver ought to have been released in his favour as it was his property which was looted by the accused. The Court is not required to look at the ownership while passing the order under Section 452 Cr.P.C.

10. Learned counsel for the revisionist has placed reliance on the judgment in the case of **Mahesh Kumar vs State of Rajasthan 1990 Sup 2 SCC 451** to submit that once the accused from whom the silver was recovered had disclaimed stolen silver, then there should not have any reason to not return the said silver to the complainant from whom it belongs.

Para 2 to 4 of the said judgment would read as under:-

"2. In the facts and circumstances of the present case, we are satisfied that the direction made by the learned Single Judge of the Rajasthan High Court for the forfeiture of the amount of Rs 20,000 (Rupees twenty thousand) to the State is wholly unwarranted. It is now accepted principle that the confessional part of the statement made by the accused leading to discovery within the meaning of Section 27 of the Evidence Act, 1872 or Section 162 of the Code of Criminal Procedure, 1973 can be made use of for purpose of and the disposal of property under Section 452 of the Code. There is a long line of decisions laying down the principle and we would refer to only a few of them.

3. In Queen Empress v. Tribhovan Manekchand [ILR 9 Bom 131] a Division Bench of the Bombay High Court laid down that the statement made to the police by the accused persons as to the ownership of property which was the subject matter of the proceedings against them although

inadmissible as evidence against them at the trial for the offence with which they were charged, were admissible as evidence with regard to the ownership of the property in an enquiry held by the Criminal Procedure Code. The same view was reiterated in Pohlu v. Emperor [AIR 1943 Lah 312 : 45 PLR 391 : 209 IC 546] where it was pointed out that though there is a bar in Section 25 of the Evidence Act, or in Section 162 CrPC for being made use of as evidence against the accused, this statement could be made use of in an enquiry under Section 517 CrPC when determining the question of return of property. These two decisions have been followed by the Rajasthan High Court in Dhanraj Baldeokishan v. State [AIR 1965 Raj 238 : (1965) 2 Cri LJ 805 : 1965 Raj LW 289] and the Mysore High Court in Veerabhadrappa v. Govinda [ILR (1973) 23 Mys 64] . In the present case, the amount in question was seized from the accused in pursuance of statements made by them under Section 27 of the Evidence Act. The High Court as well as the courts below have found the property to be the subject of theft and the acquittal of the accused is upon benefit of doubt. The accused persons disclaimed the stolen property and there is no reason why the same should not be returned to the owner i.e. the complainant to whom it belongs.

4. We, therefore, allow the appeal, set aside the impugned part of the order passed by the High Court directing the forfeiture of amount of Rs 20,000 (Rupees twenty thousand) and instead direct that the same be returned to the appellant to whom the money belongs."

11. I have considered the submissions of learned counsel for the revisionist and learned A.G.A. for the State.

12. During the course of trial the revisionist had denied that the silver was recovered from the accused, who were acquitted and any seizure memo was prepared in his presence. However, it is not the case of the prosecution that silver was of the accused who were acquitted later on. This is also not the case of the prosecution that accused or anyone else has claimed the ownership of the seized silver. The question of ownership is not required to be considered when the facts are not in dispute that on the FIR being registered by the revisionist/complainant, the silver was recovered from the accused who had not claimed ownership after acquittal.

13. In view of the aforesaid, this Court is of the view that the view taken by the two courts below is incorrect on facts and law. Therefore, the present revision is allowed. The impugned orders are hereby quashed.

(2022) 11 ILRA 966
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.11.2022

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Crl. Revision No. 175 of 2002

Umesh ...Revisionist
Versus
State of U.P. ...Opp. Parties

Counsel for the Revisionist:
Sri Ashok Nath Tripathi, Sri Satendra Kumar Gupta

Counsel for the Opp. Parties:
Govt. Advocate

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 – Revision - The Prevention of Food Adulteration Act, 1955 - Section 7/16, The Prevention of Food Adulteration Rule,

1955 - Section 44-H (omitted by Central Government) - sale of non-iodized common salt, Rule 42(ZZZ)11 sold or use under proper labeling with declaration, Rule 44-I - restriction on sale of common salt - No person shall sell or offer to expose for sale or have in his premises for the purpose of sale, the common salt, for direct human consumption unless the same is iodized - if "the law or precedent" is beneficial to the accused then unless it is prohibited, the benefit should be given to the accused retrospectively. (Para - 8,10)

Unlabeled sample of salt taken - accused not questioned under Section 313 Cr.P.C. - about whether he was selling salt for human consumption or any other purpose - accused challaned of selling non-iodized salt - Food Inspector tested salt - found it non-iodized – found guilty - convict appealed - appellate court ruled in favor of trial court - prosecution's documents and evidence dependable - appeal dismissed - instant revision - sale of non-iodized salt was prohibited under Section 44-H - omitted by Central Government.**(Para -3)**

HELD:- Revision is allowed due to two reasons: Rule 44-I, which was based on conviction, was declared ultra-vires the government's rule-making powers, and the evidence was deficient, as the sample was found to be a common salt for direct human consumption.**(Para - 10)**

Revision allowed. (E-7)

List of Cases cited:-

Academy of Nutrition Improvement & ors. Vs U.O.I. , Writ Petition (C) No. 80 of 2006

(Delivered by Hon'ble Mrs. Jyotsna Sharma, J.)

1. Heard Sri Satendra Kumar Gupta, learned counsel for the revisionist and learned AGA for the State-respondents.

2. This criminal revision has been filed with a prayer to allow the present revision for setting aside and stay the operation of the impugned judgments and order dated 08.01.2002 and 01.05.2001 passed by Additional District and Sessions Judge, Aligarh and 1st Additional Chief Judicial Magistrate, Aligarh respectively, respondent nos. 2 and 3.

3. Relevant facts giving rise to this criminal revision are as below:-

(i) The revisionist faced the trial under Section 7/16 of the Prevention of Food Adulteration Act, 1955 in the Court of Ist ACJM, Aligarh Case No. 863 of 1999 and was convicted under Sections 7/16 of the Food Adulteration Act and to undergo a rigorous imprisonment of 6 months and fine of Rs. 1,000/- in default whereof he was ordered to undergo further rigorous imprisonment of 3 months.

(ii) The facts of the case as appears from the lower court record in brief are that the accused was challaned on 10.04.1994 for selling non-iodized salt. The challan came to be filed by the Food Inspector after initially taking 500 gm of sample of edible salt, testing the same and after adopting the prescribed procedure filing a complaint, finding same to be non-iodized. He was declared guilty and sentenced as above. The convict filed an appeal no. 44 of 2001 against the above judgment and order.

(iii) The appellate court heard both the sides and found all the documents filed by the prosecution in order and also the evidence produced as dependable. He affirmed the order of the trial court and dismissed the appeal. Now, this revision has been filed against both the orders, inter alia on the grounds that the sale of non-iodized common salt, though was prohibited under Section 44-H of the Prevention of Food Adulteration Rule, 1955, however, this provision was omitted by Central Government by

GSR716(E) dated 13.09.2000; even prior to the omission of Rule 44-H, the common salt could be sold or exposed or stored for sale for certain purposes like iodization, iron fortification, animal use, preservation, manufacturing medicine and industrial use under proper labeling with declaration as specified under clause 11 of the sub-rule (ZZZ) of Rule 42.

4. It is contended that the Food Inspector nowhere stated in his statement that he asked the revisionist that he wanted to purchase the salt for human consumption. It is also contended that salt, of which, the sample was taken was not being sold in a labelled pack, therefore, the entire proceedings is illegal as no evidence has been produced that the sample of common salt tested for iodine was being exposed for sale for human consumption only, therefore, he cannot be convicted on the basis of presumptions.

5. It is contended by the learned AGA that requirement of labeling was not mandatory for salt meant for human consumption. It could be sold loose also. Hence, argument of the revisionist is misconceived.

6. In the light of the above contentions, I went through the impugned orders and the material brought on record. This fact is not disputed that at the time of occurrence, the law relating to the food adulteration prescribed that any common salt exposed for sale for human consumption must be iodized in the manner as prescribed. The law required that non-iodized salt cannot be sold for human consumption, however, any uniodized salt for animal use or for the purpose of iodization iron fortification, manufacture of medicine and for industrial use was permitted by law to be sold.

7. (i) The paper on record show that the sample of the salt taken was unlabeled. The oral evidence produced from the side of the prosecution did not reveal that the sample was taken from those salt or the packets of the salt which were exposed for sale for human consumption only. The witness is silent on the point.

(ii) It may be noted that the burden of proof definitely lied on the prosecution side to prove that the salt in question was being sold for human consumption and not for animal or industrial use or any other purpose.

(iii) In the statement recorded under Section 313 Cr.P.C., no question was asked on this point. The accused was never asked whether he was selling the salt for human consumption or for any other purpose.

8. It may also be noticed that the Apex Court in Academy of Nutrition Improvement and Others Vs Union of India in Writ Petition (C) No. 80 of 2006 decided on 04.07.2011 declared that Rule 44-I of the Prevention of Food Adulteration Rule, 1955 is beyond the rule making power of the Central Government and ultra vires the Act. The Rule 44-I prescribed restriction on sale of common salt which is as under:-

"No person shall sell or offer to expose for sale or have in his premises for the purpose of sale, the common salt, for direct human consumption unless the same is iodized."

9. With the object of uniformally applying the ban throughout the country, the Central Government inserted Rule 44-H in the Prevention of Food Adulteration Act, 1955 banning the sale of non-iodized common salt for direct human consumption thus prescribing uniform application

throughout the country. The Apex Court held the Rule 44-I as invalid on 04.07.2011. It may be noted that it is not said by the Apex Court that the dictum shall have only prospective application and not retrospective.

10. In my view, if "the law or precedent" is beneficial to the accused then unless it is prohibited, the benefit should be given to the accused retrospectively. Hence, in my view, this revision deserves to be allowed on two grounds. Firstly, the Rule 44-I which was the basis of conviction was declared ultra-vires the rule making powers of the government. Secondly, the evidence was deficient on the point that the sample in fact belonged to that category of common salt which was exposed for direct human consumption.

11. The revision is **allowed**. The judgment and order dated 08.01.2002 passed by Additional District and Sessions Judge, Aligarh as well as judgment and order dated 01.05.2001 passed by 1st Additional Chief Judicial Magistrate, Aligarh, are hereby **set aside.**

(2022) 11 ILRA 969
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.11.2022

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Crl. Revision No. 1069 of 2022

XXX(Minor)S/o Pramod Singh(Juvenile) ...Revisionist

Versus

State of U.P. & Ors. ...Opp. Parties

Counsel for the Revisionist:
Sri Upendra Upadhyay

Counsel for the Opp. Parties:
G.A., Sri Shashi Kumar Mishra

(A) Criminal Law - The Juvenile Justice (Care and Protection of Children) Act, 2015 - Section 102 - Revision, Section 94 - Presumption and determination of age - where several records from educational institutions as envisaged in Section 94(2)(i) are available and they show different dates of birth - Court shall have to depend on the document which passed the test of credibility and admissibility both - comparison between the two (or more) documents on the anvil of reliability is inevitable. (Para -9)

Case involved two different birth dates - found in school records of two different institutions - primary school record showed a 12.02.2002 birth date - high school certificate showed a 15.03.2003 birth date - appellate court relied on primary school record - assuming no discrepancies in recording of date of birth - court found - date of birth from previous institution was basis for admission in subsequent institutions - high school record was not worth reliance - appellate Court declared accused a major - Instant revision. **(Para - 2,10)**

HELD:- Appellate court correctly relied on the student's primary school record's date of birth, avoiding medical examinations when a reliable school certificate was available. **(Para -11)**

Revision dismissed. (E-7)

(Delivered by Hon'ble Mrs. Jyotsna Sharma, J.)

1. Heard Sri Upendra Upadhyay, learned counsel for the revisionist and Sri O.P. Mishra, learned AGA for the State of U.P. None responds for the respondent no. 2.

2. This criminal revision has been filed under Section 102 of the Juvenile Justice Act, 2015 challenging the order

dated 10.02.2022 passed by the Sessions Judge, Etah in Criminal Appeal No. 44/2021 setting aside the order dated 29.09.2021 passed by the Juvenile Justice Board, Etah in Case No. 48 of 2020 by which the revisionist was declared juvenile. The appellate Court allowed the appeal and declared the accused a major.

3. Relevant facts leading to this criminal revision, are as below.

A FIR Case Crime No. 172 of 2020 under Sections 376D, 302, 506, 452 IPC was registered under Police Station Jalesar, District-Etah with the allegations that the complainant's daughter was raped by one Anil and the juvenile; his son aged about 11 years, who was witness to the occurrence was murdered by them by strangulation and the victim was also threatened not to tell anything about the incident. Finding accused a juvenile, the matter came before the Juvenile Justice Board, where age determination inquiry was conducted and he was declared aged 17 years 1 month and 22 days on the date of the incident by an order dated 29.09.2021. Challenging the above order of the Juvenile Justice Board, an Appeal No. 44 of 2021 was preferred by the informant. The learned appellate Court declared the juvenile a major and set aside the order of the Juvenile Justice Board. At the same time, it was ordered that the case of the juvenile shall be sent to the Special Judge, POCSO Act for disposal in accordance with law. The order of the appellate Court has been challenged on behalf of the revisionist through his natural guardian before this Court.

4. It is contended on behalf of the revisionist that the date of birth as mentioned in the high school certificate should have been given preference over other evidence instead the appellate Court relied on primary school record. And that the impugned order has been passed against the settled principles of law and against the provisions of Section 94 of the Juvenile Justice Act and therefore, the impugned order is not sustainable in law.

5. Before the Juvenile Justice Board, the father of the juvenile as CW1-and an official from SMS Jain Inter College, Hathras as CW2 and Headmaster of primary school, Bhyau as CW3 were examined. It may be noticed that the Juvenile Justice Board before proceeding to decide his age, passed an order dated 06.07.2021 for constitution of a Medical Board for medical examination of the juvenile in the background of divergence in his age in educational documents. The Juvenile Justice Board noticed that in the high school certificate, his date of birth was shown as 15.03.2003 making him aged about 17 years 1 month and 22 days on the date of occurrence and the medical examination, which was conducted after a gap of one year, did show him between 18-19 years. Reconciling both the things, the Juvenile Justice Board concluded that his age was about 17 years 1 month and 22 days on the date of occurrence.

6. I went through the impugned order passed in Criminal Appeal whereby the order of the Juvenile Justice Board was set aside and the accused was held to be a major. The learned appellate Court referred to the statement of juvenile's father wherein he stated as CW1, that his son, first studied from Class 1st to 5th in a primary school at Bhyau and from Class 6th to 10th in Shri Mahveer Swami, Jain Inter College, Jalesar. The appellate Court referred to the oral evidence of CW2, an official from the

S.M.S. Jain Inter College who mentioned that the juvenile studied in his institution from Class 7th to Class 12th. Contrary to what, CW1 said , he never said that the juvenile took admission in Class 6th. He further stated that a transfer and conduct certificate of G.S. Primary School, Jalesar was produced and that no document pertaining to his primary school, Bhyau was ever given. Next the appellate Court referred to the statement of CW3, the Headmaster of primary school, Bhyau, Etah, who stated that the juvenile studied in his institution from Class 1st to Class 5th and that his date of birth was 12.02.2002, as per the school records. He deposed that he left his studies in Class 5th and didn't take any transfer and conduct certificate from this school and that hiis name was struck off owing to his continued absence.

7. After perusal of the above oral and documentary evidence, the appellate Court was of the opinion that the date of birth as recorded in his primary school was correct and not the date mentioned in his subsequent school's records. The learned appellate Court was also of the opinion that provisions of Section 94 do not provide that high school certificate is to be given primacy over other school certificates. The appellate Court further observed that where the school certificates were available, no occasion for medical examination arose, therefore, the order of the Juvenile Justice Board was bad in law as it was based on the medical examination of the accused and that the Juvenile Justice Board failed to consider the evidence of the official of the primary school, where the juvenile first attended his studies. On the basis of above analysis, the appeal was allowed and his date of birth was declared as 12.02.2002 on the basis of school record of primary school. Consequently, he was adjudged a major on the date of the occurrence.

8. The provisions of Section 94 are as below:

"(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."

9. Section 94(2)(iii) shows that only in the absence of documents, as described in clause (i) and (ii), his age shall be determined by the ossification test or any other medical techniques. What is important to note is that the above provision nowhere says that where multiple documentary evidence which essentially fell in the category as described in Section 94(2)(i) of the Juvenile Justice Act are available, one of it may be given preference over the other. **Now the pertinent question arises- What a Court is supposed to do where several records from educational institutions as envisaged in Section 94(2)(i) are available and they show different dates of birth?** Of course the Court shall have to depend on the document which passed the test of credibility and admissibility both. In such cases the comparison between the two (or more) documents on the anvil of reliability is inevitable.

10. Coming back to the facts of this case, this is not disputed that two different dates of birth have been found in school records of two institutions. Date of birth is 12.02.2002 in school record where he studied from Class 1st to Class 5th and it is 15.03.2003 in high school certificate. The evidence oral as well as documentary , has been reproduced verbatim in Juvenile Justice Board's order. Perusal thereof clearly shows glaring gaps and the learned appellate Court has noticed those gaps and rightly depended upon the date of birth as shown in primary school record. In my view, it stands to logic that the school record of the school/educational institution first attended, may be showing correct date of birth unless there is some fact and circumstances attracting attention of the Court regarding recording of date of birth in such papers prompting the Court to disbelieve the same. As per established practice in educational institutions, the date of birth as recorded in a previous institution forms a basis of admission in subsequent institutions. It is a common knowledge that whenever a student, for some reason, leaves his previous school and applies to take admission in some other institution, he has to produce his school leaving certificate or transfer and conduct certificate. In normal course of business of school admissions, production of a transfer and conduct certificate is must. In this case, no transfer and conduct certificate was ever issued to him when he left his primary school and a transfer and conduct certificate of some other school (name of which is conspicuously missing in the oral testimony of his father), was produced before the school in which he took admission in Class 7th. The details of school where he studied in Class 6th are missing. It was for the revisionist to explain the missing link. Non-explanation thereof naturally impelled the Court to give a finding that the high school record is not worth reliance and that some relevant material has been deliberately withheld.

11. In my view, the learned appellate Court made no mistake in depending upon the date of birth mentioned in record of the primary school first attended by the student; and I also agree with the observation of the appellate Court that where a reliable school certificate was available, there was no need to call for medical examination of the student and much less placing reliance on it.

12. The revision is, accordingly, **dismissed**.

13. Copy of the order be certified to the Court concerned.

(2022) 11 ILRA 973
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.11.2022

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.
THE HON'BLE VIVEK KUMAR SINGH, J.

Crl. Misc. Writ Petition No. 8079 of 2022

Vinay Pathak ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Lalta Prasad Misra, Nadeem Murtaza, Shubham Tripathi

Counsel for the Respondents:
G.A.

(A) Criminal Law - The Prevention of Corruption Act, 1988 - Sections 7 - Offence relating to public servant being bribed, Section 17-A - Enquiry or Inquiry or investigation of offences relatable to recommendations made or decision taken by public servant in discharge of official functions or duties, Indian Penal Code, 1860 - Section 342, 386, 409, 420, 467, 468, 471, 120-B, 504, 506 - if registration of FIR is mandatory, arrest of the accused immediately after registration of FIR is not at all mandatory - offences under the Prevention of Corruption Act, 1988 as well as charge of criminal conspiracy, cannot be said to constitute "acts in discharge of official duty."(Para -23, 36)

Allegations of the FIR - material/evidences gathered during investigation - prima facie, reveal cognizable offences - allegation regarding extortion of money - petitioner not having any prior criminal history - sections added after collecting relevant material/evidences - investigation still in progress. **(Para - 3,30,32,36)**

HELD:-No interference in light of dictum of the Apex Court in re; M/s Neeharika Infrastructure Pvt. Ltd., which states that a mere perusal of the FIR allegations and evidence collected during the investigation could reveal the commission of cognizable offenses. Court's observations should not be taken negatively or as protection for the petitioner. Petitioner can file legal recourse under Section 438 Cr.P.C. or other applicable laws before the court. **(Para - 38,40)**

Writ Petition dismissed. (E-7)

List of Cases cited:-

1. Arnesh Kumar Vs St. of Bihar, (2014) 8 SCC 273

2. Yashwant Sinha & ors. Vs C.B.I. through its Director & anr., (2020) 2 SCC 338

3. M/s Neeharika Infrastructure Pvt. Ltd. Vs St. of Maha. & ors., AIR 2021 Supreme Court 1918

4. Shankara Bhat & ors. Vs St. of Kerala & Ors., MANU/KE/2227/2021

5. Satender Kumar Antil Vs CBI & ors., Special Leave to Appeal (Criminal) No.5191 of 2021

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

1. Heard Dr. L.P. Misra, assisted by Sri Nadeem Murtaza, learned counsel for the petitioner, Sri Jaideep Narain Mathur, learned Senior Advocate, assisted by Sri S.N. Tilhari, learned counsel for the State and Sri I.B. Singh, learned Senior Advocate, assisted by Ms. Ashmita Singh, learned counsel for the complainant/ opposite party no.5.

2. By means of this petition, the petitioner has prayed following main reliefs:-

"(i) to issue a writ, order, or direction in the nature of Certiorari quashing the impugned first information report, registered against the Petitioner by Respondent no. 5, as FIR/ Case Crime No.0310/2022, under section 342, 386, 504 and 506 IPC, and 7 of Prevention of Corruption Act, 1988 at Police Station- Indira Nagar, District- Lucknow on 29.10.2022, contained in Annexure no. 1 to the writ petition;

(ii) to issue a writ, order, or direction in the nature of Mandamus, commanding the Respondents not to proceed, prosecute, or arrest the Petitioner on the basis of the impugned FIR registered against the Petitioner by Respondent no.5 as FIR/ Case Crime No.0310/2022, under section 342, 386, 504 and 506 IPC, and 7 of Prevention of Corruption Act, 1988 at Police Station- Indira Nagar, District- Lucknow on 29.10.2022, contained in Annexure no.1 to the writ petition; in the alternative at least without complying with the mandatory statutory provision as contained under Section 17-A of the Prevention of Corruption Act or till the submission of charge-sheet, whichever is later"

3. The main contention to assail the impugned FIR are two fold. Firstly, no specific allegation against the present petitioner has been levelled to constitute, prima facie, offence under Section 386 IPC. Even otherwise, no offence as alleged in the FIR is, prima facie, made out against the petitioner. If the allegation regarding extortion of money is taken on its face value, as per the allegation of the FIR, in that case too, at the best offence under Section 384 IPC may be attracted, however, the petitioner is denying the aforesaid allegation, but in that case, the punishment under those sections would be below seven years and the investigation may be conducted as per the directions and guidelines of the Apex Court in re; **Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273,** by giving prior notice under Section 41-A Cr.P.C. Secondly, no FIR against the present petitioner can be lodged in view of the bar of Section 17-A of the Prevention of Corruption Act, 1988 (hereinafter referred to as "P.C. Act").

4. Dr. Misra has further submitted that since the FIR has been lodged under Section 7 of P.C. Act besides other sections of IPC, therefore, compliance of Section 17-A of P.C. Act would be mandatory. Sections 7 & 17-A of P.C. Act are being reproduced herein below:-

*"**[7. Offence relating to public servant being bribed.**-- Any public servant who,--*

(a) obtains or accepts or attempts to obtain from any person, an undue advantage, with the intention to perform or cause performance of public duty improperly or dishonestly or to forbear or cause forbearance to perform such duty either by himself or by another public servant; or

(b) obtains or accepts or attempts to obtain, an undue advantage from any person as a reward for the improper or dishonest performance of a public duty or for forbearing to perform such duty either by himself or another public servant; or

(c) performs or induces another public servant to perform improperly or dishonestly a public duty or to forbear performance of such duty in anticipation of or in consequence of accepting an undue advantage from any person,

shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

[17A. Enquiry or Inquiry or investigation of offences relatable to recommendations made or decision taken by

public servant in discharge of official functions or duties.-- No police officer shall conduct any enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties, without the previous approval--

(a) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of the Union, of that Government;

(b) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of a State, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office, at the time when the offence was alleged to have been committed:

Provided that no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person:

Provided further that the concerned authority shall convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month.]"

5. Dr. Misra has submitted that compliance of Section 17-A of P.C. Act is mandatory. In support of his aforesaid submission, he has placed reliance upon the decision of the Apex Court in re; **Yashwant Sinha and Others v. Central Bureau of Investigation through its Director and Another, (2020) 2 SCC 338**, referring paras 117, 118 & 119, which are as under:-

"117. In terms of Section 17-A, no police officer is permitted to conduct any enquiry or inquiry or conduct investigation into any offence done 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. In respect of the public servant, who is involved in this case, it is clause (c), which is applicable. Unless, therefore, there is previous approval, there could be neither inquiry or enquiry or investigation. It is in this context apposite to notice that the complaint, which has been filed by the petitioners in Writ Petition (Criminal) No. 298 of 2018, moved before the first respondent CBI, is done after Section 17-A was inserted. The complaint is dated 4-10-2018. Para 5 sets out the relief which is sought in the complaint which is to register an FIR under various provisions. Paras 6 and 7 of the complaint are relevant in the context of Section 17-A, which read as follows:

"6. We are also aware that recently, Section 17-A of the Act has been brought in by way of an amendment to introduce the requirement of prior permission of the Government for investigation or inquiry under the Prevention of Corruption Act.

7. We are also aware that this will place you in the peculiar situation, of having to ask the accused himself, for permission to investigate a case against him. We realise that your hands are tied in this matter, but we request you to at least take the first step, of seeking permission of the Government under Section 17-A of the Prevention of Corruption Act for investigating this offence and under which,

"the concerned authority shall convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month"."

(emphasis supplied)

118. Therefore, the petitioners have filed the complaint fully knowing that Section 17-A constituted a bar to any inquiry or enquiry or investigation unless there was previous approval. In fact, a request is made to at least take the first step of seeking permission under Section 17-A of the 2018 Act. Writ Petition (Criminal) No. 298 of 2018 was filed on 24-10-2018 and the complaint is based on non-registration of the FIR. There is no challenge to Section 17-A. Under the law, as it stood, both on the date of filing the petition and even as of today, Section 17-A continues to be on the statute book and it constitutes a bar to any inquiry or enquiry or investigation. The petitioners themselves, in the complaint, request to seek approval in terms of Section 17-A but when it comes to the relief sought in the writ petition, there was no relief claimed in this behalf.

119. Even proceeding on the basis that on petitioners' complaint, an FIR must be registered as it purports to disclose cognizable offences and the Court must so direct, will it not be a futile exercise having regard to Section 17-A. I am, therefore, of the view that though otherwise the petitioners in Writ Petition (Criminal) No. 298 of 2018 may have made out a case, having regard to the law actually laid down in Lalita Kumari [Lalita Kumari v. State of U.P., (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] , and more importantly, Section 17-A of the Prevention of Corruption Act, in a review petition, the petitioners cannot succeed. However, it is my view that the judgment sought to be reviewed, would not stand in the way of the first respondent in Writ Petition (Criminal) No. 298 of 2018 from taking action on Ext. P-1, complaint in accordance with law and subject to first respondent obtaining previous approval under Section 17-A of the Prevention of Corruption Act."

6. Dr. Misra has further submitted that unless and until the previous approval from competent authority is received to make investigation against the present petitioner in view of Section 17-A of P.C. Act, the police authorities may be restrained to conduct investigation against the petitioner pursuant to the impugned FIR and the operation and implementation of the impugned FIR may be stayed so far as the present petitioner is concerned.

7. Dr. L.P. Misra has also submitted that for the alleged incident of the month of February, 2022, thereafter of the month of April, 2022, the FIR has been lodged on 29.10.2022. In the said FIR, no specific date of incident has been indicated for the allegation relating to the month of February, 2022. Further, the allegations so levelled in the FIR are highly improbable inasmuch as when the complainant was allegedly instructed to deposit a sum of Rs.63 lakh in one International Business Firm account at Alwar, Rajasthan, as to why he had deposited a sum of more than Rs.74 lakh approx.

8. Dr. Misra has also vehemently submitted that during investigation the investigating agency has added Sections 409, 420, 467, 468, 471 & 120-B of IPC, besides earlier Sections 342, 386, 504, 506 IPC and Section 7 of the P.C. Act to subvert the procedure established by the law, however, ingredients of all aforesaid

sections do not attract in the present F.I.R, therefore, the impugned F.I.R. may be quashed both on merits as well as the same is violative of Section 17-A of the P.C. Act.

9. Sri I.B. Singh, learned Senior Advocate, appearing for opposite party no.5 has raised an objection regarding maintainability and scope of the writ petition under Article 226 of the Constitution of India referring the decision of the Apex Court in re; **M/s Neeharika Infrastructure Pvt. Ltd. vs. State of Maharashtra and Others, AIR 2021 Supreme Court 1918.** Sri I.B. has referred paras 7.3, 15 & 16 of the aforesaid judgement, which are being reproduced herein-below:-

"7.3. Then comes the celebrated decision of this Court in the case of State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335. In the said decision, this Court considered in detail the scope of the High Court powers under Section 482 Cr.P.C. and/or Article 226 of the Constitution of India to quash the FIR and referred to several judicial precedents and held that the High Court should not embark upon an inquiry into the merits and demerits of the allegations and quash the proceedings without allowing the investigating agency to complete its task. At the same time, this Court identified the following cases in which FIR/complaint can be quashed:

"102.(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the 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."

"15. As observed hereinabove, there may be some cases where the initiation of criminal proceedings may be an abuse of process of law. In such cases, and only in exceptional cases and where it is found that non interference would result into

miscarriage of justice, the High Court, in exercise of its inherent powers under Section 482 Cr.P.C. and/or Article 226 of the Constitution of India, may quash the FIR/complaint/criminal proceedings and even may stay the further investigation. However, the High Court should be slow in interfering the criminal proceedings at the initial stage, i.e., quashing petition filed immediately after lodging the FIR/complaint and no sufficient time is given to the police to investigate into the allegations of the FIR/complaint, which is the statutory right/duty of the police under the provisions of the Code of Criminal Procedure....

16. ...

... Therefore, in case, the accused named in the FIR/complaint apprehends his arrest, he has a remedy to apply for anticipatory bail under Section 438 Cr.P.C. and on the conditions of grant of anticipatory bail under Section 438 Cr.P.C being satisfied, he may be released on anticipatory bail by the competent court. Therefore, it cannot be said that the accused is remediless. It cannot be disputed that the anticipatory bail under Section 438 Cr.P.C. can be granted on the conditions prescribed under Section 438 Cr.P.C. are satisfied. At the same time, it is to be noted that arrest is not a must whenever an FIR of a cognizable offence is lodged. Still in case a person is apprehending his arrest in connection with an FIR disclosing cognizable offence, as observed hereinabove, he has a remedy to apply for anticipatory bail under Section 438 Cr.P.C. As observed by this Court in the case of Hema Mishra v. State of Uttar Pradesh, (2014) 4 SCC 453, though the High Courts have very wide powers under Article 226, the powers under Article 226 of the Constitution of India are to be exercised to prevent miscarriage of justice and to prevent abuse of process of law by the authorities indiscriminately making pre-arrest of the accused persons. It is further observed that in entertaining such a petition under Article 226, the High Court is supposed to balance the two interests. On the one hand, the Court is to ensure that such a power under Article 226 is not to be exercised liberally so as to convert it into Section 438 Cr.P.C. proceedings. It is further observed that on the other hand whenever the High Court finds that in a given case if the protection against pre-arrest is not given, it would amount to gross miscarriage of justice and no case, at all, is made for arrest pending trial, the High Court would be free to grant the relief in the nature of anticipatory bail in exercise of its powers under Article 226 of the Constitution of India, keeping in mind that this power has to be exercised sparingly in those cases where it is absolutely warranted and justified. However, such a blanket interim order of not to arrest or "no coercive steps" cannot be passed mechanically and in a routine manner."

10. On the basis of aforesaid observation of the Hon'ble Apex Court in re; **M/s Neeharika Infrastructure Pvt. Ltd. (supra),** Sri I.B. Singh has submitted that the allegations so levelled against the petitioner in the FIR disclose commission of cognizable offence, therefore, the FIR in question may not be quashed. Since the FIR may not be quashed, therefore, no interim protection can be granted to the petitioner. Further, there is a statutory prescription under Section 438 Cr.P.C. to file anticipatory bail application, therefore, extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India may not be invoked.

11. Replying the aforesaid contention of Sri I.B. Singh, learned Senior Advocate, Dr. Misra has submitted that since the impugned FIR is illegal as the same could have not been lodged in view of the

specific bar of Section 17-A of the P.C. Act, therefore, the impugned FIR is liable to be quashed. Hence, the dictum of Hon'ble Apex Court in re; **M/s Neeharika Infrastructure Pvt. Ltd.** (supra) would not be applicable in the present case.

12. On that, Sri I.B. Singh has placed reliance upon the decision of Kerala High Court in re; **Shankara Bhat and Ors. Vs. State of Kerala and Ors.**, reported in **MANU/KE/2227/2021**, whereby applicability of Section 17-A of P.C. Act has been examined and the Kerala High Court in paras 13, 25 & 26 of the said judgment has observed as under:-

*"**13.** In the back ground of the law laid down in that context, the contention, whether prior approval as contemplated under section 17A introduced by 2018 Amendment to the Prevention of Corruption Act is required in respect of every act which form subject matter of prosecution has to be considered. In this context, it is essential to refer to the exact words Crl.M.C Nos.7542/2018 & others 17 employed by the statute which reads as follows;*

"S. 17A No police officer shall conduct any enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties without previous approval.".

Under section 17A, which was inserted by Act 16 of 2018, and which came into force with effect from 26/7/2018, the previous approval by the concerned authorities is essential. The crucial question that arises for consideration in these proceedings is whether previous approval from the competent authority need to be obtained for every enquiry, inquiry or investigation, into every offence committed by the public servant. The crux of the issue is whether the above provision is an omnibus, all pervasive pre requisite for every enquiry or inquiry or investigation into every act done by the public servant in discharge of his official functions.

"25. The reasonable conclusion that can be arrived at regarding the scope of section 17A is that prior approval under section 17A for conducting any enquiry, inquiry or investigation is required only when the offence alleged is relatable to a decision taken or recommendation made by the public authority and it involves a debatable or suspicious or doubtful recommendation made or decision taken by the authority. Acts, which are ex facie criminal or constitute an offence do not require approval under section 17A of P.C.Act.This legal proposition, seems to be clear from the statute and is in consonance with the spirit of the Prevention of Corruption Act and also in consonance with the legal principles laid down in relation to section 197 Cr.P.C.

26. Applying the above legal principles, I am of the firm opinion that in the cases at hand, which involve allegation of falsification of accounts, breach of trust and misappropriation of funds or acts which are exfacie criminal, no prior approval under section 17A of Prevention of Corruption Act is required. Hence, all the Crl.M.Cs. are without any merit and are liable to be dismissed. However, it is made clear that except this issue, all other issues touching on the merit, are left open to be raised and considered at the appropriate stage. In the result, all the Crl.M.Cs stand dismissed."

13. The aforesaid judgment has been challenged before the Apex Court by filing

Petition(s) for Special Leave to appeal (Crl.) No(s).9341/2021, Manoj. K.M vs. State of Kerala & Anr. and the said Special Leave to Appeal was dismissed by the Apex Court vide order dated 10.12.2021 by the following order:-

"Learned counsel for the petitioner states that Section 13(1) of the Prevention of Corruption Act, 1988 was substituted vide Act 16 of 2018 with effect from 26.7.2018 and that clause (d) to Section 13(1) was not in the statute when the FIR in the instant case was registered.

The impugned order has primarily examined the purport and the legal effect of Section 17A of the Prevention of Corruption Act, 1988. Keeping in view the factual background of this case, we are not inclined to interfere with the impugned order, but leave it open to the petitioner to raise the aforesaid contentions and issues before the Investigating officer/Court.

Pending application(s), if any, shall stand disposed of."

14. Therefore, on the basis of aforesaid judgment, Sri I.B. Singh has submitted that the argument of Dr. Misra regarding 17-A of the P.C. Act Act may not be applicable in the present case.

15. Sri Jaideep Narain Mathur, learned Senior Advocate, appearing on behalf of the State-respondents has submitted that bare perusal of the allegations of the FIR clearly reveals that the present petitioner has committed offence under Sections 342, 386, 504 & 506 IPC as well as Section 7 of the P.C. Act. Sri Mathur has also drawn attention of this Court towards para 15 of the counter affidavit of the State wherein it has been categorically indicated that on the basis of evidence collected so far, offence under Sections 409, 420, 467, 468, 471 & 120-B of IPC has been added and at present, investigation is under progress for the offences under Sections 342, 386, 504, 506, 409, 420, 467, 468, 471, 120-B of IPC and Section 7 of the Prevention of Corruption Act.

16. Sri Mathur has further submitted that the instant FIR is consisting three incidents. First incident is relating to the month of February, 2022 when the present petitioner compelled the informant to provide 15% commission for the payments of work done by his Company, thereby providing the mobile number of the co-accused Ajay Mishra. The informant under compelling circumstances paid 15% commission to the petitioner through co-accused Ajay Mishra. Second incident is relating to the month of April, 2022 when the informant has been forced to pay 15% commission of his remaining payment and he paid such commission through cash and through e-banking in the account of one International Business Firm at Alwar, Rajasthan. Third incident is dated 01.09.2022 when the complainant/ informant paid commission to the tune of Rs.15,55,000/- to the petitioner through co-accused Ajay Mishra regarding his another payment for the work done by his Company. The informant has indicated not only the dates of such payments but also indicated the amount which is Rs.1,41,00,000/- in all the aforesaid incidents. Sri Mathur has also submitted that when advance commission was demanded from the informant and he could not pay the same, the work assigned to his Company has been stopped by the petitioner and given to the Company of co-accused Ajay Mishra, as has been clearly indicated in the FIR.

17. Sri Mathur has apprised the Court that looking to the gravity and seriousness of the allegations, the investigation has

been handed over to the Special Task Force, U.P. Some senior officers/officials of Special Task Force are present in the Court to assist Sri Mathur so that proper informations could be provided to the Court. On the basis of instructions so received from those officers, Sri Mathur has apprised the Court that during the period which has been referred in the FIR, the petitioner has called the co-accused so many times and co-accused has also called the petitioner couple of times. He has also apprised that the informant/ complainant was having no business relations of any kind whatsoever with the Company in the name of International Business Firm, Alwar, Rajasthan and transaction so made with such Firm by the informant/ complainant on 29.04.2022 was the single transaction whereas co-accused Ajay Mishra is having business relation with such Firm at Alwar, Rajasthan and there are couple of transactions of co-accused Ajay Mishra with such Firm. On the basis of aforesaid submission, Sri Mathur has submitted that this may not be a case that the informant/complainant is having any business relation with the Company at Alwar, Rajasthan but he deposited a sum of Rs.74 lakh approx, to be more precise Rs.51,62,500/-, Rs.11,80,000/- & Rs.10,98,875/- through RTGS at the behest of the petitioner and co-accused Ajay Mishra. Therefore, as per Sri Mathur, some more sections have been added by the investigating agency against the accused persons.

18. So far as contention of the learned counsel for the petitioner regarding bar to investigate the issue in terms of Section 17-A of P.C. Act is concerned, Sri Mathur has submitted that Section 17-A of P.C. Act clearly mandates that said bar would be applicable only where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties. In the present case, extorting money taking undue advantage of his position from the informant may not be considered the act which has been done in discharge of his official duties or function. He has further submitted that since the petitioner is presently serving on the post of Vice Chancellor and has committed offence taking undue advantage of his position, therefore, FIR under Section 7 of P.C. Act besides other sections of IPC has been lodged but the alleged offence is not relatable to any recommendation made or decision taken by the petitioner in discharge of his official function or duties, therefore, bar of Section 17-A of P.C. Act would not be applicable in the present case. Even otherwise this aspect may be looked into at the time of taking cognizance of the offence under Section 19 of the P.C. Act.

19. Sri Mathur has, therefore, submitted that for getting benefit of Section 17-A of the P.C. Act in the light of the dictum of Apex Court in re; **Yashwant Sinha (supra)**, the offence in question must be relatable to any recommendation made or decision taken by the petitioner in discharge of his official functions or duties but alleged offence of the petitioner committing forgery, fraud, criminal breach of trust, forgery of a valuable security etc., extorting money and criminal intimidation etc. having criminal conspiracy with other accused person misusing the position as Vice Chancellor may not come within the four corners of Section 17-A of the P.C. Act, so he is not entitled to get benefit of the judgment of the Apex Court in re; **Yashwant Sinha (supra)**.

20. Sri Mathur has also placed reliance upon the dictum of the Apex Court

in re; **M/s Neeharika Infrastructure Pvt. Ltd. (supra)** referring those paragraphs, which have been cited by Sri I.B. Singh, learned Senior Advocate, appearing on behalf of the complainant/ opposite party no.5.

21. So as to demonstrate the test as to whether the act was done in discharge of official duty, Sri Mathur has placed reliance upon the dictum of Privy Council in re; **H.H.B. Gill and another v. The King, AIR (35) 1948 Privy Council 128**, referring relevant portion of para-30 thereof, which reads as under:-

" [30] ... A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus a Judge neither acts nor purport to act as a Judge in receiving a bribe, though the judgment which he delivers may be such an act: not doses a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such as an act. The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office..."

22. Sri Mathur has submitted that the aforesaid observation of Privy Council has been followed by the Apex Court time and again in various judgments.

23. Sri Mathur has placed reliance of paras 149 & 152 of Full Bench judgment of this Court in re; **Smt. Neera Yadav vs. C.B.I. (Bharat Sangh), [(2006) 1 UPLBEC 601]**, which read as under:-

"149. In the present case, three charge-sheets contain offence under Sections 13(1)(d) and (2) of Act of 1988 read with Section 120-B, IPC and one charge sheet is only under Section 13 (1)(d) & (2) of the Act of 1988. The offences under Act of 1988 as has been held by the Hon'ble Apex Court in Harihar Prasad (Supra), Kalicharan Mahapatra (Supra), which still holds field, does not come within the purview of word "in discharge of the official duty". Thus, the offence of criminal conspiracy under Section 120-B, IPC, would also not be within the term "in discharge of official duty" and, therefore, Section 197 Cr.P.C. has no application at all.

152. In view of the aforesaid, answers to the aforesaid three questions are as follows:

(I) For prosecution under Prevention of Corruption Act, 1988, once sanction under Section 19 of the said Act is granted, there is no necessity for obtaining further sanction under Section 197 of the Code of Criminal Procedure.

(II) Where a public servant is sought to be prosecuted under the provisions of Prevention of Corruption Act read with Section 120B, I.P.C., and sanction under Section 19 of Act of 1988 has been granted, it is not at all required to obtain sanction under Section 197 Cr.P.C. from the State Government or any other authority merely because the public servant is also charged under Section 120B, I.P.C.

(III) The offences under the Prevention of Corruption Act, 1988 as well as charge of criminal conspiracy, cannot be said to constitute "acts in discharge of official duty."

24. Sri Mathur has submitted that even if the allegation of the petitioner is that he has been falsely implicated so as to tarnish his reputation and allegations so levelled against him in the FIR do not

corroborate with the material available on record, then this is a fit case to file anticipatory bail application under Section 438 Cr.P.C. and in such circumstances, where the petitioner has got alternative statutory remedy, the extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India may not be invoked. Therefore, as per Sri Mathur, the present petition may be dismissed.

25. Sri Mathur has also submitted that the investigating agency is well aware that the petitioner is a reputed person serving as Vice Chancellor, Chhatrapati Shahuji Maharaj University, Kanpur and has been serving on such position w.e.f. 2009 till date at various Universities, recital to this effect has been given in para-10 of the writ petition, therefore, there may not be any question of his harassment, however, his proper cooperation would be required in the present case as the issue is so serious.

26. On that, Dr. Misra has submitted placing reliance upon paras-81, 111 & 112 of the judgment in re; **Yashwant Sinha** (supra) that before registration of an FIR, preliminary inquiry is must in the cases involving allegation of corruption by a public servant. Paras- 81, 111 & 112 of the aforesaid case are being reproduced herein-below:-

"81. In this case, the short point, which this Court is called upon to consider, is the effect of the impugned judgment not dealing with a binding decision rendered by a Constitution Bench which was relied upon by the petitioners in Writ Petition (Criminal) No. 298 of 2018 and rendered in Lalita Kumari [Lalita Kumari v. State of U.P., (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] . It is apposite that I set out what this Court, speaking through the aforesaid Constitution Bench judgment, has laid down in para 120 : (SCC p. 61)

"Conclusion/Directions

120. xxx

120.1. xxx

120.2. xxx

120.3. xxx

120.4. xxx

120.5. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7. xxx

120.8. xxx"

"111. In P. Sirajuddin [P. Sirajuddin v. State of Madras, (1970) 1 SCC 595 : 1970 SCC (Cri) 240], relied upon by the Constitution Bench in Lalita Kumari [Lalita Kumari v. State of U.P., (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] , what this Court has held, and which has

apparently been relied upon by the Constitution Bench though not expressly referred to is the following statement contained in para 17 : (P. Sirajuddin case [P. Sirajuddin v. State of Madras, (1970) 1 SCC 595 : 1970 SCC (Cri) 240] , SCC p. 601)

"17. ... Before a public servant, whatever be his status, is publicly charged with acts of dishonesty which amount to serious misdemeanour or misconduct of the type alleged in this case and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. The lodging of such a report against a person, specially one who like the appellant occupied the top position in a department, even if baseless, would do incalculable harm not only to the officer in particular but to the department he belonged to, in general."

(emphasis supplied)

112. In Lalita Kumari [Lalita Kumari v. State of U.P., (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] , one of the contentions which was pressed before the Court was that in certain situations, preliminary inquiry is necessary. In this regard, attention of the Court was drawn to CBI Crime Manual. The following paragraphs of Lalita Kumari [Lalita Kumari v. State of U.P., (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] may be noticed, which read as follows : (SCC pp. 50-51, paras 89-92)

"89. Besides, the learned Senior Counsel relied on the special procedures prescribed under the CBI Manual to be read into Section 154. It is true that the concept of "preliminary inquiry" is contained in Chapter IX of the Crime Manual of CBI. However, this Crime Manual is not a statute and has not been enacted by the legislature. It is a set of administrative orders issued for internal guidance of the CBI officers. It cannot supersede the Code. Moreover, in the absence of any indication to the contrary in the Code itself, the provisions of the CBI Crime Manual cannot be relied upon to import the concept of holding of preliminary inquiry in the scheme of the Code of Criminal Procedure. At this juncture, it is also pertinent to submit that CBI is constituted under a special Act, namely, the Delhi Special Police Establishment Act, 1946 and it derives its power to investigate from this Act.

90. It may be submitted that Sections 4(2) and 5 of the Code permit special procedures to be followed for special Acts. Section 4 of the Code lays down as under:

"4. Trial of offences under the Indian Penal Code and other laws.--(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.'

It is thus clear that for the offences under the laws other than IPC, different provisions can be laid down under a special Act to regulate the investigation, inquiry, trial, etc. of those offences. Section 4(2) of the Code protects such special provisions.

91. Moreover, Section 5 of the Code lays down as under:

"5. Saving.--Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or

any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.'

Thus, special provisions contained in the DSPE Act relating to the powers of CBI are protected also by Section 5 of the Code.

92. In view of the above specific provisions in the Code, the powers of CBI under the DSPE Act, cannot be equated with the powers of the regular State Police under the Code."

27. While citing paras-107 & 108 of the dictum of the Constitution Bench of the Apex Court in re; **Lalita Kumari v. Government of Uttar Pradesh, (2014) 2 SCC 1**, Dr. Misra has submitted that if registration of FIR is mandatory, arrest of the accused immediately after registration of the FIR is not at all mandatory. Paras-107 & 108 of the aforesaid judgment are as under:-

"107. While registration of FIR is mandatory, arrest of the accused immediately on registration of FIR is not at all mandatory. In fact, registration of FIR and arrest of an accused person are two entirely different concepts under the law, and there are several safeguards available against arrest. Moreover, it is also pertinent to mention that an accused person also has a right to apply for "anticipatory bail" under the provisions of Section 438 of the Code if the conditions mentioned therein are satisfied. Thus, in appropriate cases, he can avoid the arrest under that provision by obtaining an order from the court.

108. It is also relevant to note that in Joginder Kumar v. State of U.P. [(1994) 4 SCC 260 : 1994 SCC (Cri) 1172] , this Court has held that arrest cannot be made by the police in a routine manner. Some important observations are reproduced as under : (SCC pp. 267-68, para 20)

"20. ... No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do."

(emphasis supplied)

28. Heard learned counsel for the parties and perused the material available on record.

29. At the very outset, we would like to deal the issue of maintainability of the writ petition in the light of dictum of the Apex Court in re; **M/s Neeharika Infrastructure Pvt. Ltd. (supra)** as such objection has been raised by Sri I.B. Singh, learned Senior Advocate, appearing on behalf of the complainant/ opposite party no.5 as well as Sri Jaideep Narain Mathur, learned Senior Advocate, appearing on behalf of the State-respondents.

30. In view of para 7.3. (102.1, 102.2 & 102.3) of the aforesaid judgement, it may not be observed, keeping in view the contention of Sri Mathur on the basis of specific instructions so received from the Officers of Investigating Agency, that the allegations of the FIR do not disclose a cognizable offence. Besides, in view of paras- 15 & 16 of the aforesaid judgment, no extreme exception has been carved out by the learned counsel for the petitioner to interfere in the FIR under Article 226 of the Constitution of India. Prima facie, the allegations of the FIR and material and evidences, which are said to have been gathered during investigation as per prosecution, constitute the cognizable offences, therefore, such FIR may not be quashed, hence no interim order can be granted in a petition under Article 226 of the Constitution of India. At the same time, it is also undisputed that provision of Section 438 Cr.P.C. is in existence in the State of U.P., so if the allegation of the learned counsel for the petitioner is considered to the effect that the impugned FIR has been lodged without having any cogent and relevant material with the prosecution to tarnish the reputation of the petitioner, who is discharging the functions of Vice Chancellor of one University and has been Vice Chancellor of various Universities since 2009, the appropriate remedy would be to file an appropriate application for anticipatory bail under Section 438 Cr.P.C. instead of filing writ petition under Article 226 of the Constitution of India inasmuch as the alternative statutory remedy may not ordinarily be circumvented unless there is any exceptional circumstances to interfere in such FIR.

31. Therefore, in view of the above, considering the dictum of the Hon'ble Apex Court in re; **M/s Neeharika Infrastructure Pvt. Ltd.** (supra), we are not inclined to quash the impugned FIR; so, we cannot pass any interim order in the present case.

32. So far as arguments of Dr. Misra regarding conducting preliminary inquiry prior to lodging the FIR in view of the dictum of the Apex Court in re; **Lalita Kumari** (supra) is concerned, we are of the considered opinion that in para 120.5, the Apex Court has clearly opined that the preliminary inquiry would only be required only to ascertain whether the information reveals any cognizable offence. In the present case, the allegations of the FIR as well as the material/ evidences which are said to have been gathered during investigation, prima facie, reveal cognizable offences subject to outcome of the investigation. Further, para-120.6 of the aforesaid judgment indicates category of the cases/ offences in which preliminary inquiry may be made, wherein clause (d) mentions "corruption cases' but in such para, the Hon'ble Apex Court has observed categorically that the aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry. Meaning thereby, the category so described from (a) to (e) in para 120.6 in re; **Lalita Kumari** (supra), as per the Apex Court, are only illustrations and not exhaustive warranting preliminary inquiry as the direction for preliminary inquiry depends upon the facts and circumstances of the issue in question, therefore, if the information received by the prosecution reveals any cognizable offence and that information is, prima facie, definite, the preliminary inquiry may not be warranted in such cases. Besides, the case dealt by the Apex Court in re; **Lalita Kumari** (supra) was relating to the C.B.I. investigation and undisputedly the concept of "Preliminary

Inquiry" is contained in Chapter IX of the Crime Manual of C.B.I. whereas no such prescription is provided under any Crime Manual of Cr.P.C. or under any manual being dealt by the investigating agency of the present case i.e. Special Task Force. This aspect regarding special proceeding of preliminary inquiry prescribed under C.B.I. Manual has been considered under Para 89 of **Lalita Kumari** (supra).

33. Further, the Full Bench of this Court in re; **Smt. Neera Yada**v (supra) has held in para 152 (III) that the offences under the Prevention of Corruption Act as well as charge of criminal conspiracy, cannot be said to constitute "acts in discharge of official duty."

34. So far as arguments of Dr. Misra regarding the provision of Section 17-A of P.C. Act is concerned, we are of the considered opinion that so as to get the benefit of the P.C. Act, the offence in question must be relatable to any recommendation made or decision taken by a public servant in discharge of his official functions or duties. However, we leave it open for the petitioner to take this plea before the investigating agency or before the competent court of law, as the case may be and such agency or court may take appropriate decision, as per law, as to whether this aspect should be considered in the light of Section 17-A or 19 of the P.C. Act.

35. The Privy Council in **H.H.B. Gill** (supra) has rightly observed that a Judge neither acts nor purport to act as a Judge in receiving a bribe, though the judgment which he delivers may be such an act: likewise the act of a Government medical officer in picking the pocket of a patient to whom he is examining may not be said to an act in discharge of his official duties as a public servant though the examination itself may be such an act. Therefore, if the aforesaid test is applied in the present case, the alleged act of the petitioner committing forgery, fraud, criminal breach of trust, criminal intimidation, forgery of valuable security etc., wrongful confinement, extorting money etc. having criminal conspiracy with other accused persons misusing his position as Vice Chancellor may not be said to an act or purported to act in discharge of his official duty as it is not relatable to any recommendation made or decision taken by him in discharge of his official functions or duties though directing for payment of the informant for the work done by his Firm may be such an act. Hence, in view of the above, the present petitioner may not get the benefit of Section 17-A of the P.C. Act in the light of the judgment of the Apex Court in re; **Yashwant Sinha** (supra). The facts and circumstances of the present case are different from the facts and circumstances of the judgment in re; **Yashwant Sinha** (supra). However, we have great respect towards the judgment of the Hon'ble Supreme Court in re; **Yashwant Sinha** (supra), but it is a trite law of the Apex Court that unless and until the facts and circumstances of the case in hand are identically the same with the case of the Apex Court so cited, that would not be applicable.

36. So far as paras 107 & 108 of the case in re; **Lalita Kumari** (supra) are concerned wherein it has been observed by the Apex Court that if registration of FIR is mandatory, arrest of the accused immediately after registration of FIR is not at all mandatory, we are of the considered opinion that the trite law of the Apex Court is binding upon every concerned as law of

the Hon'ble Supreme Court is the law of land. Notably, the petitioner is not having any prior criminal history and keeping in a view the fair stand of the State-respondent that the proper co-operation of the petitioner is very much required in this serious issue, we think it proper to observe that a proper recourse, as per law, should be adopted by the investigating agency.

37. So far as submission of Dr. L.P. Misra regarding added sections during investigation to subvert the procedure established by the law is concerned, we are of the opinion that since those sections are said to have been added after collecting the relevant material/evidences and the investigation is still in progress, therefore, we cannot accept the aforesaid submission of Dr. L.P. Misra. However, we legitimately expect that the Investigating Officer shall conduct and conclude the investigation strictly in accordance with law and also in the light of settled proposition of law of the Apex Court from **Joginder Kumar** (supra)**, Lalita Kumari** (supra) till **Satender Kumar Antil vs. CBI and others, Special Leave to Appeal (Criminal) No.5191 of 2021** as it is needless to say that all concerned are duty bound to follow the directions and guidelines of the Apex Court issued from time to time in catena of cases.

38. Before parting with, we make it clear that since we are not entertaining this petition, in the light of the dictum of the Apex Court in re; **M/s Neeharika Infrastructure Pvt. Ltd.** (supra), for the reason that bare perusal of the allegations of the FIR and the material/evidences which are said to have been collected during investigation, as recital to this effect has been made in the counter affidavit of the State, disclose, prima facie, commission of cognizable offences subject to final outcome of the investigation, therefore, our aforesaid observations may not be taken adversely against the present petitioner nor it may be treated as protection to the petitioner in any manner whatsoever. The investigating agency or any competent court below should not be influenced from the aforesaid observations of this judgment. The fair and impartial investigation is a bare minimum expectation of this Court and it is also expected from all concerned that the settled proposition of law is followed.

39. In view of what has been considered above, we hereby **dismiss** this writ petition.

40. However, it is always open for the petitioner to take appropriate legal recourse by filing his appropriate applications under Section 438 Cr.P.C. or any other application before the competent court of law and if any appropriate application is filed before the learned court below by the petitioner, the same shall be considered and disposed of with expedition, without giving any unnecessary adjournment to any of the parties.

41. No order as to cost.

(2022) 11 ILRA 988
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.11.2022

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.
THE HON'BLE VIVEK KUMAR SINGH, J.

Crl. Misc. Writ Petition No. 8164 of 2022

Ankit Sharma @ Ankit Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Adarsh Kumar Maurya, Ajay Kumar Shukla, Kanhaiya Yadav, Nida Navi, Rajendra Kumar Dwivedi, Ram Chandra Sharma

Counsel for the Respondents:
G.A.

(A) Criminal Law - U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Section 2(b)(i) & 3 - Indian Penal Code, 1860 - Sections 41, 411, 413, 419 & 420 - The U.P. Gangsters and Anti-Social Activities (Prevention) Rules, 2021 - Rule 5(C), Rule 10 & Rule 8 - Government Order - Only those criminal cases shall be included in the gang chart in which the police has prepared the charge sheet and the same has been filed before the court concerned - In case of any misuse by the authorities, the concerning incharge of the police station as well as Senior Superintendent of Police/ Superintendent of Police Incharge of the concerned Districts shall be held responsible. (Para -13)

Quashing of F.I.R. - no charge-sheet has been filed - before making compliance of Rule 10 of Rules of 2021, the gang-chart has been filed - wrong impression given to Court that charge-sheet has been filed - action under Rule-8(5) - on discovering an adverse situation, the Incharge of Police Station/Station House Officer/Inspector shall be held liable for negligence under departmental and criminal proceedings. **(Para -12)**

HELD:-Impugned F.I.R. under Section 2(b)(i) and 3 of Gangsters Act quashed. Charge-sheet filed against the present petitioner, giving liberty to the competent authority to take a fresh decision and do the needful. **(Para -15, 16)**

Writ Petition allowed. (E-7)

List of Cases cited:-

Master @ Ramzan & anr. Vs St. of U.P. & ors., Writ Petition No.22007 (M/B) of 2020

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

1. Heard Sri Rajendra Kumar Dwivedi, learned counsel for the petitioner and Sri Badrul Hasan, learned A.G.A. for the State.

2. Learned counsel for the petitioner has filed an application praying for consideration of prayer of petitioner for quashing of the F.I.R. bearing Case Crime No.451 of 2022, under Section 2(b)(i) and 3 of U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 (for short 'Gangsters Act'), Police Station-Pasgawan, District- Lakhimpur Kheri. The application is supported with an affidavit and the same is taken on record.

3. By means of the present writ petition, petitioner has sought quashing of the F.I.R. bearing Case Crime No.451 of 2022, under Section 2(b)(i) and 3 of Gangsters Act, Police Station-Pasgawan, District- Lakhimpur Kheri.

4. On 04.11.2022, this Court passed the following order:-

"Heard Sri Rajendra Kumar Dwivedi, learned counsel for the petitioner, who has filed vakalatnama, the same is taken on record and Sri Badruddin Hasan, learned A.G.A. has appeared on behalf of State.

Sri Dwivedi, learned counsel for the petitioner has preferred Rule 5(c) of The Uttar Pradesh Gangster and Anti-Social Activities (Prevention) Rules, 2021 to submit that without filing the charge-sheet in the particular case crime the gangster act may not be imposed. In the present case, without there being filed any charge-sheet, the gangster act has been imposed

against the petitioner. He has also placed reliance of the judgment and order dated 9.12.2020 passed by this Court, wherein the similar controversy has been considered and the said writ petition was allowed on the basis of the same submissions so raised by Sri Dwivedi in the present case.

Learned A.G.A. has drawn attention of this Court towards annexure no.2, which is gang-chart, wherein it has been indicated that the charge-sheet no.345/2022 dated 9.9.2022 has been filed before the learned court below. He has also submitted that in the first information report, the same fact has been indicated. However, Sri Dwivedi has again submitted that no such charge-sheet has yet been filed before the learned court below, may be the same has been prepared.

Put up this case as fresh on 9.11.2022 to enable the learned A.G.A. to seek specific instructions as to whether the charge-sheet has been filed in Case Crime No.123 of 2021, under Sections 41/411, 419, 420 I.P.C., P.S. Pargana Kheri.

When the case is listed next, the name of Sri Rajendra Kumar Dwivedi and Ms. Nida Nabi be shown as counsel for the petitioner."

5. At the very outset, learned counsel for the petitioner has drawn attention of this Court towards annexure no.5 of the affidavit filed today which is a certified copy of the questionnaire dated 04.11.2022 issued by the learned court below wherein it has been categorically mentioned that by 04.11.2022 no charge-sheet has been filed in Case Crime No.123 of 2021, under Section 41, 411, 413, 419, 420 I.P.C. Police Station-Pasgawan, District-Kheri. Therefore, it is clear that till filing of the gang-chart (annexure no.2 to the writ petition), no charge-sheet was filed against the petitioner in Case Crime No.123 of 2021. However, in the gang-chart, the impression has been given as if the charge-sheet has been filed on 21.08.2021. Therefore, for seeking specific instructions, the matter was fixed for today.

6. Learned A.G.A. has filed instruction today and the same is taken on record.

7. Learned A.G.A. on the basis of instructions has stated that the charge-sheet has been filed on 05.11.2022 before the learned court below.

8. On being confronted the learned A.G.A. about the aforesaid situation, he has fairly stated that in the gang-chart it should have been categorically indicated that however, charge-sheet has been prepared but the same has not been filed.

9. On being further confronted that the date of charge-sheet has been indicated as 21.08.2021, however, no such charge-sheet has been filed on or before 04.11.2022, on that learned A.G.A. has submitted that aforesaid documents is on record, therefore, he has nothing to say.

10. Heard learned counsel for the parties and perused the material available on record.

11. For convenience, Rule 5(C), Rule 10 and Rule 8 of the U.P. Gangsters and Anti-Social Activities (Prevention) Rules, 2021 (hereinafter referred to as 'Rules of 2021'), which have been indicated in the affidavit, are being reproduced herein-below:-

*"**Rule-5(C)**- The gang-chart shall not mention those cases in which acquittal has*

been granted by the Special Court or in which the final report has been filed after the investigation. However, the gang-chart shall not be approved without the completion of investigation of the base case.

Rule-10- *Records of Base Cases.-(1) Along with gang chart, the certified copy of the charge sheet and recovery memo shall be attached compulsorily.*

(2) Where the accused is not named in the First Information Report and document discloses the way in which his name came to light and if something has been recovered, a certified copy of the recovery memo shall be attached.

Rule 8- *Stating unconfirmed or false information is prohibited.-(1) The Incharge of Police Station/Station House Officer/Inspector shall not mention the cases as Part Trial or Partial Trial (PT) without ascertaining the up-to-date status of the cases in the gang-chart.*

(2) No unconfirmed or false information shall be entered in the gang-chart.

(3) The latest status of the cases against the gang, which are being shown in the gang-chart, regarding their pendency in the Special Court, the convictions or the stage at which they are in the Court, must be clearly mentioned

(4) The responsibility of recording the correct and true information shall lie on the concerned Incharge of Station/ Station House Officer/Inspector

(5) On discovering an adverse situation, the Incharge of Police Station/Station House Officer/Inspector shall be held liable for negligence under departmental and criminal proceedings."

12. In light of aforesaid facts and circumstances and also from the perusal of the aforesaid provisions of law i.e. Rule 5(C), Rule-10 and Rule-8 of Rules of 2021, it is clear that before making compliance of Rule 10 of Rules of 2021, the gang-chart has been filed. Even the wrong impression has been given to the Court that the charge-sheet has been filed in the Case Crime No.123 of 2021. Therefore, in such circumstances, required action under Rule-8(5) would be warranted which clearly mentions that on discovering an adverse situation, the Incharge of Police Station/Station House Officer/Inspector shall be held liable for negligence under departmental and criminal proceedings.

13. Not only above, in an identical circumstances, this Court vide judgment and order dated 09.12.2020 passed in ***Writ Petition No.22007 (M/B) of 2020; 'Master @ Ramzan and Anr. Vs. State of U.P. and Ors***' has allowed the writ petition quashing the F.I.R. in question. For convenience, the judgment and order dated 09.12.2020 passed in the aforesaid case in being reproduced herein below:-

1. Heard Asim Kumar Singh, learned counsel for the petitioners and Shri Shachindra Pratap Singh, learned A.G.A. for the respondent State.

2. The writ petition has been filed challenging the impugned F.I.R. No.0430 of 2020 dated 13.10.2020, under Section 3(1) of the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 (for short 'Gangsters Act') registered at Police Station Kotwali Dehat, District Gonda.

3. The petitioners have also prayed for quashing of the Gang Chart prepared under the U.P. Gangsters and Anti Social Activities (Prevention) Act, Police Station Kotwali Dehat, District Gonda and commanding the opposite parties to drop the proceedings under Section 3(1) of Gangsters Act registered at Police Station

Kotwali Dehat, District Gonda, with all consequential reliefs.

4. Learned counsel for the petitioners submits that the impugned F.I.R. has been lodged in a most arbitrary and illegal manner without proper application of mind.

5. It is also submitted that in the gang chart, three criminal cases have been shown against petitioner no.2. In case bearing Case Crime No.156/2019, he has been granted bail whereas so far Case Crime No.312 of 2019 and Case Crime No.406 of 2020 are concerned, the police has not yet filed any chargesheet in the concerning court.

6. Similarly, in the gang chart, two criminal cases have been shown against petitioner no.1. In one case bearing Case Crime No.156/2019, he has been granted bail whereas in other case, chargesheet has not been filed by the police as yet.

However, on the basis of the wrong information furnished in the gang chart, the impugned F.I.R. has been lodged against the petitioners.

7. It is stated that as per the Government Order dated 2.1.2004 as well as Circular issued by the Director General of Police dated 24.10.2003, only those criminal cases in which chargesheets have been filed, shall be taken into consideration for the purpose of invoking Gangsters Act, 1986.

8. Learned A.G.A. was granted time to seek instructions. Learned A.G.A. on the basis of the instructions, has filed short counter affidavit, which is taken on record.

9. In paragraphs 5,6 and 7 of the short counter affidavit, it has been stated that the police after completing investigation, had filed the chargesheet in Case Crime No.156 of 2019 before lodging of impugned F.I.R., however in Case Crime No.312 of 2019, the chargesheet has been prepared by the police and has been submitted in the concerning court on 4.12.2020. Similarly, in Case Crime No.406 of 2020, the police has prepared the chargesheet which has been submitted before the court concerned on 4.12.2020. The relevant paragraphs are reproduced as under :-

"5. That it is relevant to mention here that after completion of investigation in Case Crime No.156 of 2019 registered at Police - Kotwali Dehat, District Gonda under Sections 323, 504, 307 and 302 IPC, 7 CLA Act, charge sheet dated 31.05.2019 was forwarded and received by the concerned Court on 12.06.2019.

6. That in Case crime No.312 of 2019, registered at Police Kotwali Dehat, District Gonda, under Sections 504, 506 IPc, chargesheet dated 30.11.2020 was forwarded and received by the concerned court on 04.12.20202. Phototstat copy of the receipt dated 04.12.2020 is being filed herewith as Annexure No.SCA-1 to this Short Counter Affidavit.

7. That in Case Crime No.406/2020, registered at Police - Kotwali Dehat, District Gonda, under Sections 352, 504 and 506 IPC, charge sheet dated 29.09.2020 was forwarded and received by the concerned Court on 04.12.2020. Photostat copy of the receipt dated 04.12.20202 is being annexed as Annexure No.SCA-2to this Short Counter Affidavit."

10. As such, it is evidently clear that in Case Crime No.312 of 2019 as well as Case Crime No.406 of 2020, the chargesheets against the petitioners have been filed in the court after lodging of the impugned F.I.R. under Section 3(1) of the Gangsters Act, 1986.

11. It is to be noted that the Government Order dated 2.1.2004 specifically provides that only those criminal cases shall be included in the gang chart in which the police has

prepared the chargesheet and the same has been filed before the court concerned.

12. It has also been mentioned in the said Government Order that in case of any misuse by the authorities, the concerning incharge of the police station as well as Senior Superintendent of Police/ Superintendent of Police Incharge of the concerned Districts shall be held responsible.

13. Paragraphs 5 and 10 of the Government Order dated 2.1.2004 are relevant. Paragraphs 5 and 10 of the Government Order dated 2.1.2004 are reproduced :-

"5. किसी भी गिरोह के विरूद्ध कार्यवाही करने के लिए, उसके विरूद्ध केवल उन्हीं मामलों को आपराधिक सूची में सम्मिलित मानन् चाहिए, जिन मामलों में पुलिस द्वारा विवेचना के उपरान्त आरोप पत्र प्रेषित किया जा चुका है। जिन मामलों में अन्तिम रिपोर्ट प्रेषित की जा चुकी है या न्यायालय द्वारा विचारण के उपरान्त अभियुक्त को दोषमुक्त किया जा चुका है, उसे आपराधिक विवरण में सम्मिलित न किया जाये।

10. यहाँ यह भी स्पष्ट किया जाता है कि यदि किसी जनपद में इस अधिनियम में दिये गये प्राविधानों के सम्बन्ध में किसी अधीनस्थ अधिकारी द्वारा अपने कर्तव्य पालन की उपेक्षा करने अथवा अपने अधिकार का दुरूपयोग का कोई मामला प्रकाश में आता है तो सम्बन्धित थाना प्रभारी एवं दोषी पाये गये अधिकारी के अलावा जनपद के वरिष्ठ पुलिस अधीक्षक / पुलिस अधीक्षक प्रभारी भी उत्तरदायी माने जायेंगे।"

14. It is also to be noted that vide Circular dated 24.10.2003, Director General of Police, U.P. has issued the directions similar to the Government Order dated 2.1.2004 as noted above.

Relevant paragraph 2 of Circular dated 24.10.2003 is reproduced as under :-

"2. किसी भी गिरोह के विरूद्ध कार्यवाही करने के लिए उसके विरूद्ध केवल उन्हीं मामलों को आपराधिक सूची में सम्मिलित मानना चाहिए जिन मामलों में पुलिस द्वारा विवेचना के उपरान्त आरोप-पत्र प्रेषित किया जा चुका है, जिन मामलों में अन्तिम रिपोर्ट प्रेषित की जा चुकी है या न्यायालय द्वारा विचाराण के उपरान्त अभियुक्त को दोषमुक्त किया जा चुका है, उसे आपराधिक विवरण में सम्मिलित न किया जाये।"

15. In view of the above, we are of the considered view that the gang chart dated 9.10.2020, copy of which is annexed as Annexure No.2 to the writ petition was prepared on the wrong information with respect to the filing of the chargesheets in the case crime numbers mentioned therein

16. The impugned F.I.R. on the basis of the aforesaid gang chart as such was lodged on the basis of the wrong information furnished in the gang chart as noted above.

17. As such the writ petition in the given facts and circumstances is hereby allowed.

.

The impugned F.I.R. No.0430 of 2020 dated 13.10.2020, under Section 3(1) of the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 registered at Police Station Kotwali Dehat, District Gonda as well as gang chart dated 9.10.2020, copy of which are annexed as Annexure Nos.1 and 2 to the writ petition are hereby quashed.

18. However, since it is submitted by learned A.G.A. that now chargesheets in Case Crime No.312 of 2019 and Case Crime No.406 of 2020 against petitioners have already been prepared and filed before the court concerned meaning thereby that in all the criminal cases as mentioned in the gang chart, chargesheets against both the petitioners have been filed as such we hereby give liberty to the

competent authority to take a fresh decision in this regard and do the needful."

14. In the aforesaid judgment, the relevant provisions of law has been considered and reference of Government Order dated 02.01.2004 has been given in paragraphs 11 to 14 which would also applicable in the present case.

15. Therefore, in view of what has been considered above, we find that the impugned F.I.R. No.451 of 20222, under Section 2(b)(i) and 3 of Gangsters Act, Police Station-Pasgawan, District-Lakhimpur is liable to be quashed. Accordingly, the aforesaid F.I.R. is hereby quashed.

16. However, since it has been submitted by learned A.G.A. that now the charge-sheet has been filed in the case crime number in question against the present petitioner, as such, we hereby giving liberty to the competent authority to take a fresh decision in this regard and do the needful.

17. Accordingly, the writ petition is allowed.

18. No order as to cost.

(2022) 11 ILRA 994
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.11.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE SYED WAIZ MIAN, J.

Crl. Misc. Writ Petition No. 10241 of 2019

Kailash Jaiswal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nipun Singh, Sri Ravindra Kumar Tripathi

Counsel for the Respondents:
G.A.

(A) Criminal Law - The Uttar Pradesh Control of Goondas Act, 1970 – Section 3, The U.P. Control of Goondas Rules, 1970 - Rule 4 - 'Goonda' - on one stray incident only petitioner could not be deemed to be habitual offender on the basis of that single incident - one cannot be treated to be a habitual offender unless and until there is recurrence of offences. (Para - 16)

Malicious proceedings initiated against petitioner - by-pass civil decree - harass petitioner - to release property in dispute - vests with petitioner lawfully - in favour of district administration - proceedings initiated merely on lodging of a single case - second respondent (District Magistrate) - no respect for rule and law - become law unto himself -declines to comply directions of State Government, orders passed by trial court, High Court, as well as, the Supreme Court **-** Failing to obtain property in dispute in legal proceedings - second respondent resorted to invoke U.P. Goondas Act - against petitioner - misusing forum of criminal administration.**(Para -3, 17)**

HELD:-Conduct of second respondent not justified. Second respondent exposed himself to civil and criminal consequences. Impugned notice issued by District Magistrate quashed. Cost of Rs. 5 lacs imposed upon second respondent (District Magistrate). Direction to inquire and initiate disciplinary enquiry against then. **(Para - 17, 18)**

Writ Petition allowed. (E-7)

List of Cases cited:-

1. Suresh Tewari Vs St. of U.P. & ors., 2018 (5) ALJ 1

2. Ramji Pandey Vs St. of U.P. & ors., 1981 SCC Online All 305

3. Bhim Sain Tyagi Vs The St. of U.P. & ors., 1999 SC Online All 1403

(Delivered by Hon'ble Suneet Kumar, J. & Hon'ble Syed Waiz Mian, J.)

1. Heard learned counsel for the petitioner and learned A.G.A. for the State and perused the material placed on record by the respective parties.

2. Petitioner by the instant petition, inter alia, seeks the following relief:

"i. Issue a writ, order or direction in the nature of certiorari quashing the impugned notice dated 11.04.2019 issued by the District Magistrate, Gorakhpur against the petitioner under section 3/4 of U.P. Goonda Act (Annexure No. 1 to the writ petition)."

3. It is submitted by learned counsel for the petitioner that it is not only a case of malicious prosecution to by-pass the civil decree but at the same time to coerce the petitioner to release the property in dispute in favour of the district administration. It is further submitted that having regard to the definition of 'Goonda' under the Uttar Pradesh Control of Goondas Act, 1970 (for short "U.P. Goondas Act'), the proceedings could not have been initiated merely on lodging of a single case.

4. The facts briefly stated is that nazool land, bearing plot no. 125, Bungalow No. 5, situated at Park Road, Gorakhpur, admeasuring 30000 sq. ft. was transferred by the State vide freehold deed dated 24/25 September 1999, duly registered in favour of the petitioner, by the Collector, Gorakhpur, on behalf of the State Government. At the time of execution of the freehold deed, the erstwhile Sales Tax Department, presently, Trade Tax Department was occupying the premises on rent. The Trade Tax Department defaulted in payment of rent, aggrieved, petitioner instituted a SCC suit being Suit No. 33 of 2000 (Kailash Jaiswal Versus State of U.P. through Collector Gorakhpur and Trade Tax Department, through its Deputy Commissioner) seeking ejectment, as well as, recovery of arrears of rent. The suit came to be decreed partially directing ejectment of the Trade Tax Department vide order dated 01 December 2005. Aggrieved, the State of U.P. and the Trade Tax Department raised challenge to the ejectment order in revision being SCC revision No. 1 of 2006, which came to be dismissed vide judgment and order dated 29 March 2006. Thereafter, petitioner filed an execution application for possession of the premises and recovery of the decreetal amount by way of attachment and sale of property of the Trade Tax Department, being Execution Case No. 1 of 2006. Before the execution court the Trade Tax Department gave an undertaking that they would vacate the premises but did not comply with their undertaking. Petitioner in Writ-C No. 5190 of 2010 (Kailash Jaiswal Versus State of U.P. and others) approached this Court, wherein, the Court disposed of the writ petition directing the executing court to complete the execution within a period of one month and further directed the Senior Superintendent of Police and Collector, Gorakhpur, to provide necessary police protection to the executing court to get the decree executed if there is any order to that effect passed by the executing court. The relevant portion of the writ court order dated 06 August 2010 is extracted.

"Upon hearing learned counsel for the petitioner and learned counsel for the

respondents, the petition is being finally disposed of with a direction to the Executing Court to complete the execution after considering the objection, if any, within a period of one month from the date of production of certified copy of this order. If there has already been an order by the Executing Court to deploy the police for taking over the possession, the Superintendent of Police and Collector, Gorakhpur are directed to give the necessary assistance of the police protection to the Executing Court so that the order of decree, which has been confirmed upto Apex Court, may be executed and the arrears of rent shall also be paid to the petitioner within the said period."

5. Thereafter, it appears that possession of the premises was handed over to the petitioner on 30 November 2010. Since then, the petitioner is in peaceful possession of the said property. It appears that thereafter, the Tax Advocate Association filed an objection under Order XXI Rule 97 C.P.C. before the trial court which came to be rejected vide order dated 25 September 2010. The matter was carried in civil revision and the revisional court dismissed the revision on 23 October 2010. Aggrieved, Association approached this Court in Writ-C No. 65183 of 2010 (Tax Advocate Association and another Versus State of U.P. and others). This Court vide order dated 2 November 2010, dismissed the writ petition. The operative portion of the order reads thus:

In this view of the matter, even if the petitioners are licensee of the tenant, they are bound by the decree notwithstanding the fact that they were not impleaded in the suit for ejectment. Also there is nothing on record to show that any allotment etc. was made in favour of the petitioners. In absence of any title to the property in dispute, the Courts below have rightly rejected the objections filed under Order 21 Rule 97 C.P.C.

It has come on record that the Sales Tax Office has been shifted elsewhere. It follows that there is no Sales Tax Office presently on the spot. In this fact situation, the petitioners are unnecessarily keeping in their possession the disputed property. The object and purpose, if any, to grant a license to them has come to an end due to shifting of the Sales Tax Office.

The petitioners claim themselves that they are lawyers. If that is so, they should abide by law and follow the law and not to commit its breach. It is hoped that good-sense will prevail upon them.

There is no merit in the petition. The petition lacks merit and it is dismissed."

6. Aggrieved, Association carried the matter in appeal before the Hon'ble Supreme Court which came to be dismissed vide order dated 13 December 2010.

7. It appears that thereafter the petitioner started making construction on the property which was being objected by the District authorities. Aggrieved, petitioner approached this Court in Writ-C No. 17431 of 2015 (Kailash Jaiswal Versus State of U.P. and others). This Court after recording the history of the litigation, inter se, parties restrained the City Magistrate to interfere with the peaceful possession of the property and quashed the order of the City Magistrate, restraining the petitioner from raising construction. The operative portion of the order reads thus:

"In such circumstances, the impugned order dated 14 September 2015 passed by the City Magistrate cannot be sustained. It

is, accordingly, set aside. A direction is issued to the District Magistrate, Gorakhpur as also the Senior Superintendent of Police, Gorakhpur to ensure that no hindrance is caused in the raising of constructions by the petitioner if they are in accordance with the plan sanctioned by the Gorakhpur Development Authority.

The writ petition is, accordingly, allowed."

8. It appears that the District administration was not satisfied that the petitioner had obtained/purchased the property in dispute which is on prime location, District Magistrate instituted a suit being Suit No. 259 of 2002 for cancellation of freehold deed dated 24/25 September 1999 (State of U.P. through Collector, Gorakhpur Versus Kailash Jaiswal and others). During pendency of the suit, F.I.R. being case Crime No. 212 of 2019, under sections 189, 332, 504, 506 I.P.C. came to be lodged at Police Station Cantt. District Gorakhpur by Deputy Commissioner (Administration) Trade Tax Department Gorakhpur, alleging that after recording his statement in the court while returning, petitioner threatened him. Petitioner approached this Court by filing Misc. Writ Petition No. 7526 of 2019, seeking quashing of the first information report. This Court granted protection to the petitioner till the submission of the charge sheet under Section 173(2) of Cr.P.C. vide order dated 28 March 2019. After investigation, police report (charge sheet) came to be submitted in the aforenoted Case Crime No. 212 of 2019 against the petitioner. The charge sheet and entire proceeding was subjected to challenge by the petitioner in an petition being Application No. 26502 of 2019 filed under Section 482 Cr.P.C., wherein, this Court vide order dated 9 July 2019, directed that no coercive action shall be taken against the petitioner. It is further asserted in paragraph 54 of the writ petition that on 10 April 2019, at about 10.00 in the night, 10-12 police officials in uniform, alongwith 6-7 officers in plain dress, visited the house of the petitioner. On enquiry, it is alleged that they started abusing the petitioner and threatened him to come out from the house otherwise they would kill him in a fake encounter. It is further alleged that the petitioner's daughter was present at the relevant time and informed the police officials that they are restrained from adopting coercive measure against the petitioner. It is submitted that the presence of the officers has been recorded in CCTV camera.

9. In the counter affidavit filed on behalf of the second respondent, District Magistrate, Gorakhpur, the contents of paragraphs 54 and 55 have been denied, but, in paragraph no. 35, it has been stated that the proceedings initiated against the petitioner is just and proper which does not suffer from any illegality, infirmity or defect. On the very next day of the above noted incident i.e. 11 April 2019, the impugned notice under Section ¾ of U.P. Goondas Act was issued to the petitioner.

10. In this backdrop, it is relevant to take notice of the communication dated 9 May 2003, issued by the Special Secretary, Government of U.P. addressed to the second respondent, District Magistrate, Gorakhpur, wherein, the State directed the District Magistrate to withdraw the suit instituted on behalf of the State against the petitioner regarding cancellation of free hold deed. In response, District Magistrate, vide communication dated 2 June 2006, addressed to the Deputy Secretary,

Government of U.P. sought recall of the aforenoted direction. The Special Secretary, Government of U.P. vide communication dated 28 February 2006, addressed to the Principal Secretary, Tax and Registration, stated that the direction issued by the State Government to withdraw the suit, is legal and requires no reconsideration. Thereafter, State Government vide communication dated 2 June 2006, addressed to the District Magistrate conveyed that the recall of the earlier State Government order to withdraw the suit filed against the petitioner being lawful and proper cannot be reconsidered. Despite the communication of the State Government, the suit has not been withdrawn by the District Magistrate.

11. In this backdrop, it is submitted that the notice under the U.P. Goondas Act is not only malicious but misuse of the power vested upon the District Magistrate, the proceedings have been initiated in colourable exercise of power to coerce the petitioner to vacate the premises which admittedly does not vest with the State. Further, it is submitted that on a single case, proceedings under the U.P. Goondas Act cannot be initiated as the petitioner is not a habitual offender.

12. Reliance has been placed on the decision of this Court rendered in **Suresh Tewari Versus State of U.P. and others, 2018 (5) ALJ 1.**

13. In the counter affidavit, there is no specific denial of the assertions made in the writ petition and the legal issues raised by the petitioner. It is also not the case of the respondent authorities that the reputation of the petitioner is dangerous to the community. The undisputed facts reflect high handedness and gross misuse of the power by the District Magistrate. The conduct of the District Magistrate in not complying the repeated orders of the State Government to withdraw the suit against the petitioner tantamounts to gross indiscipline and insubordination.

14. Learned counsel for the petitioner submits that impugned notice is not in conformity with the Rule 4 of the U.P. Control of Goondas Rules, 1970. He further submits that Section 3 of the U.P.Control of Goondas Act, 1970 (hereinafter to be referred to as the "Act") confers powers on the concerned District Magistrate to extern anyone, who is the Goonda outside the district or to place restriction on his movement. If the District Magistrate is satisfied that the matters set forth in clauses (a), (b) and (c) of sub-Section (1) of the Goondas Act are made out he may issue notice to the Goonda informing him of the general nature of material allegations against him in clause (d) of the Act. He further submits that in the instant case clause (d) mentions about the only case registered against the petitioner being Case Crime No. 212 of 2019, thus the second respondent has mechanically noted the case pending against the petitioner in the prescribed proforma without applying its mind, as well as, without recording satisfaction about the matter set out in clauses (a), (b) and (c) of Act. Learned counsel for the petitioner has placed reliance upon paragraph no.5 of the Full Bench decision of this Court rendered in the matter of **Ramji Pandey Vs. State of Uttar Pradesh and others, 1981 SCC Online All 305**, which reads as under:-

"Now coming to the provisions of the Act, it would be seen that Section 3 confers power on the District Magistrate to extern any one who is a Goonda outside the

district or to place restrictions on his movement. If the District Magistrate is satisfied that the matters set forth in Clauses (a), (b) and (c) of Sub-section (1) are made out he may issue notice to the Goonda informing him of the "general nature of material allegations" against him in respect of those matters. The District Magistrate is further required to give him reasonable opportunity of tendering his explanation regarding those matters. The notice issued by the District Magistrate must contain the general nature of material allegations on the baggies of which the District Magistrate may have formed his opinion under Section 3(1) of the Act. In the absence of material allegations the person to whom notice is issued will be denied opportunity of explanation. It is therefore, mandatory to set out the general nature of material allegations in the notice issued under Section 3(1) of the Act. If the notice fails to contain the general nature of material allegations it would be vitiated and the proceedings taken in pursuance thereof would be rendered null and void. We are in agreement on this question with the view taken by the Division Bench in Harsh Narain's case 1972 All LJ 762."

15. This Court in **Bhim Sain Tyagi Vs. The State of U.P. and others, 1999 SC Online All 1403**, observed as under:-

"22. Before concluding this matter it may be useful to mention that the right of the petitioners to offer explanation would have to depend upon the material allegations consequently, the reasonable opportunity which is afforded by sub-Section (2) of producing his evidence in support of his explanation, which is guaranteed to the petitioner shall not be exercisable if the petitioner does not come to know the general nature of allegations against them."

16. The Division Bench of this Court in **Suresh Tewari** (supra), held relying upon the Supreme Court judgment that on one stray incident only petitioner could not be deemed to be habitual offender on the basis of that single incident. Para nos. 19 and 23 reads thus:

19.....The requirement of applicability of the clause (i) is that Goonda means that a person who either by himself or as a member or leader of a gang, habitually commits or attempts to commit, or abets the commission of offences punishable referred to in the said clause. In the impugned show cause notice there is a description of only one criminal case against the petitioner, while as per the definition and the law settled by this Court as well by the Hon'ble Apex Court, one cannot be treated to be a habitual offender unless and until there is recurrence of offences. Since there is a reference of one stray incident only in the notice, the petitioner could not be deemed to be a habitual offender on the basis of that single incident only and so the notice fails to satisfy the legal requirement.

23. The Hon'ble Apex Court in the case of Vijay Narain Singh versus State of Bihar and others (1984) 3 SCC 14 has been pleased to hold that it is essential to refer to at least two incidents of commission of crime for applicability of Clause (i) of section 2(b) of the Act. Since there is reference of one incident only in the notice, it falls short of the legal requirement as provided in Clause (i) of section 2(b) and in this way the notice being illegal could be challenged before this Court as laid down by the Full Bench of this Court in the case

of Bhim Sain Tyagi v. State of U.P. And others 1999 (39) ACC 321.

17. Having regard to the facts and circumstance of the case, prima-facie, we are convinced that the proceedings initiated against the petitioner is not only malicious but to harass the petitioner in respect of the property in dispute which admittedly vests with the petitioner lawfully. Further, the conduct of the respondent, in particular, the second respondent, District Magistrate, Gorakhpur, clearly demonstrates that he has no respect for the rule and law and has become law unto himself. The second respondent declines to comply the directions of the State Government, the orders passed by the trial court, High Court, as well as, the Supreme Court. Failing to obtain the property in dispute in legal proceedings, the second respondent has now resorted to invoke U.P. Goondas Act against the petitioner misusing the forum of criminal administration. The facts, noted herein above, in no uncertain terms, justifies the conduct of the second respondent. The second respondent has exposed himself to civil and criminal consequences.

18. In the circumstance, we are constrained to quash the impugned notice dated 11 April 2019, issued by the District Magistrate, Gorakhpur. A cost assessed at Rs. 5 lacs is imposed upon the second respondent, District Magistrate, Gorakhpur, to be deposited with the High Court Legal Services Committee within 10 weeks from date. The first respondent Principal Secretary (Home Department), Government of U.P., Lucknow, is directed to get the matter inquired and initiate disciplinary enquiry against the then delinquent District Magistrate, Gorakhpur.

19. The writ petition is allowed.

(2022) 11 ILRA 1000
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.09.2022

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ-A No. 8561 of 2022

Santosh Malviya & Ors. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ramesh Kumar Tiwari, Aditi Pandey

Counsel for the Respondents:
A.S.G.I., Sri Ankur Goyal, Sri Gaurav Mahajan

Civil Law – Constitution of India,1950 – Article 15, 16, 16(1), 16(4), 32, 226, 227, 323(a), 323(b) & 335 - Administrative Tribunal Act, 1985 - Sections 14 & 15 – Writ Petition - Challenging Office Memorandum issued by Central Govt. declaring ultra vires - it is settled law that Central Administrative Tribunal has absolute power to hear the cases of Central Govt. Employee including quashing of office memorandum, rules and regulations or declare ultra vires - accordingly writ Petition is not maintainable - dismissed. (Para – 11, 12)

Writ Petition is dismissed. (E-11)

List of Cases cited: -

1. L. Chandra Kumar Vs U.O.I., 1997 (0) SU.P.reme(SC) 516,

2. All India Equality Forum & ors. Vs U.O.I. & ors. (2018 DLT 636(DB),

3. S.P. Sampath Kumar Etc Vs U.O.I. & ors., 1987 AIR 386

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard learned counsel for the petitioners, Sri Ankur Goyal, learned counsel for the respondent no.1 and Sri Gaurav Mahajan, learned counsel for the respondent nos. 2 and 3.

2. Earlier on 30.6.2022, learned counsel for the respondent no.1 has raised preliminary objection qua the maintainability of the writ petition and Court has passed the following order:-

"Heard learned counsel for the petitioner and Shri Gyan Prakash, learned A.S.G.I. assisted by Shri Ankur Goel, learned counsel for respondent no.1 as well as Shri Gaurav Mahajan, learned counsel for respondent no.2 and 3.

By means of present writ petition, the petitioners are challenging para 7 Clause iii and iv of OM no.20011/2/2019-Estt. (D) dated 13.08.2021 issued by respondent no.1 and instruction dated 26.10.2021 issued by respondent no.2. Further prayer has been made to command the respondent no.1 to amend or modify the OM dated 13.08.2021 in accordance with law.

At the very outset, Shri Gyan Prakash, learned A.S.G.I. has raised preliminary objection qua the maintainability of the writ petition as the relief is sought against Income Tax Department and the remedy in respect of grievance raised by the petitioner lies before Central Administrative Tribunal. Since such remedy has not been exhausted, the writ petition filed directly before this Court is not liable to be entertained in view of the law laid down by the Apex Court in the case of L. Chandra Kumar Vs. Union of India & others, reported in AIR (1997) 3 SCC Page 261.

In the facts and circumstances of the case, it would be appropriate, let a proper response may be filed in the matter.

All the respondents are accorded two weeks' time to file objection in the matter. Rejoinder Affidavit, if any, may be filed within a week thereafter.

Put up as fresh on 20.07.2022 before appropriate Court."

3. Today, learned counsel for the petitioners has placed upon the judgment of Delhi High Court in the case of ***All India Equality Forum and others vs. Union of India through Secretary and others reported in 2018 DLT 636 (DB)*** and submitted that present controversy is similar to the aforesaid judgment of Delhi High Court, therefore, this petition is maintainable.

4. Per contra, learned counsel for the respondent no.1 submitted that in the aforesaid judgment of Delhi Court, petitioner went to Supreme Court and Supreme Court has granted liberty to petitioner to approach the High Court, therefore, Delhi High Court entertain the said petition. He next submitted that in light of Section 14 of The Administrative Tribunals Act, 1985 as well as law laid down by the Apex Court in the case of ***L. Chandra Kumar Vs. Union of India reported in 1997 0 Supreme (SC) 516 & S.P. Sampath Kumar Etc. vs. Union of India & Others reported in 1987 AIR 386,*** petitioners have efficacious remedy to file original application before the Central Appellate Tribunal (in short CAT). He lastly submitted that CAT is having full power to quash any office memorandum as well as rules and regulations or declare ultra vires, therefore, petition is not maintainable and liable to be dismissed.

5. I have considered the rival submissions advanced by the learned counsel for the parties and perused the record as well as judgment relied by the learned counsel for the parties. There is no dispute on the point that petitioners are Income Tax Inspectors and their services was governed by Central Government.

6. I have perused the judgment of Delhi Court in the case of ***All India Equality Forum (supra)*** so relied by the learned counsel for the petitioner. Relevant paragraphs of the said judgment are quoted below:-

"4 The issues raised in the writ petition throw open an expansive jurisprudential vista, and could invite a comprehensive and detailed dissertation on the entire law relating to reservation for Scheduled Castes and Scheduled Tribes, in the context of Articles 16(1), 16(4) and 335 of the Constitution of India. This Court is, however, proscribed from doing so by virtue of an order of the Supreme Court, dated 11th March 2010, passed in a batch of writ petitions, including WP (C) 413/1997, which is stated to have been filed by the present petitioner. The operative portion of the said order reads thus:

"Therefore, we permit the petitioners in these writ petitions to withdraw these writ petitions with liberty to move the High Court and in the event of writ petitions are filed before the High Court the same may be considered in the light of the observations made by this Court in M. Nagaraj and others vs. Union of India and another (supra). The petitioners would be at liberty to seek appropriate interim relief in the High Court."

30 Sinha, learned counsel appearing for the respondent, fairly admitted that the controversy, in the present case, stood covered by the judgments of the Supreme Court in M. Nagaraj (supra) and B.K. Pavitra (supra). At the same time, he contended, vociferously, that the writ petition itself was not maintainable, as the petitioner would be required, in the first instance to approach the Central Administrative Tribunal (hereinafter referred to as "the Tribunal") in view of the law laid down by the Supreme Court L. Chandra Kumar v U.O.I., (1997) 3 SCC 261.

31. Needless to say, the said objection of Mr.Sinha cannot merit any consideration in the present case, as the petitioner has moved this Court pursuant to the specific liberty, granted by the Supreme Court in this behalf, vide its order dated 11th March, 2010, already referred to hereinabove. In view of the said liberty, it is not open to this Court to travel behind the said judgment and enter into any discussion regarding maintainability of the petition. The brief of this Court this, neatly and squarely, to adjudicate on whether, or not, the impugned OM, dated 13th August 1997 could sustain, in the wake of the law as enunciated in M. Nagaraj (supra).

32. The objection of Mr Sinha is, therefore, overruled."

7. From perusal of the same, it is apparently clear that Hon'ble Delhi High Court entertained the writ petition on the ground that Hon'ble Supreme Court has given liberty to petitioner to approach the High Court.

8. I have perused the Section 14 of Act, 1985, which empowers the jurisdiction, powers and authority of the CAT. From perusal of the same, it is clear that Tribunal has absolute power to hear the other cases of Central Government Employee after due notification of Government of India.

9. The Apex Court in the matter of ***S.P. Sampath Kumar (Supra),*** has considered the power of Administrative Tribunal and held that Tribunal is the substitute of the High Court and is entitled to exercise the powers. Relevant paragraphs of the said judgement are quoted below:-

"What, however, has to be kept in view is that the Tribu- nal should be a real substitute of the High Court--not only in form and de jure but in content and de facto. As was pointed out in Minerva's Mills, the alternative arrangement has to be effective and efficient as also capable of uphold- ing the constitutional limitations. Article 16 of the Con- stitution guarantees equality of opportunity in matters of public employment. Article 15 bars discrimination on grounds of religion, race, caste, sex or place of birth. The touch- stone of equality enshrined in Article 14 is the greatest of guarantees for the citizen. Centering around these articles in the Constitution a service jurisprudence has already grown in this country. Under Sections 14 and 15 of the Act all the powers of the Courts except those of this Court in regard to matters specified therein vest in the Tribunal--either Central or State. Thus the Tribunal is the substitute of the 'High Court and is entitled to exercise the powers thereof.

The High Courts have been functioning over a century and a quarter and until the Federal Court was established under the Government of India Act, 1935, used to be the highest courts within their respective jurisdiction subject to an appeal to the Privy Council in a limited category of cases. In this long period of about six scores of years, the High Courts have played their role effectively, efficiently as also satisfactorily. The litigant in this country has seasoned himself to look upto the High Court as the unfailing protec- tor of his person, property and honour. The institution has served its purpose very well and the common man has thus come to repose great confidence therein. Disciplined, inde- pendent and trained Judges well-versed in law and working with all openness in an unattached and objective manner have ensured dispensation of justice over the years. Aggrieved people approach the Court the social mechanism to act as the arbiter--not under legal obligation but under the belief and faith that justice shall be done to them and the State's authorities would implement the decision of the Court. It is, therefore, of paramount importance that the substitute institution--the Tribunal--must be a worthy successor of the High Court in all respects. That is exactly what this Court intended to convey when it spoke of an alternative mechanism in Minerva Mills' case."

10. I have also perused the judgment of Apex Court in the case of ***L. Chandra Kumar (Supra)*** and Court has held that CAT has ample power to entertain the original application upon any ground including ultra vires. Relevant paragraphs of the said judgement are quoted below:-

"70. We may first address the issue of exclusion of the power of judicial review of the High Courts. We have already held that in respect of the power of judicial review, the jurisdiction of the High Courts under Article 226/227 cannot wholly be excluded. It has been contended before us that the Tribunals should not be allowed to adjudicate upon matters where the vires of legislations is questioned, and that they should restrict themselves to handling matters where constitutional issues are not raised. We cannot bring ourselves to agree to this proposition as

that may result in splitting up proceedings and may cause avoidable delay. If such a view were to be adopted, it would be open for litigants to raise constitutional issues, many of which may be quite frivolous, to directly approach the High Courts and thus subvert the jurisdiction of the Tribunals. Moreover, even in these special branches of law, some areas do involve the consideration of constitutional questions on a regular basis; for instance, in service law matters, a large majority of cases involve an interpretation of Articles 14, 15 and 16 of the Constitution. To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Article 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter.

73 Before moving on to other aspects, we may summarise our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional setup, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the concerned High Court may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal.

79. In view of the reasoning adopted by us, we hold that Clause 2(d) of Article 323A and Clause 3(d) of Article 323B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323A and 323B would, to the same extent, be unconstitutional. The jurisdiction

conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under Article 323A and Article 323B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the concerned Tribunal falls. The Tribunals will, nevertheless, continue to act like Courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated."

11. Therefore, in light of Section 14 of Act, 1985 as well as law laid down by the Apex Court, there is no dispute on the point that CAT is having absolute power to hear the other cases of Central Government Employee including quashing of office memorandum, rules and regulations or declare ultra vires.

12. Accordingly, the writ petition is not maintainable and **dismissed** on the ground of alternative remedy. However, petitioner is at liberty to approach the Central Administrative Tribunal, if so desired.

(2022) 11 ILRA 1005
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.09.2022

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

Writ-A No. 12070 of 2022
Along with
Other Connected Cases

Nand Lal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anil Kumar Yadav

Counsel for the Respondents:
C.S.C.

Civil Law – Constitution of India,1950 – Article 226 & 309 - U.P. St. Aided Education Institution Employees Contributory Provident Fund Insurance Pension Rules, 1964 (Applicable Rules) - Rules 2, 3, 4, 5 (g), 17, 19(a), 19(b), 21 & 34 - U.P. Secondary Education Services Selection Board Act, 1982 - Section 33-G, - U.P. Retirement Benefit Rules, 1961 (Government Employees Rules) - Rule 2, 3 & 5(g) - Writ of Mandamus - Vacancies arose - appointment through selection by Committee of Management on ad-hoc - financial approval granted by DIOS - Services of petitioners were regularized - SU.P.erannuation - claim of retiral dues including pension - Rejected **-** hence, writ petition **-** court finds that, all the petitioners were teachers working at St.-aided educational institutions and not St.-owned institutions - since Rules of 1964 applicable would be applicable U.P.on the petitioners, not the Govt. Employees Rules therefore, they are not, 'Officers' of St. Govt. - Policy St.ment contained in G.O. was not the law - Moreover, modification

of Old Pension Scheme with respect to St.-aided educational institutions made by executive authority since was contrary to legislative action, had no legal effect - U.P. Qualifying Services for Pension & Validation Act, 2021 also does not create any obstacle in the path of petitioners to claim pension as they were not officers under that law - since, petitioners' services were regularised as permanent employees by enforcement of Section 33-G read with Rules of 1964 which Rules were never amended - as such, their eligibility and entitlement to pension arising those rules remained preserved and unaltered - held, order rejecting claim of petitioners, set side - directions issued to complete all the formalities to ensure pensionary benefits within two months failing which petiti

Writ Petition Allowed. (E-11)

List of Cases cited: -

1. Sunita Sharma Vs St. of U.P. & ors. (Writ - A No. 25431 / 2018 decided on 20.12.2018),

2. Shambhu Nath Prasad Vs St. of U.P. & ors. (Writ - A No. 5951 / 2022 decided on 11.04.2022),

3. Ali Hussain Vs St. of U.P. & ors. (Writ - A No. 8214 / 2020 decided on 17.09.2021),

4. St. of U.P. & ors. Vs Sunita Sharma & anr. (Special Appeal Defective No. 181 / 2020 - decided on 11.06.2020),

5. St. of U.P. & ors. Vs Satya Prakash Singh & anr. (Special Appeal Defective No. 158 / 2021- decided on 19.02.2021),

6. St. of U.P. & ors. Vs Satya Prakash Singh & anr. (SLP No. 13644 / 2021 decided on 22.07.2022),

7. Kamaluddin Vs St. of U.P. & ors. Vs St. of U.P. & ors. (Writ - A No. 17042 / 2021 decided on 06.12.2021),

8. Prem Singh Vs St. of U.P.(2019 vol. 10 SCC 516),

9. Kaushal Kishore Chaubey & ors. Vs St. of U.P. & ors. (Writ - A No. 58147/2020 decided on 08.10.2021),

10. Dr. Shushma Chandel Vs St. of U.P. & ors. (2021 ILR vol. 9 Ald 1276),

11. Satyesh Kumar Mishra & ors. Vs St. of U.P. & ors. (2016 Vol. 6 ADJ 808 LB),

12. Ajay Kumar Das Vs St. of Orissa (2011 Vol. 11 SCC 136),

13. St. of Karn. Vs Umadevi (2006 Vol. 4 SCC 1),

(Delivered by Hon'ble Saumitra Dayal Singh, J.)

1. Largely, the issue involved in this batch of writ petitions is one. Accordingly, with the consent of parties, all writ petitions have been heard together. All counsel were heard on the facts narrated in the lead case - *Writ A No. 12070 of 2022 (Nand Lal vs. State of U.P. & 4 Ors.).*

2. Heard Sri Adarsh Singh, Sri Sankalp Narain, Sri Siddharth Khare, Sri R.K.Singh Kaosik, Sri Y.K. Srivastava, Sri Pragyanshu Pandey, Sri Deo Prakash, Sri Mahendra Singh, Sri Rajnish Kumar Srivastava, Sri Anil Yadav, Sri Seemant Singh and Sri Rajesh Kumar learned counsel for the petitioners; Shri Neeraj Tripathi, learned Additional Advocate General along with Shri J.N. Maurya, learned Chief Standing Counsel, Shri Shashank Shekhar Singh, learned Additional Chief Standing Counsel and Shri Chandan Kumar, learned Standing Counsel for the State-respondents.

3. Material facts involved in **Writ- A No. 12070 of 2022** are described below.

4. In the year 1994, two vacancies arose on the post of ad hoc teachers at the institution, Adarsh Inter College Maharajganj - one occasioned by the death (in harness) and the other upon promotion.

Vide its first resolution dated 1.5.1994, the Committee of Management of that institution resolved to fill up those posts. It was backed by a second resolution dated 15.1.1994 constituting a Selection Committee. In compliance thereof, the petitioner along with one Ram Shankar Rai were appointed Assistant Teacher(s), on 19.6.1994. The Committee of Management of the said institution then sought financial approval from the District Inspector of Schools, Maharajganj. It was granted on 22.10.1994. It is also not in dispute; the present petitioner continued to function and discharge his duties as Assistant Teacher at the above-described institution. Upon amendment made to the **Uttar Pradesh Secondary Education Services Selection Board Act 1982 (hereinafter referred to as the Act)** being U.P. Act no.7 of 2016, section 33G was introduced in the Act. It was enforced with effect from 22.03.2016. In compliance thereof, a Divisional Level Committee was constituted. Vide its Resolution dated 22.8.2016, the said Committee resolved to regularize the petitioner Nand Lal with effect from 22.03.2016 i.e., by operation of law, arising from the enforcement of Section 33G of the Act, from that date. It is also not in dispute, the petitioner continued to work till 31.02.2021 when he attained the age of superannuation. All salary dues have been computed and paid out to the petitioner, accordingly.

5. The dispute that arises is - upon his retirement, the petitioner claims payment of retiral dues including (the bone of contention), pension. That claim has been declined. The petitioner is aggrieved by the impugned order dated 27.6.2022 passed by Deputy Director of Education, Gorakhpur, rejecting his claim for payment of pension.

6. Similar fact situation obtains in the other cases. In some cases, despite a positive direction earlier issued by this Court - to grant the benefit of retiral dues in terms of still earlier decision of this Court in **Sunita Sharma vs. State of U.P. & 5 Ors., Writ- A No. 25431 of 2018** decided on 20.12.2018, presently, by further order passed by respondent authorities, that claim has been declined. In still others, no orders have been passed. Thus, the petitioners claim a positive mandamus upon the respondents to pay up the retiral dues, including pension.

7. In Writ - A No. 14333 of 2022, the earlier writ petition filed by the petitioner Shambhu Nath Prasad being **Writ-A No. 5951 of 2022 (Shambhu Nath Prasad vs. State of U.P. & 5 Ors.)** was disposed of by order dated 11.4.2022 in terms of another order dated 17.9.2021 in **Ali Hussain Vs. State of U.P. and Others, Writ-A No. 8214 of 2020, decided on 17.9.2021.**

8. In such facts, Shri Adarsh Singh, learned counsel for the petitioner has referred to the order of this Court in **Sunita Sharma (supra).** Upon due consideration of the provisions of the **U.P. State Aided Educational Institutions Employees Contributory Funds Insurance and Pension Rules, 1964 (hereinafter referred to as the 'Applicable Rules')** as distinct from the **Uttar Pradesh Retirement Benefit Rules, 1961 (hereinafter referred to as the 'Government Employees Rules'),** it was reasoned, the Rules applicable to the petitioners in this batch of petitions would be the 'Applicable Rules' and not the 'Government Employees Rules'. In the hierarchy of laws, the 'Applicable Rules' must be placed higher to the Government Order dated 18.10.1997. Therefore, the

Rules were fully enforceable, in its face. Relevant to our purpose, it was finally concluded, in that decision:

"Learned counsel for the petitioner places reliance upon the provisions contained under Rule 19(b) of the Rules of 1964, which is reproduced hereafter:-.

(b) Continuous temporary or officiating service followed without interruption by confirmation in the same or another post shall also count as qualifying service.

Rule 3 of 1964 Rules clearly provides that these Rules shall apply to permanent employees serving in the State aided educational institution of the category specified thereunder, be it run by a local body or a private management, if it is recognized by the competent authority for the purposes of extending of grant-in-aid. It is not in issue that the provisions of Rules of 1964 are attracted in the facts of the present case, inasmuch as the Institution is a recognized Institution, wherein salary is being extended to teaching and non-teaching staff by the State by virtue of the provisions contained in the Act of 1971. On the date of his retirement, petitioner was a permanent employee serving in aided educational institution, which is recognized by a competent authority for the purposes of aid. Rule 19(b) of the Act would clearly come to the rescue of the petitioner, inasmuch as it clearly provides that continuous temporary or officiating service followed without interruption by confirmation in the same or another post, shall also count as qualifying service. Petitioner's engagement from 1996 till 2016, when she was regularized, would be treated as continuous temporary service followed without interruption by confirmation on same post. The adhoc continuance followed with regularisation, therefore would be covered within the ambit and scope of Rule 19-B of the 1964 rules, and therefore, such period would have to be counted towards qualifying service for the purposes of payment of pension etc.

Learned Standing Counsel has not placed any provision whereunder the Rules of 1964 have either been rescinded, modified or substituted by any other provision and the Rules of 1964 therefore continues to remain in force.

So far as the Government Order relied upon by learned Standing Counsel is concerned, it is settled that in hierarchy of laws a statutory Rule would stand at a higher pedestal than a Government instructions. Once the statutory Rules of 1964 remains in force and is attracted in the facts of the present case, the provisions of the Rules cannot be by passed merely by relying upon a Government instructions. The defence set up by the respondents, therefore to non suit the petitioner cannot be sustained. It appears that though U.P. Retirement Benefits Rules, 1961 and other like provisions were amended w.e.f. 1.4.2005, but no such amendment has been incorporated in the Rules of 1964. As a consequence, the benefits admissible under the Rules of 1964 would continue to be applicable upon teachers, who are covered thereunder.

The view, which this Court proposes to take, is also supported by a judgment of the Division Bench in Special Appeal (Defective) No. 678 of 2013 State of U.P. through its Secretary Secondary Education vs. Mangali Prasad Verma and two others, wherein the benefit under the Rules of 1964 have been made applicable upon the respondents therein. Relevant portion of the judgment of the Division Bench is reproduced thereinafter:-

"We may, however, clarify that the Government Order dated 28.1.2004 which was so heavily relied upon by the State Government does not alter the legal position in any manner inasmuch as, the applicability of Rules 1964 is not depended upon any declaration being made by the Governor or by the State Government. If a teacher was working in an aided institution prior to the date of his retirement provisions of rules 1964 become applicable by operation of law. The manner of counting the qualifying service stands explained under the Government Order dated 26.7.2001.

We may also clarify that the teachers and employees of institutions which are brought on the grant-in-aid for the first time on or subsequent to 1.4.2005 would be covered by the new scheme enforced on 1.4.2005 and this judgment will have no application in their case.

We may notice that similar view has taken by the Division Bench of this Court in the case of State of U.P. And 6 Ors Vs. Shir Krishna Prasad Yadav and 13 Ors being Special No.228 of 2016 decided on 24.5.2017.

In view of the aforesaid, we find no illegality in the judgment and order of the learned Single Judge, it is accordingly, affirmed. The Appeal is Dismissed."

In view of the discussions aforesaid, it is clear that petitioner is entitled to pensionary benefits under the Rules of 1964 and for such purposes the adhoc continuance from 1996-2016 followed with regularization would have to be counted towards qualifying service for sanction and fixation of pension. A mandamus is issued accordingly to the respondents for grant of pensionary benefits to the petitioner. Necessary order in that regard could be passed by the competent authority within a period of three months. All consequential benefits would also be extended to the petitioner within a further period of two months thereafter."

9. Then, it has been shown, the said decision was challenged in an intra-Court appeal, before a division bench in **Special Defective No. 181 of 2020 (State of U.P. Through The Secretary Secondary Education Department, Governmentt of U.P. & 4 Ors. vs. Sunita Sharma & Anr.).** Upon dealing with the same objections, as have been presently raised, the division bench ruled as below:

"In appeal, the argument advanced by learned counsel for the appellant is that the respondent-petitioner was working in an adhoc capacity and, therefore, her service does not fall within the category of temporary or officiating service and as such Rule 19 (b) is having no application. We do not find any merit with the arguments advanced. As already stated the appointment was given to the petitioner against a permanent vacancy with assertion in the order of appointment as "adhoc". However, the appointment though said to be on ad-hoc basis but that continued for two decades and ultimately resulted into regularization in service. The appointment, as such, was not a stop gap arrangement but in temporary capacity. The same falls under the categories given in Rule 19(b) of 1964 for the purpose of computing qualifying service."

10. The fact that the petitioner in that case had earlier worked in ad hoc capacity, was found to be of no consequence to the

applicability of Rule 19(b) of the 'Applicable Rules'. Since the appointment had been made against a permanent vacancy, the mere mention of word "ad hoc', was found to be no legal consequence.

11. Referring to another division bench decision of this Court in intra court appeal in **Special Appeal Defective No. 158 of 2021 (State of U.P. & 2 Ors. Vs. Satya Prakash Singh & Anr.),** it has been next asserted, no reliance may be placed on **U.P. Qualifying Service for Pension and Validation Act 2021 (hereinafter referred to as the 'Qualifying Service Act').** It would not apply in the present case since the initial appointment of the petitioner was against a sanctioned post and it was not contrary to the law. In fact, it was in accordance with the law. That decision is stated to have attained finality upon dismissal of the **Special Leave to Appeal No. 13644 of 2021 (State of U.P. & 2 Ors. Vs. Satya Prakash Singh & Anr.),** by the Supreme Court, vide order dated 22.7.2022.

12. Adopting the submission so advanced, Sri Sankalp Narain learned counsel for the petitioner in Writ - A No. 12045 of 2022 would submit, all petitioners were appointed under U.P. Secondary Education Services Commission (Removal of Difficulties) Order. That fact itself established - appointments were made wholly in accordance with law. In fact, these appointments had become necessary at the relevant time, as educational institutions were short staffed in teaching faculty owing to factors that then existed. Only to tide over that crisis, appointments were made against permission granted by the statutory authorities. Further, those appointments were made wholly in accordance with law, after following due procedure. All petitioners continued to work for decades. No defect was ever alleged or discovered in their initial appointment. In such circumstances giving effect to the provisions of Section 33G, their services came to be regularised w.e.f. 22.3.2016.

13. Moreover, it has been strenuously urged, a wholly artificial dispute is being raised belatedly, after availing the services rendered by the petitioners. All throughout, the petitioners were paid full salary in the pay scale admissible to regularly appointed teachers, together with all increments, promotions etc. In absence of any enabling law, action taken by the respondents is wholly discriminatory. Referring to the 'Applicable Rules', he would submit, the same is a complete Code, amongst others, as to entitlement and payment of pension. Chapter-V of the 'Applicable Rules' provides for eligibility to pension. It also defines "qualifying service' necessary for the payment of pension. It recognises and includes temporary or officiating services followed without interruption by confirmation in the same or other post.

14. Thus, according to him, it is too late in the day and impermissible in law for the respondent authorities to relook the status of the petitioners, through a different pane. Once the petitioners acquired the status of a regular employee, wholly in accordance with law, the continuous services rendered by them prior to their regularisation cannot be dissected or ignored for the purpose of their eligibility to pension. Since the 'Applicable Rules' are complete, the facts of the case do not permit invocation of Rule 34 thereof. That rule would apply to a case of an employee or person whose case may not have been specifically provided for or covered under the 'Applicable Rules'.

15. Last, he has placed reliance on another decision of a learned single- judge of this Court in **Kamaluddin Vs. State of U.P. and Others, Writ - A No. 17042 of 2021,** decided on 06.12.2021 - to invoke the general principle - even if the 'Government Employees Rules' were to be looked into, the supervening circumstance of the petitioners having worked for a long duration of time would entitle them to pensionary dues as was held by the Supreme Court in the case of **Prem Singh Vs. State of U.P. (2019) 10 SCC 516**, which principle was also applied and followed by a division bench of this Court in **Kaushal Kishore Chaubey and Others Vs. State of U.P. and Others, Writ-A No. 5817 of 2020.**

16. Sri Siddharth Khare learned counsel for the petitioner appearing in *Writ-A No. 14333 of 2022* would also adopt the submissions noted above. He would further submit; the rejection order is based on a complete non-application of mind. Relying strongly on another decision of a learned Single Judge of this Court in **Dr. Sushma Chandel Vs. State of U.P. and Others, 2021 (ILR) 9 Ald 1276** as followed in **Ali Hussain (supra),** it has been urged, objections being now raised had been specifically dealt with and answered against the State. Those judgments were never tested in appeal. They have long attained finality. The effect of the 'Qualifying Service Act' was also specifically considered in **Dr. Sushma Chandel (supra).** It was held, the same could not obstruct eligibility to pension under the 'Applicable Rules'. In addition, he would submit, the 'Qualifying Service Act' would apply to a case where qualifying service may have been rendered on a temporary or a permanent post at a government establishment. Therefore, the status of the employee at an educational institution would not be covered thereunder.

17. Sri Kaosik, Sri Y.K. Srivastava, Sri Pragyanshu Pandey, Sri Deo Prakash, Sri Mahendra Singh, Sri Rajnish Kumar Srivastava, Sri Anil Yadav, Sri Seemant Singh, and Sri Rajesh Kumar learned counsel for the petitioners have adopted the submissions noted above.

18. Opposing the writ petition, Shri. Neeraj Tripathi learned Additional Advocate General would submit, there can be no doubt, the petitioners were appointed under the Removal of Difficulties Order. However, it has not been considered in any of the earlier decisions (relied by learned counsel for the petitioners), that those petitioners came to be appointed against short-term vacancies that existed for a period of six months or till the employee in whose circumstance such vacancy had arisen, failed to report back to duty. Till that time had expired, the permanent-appointed employee retained his lien over the post occupied by the petitioners. Without examining that issue, an omnibus Mandamus may not be issued for payment of retiral dues. In short, he would submit, individual facts merit consideration before the claim for payment of pension or retiral dues may be allowed. Then, referring to the 'Applicable Rules', it has been submitted, those are applicable only to "permanent employees serving at State aided educational institutions". Relying on Rule 5(g) of the 'Applicable Rules', it has been urged, none of the petitioners became eligible to pension till the time they became permanent employees. Since that date fell beyond the cut-off date i.e., 01.04.2005 when the New Pension Scheme came into force, the petitioners cannot claim retiral dues under the 'Applicable Rules'.

19. Also, under Rule 19(a) of the 'Applicable Rules', service rendered would not count for pension unless the employee had held a substantive post on a permanent establishment on 31.03.2005. Since the petitioners came to first hold that post beyond the cut-off date 01.04.2005, they never became eligible to pension under the 'Applicable Rules'.

20. To bolster his submission, the learned A.A.G. has referred to Rule 34 of the 'Applicable Rules', that provides - matters of pension/family pension not specifically covered under the 'Applicable Rules' would be governed by Rules and corresponding procedure laid down in law with respect to State Government employees. Therefore, in is his submission, it has completely escaped the attention of the Court (in the earlier decisions referred to leaned counsel for the petitioners), that a statutory intervention had been made upon publication of Notification No. Sa-3-379/Ten-2005-301(9)/2003 dated 28 March 2005 whereby w.e.f. 01 April 2005 it was clearly provided, a New Contributory Pension Scheme would mandatorily apply to employees of the State Government and of the State aided private educational institutions etc.

21. Corresponding to that change of policy, statutory intervention followed. First through Ordinance No. 19/20 and later through 'Qualifying Service Act', the term "qualifying service' was given the meaning - services rendered against appointment on a temporary or permanent post, in accordance with the provisions of the service rules prescribed by the government.

22. To actualise that purpose, the 'Government Employees Rules' were amended vide Notification No. 3-469 dated 07.4.2005. By that, it was specifically provided, the 'Government Employees Rules' shall not apply to employees entering service and post on or after 01.04.2005. The learned A.A.G. has now relied on the language of Section 33G of the Act. It is his submission that the date of regularisation is the relevant date on which the petitioners may claim to be born in the cadre. That date (22.03.2016) being well beyond the cut-off date i.e., 31.03.2005, the petitioners can never claim entitlement to payment of pension under the unamended laws. The appointments granted to the petitioners - post 01.04.2005, were the first substantive appointment granted, that too subject to successful completion of probation.

23. Thus, it has been the submission of learned A.A.G. - by virtue of Rule 34 of the 'Applicable Rules' read with the Government Notification dated 28.03.2005, the amended "Government Employees Rules' and the "Qualifying Service Act', the petitioners' claim to pension under the "Applicable Rules' stood overridden by a non obstante clause employed by the legislature in Section 2 of the 'Qualifying Service Act' read with Rule 34 of the "Applicable Rules'.

24. Further, the learned A.A.G. has relied on another decision of a learned single judge of this Court in **Satyesh Kumar Mishra And Others Vs. State of U.P. And Others, 2016(6) ADJ 808 (LB).** Therein, persons who had joined as Assistant Teacher after the cut-off date 01.04.2005, were held ineligible to pension under the 'Applicable Rules'. In reaching that conclusion, the learned single-Judge had considered the effect of Government Notification No. Sa-3-379/Ten-2005-301(9)/2003 dated 28 March 2005.

Decisions to similar effect of other learned single-Judge bench of this Court have also been referred to.

25. Last, in the alternative, it has been submitted a clear cleavage of opinion has arisen. The matter may, therefore, be referred to a larger bench.

26. Having heard learned counsel for the parties and having perused, in the first place, the provision of Section 33G of the Act to the extent it merits notice, reads as below:

*"**Section 33-G. Regularisation of certain more appointments against the short term vacancies** - Any teacher, other than the Principal or the Head Master, who -*

(a) was appointed by promotion or by direct recruitment in the lecturer's grade or trained graduate grade on or after August 7, 1993 but not later than January 25, 1999 against a short term vacancy in accordance with paragraph 2 of the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) order, 1981 as amended from time to time, and such vacancy was subsequently converted into a substantive vacancy;

(b) was appointed by promotion or by direct recruitment on or after August 7, 1993, but not later than December 30, 2000 on adhoc basis against substantive vacancy in accordance with Section 18, in the Lecturer grade or Trained Graduate grade;

(e) Has been found suitable for appointment in a substantive capacity by the selection committee referred to in clause (a) of sub-section (2) of Section 33-C in accordance with the procedure prescribed under clause (b) of the said sub-section;Shall be given substantive appointments by the Management.

(6) The services of the adhoc teachers and the teachers who have been appointed against short term vacancies shall be regularised from the date of commencement of the Uttar Pradesh Secondary Education Services Selection Board (Amendment Act), 2016."

27. The date of enforcement of Section 33G (6) of the Act is 22.03.2016. Also, there is no dispute to the eligibility of any of the petitioners - to regularization from that date. In any case, the stage to examine that issue is long past. It is an undisputed fact; each petitioner was regularized and has completed his term of service - upon attaining the age of the superannuation. No petitioner was terminated from service or offered like punishment.

28. Thus, an automatic consequence arose in law upon regularization offered under Section 33G of the Act. The petitioners earned the legal status of a permanent employee with effect from 22.03.2016, being the date of enforcement of Section 33G of the Act. That substantive right got conferred long back could not be and it has not been altered, till date.

29. Therefore, it is to be seen - which law was in force on that date, and/or is in force today, *qua* the eligibility to pension claimed by the petitioners. The date of the petitioners being born in the cadre would be relevant, if a different law is found to exist (as may govern the claim for pension and retiral dues), should the date of regularization be treated to be the date on which the petitioners were born in the cadre. It is so because, if the law i.e., the 'Applicable Rules' continued to be

enforceable on 22.03.2016, despite other laws relied upon by the learned A.A.G., including Government Notification dated 28.03.2005 as has been given effect to by the 'Qualifying Service Act' as also by amending the 'Government Employees Rules', that issue would remain an academic issue. Therefore, it is the other aspect of the submission advanced by the learned Additional Advocate General that merits consideration, first.

30. There can be no dispute to the applicability of the fundamental principle. It is unambiguous - in the hierarchy of laws, at the top of the ladder is perched the Constitutional law. Sitting at the next lower step and therefore subservient to it is the law enacted by the principal legislature, followed on the next lower step, by law made by a delegate of the principal legislature. Only in the absence of enacted law or a field lying unoccupied, any notification issued by the executive in exercise of power referable to Article 309 or like provision of the Constitution of India, would come to full life. At the first/lowest step (and therefore subservient to all laws sitting above), sit executive orders including Government Orders, that may sometimes cause the effect of law, subject primarily to absence of any contrary law existing at any higher step of the ladder.

31. The 'Applicable Rules' (of 1964) and the 'Government Employees Rules' (of 1964) were both notified in exercise of Article 309 of the Constitution of India. In absence of any other law made on the subject, either by the principal legislature or its delegate, both sets of Rules noted above were fully enforceable. Then, by virtue of Rule 2 of the 'Government Employees Rules', they applied to officers under the rule making power of the Governor. Rules 2 & 3 of those Rules (unamended) read as below:

"2. Application.- (1) These rules shall apply to all officers under the rule making power of the Governor, other than those who retired before the date of the coming into force of these rules.

Provided firstly, that [a person who was an officer]" on the date immediately preceding the date of commencement of these rules shall have the option to elect for the existing pension rules applicable to him, in which case he will not be eligible for any of the benefits granted under these rules except as provided in Rule 11. The option shall be exercised within a period of [six months] from the date of notification of these rules in the official Gazette. The option once exercised shall be final."

3. Definition.- *In these rules unless there is anything repugnant in the subject or context-*

(6) "Officer" means a Government Servant (whether belonging to superior or inferior service) who holds a lien on a permanent pensionable post under the Government or would have held a lien on such a post had his lien not been suspended."

32. On the other hand, Rule 3 of the 'Applicable Rules', apply to permanent employees serving in State-aided educational institutions, of specified categories. Rule 3 and 4 of that set of Rules reads as below:

"3. These rules shall apply to permanent employees serving in State aided educational institutions of the following categories run either by a Local Body or by a Private management and

recognised by a competent authority as such for purposes of payment of grant-in-aid;

(1) Primary Schools;

(2) Junior High Schools;

(3) Higher Secondary Schools;

(4) Degree Colleges;

(5) Training Colleges.

4. (a) These rules are intended to the employees of the State aided educational institutions, three types of service benefits, viz., Contributory Provident Fund, Insurance and Pension (Triple Benefit Scheme). The quantum of the benefits and the conditions by which they are governed are described in the succeeding Chapters:

(b) An employee already in permanent service on the date of enforcement of these rules shall be given an option to elect these new rules or to continue to be governed by the existing rules applicable to him.

(c) No employees shall be allowed option to choose only a part of the scheme except as otherwise specifically provided for in these rules.

(d) Option once exercise shall be final."

33. Then, Rule 5(g) of the 'Applicable Rules' reads as below:

"5(g) "Employee' means a permanently employed person borne on the whole-time teaching or non-teaching establishment of an aided institution, excluding (a) the inferior staff and (b) the ministerial staff of institutions maintained by a Local Body."

No doubt under the "Applicable Rules' an employee means a permanent employee only, yet, it cannot be denied - on the date of retirement, each petitioner was a permanent employee upon regularization granted under section 33G of the Act, w.e.f. 22.3.2016.

34. Then, Rules 17, 19 and 21 of the "Applicable Rules' read as below:

"17. An employee shall be eligible for pension on-

(i) retirement on attaining the age of superannuation or on the expiry of extension granted beyond the superannuation age.

(ii) voluntary retirement.....

(iii) retirement before the age of superannuation under a medical certificate.....

(iv) discharge due to abolition of post or closure.....

Note- .....

19. (a) Service will not count for pension unless the employee holds a substantive post on a permanent establishment.

(b) Continuous temporary or officiating service followed without interruption by confirmation in the same or another post shall also count as qualifying service."

21. An employee shall be eligible for superannuation/retiring/ invalid pension only after completing 10 years of qualifying service at 1/20 of his average emoluments of the past three years for every completed years of service subject to....."

35. Thus, under the "Applicable Rules' specific to the claim of pension, employees (such as the petitioners), could gain eligibility to receive pension, on attaining the age of superannuation by virtue of Rule 17, subject to satisfaction of Rules 19 and 21 of the 'Applicable Rules'. Thus (i) the concerned employee should

have held a substantive post on a permanent establishment, on the date of his retirement. Then, relevant to the present facts - (ii) such employee must have retired after attaining the age of superannuation and (iii) he must have performed 10 years continuous service on the date of his superannuation.

36. To the first condition noted above, there can be no dispute. Even a days' length of substantive post held before retirement, preceded by fulfilment of condition of "qualifying service' (as defined under the "Applicable Rules'), would entitle a retired employee to pension under those Rules. Also, as to the second condition (noted above), there is no dispute.

37. So far as the third eligibly condition is concerned, per se, the two sets of Rules noticed above, namely the "Applicable Rules' and the "Government Employees Rules' operate on two different and mutually exclusive sets of persons/employees. Teachers at State-aided educational institutions, not being "officers' as defined under Rule 3(6) of the "Government Employees Rules', were never covered under that set of Rules. Hence, on its own force, the amendment made to Rule 2 of the latter Rules whereby sub-Rule 3 was added, **never** became applicable to teachers at State-aided educational institutions, they being persons governed by the "Applicable Rules'. In absence of any amendment to the "Applicable Rules', their eligibility and entitlement to pension arising those Rules remained preserved and unaltered.

38. As to the concept of "qualifying service' that may fructify the eligibility (established by the employee) to an entitlement to receive pensionary relief, Rule 19(a) of the "Applicable Rules' read with Rule 21 thereof prescribe ten years' continuous service. It is this eligibility issue that Rule 19(b) addresses in the context of the present petitioners. It includes therein continuous temporary or officiating service, followed without interruption, by confirmation, as the "qualifying service'. That condition stood satisfied, in case of each petitioner. There is no dispute to that fact either.

39. Seen in that light, Rule 19(b), only furnishes a clarification that perhaps became necessary - upon the language employed by Rule 19(a) read with Rule 21 of the Rules. Therefore, Rule 19(b) enables, substantive post held even for one day preceded with continuous service rendered as may add up to ten years in all, to be eligibility to be earned by a retired employee - to avail pensionary benefits under the "Applicable Rules'.

40. The policy statement contained in the Government Order dated 28.03.2005 referred to by the learned Additional Advocate General is clearly not the law. Sitting at the lowest step of the law, it never enjoyed any status as may have ever allowed it to be read in preference over the enacted law. Both 'Government Employees Rules' and the 'Applicable Rules' were pre-existing laws, made under Article 309 of the Constitution of India. In neither case, there existed any legislation either by the principal legislature or its delegate. Hence, they were and continue to be the binding law. In **Ajay Kumar Das Vs State of Orissa (2011) 11 SCC 136,** the Supreme Court held:

"14. Neither the Circular dated 18-6-1982 nor the subsequent Circular dated 19-3-1983 modifying the earlier

Circular dated 18-6-1982 can override the statutory provision contained in Rule 74(b) of the Code if it results in reduction of pay of the employee on promotion. That the Orissa Service Code has been framed under Article 309 of the Constitution of India is not in dispute. It is well settled that the statutory rules framed under Article 309 of the Constitution can be amended only by a rule or notification duly made under Article 309 and not otherwise. Whatever be the efficacy of the executive orders or circulars or instructions, statutory rules cannot be altered or amended by such executive orders or circulars or instructions nor can they replace the statutory rules. The Rules made under Article 309 of the Constitution cannot be tinkered by the administrative instructions or circulars".

41. Then, the 'Government Employees Rules' were amended by issuance of Notification No. 3-469 dated 07.04.2005, however, no such amendment was made to the 'Applicable Rules'. For ready reference, the text of the said Notification dated 07.04.2005, reads as below:

*"**नवीन पेंशन योजना संशोधित 1 अप्रैल 2005 से प्रभावी***

उत्तर प्रदेश सरकार वित्त (सामान्य) अनुभाग-3

संख्या सा-3-469/दस-2005-301 (9)--03
लखनऊः दिनांक : 07 अप्रैल 2005
अधिसूचना / प्रकीर्ण

संविधान के अनुच्छेद 309 के परन्तुक द्वारा प्रदत्त शक्ति का प्रयोग करके राज्यपाल उत्तर प्रदेश रिटायरमेंट बेनिफिट्स रूल्स, 1961 को संशोधित करने की दृष्टि से निम्नलिखित नियमावली बनाते है।

उत्तर प्रदेश रिटायरमेंट बेनिफिट्स (संशोधन) रूल्स, 2005

1. संक्षिप्त नाम और प्रारम्भ- *(1) यह नियमावली उत्तर प्रदेश रिटायरमेंट बेनिफिट्स (संशोधन) रूल्स, 2005 कही जायेगा*

(2) यह 1 अप्रैल, 2005 को प्रवृत्त हुआ समझा जायेगी।

2. नियम 2 का संशोधन- *उत्तर प्रदेश रिटायरमेंट बेनिफिट्स रूल्स, 1961 में नियम 2 में, वर्तमान उपनियम (2) के पश्चात निम्नलिखित नया उपनियम बढ़ा दिया जायेगा. अर्थात्*

(3) यह नियमावली राज्य के कार्य कलाप के सम्बन्ध में पेंशनी स्थापन सेवाओं और पदों पर, चाहे वे अस्थायी हों या स्थायी हों, 1 अप्रैल, 2005 को या उसके पश्चात् प्रवेश करने वाले कर्मचारियों पर लागू नहीं होगी।"

42. Clearly, while issuing that notification and amending the law made under Article 309 of the Constitution of India, no amendment was made to the 'Applicable Rules'. Amendment made was confined to Rule 2 of the 'Government Employees Rules'. Hence, there can be no quarrel to the proposition - law whether framed under Article 309 or in exercise of the legislative powers by the principal legislature or its delegate is a species of statutory law. Not amended, it continued to operate with full force. Since the 'Applicable Rules' were not amended, no benefit may be had by placing reliance on or referring to the Government Notification dated 07.04.2005, that amended the "Government Employees Rules'. It left the "Applicable Rules' untouched.

43. Next, it is true - the government of the day did express a change of administrative policy - by issuance of notification dated 28 March 2005, to modify the Old Pension Scheme with respect to State-aided educational institutions, also. However, that expression of changed policy remained from being actualised, legislatively. Therefore, it is

merely an unfulfilled policy aspiration of the executive. Being contrary to the pre-existing legislative law - namely, the "Applicable Rules' framed under Article 309 of the Constitution of India; it must yield to the same. Consequently, that policy expression made by the executive authority, contrary to the legislative action, causes no legal effect. In **State of Karnataka Vs Umadevi [3] (2006) 4 SCC 1,** the Supreme Court observed:

"6. The power of a State as an employer is more limited than that of a private employer inasmuch as it is subjected to constitutional limitations and cannot be exercised arbitrarily (see Basu's Shorter Constitution of India). Article 309 of the Constitution gives the Government the power to frame rules for the purpose of laying down the conditions of service and recruitment of persons to be appointed to public services and posts in connection with the affairs of the Union or any of the States. That article contemplates the drawing up of a procedure and rules to regulate the recruitment and regulate the service conditions of appointees appointed to public posts. It is well acknowledged that because of this, the entire process of recruitment for services is controlled by detailed procedures which specify the necessary qualifications, the mode of appointment, etc. If rules have been made under Article 309 of the Constitution, then the Government can make appointments only in accordance with the rules. The State is meant to be a model employer. The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 was enacted to ensure equal opportunity for employment seekers. Though this Act may not oblige an employer to employ only those persons who have been sponsored by employment exchanges, it places an obligation on the employer to notify the vacancies that may arise in the various departments and for filling up of those vacancies, based on a procedure. Normally, statutory rules are framed under the authority of law governing employment. It is recognised that no government order, notification or circular can be substituted for the statutory rules framed under the authority of law. This is because, following any other course could be disastrous inasmuch as it will deprive the security of tenure and the right of equality conferred on civil servants under the constitutional scheme. It may even amount to negating the accepted service jurisprudence. Therefore, when statutory rules are framed under Article 309 of the Constitution which are exhaustive, the only fair means to adopt is to make appointments based on the rules so framed".

44. Insofar as the 'Qualifying Service Act' is concerned, it reads as below:

"Statement of Objects and Reasons

Pension and gratuity admissible to a retired Government servant are determined in relation to the length of qualifying service of the Government servant. Although the term "Qualifying Service" is described in the Uttar Pradesh Civil Service Regulation and the Uttar Pradesh Retirement Benefit Rules, 1961, however the definition of the said term is open to subjective interpretation which leads to administrative difficulties.

It has therefore, been decided to make a law defining the term "Qualifying Service" and to validate such definition with effect from April 1, 1961 which is the date of commencement of Uttar Pradesh Retirement Benefit Rules, 1961.

Since the State Legislature was not in session and immediate legislative

action was necessary to implement the aforesaid decision, the Uttar Pradesh Qualifying Service for Pension and Validation Ordinance 2020 (U.P. Ordnance Number 19 of 2020) was promulgated by the Governor on October 21, 2020.

This bill is introduced to replace the aforesaid Ordinance

1. (1) This Act may be called the Uttar Pradesh Qualifying Service for Pension and Validation Act, 2021.

(2) It shall extend to the whole of the State of Uttar Pradesh.

(3) It shall be deemed to have come into force on April 1, 1961.

2. Notwithstanding anything contained in any rule, regulation or Government order for the purposes of entitlement of pension to an officer, "Qualifying Service" means the services rendered by an officer appointed on a temporary or permanent post in accordance with the provisions of the service rules prescribed by the Government for the post.

3. Notwithstanding any Judgement, decree or order of any Court, anything done or purporting to have been done and may action taken or purporting to have been taken under or in relation to sub-rule (8) of rule 3 of the Uttar Pradesh Retirement Benefit Rules, 1961 before the commencement of this Act, shall be deemed to be and always to have been done or taken under the provisions of this Act and to be and always to have been valid as if the provisions of this Ordinance were in force at all material times with effect from April 1, 1961.

4. Save as otherwise provided, the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law for the time being in force other than this Act."

45. The "Qualifying Service Act' also does not create any obstacle in the path of the petitioners to claim pension as they are not "officers' under that law. Though that Act does not define the word "officer' used therein, yet, section 3 read in the context of the Object and Reasons clause thereto, leave no room to doubt that that enactment was made strictly with reference to the "Government Service Rules'. Keeping in mind the definition of the term "Officer' contained in Rule 5(g) of the "Government Employees Rules' (noted above), it only includes a government servant who may hold a lien on a permanent pensionable post under the Government. It may be applied to other government employees - by way of the only permissible extension, thereto and no further.

46. Petitioners being teachers working at the State-aided educational institutions and not State-owned institutions, they could never be described as "Officers' of the State Government. Therefore, there did not ever exist any master-servant relationship between them and the State Government as may ever allow them to be described as "officers' of the State government, even in any loose sense of that term. For these reasons, the ration in **Satyesh Kumar Mishra and ors. Vs State of U.P. and Ors (supra)** is wholly distinguished.

47. Since the petitioners remained appointed under section 33 G of the Act, read with the "Applicable Rules' which Rules were never amended, they are seen to have never ventured out of the umbrella protection of the "Applicable Rules'. They have remained fully insulated from the

wrath of section 2 of the "Qualifying Service Act'. Therefore, the petitioners never became the sacrificial offering contemplated under Rule 34 of the "Applicable Rules', as may have visited them the sufferance of the amended "Government Employees Rules'.

48. If any clarification was ever necessary, the same is contained in the above amendments, itself. The "Qualifying Service Act' is a creature of the State legislature. Also, both sets of Rules namely, the 'Government Employees Rules' and the 'Applicable Rules' are rules framed under Article 309 of the Constitution of India. The State having chosen to amend only the law pertaining to government servants including the set of Rules applicable to them, without making any parallel effort to amend the other set of Rules applicable to teachers at State-aided educational institutions, it is impossible to conceive - the petitioners' rights to pension have been altered. In fact, the exact opposite is true.

49. In view of the above, denial of the claim made by the petitioners' is found to be contrary to law. The impugned orders are set aside. A positive direction is issued to the Deputy Director Secondary Education, Uttar Pradesh (as impleaded in individual cases) to complete all formalities and compute the pension payable to each respective petitioner and to ensure its timely payment. For that purpose, period of two months is granted to the said respondent to compute the individual pension amount payable to individual petitioners, after including the ad hoc service rendered by each petitioner, before regularisation of his service in the "qualifying service' rendered for the purpose of the "Applicable Rules'. The pension together with its dues so computed may be paid out within a further period of one month. Failing that, the petitioner concerned shall be entitled to interest @ of 8% from today till the date of actual payment.

50. With the above directions, the writ petitions stand **allowed**. No order as to costs.

51. The Court may record its appreciation for the spirited submissions advanced by the younger members of the Bar. Unless the younger bar takes up the mantle in time, the critical interests of institution may remain unserved.

(2022) 11 ILRA 1020
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.10.2022

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-A No. 23479 of 2019

Dr. Ram Suresh Rai & Ors. ...Petitioners
Versus
U.O.I. ...Respondent

Counsel for the Petitioners:
SAmrendra Nath Tripathi, Kumkum Tripathi, Lalta Prasad Misra

Counsel for the Respondent:
C.S.C., Puneet Chandra, Ravi Shanker Tewari

Civil Law – Constitution of India,1950 - Article 14 & 226 - Writ Petition - Petitioners who are Ayush Doctors engaged on contractual basis under the NHRM Scheme - challenging the rejection order by which Govt. denied to grant equivalent honorarium as given to the Allopathic Doctors - on the ground of qualification, nature

of duties, responsibility & treatment which are different in comparable - plea of petitioners, that a class of Medical officers have been discriminated, in so far as it relates to the benefit of SACP, without any justification or rational reason - court find - Govt. declined the Dynamic ACP applicable to the Medical Officers of the CHS, irrespective of the stream of specialization (i.e. Allopathiy/ Ayurvedic/ Unani/ Dental) - The ACP scheme in general is not an incentive scheme resting U.P.on to the nature of duty, responsibility or qualification of the Govt. Servant - The comparison by the St. Govt. to carve out a class of Medical officers i.e. PHMS being sU.P.erior to other medical officers is misconceived and unfounded - impugned order quashed - direction issued - the Special ACP Scheme shall be applicable to the Medical Officers of other streams also - Writ Petition Allowed. (Para – 28, 34, 42, 43, 44)

Writ Petition is Allowed. (E-11)

List of Cases cited: -

1. Dr. Sanjay Singh Chauhan & ors. Vs St. of Uttrakhand (WP (SB/) No. 484/2014 decided on 03.04.2018),

2. North Delhi Municipal Corporation Vs Dr. Ram Naresh Sharma & ors. (SLP © No. 10156/2019),

3. Mewa Ram Kanojia Vs All India Institute of Medical Sciences & ors., (1989) 2 SCC 235,

4. St. of Madhya Pradesh Vs R.D. Sharma & ors., Manu/SC/0098/2022,

5. Dr. Puneet Kumar GU.P.ta & anr. Vs U.O.I. through Secy. Ministry of Health & Family & ors., Writ Petition No. 738 (S/B) of 2015,

6. S.C. Chandra & ors. Vs St. of Jharkhand & ors., (2007) 8 SCC 279.

(Delivered by Hon'ble Alok Mathur, J.)

1. Heard Dr. L.P. Mishra, alongwith Sri Amrendra Nath Tripathi, learned counsel for the petitioners as well as Sri Rahul Shukla, learned Additional Chief Standing Counsel for the State respondents, Sri S.B. Pandey, learned Senior Advocate assisted by Sri Anand Dwivedi, learned counsel appearing for Union of India and Sri Puneet Chandra, learned counsel appearing on behalf of National Health Mission.

2. It is submitted by learned counsel for the petitioners that they are Ayush doctors who are working in the NHRM Scheme and are aggrieved by the impugned order dated 29.03.2019, passed by the Principal Secretary, Medical and Health Department, Government of U.P., Lucknow thereby rejecting their representation for being granted equivalent honorarium as is being given to the Allopathic doctors.

3. Brief facts of the case are that the petitioners are qualified AYUSH Doctors and were engaged as such and were posted in different districts in the State of Uttar Pradesh and their services were renewed from time to time and are currently serving as contractual employees. The Union of India recognizing the importance of health in the process of economic and social development and improving the quality of life of its citizens resolved to launch the National Health Mission Scheme to carry out necessary aid in the basic health case delivery system.

4. An advertisement was issued for appointment on various posts in all the districts including the post of Medical Officer Allopathic, BDS Doctors as well as AYUSH Doctors. Till the year 2009-10, honorarium for all the above-mentioned doctors was proposed to be Rs.24,000/- per month but later on in 2010-11, the honorarium of Medical Officers Allopathic was increased to Rs.30,000/- per month.

Similarly, for the year 2011-12, the honorarium of the Medical Officers Allopathic was increased to Rs.36,000/- per month for rural posting and Rs.33,000/- per month for urban posting and honorarium of Medical Officers BDS was increased to Rs.35,000/- per month for rural posting and Rs.30,000/- per month for urban posting. The honorarium of Ayush Doctors was not revised and renewal of Ayush Doctors was denied and aggrieved by the order, not renewing the period of Ayush Doctors, they challenged the action before this Court and Court while disposing the Writ Petition No. 769 (S/B) of 2011, directed the respondents to continue their services till the scheme continues and be paid accordingly.

5. The State Government assailed the order passed by the writ Court by filing Special Leave Petition (Civil) No. 28122 of 2011, which was dismissed on 18.10.2011 and in compliance of the order of the Court the services of Ayush doctors were continued and renewed but the honorarium remained Rs.24,000/- per month.

6. The claim of the AYUSH Doctors for equal honorarium was further raised in Writ Petition No. 295 (S/B) of 2013 - Anil Kumar and Others Vs. Union of India and Others, which was disposed of by this Court by means of order dated 01.03.2013, with direction to the Principal Secretary, Health and Family Welfare, U.P. to take decision in this regard and the Principal Secretary took the decision in the matter vide order dated 04.09.2013, whereby the representation was rejected on the ground that honorarium was to be fixed in terms of the operational guidelines/record of proceedings and in the said terms the Government of India had approved honorarium only Rs.24,000/- per month.

7. The claim of the petitioners to be treated at par with the Allopathic Doctors has been rejected by the State Government on the following ground :

"(i) AYUSH doctors do not have to render emergency services,

(ii) their services are limited for their work up to six hours and

(iii) they are not given any medico legal work."

8. The aforesaid order has been passed considering various directions issued by the High Court in Writ Petition No. 5633 (S/S) of 2019 and Writ Petition No. 22529(S/B) of 2018, rejecting the claim of the petitioners.

9. It is submitted by learned counsel for the petitioners that it is wrong to say that the duties and responsibilities of the AYUSH doctors are in any way inferior to the Allopathic doctors, and the reasoning given for such discrimination is illegal and arbitrary. The reasoning that Allopathic doctors are entitled for non-practicing allowance, is baseless, as no such allowance is admissible to any contractual employee either Allopathic or AYUSH. It is submitted that the State Government is giving equal honorarium to the Allopathic and AYUSH medical officers in case of contractual appointments. It is also relevant to mention here that in case of emergency, every moment and every second is important and vital and every medical practitioner is under pious and legal obligation to attend the medical emergencies. Moreover, in many PHCs/CHCs only AYUSH doctors are appointed and in medical emergencies, such doctors have been appointed to take care of the medical emergencies, and such patients are treated by the AYUSH doctors

and even the guidelines of the AYUSH doctors also permit them to do the same.

10. It is submitted by learned counsel for the petitioners that on one hand the order says that the honorarium of the AYUSH doctors are to be decided by the Department of AYUSH of Central Government and on the other hand National AYUSH Policy, 2002 formulated by the Department of AYUSH of the Central Government are not being followed while fixing the honorarium.

11. To canvass their claim for being treated equally on the ground that their obligations are also similar to those of Allopathic doctors, it has been stated that AYUSH doctors are employed under the Jan Suraksha Yojana, are employed as Obstetrics and also employed in emergency service. It is stated that AYUSH doctors are also duly registered by the registering Council and are practicing as doctors in their respective fields of medicine and it is submitted that the State Government is discriminating between them without there being any rational basis which is illegal and arbitrary.

12. It is further submitted that till 2009-10, honorarium for all the doctors was uniformly fixed at Rs.24,000/- per month and it is only after 2011-12 that honorarium of Allopathic doctors was raised to Rs. 36,000/- per month for rural posting and Rs.33,000/- per month for urban posting, while honorarium for Ayush doctors was not revised.

13. In earlier round of litigation, this very aspect was meticulously scrutinised and this Court while deciding bunch of cases leading being Writ Petition No. 738 (S/B) of 2015, had considered all the aspects of their work, educational qualifications and returned a finding that AYUSH doctors are also entitled to the same honorarium as is given to Allopath doctors.

14. Similar controversy was raised before the High Court Uttrakhand in the case of **Dr. Sanjay Singh Chauhan and Others Vs. State of Uttrakhand, Writ Petition No. 484 (S/B) of 2014** (decided on 03.04.2018), wherein the High Court of Uttrakhand observed as under :-

"1. The petitioners were appointed as Medical Officers "Ayush" on the contract basis during the year 2010 to 2013 under "National Rural Health Mission" (hereinafter referred to as "NRHM" for the sake of brevity). The NRHM was started by Government of India in the year 2005 for the purpose of Healthcare, more particularly, in rural areas. The 85% expenses are borne by the Central Government and 15% by the State Government.

2. According to the preamble of NRHM scheme, it is meant to develop and improve the quality of life of citizens and to adopt a synergistic approach by relating health to indica of good health viz. segments of nutrition, sanitation, hygiene and safe drinking water. It also aims at main streaming the Indian System of Medicine to facilitate health care. The overall goal of the Mission is to improve the availability of access to quality health care by people especially for those residing in rural areas, the poor, women and children. In fact, it provides effective health care to rural population throughout the country 2 with special focus on 18 States including State of Uttarakhand.

3. The petitioners were appointed in Rastriya Bal Swasthaya Karyakram

(RBSK) run by the NRHM. The State Government has also employed Allopathic, Dental, Ayurvedic and Homeopathic Medical Officers under NRHM on contract basis. The Allopathic and Dental Doctors were given consolidated salary of Rs.48,000/-, Rs.52,000/- and Rs.56,000/- for Sugam, Durgam and Ati-durgam places respectively. The petitioners were paid only Rs.36,000/-, Rs.40,000/- and Rs.44,000/- for Sugam, Durgam and Ati-durgam places respectively. There were 82 Ayurvedic and 18 Homeopathic Medical Officers appointed on contract basis under NRHM. 296 Ayurvedic Medical Officers were also appointed on contract basis under RBSK. Initially there was no difference in the salary between Allopathic Medical Officers and Ayurvedic Medical Officers as per advertisement issued in the year 2010. The petitioners have made several representations seeking parity of salary with their counter-parts working as Allopathic Medical Officers and Dental Medical Officers.

4. The case of the petitioners has been rejected only on the ground that they are working on contractual basis and thus, they are not entitled to the parity with Allopathic Medical Officers and Dental Medical Officers. The petitioners are discharging the same duties which are being discharged by the Allopathic Medical Officers and Dental Medical Officers. 3

5. The underlying principles of NRHM is to provide basic health facilities to the citizen of the State, more particularly, of rural areas. The petitioners have obtained their degrees from recognized institutions. They have also taken 4-5 years course. It is for the patient to opt for any of the system i.e. Allopathic or Ayurvedic or Homeopathic.

6. There is no intelligible differentia so as to distinguish the Ayurvedic and Homeopathic Medical Officers viz-a-viz Allopathic and Dental Medical Officers. There is no rational why the similar situate persons have been discriminated against. The petitioners as well as Allopathic and Dental Medical Officers constitute homogenous class.

7. Homeopathy, Ayurved and Allopathy are different streams of Medicines, yet these have to be treated at par with each other. The nature of degrees and duration of courses are almost the same. There is also discrimination by paying Rs.10,000/- extra to the Doctors working in Community Health Centres and Primary Health Centres. The petitioners are working in rural areas. They cannot be discriminated against only on the ground that they are not serving in Community Health Centres and Primary Health Centres.

8. Their Lordships of Hon'ble Supreme Court in (1987) 4 SCC 634 in the case of Bhagwan Dass and others Vs. State of Haryana and others have held that if duties and functions of temporary appointees and employees of regular cadre in the same government 4 department are similar, there cannot be discrimination in pay between them merely on ground of difference in mode of their selection or that the appointment or scheme under which appointments made was temporary. Their Lordships have held as under :-

"8. It is therefore futile to contend that the petitioners in their capacity as Supervisors were required only to perform part-time work. As per clause (d) of the aforesaid extract, the supervisors were required to stay for the whole day in the village and were required to visit the Informal Education Centre and the Adult Education Centre in the night. They were also required to go on tour and to remain at the headquarter once a week from 9.30

A.M. to 4.00 P.M. The conclusion is therefore inevitable that the petitioners were not part-time functionaries but were whole-time functionaries. 10. With regard to the first ground for not granting salary on the same basis as of respondents 2 to 6, viz. that they are part-time employees whereas respondents 2 to 6 are full-time employees, having examined the aforesaid records placed before the Court, we are of the opinion that there is no substance in this contention.

11. With regard to the next contention viz. that the mode of recruitment of the petitioners is different from the mode of recruitment of respondents 2 to 6, we are afraid it is altogether without substance. The contention has been raised in the following terms (paragraph 4(d) of the Counter affidavit dated 6-1-1986 filed on behalf of Respondents 1 to 13):-- It is absolutely incorrect that the Petitioners are similarly placed as the employees under the Social Education Scheme, as alleged. The latter are wholetime employees selected by the subordinate services Selection Board after competing with candidates from any pan of the country. In the case of Petitioners, normally the selection at best is limited to the candidates from the Cluster of a few villages only. The contention made by the Petitioners has no justifiable basis." (Emphasis added).

We need not enter into the merits of the respective modes of selection. Assuming that the selection of the petitioners has been limited to the cluster of a few villages, whereas Respondents 2 to 6 were selected by another mode wherein they had faced competition from candidates from all over the 5 country., we need not examine the merits of these modes for the very good reason that once the nature and functions and the work are not shown to be dissimilar the fact that the recruitment was made in one way or the other would hardly be relevant from the point of view of "Equal pay for equal work" doctrine. It was open to the State to resort to a selection process whereat candidates from all over the country might have competed if they so desired. If however they deliberately chose to limit the selection of the candidates from a cluster of a few villages it will not absolve the State from treating such candidates in a discriminatory manner to the disadvantage of the selectees once they are appointed, provided the work done by the candidates so selected is similar in nature. It was perhaps considered advantageous to make recruitment from the cluster of a few villages for the purposes of the Adult Education Scheme because the Supervisors appointed from that area would know the people of that area more intimately and would be in a better position to persuade them to take advantage of the Adult Education Scheme in order to make it a success. So also it was perhaps considered desirable to make recourse to this mode of recruitment of candidates because candidates from other parts of the country would have found it inconvenient and onerous to seek employment in such a Scheme where they would have to work amongst total strangers and it would have made it difficult for them to discharge their functions of persuading the villagers to avail of the Adult Education Scheme on account of that factor. So also they might not have been tempted to compete for these posts in view of the fact that the Scheme itself was for an uncertain duration and could have been discontinued at any time. Be that as it may, so long as the petitioners are doing work which is similar to the work performed by respondents 2 to 6 from the stand point of 'Equal work for equal pay' doctrine, the petitioners cannot be discriminated against in regard to pay

scales. Whether equal work is put in by a candidate, selected by a process whereat candidates from all parts of the country could have competed or whether they are selected by a process where candidates from only a cluster of a few villages could have competed is altogether irrelevant and immaterial, for the purposes of the applicability of 'Equal work for equal pay' doctrine.. A typist doing similar work as another typist cannot be denied equal pay on the ground that the process 6 of selection was different in as much as ultimately the work done is similar and there is no rational ground to refuse equal pay for equal work. It is quite possible that if he had to compete with candidates from all over the country, he might or might not have been selected. It would be easier for him to be selected when the selection is limited to a cluster of a few villages. That however is altogether a different matter. It is possible that he might not have been selected at all if he had to compete against candidates from all over the country. But once he is selected, whether he is selected by one process or the other, he cannot be denied equal pay for equal work without violating the said doctrine. This plea raised by the Respondent-State must also fail.

12. Turning now to the contention that the nature of the duties are different,, the Respondent-State has failed to establish its plea. In the regular cadre, the essential qualification for appointment is B.A., B.Ed. Petitioners also possess the same qualifications viz. B.A., B.Ed. In fact many of them even possess higher degrees such as M.A.M.Ed. In what manner and in what respect are the duties and functions discharged by those who are in the regular cadre different? The petitioners having discharged the initial burden showing similarity in this regard, the burden is shifted on the Respondent-State to establish that these are dissimilar in essence and in substance. We are unable to uphold the bare assertion made in this behalf by the State of Haryana (in paragraph 21 of the Counter-affidavit dated November 23, 1985). In fact the communication dated April 8, 1985 (Annexure R-2) addressed by the respondent State of Haryana to the District Officers which has been quoted in the earlier part of the judgment supports the contentions of the petitioners and belies the plea raised by the Respondent-State."

9. Their Lordships of Hon'ble Supreme Court in the recent judgment reported in ***(2017) 1 SCC 148*** *in the case of* ***State of Punjab and others Vs. Jagjit Singh and others*** *have laid down the following principles to determine parity in principle of "equal pay for equal work". Their Lordships have held that the temporary employees are also entitled to minimum regular pay scale 7 on the principle of "equal pay for equal work". Their Lordships have held as under : "42.2. The mere fact that the subject post occupied by the claimant, is in a "different department" vis-a-vis the reference post, does not have any bearing on the determination of a claim, under the principle of "equal pay for equal work'. Persons discharging identical duties, cannot be treated differently, in the matter of their pay, merely because they belong to different departments of Government (see - the Randhir Singh case1, and the D.S. Nakara case2).*

42.3. The principle of "equal pay for equal work', applies to cases of unequal scales of pay, based on no classification or irrational classification (see - the Randhir Singh case1). For equal pay, the concerned employees with whom equation is sought, should be performing work, which besides being functionally equal, should be of the same quality and sensitivity (see - the

Federation of All India Customs and Central Excise Stenographers (Recognized) case3, the Mewa Ram Kanojia case5, the Grih Kalyan Kendra Workers' Union case6 and the S.C. Chandra case12).

42.4.Persons holding the same rank/designation (in different departments), but having dissimilar powers, duties and responsibilities, can be placed in different scales of pay, and cannot claim the benefit of the principle of "equal pay for equal work' (see - the Randhir Singh case1, State of Haryana v. Haryana Civil Secretariat Personal Staff Association9, and the Hukum Chand Gupta case17). Therefore, the principle would not be automatically invoked, merely because the subject and reference posts have the same nomenclature.

42.5. In determining equality of functions and responsibilities, under the principle of "equal pay for equal work', it is necessary to keep in mind, that the duties of the two posts should be of equal sensitivity, and also, qualitatively similar. Differentiation of pay-scales for posts with difference in degree of responsibility, reliability and confidentiality, would fall within 8 the realm of valid classification, and therefore, pay differentiation would be legitimate and permissible (see - the Federation of All India Customs and Central Excise Stenographers (Recognized) case3 and the State Bank of India case8). The nature of work of the subject post should be the same and not less onerous than the reference post. Even the volume of work should be the same. And so also, the level of responsibility. If these parameters are not met, parity cannot be claimed under the principle of "equal pay for equal work' (see - State of U.P. v. J.P. Chaurasia4, and the Grih Kalyan Kendra Workers' Union case6).

42.6. For placement in a regular pay-scale, the claimant has to be a regular appointee. The claimant should have been selected, on the basis of a regular process of recruitment. An employee appointed on a temporary basis, cannot claim to be placed in the regular payscale (see - the Orissa University of Agriculture & Technology case10).

42.7. Persons performing the same or similar functions, duties and responsibilities, can also be placed in different pay-scales. Such as - "selection grade', in the same post. But this difference must emerge out of a legitimate foundation, such as - merit, or seniority, or some other relevant criteria (see - State of U.P. v. J.P. Chaurasia4).

42.8. If the qualifications for recruitment to the subject post vis-a- vis the reference post are different, it may be difficult to conclude, that the duties and responsibilities of the posts are qualitatively similar or comparable (see - the Mewa Ram Kanojia case5, and Government of W.B. v. Tarun K. Roy11). In such a cause, the principle of "equal pay for equal work', cannot be invoked.

42.9. The reference post, with which parity is claimed, under the principle of "equal pay for equal work', has to be at the same hierarchy in the service, as the subject post. Pay-scales of posts may be different, if the hierarchy of the posts in question, and their channels of promotion, are different. Even if the duties and responsibilities are same, parity would not be permissible, as against a superior post, such as 9 a promotional post (see - Union of India v. Pradip Kumar Dey7, and the Hukum Chand Gupta case17).

42.10. A comparison between the subject post and the reference post, under the principle of "equal pay for equal work', cannot be made, where the subject post and the reference post are in different establishments, having a different

management. Or even, where the establishments are in different geographical locations, though owned by the same master (see - the Harbans Lal case23). Persons engaged differently, and being paid out of different funds, would not be entitled to pay parity (see - Official Liquidator v. Dayanand13).

42.11. Different pay-scales, in certain eventualities, would be permissible even for posts clubbed together at the same hierarchy in the cadre. As for instance, if the duties and responsibilities of one of the posts are more onerous, or are exposed to higher nature of operational work/risk, the principle of "equal pay for equal work' would not be applicable. And also when, the reference post includes the responsibility to take crucial decisions, and that is not so for the subject post (see - the State Bank of India case8).

42.12. The priority given to different types of posts, under the prevailing policies of the Government, can also be a relevant factor for placing different posts under different payscales. Herein also, the principle of "equal pay for equal work' would not be applicable (see - State of Haryana v. Haryana Civil Secretariat Personal Staff Association9).

42.13. The parity in pay, under the principle of "equal pay for equal work', cannot be claimed, merely on the ground, that at an earlier point of time, the subject post and the reference post, were placed in the same pay- scale. The principle of "equal pay for equal work' is applicable only when it is shown, that the incumbents of the subject post and the reference post, discharge similar duties and responsibilities (see - State of West Bengal v. West Bengal Minimum Wages Inspectors Association14).

42.14. For parity in pay-scales, under the principle of "equal pay for equal work', equation in the nature of duties, is of paramount importance. If the principal nature of duties of one post is teaching, whereas that of the other is non-teaching, the principle would not be applicable. If the dominant nature of duties of one post is of control and management, whereas the subject post has no such duties, the principle would not be applicable. Likewise, if the central nature of duties of one post is of quality control, whereas the subject post has minimal duties of quality control, the principle would not be applicable (see - Union Territory Administration, Chandigarh v. Manju Mathur15).

42.15. There can be a valid classification in the matter of pay-scales, between employees even holding posts with the same nomenclature i.e., between those discharging duties at the headquarters, and others working at the institutional/sub-office level (see - the Hukum Chand Gupta case17), when the duties are qualitatively dissimilar.

42.16. The principle of "equal pay for equal work' would not be applicable, where a differential higher pay-scale is extended to persons discharging the same duties and holding the same designation, with the objective of ameliorating stagnation, or on account of lack of promotional avenues (see - the Hukum Chand Gupta case17).

42.17. Where there is no comparison between one set of employees of one organization, and another set of employees of a different organization, there can be no question of equation of pay-scales, under the principle of "equal pay for equal work', even if two organizations have a common employer. Likewise, if the management and control of two organizations, is with different entities, which are independent of one another, the

principle of "equal pay for equal work' would not apply (see - the S.C. Chandra case12, and the National Aluminum Company Limited case18). 60. Having traversed the legal parameters with reference to the application of the principle of "equal pay for equal work', in relation to 11 temporary employees (daily-wage employees, ad-hoc appointees, employees appointed on casual basis, contractual employees and the like), the sole factor that requires our determination is, whether the concerned employees (before this Court), were rendering similar duties and responsibilities, as were being discharged by regular employees, holding the same/corresponding posts. This exercise would require the application of the parameters of the principle of "equal pay for equal work' summarized by us in paragraph 42 above. However, insofar as the instant aspect of the matter is concerned, it is not difficult for us to record the factual position. We say so, because it was fairly acknowledged by the learned counsel representing the State of Punjab, that all the temporary employees in the present bunch of appeals, were appointed against posts which were also available in the regular cadre/establishment. It was also accepted, that during the course of their employment, the concerned temporary employees were being randomly deputed to discharge duties and responsibilities, which at some point in time, were assigned to regular employees. Likewise, regular employees holding substantive posts, were also posted to discharge the same work, which was assigned to temporary employees, from time to time. There is, therefore, no room for any doubt, that the duties and responsibilities discharged by the temporary employees in the present set of appeals, were the same as were being discharged by regular employees. It is not the case of the appellants, that the respondent-employees did not possess the qualifications prescribed for appointment on regular basis. Furthermore, it is not the case of the State, that any of the temporary employees would not be entitled to pay parity, on any of the principles summarized by us in paragraph 42 hereinabove. There can be no doubt, that the principle of "equal pay for equal work' would be applicable to all the concerned temporary employees, so as to vest in them the right to claim wages, at par with the minimum of the pay-scale of regularly engaged Government employees, holding the same post.

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.

11. Accordingly, the writ petition is allowed. The State/respondents are directed to pay and release the salary to the petitioners at par with Allopathic Medical Officers and Dental Medical Officers from the date when the same was paid to the Allopathic and Dental Medical Officers, within a period of three months from today with arrears."

15. The High Court of Uttrakhand allowed the writ petition and held the AYUSH doctors should be treated at par with the Allopathic doctors and are entitled for the same honorarium. The said judgment was challenged before the Hon'ble Apex Court in Special Leave to Appeal (Civil) No. 33645 of 2018, which was dismissed by means of order dated 24.03.2022. Same issue has been raised before this Court where the AYUSH doctors have been denied the benefit of

ACP, which was made admissible to the medical officers of Provincial Medical Services, there also the State Government had tried discriminate between medical officers (Ayurvedic) from AYUSH and Allopathic doctors.

16. 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/-.

17. 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.

18. The facts, inter se parties, are not disputed.

19. 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 hereinbelow:

''(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–3

क्र0 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/–*

20. 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) (i) 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 जायेंगेः–*

(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।''***

21. 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.

22. 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 practice 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).

23. 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 others, SLP (C) No. 10156 of 2019**.

24. 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 hereinbelow:

"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."

25. 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 others,** Writ Petition No. 484 (S/B) of 2014.

26. 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."

27. State of Uttrakhand, aggrieved by he order of the High court, carried the decision in appeal to the Supreme Court where the appeal (SLP (Civil) No. 33645 of 2018)was dismissed , 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."

28. 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.

29. 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 others, (1989) 2 SCC 235, State of Madhya Pradesh Versus R.D. Sharma and others, Manu/SC/0098/2022, Dr. Puneet Kumar Gupta and another Versus Union of India through Secy. Ministry of Health and Family and others, Writ Petition No. 738 (S/B) of 2015, S.C. Chandra and others Versus State of Jharkhand and others, (2007) 8 SCC 279.**

30. 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.

31. 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.

32. 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.

33. 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).

34. 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 hereinbelow:

"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."

35. 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.

36. 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.

37. 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.

38. 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.

39. 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.

40. 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.

41. 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.

42. 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 realm of administrative policy. But the question is whether such a policy upon being provided can discriminate amongst different streams of medicine practiced 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.

43. Accordingly, the writ petition is **allowed**.

44. The impugned order dated 29.03.2019, passed by the Principal Secretary, Medical and Health Department, Government of U.P., Lucknow, is hereby 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 also.

(2022) 11 ILRA 1036
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2022

BEFORE

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

Special Appeal Defective No. 323 of 2022

Public Service Commission, U.P. Prayagraj
...Appellant
Versus
JWO Satish Chandra Shukla (Retd.) & Ors.
...Respondents

Counsel for the Appellant:
Sri Rakesh Pandey, Senior Advocate Sri Nipun Singh, Sri G.K. Singh, Sr. Advocate

Counsel for the Respondents:
Sri Ajay Mishra, Advocate General, Sri K.R. Singh, Chief Standing Counsel, Sri A.B.N. Tripathi, Sri T. Islam

Civil Law – Constitution of India, 1950 - Article 226, - U. P. Public Services Reservation for Physically Handicapped, Dependants of Freedom Fighters and Ex-servicemen Act, 1993 - Sections 3, 3(1), 3(1)(i-a), 3(2), 5, 5(1) & 5(1-A) – Appeals – 8888888888888 arising out of allowed the 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*U.P.ressio 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. Prashant Kumar Vs St. of U.P. & ors., 2005 (4) E.S.C. 2395 (All)

2. Shankar K. Mandal & ors.Vs St. of Bihar & ors., (2003) 9 SCC 519

3. Ashok Kumar Sharma Vs Chander Shekhar, (1997) 4 SCC 18 : 1997 SCC (L&S) 913

4. BhU.P.inderpal Singh Vs St. of Punjab, (2000) 5 SCC 262 : 2000 SCC (L&S) 639

5. Jasbir Rani Vs St. of Pun., (2002) 1 SCC 124 : 2002 SCC (L&S) 107

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

1. This Special Appeal by the Uttar Pradesh Public Service Commission is directed against a judgment and order dated August 2, 2022, allowing Writ - A No. 18091 of 2021.

2. The writ-petitioners, who are respondent nos. 1 to 4 to this Appeal, are all Ex-Servicemen, who have retired or been discharged from different positions in the Armed Forces of the Union, such as the Army or the Navy.

3. The grievance of the writ-petitioners is that they are entitled to be considered under The Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) (Amendment) Act, 2021 (for short, '2021 Act'), entitling them to a 5% reservation in the ongoing selection/ recruitment, held pursuant to Advertisement No. A-1/E-1/2021 dated February 5, 2021 to the "Combined State/ Upper Subordinate Services (PCS) Examination, 2021 and Assistant Conservator of Forest (A.C.F.)/ Range Forest Officer (R.F.O.) Services Examination - 2021" (for short, 'the PCS Examination, 2021').

4. The learned Single Judge has set out in copious detail the facts of the case, including the rival stands of the writ-petitioner-respondents (for short, 'the writ petitioners') and the Uttar Pradesh Public Service Commission (for short, 'the Commission'), which need not be recapitulated here, except the essentials on which the event in the cause turns.

5. Prior to the enactment of The Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993 (U.P. Act No. 4 of 1993) (for short, 'the 1993 Act'), reservation for Ex-Servicemen in different services of the State was governed by circulars and government orders issued by the State Government under the directions and control of the Government of India. In the days prior to enforcement of the 1993 Act, reservation for Ex-Servicemen existed in all categories of posts under the State, including Group A, B, C and D. Upon enactment and enforcement of the 1993 Act, however, there was codification of the State's Policy regarding horizontal reservation *inter alia* for the Ex-Servicemen. A total of 5% of vacancies at the stage of direct recruitment in favour of the Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen were reserved under Section 3(1) of the 1993 Act

by virtue of Section 3(2). The *inter se* quota of each category was entrusted to be fixed by the State Government from time to time by notified order. The 1993 Act came into force on December 11, 1993. The 1993 Act, however, suffered an amendment *vide* U.P. Act No. 6 of 1997 (for short, 'the First Amendment Act'), enforced w.e.f. July 31, 1997. The First Amendment Act brought about the change that the *inter se* percentage of reservation to the three categories of horizontal reservation, that was left to the State Government to determine by notified order, was specified by the 1993 Act itself substituting the existing sub-Section (1) of Section 3. The First Amendment Act pro*vide*d that in posts to be filled up by direct recruitment, 2% of vacancies shall be reserved for dependents of Freedom Fighters and 1% for Ex-Servicemen.

6. A second amendment to the 1993 Act was made by U.P. Act No. 29 of 1999 and enhanced the percentage of reservation for the Ex-Servicemen within the 5% horizontal reservation quota from 1% to 2%. However, by clause (i-a) of sub-Section (1) brought in through the amendment to the existing Section 3 of the 1993 Act, it was pro*vide*d in the following terms:

"3. In section 3 of the principal Act, in sub-section (1) for clause *(i)* the following clauses shall be substituted, namely−

"*(i)* in public services and posts two per cent of vacancies for dependents of freedom fighters:

(i-a) in public services and posts other than group "A' posts or group 'B' posts on and from May 21, 1999 two per cent of vacancies, and on and from the date on which the Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) (Amendment) Act, 1999 is published in the *Gazette* five per cent of vacancies, for Ex-servicemen;"

7. Section 5 of the 1993 Act was also amended by U.P. Act No. 29 of 1999 (for short, 'the Second Amendment Act'), providing in the following terms:

"4. In section 5 of the principal Act, for sub-section (1), the following sub-sections shall be substituted, namely:

"(1) The Provisions of this Act as amended by the Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) (Amendment) Act, 1997 shall not apply to cases in which selection process has been initiated before the commencement of the said Act of 1997 and such cases shall be dealt with in accordance with the provisions of this Act as they stood before such commencement.

(1-A) The Provisions of this Act as amended by the Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-servicemen) (Amendment) Act, 1999 shall not apply to cases in which selection process has been initiated before the commencement of the said Act of 1999 and such cases shall be dealt with in accordance with the provisions of this Act as they stood before such commencement.

Explanation-For the purposes of sub-sections (1) and (1-A) the selection process shall be deemed to have been initiated where, under the relevant service rules, recruitment is to be made on the basis of-

(i) written test or interview only, the written test or the interview, as the case may be, has started; or

(ii) both written test and interview, the written test has started."

8. It must be remarked that for extension of the benefit of reservation of the lesser 1% reduced by the First Amendment Act, there was an identical provision to amend Section 5 of the 1993 Act. A look at the provisions of the Second Amendment Act would show that while it enhanced the percentage of reservation for Ex-Servicemen in the Public Services and posts in connection with affairs of the State, where vacancies were to be filled by direct recruitment, from 1% to 5%, but excluded the applicability of this horizontal reservation insofar as Group A and B posts were concerned. Earlier it was applicable for posts of all categories. The other feature of seminal importance to both the First and the Second Amendment Acts is how the relative amendments would affect the ongoing recruitment at the relevant time. Both the First and the Second Amendment Acts said in unequivocal terms that the relative Amending Act shall not apply to cases, where the selection process was initiated before commencement of the Amendment Act concerned. It was also made explicit that all cases, where the selection process had been initiated before commencement of the Amendment Act concerned, such cases shall be dealt with in accordance with the provisions of the 1993 Act, as these stood immediately before the enforcement of the relevant Amendment Act. The appended explanation to the amended provisions introduced through both the First and the Second Amendment Acts to the existing provisions of Section 5 of the 1993 Act carried an explanation, also identical in terms in both the amendments. The explanation appended to the amended provisions of Section 5 stipulates when the selection process shall be deemed to have been initiated and pro*vide*s in the terms that the amended provisions of Section 5 extracted hereinabove show. In case of a recruitment made on the basis of a written test or interview alone, the written test or the interview, as the case may be, once started, would be regarded as initiation of the selection process. In cases where both written test and interview are envisaged under the Service Rules, the selection process would be regarded as initiated when the written test has started.

9. Now, by a further amendment to the 1993 Act made through U.P. Act No. 14 of 2021, which has been published in the Official *Gazette* on March 10, 2021, the existing clause (i-a) of sub-Section (1) of Section 3 has been amended to pro*vide* as follows:

"2. In section 3 of the Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993 in sub-section (1) for the existing clause (i-a), the following clause shall be *substituted*, namely:- (i-a) in public services and posts other than Group 'A' posts, on and from the date on which the Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) (Amendment) Act, 2021 is published in the *Gazette*, five, percent of vacancies for ex-servicemen."

U.P. Act No. 14 of 2021, for the sake of convenience, shall hereinafter be called as 'the Third Amendment Act'.

10. It may also be mentioned here in the passing that the Amendment Acts were preceded by ordinances to the said effect about which there is no issue in the writ petition, giving rise to this Appeal.

Advertisement No. A-1/E-1/2021 was issued by the Commission on February 5, 2021, inviting applications for recruitment to posts through the PCS Examination, 2021. The last date for submission of online form was March 5, 2021. By the notification bearing No. 48/01/ई-1/2020-21 dated March 10, 2021, it was pro*vide*d as under:

"उ0प्र0 लोक सेवा आयोग, प्रयागराज द्वारा सम्मिलित राज्य / प्रवर अधीनस्थ सेवा परीक्षा, 2021 तथा सहायक वन संरक्षक / क्षेत्रीय वन अधिकारी सेवा परीक्षा, 2021 से संबंधित विज्ञापन संख्या- ए-1 / ई -1/2021 दिनांक 05.02.2021 को जारी किया गया था जिसके संबंध में अभ्यर्थियों से आनलाइन आवेदन पत्र निर्धारित अन्तिम तिथि दिनांक 05.03.2021 तक प्राप्त किये जा चुके हैं।

उक्त विज्ञापन से संबंधित कतिपय अभ्यर्थियों के फोटो व हस्ताक्षर त्रुटि पूर्ण पाये गये है, जिनकी सूचना आयोग की वेबसाइट http://uppsc.up.nic.in पर उपलब्ध है। अतः उक्त विज्ञापन के अभ्यर्थियों को दिनांक 10.03.2021 से 17.03.2021 तक सही फोटो व हस्ताक्षर पुनः अपलोड करने का अन्तिम अवसर प्रदान करते हुए उनसे अपेक्षा की जाती है कि वे नियत तिथि तक फोटो व हस्ताक्षर आयोग की उक्त वेबसाइट पर अपलोड़ कर दें। नियत तिथि के उपरान्त इस हेतु कोई अवसर नहीं प्रदान किया जाएगा तथा इस सम्बन्ध में किसी प्रत्यावेदन पर विचार किया जाना सम्भव नहीं होगा।"

(emphasis by Court)

11. The writ petitioners, who applied for recruitment through the PCS Examination, 2021, with the last date for submission of the application form being March 5, 2021, claimed that they are entitled to the benefit of reservation for Ex-Servicemen regarding Group B posts, that has been introduced by the Third Amendment Act. The Commission have denied the benefit of horizontal reservation to the writ petitioners in the category of Ex-Servicemen based on the Third Amendment Act on ground that the third amendment is expressly made effective from the date of publication of the Third Amendment Act in the Official *Gazette* on March 10, 2021, whereas the last date for submission of the online application form was March 5, 2021. The Commission, therefore, took a stand that the writ petitioners cannot be extended the benefit of the Third Amendment Act.

12. It is the writ petitioners' case that they were informed by the Commission on August 27, 2021 through a reply sent by their Public Information Officer that the Government Order with regard to reservation for the Ex-Servicemen was issued on March 16, 2021, after the last date for submission of online application forms for the PCS Examination, 2021 i.e. March 5, 2021. As such, the amended provisions would not enure to the writ petitioners' benefits. It appears that on October 24, 2021, the writ petitioners appeared in the preliminary examination and the results of the preliminary examination were declared on December 1, 2021. The writ petitioners failed to qualify. Accordingly, the writ petitioners instituted the present writ petition some times in December, 2021, seeking extension of the benefit of the Third Amendment Act. It is, therefore, the writ petitioners' case that if they were extended the benefit under the Third Amendment Act, the PCS Examination, 2021 being one for a Group B posts, the writ petitioners, who were Ex-Servicemen, would qualify the preliminary examinations in the reservation category and get a chance to appear in the main

written test. It is on this cause of action that the writ petitioners have instituted the writ petition asking for the issue of a mandamus to the Commission to implement the necessary follow-up action, in terms of the provisions of the Third Amendment Act to the ongoing selection process for the PCS Examination, 2021, insofar as it relates to the writ petitioners.

13. The Commission contested the aforesaid claim put forward by the writ petitioners and urged for a principle that the Third Amendment Act being prospective, would not apply to a case, where the last date of submission of the online application form had already gone by, when the Third Amendment Act was introduced. The Commission, therefore, contended before the learned Single Judge that the benefit of the Third Amendment Act cannot be extended to the writ petitioners. The learned Judge, however, has allowed the writ petition, quashed the decision of the Commission to deny benefit of the Third Amendment Act to the writ petitioners and issued a mandamus to re-determine the preliminary examination results, giving benefit of reservation to Ex-Servicemen on Group B and C posts. The learned Judge has further ordered that after publication of the preliminary examination results within one month, admit cards be issued for the main written examination based on the results of the preliminaries, and further, the results of the main examination be declared giving 5% reservation on Group B posts to Ex-Servicemen. Call letters for interview have been directed to be issued accordingly.

14. Aggrieved, the Commission have preferred this Appeal under Chapter VIII Rule 5 of the Rules of Court, 1952.

15. Heard Mr. Rakesh Pande, learned Senior Advocate assisted by Mr. Nipun Singh, learned Counsel on behalf of the Commission, Mr. Ajay Mishra, learned Advocate General assisted by Mr. K.R. Singh, learned Chief Standing Counsel appearing on behalf of the State of U.P. and Mr. A.B.N. Tripathi and Mr. T. Islam, learned Advocates for the writ petitioners.

16. It is submitted by the learned Senior Advocate appearing for the Commission that the learned Single Judge has failed to take into account the fact that the last date of submission of online application form was March 5, 2021 and the Third Amendment Act came to be published in the Official *Gazette* on March 10, 2021. As such, the provisions of reservation with regard to Group B posts for Ex-Servicemen, introduced through the Third Amendment Act, cannot enure to the writ petitioners' benefit. It is further pointed out that the writ petitioners were informed by the Commission on August 27, 2021, prior to the preliminary examination that the Third Amendment Act would not enure for their benefit, but they chose to sit the examination without challenging the action of the Commission at that stage, and once they have failed to clear the preliminary examination held on October 24, 2021, the results whereof were declared on December 1, 2021, they have brought the writ petition, giving rise to this Appeal. It is contended that the writ petitioners are estopped from challenging the result of the selections, once they have sat the preliminary examinations after due communication of the fact that the benefit of the Third Amendment Act would not be available to them.

17. It is argued that the learned Single Judge has failed to appreciate that the amendments to Section 5 of the 1993 Act, introducing amended sub-Sections (1) and (1-

A) by the First and the Second Amendments to the existing Section 5 of the 1993 Act is different from that introduced by the Third Amendment Act, inasmuch as it does not carry any explanation of the kind found in sub-Sections (1) and (1-A), introduced through the First and the Second Amendment Acts. In the absence of the decisive explanation in the Third Amendment Act, the applicability of the 1993 Act would depend on the last date mentioned in the advertisement for receipt of the application forms online. Here, the last date of application forms online was March 5, 2021, whereas the Third Amendment Act was published in the Official *Gazette* on March 10, 2021. It is also said in criticism of the learned Single Judge's judgment that the learned Single Judge has misconstrued the notification dated March 10, 2021 as an extension of date for submission of the online application forms, whereas it was an extension of date for certain corrections to forms, already uploaded, on or before the last date fixed for receipt of the online forms. It is also urged that the learned Judge has failed to take into consideration the fact that the entire selection process has almost concluded and August 5, 2022 is the last date for interview, whereafter results would be declared. Interference with the selection process at this stage is not warranted. It is emphasized that the writ petitioners are four in number, whereas other similarly circumstanced do not object. To allow the writ petition at this stage would throw the entire selection process out of gear.

18. The learned Advocate General has supported the submissions advanced by the learned Senior Counsel appearing for the Commission.

19. On the other hand, the learned Counsel for the writ petitioners have supported the impugned order and the reasoning of the learned Single Judge.

20. Upon hearing the learned Counsel for parties, we are unable to agree on any of the counts that the learned Single Judge has found for the writ petitioners.

21. The remarks of the learned Single Judge that the last date for submission of online application forms as the determining criteria for eligibility bear reference to eligibility as such, say with reference to the essential qualifications etc., but has no bearing for the purpose of applying reservation in an ongoing recruitment appear to be based on unaccepted reasoning. The learned Judge has distinguished the decision of the Full Bench of this Court in **Prashant Kumar v. State of U.P. and others, 2005 (4) E.S.C. 2395 (All)** on ground that the case dealt with eligibility for persons, who were not notified as O.B.C. until the last date for filling up of the online application forms, but thereafter. It has been remarked by the learned Judge that here the writ petitioners are Ex-Servicemen and at the time of submission of the application forms, they have claimed that category for the purpose of age relaxation. It has also been remarked by the learned Judge that the last date for submission of the application forms had been extended by the Commission through a Press Release dated March 10, 2021 from the said date to March 17, 2021 and that Group B posts were included by way of the Third Amendment Act, notified on March 15, 2021. In fact, the Third Amendment Act was notified by publication in the Official *Gazette* on March 10, 2021. It has been observed that the Third Amendment Act made the benefit applicable on and from the date of publication in the Official *Gazette*. It did not require any separate

Government Order to make it applicable. It has then been observed by the learned Judge that the legislature had consciously avoided introducing any sub-clause to Section 5 of the 1993 Act, saving the ongoing selections as it had done on earlier occasions when the Second and Third Amendment Acts were notified. According to the learned Judge, the intention of the legislature was clear and it was the obduracy on the Commission's part in declining to extend the benefit of reservation in Group B posts to the writ petitioners under the Third Amendment Act.

22. So far as these findings of the learned Judge are concerned, we are not in agreement with them except for the remarks that the Third Amendment Act did not require a separate Government Order to be issued to make it applicable. In fact, no Government Order appears to have been issued to enforce the Act. The mention of the Government Order has figured in some communication by the Commission on account of a poor forensic understanding of their functionaries, but nothing here turns upon it.

23. The Third Amendment Act is clear in its intendment and that it is applicable from the date when it was notified in the Official *Gazette*. It is clearly prospective in nature; not retrospective by any principle of construction. It is a well settled principle of statutory construction that any substantive law, particularly one creating, curtailing, enlarging an existing right or providing for a new one, is deemed to be prospective, unless expressed to be retrospective. Reverse principle may apply in case of procedural laws. Here, the Third Amendment Act introduces a new right and that is provision of reservation to Ex-Servicemen on posts under the State in Group B. Earlier by the Second Amendment Act, reservation for Ex-Servicemen though increased in numerical percentage, had withdrawn it vis-a-vis Group B posts. Thus, the Third Amendment Act brought in a new right i.e. reservation in Group B posts under the State for Ex-Servicemen. A statute of this kind, creating a new right, can hardly be regarded as retrospective. Moreover, the Third Amendment Act expressly says *vide* clause (i-a), introduced by Section 2 of that Amendment Act, that it would be applicable from the date that the Amendment Act is published in the *Gazette*, granting 5% reservation to Ex-Servicemen. It is also not in dispute that the Third Amendment Act was published in the Official *Gazette* on March 10, 2021.

24. The general principles about the prospective operation of laws, including amendments that introduce or affect substantive rights, have been the subject matter of elucidation in **Principles of Statutory Interpretation**, Thirteenth Edition by Justice G.P. Singh, where on the basis of judicial authority, the learned Commentator has exposited:

"2.
RETROSPECTIVE OPERATION

(a) General principles

"*(i)* x x x x

(ii) *Statutes dealing with substantive rights.*- It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the

statute sufficient to show the intention of the Legislature to affect existing rights, it is "deemed to be prospective only *"nova constitutio futuris formam imponere debet non prae teritis' [2 c. Int. 392]"* In the words of LORD BLANESBURG, "provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. "Every statute, it has been said", observed LOPES, L.J., "which takes away or impairs vested rights acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions already past, must be presumed to be intended not to have a retrospective effect". As a logical corollary of the general rule, that retrospective operation is not taken to be intended unless that intention is manifested by express words or necessary implication, there is a subordinate rule to the effect that a statute or a section in it is not to be construed so as to have larger retrospective operation than its language renders necessary. .....

"..... An amending Act is, therefore, not retrospective merely be cause it applies also to those to whom pre-amended Act was applicable if the amended Act has operation from the date of its amendment and not from an anterior date. But this does not mean that a statute which takes away or impairs any vested right acquired under existing laws or which creates a new obligation or imposes a new burden in respect of past trans actions will not be treated as retrospective. Thus to apply an amending Act, which creates a new obligation to pay additional compensation, or which reduces the rate of compensation, to pending proceedings for de termination of compensation for acquisitions already made, will be to construe it retrospective which cannot be done unless such a construction follows from express words or necessary implication. Similarly, a new law enhancing compensation payable in respect of an accident arising out of use of motor vehicle will not be applicable to accidents taking place before its enforcement and pending proceedings for assessment of compensation will not be affected by such a law unless by express words or necessary implication the new law is retrospective. It makes no difference in application of these principles that the amendment is by substitution or otherwise..."

25. One principal limb of the reasoning that the learned Judge has adopted to apply the Third Amendment Act to the ongoing selection is the conscious omission of a clause similar to sub-Sections (1) and (1-A) of Section 5, with the appended explanation as finds place in the First and the Second Amendment Acts. Those clauses, amending Section 5 of the 1993 Act, introduced through the First and the Second Amendment Acts, indicating that the relative amendments would not be applicable to the ongoing selection process and then explaining what ongoing process means, has in fact made those amendments applicable to ongoing selections that had not reached the stage of the written test or the interview, or the written test alone, as the case may be, as per the contingencies there. In more specific terms, the amendments to the changed horizontal reservation in Public Services, including those for Ex-Servicemen by the First and the Second Amendment Acts, would apply to a selection process, where the last date of receipt of application forms had gone by, but in a case where the selection was to be made through written test or interview, the written test or interview, as the case may be, had not commenced. The omission of a

similar clause in the Third Amendment is not to be understood the way the learned Single Judge has done. The learned Single Judge has interpreted the omission virtually to mean that the Third Amendment would apply to cases in which the process of selection had already been initiated, the absence of a clause similar to sub-Sections (1) and (1-A) of Section 5 of the 1993 Act, relative to the Third Amendment Act, makes the Third Amendment Act prospective on its own terms.

26. The learned Single Judge has held that in the 1993 Act, by the First and the Second Amendments, the legislature has introduced a fiction, which explains when the selection process would start. In the opinion of the learned Judge, the fiction introduced by sub-Sections (1) and (1-A) to Section 5 of the 1993 Act, by the First and the Second Amendment Acts, would also apply to the substituted clause (i-a) of sub-Section (1) of Section 3 of the 1993 Act, brought in by means of the Third Amendment Act. This Court has noticed above that there is no corresponding amendment to Section 5 vis-a-vis clause (i-a) of sub-Section (1) of Section 3, as substituted by the Third Amendment Act, in the manner that the provision was introduced by amending sub-Sections (1) and (1-A) of Section 5 of the 1993 Act, through the First and the Second Amendment Acts. Therefore, the fiction about what selection process would mean for the purpose of clause (i-a) of sub-Section (1) of Section 3, substituted by the Third Amendment Act, is not at all relevant. The learned Single Judge has clearly erred in applying the provisions of sub-Sections (1) and (1-A) of Section 5 of the First and the Second Amendment Acts or the Second Amendment Act alone to the amendment brought in by the Third Amendment Act, which does not carry a corresponding clause creating a fiction about what commencement of the selection process would mean.

27. Now, the question arises, what would be the date or the point of time or the event, when the amendment would become applicable on a prospective basis.

28. The learned Single Judge has taken note of the decision of the Supreme Court in **Shankar K. Mandal and others v. State of Bihar and others, (2003) 9 SCC 519,** where it has been held:

"5. ..... What happens when a cut-off date is fixed for fulfilling the prescribed qualification relating to age by a candidate for appointment and the effect of any non-prescription has been considered by this Court in several cases. The principles culled out from the decisions of this Court (see *Ashok Kumar Sharma v. Chander Shekhar* [(1997) 4 SCC 18 : 1997 SCC (L&S) 913] , *Bhupinderpal Singh v. State of Punjab* [(2000) 5 SCC 262 : 2000 SCC (L&S) 639] and *Jasbir Rani v. State of Punjab* [(2002) 1 SCC 124 : 2002 SCC (L&S) 107]) are as follows:

(1) The cut-off date by reference to which the eligibility requirement must be satisfied by the candidate seeking a public employment is the date appointed by the relevant service rules.

(2) If there is no cut-off date appointed by the rules then such date shall be as appointed for the purpose in the advertisement calling for applications.

(3) If there is no such date appointed then the eligibility criteria shall be applied by reference to the last date appointed by which the applications were to be received by the competent authority."

29. There are remarks by the learned Single Judge, particularly in Paragraph No. 22 of the impugned judgment that show that the principles in **Shankar K. Mandal** *(supra)* had not been held applicable because the learned Judge has thought that the principles in **Shankar K. Mandal** are referable to eligibility of a candidate with reference to his/ her educational qualifications etc. These principles do not apply to the case of reservation.

30. The decision of the Full Bench in **Prashant Kumar** *(supra)* had the following question for consideration before their Lordships:

"At what stage the caste of a candidate should be entered in the Schedule-I of the U.P. Public Services (Reservation for Scheduled Caste, Scheduled Tribes and Other Backward Classes) Act, 1994 for him to get benefit as an O.B.C. candidate. Should it be before the notification/advertisement of the selections, or the written test, or the oral test (in case of oral test only), or the declaration of the result?"

31. It was answered in the following terms:

"30. We consequently answer the question as follows:

"The benefit of reservation to "Other Backward Class' candidates in selection in Public Services by direct recruitment as pro*vide*d by U.P. Public Service (Reservation for Scheduled Caste/Scheduled Tribes and Other Backward Class) Act, 1994, is applicable, to only those categories or castes which are notified as Other Backward Classes entered in Schedule-I of the Act, upto the last date of filling up of the application form for such selections, pro*vide*d there is no contrary provision in the Service Rules, the terms and conditions of recruitment, or in the advertisement.""

32. The decision of the Full Bench also pegs down the date of eligibility to the last date for the filing of the application form. The decisions that indicate the last date of submission of application forms to be the date by which the eligibility qualification for declaration of a reservation category must come into existence, would also apply on principle to the present case. Here, what is sought in substance is a reservation category, may be horizontal, that was not available to the writ petitioners until the last date of submission of their application forms. It became available under the Third Amendment Act w.e.f. the date it was published in the Official *Gazette* i.e. March 10, 2021. The last date for submission of the application forms was clearly March 5, 2021. On principle, therefore, the eligibility under the Third Amendment Act has to be judged with reference to the last date for submission of the application forms for the PCS Examination, 2021.

33. The learned Single Judge has also held that the last date of submission of the application forms must be deemed to be extended until March 17, 2021, because a perusal of the Press Release dated March 10, 2021 shows that the Portal of the Commission remained open for making modification/ corrections to application forms submitted by candidates. It has been opined that if the Commission was careful enough, it could have extended the benefit of reservation in Group B posts to the writ petitioners in terms of the Third Amendment Act, that was published in the *gazette* on March 10, 2021, inasmuch as the

amendment was made applicable on and from the date of its publication in the Official *Gazette*. We do not agree. A perusal of the Press Note dated March 10, 2021 indicates that the Commission have clearly mentioned therein that it has received application forms from candidates for the PCS Examination, 2021 in response to the advertisement dated February 5, 2021 by the last date fixed i.e. March 5, 2021. It is then said that in some cases, mistakes about the photographs or in the signatures of the candidates made, have been found, the information regarding which has been posted on the Commission's website. The Notification/ Press Note then goes on to say that the candidates who have uploaded their application forms carrying defects relating to their photographs or signatures, would have last opportunity between March 10, 2021 and March 17, 2021, to upload their correct photographs and signatures. Thereafter, there would be no further opportunity.

34. The said Notification/ Press Note dated March 10, 2021, in our opinion, has been patently misconstrued by the learned Single Judge to be an extension of the last date for receipt of the application forms for the PCS Examination, 2021. It is no more than extension of a limited facility to those candidates, who had applied by the last date fixed i.e. March 5, 2021, but had some errors or discrepancy about their uploaded photographs or signatures, to rectify those errors. There was no extension of the last date for submission of the application form. Contrary to the opinion of the learned Single Judge, we think that the Notification/ Press Note dated March 10, 2021 reinforces the position that the last date for receipt of the application forms from eligible candidates was March 5, 2021.

35. Having found the legal position obtaining in the case that the rule about the date by which eligibility under the Third Amendment Act has to be considered is the last date, on which the application forms for the examination in question have to be submitted, the benefit of the Third Amendment Act, which came into force after the last date for receipt of application forms for the PCS Examination, 2021, would not enure to the writ petitioners' benefit.

36. So far as the application of the principle of estoppel after sitting the examination is concerned, the learned Single Judge has discarded it for reason that it would not be applicable to a case, where it is a question of discrimination based on misapplication of the Rules. We do not disagree with that part of the reasoning of the learned Judge, but the same would be of no consequence in view of the other findings of ours in this judgment.

37. In the result, this Appeal succeeds and is allowed. The impugned judgment and order dated August 2, 2022 passed by the learned Single Judge is set aside and the writ petition stands dismissed.

(2022) 11 ILRA 1047
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.11.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

Writ-A No. 3967 of 2019

Smt. Kusum Gupta
...Defendant-Tenant-Petitioner
Versus
Prescribed Authority/Civil Judge (Sr. Div.), Distt. Shahjahanpur & Ors.
...Respondents

Counsel for the Petitioner:
Sri Kshitij Shailendra

Counsel for the Respondents:
Sri Utpal Chatterjee, Sri Shireesh Gopesh

Civil Law – Constitution of India - Article - 226, - U.P. Urban Building Regulation of Letting, Rent and Eviction Act, 1972 - Section - 21(1)(a) - Transfer of Property Act,1882 - Section - 107 - Tenant's Petition - challenging impugned order of release & eviction - Question of comparative hardship - Landlord moved application for release & eviction of demised shop on the ground of *bona fide* needs - tenant's case that she has constantly made efforts to secure another shop on rent, but remained unsuccessful which has not been considered - eviction of tenant would certainly involve some hardship - but where the landlord's bona-fide need is established, the tenant's interest has to yield on the scale of comparative hardship - landlord cannot be deprived of the gainful use of his own premises - Court finds that, both of Courts of fact below have found the case of Landlord established on issue of bona-fide need and comparative hardship - it is not for this court to interfere with those findings of fact, merely because a different view, even a better one, is possible - petition fails and is dismissed - directions issued for vacating the demised shop accordingly.(Para – 34, 35, 37, 39, 40)

Writ Petition is dismissed. (E-11)

List of Cases cited: -

1. Manorama Dubey Vs Dr. Santosh Kumar Khanna & ors., 2017 (3) ARC 468,

2. Syed Sugara Zaidi Vs Laeeq Ahmad (Dead) through LRs & ors., (2018) 2 SCC 21,

3. Dr. K. Gopal Vs Smt. Sudarshan Devi Bhatia, 2012 (92) AllLR 364,

4. Kishore Kumar Chaurasia Vs Durga Devi, 2016 (2) ARC 642,

5. Gyan Prakash Vs Ram Kumar Goyal, 2017 (1) ARC 413,

(Delivered by Hon'ble J.J. Munir, J.)

1. This is a tenant's writ petition, challenging an order of release and eviction 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') passed concurrently by the two Authorities below.

2. Shyam Sundar Gupta moved an application for release and eviction under Section 21(1)(a) of the Act before the Prescribed Authority (Civil Judge, Sr. Div., Shahjahanpur), seeking release of the shop, detailed at the foot of the application and currently in the tenancy occupation of Smt. Kusum Lata, the petitioner. The application was moved by Shyam Sundar Gupta, hereinafter referred to as 'the landlord' with a case that the shop, subject matter of proceedings (for short, 'the demised shop') was exclusively owned by the landlord. The demised shop had fallen to the landlord's share in a family settlement on 24.04.1998, a fact admitted to Smt. Kusum Lata. Smt. Kusum Lata has, later on in proceedings before the Courts below, been referred to as Smt. Kusum Gupta. It is clarified that Smt. Kusum Lata and Smt. Kusum Gupta are one and the same person. For the sake of convenience, Smt. Kusum Gupta shall hereinafter be referred to as 'the tenant'.

3. It is the landlord's case that the tenant is in occupation of the demised shop at a monthly rent of Rs.800/- since 27.11.1987. The landlord's father, Radhey Shyam Gupta had executed a registered lease dated 27.11.1987 in the tenant's favour, letting out the demised shop for a term of ten years with a stipulation that at the end of every ten years, if the term of the

tenancy is enlarged, there would be an escalation in rent for the next ten years by 10% automatically. The landlord's father passed away in the year 1997 and the landlord, in the events to follow, did not renew or extend the lease. In consequence, the term of the lease has not been renewed and the tenancy has outlived its life. It is no longer current. It was also pleaded by the landlord that the demised shop was constructed, admittedly prior to the year 1987 and is, accordingly, governed by the provisions of the Act. The landlord is employed with the Ordnance Factory at Shahjahanpur and scheduled to retire on 30.06.2011. He is serving on the post of Inspector (Tailoring). The landlord asserted that post retirement, he would estimatedly draw a pension of Rs.5000/- per mensem. During service, the landlord has drawn excessively from his Provident Fund to meet contingent expenditure, according to requirements of the family. The said withdrawal has been made in advance. Likewise, the residue of the landlord's gratuity is a negligible sum. Upon his retirement, the landlord requires the demised shop to keep himself busy, augment his income to secure himself against age-related ailments, to earn money for defraying the expenses of his daughter's wedding, and above all, to settle his younger son in business, where there is tough competition to face. It is on all the above counts that the landlord needs the demised shop *bona fide*.

4. The landlord has, in his family, besides himself, his aged mother, his wife Smt. Vijay Laxmi, two sons Saurabh Gupta and Tushar Gupta and a daughter Km. Shweta Gupta. The landlord's wife is a teacher at the Baba Vishwanath Junior High School, Town Hall Road, Shahjahanpur on a monthly salary of Rs.5000/-. The elder son Saurabh Gupta is a Public Relations Officer with the Bajaj Allianz and posted at NOIDA. He is a married man, who receives a total monthly salary of Rs.18,000/-. He resides with his wife at NOIDA. Given the dearness in the present times, he does not extend any financial help to the landlord nor is he capable of doing that. The landlord's other son, Tushar Gupta has passed his Intermediate Examination and after retirement, the landlord would not be in a position to educate his son further. Accordingly, he needs the demised shop to enable his son to be by his side in order to establish and run a shop, dealing in cosmetics, clothes, saaris, branded shirts, trousers etc. The landlord's daughter is aged 24 years and has done her graduation. She can well take care of the household and the landlord bears the responsibility of arranging her marriage. After retirement, the landlord would be without livelihood. He has no such member in the family domiciled at Shahjahanpur, whom the landlord may look up to in times of need and one who could provide for the landlord or his family or help them in any manner. In the circumstances, the only option available to the landlord is to seek release of the demised shop and establish his own shop therein, which would enable the landlord to stay active until he lives in the mortal world, and at the same time, marry off his daughter. It would also help him ensure that his son Tushar Gupta becomes proficient in business. It is the landlord's assertion that there is no other shop, besides the demised shop to establish himself and his son in business.

5. By contrast, it is said for the tenant that he has two daughters, both of whom have received higher education in Ghaziabad and are in receipt of handsome

emoluments. They are settled at Delhi. The tenant's son, Amit, who was married recently, owns a number of tankers that he not only leases out for transportation, but also uses them to carry his own goods for trade in those tankers. The tenant's relationship with her son is not cordial. In the event, the tenant vacates the demised shop, she would not suffer any hardship. Her husband Ashok Kumar is engaged in the business of a cloth merchant and earlier, would trade in gold biscuits that he bought in Bombay and sold off in Shahjahanpur. The balance of comparative hardship lies in favour of the landlord. It was also pleaded by the landlord that the tenant keeps indifferent schedule and opens shop once in a while during the course of a week or two. In case the tenant vacates the demised shop, she would not suffer any injury. She can easily shift business to another premises, whereas the landlord has no other alternative arrangement. It would be very inappropriate if the landlord establishes his shop taking the premises on rent though he has his own. At a distance of 200 yards from the demised shop, which is located in the Sadar Bazar, Shahjahanpur, is the shop of one Krishna Gopal. The said shop is a big one and located on the roadside. It is situate in Mohalla Sadar Bazar, opposite the Arya Mahila Degree College. The said shop is available on rent and also up for sale. The entire circumstances, including how Krishna Gopal's business in the said shop has come to an end, have been pleaded by the landlord, as also the fact that the shop available on rent, and otherwise lying closed. It is on the basis of these averments that the landlord asked the demised shop to be released.

6. The tenant put in his written statement and admitted the execution of the lease deed dated 27.11.1987 and the terms thereof. The fact, that the Act applies, is also admitted to the tenant. In the additional pleas, it is the tenant's case that she entered the demised shop as a tenant on a monthly rent of Rs.800/- through the registered lease deed dated 27.11.1987, executed by Radhey Shyam Gupta. According to the covenants in the lease, the term is ten years, whereafter it is extendable by ten years, that is to say, up to the year 2007. It is also provided in the lease that after the first extension of ten years, a further extension of another ten years can be done, which would secure the lease up to the year 2017. Thereafter, the tenancy could continue by consent of parties. As such, the tenant's case is that given the terms of the lease, the landlord is not entitled to institute the present proceedings for release, which are premature and, therefore, not maintainable. The lease has not expired by efflux of time. The application for release has been instituted contrary to terms of the lease. The case is barred by the principle of estoppel and acquiescence. According to the tenant, the landlord is bent upon evicting the tenant by stating falsehood and thereby extinguish her source of livelihood. In order to fulfill the aforesaid wish of his, the landlord served a notice dated 22.12.1997, that was replied to by the tenant. This was followed by a notice served by the landlord himself. It was absolutely baseless and demanded of the tenant to vacate the demised shop, besides raising an illegal demand of rent etc. A suit for eviction was instituted in the Court of the Judge, Small Cause being S.C.C. Suit No. 14 of 1999, seeking the tenant's eviction. The said suit was tried and dismissed by the Trial Judge vide judgment and decree dated 25.05.2011.

7. It is tenant's case that the aforesaid facts show that it is the landlord's desire to evict the tenant, which has not been fulfilled

so far. The case is said to be barred by res judicata as well. The landlord draws a monthly pension of Rs.35,000/-. He has received a lavish sum of money towards Provident Fund, Gratuity and Group Insurance. The landlord's wife is a Headmistress. She draws a salary of Rs.40,000/- per month. The elder son Saurabh Gupta is employed with the Bajaj Allianz at NOIDA, drawing a monthly sum of Rs.50,000/-. His wife is also in service and earns a salary of Rs.30,000/- per month. The younger son Tushar Gupta, whose need has been pleaded by the landlord alongside his own, after doing his graduation, is preparing to write the examinations for selection to the Indian Administrative Service or the Provincial Civil Service. He has his interest in education; not in trade or business. He wants to become an Officer. The landlord's daughter is already married. The landlord is leading a luxurious life and has no need for the demised shop to establish his business. Also, the landlord is not capable of doing business, of which he has no experience. He has never been detailed by the Ordnance Factory on jobs of sale and purchase of clothes. The case that the landlord has made out is a device to evict the tenant. Thereafter, he would let out the shop on rent after charging a big premium. The landlord's son is not unemployed and his need neither genuine nor *bona fide*. In the event the demised shop is not vacated, the landlord would not face any difficulty. By contrast, if the tenant is evicted, she would suffer great hardship. The business housed in the demised shop is the only source of livelihood for the tenant and members of her family. The tenant and her family, if evicted, would be reduced to penury. They would suffer greater hardship in comparison to the landlord.

8. The tenant has earned goodwill at the place, that is to say, the demised shop, where she has been doing business. Her husband has been assisting her in the venture. He has no business of his own. The landlord's assertions, to the contrary, are incorrect. There is no other shop close by or in the vicinity, that can be secured on rent by the tenant. The shop, which the landlord says belongs to Krishna Gopal and claimed to be available on rent, is not being offered for rent; or even for sale. The tenant has searched for a shop in the entire Bazar, but could find none. The landlord owns other shops that are in his possession and if he wants to set up business, he can utilize one of those shops. It is also pleaded that none of the tenant's daughters have received education in Ghaziabad. Both of them have read in Sudama Prasad Bal Vidya Mandir, Shahjahanpur and one of them has passed her Intermediate, whereas the other has appeared in the examination privately. The younger daughter of the tenant is married. The elder is yet to marry. The tenant's son is engaged in the job selling building material at Bareilly *(Ret-Bajari)*. He does not own tankers, nor does he offer them on rent for transportation. He is financially not well off. It has been admitted that the relationship of the tenant and her son is not cordial. He is not in possession of the tenant's house or any part of it, as claimed. The tenant has asked on these pleadings that the landlord's application for release be dismissed.

9. The landlord in support of his case filed by way of documentary evidence, a photostat copy of the memorandum of family settlement and photostat copy of the map annexed to the memorandum dated 24.04.1998. These bear Paper Nos. 33 and 32, respectively. Further, an affidavit was filed by the landlord, Shyam Sundar Gupta in support of his case for release bearing Paper No. 33B, another affidavit by PW-2

Manoj Kumar, Paper No. 33C, still another by Shiv Prasad Gupta PW-3, Paper No. 33D and an affidavit of PW-4 Jagdish Prasad, Paper No. 33E. Shyam Sundar Gupta also filed his counter affidavit, bearing Paper No. 92 and an affidavit of Tushar Gupta, his son, Paper No. 94.

10. The tenant filed her own affidavit, bearing Paper No. 77, besides that of Ashok Kumar Gupta, Paper No. 85 and that of Alok Kumar, Paper No. 86. In addition, affidavit of one Vinod Kumar Singh Tanwar was also filed, Paper No. 87. Ashok Kumar Gupta also filed a counter affidavit, bearing Paper No. 96.

11. The Prescribed Authority framed the followings issues (translated into English from Hindi):

(1) Whether the applicant's case is premature?

(2) Whether there is relationship of landlord and tenant between parties?

(3) The issue of *bona fide* need.

(4) The balance of comparative hardship/ if in the event of release of the demised shop (or refusal), which party would suffer greater hardship?

12. The Prescribed Authority held that the release application was not premature, because on the date it came up for determination, the period of lease that could be the maximum extension, that is to say, up to 27.11.2017, was over. About the relationship of landlord and tenant between parties, it was held in favour of the landlord on the tenant's admission. The issue of *bona fide* need was answered for the landlord upon evaluation of evidence led by both sides and so was the comparative hardship. The release application was allowed by the Prescribed Authority vide judgment and order dated 18.04.2018, ordering the tenant to deliver possession of the demised shop to the landlord within three months, failing which the landlord would have the right to recover the same through process of Court. This order carried the usual direction to the landlord to pay two years' rent within 45 days to the tenant. The order passed by the Prescribed Authority was questioned in appeal under Section 22 of the Act, which was rather unconventionally nomenclatured as a Civil Appeal, before the Court of the District Judge, Shahjahanpur. It was assigned Civil Appeal No. 33 of 2018 and heard by the District Judge, sitting as the Appellate Authority under the Act. The District Judge, by her judgment and order impugned dated 24.12.2018, dismissed the appeal and affirmed the order passed by the Prescribed Authority.

13. Dissatisfied with the orders of release passed by the two Courts below, the tenant has instituted the present writ petition under Article 226 of the Constitution.

14. Notice pending admission was issued on 12.03.2019 and stay of eviction was granted on the condition of deposit of rent/ damages at the rate of Rs. 5000/- per month with effect from the month of March, 2019. Pending admission, parties have exchanged affidavits. Later on, the petition was formally admitted to hearing, which proceeded forthwith and judgment was reserved.

15. Heard Mr. Kshitij Shailendra, learned Counsel for the tenant and Mr. Utpal Chaterjee, Advocate along with Mr. Shireesh Gopesh, Advocate, learned Counsel appearing on behalf of the landlord.

16. Mr. Kshitij Shailendra, learned Counsel for the tenant has extensively argued on the issue that the release application was premature when made, because the term of the lease had not come to an end by that time. He further submits that it was not stricto sensu a lease for a fixed term, since it carried an initial term of ten years, renewable for another ten years twice, at the expiration of the initial period of lease or the term first extended. This submission the learned Counsel for the tenant has come up with in the context of the provisions of Section 21(4) of the Act, which read:

"Section 21. Proceedings for release of building under occupation of tenant.- (1) x x x x

(2) x x x x

(3) x x x x

(4) An order under sub-section (1) or sub-section (1-A) or sub-section (2), may be made notwithstanding that the tenancy has not been determined:

Provided that no such order shall be made in the case of a tenancy created for a fixed term by a registered lease before the expiry of such term.

....."

(Emphasis by Court)

17. It is submitted by the learned Counsel for the tenant that the landlord instituted proceedings for release, moving the application before the Prescribed Authority in the month of April, 2011. The registered lease was executed on 27.11.1987 with a right to the tenant to ask for extension for a period of ten years after the initial term was over and a further right to again ask for a ten years' renewal, when the first extension was over. The lease would, thus, come to an end not before 26.11.2017. It is submitted that the Courts below have misconstrued the terms of the registered lease, particularly the Appellate Court, when it has remarked that the lease expired in the year 2007 and the release application was filed after that date. This is contrary to the terms of the lease deed as well as the admission of the landlord, where he says that the period of lease expired on 26.11.2017. The attention of the Court in this connection was invited to the landlord's counter affidavit, Paper No. 92C, where in Paragraph No. 9, the landlord has averred that the lease deed dated 27.11.1987 was for a fixed period of ten years, renewable twice, each for a period of ten years, and, accordingly, on 26.11.2017, the tenancy would come to an end by efflux of time.

18. The learned Counsel for the tenant has, on this point also, criticized the judgment of the Prescribed Authority in that, that she placed reliance upon the decision of this Court in **Manorama Dubey vs. Dr. Santosh Kumar Khanna and others, 2017 (3) ARC 468** regarding the term of tenancy and a fortiori the prematurity of action. It is urged that the said judgment is not at all applicable here, because that was a case of subsequent purchase and the necessity of notice by the subsequent purchaser in terms of the first proviso to Section 21.

19. The learned Counsel for the landlord, on the other hand, has submitted that the period of tenancy/ lease fixed by the registered sale deed dated 27.11.1987 was a term of ten years, extendable twice for the same period, that is to say, a total period of 30 years, with the consent of the landlord alone. It is urged that Radhey Shyam Gupta, the landlord's father, who had let out the demised shop passed away on 22.12.1997. After family settlement, the

demised shop fell to the landlord's share. He has been attorned as the landlord by the tenant. It is urged that right from the year 1997 till date, the landlord has never consented to the extension of the tenancy in accordance with the registered lease deed. In this connection, Mr. Utpal Chaterjee has drawn the Court's attention to Clause 2 of the lease at Page 90 of the paper-book and submits that there is no evidence about the two further renewals for ten years, in terms of the covenant for renewal carried in the registered lease deed. As such, the term of the lease expired on 26.11.1987 and the release application moved in the year 2011, is not premature at all.

20. This Court has carefully considered the submissions advanced by the learned Counsel appearing for both parties, perused the lease deed, in particular, and the record.

21. In order to appreciate the contention of the parties, the terms of demise made through the registered lease deed dated 27.11.1987 and Clause 2 of the lessee's covenants, including Clause 5 of the lessor's covenants must be referred to. These read:

"THIS INDENTURE made at Shahjahanpur, this 26th day of November One Thousand Nine Hundred and Eight Seven between Sri Radhey Shyam Gupta S/o Late Shyam Lal Gupta, resident of Mohalla Sadar Bazar, Shahjahanpur hereinafter called "The Lessor" (which expression shall shall unless it be repugnant to the context or meaning thereof deemed to include his respective heirs and executors) of the FIRST PART; and Srimati Kusum Gupta W/o Sri Ashok Kumar R/o Moh. Bahadurganj, District Shahjahanpur, hereinafter called "The Lessee" (which express shall unless it be repugnant to the context or meaning thereof be deemed to include her heirs and executors) of the OTHER PART. Witnesseth that for and on the consideration of rent hereinafter reserved and of the convenant and conditions hereinafter contained and on the part of the Lessee to be paid, observed and performed the Lessor to do hereby demise and lease unto the Lessee a portion of the ground-floor of the residential building on the Eastern Side, hereinafter called "the premises" measuring 327.42 sq. ft. (15'-10.5"x20'-5") more or less for the purpose of shop bounded as under situated in Bazar-Sadar Bazar, Shahjahanpur and of which the Lessee will be in occupation TO HAVE AND TO HOLD the said demised or expressed so to be unto the Lessor for the term of ten years YIELDING AND PAYING therefor during the said term unto the Lessee, the clear monthly rent of Rs.800/- only (Rupees Eight Hundred Only) to be paid monthly from the date of handing over possession of the premises intended to be leased to the Lessee, i.e. 27 Nov. 1987 after the execution of these presents.

THE LESSEE'S CONVENANTS

1- x x x x

2- The Lessee will have option to renew the said lease for a further period upto the extent of another ten years at the enhanced rent of 10% and upon the same terms and conditions. The Lessee may further opt to renew the lease for another period of next ten years at a further enhanced rent of 10% on the rent prevailing at the time of expiry of the schedule lease and upon the same terms and conditions, except the clause for further renewal and to this condition the Lessor will not be entitled to object in any case;"

THE LESSOR'S CONVENANTS

5- The Lessor shall grant renewal of the said lease by mutual consent or otherwise for a further period of ten years and so on the terms and conditions as mentioned in para No.2 of this lease the Lessee's convenants as aforesaid mentioned."

22. A conjoint perusal of the terms of the demise, initially created by the registered lease deed and the relevant covenants in the deed, in this Court's opinion, make the time period of the tenancy patent. The registered lease deed creates a fixed term lease for a period of ten years w.e.f. 27.11.1987. Upon its own term, it would come to an end on 26.11.1997. Clause 2 of the lessee's covenants and the corresponding Clause 5 of the lessor's covenants, empower the lessee to demand extension of the lease twice for a period of ten years; first on the expiry of the initial term; and, second, on the expiry of the extended term of ten years. A close reading of Clause 2 of the lessee's covenant shows that the lessee has a right to seek extension, which the lessor by virtue of Clause 5 of his covenants is bound to extend, because the words "mutual consent' occurring in the lessor's covenant in Clause 5 is followed by 'or otherwise' and goes on to say that the renewal is to be made on the terms and conditions as mentioned in Clause 2. Clause 2 gives an option to the lessee to ask for renewal, which does not appear upon any construction of the terms to admit of a right of refusal by the lessor. The consequence is that the registered lease deed dated 27.11.1987 is indeed a fixed term lease, carrying a covenant for renewal in the terms indicated.

23. The legal position about a covenant for renewal, which the lessee is entitled to have as a matter of right, does not mean that on the expiry of the initial term of the lease fixed, the renewal comes by ipso facto. Even if the lessor is bound to grant renewal on the lessee's demand or option, that renewal has to be granted in accordance with law. Since it is a case of a lease for a term exceeding one year, like the lease originally made in terms of the lease deed dated 27.11.1987, the deed of renewal of lease for the next ten years also has to be one made by a registered instrument. This is the inescapable conclusion upon a reading of the terms of Section 107 of the Transfer of Property Act, which say:

"107. Leases how made.-- A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

Where a lease of immoveable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee:

Provided that the State Government may, from time to time, by notification in the Official Gazette, direct that leases of immoveable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession."

24. This Court, in the view that we take, holds that a covenant in the lease deed providing for renewal does not ipso facto

extend the term of the lease. The view that we take has the assurance of the holding of the Supreme Court in **Syed Sugara Zaidi vs. Laeeq Ahmad (Dead) through LRs and others, (2018) 2 SCC 21.** In **Syed Sugara Zaidi** (*supra*), it has been held by their Lordships:

"**14**. The term in the lease agreement for renewal of lease deed does not ipso facto extend the tenure or term of the lease. So far as the clause for renewal in the lease deed is concerned, it was held in DDA v. Durga Chand Kaushish [DDA v. Durga Chand Kaushish, (1973) 2 SCC 825] that such covenant only entitled a lessee to obtain a fresh lease in accordance with and in due satisfaction of the law governing the making of leases. In the absence of renewal of rent agreement, in our considered view, the possession of the respondent-tenants in the demised premises has become unlawful and they are liable to be evicted."

25. There is another feature about the covenant of renewal in this case. It provides for an automatic escalation of rent by 10% of the monthly rent payable on each event of renewal. There is nothing on record to show that rent was ever enhanced from that initially fixed in the sum of Rs.800/- per month; and even if it was, there is no evidence to show that there was ever executed a deed of renewal of lease for a further term of ten years in terms of the covenant for renewal. This Court is, therefore, of opinion that the term of the registered lease deed dated 27.11.1987 expired on 26.11.1997. There was no renewal of the lease made in accordance with law, even though the tenant had a right to claim it and the landlord was bound to grant it in terms of the covenants of the lessor and the lessee, carried in the registered lease deed. The term of the lease deed, thus, came to an end on 26.11.1997. Under the general law, the tenant would then continue as a tenant at sufferance and since the Act applies, she would be a statutory tenant under it. There is, thus, no force in the contention of the learned Counsel for the tenant that the release application was premature. For reasons, very different than those that have weighed with the Courts below, this Court concurs in the conclusion reached on the aforesaid issue by them.

26. The next point to be considered is whether the findings of the two Courts below on the issue of the *bona fide* need of the landlord is vitiated on account of perversity, manifest illegality or non-consideration of material evidence.

27. It is submitted by the learned Counsel for the tenant that the findings recorded by the Courts below on the issue of *bona fide* need are perverse and it is a case where the landlord had not approached the Prescribed Authority with clean hands. It is urged that his claim was based upon gross concealment of facts, particularly with respect to his status, availability of heavy funds with him, his monthly income, income and status of his sons and wife, as well as the existence of two shops, located to the west of his residential premises, that form part of the same building, that houses his residence. It is submitted that these shops were let out by the landlord after his retirement. Learned Counsel for the landlord has refuted the aforesaid submissions and said that it is up to the landlord to decide, which of the tenanted accommodation that he owns, he wishes to be released for the fulfillment of his *bona fide* need.

28. Upon hearing learned Counsel and perusing the impugned judgments as well

as the records, what this Court finds is that the primary inquiry to be made on the question of *bona fide* need is to determine whether the need set up by the landlord is an existing need for himself or a member of his family. The need that has been set up here is for the landlord himself and his unemployed son, Tushar to set up a retail outlet dealing in clothes, cosmetics etc. The landlord's need that has been made the basis of the case for release is that post retirement, he needs an occupation for himself to keep himself busy and further for the augmentation of his income. The coupled need for his son is to establish the young man in business, training him along the way so that it becomes an independent source of livelihood for him. Now, neither of the two needs, under the circumstances, can be said to be unreasonable or fanciful. The Courts below have found that the landlord's son, Tushar has earned his M.Com. decree, pending proceedings and what appears is that when proceedings commenced before the Prescribed Authority, Tushar had passed his intermediate. By the time, proceedings before the Authority of first instance reached terminus, Tushar had passed his M.Com. The Courts below have not found Tushar to be engaged in any gainful and stable employment. According to the tenant's case also, Tushar, after passing his M.Com., is engaged in offering tuitions and coaching, that yields him Rs. 40,000/- per month. Tuition and coaching sans evidence of proceeds from that pursuit, is the most flimsy pretext to show an educated man or woman to be gainfully employed. The Courts below have not believed this engagement of Tushar to be gainful or yielding or even existing. There is no reason for this Court to take a contrary view in the absence of some material evidence that the Courts below have omitted to consider on this point. The landlord can certainly seek release of any premises that he owns, in the occupation of a tenant, to settle an adult member of his family in business, trade, occupation or profession, utilizing the tenanted accommodation. The need for provision of occupation to an adult member of the landlord's family is a good ground to support a case of *bona fide* need, urged by the landlord under Section 21(1)(a) of the Act. In this connection, reference may be made to the decision of this Court in **Dr. K. Gopal vs. Smt. Sudarshan Devi Bhatia, 2012 (92) ALR 364,** where it has been held:

"56. It is not possible to accept this submission of learned counsel for the petitioner. It is no doubt true that the husband and the two sons of the landlady are engaged in the business of silver ornaments from the house situated at Kali Thatheran Chowk Bazar, Mathura, but the documents on record filed by the parties indicate that the business was being run in the name of the elder son of the landlady. The landlady had filed the application for release of the disputed shop as she wanted to establish her younger son Pankaj in independent business. It cannot be said that such a need is not a bonafide need even if Pankaj was actually assisting his father and his brother in the business from the residential house. This is what has been observed by the Supreme Court in Akhileshwar Kumar v. Mustaqim, AIR 2003 SC 532 which has been relied by the Appellate Court and the observations are:-

"3. In our opinion, the approach adopted by the High Court cannot be countenanced and has occasioned a failure of justice. Overwhelming evidence is available to show that the plaintiff No. 1 is sitting idle, without any adequate

commercial activity available to him so as to gainfully employ him. The plaintiff No. 1 and his father both have deposed to this fact. Simply because the plaintiff No. 1 is provisionally assisting his father in their family business, it does not mean that he should never start his own independent business. What the High Court has overlooked is the evidence to the effect, relied on by the trial Court too, that the husband of plaintiff No. 4, i.e. son-in-law of Ram Chandra Sao, was assisting the latter in his business and there was little left to be done by the three sons."

29. To the same effect is the holding of this Court in **Kishore Kumar Chaurasia vs. Durga Devi, 2016 (2) ARC 642** and that of the Uttarakhand High Court in **Gyan Prakash vs. Ram Kumar Goyal, 2017 (1) ARC 413.**

30. The other limb, on which the case of *bona fide* need is urged by the landlord, is about his own occupation and augmentation of income. There is no doubt about it that the landlord is a retired government servant and merely because he is enjoying a pension or has received post-retirement funds, is no ground to deny him the benefit of seeking augmentation of his income or finding for himself an occupation to keep himself busy. The said requirement of the landlord's is also one that validly supports a case of *bona fide* need. The view that the Courts have taken on the issue of *bona fide* need is one that is a reasonable inference on facts and evidence, bearing in mind the law applicable.

31. The other aspect emphasized by the learned Counsel for the tenant is that the the landlord has two shops to the west of his residential premises, that were not disclosed in the release application and which he let out after his retirement. The Courts below, particularly, the Appellate Court has taken note of the fact that it took the tenant a long period of time to file a written statement- a period of about four years. The Appellate Court has noticed that the tenant in her affidavit has deposed that the landlord has suppressed the fact from the Court that to the west of his house, there are two shops. It is remarked that though the tenant and her husband have said in their affidavits that the two shops to the west of the landlord's house have been recently constructed, the two photographs of these shops annexed, showing a jeweller and courier company housed there, indicate the shops to be quite small. The fact that the shops are small is a finding of fact recorded by the Appellate Court on the basis of material placed on record by the tenant. The tenant has not brought on record the precise dimensions of these shops to rebut the Court's impression about the shops being small.

32. It has also been remarked that considering that the shops have been recently constructed, the time when the landlord moved the release application, these shops would not have been in existence. The precise date of construction of the shops or whether the shops were in existence at the time when the application was presented, does not appear to be there on record. The Appellate Court has concluded that when the release application was filed, the landlord had no other shop. This Court must observe that whether the shops were in existence before the release application was filed or these were subsequently constructed and let out during release proceedings, the Courts of fact below have opined that the shops to the west of the landlord's premises appear to be

small. The landlord has a right to use his resources and raise constructions on his premises that might yield him rent to augment his income, particularly after retirement. It does not mean that the landlord has no need for the demised shop to house his proposed business, which he intends to establish along with his son. The two shops, already let out or subsequently constructed and let out during proceedings, in the landlord's judgment might not be suitable for him. The landlord cannot be asked or directed to satisfy his requirement, which is otherwise well established on record by utilizing a particular part of the premises, that is vacant with him or let out to another tenant. It is well settled that the landlord is the master of his requirement that he has established before the Court. The landlord led evidence and established that he does need the demised shop in order to set up business for himself and his son, retailing in clothes, cosmetics etc. The Courts below have concurrently accepted on valid premises the landlord's case of *bona fide* need.

33. The learned Counsel for the tenant has further submitted that the Courts below have not considered the case of partial release, that was urged before the them. In this connection, this Court has carefully looked into the impugned judgments. The Appellate Court has specifically noticed the tenant's case for partial release, which is to the effect that some part of the demised shop, which admeasures 16'x21', abutting the landlord's residential premises on the western side, can be utilized by taking some area out of it and some out of the landlord's house to construct a shop for the fulfillment of the landlord's need. The Appellate Court has rejected this contention, saying that once the landlord's need is established for the demised shop, there is no reason why the landlord should be asked to take some area out of the demised shop and some from his premises or the other two shops, to construct a new one. The said finding, in the clear opinion of this Court, is not in any way vitiated by any manifest illegality. *Bona fide* need for the demised shop being established, equities hardly arise in this case for grant of partial release.

34. So far as the question of comparative hardship is concerned, the Courts below have also found it to be established in favour of the landlord on ex facie valid grounds. The Appellate Court has noticed the landlord's contention that the alternative shops enumerated by the landlord are not feasible or viable for business. About the tenant's case that she has constantly made efforts to secure another shop on rent, but remained unsuccessful, the Appellate Court has opined that there is no evidence about these efforts being made. There is no mention of the owners whose shops she attempted to secure on rent. No material is produced to show that she made any application to the R.C. & E.O. for allotment of a vacant shop. The principle is well settled that if the tenant has not made efforts to look for alternative accommodation, the issue of comparative hardship goes against him/ her. Here, the tenant has made an assertion that she attempted to secure other shops on rent, but failed. However, as rightly remarked by the Appellate Court, there is nothing on record by way of material to show that efforts were, in fact, made to secure an alternative shop. The minimum requirement to establish her case by the tenant about making efforts to look for an alternative shop, would be to come out with the names of owners of shops, who were approached for renting their premises, or

else the proof of an application made to the R.C. & E.O. for allotment of a suitable vacant shop. However, none of these facts or evidence have been pleaded or produced to establish a case of search for alternative accommodation by the tenant, even after commencement of proceedings for release before the Courts below.

35. Eviction of the tenant would certainly involve some hardship, but where the landlord's *bona fide* need is established, the tenant's interest has to yield, even if in the scale of comparative hardship, the two are evenly balanced. Here, it certainly appears that the case of comparative hardship is tilted clearly in favour of the landlord. One of the reasons is the landlord's supervening retirement, much after the demised shop was let out to the tenant, and the other, an adult son, a member of his family, who has earned his degrees, sitting idle without employment. The landlord cannot be deprived of the gainful use of his own premises to keep himself occupied and settle his son in business, in order to secure the tenant's ongoing business in the premises. The question of long standing goodwill was also urged as relevant to the issue of comparative hardship. It must be remarked that goodwill, as well settled by now, is something that goes with the person and not the premises. On that submission of the tenant's, the findings on the issue of comparative hardship, cannot be held bad.

36. This Court must also take notice of the fact that the tenant has been in occupation of the demised shop for the past more than 35 years, and after ten years, without extension of lease or enhancement of rent, as contracted initially. No doubt, this Court, while granting interim stay of eviction, enhanced the rent to a sum of Rs.5000/-, but that was limited to the purpose of the interim order alone. It cannot be gainsaid that the tenant has been enjoying the premises in all these decades on a paltry rent of Rs.800/-. The entire conspectus of facts and the non-revision of rent also disentitle the tenant to relief, invoking the equitable jurisdiction of this Court under Article 226 of the Constitution. That apart, the two Courts of fact below have found the case of the landlord established on issues of *bona fide* need and comparative hardship. It is not for this Court to interfere with those findings of fact, merely because a different view, even a better one, is possible.

37. This petition **fails** and is **dismissed**.

38. The interim order dated 12.03.2019 is hereby **vacated**.

39. However, considering the facts and circumstances, the tenant is allowed six months time to handover peaceful and vacant possession of the shop in dispute provided she executes an undertaking before the Prescribed Authority, Shahjahanpur, embodying the following terms within one month of the date of receipt of a certified copy of this order:

(1) The tenant shall handover peaceful and vacant possession of the demised shop to the landlord on or before 08.05.2023.

(2) During the period of six months that the tenant remains in occupation, she will not sublet the demised shop, damage or disfigure it in any manner whatsoever.

40. In the event, an undertaking, as above directed, is not filed before the

Prescribed Authority by the tenant within the time allowed or the undertaking violated, the release order shall become executable **forthwith**.

(2022) 11 ILRA 1061
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.11.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

Writ-A No. 10347 of 2018

Aligarh Sarrafa Committee, Sarrafa Bazar, Aligarh & Anr. ...Petitioners
Versus
Smt. Prabha Rani & Ors. ...Respondents

Counsel for the Petitioners:
Sri Pankaj Agarwal

Counsel for the Respondents:
Ms. Akansha Gaur, Kashi Naresh Mishra

Civil Law – Constitution of India,1950 - Article - 226, - U.P. Urban Building Regulation of Letting, Rent and Eviction Act, 1972- Section - 21(1)(a) - U.P. Urban Building Regulation of Letting, Rent and Eviction Rules, 1972 - Rule - 16(2)(b) - Tenant's Petition - challenging impugned order of release & eviction - Question of comparative hardship & bona fide needs - Landlord moved application for release & eviction of demised shop on the ground of *bona fide* needs - Landlady's son is under a contractual engagement with a private hospital at Delhi, being doctor he wants to established a clinic there at Aligarh - on the other hand, tenant has property close by, even vacant and available, where he can shift - it is a well settle law that, tenant cannot dictate to the landlord, even if he has other property, the one he choose to establish his business or profession - the finding of both court below is well - this court is not inclined to interfere with the findings, therefore, on the issue of comparative hardship - thus, tenant is not entitled to relief in the exercise of extraordinary jurisdiction under article 226 of the constitution - petition fails and is dismissed - directions issued for vacating the demised shop accordingly.(Para – 31, 32, 33, 34, 36)

Writ Petition is dismissed. (E-11)

List of Cases cited: -

1. Smt. Kanta & ors. Vs Additional District Judge, Lucknow & ors., 2015 (1) ARC 459 (LB)

2. Bhagwat Prasad Agrawal Vs Radha Raman Agrawal, 2015 (2) ARC 370

(Delivered by Hon'ble J.J. Munir, J.)

1. This is a tenants' petition against an order of release passed 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') passed concurrently by the two Authorities below.

2. The two petitioners, who are effectively one, are tenants in a shop, situate at Sarrafa Bazar, Aligarh, admeasuring 15 square meters, of which Smt. Prabha Rani, respondent no.1 to this petition, is the landlady. The shop aforesaid is held by the petitioners at a monthly rent of Rs.50/-. The said shop shall hereinafter be called "the demised shop'.

3. The facts giving rise to this petition are that Smt. Pratibha Rani, respondent no.1, who shall hereinafter be referred to as the landlady, instituted the present proceedings under Section 21(1)(a) of the Act with the case that she purchased two shops, admeasuring 15 square meters, situate at Sarrafa Bazar, Aligarh, through a registered sale deed dated 31.10.1995. Out of the two shops, the smaller one, which has a door of one meter, is in the occupation of the landlady's husband,

Manohar Lal Gupta, who carries on the business of a jeweller therein. The other shop, that has a door of two meters wide, is in the tenancy occupation of the Aligarh Sarrafa Committee since the time of the previous owner and landlord, at the monthly rent, already mentioned hereinabove. It is the said shop, that has already been introduced hereinbefore as the demised shop. The Aligarh Sarrafa Committee, Sarrafa Bazar, Aligarh is a registered body, which has a triennial election and is represented by its Secretary. The Secretary of the aforesaid Sarrafa Committee is responsible for all actions of the Body and is competent to prosecute and defend legal proceedings on its behalf. The Aligarh Sarrafa Committee shall hereinafter be referred to as 'the tenant'. It is the landlady's case that the tenant has a weighbridge (*dharamkanta*) installed in the demised shop. For the present, the weighbridge is not in use. Every shop in the Sarrafa Bazar is now equipped with electronic weighing machines.

4. The tenant, apart from the demised shop, has another at Rafatganj, located at a short distance from the former. The tenant is the owner of the latter shop, where also a weighbridge is installed. The shop at Rafatganj also by and large remains closed. In addition, the tenant has still another shop, located at a distance of about 20 yards in the Surajbhan Market, Purani Kotwali, Aligarh, where too a weighbridge is installed. Whatever use the tenant has for a weighbridge is sufficiently met by the one that is housed in the shop that the tenant has at the Surajbhan Market. The Surajbhan Market is also part of the Sarrafa Bazar and, therefore, good for the requirements of the tenant. The tenant has one more shop, located near the *Pyaun*, that is situate opposite Kunji Lal's shop. The said shop is vacant and lying locked. The tenant is the owner of the said shop. Apart from all these three shops, barely 50 yards away from the demised shop, the tenant has a property known as *'Atithi Grih'*, situate at Purani Kotwali, Sarrafa Bazar. The said property is a mere 50 yards away from the demised shop. This property is a four storeyed building and apart from the occupancy on the ground floor, all floors of the building are lying vacant. The tenant can easily establish its weighbridge in any of these properties. It must be remarked here that the way the landlady has received assistance in the drafting of her application, it appears to be the result of inexperience or poor forensic talent. This Court says so because the first part of the application, in a case under Section 21(1)(a) of the Act, ought to carry pleadings about the landlord/landlady's bona fide need. The pleadings, that have just now been mentioned, seem to refer to the facts that are relevant about the issue of comparative hardship, which should come next after the pleadings related to the *bona fide* need. Nevertheless, despite the inartistic manner in which the pleadings have been drafted, do not detract from the merits of the landlady's case, because the relevant averments are there, may be in unhappy sequence.

5. It is then averred by the landlady that she applied for release of the demised shop earlier, setting up the *bona fide* need that her husband required it. The aforesaid case being U.P. U.B. Case No. 56 of 1998 was rejected by the Prescribed Authority vide judgment and order dated 08.12.2007. The judgment was affirmed in appeal on 18.01.2011. The landlady's case is that her son Prashant Gupta, who is a Doctor, has earned his Postgraduate Degree (MD) in Ophthalmology from the All India Institute

of Medical Sciences, New Delhi and for the time being, employed temporarily at the Sanjay Gandhi Memorial Hospital, Mangolpuri, New Delhi as a Senior Resident. Prashant Gupta's wife, Smt. Savita Agrawal has earned her MD Degree in Pathology from the S.N. Medical College, Agra in the year 2008 and she too is temporarily working at New Delhi. Prashant Gupta is the only son of the landlady and wants to establish his clinic at Aligarh, utilizing the demised shop for the purpose. It is averred that there is no other doctor's clinic in the area. The clinic would offer stable employment to the landlady's son, where the husband and wife wife can practice together.

6. The landlady's case specifically urged is that she *bona fide* needs the demised shop for her son's clinic, particularly so as the landlady and her husband are moving towards old age and require their son's presence close at hand. In the event the demised shop is released, she would utilize it only for her son's clinic. She would not let out the shop again. It is averred at the tail-end of the application in a formal averment that comparative hardship lies in favour of the landlady and against the tenant.

7. The tenant filed its written statement, denying the landlady's case. It was, however, not denied that the landlady owns two shops, one of which is in her husband's occupation and further that her husband is engaged in business as a jeweller. It is also not disputed that the demised shop is held by the tenant on a monthly rent of Rs.50/-, where it has its weighbridge. It has been objected to by the tenant that the landlady has not filed any map along with her application. It is also pointed out by the tenant that Vijay Agrawal is the President of the Sarrafa Committee, Aligarh and Vinod Kumar is the Secretary. It is then pleaded on behalf of the tenant that the existence of the properties in Paragraph No. 3 is not admitted as pleaded, but this Court must remark that in Paragraph No. 4 of the written statement, the existence of the four properties, that the landlady has alleged in Paragraph No. 3 of the release application, has not been denied. What has been said is that those properties are not available to the tenant, because of non-vacancy. It is also asserted that it is incorrect to say that the weighbridge in the demised shop is non-functional.

8. It is also the tenant's case that the earlier release application, that the landlady had brought under Section 21(1)(a) of the Act on the grounds of her husband's requirement, has been rejected. The tenant has not denied the fact that the landlady has one son i.e. Prashant Gupta, but it is asserted that he is employed with the Sanjay Gandhi Memorial Hospital, Mangolpuri, New Delhi. It has further been said that the landlady is put to strict proof about her son's employment and that of his wife at New Delhi. It is the tenant's case that the landlady has not come to Court with clean hands. The landlady has not given out the details of her family members, their ages, status, business nor has she furnished the particulars of other properties owned by the members of her family at Aligarh or away from Aligarh. It is also pleaded that the dimensions of the shops purchased through the sale deed dated 31.10.1995 has not been given out.

9. It is the tenant's case that since the year 1994, the landlady has dragged the tenant to Court in baseless litigation. The landlady instituted Suit No. 457 of 1995,

which was dismissed on 30.09.1999. Another S.C.C. Suit No. 28 of 1995 was instituted by the landlady, which was dismissed on 06.02.1998. The first release application being U.P. U.B. Case No. 56 of 1998 was dismissed on 09.02.2007 and the appeal therefrom being U.P. U.B. Appeal No. 1 of 2007 was dismissed on 18.01.2011.

10. It is the tenant's case that the landlady has no *bona fide* need. She has a son and four daughters, all of whom are doctors. All the children after earning their MBBS Degrees have also earned MD Degrees. They are well settled. The son is married and his wife is also a doctor, who is employed at Delhi for the past number of years. The landlady's son and his wife have no intentions of coming back to Aligarh, and settling down or establishing a clinic at Aligarh. The tenant has also asserted that the landlady and her husband live in a house which they own, situate at Gandhi Nagar at Aligarh. The landlady's husband is quite old. He is said to be above 60 years. It is pleaded that the landlady's husband, apart from his business as a jeweller, is also into money lending, besides working as a broker. The landlady wants to enhance the rent payable by the tenant.

11. It is asserted that the landlady's case that after release of the demised shop, she would not let it out, is not true, because once released, she would sell off the demised shop and the adjoining one too. In their old age, the landlady and her husband would move out of Aligarh to Delhi and live with their son and daughter-in-law. It is further pleaded by the tenant that the demised shop is not suitable either for Prashant Gupta or his wife and the two together cannot establish their clinic or nursing home or Pathology Laboratory in a shop that small. The tenant has also said that the landlady owns 30 *bighas* (kachcha) of agricultural land in Village Bhinauli and one big residential house at Gandhi Nagar, Aligarh. That apart, she has a property in Delhi. Her bona fide need does not exist. The tenant has no other property in a vacant state and, therefore, it is not possible to move the weighbridge installed in the demised shop to any other premises. Interestingly, the tenant has also pleaded in Paragraph No. 23 of the written statement that Dr. Asha Rathi, Dr. G.M. Rathi, Dr. M.C. Garg, Dr. Mahesh Garg and Dr. Dinesh Chandra have their clinics in the vicinity.

12. The landlady filed a replication, where her pleaded in the release application was reiterated and elucidated while traversing the tenant's objections.

13. The landlady filed in evidence, her own affidavit, Paper No. 17-Ga, the affidavit of her son Dr. Prashant Gupta, Paper No. 18-Ga, an affidavit of one Satya Prakash Sharma, Paper No. 19-Ga, an affidavit of Hari Mohan Verma, Paper No. 20-Ga and still another affidavit of Rajbabu Verma, Paper No. 34-Ga. In the rejoinder, the landlady filed her own affidavit, Paper No. 35-Ga, that of Raghuvar Dayal Gupta, Paper No. 36-Ga, the affidavit of Ravindra Kumar Verma, Paper No. 41-Ga, besides the affidavit of Prabha Rani together with two photographs. Along with the affidavit, Paper No. 6-Ga, a photostat copy of the sale deed dated 01.11.1995, a photostat copy of Prashant Gupta's MD Degree and a photostat copy of the certificate relating to Savita Agrawal issued by the Dr. B.R. Ambedkar Medical University, Agra, were brought on record. A further affidavit, Paper No. 43-Ga has been filed by the landlady, annexing with it a photostat copy

of fellowship certificate from Shroff Eye Centre, New Delhi and an office order dated 14.11.2014 from the Uttar Pradesh Rural Institute of Medical Sciences and Research, Saifai, Etawah.

14. The tenant in its evidence has produced the affidavit bearing Paper No. 28-Ga from the Secretary, Sarrafa Committee, Vinod Kumar, another affidavit bearing Paper No. 29-Ga from Vinod Kumar, still another affidavit bearing Paper No. 30-Ga from Pradeep Agrawal and also an affidavit from the President, Sarrafa Committee, Vijay Agrawal (Paper No. 31-Ga), annexing with it the judgment dated 09.02.2007 in U.P. U.B. Case No. 56 of 1998, judgment dated 18.01.2011 in U.P. U.B. Appeal No. 1 of 2007, three rent receipts and two photographs. No documentary evidence, besides the above, was filed on behalf of the tenant.

15. The Courts below have found for the landlady on both counts of *bona fide* need and comparative hardship and granted the release application.

16. Aggrieved, the present writ petition has been instituted by the tenant.

17. Heard Mr. Pankaj Agarwal, learned Counsel for the tenant and Ms. Akanksha Gaur, learned Counsel for the landlady.

18. It is argued by Mr. Pankaj Agarwal, learned Counsel for the tenant that the landlady's son's need for establishing an Ophthalmology Clinic at Aligarh is without basis and flimsy. Her son Prashant Gupta along with his wife and children is a permanent resident of Delhi and working there. It is argued that there is nothing on record to show that the landlady's son has any intention to shift to Aligarh and set up his clinic, forsaking his roaring practice at Delhi. Learned Counsel for the tenant has drawn the Court's attention to the copy of the Voter ID Card and the other documents filed through the list bearing Paper No. 18-Ga, which show that the landlady's son is permanently residing at Delhi. It is argued that the Courts below ignoring all this evidence has allowed the release application on the ground alone that the landlord is the best judge of his requirement for the premises that he owns and the tenant cannot dictate terms to the landlord.

19. Ms. Akanksha Gaur, learned Counsel for the landlady, on the other hand, has refuted the submissions of Mr. Pankaj Agarwal. She has pointed out that the two Courts below have concurrently found the landlady's need to be *bona fide* and answered on the issue of comparative hardship also against the tenant, taking a plausible view of the matter, upon consideration of all evidence on record. It is not a case of non-consideration of material evidence. It is urged by the learned Counsel that there is no occasion for this Court to interfere with the concurrent findings of fact recorded by the two Courts below. It is particularly submitted that the tenant's case about the landlady's son being not minded to shift to Aligarh from Delhi, because he is well settled there, is without basis. Elucidating that submission of hers, learned Counsel points out that Prashant Gupta was first working with the Shroff Eye Centre, New Delhi. He then moved to the Sanjay Gandhi Memorial Hospital, Mangolpuri, New Delhi as a Senior Resident and thereafter to the Sitapur Eye Hospital. However, for the present, due to the difficulties faced by his aged parents,

domiciled at Aligarh, the landlady's son has established a clinic at Aligarh. It is also emphasized that Dr. Prashant Gupta was in private employment, until he moved to Aligarh and was not employed in any government service. He has shifted to Aligarh in the year 2020, pending the writ petition and established his clinic in rented premises, admeasuring 2x5 square meters. The learned Counsel for the landlady points out that a copy of the rent agreement executed on 28.09.2020 between Dr. Prashant Gupta and his landlord, Jitendra Kumar son of Jauhari Mal Jain, is annexed as Annexure No. 1 to the counter affidavit.

20. It is also pointed out that Dr. Prashant Gupta is differently abled with a 52% permanent disability, known as Post Polio Residual Paralysis of the left lower limb, according to the said certificate, issued in this behalf by the Chief Medical Officer, Aligarh. It is for the said reason also that the landlady wants her son to be close by, besides her own difficulties of old age and that of her aging husband. It must be mentioned here that these documents were not on record before the Courts below.

21. The handicap certificate is of the year 2004 and may not be looked into by this Court for the reason that it was not filed before the Courts below. However, so far as the rent agreement is concerned, it is evidence of a supervening event that happened pending this petition. Possibly, the said agreement could never have been filed before the Courts below, as it never existed then. The document is related to the changing circumstances of parties and the cause of action in an application for release under Section 21(1)(a) of the Act, is to a large extent dynamic. The *bona fide* need of the landlady may vary with decisive events and so also the tenant's case about the parties' comparative hardship. This Court is of opinion, therefore, that the fact that the landlady asserts that pending this petition, the landlady's son has moved to Aligarh and established a clinic in a rented premises, a photostat copy of the rent agreement whereof he has annexed to the counter affidavit, must receive some consideration by this Court. This is not to say that the event in the case is to turn on the said fact alone, or even decisively, for the most of it is to be judged by the validity of the findings recorded by the two Courts below, on the twin issues of *bona fide* need and comparative hardship.

22. The Prescribed Authority has broadly opined that the landlady's need for the demised shop, in order to house her son's clinic there, is well established by the fact that the evidence on record shows that her son is not in any government employment. The principle, according to the Prescribed Authority, is that the landlord has a right to ensure that every adult member of the family is established in independent business/ profession. In all fairness to the tenant, the findings of the Prescribed Authority on the question of *bona fide* need are not very impressive. The opinion of the Prescribed Authority on comparative hardship is also not very well considered either. Perhaps, it is for this reason that the Appellate Court while writing a judgment of affirmation had to script a rather lengthy opinion, much beyond what would normally be the length of the expression.

23. The Appellate Court has wholesomely reviewed the parties' case and evidence on record, and after looking into the affidavits and other documents, has remarked that the tenant has said in its

counter affidavit, Paper No. 56-Ga that the landlady's son earns with the Shroff Eye Centre a minimum of Rs. 1 lakh per month, and, therefore, the need set up by the landlady is *mala fide*. It has also been recorded by the Appellate Court that in the same affidavit it has been asserted that the landlady's son is not entirely unemployed and his clinical education has been completed in the year 2009. It has been observed by the Appellate Court that in the affidavit, it has been said by the tenant that the landlady has a two storeyed house at Gandhi Nagar, Aligarh, lying vacant, where her son can establish his clinic. The Appellate Court has recorded a finding to the effect that it cannot be denied that the landlady's son Prashant Gupta is a doctor, who has passed his MD in Ophthalmology from the AIIMS in the year 2009 and he is an Ophthalmologist. At the time when the release application was filed, the landlady's son was employed with the Sanjay Gandhi Memorial Hospital, Mangolpuri, New Delhi as a Senior Resident. The Appellate Court has remarked that work as a Senior Resident is part of the Postgraduate Training, which a doctor after earning the PG Degree has to undertake in a Government or non-Government Hospital for the purpose of achieving proficiency. The maximum period of this training is three years. The Appellate Court has concluded that residentship is, therefore, in its nature a temporary employment and not permanent. The Appellate Court has remarked that most doctors, after earning their Postgraduate qualifications, establish their own clinics and before they do so, endeavour to gain maximum professional experience by working as Residents in different hospitals. It is on the basis of the aforesaid position about the status of residentship, which this Court thinks has been correctly appreciated by the Appellate Court that the submission of the tenant that the landlady's son is permanently employed at Delhi was rejected. We are in agreement with the aforesaid conclusion recorded by the Appellate Court.

24. The Appellate Court has also taken note of the assertion in the landlady's affidavit, Paper No. 34-Ga that her son, Dr. Prashant Gupta has completed his fellowship with the Shroff Eye Centre on 6th October, 2015 and that on account of the demised shop not being released, forced to continue in employment with the Shroff Eye Centre. Note has also been taken of another affidavit, bearing Paper No. 46-Ga, where the landlady has stated that after 06.10.2015, upon completion of fellowship, her son is continuing with the Shroff Eye Centre on contract employment. On the foot of all these affidavits, the Appellate Court has remarked that it cannot be denied that Dr. Prashant Gupta was doing his Senior Residentship as part of his training or fellowship at the Shroff Eye Centre and after its completion, he is continuing there on contract. The Appellate Court has remarked that service on contract is temporary in nature and upon the contract coming to an end, the employer can always remove an employee. The Shroff Eye Centre is a private hospital. The management of this hospital can determine the services the landlady's son by notice. Thus, the services that Dr. Prashant Gupta is rendering with the Shroff Eye Centre are temporary in nature. It has, therefore, been concluded that Dr. Prashan Gupta is not in permanent employment. The Appellate Court has also rejected the tenant's submission that since the landlady's son has a Voter ID Card and Aadhaar Card, showing his domicile to be that of Delhi, he is a permanent resident of Delhi. This submission has been rejected on the foot of

the reasoning that once the landlady's son is serving on contract basis in Delhi, it is but logical that his Voter ID Card and address would be that of Delhi. The Appellate Court has remarked that the mere fact that the landlady's son has an address of Delhi and a Voter ID Card, showing domicile Delhi, does not mean that he is permanently established in Delhi. It has been observed that no evidence has been offered by the tenant to show that Dr. Prashant Gupta is indeed permanently settled in Delhi.

25. The Appellate Court has held that the above circumstances show that the landlady's son is not permanently established in employment or practice at Delhi. Therefore, if he wants to move to Aligarh and set up an Ophthalmologist Clinic, in order to permanently settle himself in practice, in the Appellate Court's opinion, it is not a case of mere shifting to the demised shop. The landlady's need has, therefore, been held *bona fide* on these findings.

26. So far as the comparative hardship is concerned, the Appellate Court has held that burden lies on the tenant to establish it in its favour. On the basis of various affidavits on record, the Appellate Court has noticed the different properties owned by the tenant close by to the demised shop, reference whereof has already been made by this Court in the earlier part of the judgment. It has particularly been opined on the basis of affidavits, Paper Nos. 29-Ga, 30-Ga and 31-Ga that the fact that the tenant has a shop, opposite Kunji Lal's and a vacant status has not been denied. The Appellate Court has held that the said shop, opposite the *Pyaun* and Kunji Lal, is available to the tenant in a vacant state. It has also been opined that two of the tenant's shops already house functional weighbridges. In addition, in the Surajbhan Market, he has a three storeyed building, which is being used as a guest house. The first and second floors of the building are lying vacant. These can be utilized for shifting the weighbridge, currently housed in the demised shop. Likewise, it could be moved to the vacant shop, opposite Kunji Lal and the Pyaun. On the basis of existence of so much of alternative accommodation, comparative hardship has been answered against the tenant and for the landlady.

27. It is on the basis of all these conclusions that the order of release passed by the Prescribed Authority has been affirmed by the Appellate Court. There is nothing on record to show that the landlady's son is so well established in Delhi, either in some kind of service at a Government Hospital or his private practice, that he would possibly not ever think of moving to Aligarh and establishing his clinic there. The Appellate Court is quite right about its conclusions on the said fact, where it is noted that the landlady's son has an employment of sorts as doctor on contract with a private hospital, which can hardly be characterized as stable employment.

28. Quite apart, a doctor like a lawyer is the master of his profession, which he can always practice independently. In fact, very often the doctors, like lawyers, are more inclined to independently practice, rather than function under the yoke and harness of employment. Even if the landlady's son were employed in government service, in a hospital outside Aligarh, his desire to establish his own practice and its facilitation by the landlady, could not have been regarded as something,

which did not constitute *bona fide* need within the meaning of Section 21(1)(a) of the Act. There is little doubt that Dr. Prashant Gupta is a member of the landlady's family. His wife is not. The fact that Dr. Prashant Gupta's wife has secured some employment as an Assistant Professor with the AIIMS at Saifai is hardly relevant to judge the question of *bona fide* need, which has rightly been confined by the Courts below to that of Dr. Prashant Gupta. There is authority in multitude and preponderant that lay down for rule that if the landlord requires some accommodation for establishing himself or an adult member of his family in business, which a *fortiori* would include a profession, it does not lie in the tenant's mouth to say that the landlord can secure that objective by establishing his business or profession elsewhere. The same is true of the landlord's adult family members. In this connection, reference may be made to the decision of this Court in **Smt. Kanta and others v. Additional District Judge, Lucknow and 5 others, 2015 (1) ARC 459 (LB).** In **Smt. Kanta** (*supra*), it has been held:

"10. ..... A tenant cannot dictate the terms to his landlord as to the choice of accommodation. He has relied upon a case reported in 2013 (1) ARC 217, Magan Lal Vs. Kalim Ullah, in which it has been held that need of the landlord to set up his son in a business, is a bonafide need. Reliance has also been placed upon the judgment reported in 2006 (1) ARC 282 Vishnu Kant Goswami Vs. IInd A.D.J., Allahaad and another; in which it has been held that every landlord and every adult member of his family is entitled to have a separate independent business and no landlord or any of his family member can be compelled to participate in the family business or joint business. Thus even if it is found that the landlord-opposite party no.3 is carrying on his business with his family members, it cannot be said that he cannot set up his adult son in an independent business."

29. Another important authority on the point is that of this Court in **Bhagwat Prasad Agrawal v. Radha Raman Agrawal, 2015 (2) ARC 370.** In **Bhagwat Prasad Agrawal** (*supra*), it has been held:

"The Prescribed Authority rejected the plea for the reason that the tenant cannot dictate as to which premises would suit the need of the landlord. The tenant cannot dictate terms or advise to the landlord that what he should do or what he should not. It is the privilege of the landlord to choose the nature and place of business. Therefore, it was not open for the petitioner to contend that the shop at the first floor would be most suitable to the landlord in carrying on the business in that premises. The plea that the respondent is a permanent resident of Delhi and, therefore, the premises is not needed, was not acceptable by the authorities for the reason that merely because the landlord was residing at Delhi would not mean that he would not come to Kosi, Mathura, his parental home, rather there is all the more reason for the landlord to reside or to open a office for Tax Consultancy, accordingly, the authorities found the need set up by the landlord to be bonafide. While considering the comparative hardship, it was duly proved by the landlord that the petitioner has other shops in the city, accordingly, relying upon Rule 16(2)(b) of the Rules of 1972 which provides that if the tenant is having alternative accommodation in his possession, there shall be greater

justification for allowing the release application."

30. The landlord or a member of his family has absolute freedom to forsake his business or employment in another town or city and shift to the place, where his/ her property is situate and establish his/ her business there, gainfully utilizing the property. The tenant cannot be heard to say that the landlord or for that matter a member of his family should continue in employment at another place, where for the time being the landlord or the member of his family, for whose need release is sought, might be in employment or business.

31. The learned Counsel for the tenant has sought to draw a distinction between a positive decision by the landlord to shift according to his choice to the place, where he owns property, that he seeks release of, and the likelihood of the landlord indeed shift from his gainful and affluent employment in another city. Invariably, the landlady's choice to shift giving up employment or business in another place or town for the place where he/she owns property, cannot be questioned. For the sake of argument, however, if given the particular circumstances of a landlord or a member of his family, it can be shown by indubitable evidence that the landlord or the member of his family, for whose bona fide need release is sought, is so well established at another place that there is no likelihood of the landlord indeed shifting by any means and the application for release is nothing, but a sham, an arguable case might be made out. However, this Court does not wish to express any opinion on the point, because on the facts here, it does not really arise. The employment of the landlady's son here is a contractual engagement with a private hospital at Delhi and can, by no standard, be said to be such flourishing engagement that the landlady's son cannot be imagined to opt shifting to Aligarh and establish his clinic there.

32. So far as the issue of comparative hardship is concerned, both the Courts below have opined against the tenant and evidence is overwhelming on record with details of properties that shows that the tenant has property close by, even vacant and available, where it can shift. This Court is not inclined to interfere with the finding, therefore, on the issue of comparative hardship as well.

33. Before parting, this Court must remark that though the rent agreement that has been brought on record through the counter affidavit is not part of the record before the Authorities below and generally may not be looked into, but it is indeed a supervening event of much consequence. In the rejoinder affidavit filed on behalf of the tenant in Paragraph No. 21, there is a bald denial of the fact that the landlady's son has established his clinic at Aligarh in the year 2020, pending this petition in a rented premises. There is no evidence brought or attempted to be secured through the process of Court to demonstrate that in fact the rent agreement is a fake document and the landlady's son has not established his clinic in the rented premises, details whereof are given in the rent agreement with full disclosure of the landlord's name, parentage, address and that of the landlady's son, besides the terms of the lease. Instead, in answer, the tenant has asserted that the landlady's son has purchased a house admeasuring 284.98 square meters, part of House No. 3/73A, located at Plot No. 18, Vikram Colony, Koil, Aligarh, through a registered sale

deed dated 13.11.2017, a copy whereof has been annexed, and that he can utilize the said property to establish his clinic. It is a well settled principle that the tenant cannot dictate to the landlord even if he has other property, the one he chooses to establish his business or profession. That apart, the property that has been purchased in the year 2017 appears to be residential property, which may not be suitable for a clinic or may be contrary to the local authorities' regulations as well, regarding residential and commercial user. The facts that have been noticed in the last part of our judgment have primarily been looked into for the purpose of considering whether this Court should exercise its extraordinary jurisdiction to interfere with the concurrent findings of the two Courts of fact below. The facts additionally noticed, leave no manner of doubt in this Court's mind that the tenant is not entitled to relief in the exercise of our equitable jurisdiction under Article 226 of the Constitution.

34. This petition fails and is **dismissed**.

35. The interim order dated 08.04.2022 is hereby **vacated**.

36. However, considering the facts and circumstances, the tenant-petitioners are allowed six months time to handover peaceful and vacant possession of the shop in dispute provided they execute an undertaking before the Prescribed Authority, Aligarh, embodying the following terms within one month of date:

(1) The tenants shall handover peaceful and vacant possession of the demised shop to the landlady-respondent no.1 on or before 03.05.2023.

(2) During the period of six months that they remain in occupation, they will not sublet the shop, damage or disfigure it in any manner whatsoever.

37. In the event, an undertaking, as above directed, is not filed before the Prescribed Authority by the tenant within the time allowed or undertaking is violated, the release order shall become executable **forthwith**.

(2022) 11 ILRA 1071
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.10.2022

BEFORE

THE HON'BLE J.J. MUNIR, J.

Writ-A No. 57399 of 2008

Sri Natthoomal ...Petitioner
Versus
A.D.J., Mathura & Ors. ...Respondents

Counsel for the Petitioner:
Sri Arun Kumar Vishwakarma, Sri Neeraj Srivastava, Sri Atul Dayal (Sr. Advocate)

Counsel for the Respondents:
Sri Rahul Sahai, Sri Rajesh Gupta, Sri Satish Pandey

Civil Law – Constitution of India - Article 226, - U. P. Urban Building Regulation of Letting, Rent and Eviction Act, - Sections 21, 21(1)(a) & 22 - Landlord's bona fide need - demised shop - which was occupying by the tenant at a measly rent of Rs. 70/- since long term - proceeding for vacating the tenant on account of the bona fide needs - Landlord wants to establish his one of sons in independent business - trial court decreed the suit in favour of landlord - in appeal set-aside - Writ Petition - issue of 'Comparative Hardship' discussed - the *bona fide* need cannot be presumed, but once that is established, the difficulty faced by the

tenant alone cannot defeat the landlord's *bona fide* need - held, 'comparative hardship' ought to be answered in favour of the landlord and against the tenants - 'Comparative Hardship' is not evenly balanced and lies in favour of the landlord - Appellate court is manifestly illegal, being based on irrelevant consideration and the result of a perverse approached - impugned judgment of the appellant court deserve to be quashed - prescribed authority restored - writ petition allowed - direction issued accordingly for vacating the demised shop within 15 days. (Para – 14, 35, 39, 40)

Appeals/petitions are disposed of. (E-11)

List of Cases cited: -

1. Vijay Kumar Gupta & anr. Vs Smt. Sumitra Devi & ors., 2014 (1) ARC 371

2. Ragavendra Kumar Vs Firm Prem Machinary & Co., (2000) 1 SCC 679

3. Ganga Narain Gupta Vs Sheetala Prasad, 2006 (65) AllLR 587

4. Shambhu Nath Vs III A.D.J. & ors., 2014 (1) ARC 372

5. Sarla Ahuja Vs United India Insurance Co. Ltd, (1998) 8 SCC 119

(Delivered by Hon'ble J.J. Munir, J.)

1. This is a landlord's writ petition, arising out of proceedings 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').

2. The facts giving rise to this writ petition are these:

Natthoomal son of Daulatram instituted proceedings against Giriraj Dharan son of Surajbhan for release under Section 21(1)(a) of the Act, with the allegations that he is the owner and landlord of a shop, bearing Municipal Premises No. 127/82-A, Kachchi Sarak, Shahganj Darwaza, District Mathura. Giriraj Dharan is a tenant in the said shop at the rate of Rs.70/- per month, excluding taxes. Giriraj Dharan has been in arrears of rent since 01.08.1999. Natthoomal, who shall hereinafter be called 'the landlord', has a shop located to the south of the shop in the tenancy occupation of Giriraj Dharan. The shop in Giriraj Dharan's tenancy shall hereinafter be called 'the demised shop'.

3. The landlord carries on the business of a jeweller in his shop aforesaid, dealing in silver jewellery. Along with the landlord, one of his sons, Rupesh Kumar also does business in the same shop as the landlord. The landlord's elder son, Pankaj and the one younger to him, Rupesh Kumar are married. Pankaj has been blessed with two children, but has no gainful occupation. The family's peace for the landlord has been a casualty on account of disputes between the womenfolk, all of which has made it difficult for Pankaj to carry on business in the same shop as the landlord. The landlord has asserted that the shop where he does business is not big enough to take care of the requirements of the landlord and his two sons, all at once. The landlord's son Pankaj has good experience of a jeweller's business in silver ornaments and he can carry on this business. The landlord has the necessary capital to set up his son Pankaj in independent business. The landlord has another shop, bearing No. 127/ 82-C, wherein there is an old tenant, Mohan Lal in occupation. Apart from these three shops, the landlord does not have any other, where he may set up his son in independent business. It is pleaded by the landlord that he requires the demised shop to be released on account of the *bona fide* need that he has

for the said shop in order to establish his son Pankaj in independent business.

4. Apart from Pankaj, the landlord has two other sons, Rupesh and Ghanshyam. Ghanshyam is not married so far. He has discontinued his studies and is otherwise competent to establish his own business. Giriraj Dharan, the tenant in the demised shop, has another tenanted shop, situate at Bairagpura, Mathura. Giriraj Dharan primarily carries on his business in the shop at Bairagpura. In addition, Giriraj Dharan has in his ancestral home, which is located close-by to the demised shop, three vacant shops of his own. In the event the demised shop is released, the tenant would not suffer greater hardship compared to what the landlord would, if the demised shop were refused to be released. It is also averred by the landlord that he conveyed his *bona fide* need to Giriraj Dharan, asking him to vacate the shop, but he declined. Compelled by his refusal, the landlord instituted proceedings for release as aforesaid through the application under Section 21(1)(a) of the Act on 04.01.2002 before the Prescribed Authority. The release application was registered as P.A. Case No. 3 of 2002 on the file of the Prescribed Authority.

5. Giriraj Dharan put in a written statement, contesting the landlord's case for release. It was pleaded by him that the landlord and all his sons carry on business in silver in the shop located to the south of the demised shop. Their business is of trading in silver. It has been asserted by Giriraj Dharan that no cause of action has arisen to the landlord to seek release of the demised shop. He has no need for the same and has sufficient property. He has a big shop, where the landlord and his sons do business in silver ornaments. The landlord's sons make these ornaments and supply them- a kind of business, called Desawari. The nature of their business is not retail. They supply their wares to different places. The landlord and his sons are income tax payers. They are rich men. The landlord's son has a Saari Printing Works, located at Saraswati Kund, Mathura. The demised shop is unfit for the purpose of manufacturing business in Saaris that the landlord's son undertakes. It is asserted that the landlord's need set up is mala fide. The landlord has come up with the application for release, because he demanded enhanced rent at the rate of Rs.300/- per month, which the tenant Giriraj Dharan refused. It is on that account that the landlord has instituted the present proceedings for release, without any *bona fide* need, on wrong facts and non-existent grounds. It is also averred that the landlord and his sons buy wares from Giriraj Dharan on credit, leading to a substantial sum of money falling due, which the landlord owes to Giriraj Dharan. The latter asked the landlord to adjust his outstandings against the rent due, but the landlord wants to increase the rent. Giriraj Dharan carries on in the demised shop his tea shop, where he sells, besides tea, biscuits, snacks, cigarettes etc., in order to earn his livelihood. It was averred that in case he is evicted from the demised shop in consequence of the release order, he would be ruined and his family starve to death. It was also pleaded that in the vicinity, there is no such shop which Giriraj Dharan could take on rent. It was averred further that the tenant had secured on rent a godown in the name of his son from Thakur Dauji Maharaj, where he stores his stock. The said premises are not a shop. Giriraj Dharan's ancestral house has been partitioned long back and no shop has fallen to his share. The landlord and his

sons are into the business of manufacturing, where they have 8-10 servants. The landlord and his sons do not have the need to retail anything.

6. It was also averred in the written statement that Giriraj Dharan has been served with a notice dated 19.11.2002 by registered post by the landlord's brother, Mahesh Chandra, informing Giriraj Dharan that Mahesh Chandra was the owner of the rear part of the demised shop, which had fallen to his share in some partition. The said notice had been replied to by Giriraj Dharan through his Counsel. It was averred that Mahesh Chandra has held out to be a co-landlord of the demised shop, but the landlord has not impleaded him as a party. For the said reason, the landlord's application for release was not properly framed and not maintainable.

7. Pending the release application, an application for impleadment was filed by Govind Saran Mittal, Giriraj Dharan's brother on 30.08.2005. He alleged that he too was a tenant in the demised shop. The landlord objected to the impleadment, saying that it was motivated by dilatory tactics. The application was, however, allowed by the Prescribed Authority, in consequence whereof Govind Saran Mittal came to be impleaded as opposite party no.2 to the release application.

8. Govind Saran Mittal filed his separate written statement. It is Mittal's case that the landlord had no cause of action against him. The landlord, in collusion with Giriraj Dharan, has brought these release proceedings, which are collusive and intended to evict Mittal. It is pleaded that Giriraj Dharan is a brother-in-law of the landlord's and the two have conspired to file a compromise in Court behind Mittal's back. It is Mittal's case that the demised shop is a very old tenancy. Long ago, the owner and the landlord of the demised shop was Smt. Dulari wife of Manohar Lal and Mittal's father and that of Giriraj Dharan (the two being brothers) was the tenant. Prior to their father, their grandfather was the tenant. The family have been in successive tenancy occupation of the demised shop since before the year 1957. After Smt. Dulari, Shrinath Dass Gayasiram became the owner and landlord of the demised shop. After Giriraj Dharan and Mittal's grandfather passed away, their father inherited the tenancy and became the sole tenant of the demised shop. Shrinath Dass Gayasiram executed a sale deed of the demised shop in favour of Sri Daulat Ram, the landlord's father and after Daulat Ram, the landlord inherited the demised shop. The tenancy in the demised shop is one antedating the year 1957 and continuing since the time of Giriraj Dharan and Mittal's grandfather. Giriraj Dharan and Govind Saran Mittal shall hereinafter be referred to as 'the tenants', unless the context requires an individual reference.

9. The tenants' father passed away on 02.10.1976 and upon his demise, all his heirs have become tenants. The tenants' father, Surajbhan also had two other sons, Harish Chandra and Keshav Deo, who are living away for some time. For the present, the demised shop is in occupation of Giriraj Dharan and Mittal, both of whom are carrying on their respective business in the said shop separately. The demised shop has two doors/ outlets and, therefore, the southern outlet is used by Mittal for his shop selling food-grains, whereas the northern door outlet is used by his brother, Giriraj Dharan for his business of tea vending etc. The demised shop has an electricity connection and a meter installed

since the time of the tenants' father, in the name of their other brother, Harish Chandra. It is pleaded that the landlord has no need for the demised shop. He has substantial properties. The landlord has a big shop, where he does his business. The other shop, which is said to be in the tenancy occupation of Mohan Lal, is a matter of mere show, in order to harass the tenants. The shop, which is said to be in Mohan Lal's tenancy occupation, was earlier in the tenancy occupation of one Mool Chand Khandelwal. The said shop was vacated and after Mool Chand Khandelwal moved out, Mohan Lal was shown to be a sham tenant there. Mohan Lal himself has substantial property and does not need the shop that is said to be in his occupation. The landlord is an income tax payer. All his sons and daughters-in-law are income tax payers. They are a rich family. The landlord has one Saari Printing Works at Saraswati Kund, Mathura. The landlord's son Pankaj is engaged in manufacturing and supplying boxes for sweets to Brijwasi Mithaiwale on a large scale. The landlord and all his sons have flourishing business, which yields them good profit. The landlord and his sons have acquired properties, utilizing their wealth.

10. It has been emphasized that Pankaj has purchased a house (*Kothi*) in the name of his wife, Smt. Kavita, situate at Guru Kripa Masani Road, Mathura. That house is worth Rs.50 lakhs. There was house-warming for the said property on 20.07.2007. The landlord pending the proceedings has purchased another shop at Guru Kripa, Masani Road, Mathura. It is pleaded by Mittal that the tenants are in occupation of the demised shop for the past more than 50 years, that is to say, since the time of their grandfather and have acquired goodwill in business. Mittal has also said that he has no alternate source of livelihood and in event of release, would suffer greater hardship than the landlord in case of refusal.

11. In the replication filed on behalf of the landlord, it is said that the Act applies and Giriraj Dharan is a tenant prior to enforcement of the Act. Giriraj Dharan has set up his brother in the present proceedings in order to delay the course of law. Both the brothers have a common cause. The landlord has denied the *factum* of his son Pankaj purchasing a house in his wife's name at Masani Road, or the fact of acquisition of a shop pending proceedings. The fact that the landlord's son has a Saari Printing Works has also been denied, as also the fact that his son had, had an income tax raid. It is pleaded in their replica that Mittal has wrongly claimed that his relations with his sons are estranged. To the contrary, Mittal stays with his sons and has his own flour mill (*Aata Chakki*). He operates that flour mill along with his elder son, whereas his younger son does another business. The landlord has filed his evidence on affidavit, which comprises the affidavits of Ashok Kumar Sharma, Mukesh, Tulsiram, Girish Chandra and Dau Dayal, besides documentary evidence, that includes a sale deed, copies of municipal assessments and photographs. The tenant has given affidavits of Dau Dayal, Tulsiram, Girish Chandra and Giriraj Dharan. Giriraj Dharan has filed four affidavits in all. Mittal has filed affidavits of a number of witnesses, like those of Rambabu Sharma, Hiralal, Neeraj, Dileep, Bhagwandas and Shiv Kumar. Documentary evidence too has been adduced on behalf of the tenants, details of which are listed in the judgments of the Courts below. No useful purpose would be served by recapitulating the list, except

what is relevant. The relevant evidence shall be referred to during the course of this judgment.

12. The Prescribed Authority framed two issues and on the basis of it, determined the application for release. These read (translated into English from Hindi):

(1) Whether the applicant has a *bona fide* need for the shop in dispute for his son Pankaj's business?

(2) Whether in case of the demised shop not being released, the applicant will suffer greater hardship than what the opposite party would face, if the property is released?

13. The Prescribed Authority has looked carefully into the evidence of parties, including the documents and affidavits. The Prescribed Authority has disbelieved a few of the witnesses, like Dau Dayal, Tulsiram and Girish Chandra, who have given contradictory affidavits about the business and *bona fide* need of parties. The Trial Court has found that the landlord has, according to the municipal assessment, a house and three shops in his ownership. One of these shops is the demised shop. In one of the shops, Mohan Lal is shown as the tenant, whereas the third is in the landlord's occupation. The Trial Court has remarked that the contention of Mittal that Mohan Lal's shop has not been allotted in his favour, which the landlord can get vacated, is not tenable, inasmuch as the issue in the present proceedings is not about the shop in Mohan Lal's tenancy, but the demised shop. The landlord has moved the present release application, relating to the demised shop, wherein Giriraj Dharan is the tenant. It is up to the landlord to decide which shop he wants to be released for the satisfaction of his *bona fide* need. The Prescribed Authority has remarked that the release of the demised shop is sought for the purpose of settling the landlord's son, Pankaj in independent business. It has been held that the fact is not in dispute that in the past, Pankaj would do business along with his father in the same shop. The landlord has funds to set up his son in independent business. The Trial Court has opined that the landlord has a right to set up any adult member of his family in independent business, which qualifies as *bona fide* need. The case about Pankaj being engaged in the business of *Saari* Printing and manufacture of sweets packaging boxes has not been accepted by the Prescribed Authority, in the absence of any documentary evidence to prove the *factum* of those enterprises being undertaken by Pankaj. The Prescribed Authority has, accordingly, found on the issue of *bona fide* need for the landlord.

14. On the other issue of comparative hardship, the Prescribed Authority has also carefully looked into the evidence and opined that by merely moving applications for allotment, it cannot be said that the tenant has made efforts to secure alternative accommodation pending proceedings. That is one of the limbs of the findings, on the basis of which the Prescribed Authority has held on the question of comparative hardship in the landlord's favour. The Prescribed Authority has remarked that *bona fide* need cannot be presumed, but once that is established, the difficulty faced by the tenant alone cannot defeat the landlord's *bona fide* need. It has been held that on the basis of evidence on record, it is apparent that the tenants have purchased properties pending proceedings and concluded that on an overall assessment of evidence, comparative

hardship ought to be answered in favour of the landlord and against the tenants.

15. In conclusion, the Prescribed Authority allowed the release application and directed the tenants' eviction within a period of one month, with directions to the landlord to pay the tenants two years' rent towards compensation. The release application as aforesaid, was allowed by the Prescribed Authority vide judgment and order dated 19.03.2008.

16. Aggrieved by the judgment and order passed by the Prescribed Authority, Mittal alone appealed to the District Judge, Mathura under Sectioin 22 of the Act. The appeal came to be registered on the file of the District Judge as P.A. Appeal No. 10 of 2008. The Additional District Judge, Court No.8, Mathura, before whom the appeal came up for hearing, allowed it vide judgment and order dated 14.08.2008, set aside the Prescribed Authority's judgment, reversed it and dismissed the landlord's release application. The judgment and order dated 14.08.2008 passed by the Additional District Judge, Court No.8, Mathura shall hereinafter be referred to as 'the impugned order'.

17. Aggrieved by the impugned order, the landlord has instituted the present writ petition.

18. Notice pending admission was issued on 07.11.2008 and over the course of years that the petition has remained pending, parties have exchanged affidavits. A counter affidavit has been filed by Giriraj Dharan also, though he never appealed the order releasing the demised shop passed by the Prescribed Authority. Mittal, who preferred the appeal, has, of course, filed a separate counter affidavit. A rejoinder affidavit each to the two counter affidavits filed on behalf of Giriraj Dharan and Mittal, who are respondent nos. 2 and 3 to the writ petition, have been filed by the landlord. Post exchange of affidavits, the petition was admitted to hearing, which proceeded forthwith.

19. Heard Mr. Atul Dayal, learned Senior Advocate assisted by Mr. Neeraj Srivastava, Advocate appearing on behalf of the petitioner and Mr. Satish Pandey, Advocate holding brief of Mr. Rahul Sahai, learned Counsel for respondent no. 3. Mr. Rajesh Gupta, Advocate has appeared on behalf of respondent no. 2, but says that he has no instructions.

20. The Appellate Court, in reversing the findings of the Prescribed Authority, has largely taken into consideration irrelevant evidence. The learned Judge has opined that for the purpose of determining the landlord's case of *bona fide* need, it has to be determined whether his son, Pankaj has some independent business, or as the landlord says, the son does business with the landlord together, leading to bickerings in the family. The learned Judge has then remarked that it has to be determined whether Pankaj is indeed unemployed. The Appellate Court has remarked that there are on record affidavits of Bhagwandas and Shiv Kumar, that say that Pankaj is engaged in the business of manufacturing packaging boxes for sweets on a large scale and further state that Pankaj and his wife are income tax payers. The two witnesses have also said that in their presence, Pankaj and his wife have faced proceedings of survey by the Income Tax Department. The learned Judge has remarked that the landlord has rebutted the fact about Pankaj and his wife being income tax payers, as also that about the alleged proceedings

against him by the Income Tax Department, but Pankaj has not filed his own affidavit, denying the fact. The Appellate Court has inferred that non-denial by Pankaj himself shows that the landlord's son did not have the courage to deny the fact on oath and take the risk of perjuring himself. It has been observed that the landlord denying the fact of his son being an income tax payer or accepting it, is of no consequence, unless Pankaj himself came forward with his stand. It has been held that since Pankaj has not filed his affidavit rebutting the allegations, the inference is that he is an income tax payer. It has further been remarked that an income tax payer is not a person of ordinary means. Such a man is either one who draws a high salary or has flourishing business. This would be the necessary inference in law, according to the Appellate Court, from the facts found, as aforesaid.

21. There is another finding recorded to the effect that the assertion on behalf of the tenants that Pankaj has purchased a shop in Hari Kunj, has also not been denied on affidavit. The inference drawn is that Pankaj has purchased a shop in Hari Kunj. The conclusion drawn is that for Pankaj, to settle down in business, the landlord has set up his *bona fide* need, but the landlord's son does not need the demised shop, inasmuch as the shop that Pankaj has purchased in Hari Kunj is sufficient for his business requirements.

22. It would be apposite to consider the worth of the aforesaid findings recorded by the Appellate Court, as referred to hereinabove. The fact whether Pankaj is an income tax payer or not, is no business of the Appellate Court to investigate. Assuming that Pankaj is an income tax payer, the landlord has a right to set up an independent business for his son or augment his business, independent from his own. It is not the tenants' right to question the landlord's *bona fide* need claimed for his son's independent business by relying on the son's income tax returns or those of his wife. Normally, a person, who is engaged in business like the tenants, say of trade in silver together with his father, may also earn enough to become an income tax payer. The fact that a person is an income tax payer is no index to infer that he has an independent business of his own. Moreover, the remarks of the Appellate Court that an income tax payer is not an ordinary parson, but a businessman with a big turnover or a flourishing trade, are all misplaced.

23. Payment of income tax is hardly a parameter to infer that the person concerned/ member of the landlord's family, for whom the business premises is claimed to be needed *bona fide* for independent business, already has an existing business of his own. The Appellate Court has not only taken into consideration irrelevant evidence, but conjectured much about the landlord's son being an income tax payer. There is no evidence aliunde on record to show that the landlord's son or his daughters-in-law are income tax payers. There is no document on record, like an assessment order or return, to demonstrate the fact that Pankaj is, in fact, an income tax payer. The mere fact that Pankaj has not denied the assertion about him being an income tax payer through his personal affidavit, cannot lead to the inference that he is one. There is, after all, a denial of the fact by the landlord that his son Pankaj is not an income tax payer. It is the landlord who has asked for the release of the demised shop and he is well within his rights to give evidence about the fact that

his son, for whose independent business he requires the demised shop, is not an income tax payer. The landlord's evidence cannot be ignored as the Appellate Court has done.

24. Moreover, the affidavits, on the basis of which it has been inferred that the landlord's son is an income tax payer, are those of one Bhagwandas and another Shiv Kumar. It is not clear as to how these persons, apart from saying that they have witnessed some kind of income tax survey proceedings against Pankaj, would know that he is an income tax payer. There is no evidence annexed to those affidavits, like some proceedings of assessment or assessment order to establish the fact.

25. Likewise, the finding that since the assertion about Pankaj buying a shop in Hari Kunj has not been denied on affidavit, the fact stands proved, is equally flawed. There is again no evidence to show, like a sale deed, that such a shop has been purchased by Pankaj. In the absence of any independent evidence, no inference can be drawn on the basis of a mere non-traverse about a fact as positive as purchase of another shop by the landlord's son. Even if it be assumed that Pankaj has purchased some shop out of his own resources or whatever be the source, it is not for the tenants to dictate to the landlord, where and how the landlord should go about satisfying his *bona fide* need to settle his son in independent business. Even if the landlord has more than one shop available to him, the tenant nor the Court can say which shop the landlord should utilize to satisfy his son's business requirements. There is no denying the fact that he is a matured man with a family and there is no evidence aliunde on record to show that Pankaj owns a business of his own, except allegations on affidavits. About the freedom of the landlord to earn his livelihood for maintaining himself and his family according to his choice, it was held by this Court in ***Vijay Kumar Gupta & another v. Smt. Sumitra Devi & others 2014 (1) ARC 371:***

7. The above referred authorities though, were in the context of residential accommodation, but the principle that the landlord is the master of arranging his own affairs applies not only in respect to his residential accommodation but also the manner and method etc. of earning his livelihood for maintaining himself and family.

8. In **Ragavendra Kumar Vs. Firm Prem Machinary & Co. (2000) 1 SCC 679,** the Court said that landlord is best judge of his requirement for his residential or business purpose and he has complete freedom in the matter.

26. The other finding, on the basis of which the Appellate Court has reversed the order of the Prescribed Authority, is about the existence of another shop available to the landlord, wherein there is no lawful occupant.

27. The next submission that the Appellate Court has considered to find against the landlord on the question of *bona fide* need is based on the tenants' contention that there are two other shops, apart from the demised shop, bearing Shop Nos. 127/82B and 127/82C that are in the landlord's possession. In addition, the Appellate Court has also noticed the tenants' assertion that there were two other shops on the same premises that bore old Nos. 1798D and 1798E, which fell to the landlord's share. The Appellate Court, after noticing the above contentions urged on behalf of the tenants, has remarked that

these facts are admitted to parties. In our opinion, the remark last mentioned is an error apparent. There is no admission brought to this Court's notice that Shop Nos. 127/82B and 127/82C are in the landlord's possession. This would also be apparent from the next remark by the Appellate Court, where it is said that the shop, that is said to be in Mohan Lal's tenancy, had for its original tenant, one Mool Chand, from whom it was got vacated and delivered possession of to Mohan Lal. The shop bearing No. 127/82C is, therefore, in the occupation of Mohan Lal as a tenant, or as the Appellate Court later on says, as an illegal occupant. It cannot be said to be "admittedly' in the landlord's possession. It is particularly so because the landlord says that Mohan Lal is a tenant in Shop No. 127/82C, notwithstanding the finding of the Appellate Court that Mohan Lal is an unlawful occupant in the shop under reference. It cannot be said to be a fact admitted to parties that Shop No. 128/82C is in the landlord's possession.

28. The Appellate Court has then looked into the successive quinquennial assessment of house tax record to determine about the existing tenants in the two other shops, bearing Nos. 127/82B and 127/82C. The tenancy in Shop No. 127/82C, where Mohan Lal is claimed by the landlord to be a tenant, has been particularly examined. The Appellate Court has looked into the house tax assessment record for the years 1970 to 1987, bearing Paper No. 67-Ga, which shows the profile of tenants in the demised shops and the other shops that are the subject matter of contention to judge the issue of *bona fide* need. About the said assessment, the Appellate Court has recorded a finding that in one of the shops, Surajbhan is shown to be a tenant and in the second, Mool Chand. In the third, Pitambar Das and in the fourth, Kishori Lal are recorded as tenants. Mohan Lal is not recorded as a tenant in any of the four shops mentioned in the assessment, all of which are housed in the same premises as the demised shop. It is then remarked by the Appellate Court that Mohan Lal is found recorded in Paper No. 99-Ga, which is a copy of the house tax assessment from the year 1987 to 1993. Here, Mohan Lal has been shown recorded as a tenant in Shop No. 1798/C. There is a further comment about Paper No. 99-Ga/3 to the effect that in this assessment, Mool Chand is not recorded as a tenant. From these records of assessment, the Appellate Court has drawn the conclusion that Shop No. 127/82C was in the tenancy occupation of Mool Chand up to the year 1987, and after that, it was handed over to Mohan Lal. The Appellate Court, with reference to the provisions of the Act, has held that there can be no valid tenancy without an allotment order, except where it has been continuing since prior to July, 1976. Since Mohan Lal has admittedly come in in the year 1987, without an order of allotment, he is not a tenant, but an unauthorized occupant. The shop must, therefore, be deemed to be vacant. There is a further finding that in Paper No. 67-Ga-2, the municipal assessment records for the years 1972 to 1987, neither Mohan Lal nor Gopal Das are shown recorded as tenants. Both these men have been recorded after 1987. Since the two are in possession of the two shops, according to the Appellate Court, without an allotment order, with the tenancy not traceable to a date prior to July, 1976, the shops in their possession must be held to be in unauthorized occupation and, therefore, deemed vacant.

29. The Appellate Court has gone on to remark that the authority of this Court in **Ganga Narain Gupta vs. Sheetala Prasad, 2006 (65) ALR 587**, which says

that the landlord can ask anyone of his various tenants to vacate one or the other of the shops in tenancy occupation in order to satisfy his *bona fide* need, and cannot be compelled to ask a particular tenant to vacate, would not apply to the facts here. The reason assigned is that the other person in occupation of another shop or premises of the landlord must be a lawful tenant and not an unauthorized occupant. This finding is followed by a reversion to the fact earlier found that the landlord's son Pankaj and his daughters-in-law, being income tax payers, would show that they are well established in business and do not require the demised shop, much less *bona fide* need it. In this Court's opinion, the approach of the Appellate Court is fundamentally flawed and manifestly illegal on this limb of the reasoning too. Once for a proposition of law, it is not in dispute that the landlord can choose from amongst the various tenants, who are in occupation of different premises or shops, against whom he wants to proceed for release on the ground of *bona fide* need, the fact that some other shop occupied by another tenant, whom the tenant says is in unauthorized occupation, is not at all relevant.

30. The fact whether the other person in possession of another shop belonging to the landlord is an unauthorized occupant or a lawful tenant, cannot be decided in proceedings for release brought on the ground of *bona fide* need, under Section 21(1)(a) of the Act. This can be done by moving the Rent Control and Eviction Officer, under Section 12/16 of the Act. Also, in proceedings, where the question is if the person in occupation of the other shop, bearing No. 127/82C, is a tenant or an unauthorized occupant, the affected party has to be impleaded as a necessary party and heard. That inquiry cannot be made in the present proceedings that have been brought for release of the demised shop, in the occupation of the tenants. In Mohan Lal's absence, behind his back, without hearing him, in proceedings for release under Section 21(1)(a) of the Act, to hold that Mohan Lal is not a tenant, but an unauthorized occupant, is a finding beyond the scope of the present proceedings under Section 21(1)(a) of the Act.

31. For the purpose of these proceedings, the landlord asserts that Mohan Lal is a tenant in another shop of the landlord's and the fact has to be accepted for Mohan Lal is in settled possession over a long period of time. The question about vacancy based on the day of commencement of Mohan Lal's tenancy cannot be inquired into in proceedings for release under Section 21(1)(a) of the Act, brought inter partes between the landlord and the tenants.

32. Quite apart from these facts, the law is fairly well settled that a landlord has the right to expand his business and the tenant or the Court cannot force him to carry on in the same shop. When the case is one of the landlord's needing additional accommodation for his sons' business requirement, which would include ex *hypothesi*, the landlord's need to provide for his sons' expansion of business, the landlord cannot be denied the right to seek release of additional accommodation, where he has a sitting tenant, whom he wants to evict for the purpose. The fundamental principle about the landlord's right to expand his business being a ground to support a case of *bona fide* need under Section 21(1)(a) of the Act, has been succinctly laid down by esteemed Brother Manoj Kumar Gupta in **Shambhu Nath v.**

Third Additional District Judge and others, 2014 (1) ARC 372 in the following words:

11..... A landlord has got a right to expand his business and in case he requires additional space for it, the need cannot be said to be malafide. The tenant cannot dictate terms to the landlords as to how he should satisfy his need. The court cannot act as a rationing authority and force the landlord not to expand his business or carry on in the same shop. In the above context, it is worthwhile to quote the following lines from the judgement of the Supreme Court in Sarla Ahuja Vs. United India Insurance Company Ltd, (1998) 8 SCC 119:-

".....When a landlord asserts that he requires his building for his own occupation, the Rent Controller shall not proceed on the presumption that the requirement is not *bona fide*. When other conditions of the clause are satisfied and when the landlord shows a prima facie case, it is open to the Rent Controller to draw a presumption that the requirement of the landlord is *bona fide*. It is often said by courts that it is not for the tenant to dictate terms to the landlords as to how else he can adjust himself without getting possession of the tenanted premises. While deciding the question of *bona fide*s of the requirement of the landlord, it is quite necessary to make an endeavour as to how else the landlord could have adjusted himself."

33. This Court is of opinion that the landlord's right to expand his business would include the right to ensure expansion of business for a family member, for whose necessity he is entitled otherwise to seek release of a tenanted premises owned by him. The right of the landlord to seek release under Section 21(1)(a) of the Act for the expansion of business, cannot be confined to the landlord's own need. It applies equally to that of the members of his family, for whom he can otherwise seek release. Any other construction on the terms of Section 21(1)(a) of the Act would bog down the statute.

34. Broadly speaking, there are three shops owned by the landlord, in two of which there are tenants in occupation. In one shop, the landlord is carrying on business along with his son Rupesh Kumar. Pankaj, the son for whom he seeks release of the demised shop, is finding it difficult to carry on business in the same shop. There is no evidence to show that Pankaj indeed has another shop of his own. The mere fact that he is an income tax payer does not show that he is in occupation of premises suitable for his business. Even if he has, the landlord has a right to seek release of additional accommodation for the need of expansion or better satisfaction of the business requirements of his son. It is no business of the tenant or the Court to tell the landlord, where and how the landlord's son Pankaj should house and carry on his business. It is also not within the province of either of them to say that whatever accommodation the landlord's son Pankaj is utilizing to do business, is good enough for his needs, because he is an income tax payer. Findings to this effect and the related findings are not only manifestly illegal, but also based on irrelevant considerations. In the Court's opinion, the findings of the Prescribed Authority on the question of *bona fide* need are well reasoned and must be affirmed, whereas those of the Appellate Court held not tenable at all.

35. So far as the question of comparative hardship is concerned, the

Appellate Court has not expressed any opinion, because it has been held, and rightly so, that once *bona fide* need has not been found by that Court, no opinion is required to be entered on the question of comparative hardship. Since this Court has disagreed with the conclusions of the Appellate Court on the issue of comparative hardship, and affirmed those of the Prescribed Authority, the issue of comparative hardship becomes relevant. The Prescribed Authority, in returning its opinion on the question of comparative hardship, has taken note of the fact that so far as Giriraj Dharan is concerned, he owns a tea shop, selling tea, biscuits, snacks, cigarettes etc., but has a tenanted premises at Bairagpura, rented from Thakur Dauji Maharaj, a temple trust. In those premises, he runs a shop providing tents for marriages, crockery etc. on rent. Evidence regarding the aforesaid business of the tenant, Giriraj Dharan has been considered by the Prescribed Authority, which includes documentary evidence. One of these evidence, is about the provision of crockery on rent to the landlord regarding a *Namkaran* Ceremony of the landlord's grandchild. The Prescribed Authority has also taken note of the tenant's ancestral property at Mohalla Halanganj, where there is a shop, out of the three in the tenant's possession. There is also a document noticed by the Prescribed Authority, which is a sale deed showing Giriraj Dharan's son Rishi Mohan, pending suit, to have purchased property in Halanganj. There is another municipal assessment record showing that the tenant has still another property at Bairagpura in the name of his wife, Pushpa Devi. The municipal assessment is Paper No. 50-Ga/2. From all these facts, the Prescribed Authority has concluded that the tenant, Giriraj Dharan is a well-off man, who has purchased properties in the names of his wife and sons. Pending proceedings, he has also purchased a property in his son's name. In the circumstances, he would not face any hardship in the event the demised shop were released. It has also been opined that "comparative hardship' is not evenly balanced and lies in favour of the landlord.

36. So far as the other tenant Mittal is concerned, who has got himself impleaded in the release proceedings, it has been urged that the landlord must prove his *bona fide* need and that if the landlord's *bona fide* need is not established, the issue of comparative hardship ought not to be examined. The Prescribed Authority opined that here, the landlord has well established his *bona fide* need and, therefore, the issue of comparative hardship has also been examined.

37. To these findings, this Court must add that so far as Mittal is concerned, he has virtually thrust himself through impleadment as a tenant, taking advantage of the fact that Giriraj Dharan and his father was a tenant in the demised shop. There is, however, hardly any evidence to show that, in fact, Mittal is carrying on business in the demised shop. The release application, therefore, moved against Giriraj Dharan alone could have been granted. Surprisingly, Giriraj Dharan has not appealed the judgment of the Prescribed Authority, releasing the demised shop. It is Mittal alone who has appealed to the District Judge and got the judgment of the Prescribed reversed. This feature of the case further tips the scale of comparative hardship against the tenant, where Mittal does not seem to have much of recorded presence as a tenant after his father.

38. Though not of much relevance under the Act, there is one fact that cannot be ignored, while judging equities between

parties, that this Court must ensure in the exercise of jurisdiction under Article 226 of the Constitution. The tenant is occupying the demised shop at a measly rent of Rs.70/- per month. The demised shop has been held by virtue of protection under the Rent Control Laws for so long that it is of no use to the landlord at all.

39. In the clear opinion of this Court, the judgment passed by the Appellate Court is manifestly illegal, being based on irrelevant considerations and the result of a perverse approach. Bearing in mind the clear requirements of the law, on the facts obtaining and the equities arising between parties in this case, the judgment of the Appellate Court deserves to be quashed and that of the Prescribed Authority restored.

40. In the result, this writ petition **succeeds** and is **allowed**. The impugned judgment and order dated 14.08.2008 passed by the Additional District Judge, Court No.8, Mathura in P.A. Appeal No. 10 of 2008 is hereby **quashed**. The judgment of the Prescribed Authority in P.A. Case No. 3 of 2002 is **restored**. The tenants are granted three months' time to vacate the demised shop, provided they furnish an undertaking on affidavit before the Prescribed Authority, Mathura **within 15 days** of receipt of a certified copy of this judgment, stipulating that they will handover vacant and peaceful possession of the demised shop to the landlord on or before 10.01.2023. In case of default in either furnishing the requisite undertaking or delivering possession by the date fixed, the release order shall be carried into execution forthwith.

(2022) 11 ILRA 1084
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.11.2022

BEFORE

THE HON'BLE VIKRAM D. CHAUHAN, J.

Writ - A No. 17078 of 2015

Smt. Gomti Devi & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri N.L. Srivastava, Sri Bibhuti Narayan Singh

Counsel for the Respondents:
C.S.C.

(A) Civil Law – Constitution of India,1950 - Article 14, 16, 21, 226 & 309 - U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 - Rule 5 - - Writ Petition - Challenging order of rejection - claim of appointment on the compassionate ground - rejected on the Ground of delay - deceased employee died in harness - first application for seeking compassionate appointment submitted within time by wife of deceased in favour of her elder son - department accepted the same and offered appointment - but, elder son could not join due to mentally unfit - thus, petitioner submitted second application for seeking appointment in favour of her younger son - authority erred in rejecting on the ground of delay without considering material facts - writ petition allowed - matter remanded back to the authority for re-consideration of claim of appointment afresh. (Para – 54, 57, 58)

(B) Civil Law – Constitution of India,1950 - Article 14, 16, 21, 226 & 309 - U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 - Rule 5 - - Writ Petition - rejection of claim of appointment on compassionate ground - finding of authority - while rejection that, there was no financial distress to the family - no material on record to show -court find that - financial distress has not been addressed in proper perspective by the authorities - liabilities being faced by the family

of the deceased employee on account of sudden death as well as one of the son of the deceased has suffered with mental illness has not been taken into consideration - held, finding not sustainable. (Para – 56, 57, 58, 59)

(C) Civil Law – Constitution of India,1950 - Article 14, 16, 21, 226 & 309 - U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 - Rule 5 - - Writ Petition - rejection of claim of appointment on compassionate ground - finding of authority that, son of petitioner was got married showed that her family did not have any financial constraints - *Marriage* is one of the civil right of an individual - Even a poor person has a right to marry under the constitution - *Marriage* of a person has no rational nexus with the financial status of the person as well as has no nexus to the object of compassionate appointment - rules of compassionate appointment does not provide that the *marriage* would raise presumption that individual has the financial capacity to support itself - held, finding of authority is arbitrary and thus unsustainable - writ petition allowed.(Para – 50, 51, 53)

Writ Petition Allowed. (E-11)

List of Cases cited: -

Malaya Nanda Sethy Vs St. of Orissa & ors. (Civil Appeal No. 4103/2022 (arising out of SLP No. 936/2022) dated 20.05.2022.

(Delivered by Hon'ble Vikram D. Chauhan, J.)

1. Heard learned counsel for the petitioners and the learned Standing Counsel for the State-respondents.

2. The present writ petition is preferred challenging the order dated 28th January, 2015 passed by DIG (Establishment), Police Head Quarter, U.P., Allahabad and with a further prayer to issue a mandamus directing the respondent no.2 to appoint petitioner no.2 on compassionate ground in the office of the respondent.

3. The submission of the learned counsel for the petitioners is that the husband of petitioner no.1 and father of petitioner no.2, namely, Late Prem Shankar Dwivedi was a Constable and he was posted at District Sultanpur in the year 1999. Late Prem Shankar Dwivedi died during his service while working on the post of Constable in District - Sultanpur. After the death of the deceased employee, petitioner no.1 submitted a representation dated 9th September 1999 before respondent no.2 and requested that petitioner no.1 is an illiterate lady and, therefore, compassionate appointment may be granted to her elder son, namely, Shri Dinesh Kumar Dwivedi, as there is no earning member in the family of petitioner no.1 after death of her husband.

4. After completion of all the formalities and after due inquiry with regard to financial status of family, respondent no.2, has issued appointment letter dated 11th December, 2014 appointing Shri Dinesh Kumar Dwivedi (eldest son of deceased employee) on the post of Constable (M) and the aforesaid appointment letter dated 11th December, 2004 further provided that Shri Dinesh Kumar Dwivedi will appear before the Police Training Centre, Moradabad on 15th December, 2004 for six months training. Unfortunately, mental condition of Dinesh Kumar Dwivedi was very serious on 14th December, 2004 and, therefore, in place of joining the place of Training Centre, Moradabad for training on 15th December, 2004, he was hospitalized at Primary Health Centre, Tarun, Faizabad on 17th December, 2004 as he was suffering from

mental disease and was continuously undergoing treatment.

5. On account of the aforesaid fact, eldest son of petitioner no.1 (namely Shri Dinesh Kumar Dwivedi) could not join the aforesaid post. On 2nd May, 2006, petitioner no.1 filed a representation along with an affidavit before the respondent no.2 with a request that mental condition of her son namely Shri Dinesh Kumar Dwivedi has deteriorated and is unable to join the post in question and as such appointment letter may be issued in favour of petitioner no.2, being younger son of petitioner no.1, namely, Shri Manoj Kumar Dwivedi for being appointed on compassionate ground.

6. After receiving the aforesaid representation of petitioners, respondent no.2 did not pass any order and as such petitioners preferred a reminder dated 1st January, 2008 before respondent no.2 along with an affidavit and medical certificate of Shri Dinesh Kumar Dwivedi. The petitioners thereafter approached the respondent no.2 on several occasions for consideration of appointment of petitioner no.2 on compassionate ground in place of his elder brother. However, no action was taken on the request of the petitioners.

7. Thereafter, the petitioner no.2 met respondent no.2 personally on 2nd July, 2008 at his office and narrated the entire grievance and further requested for grant of compassionate appointment. On the aforesaid, respondent no.2 orally directed the petitioner no.1 to file a fresh representation in respect of grant of compassionate appointment and in furtherance thereof, petitioner no. 1 has filed a representation dated 5th July, 2008 along with an affidavit and medical certificate of Shri Dinesh Kumar Dwivedi before the respondent no.2.

8. Despite the aforesaid representation, no order was passed by the respondent no.2 for grant of compassionate appointment and as such the petitioner preferred Writ-A No.67008 of 2008 before this Court wherein a direction was issued on 27th August, 2012 to respondent no. 2 to consider the claim for compassionate appointment of petitioner no.2 in accordance with law by a reasoned order within a period of six weeks from the date of submission of a certified copy of the order. The respondent no.2 thereafter, referred the matter to respondent no.1 for condonation of delay in accordance with Rule 5 of U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 (hereinafter referred as Rules of 1974). The State Government by means of a communication dated 19th January, 2015 to the Police Head Quarter has rejected the application for compassionate appointment and has refused to condone the delay in preferring the application for compassionate appointment. In pursuance to the aforesaid, the respondent no.2 passed the impugned order dated 28th January, 2015 rejecting the claim of the petitioners.

9. It is submitted by learned counsel for the petitioners that the rejection of the claim of the petitioners is arbitrary and is not tenable under law. He submits that impugned order takes notice of the fact that the deceased employee expired on 7th August, 1999 and the application for compassionate appointment was submitted on 6th May, 2013, which is after a period of 13 years from the date of death of the employee and as such the application was held to be time barred. The respondents

further did not find it appropriate to condone the delay in filing the application.

10. The submission of learned counsel for the petitioners is that the initial application for grant of compassionate appointment was submitted on 9th September, 1999 before the respondent no.2 and on the aforesaid application, appointment letter was issued in favour of eldest son of petitioner no.1 on 11th December, 2004. However, eldest son of petitioner no.1 could not join in pursuance of the appointment letter as he was mentally unfit and on account of aforesaid fact, petitioner no.1 again filed a representation dated 2nd May, 2006 before respondent no.1, that in place of eldest son of petitioner no. 1 namely Shri Dinesh Kumar Dwivedi, who is now mentally unsound, the younger son of petitioner no.1, namely, Shri Manoj Kumar Dwivedi (Petitioner no. 2) be appointed. It is further submitted that the aforesaid application remained pending and the petitioner no. 1 had filed a reminder on 1st January, 2008 along with medical certificate of Shri Dinesh Kumar Dwivedi and an affidavit. It is further submitted that when no action was taken, petitioner no.2 met respondent no.2 personally on 2nd July, 2008 at his office and respondent no.2 orally directed petitioner no. 1 to submit a fresh representation in respect of the claim of petitioner no. 2 and, thereafter, a fresh representation dated 5th July, 2008 was submitted by petitioner no. 1 for appointment of petitioner no.2 on compassionate grounds.

11. Learned counsel for petitioners further submits that once the initial application has been submitted in the year 1999 and the respondents after considering the financial condition and other aspects of the matter has issued the appointment letter in favour of eldest son of petitioner no.1, who subsequently became medically unfit, when the appointment letter was issued, as such the petitioner no.1 by representation had requested for appointment of petitioner no.2 in place of eldest son Shri Dinesh Kumar Dwivedi and as such there is no delay in approaching the respondents for grant of compassionate appointment.

12. It is submitted that the application for compassionate appointment, which was firstly preferred in the year 1999 was finally considered by the respondents in 2004 and when the eldest son of the petitioner no. 1, namely, Shri Dinesh Kumar Dwivedi could not join on account of his mental condition, an application was filed to appoint petitioner no.2 in his place and as such the circumstances in which the petitioner no. 1 was forced to apply for changing the offer of compassionate appointment in favour of petitioner no 1, warranted under law for condonation of delay (if any) in exercise of power under the proviso to Rule 5 of the Rules of 1974.

13. It is further submitted that the rejection of the claim of compassionate appointment of petitioners on the ground of delay, is arbitrary and untenable under law and without application of mind. While passing the impugned order, the authority concerned has not taken into consideration the aforesaid facts and circumstances which warranted condonation of delay and further the finding recorded in the impugned order that the petitioners applied for the first time in the year 2013 is also *dehors* the record.

14. It is further submitted on behalf of petitioners that the impugned order further rejects the claim of petitioners on the ground that the petitioners is

receiving family pension to the tune of Rs.7,000/- per month and has income from agricultural land of Rs.7,700/- per month and as such respondent no.2 has held that financial condition of the petitioners is not such that the compassionate appointment may be granted. The respondent no.2 further by passing impugned order has taken objection to the marriage of petitioner no.2 during his poor financial condition and as such has denied compassionate appointment. It has also been taken note in the impugned order that the petitioner no.1 is illiterate however, she could have applied for appointment, as even illiterate persons are being given appointment on compassionate ground. The impugned order takes note of the fact that the medical certificate of petitioner no.1 has not been filed and that the petitioner no. 1 has waited for the fact that the petitioner no.2 becomes major and thereafter, has applied for grant of compassionate appointment.

15. It is submitted that the family pension being given to the petitioners is not sufficient particularly in view of the fact that eldest son of petitioner no.1 is suffering from mental illness and a family of four persons would not survive at a meagre family pension of Rs.7,000/- per month.

16. It is further submitted that the agricultural income shown as Rs.7,700/- per month is *dehors* the record as there was no evidence before the respondent authorities which could have found the basis of the aforesaid income nor any such documentary evidence was served on the petitioners neither any opportunity was given prior to determination of the agricultural income of the petitioners. He submits that initially on the death of the employee, the petitioner no.1 had given the name of his eldest son Shri Dinesh Kumar Dwivedi. However, on the date of issuance of appointment letter in 2004, he was mentally sick and as such he was not in a position to join the duties and as such respondents cannot raise objection that petitioner no.1 should have applied for grant of compassionate appointment. The rules in this respect give a right to any family member to be appointed on compassionate ground and as such the choice vests with the petitioners.

17. It is submitted that finding recorded by the respondent no.2 that petitioner no. 1 waited for the younger son Manoj Kumar Dwivedi to become major to apply for compassionate appointment is not in accordance with law as initially eldest son had applied for grant of compassionate appointment. However, he suffered from mental sickness and as such change was sought and petitioner no.2 was requested to be appointed on compassionate ground .

18. Learned Standing Counsel on behalf of the respondents submits that the husband of petitioner no.1 was posted as Constable in District Sultanpur, who died on 7th August, 1999 while in service. After the death of the aforesaid employee, petitioner no.1 applied for appointment of Shri Dinesh Kumar Dwivedi (eldest son of deceased employee) on compassionate ground and the Police Head Quarter by order dated 11th December, 2004 appointed Shri Dinesh Kumar Dwivedi as Constable (M) with the condition that Dinesh Kumar Dwivedi will join the Police Training Centre, Moradabad on 15th December, 2004.

19. Learned Standing Counsel further submitted that Shri Dinesh Kumar

Dwivedi due to his mental sickness could not join for training. Thereafter, petitioner no.1 preferred application for grant of compassionate appointment to petitioner no.2 in place of Shri Dinesh Kumar Dwivedi. The aforesaid application remain pending and, therefore, this Court by order dated 27th August, 2015 passed in Writ-A No.67008 of 2008 directed the respondents to decide the claim of the petitioners for compassionate appointment within a period of six weeks from the date of submission of a certified copy of the order. However, the claim of the petitioners did not find favour of the authorities concerned and the same was rejected by means of the impugned order on the ground that the claim was filed after a period of five years and no ground was substantiated for condoning the delay in preferring the application. He submits that the application of the petitioners have been rightly rejected and the impugned order is in accordance with law.

20. Appointment in public service are to be made with open invitation to all eligible candidates and on merit. In all the government vacancies equal opportunity should be provided to all aspirants as mandated under Articles 14 and 16 of the Constitution. No other mode of appointment nor any other consideration is permissible. However, appointment on compassionate ground offered to a dependent of a deceased employee is an exception to the said norms. The exception is carved out to meet certain exigencies and in the interest of justice out of humanitarian consideration. The whole object of granting compassionate employment is thus to enable the family to tide over the crisis. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved viz. relief against destitution. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family on account of sudden ending of erstwhile employment.

21. Appointment on compassionate grounds is not automatic, but subject to scrutiny of various parameters including the financial position of the family, the economic dependence of the family upon the deceased employee. Therefore, no one can claim to have a vested right for appointment on compassionate grounds.

22. In **Malaya Nanda Sethy Vs. State of Orissa** and others passed in Civil Appeal No. 4103 of 2022 [Arising out of S.L.P.(Civil) No. 936 of 2022] dated 20th May, 2022 has held that application for compassionate appointment is to be considered well in time. The consideration must be fair, reasonable and based on relevant considerations. The application cannot be rejected on the basis of frivolous and for reasons extraneous to the facts of the case. Then and then only the object and purpose of appointment on compassionate grounds can be achieved.

23. In the present case, husband of petitioner no.1 and father of petitioner no.2, namely, Late Prem Shankar Dwivedi was a Constable and he was posted at District - Sultanpur in the year 1999. However, he died on 7.8.1999 during his service while working on the post of Constable in District - Sultanpur. After the death of deceased employee, petitioner no.1 submitted a representation dated 9th September 1999, before the respondent no.2 and requesting

that the petitioner no.1 is an illiterate lady and, therefore, compassionate appointment may be granted to her elder son, namely, Dinesh Kumar Dwivedi because there is no earning member in the family of petitioner no.1 after the death of her husband.

24. In pursuance to aforesaid application for grant of compassionate appointment, respondent no. 2 has issued an appointment letter dated 11th December, 2004 directing the appointment of Shri Dinesh Kumar Dwivedi (eldest son of the deceased employee) on the post of Constable (M) and the aforesaid appointment letter further provided that Shri Dinesh Kumar Dwivedi will appear before the Police Training Centre, Moradabad on 15th December, 2004 for six months training.

25. Unfortunately, the mental condition of Shri Dinesh Kumar Dwivedi was very serious on 14th December, 2004 and, therefore, in place of joining the place of Training Centre, Moradabad for training on 15th December, 2004, he was hospitalized at Primary Health Centre, Tarun, Faizabad on 17th December, 2004 as he was suffering from mental disease and was continuously going under treatment. In this respect a medical certificate dated 17th December, 2007 has been issued by the In-charge, Medical Officer, Primary Health Centre, Tarun, Faizabad.

26. On account of the mental health of elder son of petitioner no. 1 not been favourable, petitioner no. 1 preferred representation dated 2nd May, 2006 along with affidavit informing the respondent authorities that mental health of Shri Dinesh Kumar Dwivedi have become worst and, therefore, requested that appointment letter be issued in favour of the petitioner no. 2 (younger son of petitioner no. 1) on compassionate ground. The aforesaid representation dated 2nd May, 2006 further stated that on 15th November, 2005 petitioner no. 1 had informed the Superintendent of Police, Sultanpur about the medical condition of Shri Dinesh Kumar Dwivedi and had further requested for appointment of petitioner no. 2 in place of Dinesh Kumar Dwivedi.

27. When the respondents did not take any action on representation of the petitioner no. 1 for appointment of petitioner no. 2 in place of Shri Dinesh Kumar Dwivedi, then the petitioner no. 1 again filed a representation dated 1st January, 2008 before the respondent no. 2 along with affidavit and medical certificate of Shri Dinesh Kumar Dwivedi. Despite the aforesaid representation of the petitioner no. 1, no action was taken by the respondent authorities and only assurances were given that the matter would be taken up and the decision would be communicated. Since no order was being passed on the above-mentioned representation of the petitioners, the petitioners met the respondent no. 2 personally on 2nd July, 2008 at Allahabad and the entire grievance was narrated to respondent no. 2, then respondent no. 2 directed petitioner no. 1 to give a fresh representation along with entire records so that matter can be considered. On the oral direction of respondents, the petitioner no. 1 again preferred representation dated 5th July, 2008 along with affidavit and medical certificate for issuance of appointment letter in favour of petitioner no. 2 in place of Shri Dinesh Kumar Dwivedi on compassionate ground.

28. No action was taken by the respondents on the above-mentioned

representations of petitioner no. 1 and as such the petitioner no. 1 preferred Writ Petition No 67008 of 2008 (Smt Gomti Devi Vs State of U.P.) before this Court. The above-mentioned writ petition was finally decided by judgement and order dated 27th August, 2012. By order dated 27th August, 2012 this Court directed the respondents to consider the claim for compassionate appointment of petitioner no. 2 in accordance with law by a reasoned order within a period of six weeks from the date of submission of certified copy of the order passed by this Court.

29. The petitioner no. 2 submitted the above-mentioned order dated 27th August, 2012 before the respondent no. 2 on 24th September, 2012 along with the covering letter through registered post. After receiving the certified copy of the order dated 27th August, 2012, respondent no. 2 has rejected the claim for compassionate appointment of the petitioner no. 2 by impugned order dated 28th January, 2015.

30. The claim for compassionate appointment is governed by Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974. The Rule 5 of the aforesaid Rules of 1974 provides that in case the 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, one member of his family who is not already employed under the Central government or a State government shall on making an application for the purpose be given a suitable employment in government service on a post. The aforesaid Rules further provides that the application for employment shall be made within a period of five years from the date of death of the government servant. The Rules of 1974 further empower the State Government to relax the requirement including the time limit where it is satisfied that the time limit fixed for making application for employment causes undue hardship in a particular case.

31. A perusal of the impugned order dated 28th January, 2015 would demonstrate that the application for compassionate appointment of the petitioner no. 2 was send to the State Government treating the same to be beyond the five years limit prescribed in Rule 5 of the Rules of 1974. The respondent no. 2 by impugned order dated 28th January, 2015 rejected the claim of the petitioner no. 2 for compassionate appointment and thereby declined to relax the time limit provided in the above-mentioned Rules of 1974.

32. The rejection of the claim for compassionate appointment is made by the respondents on the ground that the deceased employee expired on 7th August, 1999 and the petitioner no. 1 has applied for appointment on compassionate ground by application dated 6th May, 2013 after almost 13 years of the death of the deceased employee. On the aforesaid basis respondents came to the conclusion that the application for compassionate appointment was barred by time. Further, the claim of petitioners has also been rejected on the ground that the petitioners are getting family pension of Rs. 7000/- per month and further income from agricultural land to the tune of Rs. 7700/- per month is being received by the petitioners and as such the respondents have come to the conclusion that the family is not in financial crisis. The respondents further taking note of the fact

that the petitioner no. 2 is married and in case the financial condition of the petitioners' family was not good then the petitioner no. 2 would not have married. The impugned order further states that the petitioner no. 1 has not applied for compassionate appointment on the ground that she is illiterate despite the fact that the State Government also provide employment to illiterate person. The respondents further recorded that the petitioners have not filed any proof with regard to ill-health of petitioner no. 1 and petitioner no. 1 waited for petitioner no. 2 to become major and then has applied for grant of compassionate appointment and on the aforesaid basis claim of the petitioners for compassionate appointment has been rejected being filed beyond the time prescribed under the Rules of 1974.

33. In the present case, deceased employee expired on 7th August, 1999 and application for grant of compassionate appointment was preferred by petitioner no. 1 on 9th September, 1999 for appointment of elder son of petitioner no. 1 being Shri Dinesh Kumar Dwivedi. In the counter affidavit filed by the respondents in paragraph 10 it has been stated that the claim for compassionate appointment of the petitioner no. 1 for appointment of the elder son of petitioner no. 1 was processed by Superintendent of Police, Sultanpur by communication dated 8th March, 2000 within the time limit prescribed under the 1974 Rules and the appointment letter was issued on 11the December, 2004 in favour of Shri Dinesh Kumar Dwivedi (elder son of petitioner no. 1) by the police head quarter.

34. In pursuance to above-mentioned appointment order dated 11th December, 2004, Shri Dinesh Kumar Dwivedi could not join the post on account of his serious mental condition. The aforesaid fact with regard to Shri Dinesh Kumar Dwivedi not joining in pursuance to the appointment letter dated 11th December, 2004 is admitted by the respondents in the counter affidavit.

35. The petitioner no. 1 considering the mental health of Shri Dinesh Kumar Dwivedi and the fact that he may not be able to join his post in pursuance to the appointment letter dated 11the December, 2004 preferred representation dated 2nd May, 2006 along with affidavit before the respondent no. 2 informing about the ill-health of Shri Dinesh Kumar Dwivedi and further requesting that the petitioner no. 2 may be appointed in place of Shri Dinesh Kumar Dwivedi. The aforesaid fact that the petitioner no. 1 had approach the respondent by representation dated 2nd May, 2006 has not been denied by the respondents in the counter affidavit. The representation dated 2nd May, 2006 further records that on 15th November, 2005, the Superintendent of Police, Sultanpur was informed about the aforesaid fact.

36. The petitioner no. 1 thereafter preferred representation dated 1st January, 2008 before the respondent no. 2 along with affidavit and medical certificate of Shri Dinesh Kumar Dwivedi thereby requesting the respondent authorities to issue appointment letter in favour of petitioner no. 2 as the mental condition of Shri Dinesh Kumar Dwivedi is not such as would permit him to join his duties. The aforesaid representation dated 1st January, 2008 is not disputed by the respondents in the counter affidavit.

37. Thereafter the petitioner no. 1 has approached the office of respondent no.

2 and met him personally on 2nd July, 2008 at Allahabad and has narrated the entire grievance of the petitioner. The respondent no. 2 had orally directed the petitioner no. 1 to submit a fresh representation along with the entire record and as such petitioner no. 1 has filed representation dated 5th July, 2008 along with medical certificate of Shri Dinesh Kumar Dwivedi and affidavit and has further requested for issuance of appointment letter in favour of petitioner no. 2. The aforesaid representation dated 5th July, 2008 has not been denied by the respondents in the counter affidavit. When no action was taken by the respondents on the representation of the petitioner no. 1, the petitioner no. 1 preferred Writ Petition No. 67008 of 2008 before this Court and said writ petition was disposed of by order dated 27th August, 2012 directing the respondents to take decision on the claim for compassionate appointment of the petitioner no. 2. Thereafter the claim for compassionate appointment of the petitioner no. 2 has been rejected by the respondent authorities by impugned order dated 28th January, 2015.

38. The basis for rejection of the claim of the petitioner no. 2 for grant of compassionate appointment is on account of the fact that the application for grant of compassionate appointment was preferred by petitioner no. 1 on 6th May, 2013 whereas the deceased employee has died on 7th August, 1999. As per the impugned order, the claim for compassionate appointment was made by the petitioners beyond the five years limit prescribed under the Rules of 1974.

39. The aforesaid ground for rejection of the claim of the petitioner is untenable in view of the fact that the petitioner no. 1 initially applied for grant of compassionate appointment on 9th September, 1999 and the aforesaid application of the petitioner for grant of compassionate appointment was processed by the respondent authorities and the appointment letter dated 11th December, 2004 was issued in favour of Shri Dinesh Kumar Dwivedi (elder son of petitioner no. 1). It is to be noted that petitioner no. 1 promptly made application for compassionate appointment on 9th September, 1999 (within a month from the date of death of the government servant) and the respondents after almost 4 years proceeded to decide the aforesaid application for compassionate appointment of the petitioners. The appointment letter for compassionate appointment was issued in favour of Shri Dinesh Kumar Dwivedi (elder son of petitioner no. 1) on 11th Decmeber, 2004, however, during the intervening period, mental health of Shri Dinesh Kumar Dwivedi deteriorated and as such, he was not in a position to join the post as per the appointment letter dated 11th December, 2004. The petitioner no. 1 thereafter approached the respondents for issuing appointment letter in favour of petitioner no. 2 (being the younger son of petitioner no. 1) in place of Shri Dinesh Kumar Dwivedi. The initial information with regard to the aforesaid was submitted by the petitioner on 15th November, 2005 and thereafter the representation dated 2nd May, 2006 along with the affidavit was also submitted before the respondent authorities. Further representation was also submitted by the petitioner on 1st January, 2008 and 5th July, 2008. The aforesaid facts have not been disputed by the respondents in the counter affidavit filed in the present writ petition.

40. The impugned order takes notice of the application for grant of

compassionate appointment of 6th May, 2013 despite the fact that prior to the aforesaid application, the petitioner had already preferred the application for compassionate appointment on 9th September, 1999 which was followed by issuance of appointment letter on 11th December, 2004 in favour of Shri Dinesh Kumar Dwivedi. However, Shri Dinesh Kumar Dwivedi could not join his duty on account of his mental health and as such representation dated 2nd May, 2006 was preferred bringing to the notice of the respondent authorities the ill-health and mental condition of Shri Dinesh Kumar Dwivedi and further for issuance of appointment letter in favour of petitioner no. 2 (younger son of petitioner no. 1). The aforesaid facts have not been considered by the respondent authorities while passing the impugned order.

41. The date of application for compassionate appointment is recorded in the impugned order as 6th May, 2013 despite the fact that it is an admitted case of the respondents that the first application for compassionate appointment was preferred in 1999 itself and thereafter in 2006, the petitioner no. 1 had requested the change of the name of the beneficiary of compassionate appointment in place of Shri Dinesh Kumar Dwivedi who was mentally not of sound mind to join the post offered. It is also to be noted that the respondent authorities by order dated 11th December, 2004 has issued appointment letter in favour of Shri Dinesh Kumar Dwivedi which was after considering all the aspects with regard to grant of compassionate appointment.

42. The petitioner no. 1 had sought replacement of the name of Shri Dinesh Kumar Dwivedi with the name of petitioner no. 2 on account of unsound mental condition of Shri Dinesh Kumar Dwivedi. In this respect the petitioners have also filed medical certificate and affidavit before the respondent authorities. All these aspects have not been considered by the respondent authorities while passing the impugned order. The finding recorded in the impugned order that application for compassionate appointment has been made on 6th May, 2013 is not sustainable as it is admitted in the counter affidavit that the application for compassionate appointment was preferred firstly in the year 1999 and thereafter in the year 2006 (for replacement of the name of the beneficiary), as such, the impugned order insofar it as it rejects the application of the petitioner as being time barred is not sustainable under law. The respondents are obliged under law to take a decision considering all the facts and circumstances of the case and the non-consideration of the facts herein before stated would make the impugned order unsustainable under law. The respondent authorities while passing the impugned order has failed to take into consideration the important facts which have bearing on the decision of the respondent authorities.

43. It is to be noted that the compassionate appointment was offered by the respondent authorities in pursuance to the application dated 9th September, 1999 to Shri Dinesh Kumar Dwivedi, however, he could not join the post on account of his mental health and as such the petitioner no. 1 sought replacement of the name of the beneficiary as petitioner no. 2. It is to be noted that Shri Dinesh Kumar Dwivedi has not joined his duties in pursuance to the appointment letter dated 11th December, 2004 and the right of employment on compassionate ground which stood fortified by issuance of appointment letter

dated 11th December, 2004 has not extinguished on account of non-joining of Shri Dinesh Kumar Dwivedi on medical grounds and the subsequent replacement being sought by petitioner no. 1 by requesting for appointment of petitioner no. 2 in place of Shri Dinesh Kumar Dwivedi was in continuation of the earlier order dated 11th December, 2004. The aforesaid replacement of the beneficiary under the compassionate appointment scheme was being sought on account of the fact that the employee died in the year 1999 and application for appointment on compassionate ground was preferred in the year 1999 itself by petitioner no. 1, however, the respondent authorities issued the appointment letter on 11th December, 2004 and during the intervening period subsequent developments have taken place and as a result of the same, the mental health condition of Shri Dinesh Kumar Dwivedi was not such as he could have joined the post in pursuance to the appointment letter dated 11th December, 2004 and as such the petitioner no. 1 sought replacement of the name of beneficiary for grant of compassionate appointment in favour of the petitioner no. 2.

44. It is further to be noted that the claim for compassionate appointment was duly processed and accepted by the respondent authorities and appointment letter was issued in the year 2004, however, the acceptance of the compassionate appointment by the respondents could not be completed by joining of the beneficiary to the post on the ground of ill-health and as such although the respondents had issued the appointment letter, the beneficiary could not join duty and such peculiar facts and circumstances which have developed after the filing of the application for compassionate appointment in the year 1999 was required to be considered by the respondent authorities while passing the impugned order. The respondent authority while passing the impugned order has not taken aforesaid facts and circumstances into consideration and has passed the order mechanically. Such an approach by the respondent authorities is counter-productive to the very object for which the compassionate appointment scheme have been envisaged.

45. It is trite in law that facts of a particular case has a important bearing on the decision to be arrived at. The facts and particulars are the foundation on which the justice is to be administered. The administrative authorities while taking a decision is expected to consider all the material facts and circumstances to arrive at decision. Non-consideration of any material facts and circumstances may lead to injustice. The authority concerned is enjoined with the duty to apply the law on the facts and circumstances of a particular case while arriving at a decision. Such an approach is also required to bring fairness and stability to the decision arrived at by the administrative authority. Non-consideration of material facts and circumstances in a particular case may lead the decision as unfair and untenable under law. It is further to be noted that the decision-making authority is also a fact-finding authority and as such is required under law to consider all the facts in proper perspective so that a fair decision is arrived at by the authority concerned. Each matter before the administrative authority has its own peculiar features. The authority concerned is enjoined with the duty to apply these peculiar facts of the matter to the law applicable and then recorded finding on the claim before the aforesaid authority.

46. The respondent in the impugned order has further recorded a finding that the petitioners are receiving the family pension of Rs. 7000/- per month and further has agricultural income of Rs. 7700/- per month from agricultural land and as such there is no financial distress to the family of the deceased employee. It is to be noted that insofar as receiving of the family pension is concerned, the same was also before the respondent authorities when the decision for grant of compassionate appointment was taken in the year 2004 and the respondent authorities in considering the aforesaid fact of the matter has granted compassionate appointment to the elder son of the petitioner no 1. The respondent authorities further has concluded that the petitioners have agricultural income to the tune of Rs.7700/- per month. Learned counsel for the petitioners have disputed the aforesaid fact and has stated that the petitioners are earning Rs. 20,000/- per year from the agricultural land. The aforesaid fact has been stated in paragraph 14 of the writ petition, however, the aforesaid fact has not been denied in paragraph 18 of the counter affidavit. The basis on which the respondent authorities have come to the conclusion that the petitioners have agricultural income to the tune of Rs.7700/- per month has not been disclosed in the counter affidavit.

47. The impugned order is also silent on the basis on which the authority concerned has come to the conclusion that the petitioners is having agricultural income to the tune of Rs. 7700/- per month. The authority concerned while arriving at a decision is required to consider objectively the facts and circumstances of the case and any finding recorded by the authority concerned without there being factual foundation as well as evidence in support of the factual foundation would be unsustainable in law. The respondents have failed to bring on record any material to demonstrate as to how the respondents have come to the conclusion that the petitioners have agricultural income to the tune of Rs.7700/- per month and as such the finding of the respondents that the petitioners have agricultural income to the tune of Rs. 7700/- per month is wholly unsustainable in law.

48. It is further to be seen that the impugned order take notice of the family pension and agricultural income and comes to the conclusion that the petitioners are not in financial constraint and as such the compassionate appointment has been denied. The financial income of the family of a deceased employee is to be considered by the employer by taking into consideration whether the aforesaid income is enough to support the family in a dignified manner. The State is a welfare State and has duty under the Constitution to safeguard the interest of a citizen and provide them a dignified life. The respondent authority by passing the impugned order has not considered whether a meagre amount of Rs.14,700/- per month would be enough to support a family member of four persons of the deceased employee specially in view of the fact that one of the son of the deceased employee is having mental sickness and expenditure is being incurred in his well-being. The respondent authorities while passing the impugned order has not disclosed the reasons as to why the income of the family has been considered to be enough to support the family.

49. The respondent authorities were also required to consider the expenditure

which the family of the deceased employee is required to incur to maintain the dignified life and should have objectively considered all the aforesaid aspect of the matter specifically when the mental health of the elder son of the deceased employee is not disputed in the counter affidavit filed by the respondents before this Court.

50. The respondents in the impugned order has further held that the petitioner no. 2 is married and in case the family was suffering from financial constraint then the petitioner no. 2 would not have married. The finding recorded by the respondents in the impugned order is wholly unsustainable in law. It is to be noted that the right to marry a person of one's own choice is an integral part of Article 21 of the Constitution. The marriage of a person has no rational nexus with the financial status of the person. It is to be noted that even a poor person has a right to marry under the Constitution and the respondents by passing the impugned order has held that the petitioner no. 2 is married and in case the financial position of the petitioners was not good then the petitioner no. 2 would not have married. The aforesaid finding of connecting the financial condition with the marriage is having no rational nexus. Even a poor person can marry despite financial constraint.

51. Marriage as an institution has great legal significance and various obligations and duties flow out of marital relationship. The institutions of marriage is important social institution that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. Marriage is one of the civil right of an individual.

52. The civil society is based on the foundation of social institutions and the cumulative aim of various social institution is to bring harmony and order in the civil society. The institution like marriage give recognition to the relationship by the civil society and law.

53. The marriage by itself would not denude an individual of his financial status. The poorest person of the country has a right to marry while his financial status may remain intact. Any interpretation by the administrative authorities on the sole criteria of marriage of an individual denuding the financial status of the said individual is arbitrary and has no nexus to the object of compassionate appointment. The financial position of an individual is to be assessed by the authority concerned on the settled criteria. The rules of compassionate appointment does not provide that the marriage of an individual would raise presumption that the individual has the financial capacity to support itself. The marital status of the members of the family may be a factor to consider the number of dependents in the family or number of bread earners in the family and such an approach should be considered to determine the financial crisis of the family of the deceased employee.

54. The impugned order further takes note that the petitioner no. 1 could have herself applied for compassionate appointment even if she is an illiterate person as the State even appoints an illiterate person. In this respect, it is to be noted that in the year 1999 itself when the deceased employee died, the petitioner no. 1 had applied for grant of compassionate appointment to the elder son of the petitioner no. 1. The Rules of 1974 provide that the employment should be granted to one member of the family of the deceased employee. The petitioner no. 1, therefore,

had applied for appointment of the elder son of petitioner no. 1 for compassionate appointment, however, he could not joined the post on account of his mental illness and, therefore, the petitioner no. 1 had approached the respondent authorities for replacement of the name of beneficiary under the compassionate appointment scheme and the benefit of compassionate appointment be granted to petitioner no. 2.

55. It is the choice of the family members of the deceased employee as to the person who is to be accorded the benefit of compassionate appointment. Under the facts and circumstances, petitioners had promptly applied for grant of compassionate appointment in the year 1999 and decision of granting compassionate appointment was taken in the year 2004 by the respondent authorities and as such there was a huge delay on the part of respondent authorities in addressing the financial distress of the family of deceased employee and on account of the aforesaid delay subsequent intervening facts came into consideration by way of mental illness of elder son of petitioner no. 1 in respect of which the replacement of the beneficiary was sought by the petitioner no. 1 from the respondent authorities.

56. The petitioners have also filed the medical certificate and affidavit to bring on record facts and circumstances before the authority concerned. It is further to be noted that affidavit filed before the authority concerned it is disclosed that the deceased employee had two sons and one minor daughter and the elder son of the deceased employee was mentally ill. The aforesaid facts and circumstances have not been taken into consideration by the respondent authorities while passing the impugned order. The financial distress has not been addressed by the respondent authorities in proper perspective. The liabilities being faced by the family of the deceased employee on account of sudden death has not been considered by the respondent authority specifically the fact that one of the son of the deceased employee has suffered mental illness after the death of the employee concerned.

57. Although, respondent authorities have positively considered the application for compassionate appointment and had offered appointment to the elder son of the petitioner no. 1 in 2004, however, he was mentally unfit when the aforesaid offer for appointment was made and as such it was the duty of the respondent authorities to have considered the aforesaid facts and have offered the replacement. The respondent authorities while passing the impugned order further has not taken into consideration the liability that is faced by the family of the deceased employee on account of the medical treatment of the elder son of the deceased employee, who is mentally ill. The respondent authorities have only taken note of the income of the family of the deceased employee while passing the impugned order, however, has not dealt with the liability aspect as to whether the income generated by the family of the deceased employee is sufficient to meet out the liability of the family and would permit them to live a dignified life in consonance with Article 21 of the Constitution of India.

58. In view of the above-mentioned analysis the impugned order dated 28th January, 2015 passed by respondent no. 2 is not sustainable and as such is set aside and the matter is remanded back to respondent no. 2 to consider the application for compassionate appointment

of petitioner no. 2 on merits and in accordance with law and in view of the observations made by this Court hereinabove. In peculiar facts and circumstances of the case, it is directed that the application for compassionate appointment shall be considered by the respondents as within time. The above-mentioned exercise shall be completed by the respondents within a period of three months from the date of production of certified copy of the order. The respondents shall prior to passing of the order shall give an opportunity of hearing to the petitioners.

59. As a result the writ petition is allowed with direction as detailed herein above.

(2022) 11 ILRA 1099
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.11.2022

BEFORE

THE HON'BLE VIKRAM D. CHAUHAN, J.

Writ - A No. 42631 of 2017

Mohd. Janbaz Alam ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Upendra Upadhyay

Counsel for the Respondents:
C.S.C.

Civil Law – Constitution of India,1950 - Article 14, 15, 16, 17, 18, 39, 39(a), 43, 46, 142 & 226 - Indian Contract Act, 1872 - Section - 72 - Writ Petition - against impugned order of adjustment of certain amount from the retiral dues - petitioner retired in year 2014 - alleged excess salary was made in the year 2008 due to wrong fixation which was not detected & recovered by the respondent after retirement - payment of salary & other financial benefits of an employee is always subject to audit proceedings - Mistakes was made in year 2008, when third ACP was granted to petitioner, but same was detected after his retirement in year 2016 - audit is normaly held periodically and nothing has been brought on the record as to why the audit has not objected to such erroneous fixation earlier - recovery of amount at the behest of the employer when there is no fault of employee will entail hardship as the recovery under the equity jurisdiction is not permissible - hence writ petition allowed - impugned order of recovery set aside - recovered amount shall be restored in favour of the petitioner within three months.(Para – 22, 23, 24, 25)

Writ Petition is Allowed. (E-11)

List of Cases cited: -

1. St. of Punjab & ors. Vs Rafiq Masih (White Washer) (2015 vol. 4 SCC 334),

2. Thomas Daniel Vs St. of Kerala & ors., Civil Appeal No.7115 of 2010 decided on Dt. 02.05.2022

3. Col. B. J. Akkara (Retd.) Vs Government of India, (2006 vol. 11 SCC 709).

(Delivered by Hon'ble Vikram D. Chauhan, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

2. It is submitted by learned counsel for the petitioner that the petitioner was working on the post of Junior Engineer under the respondents and has since retired on 30.06.2014 from the office of Executive Engineer, Rural Engineering Services, Gorakhpur. It is further submitted by learned counsel for the petitioner that a liability was fixed against the petitioner on the ground of excess payment of ₹ 99,856/-

. The aforesaid liability is in respect of the year 2011-12 for construction of drain and road under Dr. Ambedkar project scheme for an estimate of ₹ 80.75 lakhs. Against the aforesaid estimated value, the financial and administrative approval was accorded to the tune of ₹ 56.15 lakhs and in pursuance thereof, a contract was executed on 12.09.2011. After completion of the contract, the total payment made was ₹ 55,49,856/-. The respondents have disputed the difference of amount of ₹ 99,856/- after taking measurement. The petitioner came to know about the aforesaid liability been fixed after his retirement thereafter the petitioner has moved an application before the Executive Engineer on 12.03.2016 giving details of circumstances in which the difference arisen and the amount should not be realised. It is further submitted that the petitioner has regularly represented the respondent authorities however the grievance of the petitioner was not decided and retirement dues after retirement of petitioner was not paid. After the retirement of the petitioner on 08.09.2016 another order was passed by the respondent No.4 claiming wrong fixation of promotional pay scale since 01.12.2008 and as such, the difference of amount of ₹ 3,10,022.00 was sought to be recovered. It is further submitted that thereafter on 02.05.2017, an order has been passed by the Additional Director, Treasury and pension, Varanasi Region, Varanasi directing adjustment of ₹ 4,09,878/- from the retirement dues of the petitioner. By means of impugned order, adjustment of ₹ 4,09,878/- is being made from the retiral dues of the petitioner. It is further submitted that the petitioner submitted representation dated 13.04.2017 before the respondent authorities against the order dated 08.09.2016. Petitioner further filed a representation dated 01.04.2017 before the respondent authorities against the recovery of ₹ 99,856.00.

3. It is further submitted by learned counsel for the petitioner that payment of excess salary was made in the year 2008 and aforesaid wrong fixation was not detected by the respondent and they have proceeded to initiate the recovery proceeding after retirement of the petitioner on 30.6.2014. It is further submitted that the retiral dues have been released, however now the amount is being adjusted from the pension. It is further submitted by learned counsel for the petitioner that neither the petitioner was in any manner involved in the fixation of third ACP nor any fraud or misrepresentation has been attributed to the petitioner in respect of wrong fixation. He has further submitted that the petitioner is entitled to protection in view of the law laid down by the Apex Court in **State of Punjab and others Vs. Rafiq Masih (White Washer) (2015) 4 SCC 334.**

4. Learned Standing Counsel appearing on behalf of the State submits that financial and administrative approval was given for work to the tune of ₹ 60 lakhs by the Government. The Executive Engineer sanctioned ₹ 54.50 lakh for the work in question and as such, petitioner was authorised to make payment to the extent of ₹ 54.50 lakh, however, petitioner has made payment of ₹ 55, 49,856.00/- and as such, a payment of ₹ 99,856.00 has been excessively paid by the petitioner and the aforesaid amount is also sought to be recovered from the petitioner by impugned order. It is further submitted by learned Standing Counsel that the excess of salary paid and excess of payment made to the contract by the petitioner is sought to be recovered by means of the impugned order.

Learned standing counsel do not dispute the fact that wrong fixation of salary was made in the year 2008 and the same was detected after retirement of the petitioner in the year 2014 and therefore, recovery is being made from the retiral dues. He submits that the recovery is being made on the basis of consent letter submitted by the petitioner, which is at page 51 of the writ petition. On the aforesaid basis, learned Standing Counsel submits that once the petitioner himself has given consent for recovery then he cannot resile from his consent.

5. The service of employee is governed by the terms and condition provided in the service rules or otherwise. The salary and other financial benefits are provided by the employer to the employee after due sanction in accordance with law. The employee is entitled to financial benefits arising out of the service to the extent as may be permissible under the relevant service rules or the Government Orders issued from time to time. No employee has the indefensible right to obtain financial benefits in respect of service from his employer where the aforesaid financial benefits do not have the sanction of law.

6. In some cases employees are extended financial benefits in respect of the service which the said employees are not entitled under law. The financial benefits so extended may be by mistake of employer or by fraud or misrepresentation of the employee. The employee is entitled to receive the financial benefits including salary arising out of the service only to the extent as may be sanctioned by the employer in accordance. The employer is obliged to sanction these financial benefits to his employee in accordance with law. However, the difficulty may arise where on account of mistake of employer, financial benefits is extended to its employee which are not permissible under law.

7. Under the common law, a payment made by mistake is entitled to be recovered. The recovery of payment is based on the principle of enrichment. One should not unjustly profit at the expense of another. The said principle is also reflected under Section 72 of the Indian Contract Act, 1872.

8. In the present case, employer is the State and the action of the State is required to be in consonance with the Constitution. The action of the state is required to be just, fair and reasonable. State action which is arbitrary and unfair, would not stand the concept of justice enshrined under the Constitution. If the excess amount was not paid on account of any misrepresentation or fraud of the employee or if such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of Rule/Order which is subsequently found to be erroneous, such recovery of excess payment of financial benefits may visit the employee with greater hardship more particularly where the employee has retired from service. An employee would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess financial benefits for a long period, he would spend it, genuinely believing that he is entitled to it as such any subsequent action to recover the excess payment will cause undue hardship to the employee. The State/Government is expected to reflect the constitutional mandate in all its action. The employer/State is under obligation to mitigate the hardship of the employee more

particularly when the hardship arises out of the mistake of the employer.

9. The Apex Court in **Rafiq Masih (supra)** has recognised that the State action should be in consonance with the concept of justice enshrined in the Constitution. The Apex Court has further observed that the right to recover being pursued by the employer, will have to be compared, with the effect of the recovery on the employee concerned. If the effect of the recovery from the employee concerned would be, more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer to recover the amount, then it would be iniquitous and arbitrary, to effect the recovery. In such a situation, the employee's right would outbalance, and therefore eclipse, the right of the employer to recover.

10. The Apex Court in **Rafiq Masih, (supra)** has observed as under :

"8. As between two parties, if a determination is rendered in favour of the party, which is the weaker of the two, without any serious detriment to the other (which is truly a welfare State), the issue resolved would be in consonance with the concept of justice, which is assured to the citizens of India, even in the Preamble of the Constitution of India. The right to recover being pursued by the employer, will have to be compared, with the effect of the recovery on the concerned employee. If the effect of the recovery from the concerned employee would be, more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer to recover the amount, then it would be iniquitous and arbitrary, to effect the recovery. In such a situation, the employee's right would outbalance, and therefore eclipse, the right of the employer to recover.

9. The doctrine of equality is a dynamic and evolving concept having many dimensions. The embodiment of the doctrine of equality can be found in Articles 14 to 18 contained in Part III of the Constitution of India, dealing with "fundamental rights". These Articles of the Constitution, besides assuring equality before the law and equal protection of the laws; also disallow discrimination with the object of achieving equality, in matters of employment; abolish untouchability, to upgrade the social status of an ostracised section of the society; and extinguish titles, to scale down the status of a section of the society, with such appellations. The embodiment of the doctrine of equality, can also be found in Articles 38, 39, 39-A, 43 and 46 contained in Part IV of the Constitution of India, dealing with the "directive principles of State policy". These Articles of the Constitution of India contain a mandate to the State requiring it to assure a social order providing justice-social, economic and political, by inter alia minimising monetary inequalities, and by securing the right to adequate means of livelihood, and by providing for adequate wages so as to ensure, an appropriate standard of life, and by promoting economic interests of the weaker sections.

10. In view of the aforestated constitutional mandate, equity and good conscience in the matter of livelihood of the people of this country has to be the basis of all governmental actions. An action of the State, ordering a recovery from an employee, would be in order, so long as it is not rendered iniquitous to the extent that the action of recovery would be more unfair, more wrongful, more improper, and more unwarranted, than the corresponding

right of the employer, to recover the amount. Or in other words, till such time as the recovery would have a harsh and arbitrary effect on the employee, it would be permissible in law. Orders passed in given situations repeatedly, even in exercise of the power vested in this Court under Article 142 of the Constitution of India, will disclose the parameters of the realm of an action of recovery (of an excess amount paid to an employee) which would breach the obligations of the State, to citizens of this country, and render the action arbitrary, and therefore, violative of the mandate contained in Article 14 of the Constitution of India."

11. The employee under law has no right against recovery but in equity, exercising judicial discretion the recovery is disallowed to provide relief to the employees from the hardship that will be caused if the recovery is permitted. The said principle is recognised by Apex Court in judgement rendered on 2.5.2022 in **Civil Appeal No.7115 of 2010 (Thomas Daniel Vs. State of Kerala and others)**

"9. This Court in a catena of decisions has consistently held that if the excess amount was not paid on account of any misrepresentation or fraud of the employee or if such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order which is subsequently found to be erroneous, such excess payment of emoluments or allowances are not recoverable. This relief against the recovery is granted not because of any right of the employees but in equity, exercising judicial discretion to provide relief to the employees from the hardship that will be caused if the recovery is ordered. This Court has further held that if in a given case, it is proved that an employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, the courts may on the facts and circumstances of any particular case order for recovery of amount paid in excess."

12. In **Col. B.J. Akkara (Retd.) Vs. Government of India**, (2006) 11 SCC 709, Hon'ble Supreme Court has observed as under:

"28. Such relief, restraining back 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."

13. In the matter of recovery, it is well settled if certain payment has been made to the employee on account of any fault of the employer, and for which the employee is

not responsible, namely, not guilty of fraud or misrepresentation, in such a case, the amount which has already been received by the employee and he has spent, should not be recovered.

14. The Apex Court in **Rafiq Masih (supra)** has summarised some situations of hardship in which the payments made by mistake cannot be recovered. In this context paragraph 12 of the aforesaid judgment is quoted hereunder:

"12. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from employees belonging to Class III and Class IV service (or Group C and Group D service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

15. Learned Standing Counsel has not disputed the proposition of law laid down in **Rafiq Masih (supra)** and **Thomas Daniel (supra)**. It is submitted by learned Standing Counsel that recovery is being made on the strength of the consent of the petitioner, which is at page 51 of the writ petition. It is further submitted that by consent letter dated 08.07.2016 petitioner has permitted the employer to realise the amount.

16. It is not in dispute between the parties that the petitioner is Class III employee and has retired 30.6.2014 and after his retirement, recovery is being made. The recovery of the amount of ₹ 4,09,878.00/- is being made from the petitioner. The aforesaid amount includes an amount of ₹ 99,856/- being an amount in excess paid by the petitioner to the contractor for executing the work contract. Further an amount of ₹ 3,10,022/- is sought to be recovered on account of excess salary paid to the petitioner from 12.8.2008. It is to be noted that the petitioner has retired from service on 30.06.2014 and the order of recovery has been passed from the retiral dues of the petitioner on 08.09.2016.

17. The recovery of the aforesaid amount is being made on the strength of the fact that the excess payment has been made to the petitioner on account of incorrect fixation of salary by mistake and further that the petitioner has made excess payment to the contractor which the State had suffered loss.

18. Insofar as the loss suffered by the State on account of excess payment made

by the petitioner to the tune of ₹ 99,856/- to the contractor for the work contract executed, such a loss is alleged to be suffered by the State is of the year 2011-12 when the petitioner was in service. After the retirement when the petitioner came to know with regard to the aforesaid recovery been made from the petitioner, the petitioner by means of application dated 12.03.2016 filed objection to the aforesaid recovery explaining that the amount has been paid to the contractor as is permissible under law. The objection raised by the petitioner against the aforesaid recovery of excess payment made to the contractor was not decided by the employer and as such reminder dated 20.03.2016 was sent to the Executive Engineer.

19. Thereafter on 31.03.2016, respondent No.3 forwarded a letter to respondent No.4 directing that the representation of the petitioner should be decided at the earliest. However, no order was passed by the respondents on the aforesaid objection of petitioner. The petitioner thereafter has further submitted a representation dated 01.04.2017 and 22.05.2017. The stand in the counter affidavit in paragraph 15 is that the representations of the petitioner were decided by order dated 08.09.2016 and 20.04.2017. A perusal of above-mentioned orders dated 08.09.2016 and 28.04.2017 would demonstrate that the objection by the petitioner against the aforesaid recovery by filing of objection/representation has not been considered and an order has been passed mechanically and without application of mind to the objection raised by the petitioner against recovery. It is to be noted that the employee can always show by filing representation/objection that the recovery/loss to the State is not attributable to the petitioner and that the payment has been made in accordance with law. The employer is required to consider the case of the petitioner in the light of objection raised by the employee. However in the present case, the objection raised by the employee by means of representation have not been considered nor the same has been decided. Such an approach by the employer is in gross violation of principles of natural justice and fair play.

20. The other amount sought to be recovered is with regard to payment of excess salary to the petitioner from the year 2008. The petitioner has retired on 30.06.2014 from the service and after the retirement of the petitioner, excess salary is sought to be recovered by means of impugned orders dated 08.09.2016 and 02.05.2017. It is not the case of the respondents that any fraud or misrepresentation has been made by the petitioner while fixation of the salary. The payment of excess salary is on account of mistake of the employer. As such. in view of the law laid down by the Apex Court in **Rafiq Masih (supra)** and **Thomas Daniel (supra)**, the aforesaid recovery in not permissible under law.

21. Learned Standing Counsel has tried to defend the recovery of the amount on the basis of consent letter dated 08.07.2016 of the petitioner which according to learned Standing Counsel is the consent to adjust the amount of excess payment made to the petitioner from the retiral dues of the petitioner. He submits that the recovery has been effected on the basis of consent letter dated 08.07.2016 of the petitioner.

22. A bare perusal of the above-mentioned consent letter dated 08.07.2016 of the petitioner would go to show that

since the petitioner had retired on 30.06.2014 and even after a lapse of two years, retiral benefits of the petitioner were not been paid on account of alleged recovery against the petitioner, the petitioner requested the respondents to temporarily stop the amount equivalent to the alleged recovery and remaining retiral benefits may be released. The petitioner had requested the respondents to temporarily stop the payment of the amount equivalent to the alleged recovery from the retiral dues of the petitioner since the representation against the aforesaid recovery was pending before the respondents for consideration. The aforesaid consent was only to stop the due amount temporarily till the objection and representation of petitioner is pending and release the remaining amount. The employee had never given an undertaking that the recovery amount may be adjusted from the dues.

23. There is one more aspect of the matter that the payment of salary and other financial benefits of an employee is always subject to audit proceeding. Each department of the government is subjected to audit periodically, such periodical audit is done with the object that any mistake by the employer or the authority concerned in payment of financial benefit to the employee, the same may be brought to the knowledge and rectified at the earliest. In the present case, the mistake was made in the year 2008 when the third ACP was granted, however the same was detected after his retirement in the year 2016. The audit is normally held periodically and nothing has been brought on record as to why the audit has not objected to such erroneous fixation earlier. If the government has established the Audit Department to keep a check then it is imperative on the aforesaid department to raise the issue at the earliest. Once an employee has retired and has travelled in service for substantial years after fixation of pay then recovery of such amount at the behest of the employer when there is no fault of employee will entail hardship as the recovery under the equity jurisdiction is not permissible under law.

24. As a result, the writ petition is **allowed**. The impugned order dated 8.9.2016 passed by Executive Engineer, Rural Engineering Department, Ghazipur Division Ghazipur and consequential order dated 2.5.2017 passed by Additional Director, Treasury and Pension, Varanasi Region, Varanasi, are set aside.

25. Consequentially, the amount recovered in pursuance to the impugned orders dated 8.9.2016 and 2.5.2017, shall be restored in favour of the petitioner within a period of three months.

(2022) 11 ILRA 1106
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.11.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE SAURABH SRIVASTAVA, J.

Writ C No. 25065 of 2022

Kaneez Fatima ....Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Araf Khan, Sonakshi Arora

Counsel for the RespondentS:
C.S.C., Arti Raje, Sri M.C. Chaturvedi, Sr. Advocate

A. Constitution of India – Article 226 – Writ – Maintainability – Fundamental right guaranteed under Article 14 and 21 – Enforcement – Writ against order passed by authority u/s 161 of the Electricity Act, 2003, how far maintainable – Held, if just compensation is not awarded, it would affect fundamental rights of the sufferer guaranteed under Articles 14 and 21 of the Constitution of India. Therefore, order so passed would be amenable to writ jurisdiction under Article 226 of the Constitution of India. (Para 30)

B. Electricity Act, 2003 – Policy decision dated 25.09.2021 – Guidelines for compensation on electrocution – Para 2 – Right to get just compensation – Petitioner's husband died due to electrocution on account of defective installation of 11 KV overhead line by the respondents – Application of multiplier – Compensation for future prospect and loss of consortium – Held, compensation for death of the husband of the petitioner due to electrocution is payable to the petitioner applying the multiplier of 18 – At the time of death, the age of deceased was 27 years, hence 40% towards future prospect was added applying the principle laid down in Panay Sethi's case – Rs. 66,85,000/- was determined as compensation payable to the petitioner. (Para 14, 15, 19 and 33)

C. Compensation – Notional Income – Determination of income of non-earning victim – Relevance of notional income to compute the compensation – Held, in the absence of proof of actual income, notional income is determined to compute compensation. (Para 18)

C. Compensation – Consortium – Relevance in determining just compensation – Consortium is a compendious term which encompasses 'spousal consortium', 'parental consortium', and 'filial consortium'. The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family – With respect to a spouse, it would include sexual relations with the deceased spouse. (Para 20)

D. Tort law – Compensation for negligence – Strict liability – Principle laid down in MC Mehta's case and confirmed in Shail Kumari's case relied upon – Where an enterprise is engaged in a hazardous or inherently dangerous activity and harm is caused on anyone on account of the accident in the operation of such activity, the enterprise is strictly and absolutely liable to compensate those who are affected by the accident – Such liability is not subject to any of the exceptions to the principle of strict liability under the rule in Rylands v. Fletcher. (Para 28)

Writ petition allowed. (E-1)

List of Cases cited:-

1. WRIT - C No. - 10191 of 2009; Shiv Ranshu Chhuneja Vs St. Of U.P. & ors. decided on 10.04.2018

2. MISC. BENCH No. - 6929 of 2014; Yash Pal Singh (Minor) & Anr. Vs St. Of U.P. Thru.Prin. Secy. (Electricity) & 5 Ors. decided on 24.04.2017

3. Kirti Vs Oriental Insurance Co. Ltd.; (2021) 2 SCC 166

4. Kajal Vs Jagdish Chand; (2020) 4 SCC 413

5. Lata Wadhwa Vs St. of Bihar; (2001) 8 SCC 197

6. National Insurance Co. Ltd. Vs Pranay Sethi, (2017) 16 SCC 680

7. Magma General Insurance Co. Ltd. Vs Nanu Ram; (2018) 18 SCC 130

8. Rajesh Vs Rajbir Singh; (2013) 9 SCC 54

9. Sarla Verma Vs DTC, (2009) 6 SCC 121

10. Maharaja Agrasen Hospital Vs Rishabh Sharma; (2020) 6 SCC 501

11. Raman Vs Uttar Haryana Bijli Vitran Nigam Ltd.; (2014) 15 SCC 1

12. M.P. Electricity Board Vs Shail Kumari; (2002) 2 SCC 162

13. Civil Misc. Writ Petition No. 10191 of 2009; Shiv Ranshu Chhuneja Vs St. of U.P. & ors. decided on 10.04.2018

14. R. Valli & ors. Vs Tamil Nadu St. Transport Corporation Ltd.; (2022) 5 SCC 107

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Shri Araf Khan, learned counsel for the petitioner, learned standing counsel for the State-respondent and Shri M.C.Chaturvedi, learned Senior Advicate assisted by Ms. Arti Raje, learned counsel for respondent nos. 2 to 4.

Brief Facts:-

2. Briefly stated, facts of the present case are that the petitioner's husband, namely Hani Khan died on 10.04.2022 on account of electrocution by 11 KV overhead line which was installed by the respondents at a height of less than 4.7 meters in breach of Rule 77 of of the Rules, 1956 and non-maintenance of the aforesaid line by the respondents as per provisions of Rule 29 of the Rules, 1956.

3. As per admitted case of the respondents, the death of the husband of the petitioner was caused on 10.04.2022. The petitioner submitted entire desired papers including certificate of Maharani Laxmi Bai Medical College and Hospital, Jhansi, dated 10.04.2022 in which cause of death of her husband has been shown as electric current, Panchnama dated 10.04.2022 and death certificate dated 20.04.2022 etc. of her husband.

4. Petitioner's statement was recorded by the competent authority/Electricity Safety Officer on 13.04.2022. **Form 4 under Section 161(2) of the Electricity Act, 2003 was submitted by the Deputy Director, Electricity Safety, Government of Uttar Pradesh, Jhansi, Region, Jhansi on 18.04.2022** in which the entire particulars of the incidence and the investigation report etc. were well mentioned with reference to documentary evidences, namely, first information report dated 11.04.2022, detailed report dated 11.04.2022, police report, medical report received on 15.04.2022 and investigation report dated 13.04.2022 etc. **The fact of cause of death of the petitioner's husband being electric current and negligence of officers and employees were also recorded in the said report.**

5. **On 18.04.2022 the Deputy Director, Electricity Safety,** Government of Uttar Pradesh, Jhansi Region, Jhansi, submitted a report to the respondent no.2 requesting him to take action as per relevant Government orders and also **submitted that investigation under Section 161 of the Electricity Act, 2003 has been completed and recommendation for compensation to the petitioner has been made which is to be paid by the Electricity Distribution Corporation. Thus, by 18.04.2022 all the required investigation and reports were submitted by the competent authorities to the respondent no.2 for payment of compensation to the petitioner.**

6. **In paragraph 8 of the writ petition, the petitioner has specifically stated that her deceased husband was working as a contractor of M/s. Sri Ramdoot Steelfab and his total income was around Rs.3,50,000/- per annum** and in support thereof she has also submitted proof of income namely income tax return/acknowledgement relating to A.Ys. 2017-18, 2019-20 (Net Total Income

Rs.3,47,630/-) and 2021-22 (Net Total Income Rs.3,71,230/-), copies of which have been collectively filed as Annexure 7 to the writ petition. **The contents of paragraph-8 of the writ petition regarding annual income of the deceased to be Rs.3,50,000/- supported by documentary evidences as aforementioned has been admitted by the respondents in paragraph-7 of the counter affidavit/ affidavit of compliance dated 06.09.2022.**

7. Thus, **it is undisputed that the income of the deceased based on average income of last three years, was more than Rs.3,50,000/- per annum.** It has also been admitted by the respondents in paragraph-6 of the aforesaid personal affidavit/ counter affidavit dated 06.09.2022 that the death of the petitioner's husband was caused due to defective installation of 11 KV overhead line.

8. Thus, **as per admitted case of the respondents, the death of the petitioner's husband was caused on 10.04.2022 due to defective installation of 11 KV overhead line of the respondents.** Since on admitted facts of the case, the respondents have not paid compensation to the petitioner, therefore, the petitioner has filed the **present writ petition praying for the following relief:**

"i) Issue writ, order or direction in the nature of MANDAMUS commanding/ directing the Respondents to compensate the victim's family with such justifiable/ reasonable amount which this Hon'ble court may deem fit and necessary in the interest of justice at the earliest.

ii) Pass any other order or direction which this Hon'ble court may deem fit and necessary in the interest of justice"

Submissions:-

9. Learned counsel for the petitioner submits that the petitioner is entitled for just compensation on the basis of her deceased husband's admitted annual income, in terms of the law laid down in two Division Bench judgments of the this court in **Shiv Ranshu Chhuneja vs. State Of U.P. And Others** (WRIT - C No. - 10191 of 2009, decided on 10.04.2018) and in **Yash Pal Singh (Minor)& Anr. vs. State Of U.P. Thru.Prin. Secy. (Electricity) & 5 Ors.** (MISC. BENCH No. - 6929 of 2014, decided on 24.04.2017). Learned counsel for the petitioner further submits that the petitioner is a widow lady and there are four dependents of the deceased and she is running from pillar to post to get just compensation in terms of the aforesaid judgments read with the policy decision of the respondents dated 25.09.2021 but compensation has not been paid to them and she and her family have been left with no source of income for their survival. Learned counsel for the petitioner further submits that it is only after this court passed the order dated 01.09.2022 and 08.09.2022, the respondents have paid merely a sum of Rs.5 lacs and stated on 09.09.2022 before this Court that the total compensation is Rs.7,23,506/- out of which Rs.5 lacs have been paid as per sanction letter dated 03.09.2022 and the balance amount of Rs.2,23,500/- shall be paid soon. He submits that the aforesaid computation of the compensation is based merely on notional income of Rs.51,000/- per annum whereas it has been admitted by the respondents that the actual annual income of the deceased from contract work was Rs.3,50,000/-. He submits that under the circumstances, the writ petition deserves to be allowed with exemplary cost.

10. Learned counsel for the respondents submits that the facts of incident causing death of the petitioner's husband due to defective installation of 11

KV overhead line and his income have been admitted by the respondents in paragraphs-6 and 7 of their personal affidavit/ counter affidavit dated 06.09.2022. He submits that the aforesaid judgments relied by the learned counsel for the petitioner have no application on facts of the present case inasmuch as subsequent to the aforesaid judgments, a policy decision providing compensation has been taken by the U.P. Power Corporation on 25.09.2021 in 169th Meeting and compensation is liable to be paid accordingly.

Discussion and Findings:-

11. We have carefully considered the submissions of the learned counsels for the parties and perused the records of the writ petition.

12. It is admitted by the respondents that the deceased husband of the petitioner namely Hani Khan died on 10.04.2022 due to electrocution on account of defective installation of 11 KV overhead line by the respondents. It has also been admitted by the respondents in their personal/ counter affidavit dated 06.09.2022 that the actual income of the deceased husband of the petitioner was Rs.3,50,000/- per annum based on last three years income tax return.

13. The policy decision of the U.P. Power Corporation dated 25.09.2021 for payment of compensation in case of death or disability due to electrocution, much relied by the respondents, is reproduced below:

"उ0प्र0 पावर कारपोरेशन लिमिटेड
(उ0प्र0 सरकार का उपक्रम)
U.P. Power Corporation Limited
(Govt. of Uttar Pradesh Undertaking)
शक्ति भवन विस्तार, 14 अशोक मार्ग, लखनऊ–226001
संख्याः–
2828–औस/2021–19(125)–ए0एस0/01 दिनांक 25 सितम्बर, 2021

विषयः– त्रृटिपूर्ण विद्युत अधिष्ठापन के कारण हुई विद्युतीय दुर्घटना में बाहरी व्यक्ति की मृत्यु अथवा अपंगता/पशुओ की मृत्यु/फसल अग्निकाण्ड तथा सम्पत्ति के प्रकरणों में क्षतिपूर्ति प्रदान किये जाने के सम्बन्ध में।

कार्यालय ज्ञाप

उ0 प्र0 पावर कारपोरेशन लि0 के निदेशक की 169वीं बैठक में लिए गये निर्णय के अनुसार उ0 प्र0 पावर कारपोरेशन लि0 एवं उसके सहयोगी डिस्काम के नियंत्रणाधीन क्षेत्रों में त्रुटिपूर्ण विद्युतीय अधिष्ठापन के फलस्वरूप घटित दुर्घटनाओं में किसी बाहरी व्यक्ति की मृत्यु अथवा अपंगता/पशुओं की मृत्यु/ फसल अग्निकाण्ड तथा सम्पत्ति के नुकसान होने की स्थिति में प्रभावित व्यक्ति अथवा उसके वैधानिक वारिस को निर्धारित समय–सीमा में क्षतिपूर्ति प्रदान किये जाने एवं निस्तारण के सम्बन्ध में कारपोरेशन के आदेश संख्या– 1890–ई0ए0/रा0वि0प0/ औ0सं0–18/92–8/विविध/92 दिनांक 26.09.1992, आदेश संख्या– 4570– औ0सं0–17/पाकालि/2004 दिनांक 25.09.2004, आदेश संख्या– 3286–औ0सं0/ 2011 दिनांक 19.10.2011 आदेश संख्या– 4095–औ0सं0/2016 दिनांक 13.10.16 आदेश संख्या– 1816–औ0सं0/2017 दिनांक 10.04.2017, आदेश संख्या– 4004– औ0सं0/2018 दिनांक 06.10.2018 सपठित आदेश संख्या– 402–औ0सं0/2019 दिनांक 21.02.2019 को अवक्रमित करते हुए क्षतिपूर्ति प्रक्रिया के सरलीकरण व त्वरित निस्तारण हेतु एकल व्यवस्था एतद्द्वारा निम्नवत प्रतिपादित की जाती हैः–

विद्युत दुर्घटना की स्थिति में जॉच प्रक्रियाः–

1. त्रृटिपूर्ण विद्युत अधिष्ठान के कारण हुई विद्युतीय दुर्घटना में बाहरी व्यक्ति की मृत्यु अथवा अपंगता/पशुओं की मृत्यु/ फसल अग्निकाण्ड तथा सम्पत्ति के प्रकरणों के सम्बन्ध में।

. विद्युत अधिनियम, 2003 की धारा 53 के प्राविधानों के अनुसार सुरक्षित विद्युत आपूर्ति में विफलता के कारण किसी

जनहानि/पशुहानि/फसल अथवा सम्पत्ति के नुकसान की सूचना प्राप्त होने पर, सम्बन्धित उपखण्ड अधिकारी/ सहायक अभियन्ता 24 घण्टे के अन्दर विद्युत सुरक्षा निदेशालय को सूचित करेगा एवं 02 दिवस के अन्दर विद्युत दुर्घटना के सम्बन्ध में निर्धारित प्रपत्र सं0– 44(ए) पर सहायक निदेशक/ उप निदेशक/ निदेशक, विद्युत सुरक्षा निदेशालय को सूचित करेगे तथा साथ में विद्युत सुरक्षा निदेशायल, उ0प्र0 द्वारा संचालित बेवसाइट टपकलनजेनतोंिण्वतह पर घटना का विवरण अपलोड भी करेंगे। इसके अतिरिक्त विद्युत दुर्घटना की सूचना जिला प्रशासन/ पुलिस प्रशासन एवं निकटतम चिकित्सालय को देगें तथा कॉरपोरेशन के उच्च अधिकारियों को भी संज्ञानित करायेंगे।

. विद्युत दुर्घटना की सूचना प्राप्त होने पर सहायक निदेशक/उप निदेशक/निदेशक, विद्युत सुरक्षा द्वारा स्थालीय जाँच 18 दिनों में (विद्युत अग्निकाण्ड के कारण फसलों एवं सम्पत्ति की क्षति के प्रकरण में 02 दिवस में) पूर्ण कर जाँच आख्या अधीक्षण अभियन्ता को प्रेषित करेंगे तथा उसकी प्रतिलिपि अधिशासी अभियन्ता एवं सम्बन्धित विद्युत वितरण निगम के प्रबन्ध निदेशक एवं मुख्य अभियन्ता को उपलब्ध करायेंगे।

. कतिपय कारणों से यदि मृतक की पोस्टमार्टम रिपोर्ट एवं एफ0आई0आर0 रिपोर्ट आदि अभिलेखों की अनुपलब्धता होने की स्थिति में क्षतिपूर्ति (अनुग्रह राशि) के भुगतान में उत्पन्न हुई समस्याओं पर जाँच कमेटी बनाकर व जिलाधिकारी के समक्ष तथ्यों को लाकर प्रकरण का नियमानुसार विधिवत स्पष्ट रूप से निस्तारण सुनिश्चित किया जायेगा।

. उ0प्र0 पावर कारपोरेशन के अधीन विद्युत वितरण निगमों मे दिनांक 01.01.1992 से 06.1.2018 के मध्य घटित विद्युत दुर्घटनाओं के लम्बित प्रकरणो में बाहरी व्यक्तियों के एवं पशुओं की मृत्यु/ घायल होने की क्षतिपूर्ति पूर्ववत सम्बन्धित आदेशों के अन्तर्गत अनुमन्य की जायेगी।

. विद्युतीय दुर्घटना के कारण उत्पन्न हुई विपरीत प्रशासनिक स्थिति (सड़क जाम/ उग्र प्रदर्शन आदि) के कारण यदि तत्काल अनुग्रह धनराशि का भुगतान किया जाना आवश्यक हो तो, ऐसी स्थिति में क्षेत्र के जिलाधिकारी क्षतिपूर्ति/ अनुग्रह राशि की स्वीकृति हेतु सक्षम अधिकारी होंगे।

2. **<u>क्षतिपूर्ति के रूप में दी जाने वाली अनुग्रह राशि की प्रक्रिया का विवरणः–</u>**

<u>बाहरी व्यक्ति की विद्युत दुर्घटना में हुई मृत्यु/अपंगता की दशा में</u>

कारपोरेशन के त्रृटिपूर्ण विद्युतीय अधिष्ठान के कारण हुई बाहरी व्यक्ति की विद्युत दुर्घटना से प्रभावित बाहरी व्यक्ति/ वारिस को क्षतिपूर्ति/ मुआवजा दिये जाने हेतु निम्न व्यवस्था प्रतिपादित की जाती हैः–

. त्रृटिपूर्ण विद्युतीय अधिष्ठापन के कारण विद्युत दुर्घटना में बाहरी व्यक्ति की मृत्यु होने पर क्षतिपूर्ति के रूप में रू0 5.00 लाख, अनुग्रह राशि देय है। उ0प्र0 शासन द्वारा गठित समिति की संस्तुतियों के अनुसार मृतक की आयु के सापेक्ष **यदि किसी व्यक्ति की गणना के अनुसार क्षतिपूर्ति की धनराशि रू0 5.00 लाख के कम होने पर सम्बन्धित मृतक के आश्रितों को न्यूनतम रू0 5.00 लाख की क्षतिपूर्ति अनुमन्य की जायेगी।**

. विद्युत दुर्घटना में मृत्यु, स्थायी/ पूर्ण अपंगता/ आंशिक अपंगता होने पर, क्षतिपूर्ति दुर्घटनाग्रस्त व्यक्ति की विवाहित/ अविवाहित स्थिति, आयु एवं परिवार की संख्या के आधार पर समिति की रिपोर्ट (तालिका–1 एवं 2) में दी गई सारणियों के अनुसार अनुमन्य किया जायेगा।

. सक्षम अधिकारी द्वारा घातक/ अघातक विद्युत दुर्घटनाओं में कारपोरेशन के अधिष्ठापन की त्रृटि न होने की स्थिति में छव निसज सपंइपसपजल के रूप में अनुग्रह धनराशि की क्षतिपूर्ति स्वीकृत की जायेगी।

. बाहरी व्यक्ति की मृत्यु की दशा मे, क्षतिपूर्ति के रूप में अनुग्रह राशि स्वीकृति करने हेतु अधीक्षण अभियन्ता सक्षम अधिकारी होगें।

. अनुग्रह धनराशि/ क्षतिपूर्ति हेतु सम्बन्धित अधिशासी अभियन्ता द्वारा निम्न प्रक्रिया का पालन किया जायेगाः–

. सम्बन्धित अधिशासी अभियन्ता, निदेशक, विद्युत सुरक्षा से विद्युत दुर्घटना से सम्बन्धित जांच आख्या प्राप्त होने पर पीड़ित परिवार के द्वारा प्रस्तुत आवेदन पत्र एवं उपलब्ध कराये गये साक्ष्यों/ अभिलेखों को संकलित करेंगे।

. विद्युत दुर्घटना में मृत्यु होने पर बाहरी व्यक्ति के परिवारजनों से प्राप्त आवेदन के अनुसार, उत्तराधिकारी की सूचना, मण्डल कार्यालय सहित सम्बन्धित विद्युत कार्यालय में चस्पा करेंगे, जिसमें

आपत्ति प्रस्तुत करने हेतु 07 दिनों का समय दिया जायेगा।

. आपत्ति प्राप्त करने की समयावधि समाप्त होने पर, 07 दिन के अन्दर उत्तराधिकारी से उनका आधार कार्ड/ चुनाव पहचान–पत्र (वोटर आई0 डी0)/ पैनकार्ड/ राशनकार्ड/ पासपोर्ट/ लेखपाल अथवा ग्राम विकास अधिकारी द्वारा प्रदत्त कुटुम्ब रजिस्टर के आधार पर पीड़ित परिवार के उत्तराधिकारी का निर्धारण विधिक मापदण्डों के आधार पर करते हुये प्रकरण में क्षतिपूर्ति स्वीकृति का कारण, आदेश में लिखित रूप से अंकित (त्मबवतकपदह तमेंवद पद ूतपजपदह) करते हुए आदेश निर्गत करेंगे। उत्ताराधिकारी के सम्बन्ध में किसी भी प्रकार के विवाद की स्थिति में विधिक रूप से समक्ष अधिकारी द्वारा प्रदत्त उत्ताराधिकार प्रमाणपत्र प्राप्त होने के उपरान्त ही अग्रिम कार्यवाही की जाये।

. क्षतिपूर्ति के रूप में अनुग्रह राशि प्राप्त करने वाले को अण्डरटेकिंग देना होगा कि यदि किसी भी प्रकार का विवाद उत्पन्न होने पर उनके द्वारा उक्त धनराशि विभाग को वापस की जायेगी और अगर तथ्य गलत पाये गये तो उनके विरूद्ध विधिक कार्यवाही भी की जायेगी।

. किसी बाहरी व्यक्ति की विद्युतीय दुर्घटना में मृत्यु की दशा में, क्षतिपूर्ति के रूप में दी गयी अनुग्रह राशि के अतिरिक्त, मृतक आश्रित के अधीन किसी भी प्रकार का सेवायोजन अथवा कोई अन्य अनुतोष अनुमन्य नहीं होगे।

3. **बाहरी व्यक्ति की विद्युत दुर्घटना में घायल होने की दशा में।**

. बाहरी व्यक्ति की विद्युत दुर्घटना में घायल होने की दशा में, क्षतिपूर्ति के रूप में अनुग्रह राशि स्वीकृति करने हेतु अधीक्षण अभियन्ता सक्षम अधिकारी होगे।

. अघातक विद्युत दुर्घटना में किसी व्यक्ति के आंशिक/ पूर्ण अपंगता होने पर तालिका–1 में दिये गये विकलांगता प्रतिशत के आधार पर क्षतिपूर्ति/ अनुग्रह राशि का आंकलन किया जायेगा।

. विद्युत सुरक्षा निदेशालय द्वारा प्रस्तुत जांच आख्या, मुख्त चिकित्सा अधिकारी द्वारा निर्गत विकलांगता प्रमाण–पत्र, एफ0आई0आर0 की प्रति एवं विभागीय जांच में प्राप्त संस्तुति के आधार पर क्षतिपूर्ति की कार्यवाही सुनिश्चित की जायेगी।

. क्षतिपूर्ति के रूप में अनुग्रह राशि प्राप्त करने वाले को शपथ–पत्र देना होगा कि यदि किसी भी प्रकार का विवाद उत्पन्न होने पर उनके द्वारा उक्त धनराशि विभाग को वापस की जायेगी और अगर तथ्य गलत पाये गये तो उसके विरूद्ध विधिक कार्यवाही भी की जायेगी।

4. **विद्युत दुर्घटना में पशु की मृत्यु होने की दशा में।**

. पशु की मृत्यु की दशा मे, क्षतिपूर्ति के रूप में अनुग्रह राशि स्वीकृति करने हेतु, अधीक्षण अभियन्ता सक्षम अधिकारी होंगे।

. विद्युत सुरक्षा निदेशालय द्वारा प्रस्तुत जांच आख्या, पशु की क्रय रसीद, समक्ष पशु चिकित्सा अधिकारी द्वारा जारी मृत्यु प्रमाण पत्र, पोस्टमार्टम रिपोर्ट, एफ0आई0आर0 की प्रति, विभागीय जांच में प्राप्त संस्तुति के आधार पर क्षतिपूर्ति की कार्यवाही सुनिश्चित की जायेगी।

. क्षतिपूर्ति के रूप में अनुग्रह राशि प्राप्त करने वाले को शपथ–पत्र देना होगा कि यदि किसी भी प्रकार का विवाद उत्पन्न होता है तो उनके द्वारा उक्त धनराशि विभाग को वापस की जायेगी और अगर तथ्य गलत पाये गये तो उनके विरूद्ध विधिक कार्यवाही भी की जायेगी।

5. **विद्युतीय अग्निकाण्ड में फसलों/ सम्पत्तियों की हुई क्षति के सम्बन्ध में।**

. विद्युतीय अग्निकाण्ड में फसलो/ सम्पत्तियों की हुई क्षति के रूप में अनुग्रह राशि स्वीकृति करने हेतु मुख्य अभियन्ता (वितरण) सक्षम अधिकारी होंगे।

. विद्युत सुरक्षा निदेशालय, उ0प्र0 शासन की संस्तुति के आधार पर सम्बन्धित पीड़ित परिवार के द्वारा प्रस्तुत आवेदन पत्र में भू–स्वामी होने के अभिलेखो का मालिकाना हक एवं खतौनी/ लेखपाल द्वारा उपलब्ध कराये गये साक्ष्यों/ अभिलेखों को संलग्न किया जायेगा।

. सम्बन्धित जिले के तहसीलदार एवं जिलाधिकारी के द्वारा क्षति का आंकलन एवं संस्तृति तथा निदेशक, विद्युत सुरक्षा निदेशालय, उ0प्र0 शासन की संस्तृति के आधार पर सम्बन्धित मुख्य अभियन्ता (विवरण) द्वारा अनुग्रह धनराशि की स्वीकृति प्रदान की जाएगी। स्वीकृत धनराशि का भुगतान खण्ड स्तर पर किया जायेगा।

. विद्युत दुर्घटना में बाहरी व्यक्तियों/ पशुओं के प्रकरणों के निस्तारण में विद्युत सुरक्षा निदेशालय की जॉच आख्या एवं संस्तृति प्राप्त होने के 10 दिनों के अन्दर क्षतिपूर्ति की धनराशि का भुगतान कर दिया जाये तथा सम्पूर्ण प्रक्रिया 30 दिनों में पूर्ण कर ली जाये। इसके अतिरिक्त फसल/ सम्पत्तियों की

हुई क्षति के फलस्वरूप क्षतिपूर्ति के प्रकरणो को विद्युत सुरक्षा निदेशायल की संस्तृति व जिलाधिकारी की आख्या प्राप्त होने के आधार पर 07 कार्य दिवसों के भीतर स्वीकृत एवं निस्तारित किया जाये।

. मुख्य अभियन्ता (वितरण) विद्युत दुर्घटना के फलस्वरूप क्षतिपूर्ति के प्रकरणों का मासिक आधार पर अनुश्रवण करेंगे एवं भुगतान से सम्बन्धित समस्त सूचनायें क्षेत्रीय कार्यालय में संरक्षित रखेंगे एवं दुर्घटनाओ को रोकने हेतु किये गये प्रयासों की मासिक रिपोर्ट प्रबन्ध निदेशक, डिस्काम को भेजेंगे। सम्बन्धित डिस्काम/ क्षेत्र/ मण्डल/ खण्ड का दायित्व होगा कि वे अपने कार्यालय मे विद्युत दुर्घटनाओं के प्रकारणो की सूची बनाकर सुरक्षित रखेंगे एवं त्रृटिपूर्ण अधिष्ठापन को ठीक किये जाने हेतु किये गये प्रयासो को भी लिपिबद्ध करेंगे।

GUIDE LINES FOR COMPENSATION ON ELECTROCUTION

FAULT LIABILITY

A-Fatal Accident

*1. **Notional Income (N.I.) of victim shall be taken in to consideration as Rs. 51,000** (Fifty One Thousand) per annum (about Rs. 140 per day).*

2. Multiplier shall be adopted as per following chart

Age of Victim

Multiplier Applied (M.A.)

Up to 15 years 15

Above 15 years but not exceeding 20 years 16

Above 20 years but not exceeding 25 years 17

Above 25 years but not exceeding 30 years 18

Above 30 years but not exceeding 35 years 17

Above 35 years but not exceeding 40 years 16

Above 40 years but not exceeding 45 years 15

Above 45 years but not exceeding 50 years 13

Above 50 years but not exceeding 55 years 11

Above 55 years but not exceeding 60 years 8

Above 60 years but not exceeding 65 years 6

Above 65 years 5

3. The amount of compensation so arrived at in the case of fatal accident claims shall be deducted towards Personal and living Expenses (P.E.) by

(i) 1/2nd if deceased was unmarried but if family of a bachelor is large and dependent on the income of the deceased, the deduction shall be 1/3rd (33.33%)

(ii) 1/3rd if deceased was married where dependent family members are 2 to 3 in number, 1/4th where dependent family members 4 to 6 in number and 1/5th where dependent family members are more than 6 in number.

(iii) For the purpose of calculation of number of family members in clause (ii), a minor dependent will be counted as half.

Spouse, parents and grand-parents having no income and minor children shall be deemed dependent family members. (Parivar Register and affidavit may be considered as proof of family members and dependency).

4. The following General Damages shall also be payable in addition to Compensation Outlined (C.O.) above:

(i) Compensation for Loss of Estate (L.E.) Rs. 5,000 (Five Thousand).

(ii) Compensation for Loss of Consortium (L.C.), if beneficiary is spouse Rs. 5.000 (Five Thousand).

(iii) Compensation for Loss of love and Affection (L.A.) Rs. 5,000 (Five Thousand).

(iv) Funeral Expenses costs of transportation of body (F.E.) Rs. 5,000

(Five Thousand) or actual expenses whichever is less.

(v)Medical Expenses (M.E.) -Actual expenses incurred before death supported by bills/vouchers but not exceeding Rs. 20,000 (Twenty Thousand).

*Formula: N.I.*M.A.=C.O.*

C.O.:P.E.= Amount

C.O.-

Amount+L.E.+L.C.+L.A.+F.E.+M.E.=Tota l Compensation.

Example for spot death of a person aged 14 years leaving behind mother and father:

*Rs.51000*15 (Multiplier)*

=765000

Rs.765000/3

=255000

Rs.765000-255000+

5000+5000+5000 =525000

B-Non-Fatal

General Damages in case of Injuries and Disabilities:

(i) Pain and Suffering Grievous injuries

(ii) Grievous injuries (G.I.) --

Rs. 10,000/-

(iii) Simple injuries (S.I.) –

Rs. 5,000/-

(ii) Medical Expenses (M.E.) :- Actual expenses incurred, supported by bills/vouchers but not exceeding Rs. 20,000 for grievous injury and - Rs. 10,000 for simple injury (on medical report)

Disability in non-fatal accidents:

The following compensation shall be payable in cases of disabilities to the victim arising out of non-fatal accidents:

C- Temporary Disability

Loss of income, if any, for actual period of disablement not exceeding fifty two weeks.

D- Permanent Disability

(a) In case of permanent total disablement the amount payable shall be arrived at by multiplying the annual loss of income by the Multiplier applicable to the age on the date of determining the compensation, or

(b) In case of permanent partial disablement such percentage of compensation, which would have been payable in the case of permanent total disablement as specified under item (a) above.

Injuries deemed to result in Permanent Total Disablement/Permanent Partial Disablement and percentage of loss of earning capacity shall be as per Schedule I under Workmen's Compensation Act, 1923, Disability Certificate from Medical Board mentioning percentage of disablement shall be final and shall be taken in to consideration.

Notional Income of victim shall be taken in to consideration as Rs. 51,000 (Fifty One Thousand) per annum.

Example for 100% permanent disability of person aged 14 years with medical bills for amount. Rs. 20.000 (Twenty Thousand):

*51000*15 =765000*

*765000*100/100 =765000*

765000+10000+20000 =795000

No Fault Liability

1. In death - Rs. 1.000,00 (One Lac)

2. In permanent disability - Rs. 1,25,000 (One Lac and Twenty Five Thousand)

3. Grievous injury - Rs. 3000 (Eight Thousand

4. Simple injury - Rs. 2000 (Three Thousand)

No compensation shall be paid if victim was involved in illegal activities like theft of electricity or riots etc. Third party insurance system may also be introduced to meet out compensation.

6- **विद्युत दुर्घटना में पशुओं की मृत्यु/ घायल होने पर वर्तमान में प्रभावी क्षतिपूर्ति अनुग्रह राशिः–**

दुधारू पशु

. भैस, गाय, ऊॅट, याक आदि की मृत्यु होने पर रू0 30,000/– (तीस हजार) अनुमन्य किया जायेगा।

. भेड़ बकरी, सुअर, आदि की मृत्यु होने पर रू0 3,000/– (तीन हजार) अनुमन्य किया जायेगा।

दुधारू पशुओं के अतिरिक्त पशु

. ऊॅट, घोड़ा, बैल आदि की मृत्यु होने पर रू0 25,000/– (पच्चीस हजार) अनुमन्य किया जायेगा।

. बछड़ा, गधा, खच्चर आदि की मृत्यु होने पर रू0 16,000/– (सोलह हजार) अनुमन्य किया जायेगा।

7. **अनुशासनात्मक एवं वसूली की कार्यवाहीः–**

विद्युत दुर्घटना के लिए दोषी कार्मिक/ कार्मिको का उत्तरदायित्व निर्धारित करते हुए डिस्कॉम के प्रबन्ध निदेशक के स्तर से एक माह के भीतर कार्यवाही सुनिश्चित की जायेगी।

क्र0सं0	विवरण	मुख्य दायित्व	पर्यवेक्षणीय दायित्व	प्रशासकीय दायित्व
1.	एल0टी0 लाइन	लाइनमैन/ अवर अभियन्ता	उपखण्ड अधिकारी	अधिशासी अभियन्ता (वितरण)
2.	11/04 परिवर्तक या इससे अधिक एवं 11 के0वी0 लाइनें	लाइनमैन/ अवर अभियन्ता	उपखण्ड अधिकारी	अधिशासी अभियन्ता (वितरण)
3.	33 के0वी0 उपकेन्द्र	टी0जी0–2 (एस0एस0ओ0)/ अवर अभियन्ता	उपखण्ड अधिकारी	अधिशासी अभियन्ता (वि0)
4.	33 के0वी0 लाइन	अवर अभियन्ता/ उपखण्ड अधिकारी	उपखण्ड अधिशासी अधिकारी (वि0)	अधिशासी अभियन्ता (वितरण)

8. **प्रकरण के निस्तारण हेतु आवश्यक अभिलेखः–**

क्र0सं0	विद्युत दुर्घटना का प्रकार	पीड़ित पक्षकार द्वारा उपलब्ध कराये जाने वाले अभिलेख
1.	बाहरी व्यक्तियो के विद्युत दुर्घटना में मृत्यु होने की दशा में	1. विद्युत सुरक्षा की जांच आख्या 2. मृत्यु प्रमाणपत्र 3. सक्षम अधिकारी द्वारा वारिसान प्रमाणपत्र 4. पोस्टमार्टम रिपोर्ट 5. एफ0आई0आर0 की प्रति 6. विभागीय जांच
2.	बाहरी व्यक्तियो के विद्युत दुर्घटना में घायल होने की दशा में।	1. विद्युत सुरक्षा की जांच आख्या 2. मुख्य चिकित्सा अधिकारी द्वारा निर्गत चिकित्सा प्रमाण पत्र 3. एफ0आई0आर0 की प्रति 4. विभागीय जांच
3.	विद्युत दुर्घटना मे पशुओं की मृत्यु होने की दशा में।	1. विद्युत सुरक्षा की जांच आख्या 2. पशु की क्रय रसीद 3. पशु की मृत्यु में सक्षम पशु चिकित्सा अधिकारी द्वारा जारी मृत्यु प्रमाण पत्र 4. पोस्टमार्टम रिपोर्ट 5. एफ0आई0आर0 की प्रति 6. विभागीय जांच
4.	फसल के नुकसान होने की दशा में।	1. विद्युत सुरक्षा की जांच आख्या 2. फसल के नुकसान में फसल मालिक के सम्बन्ध में प्रधान द्वारा सत्यापित विवरण पत्र 3. जिलाधिकारी/ उपजिलाधिकारी द्वारा फस 4. एफ0आई0आर0 की प्रति 5. विभागीय जांच
5.	सम्पत्ति के नुकसान होने की दशा में।	1. विद्युत सुरक्षा की जांच आख्या 2. सम्पत्ति के नुकसान में सम्पत्ति मालिक क 3. जिलाधिकारी/ उपजिलाधिकारी द्वारा सम 4. एफ0आई0आर0 की प्रति 5. विभागीय जांच

कारपोरेशन मुख्यालय को डिस्काम के माध्यम से धनराशि अवमुक्त हेतु प्रत्येक माह मॉग पत्र निम्न सूचना के साथ प्रेषित किया जायेः–

1 विद्युत दुर्घटना की प्रकरणवार आख्या/ त्रृटिपूर्ण अधिष्ठान के दूर किये जाने के सम्बन्ध में की गई कार्यवाही।

2 पीड़ित व्यक्ति/ परिवार को विद्युत दुर्घटना के फलस्वरूप प्रदान की गई क्षतिपूर्ति का विवरण।

3 विद्युत दुर्घटना के लिए दोषी अधिकारी/ कर्मचारी के विरूद्ध की गई अनुशासनात्मक एवं वसूली की कार्यवाही का विवरण संलग्न प्रारूप में उपलब्ध कराया जाये।

4 विद्युत सुरक्षा निदेशालय से प्राप्त आख्या में दोषी कार्मिको के विरूद्ध कारपोरेशन के नियमानुसार जॉच कार्यवाही की जायेगी तथा सम्बन्धित कार्मिकों को अपने बचाव का पूरा अवसर देते हुए आवश्यक कार्यवाही सुनिश्चित की जायेगी।

ऐसे प्रकरण जिनमें दुर्घटना की तिथि प्रश्नगत आदेश के निर्गमन की तिथि से पूर्व की है, में तत्कालीन विद्यमान नियमों/ आदेशो के अनुसार ही क्षतिपूर्ति का निर्धारिण किया जायेगा साथ ही किसी भी दशा में कोई पुराना प्रकरण पुनर्रूदघाटित नहीं किया जायेगा उपरोक्त व्यवस्थायें तत्काल प्रभाव से लागू की जाती है।

निदेशक मण्डल की आज्ञा से''

14. As per **para-2 read with "guidelines for compensation on electrocution" of the afore-quoted policy decision dated 25.09.2021** of the respondents, the compensation is to be determined on the basis of income of the

victim with minimum compensation of Rs.5 lakhs. However, in the absence of proof of actual income so as to avoid litigation and to grant compensation quickly to the dependents of the deceased, a notional income of Rs.51,000/-, i.e. Rs.140/- per day has been provided in the aforesaid policy decision. In the present set of facts, the actual annual income of the deceased husband of the petitioner has been admitted by the respondents at Rs.3,50,000/- per annum and yet the compensation of merely Rs.7,23,500/- has been determined by them on the basis of notional income of Rs.51,000/- per annum. A computation chart and the policy decision dated 25.09.2021 produced by the respondents before us on 08.09.2022 have been kept on record. **In the aforesaid computation chart, the respondents have admitted the number of dependents of the deceased to be four and the age of the deceased to 27 years.**

15. Thus, as per admitted case of the respondents, the compensation for death of the husband of the petitioner due to electrocution on 10.04.2022 is payable to the petitioner applying the **multiplier of 18** as per aforequoted policy decision of the corporation dated 25.09.2021.

Compensation - should be just, reasonable and guided by principles of fairness, equity and good conscience:-

16. In **Kirti v. Oriental Insurance Co. Ltd., (2021) 2 SCC 166 (Para-10),** Hon'ble Supreme Court has laid down the law that ***any compensation awarded by a court ought to be just, reasonable and consequently must undoubtedly be guided by principles of fairness, equity and good conscience.*** In the case of **Kajal v. Jagdish Chand, (2020) 4 SCC 413 (para-33),** Hon'ble Supreme Court has held that ***it is well settled law that in the motor accident claim petitions, the Court must award the just compensation and, in case, the just compensation is more than the amount claimed, that must be awarded especially where the claimant is a minor.*** In the case of **Kajal (Supra) (Paras-8, 9, 10, 11, 12, 13 and 14)**, Hon'ble Supreme Court quoted with approval certain foreign judgments and its own judgment and held as under:

"8. In Phillips v. London & South Western Railway Co., (1879) [L.R.] 5 Q.B.D. 78 (CA), Field, J., while emphasising that damages must be full and adequate, held thus : (QBD p. 79)

"... 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".

9. In Mediana, In re, 1900 AC 113 (HL), Lord Halsbury held : (AC pp. 116-17)

"... Of course the whole region of inquiry into damages is one of extreme difficulty. You very often cannot even lay down any principle upon which you can give damages; nevertheless, it is remitted to the jury, or those who stand in place of the jury, to consider what compensation in

money shall be given for what is a wrongful act. Take the most familiar and ordinary case : how is anybody to measure pain and suffering in moneys counted? Nobody can suggest that you can by any arithmetical calculation establish what is the exact amount of money which would represent such a thing as the pain and suffering which a person has undergone by reason of an accident. In truth, I think it would be very arguable to say that a person would be entitled to no damages for such things. What manly mind cares about pain and suffering that is past? But nevertheless the law recognises that as a topic upon which damages may be given."

10. The following observations of Lord Morris in his speech in H. West & Son Ltd. v. Shephard, 1964 AC 326 : (1963) 2 WLR 1359 (HL), are very pertinent : (AC p. 346)

"... 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 (at p. 357) 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. Lord Denning while speaking for the Court of Appeal in Ward v. James, (1966) 1 QB 273 : (1965) 2 WLR 455 : (1965) 1 All ER 563 (CA), laid down the following three basic principles to be followed in such like cases : (QB pp. 299-300)

"First, assessibility : In cases of grave injury, where the body is wrecked or the brain destroyed, it is very difficult to assess a fair compensation in money, so difficult that the award must basically be a conventional figure, derived from experience or from awards in comparable cases. Secondly, uniformity : There should be some measure of uniformity in awards so that similar decisions are given in similar cases; otherwise there will be great dissatisfaction in the community, and much criticism of the administration of justice. Thirdly, predictability : Parties should be able to predict with some measure of accuracy the sum which is likely to be awarded in a particular case, for by this means cases can be settled peaceably and not brought to court, a thing very much to the public good."

12. The assessment of damages in personal injury cases raises great difficulties. It is not easy to convert the physical and mental loss into monetary terms. There has to be a measure of calculated guesswork and conjecture. An assessment, as best as can, in the circumstances, should be made.

13. McGregor's Treatise on Damages, 14th Edition, Para 1157, referring to heads of damages in personal injury actions states:

"The person physically injured may recover both for his pecuniary losses

and his non-pecuniary losses. Of these the pecuniary losses themselves comprise two separate items viz. the loss of earnings and other gains which the plaintiff would have made had he not been injured and the medical and other expenses to which he is put as a result of the injury, and the courts have sub-divided the non-pecuniary losses into three categories viz. pain and suffering, loss of amenities of life and loss of expectation of life."

14. In Concord of India Insurance Co. Ltd. v. Nirmala Devi, (1979) 4 SCC 365 : 1979 SCC (Cri) 996 : 1980 ACJ 55, this Court held : (SCC p. 366, para 2)

"2. ... the determination of the quantum must be liberal, not niggardly since the law values life and limb in a free country in generous scales."

17. Thus, as per settled principles of law, the respondents are bound to award just compensation to the petitioner for fatal accident on account of their own negligence which caused the death of the husband of the petitioner on 10.04.2022. However, despite there being admitted proof of actual income of the deceased to be Rs.3,50,000/- per annum, the respondents have computed compensation on the basis of assumed notional income of the deceased as Rs.51,000/- per annum.

Concept of Notional Income:-

18. **Kirti v. Oriental Insurance Co. Ltd. (supra) (Para-17, 18 and 19),** Hon'ble Supreme Court observed that there are two distinct categories of situations wherein the court usually determines **notional income** of a victim. **The first category** of cases relates to those wherein the victim was employed, but the claimants are not able to prove victim's actual income, before the court. In such a situation, the court "guesses" the income of the victim on the basis of the evidence on record, like the quality of life being led by the victim and her family, the general earning of an individual employed in that field, the qualifications of the victim, and other considerations. **The second category** of cases relates to those situations wherein the Court is called upon to determine the income of a **non-earning victim**, such as a child, a student or a homemaker. Different principles are adopted by courts for determining the compensation towards a non-earning victim in order to arrive at the just compensation. Some of these involve the determination of notional income. In the case of **Lata Wadhwa v. State of Bihar, (2001) 8 SCC 197 (Para-10),** Hon'ble Supreme Court dealing with compensation for the victims of a fire during a function, granted compensation to housewives on the basis of services rendered by them in the house and their age. Thus, in the absence of proof of actual income, notional income is determined to compute compensation.

Compensation for Future Prospect and loss of consortium:-

19. Once notional or actual income has been determined, the question remains as to whether escalation for future prospect should be granted with regard to it. In the case of **National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 (Para-57)**, a Constitution Bench of Hon'ble Supreme Court extended the benefit of future prospects to even self-employed persons or those on a fixed salary and laid down the law that an **addition of 40%** of the established income of the deceased **towards future prospects** would be reasonable to grant **where the deceased**

was below 40 years and an **addition of 25% should be granted where the deceased was between the age of 40 to 50 years.** The principle laid down by the Constitution Bench of Honb'le Supreme Court in the case of **Pranay Sethi (supra)** has been followed by Hon'ble Supreme Court in several judgments including in the case of **Kirti (supra).**

20. **"Consortium"** is a compendious term which encompasses "**spousal consortium**", "**parental consortium**", and "**filial consortium**". The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse. **Spousal consortium** is generally defined as rights pertaining to the relationship of a husband-wife which allows compensation to the surviving spouse for loss of "company, society, cooperation, affection, and aid of the other in every conjugal relation". **Parental consortium** is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training". **Filial consortium** is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.

21. In the case of **Magma General Insurance Co. Ltd. v. Nanu Ram, (2018) 18 SCC 130 (Paras-15, 21.1, 21.2, 21.3 and 22)**, Hon'ble Supreme Court considered the issue of future prospects and compensation for loss of consortium and referring its earlier Constitution Bench judgment in the case of **Rajesh v. Rajbir Singh, (2013) 9 SCC 54,** held as under:

"15. With respect to the issue of future prospects, a Constitution Bench of this Court in National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 has held that in case the deceased was self-employed or on a fixed salary, and was below 40 years of age, an addition of 40% of the established income should be granted towards future prospects. Future prospects are to be awarded on the basis of:

(i) the nature of the deceased's employment; and

(ii) the age of the deceased.

In the present case, it is claimed by the family of the deceased that he was engaged in making namkeen, and was earning a monthly income of about Rs 15,000 per month. However, no evidence was brought on record to establish the same. MACT as well as the High Court assessed the income of the deceased on the basis of the minimum wage of an unskilled worker. The nature of his employment being taken as a self-employed person. ***The deceased was 24 years old at the time of the accident. Hence, future prospects ought to have been awarded at 40% of the actual income of the deceased,*** *instead of 50% as awarded by the High Court. Hence, the judgment1 of the High Court on this issue is modified to that extent.*

21. A Constitution Bench of this Court in National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 dealt with the various heads under which compensation is to be awarded in a death case. One of these heads is loss of consortium. In legal parlance,

"consortium" is a compendious term which encompasses "spousal consortium", "parental consortium", and "filial consortium". The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse:

21.1. ***Spousal consortium*** *is generally defined as rights pertaining to the relationship of a husband-wife which allows compensation to the surviving spouse for loss of "company, society, cooperation, affection, and aid of the other in every conjugal relation".*

21.2. ***Parental consortium*** *is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training".*

21.3. Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.

22. Consortium is a special prism reflecting changing norms about the status and worth of actual relationships. Modern jurisdictions world-over have recognised that the value of a child's consortium far exceeds the economic value of the compensation awarded in the case of the death of a child. Most jurisdictions therefore permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to the parents is a compensation for loss of the love, affection, care and companionship of the deceased child."

22. In the case of **National Insurance Co. Ltd. v. Pranay Sethi (supra) (Paras 59.3 to 59.8)**, Hon'ble Supreme Court summarised the **law on the point of addition for future prospect and loss of consortium etc.** and held as under:-

*"**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 paras 30 to 32 of Sarla Verma v. DTC, (2009) 6 SCC 121 which we have reproduced hereinbefore.*

59.6. *The selection of multiplier shall be as indicated in the Table in Sarla Verma v. DTC, (2009) 6 SCC 121 read with para 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."*

23. In the case of **Sarla Verma v. DTC, (2009) 6 SCC 121 (Paras-17, 18, 19, 30, 31 and 32)** as affirmed by the Constitution Bench judgment **(Pranay Sethi's case)**, Hon'ble Supreme Court held as under:-

"17. Assessment of compensation though involving certain hypothetical considerations, should nevertheless be objective. Justice and justness emanate from equality in treatment, consistency and thoroughness in adjudication, and fairness and uniformity in the decision-making process and the decisions. While it may not be possible to have mathematical precision or identical awards in assessing compensation, same or similar facts should lead to awards in the same range. When the factors/inputs are the same, and the formula/legal principles are the same, consistency and uniformity, and not divergence and freakiness, should be the result of adjudication to arrive at just compensation. In General Manager, Kerala S.R.T.C vs Susamma Thomas, (1994) 2 SCC 176, this Court stated: (SCC p. 185, para 16)

"16. ... The proper method of computation is the multiplier method. Any departure, except in exceptional and extraordinary cases, would introduce inconsistency of principle, lack of uniformity and an element of unpredictability, for the assessment of compensation."

18. Basically only three facts need to be established by the claimants for assessing compensation in the case of death:

(a) age of the deceased;

(b) income of the deceased; and

(c) the number of dependants.

The issues to be determined by the Tribunal to arrive at the loss of dependency are:

(i) additions/deductions to be made for arriving at the income;

(ii) the deduction to be made towards the personal living expenses of the deceased; and

(iii) the multiplier to be applied with reference to the age of the deceased.

If these determinants are standardised, there will be uniformity and consistency in the decisions. There will be lesser need for detailed evidence. It will also be easier for the insurance companies to settle accident claims without delay.

19. To have uniformity and consistency, the Tribunals should determine compensation in cases of death, by the following well-settled steps:

Step 1 (Ascertaining the multiplicand)

The income of the deceased per annum should be determined. Out of the said income a deduction should be made in regard to the amount which the deceased would have spent on himself by way of personal and living expenses. The balance, which is considered to be the contribution to the dependant family, constitutes the multiplicand.

Step 2 (Ascertaining the multiplier)

Having regard to the age of the deceased and period of active career, the appropriate multiplier should be selected.

This does not mean ascertaining the number of years he would have lived or worked but for the accident. Having regard to several imponderables in life and economic factors, a table of multipliers with reference to the age has been identified by this Court. The multiplier should be chosen from the said table with reference to the age of the deceased.

Step 3 (Actual calculation)

The annual contribution to the family (multiplicand) when multiplied by such multiplier gives the "loss of dependency" to the family.

Thereafter, a conventional amount in the range of Rs 5000 to Rs 10,000 may be added as loss of estate. Where the deceased is survived by his widow, another conventional amount in the range of 5000 to 10,000 should be added under the head of loss of consortium. But no amount is to be awarded under the head of pain, suffering or hardship caused to the legal heirs of the deceased.

The funeral expenses, cost of transportation of the body (if incurred) and cost of any medical treatment of the deceased before death (if incurred) should also be added.

30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra, (1996) 4 SCC 362, the general practice is to apply standardised deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceeds six.

31. Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent(s) and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependant and the mother alone will be considered as a dependant. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependants, because they will either be independent and earning, or married, or be dependent on the father.

32. Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependant, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where family of the bachelor is large and dependant on the income of the deceased, as in a case where he has a widowed mother and large number of younger non-earning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third."

Assessment of Compensation:-

24. For assessment of damages to compensate the dependants, it has to take into account many imponderables, as to the life expectancy of the deceased and the dependants, the amount that the deceased

would have earned during the remainder of his life, the amount that he would have contributed to the dependants during that period, the chances that the deceased may not have lived or the dependants may not live up to the estimated remaining period of their life expectancy, the chances that the deceased might have got better employment or income or might have lost his employment or income altogether. The manner of arriving at the damages is to ascertain the net income of the deceased available for the support of himself and his dependants, and to deduct therefrom such part of his income as the deceased was accustomed to spend upon himself, as regards both self-maintenance and pleasure, and to ascertain what part of his net income the deceased was accustomed to spend for the benefit of the dependants and, thereafter, it should be capitalised by multiplying it by a figure representing the proper number of years. The court must try to assess as best as it can, the loss suffered. The multiplier method is logically sound and legally well-established method of ensuring a "just' compensation which will make for uniformity and certainty of the awards. A departure from this method can only be justified in rare and extraordinary circumstances and very exceptional cases.

25. In the case of **Lata Wadhwa v. State of Bihar (supra) (Para-8)**, Hon'ble Supreme Court entertained a writ petition under Article 32 of the Constitution of India for grant of compensation to **victims due to fire accident** attributable to inadequate safety measures adopted by the organizers and held as under:-

*"8. So far as the determination of **compensation in death cases** is concerned, apart from the three decisions of the Andhra Pradesh High Court, which had been mentioned in the order of this Court dated 15-12-1993, this Court in the case of G.M., Kerala SRTC v. Susamma Thomas, (1994) 2 SCC 176 exhaustively dealt with the question. It has been held in the aforesaid case that for assessment of damages to compensate the dependants, it has to take into account many imponderables, as to the life expectancy of the deceased and the dependants, the amount that the deceased would have earned during the remainder of his life, the amount that he would have contributed to the dependants during that period, the chances that the deceased may not have lived or the dependants may not live up to the estimated remaining period of their life expectancy, the chances that the deceased might have got better employment or income or might have lost his employment or income altogether. The Court further observed that the manner of arriving at the damages is to ascertain the net income of the deceased available for the support of himself and his dependants, and to deduct therefrom such part of his income as the deceased was accustomed to spend upon himself, as regards both self-maintenance and pleasure, and to ascertain what part of his **net income** the deceased was accustomed to spend for the benefit of the dependants and, thereafter, it should be capitalised by multiplying it by a figure representing the proper number of years' purchase. It was also stated that much of the calculation necessarily remains in the realm of hypothesis and in that region, arithmetic is a good servant but a bad master, since there are so often many imponderables. In every case, "**it is the overall picture that matters", and the court must try to assess as best as it can, the loss suffered. On the acceptability of the multiplier method, the Court observed:**

"The multiplier method is logically sound and legally well-established method of ensuring a ''just' compensation which will make for uniformity and certainty of the awards. A departure from this method can only be justified in rare and extraordinary circumstances and very exceptional cases."

The Court also further observed that the proper method of computation is the multiplier method and any departure, except in exceptional and extraordinary cases, would introduce inconsistency of principle, lack of uniformity and an element of unpredictability in the assessment of compensation. The Court disapproved the contrary views taken by some of the High Courts and explained away the earlier view of the Supreme Court on the point. After considering a series of English decisions, it was held that the multiplier method involves the ascertainment of the loss of dependency or the multiplicand having regard to the circumstances of the case and capitalizing the multiplicand by an appropriate multiplier. The choice of the multiplier is determined by the age of the deceased (or that of the claimants, whichever is higher) and by the calculation as to what capital sum, if invested at a rate of interest appropriate to a stable economy, would yield the multiplicand by way of annual interest. In ascertaining this, regard should also be had to the fact that ultimately the capital sum should also be consumed up over the period for which the dependency is expected to last. In view of the aforesaid authoritative pronouncement of this Court and having regard to the determination made in the Report by Shri Justice Chandrachud, on the basis of the aforesaid multiplier method, it is difficult for us to accept the contention of Ms Rani Jethmalani that the settled principle for determination of compensation has not been followed in the present case. The further submission of the learned counsel that the determination made is arbitrary, is devoid of any substance, as Shri Justice Chandrachud has correctly applied the multiplier, on consideration of all the relevant factors. Damages are awarded on the basis of financial loss and the financial loss is assessed in the same way as prospective loss of earnings. The basic figure, instead of being the net earnings, is the net contribution to the support of the dependants, which would have been derived from the future income of the deceased. When the basic figure is fixed, then an estimate has to be made of the probable length of time for which the earnings or contribution would have continued and then a suitable multiple has to be determined (a number of years' purchase), which will reduce the total loss to its present value, taking into account the proved risks of rise or fall in the income. In the case of Mallett v. McMonagle, 1970 AC 166 : (1969) 2 All ER 178 (HL), Lord Diplock gave a full analysis of the uncertainties, which arise at various stages in the estimate and the practical ways of dealing with them. In the case of Davies v. Taylor, 1974 AC 207 : (1972) 3 All ER 836 (HL), it was held that the Court, in looking at future uncertain events, does not decide whether on balance one thing is more likely to happen than another, but merely puts a value on the chances. A possibility may be ignored if it is slight and remote. Any method of calculation is subordinate to the necessity for compensating the real loss. But a practical approach to the calculation of the damages has been stated by Lord Wright, in a passage which is frequently quoted, in Davies v. Powell Duffryn Associated Collieries Ltd., (1942) 1 All ER

657 (HL) to the following effect: (All ER p. 665 A-B)

"The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase."

(Emphasis supplied by us)

Compensation for Negligence - Tort - Strict Liability:-

26. In the case of **Maharaja Agrasen Hospital v. Rishabh Sharma, (2020) 6 SCC 501 (Para-12.5.4),** Hon'ble Supreme Court while granting compensation of Rs.76,00,000/- for medical negligence, held as under:-

"12.5.4. *The grant of compensation to remedy the wrong of medical negligence is within the realm of law of torts. It is based on the principle of restitution in integrum. The said principle provides that a person is entitled to damages which should as nearly as possible get that sum of money which would put him in the same position as he would have been if he had not sustained the wrong."*

27. In the case of **Raman v. Uttar Haryana Bijli Vitran Nigam Ltd., (2014) 15 SCC 1 (Paras-16, 17, 18, 19, 20 and 21),** Hon'ble Supreme Court considered a judgment of Punjab and Haryana High Court passed in Civil Misc. Writ Petition No.14046 of 2012 and L.P.A. No.1631 of 2013 granting **compensation for 100% permanent disability** suffered by a five years old boy **due to electrocution** on 03.11.2011 and affirming the compensation of **Rs.60,00,000/-** and after referring to large number of judgments, held as under:

"16. The learned Single Judge of the High Court has awarded compensation keeping all these aspects of the matter and has applied the guiding principle of multiplier method after adverting to the case of Sarla Verma v. DTC, (2009) 6 SCC 121 for the purpose of computation of just and reasonable compensation in favour of the appellant which method should not have been applied to the case on hand, particularly, having regard to the statutory negligence on the part of the respondents in not providing the safety measures to see that live electric wires should not fall on the roof of the building by strictly following the Rules to protect the lives of the public in the residential area. ***This Court in Balram Prasad v. Kunal Saha, (2014) 1 SCC 384, has deviated from following the multiplier method to award just and reasonable compensation in favour of the claimant in a medical negligence case. The same principle will hold good in the case on hand too.*** *The following case law is followed by this Court in the abovereferred case, the relevant paragraphs are extracted herein to award just and reasonable compensation in favour of the appellant: (SCC pp. 425, 437-39 & 445, paras 68, 99, 101, 103.1. & 112)*

"68. ... three-Judge Bench decision of this Court in Indian Medical Assn. v. V.P. Shantha, (1995) 6 SCC 651, wherein this Court has categorically disagreed on this specific point in another case wherein "medical negligence' was involved. In the said decision, it has been held at para 53 that ***to deny a legitimate***

claim or to restrict arbitrarily the size of an award would amount to substantial injustice to the claimant.

* * *

99. In Govind Yadav v. New India Insurance Co. Ltd., (2011) 10 SCC 683 this Court at para 15 observed as under which got reiterated at SCC pp. 639-40, para 13 of Ibrahim v. Raju, (2011) 10 SCC 634 : (Govind Yadav v. New India Insurance Co. Ltd., (2011) 10 SCC 683 , SCC pp. 691-92)

"15. In Reshma Kumari v. Madan Mohan, (2009) 13 SCC 422 this Court reiterated that the ***compensation awarded under the Act should be just*** *and also identified the factors which should be kept in mind while determining the amount of compensation. The relevant portions of the judgment are extracted below: (SCC pp. 431-32 & 440-41, paras 26-27 & 46-47)*

"26. ***The compensation which is required to be determined must be just.*** *While the claimants are required to be compensated for the loss of their dependency, the same should not be considered to be a windfall. Unjust enrichment should be discouraged. This Court cannot also lose sight of the fact that in given cases, as for example death of the only son to a mother, she can never be compensated in monetary terms.*

27. The question as to the methodology required to be applied for determination of compensation as regards prospective loss of future earnings, however, as far as possible should be based on certain principles. A person may have a bright future prospect; he might have become eligible to promotion immediately; there might have been chances of an immediate pay revision, whereas in another (sic situation) the nature of employment was such that he might not have continued in service; his chance of promotion, having regard to the nature of employment may be distant or remote. It is, therefore, difficult for any court to lay down rigid tests which should be applied in all situations. There are divergent views. In some cases it has been suggested that some sort of hypotheses or guesswork may be inevitable. That may be so.

* * *

46. In the Indian context several other factors should be taken into consideration including education of the dependants and the nature of job. In the wake of changed societal conditions and global scenario, future prospects may have to be taken into consideration not only having regard to the status of the employee, his educational qualification; his past performance but also other relevant factors, namely, the higher salaries and perks which are being offered by the private companies these days. In fact while determining the multiplicand this Court in Oriental Insurance Co. Ltd. v. Jashuben, (2008) 4 SCC 162 held that even dearness allowance and perks with regard thereto from which the family would have derived monthly benefit, must be taken into consideration.

*47. One of the incidental issues which has also to be taken into consideration is i****nflation****. Is the practice of taking inflation into consideration wholly incorrect? Unfortunately, unlike other developed countries, in India there has been no scientific study. It is expected that with the rising inflation the rate of interest would go up. In India it does not happen. It, therefore, may be a relevant factor which may be taken into consideration for determining the actual ground reality. No hard-and-fast rule, however, can be laid down therefor."'*

* * *

101. ... he has also strongly placed reliance upon the observations

made at para 170 in Malay Kumar Ganguly v. Sukumar Mukherjee, (2009) 9 SCC 221 referred to supra wherein this Court has made observations as thus: (SCC p. 282)

*"170. Indisputably, **grant of compensation involving an accident is within the realm of law of torts. It is based on the principle of restitutio in integrum. The said principle provides that a person entitled to damages should, as nearly as possible, get that sum of money which would put him in the same position as he would have been if he had not sustained the wrong.** [See Livingstone v. Rawyards Coal Co., (1880) LR 5 AC 25 (HL)]'*

* * *

103.1. In Ningamma v. United India Insurance Co. Ltd., (2009) 13 SCC 710 this Court has observed at para 34 which reads thus: (SCC p. 721)

"34. ... in our considered opinion a party should not be deprived from getting "just compensation" in case the claimant is able to make out a case under any provision of law. Needless to say, the MVA is beneficial and welfare legislation. In fact, the court is duty-bound and entitled to award "just compensation' irrespective of the fact whether any plea in that behalf was raised by the claimant or not.'

* * *

112. The claimant has also placed reliance upon Nizam's Institute of Medical Sciences v. Prasanth S. Dhananka, (2009) 6 SCC 1 in support of his submission that if a case is made out, then the Court must not be chary of awarding adequate compensation. The relevant paragraph reads as under: (SCC pp. 38-39, para 88)

*"88. We must emphasise that the court has to strike a balance between the inflated and unreasonable demands of a victim and the equally untenable claim of the opposite party saying that nothing is payable. **Sympathy for the victim does not, and should not, come in the way of making a correct assessment, but if a case is made out, the court must not be chary of awarding adequate compensation.** The "adequate compensation" that we speak of, must to some extent, be a rule of thumb measure, and as a balance has to be struck, it would be difficult to satisfy all the parties concerned.'"*

17. Further in para 119, it is held (Balram Prasad v. Kunal Saha, (2014) 1 SCC 384, SCC pp.447-48)

"119.....this Court has rejected the use of multiplier system to calculate and award the quantum of compensation which must be just and reasonable. The relevant paragraph is quoted hereunder: (Nizam's Institute of Medical Sciences v. Prasanth S. Dhananka, (2009) 6 SCC 1 , SCC para 92)

"92. Mr Tandale, the learned counsel for the respondent has, further submitted that the proper method for determining compensation would be the multiplier method. We find absolutely no merit in this plea. The kind of damage that the complainant has suffered, the expenditure that he has incurred and is likely to incur in the future and the possibility that his [pic]rise in his chosen field would now be restricted, are matters which cannot be taken care of under the multiplier method."

(emphasis in original)

18. Further under para 121, the relevant paragraph from United India Insurance Co. Ltd. v. Patricia Jean Mahajan, (2002) 6 SCC 281 reads as under: (Balram Prasad v. Kunal Saha, (2014) 1 SCC 384, SCC p. 448)

"121. ... "20. The court cannot be totally oblivious to the realities. The Second Schedule while prescribing the multiplier,

had maximum income of Rs 40,000 p.a. in mind, but it is considered to be a safe guide for applying the prescribed multiplier in cases of higher income also but in cases where the gap in income is so wide as in the present case income is 2,26,297 dollars, in such a situation, it cannot be said that some deviation in the multiplier would be impermissible. Therefore, a deviation from applying the multiplier as provided in the Second Schedule may have to be made in this case. Apart from factors indicated earlier the amount of multiplicand also becomes a factor to be taken into account which in this case comes to 2,26,297 dollars, that is to say, an amount of around Rs 68 lakhs per annum by converting it at the rate of Rs 30. By Indian standards it is certainly a high amount. Therefore, for the purposes of fair compensation, a lesser multiplier can be applied to a heavy amount of multiplicand. A deviation would be reasonably permissible in the figure of multiplier even according to the observations made in Kerala SRTC v. Susamma Thomas, (1994) 2 SCC 176 where a specific example was given about a person dying at the age of 45 leaving no heirs being a bachelor except his parents.' (United India Insurance Co. Ltd. v. Patricia Jean Mahajan, (2002) 6 SCC 281, SCC p. 295, para 20)"

19. Further, in para 177, it was held as under: (Balram Prasad v. Kunal Saha, (2014) 1 SCC 384, SCC p. 475)

"177. Under the heading of loss due to pain and suffering and loss of amenities of the wife of the claimant, Kemp and Kemp write as under:

"The award to a plaintiff of damages under the head "pain and suffering" depends as Lord Scarman said in Lim Poh Choo v. Camden and Islington Area Health Authority19, upon the claimant's personal awareness of pain, her capacity of suffering. Accordingly, no award is appropriate if and insofar as the claimant has not suffered and is not likely to suffer pain, and has not endured and is not likely to endure suffering, for example, because he was rendered immediately and permanently unconscious in the accident. By contrast, an award of damages in respect of loss of amenities is appropriate whenever there is in fact such a loss regardless of the claimant's awareness of the loss.'

** * **

"Even though the claimant may die from his injuries shortly after the accident, the evidence may justify an award under this head. Shock should also be taken account of as an ingredient of pain and suffering and the claimant's particular circumstances may well be highly relevant to the extent of her suffering.

** * **

By considering the nature of amenities lost and the injury and pain in the particular case, the court must assess the effect upon the particular claimant. In deciding the appropriate award of damages, an important consideration is how long he be deprived of those amenities and how long the pain and suffering has been and will be endured. If it is for the rest of his life the court will need to take into account in assessing damages the claimant's age and his expectation in life. ...'"

20. Further, in Rekha Jain v. National Insurance Co. Ltd., (2013) 8 SCC 389 this Court at paras 34-35, 38-39 and 41-43, with regard to the quantum of damages, has held as under: (SCC pp. 407-408)

"34. ... "24. In deciding on the quantum of damages to be paid to a person for the personal injuries suffered by him, the court is bound to ascertain all

considerations which will make good to the sufferer of the injuries, as far as money can do, the loss which he has suffered as a natural consequence of the wrong done to him.' (K. Narasimha Murthy v. Oriental Insurance Co. Ltd., 2004 SCC OnLine Kar 104 : ILR 2004 KAR 2471, SCC OnLine Kar : ILR pp. 2483-84, para 24)

35. ... "26. Therefore, the general principle which should govern the assessment of damages in personal injury cases is that the court should award to injured person such a sum of money as will put him in the same position as he would have been in if he had not sustained the injuries. But, it is manifest that no award of money can possibly compensate an injured man and renew a shattered human frame.' (K. Narasimha Murthy v. Oriental Insurance Co. Ltd., 2004 SCC OnLine Kar 104 : ILR 2004 KAR 2471, SCC OnLine Kar : ILR p. 2484, para 26)

* * *

38. In Fowler v. Grace, (1970) 114 Sol Jo 193 (CA), Edmund Davies, L.J. has said that:

"It is the manifest duty of the Tribunal to give as perfect a sum as was within its power. There are many losses which cannot easily be expressed in terms of money. If a person, in an accident, loses his sight, hearing or smelling faculty or a limb, value of such deprivation cannot be assessed in terms of market value because there is no market value for the personal asset which has been lost in the accident, and there is no easy way of expressing its equivalent in terms of money. ...'

39. In Mediana, In re, 1900 AC 113 : (1900-03) All ER Rep 126 (HL), it is held at para 32 which is extracted as herein:

"32. In personal injury cases, the court is constantly required to form an estimate of chances and risks which cannot be determined with precision. It is because, the law will disregard possibilities which are slight or chances which are nebulous; otherwise, all the circumstances of the situation must be taken into account, whether they relate to the future which the plaintiff would have enjoyed if the accident had not happened, or to the future of his injuries and his earning power after the accident. Damages are compensation for an injury or loss, that is to say, the full equivalent of money so far as the nature of money admits; and difficulty or uncertainty does not prevent an assessment.' (K. Narasimha Murthy v. Oriental Insurance Co. Ltd., 2004 SCC OnLine Kar 104 : ILR 2004 KAR 2471, SCC OnLine Kar : ILR p. 2486, para 32)

* * *

41. McGregor on Damages (14th Edn.) at Para 1157, referring to the heads of damages in personal injury actions, states as under:

"The person physically injured may recover both for his pecuniary losses and his non-pecuniary losses. Of these the pecuniary losses themselves comprise two separate items viz. the loss of earnings and other gains which the plaintiff would have made had he not been injured and the medical and other expenses to which he is put as a result of the injury, and the courts have sub-divided the non-pecuniary losses into three categories viz. pain and suffering, loss of amenities of life and loss of expectation of life.

Besides, the Court is well advised to 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". The observation of Lord Devlin that the proper approach to the problem or 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", is quite apposite to be kept in mind by the court in assessing compensation in personal injury cases.'

42. In R. Venkatesh v. P. Saravanan, 2000 SCC OnLine Kar 472 : (2001) 1 Kant LJ 411 the High Court of Karnataka while dealing with a personal injury case wherein the claimant sustained certain crushing injuries due to which his left lower limb was amputated, held that in terms of functional disability, the disability sustained by the claimant is total and 100% though only the claimant's left lower limb was amputated. In para 9 of the judgment, the Court held as under: (Kant LJ p. 415)

"9. As a result of the amputation, the claimant had been rendered a cripple. He requires the help of crutches even for walking. He has become unfit for any kind of manual work. As he was earlier a loader doing manual work, the amputation of his left leg below the knee, has rendered him unfit for any kind of manual work. He has no education. In such cases, it is well settled that the economic and functional disability will have to be treated as total, even though the physical disability is not 100%.'

43. Lord Reid in Baker v. Willoughby, 1970 AC 467 : (1970) 2 WLR 50 : (1969) 3 All ER 1528 (HL) has said: (AC p. 492 A)

*"**... A man is not compensated for the physical injury: he is compensated for the loss which he suffers as a result of that injury.** His loss is not in having a stiff leg: it is in his inability to lead a full life, his inability to enjoy those amenities which depend on freedom of movement and his inability to earn as much as he used to earn or could have earned....'"*

*21. **In view of the law laid down by this Court in the abovereferred cases which are extensively considered and granted just and reasonable compensation, in our considered view, the compensation awarded at Rs 60 lakhs** in the judgment of the learned Single Judge of the High Court, out of which Rs 30 lakhs were to be deposited jointly in the name of the appellant represented by his parents as natural guardian and the Chief Engineer or his nominee representing the respondent Nigam in a nationalised bank in a fixed deposit till he attains the age of majority, is just and proper but we have to set aside that portion of the judgment of the learned Single Judge directing that if he survives, he is permitted to withdraw the amount, otherwise the deposit amount shall be reverted back to the respondents as the same is not legal and valid for the reason that once the compensation amount is awarded by the court, it should go to the claimant/appellant. Therefore, the victims/claimants are legally entitled for compensation to be awarded in their favour as per the principles/guiding factors laid down by this Court in a catena of cases, particularly, in Balram Prasad v. Kunal Saha, (2014) 1 SCC 384 referred to supra. Therefore, the compensation awarded by the Motor Accidents Claims Tribunals/Consumer Forums/State Consumer Disputes Redressal Commissions/National Consumer Disputes Redressal Commission or the High Courts would absolutely belong to such victims/claimants. If the claimants die, then the Succession Act of their respective religion would apply to succeed to such estate by the legal heirs of victims/claimants or legal representatives as per the testamentary document if they choose to execute the will indicating their desire as to whom such estate shall go after*

their death. For the aforesaid reasons, we hold that portion of the direction of the learned Single Judge contained in sub-para (v), to the effect of Rs 30 lakhs compensation to be awarded in favour of the appellant, if he is not alive at the time he attains majority, the same shall revert back to the respondent Nigam after paying Rs 5 lakhs to the parents of the appellant, is wholly unsustainable and is liable to be set aside. Accordingly, we set aside the same and modify the same as indicated in the operative portion of the order."

28. In the case of **M.P. Electricity Board v. Shail Kumari, (2002) 2 SCC 162 (Paras 9, 10, 11, 12 and 13),** Hon'ble Supreme Court appled the rule of strict liability and held as under:

"9. The doctrine of strict liability has its origin in English common law when it was propounded in the celebrated case of Rylands v. Fletcher, (1868) 3 HL 330 : (1861-73) All ER Rep 1. Blackburn, J., the author of the said rule had observed thus in the said decision: (All ER p. 7E-F)

"[T]he true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape."

10. There are seven exceptions formulated by means of case-law to the doctrine of strict liability. It is unnecessary to enumerate those exceptions barring one which is this: "Act of stranger i.e. if the escape was caused by the unforeseeable act of a stranger, the rule

11. The ***rule of strict liability*** *has been approved and followed in many subsequent decisions in England. A recent decision in recognition of the said doctrine is rendered by the House of Lords in Cambridge Water Co. Ltd. v. Eastern Counties Leather plc. (1994) 1 All ER 53 (HL). The said principle gained approval in India, and decisions of the High Courts are a legion to that effect. A Constitution Bench of this Court in Charan Lal Sahu v. Union of India, (1990) 1 SCC 613 and a Division Bench in Gujarat SRTC v. Ramanbhai Prabhatbhai, (1987) 3 SCC 234 had followed with approval the principle in Rylands v. Fletcher, (1868) 3 HL 330 : (1861-73) All ER Rep 1. By referring to the above two decisions a two-Judge Bench of this Court has reiterated the same principle in Kaushnuma Begum v. New India Assurance Co. Ltd., (2001) 2 SCC 9.*

12. In M.C. Mehta v. Union of India, (1987) 1 SCC 395, this Court has gone even beyond the rule of strict liability by holding that: (SCC p. 421, para 31)

Where an enterprise is engaged in a hazardous or inherently dangerous activity and harm is caused on anyone on account of the accident in the operation of such activity, the enterprise is strictly and absolutely liable to compensate those who are affected by the accident; such liability is not subject to any of the exceptions to the principle of strict liability under the rule in Rylands v. Fletcher, (1868) 3 HL 330 : (1861-73) All ER Rep 1.

13. In the present case, the Board made an endeavour to rely on the exception to the rule of strict liability (Rylands v. Fletcher, (1868) 3 HL 330 : (1861-73) All ER Rep 1) being "an act of stranger". The said exception is not available to the Board as the act attributed to the third respondent should reasonably have been anticipated or at any rate its consequences should have been prevented by the appellant-Board. In Northwestern Utilities Ltd. v. London Guarantee and Accident Co. Ltd., 1936 AC

108 : 105 LJPC 18 : 154 LT 89, the Privy Council repelled the contention of the defendant based on the aforecited exception. In that case a hotel belonging to the plaintiffs was destroyed in a fire caused by the escape and ignition of natural gas. The gas had percolated into the hotel basement from a fractured welded joint in an intermediate pressure main situated below the street level and belonging to the defendants which was a public utility company. The fracture was caused during the construction involving underground work by a third party. The Privy Council held that the risk involved in the operation undertaken by the defendant was so great that a high-degree care was expected of him since the defendant ought to have appreciated the possibility of such a leakage.

(Emphasis supplied by us)

29. In the case of **Shiv Ranshu Chhuneja vs. State of U.P. and Ors, in Civil Misc. Writ Petition No.10191 of 2009 (decided on 10.04.2018)**, a coordinate bench of this Court considered the question of **compensation to a victim who suffered 100% disability on account of electrocution** and held as under:

"10. The first issue, therefore, that we have to determine is as to whether the present writ petition can be entertained and maintained for the award of such compensation and for quashing of the order passed by the respondent - Corporation. We may put on record that the orders, which have been passed for awarding compensation is in the statutory exercise of power under Section 161 of the 2003 Act. Such an order being an order awarding compensation partakes the nature of not only an administrative order which touches quasi judicial functions as it is an order pertaining to award of compensation to a person having suffered an injury and also that virtually affects his fundamental rights guaranteed under Article 21 of the Constitution of India. In such circumstances, the order passed by the Chief Electrical Inspector can be made amenable to the jurisdiction of this Court under Article 226 of the Constitution of India. It is not only to be tested on the principle of administrative law and reasonableness but also on the ground of protection and enforcement of fundamental rights guaranteed under Article 21 of the Constitution of India, which is one of the primary duties of this Court as enshrined under the Constitution of India. A writ petition can be maintained before this Court for which we find ample support from the judgment of the Apex Court in the case of Chairman, Railway Boad and others Vs. Chandrima Das (Mrs.) and others, (2000) 2 SCC 465. Paragraphs 9 to 11 that are extracted hereinunder :

"9. Various aspects of the Public Law field were considered. It was found that though initially a petition under Article 226 of the Constitution relating to contractual matters was held not to lie, the law underwent a change by subsequent decisions and it was noticed that even though the petition may relate essentially to a contractual matter, it would still be amenable to the writ jurisdiction of the High Court under Article 226. The Public Law remedies have also been extended to the realm of tort. This Court, in its various decisions, has entertained petitions under Article 32 of the Constitution on a number of occasions and has awarded compensation to the petitioners who had suffered personal injuries at the hands of the officers of the Govt. The causing of injuries, which amounted to tortious act,

was compensated by this Court in many of its decisions beginning from Rudul Sah v. State of Bihar (1983) 4 SCC 141 . (See also Bhim Singh v. State of Jammu and Kashmir (1985) 4 SCC 577; Peoples' Union for Democratic Rights v. State of Bihar (1987) 1 SCC 265; Peoples' Union for Democratic Rights v. Police Commissioner, Delhi Police Headquarters (1989) 4 SCC 730; Saheli, A Women's Resources center v. Commissioner of Police, Delhi (1990) 1 SCC 422; Arvinder Singh Bagga v. State of U.P., AIR 1995 SC 117; P. Rathinam v. Union of India 1989 Supp (2) SCC 716; Death of Sawinder Singh Grower In re 1995 Supp (4) SCC 450; Inder Singh v. State of Punjab (1995) 3 SCC 702; and D.K. Basu v. State of West Bengal (1997) 1 SCC 416.

10. In cases relating to custodial deaths and those relating to medical negligence, this Court awarded compensation under Public Law domain in Nilabati Behera v. State of Orissa (1993) 2 SCC 746; State of M.P. v. Shyamsunder Trivedi (1995) 4 SCC 262; People's Union for Civil Liberties v. Union of India (1997) 3 SCC 433 and Kaushalya v. State of Punjab (1999) 6 SCC 754; Supreme Court Legal Aid Committee v. State of Bihar (1991) 3 SCC 482; Jacob George (Dr) v. State of Kerala (1994) 3 SCC 430; Paschim Banga Khet Mazdoor Samity v. State of West Bengal (1996) 4 SCC 37 and Manju Bhatia v. New Delhi Municipal Council (1997) 6 SCC 370

11. Having regard to what has been stated above, the contention that Smt. Hanuffa Khatoon should have approached the Civil Court for damages and the matter should not have been considered in a petition under Article 226 of the Constitution, cannot be accepted. Where public functionaries are involved and the matter relates to the violation of Fundamental Rights or the enforcement of public duties, the remedy would still be available under the Public Law notwithstanding that a suit could be filed for damages under Private Law."

31. Coming to the issue of running expenses of the petitioner, since the petitioner himself is now engaged and is earning then in the said background, the minimum expenses in the event of loss of total earning has to be construed in favour of the petitioner. In the circumstances, the formula adopted in the case of Yash Pal Singh (Minor) & Anr. (supra) of giving at least Rs.10,000/- per month calculating the longevity of his life upto 70 years would be a just and fair calculation and we award compensation accordingly. The petitioner for the time being is approximately 26 years of age. Thus, he would have a life expectancy of 44 years and consequently a sum of Rs.1,20,000/- multiplied by 44 would be a just and fair compensation in order to enable the petitioner to meet his usual normal expenses in the light of what has been stated above. This would come to the tune of Rs.52.80 lakhs.

32. Adding all the three amounts as indicated above, the petitioner would, therefore, be entitled to a total amount of Rs.86,20,000/-.

33. Accordingly we allow the writ petition with a direction to the respondents to make available the entire amount to the petitioner as above within three months from today. The payment shall be made by the respondents accordingly and any delay in payment would carry 9% simple interest per annum on the unpaid amount."

Matainability of writ petition:

30. The order for compensation has been passed by the authority in exercise of statutory power under Section 161 of the

Electricity Act, 2003 and the policy decision to award just compensation. If just compensation is not awarded, it would affect fundamental rights of the sufferer guaranteed under Articles 14 and 21 of the Constitution of India. Therefore, order so passed would be amenable to writ jurisdiction under Article 226 of the Constitution of India.

Computation of Compensation:-

31. In the light of the discussions made above and applying the law settled by Hon'ble Supreme Court in various judgments aforementioned, we find that the petitioner is entitled for compensation on the basis of undisputed actual annual income of the deceased at Rs.3,50,000/-. The notional income of Rs.51,000/- as given in the policy decision of the Corporation dated 25.09.2021 shall not be applicable where the actual income of the deceased husband of the petitioner has been admitted by the respondents to be Rs.3,50,000/- per annum.

32. In a recent judgment dated 10.02.2022 in the case of **R. Valli & Ors. vs. Tamil Nadu State Transport Corporation Ltd. (2022) 5 SCC 107**, Hon'ble Supreme Court computed compensation in the matter of a deceased aged about 54 years, as under:

"6. The judgment in Sarla Verma was affirmed in Reshma Kumari & Ors. v. Madan Mohan & Anr. 3 . Both the judgments were affirmed by the Constitution Bench of this Court reported as National Insurance Company Limited v. Pranay Sethi & Ors. 4 . This Court in Pranay Sethi held as under:

"44. At this stage, we must immediately say that insofar as the aforesaid multiplicand/multiplier is concerned, it has to be accepted on the basis of income established by the legal representatives of the deceased. Future prospects are to be added to the sum on the percentage basis and "income" means actual income less the tax paid. The multiplier has already been fixed in Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] which has been approved in Reshma Kumari [Reshma Kumari v. Madan Mohan, (2013) 9 SCC 65 : (2013) 4 SCC (Civ) 191 : (2013) 3 SCC (Cri) 826] with which we concur.

xx xx xx

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.

xx xx xx

59.7. The age of the deceased should be the basis for applying the multiplier."

10. A three-Judge Bench in an order reported as United India Insurance Co. Ltd. v. Satinder Kaur alia Satwinder Kaur & Ors. 8 has applied the multiplier keeping in view the age of the deceased even if he was a bachelor. The Court held as under:

"48. Another three-judge bench in Royal Sundaram Alliance Insurance Co. Ltd. v. Mandala Yadagari Goud, (2019) 5 SCC 554 traced out the law on this issue, and held that the compensation is to be computed based on what the deceased would have contributed to support the dependants. In the case of the death of a married person, it is an accepted norm that the age of the deceased would be taken into account. Thus, even in the case of a bachelor, the same principle must be applied."

12. Hence, the compensation on the basis of income assessed by the Tribunal would be as under:

	Head	
A	*Monthly Dependency*	*Rs.20,756/-*
B	*Future Prospects (15% of monthly dependency)*	*Rs.3,113/-*
C	*1/4th Deduction towards Personal Expenses*	*Rs.5,967/-*
D	*Total Dependency (A + B - C)*	*Rs.17,902/-*
E	*Age Multiplier*	*11*
F	*Compensation (D x 12 x 11)*	*Rs.23,63,064/-*
G	*Loss of Estate*	*Rs.15,000/-*
H	*Funeral Expenses*	*Rs.15,000/-*
I	*Consortium*	*Rs.40,000/-*
	Total	*Rs.24,33,064/-*

13. Thus, the appellants are found entitled to compensation of Rs. 24,33,064/- ***with interest @ 9% from the date of filing of the claim application till realisation.***

14. The appeal thus stands disposed of with costs throughout."

33. Admitted facts of the case as discussed in forgoing paragraphs of this judgment are that the husband of the petitioner namely Sri Hani Khan died on 10.04.2022 on account of electrocution by 11 KV overhead line due to negligence of the respondents. At the time of his death, he was aged about 27 years and left behind four dependents including the petitioner. His average annual income on the basis of past income tax returns was about Rs.3,50,000/-. Applying the law laid down by Hon'ble Supreme Court in the judgment aforementioned read with the policy decision of the respondents dated 25.09.2021, the compensation payable to the petitioner on the basis of actual income of the deceased and the multiplier provided in the policy of the respondents dated 25.09.2021, is computed as under:-

Sl.No.	Head	
A	Monthly income	
B	Future prospects (40% of monthly income)	
C	1/4th Deduction towards personal expenses	
D	Total Dependenc (A+B-C)	
E	Age Multiplier	18
F	Compensation (D x 12 x 18)	
G	Loss of Estate	
H	Funeral Expenses	
I	Consortium	
	Total =	

34. The amount of compensation determined above shall be distributed amongst the dependents of the deceased as under:-

(a) The respondents shall pay to the dependents of the deceased the above mentioned amount of compensation of Rs.66,85,000/- with simple interest @ 6% per annum from the date of filing of the claim application till realisation, after adjusting the amount earlier paid by them to the petitioner.

(b) Out of the aforesaid amount of compensation, a sum of Rs.10,00,000/- shall be paid in the name of the minor daughter of the deceased through the petitioner as guardian which shall be kept by the petitioner in the highest interest bearing fixed deposit with interest payable monthly/ quarterly, in a Nationalized Bank till the aforesaid minor daughter attains majority. The interest so received by the petitioner shall be spent by the petitioner only for the purposes of education and maintenance of her aforesaid minor daughter-Amayera Khan (vek;jk [kku). After the aforesaid minor daughter shall attain majority, the aforesaid principal amount may be utilised or invested by the petitioner as per need and after her, the remaining amount, if any, by her aforesaid daughter.

(c) Out of the aforesaid amount of compensation, another sum of Rs.10,00,000/- shall also be paid in the name of the aforesaid minor daughter of the deceased through the petitioner as guardian which shall also be kept by the petitioner in a highest interest bearing fixed deposit in a Nationalized Bank in the name of the aforesaid minor daughter with provision for accumulation of interest, for the purposes of higher education and marriage of the aforesaid minor daughter.

(d) The other two dependents of deceased shall be paid Rs.10,00,000/- each out of the compensation amount determined above.

(e) The interest and the balance amount of compensation (after adjusting the aforesaid amount of Rs.40,00,000/- payable to three dependents and also after adjusting the amount already paid), shall be paid to the petitioner.

Directions:-

35. Decision of the respondents dated 25.09.2021 to compute and pay compensation only on the basis of notional income, is not only arbitrary and violative of fundamental rights guaranteed under Articles 14 and 21 of the Constitution of India but is also in conflict of the law laid down by Hon'ble Supreme Court in judgments aforementioned directing for payment of just compensation. Therefore, we issue a general mandamus to the respondents to compute and pay just compensation on the basis of actual income of the injured person/ victim/ deceased wherever actual income is ascertainable or may be proved by claimant with future prospect as per law settled by Hon'ble Supreme Court in the various judgments aforenoted and apply the multiplier as provided in the policy decision dated 25.09.2021. If actual income of injured/ victim/ deceased is either not ascertainable or is not proved by claimant, then notional income as given in the policy decision dated 25.09.2021, shall be applied for computation and payment of compensation. The amount of compensation for loss of estate, loss of consortium and funeral expenses shall be determined and paid by the respondents in accordance with the law settled by Hon'ble Supreme Court in the case of **National Insurance Company Ltd. vs. Pranay Sethi** (supra), which is binding under Articles 141 of the Constitution of India.

Conclusions:

36. The discussions, findings and directions made above are briefly summarized as under:-

(A) Compensation awarded ought to be just, reasonable and consequently must undoubtedly be guided by principles of fairness, equity and good conscience and, in case, the just compensation is more than the amount claimed, that must be awarded especially where the claimant is a minor.

(B) The respondents are bound to award just compensation to the petitioner for fatal accident on account of their own negligence which caused the death of the husband of the petitioner on 10.04.2022. However, despite there being admitted proof of actual income of the deceased to be Rs.3,50,000/- per annum, the respondents have computed compensation on the basis of assumed notional income of the deceased as Rs.51,000/- per annum, which is arbitrary and illegal.

(C) There are two distinct categories of situations wherein the court usually determines **notional income** of a victim. **The first category** of cases relates to those wherein the victim was employed, but the claimants are not able to prove victim's actual income, before the court. In such a situation, the court "guesses" the income of the victim on the basis of the evidence on record, like the quality of life being led by the victim and her family, the general earning of an individual employed in that field, the qualifications of the victim, and other considerations. The **second category** of cases relates to those situations wherein the Court is called upon to determine the income of a **non-earning victim**, such as a child, a student or a homemaker. Different principles are adopted by courts for determining the compensation towards a non-earning victim in order to arrive at the just compensation.

(D) **In the absence of proof of actual income**, notional income is applied to compute compensation.

(E) "Consortium" is a compendious term which encompasses "spousal consortium", "parental consortium", and "filial consortium". The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse.

(F) To deny a legitimate claim or to restrict arbitrarily the size of an award would amount to substantial injustice to the claimant. The compensation which is required to be determined must be just. Grant of compensation involving an accident is within the realm of law of torts. It is based on the principle of restitution in integrum. The said principle provides that a person entitled to damages should, as nearly as possible, get that sum of money which would put him in the same position as he would have been if he had not sustained the wrong.

(G) The order for compensation has been passed by the authority in exercise of statutory power under Section 161 of the Electricity Act, 2003 and the policy decision to award just compensation. If just compensation is not awarded, it would affect fundamental rights of the sufferer guaranteed under Articles 14 and 21 of the Constitution of India. Therefore, order so passed would be amenable to writ jurisdiction under Article 226 of the Constitution of India.

(H) Decision of the respondents dated 25.09.2021 to compute and pay compensation only on the basis of notional

income, is not only arbitrary and violative of fundamental rights guaranteed under Articles 14 and 21 of the Constitution of India but is also in conflict of the law laid down by Hon'ble Supreme Court in judgments aforementioned directing for payment of just compensation. **Therefore, we issue a general mandamus to the respondents to compute and pay just compensation on the basis of actual income of the injured person/ victim/ deceased wherever actual income is ascertainable or may be proved by claimant with future prospect as per law settled by Hon'ble Supreme Court in the various judgments aforenoted and apply the multiplier as provided in the policy decision dated 25.09.2021. If actual income of injured/ victim/ deceased is either not ascertainable or is not proved by claimant, then notional income as given in the policy decision dated 25.09.2021, shall be applied for computation and payment of compensation. The amount of compensation for loss of estate, loss of consortium and funeral expenses shall be determined and paid by the respondents in accordance with the law settled by Hon'ble Supreme Court** in the case of **National Insurance Company Ltd. vs. Pranay Sethi** (supra), which is binding under Articles 141 of the Constitution of India.

(I) The amount of compensation determined above shall be distributed amongst the dependents of the deceased as under:-

(a) The respondents shall pay to the dependents of the deceased the above mentioned amount of compensation of Rs.66,85,000/- with simple interest @ 6% per annum from the date of filing of the claim application till realisation, after adjusting the amount earlier paid by them to the petitioner.

(b) Out of the aforesaid amount of compensation, a sum of Rs.10,00,000/- shall be paid in the name of the minor daughter of the deceased through the petitioner as guardian which shall be kept by the petitioner in the highest interest bearing fixed deposit with interest payable monthly/ quarterly, in a Nationalized Bank till the aforesaid minor daughter attains majority. The interest so received by the petitioner shall be spent by the petitioner only for the purposes of education and maintenance of her aforesaid minor daughter-Amayera Khan (अमायरा खान). After the aforesaid minor daughter shall attain majority, the aforesaid principal amount may be utilised or invested by the petitioner as per need and after her, the remaining amount, if any, by her aforesaid daughter.

(c) Out of the aforesaid amount of compensation, another sum of Rs.10,00,000/- shall also be paid in the name of the aforesaid minor daughter of the deceased through the petitioner as guardian which shall also be kept by the petitioner in a highest interest bearing fixed deposit in a Nationalized Bank in the name of the aforesaid minor daughter with provision for accumulation of interest, for the purposes of higher education and marriage of the aforesaid minor daughter.

(d) The other two dependents of deceased shall be paid Rs.10,00,000/- each out of the compensation amount determined above.

(e) The interest and the balance amount of compensation (after adjusting the aforesaid amount of Rs.40,00,000/- payable to three dependents and also after adjusting the amount already paid), shall be paid to the petitioner.

37. With the aforesaid directions, **the writ petition is allowed** to the extent indicated above.

38. The papers kept in sealed cover under order dated 09.09.2022 shall be returned by the office to the learned counsel for the respondent-Corporation.

(2022) 11 ILRA 1139
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.11.2022

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Crl. Appeal No. 17 of 1990

Revti & Ors. ...Appellants
Versus
State of U.P. ...Opp. Party

Counsel for the Appellants:
Sri R. Bhargava, Sri Kuldeep Singh Chahar

Counsel for the Respondents:
A.G.A.

Criminal Law-Indian Penal Code- Sections 306 & 201- Conviction under Section 201 IPC alone- Charge under Section 306 I.P.C. has not been found to be proved against accused persons before trial court and they were acquitted of this charge. Therefore, it can be inferred that no offence of abatement to commit suicide has been proved against accused persons. Suicide, as such, is no offence and this is logical that suicide self is not proved by cogent evidence and accused cannot be held guilty for causing disappearance of evidence punishable under Section 201 I.P.C. for making out a case under Section 201 I.P.C. This fact is not proved beyond reasonable doubt that the deceased had died an unnatural death by consuming poison in the fateful night. The accused are already acquitted of the charge under Section 306 IPC by the learned trial Court and said verdict of acquittal has not been challenged either by the State or by the complainant- Mere fact that the deceased allegedly died an unnatural death, could not be sufficient to bring home charge punishable under Section 201 IPC unless the prosecution was able to establish that the accused persons knew or had reason to believe that an offence has been committed and have done something causing the offence of commission of evidence to disappear, he cannot be convicted.

Where the prosecution has failed to establish the main offence u/s 306 IPC and that the accused did something to cause the disappearance of evidence relating to the commission of the said offence, then the accused cannot be convicted u/s 201 IPC. (Para 24, 26,27)

Criminal Appeal allowed. (E-3)

Case Law/ Judgement relied upon:-

1. Crl. Appeal Nos. 265-266 of 2018 (Arising out of S.L.P. (Crl) Nos. 1815-1816 of 2016) Dinesh Kumar Kalidas Patel Vs The St. of Guj.

2. Palvinder Kaur Vs St. of Punj. 1952 AIR 354

(Delivered by Hon'ble Ram Manohar Narayan Mishra, J.)

1. Heard Sri Kuldeep Singh Chahar, learned counsel for the convict-appellants, learned A.G.A. appearing for the State and perused the material placed on record.

2. This criminal appeal has been filed against the judgment and order dated 08.12.1989 passed by learned IInd Additional Sessions Judge, Mathura, in Sessions Trial No. 145 of 1989, State Vs. Revti and others, arising out of Case Crime No. 332 of 1987, Police Station Vrindavan, District Mathura, whereby the appellants

were convicted and sentenced under Section 201 I.P.C. with one year R.I. It was also directed that the period spent by the accused in jail shall be adjusted towards the sentence imposed as above.

3. The order sheet shows that the appeal was admitted by this Court as far back as on 4.1.1990 and on the same day both of the appellants were enlarged on bail by this Court.

4. Pursuant to the communication of the Chief Judicial Magistrate, Mathura in compliance of the order of this Court dated 17.12.2018, the Office has submitted its report dated 27.2.2021, a perusal whereof shows that appellant no.5, namely, Dalla has died. The death confirmation report is accompanied with requisite documents as per the circular of this Court. In view of the said fact, this criminal appeal qua appellant no.5- Dalla, stands dismissed as abated and appeal shall proceed in respect of the surviving appellants, only.

5. Prosecution case as appears on perusal of record is that in the night of 7/8.9.1987, Smt. Sondevi, who was married to appellant No.1-Revti, attempted to commit suicide. According to the prosecution, in the evening of the date of occurrence, at about 4 P.M. there had been some exchange of words between Revti and Sondevi, Revti told her not face him and she should die. Feeling depressed, she took poisonous pills and died in the night. The accused above named took the dead body for funeral. Thereafter Madan sprinkled kerosene oil over the dead body of Sondevi and burnt her. Kajoli, Digamber and others had seen the occurrence. Report about the incident was lodged by Bharat Singh on 8.9.1987 at 7:30 A.M. Police registered a case at G.D. No.12. Sri Tomar, Investigating Officer of this case, immediately proceeded to the spot, funeral-ground and collected burnt ashes and bones and prepared Fard (Ex.Ka-4) and after investigation, he submitted charge-sheet against the accused. The case was committed to Court of Session for trial which was transferred to the Court of IInd Additional Session Judge, Mathura by orders of Session Judge

6. Burnt ashes and bones, recovered by the Investigating Officer were sent to the chemical examination, but no poisonous contents were detected.

7. Accused pleaded not guilty to the charge under Section 306/201 I.P.C. framed against them respectively, and alleged false implication on account of enmity.

8. Prosecution to prove its case examined PW-1 Kajoji and P.W.-2 Digamber. Kajoli has staed that thee was some exchange of words in between Sondevi & Revti. Revti said her that she should die, in as much as she had not given a birth to a male child, and Sondevi took the poisionous pills and in the night she died. Madan, Revti, Bheema, Dalla, Baby and Girraj took her dead body to funeral ground and Madan sprinkled kersine oil upon her dead body and burned her to ashes. To the same effect is the statement of Digamber- P.W.-2.

9. PW-3 Kashi Nath has been declared hostile. PW-4 Bharat Singh is the informant of the case. He has proved report (Ex.Ka-1). PW-5 S.I. L.K.Tomar, is the Investigating Officer of the case, he proved recovery memo of burnt ash and bone (Ex.Ka-4), chemical examiner report (Ex.Ka-5), chargesheet (Ex.Ka-6) and G.D. (Ex.Ka-7).

10. Accused examined one Damodar in support of their defense plea. He has stated that he was made to sign on a plain paper by the Sub-Inspector and Revti had never scolded his wife. Son Devi had not consumed poision and she died natural death.

11. Learned court below referred Section 113-B of the Indian Evidence Act, which reads as follows:-

"113-A. Presumption as to abetment of suicide by a married woman.--When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband."

12. Learned court below observed that according to the prosecution version, the deceased was married about 8 years back and thus, presumption contained under Section 113-A I.P.C. cannot be made against the convict-appellants.

13. Now remains the oral evidence of Kajoli and Digamber. From their evidence, no doubt, it is clear that Smt. Sondevi had taken poisonous pills and later on committed suicide, but thee is no evidence to show that it was necessarily on account of any scolding extended by Revti, or any other family member of her in-laws. So the evidence on record falls short of proof for offence under Section 306 I.P.C.

14. On the basis of above finding, the trial court has recorded conviction of the appellants under Section 201 I.P.C. and acquitted them of the charge punishable under Section 306 I.P.C. on the ground that the evidence on record falls short of proof for offence under Section 306 I.P.C. The accused were granted interim bail by the trial Court after conviction.

16. Feeling aggrieved by the above judgment, present criminal appeal has been filed on behalf of the convicted persons with a prayer to set aside the impugned judgment and sentence passed by the court below against the appellants.

17. Learned counsel for the appellants raised several contentions on merits of the case and submitted that as appellants have been acquitted in main offence punishable under Section 306 I.P.C. and their conviction under Section 201 I.P.C. is illegal. Learned counsel for the appellants raised a question of law as to whether the conviction under Section 201 I.P.C. could have been maintained by acquitting him of the main offence under Section 306 I.P.C.. He further submitted that the evidence of the witnesses are unreliable. No family members of the deceased have come into the picture either as witness or as informant of the case. The witnesses of prosecution are the villagers, who have implicated the appellants due to previous enmity. There is no scientific evidence in support of the prosecution version that the deceased had consumed some poisonous substance or committed suicide. The consistent version of the defence is that she had died on account of a natural death and that is why she was cremated by convict persons who are husband and family members of the deceased in usual course. There is no witness of the fact that she and consumed poison or committed suicide. The evidence of witnesses is based on hearsay. Learned

counsel for the appellants prayed for allowing the appeal and for acquittal of appellants from charge punishable under Section 201 I.P.C.

18. Learned A.G.A. countenances the impugned judgment and submitted that there is no factual and legal error in the present judgement and it is based on evidence on record. Thee is nothing to disbelieve the evidence of witnesses of fact, who have supported the prosecution version.

19. No appeal appears to have been filed against the verdict of acquittal passed by the court below under Section 306 I.P.C. in respect of the appellants, therefore, this Court has to concentrate on verdict of conviction under Section 201 I.P.C. passed against the appellants.

20. The first information report in present case was lodged by P.W.4 Bharat Singh, who has testified during trial that his father was chaukidar (watchman) of the village at the time of incident. He had gone out of village. He had heard in the morning that Son Devi had consumed poison and died. He was not aware as to for what reason she had consumed poison. Her last rituals were performed by cremation. He had informed the incident to police outpost orally, which was scribed by the police constable. The report is Exhibit Ka-1, which bears his signature. It was written by the police constable as per his version. He resides in village Mora. He did not reside in village Nagla. He did not know as to who burnt her.

21. P.W.1- Kajoli and P.W.2- Digamber Singh have been examined by the prosecution as witnesses of fact and learned court below has lace partial reliance on testimony of these witnesses to the charge under Section 201 I.P.C.. However, P.W.1 Kajoli stated before the court that accused Revati- the husband of the deceased had exhorted the deceased, who was his wife on fateful evening that she could not give birth of a son, so he did not want to see her face. She should die and she consumed poisonous tablet in the night and died. The witnesses stated that he was not literate and he did not know the dates and did not inform the investigating officer about the date of incident. He cannot understand as to how he has stated in his statement the date of incident. The house of Revati lies after 10 to 15 houses from the home of witness. He has filed an affidavit before the Investigating Officer marked as Ex.-Kha-1 and it was rightly got written by him. In his written affidavit the facts are based on the information received by him by village watchman and he had told him that Son Devi was killed. He was passing through the house of Revati in the evening of incident and heard voice of Revati that he was exhorting his wife. Narayan and Digamber were coming out side of the house of Revati. Then he also visited the house of Revati. He had heard these things on the shop of bidi and he had not told the investigating officer that he had heard the voice of Revati (accused) from the bidi shop. The first informant is son of Gullu Chaukidar and they are resident of Nagwa Mora. The accused who are present in the court had cremated the body of Son Devi and the accused Madan had sprinkled kerosene oil on dead body of Son Devi before it was ignited. The deceased had never delivered a child.

22. PW-3 Kashi Nath has been declared hostile as he has not supported case of the prosecution. PW-2 Digamber Singh is the star witness of the prosecution,

who has stated that deceased had given birth of a daughter, who died and she had not given birth to a male child. Around two year and one month ago, he was sitting with Revati and both were smoking Hukkah, then Revati had threatened his wife for not giving birth to a male child, evenafter 8 years of the marriage and said that you should die. Deceased had consumed poison in the same night and died. Accused persons took the dead body in cremation ground and burnt it after sprinkling kerosene oil. He had cautioned the accused persons to avoid cremation of dead body in such manner but they did not pay the heed. He had not reported this matter to anyone. This witness was given suggestion by defense that accused Madan and his brother were challaned under Section 151 Cr.P.C., to which he denied.

23. Some contradictions are suggested by defense in sworn testimony of PW-2 and his previous statement recorded under Section 161 and 164 Cr.P.C. although case diary is not available on record.

24. Paper No.9-A/1 is the report of Forensic Science Laboratory dated 28.10.1988, which is marked as Ex.Ka-5, in which it is stated that no metallic poison was found in ashes and bones, which was sent for scientific examination in present case i.e. Case Crime No. 332 of 1987, under Sections 306, 201 I.P.C., Police Station Vrindavan, District Mathura. There is no plausible evidence, whether in form of oral or documentary that the deceased had consumed poison in that fateful night. The consistent case of the defense is that she died a natural death and the accused were implicated in a manufactured case due to village rivalry. No complaint or FIR has been lodged from the side of parents of the deceased. An affidavit has been found on record purportary filed by Vishal, father of deceased- Son Devi, dated 10.9.1987, which is addressed to Judicial Magistrate, Sadar Mathura, in which it is stated that the deceased had given birth to a female child who subsequently died. The deceased died natural death in the night of 7/8.9.1987 and she was cremated on 8.9.1987 before co-villagers of village Nagla Morra, in accordance with Hindu rites. She was never tortured or harassed by her husband or her in-laws. Original Health Card of the child of Son Devi, wife of Revati Singh dated 11.6.1986 has also been filed by the defence in support of the version that she has given birth to a female child on 11.6.1986. Charge under Section 306 I.P.C. has not been found to be proved against accused persons before trial court and they were acquitted of this charge. Therefore, it can be inferred that no offence of abatement to commit suicide has been proved against accused persons. Suicide, as such, is no offence and this is logical that suicide self is not proved by cogent evidence and accused cannot be held guilty for causing disappearance of evidence punishable under Section 201 I.P.C. for making out a case under Section 201 I.P.C. It is mandatory that the accused was knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment. Hon'ble Apex Court in **Criminal Appeal Nos. 265-266 of 2018 (Arising out of S.L.P. (Criminal) Nos. 1815-1816 of 2016) Dinesh Kumar Kalidas Patel vs. The State of Gujara**t, decided on 12.2.2018, has placed reliance on the dictum of Apx Court in the case of **Palvinder Kaur vs. State of Punjab,** wherein it is held as follows:

"In order to establish the charge under Section 201 of the Indian Penal Code, it is essential to prove that an offence has been

committed, -- mere suspicion that it has been committed is not sufficient, -- that the accused knew or had reason to believe that such offence had been committed and with the requisite knowledge and with the intent to screen the offender from legal punishment causes the evidence thereof to disappear or gives false information respecting such offences knowing or having reason to believe the same to be false." AIR 1952 SC 354 AIR 1953 SC 131 AIR 1968 SC 829 The conviction in this case was ultimately set aside on the aforementioned legal position and the facts."

25. Hon'ble Apex Court while discussing and considering various case laws in **Dinesh Kuamr Kalidas Patel's** case, in which appellant was convicted under Section 498-A, 201 I.P.C. has held:

"thus, the law is well-settled that a charge under Section 201 of the IPC can be independently laid and conviction maintained also, in case the prosecution is able to establish that an offence had been committed, the person charged with the offence had the knowledge or the reason to believe that the offence had been committed, the said person has caused disappearance of evidence and such act of disappearance has been done with the intention of screening the offender from legal punishment. Mere suspicion is not sufficient, it must be proved that the accused knew or had a reason to believe that the offence has been committed and yet he caused the evidence to disappear so as to screen the offender. The offender may be either himself or any other person.

It is further held that We are afraid, the High Court is not justified in maintaining the conviction under Section 201 only on the ground that no communication was given to the police and that the post-mortem had not been performed. The Trial Court has taken note of the fact that the father of the deceased and her brother (who is a doctor) had attended the last rites of the deceased and neither of them had any complaint or suspicion at that time of the commission of any offence. The Sessions Court has also taken note of the suicide note left by the deceased wherein she had taken the entire blame on herself. Yet the court has taken the view, from the consideration we have extracted from paragraph-16 of the Sessions court judgment, that the deceased might have been in a state of depression having remained alone for most of the time and it amounted to torture. The appellant has been acquitted of the offence under Section 498A by the High Court, and rightly so. The prosecution has also not been able to satisfy the ingredients under Section 201 of the IPC. Neither the Sessions Court nor the High Court has any case that there is any intentional omission to give information by the appellant to the police. It is also to be noted that prosecution has no case under Section 201 of the IPC against the appellant.

As held by this Court in Hanuman and others v. State of Rajasthan, the mere fact that the deceased allegedly died an unnatural death could not be sufficient to bring home a charge under Section 201 of the IPC. Unless the prosecution was able to establish that the accused person knew or had reason to believe that an offence has been committed and had done something causing the offence of commission of evidence to disappear, he cannot be convicted."

26. Therefore, in the light of the totality and facts and circumstances of the case, this fact is not proved beyond reasonable doubt that the deceased had died

an unnatural death by consuming poison in the fateful night. The accused are already acquitted of the charge under Section 306 IPC by the learned trial Court and said verdict of acquittal has not been challenged either by the State or by the complainant. Enmity between accused and witnesses has been suggested by the defence, however, same has been denied by the witnesses Kajoli and Digamber, in their sworn testimony.

27. In view of above, reasoning of above cited judgements of Apex Court is applicable where it is held that mere fact that the deceased allegedly died an unnatural death, could not be sufficient to bring home charge punishable under Section 201 IPC unless the prosecution was able to establish that the accused persons knew or had reason to believe that an offence has been committed and have done something causing the offence of commission of evidence to disappear, he cannot be convicted.

28. Thus, as aforesaid, this Court is of the view that the learned Sessions Court is not justified in convicting the appellants under Section 201 IPC and the same cannot be sustained.

29. Accordingly, this appeal succeeds and is **allowed**. The impugned judgment and order of conviction and sentence dated 8.12.1989 in S.T. No.145 of 1989, passed by Additional Session Judge- IInd, Mathura is hereby set aside and the appellants namely, Revati, Babu Lal, Girraj, Bheema and Madan are acquitted of the charge u/s 201 I.P.C.

30. It is directed that the accused-appellants shall file bail bonds to the tune of Rs.40,000/- and two sureties each, in the likeamount to the satisfaction of the learned trial Court, within a period of one month from today in compliance of Section 437 (a) of Cr.P.C.

31. Let a copy of this judgment along with lower court's record be sent back to the court concerned for immediate compliance.

(2022) 11 ILRA 1145
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.11.2022

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE SYED WAIZ MIAN, J.

Jail Appeal No. 119 of 2021

Ahsan ...Appellant

Versus

State of U.P. ...Opp. Party

Counsel for the Appellant:
From Jail, Sri Mohit Behari Mathur

Counsel for the Respondents:
A.G.A.

Criminal Law- Indian Evidence Act, 1872- Sections 137 & 138- On perusal of Sections 137 and 138 of Evidence Act, 1872, makes it clear that the victim has to be examined in chief and then she has to be cross examined by the defence- It is not the case of prosecution that defence has foregone or waived its right for cross-examination or that full opportunity of cross-examination was not granted, rather, it appears that the prosecution had not produced the victim P.W.1 for her complete cross-examination on the date fixed, nor, the trial court made an endeavour to take coercive measures against the witness to secure her presence for cross-examination in order to complete her statement. The record does not indicate that any such endeavour or

steps was taken. The omission of the prosecution to get the victim cross examined would sever the root of the prosecution case. The testimony of P.W.2, P.W.3, P.W.4 and P.W.6 the doctor, being mere corroborative, would not support the prosecution case as the star witness i.e. victim was not subjected to cross- The conviction solely based on the testimony of P.W.1, per se, is illegal.

Settled law that in order to complete the statement of a witness, the accused has to be given an opportunity of cross-examination and where the same is not provided for no fault of the defence, then the testimony of the victim could not have been taken into consideration against the appellant. (Para 9, 10,11)

Criminal Appeal allowed. (E-3)

Case Law/ Judgements relied upon:-

1. St. of Raj. Vs Daulat Ram, AIR (SC) 1980 0 1314

2. Hori Lal Vs St. of U.P, Crl. Appeal No. 1576 of 1990.

(Delivered by Hon'ble Suneet Kumar, J. & Hon'ble Syed Waiz Mian, J.)

1. Heard Shri Mohit Behari Mathur, learned Amicus Curiae and the learned A.G.A. for the State-respondents.

2. The instant jail appeal has been filed by the appellant against the order dated 25.02.2020 passed in Sessions Trial No.44 of 2020 (State of U.P. Vs. Ahsan) arising out of Case Crime No.534 of 2019, under Sections 376-AB I.P.C. & Section 5(m)/6 POCSO Act, Police Station Pilkhuwa, District- Hapur, whereby the appellant came to be convicted under Section 376 AB for life and fine at Rs.50,000/- was imposed. That apart appellant has been convicted under Section 5m/6 POCSO Act for life and Rs.50,000/- fine was imposed.

3. The prosecution to prove the charge examined victim-P.W.1(Lavi), Amresh-P.W.2 (mother of the victim), Vinod-P.W.3 (informant), Payal-P.W.4 (sister of the victim), the other witnesses examined are formal witness, including, Dr. Anju Singh-P.W.-6.

4. According to prosecution case, in the evening of 10.10.2019, the daughter of the complainant, namely, Labi, aged about two and half years, was playing in front of his house, one Ahsan S/o Aas Mohammad, took her in the field of sugar cane and raped her. The elder daughter of the complainant, namely, Payal and one Rekha, who were coming from the field, had seen Ahsan coming out from the sugar cane field, and the victim was weeping. The victim narrated the incident to the family members and thereafter the complainant went to the Police Station and lodged the First Information Report.

5. The sole submission of the learned Amicus Curiae is that the conviction of the appellant rests on the testimony of the victim-P.W.1. Admittedly, P.W.2 & P.W.3 were not present and P.W.4, as per the prosecution case, was present, nearby, but has denied the presence of the accused/appellant on the spot and P.W.4 has categorically stated that the appellant at the relevant time was at his mama's place. Further, she deposes that victim had not disclosed the name of the appellant of having committed the offence. In this backdrop, it is further submitted that it is reflected from the record of the trial court that examination-in-chief of P.W.1 was recorded on 14.01.2020. Victim supported the prosecution version that the appellant

had committed the offence. The cross-examination of P.W.1 was deffered by the trial court for 24.01.2020, thereafter, prosecution did not produce P.W.1 for further cross-examination, nor, the trial court took measures to summon the P.W.1 for her cross-examination. In this backdrop, it is submitted that it is a case of no evidence and the trial court committed gross error in resting the conviction on the testimony of P.W.1 without giving full opportunity to the appellant to complete the cross-examination. It is further submitted that the testimony of the other witnesses of fact, namely, P.W.2, P.W.3 & P.W.4 in the circumstance would not corroborate the testimony of P.W.1 because the testimony of P.W.1 remained incomplete. P.W.2 (mother) and P.W.3 (informant), admittedly, were not present on the spot and P.W.4 (sister of the victim) though present, has denied the presence of the accused on the spot and she has categorically stated in her cross-examination that the victim did not name the appellant of having committed the offence.

6. In support of his submission, learned counsel for the appellant has placed the reliance on the decision rendered by the Supreme Court in **State of Rajasthan Vs. Daulat Ram, AIR (SC) 1980 0 1314** and Division Bench decision of this Court rendered in **Hori Lal Vs. State of Uttar Pradesh.**

7. In **Hori Lal** (Supra), the Court in paragraph 23 made the following observations.

8. Para 23 reads as thus:

" 23. So far as the testimony of (PW-2) Chigga Ram is concerned, though he has supported the prosecution version in his examination-in-chief, however his statement shows that on 11.07.1989, his cross-examination was deferred for 03.08.1989, but thereafter (PW-2) Chigga Ram did not appear for his further cross-examination and thus, his statement remained incomplete. Perusal of Sections 137 and 138 of Evidence Act, 1872 makes it clear that a witness first has to be examined-in-chief and then he has to be cross-examined by the adverse party. In the instant matter, it is not a case that defence has foregone or waived his right of his cross-examination or that opportunity for cross-examination was granted to adverse party to complete cross-examination, rather it appears that Court has passed order for summoning of (PW-2) Chigga Ram for his further cross-examination, but he did not appear for the same. Though in such an eventuality, it was incumbent upon the trial court that it must have issued coercive process against this witness to secure his presence for his cross-examination in order to complete his statement, but there is nothing to indicate that learned trial court has taken any such step. In the impugned judgment, it was observed by the learned trial court that though the cross-examination of (PW-2) Chigga Ram could not be completed, but whatever cross-examination has done earlier, that was sufficient and that he has been cross-examined on all important points. Taking such a view, learned trial court has relied upon the statement of (PW-2) Chigga Ram. We are afraid, the approach adopted by the learned trial court regarding statement of (PW-2) Chigga Ram is not in accordance with law. As stated earlier, to complete the statement of a witness, the adverse party has to be given an opportunity of cross-examination, which is lacking in the present case. In view of these facts and circumstances, statement of (PW-2) Chigga

Ram could not have been taken into consideration against the accused-appellants."

9. On perusal of Sections 137 and 138 of Evidence Act, 1872, makes it clear that the victim has to be examined in chief and then she has to be cross examined by the defence.

10. In the instant case, it is not the case of prosecution that defence has foregone or waived its right for cross-examination or that full opportunity of cross-examination was not granted, rather, it appears that the prosecution had not produced the victim P.W.1 for her complete cross-examination on the date fixed, nor, the trial court made an endeavour to take coercive measures against the witness to secure her presence for cross-examination in order to complete her statement. The record does not indicate that any such endeavour or steps was taken. The omission of the prosecution to get the victim cross examined would sever the root of the prosecution case. The testimony of P.W.2, P.W.3, P.W.4 and P.W.6 the doctor, being mere corroborative, would not support the prosecution case as the star witness i.e. victim was not subjected to cross. The appellant in his statement under Section 313 Cr.P.C. had denied the incident and claimed of having been falsely implicated out of enmity.

11. In the circumstances, we are of the opinion that the conviction solely based on the testimony of P.W.1, per se, is illegal and we are unable to agree and sustain the judgment and conviction of the appellant by the trial court.

12. Accordingly, the jail appeal is **allowed**.

13. The judgment and order of the trial court is hereby set aside.

14. The appellant shall be released from jail forthwith if not wanted in any other case. The mandate of Section 437-A of Cr.P.C. shall be complied.

15. Registry to send a copy of this order to the concerned Jail Superintendent and the learned C.J.M. for compliance.

16. Record to be returned.

17. We appreciate the assistance of Shri Mohit Behari Mathur, learned Amicus Curiae and direct that Rs. 25,000/- shall be paid to him by the State Government as his remuneration.

(2022) 11 ILRA 1148
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.11.2022

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Crl. Appeal No. 691 of 2006

Ramesh ...Appellant
Versus
State of U.P. ...Opp. Party

Counsel for the Appellant:
Sri Devendra Saini, Sri Anupam Dubey, Dr. Hridyawati Misra

Counsel for the Respondents:
Govt. Advocate

Criminal Law- Indian Evidence Act, 1872- Section 3- Section 134- The identity of the accused-appellant cannot be doubted by any stretch of imagination as he is the step father of victim "X'. The case right from the inception is of the accused-appellant taking away victim "X' from the

house of the first informant to his house and then committing rape upon her in the night. The manner of the incident is specific and without any change throughout the case. The clothes of the victim were sent to the Forensic Science Lab - All the clothes were found to be stained by semen of human origin. This would corroborate with the allegation of victim "X' being raped -It is the settled principle of law that the testimony of a prosecutrix or a victim of rape stands at par with that of the testimony of an injured witness- Conviction can be made on the sole testimony of the rape victim- The examination of a number of witnesses in a case is not important than the quality of witnesses.

Where the testimony of the prosecutrix is consistent and cogent and is also corroborated by other evidence, then conviction can be secured solely upon the basis of the testimony of the prosecutrix as the testimony of the prosecutrix stands at par with that of an injured witness. (Para 32, 33, 36)

Criminal Appeal rejected. (E-3)

Case Law/ Judgements relied upon:-

1. St. of Maha. Vs Chandraprakash Kewalchand Jain : (1990) 1 SCC 550

2. St. of Punj. Vs Gurmit Singh : (1996) 2 SCC 384

3. Vijay Vs St. of M.P. : (2010) 8 SCC 191

4. St. of U.P. Vs Chhotel Lal : (2011) 2 SCC 550

(Delivered by Hon'ble Samit Gopal, J.)

1. The present Criminal Appeal under Section 374(2) Cr.P.C. has been preferred by the appellant Ramesh against the judgment and order dated 01.02.2006 passed by Additional District and Sessions Judge, Room No.8, Saharanpur in Sessions Trial No.175 of 2005 (State Vs. Ramesh) convicting and sentencing the appellant under Section 376 IPC to 10 years R.I with fine of Rs.3,000/- and in default of payment of fine to 3 months further rigorous imprisonment. The trial court has further directed that half of fine as recovered shall be paid to the victim/P.W.2 as compensation.

2. The name of the prosecutrix is not being disclosed and mentioned in the present judgment in the light of directions of the Apex Court in various judgments and as per Section 228A of the Indian Penal Code. She is, thus, referred to as "X' in the judgment.

3. An application dated 18.01.2005 written by Ghanshyam Singh, S/o Karm Singh was given by Dheer Singh, S/o Bholaram, R/o Village Ganeshpur, Police Station Viharigarh, District Saharanpur to the S.H.O Police Station Mirzapur, District Saharanpur alleging therein that his sister Shishwati was married in village Vanjarewala from whom one daughter was born. Shishwati was abandoned by her husband after which her court marriage was done with Ramesh, S/o Bhola (accused-appellant) of village Kashampur around 7 years back. The victim "X' was sent with Shishwati considering Ramesh as her father after which victim "X' was brought by the first informant and was kept by him and she started her studies who was studying in class VIII. His sister was of unsound medical condition and used to remain ill. On 14.1.2005 being Friday, Ramesh came to his village and took victim "X' with her by saying that Shishwati is unwell, victim "X' would give her medicine and food and brought her to his village Kashampur. On the same night, Ramesh took victim "X' from near the sister of first informant while being in an intoxicated condition and took

her to another room, tied her hands and raped her. On the next day victim "X' told about the incident to Shushila, the niece of the first informant who was married in Kashampur who then on telephone told about it on the next day to the first informant on which on 17.1.2005, he and other persons went to Kashampur and inquired about it from victim "X' who told them that Ramesh tied her hands and raped her. She was in a bad condition. The first informant then got many people of village Kashampur collected and told them about the incident who deprecated it and told him to do whatever he likes. The victim "X' is aged about 13 years. She has been brought to the police station. The first informant report be thus lodged and action be taken. The said application is Exbt. Ka-1 to the records.

4. On the basis of the said application, an FIR was lodged as Case Crime No.12 of 2005 under Section 376 IPC at Police Station Mirzapur, District Saharanpur on 18.1.2005 at 9.30 a.m. by Dheer Singh against Ramesh, S/o Bhola. The Chik FIR is Exbt. Ka-2 to the records.

5. The Investigating Officer took into possession a printed Salwar and an underwear of victim "X'. Dheer Singh and Smt. Rekha Kiran w/o Dheer Singh are the witnesses of the same. The recovery memo of the same is Exbt. Ka-5 to the records.

6. The victim was medically examined on 18.1.2005 at 9.30 p.m. by Dr. Rashmi Mehta, the Medical Officer, Womens Hospital, Saharanpur. After general examination, the doctor noted as follows:-

"Height-145 cm. Weight-40 kg. teeth-14/14

Sec. sex character (breast, pubic and axillary hair) developed.

No mark of injury seen all over body."

On internal examination, the doctor noted as follows:-

"No injury seen on private part. Old torn and healed hymen present. Vagina admits two finger easily. P/s slight bleeding per vagina present coming from uterus. No injury seen on vagina. Vaginal smear made and sent to pathology for presence of spermatozoa."

For determination of age, X-Ray of right elbow, wrist and knee was advised. For blood grouping she was referred to the pathology department of S.B.D. Hospital.

She was advised to give her under clothes at the Police station for being sealed. The said medical examination report is Exbt. Ka-10 to the records.

7. The X-Ray of the victim "X' for age was done on 19.1.2005. The radiologist reported as follows:-

"1. Right wrist:- Lower epiphysis of radius & ulna have not fused.

2. Right Elbow:- All epiphysis around elbow have fused.

3. Right knee:- Lower ephiphysis of femur and end of tibia have fused. Upper epiphysis of tibula partially fused."

The said report is Exbt. Ka-9 to the records.

8. The Senior Radiologist, S.B.D. Hospital gave his report. Subsequently a supplementary report dated 21.1.2005 was prepared by Dr. Rashmi Mehta mentioning therein that the blood group as per the report of the pathologist Dr. Ranjana Chaudhary is "B Positive". The vaginal smear report tested negative for

spermatozoa. The opinion of the doctor is as follows:-

"1. No opinion can be given regarding recent rape as no fresh injury found.

2. According to radiologist report age of girl is between 16 and 17 years (sixteen and seventeen)."

The said supplementary report is Exbt. Ka-11 to the records.

9. The Salwar and underwear of victim "X' were sent to the Forensic Science Lab, Agra for testing. A report dated 26.4.2005 was sent by the Assistant Director of the said lab. The Salwar was marked as item no.1 and the underwear was marked as item no.2. The opinion as per the examination is as follows:-

"1. On item nos.1 and 2 on big pants blood stains were found.

2. On item no.1 and 2 spermatozoa were found.

3. On item no.1 and 2 human blood was found.

4. On item no.1 and 2 human semen was found.

5. On item no.1 and 2 blood of group "B" was found.

6. On item no.1 and 2 the spots of semen could not be tested for their group and as such no definite opinion could be given about it.

The said report of the Forensic Science Lab is Exbt. Ka-8 to the records."

10. A site-plan of the place of occurrence was prepared by the Investigating Officer on 20.1.2005. The same is Exbt. Ka-6 to the records. In the site-plan point B which is adjacent to the kitchen and is a tin-shed which is shown to be the place of occurrence.

11. The X-Ray plates of victim "X' for determination of her age were also filed and proved which were marked as Exbt. 4 and 5 to the records.

12. The investigation concluded and a Charge Sheet No.14 of 2005, dated 25.1.2005 under Section 376 IPC was submitted against the accused-appellant. The same is Exbt. Ka-7 to the records.

13. Vide order dated 4.5.2005 passed by Sessions Judge, Saharanpur, charge under Section 376 IPC was framed against the accused-appellant. He pleaded not guilty and claimed to be tried.

14. The charge as was framed on 4.5.2005 read that on 14.1.2005 in the night some times in village Kashampur within Police Station Mirzapur, District Saharanpur, victim "X' the niece of the first informant Dheer Singh was forcefully raped by the accused and as such an offence under section 376 IPC is made out which is cognizable by the said court and hence charge was framed.

15. Subsequently an application being Application No.11-Kha was moved by the learned Government counsel before the trial court stating therein that in the charge as framed on 4.5.2005, there is an error of the date of offence. The trial court vide order dated 28.7.2005 allowed the said application, set-aside the charge as framed on 4.5.2005 and in place of it directed that the date of the incident be mentioned as 15/16.01.2005 in the night and thus amended the said charge on 10.08.2005 and framed charge under section 376 IPC against the accused-appellant. Even on 10.08.2005, the accused pleaded not guilty and claimed to be tried.

16. The trial then started in which the prosecution produced Dheer Singh, the first informant as P.W.1, victim "X' was produced as P.W.2, Surajpal, Constable Clerk Police Station Nagal was produced as P.W.3, Sub Inspector Shiv Kumar Sharma, the Investigating Officer was produced as P.W.4, Doctor Sudhakar Verma, the Radiologist was produced as P.W.5, Constable Subhash Chand was produced as P.W.6 and Doctor Rashmi Mehta, Medical Officer, Womens Hospital, Saharanpur was produced as P.W.7.

17. The accused-appellant in his statement recorded under Section 313 Cr.P.C. has stated that Dheer Singh, the maternal uncle of victim "X' himself dropped her to his house. He further states that he informed Dheer Singh that the girl has run away from the house. He called Dheer Singh by informing him on phone. He further states that he has no children. Dheer Singh has falsely implicated him just to grab his property. Victim "X' has run away even earlier for about 14 days. Her mama had dropped her on 15th of the month. On 16th, she again went away from the house and then he launched search for her. He apprehended her along with a boy with whom she was trying to elope. The boy ran away but she was recovered. On 17th, he made a telephonic call at the house of Satish and called Dheer Singh then there was a Panchayat in the village. In the Panchayat it was decided to send the mother and the daughter with Dheer Singh, due to the said enmity Dheer Singh has falsely implicated him.

18. The trial court then convicted the accused-appellant as stated above.

19. Heard Sri Anupam Dubey, learned Amicus Curiae for the appellant, Sri Sanjay Kumar Singh, learned counsel for the State and perused the records of this appeal and also the trial court records.

20. Learned Amicus Curiae argued that there are serious contradictions in the statement of the victim recorded under section 164 Cr.P.C. and that given before the trial court. It is argued that in her statement under Section 164 Cr.P.C., she states that her father Ramesh took her to a tin shed room, tied her hands, gagged her mouth with a cloth and then committed rape on her after which she became unconscious but in her statement in court, she states that she was sleeping with her mother and her father was sleeping under the tin-shed outside. When she opened her eyes she found herself naked. It was about 5 a.m. In between she was unconscious. She does not know as to what happened with her. It is further argued that as per the prosecution case the victim "X' for the first time informed about the incident to Smt. Shushila, the niece of the first informant who is married in village Kashampur which is the village where the incident is alleged to have taken place but Smt. Shushila, the niece of the first informant has not been examined in the present matter. It is further argued that even Smt. Shishwati, the mother of victim "X' has also not been examined in the trial. The said two persons namely Shushila and Smt. Shishwati are important witnesses and their non-examination in the trial would render the entire prosecution story as suspect. It is next argued that the medical evidence does not corroborate with the prosecution case. The doctor did not find any injury on the private parts of the victim. The hymen was found to be old torn and healed and even the opinion of the doctor in the supplementary report is to the effect that no opinion can be given regarding recent rape

as no fresh injury was found. It is argued next that even the age of the victim as per the supplementary report was opined to be between 16 and 17 years which would also go to show that the version as given in the FIR that she was aged about 13 years is incorrect. It is argued that as per the age given by the doctor in the supplementary medical examination which is based on the radiological opinion and by giving benefit of variation of two years, she would be major. It is further argued that there is no cogent and reliable evidence on record to substantiate the allegations against the accused-appellant. The accused-appellant is the step father of the victim "X'. In his statement under Section 313 Cr.P.C., he has in detail stated about the reason for his false implication which was a motive for his false implication as the first informant wanted to grab his property, as such the present appeal deserves to be allowed. The impugned judgement and order of conviction of the trial court deserves to be set-aside and the accused-appellant is liable to be acquitted of the charges levelled against him.

21. Per contra learned counsel for the State has vehemently opposed the arguments of learned Amicus Curiae for the appellant and argued that the accused-appellant is named in the FIR. There are allegations against him of committing rape upon his step daughter. The medical examination report although does not state of the recent rape being committed on her which was only on the basis of the fact that there was no fresh injury found on the victim "X' but the report of the Forensic Science Lab Exbt. Ka-8 to the records corroborates with the allegations of rape as the chemical examiner has found semen and spermatozoa in the clothes of the victim "X' which were of human origin. Even the blood group "B' was found on the clothes which also co-relates with the blood group of victim "X' which would go to show that there was bleeding from the private parts of the victim "X'. It is argued that the contradictions as has been argued to be with regards to the statement under Section 164 Cr.P.C. and the statement given in the court by the victim "X' is concerned, the same is minor in nature which would not in any manner render the entire case to be false. It is argued that the accused-appellant is the step father of the victim "X'. There are no chances of false implication and mis-identity. It is argued that in so far as the mother of the victim "X' being not examined in the trial, the FIR itself states that she was a lady having mental retardness. It is argued that Shiv Kumar Sharma, P.W.4 who is the Investigating Officer of the case was cross-examined for this aspect who stated that he tried to interrogate Smt. Shishwati but he came to know that she has left the village Kashampur. He further states that he did not make an attempt to interrogate her by going to village Ganeshpur. The statement of victim "X' is unimpeachable. She has stated of the accused-appellant committing rape on her. The prosecution story is corroborated by her in her statement. The same is sufficient to bring home the charges against the accused-appellant and recording conviction. It is argued that non-production of Smt. Shushila and the mother of the victim may be a lapse on the part of the Investigating Officer but the same would not in any manner go to dislodge the entire prosecution case. The prosecution has succeeded in proving its case beyond reasonable doubt. The present appeal deserves to be dismissed.

22. P.W.1 Dheer Singh is the first informant of the present case and the

maternal uncle/mama of victim "X'. He states that the accused is his brother-in-law. Shishwati is his sister. She was earlier married in village Vanjarewala with Nathi. From the wedlock victim "X' was born. Nathi had left Smt. Shishwati. Later on she performed court marriage with accused-appellant Ramesh. She was then sent with Ramesh. Victim "X' used to live with him. Victim "X' is aged about 13-14 years and is living in village Ganeshpur and studying in a school there in class VIII. His sister is mentally retarded. On 14.1.2005 accused Ramesh came to his house and stated that Shishwati is ill and victim "X' be sent to take care of her. On the next day victim "X' was sent with him to take care of Smt. Shishwati. Later on Shushila called him and told him that the father of the victim "X' has done illegal act on her. He then went to Kashampur and inquired it from victim "X'. She told him about the entire incident. Then on the next day he got a report written by Ghanshyam. He identifies the said application/report and proves his signature on it and proved the same. The same is marked as Exbt. Ka-1. He states that on the basis of the said application, a report was lodged at the Police Station. Police got the medical examination of victim "X' conducted. Her clothes which she was wearing at the time of the incident were taken into possession by the police of which a recovery memo was drawn on which he signed. He identified the same and his signature on the recovery memo.

23. P.W.2 victim "X' states that her mother Smt. Shishwati was married to Nathi Ram, resident of Vanjarewala who had left her. She is the child of Nathi Ram. She was brought by Dheer Singh, her mama. She was studying in a school in Ganeshpur. Her date of birth is 15.10.1992. She files a school certificate for date of birth. She states that later on her mama Dheer Singh got her mother married with Ramesh after which she accepted him as her father. Her mother Shishwati used to remain ill. On 14.1.2005 Ramesh came to Ganeshpur and told her mama Dheer Singh that Shishwati is unwell and to take care she has to be taken. He stayed there overnight. Next day on 15th January she went with Ramesh. In the night after preparing the food, she was lying near her mother. Ramesh gave medicines to her mother after which she became unconscious. He then took her to a room of tin-shed and gagged her mouth with a cloth and tied her hands and committed rape on her. She became unconscious. When she regained consciousness, she found herself and Ramesh naked. She then untied her hands and told about the incident to her mother and then on the next day told about it to Shushila who was married in Kashampur. Shushila then told her mama on which he came to Kashampur and took her away. A report was lodged, her medical examination was conducted. The clothes which she was wearing, was taken by the police and a recovery memo was prepared. She identifies her signature on the said memo. A packet was opened in the court containing the clothes of the victim "X' which was identified by her as the clothes which she was wearing at the time of incident. The same were marked as material Exbt. 1, 2 and 3.

24. In her cross-examination, she states that she has studied up-to class VIII and then left her studies. She was studying in Inava Public School which is from class 1 to 8. She used to go to school daily. After the incident, she did not go to the school. On 14.1.2005 she went to the school. She can submit the certificate about it. She denies that she ran away with a boy of the

school in the last week of December and then on 13th January, she was recovered by her mama along with boy. She further denies that her mama Dheer Singh had left her with her mother on 14th January. She denies that on 16.1.2005 a boy of village Kashampur came and she was preparing to run away with him. She further denies that on 17.1.2005 accused Ramesh has called her mami Rekha Kiran and mama and others to village Kashampur. She denies that a Panchayat was held on 17.1.2005 about it in which her mama Dheer Singh and relatives were insulted and she and her mother were thrown out of the house on the same day. She further denies that due to the said enmity her mama and mami have lodged a false report. She denies that due to the same her mama did not let her go to the school and she was kept guarded till date. She states that her statement was recorded by the Investigating Officer after 2-3 days of the incident in Mirzapur Police Station. Her statement was not recorded on the day the FIR was lodged. It was recorded on the next day of lodging of the report. She then states that it was recorded on 18th. She did not go to the police station after that. She states that she has told to the Investigating Officer that Ramesh stayed overnight on 14th. If the same is not written in her statement, she cannot state about the reason. She further told the Investigating Officer that on the day of incident after preparing the food she laid near her mother after which Ramesh gave medicines to her mother who then became unconscious. If the same is not written in the statement, she cannot tell the reason. She had slept after taking food. She does not remember when she was taken under the tin-shed. She had reached to Kashampur from Ganeshpur at 8 p.m. When she reached there, her mother did not cook food. She on reaching prepared food. She cooked food for about 1-½ hours. She and her mother had taken meals. Her father had not eaten it. After eating food she slept near her mother. Her father slept outside under tin-shed. When she opened her eyes, she found herself naked. It was about 5 a.m. In between she was unconscious. She does not know what happened with her. After it she slept near her mother. She did not prepare tea and breakfast in the morning. She went to her sister and stayed there till 17.1.2005 till her mama came. She denies the suggestion that in her statement she has stated that no such incident has taken place. She further denies that she is giving a false statement on being prompted by her mama and no such incident has taken place and her mama is taking revenge of his insult in the Panchayat. It is true that in the house of accused Ramesh there is no child or any other person but it is incorrect that her mama has taken the land of the accused Ramesh and has lodged a false case.

25. P.W.3 Suraj Pal is the Head Constable of Police Station Mirzapur. He states of lodging of the present FIR and also of transcribing the corresponding G.D. He proves the same. He further states that a sealed bundle was brought by the Investigating Officer on 20.1.2005 which was recorded in the G.D. and was deposited. The report regarding the same was transcribed by Head Constable Ajit Singh whose handwriting was identified by him.

26. P.W.4 Shiv Kumar Sharma is the Investigating Officer of the matter. He took up the investigation and recorded the statement of witnesses, arrested the accused on 19.1.2005, took the clothes of victim "X' and prepared its recovery memo and filed a charge sheet against the accused. He further states that a report of the Forensic Science

Lab was received by him which is paper no.15-Kha to the records and was marked as Exbt. Ka-8.

27. P.W.5 Dr. Sudhakar Garg is the Senior Radiologist, S.B.D. Hospital, Saharanpur. He had conducted the X-Ray examination of victim "X' and had given his report regarding the same. He proves the X-Ray plates and X-Ray report. The details have already been stated above.

28. P.W.6 Constable Police Subhash Chand was posted at Police Station Mirzapur, District Saharanpur. He has given the link evidence of the material which was in a sealed bundle and was taken by him from the Police Station to the Forensic Science Lab, Agra and deposited there.

29. P.W.7 Dr. Rashmi Mehta is the Medical Officer, Womens Hospital, Saharanpur. She conducted the medical examination of the victim "X' and also prepared the supplementary report. The details of the reports have already been stated above. She states about the same in the court.

30. In her cross-examination to court she states that victim "X' as per estimation of the age could be less than 18 years of age but cannot be above it. She states that in any event the age of the victim cannot be above 18 years.

31. After having heard the learned counsel for the parties and perusing the record, it is evident that the appellant is the step father of the victim "X' and the brother-in-law/Jija of P.W.1 Dheer Singh, the first informant of the matter. The evidence of the accused-appellant coming to the house of P.W.1 and taking away the victim "X' on the pretext of her mother being ill and she to attend her and take care of her is a consistent prosecution case. The same does not get distorted in any matter. The identity of the accused-appellant cannot be doubted by any stretch of imagination as he is the step father of victim "X'. The case right from the inception is of the accused-appellant taking away victim "X' from the house of the first informant to his house and then committing rape upon her in the night. The same is consistent in the FIR and also in the statement of victim "X'. The manner of the incident is specific and without any change throughout the case. The clothes of the victim were sent to the Forensic Science Lab which were the Salwar and her underwear. All the clothes were found to be stained by semen of human origin. This would corroborate with the allegation of victim "X' being raped. Smt. Shushila being not examined although the prosecution has not come out with any justification about it but the same would not render the entire prosecution evidence as false. In so far as Smt. Shishwati, the mother of the victim "X' is concerned and the fact that she has not been examined is concerned, the FIR itself states that she is mentally retarded. The Investigating Officer Shiv Kumar Sharma, P.W.4 in his cross-examination stated that he tried to interrogate her in village Kashampur but he was informed that she has left the said place and gone somewhere else after which he did not make an effort to go to village Ganeshpur and examine her. Moreover, the non-production of the said two persons in the trial would not render the entire prosecution as false or even doubtful.

32. It is the settled principle of law that the testimony of a prosecutrix or a victim of rape stands at par with that of the

testimony of an injured witness. The same has been held in the case of **State of Maharashtra Vs. Chandraprakash Kewalchand Jain** : (1990) 1 SCC 550 in para 16 which is extracted herein:

*"**16.** A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness. For the above reasons we think that exception has rightly been taken to the approach of the High Court as is reflected in the following passage:*

"It is only in the rarest of rare cases if the court finds that the testimony of the prosecutrix is so trustworthy, truthful and reliable that other corroboration may not be necessary."

With respect, the law is not correctly stated. If we may say so, it is just the reverse. Ordinarily the evidence of a prosecutrix must carry the same weight as is attached to an injured person who is a victim of violence, unless there are special circumstances which call for greater caution, in which case it would be safe to act on her testimony if there is independent evidence lending assurance to her accusation."

(emphasis supplied)

33. Further in the case of **State of Punjab Vs. Gurmit Singh : (1996) 2 SCC 384** the Apex Court held that for the offence under Section 376 IPC, conviction can be made on the sole testimony of the rape victim. It was also held that the negligence of the investigating officer cannot effect the creditibility of the statement of the prosecutrix. In paras 8 and 21 it was held as follows:

"8. ... The court overlooked the situation in which a poor helpless minor

girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how can that become a ground to discredit the testimony of the prosecutrix? The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix ... The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case ... Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury ... Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances....

***

21. ... The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

34. In the case of **Vijay Vs. State of M.P. : (2010) 8 SCC 191** the Apex Court referred to its decisions in the cases of State of Maharasthra Vs. Chandraprakash Kewalchand Jain : (1990) 1 SCC 550 and State of Punjab Vs. Gurmit Singh : (1996) 2 SCC 384 and also few other decisions and in para 14 observed as follows:

"14. Thus, the law that emerges on the issue is to the effect that the statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix."

35. Further in the case of **State of UP Vs. Chhotel Lal : (2011) 2 SCC 550** the Apex Court has postulated the approach to be adopted by Courts in evaluating the testimony of victim of rape. In para 26 it has been held as follows:

"26. *The important thing that the court has to bear in mind is that what is lost by a rape victim is face. The victim loses value as a person. Ours is a conservative society and, therefore, a woman and more so a young unmarried woman will not put her reputation in peril*

by allegingfalsely about forcible sexual assault. In examining the evidence of the prosecutrix the courts must be alive to the conditions prevalent in the Indian society and must not be swayed by beliefs in other countries. The courts must be sensitive and responsive to the plight of the female victim of sexual assault. Society's belief and value systems need to be kept uppermost in mind as rape is the worst form of women's oppression. A forcible sexual assault brings in humiliation, feeling of disgust, tremendous embarrassment, sense of shame, trauma and lifelong emotional scar to a victim and it is, therefore, most unlikely of a woman, and more so by a young woman, roping in somebody falsely in the crime of rape. The stigma that attaches to the victim of rape in Indian society ordinarily rules out the levelling of false accusations. An Indian woman traditionally will not concoct an untruthful story and bring charges of rape for the purpose of blackmail, hatred, spite or revenge."

36. As such the examination of a number of witnesses in a case is not important than the quality of witnesses. From the perusal of the evidence of the victim "X', it is clear that her stand with regards to rape being committed on her is specific and consistent. The contradiction as has been argued drawing the attention to the statement under Section 164 Cr.P.C. and the statement in court of victim "X' is a minor contradiction and does not in any manner would go to show that no such incident had taken place. In both the statements, the case was specific of rape being committed upon her. The doctor who examined the victim and gave the supplementary report being Dr. Rashmi Mehta, P.W.7 has in the supplementary report placing her observations on the radiological examination opined the age of the victim between 16-17 years and even in her cross-examination has specifically stated that her age at the time of incident was below 18 years and cannot be above 18 years at all. Thus the victim was a minor at the time of the incident. The accused although in his statement under Section 313 Cr.P.C. has stated that he is issueless and the first informant Dheer Singh has an eye on his property and want to grab his property and as such he has falsely implicated him but there is nothing on record to show as to what was the property owned by him and also the fact as to who all are his co-laterals and other persons and whether the said property was exclusively under his title or not. The version of a Panchayat being held is uncorroborated. The victim denies of any such Panchayat being held. There is no evidence led by the accused-appellant to corroborate the said fact.

37. Looking to the facts and circumstances of the case, it is evident that the prosecution has succeeded to prove its case beyond reasonable doubt against the accused-appellant. The present appeal is thus dismissed. The judgment and order of the trial court is hereby affirmed.

38. As per the office report dated 23.09.2014, a report dated 13.08.2014 has been received from the C.J.M., Saharanpur which is in compliance of an order dated 2.8.2014 passed by a coordinate Bench of this Court stating therein that the accused-appellant has completed his sentence of 10 years and has been released on 20.10.2012. He has also deposited a fine of Rs.3,000/-.

39. In these circumstances, if the accused-appellant has served out the entire sentence as awarded by the trial court and

has deposited the fine as aforesaid, he need not be taken into custody.

40. The office is directed to send the certified copy of this judgment along with the trial court records to the trial court concerned for necessary information and follow-up action.

41. Office is directed to pay a sum of Rs.8,000/- for assistance of the Court to learned Amicus Curiae within two months from today.

42. The trial court shall communicate this judgement to the accused-appellant within a period of one week from the date of receipt of the same.

(2022) 11 ILRA 1160
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 11.11.2022

BEFORE

THE HON'BLE DINESH KUMAR SINGH, J.

Crl. Appeal No. 953 of 2014
with Crl. Appeal Nos. 959 of 2014 and 948 of 2014

Raj Kumar @ Raj Kumar Srivastava ...Appellant

Versus

State ...Respondent

Counsel for the Appellant:
Nandit Kumar Srivastava, Pranjal Krishna, Tapeshwar Kumar Maurya

Counsel for the Respondents:
Brijeshwar Nath, Shiv P. Shukla

Criminal Law- Prevention of Corruption Act, 1988- Section 27 -Section 13(1)(d) and 13(2)- It is well settled that demand and acceptance of illegal gratification is a sine qua non to prove the offence of bribe under Section 13(1)(d) of Prevention of Corruption Act-Mere recovery of the amount would not prove the charges against the accused which was said to have been paid by way of illegal gratification. If the Court finds that there is no evidence to prove payment of bribe or to show that the accused had voluntarily accepted the money knowing it to be bribe, the conviction cannot be sustained-From the evidence lead by the CBI particularly considering the fact of recovery of foreign currency and the evidence of two passengers whose testimony has remained unshaken, this Court is of the view that the offence under Section 13(1)(d) of Prevention of Corruption Act is proved against the appellants.

Where the prosecution fails to prove the demand and acceptance of illegal gratification, then mere recovery of the amount will not make out any offence but where the prosecution witnesses prove the factum of demand and acceptance of bribe then the said evidence is sufficient to bring home the charge against the accused.

Quantum of Punishment- Proportionate Punishment- The special circumstance i.e. 22 years of time period having been lapsed from the date of the alleged offence and their official positions which they held at the time of commission of offence, this Court is of the view that the minimum sentence should be reduced to the sentence already undergone with a fine.

The long delay in deciding the appeal is one of the mitigating factors to take into consideration on the point of the quantum of sentence and the same is to be reckoned as a factor for reducing the sentence to the period already undergone. (Para 12, 17, 20, 22)

Criminal Appeal rejected, sentence modified. (E-3)

Case Law/ Judgements relied upon:-

1. C.K. Damodaran Nair Vs Govt. of India, (1997) 9 SCC 477

2. A. Subair Vs St. of Ker., (2009) 6 SCC 587

3. St. of Guj. Vs Navinbhai Chandrakant Joshi, (2018) SCC Online SC 699:AIR 1028 SC 3345

4. P. Satyanarayan Murthy Vs Dist. Inspr. of Police, St. of A.P, (2015) 10 SCC 152

5. V.K. Verma Vs CBI, (2014) 3 SCC 485

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

1. These criminal appeals have been filed under Section 27 of the Prevention of Corruption Act, 1988 read with Section 374(2) Cr.P.C. against the judgment and order dated 21.7.2014 passed by the learned Special Judge, Anti-Corruption, West, Uttar Pradesh, Lucknow in Criminal Case No.01 of 2011 (CBI Vs. Udai Pratap Bhartiya and three others) under Section 120-B IPC read with Section 13(1)(d) and 13(2) of Prevention of Corruption Act, arising out of Crime No.RC0062000A0017/2000, Police Station CBI/ACB, Lucknow, whereby the appellants have been convicted for offence under Section 120-B IPC read with Section 13(1)(d) and 13(2) of Prevention of Corruption Act, 1988 and sentenced them four years rigorous imprisonment with fine of Rs.40,000/- each and in default of payment of fine, further one year additional rigorous imprisonment.

2. The prosecution case, in brief, is that a secret information was received that custom officials and the bank officials posted at Amausi Airport were indulging in corruption practices and were demanding and accepting the bribe from the passengers coming from abroad. On this information, Sri Jayant Kashmiri, Inspector, CBI, Lucknow on 23.10.2000 constituted a team including the CBI officials and two independent witnesses, Sri Arun Srivastava, Law Officer, Circle Office, Canara Bank and R.C. Srivastava, Manager Overseas Banking, Main Branch, State Bank of India, Lucknow. The team reached to the Amausi Airport at 0040 hours on 23.10.2000. After sometime, Flight No.IAIC 884 reached Amausi Airport, Lucknow from Sharjah. The CBI officials reached inside the Airport and started keeping eye on the custom officials at custom gate and the bank officials working at the foreign exchange counter of the Allahabad Bank. The team members noticed that the custom officials and the bank officials were allowing the passengers to go out of the gate after taking money from them. The team members reached to the custom counters and the bank counters and, on search from Sri U.P. Bhartiya, Superintendent, Air Custom 3205 Dirham and Rs.12,770/- in cash, from appellant-Sunil Kumar, who was employed as Sepoy, 230 Dirham and Rs.80/-, from appellant-Rajkumar, Sepoy, 2000 Riyal, 175 Dirham and Rs.3,050/-, from appellant-S.S. Pandey, Driver, 15 Dirham and Rs.2,790/-, from Ashutosh Mishra, Manager-cum-In-charge, Allahabad Bank, Custom Counter, Amausi Airport 18390 Dirham, 360 U.S. Dollar and Rs.11,310/- were recovered. A seizure memo was prepared.

3. The appellants and the Manager-cum-In-charge, Allahabad Bank, Custom Counter could not give any explanation for having foreign currency and cash in their possession. The CBI, thereafter, registered a case on 23.10.2000 itself as RC 17(A)/2000/CBI.

4. It was noticed that in the said flight IAIC 884, there were 113 passengers and out of them, statements of 17 passengers were taken and five passengers specifically stated that the custom officials had demanded money from them. Independent

witnesses, R.C. Srivastava and Arun Srivastava were examined in the Court, who proved the surprise inspection and the seizure memo. The CBI after completing the investigation, filed charge sheet and on 4.2.2013 charges were framed.

4. Since U.P. Bhartiya, appellant had died during the pendency of the appeal, his appeal being Criminal Appeal No.947 of 2014 got abated and a separate order in this respect has been passed.

5. The CBI to prove its case examined as many as 15 witnesses including the two passengers, who came from Flight No.IAIC 884. Chhoteylal (P.W.-8) and Mohd. Ubaid (P.W.-9). Several documentary and material evidence were produced in support of the prosecution case. On behalf of the defence, seven witnesses were examined.

6. Appellants could not deny the possession of foreign currency and cash in their possession. They also could not offer any explanation for possession of the foreign currency. Independent witnesses, R.K. Srivastava (P.W.-3) and Ramesh Chandra Srivastava (P.W.-4) have proved the foreign currency and the Indian currency recovered from the appellants. Two passengers Chhoteylal (P.W.-8) and Mohd. Ubaid (P.W.-9) have specifically stated that the custom officials posted at the custom gate had demanded money for their exit from the gate.

7. The trial court has extracted the evidences of all the witnesses and for the sake of brevity, the same is not being reproduced herein. The trial court after considering the entire facts and the material evidence available on record, has convicted and sentenced the appellants as mentioned above.

8. Sri Nandit Srivastava, learned Senior Counsel assisted by Sri Pranshu Agarwal and Sri Shiv Shankar Singh, learned counsel for the appellants submits that the prosecution has failed to prove that there was a demand of money by the appellants from the passengers and in absence of proof of a demand or request of a valuable thing or pecuniary advantage, offence under Section 13(1)(d) of Prevention of Corruption Act cannot be held to be established. He further submits that the chain does not get completed as there was no demand and no one had seen accepting money by the appellants and, only on the basis of the recovery made, they have been prosecuted and the learned trial court has held them guilty for offences under Section 120-B IPC read with Section 13(1)(d) and 13(2) of Prevention of Corruption Act. He, therefore, submits that the learned trial court has erred in law in not appreciating that unless and until the demand, acceptance and recovery are proved, the appellants could not have been held guilty.

9. On the other hand, Sri Shiv P. Shukla, learned counsel for the CBI submits that from the evidence of Chhoteylal (P.W.-8) and Mohd. Ubaid (P.W.-9), it is amply clear that the appellants and the deceased U.P. Bhartiya had demanded money in discharge of their official function from the passengers for allowing them to cross the custom gate and only after receiving the money, they would allow the passengers to cross the custom gate. He further submits that the appellants not only demanded money, but also accepted the pecuniary advantage for themselves and there has been recovery from them, which they have not denied. He also submits that all the four appellants used to demand money from the passengers

coming from abroad and, thereafter, they were dividing the money collected among themselves in proportion.

10. Learned counsel for the CBI further submits that the offence under Section 120-B IPC read with Section 13(1)(d) and 13(2) of Prevention of Corruption Act got proved beyond reasonable doubt by leading cogent and credible evidence by the CBI and the impugned judgment and order, which is a well reasoned order in detail, has been passed after considering the evidence on record, which is not likely to be interfered with.

11. I have considered the submissions advanced on behalf of the learned counsel for the parties and perused the record.

12. Two passengers, Chhoteylal (P.W.-8) and Mohd. Ubaid (P.W.-9), from whom money was demanded, have categorically deposed that the custom officials posted on duty, demanded money from them and they would allow the passengers to cross the custom gate only after accepting the money from them. These two witnesses were also allowed to cross custom gate only they paid the money demanded by the appellants.

13. Section 13(1)(d) and 13(2) of Prevention of Corruption Act would read as under:-

*"13. **Criminal misconduct by a public servant.**--(1) A public servant is said to commit the offence of criminal misconduct,--*

(a) .....

(b) .....

(c) .....

(d) if he,--

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or

(e) .....

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than3[four years] but which may extend to 4[ten years] and shall also be liable to fine."

14. The essential ingredients of Section 13(1)(d) of the Prevention of Corruption Act are:

(i) that he should have been a public servant;

(ii) that he should have used corrupt or illegal means or otherwise abused his position as such public servant, and

(iii) that he should have obtained a valuable thing or pecuniary advantage for himself or for any other person.

15. The Supreme Court in the case of **C.K. Damodaran Nair Vs. Govt. of India**, (1997) 9 SCC 477 had occasion to consider the word "obtain" used in Section 5(1)(a) of Prevention of Corruption Act, 1947, which is para materia of Section 13(1)(d) of Prevention of Corruption Act, 1988 and, in paragraph 12 of the said judgement, it has been held as under:-

"12. The position will, however, be different so far as an offence under Section 5(1)(d) read with Section 5(2) of the Act is

concerned. For such an offence prosecution has to prove that the accused "obtained" the valuable thing or pecuniary advantage by corrupt or illegal means or by otherwise abusing his position as a public servant and that too without the aid of the statutory presumption under Section 4(1) of the Act as it is available only in respect of offences under Section 5(1)(a) and (b) -- and not under Section 5(1)(c), (d) or (e) of the Act. "Obtain" means to secure or gain (something) as the result of request or effort (Shorter Oxford Dictionary). In case of obtainment the initiative vests in the person who receives and in that context a demand or request from him will be a primary requisite for an offence under Section 5(1)(d) of the Act unlike an offence under Section 161 IPC, which, as noticed above, can be, established by proof of either "acceptance" or "obtainment".

16. The Supreme Court in the case of **A. Subair Vs. State of Kerala**, (2009) 6 SCC 587 while placing reliance on the judgment of C.K. Damodaran Nair (supra) in paragraph 15 held as under:-

"15. In C.K. Damodaran Nair v. Govt. of India [(1997) 9 SCC 477 : 1997 SCC (Cri) 654] this Court had an occasion to consider the word "obtained" used in Section 5(1)(d) of the Prevention of Corruption Act, 1947 [now Section 13(1)(d) of the Act, 1988], and it was held: (SCC p. 483, para 12)

"12. The position will, however, be different so far as an offence under Section 5(1)(d) read with Section 5(2) of the Act is concerned. For such an offence prosecution has to prove that the accused "obtained' the valuable thing or pecuniary advantage by corrupt or illegal means or by otherwise abusing his position as a public servant and that too without the aid of the statutory presumption under Section 4(1) of the Act as it is available only in respect of offences under Sections 5(1)(a) and (b)--and not under Sections 5(1)(c), (d) or (e) of the Act. "Obtain' means to secure or gain (something) as the result of request or effort (Shorter Oxford Dictionary). In case of obtainment the initiative vests in the person who receives and in that context a demand or request from him will be a primary requisite for an offence under Section 5(1)(d) of the Act unlike an offence under Section 161 IPC, which, as noticed above, can be, established by proof of either "acceptance' or "obtainment'."

The legal position is no more res integra that primary requisite of an offence under Section 13(1)(d) of the Act is proof of a demand or request of a valuable thing or pecuniary advantage from the public servant. In other words, in the absence of proof of demand or request from the public servant for a valuable thing or pecuniary advantage, the offence under Section 13(1)(d) cannot be held to be established."

17. It is well settled that demand and acceptance of illegal gratification is a sine qua non to prove the offence of bribe under Section 13(1)(d) of Prevention of Corruption Act as held by the Supreme Court in the case of **State of Gujarat Vs. Navinbhai Chandrakant Joshi,** (2018) SCC Online SC 699:AIR 1028 SC 3345. Mere recovery of the amount would not prove the charges against the accused which was said to have been paid by way of illegal gratification. If the Court finds that there is no evidence to prove payment of bribe or to show that the accused had voluntarily accepted the money knowing it to be bribe, the conviction cannot be sustained. **P. Satyanarayan Murthy Vs. District Inspector of Police, State of Andhra Pradesh**, (2015) 10 SCC 152.

18. At this stage, Sri Nandit Srivastava, learned Senior Counsel for the appellants submits that at the relevant time, the minimum sentence under Section 13(2) of Prevention of Corruption Act was one year which could have been extended upto seven years. The appellants are Sepoys and Driver. The offence allegedly took place in the year 2000 and 22 long years have gone bye since then. He, therefore, submits that considering the judgment in the case of ***V.K. Verma Vs. Central Bureau of Investigation***, (2014) 3 SCC 485, this Court may reduce the substantive sentence to the period already undergone and may impose the fine taking into the special circumstances.

19. The Supreme Court in the case of V.K. Verma (supra) held as under:-

"8. The long delay before the courts in taking a final decision with regard to the guilt or otherwise of the accused is one of the mitigating factors for the superior courts to take into consideration while taking a decision on the quantum of sentence. As we have noted above, the FIR was registered by CBI in 1984. The matter came before the Sessions Court only in 1994. The Sessions Court took almost ten years to conclude the trial and pronounce the judgment. Before the High Court, it took another ten years. Thus, it is a litigation of almost three decades in a simple trap case and that too involving a petty amount.

9. In Ashok Kumar v. State (Delhi Admn.) [(1980) 2 SCC 282 : 1980 SCC (Cri) 426] , the commission of offence of theft was committed in 1971 and the judgment of this Court was delivered in 1980. The conviction was under Section 411 IPC. This Court having regard to the purpose of punishment and "the long protracted litigation", reduced the sentence to the period already undergone by the convict.

10. In Sharvan Kumar v. State of U.P. [(1985) 3 SCC 658 : 1985 SCC (Cri) 437] , the commission of offence was in 1968 and the judgment was delivered in 1985. The conviction was under Sections 467 and 471 IPC. In that case also, the long delay in the litigation process was one of the factors taken into consideration by this Court in reducing the sentence to the period already undergone.

11. In Ajab v. State of Maharashtra [1989 Supp (1) SCC 601 : 1989 SCC (Cri) 602] also, this Court had an occasion to examine the similar situation. The offence was committed in 1972 and this Court delivered the judgment in 1989. The conviction was under Section 224 read with Section 395 IPC. In that case also "passage of time was reckoned as a factor for reducing the sentence to the period already undergone". This Court in that case, while reducing the substantive sentence, increased the fine holding that the same would meet the ends of justice.

12. The appellant is now aged 76. We are informed that he is otherwise not keeping in good health, having had also cardiovascular problems. The offence is of the year 1984. It is almost three decades now. The accused has already undergone physical incarceration for three months and mental incarceration for about thirty years. Whether at this age and stage, would it not be economically wasteful, and a liability to the State to keep the appellant in prison, is the question we have to address. Having given thoughtful consideration to all the aspects of the matter, we are of the view that the facts mentioned above would certainly be special reasons for reducing the substantive sentence but enhancing the fine, while maintaining the conviction.

13. Accordingly, the appeal is partly allowed. The substantive sentence of imprisonment is reduced to the period already undergone. However, an amount of Rs 50,000 is imposed as fine. The appellant shall deposit the fine within three months and, if not, he shall undergo imprisonment for a period of six months. On payment of fine, his bail bond will stand cancelled."

20. From the evidence lead by the CBI particularly considering the fact of recovery of foreign currency and the evidence of two passengers whose testimony has remained unshaken, this Court is of the view that the offence under Section 13(1)(d) of Prevention of Corruption Act is proved against the appellants.

21. So far the appeals on merit are concerned, there is no merit in the present appeals, which are hereby ***dismissed and the conviction of the appellants is upheld***.

22. However, considering the judgement of the Supreme Court in the case of V.K. Verma (supra), the special circumstance i.e. 22 years of time period having been lapsed from the date of the alleged offence and their official positions which they held at the time of commission of offence, this Court is of the view that the minimum sentence should be reduced to the sentence already undergone with a fine of Rs.35,000/- to be deposited by each appellant within a period of four weeks from today in favour of Armed Forces Battle Casualties Welfare Fund, S/B Account No.90552010165915, Canara Bank, South Block, Defence Headquarters, New Delhi-110011, IFSC Code:CNRB0019055. If the appellants fail to deposit the fine as directed above, they shall undergo the sentence as awarded by the learned trial court.

(2022) 11 ILRA 1166
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.10.2022

BEFORE

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

Crl. Appeal No. 1257 of 2020

Susheela Devi ...Appellant
Versus
State of U.P. ...Opp. Party

Counsel for the Appellant:
Sri Abdul Mazeed, Sri Kuldeep Mishra, Sri Nazrul Islam Jafri(Senior Adv.)

Counsel for the Opp. Party:
G.A.

Criminal Law- Indian Evidence Act, 1872- Section 154- Hostile Witness- The testimony of hostile witnesses cannot be thrown away just on the basis of the fact that they have not supported the prosecution case and were cross-examined by the prosecutor. The testimony of the hostile witnesses can be relied upon to the extent it supports the prosecution case. Needless to say that the testimony of hostile witnesses should be scrutinized meticulously and very cautiously.

Settled law that the entire testimony of a hostile witness cannot be discarded but that part, which supports the case of the prosecution, has to be considered.

Indian Evidence Act, 1872- Section 32- The court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the

sole basis for recording conviction- In order to pass the test reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused, who had no opportunity of testing the veracity of the statement by cross-examination. But once, the court has come to the conclusion that the dying declaration was the truthful version as to the circumstance of the death and the assailants of the victim, there is no question of further corroboration. The hostility of witnesses of fact cannot demolish the value and reliability of the dying declaration of the deceased, which has been proved by prosecution in accordance with law and is a truthful version of the event that occurred and the circumstances leading to her death- None of the witnesses or the authorities involved in recording the dying declaration had turned hostile.

Where the court finds the dying declaration to be truthful, credible and natural after subjecting the same to close scrutiny then conviction can be secured solely on the basis of the dying declaration without seeking any further corroboration despite the witnesses turning hostile.

Indian Penal Code, 1860- Sections 302 & 304 (Part-I) IPC- The offence would be punishable under Section 304 (Part-I) IPC.- it appears that the death caused by the accused was not pre-meditated. Accused had no intention to cause the death of the deceased. The injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with the deceased. Hence the instant case falls under the exceptions (1) and (4) to Section 300 of IPC. The conviction of the appellant under Section 302 IPC is converted into conviction under Section 304 (Part-I) IPC and the appellant is sentenced to undergo 10 years of incarceration with remission.

Where death is due to septicaemia after several days and the accused had no intention to commit murder, then instead of Section 302 IPC, the offence would be punishable u/s 304 (Part - I) IPC. (Para 14, 21, 22, 24, 26, 27, 36)

Criminal Appeal partly allowed. (E-3)

Case Law/ Judgements relied upon:-

1. Koli Lakhmanbhai Chandabhai Vs St. of Guj.,1999 (8) SCC 624

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

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

4. Lakhan Vs St. of M.P, (2010) 8 SCC 514

5. Krishan Vs St. of Har., (2013) 3 SCC 280

6. Ramilaben Hasmukhbhai Khristi Vs St. of Guj., (2002) 7 SCC 56

7. Bengai Mandal @ Begai Mandal Vs St. of Bih. (2010) 2 SCC 91

8. Maniben Vs St. of Guj. (2009) 8 SCC 796

9. Chirra Shivraj Vs St. of A.P., (2010) 14 SCC 444

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

1. This appeal has been preferred against the judgment and order dated 4.1.2020, passed by the learned Additional District and Session Judge, Court No.6, Pilibhit, in Session Trail No.123 of 2018 arising out of Case Crime No.34 of 2018 under Section 302 IPC, Police Station-Diyoriya, District-Pilibhit, whereby the appelant is convicted and sentenced for the offence under Section 302 IPC for life imprisonment with a fine of Rs.50,000/- and in defalut of payment of fine, further imprisonemnt for one year.

2. None has appeared for appellant. We are intending to modify the order in

favour of the appellant. Hence, we have heard and taken assistance from Shri N.K. Srivastava, learned AGA and perused the record.

3. The brief facts of the case are that a written report was submitted by informant-Jagdish Prasad at Police Station-Diyoriya Kalan, District-Pilibhit on 23.2.2018 with the averments that the daughter of informant, namely, Roopwati was married to Rajendra Kumar before three years of occurrence. Informant had given sufficient dowry as per his financial status, but in-laws of her daughter were not satisfied and continuously demanding the additional dowry. Due to non-fulfilment of demand of additional dowry, she used to be beaten and tortured. On 22.2.2018, at about 11:00 a.m., Rajendra Kumar (husband of Roopwati), Sunil Kumar (dewar) and her mother-in-law poured kerosene oil on Roopwati and set her ablazed. On getting the information by neighbours, informant and others went to the house of in-laws of her daughter and found her in burning condition where she told them that aforesaid persons had set her ablazed for want of additional dowry. She was admitted in the hospital at Pilibhit.

4. On the basis of aforesaid, written report, first information report was registered on 23.2.2018 under Section 498-A, 307, 323 IPC and Section 3/4 Dowry Prohibition Act against all the accused persons. Investigation was started by the Investigating Officer. After 9 days of occurrence, injured-Roopwati succumbed to injuries and the case was converted into Section-304 B and 302 IPC. The Investigating Officer visited the place of occurrence and site plan was prepared. During the course of investigation, I.O. Recorded the statements of witnesses under Section 161 Cr.P.C. Burnt clothes were recovered by I.O. of which recovery memo was prepared. Dying-Declaration of injured /deceased Roopwati was recorded at District-Pilibhit on 23.2.2018 by Naib Tehsildar, Pilibhit, Sadar. After the death of injured Roopwati, proceedings of panchayatnama were conducted and enclosed report was prepared. Dead-body was sent for postmortem where postmortem was conducted on dead-body and postmortem report was prepared. After conclusion of investigation, I.O. Submitted charge-sheet against Rajendra Kumar and Sushila Devi under Sections 498A, 304B, 302 IPC and ¾ of Dowry Prohibition Act. Named accused Sunil Kumar was exonerated as no sufficient evidence was found against him.

5. The case being triable exclusively by court of session, was committed by Magistrate to the court of session. Learned trial-court framed charges against the appellant under Sections 498A, 304-B, 302 IPC read with Section 34 IPC and Section 4 of Dowry Prohibition Act. Accused-appellant denied the charges and claimed to be tried.

6. Prosecution examined following witnesses:

1. Jagdish Prasad
2. Yadwati
3. Chatrapal
4. Neeraj Kumar
5. Rekha Sharma
6. Shikha
7. Mukesh Kumar
8. Dr.Rajesh Kumar

9.	Praveen Malik
10.	Sher Bahadur Singh
11.	Parvati Devi
12.	Ram Bresh Yadav
13.	Mod. Aslam

7. Apart from aforesaid witnesses, prosecution submitted following documentary evidence, which was proved by leading the evidence:

1.	Written Report	Ex.ka1
2.	Recovery memo of clothes	Ex.ka2
3.	Statement u/S 161 Cr.P.C.	Ex.ka3
4.	Site plan with Index	Ex.ka4
5.	Postmortem report	Ex.ka5
6.	Final Report	Ex.ka6
7.	Panchayatnama	Ex.ka7
8.	F.I.R.	Ex.ka8
9.	Dying-Declaration	Ex.ka10

Statements of accused were recorded u/S 313 Cr.P.C. No defence evidence is produced.

8. Deceased was hospitalised just after the occurrence took place and she died after about 9 days of the incident. In the meantime, she remained under treatment, continuously. Her medical papers were also filed by prosecution, which are on record.

9. In this case, no prosecution witness has supported the prosecution case and all the witnesses of fact have turned hostile. Jagdish Prasad-PW1 is the father of the deceased as well as informant, but in his testimony before trial-court, he has specifically stated that he had not dictated the written report. He had only signed it. He was declared hostile and put to the cross-examination by prosecutor. In his cross-examination, he has stated that the written report was getting typed by villagers and he had only put his signature. He had not blamed any of the accused persons for the death of her daughter. He has denied his statements under Section 161 Cr.P.C. also. It is specifically deposed by PW1 that the deceased was under depression due to not conceiving the child.

PW9
PW10
PW11
PW12
PW13

10. PW2 is mother of the deceased. She has also not supported the prosecution case and turned hostile. She has also denied her statement under Section 161 Cr.P.C. during cross-examination by prosecutor. Neeraj Kumar-PW4 is witness of recovery of empty lamp of kerosene oil, but he has stated that I.O. Procured his signature on blank papers. He was also turned hostile. Chatrapal-PW3 is witness of recovery memo. Hence, in this way, only two witnesses of fact, namely, PW1 and PW2 are produced by prosecution and both have not supported the prosecution version and specifically deposed that no additional dowry was demanded by the accused-appellant.

11. It is brought to our notice that dying declaration of deceased was recorded when she was surviving, but this dying declaration has no corroboration with any prosecution evidence. All the witnesses of fact have turned hostile and nobody supported the version which is mentioned in dying declaration. Therefore, learned trial court committed grave error by convicting the accused on the basis of dying declaration only when it was not corroborated at all.

12. It is brought to our notice that if, for the sake of arugment, it is assumed that appellant has committed the offence, in that

case also no offence under Section 302 IPC is made out. Maximum this case can travel up to the limits of offence under Section 304 IPC because the deceased died after 9 days of the occurrence due to developing the infection in her burn-wounds, i.e., septicemia. As per catena of judgments of Hon'ble Apex Court and this Court, offence cannot travel beyond section 304 IPC, in case the death occurred due to septicimia. Learned counsel for the appellant also submitted that postmortem report also shows that cause of death was septicimia. Learned counsel relied on the judgment in the case of ***Maniben vs. State of Gujarat*** [2009 Lawsuit SC 1380], and the judgment in Criminal Appeal Nos.1438 of 2010 and 1439 of 2010 dated 7.10.2017 and judgment of Criminal Appeal No.2558 of 2011 delivered on 1.2.2021 by this Court and several other judgments.

13. Learned AGA submitted that conviction of accused can be based only on the basis of dying declaration, if it is wholly reliable. It requires no corroboration. Moreover, testimony of hostile witnesses can also be relied on to the extent it supports the prosecution case. Learned trial court has righty convited the appellant under Section 302 IPC and sentenced accordingly. There is no force in this appeal and the same may be dismissed.

14. First of all, there is issue relating to the hostality of witnesses. Two witnesses of fact were examined before learned trial court, namely Jagdish Prasad, complainant and father of the deceased (PW1), Yadwati-mother of the deceased (PW2). Both these witnesses have turned hostile, but the testimony of hostile witnesses cannot be thrown away just on the basis of the fact that they have not supported the prosecution case and were cross-examined by the prosecutor. The testimony of the hostile witnesses can be relied upon to the extent it supports the prosecution case. Needless to say that the testimony of hostile witnesses should be scrutinized meticulously and very cautiously.

15. Hon'ble Apex Court in ***Koli Lakhmanbhai Chandabhai vs. State of Gujarat*** *[1999 (8) SCC 624]*, as held that evidence of hostile witness can be relied upon to the extent it supports the version of prosecution and it is not necessary that it should be relied upon or rejected as a whole. It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence.

16. In ***Ramesh Harijan vs. State of U.P.*** *[2012 (5) SCC 777]*, the Hon'ble Apex Court has also held that it is settled legal position that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether.

17. In ***State of U.P. vs. Ramesh Prasad Misra and another*** *[1996 AIR (Supreme Court) 2766]*, the Hon'ble Apex Court held that evidence of a hostile witnesses would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied

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

18. Perusal of impugned judgment shows that learned trail court has scrutinised the evidence on record very carefully.

19. As far as the dying declaration is concerned, it was recroded by Mod. Aslam, Nayab Tehsildar, who was examined as PW13. Dying declaration is recorded by PW13 after obtaining the certificate of mental-fitness from the doctor. After completion of dying delaration also the said docter has given certificate that during the course of statement, the victim remained conscious.

20. Legal position of dying declaration to be the sole basis of conviction is that it can be done so if it is not tutored male voluntarily and is wholly reliable. In this regard, Hon'ble Apex Court has summarized the law regarding dying declaration in ***Lakhan vs. State of Madhya Pradesh*** *[(2010) 8 Supreme Court Cases 514],* in this case, Hon'ble Apex Court held that the doctrine of dying declaration is enshrined in the legal maxim nemo moriturus praesumitur mentire, which means, "a man will not meet his Maker with a lie in his mouth". The doctrine of dying declaration is enshrined in Section 32 of Evidence Act, 1872, as an exception to the general rule contained in Section 60 of Evidence Act, which provides that oral evidence in all cases must be directed, i.e., it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.

21. The law on the issue of dying declaration can be summarized to the effect that in case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. It is also held by Hon'ble Apex Court in the aforesaid case, that a dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by office of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim.

22. Deceased survived for 9 days after the incident took place. Her dying declaration was recorded by Nayab Tehsildar and doctor appended certificate of mental health of the victim before and after making of dying declaration, which is proved. PW13 is absolutely independent witnesses. In the wake of aforesaid judgments of Lakhan (supra), dying declaraion cannot be disbelived, if it inspires confidence. On reliability of dying declaration and acting on it without corroboration, Hon'ble Apex Court held in ***Krishan vs. State of Haryana*** *[(2013) 3 Supreme Court Cases 280*] that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant

circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. Hence, in order to pass the test reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused, who had no opportunity of testing the veracity of the statement by cross-examination. But once, the court has come to the conclusion that the dying declaration was the truthful version as to the circumstance of the death and the assailants of the victim, there is no question of further corroboration.

23. In ***Ramilaben Hasmukhbhai Khristi vs. State of Gujarat,*** *[(2002) 7 SCC 56]*, the Hon'ble Apex Court held that under the law, dying declaration can form the sole basis of conviction, if it is free from any kind of doubt and it has been recorded in the manner as provided under the law. It may not be necessary to look for corroboration of the dying declaration. As envisaged, a dying declaration is generally to be recorded by an Executive Magistrate with the certificate of a medical doctor about the mental fitness of the declarant to make the statement. It may be in the from of question and answer and the answers be written in the words of the person making the declaration. But the court cannot be too technical and in substance if it feels convinced about the trustworthiness of the statement which may inspire confidence such a dying declaration can be acted upon without any corroboration.

24. From the above case laws, it clearly emerges that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused when such dying declaration is true, reliable and has been recorded in accordance with established practice and principles and if it is recorded so then there cannot be any challenge regarding its correctness and authenticity.

25. In dying declaration of deceased (Ex.ka10), it is also important to note that it was recorded on 23.2.2018 and the deceased died on 3.3.2018 while the incident took place on 22.2.2018. It means that she remained alive for 8 days after making dying declaration. Therefore, truthfulness of dying declaration can further be evalated from the fact that she survived for 8 days after making it from which it can reasonably be inferred that she was in a fit condition to make the statment at the relevant time. Moreover, in the dying declaration, the deceased did not unnecessarily involved the other family members of the accused appellant. She only attributed the role of burning to her mother-in-law.

26. In such a situation, the hostality of witnesses of fact cannot demolish the value and reliability of the dying declaration of the deceased, which has been proved by prosecution in accordance with law and is a truthful version of the event that occurred and the circumstances leading to her death.

27. As already noticed, none of the witnesses or the authorities involved in recording the dying declaration had turned hostile. On the contrary, they have fully supported the case of prosecution. The dying declaration is reliable, truthful and was voluntarily made by the deceased,

hence, this dying declaration can be acted upon without corroboration and can be made the sole basis of conviction. Hence, learned trial court has committed no error on acting on the sole basis of dying declaration. Learned trial court was completely justified in placing reliance on dying declaration Ex. KA-10 and convicting the accused-appellant on the basis of it.

28. Now we come to the point that deceased died due to septicemia, hence this case falls within the ambit of Section 304 IPC and not under Section 302 IPC. In this regard, learned counsel has submitted that deceased died after 9 days of incident due to the poisonous infection developed in her burn injuries, which could be avoided by good treatment. There was no intention of the appellant to cause the death of his wife.

29. Death of deceased was a homicidal death. The fact that it was a homicidal death takes this Court to most vexed question whether it would fall within the four-corners of murder or culpable homicide not amounting to murder. Therefore, we are considering the question whether it would be a murder or culpable homicide not amounting to murder and punishable under Section 304 IPC.

30. Perusal of postmortem report of the deceased goes to show that the cause of death is mentioned as septicemia due to antemortem thermal burn injuries. Hence, it is a case of death of the deceased due to septicemia, which developed in her wounds during treatment. There is no dispute to the fact that the death of the deceased occurred due to poisonous effect of the injuries because septicemia was developed during the course of treatment, which was the main cause of the death of the deceased.

31. In ***Bengai Mandal alias Begai Mandal vs. State of Bihar*** *[(2010) 2 SCC 91],* incident occurred on 14.7.1996, while the deceased died on 10.8.1996 due to septicemia caused by burn injuries. The accused was convicted and sentenced for life imprsonment under Section 302 IPC, which was confirmed in appeal by the High Court, but Hon'ble The Apex Court converted the case under Section 304 Part-II IPC on the ground that the death ensued after twenty-six days of the incident as a result of septicemia and not as a consequence of burn injuries and, accordingly, sentenced for seven years' rigorous imprisonment.

32. In ***Maniben vs. State of Gujarat [****(2009) 8 SCC 796]*, the incident took place on 29.11.1984. The deceased died on 7.12.1984. Cause of death was the burn injuries. The deceased was admitted in the hospital with about 60 per cent burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. Trial-court convicted the accused under Section 304 Part-II IPC and sentenced for five years' imprisonment, but in appeal, High Court convicted the appellant under Section 302 IPC. Hon'ble The Apex Court has held that during the aforesaid period of eight days, the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries. Accordingly, judgment and order convicting the accused under Section 304 Part-II IPC by the trial-court was maintained and the judgment of the High Court was set aside.

33. In ***Chirra Shivraj vs. State of Andhra Pradesh*** *[(2010) 14 SCC 444*], incident took place on 21.4.1999. Deceased died on 1.8.1999. As per the prosecution

version, kerosene oil was poured upon the deceased, who succumbed to the injuries. Cause of death was septicemia. Accused was convicted under Section 304 Part-II IPC and sentenced for five years' simple imprisonment, which was confirmed by the High Court. Hon'ble The Apex Court dismissed the appeal holding that the deceased suffered from septicemia, which was caused due to burn-injuries and as a result thereof, she expired on 1.8.1999.

34. We can safely rely upon the decision of the Gujarat High court in Criminal Appeal No.83 of 2008 (***Gautam Manubhai Makwana Vs. State of Gujarat***) decided on 11.9.2013 wherein the Court held as under:

"12. In fact, in the case of Krishan vs. State of Haryana reported in (2013) 3 SCC 280, the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and the history before the doctor is consistent and seems to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene and setting him ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

15.1 Similarly, in the case of Maniben (supra), the Apex Court has observed as under:

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she

along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

16. In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around 30 days in the hospital and that his condition worsened after around 5 days and ultimately died of septicemia. In fact he had sustained about 35% burns. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed.

35. On the overall scrutiny of the facts and circumstances of the case coupled with medical evidence and the opinion of the Medical Officer and considering the principle laid down by the Courts in above referred case laws, we are of the considered opinion that in the case at hand, the offence would be punishable under Section 304 (Part-I) IPC.

36. From the upshot of the aforesaid discussions it appears that the death caused by the accused was not pre-meditated. Accused had no intention to cause the death of the deceased. The injuries were though sufficient in the ordinary course of nature to have caused death, accused had no intention to do away with the deceased. Hence the instant case falls under the exceptions (1) and (4) to Section 300 of IPC. While considering Section 299 IPC, offence committed will fall under Section 304 (Part-I) IPC.

37. In view of the aforesaid discussion, we are of the view that appeal has to be partly allowed. The conviction of the appellant under Section 302 IPC is converted into conviction under Section 304 (Part-I) IPC and the appellant is sentenced to undergo 10 years of incarceration with remission. The fine of Rs. 50,000/- is reduced to Rs.20,000/-. Default sentence is maintained.

38. Accordingly, the appeal is **partly allowed**.

39. Record and proceedings be sent back to the court below. A copy of this order be also sent to the accused in jail.

(2022) 11 ILRA 1176
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.11.2022

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Crl. Appeal No. 1636 of 1994

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

Counsel for the Appellants:
Sri S.S. Shukla, Sri Mahendra Pratap Singh

Counsel for the Respondents:
A.G.A.

Criminal Law- Indian Evidence Act, 1872 - Section 134- The Indian Evidence Act has not prescribed any minimum number of witnesses required for proving a fact - In the matter of appreciation of evidence of witnesses, it is not number of witnesses, but quality of their evidence which is important.

Settled law that it's the quality of evidence and not the quantity of witnesses that is important.

Indian Penal Code, 1860- Sections 308/34 & 325/34- Perusal of evidence of injured PW1 Jagdish, it appears that his testimony is wholly reliable and truthful- The evidence given by PW1 Jagdish and PW2 Jairam has been corroborated by documentary evidence- From the perusal of the injuries received by injured PW1 Jagdish and the x-ray report, it appears that injuries on his forehead and face are simple in nature. The only injury received in the metacarpal phalynx of left forearm is grievous as there is dislocation of the aforesaid bone- PW4 has not stated in his evidence that the injuries received by PW1 Jagdish were fatal or life threatening in nature- From the evidence available on record, it is not proved that the accused-appellants had attacked the injured Jagdish with the intention of causing such injury which may result in culpable homicide not amounting to murder - Thus, prosecution has failed to prove the charge u/s 308 r/w 34 I.P.C. From the evidence on record, the prosecution has proved the charge u/s 325 r/w 34 I.P.C. against the accused-appellants, for which they are liable to be convicted.

Where the medical evidence shows that the injury is not life threatening then the same establishes that the intention of the accused was not to commit culpable homicide not amounting to murder and the offence would be one punishable u/s 325 r/w34 IPC instead of Section 308 r/w 34 IPC.

Code of Criminal Procedure, 1973- Section 357 Cr.P.C. provides power to the Court to award compensation to victim, which is in addition and not ancillary to other sentences. While granting just and proper compensation Court ought to have consider capacity of the accused for such payment as well as relevant factors such as medical expenses, loss of earning, pain and sufferings etc.- Considering the facts and circumstances of the present case as well as keeping in view the position of law as mentioned above and considering that the incident was happened about 33 years back; the incident was occurred in spur of the moment, this Court is of the view that if the sentence awarded is reduced to the period already undergone and a reasonable compensation is awarded to the victim, the ends of justice would be served- Judgment and order dated 21.10.1994 passed by IVth Additional District and Sessions Judge, Kanpur Dehat, in Sessions Trial No. 101 of 1992, is hereby modified to the extent that accused-appellants, Ram Babu and Ram Prakash, are convicted u/s 325 I.P.C. instead of Section 308 r/w 34 I.P.C. as done by the trial court.

Where the offence was not pre-meditated, there was no intention to commit murder, injuries inflicted by the accused were simple and a long time has elapsed since the commission of the offence then it would be just and proper to

reduce the sentence to the period already undergone with award of fair and proper compensation to the victim. (Para 18, 22, 26, 28, 29)

Criminal Appeal partly allowed. (E-3)

Case Law/ Judgements relied upon:-

1. Laxmibai (Dead) thru LRs Vs Bhagwantbura (Dead) thru LRs, AIR 2013 SC 1204

2. Accused 'X' Vs St. of Maha. (2019) 7 SCC 1

3. St. of M.P Vs Vikram Das (2019) 4 SCC 125)

4. Roop Chand Vs St. (NCT) of Delhi, 2020 (3) ALT (Crl.) 331 (A.P.)

5. Omanakkuttan & ors. Vs St. of Ker., 2021 (115) ACC 747

(Delivered by Hon'ble Hon'ble Surendra Singh-I, J.)

Heard Sri Mahendra Pratap Singh, learned counsel for the appellants and Sri Sunil Kumar Tripathi, learned A.G.A. for the State.

2) This criminal appeal has been filed against the judgement and order dated 21.10.1994 passed by IVth Additional District and Sessions Judge, Kanpur Dehat, in Sessions Trial No. 101 of 1992, State of U.P. Vs. Ram Babu and another arising out of Case Crime No. 96 of 1989, Police Station- Sikandra, District- Kanpur Dehat.

3) By the impugned order, the trial court has convicted the appellants, Ram Babu and Ram Prakash u/s 308 r/w 34 I.P.C. and sentenced them to two years six months rigorous imprisonment.

4) The prosecution case as revealed by the written report dated 17.10.1989 submitted by informant Jairam in Police Station- Sikandra is that he is resident of Sahajpur, Police Station- Sikandra, District- Kanpur Dehat. Last year accused, Ram Babu had quarrel with informant's son, Jagdish due to which he kept enmity with the informant and his son. On 17.10.1989 at about 8 a.m., informant's son, Jagdish, was going to meet ex-M.P. of District- Etawah, Ram Singh Shakya, who had arrived in his village at the residence of Shiv Prasad. Accused, Ram Babu was holding a hansia in his hand. He exhorted his son that why is his enemy passing in front of his door. On the exhortation of accused-appellant, Ram Babu, his brother, Ram Prakash armed with a lathi, his son, Anil and Sudhir, armed with kanta arrived there and started beating informant's son, Jagdish. On hearing the noise, informant, Jairam, his other son, Rakesh and Vishram Singh son of Ram Sharan and other persons of his village arrived on the spot and raised alarm on which the accused persons escaped from the place of occurrence. Jagdish received grievous injuries caused by hansia, lathi and kanta. He fell down on the spot and became unconscious. The informant took Jagdish to the Police Station- Sikandra, where he gave the written report on the basis of which Case Crime No. 96 of 1989 u/s 308 I.P.C. was registered against the accused-appellants, Ram Babu and Ram Prakash and two other persons.

5) The institution of the criminal case was entered in the case diary by the Head Moharrir, Tara Singh, who proved the same as (Ext.Ka.4). The investigation of the case was first done by S.I. C.P. Singh and on his transfer by S.I. Madhusudan Singh, who visited the place of occurrence and prepared the site plan (Ext.Ka.5), recorded the statement of the witnesses and after completion of investigation, submitted

charge-sheet u/s 308 I.P.C. against accused-appellants, Ram Babu and Ram Prakash. The case was then committed to the court of Sessions by Additional Chief Judicial Magistrate, IIIrd, Kanpur Dehat vide order dated 29.02.2022.

6) On 17.10.1992, the IVth Additional Sessions Judge, Kanpur Dehat, framed charge u/s 308 r/w 34 I.P.C. against accused-appellant, Ram Babu and Ram Prakash. They denied the charge and claimed trial.

7) To prove the charge, the prosecution examined injured PW1 Jagdish, informant PW2 Jairam and eye-witness PW3 Vishram Singh as witnesses of fact whereas Medical Officer PW4 Dr. Subhash Sharma, PW5 S.I. Tara Singh, who was the then Head Moharrir at Police Station- Sikandra, Investigating Officer PW6 S.I. Madhusudan Singh and radiologist PW7 Dr. V.C. Rastogi, were examined as formal witnesses.

8) PW1 Jagdish, PW2 Jairam and PW3 Vishram Singh gave evidence about the occurrence of crime. The informant PW2 Jairam also proved the written report (Ext.Ka.1) which he had submitted at the Police Station- Sikandra on the basis of which first information report was registered.

9) PW4 Dr. Subhash Sharma, the then Medical Officer at District Hospital, Sikandra, examined the injured Jagdish on 17.10.1989 at 8.30 p.m. and had prepared his injury report (Ext.Ka.2). As per the injury report, following injuries were found on the person of the injured Jagdish :

(i) Incised wound 2 cm x 3 cm x bone deep at right side of forehead at right frontal 1.5 cm above from right eyebrow. Margin regular, clotted blood present.

(ii) Incised wound 1.8 cm x 0.5 cm x bone deep at the right side of the face, 0.5 cm away from lateral canthus of right eye and 3 cm slightly below from injury no. 1. Margin regular, clotted blood present.

(iii) Abraded contusion 5 cm x 1 cm at right side of the neck, 1.5 cm on backward from right ear. Size of abrasion 3.5 cm x 0.5 cm. Oozing present. Colour of contusion bluish red in colour.

(iv) Incised wound 4 cm x 0.8 cm x through and through at the left side of the face just above the left side of the upper lip. Similar injury was found on upper jaw below the left lip in the gums. The edges of the injury were clear cut and blood was oozing.

(v) Contusion 9 cm x 1.5 cm at the side of back 3.5 cm below the interior angle of left scapula. Reddish in colour.

(vi) Abraded contusion 7.5 cm x 2 cm at the left side of the back 7 cm below from injury no. 5. Reddish in colour.

(vii) Traumatic swelling 4 cm x 3 cm at the right hand at upper aspect just above the root of right thumb. Deformity in carpal bone was found and could not be moved. It appears that there is fracture in first carpal bone.

(viii) Abrasion 5 cm x 0.5 cm at the left leg of upper aspect 12 cm below from knee joint.

In the opinion of the doctor, all injuries except injury nos. (i), (ii), (iv) and (vii) were simple in nature and caused by hard blunt object. Injury nos. (i), (ii), (iv) and (vii) were grievous in nature and caused by sharp-edged weapon. X-ray was advised for injury nos. (i), (ii), (iv) and (vii). All the injuries were fresh. Injury nos. (i), (ii), (iv) and (vii) could be caused by kanta and hansia. The other injuries could be caused by lathi and danda.

10) PW7 Dr. V.C. Rastogi, the then Radiologist at District Hospital, Kanpur Dehat, who had x-rayed the left hand and left forearm of injured Jagdish, has proved the x-ray report relating to hand as material Ext.1 and 2 and that relating to left forearm as material Ext.3. He has stated that in his evidence that the nature of material Ext.1 and 2 was NAD and in material Ext.3, location of metacarpal phalynx of left thumb seen. He has proved his x-ray report as Ext.Ka.7.

11) The then Head Moharrir at Police Station- Sikandra, S.I. Tara Singh has proved the chik F.I.R (Ext.Ka.3) and the report relating to institution of the case in G.D. (Ext.Ka.4).

12) The Investigating Officer, PW6 S.I. Madhusudan Singh, has proved the site plan (Ext.Ka.5) and charge-sheet (Ext.Ka.6).

13) On 24.09.1994, the court recorded the statement of accused-appellants, Ram Babu and Ram Prakash u/s 313 Cr.P.C. They stated that the witnesses were giving false evidence. They had not committed any offence. They had not caused injury to Jagdish on the alleged place, date and time of the occurrence and a false case was registered due to enmity against them. They did not examine any witness in their defence.

14) Injured PW1 Jagdish has stated in his evidence that on 17.10.1989 at 8 a.m. while he was going to meet the ex-M.P., Ram Singh Shakya, who had come in the house of Shiv Prasad while he was passing in front of the door of the accused-appellants, Ram Babu exhorted his brother, accused-appellant, Ram Prakash and his son, Anil and Sudhir. The accused-appellant, Ram Babu attacked Jagdish with hansia and accused-appellant, Ram Prakash with lathi while Anil and Sudhir attacked him with kanta. On alarm being raised by Jagdish, his father, informant Jairam, his step-brother, Rakesh and Vishram Singh reached there. PW1 Jagdish was seriously injured in the incident. Thus, his presence on the spot of occurrence cannot be doubted. His evidence regarding the incident is reliable and convincing and nothing has been found in his cross-examination which may raise doubt in the veracity of his statement.

15) On hearing the noise raised by PW1 Jagdish, informant PW2 Jairam who arrived at the place of occurrence, has corroborated the evidence of PW1 Jagdish to the extent about the time, date, place and manner of occurrence and the fact that PW1 Jagdish received injury during the course of the occurrence. But he did not corroborate the complicity of accused-appellants, Ram Babu and Ram Prakash, in the offence. He also deposed that after the incident, PW2 Jairam carried the injured Jagdish to Police Station- Sikandra from where on the basis of his written report, F.I.R was registered and the injured Jagdish was brought to P.H.C., Kanpur Dehat, where the Medical Officer noted his injuries and on his advice, he was sent to District Hospital, Kanpur Dehat where x-ray of his left hand and left forearm was done. PW3 Vishram Singh has deposed that he did not witness the occurrence.

16) The Indian Evidence Act has not prescribed any minimum number of witnesses required for proving a fact as it is provided in Section 134 of Indian Evidence Act.

Section 134 of Indian Evidence Act : No particular number of witnesses shall in

any case be required for the proof of any fact.

17) It has been held by Hon'ble Supreme Court in ***Laxmibai (Dead) through LRs Vs. Bhagwantbura (Dead) through LRs, AIR 2013 SC 1204*** that in the matter of appreciation of evidence of witnesses, it is not number of witnesses, but quality of their evidence which is important, as there is no requirement in law of evidence that any particular number of witnesses is to be examined to prove/disprove a fact. It is a time-honoured principle, that evidence must be weighed and not counted. The test is whether the evidence has a ring of trust, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value provided by each witness, rather than the multiplicity or plurality of witnesses. It is quality and not quantity, which determines the adequacy of evidence as has been provided by Section 134 of the Act.

18) From the perusal of evidence of injured PW1 Jagdish, it appears that his testimony is wholly reliable and truthful. Being the injured, he would not spare the actual offender in his evidence. Nothing otherwise has been mentioned in his cross-examination which may shake his testimony and raise doubt about his reliability and veracity. The evidence given by PW1 Jagdish and PW2 Jairam has been corroborated by documentary evidence namely written report, chik F.I.R., entry of institution of registration of criminal case in G.D., injury report and x-ray report with x-ray plate of the injuries received by PW1 Jagdish in the occurrence, site plan and charge-sheet prepared by the Investigating Officer. From the analysis of the oral and documentary evidence, it could be concluded that with a common intention of causing culpable homicide not amounting to murder, accused-appellants, Ram Babu and Ram Prakash injured Jagdish with hansia and lathi respectively, causing him grievous injury. From the evidence on record, the Court comes to the conclusion that the prosecution has proved the charge u/s 308 r/w 34 I.P.C. beyond reasonable doubts against accused-appellants, Ram Babu and Ram Prakash. The trial court has rightly convicted the accused-appellants under Section 308 r/w 34 I.P.C.

19) Learned counsel for the appellants has argued that the date of birth of accused-appellants, Ram Babu and Ram Prakash is 06.04.1953 and 01.01.1954 respectively. Their present age is 69 and 68 years respectively. Accused-appellants, Ram Babu and Ram Prakash, informant, Jairam and injured, Jagdish are residents of the same village. The accused-appellants are living peacefully with informant and injured for the last 28 years after they were convicted by the trial court on 21.10.1994. The attack by the accused-appellants was not planned but it took place suddenly in the heat of moment. It has also been argued on behalf of accused-appellant that during investigation, they remained in jail for 23 days. The duration of custody of accused-appellants, Ram Babu and Ram Prakash, in jail during investigation is corroborated from the date of their arrest mentioned in the arrest memo and the date of acceptance of bail bonds by the trial court. The accused-appellants have prayed that their sentence may be reduced and they may be released for the period which they have undergone in jail during investigation and trial.

20) Learned A.G.A. appearing for the State has vehemently opposed the prayer. However, he could not deny the

submissions made on behalf of the accused-appellants. He further submits that in case sentence is reduced to the period already undergone, the victim be paid compensation as provided under Section 357 Cr.P.C.

21) We have heard learned counsel for both the parties and perused the entire lower court record.

22) This Court finds that the alleged eye-witness, informant PW2 Jairam has not fully supported the evidence of injured PW1 Jagdish because it appears that the evidence of PW2 Jairam was recorded about 4 ½ years after the date of occurrence and he is resident of the village of the accused-appellants, Ram Babu and Ram Prakash and due to compromise, he may have settled his dispute and he did not give evidence against the accused-appellants. But the hostile evidence of PW3 Vishram Singh does not obliterate the truthful and convincing evidence of injured PW1 Jagdish and partially true evidence of PW2 Jairam which in turn is supported by documentary evidence. From the perusal of the injuries received by injured PW1 Jagdish and the x-ray report, it appears that injuries on his forehead and face are simple in nature. The only injury received in the metacarpal phalynx of left forearm is grievous as there is dislocation of the aforesaid bone. PW4 Dr. Subhash Sharma has not stated in his evidence that the injuries received by PW1 Jagdish were fatal or life threatening in nature. From the analysis of oral and documentary evidence adduced by the prosecution, the Court comes to the conclusion that on the alleged date, time and place of occurrence in pursuance of common intention, accused-appellants, Ram Babu and Ram Prakash, caused grievous injuries to injured Jagdish. From the evidence available on record, it is not proved that the accused-appellants had attacked the injured Jagdish with the intention of causing such injury which may result in culpable homicide not amounting to murder of Jagdish. Thus, prosecution has failed to prove the charge u/s 308 r/w 34 I.P.C. From the evidence on record, the prosecution has proved the charge u/s 325 r/w 34 I.P.C. against the accused-appellants, Ram Babu and Ram Prakash for which they are liable to be convicted. The appellants have already undergone 23 days in jail during investigation.

23) Indian legislature has not given any sentencing policy, though Malimath Committee (2003) and Madhava Menon Committee (2008) has asserted the need of sentencing policy in India.

24) Principle of sentencing has been an issue of concern before the Supreme Court in many cases and tried to provide clarity on the issue. Apex Court has time and again cautioned against the cavalier manner considering the way sentencing is dealt by High Courts and Trial Courts.

"... It is established that sentencing is a socio-legal process, wherein a Judge finds an appropriate punishment for the accused considering factual circumstances and equities. In light of the fact that the legislature provided for discretion to the Judges to give punishment, it becomes important to exercise the same in a principled manner." (para 49 of **Accused 'X' vs. State of Maharastra (2019) 7 SCC 1)**

"12. Sentencing for crimes has to be analysed on the touchstone of three tests viz. crime test, criminal test and comparative proportionality test. Crime test involves factors like extent of planning,

choice of weapon, modus of crime, disposal modus (if any), role of the accused, anti-social or abhorrent character of the crime, state of victim. Criminal test involves assessment of factors such as age of the criminal, gender of the criminal, economic conditions or social background of the criminal, motivation for crime, availability of defence, state of mind, instigation by the deceased or any one from the deceased group, adequately represented in the trial, disagreement by a Judge in the appeal process, repentance, possibility of reformation, prior criminal record (not to take pending cases) and any other relevant factor (not an exhaustive list).

13. Additionally, we may note that under the crime test, seriousness needs to be ascertained. The seriousness of the crime may be ascertained by (i) bodily integrity of the victim; (ii) loss of material support of amenity; (iii) extent of humiliation; and (iv) privacy breach." (**State of Madhya Pradesh vs. Udham and others (2019) 10 SCC 300)**

25) It is also notable that "... *where minimum sentence if provided for, the Court cannot impose less than minimum sentence*." (Para 8 of ***State of Madhya Pradhesh vs. Vikram Das (2019) 4 SCC 125)***

26) Section 357 Cr.P.C. provides power to the Court to award compensation to victim, which is in addition and not ancillary to other sentences. While granting just and proper compensation Court ought to have consider capacity of the accused for such payment as well as relevant factors such as medical expenses, loss of earning, pain and sufferings etc.

27) Supreme Court has reiterated need for proper exercise of power of granting compensation under Section 357 Cr.P.C. in ***Manohar Singh Vs. State of Rajasthan and others : (2015) 3 SCC 449*** and in paras 11, 31 and 54 it is stated that:

"11....Just compensation to the victim has to be fixed having regard to the medical and other expenses, pain and suffering, loss of earning and other relevant factors. While punishment to the accused is one aspect, determination of just compensation to the victim is the other. At times, evidence is not available in this regard. Some guess work in such a situation is inevitable. Compensation is payable under Section 357 and 357- A. While under section 357, financial capacity of the accused has to be kept in mind, Section 357-A under which compensation comes out of State funds, has to be invoked to make up the requirement of just compensation."

"31. The amount of compensation, observed this Court, was to be determined by the courts depending upon the facts and circumstances of each case, the nature of the crime, the justness of the claim and the capacity of the accused to pay."

"54. Applying the tests which emerge from the above cases to Section 357, it appears to us that the provision confers a power coupled with a duty on the courts to apply its mind to the question of awarding compensation in every criminal case. We say so because in the background and context in which it was introduced, the power to award compensation was intended to reassure the victim that he or she is not forgotten in the criminal justice system. The victim would remain forgotten in the criminal justice system if despite the legislature having gone so far as to enact specific provisions relating to victim compensation, courts choose to ignore the provisions altogether and do not even apply their mind to the question of compensation.

It follows that unless Section 357 is read to confer an obligation on the courts to apply their mind to the question of compensation, it would defeat the very object behind the introduction of the provision."

28) Considering the facts and circumstances of the present case as well as keeping in view the position of law as mentioned above and considering that the incident was happened about 33 years back; the incident was occurred in spur of the moment; and considering the judgment passed by Supreme Court in ***Roop Chand vs. State (NCT) of Delhi, 2020 (3) ALT (Crl.) 331 (A.P.) and Omanakkuttan and others vs. State of Kerala, 2021 (115) ACC 747***, this Court is of the view that if the sentence awarded is reduced to the period already undergone and a reasonable compensation is awarded to the victim, the ends of justice would be served.

29) In view of above, the appeal is partly allowed. Judgment and order dated 21.10.1994 passed by IVth Additional District and Sessions Judge, Kanpur Dehat, in Sessions Trial No. 101 of 1992, is hereby modified to the extent that accused-appellants, Ram Babu and Ram Prakash, are convicted u/s 325 I.P.C. instead of Section 308 r/w 34 I.P.C. as done by the trial court.

30) Accused-appellants, Ram Babu and Ram Prakash, are sentenced to the period already undergone, provided they deposit Rs. 4,000/- each as fine out of which Rs. 4,000/- shall be paid to the victim, PW1 Jagdish, within a period of two months from today. In case fine is not deposited, as directed above, appellants, Ram Babu and Ram Prakash, shall undergo the imprisonment for the period sentenced by the trial court.

31) Lower court record along with a copy of this judgment be sent back immediately to District Court concerned for compliance and further necessary action.

(2022) 11 ILRA 1183
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.11.2022

BEFORE

THE HON'BLE SAMIT GOPAL, J.

Crl. Appeal No. 2097 of 1982

Om Prakash ...Appellant
Versus
State of U.P. ...Opp. Party

Counsel for the Appellant:
Sri Puran Chandra Joshi, Sri D.N. Wali, Sri K.K. Misra, Pt. Pwan Chandra, Sri R.K. Dhama, Sri Sudhir Dixit

Counsel for the Respondents:
A.G.A.

Criminal Law- Indian Penal Code, 1860- Section 376- Indian Evidence Act, 1872- Section 3- The factum of rape thus does not remain uncorroborative, it finds support from the medical evidence also- The Chik FIR, the recovery memo of blood stained clothes of victim 'X', her medical examination report, the supplementary medical examination report, the site plan of the place of occurrence and the charge sheet of the present matter which are on record go to show that the genuineness of all the said documents have been admitted by the defence and as such now stating that the doctor and the Investigating Officer were not being examined by the prosecution, would render the prosecution story and the entire trial doubtful does not hold good.

Where the defence has not questioned the withholding of the Doctor and the investigating officer and has admitted the documentary

evidence authored by the said persons during the trial then the said question cannot be raised during appeal.

Indian Evidence Act, 1872- Section 3- It is trite law that a related witness may not be lebelled as interested witness. Interested witnesses are those who want to derive some benefit from the result of litigation or implicating the accused. Once it is established that witnesses were present at the scene, to witness the occurrence, they cannot be discarded merely on the ground of being closely related to the victim- Relationship is not sufficient to discredit a witness unless there is motive to give false evidence to spare the real culprit and falsely implicate an innocent person.

Merely because the witness is related to the victim but his presence his wholly natural at the spot, he cannot be labelled as an interested witness.

Indian Evidence Act, 1872- Section 3 -The testimony of a victim of rape is similar to the evidence of an injured complainant or witness. If it is found to be reliable, by itself, it may be sufficient to convict the accused and no corroboration of her testimony is required.

Settled law that conviction can be secured by the trial court solely upon the testimony of the rape victim without seeking further corroboration where the testimony of the victim is credible and trustworthy.

Proportionality of Sentence-The accused-appellant as of now is aged about 68 years as per observation of the trial court in his statement recorded under Section 313 Cr.P.C.- The age of the appellant will have no effect on the question of sentence and also on the conviction of the appellant- It is trite law that inadequacy of sentence is not in the interest of justice and if a person has been convicted and there is evidence beyond reasonable doubt about the same adequate sentence has to be awarded to him- With regards to the sentencing of the appellant, it is clear that lacks of sufficient time and the age of the accused cannot be a ground to extend any benefit to him in the crime committed by him.

Where the offence has been proved beyond reasonable doubt against the accused then merely the factum of the age of the appellant or the duration of the pendency of the appeal cannot be construed as a supervening or mitigating factor for reducing the sentence. (Para 21, 22, 23, 24, 25, 26,27, 32)

Criminal Appeal rejected. (E-3)

CaseLaw/ Judgements relied upon:-

1. St. of U.P. Vs Kishanpal & ors : (2008) 16 SCC 73

2. St. of Maha. Vs Chandraprakash Kewalchand Jain : (1990) 1 SCC 550

3. St. of U.P. Vs Chhotey Lal : (2011) 2 SCC 550

4. Hazara Singh Vs Raj Kumar & ors. : (2013) 9 SCC 516

5. Sahebrao Arjun Hon Vs Raosaheb s/o Kashinath Hon & ors : Crla No. 1499 of 2022 (dec. on 06.09.2022)

6. Karan Singh Vs St. of U.P. & ors : Crla No. 327 of 2022 (dec. on 02.03.2022)

7. St. of Raj. Vs Banwari Lal & anr. : Diary No. 21596 of 2020 (dec. on 08.04.2022)

(Delivered by Hon'ble Samit Gopal, J.)

1. The present appeal under Section 374 Cr.P.C. has been filed by the appellant Om Prakash against the judgement and order dated 02.07.1982 passed by III Additional District and Sessions Judge, Meerut in Session Trial No. 4 of 1981 (State of U.P. Vs. Om Prakash) by which he has been convicted and sentenced under Section 376 IPC to undergo six years rigorous imprisonment.

2. The name of the prosecutrix is not being disclosed and mentioned in the present judgment in the light of directions of the Apex Court in various judgments and as per Section 228-A of the Indian Penal Code. She is thus referred to as "X' in the judgment.

3. The prosecution case as per an application dated 04.10.1979 given by Bakreeda to the police of which Dharmapal is the scribe is that on that day at about 12:00 noon his daughter victim 'X' aged about 10 years was mowing grass in the field of Kaliram in the jungle of village Jivana. Om Prakash son of Sukhvirey Kumhar forcibly caught hold of his daughter and took her to the jwar field and committed rape on her on which she started shouting, hearing which Dharmapal Singh son of Ram Swarup Jaat, his son Ayyub and Hashim son of Kutubuddin Darji of his village who were working in the field went to the place of occurrence and saw the accused doing the act. They reached near on which Om Prakash ran away. He was chased but could not be apprehended. He has brought his daughter victim 'X' for lodging of the report. She is bleeding from her private part. His report be lodged and legal action be taken. The said application is Exb: Ka-1 to the records.

4. On the basis of the said application, a First Information Report was lodged on 04.10.1979 at 17:10 hrs as Case Crime No. 215 of 1979, under Section 376 IPC, Police Station Binoli, District Meerut against the accused-appellant Om Prakash son of Sukhvirey. The Chik FIR is Exb: Ka-5 to the records.

5. The Investigating Officer took into possession the clothes of victim 'X' which were blood stained and sealed it. A recovery memo for the same was prepared on 04.10.1979. Yoqoob Ali and Bakreeda are the witnesses of the same. The same is Exb: Ka-7 to the records.

6. Victim 'X' was medically examined on 04.10.1979 at 08:00 pm at Womens Hospital, Meerut by Dr. Rajni Gupta, Medical Officer. She was brought by the police constable. The doctor on physical examination noted as follows:-

"Height 129, weight 52 LBS, teeth 14/14, hairs - pubic, auxiliary - absent, breast - not developed."

On internal examination, the doctor noted as follows:-

"Hymen freshly torn, erosion present, admitting two fingers with great difficulty, vagina is full of bleeding and clots, vagina also heavily eroded."

Vaginal smear was sent for pathological examination and x-ray of wrist elbow and knee was advised. The doctor opined that no report can be given about the age at present. The patient was noted to be admitted in general ward. The said medical examination report is Exb: Ka-2 to the records.

A supplementary medical report was prepared on 29.10.1979 by Dr. Rajni Gupta, the Medical Officer, Womens Hospital, Meerut in which it was stated that there was no sperm seen in the vaginal smear. Further, the supplementary report was as follows:-

"*age of the girl is round about 10 years. Probably a case of rape according to the examination."* The said supplementary report is Exb: Ka-3 to the records.

7. The Investigating Officer prepared site plan of the occurrence on 04.10.1979. The same is Exb: Ka-6 to the records.

8. The investigation concluded and a Charge Sheet No. 112 of 1979 dated 04.12.1979 under Section 376 IPC against the accused-appellant was submitted. The same is Exb: Ka-4 to the records.

9. Vide order dated 16.09.1981 passed by III Additional Sessions Judge, Meerut charge under Section 376 IPC was framed against the accused-appellant. He pleaded not guilty and claimed to be tried.

10. The prosecution in order to prove its case produced victim 'X' as PW-1, Bakreeda the first informant and the father of the victim 'X' as PW-2 and Ayyub the brother of the victim 'X' and son of Bakreeda as PW-3. The accused did not lead any defence evidence.

11. The genuineness of certain documents were admitted by the defence and hence formal proof of the same was dispensed with. The documents are as follows:-

(i) Chik FIR Exb: Ka-5
(ii) Recovery memo of blood stained clothes Exb: Ka-7
(iii) Medical examination of victim 'X' Exb: Ka-2
(iv) supplementary medical examination report Exb: Ka-3
(v) Site plan Exb: Ka-6 and
(vi) Charge sheet Exb: Ka-4.

12. Heard Sri Sudhir Dixit, learned counsel for the appellant, Sri Sanjay Kumar Singh, learned Additional Government Advocate for the State and perused the records.

13. Learned counsel for the appellant argued that the doctor conducting the medical examination of victim 'X' and also preparing the supplementary medical examination report and the Investigating Officer of the case have not been examined. The same is a big dent to the prosecution by not examining them. It is next argued that the injuries as received by victim 'X' noted by the doctor in the medical examination report was due to an accident. It is further argued that Dharampal and Hashim the alleged eye witnesses of the incident as per the First Information Report, have not been produced in the trial and as such there is no independent witness to support the prosecution case.

14. It is further argued that the accused was opined to be looking about 28 years old at that time as observed and mentioned by the trial court in his statement under Section 313 Cr.P.C. which was recorded on 25.06.1982 and even looking to the same he is now about 68 years of age as the said statement was recorded about 40 years back. It is argued that the incident in the present case is of the year 1979 and 43 years have passed since then and as such sending the appellant to jail now, would be too harsh as he is about 68 years as of now.

15. Per contra, learned counsel for the State opposed the arguments of learned counsel for the appellant and argued that the prosecution has proved its case beyond reasonable doubt. The First Information Report was lodged on the same day. The medical examination report of the victim 'X' shows fresh bleeding injury present in her vagina and supplementary medical examination report opines that it is a case of rape. Victim 'X' was aged about 10 years and was a child. The appellant is named in the First Information Report, statement of victim 'X' and the other witnesses and the

role is consistent throughout. The prosecution has been successful in proving that rape has been committed upon victim 'X' and the evidence as produced without any doubt shows the involvement of the appellant. The present appeal deserves to be dismissed.

16. Victim 'X' PW-1 when she was produced before the trial court, was about 12 years of age. The trial court had put certain questions to her to ascertain whether she understands the sanctity of oath and then being satisfied that she understands it oath was administered to her. She identifies the accused person who is present in court and states that he is a resident of her village. She states that the incident is of about 2½ years ago at about 12:00 in the afternoon. She was scrapping grass in the field of Kaliram, the accused Om Prakash came there and took her to the field of brinjal. He forcibly took her to the jwar field and then committed rape on her. She shouted, on her shout, Hashim, Dharampal and Ayyub came there. When the witnesses came, the accused got up and ran away. They chased him but could not catch him. She was bleeding and her clothes got blood stained. After the arrival of the witnesses, her father also came to the place of occurrence. She told him about the incident. Her medical examination was conducted.

In her cross examination, she states that Ayyub is her real brother. Hashim is the son of her tau. Accused Om Prakash is son of Sukhvirey. She denies that her father had purchased some land from Dharampal. She denies the fact that her father had taken Rs. 1,000/- from father of the accused to purchase land and as he did not return it there was some fight between them. She states that there is no field near the place of occurrence. There is a nali running parallel to the jwar field of Kaliram which is about one yard in breadth and is only one side of field after the nali there is field of Kaliram. Kaliram is the father of Ompal. The field of Jai Chand is besides the field of Kaliram. The field of Halku is besides the field of Kaliram. She has seen the tubewell of Jai Chand which is in his field. It is at some distance from the jwar field of Kaliram, it is about two lathi away from the jwar field. Lathi is about the height of the waist of a person. At that time there was no one at the tubewell. She did not see anyone in the nearby fields. There were some persons in the orchard but she did not see them. Orchard is about 4-5 yards away from the jwar field. Her brother Ayyub and Hashim had come from the same orchard. When accused came and caught her hand she had scrapped one bundle grass with a khurpi. She had not seen accused Om Prakash previously. In the field of Kaliram, half of the jwar was cut and was lying, half of jwar was standing. The accused caught hold of her hand after going there on which she shouted and continue to shout. The accused took her from the said field to the field of jwar which was about two lathi inside where jwar was standing where she was scrapping the grass. The jwar crop was near it. It was upto half of the field and half of it was vacant. The place of occurrence where the accused threw her on the ground was not having any jwar plants. The place was empty as the jwar plants were cut. The blood which had come out had also stained the ground and her clothes. Hashim, Ayyub and Dharampal came there and asked her as to who committed rape. When the witnesses came there, the accused ran away. Her brother Ayyub left her at the field and went to the village and called her father Bakreeda. Then Bakreeda took her to the police station. She was first taken to the

house and a report was written and then went to the police from where she was taken to Meerut Hospital by a constable. She denies the suggestion that the Investigating Officer came to the village and then the First Information Report was written. She further denies that the accused did not commit rape on her but her father has lodged a false report.

17. Bakreeda PW-2 who is the first informant and father of victim 'X' states that victim 'X' is aged about 12 years as of now. The incident is of about 2½ years ago. She had gone to the field of Kaliram in village Jivana where she was raped in the afternoon. His son Ayyub came to the house and told him about the incident then he reached there. He found his daughter crying at the place of occurrence and blood was coming out from her vagina. Her clothes were blood stained. He brought her to the house where he got a report transcribed from Dharampal. The report was written on his dictation which was read to him and then he affixed his thumb impression on it. He proves the same which was marked as Exb: Ka-1 to the records. He then brought his daughter with blood stained clothes to the police station and lodged his report. The clothes were taken by the Investigating Officer and a recovery memo was prepared. He identifies the clothes which were marked as material Exb: 1 and 2. He states that his daughter told him about the incident at the place of occurrence.

In his cross examination, he states that he had purchased land of Dharampal. He denies the suggestion that he had taken Rs. 1,000/- from Sukhhvirey and father of accused for purchasing land. He further denies that on not returning the money he falsely implicated him in the present case. He states that the place of occurrence is about 500 yards away from his house. When he reached the place of occurrence his daughter was wearing of her clothes. The crops were standing. He states that he had got written in the application that victim 'X' told him about the incident at the place of occurrence. He states that he does not know as to why the same is not mentioned in it. He further states that Dharampal had gone with victim 'X' to the police station. From the police station he, Dharampal, his son Ayyub and the Investigating Officer went to the place of occurrence. When they reached the place of occurrence, there was one darati, some cut grass and one chadar therein. The Investigating Officer had taken the items in his possession. He denies the suggestion that due to enmity on the saying of police he has lodged a false report.

18. Kayyum PW-3 is the brother of victim 'X' and the son of the first informant. He states that his father had one brother named Ibrahim who is dead. Ibrahim has two sons namely Yusuf and Rais. Hashim is not son of his tau. Election of village pradhan is going on in his village. Witness Dharmapal is a candidate in the same. Dharamapal has colluded with accused Om Prakash. Witness Hashim has also colluded with Om Prakash. About 2½ years back at about 12:00 noon he was mowing grass in the orchard, he heard a cry coming from the jwar field of Kaliram. On hearing it, he and Hashim ran towards the place. He saw accused Om Prakash committing rape on his sister victim 'X'. When they reached near him, he got up and ran away. He was chased but could not be caught.

In his cross examination he states that the orchard in which he was working was of Dhoom Singh. He was working since the

last four hours prior to the occurrence. There is no one who guards the orchard. There is no other orchard except for the same nearby. He denies the suggestion that he was digging grass at some other field in the village. He states that the Investigating Officer interrogated him on the same day and he told him that he and Hashim were digging grass at some distance from the place of occurrence in a field of the village. He denies the suggestion that he has said of being in the orchard after knowing the statement of victim 'X'. He showed the orchard to the Investigating Officer. His sister was shouting loudly. She was shouted that Om Prakash has taken her and she may be saved. He did not shout but ran to the place silently. When he was about 10-12 yards away from the place of occurrence then accused Om Prakash got up and ran away. He reached the place through the field of Halku Pandit. They did not raise any shout prior to the accused getting up and running away. The accused ran towards the tubewell.

The Investigating Officer was shown the way from where he ran. There is nali at the south and east of the jwar field of Kaliram. His sister was about two lathis inside from east side of the field. The jwar field is about 9½ bighas. Half of the field had jwar on it but half had no crop. The place where his sister was lying was not having any jwar plants. There was no khurpi or darati at the place of occurrence but there was a chadar near the nali which was taken by the Investigating Officer. The Investigating Officer came to the village at about 05:00 pm. From police station, he along with Investigating Officer, his father and Yakoob came back to the village. Munsi was the grandfather of Hashim. He does not know how many brothers Munsi has. Kubool is the father of Ibrahim. He denies that Munsi is the brother of Kubool. He further denies that he was not present at the place of occurrence and did not see the incident.

19. The accused in his statement recorded under Section 313 Cr.P.C. denies the prosecution case. He states that there was a loan of Rs. 1,000/- on the first informant of his father which was being asked to him due to which he has been falsely implicated. He was opined to be about 28 years of age by the trial court on the day of recording of his statement under Section 313 Cr.P.C.

20. The trial court then convicted and sentenced the accused appellant as stated above.

21. After having heard learned counsel for the parties and perusing the records, it is evident that the appellant is named in the First Information Report. The victim 'X' is stated to be about 10 years of age in the First Information Report and also stated to be of the same age in the supplementary medical examination report by the doctor. The medical examination of the victim 'X' shows injuries on her vagina. The doctor did not give any opinion about rape when she had medically examined the victim "X' but in the supplementary medical examination report gave an opinion that it is a probable case of rape according to the examination. The factum of rape thus does not remain uncorroborative, it finds support from the medical evidence also. The age of the victim 'X' as stated by her father in the FIR also, in his statement and further from the opinion as arrived upon through radiological examination, she was aged about 10 years and was a child. The argument of learned counsel for the appellant that the doctor conducting the

medical examination of the victim 'X', preparing the supplementary medical examination report and also the Investigating Officer of the case have not been examined which would dent the prosecution case is fallacious. The Chik FIR, the recovery memo of blood stained clothes of victim 'X', her medical examination report, the supplementary medical examination report, the site plan of the place of occurrence and the charge sheet of the present matter which are on record go to show that the genuineness of all the said documents have been admitted by the defence and as such now stating that the doctor and the Investigating Officer were not being examined by the prosecution, would render the prosecution story and the entire trial doubtful does not hold good.

22. On one hand, the defence has admitted the genuineness of the said documents during trial and on the other hand in the appeal, the argument of maker of the documents, not being examined and thus calling upon to draw an adverse inference is not at all impressive to the Court. In so far as Dharampal and Hashim are concerned, the reason for there non production before the trial court has been stated in the examination-in-chief by Kayyum PW-3 that they have colluded with the accused Om Prakash as there was election of village Pradhan. On the said point there has been no cross examination from the side of the accused-appellant. The same thus remains unrebutted.

23. Further, the argument of learned counsel for the appellant that the accused-appellant as of now is aged about 68 years as per observation of the trial court in his statement recorded under Section 313 Cr.P.C., it is stated that the age of the appellant will have no effect on the question of sentence and also on the conviction of the appellant. If the case has been proved beyond reasonable doubt, adequate sentence has to be awarded to him. It is trite law that inadequacy of sentence is not in the interest of justice and if a person has been convicted and there is evidence beyond reasonable doubt about the same adequate sentence has to be awarded to him.

24. In so far as the argument relating to the PW-3 Kayyum is concerned, it is true that he is the brother of the victim 'X' and son of the first informant but it is trite law that a related witness may not be lebelled as interested witness. Interested witnesses are those who want to derive some benefit from the result of litigation or implicating the accused. Once it is established that witnesses were present at the scene, to witness the occurrence, they cannot be discarded merely on the ground of being closely related to the victim. The Apex Court in **State of Uttar Pradesh Vs. Kishanpal and others : (2008) 16 SCC 73** held as under:-

"18. The plea of defence that it would not be safe to accept the evidence of the eye witnesses who are the close relatives of the deceased, has not been accepted by this Court. There is no such universal rule as to warrant rejection of the evidence of a witness merely because he/she was related to or interested in the parties to either side. In such cases, if the presence of such a witness at the time of occurrence is proved or considered to be natural and the evidence tendered by such witness is found in the light of the surrounding circumstances and probabilities of the case to be true, it can provide a good and sound basis for conviction of the accused. Where

it is shown that there is enmity and the witnesses are near relatives too, the Court has a duty to scrutinize their evidence with great care, caution and circumspection and be very careful too in weighing such evidence. The testimony of related witnesses, if after deep scrutiny, found to be credible cannot be discarded.

19. It is now well settled that the evidence of witness cannot be discarded merely on the ground that he is a related witness, if otherwise the same is found credible. The witness could be a relative but that does not mean his statement should be rejected. In such a case, it is the duty of the Court to be more careful in the matter of scrutiny of evidence of the interested witness, and if, on such scrutiny it is found that the evidence on record of such interested witness is worth credence, the same would not be discarded merely on the ground that the witness is an interested witness. Caution is to be applied by the court while scrutinizing the evidence of the interested witness.

20. It is well settled that it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the court to place credence on the statement. The ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyse the evidence to find out whether it is cogent and credible."

25. Relationship is not sufficient to discredit a witness unless there is motive to give false evidence to spare the real culprit and falsely implicate an innocent person.

26. The testimony of a victim of rape is similar to the evidence of an injured complainant or witness. If it is found to be reliable, by itself, it may be sufficient to convict the accused and no corroboration of her testimony is required. The same has been held by the Apex Court in the case of **State of Maharashtra Vs. Chandraprakash Kewalchand Jain : (1990) 1 SCC 550** in para 16 which is extracted herein:

"16. A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence

required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness. For the above reasons we think that exception has rightly been taken to the approach of the High Court as is reflected in the following passage:

"It is only in the rarest of rare cases if the court finds that the testimony of the prosecutrix is so trustworthy, truthful and reliable that other corroboration may not be necessary."

With respect, the law is not correctly stated. If we may say so, it is just the reverse. Ordinarily the evidence of a prosecutrix must carry the same weight as is attached to an injured person who is a victim of violence, unless there are special circumstances which call for greater caution, in which case it would be safe to act on her testimony if there is independent evidence lending assurance to her accusation."

(emphasis supplied)

27. The evidence of prosecutrix alone may sustain a conviction, the same has been held by the Apex Court in the case of **State of Uttar Pradesh Vs. Chhotey Lal : (2011) 2 SCC 550** in para 26. The same is extracted hereinbelow:-

"26. The important thing that the court has to bear in mind is that what is lost by a rape victim is face. The victim loses value as a person. Ours is a conservative society and, therefore, a woman and more so a young unmarried woman will not put her reputation in peril by alleging falsely about forcible sexual assault. In examining the evidence of the prosecutrix the courts must be alive to the conditions prevalent in the Indian society and must not be swayed by beliefs in other countries. The courts must be sensitive and responsive to the plight of the female victim of sexual assault. Society's belief and value systems need to be kept uppermost in mind as rape is the worst form of woman's oppression. A forcible sexual assault brings in humiliation, feeling of disgust, tremendous embarrassment, sense of shame, trauma and lifelong emotional scar to a victim and it is, therefore, most unlikely of a woman, and more so by a young woman, roping in somebody falsely in the crime of rape. The stigma that attaches to the victim of rape in Indian society ordinarily rules out the levelling of false accusations. An Indian woman traditionally will not concoct an untruthful story and bring charges of rape for the purpose of blackmail, hatred, spite or revenge."

28. Learned counsel for the appellant had placed an argument that the appellant is now aged about 68 years, the incident is of the year 1979 and 43 years have passed since then and as such sending the appellant to jail would be too harsh. The policy of sentencing of an accused has been dealt with by the Apex Court in the case of **Hazara Singh Vs. Raj Kumar and others : (2013) 9 SCC 516**, in para 11 to 17 and

then in para 27 also. The same are extracted hereinbelow:-

"11. The cardinal principle of sentencing policy is that the sentence imposed on an offender should reflect the crime he has committed and it should be proportionate to the gravity of the offence. This Court has repeatedly stressed the central role of proportionality in sentencing of offenders in numerous cases.

12. The factual matrix of this case is similar to the facts and circumstances of the case in *Shailesh Jasvantbhai and Another vs. State of Gujarat* wherein the accused was convicted under Section 307/114 IPC and for the same the trial Court sentenced the accused for 10 years. However, the High Court, in its appellate jurisdiction, reduced the sentence to the period already undergone. In that case, this Court held that the sentence imposed is not proportionate to the offence committed, hence not sustainable in the eye of the law. This Court, observed thus:

"7. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be 8 Page 9 achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law, which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of "order" should meet the challenges confronting the society. Friedman in his Law in Changing Society stated that: "State of criminal law continues to be - as it should be -a decisive reflection of social consciousness of society." Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.

8. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc."

13. This position was reiterated by a three-Judge Bench of this Court in Ahmed Hussein Vali Mohammed Saiyed and Anr. vs. State of Gujarat wherein it was observed as follows:-

"99.....The object of awarding appropriate sentence should be to protect the society and to deter the criminal from achieving the avowed object to law by imposing appropriate sentence. It is expected that the courts would 9 Page 10operate the sentencing system so as to impose such sentence, which reflects the conscience of the society and the sentencing process has to be stern where it

should be. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against the interest of society which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

100. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which both the criminal and the victim belong."

In that case, the court further goes to state that meager sentence imposed solely on account of lapse of time without considering the degree of the offence will be counter productive in the long run and against the interest of the society.

14. In Jameel vs. State of Uttar Pradesh, this Court reiterated the principle by stating that the punishment must be appropriate and proportional to the gravity of the offence committed. Speaking about the concept of sentencing, this Court observed thus: -

"15. In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it 1 Page 11 warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.

16. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence."

15. In Guru Basavaraj @ Benne Settapa vs. State of Karnataka, while discussing the concept of appropriate sentence, this Court expressed that:

"It is the duty of the court to see that appropriate sentence is imposed regard being had to the commission of the crime and its impact on the social order. The cry of the collective for justice, which includes adequate punishment cannot be lightly ignored."

16. Recently, this Court in Gopal Singh vs. State of Uttarakhand held as under:-

"18. Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence....."

17. We reiterate that in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of

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

X X X X X X X X X X X

27. While rejecting the similar reasons as stated by the High Court in the present case, the following conclusion arrived at by this Court are relevant: (Sadha Singh Case)....

"7. .... The learned Judge then took notice of the fact that three co-accused of the appellants were given benefit of doubt by the trial court and acquitted them although they were also attributed causing of some injuries. If acquittal of some co-accused casts a cloud of doubt over the entire prosecution case, the whole case may be rejected. But we fail to understand how acquittal of some of the accused can have any relevance to the question of sentence awarded to those who are convicted. In this case the prosecution submitted that these two appellants alone were armed with guns. Then the learned Judge observes that no useful purpose, will be served by sending the appellants to prison again to undergo the unexpired period of their sentence. We repeatedly asked why this indulgence and waited for answer in vain. If someone is enlarged on bail during the pendency of appeal and when the appeal is dismissed sending him back to jail is going to raise qualms of conscience in the Judge, granting of bail pending appeal would be counter-productive. One can pre- empt or forestall the decision by obtaining an order of bail.

8. If the learned Judge had in mind the provisions of Section 360 of CrPC so as to extend the benefit of treatment reserved for first offenders, these appellants hardly deserve the same. Admittedly, both the appellants were above the age of 21 years on the date of committing the offence. They have wielded dangerous weapons like firearms. Four shots were fired. The only fortunate part of the occurrence is that the victim escaped death. The offence committed by the appellants is proved to be one under Section 307 of IPC punishable with imprisonment for life. We were told that the appellants had hardly suffered imprisonment for three months. If the offence is under Section 307 IPC i.e. attempt to commit murder which is punishable with imprisonment for life and the sentence to be awarded is imprisonment for three months, it is better not to award substantive sentence as it makes mockery of justice. Mr Jain said that the High Court has enhanced the fine and compensated the injured and, therefore, we should not enhance the sentence. Accepting such a submission would mean that if your pockets can afford, commit serious crime, offer to pay heavy fine and escape tentacles of law. Power of wealth need not extend to overawe court processes. Thus it appears that the High Court wrongly interfered with the order of sentence on wholly untenable and irrelevant grounds some of them not borne out by the record. In order, therefore, to avoid miscarriage of justice we must interfere and set aside the sentence imposed by the High Court and restore the sentence imposed by the learned Sessions Judge which we hereby order. Both the

appellants shall be taken into custody forthwith to suffer their sentence."

29. Further, in the case of **Sahebrao Arjun Hon Vs. Raosaheb s/o Kashinath Hon & others : Criminal Appeal No. 1499 of 2022 (decided on 06.09.2022)**, in para 12 the Apex Court has held that for sentencing the judicial discretion is always guided by various considerations and it has been ruled that undue sympathy in reducing the sentence to the minimum may adversely affect the faith of people in efficacy of law. The same has been enumerated in the said paragraph. Para 12 of the same is extracted hereinbelow:-

"12. As far as the sentencing is concerned, the judicial discretion is always guided by various considerations such as seriousness of the crime, the circumstances in which crime was committed and the antecedents of the accused. The Court is required to go by the principle of proportionality. If undue sympathy is shown by reducing the sentence to the minimum, it may adversely affect the faith of people in efficacy of law. It is the gravity of crime which is the prime consideration for deciding what should be the appropriate punishment."

30. Further, in the case of **Karan Singh Vs. The State of Uttar Pradesh and others : Criminal Appeal No. 327 of 2022 (decided on 02.03.2022)** the Apex Court has considered the question of a ground being taken that a long time has elapsed and as such the accused may not be convicted. While ruling on the said argument it was held that the same cannot be a ground for acquittal of the appellant. Para 47 of the said judgment is quoted hereinbelow:-

"47. We find no grounds to interfere with the concurrent findings of the Trial Court and the High Court. The fact that the trial/appeal should have taken years and that other accused should have died during the appeal cannot be a ground for acquittal of the Appellant. The appeal is thus dismissed."

31. Further, the Apex Court in the case of **State of Rajasthan Vs. Banwari Lal and another : Diary No. 21596 of 2020 (decided on 08.04.2022)** has referred to the principles of sentencing which are to be considered in para 7 and 8 of the said judgment and it has been held as under:-

"7. At this stage, few decisions of this Court on principles for sentencing and tests for awarding an appropriate sentence in a given case are required to be referred to and considered.

i) In the case of Mohan Lal (supra), the High Court modified the judgment and order passed by the learned trial Court and sentenced the accused to the period already undergone by him, which was only six days and absolutely no reasons, much less valid reasons, were assigned by the High Court. While setting aside the order passed by the High Court, this Court has observed in paragraphs 9 to 13 as under:

"9. The High Court simply brushed aside the aforementioned material facts and sentenced the accused to the period already undergone by him, which is only 6 days in this case. In our view, the trial court and the High Court have taken a lenient view by convicting the accused for offences under Sections 325 and 323 IPC. Absolutely no reasons, much less valid reasons, are assigned by the High Court to impose the meagre sentence of 6 days. Such imposition of sentence by the High Court

shocks the judicial conscience of this Court.

10. Currently, India does not have structured sentencing guidelines that have been issued either by the legislature or the judiciary. However, the courts have framed certain guidelines in the matter of imposition of sentence. A Judge has wide discretion in awarding the sentence within the statutory limits. Since in many offences only the maximum punishment is prescribed and for some offences the minimum punishment is prescribed, each Judge exercises his discretion accordingly. There cannot, therefore, be any uniformity. However, this Court has repeatedly held that the courts will have to take into account certain principles while exercising their discretion in sentencing, such as proportionality, deterrence and rehabilitation. In a proportionality analysis, it is necessary to assess the seriousness of an offence in order to determine the commensurate punishment for the offender. The seriousness of an offence depends, apart from other things, also upon its harmfulness.

11. This Court in Soman v. State of Kerala [Soman v. State of Kerala, (2013) 11 SCC 382 : (2012) 4 SCC (Cri) 1] observed thus: (SCC p. 393, para 27)

"27.1. Courts ought to base sentencing decisions on various different rationales -- most prominent amongst which would be proportionality and deterrence.

27.2. The question of consequences of criminal action can be relevant from both a proportionality and deterrence standpoint.

27.3. Insofar as proportionality is concerned, the sentence must be commensurate with the seriousness or gravity of the offence.

27.4. One of the factors relevant for judging seriousness of the offence is the consequences resulting from it.

27.5. Unintended consequences/harm may still be properly attributed to the offender if they were reasonably foreseeable. In case of illicit and underground manufacture of liquor, the chances of toxicity are so high that not only its manufacturer but the distributor and the retail vendor would know its likely risks to the consumer. Hence, even though any harm to the consumer might not be directly intended, some aggravated culpability must attach if the consumer suffers some grievous hurt or dies as result of consuming the spurious liquor."

12. The same is the verdict of this Court in Alister Anthony Pareira v. State of Maharashtra [Alister Anthony Pareira v. State of Maharashtra, (2012) 2 SCC 648 : (2012) 1 SCC (Civ) 848 : (2012) 1 SCC (Cri) 953] wherein it is observed thus: (SCC p. 674, para 84)

"84. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: the twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances."

13. From the aforementioned observations, it is clear that the principle governing the imposition of punishment will depend upon the facts and circumstances of each case. However, the sentence should be appropriate, adequate, just, proportionate

and commensurate with the nature and gravity of the crime and the manner in which the crime is committed. The gravity of the crime, motive for the crime, nature of the crime and all other attending circumstances have to be borne in mind while imposing the sentence. The court cannot afford to be casual while imposing the sentence, inasmuch as both the crime and the criminal are equally important in the sentencing process. The courts must see that the public does not lose confidence in the judicial system. Imposing inadequate sentences will do more harm to the justice system and may lead to a state where the victim loses confidence in the judicial system and resorts to private vengeance."

ii) In the case of Udham (supra), in paragraphs 11 to 13, it is observed and held as under:

"11. We are of the opinion that a large number of cases are being filed before this Court, due to insufficient or wrong sentencing undertaken by the courts below. We have time and again cautioned against the cavalier manner in which sentencing is dealt in certain cases. There is no gainsaying that the aspect of sentencing should not be taken for granted, as this part of Criminal Justice System has determinative impact on the society. In light of the same, we are of the opinion that we need to provide further clarity on the same.

12. Sentencing for crimes has to be analysed on the touchstone of three tests viz. crime test, criminal test and comparative proportionality test. Crime test involves factors like extent of planning, choice of weapon, modus of crime, disposal modus (if any), role of the accused, anti-social or abhorrent character of the crime, state of victim. Criminal test involves assessment of factors such as age of the criminal, gender of the criminal, economic conditions or social background of the criminal, motivation for crime, availability of defence, state of mind, instigation by the deceased or any one from the deceased group, adequately represented in the trial, disagreement by a Judge in the appeal process, repentance, possibility of reformation, prior criminal record (not to take pending cases) and any other relevant factor (not an exhaustive list).

13. Additionally, we may note that under the crime test, seriousness needs to be ascertained. The seriousness of the crime may be ascertained by (i) bodily integrity of the victim; (ii) loss of material support or amenity; (iii) extent of humiliation; and (iv) privacy breach."

In the said decision, this Court again cautioned against the cavalier manner in which sentencing is dealt with in certain cases.

iii) In the case of Satish Kumar Jayanti Lal Dabgar (supra), this Court has observed and held that the purpose and justification behind sentencing is not only retribution, incapacitation, rehabilitation but deterrence as well.

8. Applying the law laid down by this Court on principles for sentencing, to the facts of the case on hand, we are of the opinion that the approach of the High Court is most cavalier. Therefore, the order of the High Court merits interference by this Court. Merely on the technical ground of delay and merely on the ground that after the impugned judgment and order, which is unsustainable, the accused have resettled in their lives and their conduct has since been satisfactory and they have not indulged in any criminal activity, is no ground not to condone the delay and not to consider the appeal on merits. Hence, the delay of 1880 days in preferring the appeal is condoned."

32. Thus applying the principles of law with regards to the sentencing of the

appellant, it is clear that lacks of sufficient time and the age of the accused cannot be a ground to extend any benefit to him in the crime committed by him.

33. From the discussions as stated above it is evident that the prosecution has succeeded in proving the case beyond reasonable doubt against the accused-appellant. The version of the first informant and the victim 'X' regarding rape being committed on her by the accused-appellant does not get dented throughout the case. The medical evidence corroborates with the prosecution version. The opinion of the doctor also states of rape being committed on her. The victim 'X' was aged about 10 years at that time. The same has also not been a matter of challenge by the accused-appellant. Hence, the present appeal is **dismissed**.

34. The judgment and order of conviction of the trial court is upheld. The appellant is on bail. He shall be taken into custody to serve out the sentences awarded to him by the trial court.

35. Office is directed to transmit the lower court records along with a copy of this judgment to the trial court forthwith for its compliance and necessary action.

(2022) 11 ILRA 1199
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.11.2022

BEFORE

THE HON'BLE SANJAY KUMAR PACHORI, J.

Jail Appeal No. 2176 of 2010

Rajesh Kumar Dubey ...Appellant
Versus
State of U.P. ...Opp. Party

Counsel for the Appellant:
Sri Rajesh Kumar Dwivedi, Amicus curiae

Counsel for the Respondents:
Sri Manoj Kumar Sahu, A.G.A.

Criminal Law- Indian Penal Code, 1860- Sections 375 & 376- The important ingredient of the offence under Section 375 punishable under Section 376, IPC is penetration. No offence under Section 376 IPC can be made out unless there was penetration to some extent. In absence of penetration to any extent would not bring the offence of the accused within the four corners of Section 375, IPC. Therefore, the basic ingredients for proving a charge of rape are the accomplishment of the act with force. The other important ingredient is penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim completely, partially or slightly would be enough for the purpose of Section 375 and 376 IPC.

Penetration to any extent with the use of force for accomplishment of the act, are sufficient to make out the offence of rape.

Indian Penal Code, 1860- Section 375- Section 376- Indian Evidence Act, 1872- Section 3- It is settled position of law that a conviction can be based entirely on the statement of a rape victim- The statement of the prosecutrix if found to be worthy of credence, and reliable, requires no corroboration. She stands at a higher pedestal than an injured witness. However, if the court may find it difficult to accept the testimony of the prosecutrix, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony- It is a settled proposition of law that even if there are some omissions, contradictions, and discrepancies, the entire evidence cannot be disregarded.

Conviction can be secured solely on the testimony of the victim where her statement is found to be truthful and credible by the court

but where the same has contradiction, omissions etc. then the court may seek corroboration from other materials.

Code of Criminal Procedure, 1973- Section 154- The delay in lodging the FIR in a sexual assault cannot normally affect the prosecution case, as held by the Supreme Court in various judgments, but where there is an inordinate delay in registration of the FIR, in such circumstances, it casts a cloud of suspicion on the credibility of the entire prosecution story and such type of delay would certainly be regarded as fatal to the prosecution case and thus, the whole prosecution case is under the cloud of suspicion and doubt-Overwriting in the complaint (Ex.Ka.-1) and chik FIR (Ex.Ka.-4) by the overwriting, date of the complaint, number of crime have been changed, G.D. Rapat (Ex.Ka.-5) has no number, date or time, name of the scribe is not mentioned in the complaint, PW-1 victim St.d that she did not know the name of scribe of the complaint, there is no date on which copy of the FIR (Ex.Ka.-4) has been sent to the jurisdictional Magistrate.

Even in an offence of sexual assault, inordinate delay in lodging the FIR can render the case of the prosecution doubtful and where the inordinate delay is accompanied with material discrepancies in the complaint, chik FIR and relevant G.D entries then the same may be fatal to the case of the prosecution.

Indian Penal Code, 1860- Section 375- Section 376- Indian Evidence Act, 1872- Section 3- Section 101- It is not the duty of the defence to explain as to how and why in a sexual assault case the victim has falsely implicated the appellant. The evidence of prosecutrix cannot be accepted merely because the appellant has not been able to say as to why she has come forward to depose against him. On the basis of the facts and circumstances discussed above, an inferrence can easily be drawn that the prosecution case is wholly based on sole testimony of PW-1 victim and the evidence of the victim does not inspire confidence. Therefore, the entire genesis of the case is in serious doubt in view of the contradictions and material inconsistencies.

The burden of proof to prove its case beyond reasonable doubt is always upon the prosecution and cannot be shifted upon the accused to explain his false implication. (Para 60, 62, 63, 64, 65, 66,80,88)

Criminal Appeal allowed. (E-3)

Case Law/ Judgements relied upon:-

1. Narain Saha & anr. Vs St. of Trip., AIR 2005 SC 1452

2. Marudanal Augusti Vs St. of Ker., AIR 1980 SC 638

3. Amitbhai Anilchandra Shah Vs C.B.I. & anr., 2013 AIR SC 3794

4. Hemraj & ors. Vs St. of Har. 2005 (52) ACC 258 (SC).

5. St. of U.P. Babul Nath (1994) 6 SCC 29

6. Tarkeshwar Sahu Vs St. of Bih. (Now Jhar.) (2006) 8 SCC 560

7. Madan Lal Vs St. of J. & K., (1997) 7 SCC 677

8. Koppula Venkat Rao Vs St. of A.P. (2004) 3 SCC 602

9. St. of M.P. Vs Mahendra @ Golu 2021 SCC Online SC 965

10. Aman Kumar & anr. Vs St. of Har. (2004) 4 SCC 379

11. St. of Punj. Vs Major Singh AIR 1967 SC 63

12. Vijay @ Chinee Vs St. of M.P.(2010) 8 SCC 191

13. Phool Singh Vs St. of M.P. (2022) 2 SCC 74

14. Ganesan Vs St. Rep. By its Inspcr. 2021 SCC OnLine SC 1023

15. St. of H.P. Vs Raghubir Singh (1993) 2 SCC 622

16. Wahid Khan Vs St. of M.P. (2010) 2 SCC 9

17. Rai Sandeep @ Deepu Vs St. (2012) 8 SCC 21

18. St. of Raj. Vs Babu Meen (2013) 2 SCALE 479

19. Mohd. Iqbal Vs St. of Jhar. (2013) 14 SCC 481

20. Md. Ali Vs St. of U.P. (2015) 3 SCALE 274

21. Rameshwar Vs St. of Raj. AIR 1952 SC 54

22. Sidheshwar Ganguly Vs St. of W.B., AIR 1958 SC 143

23. Gurcharan Singh Vs St. of Har., AIR 1972 SC 2661

24. Modho Ram & anr. Vs St. of U.P., (1973) 1 SCC 533

25. St. of Maha. Vs Chandraprakash Kewalchand Jain (1990) 1 SCC 550

26. Modam Gopal Kakkad Vs Naval Dubey & anr.(1992) 3 SCC 204

27. St. of Raj. Vs Shri Narayan (1992) 3 SCC 615

28. Karnel Singh Vs St. of M.P.(1995) 5 SCC 518

29. Bodhisattwa Gautam Vs Miss Subhra Chakraborty (1996) 1 SCC 490

30. St. of Punj. Vs Gurmit Singh & ors. (1996) 2 SCC 384

31. St. of U.P. Vs Pappu @ Yunus & anr. AIR 2005 SC 1248

32. St. of Raj. Vs Om Prakash AIR 2007 SC 2257

33. St. of U.P. Vs M. K. Anthony AIR 1985 SC 48

34. St. Vs Saravanan & anr. AIR 2009 SC 152

35. Sohrab & anr. Vs St. of M.P. 27. AIR 1972 SC 2020

36. Bharwada Bhogini Bhai Hirji Bhai Vs St. of Guj. AIR 1983 SC 753

37. Prithu @ Prithi Chand & anr. Vs St. of H.P (2009) 11 SCC 588

38. St. of U.P. Vs Santosh Kumar & ors.(2009) 9 SCC 626

39. Satyapal Vs St. of Har, AIR 2009 SC 2190

40. Karnel Singh Vs St. of M.P.(1995) 5 SCC 518

41. Gurcharan Singh Vs St. of Har. AIR 1972 SC 2661.

42. Devinder Singh & ors. Vs St. of H.P. AIR 2003 SC 3365

43. Sadashiv Ramrao Hadbe Vs St. of Maha. & anr.35(2006) 10 SCC 92

44. Dilip & anr. Vs St. of M.P. (2001) 9 SCC 452

45. Vimal Suresh Kamble Vs Chaluverapinake Apal S.P. & anr.(2003) 3 SCC 175

46. Yerumalla Latchaiah Vs St. of A.P. (2006) 9 SCC 713

47. Mohd. Habib Vs St.(1988) 35 DLT 170 (DB) 40

48. Zahroor Ali Vs St. of U.P.1989 SCC OnLine All 580

49. St. of Kar. Vs Mapilla P. P. Soapi 2003 (3) JCC 1543

50. Babu Vs St. of Ker. (2010) 9 SCC 189

51. Rajinder Kumar Kindra Vs Delhi Admin (1984) 4 SCC 635

52. Excise & Tax. Officer-cum-Assessing Authority Vs Gopi Nath & Sons,1992 Supp (2) SCC 312

53. Triveni Rubber & Plastics Vs CCE,1994 Supp (3) SCC 665

54. Gaya Din Vs Hanuman Prasad (2001) 1 SCC 501

55. Aruvelu Vs State, (2009) 10 SCC 206

56. Gomini Bala Koteswara Rao Vs St. of A.P. (2009) 10 SCC 636

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

1. This jail appeal has been preferred by the appellant, Rajesh Kumar Dubey against the judgment and order passed by Additional Sessions Judge/FTC-3 Lucknow, on 13.8.2009 in Session Trial No. 128 of 2009, arising out of Case Crime No. 645 of 2008, Police Station Hasanganj, District Lucknow, whereby the appellant has been convicted under Sections 354, 376 read with section 511 of The Indian Penal Code (in short "I.P.C.") and sentenced to undergo one-year imprisonment under section 354 of IPC and to undergo five years imprisonment and a fine of Rs. 1,000/- each with a default sentence of one month under section 376 read with section 511 of IPC.

PROSECUTION CASE

2. The prosecution case in brief as per the first information report1 (Ex.Ka.-4), which was lodged on 12.11.2008 at 6:10 (hours, a.m. or p.m. has not been written) on the basis of written complaint (Ex.Ka.-1) of the victim 'X' (PW-1) at PS Hasanganj, District Lucknow by the victim is that she cooks food at the house of colonel S. K. Sharma in his presence. On 10.11.2008, at 9:00 p.m., the appellant reached the house of the victim and told the victim that colonel sahab had come and was calling her for cooking food, she reached the house believing his information and went inside the house by opening the gate. The appellant caught her arm and started molesting her. Hearing her cries, elder brother of colonel sahab Dr. Uma Kant Sharma and one other person, who had come to the house of Ratan Kant Sharma reached there, and saved the victim from the appellant by reprimanding him.

3. The FIR dated 12.11.2008 (Ex.Ka-4) was registered as case Crime no. 645 of 2008 under section 354 of I.P.C. against the appellant at PS Hasanganj, District Lucknow at 6:10 (hours, a.m. or p.m. has not been written) by Head Constable Asharaf Ali (PW-4) on the basis of the written complaint (Ex.Ka.-1). The distance between the place of occurrence and the Police Station is about 1 Km.

4. The investigation was started by Sub-Inspector2 Ranjit Dubey (PW-3). He inspected the place of incident, as pointed out by the informant/victim (PW-1) and prepared a site map (Ex.Ka.-2) of the place of occurrence. The investigating officer3 recorded the statement of the victim, Uma Kant Sharma under section 161 of the Code of Criminal Procedure 1973 (in short 'Cr. PC.') on 27.11.2008 and other prosecution witnesses under Section 161 of Cr. PC. The statement of the victim under Section 164 of Cr. PC. (Paper No. A-6/23) which had been seen by the I.O. and endorsed in the case diary on 28.11.2008. After completing the investigation, a charge sheet (Ex.Ka.-3) was submitted against the appellant under Sections 354, 376 read with Section 511 of IPC before the court concerned on 11.12.2008.

5. The concerned Magistrate took cognizance in the matter and committed the case to Sessions Court on 12.2.2009 for trial. On committal, the trial court framed charges against the appellant under Sections 354, 376 read with Section 511 of IPC on 28.3.2009. The appellant denied the charges and claimed trial. The appellant was so poor that he could not afford to engage a lawyer and the case before the court was conducted by *amicus curiae* Sri Pradeep Chand Sharma on the basis of the appellant's application dated 28.3.2009.

6. To prove the charges against the appellant, the prosecution examined as many as 4 witnesses. PW-1 victim/first informant; PW-2 Dr. Uma Kant Sharma, brother of colonel S.K. Sharma, who had reached the place of the incident immediately after hearing the screaming of the victim; PW-3 S.I. Ranjit Dubey (I.O.) and PW-4 HCP Asharaf Ali (scribe of chik of FIR).

7. After taking the evidence of the prosecution witnesses, as per Section 313 of Cr. PC., the appellant was questioned about the evidence led against him by the prosecution, wherein he denied the incriminating evidence put to him and stated that he has been implicated due to enmity (*MUJHE JABRAN RANJISHAN (VICTIM'S NAME) NE FASAYA HAI, MAIN NIRDOSH HUN*) and the witnesses have given evidence due to enmity. The appellant did not produce any evidence before the trial court.

8. Before the trial court, the appellant argued that the FIR has been lodged after due deliberation and consultation. There is a contradiction between the statements of PW-1 victim and PW-3 S.I. Ranjit Dubey with regard to the injury of the victim. The victim stated that during the incident she received injuries, but the Investigating Officer stated that he did not get medical examination of the victim because the victim had not received any injury. It is further contended that there are material contradictions between the statement of PW-1 victim and PW-2 Dr. Uma Kant Sharma with regard to the presence of PW-2 after the incident. It is further argued that when colonel saheb was not present in his house, the victim reached there to meet the appellant and he falsely implicated after someone saw the incident.

FINDINGS OF THE TRIAL COURT

9. The trial court found that the victim has explained the delay in lodging the FIR on 12.11.2008, wherein she explained that the FIR was lodged after colonel sahab reached in his house, after relying upon the judgment of the Supreme Court in case of **Narain Saha & Anr. v. State of Tripura, AIR 2005 SC 1452**, wherein it was held that merely because the complaint was lodged less than promptly, does not raise the question that the complaint was false. The reluctance to go to the police is because of society's attitude towards such women. It casts doubt and shame upon her rather than comfort and sympathy towards her. Therefore, the delay in lodging the FIR in such cases does not necessarily indicate that her version is false.

10. The trial court further observed that the victim was a maid in the house of colonel S. K. Sharma for 10 years and she cooked food in his house in his presence both in the morning and evening, and the appellant is a security guard in the said house for 6 to 7 months prior to the incident. The incident took place after she opened the main gate of the house, which has a high boundary wall.

11. The trial court further observed that there is a discrepancy between the statements of PW-1 victim and PW-3 Ranjit Singh with regard to the injuries of the victim. As per the prosecution case, when the victim entered the house after opening the main gate, the appellant caught hold of the arm of the victim from behind and pressed her chest, and attempted to rape her. As per the site map (Ex.Ka.-2) the incident took place on the lawn situated nearby the main gate connecting the

boundary wall. The victim stated that the appellant came from behind and was forcing her and she received injuries in her leg and knee, but there was no bleeding. The evidence of the victim is corroborated by the statement of the victim recorded under Section 164 of Cr. PC. The trial court discarded the argument of the appellant and found that there is no material discrepancy that affects the case of the prosecution.

12. The trial court discarded the argument of the appellant that the evidence of PW-2 Dr. Uma Kant Sharma is not trustworthy because there are material contradictions between the evidence of PW-1 victim and PW-2. The trial court found that the incident took place on 10.11.2008 from 8:30 P.M. to 9:00 P.M. The witness is the real brother of colonel S.K. Sharma and he was residing in the back portion of the house. PW-2 reached immediately after hearing the cry of the victim at the place of the incident and saw that the appellant was lying over the victim, at that time the appellant was found nude. PW-2 called the police on No. 100, in the meantime, the appellant fled away from the spot. The trial court observed that the evidence of PW-1 is satisfactorily corroborated by PW-2.

13. The trial court further found that if the presence of another person Ratan Kant Sharma is found doubtful, it will not affect the trustworthiness of the evidence of the victim. The appellant has not put any question with regard to his false implication due to enmity to the PW-1 and PW-2 and he has not produced any evidence in this regard. The trial court concluded that the prosecution has successfully proved the charges against the appellant under Sections 354, 376 read with Section 511, I.P.C. beyond reasonable doubt and thereby convicted and sentenced the appellant as above.

14. Being aggrieved by the trial court's judgment and order, the appellant has preferred this appeal.

SUBMISSIONS BEFORE THIS COURT

15. Heard Sri Rajesh Kumar Dwivedi, learned counsel *amicus curiae* for the appellant; Sri Manoj Kumar Sahu, learned A.G.A., for the State and perused the material available on record.

16. Learned amicus curiae for the appellant vehemently urged that;

(a) PW-1 victim lodged the FIR of the present case after about 30 hours of unexplained delay, if the FIR was lodged on 12.11.2008 at 6:10 a.m. (hours, a.m. and p.m. has not been mentioned). Though, PW-3 S.I. Ranjit Dubey had reached the place of the incident immediately after the incident and he called the victim;

(b) There is an overwriting over the date as shown as '12.11.2008' in the complaint (Ex.Ka.-1) and the word "Aaj", has been deleted and name of the scribe of the complaint has not been mentioned. Therefore, scribe of the complaint was not examined by the prosecution;

(c) There is an overwriting in case crime no. of chik FIR (Ex.Ka.-4) as well as its G.D. Rapat no. (Ex.Ka.-5), it seems that initially case crime no. '646' was written but later crime no. '645' had been written.

(d) G.D. Rapat No. (Ex.Ka.-5), which had been prepared after registering the FIR, has no number, date, and time;

(e) The date on which the copy of the FIR had been sent to the Jurisdictional Magistrate is not mentioned.

(f) PW-2 Dr. Uma Kant Sharma gave telephonic information about the incident on number 100 to the police which was not reduced into writing. As per the statement of PW-2, he lodged the FIR at the police station on the date of the incident, which was not made part of the investigation;

(g) The torn clothes of the victim were neither recovered nor it was seized;

(h) The victim was not produced before any doctor for her medical examination; statement of the victim was recorded under Section 161 Cr. PC. on 27.11.2008, after 16 days of the incident. On the basis of statement of the victim Section 376/511, IPC had been added on 27.11.2008.

(i) There is a material contradiction between her statement under Section 161, Cr. PC., chief examination, and cross-examination with regard to attempting to commit rape.

(j) The statement of the victim under Section 164 of Cr. PC. has no date of its recording, which had been endorsed by the I.O. on 28.11.2008 in the case diary, which was not proved by the prosecution;

(k) There are material contradictions in the testimony of PW-1 victim and PW-2 Dr. Uma Kant Sharma, with regard to the presence of PW-2 who claimed to be an eye witness of the incident;

(l) As per the statement of PW-2 Uma Kant Sharma, he was told about the incident by a girl residing in his neighbourhood. But the independent witness was not examined by the prosecution;

(m) No broken pieces of bangles or any other incriminating article was recovered and proved by the prosecution; and

(n) The place of occurrence was not established and proved by the prosecution.

In the aforesaid background, it is submitted that the prosecution has failed to prove the case against the appellant beyond all reasonable doubt and the conviction, as recorded, is against the weight of evidence. Hence, the impugned judgment and order dated 13.8.2009 is liable to be set aside.

17. Learned amicus curiae relied upon the judgments of the Supreme Court in case of **Marudanal Augusti v. State of Kerala, AIR 1980 SC 638, Amitbhai Anilchandra Shah v. Central Bureau of Investigation & Anr., 2013 AIR SC 3794** and **Hemraj & Ors. v. State of Haryana 2005 (52) ACC 258 (SC).**

18. **Per Contra**; learned A.G.A. submitted that the reason for the delayed reporting of the FIR has also been explained by the prosecution. There was no reason as to why a married woman, would falsely implicate the appellant. PW-2 was the most natural and independent witness of the incident and there was nothing on record to show that he had any animus, grudge, or vendetta against the appellant to depose falsely against the appellant. There is nothing brought out in cross-examination to render her evidence fragile. Learned trial court has rightly held the appellant guilty; the findings recorded by the trial court are on appreciation of the evidence, which is neither perverse nor contrary to the evidence on record; the charges levelled against the appellant had been proved beyond a reasonable doubt. Thus, his conviction and sentence do not warrant any interference. The judgment and order of the trial court are liable to be affirmed. A prayer was, therefore, made to dismiss the appeal.

ANALYSIS OF THE PROSECUTION EVIDENCE:

19. Before considering the respective submissions, it would be appropriate to

notice the arguments on behalf of the appellant in detail. The appellant's arguments are:

Firstly; the FIR of the present case was lodged with consultation and deliberation on 12.11.2008 after 30 hours of the incident, if the FIR was registered as alleged in the morning of 12.11.2008 at 6:10 a.m., even though the distance between the place of occurrence and the police chowky is just 1 Km. and the police arrived at the place of the incident immediately after the occurrence. The delay in lodging the FIR assumes significance and casts a complete shadow of doubt on the prosecution case and such delay seriously doubts the truth and veracity of allegations levelled by the victim. The delay in lodging the FIR corrodes the credibility of the prosecution story for the reasons below:

(a) As per the statement of PW-2 Uma Kant Sharma, police came immediately after the incident on 10.11.2008 at the place of the incident but the FIR was lodged after 30 hours (if the FIR was lodged on 12.11.2008 at 6:10 a.m.) of the incident.

(b) As per the statement of PW-2, the appellant was arrested from the room of colonel sahab i.e. place of incident at 2.30 hours on the night of 10/11, but the FIR was lodged on 12.11.2008. However, the arrest of the appellant had been shown on 12.11.2008 at 8:00 hours from B-180 Nirala Nagar, (from the place of the incident) as per arrest memo.

(c) There is an overwriting over the date as shown '12.11.2008' in the complaint (Ex.Ka.-1) and deleting of the word "Aaj" of the complaint and the name of the scribe of the complaint had not been mentioned, therefore, scribe of the complaint was not examined by the prosecution;

(d) G.D. Rapat No. (Ex.Ka.-5), which was prepared after lodging the FIR, has no number, date, or time.

(e) There is no date on which the FIR was sent to the jurisdictional Magistrate.

(f) PW-1 victim stated that she lodged the FIR on 12.11.2008 after waiting for her nephew, but on the other hand, PW-2 Uma Kant Sharma stated that he dialed number 100 and went to the police station; SI Ranjit Dubey came at the place of incident and he lodged the report, the fact regarding the theft had been told.

Secondly; the entire genesis of the case is in serious doubt in view of the contradictions and material inconsistencies between the statement of PW-1 victim and PW-2 Dr. Uma Kant Sharma, with regard to the presence of eye-witness PW-2 Uma Kant Sharma, lodging of the FIR, and time of arrest of the appellant, which emerges from the following circumstances:

(a) PW-1 victim firstly; stated in her examination-in-chief that on her screaming, Uma Kant Sharma and one person, who came to the house of Ratan Kant Sharma, reached the spot; secondly; the victim stated in her cross-examination that PW-2 Uma Kant Sharma and Ratan Kant Sharma reached on her screaming after 15 minutes and no other person except them reached on her screaming. thirdly; she stated in her statement recorded under Section 164 Cr. PC. (Paper No. A-6/23, which has no date of its recording), which has been endorsed by the I.O. after 17 days of the incident on 28.11.2008, that hearing her voice an advocate, whose name she does not know, reached there and scolded Rajesh.

On the other hand, PW-2 Uma Kant Sharma stated that he awoke to the noise of the daughter of Judge Chandra, who lived behind, she saw the incident from her rooftop and said a man is harassing a woman who is screaming. When he came out, and saw the appellant was laying down over the victim in a bush at that time the

appellant was naked, after that client of vakeel sahab reached there.

(b) PW-1 victim stated in her cross-examination that PW-2 Uma Kant Sharma resided 2-3 houses away from the place of the incident (i.e. house of the colonel S.K. Sharma); on the other hand, PW-2 Uma Kant Sharma stated that he resided in the back portion of the house of colonel S.K.Sharma.

(c) PW-2 Uma Kant Sharma in his statement-in-chief stated firstly; the appellant broke the door of the colonel with a trowel (Khurpi), and he interrupted on which the appellant told that he was repairing the stool. He dialed number 100 and went to the police station, met inspector Ranjit Dubey and Ranjit Dubey came to the place of occurrence.

secondly; PW-2 stated in his cross-examination that he and Dr. M. Tripathi informed the police. The police came to the spot and inquired about the incident. The victim called. Meanwhile, the appellant fled away. He informed the police about the fact regarding theft and lodged the report (but there is no report on record). The appellant was arrested from the room of colonel sahab (place of the incident) at 2.30 hours on the night of 10/11, but the arrest of the appellant had been shown on 12.11.2008 from the same room.

But on the other hand, PW-1 victim lodged the FIR on the basis of written complaint, wherein she put her thumb impression, after waiting for her nephew on 12.11.2008. She further stated in her cross-examination that she did not remember the name of scribe of the complaint. Furthermore, the name of scribe of the complaint is not mentioned in the complaint.

Thirdly; the prosecution case wholly depends on the testimony of a solitary witness, PW-1 victim 'X'. The incident occurred in the night at 9:00 a.m. and nobody witnessed the incident, which is borne out from the contradictions/omissions present in the testimony of PW-1, PW-2, and PW-3. The ocular version of PW-1 does not appear reliable and does not inspire confidence in the prosecution case. In support thereof, it has been pointed out that;

(a) there is a material inconsistency between her chief-examination and cross-examination of the victim PW-1. She stated in her cross-examination that she had told the police about the facts of holding her chest and attempt of penetration, but it is not written in her statement recorded under Section 161, Cr.PC., as also stated by PW-3 S.I. Ranjit Dubey (I.O.) who stated in his cross-examination that it is correct to say that in her statement under Section 161 Cr. PC., tearing of the blouse, pressing chest, and attempting to do intercourse is not mentioned because the victim did not tell so.

However, the FIR was lodged under Section 354, IPC, and offence punishable under Section 376 read with Section 511, IPC had been added after 16 days of the incident.

Fourthly; there are material inconsistencies beween the statement of PW-2 Uma Kant Sharma and PW-3 S.I. Ranjit Dubey with regard to the place of the incident because:

(a) PW-2 Uma Kant Sharma stated in his examination-in-chief that he saw the applicant lying down over the victim in a bush and at that time the appellant was naked, but on the other hand, PW-3 S.I. Ranjit Dubey stated in his cross-examination that he prepared the site map of the place of incident on the instance of the victim, which was situated in the mid of lawn and there was no tree or bush nearby.

Fifthly; there are material contradictions with regard to the injury

sustained by the victim PW-1 between the statement of PW-1 victim and PW-3 S.I. Ranjit Dubey (I.O.) because:

(a) the victim stated in her statement recorded under Section 164 Cr. PC. that as soon as she went inside the house, the appellant after grabbing her tightly, pulled her hair and torn all her clothes, after dragging her from the gate the appellant went towards the bush and took off all his clothes, and tried to rape her. In this attempt, he pulled her hair, hit her and twisted her neck but she did not medically examine.

(b) The victim PW-1 stated in her chief-examination that she sustained abrasions on both her knees and hand and in her cross-examination she stated that she kept fighting for 10-15 minutes till PW-2 Uma Kant Sharma came, but on the other hand, PW-3 S.I. Ranjit Dubey (I.O.) stated that he did not get her medical examination conducted because there was no injury and abrasion on the body of the victim.

Sixthly; As per the statement of PW-2 Uma Kant Sharma, who claimed to be an eye witness of the incident, reached the place of occurrence after the daughter of Judge Chandra called him, who witnessed the incident from the rooftop of her house. She had not been examined by the prosecution.

20. It is appropriate to mention the statement of the victim recorded under Section 164, Cr.P.C. (Paper No. A-6/23, which has no date of its recording) before appreciating the evidence of the prosecution witnesses, which is as follows:-

"She cooks food at the house of colonel sahab. On 10.11.2008 at 9.00 p.m. Rajesh Dubey, the guard of the colonel sahab came to her house and told that colonel sahab has came and is calling her. Sahab and Mem sahab had gone out somewhere. As soon as she went inside the house, Rajesh Dubey after grabbing her tightly pulled her hair and torn all her clothes. After dragging her from the gate he went towards the bush and took off all his clothes. He tried to rape her. In this attempt, he pulled her hair, hit her, and twisted her neck, due to which her neck is still in pain. She was crying out loudly. Hearing her voice an advocate, whose name she does not know, reached there and scolded Rajesh. She somehow wrapped her clothes and ran away to her house. She went home and told her husband about the incident."

21. Before I proceed to dwell upon the merit of the contentions raised before me, it will be apposite to have close scrutiny of the entire ocular evidence, which is as follows:-

22. **PW-1** victim 'X' (aged about 39 years) stated in her examination-in-chief that she is illiterate and is a maid in the house of Colonel Shashi Kant Sharma only for cooking food. The applicant was a security guard at the same house. Six month ago, the appellant came to her house to call her at 9:00 p.m. and told her that colonel has come and called her for cooking food. She went with him. As soon as she opened the gate of the house of colonel and entered inside, the appellant followed her and caught her hand, and put off her clothes. He began to hold her breasts with bad intentions and began coercing her and attempting to insert his urinal part into her urine tract. She raised alarm. On her screaming, Uma Kant Sharma and one person, who came to the house of Ratan Kant Sharma, reached the spot. Then, they scolded the appellant and freed her. During the scuffle, she sustained abrasions on her both knees and hands. She

lodged the report Ex.Ka.-1 on 12.11.2008 after waiting for her nephew.

23. PW-1 victim 'X' in her cross-examination stated that her house is situated 1-1.5 Km. away from the house of S. K. Sharma, 5-7 minutes walking distance from the place of the incident. The house of colonel is situated on the main road which is a busy road. In the house of colonel, she has been cooking food for 10 years and she had not come to the house at 6:00 p.m. on the date of the incident. She used to go to prepare the food in the morning and evening. She did not go to the house to prepare the food at night. There are 4-5 rooms in the house. The distance between the main gate and the rooms is about 10-20 feet. The boundary of the house is higher than her height. At the time of the incident, she had put on a sari. The appellant has been working as a security guard for 6-7 months. The brother of colonel did not come just after she screamed.

24. The court asked questions to the victim 'X' wherein she stated that Uma Kant Sharma came after 10 -15 minutes till then she kept fighting and screaming. Uma Kant Sharma and Ratan Lal Sharma are brothers. They lived 2-3 houses away from the house of colonel and no other person except them reached on her screaming. The incident took place at 9 p.m. she did not remember the day and date of the incident. She had told the police about the facts of holding her chest, and the attempt of penetration, but it is not written in her statement. She is not aware of the meaning of the word 'ashleel'. Today she explained in court about 'Badtmeeji'. Uma Kant Sharma had come inside the gate and was standing near the lobby at some distance, at that time her sari was open and her blouse was torn. Today the sari and torn blouse are not present in the court.

25. She further stated in her cross-examination that she went to the police station on the next day of the incident. She did not remember the name of scribe of the complaint. There is overwriting on the date and year in the complaint. Before this incident, she was not in talking terms with the appellant. Medical examination has not been got conducted.

26. Some other questions have been asked by the court to the victim 'X' which are as follows:

When you did not have any talking terms with the appellant, how did you rely upon him and come? On 11.11.2008, it gets very dark at 9:00 p.m. why did you not bring your husband or any other member with you?

The victim 'X' stated that "I am serving there and he was also serving there. Whenever a servant will call, I would presume that I have been called. Whenever it became late during the feast or food parties I used to come alone. That day there was no feast or party. colonel sahab was not at home, he had gone outside. I went there upon being called because he told me that sahab has come."

27. The following suggestions have been asked from this witness, it is wrong to say that whenever the colonel was not present, she often went to meet the appellant and after being noticed by the brother of colonel, she lodged a false case.

28. It is noticeable that there are inconsistencies between the statement of the prosecutrix with regard to the presence of PW-2 Uma Kant Sharma, who claimed as eye witness of the incident at the spot. *firstly*; she stated in her statement-in-chief that on her screaming PW-2 Uma Kant

Sharma and one other person, who had come to the house of Ratan Kant Sharma reached the spot and they scolded the appellant and saved her. secondly; she stated in her cross-examination that on her screaming PW-2 and Ratan Lal Sharma reached the spot and no other person except them reached. thirdly; she stated in her statement recorded under Section 164 Cr. PC. that hearing her cries an advocate, whose name she does not know, reached there and scolded the appellant.

29. It is further noticeable that despite the injuries sustained by the prosecutrix no medical examination has been conducted. As the prosecutrix stated in her cross-examination that PW-2 came after 10-15 minutes till then she kept fighting and screaming and during the scuffle, she received abrasions on her both knees and hands. PW-1 further stated in her statement recorded under Section 164 Cr. PC. that the appellant after grabbing her tightly pulled her hair and torn all her clothes, after dragging her from the gate he went towards the bush, in this attempt, he hit her and twisted her neck.

30. It is further noticeable that there is inconsistency with regard to the fact of attempting to commit rape. *firstly*; she stated in her cross-examination that she told the police about the facts of holding her chest and attempting penetration with her, but it was not written in her statement under Section 161 Cr. PC. and she did not tell about tearing off her blouse, pressing her chest and attempted to do intercourse under Section 161 Cr. PC. Although her statement recorded under Section 164 Cr. PC. stated that the appellant attempted to commit rape with her.

31. After analysing all of the above circumstances, it rounds off to the following facts: *Firstly*; during the attempt to commit rape she kept fighting for 10-15 minutes with the appellant and she sustained abrasions over her both knees and hands but she did not medically examine. *Secondly*; there is overwriting over the date of the complaint as well as the word 'Aaj' in the complaint (Ex.Ka.-1). *Thirdly*; there is a discrepancy with regard to the presence of PW-2 who reached the place of the incident on her screaming. Fourthly; there is an inconsistency between the statement of the prosecutrix with regard to attempt to commit rape with her.

32. **PW-2** Dr. Uma Kant Sharma (Dental Doctor) stated in his statement-in-chief that the incident occurred at 8:30-9:00 p.m. on 10.11.2008 when his brother was not present in the house, and at that time he was lying in her room. The victim was engaged in preparing food every morning and evening whenever his brother was present in the house. In the same house, his brother was living in the front portion and he was living in the back portion of that house. He noticed that the appellant was in a drunken state and he went to the house of the victim to call her to prepare the food and she had to proceed immediately. Thereafter the appellant began to coerce and scuffle with her and also began making attempt to take her backward.

33. He stated further in his examination-in-chief that he awoke on the noise of daughter of Judge Chandra Sahab, who lived behind, saw from her rooftop, and said a man is harassing a woman who is screaming. When he came out, he saw in the tube light that the appellant was laying down over the victim in a bush, at that time the appellant was naked and was riding over her. He saw the appellant was doing obscene activities with the victim. He asked

her to move away, then the appellant said that he was not his servant. After that the client of vakeel sahab reached there. The clothes and slippers of the victim were left there. Thereafter the victim went to her house. The clothes and slippers of the victim were left there. Then the appellant broke the door of room of the house of colonel with a trowel (*Khurpi*), the witness interrupted on which he told that he was repairing the stool. Before this incident, the appellant did obscene activities with transgenders. He dialed number 100 and went to the police station and met inspector Ranjit Dubey. Then the inspector came to the place of the incident. The appellant had absconded. He lodged the report.

34. PW-2 Dr. Uma Kant Sharma in his cross-examination stated that the victim has been working since 2000. He and the colonel lived in the same house and he was alone when the incident occurred. Daughter of Judge Sahab, who lived behind the house told that a person was teasing a girl. He saw the incident from a distance of 2 and a half meters, the appellant and victim at the front portion of the house on the lawn in a shrub, and the victim was screaming. The appellant was riding over the victim, her legs were widened and his pants were open. After seeing him, the appellant did not flee. He felt that the appellant was in a drunken state.

35. He further stated in his cross-examination that he and Dr. M. Tripathi informed the police and the police came at the spot and inquired about the incident. At that time appellant fled away. The victim called and she would have told the police about the rape. The inspector got written the report by him. After writing half report, the fact regarding theft had been told. The fact of theft was not mentioned. The appellant was arrested from the room of colonel at 2:30 hours of the night of 10/11 in his presence.

36. The following suggestions have been asked from this witness, it is wrong to say that the appellant and the victim had sweet relations. It is also wrong to say that a false report has been lodged on being seen by this witness.

37. After analysing the evidence of the witness it is noticeable *firstly;* that PW-2 reached the spot after receiving the information from the daughter of Judge Chandra who saw the incident from her rooftop. He resided in the back portion of the house. *secondly*; PW-2 saw the incident in a bush situated in the front part of the house, but the appellant had absconded. *thirdly*; PW-2 dialed 100 number and went to the police station and met with PW-3 S.I. Ranjit Dubey who came to the place of occurrence and called the victim. *fourthly*; He lodged the report with regard to the incident of theft, however, it is not on record. *fifthly; t*he appellant has been arrested from the room of the colonel at 2:30 hours of the night of 10/11 in his presence i.e. on the date of the incident.

38. There is an inconsistency with regard to the arrest of the appellant in his statements, *firstly*; he stated that the appellant had absconded from the place of the incident *secondly*; he stated that the appellant was arrested from the room of colonel at 2:30 hours of the night of 10/11 i.e date of the incident, before lodging the FIR.

39. **PW-3** SI Ranjit Dubey (I.O.) deposed that the investigation of the present case was assigned on 12.11.2008. He arrested the appellant on 12.11.2008.

On 27.11.2008, he recorded the statement of the victim, Dr. Uma Kant Sharma, and Ratan Kant Sharma. He sketched the place of the incident (Ex.Ka.-2) after inspection at the instance of the victim. On 28.11.2008, copied the statement of the victim recorded under section 164 of Cr. P.C. and after completing the investigation, filed a charge sheet (Ex.Ka.-3) against the appellant under Sections 354, 376 read with 511 of IPC on 11.12.2008. The Chik FIR (Ex.Ka.-4) of the case was prepared by Head Constable Ashaarf Ali, who was posted with him. The lodging General Diary Rapat (Ex.Ka.-5) was also in the handwriting of HCP Asharaf Ali.

40. PW-3 SI Ranjit Dubey in his cross-examination further stated that the FIR was registered under Section 354 IPC. It is correct to say that holding the chest of the victim by the appellant and attempting to do intercourse is not mentioned in the written complaint, only obscene activities are mentioned. He recorded the statement of the victim on 27.11.2008 after 15 days of the incident because she was neither present at the spot nor found at her house. It is correct to say that he tried to meet the victim on 12.11.2008 but she could not be found. It is correct to say that he did not get her medical examination because there was no injury or abrasion on the body of the victim. Neither the clothes of the victim were taken into custody nor her clothes were found at the spot.

41. PW-3 SI Ranjit Dubey in his cross-examination further stated that he prepared the site plan of the place of incident at the instance of the victim, where the appellant committed obscene activities, which has been shown as 'AX' situated in the lawn in front of the house. This place is situated in the centre of the lawn. There was only grass in the lawn and no tree or shrub were there. There were Ashok trees on two sides, eastwards and northwards of the lawn. He did not tell how wide the lawn was. He also did not tell about the distance between the gate and the place of the incident. He could not tell if the distance between points 'AX' and 'BX' was 35-40 feet.

42. PW-3 SI Ranjit Dubey in his cross-examination further stated that the victim, in her statement stated that the incident occurred at 9:00 p.m., the appellant after holding her arms and committed obscene activities, he began pulling her and untied her sari with the intention to commit rape. She began screaming loudly. She further stated him that Uma Kant Sharma and Ratan Kant Sharma came and saved her chastity. It is correct to say that the victim in her statement, did not tell about tearing off her blouse, pressing her chest, and attempted to do intercourse. The witness himself stated that the fact of the attempt to do intercourse was told. It is also correct to say that the victim had not stated in her statement that the appellant had undressed himself.

43. PW-3 SI Ranjit Dubey in his cross-examination further stated that the statement of the victim under section 164 Cr.PC. is not present in the file. After the statement, he filed an application for perusal of the statement. That application is also not in the file. It is correct to say that in the statement under section 164 Cr. PC the victim told about the arrival of a person at the place of the incident. The victim was not conversant with the names of two persons because both were not known to her. It is also correct to say that in the statement under section 161 Cr. PC. she told about the arrival of two persons Uma

Kant Sharma and Ratan Lal Sharma (brothers of colonel sahab), who were living at the aforesaid house at the time of the screaming. It is correct to say that name of Uma Kant Sharma and Ratan Lal Sharma are mentioned in the complaint. It is correct to say that on the basis of the statements of the victim as well as witnesses he had added Section 376/511 IPC.

44. The following suggestions have been asked from this witness; it is wrong to say that the victim had not been working in the house of colonel for the last 10 years. It is also wrong to say that the victim had told about the occurrence of obscene activity and under the pressure of higher officers he added Section 376/511, IPC. It is also wrong to say that the appellant has been implicated in false case under the pressure of colonel sahab.

45. After going through the evidence of this witness, it is noteworthy f*irstly*; He recorded the statement of the victim on 27.11.2008 after 16 days of the incident because she was neither present at the spot nor found at her home. *Secondly*; he did not conduct medical examination of the victim because there was no injury or abrasion on the body of the victim. *Thirdly*; the victim in her statement before him did not tell about tearing off her blouse, pressing her chest and attempting to do intercourse. *Fourthly*; he prepared the site plan on the instance of the victim, as shown as 'AX' situated in the mid of the lawn there was no tree or shrub. *Fifthly*; he added Section 376/511, IPC after recording the statement of the victim and PW-2 under Section 161, Cr. PC. which have been recorded on 27.11.2008.

46. **PW-4** HCP Asharaf Ali Khan (scribe) in his statement-in-chief stated that he had registered the FIR (Ex.Ka.- 4) as Case Crime no. 504 of 2008, under Section 354 IPC at PS Hasanganj District Lucknow on the basis of the victim's written complaint and endorsed it in G.D. Report No. 7 at 6:10 hours. By using carbon with the original he had written in a single process, a carbon copy of G.D. Rapat of lodging FIR is annexed to the record as Ex.Ka.-5, which is in his handwriting with his signature.

47. PW-4 HCP Asharaf Ali Khan (scribe) in his cross-examination stated that the victim had brought written tehreer (complaint) to the police station. She had come to the police station alone and when he asked her, she had told him that there was no external and internal injury on her body therefore, her medical examination was not conducted. The victim had not come carrying any torn clothes. The original G.D. Rapat is not present before him today. As per the rules, it has not been weeded out.

48. One suggestion has been asked from this witness; it is wrong to say that he had registered the case under the pressure of higher officers.

49. As per the testimony of this witness, it is noticeable that he asked the victim about external and internal injury but after her denial, the medical examination of the victim was not conducted.

DISCUSSION:

50. The questions arising for consideration before me are: Whether the prosecution case, inspires confidence on the evidence adduced? Whether the prosecutrix, is a witness worthy of reliance? Whether the testimony of PW-1 who has been a victim of

sexual assault and attempt to rape stands in need of corroboration and, if so, whether such corroboration is available in the facts of the present case? Whether there was an unexplained delay in lodging the FIR? Whether the findings of fact recorded by a court be held to be perverse?

51. In order to arrive at the correct conclusion, I deem it appropriate to examine the basic ingredients of Section 375, IPC (Before the Amendment 2013) punishable under Section 376, IPC to demonstrate whether the conviction of the appellant under Sections 376/511, IPC is sustainable.

*"**375. Rape.**- A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-*

Firstly.- Against her will.

Secondly.- Without her consent.

Thirdly.- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.- With or without her consent, when she is under sixteen years of age.

Explanation.- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.- Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

52. The law on the subject has been clearly and explicitly enunciated by the Apex Court in various judgments. In the case of **State of U.P. Babul Nath (1994) 6 SCC 29** the Supreme Court dealt with the basic ingredients of the offence under Section 375 in the following words:- (SCC, para 8, page 34)

"8. It may here be noticed that Section 375 of the IPC defines rape and the Explanation to Section 375 reads as follows:

Explanation.- Penetration is sufficient to constitute the sexual intercourse necessary of the offence of rape.

From the Explanation reproduced above it is distinctly clear that ingredients which are essential for proving a charge of rape are the accomplishment of the act with force and resistance. To constitute the offence of rape neither Section 375 of IPC nor the Explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim/prosecutrix. In other words to constitute the offence of rape it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim would be quite enough for the purpose of Section 375 and 376 of IPC. That being so it is quite possible to commit legally the offence or rape even without causing any injury to the genitals or leaving any seminal stains. But in the

present case before us as noticed above there is more than enough evidence positively showing that there was sexual activity on the victim and she was subjected to sexual assault without which she would not have sustained injuries of the nature found on her private part by the doctor who examined her."

53. In **Tarkeshwar Sahu v. State of Bihar (Now Jharkhand) (2006) 8 SCC 560,** the Supreme Court has observed as under. (SCC, para 22, page 572)

"22. In the backdrop of settled position, when we examine the instant case, the conclusion becomes irresistible that the conviction of the appellant under Sections 376/511 IPC is wholly unsustainable. What to talk about the penetration, there has not been any attempt of penetration to the slightest degree. The appellant had neither undressed himself nor even asked the prosecutrix to undress so there was no question of penetration. In the absence of any attempt to penetrate, the conviction under Sections 376/511 IPC is wholly illegal and unsustainable."

54. The distinction between preparation to commit a crime and an attempt to commit it was indicated by quoting from Mayne's Commentaries on the Indian Penal Code to the effect:

"Preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement towards the commission after the preparation have been made."

55. In Stephen's Digest of Criminal Law, 9th Edition, attempt' is defined thus:

"An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts, which would constitute its actual commission if it were not interrupted. The point at which such a series of acts begins cannot be defined; but depends upon the circumstances of each particular case."

56. In **Madan Lal v. State of J & K, (1997) 7 SCC 677,** the Supreme Court observed as under: (SCC para 12, page 689)

"12. The difference between preparation and an attempt to commit an offence consists chiefly in the greater degree of determination and what is necessary to prove for an offence of an attempt to commit rape has been committed is that the accused has gone beyond the stage of preparation. If an accused strips a girl naked and then making her lie flat on the ground undressed himself and then forcibly rubs his erected penis on the private part of the girl but fails to penetrate the same into vagina and on such rubbing ejaculates himself then it is difficult for us to hold that it was a case of merely assault under Section 354 IPC and not an attempt to commit rape under Section 376 read with 511 IPC. In the facts and circumstances of the present case the offence of an attempt to commit rape by the accused has been clearly established and the High Court rightly convicted him under Section 376 read with Section 511 IPC."

57. The difference between 'attempt' and 'preparation' in a rape case was again considered in **Koppula Venkat Rao v. State of A.P. (2004) 3 SCC 602**, the Supreme Court observed as under: (SCC para 10-11, page 606)

"10. An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part-execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission or consummation/completion. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly show the legislative intention to make a difference between the cases of a mere preparation and an attempt.

11. In order to find an accused guilty of an attempt with intent to commit rape, court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events, and in spite of all resistance, materials must exist. Surrounding circumstances many times throw beacon light on that aspect."

58. In **State of Madhya Pradesh v. Mahendra @ Golu 2021 SCC Online SC 965** the Supreme Court observed as under:

"16. A plain reading of the above provision spells out that sexual intercourse with a woman below sixteen years, with or without her consent, amounted to 'Rape' and mere penetration was sufficient to prove such offence. The expression 'penetration' denotes ingress of male organ into the female parts, however slight it may be. This Court has on numerous occasions explained what 'penetration' conveys under the unamended Penal Code which was in force at the relevant time. In Aman Kumar v. State of Haryana (2004) 4 SCC 379, it was summarised that:-

"7. Penetration is the sine quo non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (see joseph Lines, IC&K 893)"

59. In **Aman Kumar & Anr. v. State of Haryana (2004) 4 SCC 379**, the Supreme Court observed as under: (SCC para 8, page 387)

"8. The plea relating to applicability of Section 376 read with Section 511 IPC needs careful consideration. In every crime, there is first, intention to commit, secondly, preparation to commit it, thirdly, attempt to commit it. If the third stage, that is, attempt is successful, then the crime is complete. If the attempt fails the crime is not complete, but law punishes the person attempting the act. Section 511 is a general provision dealing with attempts to commit offences not made punishable by other specific sections. It makes punishable all attempts to commit offences punishable with imprisonment and not only those punishable with death. An attempt is made punishable, because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is the

same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. As the injury is not as great as if the act had been committed, only half the punishment is awarded."

60. The important ingredient of the offence under Section 375 punishable under Section 376, IPC is penetration. No offence under Section 376 IPC can be made out unless there was penetration to some extent. In absence of penetration to any extent would not bring the offence of the accused within the four corners of Section 375, IPC. Therefore, the basic ingredients for proving a charge of rape are the accomplishment of the act with force. The other important ingredient is penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim completely, partially or slightly would be enough for the purpose of Section 375 and 376 IPC.

61. In case of **State of Punjab v. Major Singh AIR 1967 SC 63** a three-Judge Bench of the Supreme Court considered the question whether modesty of a female child of 7 months can also be outraged. The majority view was in affirmative. Bachawat, J. on behalf of majority, opened as under: (AIR para 15 page 67)

"15. The offence punishable under section 354 is an assault on or use of criminal force to a woman with the intention of outraging her modesty or with the knowledge of the likelihood of doing so. The Code does not define, 'modesty'. What then is a woman's modesty?

62. It is settled position of law that a conviction can be based entirely on the statement of a rape victim, a detailed discussion on this subject is to be found in **Vijay @ Chinee v. State of Madhya Pradesh**4, as, thus, the law that emerges on the issue is to the effect that the statement of the prosecutrix if found to be worthy of credence, and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix. She stands at a higher pedestal than an injured witness. (Vide: **Phool Singh v. State of Madhya Pradesh**5, **Ganesan v. State Rep. By its Inspector**6, **State of Himachal Pradesh v. Raghubir Singh**7, **Wahid Khan v. State of Madhya Pradesh**8, **Rai Sandeep @ Deepu v. State**9, State of Rajasthan v. Babu Meen10, **Mohd. Iqbal v. State of Jharkhand**11, and **Md. Ali v. State of U.P.**12)

63. It is a well settled proposition of law that a prosecutrix cannot be considered to be an accomplice. As a rule of prudence, courts should normally look for some corroboration of her testimony in order to satisfy itself that the prosecutrix is telling the truth and that a person, accused of rape, has not been falsely implicated. There is no rule of law that her testimony cannot be relied upon without corroboration. It has also been laid down that the type of corroboration required must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence. However, if the court may find it difficult to accept the testimony of the prosecutrix, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. (Vide: **Rameshwar v. State of Rajasthan**13, **Sidheshwar Ganguly v. State of West Bengal**14, **Gurcharan Singh v. State of Haryana1**5, **Modho Ram & Anr. v. State of U.P**.16, **State of Maharashtra v. Chandraprakash Kewalchand Jain**17, **Modam Gopal**

Kakkad v. Naval Dubey & Anr.18, **State of Rajasthan v. Shri Narayan**19, **Karnel Singh v. State of M.P**.20, **Bodhisattwa Gautam v. Miss Subhra Chakraborty2**1, **State of Punjab v. Gurmit Singh & Ors.**22 and **State of U.P. v. Pappu @ Yunus & Anr.**23)

64. It is settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution case, may not prompt the Court to reject the evidence in its entirety. (Vide: **State of Rajasthan v. Om Prakash**24, **State of U.P. v. M. K. Anthony**25, **State v. Saravanan & Anr.**26)

65. It is a 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 the evidence to separate the 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 witness. As the mental capabilities of a human being cannot be expected to be attuned to absorb all the details, minor discrepancies are bound to occur in the statement of witnesses. (Vide: **Sohrab & Anr. v. State of M.P**.27, **Bharwada Bhogini Bhai Hirji Bhai v. State of Gujarat**28, **Prithu @ Prithi Chand & Anr. v. State of Himachal Pradesh**29, and **State of U.P. v. Santosh Kumar & Ors.**30)

66. The delay in lodging the FIR in a sexual assault cannot normally affect the prosecution case, as held by the Supreme Court in various judgments, but where there is an inordinate delay in registration of the FIR, in such circumstances, it casts a cloud of suspicion on the credibility of the entire prosecution story and such type of delay would certainly be regarded as fatal to the prosecution case and thus, the whole prosecution case is under the cloud of suspicion and doubt. (Vide: **Satyapal v. State of Haryana**31, **Karnel Singh v. State of M.P**.32)

67. The absence of injuries on the body of the prosecutrix, generally, gives rise to an inference that she was a consenting party to coitus and shows that the prosecutrix did not resist but the absence of injuries is not by itself sufficient to hold that the prosecutrix was a consenting party. (Vide: **Gurcharan Singh v. State of Haryana**33, **Devinder Singh & Ors. v. State of Himachal Pradesh**34)

68. It is trite law that conviction cannot be based on the sole testimony of the prosecutrix, which is inconsistent and unsupported by the medical evidence and evidence of other witnesses. (Vide: **Sadashiv Ramrao Hadbe v. State of Maharashtra & Anr**.35, **Dilip & Anr. v. State of Madhya Pradesh**36, **Vimal Suresh Kamble v. Chaluverapinake Apal S.P. & Anr.**37, **Yerumalla Latchaiah v. State of Andhra Pradesh**38, **Mohd. Habib v**. **State**39, **Zahroor Ali v. State of U.P**.40, **State of Karnataka v. Mapilla P. P. Soap**i41)

69. In **Sadashiv Ramrao Hadbe (supra)**, in this case, the version given by the prosecutrix was unsupported by medical evidence and the surrounding circumstances. No injury was found on the body and the private parts of the prosecutrix. Even the doctor who examined

her was unable to give any opinion about the alleged sexual intercourse. The Supreme Court had held that the appellant was entitled to the benefit of doubt and conviction was set aside.

70. In **Dilip** (supra), the Supreme Court disbelieved the statement of the prosecutrix, as it was contradicted by the statement of her own aunt and the medical evidence, as well as the report of the forensic science laboratory and had observed that the probabilities factor operated against the prosecutrix as it came on the record that she had stated that she could not resist the two accused persons who had allegedly raped her as she was over-awed at that time. The prosecutrix had complained that she had sustained injuries and had also bled from her private part which was not corroborated by the medical evidence and also no semen was found on the vaginal swab.

71. In **Vimal Suresh Kamble** (supra), the Supreme Court discarded the evidence of the prosecutrix since it did not appear to be natural and truthful. Her conduct after alleged rape was considered to be unnatural and not believable. There was also a delay in lodging the FIR and the medical evidence did not support the report of the chemical analyst, as the prosecutrix had taken bath on the day of the alleged rape, and hence it would have been known to her that this would have caused for the evidence to disappear.

72. In **Yerumalla Latchaiah** (supra), the Supreme Court disbelieved the prosecutrix since no injury was found on the body part of the victim, hymen was found intact and the vaginal smear did not detect any semen on them.

73. In **Mohd. Habib** (supra) a Division Bench of Delhi High Court had rejected the testimony of the 21 year old prosecutrix as it was found to be unreliable since there was no inflammation or redness on the private part of the girl, nor was there any injury on the male organ and the testimony of the eye witness did not corroborate the version of the prosecutrix. It had been further observed that the prosecutrix had not given any explanation as to why her mother who had come to the spot immediately after the occurrence, who might have known about the entire events as it might have been told to her by the prosecutrix was not produced or examined. The swab of the vagina of the prosecutrix also did not show any seminal stain.

74. In the **State of Karnataka v. Mapilla** (supra), the Supreme Court had observed that the prosecution had not produced any medical report regarding the examination of PW-3. There was no evidence whatsoever to show that the doctor did prepare a medical report, hence the testimony of the prosecutrix was not believed. It was further disbelieved the prosecutrix as the alleged rape had taken place in the proximity of many neighbours and therefore, it could not be accepted that no one came after hearing the cries of the prosecutrix.

75. Having noticed the contentions of learned *amicus curiae* and learned AGA and having taken a glimpse of the evidence on record, now I will weigh the arguments of learned *amicus curiae* for the appellant. The arguments are three fold; *firstly*; the FIR of the present case was lodged after an unexplained delay of 30 hours of the incident because of consultation, and deliberation whereas police had reached the door step immediately after the incident and called the victim. *Secondly*; the prosecution case is based on solitary

testimony of the victim and *thirdly*; the evidence of victim is not trustworthy, cogent and reliable.

76. As per prosecution case the incident was took place at 8:30 p.m.- 9:00 p.m. on 10.11.2008, PW-2 Uma Kant Sharma had reached at the place of incident and he saw the incident, saved the victim from the appellant. The FIR was lodged by the victim on 12.11.2008 at 6:10 a.m. under Section 354, IPC and the appellant had been arrested on 12.11.2008 at 8:00 a.m. from the place of the incident. On 27.11.2008, the Section 376/511, IPC was added on the basis of statement of the victim as well as PW-2 Uma Kant Sharma recorded under Section 161 Cr. PC.

77. Learned *amicus curiae* is assailing the judgment *firstly,* there are material contradictions between the evidence of PW-1 victim and PW-2 Dr. Uma Kant Sharma with regard to the fact of lodging the FIR, as urged that the FIR was lodged after consultation and deliberation because PW-3 SI Ranjit Dubey had come at the place of the incident immediately after the incident, which is taken place on 10.11.2008 at 9:00 p.m. and PW-3 called the victim and the appellant had been arrested on 10/11/11/2008 at 2:30 a.m. but the FIR was lodged on 12.11.2008 at 6:10 a.m. after about 30 hours of the incident.

78. There is inconsistency between the evidence of PW-1 and PW-2 with regard to lodging the FIR, PW-1 stated that PW-1 was lodged the FIR on 12.11.2008 at 6:10 a.m. after waiting her nephew, on the other hand, PW-2 stated that he reached the place of occurrence, saved the victim from the appellant, dialed 100 number and met with PW-3 SI Ranjit Dubey who came to the place of the incident and presented the victim and he told the police about the offence of theft and lodged the FIR against the appellant.

79. Furthermore, PW-2 stated that the appellant was arrested on 10/11.11.2008 at 2:30 a.m. from the room of the house of S.K. Sharma which had been opened by the appellant by a trowel, he interrupted on which the appellant told that he was repairing the stool but PW-3 SI Ranjit Dubey stated that the appellant was arrested on 12.11.2008.

80. After a close scrutiny of the evidence, many other inconsistencies have been surfaced i.e. there is overwriting in the complaint (Ex.Ka.-1) and chik FIR (Ex.Ka.-4) by the overwriting, date of the complaint, number of crime have been changed, G.D. Rapat (Ex.Ka.-5) has no number, date or time, name of the scribe is not mentioned in the complaint, PW-1 victim stated that she did not know the name of scribe of the complaint, there is no date on which copy of the FIR (Ex.Ka.-4) has been sent to the jurisdictional Magistrate.

81. The second limb of the argument is that the prosecution case wholly depends on the sole testimony of PW-1, because no one has seen the evidence, because there are material inconsistencies in this regard between the evidence of PW-1 and PW-2.

82. There are material contradictions with regard to presence of PW-2 who claim himself as an eye witness of the incident. As per prosecution case the incident was taken place nearby the main gate of the house in the lawn, at that time owner of the house was not present in the house PW-2 Uma Kant Sharma and one person, who came to the house of Ratan Kant Sharma,

reached the spot after hearing the alarm. PW-1 stated in her statement recorded under Section 164 Cr. PC. that on her crying an advocate, whose name she did not know, reached there. But on the other hand PW-1 victim stated in her cross-examination that PW-2 Uma Kant Sharma and Ratan Kant Sharma reached on her screaming after 15 minutes and no other person except them reached. It is significance that the appellant fled away from the spot who was in drunken position, after reaching the two person.

83. PW-1 stated that PW-2 resided 2-3 houses away from the place of the incident, on the other hand PW-2 stated that he resided in the back portion of the house. He further stated that he awoke after hearing noise of the daughter of Judge Chandra, who lived behind, when he came out, and saw the appellant was lying down over the victim in a bush at that time the appellant was naked. PW-3 SI Ranjit Dubey stated that the victim had not told him that the appellant put off his clothes. PW-1 victim had also not stated before the trial court that the appellant put off his clothes. PW-2 further stated that the incident took place in a bush, as per victim the incident took place after entering in main gate of the house and then in the mid of the lawn, where there were no tree or bush as corroborated by PW-3 SI Ranjit Dubey, who prepared the site plan (Ex.Ka.-2) on instance of the victim.

84. Learned *amicus curiae* further urged that the solitary ocular testimony of PW-1 does not appear reliable and does not inspire confidence in the prosecution case, because there is material inconsistencies with regard to the incident, place of the incident and injury of the victim, there is no medical report of the victim.

85. PW-1 victim stated that she had told the police about the facts of holding chest and attempt of penetration, but it is not written in her statement recorded under Section 161 Cr. PC. as corroborated by PW-3 SI Ranjit Dubey who stated that tearing of the blouse, pressing chest, and attempting to do intercourse is not mentioned in statement of the victim because the victim did not tell so.

86. PW-2 Uma Kant Sharma stated that he saw the appellant lying down over the victim in a bush, but on the other hand, as per PW-3 SI Ranjit Dubey the incident took place on the mid of the lawn, there was no tree or bush.

87. There is no medical examination report of the victim. PW-1 victim stated that she sustained abrasions on her both knees and hands, because she kept fighting for 10-15 minutes with the appellant. She further stated in her statement under Section 164 Cr. PC. that the appellant after grabbing her tightly pulled her hair and torn all her clothes, after dragging her from the gate he went towards the bush and took off all his clothes, and tried to rape. In spite of that she was not medically examined herself because she recieved no injury as stated by PW-3 SI Ranjit Dubey that he did not get her medical examination done because there was no injury and abrasion on the body of the victim.

88. It is not the duty of the defence to explain as to how and why in a sexual assault case the victim has falsely implicated the appellant. The evidence of prosecutrix cannot be accepted merely because the appellant has not been able to say as to why she has come forward to depose against him.

89. The findings of fact recorded by a court be held to be perverse has been dealt with and considered in **Babu v. State of Kerala**, (2010) 9 SCC 189 in paragraph 20, which is as under:

"20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence', or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (Vide: ***Rajinder Kumar Kindra v. Delhi Admin.****42,* ***Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons****43,* ***Triveni Rubber & Plastics v. CCE4****4,* ***Gaya Din v. Hanuman Prasad****45,* ***Aruvelu v. State****46* ***and Gomini Bala Koteswara Rao v. State of A.P.****47)"*

90. On a totality of the consideration of entire evidence and keeping in mind the settled position of law, I am unhesitatingly of the opinion that the testimony of PW-1 victim, PW-2 Dr. Uma Kant Sharma is unreliable. The prosecution evidence is not covincing. In support of this conclusion regard be had to the following circumstances:

(a) As per occular evidence the appellant was arrested on 10/11.11.2009 at 2:30 a.m. and the police had come at the place of the incident after calling 100 number and the victim called by the police, but the FIR has been lodged after 30 hours of the incident on 12.11.2008 at 6:10 a.m. despite the fact that the police were present at the door-step. In addition to that, PW-2 lodged a FIR with regard to fact of theft against the appellant immediately after the incident as he stated.

(b) There is no date for sending the copy of the FIR to jurisdictional Magistrate.

(c) There is overwriting in the complaint and the FIR with regard to the date of the complaint, case crime no. Name of the scribe did not disclosed by the prosecution.

(d) After recieving injuries by the victim as stated, no medical examination was conducted. However, she did not recieve any injury as stated by PW-3 and PW-4.

(e) The prosecution has not established the place of the incident as noticed above and there is inconsistency between the statement of PW-1, PW-2 and PW-3 in this regard. (f) As per prosecution case, the offence under Section 376/511, IPC has been added on 27.11.2008 after recording the statement of the witnesses after 17 days of the incident.

(g) The statement recorded under Section 164 Cr. PC. having no date of its recording before the Magistrate, however PW-3 endorsed the same in case diary on 28.11.2008. It is surprising fact that PW-3 SI Ranjit Dubey stated that the statement under Section 161 Cr. PC. as well the application which has been moved by him before the Magistrate to see the statement are not on record, but these documents are available on record.

(h) The statement recorded under Section 164 Cr. PC. and application aforesaid are on record as paper no. A-6/23 inspite of that the prosecution had not proved the signature of the victim before the trial court.

(i) As noticed above that there are material inconsistencies with regard to the lodging of FIR, the presence of PW-2 Dr. Uma Kant Sharma, place of the incident, fact of attempting rape.

91. Following aspects emerge from the discussion on the prosecution evidence:

(i) PW-2 neither witnessed the incident nor he reached the place of occurrence. The victim did not recieved any injury. The appellant was arrested on 10/11.11.2008 at 2:30 a.m. (on the date of the incident) from the room of the house by PW-2. This gives rise to two possibilities. One, no incident took place at 9:00 p.m. Two, the incident of theft took place in the night of 10/11.11.2008 and PW-2 called the police, PW-3 SI Ranjit Dubey arrested the appellant. Three, the victim was consenting party after seeing by someone she lodged the FIR after 30 hours of the incident.

(ii) The aforesaid possibilities derive strength from the delay in lodging the FIR despite the presence of police at the place of the incident after calling, and reached there and called the victim. In addition to that the incident took place on the mid of the lawn, which is open place.

92. On the basis of the facts and circumstances discussed above, an inferrence can easily be drawn that the prosecution case is wholly based on sole testimony of PW-1 victim and the evidence of the victim does not inspire confidence. Therefore, the entire genesis of the case is in serious doubt in view of the contradictions and material inconsistencies.

93. The contrary view taken by the trial court is against the weight of the evidence. I hardly find objective evaluation, analysis, or scrutiny of the testimony in a proper persepective. The serious infirmities pointed out by the defence raising doubt with regard to the prosecution case have been brushed aside by the learned trial judge by simply stating that the delay in lodging the FIR does not affects the prosecution case and there is no material contradictions in the prosection evidence. The trial court, in my view, was not right and justified in lightly brushing aside the contradictions and omissions borne out from the prosecution evidence, that too, when the entire prosecution rested on a sole testimony, PW-1 victim.

94. For all the reasons recorded and discussed above, I am of the considered view that the prosecution has failed to prove the charge of offences punishable under Section 354, 376/511, IPC against the appellant beyond reasonable doubt. As the evidence on record does not bring home the guilt of the appellant beyond the pale of doubt, the appellant is entitled to the benefit of doubt. Consequently, the appellant is entitled to be acquitted of all the charges for which he was tried.

95. As a result, the criminal appeal is allowed. The judgment and order of conviction as well as sentence recorded by the trial court is set aside. The appellant is acquitted of all the charges for which he has been tried. The appellant is released after completing the sentence as awarded by the trial court as informed by learned amicus curiae and AGA.

96. The trial court record be returned forthwith together with a certified copy of this judgment.

(2022) 11 ILRA 1223
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 24.11.2022

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. RENU AGARWAL, J.

Crl. Appl. No. 2362 of 2018
with Crl. Appeal Nos. 1993 of 2018 and 2242 of 2018

Ram Gopal @ Guddu ...Appellant
Versus
The State of U.P. ...Respondent

Counsel for the Appellant:
Arun Sinha

Counsel for the Respondent:
G.A.

Criminal Law- Indian Evidence Act, 1872- Section 32(1)- Dying Declaration- Multiple Dying Declarations- The statement recorded by the police has lesser important than the statement recorded by the Tehsildar, doctor or any other person as it is generally signed by the scriber (sic) and doctor and the patient itself but if there is no such statement and she is (sic) died on account of the injuries caused to her in the incident, the statement recorded under Section 161 Cr.P.C. becomes relevant and the conviction can be solely based upon such statement if it inspire (sic) confidence- While relying on the dying declaration, the court has to look into whether the statement was given by the victim voluntarily - As PW-7 stated that hospital employees and neighbours were not present in the room, it cannot be said that the statement given by the victim was under any duress, tutoring or prompting.

Merely because the dying declaration of the deceased was recorded by the investigating officer and not by the Magistrate or Doctor, would not render the same inadmissible and conviction of the accused can be secured solely upon the basis of the said dying declaration provided the same has been made voluntarily and without any coercion or tutoring.

Indian Evidence Act, 1872- Section 32(1)- Dying Declaration- Multiple Dying Declarations- When there are multiple dying declaration (sic), such dying declaration becomes doubtful but where there are inconsistency (sic) and contradictory statements in the dying declaration (sic), they should be examined in the light of surrounding and corroborating evidence, therefore, the multiple dying declaration cannot be thrown away on the very threshold. The only rider is that the multiple dying declaration should be examined in the light of other evidence produced by the prosecution during the trial or appeal.

Only when there are inconsistencies and contradictions in multiple dying declarations that the court has to look for corroboration.

Indian Evidence Act, 1872- Section 32(1)- Dying Declaration- PW-1 and PW-2 are not eye witnesses of the fact and they were not present when the appellants set the victim ablazed (sic). Therefore, if there is omission in the manner of incident in the statements of PW-1 and PW-2 that is immaterial because the statement of victim is intact regarding the manner of incident. It is also pertinent to mention here that the victim herself given (sic) only one statement under Section 161 Cr.P.C. and no other than this statement is recorded by any other person. Therefore we are not agree (sic) with the argument of learned counsel that there are multiple dying declarations- From the evidence on record, it is found that dying declaration by the statement of victim recorded by the Investigating Officer under Section 161 Cr.P.C. and relied by the Court under Section 32 of the Indian Evidence Act are (sic) reliable evidence and the evidence is corroborated by the medical evidence as well as the evidence of PW-1 and PW-2.

It is only the statement made by the deceased before her death and which is intact and trustworthy, that is relevant and admissible u/s 32 (1) of the Evidence Act while statements of other witnesses are immaterial.

Indian Evidence Act, 1872- Section 154- Hostile Witness- PW-3 is declared hostile by ADGC- It is settled proposition of law that the statement of hostile witness can be relied upon to the extent that he supports the prosecution case.

Settled law 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.

Indian Evidence Act, 1872- Section 134- It is the prerogative of the prosecution to

prove their case by single witness or the multiple witnesses and it is the reliability and credibility of the witnesses and not the number.

It is the quality and not quantity of evidence, which is relevant. (Para 41, 50, 53, 58, 59, 62, 63)

Criminal Appeal rejected. (E-3)

Case Law/ Judgements relied upon:-

1. Mehiboobsab Abbasabi Nadaf Vs St. of Kar., (2007) 13 SCC 112 (cited)

2. St. of Punj. Vs Praveen Kumar Crl. Appeal No. 633 of 1999 dec. on 18.11.2004 (Manupatra) (cited)

3. Sanjay Vs St. of Maha. ,(2007) 9 SCC 148 (cited)

4. Amol Singh Vs St. of M.P., (2008) 5 SCC 468 (cited)

5. Heikrujam Chaoba Vs St. of Mani., (1999) 8 SCC 458 (cited)

6. Uttam Vs The St. of Maha. Crl. Appeal No. 485 of 2012

7. Kundula Bala Subrahmanyam & anr. Vs St. of A.P (1993) 2 SCC 684

8. Shudhakar Vs St. of M.P., (2012) 7 SCC 569

9. Paniben (Smt.) Vs St. of Guj.(1992) 2 SCC 474

10. Lakhan Vs St. of M.P. (2010) 8 SCC 514

11. Amol Singh Vs St. of M.P., (2008) 5 SCC 468

12. Rajesh Yadav & anr. etc. Vs St. of U.P. in Crl. Appeal No. 339-340 of 2014 dec. on 04.02.2022

13. Attar Singh Vs St. of Maha. in Crl. Appeal No. 1091 of 2010, dec. on 14.12.2012

14. Amar Singh Vs Balwinder Singh & ors. in Crl. Appeal No. 1671 of 1995, dec. on 31.01.2003

15. Anant Mohanto Vs St. of Orrisa , AIR 1979 SC 1433

16. Vishram Vs St. of M.P., AIR 1993 SC 250

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

1. The present criminal appeal No. 2362 of 2018 has been filed on behalf of appellant-Ram Gopal @ Guddu under Section 374(2) Cr.P.C. against the judgment and order dated 24.10.2018 passed by Mukesh Kumar Singh, Additional Sessions Judge/Special Judge Anti Corruption, Court No. 6, Lucknow in Sessions Trial No. 1042 of 2010 (State Vs. Ram Gopal @ Guddu), arising out of Case Crime No. 168 of 2010, under Sections 147, 302 IPC, Police Station Hasanganj, District Lucknow, convicting and sentencing the appellants to undergo imprisonment for two years under Section 147 IPC and further convicting and sentencing the appellants to undergo imprisonment for life and fine of Rs. 5000/- under Section 302 read with 34 IPC and in default of payment of fine to undergo a further period of three months additional imprisonment in addition.

2. Criminal Appeal No. 1993 of 2018 has been filed on behalf of appellat-Munnu Pandit @ Mahesh Kumar against the judgment and order dated 24.10.2018 whereby the appellant-Munnu Pandit @ Mahesh has been convicted and sentenced as above.

3. Criminal appeal No. 2242 of 2018 has been filed on behalf of appellants, Pappu, Mangla, Smt. Radha and Kamla Devi against the judgment and order dated 24.10.2018 whereby the appellants have been convicted and sentenced as above.

4. Feeling aggrieved by the aforesaid judgment and order dated 24.10.2018, the

accused-appellants have preferred the aforesaid three appeals. Since, common factual matrix and law involved in the aforementioned appeals and they have been filed against the same impugned judgment, therefore, they are being decided by a common order.

5. Wrapping the facts in brief is that the complainant of the case Lal Ji lodged an FIR to the effect that on 25.04.2010 Ram Gopal @ Guddu, Pappu Sons of Mahavir, Mangla daughter of Mahavir, Munnu Pandit and wives of Guddu @ Ram Gopal and Pappu called and carried his mother to the house of accused-Ram Gopal @ Guddu and sprinkling kerosene oil upon her, set her ablaze. Her mother was badly injured. He admitted his mother in serious condition in Civil Hospital, Hazaratganj, Lucknow with the assistance of his neighbours. Neighbours Shravan Kumar Dixit S/o Ramesh Chandra Dixit, Sanjay Kumar S/o Laddan Gupta and my wife Ramawati Devi had seen the whole incident and tried to save his mother. On hue and cry, many of his neighbours gathered at the place of occurrence. His mother is hospitalized and later on died due to injuries caused by the accused persons.

6. On the basis of written report, a Case Crime No. 168 of 2010, under Sections 307 IPC, Police Station Hasanganj, District Lucknow was registered on 25.04.2010 and after the death of injured Durga Devi again a written information was given by the complainant to the police station that his mother died due to injuries caused by the accused.

7. Autopsy of the deceased was conducted by Hasanganj police and on the same day, the deceased was sent for getting postmortem through Constable Chandra Kumar, Police Station Hazaratganj, Lucknnow. The fact is recorded in "Nakal Rapat' No. 49 at 20:50 dated 01.05.2010, alongwith necessary papers, memo, copy of GD, copy of report, photonash, Chalannash, namuna nash. The Investigating Officer recorded the statement of injured Smt. Durga Devi and prepared the site plan and after collecting the sufficient evidences against the accused, filed chargehseet no. 162 of 2010 in the Court concerned.

8. The Magistrate concerned had taken cognizance of the case and summoned the accused persons and committed the case to the court of Sessions after compliance of provisions under Section 207 of the Cr.P.C. On the basis of written report, the chik report was prepared and endorsed in GD no. 35 at about 16:40 hours.

9. The accused were summoned by the court of Sessions and charge framed under Section 302 read with Section 149 Cr.P.C. against Ram Gopal @ Guddu, Pappu, Mangla, Munnu Pandit @ Mahesh Kumar, Radha and Kamla and read over to accused. The accused abjured from the charges levelled against them and claimed to be tried.

10. In order to prove this case against accused, prosecution adduced 9 witnesses, namely, P**W-1 Lal Ji,** the complainant of the case, **PW-2 Shravan Kumar Dixit**, eye witness of the case and witness of fact, who tried to save the deceased, **PW-3 Neeraj, PW-4 Dr. S.N. Pandey** who conducted postmortem in the body. **PW-5 HCP Asharaf Ali Khan** who prepared the chik report and GD, **PW-6 SI Kameshwar Singh** who prepared the inquest and conducted autopsy, **PW-7 SI Shambhu**

Nath Tiwari who recorded the statement of witnesses, inspected and prepared the site plan and recovered the towel and "Dhibari' and prepared recovery memo thereof (Exhibit-Ka-12), **PW-8 SHO Vinay Kumar Gautam** who recorded the statement of accused Ram Gopal @ Guddu son of Mahavir, Kamla W/o Pappu, Mangla W/o Ram Chandra and recorded the statements of witnesses of inquest, namely, Srilal, Ram Adhar, Ram Kumar, Budharam and Santram. He recorded the statement of witnesses Rameshwar, Tuntun and Rajesh Kumar and scriber of the FIR and statements of SI Shambhu Nath Tiwari and SI Rameshwar Singh and Constable Bheemsen and filed chargesheet.

The prosecution adduced and proved the following papers:

(i) Written reports, Exhibit Ka-1 and Ka-2

(ii) Inquest report, Exhibit Ka-6

(iii) Site Plan, Exhibit Ka-12

(iv) Copy of GD, Exhibit Ka-5

(v) Chalan Nash, Exhibit Ka-7

(vi) Photo Nash, Exhibit Ka-8

(vii) Specimen Seal, Exhibit Ka-9

(viii) Letter to Kotwali, Hazaratganj, Lucknow, Exhibit Ka-10

(ix) Death report, Exhibit-Ka11

(x) Chargesheet, Exhibit Ka-14

11. After conclusion of the evidence, the statements of the accused recorded under Section 313 Cr.P.C. All the accused denied from the commission of crime and stated that they are falsely implicated due to enmity. Accused Ram Gopal stated that he was not present at the place of occurrence as he went to Kanpur for purchasing Coconut in answer to the question no. 2.

12. After perusal of the record and hearing of the submissions advanced by the learned Government Counsel and learned Counsel for the accused, the trial court reached to the conclusion that all the accused are named in the First Information Report. The Investigating Officer recorded the statement of the injured Smt. Durga Devi on the same day on which day the incident occurred i.e. 25.04.2010 and learned court treated the statement of injured as her dying declaration under Section 162(2) of Cr.P.C and Section 32(1) of the Indian Evidence Act as she died due to injuries caused to her by the said accused. Learned trial court found that deceased stated about the role of all the six accused and their participation in the incident. PW-2, Shravan Kumar Dixit is an independent witness who corroborated the testimony of the deceased Durga Devi. Recovery of Towel and "Dhibari' was made from the threshold of the house of the accused Ram Gopal, therefore, the court convicted and sentenced all the six accused persons under Section 302 read with 34 IPC and punished them accordingly.

13. Heard Sri Arun Sinha, learned counsel for the appellants in the present appeal as well as in Criminal Appeal No. 2242 of 2018, Sri Amarjeet Singh Rakhra, learned counsel for the appellant in Criminal Appeal No. 1993 of 2018, Sri Arunendra, learned Additional Government Advocate for the State and perused the record.

14. Learned counsel for appellant-Munnu Pandit @ Mahesh Kumar argued that he is not named in the FIR. He is not implicated in the case. No role is assigned to him during the course of incident. He has no motive to commit the crime. PW-3 is completely hostile and PW-2 who is said to be eye witness of the incident also denied his role in the commission of crime.

15. Learned counsel for rest of the appellants stated that learned court below misinterpreted the evidence as there is no dying declaration of the deceased. The date of incident is said to be 25.04.2010 and the deceased expired on 01.05.2010. There was ample time to record the statement of the deceased in the form of dying declaration but the Investigating Officer made no effort to do so and the trial court relied on the statement of the deceased while being alive recorded by the Investigating Officer under Section 161 of Cr.P.C. There are many discrepancies in the statement the deceased herself and the statements of PW-1 and PW-2 recorded in the course of trial.

16. On the contrary, learned AGA vehemently opposed the arguments advanced by learned counsel for the appellants and stated that PW-2, alongwith PW-3 and two others, namely, Sanjay and Vikki was standing in front of his house with the intention to have a bath in the river when he saw the incident and tried to save the victim and took the victim, injured to the hospital. The statement of the victim was recorded by the Investigating Officer on very day of incident in hospital which was rightly believed by the trial court. The judgment passed by the trial court is in consonance with the facts and law and is liable to be uphold.

17. The PW-1, Lal ji stated on oath that accused Ram Gopal, Pappu and their wives Radha, Kamla and sister Mangla took her mother forcibly to their house, tied her hands, sprinkled kerosene oil and set her ablazed. His mother came out of their house raising alarm to save her. Shravan Kumar Dixit , PW-2 alongwith other neighbours gathered and informed the police. The complainant was informed by one Tuntun, brother of Shravan Kumar, about the incident. He reached to Daliganj bridge on the information received from Tuntun, the brother of Shravan Kumar Dixit where Shravan Kumar Dixit was taking his mother to the Trauma Centre, Medical College, Lucknow. Doctor refused to admit her and referred her to Balrampur Civil Hospital. The victim was carried to Civil Hospital Balrampur by police Jeep and got her admitted, then the complainant lodged the FIR in the concerned police station. This witness proved the written report as Exhibit Ka-1. It is also stated by this witness that his mother informed him before her death that Ram Gopal, Pappu and their wives and sister Mangla set her ablazed. He alleged that there was previous enmity between his mother and the accused as the accused wanted to grab her house and have also taken the earnest money for her house.

18. PW-2 Shravan Kumar Dixit deposed that he was standing in front of his house alongwith Vikki, Neeraj, Sanjay and Kapil. Ram Gopal called Durga Devi, the deceased to his house. After some time, Durga Devi came out of the house in burning condition followed by accused Ram Gopal @ Guddu, Pappu, Mangla, Munnu Pandit, Radha and Kamla who were threatening her. He alongwith his friends tried to save the victim by their Towel. They too sustained injuries by "Danda' inflicted by Ram Gopal @ Guddu, Pappu, Mangla, Munnu Pandit, Radha and Kamla. They rescued the victim to Balrampur hospital. On the way, he was told by the victim Durga Devi that Ram Gopal called her to his house, where Mangla, Munnu Pandit, Radha and Kamla were already present. All of them sprinkled kerosene oil on her and set her ablazed. Both hand of the victim were tied with piece of cloth which he released. PW-2 stated that she

was taken to said hospital by police jeep and during the treatment she expired on 01.05.2010. The witness identified all the accused during the trial in the court. PW-3 Neeraj was declared hostile by AGDC, however he stated that when he came out from his house, he saw a woman buring and people were gathered around her. He stopped for 5 to 10 minutes and then he went away.

19. PW-4 Dr. S.N. Pandey, Senior consultant, radiologist conducted the autopsy of the body of the deceased in the mortuary of medical university, Lucknow on 01.05.2010 at 2:40 p.m. which was brought by Constable 1670 Bheemsen and Head Constable 1817 Chandra Kumar.

20. Following antemortem injuries were found on the body of deceased:

(i) Superficial to deep septic burn would present on all over the body except both buttock sacral region public region, both back of thigh and both leg with both sole.

(ii) Pus slugh debris with unhealthy granulation tissues present in burn wound. On opening and section cutting of both lung, liver, spleen and both kidneys.

(iii)Multiple pus foci seen at places. Membranes, brain and pleura, left lung and pericardium congested. The death of deceased opined by the doctor "due to septisemia as a result of antemortem burn wound".

21. PW-5 HCP Ashraf Ali deposed in Court that on 25.04.2010 at about 16:50 p.m., Lal Ji son of Late Rameshwar submitted a written report sighed by him on police station. On the basis of written report, Crime No. 168 of 2010, under Section 307 IPC was registered against Ram Gopal @ Guddu, Pappu, Mangla, Munnu Pandit, Radha and Kamla. The written report was endorsed in GD No. 35 at 16:50 p.m. by Head Constable Ram Prakash Prajapati as Exhibit Ka-5 and investigation was handed over to SI Shambhu Nath Tiwari.

22. PW-6 SI Kameshwar Singh deposed that he conducted autopsy on the body of the deceased in the presence of witnesses and proved the inquest report as Exhibit Ka-6.

23. PW-7 SI Shambhu Nath Tiwari deposed in Court that he recorded the statements of the witnesses and wife of the complainant and recovered "Dhibari' and Towel from the house of the accused Ram Gopal and prepared recovery memo as Exhibit Ka-12.

24. PW-8 SHO Vinay Kumar Gautam stated on oath that he arrested the accused and recorded the statements of witnesses of inquest and statements of Rameshwar, Tuntun and Rajesh.

25. When the accused were asked to adduce evidence in their defence, the accused adduced DW-1 Ramesh Chandra Srivastava who deposed in Court that he was not summoned by the Court but accused Munnu was present in his house and joined the uninterrupted recital of Ramcharitmanas. He remained there from 7:00 a.m. till 8 to 9 p.m. alongwith his family members.

DISCUSSIONS:

26. PW-1 is not eye witness. It transpires from the record that he was informed by Tuntun, the brother of Shravan

Kumar Dixit, PW-2 regarding the incident and when he reached to the bridge of Daliganj, Shravan Kumar was taking his mother to Trauma Centre, KGMU. PW-2 is eye witness who was standing in front of his house and was preparing for taking bath in river, when he saw the victim coming out from the house of the accused Ram Gopal in burning condition. Immediately they tried to put off fire by their Towel and carried her to Balrampur Hospital by Riksha to Trauma Centre and thereafter he accompanied victim and complainant to Civil Hospital, Balrampur alongwith police constables.

27. PW-3, however declared hostile but he proved this fact that when he came out from his house, he saw a woman in burning condition and there was crowed also.

28. Learned counsel for all the accused stated that there is no dying declaration as contemplated by the law and learned trial court treated the statement of victim recorded under Section 161 Cr.P.C. by Investigation Officer as evidence under Section 162(2) Cr.P.C. and Section 32 of the Indian Evidence Act. It also argued that there are multiple dying declaration. One is recorded by the Investigating Officer, the second which victim told to her son, the complainant after three days of incident and third she revealed the incident to PW-2 Shravan Kumar Dixit when he was taking her to KGMU. All the three dying declaration have sharp contradictions and they do not build confidence to be believed to the extent to convict, the accused in the crime. PW-1 admitted in his cross-examination that her mother told him that the accused sprinkled kerosene oil and set her ablazed, after three days of incident. PW-2 stated that the victim told him about this incident when he was taking her to Balrampur Hospital that Ram Gopal @ Guddu called her to his house where Pappu, Radha Devi, Kamala Devi, Mangala and Munnu all were already present and all of them collectively set her ablazed. Learned trial court mentioned the statement of the victim recorded under Section 161 Cr.P.C. and made it part of judgment. Smt. Durga Devi, the injured stated that at about 02:30 p.m. when she was at her home, her cousin Ram Gopal @ Guddu, Pappu and her sister Mangla and wives of Ram Gopal @ Guddu and Pappu and their neighbour Munnu Pandit came and called her for consultation, as soon as she entered their house, all of them put plastic sheet on her and tied her hand, Ram Gopal sprinkled kerosene oil and when she shouted that what are they doing, the wife of Ram Gopal set her ablazed and her body started burning. Shouting and crying when she came out of the house, whole of her body had burnt. One of the boy put his towel on her and tried to put off the fire. She was crying, her daughter-in-law was weeping and the victim was admitted in hospital and she stated in her statement that she has no hope of life as the accused burnt her like monsters and her body was paining and throat is drying. The statement of victim was recorded on the date of occurrence itself, so there is no probability to distort the actual incident.

29. Learned counsel for the appellants argued that there are contradictions in the statements of PW-1 and PW-2 as the PW-1 told that Pappu, Mangla, Smt. Radha and Kamla Devi came to call her while PW-2 stated that injured told him that Ram Gopal @ Guddu came to call her alone and Co-appellants Mangala, Radha, Kamla were sitting in the house, however, the deceased herself stated to the Investigating Officer

that all the accused came to her house to call her. Of course there is discrepancies in the statements of PW-1, PW2 and in the statement of the victim given to Investigating Officer but in all the three statements, the presence of all the accused is found there. The statement recorded by the Investigating Officer is victim's first hand statement, however the statement given by PW-1 and PW-2 is reproduced by them on the basis of their memory.

30. It is pertinent to mention here that the statement of PW-1 is recorded on 21.01.2011 and concluded on 11.05.2011, approximately after one year of the incident. The statement of PW-2 Shravan Kumar Dixit was recorded from 26.05.2011 to 04.07.2013 in segments. However, the statement of victim was recorded under Section 161 Cr.P.C. on the date of incident, therefore, there is no reason to disbelieve the statement of victim. Moreover, it is also pertinent to mention that while recording the statement of the victim, the Investigating Officer recorded the demeanour of the victim also. The statement of the victim is also aspire confidence as in her own statement she stated that she has no hope of life and Hon'ble Apex Court held in several judgments that no one would lie on the last bed. The discrepancies in the statement of the PW-1 and PW-2 and the victim are not of such a nature that the statement of the victim could be disbelieved.

31. The deceased in her statement mentioned that accused tied her hands by plastic sheet that also corroborates by the evidence of PW-2 Shravan Kumar Dixit who stated in his statement that the hands of the victim were tied which she released thereafter. The deceased victim assigned the role of setting fire on the wife of Ram Gopal. Learned trial court explained that the accused Radha Devi is wife of Ram Gopal who was medically examined at time of arrest and abrasions were found on her head and nose which also proves her involvement in the commission of crime.

32. Learned trial court mentioned in its judgment that if the statement of the victim is recorded by the Investigating Officer under Section 162(2) of Cr.P.C. and later on the victim expires due to the injuries caused, the statement shall be admissible in evidence under Section 32(1) of the Indian Evidence Act. For ready reference Section 162(2) of the Cr.P.C. is quoted hereunder:

Section 162(2) in The Code Of Criminal Procedure, 1973

"(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act. Explanation.- An omission to state a fact or circumstance in the statement referred to in sub- section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact."

33. It is argued by learned counsel that the victim expired on 01.05.2010, seven days after the incident but no dying declaration recorded during this period which shows that there was no such injuries and no need to record the dying declaration.

34. It is true that the statement recorded by the police has lesser important than the statement recorded by the Tehsildar, doctor or any other person as it is

generally signed by the scriber and doctor and the patient itself but if there is no such statement and she is died on account of the injuries caused to her in the incident, the statement recorded under Section 161 Cr.P.C. becomes relevant and the conviction can be solely based upon such statement if it inspire confidence. Section 32(1) of the Indian Evidence Act is quoted as under:

Section 32(1) in The Indian Evidence Act, 1872

"When it relates to cause of death-- When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

35. Learned counsel for the appellants relied upon the judgment of Hon'ble Apex Court rendered in the case of **Mehiboobsab Abbasabi Nadaf Vs. State of Karnataka** reported in **[(2007) 13 SCC 112]**, wherein Hon'ble Apex Court held that:

"Conviction can indisputably be based on a dying declaration. But, before it can be acted upon, the same must be held to have been rendered voluntarily and truthfully. Consistency in the dying declaration is the relevant factor for placing full reliance thereupon. In this case, the deceased herself had taken contradictory and inconsistent stand in different dying declarations. They, therefore, should not be accepted on their face value. Cation, in this behalf, is required to be applied.

36. Hon'ble Apex Court relying upon the case law of **Balbir Singh Vs. State of Punjab** reported in **[(2006) 12 SCC 283]** and in the case of **Muthu Kutty Vs. State** reported in **[(2005) 9 SCC 113] held: (Balbir Singh Case, SCC Page 291, Para 34** as under:

We are of the opinion that whereas the findings of the learned Sessions Judge as also the High Court in regard to the guilt of appellant I must be accepted, keeping in view the inconsistencies between the two dying declarations, benefit of doubt should be given to Appellant 2. We, however, uphold the conviction and sentence of both the appellants under Section 498-A IPC."

37. Learned counsel for the appellants relied upon the judgment given the case of **State of Punjab Vs. Praveen Kumar in Criminal Appeal No. 633 of 1999 decided on 18.11.2004 published in Manupatra,** wherein Hon'ble Apex Court held that:

"While appreciating the credibility of the evidence produced before the Court, the Court must view evidence as a whole and come to a conclusion as to its genuineness and truthfulness. The mere fact that two different versions are given but one name is common in both of them cannot be a ground for convicting the named person. The court must be satisfied that the dying declaration is truthful. If there are two dying declarations giving two different versions, a serious doubt is created about the truthfulness of the dying declaration. It may be that if there was any other reliable evidence on record, this Court could have considered such corroborative evidence to

test the truthfulness of the dying declarations."

38. Learned counsel relied upon the case of **Sanjay Vs. State of Maharashtra** reported in **[(2007) 9 SCC 148].** In this case Hon'ble Apex Court held that:

"In our opinion in view of the different dying declarations, it would not be safe to uphold the conviction of the appellant and we have to give him the benefit of doubt. It cannot be said in this case that prosecution has proved the appellant's guilt under Section 306 IPC of abetting the suicide beyond reasonable doubt."

39. Learned counsel for the appellants relied upon the judgment rendered in the case of **Amol Singh Vs. State of Madhya Pradesh** reported in **[(2008) 5 SCC 468]**, wherein Hon'ble Apex Court Ruled that:

"If the deceased had several opportunities of making such dying declarations, that is to say, if there are more than one dying declaration they should be consistent. However, if some inconsistencies are noticed between one dying declaration and the other, the Court has to examine the nature of the inconsistencies, namely, whether they are material or not. While scrutinizing the contents of various dying declarations, in such situation, the court has to examine the same in the light of the various surrounding facts and circumstances."

40. Learned counsel for the appellants argued that Hon'ble Supreme Court has decided that if there are multiple dying declaration, the dying declaration becomes doubtful and such a dying declaration cannot be relied upon for the conviction of the appellants.

41. We are agree with the point of learned counsel and the law laid down by the Apex Court that when there are multiple dying declaration, such dying declaration becomes doubtful but in all the law laid down and cited before this Court, Hon'ble Supreme Court held that where there are inconsistency and contradictory statements in the dying declaration, they should be examined in the light of surrounding and corroborating evidence, therefore, the multiple dying declaration cannot be thrown away on the very threshold. The only rider is that the multiple dying declaration should be examined in the light of other evidence produced by the prosecution during the trial or appeal.

42. In the instant case, the date of occurrence is 25.04.2010 and the victim expired on 01.05.2010 and the dying declaration as such argued by learned counsel for appellants is not recorded by Tehsildar, Doctor or any other person and the trial court treated the statement of victim under Section 161 Cr.P.C. as dying declaration as admissible under Section 32 of the Indian Evidence Act.

43. The victim told for the first time to PW-2 Shravan Kumar Dixit about the manner of incident and when PW-1, the son of the victim, joined him while PW-2 was carrying the victim to hospital, she also informed his son about the incident. PW-1 and PW-2 had reproduced in court what the victim told them. However, the statement of victim herself was recorded on the date of incident itself on 25.04.2010 and it was first hand information given to Investigating Officer. We are aware of the fact that any information passes through many person then some changes occurr in the subsequent statement.

44. PW-7, Shambhu Nath Tiwari deposed in Court that he recorded the statement of the victim in hospital and due

to paucity of time, the statement of doctor was not recorded and the statement of victim could not be recorded in the presence of Magistrate. He also stated in his statement that victim was badly injured when he recorded her statement, hospital employees and neighbours of the victim were not present. They were outside of the room. This fact is also to be taken into account that Investigating Officer did not record the statement of victim in the form of dying declaration. He simply recorded the statement under Section 161 Cr.P.C., therefore the formalities to be at the time of dying declaration were not made. Later on when the victim died, the statement was read as dying declaration by the court. While relying on the dying declaration, the court has to look into whether the statement was given by the victim voluntarily as PW-7 stated that hospital employees and neighbours were not present in the room, it cannot be said that the statement given by the victim was under any duress, tutoring or prompting.

45. Hon'ble Apex Court in Para 3 of the judgment rendered in the case of **Heikrujam Chaoba Vs. State of Manipur** reported in **[(1999) 8 SCC 458]** has held as under:

"3.An oral dying declaration no doubt can form the basis of conviction, through the Courts seek for corroboration as a rule of prudence. But before the said declaration can be acted upon, the Court must be satisfied about the truthfulness of the same and that the said declaration was made by the deceased while he was in a fit condition to make the statement. The dying declaration has to be taken as a whole and the witness who deposes about such oral declaration to him must pass the scrutiny of reliability....."

46. Hon'ble Apex Court in the judgment given in the case of **Uttam Vs. The State of Maharashtra in Criminal Appeal No. 485 of 2012** has held in Para nos. 12, 13, 14, 16, 17, 18, 21 and 23 as under:

12. In **Kundula Bala Subrahmanyam and Another v. State of Andhra Pradesh** reported in **[(1993) 2 SCC 684]14**, this Court had highlighted the significance of a dying declaration in the following words :

"18. Section 32(1) of the Evidence Act is an exception to the general rule that hearsay evidence is not admissible evidence and unless evidence is tested by cross-examination, it is not creditworthy. Under Section 32, when a statement is made by a person, as to the cause of death or as to any of the circumstances which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing, made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased, called the dying declaration, falls in that category provided it has been made by the deceased while in a fit mental condition. A dying declaration made by person on the verge of his death has a special sanctity as at that solemn moment, a person is most unlikely to make any untrue statement. The shadow of impending death is by itself the guarantee of the truth of the statement made by the deceased regarding the causes or circumstances leading to his death. A dying declaration, therefore, enjoys almost a sacrosanct status, as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of the dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny

of the courts, it becomes a very important and a reliable piece of evidence and if the court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration, by itself, can be sufficient for recording conviction even without looking for any corroboration....."

13. In **Shudhakar v. State of Madhya Pradesh** reported in **Shudhakar Vs. State of Madhya Pradesh** reported in **[(2012) 7 SCC 569]**, this Court had opined that once a dying declaration is found to be reliable, it can form the basis of conviction and made the following observations :

"20. The "dying declaration" is the last statement made by a person at a stage when he is in serious apprehension of his death and expects no chances of his survival. At such time, it is expected that a person will speak the truth and only the truth. Normally in such situations the courts attach the intrinsic value of truthfulness to such statement. Once such statement has been made voluntarily, it is reliable and is not an attempt by the deceased to cover up the truth or falsely implicate a person, then the courts can safely rely on such dying declaration and it can form the basis of conviction. More so, where the version given by the deceased as dying declaration is supported and corroborated by other prosecution evidence, there is no reason for the courts to doubt the truthfulness of such dying declaration."

14. In **Paniben (Smt.) v. State of Gujarat** reported in **[(1992) 2 SCC 474]**, on examining the entire conspectus of the law on the principles governing dying declaration, this Court had concluded thus :

"18. ..... (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (Munnu Raja v. State of M.P. [(1976) 3 scc 104].

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (State of U.P. v. Ram Sagar Yadav [(1985) 1 SCC 552]; Ramawati Devi v. State of Bihar[(1983) 1 SCC 211].

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (K. Ramachandra Reddy v. Public Prosecutor [(1976) 3 SCC 618].

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg v. State of M.P.[(1974) 4 SCC 264].

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (Kake Singh v. State of M. P.[(1981 Suppl. SCC 25].

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P.[(1981) 2 SCC 654].

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurti Laxmipati Naidu [(1980) Suppl. SCC 455].

(viii) Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. (Surajdeo Oza v. State of Bihar[1980 Suppl. SCC 769].

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased

was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram v. State of M.P. [1988 Suppl. SCC 152].

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (State of U.P. v. Madan Mohan [(1989) 3 SCC 390].

47. 16. In **Lakhan v. State of Madhya Pradesh** reported in **[(2010) 8 SCC 514**, where the deceased was burnt by pouring kerosene oil on her and was brought to the hospital by the accused and his family members, the Court noticed that she had made two varying dying declarations and held thus :

"9. The doctrine of dying declaration is enshrined in the legal maxim nemo moriturus praesumitur mentire, which means "a man will not meet his Maker with a lie in his mouth". The doctrine of dying declaration is enshrined in Section 32 of the Evidence Act, 1872 (hereinafter called as "the Evidence Act") as an exception to the general rule contained in Section 60 of the Evidence Act, which provides that oral evidence in all cases must be direct i.e. it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.

10. This Court has considered time and again the relevance/probative value of dying declarations recorded under different situations and also in cases where more than one dying declaration has been recorded. The law is that if the court is satisfied that the dying declaration is true and made voluntarily by the deceased, conviction can be based solely on it, without any further corroboration. It is neither a rule of law nor of prudence that a dying declaration cannot be relied upon without corroboration. When a dying declaration is suspicious, it should not be relied upon without having corroborative evidence. The court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased must be in a fit state of mind to make the declaration and must identify the assailants. Merely because a dying declaration does not contain the details of the occurrence, it cannot be rejected and in case there is merely a brief statement, it is more reliable for the reason that the shortness of the statement is itself a guarantee of its veracity. If the dying declaration suffers from some infirmity, it cannot alone form the basis of conviction. Where the prosecution version differs from the version given in the dying declaration, the said declaration cannot be acted upon.

17. In **Amol Singh v. State of Madhya Pradesh** reported in **[(2008) 5 SCC 468]**, when faced with two dying declarations containing inconsistencies, the approach to be adopted by the Court was summarized as under:

"13. Law relating to appreciation of evidence in the form of more than one dying declaration is well settled. Accordingly, it is not the plurality of the dying declarations but the reliability thereof that adds weight to the prosecution case. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without any corroboration. The statement should be consistent throughout. If the deceased had several opportunities of making such dying

declarations, that is to say, if there are more than one dying declaration they should be consistent. (See Kundula Bala Subrahmanyam v. State of A.P [(1993) 2 SCC 684]. However, if some inconsistencies are noticed between one dying declaration and the other, the court has to examine the nature of the inconsistencies, namely, whether they are material or not. While scrutinising the contents of various dying declarations, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances."

18. In **Sher Singh and Another v. State of Punjab** reported in **[(2008) 4 SCC 265]** , this Court has held thus :

"16. Acceptability of a dying declaration is greater because the declaration is made in extremity. When the party is at the verge of death, one rarely finds any motive to tell falsehood and it is for this reason that the requirements of oath and cross-examination are dispensed with in case of a dying declaration. Since the accused has no power of cross-examination, the court would insist that the dyingdeclaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court should ensure that the statement was not as a result of tutoring or prompting or a product of imagination. It is for the court to ascertain from the evidence placed on record that the deceased was in a fit state of mind and had ample opportunity to observe and identify the culprit. Normally, the court places reliance on the medical evidence for reaching the conclusion whether the person making a dying declaration was in a fit state of mind, but where the person recording the statement states that the deceased was in a fit and conscious state, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of mind of the declarant, the dying declaration is not acceptable. What is essential is that the person recording the dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement without there being the doctor's opinion to that effect, it can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certificate by the doctor is essentially a rule of caution and, therefore, the voluntary and truthful nature of a statement can be established otherwise."

21. In **State of Uttar Pradesh Vs. Veerpal and another** reported in **[(2022) 4 CSS 741]**, this Court has clarified that a dying declaration can be acted upon without any other corroboration and observed as below :

"16. Now, on the aspect, whether in the absence of any corroborative evidence, there can be a conviction relying upon the dying declaration only is concerned, the decision of this Court in Munnu Raja41, and the subsequent decision in Paniben v. State of Gujarat42, are required to be referred to. In the aforesaid decisions, it is specifically observed and held that there is neither a rule of law nor of prudence to the effect that a dying declaration cannot be acted upon without a corroboration. It is observed and held that if the Court is satisfied that the dying declaration is true and voluntary it can base its conviction on it, without corroboration. Similar view has also been expressed in State of U.P. v. Ram Sagar Yadav [(1985) 1 SCC 552 and

Ramawati Devi v. State of Bihar [(1983) 1 SCC 211]. Therefore, there can be a conviction solely based upon the dying declaration without corroboration."

23. In **Arvind Singh Vs. State of Bihar** *reported in* **[(2001) 6 SCC 407],** *this Court has held that:*

"Dying declaration should be dealt with care and caution and corroboration thereof, though not essential, is expedient in order to strengthen the evidentiary value of the declaration. Even where independent witnesses may not be available, all the precautions should be taken when it comes to acceptance of such a statement as trustworthy evidence. In other words, even though direct evidence may not be available, circumstantial evident without a break in the chain of events, would add weight to the evidentiary value of the dying declaration."

48. Learned counsel for the appellants argued that PW-1 did not mention the name of Mannu Pandit in his statement and merely mentioned the name of appellant Ram Gopal, Pappu and their wives and sister Mangla, however PW-2 did not mention the name of Pappu and included the name of Munnu Pandit. So far as the statement of victim is concerned, she stated the name of all the accused including Munnu pandit and Pappu. Therefore, (i)there is contradiction in the statements of both the witnesses and the statement of the victim (ii)It is argued that PW-1 and PW-2 did not clarify the roles of the appellants individually, however the victim stated that Ram Gopal sprinkled kerosene oil and his wife set her ablazed and there is omission in the statement of PW-1 and PW-2 regarding this fact (iii) PW-1 and PW-2 did not mention the use of "Panni' (Polythene), however victim herself stated that as soon as she entered the house of appellant, all the accused covered her with a plastic Panni, therefore it is argued that there is omission of use of plastic panni in the statements of PW-1 and PW-2 and omission of the name of Munnu Pandit and Pappu in the statement of PW-2 and PW-1 respectively.

49. Now while considering the evidence on record, as it is said earlier, that the statements of PW-1 and PW-2 is secondary statement while the statement of the victim is first hand statement given on the same day of incident and she named all the appellants in her statement, therefore, if the name of Pappu and Munnu is omitted in the evidence PW-1 and PW-2 cannot be given much importance.

50. So far as the manner of putting her on fire is concerned, PW-1 and PW-2 are not eye witnesses of the fact and they were not present when the appellants set the victim ablazed. Therefore, if there is omission in the manner of incident in the statements of PW-1 and PW-2 that is immaterial because the statement of victim is intact regarding the manner of incident. It is also pertinent to mention here that the victim herself given only one statement under Section 161 Cr.P.C. and no other than this statement is recorded by any other person. Therefore we are not agree with the argument of learned counsel that there are multiple dying declarations. The statement of the victim is recorded once for all during the investigation. Therefore, there is no question of contradiction in the statements of victim.

51. The statement of victim is corroborated by the statement of PW-1 and PW-2 to the extent that the victim told them that accused sprinkled kerosene oil and set her ablazed in their home. PW-2 stated that

when he was standing in front of his house to have bath in the river, he himself saw an woman coming out of the house of the accused-appellants and he with his four friends rushed towards the place of occurrence and collectively were trying to put off the fire on the body of victim by his towel which was recovered from the threshold (Dehari) of the house of the appellant Ram Gopal.

52. From the site plan, it transpires that Investigating Officer recovered the towel and dhibari from the threshold of the appellant Ram Gopal. In the six number of index, he had mentioned that he recovered the Towel and Dhibari from the place shown on the gate of Ram Gopal. However, in his statement, the Investigating Officer stated that he recovered the towel from "Tiraha' of lane near place of occurrence and he did not sent this towel for FSL report but there is no explanation as how he shown to have recovered this towel from the threshold of the appellant.

53. The victim stated in her statement recorded under Section 161 Cr.P.C. treated as dying declaration that as soon as she entered into the house of the appellant Ram Gopal, all the accused covered her with Panni and tied her hands. The statement is corroborated with the statement of PW-2, Shravan Kumar who stated in examination-in-chief that when the victim came out of the house of appellant Ram Gopal, her hands were tied with chit and he released her hands.

54. The towel was produced in the court. The statement of PW-2 corroborates the recovery of towel as is also evident from the recovery memo Exhibit Ka-13.

55. Learned counsel for the appellants argued that when she was admitted in the hospital for treatment, no remains of polythene was found on the body of the victim. Learned counsel draw attention towards the statement of PW-4 Dr. S.N. Pandey who conducted the postmortem of victim.

56. Learned AGA replied to the argument that when the postmortem was conducted on the body of the victim (deceased) then her body was found burnt and on all the burnt parts dressing was found. It is also argued by AGA that when she was admitted, the doctor must have wash her wound, therefore it is not possible to have polythene remains on her body.

57. We agree with the arguments of learned counsel for the appellant that doctor admitted in his cross examination that the piece of polythene may struck to the wounds of deceased if polythene sheet is used while ablazing but it is not clarified from the doctor whether there was any polythene remains on the body or not. Therefore, it is quite possible that when she was treated in the hospital, her wounds must have been washed by the doctor.

58. From the evidence on record, it is found that dying declaration by the statement of victim recorded by the Investigating Officer under Section 161 Cr.P.C. and relied by the Court under Section 32 of the Indian Evidence Act are reliable evidence and the evidence is corroborated by the medical evidence as well as the evidence of PW-1 and PW-2.

59. Learned counsel for the appellants argued that PW-3 Neeraj has turned hostile during trial. From the perusal of the statement of PW-3 it transpires that PW-3 is declared hostile by ADGC.

60. Hon'ble Apex Court in the case of **Rajesh Yadav and Another etc. Vs. State of U.P.** in **Criminal Appeal No. 339-340**

of 2014 decided on **04.02.2022** has held as under:

"82. In State of U.P. v. Ramesh Prasad Misra [(1996) 10 SCC 360: 1996 SCC (Cri) 1278] this Court held that (at SCC p. 363, para 7) evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra [(2002) 7 SCC 543: 2003 SCC (Cri) 112], Gagan Kanojia v. State of Punjab [(2006) 13 SCC 516: (2008) 1 SCC (Cri) 109], Radha Mohan Singh v. State of U.P. [(2006) 2 SCC 450: (2006) 1 SCC (Cri) 661], Sarvesh Narain Shukla v. Daroga Singh [(2007) 13 SCC 360: (2009) 1 SCC (Cri) 188] and Subbu Singh v. State [(2009) 6 SCC 462: (2009) 2 SCC (Cri) 1106].

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

61. Hon'ble Apex Court in the case of **Attar Sinsgh Vs. State of Maharashtra** in **Criminal Appeal No. 1091 of 2010**, decided on 14.12.2012 has held as under:

".....It could not be ignored that when a witness is declared hostile and when his testimony is not shaken on material points in the cross-examination, there is no ground to reject his testimony in toto as it is well-settled by a catena of decisions that the Court is not precluded from taking into account the statement of a hostile witness altogether and it is not necessary to discard the same in toto and can be relied upon partly. If some portion of the statement of the hostile witness inspires confidence, it can be relied upon. He cannot be thrown out as wholly unreliable. This was the view expressed by this court in the case of Syed Akbar vs. State of Karnataka reported in AIR 1979 SC 1848 whereby the learned Judges of the Supreme Court reversed the judgment of the Karnataka High Court which had discarded the evidence of a hostile witness in its entirety. Similarly, other High Courts in the matter of Gulshan Kumar vs. State (1993) Crl.L.J. 1525 as also Kunwar vs. State of U.P. (1993) Crl.L.J. 3421 as also Haneefa vs. State (1993) Crl.L.J. 2125 have held that it is not necessary to discard the evidence of the hostile witness in toto and can be relied upon partly. So also, in the matter of State of U.P. vs. Chet Ram reported in AIR 1989 SC 1543 =(1989) Crl.L.J. 1785; it was held that if some portion of the statement of the hostile witness inspires confidence it can be relied upon and the witness cannot be termed as wholly unreliable. It was further categorically held in the case of Shatrughan vs. State of M.P. (1993) Crl.L.J. 3120 that hostile witness is not necessarily a false witness. Granting of a permission by the Court to cross-examine his own witness does not amount to adjudication by the Court as to the veracity of a witness. It only means a declaration that the witness is adverse or unfriendly to the party calling him and not that the witness is untruthful. This was the view expressed by this Court in the matter of Sat Paul vs. Delhi Administration AIR 1976 SC 294. Thus, merely because a witness becomes hostile it would not result in throwing out the prosecution case, but the Court must see the relative effect of his testimony."

62. But it is settled proposition of law that the statement of hostile witness can be

relied upon to the extent that he supports the prosecution case. PW-3 is a person who PW-2 stated that he was present with him. PW-3 stated that he saw that an woman was burning and many people gathered around on the place of occurrence. He stopped there for 5 to 10 minutes and then he went away as he was a driver by profession. This witness did not name any appellant. He also denied that he helped in the rescue of victim but he proved the incident of burning of victim at the place of occurrence in the lane which corroborates further the statement of PW-1 and PW-2.

63. Learned counsel for the appellant submitted that witnesses Ramawati, Sanjay are not produced in Court. Ramawati, daughter-in-law of the deceased and Sanjay is said to have independent witnesses. It is the prerogative of the prosecution to prove their case by single witness or the multiple witnesses and it is the reliability and credibility of the witnesses and not the number.

64. Hon'ble Apex Court in the case of **Amar Singh Vs. Balwinder Singh and Others in Criminal Appeal No. 1671 of 1995, decided on 31.01.2003** has held as under:

"It is true that the witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution, whether effect of their testimony is for or against the case of the prosecution. However, that does not mean that everyone who has witnessed the occurrence, whatever their number be, must be examined as a witness."

65. Learned counsel for the appellant Munnu Pandit argued that he has no motive to commit this crime as the motive accrued to Ram Gopal and his family members. PW-1 has stated in page 11 that accused appellants have taken advance money of his house and when her mother objected to it, the appellants set her ablazed. Therefore, motive is available to the appellants but from the evidence it is clear that the presence of Munnu Pandit was established by the statement of the victim herself. PW-2 also stated on oath that when he saw all the accused including Munnu Pandit while the victim was burning. However, in cross examination on 10.05.2012 PW-2 stated that Munnu Pandit was not present where the victim was burning and he stated that he saw no accused at the time in his statement recorded on 04.07.2013. He further stated that appellant-Munnu Pandit was on bail during trial and he did not misuse the same.

66. Learned counsel for the appellant Munnu Pandit also draw attention that witness Neeraj did not named him present at the place of occurrence but as has been discussed earlier, PW-3 Neeraj has been declared hostile and he did not fully support the version of prosecution, hence the role of Munnu Pandit is not distinguishable from the role of other appellants as all the accused were present when the victim was being burnt.

67. It is also vehemently argued by learned counsel for the appellants that the measurement of Dhibari is 180 ml. and 180 ml. oil is not sufficient to burn any person. In this regard it is stated by the victim that her body was covered by polythene and Ram Gopal sprinkled kerosene oil and his wife Radha set the victim ablazed. When the kerosene oil is used alongwith polythene sheets as it is also proved by the recovery memo as Exhibit Ka-13, it is immaterial that 180 ml. Kerosene oil cannot burnt any person.

68. Learned trial court addressed all the points raised by the learned counsel for the appellants during the submissions of their arguments. The accused are charged with Section 302 read 34 IPC and prosecution proved their case beyond reasonable doubt. Learned trial court relied upon the case laws of **Anant Mohanto Vs. State of Orrisa** reported in **AIR 1979 SC 1433** and in the judgment of Hon'ble Apex Court rendered in Case of **Vishram Vs. State of Madhya Pradesh reported in AIR 1993 SC 250**. In these cases, the Hon'ble Apex Court has held that oral statements are also admissible as evidence because no one lies at the time of his death. Therefore, in the light of evidence discussed above and being mindful of the principal of governing appreciation of evidence, related to multiple dying declarations, we are of the view that learned trial court discussed all the factors of multiple dying declaration, recorded by the Investigating Officer and it's value and its admissibility and there is no reason to intervene in the judgment and order passed by the trial court.

69. Accordingly, the above captioned criminal appeals are hereby **dismissed**. The impugned judgment and order dated 24.10.2018 passed by Additional Sessions Judge/Special Judge Anti Corruption, Court No. 6, Lucknow in Sessions Trial No. 1042 of 2010 (State Vs. Ram Gopal @ Guddu), arising out of Case Crime No. 168 of 2010, under Sections 147, 302 IPC, Police Station Hasanganj, District Lucknow, is confirmed.

70. The appellants, Muunu Pandit @ Mahesh Kumar, Pappu, Mangla, Smt. Radha and Kamla Devi are on bail. Their bail bonds are canceled and sureties discharged. They are ordered to surrender before the trial court within two weeks from today to serve out the sentence awarded by the trial court failing which the trial court is directed to get them arrested and sent to jail.

71. So far as appellant Ram Gopal @ Guddu is concerned, he is stated to be in jail. He shall serve out sentence as awarded by the trial court.

72. Office is directed to send a copy of this order along with lower court record to the trial court concerned for necessary information and compliance forthwith.

(2022) 11 ILRA 1242
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.11.2022

BEFORE

THE HON'BLE VIKRAM D. CHAUHAN, J.

Crl. Appeal No. 2668 of 1984

Kailash Chandra ...Appellant
Versus
State ...Respondent

Counsel for the Appellant:
Pt. Mohan Chandra, Sri Mukesh Joshi

Counsel for the Respondents:
A.G.A.

Criminal Law- Indian Penal Code, 1860- Section 411 I.P.C.- Indian Evidence Act, 1860- Section 27- The jewellery was dug up by the Appellant by bare hands is a possibility and the same cannot be ruled out specifically when the recovery is said to have been made in the presence of independent witness- Was within the exclusive knowledge of Appellant and as such when no explanation has been offered by Appellant, prosecution case gets strengthened.

Where the recovery is within the exceptional knowledge of the accused and the same is further supported by the presence of independent witnesses then the same can be relied upon.

Indian Evidence Act, 1860- Section 3- Whereas contradiction in the statement of the witness is fatal for the case, minor discrepancy or variance in evidence will not make the prosecution's case doubtful- Minor variations in the accounts of the witnesses are often the hallmark of the truth of their testimony.

Minor contradictions that do not go to the root of the story of the prosecution are inconsequential and the same reflect the truthfulness of the testimony of the witnesses.

Code of Criminal Procedure, 1973- Section 294- **The recovery memo has been duly proved by the prosecution and as such the claim of the Appellant that the contents have not been admitted is of no consequence.**

Once the recovery memo has been duly proved by the prosecution and has been admitted by the defence then the stand that only the genuineness of the recovery memo has been admitted and not the contents thereof cannot be sustained. (Para 19, 25, 28, 29,30)

Criminal Appeal rejected. (E-3)

(Delivered by Hon'ble Hon'ble Vikram D. Chauhan, J.)

1. Heard Sri Mukesh Joshi, learned counsel for the Appellant; learned A.G.A. for the State and perused the record.

2. The present appeal is preferred against the judgment and order dated 12th September, 1984 passed by VIII Additional Sessions Judge, Etah in S.T. No.662 of 1983 (State Vs. Kailash Chandra), whereby the Appellant has been convicted and sentenced under Section 411 I.P.C. for three years rigorous imprisonment.

3. The prosecution case as per the first information report is to the effect that one Jagan Lal has lodged a first information report on 28th February, 1983 at 8.15 am with the allegation that Aunt (Chachi) of the informant namely Yasoda was living alone in her house and in the intervening night of 27th / 28th February, 1983 when she was sleeping alone in her house and did not come out for long time, then the wife of the informant, namely Uma knocked the door of the Yasoda. However, no response was given from inside the house and the house was found locked from inside. Thereafter, wife of the Informant-Uma informed about the aforesaid fact to the Informant. Informant and his brother Janki and Ram Ratan came and called Yasoda from outside. However, there was no response from inside the house. Thereafter, they went to the terrace of their house to look into the house of Yasoda and found that at the back of the house there was an entry in the wall and when they entered from the aforesaid, they found that the deceased was lying dead on the cot and her right hand and left leg was tied and the mouth was gagged with cloth and the jewellery (10 lacche of silver and earrings of gold) which the deceased wore daily were missing. On the aforesaid basis, a first information report was lodged being Case Crime No.67 of 1983 under Section 460 I.P.C. at Police Station Aliganj, District Etah.

4. The Panchayatnama of the deceased was held on 28th February, 1983 wherein Ganga Sahai, Mewa Ram, Ram Bhajan Lal, Jagat Pal and Zamadar were the panch witnesses and according to the opinion in Panchayatnama, the deceased has been murdered.

5. The body of the deceased was thereafter sealed and sent for postmortem.

Investigating Officer prepared the site plan of the place of occurrence on 28th February, 1983 and the same was marked as Ex.Ka.4. Investigating Officer has further recovered Dhoti and rope from the place of occurrence on 28th February, 1983. A recovery memo in respect of the same was prepared being Ex.Ka.12. Investigating Officer further on 28th February, 1983 also recovered household goods from the place of occurrence and the same was marked as Ex.Ka.13.

6. During investigation, Appellant was arrested under Section 25 of the Arms Act and after arrest, Appellant has confessed that Military and Sant Ram has murdered the deceased and jewellery of deceased was taken by them and that he has hidden the jewellery of the deceased in the agricultural field and that he can recover the same. On the basis of the aforesaid statement of the Appellant, on 8th March, 1983 the Appellant got recovered 10 piece of silver Laccha (jewellery) having weight of 200 grams from the agricultural field near the tree on the pointing out of Appellant from a place where he has hidden the jewellery of the deceased and after digging the soil for one feet, jewellery was recovered and the same was sealed in a cloth. The aforesaid recovery was made in the presence of witnesses Roshan Lal and Ram Dulare. Investigating Officer has prepared the recovery memo dated 8th March, 1983, which is Ex.Ka.2. The jewellery so recovered was identified by Jagan Lal, Ram Ratan, Usha and Savitri Devi before the Executive Magistrate on 2nd May, 1983.

7. Investigating Officer after completion of the investigation has submitted chargesheet against Appellant in Case Crime No.67 of 1983 on 16th May, 1983 under Section 460/411 I.P.C. Appellant denied the charges and claimed to be tried. On 10th July, 1984 the trial court has framed the charges against Appellant under Sections 460 and 411 I.P.C.

8. The prosecution in support of its case has examined five witnesses, namely:-

(i) Jagan Lal (P.W.1) is the informant. He has stated that deceased Yasoda was his Aunt (Chachi) and she was living in a separate house in Aliganj. The deceased was not having toilet in her house and as such everyday in the morning the deceased used to come to the house of P.W.1 to attend nature's call. On the date of the incident, deceased for long time did not come to the house of the informant and as such wife of the informant, namely, Usha @ Uma went to see her and called her from outside the house of deceased. The deceased did not respond to the call of Usha then informant, Ram Ratan and Janki went into the house of the deceased and found that the deceased was tied up on the cot and her one hand and leg was tied and the mouth was gagged with cloth. The aforesaid persons also found that the earrings and the "Lacche" of deceased were missing. The P.W.1 thereafter has got the first information report scribed from Mewa Ram and the same is marked as Ex.Ka.1. The said first information report was given at the police station. The witness has also stated that they had gone to the court for identification of the jewellery recovered being Material Ex.Ka.10. The witness has further stated that he had seen his aunt wearing the jewellery recovered, prior to the occurrence.

(ii) Ram Ratan (P.W.2) has stated that on hearing the news he had reached the place of incident and found that deceased was lying dead and her one hand and leg

was tied with the cot and the mouth was gagged with cloth and the earrings and lacche of the deceased was missing. Informant was present at the place of incident. He has further stated that Jagan Lal had lodged the first information report. He has stated that they also identified the jewellery recovered and he had seen the deceased wearing the aforesaid jewellery prior to the occurrence.

(iii) Smt. Usha Devi @ Uma (P.W.3) stated that she is wife of informant (P.W.1) and has stated that on the date of occurrence deceased had not come to her house for attending nature's call, therefore, she went to house of deceased and called her, however, there was no response. Thereafter, she came back and informed her husband. They have found that the wall of the house of the deceased was broken and her husband and his brothers went inside the house, deceased was lying dead and her earrings and lacche were missing. She has stated that she had identified the jewellery recovered before the Magistrate. She has also stated that the deceased has willed her property in favour of her husband and his brothers. She has stated that the Appellant is son of her Jeth and he had not received anything from the property of deceased.

(iv) Ram Dulare (P.W.4) has stated that he was in the market and accused-appellant along with 4-5 police personnels (in which one of them is Station House Officer and Roshan Lal) was also going along with Appellant. The police personnel asked him to come along with them for being witness to the recovery of the jewellery from the Appellant. The Appellant took all of them to agricultural field of Tambaku and in the agricultural field there were two trees and 10-12 paces from the eastern tree the jewellery (lacche) 1½ feet hidden in the soil, was dug up by Appellant and the same was recovered. The jewellery recovered was marked as Material Ex.Ka.1 to 10. Jewellery was sealed by the police and the recovery memo was signed by the Appellant.

(v) Ashok Kumar Rawat (P.W.5) is the Investigating Officer. He has stated that in February, 1983 he was posted at Aliganj as Second Officer. On 18th March, 1983, Case Crime No.67 of 1983 under Section 460 I.P.C. was registered being Ex.Ka.1 and the Chik FIR was prepared. Investigation was handed over to the aforesaid witness. He went to the place of occurrence and prepared the Panchayatnama as Ex.Ka.6 and the post mortem papers were prepared being Ex.Ka.7 to Ka.10 and the body was sent for post mortem. The place of occurrence was inspected and the site plan was prepared being Ex.Ka.11 and recovery of the Dhoti and rope from the place of occurrence being Ex.Ka.12 and, thereafter, house hold goods were recovered being Ex.Ka.13. He has further stated that during investigation on 8th March, 1983, Appellant was arrested for having possession of illegal weapon and Appellant after arrest has confessed that the Appellant along with Military and Sant Ram has murdered deceased and have taken away the lacche and earrings of deceased. Appellant has further informed that the lacche was hidden in agricultural field and the same can be recovered. Thereafter, recovery memo was prepared being Ex.Ka.12. Site plan was prepared being Ex.Ka.14 and same was identified by the witnesses being Ex.Ka.15 and the chargesheet was submitted being Ex.Ka.16.

9. The trial court has recorded a finding that the counsel for the Appellant has admitted the recovery memo under Section 294 Cr.P.C.

10. The Appellant under Section 313 Cr.P.C. has stated that false case has been

lodged against the Appellant and no recovery was made from pointing out of the Appellant and he has been falsely implicated. He has further stated that informant and his brothers in order to usurp the property of the deceased has prepared forged will. When the deceased was giving property to the Appellant then the informant has falsely implicated the Appellant in the present case. He has further stated that the witness Ram Dulare and Roshan Lal have prior enmity with him.

11. It is to be noted that the trial court by impugned judgment has acquitted the Appellant under Section 460 I.P.C. and has convicted the Appellant under Section 411 I.P.C.

Section 411 I.P.C. is quoted hereunder:-

"411. Dishonestly receiving stolen property. *- Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."*

12. It is to be noted that the Appellant was convicted under Section 411 I.P.C. as P.W.4 and P.W.5 in their testimony have stated that from the pointing out of the Appellant, jewellery of deceased was recovered from agricultural field of Appellant, which was hidden beneath the soil and same was dug out by Appellant.

13. It is submitted by learned counsel for Appellant that it was not possible to have dug up the soil for one feet by bare hands.

14. Learned A.G.A. for the respondent-State has stated that it has come in evidence that the soil was wet and further once the soil was dug up for hiding the jewellery and then the soil may be loose and could have been easily dug up by the Appellant with bare hands subsequently.

15. It is to be noted that on 8th March, 1983 at about 3:20 PM, the lacha (Silver Jewellery) of the deceased was recovered on the pointing out of Appellant. In this respect, Prosecution Witness No 5 - Ashok Kumar Rawat, S.O. Sakeet has testified that during investigation on 8th March, 1983, Appellant was taken into custody from Akhbarpur Kotewale Road along with illegal weapons and was arrested. Thereafter, Appellant has disclosed that he along with Military and Santram has killed the deceased and jewellery of the deceased have been hidden in his agriculture field. Appellant was taken to his agriculture field along with independent witness Roshan Lal and Ram Dulare. When they reached agricultural field of the Appellant where two trees were standing and in the north at about 10 to 12 steps, Appellant has recovered "Lacche" which belong to the deceased. The recovery memo was prepared by Prosecution Witness No. 5 being Exhibit-2. The Prosecution Witness No. 5 has proved the recovery memo dated 8th March, 1983. The map of place of recovery of jewellery of deceased from Appellant was prepared and marked as Exhibit Ka 14. The jewellery was deposited and identification report was prepared being Exhibit 15 and the jewellery in question was identified by Prosecution Witness Nos. 1, 2, 3 and 4.

16. The Prosecution Witness No. 5 in his testimony has stated that agricultural field was wet when the alleged recovery has been made. The aforesaid fact has been supported by Prosecution Witness No. 4

who is the witness of the recovery of jewellery from Appellant pointing out. It is also to be noted that the incident is of 27th / 28th February, 1983 and the recovery has been made on 8th March, 1983 and once the soil has been dug up it becomes loose and when the same spot is again dug up then it is always easier to dig jewellery with bare hands. The aforesaid stand of the prosecution that the jewellery was dug up by the Appellant by bare hands is a possibility and the same cannot be ruled out specifically when the recovery is said to have been made in the presence of independent witness.

17. It is further submitted by learned counsel for the Appellant that statement of the recovery witness does not corroborate with the site plan. He submits that as per the Prosecution Witness No. 4, agricultural field from where the alleged recovery has been made was only having "Tad ka ped" and "Tobacco" however, site plan clearly shows that there are "Jamun Trees" and "Dhaniya Crop" also. On the aforesaid basis, it is submitted by learned counsel for Appellant that the testimony of the recovery witness is not trustworthy.

18. A perusal of the site plan dated 8th March, 1983 would demonstrate that the agricultural field adjoining the place from where the alleged recovery is made was having "Jamun Tree" and "Dhaniya Crop" and agricultural field from where recovery is made was having Tobacco. It is further to be noted that statement of Prosecution Witness Nos. 4 and 5 was made on 2nd August, 1984 and the recovery is made in March 1983 as such the statement was recorded after more than one year of the alleged recovery and as such contradiction is natural and will not have any consequences on the prosecution case.

19. Discrepancy has to be distinguished from contradiction. Whereas contradiction in the statement of the witness is fatal for the case, minor discrepancy or variance in evidence will not make the prosecution's case doubtful. The normal course of the human conduct would be that while narrating a particular incidence there may occur minor discrepancies, such discrepancies in law may render credential to the depositions. Minor variations in the accounts of the witnesses are often the hallmark of the truth of their testimony. When the discrepancies were comparatively of a minor character and did not go to the root of the prosecution story, they need not be given undue importance. Mere congruity or consistency is not the sole test of truth in the depositions. In the depositions of witnesses there are always normal discrepancy, however honest and truthful they may be. Such discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence, and the like. Corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment may not render the evidence of eye witnesses unbelievable.

20. It is also submitted by learned counsel for the Appellant that the cloth in which the recovered jewellery was kept did not have any soil stains. In this respect, it is to be seen that the P.W. 5 in his statement has stated that the soil inside the hole that was dug up was dry and as such if the stains of soil was not found on the cloth that by itself will not discredit the prosecution case. The trial court has recorded a finding that the dry soil on the cloth in which the jewellery was kept if did not find the soil the same may be

because the dry soil may have been brushed aside. The trial court has further recorded a finding that the cloth in which the jewellery was kept, was stained. The aforesaid finding recorded by the trial court is possible view taken by the trial court. It is to be noted that the identification proceedings after the recovery were also held on 2nd May, 1983 and as such the aforesaid soil on the cloth may have been brushed aside on the handling of the aforesaid cloth. The view taken by the trial court is a possible view and as such cannot be interfered with.

21. It is further submitted that the recovered jewellery was sealed in a cloth and on the aforesaid the date of 12th March, 1984 was stated and as such the recovery itself is doubtful. It is to be noted that the alleged recovery is said to have been made on 8th March, 1983 and in this respect Prosecution Witness No. 5 has testified before the trial court.

22. The trial court has recorded a finding that on account of the handling of the cloth in question the cloth may have on account of spreading of the ink by regular handling is looking like 12 however is 8th March, 1983. In this respect, it is to be noted that the recovery memo was prepared on 8th March, 1983 and the recovery of the jewellery was submitted in the Malkhana and the aforesaid recovery is testified by Prosecution Witness Nos. 4 and 5 then the argument of the learned counsel for the Appellant is not sustainable specifically when nothing has been shown that the finding recorded by the trial court is perverse and against law.

23. It is also submitted that the informant and his family members in order to usurp the property of the deceased has falsely implicated the Appellant and in this respect it is submitted that in Ex.Ka.13 the goods which have been recovered, there is a passbook which is of the informant and his brothers and on the aforesaid basis, it can be said that they wanted to murder the deceased. P.W.-3 in his testimony has stated that the deceased had given her property to her husband and his brothers and if the aforesaid fact is correct, then the passbook of the informant and his brothers which was found at the house of the deceased will not discredit the prosecution case.

24. The Appellant in his statement under Section 313 Cr.P.C. has stated that the informant has prepared a forged will. The aforesaid statement is indicative of the fact that the Appellant does not deny the existence of the will. However, he has stated that the will is a forged will. When the deceased has given her property to the informant and his brothers then there was no occasion for the informant and his brothers to have murdered the deceased. The evidence on record in no manner leave doubt that the jewellery recovered is that of deceased as the same was identified by the witnesses. The Appellant has not produced any evidence to substantiate his claim that the will was forged as the same was his defence nor has produced any material or circumstance as to why he has been falsely implicated in the case.

25. On the other hand, the prosecution by evidence of P.W.-4 and P.W.-5 has proved that the recovery of the jewellery of the deceased at the behest of the Appellant and the same was recovered from 1 feet beneath the agricultural field, which is a place, knowledge of it can only be attributed to the Appellant.

26. It is to be noted that the Appellant has although stated in his statement under Section 313 Cr.P.C. that he had enmity with

P.W.4. However, the same has not been proved by the Appellant by cogent evidence nor any material has been brought on record to substantiate that there was any enmity with P.W.4. The Appellant has also not brought on record any evidence or circumstance as to why the police would falsely implicate the Appellant and as such the testimony of P.W.4 cannot be brushed aside.

27. It is further submitted by the learned counsel for the Appellant that the gold rings were not recovered and as such the recovery is doubtful. In this respect, it is to be seen that the recovery of the alleged silver jewellery on 8th March, 1983 at the behest of the Appellant has been duly proved by the prosecution. The jewellery recovered has been identified in accordance with law. The non-recovery of the gold rings by itself would not make the prosecution case doubtful.

28. It is further submitted by learned counsel for the Appellant that the conviction of the Appellant is only on the ground of recovery memo which is said to have been admitted under Section 294 Cr.P.C. However, under section 294 Cr.P.C. only genuineness has been admitted nor the contents and the recovery made thereunder. It is to be noted that the prosecution has proved the recovery memo by testifying the Prosecution Witness Nos. 4 and 5. It is further to be noted that the recovery memo has been duly exhibited. The prosecution witness has also supported the recovery of the jewellery on the pointing out of the Appellant. The recovery memo has been duly proved by the prosecution and as such the claim of the Appellant that the contents have not been admitted is of no consequence.

29. The law relating to confessions is to be found generally in Sections 24 to 30 of the Evidence Act and sections 162 and 164 of the Code of Criminal Procedure, 1973. A confession or an admission is evidence against the maker of it, unless its admissibility is excluded by some provision of law. The confession or statement of accused can be made during investigation before police officer. The language of Section 161 of the Code of Criminal Procedure, 1973 which protects the accused as well as suspects and witnesses who are examined during the course of investigation in a criminal case. Section 25 of the Evidence Act provides that no confession made to a police officer shall be proved against a person accused of an offence. The terms of Section 25 of the Evidence Act are imperative in nature. Section 26 of the Evidence Act prohibits proof against any person of a confession made by him in the custody of a police officer unless it is made in the immediate presence of a Magistrate. Section 27 of the Evidence Act is a form of exception and partially lifts the ban imposed by Sections 24, 25 and 26 of the Act. It provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

30. In the present case, recovery of jewellery of deceased at behest of Appellant has been proved by prosecution beyond reasonable doubt. The jewellery of deceased recovered has been identified and proved to belong to the deceased. There is no explanation offered by the Appellant as to how the jewellery which has been recovered at his behest has come in possession of Appellant. The recovery of the jewellery of the deceased has been made from an agriculture field by digging

out the agricultural field and jewellery being recovered from beneath the earth was within the exclusive knowledge of Appellant and as such when no explanation has been offered by Appellant, prosecution case gets strengthened.

31. The trial court on the aforesaid basis has come to the conclusion that the prosecution has been able to prove its case against the Appellant under Section 411 I.P.C. and thereafter, convicted the Appellant.

32. The Appellant has failed to dislodge the prosecution case and no circumstance has been stated which would entitle the finding of conviction and sentence recorded by the trial court as per-se perverse. This Court is in agreement with the conviction and sentence recorded by the trial court in the impugned judgment.

33. In view of the aforesaid, the present appeal lacks merit and is, accordingly, dismissed and as a consequence bail granted to the Appellant is cancelled.

34. Office is directed to return the record of the lower court forthwith along with a copy of this order for necessary compliance.

(2022) 11 ILRA 1250
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.11.2022

BEFORE

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

Crl. Appeal No. 5275 of 2008

Aftaf @ Nafees @ Pappu ...Appellant
Versus
State of U.P. ...Opp. Party

Counsel for the Appellants:
Sri Rakesh Dubey, Sri S.G. Hasnain

Counsel for the Respondents:
Govt. Advocate

Criminal Law- Indian Penal Code, 1860 - Section 376 - The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989- Section 3 (2) (v) - P.W.1, in his cross examination, categorically mentions that he has not seen the appellants committing any kind of sexual intercourse with the prosecutrix. P.W.3, whose oral testimony has been considered, also categorically states that she cannot conclusively opine that whether there was commission of sexual intercourse against the will or against the consent of the prosecutrix. None of the ingredients has been proved by the prosecutrix. Neither the F.I.R. nor the oral testimony have been remotely suggests the same. So as to attract the provisions of Section 375 read with Section 376 of IPC and Section 3 (2) (v) of SC/ST Act, ingredients of the said offence has to be proved. There is no evidence which goes to show that the offence by the appellant is committed on the ground that prosecutrix belongs to scheduled caste. The improvement in statement before lower Court was made by the prosecutrix, P.W.2, stating that appellant first asked her caste and name of her husband then commit the said offence. This is nothing else but a totally manufactured evidence. In the medical report of the prosecutrix, no injury was found on her private part. Neither the First Information Report nor the oral testimony of P.W.1 to P.W.5 even remotely suggest that the accused knew the prosecutrix.

Where the prosecution has failed to prove the offence of rape by either oral or medical evidence and there is also no evidence to establish that the accused knew the caste of the victim from before, then the conviction of the accused is liable to be set aside. (Para 15, 16, 17, 19, 20, 21)

Criminal appeal allowed. (E-3)

Case Law/ Judgements relied upon:-

1. Crl. Appeal No. 204 of 2021 (Vishnu Vs St. of U.P.) dec. on 28.1.2021

2. Crl. Appeal No.4083 of 2017 (Pintu Gupta Vs St. of U.P.) dec. on 28.7.2022

3. Ved Prakash Vs St. of Har., JIC 1996 SC 18 (distinguished on facts)

4. Patan Jamal Vali Vs St. of A.P., 2021 SCC OnLine SC 343

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

1. Heard Sri Rakesh Dubey, learned counsel for the accused-appellant and Sri Vikas Goswami, learned A.G.A. for the State.

2. Non-following of the decision of Apex Court in Criminal Appeal No.308 of 2022 (**Saudan Singh vs. State of U.P**.) decided on 25.2.2022 and non-considering the case of accused for remission seems to be the natural administrative conduct of the officers and the jail authority. We once again pained to show our anguish.

3. This appeal was listed in the year 2004. Unfortunately, as the order sheet shows, the matter was listed only after few years and the delay came to be condoned in the year 2008. From 2008 till 2022, the matter was never listed for hearing as is clear from the order sheet and it was only after the listing application was filed that the matter was listed. The lower Court's records were there in the year 2004 but the office has not prepared the paper book. As the matter is pending since long and the accused-appellant is in jail for more than 21 years with remission, we dispense with the paper book. We have requested learned counsels to go through the record. We have also perused the record.

4. This appeal challenges the judgment and order dated 23.10.2003 passed by Special Judge (SC/ST Act), Kanpur Dehat in Special Sessions Trial No.50 of 2001 (State vs. Aftaf alias Nafees alias Pappu) wherein the learned Special Judge has convicted & sentenced accused-appellant, Aftaf alias Nafees alias Pappu, under Section 376 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') read with Section 3 (2) (v) of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as SC/ST Act) and sentenced him to imprisonment for life with fine of Rs.5,000/- and, in case of default in payment of fine, further to under go one year's simple imprisonment.

5. Brief facts as culled out from the record are that Kamlesh Kumar, the husband of prosecutrix, made a complaint to Police Station Akbarpur, Kanpur Dehat stating that on 9.2.2001, at about 12.00 noon, when the prosecutrix went to her field for bringing silage for the cattle, the accused-appellant, Aftaf alias Nafees alias Pappu, caught her from behind, knocked her down and started committing rape on her. On raising alarm by the prosecutrix, the informant along with his brother, Dinesh Kumar who were cutting silage in the adjacent field reached at the place of incident where they saw that accused was committing rape on her. It was alleged that the prosecutrix sustained injuries, her glass bangles got broken and the informant, his brother and one Darogi Lal brought her to the Police Station. On basis of the written report, the F.I.R. being Case Crime No. 36 of 2001 under Section 376 of IPC and

Section 3 (2) (v) of SC/ST Act came to be lodged against the accused.

6. After lodging of the F.I.R, the investigation was moved into motion. The prosecutrix was got medically examined. The Investigating Officer, after taking statements of witnesses, submitted charge-sheet against the accused-appellant under Section 376 of IPC and under Section 3 (2) (v) of SC/ST Act.

7. The accused was committed to the Court of Sessions as the case was triable by the Court of Session. The learned Sessions Judge framed charges on the accused. The accused pleaded not guilty and wanted to be tried.

1	Kamlesh Kumar	PW1
2	Prosecutrix	PW2
3	Dr. Subha Mishra	PW3
4	Maan Singh	PW4
5	Dinesh Kumar	PW5
6	Om Prakash Singh	PW6
7	B. R. Premi	PW7

8. So as to bring home the charge, the prosecution has examined 7 witnesses who are as under :

9. In support of ocular version following documents were filed:

1	F.I.R. & G.D.	Ex.Ka.5 & Ka.6
2	Written Report	Ex.Ka.1
3	Recovery memo of glass bangles	Ex. Ka. 7
4	Recovery memo of petikot	Ex. Ka.2.
5	Medical Report of Prosecutrix	Ex. Ka. 3 & Ka.4
6	Charge-sheet	Ex. Ka. 12
7	Site Plan with Index	Ex. Ka.8

10. At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Special Judge convicted the appellant as mentioned aforesaid.

11. As far as commission of offence under Section 3 (2) (v) of SC/ST Act is concerned, it is submitted by learned counsel that the F.I.R. nowhere states that the injured belongs to a particular community. No documentary evidence so as to prove that the injured belongs to Scheduled Caste or Scheduled Tribe was produced either before Investigating Officer or Sessions Court. No independent witness has been examined by the prosecution. It is stated by prosecutrix that she did not know the accused. P.W.1 had stated that he did not know the accused and in his cross examination he had denied the commission of offence and, therefore, no case is made out for commission of offence under Section 3 (2) (v) of SC/ST Act and finding of the learned Special Judge requires to be upturned.

12. As far as commission of offence under Section 376 of IPC is concerned, it is submitted by learned counsel for the appellant that the accused has been falsely implicated in the present case. The medical evidence does not support the prosecution version as no internal/external injury was

found on person of the prosecutrix though the F.I.R. and medical examination were prompt. It is further submitted that even P.W.1, in his cross examination has denied the commission of rape and the finding of the Special Judge is based on surmises and conjectures and requires to be upturn. In support of his argument, learned counsel for the appellant has relied on the decision of this Court in Criminal Appeal No. 204 of 2021 (**Vishnu vs. State of U.P**.) decided on 28.1.2021 & in Criminal Appeal No.4083 of 2017 (**Pintu Gupta vs. State of U.P**.) decided on 28.7.2022 and has contended that no ingredients of Section (3) (2) (v) of SC/ST Act & Section 376 of IPC is made out and, therefore, the conviction is required to be set aside.

13. Per contra, Sri Vikas Goswami, learned A.G.A. for the State has submitted that the conviction of the accused is just and proper as ingredients of offence under Section 3 (2) (v) of SC/ST Act and Section 376 are very much there. It is further submitted by learned A.G.A. that P.W.2, prosecutrix, has stated that before committing the unlawful act, the accused had asked her name, caste and her husband's name and, therefore, finding of the learned Special Judge is just and proper.

14. Before we venture upon to discuss the evidence and the arguments advanced by the learned counsel for the parties, it would be pertinent to discuss Section 3 (2) (v) of SC/ST Act and Section 375 of IPC which read as under:

"3. Punishments for offences of atrocities.--

(1).....xx.....xx.....

(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,--

(i).....xxx.....

(ii).....xx.....

(iii).....xxx.....

(iv).....xxx.....

(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine."

*[375. **Rape**.--A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:--*

(First)-- Against her will.

(Secondly)--Without her consent.

(Thirdly)-- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

(Fourthly)--With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

(Fifthly)-- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly)-- With or without her consent, when she is under sixteen years of age. Explanation.--Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

(Exception)--Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.]

15. The aforesaid provisions of law would now be seen in view of the ocular version as well as the documentary evidence of the prosecution witnesses. P.W.1, in his cross examination, categorically mentions that he has not seen the appellants committing any kind of sexual intercourse with the prosecutrix. P.W.3, whose oral testimony has been considered, also categorically states that she cannot conclusively opine that whether there was commission of sexual intercourse against the will or against the consent of the prosecutrix. None of the ingredients, according to us, has been proved by the prosecutrix.

16. The evidence on record highlights the theory of commission of rape on the ground that the prosecutrix belong to a particular community. Neither the F.I.R. nor the oral testimony have been remotely suggests the same. So as to attract the provisions of Section 375 read with Section 376 of IPC and Section 3 (2) (v) of SC/ST Act, ingredients of the said offence has to be proved.

17. P.W., Kamlesh Kumar, who had lodged the F.I.R. is the husband of prosecutrix who has stated that the accused appellant professes muslim religion. The appellant is the resident of a place which is 8 to 9 kms away from the house of the prosecutrix. The most important aspect is that he does not know the accused which goes to show that the accused would not be knowing the caste of the prosecutrix. The accident occurred on 9.2.2001 in broad day light at about 12.00 noon. The F.I.R. and evidence go to show that the accused caught hold the prosecutrix from behind and knocked her down. P.W.1, P.W.5 & Darogi Lal were in the nearby field. According to P.W.1, in resisting, the prosecutrix suffered injuries and her bangles got broken. The report was got lodged by one Omkan Singh and the informant has signed on the same. It is an admitted position of fact that broken bangles were found from the so called place of occurrence. But when we read the evidence of P.W.2, the prosecutrix, it shows that she was being dragged and when she shouted, her husband and one Darogi Lal came there to save her. According to prosecutrix, the accused ran away and after lot of running around he could be caught. This is a statement which is opposite to the statement made by P.W.1 as in his statement and the statement of P.W.5, there is no corroboration to this statement. She also mentions that she does not know the accused nor the accused knows her. They are the witnesses of facts who have given different versions. Evidence of P.W.2, prosecutrix, goes to show that at the time of occurrence, first of all, the accused caught her from behind and asked her caste and name of her husband. It is highly unbelievable that person who is going to commit grave offence like rape would ask caste and name of husband of prosecutrix before commission of crime. Hence, there is no evidence which goes to show that the offence by the appellant is committed on the ground that prosecutrix belongs to scheduled caste. The improvement in statement before lower Court was made by the prosecutrix, P.W.2, stating that appellant first asked her caste and name of her husband then commit the said offence. This is nothing else but a totally manufactured evidence.

18. As per prosecution version, on hearing hue and cry of the prosecutrix, her husband, brother-in-law and one Darogi Lal reached at the spot but Darogi Lal who was independent witness has not been produced.

19. We now go to the depositions of P.W.3, the doctor, the medical examination

of prosecutrix was conducted by P.W.3. In the medical report of the prosecutrix, no injury was found on her private part. Two slides were taken from the discharge of vagina and sent for examination. Pathology report received by the doctor and supplementary report was prepared. In supplementary report, no living or dead spermatozoa was found which shatters the prosecution case with regard to commission of rape. Neither dead nor live spermatozoa was found. She was having fetus of five months.

20. This judgment shows that the learned Sessions Judge has convicted the accused-appellant where there was no evidence for commission of offence under Section 3 (2) (v) of The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. Neither the First Information Report nor the oral testimony of P.W.1 to P.W.5 even remotely suggest that the accused knew the prosecutrix. It is not worth believing that a person who want to commit sexual offence would enquire from the prosecutrix her name and her caste and then commit the unlawful act. P.W. 1 who is the husband of the prosecutrix has flatly denied the commission of offence in his cross examination though he was in the adjacent field. He had also stated that he did not know the accused-appellant. Therefore, the evidence of P.W.5 is wholly unreliable. The judgment relied by the prosecution before the Court below namely **Ved Prakash vs. State of Haryana, JIC 1996 SC 18** cannot apply to the facts of this case.

21. The evidence of doctor and the medical report does not show presence of any spermatozoa though the prosecutrix after lodging of F.I.R. was directly taken from police station for medical examination. No injury was found on her private part. In medical report of prosecutrix, some little abrasions were found on her hand and knee but it has been specifically mentioned in the medical report that these abrasions were three to four days old while the medical examination of prosecution was conducted on the very next day of the occurrence, hence, these abrasions cannot be linked with the alleged occurrence of this case. It was also stated in her testimony by prosecutrix that at the time of alleged occurrence, the appellant threw her on the ground and at the time of commission of rape she was sliding herself along with the ground but not even a single injury has been found on the back of the prosecutrix. The learned judge, unfortunately, no where has discussed about the ingredients of Section 375 of IPC. Rather, he has misread the evidence of P.W.3. The learned Sessions Judge has gone on the assumption that as saree was worn by the prosecutrix, there may not be any injuries. The learned Sessions Judge has also gone on the assumption that as she was married lady and she was carrying a child, there is no necessity of there being any kind of injury sustained by her. The learned Session Judge has considered the fact that spermatozoa may or may not be found. The important aspects are non founding of spermatozoa and non finding of any kind of injuries which would permit us to upturn the judgment of learned Sessions Judge. There is no finding as far as commission of offence under Section 3 (2) (v) of SC/ST Act. Only on the ground that the prosecutrix and her family members belong to a particular community, can it be said that the offence has been committed? The answer is, No. We are also fortified in our view by the decision of the Apex Court in **Patan Jamal Vali vs. State of Andhra**

Pradesh, 2021 SCC OnLine SC 343, wherein the Apex Court has held as under :

"58. The issue as to whether the offence was committed against a person on the ground that such person is a member of a SC or ST or such property belongs to such member is to be established by the prosecution on the basis of the evidence at the trial. We agree with the Sessions Judge that the prosecution's case would not fail merely because PW1 did not mention in her statement to the police that the offence was committed against her daughter because she was a Scheduled Caste woman. However, there is no separate evidence led by the prosecution to show that the accused committed the offence on the basis of the caste identity of PW2. While it would be reasonable to presume that the accused knew the caste of PW2 since village communities are tightly knit and the accused was also an acquaintance of PW2's family, the knowledge by itself cannot be said to be the basis of the commission of offence, having regard to the language of Section 3(2)(v) as it stood at the time when the offence in the present case was committed. As we have discussed above, due to the intersectional nature of oppression PW2 faces, it becomes difficult to establish what led to the commission of offence - whether it was her caste, gender or disability. This highlights the limitation of a provision where causation of a wrongful act arises from a single ground or what we refer to as the single axis model.

59 It is pertinent to mention that Section 3(2)(v)was amended by the Scheduled Castes and theScheduled Tribes (Prevention of Atrocities) Amendment Act, 2015, which came into effect on 26 January 2016. The words "on the ground of" underSection 3(2)(v) have been substituted with "knowing that such person is a member of a Scheduled Caste or Scheduled Tribe". This has decreased the threshold of proving that a crime was committed on the basis of the caste identity to a threshold where mere knowledge is sufficient to sustain a conviction.Section 8which deals with presumptions as to offences was also amended to include clause (c) to provide that if the accused was acquainted with the victim or his family, the court shall presume that the accused was aware of the caste or tribal identity of the victim unless proved otherwise. The amendedSection 8reads as follows:

"8. Presumption as to offences. - In a prosecution for an offence under this Chapter, if it is proved that

(a) the accused rendered [any financial assistance in relation to the offences committed by a person accused of], or reasonably suspected of, committing, an offence under this Chapter, the Special Court shall presume, unless the contrary is proved, that such person had abetted the offence;

(b) a group of persons committed an offence under this Chapter and if it is proved that the offence committed was a sequel to any existing dispute regarding land or any other matter, it shall be presumed that the offence was committed in furtherance of the common intention or in prosecution of the common object.

[(c) the accused was having personal knowledge of the victim or his family, the Court shall presume that the accused was aware of the caste or tribal identity of the victim, unless the contrary is proved.]"

60 The Parliament Standing Committee Report on Atrocities Against Women and Children has observed that, "high acquittal rate motivates and boosts the confidence of dominant and powerful communities for continued perpetration" and recommends inclusion of provisions of SC &ST Act while

registering cases of gendered violence against women from SC & ST communities53. However, as we have noted, one of the ways in which offences against SC & ST women fall through the cracks is due to the evidentiary burden that becomes almost impossible to meet in cases of intersectional oppression. This is especially the case when courts tend to read the requirement of "on the ground" underSection 3(2)(v)as "only on the ground of". The current regime under the SC &ST Act, post the amendment, has facilitated the conduct of an inter-sectional analysis under the Act by replacing the causation requirement underSection 3(2)(v)of the Act with a knowledge requirement making the regime sensitive to the kind of evidence that is likely to be generated in cases such as these. 61 However, sinceSection 3(2)(v) was amended and Clause (c) ofSection 8was inserted by Act 1 of 2016 with effect from 26 January 2016 these amendments would not be applicable to the case at hand. The offence in the present case has taken place before the amendment, on 31 March 2011. Therefore, we hold that the evidence in the present case does not establish that the offence in the present case was committed on the ground that such person is a member of a SC or ST. The conviction underSection 3(2)(v)would consequently have to be set aside."

22. The decisions cited by learned counsel for the appellant in **Visnu (Supra) and in Pintu Gupta (Supra)** will also apply to the facts of this case. This is a similar case to **Vishnu (Supra)** where the man was languishing in jail for non commission of offence for which he was punished.

23 We, therefore, hold that no case for commission of offence under Section 376 read with Section 3 (2) (v) of IPC is made out. The judgment and order impugned to this appeal is set aside. The accused-appellant is acquitted from the charges leveled against him. We direct the jail authority concerned to set the accused-appellant free, if not warranted in any other offence.

24. Record and proceedings be sent back to the Trial Court forthwith.

25. This Court is thankful to both the learned advocate for ably assisting the Court and getting this old matter decided.

26. The office has not prepared the paper book in this matter though the record was very much there in the year 2004. We, by this omnibus direction, direct Registrar (Listing) to impress upon the officer concerned to follow the decision of this Court in **Vishnu (Supra)** which are yet not being followed as even after 2021, the matters are not being listed. Even this matter has been listed only after the counsel for the appellant has filed listing application as the accused is in jail for more than 19 years (21 years with remission). His case has not been considered for remission by the jail authorities though 14 years of incarceration is over and there are directions of the Apex Court and this Court. Even if there is no direction of the Courts, under Section 433 of Cr.P.C. the authorities concerned are under an obligation to consider the case of the accused for remission.

(2022) 11 ILRA 1257
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.11.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Crl. Appl. No. 5277 of 2013

Ashok Yadav ...Appellant

Versus

State of U.P. ...Opp. Party

Counsel for the Appellant:
From Jail, Sri Sushil Kumar Dwivedi, Sri Virendra Pratap Yadav

Counsel for the Opp. Party:
A.G.A., Sri Sanjay Sharma

Criminal Law- Indian Evidence Act, 1872- Section 154 to 157- Two mutually inconsistent stand/statement of P.W.-1 and P.W.-2. One version supports the prosecution case and other version supports the innocence of accused-appellant-When the witness comes forward with two diagonally opposite statements in respect of the fact on which he is called upon to adduce evidence, then it is upon the prosecution to prove that his subsequent statement (as the case herein) is not reliable or that he is not making a true deposition before the court. If this exercise is not undertaken and the prosecution allows the two divergent statements of the witness to stand, in respect of the event in question, then it would be difficult for the court to rely upon the testimony of such a witness as the contradictory stand on a point of fact would clearly render him unreliable-The prosecution has failed to discharge its burden in terms of Section 154 of the Act of 1872 by putting his own witness to question on the subsequent statement made at the stage of cross-examination-The prosecution has miserably failed to impeach the subsequent stand of the witness by resorting to the manner and procedure specified under Section 155 to 157 of the Act of 1872. Having failed to discharge its burden of proving that subsequent statement of the witness is not reliable, we cannot allow the prosecution to contend that the subsequent statement of the witness made at the stage of cross-examination be ignored particularly when the testimony made at the stage of cross-examination has not been impeached in the manner specified in law.

The burden of proof upon the prosecution cannot be said to be discharged by ignoring the divergent statement/ stand of its own witness without subjecting the witness to cross-examination.

Indian Evidence Act, 1872- Section 8- Subsequent Conduct-The fact about absence of the accused-appellant at the stage of preparation of panchayatnama is concerned or that he made no efforts to trace out the deceased, we are of the view that such facts may only generate suspicion against the accused-appellant of commissioning of the offence. Law is settled that suspicion howsoever strong it may be cannot independently be the basis for implication or conviction of an accused.

Subsequent conduct of the accused may only create suspicion but the same alone cannot take the place of proof and cannot be the basis for securing the conviction of the accused. (Para 19, 20, 21, 24, 25, 26)

Criminal Appeal allowed. (E-3)

Case Law/ Judgements relied upon:-

Ram Niwas Vs St. of Har., 2022 SCC OnLine SC 1007

(Delivered by Hon'ble Ashwani Kumar Mishra, J. & Hon'ble Shiv Shanker Prasad, J.)

1. Heard Sri Virendra Pratap Yadav, learned Amicus Curiae for the appellant and the learned A.G.A. for the State.

2. This jail appeal is by the accused-appellant Ashok Yadav, who has been convicted in Sessions Trial No. 521 of 2011 (State Vs. Ashok Yadav), arising out of Case Crime No. 288 of 2011, under Section 302, 201 I.P.C., Police Station Puramufti, District Kaushambi and has been sentenced to life imprisonment alongwith fine of Rs.10,000/- under Section 302 I.P.C. and in default of payment in fine to further one year additional imprisonment; seven years imprisonment alongwith fine of Rs.5000/- for the offence under Section 201 I.P.C. and in default of payment in fine to one year

additional imprisonment. All sentences are to run concurrently

3. The prosecution case proceeds on a written report of Basant Lal (P.W.-1), who has stated that next to his house is the house of his uncle Ashok Yadav (accused), who is of cantankerous nature and is a thief. He has thrown his wife out of the house about 3-4 months back and his only son Gangadeen (deceased), aged about 13 years was living with him. The deceased often used to have his meals at the house of the informant and he also used to render some services to him. The deceased however was not keen in living with the accused and wanted to go with his mother. On the night of 16/17.08.2011, the informant heard cries of Gangadin and he went to the house of the accused to inquire as to why Gangadin was crying. The accused from inside the house informed that Gangadin was insisting to go with his mother and he was being scolded by him. After sometime the cries of Gangadin stopped and the informant asked the accused to open the door but the accused informed from inside the house that the deceased had gone to sleep. The informant was asked to go back to his house.

4. At about 3:00 A.M. the accused came to the house of the informant and intimated him that Gangadin had run away from the house. The informant along with other family members tried to search Gangadin. The residents of the village namely Raghu Yadav and Jagmohan Yadav however informed the informant that at about 12:00 hours in the night, while they were returning home from the power house, the accused was carrying the deceased covered in a Kathri (stitched blanket) and upon inquiring these persons were informed by the accused that the deceased is unwell and he is taking him for treatment. The informant, therefore grew suspicion and when the accused was firmly inquired regarding the whereabouts of Gangadin that the accused confessed that he has strangulated the deceased and has thrown his body in the village pond. The informant states that while he was attempting to somehow retrieve the body from the pond, that the accused fled. With the assistance of other members of the village the dead body was ultimately retrieved and has been kept in adjoining field of Shamshad.

5. On the basis of such written communication given by P.W.-1, the first information report in Case Crime No. 288 of 2011, under Section 302, 201 I.P.C., Police Station Puramufti, District Kaushambi was registered. The police came on the spot and prepared a recovery memo in respect of the Kathri (stitched blanket) and a pair of slippers. The Panchayatnama was conducted and panch witnesses were of the opinion that deceased has been strangulated and the death is homicidal and in order to ascertain the correct cause of death the post mortem be got conducted. The post mortem has been conducted in which cause of death has been found to be asphyxia as a result of ante mortem strangulation and following ante mortem injuries have been found on the body of the deceased:-

1. Contused swelling of 7cm x 3cm present in front of neck, contusion is placed 2cm below chin, on cut section of contusion mark haemorrhage seen.

2. Multiple abraded contusion of 6cm x 4cm present of right side cheek, on cut section of contusion haemorrhage seen.

3. Contusion of 7cm x 5cm present on left side face. On cut section of contusion haemorrhage seen.

4. Abrasion of 2cm x 2cm present on right index finger."

6. The Investigation ultimately concluded in terms of Chapter XII of the Code of Criminal Procedure and the charge-sheet was submitted against the accused-appellant. The Magistrate took cognizance and committed the case to the Court of Sessions, who framed charge under Section 302 I.P.C. against the accused-appellant. The charges were denied and consequently the trial commenced.

7. The prosecution in order to establish the charge levelled against the accused-appellants, has relied upon following documentary evidences, which were duly proved and consequently marked as Exhibits:

"Written report dated 17.08.2011 has been marked as Exhibit-Ka-1; F.I.R dated 17.08.2011 has been marked as Exhibit-Ka-3; Site plan dated 17.08.2011 has been marked as Exhibit-Ka-5; recovery memo of Kathri & a pair of slippers dated 17.08.2011 has been marked as Exhibit-Ka-7; panchayatnama dated 17.08.2011 has been marked as Exhibit-Ka-6; Post mortem report dated 18.08.2011 has been marked as Exhibit-Ka-2 and charge-sheet dated 17.09.2011 has been marked as Exhibit-Ka-15."

8. The prosecution has also adduced oral testimony of following witnesses:-

"P.W.-1/ informant, namely, Basant Lal; P.W.-2, namely Raghghu Yadav, witness of the fact; P.W.-3, namely Dr. Shaji Rahil, who conducted the post-mortem of the deceased; P.W.-4, namely, Constable- Suresh Chandra, who prepared the chik report; P.W.-5, namely, M.P. Verma, S.I., who has conducted the Panchayatnama."

9. P.W.-1, Basant Lal at the stage of examination-in-chief has supported the prosecution version as per which the witness had heard cries/ screams of the deceased in the night and on enquiry from the accused, he was informed that the deceased wanted to be with his mother and was being scolded for it by the accused. After some time, the cries stopped and P.W.-1 again came to the house of the accused and asked him to open the door but the accused informed him from inside the house that the deceased has gone to sleep and that he may go back to his house. The further story that the accused was seen carrying the deceased covered in a kathri (stiched blanket) by Raghghu and Jagmohan Yadav has also been reiterated. However, at the stage of cross-examination, P.W.-1 has come up with entirely different version and has disowned the previous statement made by him in examination-in-chief. He has stated that he had neither heard cries/screams of the deceased in the night intervening 16/17.08.2011 nor had he inquired as to why the deceased was crying. Every part of the statement has been specifically noticed and disowned by P.W.-1. He has also tried to suggest that it is not clear whether the deceased was strangulated or he slipped accidentally and fell in the pond. He has also denied having given any written information to the police on the basis of which the F.I.R. itself was lodged.

10. Similarly P.W.2 has also supported the prosecution case in the examination-in-chief but at the stage of cross-examination he retracted from his previous statement made at the stage of the examination-in-chief and has stated that

neither he met the accused in the intervening night nor had he seen the accused, carrying the deceased, covered in a kathri (stitched blanket) and that he has come to know only in the morning that the son of the accused-appellant had drowned in the pond and his dead body has been retrieved.

11. So far as the statement of Doctor is concerned he has proved the autopsy report and the cause of death has been proved to be strangulation. The other formal witnesses have also proved the F.I.R. and other investigation including the recovery memo.

12. On the basis of above evidence led by the prosecution, the accused was confronted with the incriminating materials, collected during the course of investigation, against him. The accused-appellant however stated that he has not committed any murder and has otherwise denied the allegations made against him. No defence witness, however, has been produced. It is on the basis of above material that the trial court has come to the finding that the prosecution has succeeded in proving the guilt of the accused-appellant under Section 302 I.P.C., beyond reasonable doubt, and the deceased has been sentenced to life.

13. Aggrieved by the conviction and sentence awarded to the accused-appellant the present jail appeal has been filed by him.

14. Sri Virendra Pratap Yadav, learned Amicus Curiae appointed in the present jail appeal has taken the Court through the facts of the case in extenso. It is urged on behalf of the appellant that though the death of the deceased was homicidal yet the accused-appellant cannot be held guilty in the matter as there is no evidence to connect him with the offence. It is further submitted that P.W.-1 and P.W.-2, who are the only witnesses of the fact have turned hostile at the stage of cross-examination and their version is inconsistent inasmuch as the witnesses of fact in the examination-in-chief have supported the prosecution case and have taken a contrary stand at the stage of cross-examination. As such the witnesses have clearly discredited their testimony as their stand is contradictory at different stages of the proceedings of trial. He further submits that apart from the statement of two witnesses no other evidence has been produced by the prosecution so as to connect the occurrence of the offence with the accused-appellant. It is the argument of learned Amicus Curiae that this is a case of circumstantial evidence as none has seen the occurrence of crime and the chain of events pointing to the hypothesis of guilt on part of the accused-appellant has not been proved by the prosecution.

15. Per contra, Sri Arunendra Singh, learned A.G.A. submits that this is a case involving heinous offence in which the accused-appellant has rightly been held guilty inasmuch as the two witnesses of fact have clearly implicated the accused of the offence for which medical evidence in the form of post mortem report clearly corroborates statements made at the stage of examination-in-chief and merely because for unknown reasons the witnesses have retracted at the stage of cross-examination yet their initial stand taken at the stage of examination-in-chief cannot be ignored, altogether. He further submits that the deceased was living with the accused, who is his father and the fact that he was neither present at the time of

panchayatnama clearly indicates that his conduct was not natural in not being present at the time when enquiry was being made with regard to death of his son. He next submits that the presumption under Section 106 of Evidence Act, 1872 would otherwise stare against the accused-appellant inasmuch as the deceased was residing only with him and is expected to have specific information/ knowledge about the manner and cause of death of his son and having failed to disclose such specific information the presumption in law would stand against him.

16. We have heard learned counsel for the respective parties in light of their submissions advanced and have carefully examined the records of the present jail appeal including the lower court records.

17. This is a case in which the proceedings have commenced on the basis of a written information of P.W.-1 which clearly contains statement of facts clearly implicating the accused of committing the murder of his son. The investigation conducted pursuant to such written report in the form of panchayatnama also indicates that the deceased was strangulated. The post mortem report also menions the cause of death as asphyxia due to ante mortem strangulation and the injuries have been clearly specified. The evidence produced by the prosecution therefore, leaves no room of doubt that the death of the deceased is homicidal. The cause of death being strangulation, the suggestion given by some of the witnesses that the cause of death is drowning cannot be believed.

18. The question that needs examination in the facts of the case is as to whether the deceased was strangulated by the accused-appellant and whether the prosecution has proved his guilt beyond reasonable doubt?

19. Though the death is admittedly homicidal yet the implication of accused-appellant is based upon the deposition of two witnesses of fact produced by the prosecution namely, P.W.-1 and P.W.-2. P.W.-1 in his examination-in-chief has supported the sequence of facts recorded in the F.I.R. as per which P.W.-1 heard the cries/ screams of the deceased and he made necessary enquiries from the accused followed with the first informant gathering information from P.W.-2 that the accused was seen taking the deceased at about 12:00 hours in the night and the accused later informed the first informant that the deceased ran away and later his dead body was found in the pond but at the stage of cross-examination this witness has clearly taken a somersault and has retracted from his previous deposition made at the stage of examination-in-chief. Similar is the status of testimony of P.W.-2, who also has supported the prosecution case at the stage of examination-in-chief but has specifically disowned his statements made earlier at the stage of cross-examination. On record we find that there are two mutually inconsistent stand/statement of P.W.-1 and P.W.-2. One version supports the prosecution case and other version supports the innocence of accused-appellant. It is in the above context that this Court is called upon to determine as to which of the version of the prosecution witness P.W.-1 and P.W.-2 would be reliable.

20. The provisions of the Indian Evidence Act, 1872 can be referred to and relied upon in order to determine as to which of two versions needs to be relied upon by the Court. Section 154 to 157 of

the Act of 1872 provides necessary guidance to the Court for determination of the probative value of the deposition made by P.W.-1 and P.W.-2. Chapter X of the Act of 1872 deals with the examination of witnesses. Section 135 describes the order of production and examination of witnesses, whereas Section 136 confers jurisdiction on the Judge conducting the trial to specify the sequence and the manner in which the evidence itself has to be adduced. Section 137 provides for examination-in-chief and the cross-examination by the adverse party of the witness. Section 138 specifies the order of examination and also confers power of re-examination to the Court. Section 146 specifies the nature of questions which may be put to a witness in cross-examination for the purpose of testing his veracity and to discover the identity of the witness or his position in life or to shake his credit, by injuring his character etc. Court has been given power under Section 148 to decide as to when a witness can be compelled to the answer a question. Section 154 allows the Court to permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party.

21. In a case of instant kind where the prosecution witness has gone against his own stand, taken at the stage of examination-in-chief, during the cross-examination by the adverse party, it would be open for the prosecution to question such witness about the circumstances or confront him with his previous statement so as to indicate as to whether the subsequent stand taken by the witness would be reliable or not. Law in that regard is well settled and even a witness who has been declared hostile can be examined and his evidence to the extent it supports the prosecution case can be relied upon. However, when the witness comes forward with two diagonally opposite statements in respect of the fact on which he is called upon to adduce evidence, then it is upon the prosecution to prove that his subsequent statement (as the case herein) is not reliable or that he is not making a true deposition before the court. If this exercise is not undertaken and the prosecution allows the two divergent statements of the witness to stand, in respect of the event in question, then it would be difficult for the court to rely upon the testimony of such a witness as the contradictory stand on a point of fact would clearly render him unreliable.

22. Although Sri Arunendra Singh, learned A.G.A. has tried to submit that in the facts of the case the evidence led by the prosecution clearly supports the first stand of the prosecution witnesses P.W.-1 and P.W.-2 as they are consistent with the post mortem report yet we are not inclined to accept such submission of learned A.G.A. as we find that the prosecution has failed to discharge its burden in terms of Section 154 of the Act of 1872 by putting his own witness to question on the subsequent statement made at the stage of cross-examination.

23. We may also refer to Section 155 of the Act of 1872 which provides the manner in which the credit of a witness may be impeached by adverse party in the manner prescribed therein. For ready reference Section 155 is reproduced hereinafter:-

"155. **Impeaching credit of witness.** - The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him: --

(1) By the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(2) By proof that the witness has been bribed, or has [accepted] the offer of bribe, or has received any other corrupt inducement to give his evidence;

(3) By proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;"

24. Section 157 of the Act of 1872 also assumes importance as the former statements of witness may be proved to corroborate later testimony as to same fact. The statute thus provides that in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved. We find that the prosecution has miserably failed to impeach the subsequent stand of the witness by resorting to the manner and procedure specified under Section 155 to 157 of the Act of 1872. Having failed to discharge its burden of proving that subsequent statement of the witness is not reliable, we cannot allow the prosecution to contend that the subsequent statement of the witness made at the stage of cross-examination be ignored particularly when the testimony made at the stage of cross-examination has not been impeached in the manner specified in law.

25. So far as the fact about absence of the accused-appellant at the stage of preparation of panchayatnama is concerned or that he made no efforts to trace out the deceased, we are of the view that such facts may only generate suspicion against the accused-appellant of commissioning of the offence. Law is settled that suspicion howsoever strong it may be cannot independently be the basis for implication or conviction of an accused. Law in that regard has been settled by the Supreme Court in a recent judgment in Ram Niwas Vs. State of Haryana, 2022 SCC OnLine SC 1007, wherein the Court after referring to the evidence on record proceeded to observe as under in para 20 and 21:-

"20. It is settled law that the suspicion, however strong it may be, cannot take the place of proof beyond reasonable doubt. An accused cannot be convicted on the ground of suspicion, no matter how strong it is. An accused is presumed to be innocent unless proved guilty beyond a reasonable doubt.

21. In the present case, we find that the prosecution has utterly failed to establish the chain of events which can be said to exclusively lead to the one and only conclusion, i.e., the guilt of the accused. In that view of the matter, we find that the judgment and order of the learned Sessions Judge and that of the High Court are not sustainable."

26. Once we cumulatively analyze the evidence led by the prosecution to prove the guilt of the accused-appellant, we find that apart from establishing the factum of homicidal death of the deceased it has failed to connect the accused-appellant with the commissioning of the offence and the circumstances on which the guilt of the accused could be proved or inferred, have not been proved at all. We find that the court below upon evaluation of the facts noticed above has accepted the testimony of prosecution witnesses P.W.-1 and P.W.-2 on the ground that the evidence available on record in the form of post mortem report corroborates the statement of the witnesses made at the stage of examination-in-chief

and the fact that principal of falsus in uno falsus in omnibus (false in one thing false in everything) does not apply to the courts in India as such the statements of the witnesses made at the stage of examination-in-chief can be looked into and have been relied upon to return the conviction of the accused. We are of the view that the court below has not adverted to the aspect relating to credibility of the deposition made by P.W.-1 and P.W.-2 in light of two contradictory stands taken by them on same facts. The court below has also not referred to the provisions of the Indian Evidence Act, 1872 and has completely overlooked the fact that the prosecution has failed to impeach the testimony of P.W.-1 and P.W.-2 made at the stage of cross-examination and the consequences which ensues on account of such failure by the prosecution. The statements of witnesses P.W.-1 and P.W.-2 could have been looked into or relied upon to return the conviction of accused only if the prosecution had impeached the later part of the testimony of the two witnesses in the manner specified herein above. Failure to do so by the court below would render it legally impermissible for the Court to refer to or rely upon the testimony of P.W.-1 and P.W.-2 at the stage of examination-in-chief by omitting the contrary stand of the same witness taken at the stage of cross-examination. The reasoning adopted by the court below for arriving at the finding of guilt of the accused-appellant is, therefore, found contrary to law and the conviction based upon such reasoning is held impermissible.

27. We may also at this stage refer to para 18 and 19 of the judgment in ***Ram Niwas (Supra)*** wherein the Court in a case based on circumstantial evidence has observed as under:-

"18. The prosecution case rests on circumstantial evidence. The law with regard to conviction on the basis of circumstantial evidence has very well been crystalized in the judgment of this Court in the case of ***Sharad Birdhichand Sarda vs. State of Maharashtra,*** *wherein this Court held thus:*

"152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] . This case has been uniformly followed and applied by this Court in a large number of later decisions up todate, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh [(1969) 3 SCC 198: 1970 SCC (Cri) 55] and Ramgopal v. State of Maharashtra [(1972) 4 SCC 625: AIR 1972 SC 656]. It may be useful to extract what Mahajan, J. has laid down in Hanumant case [AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] :

"It is well to remember that in in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the 2 (1984) 4 SCC 116 guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show

that within all human probability the act must have been done by the accused."

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

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

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783] where the observations were made : [SCC para 19, p. 807 : SCC (Cri) p. 1047]

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be' and "must be' is long and divides vague conjectures from sure conclusions."

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

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

19. This Court has held that there has to be a chain of evidence so complete so as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. It has been held that the circumstances should be of a conclusive nature and tendency. This Court has held that the circumstances should exclude every possible hypothesis except the one to be proved. It has been held that the accused "must be' and not merely "may be' guilty before a Court can convict."

28. In view of the above deliberations and discussions, we find that the trial court has erred in returning the finding of guilt against the accused-appellant on the basis of evidence led by the prosecution. Finding of the court below that the guilt of the accused-appellant has been proved beyond reasonable doubt is perverse. We hold that the prosecution has failed to prove the guilt of the accused-appellant beyond reasonable doubt and therefore, the conviction and sentenced of the accused-appellant is reversed.

29. Accordingly, the present jail appeal stands allowed.

30. The accused-appellant shall be released from jail, forthwith, unless he is wanted in any other case, subject to compliance of Section 437A Cr.P.C. Fine imposed upon the accused-appellant also cannot be maintained and is thus set aside.

31. Sri Virendra Pratap Yadav, learned Amicus Curiae has ably assisted this Court and would be entitled to his fee from the High Court Legal Services Authority.

32. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Kaushambi henceforth, who shall transmit the same to the concerned Jail Superintendent for release of the accused-appellant in terms of this judgment.

(2022) 11 ILRA 1267
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.11.2022

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal No. 4644 of 2009
Connected With
Criminal Appeal No. 4645 of 2009

Manoj @ Bhoora ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri G.S. Hajela, Sri Kameshwar Singh, Sri R.K. Yadav, Sri Sayeed Saif Ullah, Ms. Sufia Saba, Sri P.K. Yadav, Sri Virendra Kumar

Counsel for the Opposite Party:
Govt. Advocate

Criminal Law- Code of Criminal Procedure, 1973- Section 313-In the statement recorded under Section 313 Cr.P.C. the prosecution has not put any incriminating material to the accused Manoj @ Bhoora regarding the deceased being given in sacrifice for securing a son for him. Unless such incriminating material was put to the accused by the prosecution at the stage of recording of statement under section 313 Cr.P.C. such motive could not have been relied upon against the accused appellants.

Settled law that at the stage of Section 313of the Cr.Pc, it is the duty of the court to seek the explanation of the accused on the incriminating material against him and the circumstances which were not put to the accused cannot be used against him and have to be excluded from consideration.

Indian Evidence Act, 1872- Section 8- Motive- Apart from the above statement of PW-1 there is no evidence led by the prosecution to provide motive for commissioning of the alleged crime. The evidence on the aspect of motive does not otherwise inspire confidence nor can be relied upon to furnish the motive for the occurrence of crime.

Where the case rests on circumstantial evidence but the motive has not been put to the accused while recording his statement u/s 313 Cr.Pc and neither any evidence has been led by the prosecution to prove the same, then themotive cannot be held to be proved against the accused.

Indian Evidence Act, 1872- Section 3- Last Seen Theory- The only evidence with regard to the deceased being taken by the accused appellants in the first information report is of Neetu son of Mahaveer and Roshan son of Mahendra Singh. Neetu son of Mahaveer has not been produced in evidence.

Where the prosecution has withheld the witness of having last seen the deceased in the company of the accused, then the theory of last seen relied by the prosecution must fail.

Indian Evidence Act, 1872- Section 3- Circumstantial Evidence- This is a case of circumstantial evidence and the law on the point is well settled that the prosecution must prove the complete chain of events which points to the exclusive hypothesis of guilt attributed to the accused appellants. It is also the requirement of law that the prosecution

must show that alternative hypothesis does not exist on facts.

Settled law that in a case of circumstantial evidence the prosecution must link all the circumstances in a single chain which establishes the guilt of the accused and no other hypothesis is possible.

Indian Evidence Act, 1872- Section 106- The trial court has erroneously placed the burden upon the accused appellants of disclosing the whereabouts of deceased by relying upon the provisions of Section 106 of the Indian Evidence Act, without analysing the evidence on the factum that the accused appellants had taken the deceased.

Where the prosecution fails to prove the theory of last seen then the burden of proof under section 106 of the IPC cannot be placed on the accused. (Para 26, 27, 29, 45, 51)

Criminal Appeal allowed. (E-3)

Case Law/ Judgements relied upon:-

1. Sharad Birdhichand Sarda Vs St. of Maha. (1984) 4 SCC 116

2. Ram Niwas Vs St. of Har. 2022 SCC On Line SC 1007

(Delivered by Hon'ble Ashwani Kumar Mishra, J.
&
Hon'ble Shiv Shanker Prasad, J.)

1. Court of Session has tried three different sessions trial together, namely (1) Session Trial No.744 of 2007 (State vs. Vinod son of Mahendra Saini, Manoj @ Bhoora son of Mahendra Saini and Karm Singh @ Ganjja son of Neebu @ Nemnath Jogi) arising out of Case Crime No.191 of 2007 under Section 302 IPC, Police Station Nagal, District Saharanpur; (2) Session Trial No.745 of 2007 (State vs. Karm Singh @ Ganjja) arising out of Case Crime No.192 of 2007 under Section 25/4 of Arms Act; and (3) Session Trial No.746 of 2007 (State vs. Vinod) arising out of Case Crime No.193 of 2007 under Section 25/4 of Arms Act and vide impugned judgment and order dated 28.07.2009, under challenge in present appeals, convicted all three accused appellants under section 302/34 IPC and sentenced them to life imprisonment with fine of Rs.10,000/- each and in default of fine to further undergo 10 months additional simple imprisonment, as also convicted the accused appellants Karm Singh and Vinod under section 25/4 of Arms Act and sentenced them to undergo six months rigorous imprisonment with fine of Rs.500 each and in default of fine to further undergo one month additional simple imprisonment. All the sentences are to run concurrently.

2. The prosecution case proceeds on a written report (Ex.Ka.1) of the first informant Rakesh Kumar, who happens to be the father of the deceased, stating that on 30.07.2007 at about 02.00 PM the accused Vinod and Karm Singh @ Ganjja took his son Sheetal, aged 11 years (deceased), on the pretext of offering mangoes at the orchard. The two accused were learning occult practices from before which was well known in the village. Neetu son of Mahavir and Roshan son of Mahendra Singh are stated to have seen the accused going towards orchard with the deceased. When the deceased did not return by the evening the informant tried to locate him without success. On the next morning again attempt was made to locate the missing child and his dead body was found lying in the sugarcane field of Laloo son of Sewa. The informant alleges that the accused Vinod and Karm Singh @ Ganjja for practising occult practices have offered sacrifice of his son by slitting his throat.

His dead body was lying at the sugarcane field. Atmosphere of fear and terror prevailed in the village and nobody was allowing children to come out of their home. Moreover, on account of such fear and terror the residents were leaving the village alongwith their children.

3. On the basis of such disclosure the First Information Report in Case Crime No. 191 of 2007 was registered under Section 302 IPC.

4. On 01.08.2007 the Investigating Officer recovered a knife from accused Vinod and a dagger from accused Karm Singh, in respect of which a recovery memo was prepared and two separate First Information Reports were registered as Case Crime Nos. 192 of 2007 and 193 of 2007.

5. The investigation proceeded and a towel (gamchha) was recovered on the pointing out of the accused from the sugarcane field, which allegedly was used for tying hands and feets of the deceased while he was being done to death.

6. The inquest proceedings were thereafter conducted by Sub-Inspector Ram Kumar Sharma (Ex.Ka.-9) in which cause of death was found to be injuries caused by a sharp weapon and in the opinion of inquest witnesses the postmortem was required to ascertain the cause of death. The inquest witnesses included Kawar Sain, who was the scribe of the FIR and was also the village Pradhan.

7. The investigation proceeded and ultimately a charge sheet came to be filed against three accused under sections 302/34 IPC. Charge sheet was also submitted against accused Karm Singh and Vinod under Sections 25/4 of the Arms Act. The Magistrate took cognizance in the matter and committed the case to court of sessions wherein three separate trials were registered as Session Trial Nos.744 of 2007 (under sections 302/34 IPC) and 745 of 2007 & 746 of 2007 (under sections 25/4 of Arms Act). All the trials were consolidated and conducted together.

8. In order to prove its case the prosecution has produced documentary evidence in the form of written report as Ex.Ka.1; two FIR as Ex.Ka.4 & 21; recovery memo of white Gamchha as Ex.Ka.14; recovery memo of bloodstained and plain earth as Ex.Ka.7; recovery memo of knife as Ex.Ka.8; postmortem report as Ex.Ka.3; report of Forensic Science Laboratory as Ex.Ka.17; and three site plans with index as Ex.Ka.6, 18 and 15.

9. Oral testimony has also been placed before the court of the first informant Rakesh Kumar as PW-1, who is the father of the deceased. In his examination-in-chief, PW-1 has stated that he knows the accused persons and at about 1.30-2.00 PM the children were playing in the lane in front of their houses and his son Sheetal was also with them. Accused Vinod and Karm Singh came there and took his son on the premise of offering mangoes in the orchard. This assertion that the two accused took the deceased on the premise of eating mangoes was based on what he heard. He has later stated that although he saw the accused but accused could not see him. When his son did not return by the evening, PW-1 tried to locate him and he also went to the house of accused Vinod and Karm Singh but they were not available. This statement was, however, made for the first time in court and was not told to the Investigating Officer when his

statement was recorded under section 161 Cr.P.C. He has stated that two ladies on the next morning had gone to ease themselves in the agricultural field where they saw a dead child and informed PW-1 about it. This information is stated to have been received at 6.00 AM. First informant claims that there were injuries on the head, chest and neck of his son and various villagers collected at the place of occurrence. PW-1 states that he got the report scribed by Kawar Sain, and the same was filed before the Police Station. The witness has, therefore, proved the written report. It is further stated that Vinod and Karm Singh were learning occult practices. He has further stated that accused Manoj got married about 12 years back but had no son and that the deceased has been done to death by the accused Karm Singh, Vinod and Manoj.

PW-1 has been extensively cross-examined on behalf of the defence and he has disclosed that the family of the accused settled in the village about 10 to 12 years back and the male members were doing different work for their livelihood. A house has been constructed by the family of the accused wherein they reside. He has stated that Ashok son of Rameshwar and Rameshwar son of Jairam are relatives and are witnesses in this case. It has also been submitted that witness Roshan son of Mahendra Singh is also a relative, who resides at a distance of 40-45 kilometers. He has further stated that on the relevant date the school was closed and, therefore, his son was in the house and they had taken their food in the afternoon. *He has specifically stated that the accused has not taken his son in his presence and he only heard it from others.* He has, however, not disclosed the names of person from whom he heard it. He has further explained that the Orchard is close to the Abadi. He has admitted that Manoj @ Bhura was not implicated in the written report. Witness has also been cross-examined on the aspect relating to election on the post of Pradhan in the village and questions were put to him about accused persons supporting the rival faction who had opposed Kawar Sain, who was supported by the informant.

10. PW-2 Sukkur is the uncle of the first informant, who has stated that while he was returning from his field he saw the deceased going alongwith accused Karm Singh, Vinod and Manoj. This witness for the first time takes the name of Manoj also as being the person who took the deceased together with the other two accused. PW-2 claims to have disclosed the fact of seeing the deceased going with the three accused to the first informant. PW-2 has also been examined on the aspect relating to contest of election on the post of Pradhan. PW-2, however, was not a witness in the FIR and has been examined for the first time on 05.08.2007.

11. PW-3 is related as brother-in-law (Jija) of the first informant, who claims to have seen the three accused taking the deceased for eating mangoes in the Orchard. He has in the cross-examination stated that prior to this incident he had never visited the village of first informant. He has disclosed the distance of his village from the place of occurrence as about 30 kilometer and he had returned to his village on 30.07.2007 itself and has again returned in the morning on 31.07.2007. PW-3 also claims to have gone with the informant to the police station for lodgement of the FIR.

12. PW-4 is the informant's brother who also states that he had seen the three accused taking the deceased on the fateful

day at about 2.30 in the afternoon. He has also gone to the police station for lodgement of the FIR.

13. PW-5 is the only person who has come forward with a specific evidence with regard to involvement of the accused in occult practices. He has stated that there is Kaali temple in the village and the accused practiced occult there. It is stated that about 14 months ago a Panchayat was held in the village in which Kawar Sain (Pradhan) and various other villagers participated wherein the accused were also called and they were asked to immediately stop their occult practices. It has been alleged that in the panchayat villagers stated that these three persons could offer sacrifie of anyone for the occult purpose and the proceedings of the panchayat were recorded on 10.06.2007. This proceeding of panchayat has been duly exhibited as Ex.Ka.-2. It contains the signature of village Pradhan, who happens to be the scribe of the FIR and is also a witness of the inquest. In the cross-examination PW-5 has admitted that he is a relative of the first informant and has denied the suggestion that the document Ex.Ka-2 has been manufactured in order to create evidence for false implication of the accused persons.

14. PW-6 is the autopsy surgeon, who has conducted the autopsy on the dead body of the deceased and has opined that the injuries in the nature of incised wound could have been caused by a knife or a dagger. He has also stated that the possible time of death could be between 2.00 PM on 30.07.2007 to 9.00 AM on 31.07.2007. He has also stated that there was no food in the stomach/intestine at the time of autopsy. During arguments an issue is raised about the timing of the incident on the ground that deceased had his food at about 12.00 and, therefore, his stomach could not have been empty at around 02.00 PM.

15. PW-7 is the constable, who has verified the Chick FIR. PW-8 is the Investigating Officer who verified the recovery of bloodstain and plain earth and has also prepared the site plan. He has also verified the recovery of bloodstained knife and dagger. This witness has been extensively cross-examined and has stated that statement of PW-2 was recorded for the first time on 05.08.2007 and that his statement was not recorded prior to it. PW-9 to PW-11 are other formal witnesses.

16. On the basis of evidence so adduced, the trial court has come to a conclusion that the prosecution has established the guilt of the accused appellants beyond reasonable doubt and convicted them vide impugned judgment and order.

17. On behalf of the accused appellants, Sri Mahendra Singh Yadav, learned counsel submits that accused appellants have been falsely implicated on the instigation and advise of the village Pradhan Kawar Sain, who had enmity with the accused appellants, and had opposed him in the election for the office of Pradhan, who is not only the scribe of the written report but had accompanied the informant to the police station for lodging the FIR; is a witness to the inquest proceedings and had prepared the panchayat decision to portray the accused as occultist and thereby falsely implicate the accused appellants. He further submits that there is no motive for the accused appellants to commit the offence. It is then urged that this is a case of circumstantial evidence in which the prosecution has failed to connect the chain of events

leading to the hypothesis of guilt on part of the accused and the conviction is bad in law. He lastly submits that accused Vinod and Karm Singh are languishing in jail for over 14 years for no fault on their part.

18. Sri Arun Kumar, learned A.G.A. for the State, on the other hand, submits that accused appellants have committed heinous offence of murdering a 11 years old boy for offering sacrifice in occult practices to facilitate birth of a child for accused Manoj as he has not had a child even after 12 years of marriage. He further submits that prosecution has meticulously completed the chain of events to clearly implicate the accused appellants who were found to have taken the deceased and later his dead body was found. Submission is that appeals lack merit and deserves dismissal.

19. We have heard learned counsel for the parties and have perused the material brought on record including the records of the trial court.

MOTIVE

20. This is a case of circumstantial evidence. The prosecution alleges that an 11 years' old son of the first informant was done to death by the accused as sacrifice in occult practices to facilitate the birth of a child for accused - Manoj @ Bhoora, who had no son even after 12 years' of his marriage. It is also the case of the prosecution that the accused appellant were involved in occult practices and exorcism and a document in the form of panchayat decision (Ex.Ka.-2) has been brought on record. It would therefore be appropriate to analyse the evidence of the prosecution on the aspect relating to motive which allegedly is the reason for commissioning of the offence.

21. PW-1 in his examination-in-chief has asserted that the accused Vinod and Karm Singh @ Ganjja were learning occult practices in the village. He has also stated that the accused Manoj @ Bhoora got married 12 years' back but he had no issue. The prosecution relies upon the aforesaid testimony of PW-1 to allege that even after 12 years' of his marriage, accused Manoj @ Bhoora had no issue and the deceased has been offered in sacrifice to facilitate the birth of a child for the accused Manoj @ Bhoora.

22. We have examined the evidence on record in this regard. Age of the accused Manoj @ Bhoora has been specified as 25 years in his statement made under section 313 Cr.P.C. PW-1 in his cross-examination has also disclosed the age of Manoj @ Bhoora to be 23 years. If the age of Manoj @ Bhoora at the time of recording of his statement under Section 313 Cr.P.C. is only 25 years, we are at a loss to understand as to at what age he got married?

23. There is no evidence on record to show the date of marriage of Manoj @ Bhoora. The incident occurred two years prior to recording of statement under section 313 Cr.P.C. and, therefore, his age would have been around 23 years at the time of incident. We find it difficult to believe that a period of 12 years had expired from the date of his marriage.

24. We are, therefore, not inclined to accept the prosecution case that Manoj @ Bhoora could not get a child even after 12 years' of his marriage and was desperate enough for a child that he could offer the deceased in sacrifice for the birth of a son.

25. Suggestions have also been given to PW-1 that there was enmity caused

between him and Manoj @ Bhoora, about two years back, and that he actually had a son with the name of Guddu. Although no substantive evidence is lead by the defence to prove the birth of a son to Manoj but considering his young age, we find it difficult to accept the prosecution case on the aspect of motive.

26. We also find that in the statement recorded under Section 313 Cr.P.C. the prosecution has not put any incriminating material to the accused Manoj @ Bhoora regarding the deceased being given in sacrifice for securing a son for him. Even the other two accused, namely Vinod and Karm Singh, were also not confronted with any incriminating material on the aspect of such motive. Unless such incriminating material was put to the accused by the prosecution at the stage of recording of statement under section 313 Cr.P.C. such motive could not have been relied upon against the accused appellants.

27. Apart from the above statement of PW-1 there is no evidence led by the prosecution to provide motive for commissioning of the alleged crime. The evidence on the aspect of motive does not otherwise inspire confidence nor can be relied upon to furnish the motive for the occurrence of crime. We therefore, have no hesitation in holding that the prosecution has failed to provide any motive attributed to the accused-appellants for committing the alleged offence.

THEORY OF LAST SEEN

28. The first information report alleges that the deceased was enticed by the accused appellants on the pretext of offering him mangoes in the orchard. Neetu son of Mahaveer resident of village Naya Gaon and Roshan son of Mahendra Singh have allegedly seen the accused going towards mango orchard alongwith the deceased. On this aspect the prosecution has produced PW-1, who initially gave an impression in his testimony that he saw the accused appellants taking his son but later in his cross-examination has categorically stated that he had not seen the deceased being taken by the accused appellants. He, rather, stated that he had heard so by his own ears. However, he has not disclosed the name of persons from whom he heard so.

29. The only evidence with regard to the deceased being taken by the accused appellants in the first information report is of Neetu son of Mahaveer and Roshan son of Mahendra Singh. Neetu son of Mahaveer has not been produced in evidence. Roshan son of Mahendra Singh is the other prosecution evidence who has been produced as PW-3. This witness happens to be the brother-in-law of the first informant. He has stated that at about 02.00 PM he saw the accused appellants calling the deceased for offering mangoes in the orchard.

30. It may be noticed that in the first information report role of calling the deceased for offering mangoes was assigned only to the accused Vinod and Karm Singh @ Ganjja but PW-3 also implicated Manoj @ Bhoora for the purpose. This witness admittedly is not the resident of the village and lives in other village at a distance of about 40 to 45 kilometres (as per statement of PW-1) or 30 kilometres (as per statement of PW-3). PW-3 claims that at about 04.00 PM he returned to his village and again came in the morning and accompanied the first informant to police station for lodging the report.

31. In the cross-examination PW-3 admits that he had never visited the village

of first informant earlier and had come there for the first time on the date of incident. He has admitted in his cross-examination that he did not disclose the Investigating Officer that the accused appellants had taken the deceased in his presence. Even the Investigating Officer has admitted that PW-3 had not informed him that the he had come to the informant house on the date of incident. The Investigating Officer has further stated in his testimony that PW-3 had not informed him that the deceased was playing at a distance of 15 feet or that the accused Vinod had asked him to come to the mango orchard. This witness has also not disclosed the reason for his visit to the village on the date of incident. The Investigating Officer has not stated that this witness had disclosed him the date, time and month of the incident.

32. PW-2 and PW-4 are other prosecution witnesses, who are family members of the first informant. Their names were not disclosed in the FIR about seeing the deceased with the accused appellants. PW-2 happens to be the uncle of the first informant and his name has surfaced for the first time on 05.08.2007 when his statement was recorded under Section 161 Cr.P.C. wherein he has not disclosed the Investigating Officer of having seen the accused appellants taking the deceased with them at around 02.00 PM.

33. Similarly name of PW-4 was also not mentioned in the first information report as the one who saw the accused appellants taking the deceased and his name had also surfaced for the first time on 5th August, 2007. This witness has also not informed the Investigating Officer about the time or place where he saw the accused appellants taking the deceased with them. These are the only evidence of last seen.

34. We also find that though the incident occurred on 30.07.2007 but the Investigating Officer (PW-8) for the first time has recorded the statements of the witnesses under Section 161 Cr.P.C. on 05.08.2007. In the event Roshan Lal (PW-3) had seen the accused appellants taking the deceased with them on 30.07.2007 itself, and his dead body was found in the next morning and he was present alongwith first informant for lodging the FIR. There is no reason as to why his statement was recorded for the first time only on 05.08.2007. PW-3 has also admitted that he was not aware of the occupation of accused appellants and it being the first visit to the village by him (PW-3), issues of identity of accused appellants qua PW-3 would also arise.

35. PW-3 is a chance witness whereas PW-2 and PW-4 are introduced later by the prosecution and their deposition in court is a clear case of improvement over what was disclosed earlier by them to the Investigating Officer. Upon the cumulative assessment of the statements of the PW-1 to PW-4 we are persuaded to accept the contention of the defence that none of the witness are wholly reliable on the point of proving the factum of the deceased being taken by the accused-appellants on the pretext of offering mangoes in the orchard. The prosecution has, therefore, not been able to prove the plea of last seen.

36. The prosecution case otherwise is that the deceased was taken to the orchard for offering mangoes to him and his dead body was found later in the morning. The dead body of the deceased has not been found at the orchard, rather, his dead body

has been found in the sugarcane field of Laloo son of Seva Ram resident of Goharoo. There is no evidence led by the prosecution about the manner in which the deceased was brought to the sugarcane field or even about the place where he was done to death. The prosecution has also not explained as to how and who noticed the dead body in the sugarcane field first. Although PW-1 has stated that two ladies spotted the dead body in the morning but even their names have not been disclosed nor have they been produced in evidence.

OCCULT PRACTICES

37. The prosecution witnesses of facts have alleged that the accused appellants were practising occult and the deceased was offered in sacrifice for it. The prosecution witnesses have made such allegation and the main evidence in that regard is of PW-5.

38. PW-5 happens to be real brother of the first informant and has stated in his testimony that there is Kaali temple in the village where the accused appellants perform occult practices. He has also alleged that about 14 months back, meeting of Panchayat of village took place at about 05.00 PM in which the Village Pradhan Kawar Sain and various others participated. The accused appellants were allegedly pressurized to take part in the Panchayat and were told to desist from participating in the occult practices. He has also stated that apprehensions were expressed in the meeting of panchayat that the accused appellants could offer anyone in sacrifice for occult purposes. The panchayat proceedings, in that regard, was prepared on 10.06.2007 and has been certified by the Village Pradhan Kawar Sain. This document is marked as Ex.Ka-2. This is the only basis to substantiate the prosecution case that the accused appellants indulged in occult practices.

39. For the convenience of discussion the Panchayat Decision (Ex.Ka.2) is extracted hereinafter:

"पंचायत फैसला

आज दिनांक 10.06.2007 को नया गाँव मडकी में पंचायत मन्दिर में हुयी जिसमें गाँव गवांड के मोजिज लोग उपस्थित थे। जयराम प्रधान कवर जैव प्रधान, बलजोर विजेन्द्र राण लालू सिंह मुनेश पप्पू, उपरोक्त सभी लोगों ने विनोद, भूरा, कर्मसिंह को दबाव देकर बुलाया गया तथा चेतावनी दी कि आप लोग जो काली मन्दिर व खेडे पर तान्त्रिक क्रिया कर रहे हो यह ग्रामवासियों व आप के लिये भी हानिकारक है। दबाव से तब तो कहा कि हम अब ऐसी क्रिया नहीं करेंगे परन्तु ये लोग गुप्त से करते रहे।

यह पचांयत नामा गाँव पंचायत मे लिखा गया कि सनद रहे और वक्त जरूरत पर काम आये लेखक"

40. The above decision refers to some previous decision in which the accused appellants were told not to participate in occult practices and that they agreed not to do so. No date, time and place of the previous decision of the Panchayat wherein this decision was taken has been disclosed. The recital in the above decision that notwithstanding such earlier assurance the accused appellants are still practising occult is also not shown to have any basis. The above decision of panchayat is otherwise not referable to any proceedings known to law. The purpose of its recording is also not clear.

41. Ex.Ka.2 is otherwise a document certified by village Pradhan Kawar Sain

who has also participated in the alleged meeting. It may be noticed that Kawar Sain is also the scribe of the FIR; is an inquest witness; has accompanied the first informant to police station for lodging the FIR and is a key mover behind the implication of the accused appellants.

42. Although the defence has not adduced any substantive evidence on its behalf but the records reveal that almost all prosecution witnesses have been suggested enmity between the accused appellants and the first informant on the ground that the first informant sided with Kawar Sain, whereas the accused appellants sided with the other faction. Role of Kawar Sain has been questioned throughout by the defence.

43. We otherwise do not find the panchayat decision to have been taken in any regular panchayat meeting nor such record of proceedings are required to be maintained in the Panchayat. In the totality of circumstances we are not inclined to accept the alleged panchayat decision as being worthy of reliance nor can form any basis for the implication of the accused appellants. At this stage we may also note that though the prosecution case rests upon practise of occult by the accused appellants and the offence is said to be in furtherance of it, we do not find any material to show that the deceased was done to death as sacrifice during occult practices. The inquest report as well as the Investigating Officer have not found any of the materials generally used for performing occult practices like incensory (havan samagri), pooja material, sacred threads etc. near the place where dead body was found.

44. The Investigating Officer (PW-8) has moreover stated that none of the witnesses in their statements under Section 161 Cr.P.C. had informed him about the said panchayat decision. He has also admitted that no evidence has been given by the witnesses about the place of holding of alleged panchayat meeting. Even the panchayat decision (Ex.Ka.2) does not contain any recital about the place where the decision was taken by the panchayat.

45. This is a case of circumstantial evidence and the law on the point is well settled that the prosecution must prove the complete chain of events which points to the exclusive hypothesis of guilt attributed to the accused appellants. It is also the requirement of law that the prosecution must show that alternative hypothesis does not exist on facts.

46. Before proceeding with the deliberation any further it would be appropriate to refer to the law governing the case of circumstantial evidence.

47. In Sharad Birdhichand Sarda vs. State of Maharashtra reported in (1984) 4 SCC 116, the Apex Court evolved five tests to be established by the prosecution in order to prove the guilt of accused based on circumstantial evidence. Five golden principles have been enumerated in paragraph nos. 152 to 154, which are reproduced hereinafter:

"152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hunumant vs. The State of Madhya Pradesh. This case has been uniformly followed and applied by this Court in a large number of later decisions uptodate, for instance, the cases

of Tufail (Alias) Simmi v. State of Uttar Pradesh and Ramgopal v. Stat of Maharashtra. It may be useful to extract what Mahajan, J. has laid down in Hanumant's case (supra):

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground far a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade & Anr. V. State of Maharashtra, where the following observations were made:

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say. they should not be explainable on any other hypothesis except that the accused is guilty, (3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

48. Judgment of the Supreme Court in the case of Sharad Birdhichand Sarda (Supra) has consistently been followed and reiterated recently by the Court in the case of Ram Niwas Vs. State of Haryana reported in 2022 SCC On Line SC 1007.

49. When we analyse the evidence on record on the above touchstone, we have no hesitation in arriving at a conclusion that the prosecution has failed to prove the guilt of the accused appellants beyond reasonable doubt. It has not been proved by the prosecution that chain of events in the present case lead only to the hypothesis of guilt on part of the accused appellants and an alternative hypothesis cannot be ruled out. The accused appellants are, therefore, clearly entitled to benefit of doubt in the matter.

50. So far as conviction of accused appellants Vinod and Karm Singh @ Ganjja for offences under section 25/4 of Arms Act is concerned, we find that neither the recovered articles i.e. knife and dagger have been produced before the court below nor the recovery is proved, inasmuch as the witness to alleged recovery Shyam Kumar has not been produced. The conviction and sentence of accused appellants under the Arms Act, for such reasons, also cannot be sustained.

51. The trial court while analysing the evidence on record has blindly accepted the prosecution case without subjecting the evidence on record on the aspect of motive, plea of last seen and indulgence of the accused appellants in the occult practices. The trial court has erroneously placed the burden upon the accused appellants of disclosing the whereabouts of deceased by relying upon the provisions of Section 106 of the Indian Evidence Act, without analysing the evidence on the factum that the accused appellants had taken the deceased. The dead body has otherwise been found in the sugarcane field and not within the premises of the accused appellants. The judgment of the court of sessions on material aspects is therefore found wanting. The available evidence has not been subjected to careful scrutiny by the court below and, therefore, finding of guilt returned by the court of sessions cannot be sustained and is liable to be reversed.

52. In view of the discussions and deliberations held above, the present appeals succeed and are allowed. The judgment and order of conviction and sentence dated 28.07.2009, passed by the Sessions Judge, Saharanpur against the accused appellants, is set aside.

53. Since the accused appellant Manoj @ Bhoora is on bail, he need not surrender and his bail bonds stands discharged. He shall be set free subject to compliance of Section 437-A Cr.P.C., unless he is wanted in any other case. The other accused appellants, namely Vinod and Karm Singh @ Ganjja, who are reported to be in jail, shall be released forthwith, unless they are wanted in any other case on compliance of Section 437-A Cr.P.C.

54. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Saharanpur, henceforth, for necessary compliance.

(2022) 11 ILRA 1278
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.10.2022

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA THAKER, J.
THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 5184 of 2021

Sultan @ Munna & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Mohd. Abrar Khan, Sri Sukhvir Singh

Counsel for the Respondent:
G.A.

Criminal Law- Indian Evidence Act, 1872- Section 32- Dying Declaration- Legal position of dying declaration to be the sole basis of conviction is that it can be done so if it is not tutored, made voluntarily and is wholly reliable- Deceased survived for 4 months after the incident took place. Her dying declaration was recorded by Magistrate after obtaining the certificate

of medical fitness from the concerned doctor. Dying declaration cannot be disbelieved, if it inspires confidence- Truthfulness of dying declaration can further be evaluated from the fact that she survived for 4 months after making it from which it can reasonably be inferred that she was in a fit mental condition to make the statement at the relevant time. Moreover, in the dying declaration, the deceased did not unnecessarily involve the other family members of the accused appellants. She only attributed the role of burning to her husband and his second wife. The hostility of one of the witness of fact cannot demolish the value and reliability of the dying declaration of the deceased.

Settled law that where the court finds the dying declaration to be truthful, reliable and voluntary then conviction can be secured solely based on the dying declaration without seeking further corroboration, hence hostility of witness cannot dent the dying declaration.

Indian Penal Code, 1860- Section 302- Section 304 (Part-I) - It appears that the death caused by the accused persons was not pre-meditated but they intentionally caused such bodily injuries which were likely to cause death. Hence the instant case falls under the exceptions (1) and (4) to Section 300 of IPC. While considering Section 299 IPC, offence committed will fall under Section 304 (Part-I) IPC.

Where the deceased died after 4 months of the occurrence due to septicaemia and there is no evidence to show that the offence was pre-meditated then even though the accused had the intention to cause such bodily injuries which were likely to cause death, the offence would be one u/s 304 (Part-I) IPC instead of Section 302. (Para 20, 21, 24, 25, 28, 37)

Criminal Appeal partly allowed. (E-3)

Case Law/ Judgements relied upon:-

1. Koli Lakhmanbhai Chandabhai Vs St. of Guj.1999 (8) SCC 624

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

3. St. of U.P. Vs Ramesh Prasad Misra & anr.1996 AIR (Supreme Court) 2766

4. Lakhan Vs St. of M.P, (2010) 8 SCC 514

5. Krishan Vs St. of Har. (2013) 3 SCC 280

6. Ramilaben Hasmukhbhai Khristi Vs St. of Guj.(2002) 7 SCC 56

7. St. of U.P. Vs Mohd. Iqram & anr, (2011) 8 SCC 80

8. Bengai Mandal @ Begai Mandal Vs St. of Bih. [(2010) 2 SCC 91]

9. Maniben Vs St. of Guj. (2009) 8 SCC 796

10. Chirra Shivraj Vs St. of A.P. (2010) 14 SCC 444

11. Crl. Appeal No.83 of 2008 (Gautam Manubhai Makwana Vs St of Guj.) dec. on 11.9.2013 (Guj. High Court)

12. Khokan@ Khokhan Vishwas Vs St. of Chattis., 2021 LawSuit (SC) 80

13. Anversinh Vs St. of Guj., (2021) 3 SCC 12

14. Pravat Chandra Mohanty Vs St. of Odisha, (2021) 3 SCC 529

15. Pardeshiram Vs St. of M.P., (2021) 3 SCC 238

16. Tukaram& ors. Vs St. of Maha. (2011) 4 SCC 250

17. B.N. Kavatakar & Anr. Vs St. of Kar. 1994 SUPP (1) SCC 304

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

1. This appeal has been preferred against the judgment and order dated 28.2.2019, passed by the learned Additional

Sessions Judge, Court No.6, Farrukhabad, in Session Trail No.12 of 2018 (State of UP vs. Sultan and another) arising out of Case Crime No.53 of 2017, under Section 302/34 and 498A of Indian Penal Code (hereinafter referred to as 'IPC'), Police Station-Shamsabad, District Farrukhabad, whereby the accused-appellants are convicted and sentenced for the offence under Section 302/34 IPC for life imprisonment with a fine of Rs.20,000/- each and in default of payment of fine, further rigorous imprisonment for one year; accused- appellants were further convicted under Section 498A of IPC and sentenced to undergo imprisonment for two years each with fine of Rs.5000/- each and in case of default of payment of fine, to undergo further rigorous imprisonment for one month each. All the sentences were to run concurrently as per direction of the Trial Court. .

2. The brief facts of the case are that first information report of this case was lodged by complainant-Aslam (father) with the averments that the marriage of his daughter was solemnized with accused Munna @ Sultan son of Nabeedraj before about eight years. Earlier also before the said incident, the appellant after about four years of marriage life had tried to push her from the terrace and in that his daughter had sustained injuries. The accused Sultan contracted the marriage with one Yashmeen and because of that there were constant quarrel and Sultan and his second wife Yasmeen hatched a common intention to do away with his daughter and that is how, she was set ablaze . Sabeen received several burn injuries. The accused got Sabeen admitted in hospital and absconded. Sabeena had suffered about 70% burn injuries and she was in the hospital.

3. A first information report was registered on the basis of above written report. During course of investigation, I.O. recorded statement of witnesses, prepared site-plan. Dying-declaration of deceased was recorded by Magistrate. After the death of the deceased, inquest report was prepared and post mortem was conducted. Post mortem report is also placed on record. After making thorough investigation, charge sheet was submitted against the accused Sultan @ Munna, husband of the deceased and Smt. Yasmeen, second wife of Sultan @ Munna. Learned trial court framed charges against both the accused persons under Sections 498A, 302/34 of IPC. Accused-appellants denied the charges and claimed to be tried.

4. Prosecution examined following witnesses:

1.	Aslam	PW-1
2.	Irfan	PW-2
3.	Constable Mahesh	PW-3
4.	Kadeer	PW-4
5.	Dr. Amrit Singh	PW-5
6.	Dr. Kailash Chandra	PW-6
7.	SI Veerpal Singh	PW-7
8.	SI Ravindra Nath Yadav	PW-8
9.	SI Jitendra Singh	PW-9
10.	Churamani- Nayab Tehsildar	PW-10

5. Apart from aforesaid witnesses, prosecution submitted following documentary evidence, which was proved by leading the evidence:

1.	FIR	Ex.ka.1
2.	Written report	Ex.ka.2
3.	Dying-declaration	Ex.ka.13
4.	Post mortem report	Ex.ka.4
5.	Panchayatnama	Ex.ka.9
6.	Charge-Sheet	Ex.ka.7-8

7.	Site plan	Ex.ka.6

6. Deceased was hospitalised after the incident by the accused persons themselves. The deceased died after four months of the incident during the course of treatment at her father's home. The cause of death according to PW-5, who conducted the postmortum report was septicaemic. The oral testimony of Dr. namely PW-6 Kailash Chandra also shows that her dying declaration was recorded when she was in conciousness and he has proved the said document. .

7. Heard Sri Sukhvir Singh, learned counsel for the appellants and Shri Patanjali Mishra, learned AGA for the State.

8. Learned counsel for the appellants submitted that accused persons have been falsely implicated in this case. The deceased caught fire while cooking and they have not caused her death. No dowry was ever asked for. It is submitted that the accused has not set the deceased on fire. She caught fire while she was trying to go inside the room. It was the accused who tried to save her. The learned counsel has further submitted that the Court has not even relied on the DW-1, PW-4 did not support the prosecution case. PW-1 is not the eye witness and PW-4 has not supported the prosecution case. Learned counsel for the appellant has relied on the decision of this High Court in Criminal Appeal No.318 of 2015 (Pramod Kumar Vs. State of U.P.) decided on 28.2.2019 and has contended that the accused are innocent and in the alternative has submitted that if this Court comes to the conclusion that the death was because of the act of the accused then the offence would be falling within the provision of Section 304 of IPC and not Section 302 of IPC

9. Learned counsel for the appellants next submitted that dying-declaration of the deceased was recorded when she was surviving, but this dying-declaration has no corroboration with any prosecution evidence. Most of the witnesses of fact have turned hostile and the version of FIR is not supported by the oral testimony. Therefore, learned trial court committed grave error by convicting the accused on the basis of dying-declaration .

10. Learned counsel for the appellants additionally submitted that if, for the sake of argument, it is assumed that appellants have committed the offence, in that case also no offence under Section 302 IPC is made out. Maximum this case can travel up to the limits of offence under Section 304 IPC because the deceased died after 4 months of the incident due to developing the infection in her burn-wounds, i.e., septicemia. As per catena of judgments of Hon'ble *Apex Court* and this Court, offence cannot travel beyond section 304 IPC, in case where the death occurred due to septicemia. Learned counsel for the appellants also submitted that postmortem report also shows that cause of death was septicemia. Learned counsel relied on the judgment in the case of ***Maniben vs. State of Gujarat*** [2009 Lawsuit SC 1380], and the judgment in Criminal Appeal Nos.1438 of 2010 and 1439 of 2010 dated 7.10.2017 and judgment in Criminal Appeal No.2558 of 2011 delivered on 1.2.2021 by this Court.

11. No other point or argument was raised by the learned counsel for the appellants and confined his arguments on above points only.

12. Learned AGA, *per contra*, vehemently opposed the arguments placed by counsel for the appellants and submitted that conviction of accused can be based only on the basis of dying-declaration, if it is wholly reliable. It requires no corroboration. Moreover, testimony of hostile witnesses can also be relied on to the extent it supports the prosecution case. Learned trial court has rightly convicted the appellants under Section 302 IPC and sentenced accordingly. There is no force in this appeal and the same may be dismissed.

13. First of all learned counsel for the appellants has raised the issue relating to the evidence of witness PW-4 who has not supported the prosecution case. It is further submitted that the deceased died due to septicemia hence it can interred that there was intention to do away with the deceased. There was no demand of dowry so as to convict the accused under Section 498A of IPC. None of the ingredients of the provision of Section 498A IPC are made out. It is not even the case of the prosecution witnesses that any demand of dowry was made. The only allegation of PW-1 is that due to presence of second wife, both the accused used to harass his daughter (deceased). It is not borne out from the dying declaration that there was any demand of dowry. Quarrel will not be sufficient for convicting a person under 498A of IPC.

14. Hon'ble *Apex Court* in ***Koli Lakhmanbhai Chandabhai vs. State of Gujarat*** *[1999 (8) SCC 624]*, as held that evidence of hostile witness can be relied upon to the extent it supports the version of prosecution and it is not necessary that it should be relied upon or rejected as a whole. It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence.

15. In ***Ramesh Harijan vs. State of U.P.*** *[2012 (5) SCC 777]*, the Hon'ble *Apex Court* has also held that it is settled legal position that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether.

16. In ***State of U.P. vs. Ramesh Prasad Misra and another*** *[1996 AIR (Supreme Court) 2766]*, the Hon'ble *Apex Court* held that evidence of a hostile witnesses would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. Thus, the law can be summarized to the effect that evidence of a hostile witness cannot be discarded as a whole, and relevant part thereof, which are admissible in law, can be used by prosecution or the defense.

17. Perusal of impugned judgment shows that learned trial court has scrutinised the evidence on record but has failed to appreciate the fact that there is no demand of dowry which will come within the purview of Section 498A of IPC and we exonerate both the accused-appellants of the punishment under Section 498A of IPC.
.

18. Learned counsel for the appellants has argued that dying declaration is doubtful and not corroborated by witnesses

of fact, hence, it cannot be the sole basis of conviction. Legal position of dying declaration to be the sole basis of conviction is that it can be done so if it is not tutored, made voluntarily and is wholly reliable. In this regard, Hon'ble *Apex Court* has summarized the law regarding dying declaration in ***Lakhan vs. State of Madhya Pradesh*** [(2010) 8 Supreme Court Cases 514], in this case, Hon'ble *Apex Court* held that the doctrine of dying declaration is enshrined in the legal maxim *nemo moriturus praesumitur mentire,* which means, *"a man will not meet his Maker with a lie in his mouth"*. The doctrine of dying declaration is enshrined in Section 32 of Evidence Act, 1872, as an exception to the general rule contained in Section 60 of Evidence Act, which provides that oral evidence in all cases must be directed, i.e., it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.

19. The dying declaration is truthful and we rely on the same.

20. The law on the issue of dying declaration can be summarized to the effect that in case the court comes to the conclusion that the dying declaration is true and reliable, has been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and it has not been made under any tutoring/duress/prompting; it can be the sole basis for recording conviction. In such an eventuality no corroboration is required. It is also held by Hon'ble *Apex Court* in the aforesaid case, that a dying declaration recorded by a competent Magistrate would stand on a much higher footing than the declaration recorded by office of lower rank, for the reason that the competent Magistrate has no axe to grind against the person named in the dying declaration of the victim.

21. Deceased survived for 4 months after the incident took place. Her dying declaration was recorded by Magistrate after obtaining the certificate of medical fitness from the concerned doctor. In the wake of aforesaid judgments of **Lakhan (supra)**, dying declaration cannot be disbelieved, if it inspires confidence. On reliability of dying declaration and acting on it without corroboration, Hon'ble *Apex Court* held in ***Krishan vs. State of Haryana*** *[(2013) 3 Supreme Court Cases 280]* that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. Hence, in order to pass the test reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused, who had no opportunity of testing the veracity of the statement by cross-examination. But once, the court has come to the conclusion that the dying declaration was the truthful version as to the circumstance of the death and the assailants of the victim, there is no question of further corroboration.

22. In ***Ramilaben Hasmukhbhai Khristi vs. State of Gujarat,*** [(2002) 7 SCC 56], the Hon'ble *Apex Court* held that under the law, dying declaration can form the sole basis of conviction, if it is free from any kind of doubt and it has been recorded in the manner as provided under the law. It may not be necessary to look for corroboration of the dying declaration. As envisaged, a dying declaration is generally to be recorded by an Executive Magistrate with the certificate of a medical doctor about the mental fitness of the declarant to make the statement. It may be in the from of question and answer and the answers be written in the words of the person making the declaration. But the court cannot be too technical and in substance if it feels convinced about the trustworthiness of the statement which may inspire confidence such a dying declaration can be acted upon without any corroboration.

23. The fact that dying declaration gets corroboration from oral evidence also. We are convinced that the Court has not committed any mistake in relying on the same.

24. In dying declaration of deceased, it is also important to note that it was recorded on and the deceased died while the incident took place. It means that the deceased remained alive for 4 months after making dying declaration. Therefore, truthfulness of dying declaration can further be evaluated from the fact that she survived for 4 months after making it from which it can reasonably be inferred that she was in a fit mental condition to make the statement at the relevant time. Moreover, in the dying declaration, the deceased did not unnecessarily involve the other family members of the accused appellants. She only attributed the role of burning to her husband and his second wife. .

25. In such a situation, the hostility of one of the witness of fact cannot demolish the value and reliability of the dying declaration of the deceased, which has been proved by prosecution in accordance with law and is a truthful version of the event that occurred and the circumstances leading to her death.

26. As already noticed, the authorities involved in recording the dying declaration had turned hostile. On the contrary, they have fully supported the case of prosecution. The dying declaration is reliable, truthful and was voluntarily made by the deceased, hence, this dying declaration can be acted upon without corroboration and can be made the sole basis of conviction.

27. Now we come to the submission by learned counsel for the appellants that deceased died due to septicaemia, hence this case falls within the ambit of Section 304 IPC and not under Section 302 IPC. In this regard, learned counsel has submitted that deceased died after four months of incident due to the septicemia. There was no intention of the appellants to cause the death of the deceased.

28. It is an admitted fact that the deceased died after four months of burning and post mortem report goes to show that she died due to septicemia. PW-6 who has recorded the dying declaration has been examined as PW-6. The doctor , who had conducted the post mortem of the deceased was also the same doctor. He has specifically written in the post mortem report and deposed before the learned trial

court that the cause of death was septicemia due to burn injuries. Hence, the death of the deceased was septicemial death.

29. The finding of fact regarding the presence of witnesses at the place of occurrence cannot be faulted with. Death of deceased was a homicidal death. The fact that it was a homicidal death takes this Court to most vexed question whether it would fall within the four-corners of murder or culpable homicide not amounting to murder. Therefore, we are considering the question whether it would be a murder or culpable homicide not amounting to murder and punishable under Section 304 IPC. Accused-appellants are in jail since 3.2.2017.

30. In State of ***Uttar Pradesh vs. Mohd. Iqram and another,*** [(2011) 8 SCC 80], the *Apex Court* has made the following observations in paragraph 26, therein:

"26. Once the prosecution has brought home the evidence of the presence of the accused at the scene of the crime, then the onus stood shifted on the defence to have brought-forth suggestions as to what could have brought them to the spot in the dead of night. The accused were apprehended and, therefore, they were under an obligation to rebut this burden discharged by the prosecution and having failed to do so, the trial-court was justified in recording its findings on this issue. The High Court committed an error by concluding that the prosecution had failed to discharge its burden. Thus, the judgment proceeds on a surmise that renders it unsustainable."

31. In ***Bengai Mandal alias Begai Mandal vs. State of Bihar*** [(2010) 2 SCC 91], incident occurred on 14.7.1996, while the deceased died on 10.8.1996 due to septicaemia caused by burn injuries. The accused was convicted and sentenced for life imprisonment under Section 302 IPC, which was confirmed in appeal by the High Court, but Hon'ble The *Apex Court* converted the case under Section 304 Part-II IPC on the ground that the death ensued after twenty-six days of the incident as a result of septicaemia and not as a consequence of burn injuries and, accordingly, sentenced for seven years' rigorous imprisonment.

32. In ***Maniben vs. State of Gujarat*** [(2009) 8 SCC 796], the incident took place on 29.11.1984. The deceased died on 7.12.1984. Cause of death was the burn injuries. The deceased was admitted in the hospital with about 60 per cent burn injuries and during the course of treatment developed septicaemia, which was the main cause of death of the deceased. Trial-court convicted the accused under Section 304 Part-II IPC and sentenced for five years' imprisonment, but in appeal, High Court convicted the appellants under Section 302 IPC. Hon'ble The *Apex Court* has held that during the aforesaid period of eight days, the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries. Accordingly, judgment and order convicting the accused under Section 304 Part-II IPC by the trial-court was maintained and the judgment of the High Court was set aside.

33. In ***Chirra Shivraj vs. State of Andhra Pradesh*** *[(2010) 14 SCC 444]*, incident took place on 21.4.1999. Deceased died on 1.8.1999. As per the prosecution version, kerosene oil was poured upon the deceased, who succumbed to the injuries. Cause of death was septicaemia. Accused

was convicted under Section 304 Part-II IPC and sentenced for five years' simple imprisonment, which was confirmed by the High Court. Hon'ble The *Apex Court* dismissed the appeal holding that the deceased suffered from septicaemia, which was caused due to burn-injuries and as a result thereof, she expired on 1.8.1999.

34. We can safely rely upon the decision of the Gujarat High court in Criminal Appeal No.83 of 2008 ***(Gautam Manubhai Makwana Vs. State of Gujarat)*** decided on 11.9.2013 wherein the Court held as under:

"12. In fact, in the case of Krishan vs. State of Haryana reported in (2013) 3 SCC 280, the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.

13. However, the complaint given by the deceased and the dying declaration recorded by the Executive Magistrate and the history before the doctor is consistent and seems to be trustworthy. The same is also duly corroborated with the evidence of witnesses and the medical reports as well as panchnama and it is clear that the deceased died a homicidal death due to the act of the appellants in pouring kerosene and setting him ablaze. We do find that the dying declaration is trust worthy.

14. However, we have also not lost sight of the fact that the deceased had died after a month of treatment. From the medical reports, it is clear that the deceased suffered from Septicemia which happened due to extensive burns.

15. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

15.1 Similarly, in the case of Maniben (supra), the Apex Court has observed as under:

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the

appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

16. In the present case, we have come to the irresistible conclusion that the role of the appellants is clear from the dying declaration and other records. However, the point which has also weighed with this court are that the deceased had survived for around 30 days in the hospital and that his condition worsened after around 5 days and ultimately died of septicemia. In fact he had sustained about 35% burns. In that view of the matter, we are of the opinion that the conviction of the appellants under section 302 of Indian Penal Code is required to be converted to that under section 304(I) of Indian Penal Code and in view of the same appeal is partly allowed.

35. In latest decision in **Khokan@ Khokhan Vishwas v. State of Chattisgarh, 2021 LawSuit (SC) 80,** where the facts were similar to this case, the *Apex Court* has allowed the appeal of the accused appellant and altered the sentence. The decision of the *Apex Court* in the case of **Anversinh v. State of Gujarat, (2021) 3 SCC 12** which was related to kidnapping from legal guardian, wherein it was established that the Court while respecting the concerns of both society and victim, propounded that the twin principle of deterrence and correction would be served by reducing the period of incarceration already undergone by the accused. In our case, this is not that gruesome matter where the accused cannot be dealt with in light of all these judgments. Decisions in **Pravat Chandra Mohanty v. State of Odisha, (2021) 3 SCC 529 & Pardeshiram v. State of M.P., (2021) 3 SCC 238** will also enure for the benefit of the accused.

36. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the *Apex Court* in the Case of Tukaram and Ors Vs. State of Maharashtra, reported in (2011) 4 SCC 250 and in the case of B.N. Kavatakar and Another Vs. State of Karnataka, reported in 1994 SUPP (1) SCC 304, we are of the considered opinion that it was a case of homicidal death not amounting to murder. We are also of the considered opinion that in the case at hand, the offence would be punishable under Section 304 (Part-I) IPC.

37. From the upshot of the aforesaid discussions it appears that the death caused by the accused persons was not pre-meditated but they intentionally caused such bodily injuries which were likely to cause death. Hence the instant case falls under the exceptions (1) and (4) to Section 300 of IPC. While considering Section 299

IPC, offence committed will fall under Section 304 (Part-I) IPC.

38. In view of the aforesaid discussion, we are of the view that appeal has to be partly allowed. The conviction of the appellants under Section 302 IPC is converted into conviction under Section 304 (Part-I) IPC and the appellants are sentenced to undergo seven years of incarceration. The fine and default sentence are maintained.

39. Accordingly, the appeal is **partly allowed.**

(2022) 11 ILRA 1288
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.09.2022

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Misc. Bail Application No. 42918 of 2021

Aditya Kumar ...Applicant
Versus
Union of India ...Opp. Party

Counsel for the Applicant:
Sri Abrar Ahmad Siddiqui, Sri Abhishek Kumar Mishra, Sri Chandrakesh Mishra, Sri Rakesh Pati Tiwari, Sri Daya Shankar Mishra (Sr. Advocate)

Counsel for the Opp. Party:
Ashish Pandey

Criminal Law -Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 8(C)/21/29-No independent witness of the alleged recovery-the constables of Railway Police Force cannot be said to be independent witnesses- the recovery memo does not bear signatures of the Gazetted Officer. Page 6 of - a copy of the test report has not been filed by the NCB- The test report filed by the applicant categorically states that the substance was not found to be Heroin but it was Morphine- no criminal history- All the witnesses in the present case are officers and officials of Narcotic Control Bureau and personnel belonging to Railway Protection Force, therefore, there appears to be no reasonable apprehension that in case the applicant is released on bail, he would influence the witnesses.

Bail granted. (E-9)

List of Cases cited:

1. Makhan Singh Vs St.of Har., (2015) 12 SCC 247

2. U.O.I. Vs Rattan Mallik, (2009) 2 SCC 624

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

1. Heard Sri Daya Shankar Mishra, Senior Advocate assisted by Shri Chandrakesh Mishra Advocate, the learned Counsel for the applicant and Sri Ashish Pandey Advocate, the learned counsel for the Narcotic Control Bureau.

2. The present application has been filed for release of the applicant on bail in N.C.B. Crime No. 28 of 2021, under Section 8(C)/21/29 of Narcotic Drugs and Psychotropic Substances Act, P.S. N.C.B. Lucknow.

3. The search, seizure-cum- recovery memo dated 04-07-2021 states that an information was received in the N.C.B. Office at Lucknow on 03-07-2021 at 21:30 hours that a person was carrying Heroin in Coach No. 9 of Train No. 02357 from Gaya, Bihar to Bareilly, U.P. and the train would reach Bareilly junction on 04-07-2021 between 06:00 hours to 07:00 hours. In furtherance of the aforesaid information, a team of Officers of N.C.B consisting of the Intelligence Officer Mohd. Farooq,

Supervision Assistant Vivek Kumar, Hawaldar Hridesh Kumar and Driver Brijesh Kumar was constituted. The team assembled in its office at Lucknow and started its journey on 03-07-2021 at 22:30 hours from Lucknow office and reached Bareilly junction on 04-07-2021 at about 05:00 hours. No person agreed to become a witness to the proposed seizure proceedings. The Inspector R.P.F. junction was requested to provide independent witnesses, who deputed two constables of R.P.F. to act as witnesses.

4. When the train reached Bareilly junction, the N.C.B. team apprehended the applicant and from a bag kept near him about 300 gms. brown coloured narcotic powder kept in a white transparent polythene was recovered. However, in personal search of the applicant, no objectionable substance was recovered. Upon testing the narcotic substance with a Drug Detection Kit, it was found to be Heroin. The NCB team conducted a repeat test with the kit and in that also, the substance was found to be Heroin. It is alleged that the applicant also told that the substance was Heroin. It's gross weight along with the double white transparent polythene in which it was packed, was found to be 391 gms.

5. The seizure memo contains a narration that the seizure proceedings commenced on 04-07-2021 at 07:45 hours and continued till 12:20 hours, the seizure memo consisting of four pages was prepared, read over to the applicant and it was signed by the Intelligence Officer, NCB, Lucknow, the Inspector R.P.F., the witnesses and the applicant.

6. The applicant filed an application for being released on bail before the learned Additional Sessions Judge/Special Judge, N.C.B., Bareilly, which was rejected by means of an order dated 04-09-2021 on the ground that commercial quantity of Heroin was recovered from his possession in presence of the witnesses.

7. In the affidavit filed in support of the bail application it has been stated that the applicant is innocent and he has been falsely implicated in the present case and that nothing was recovered from him. It has also been stated in the affidavit that the applicant does not have any criminal history.

8. A counter affidavit has been filed on behalf of the N.C.B. in which it has been stated that the substance found in the bag of the applicant was tested with the help of the DD Kit and as per the test report the substance was Heroin. It's net weight was found to be 358 gms and gross weight was 391 gms and the statement of the applicant was recorded and he confessed that he was carrying Heroin to be delivered to a person as per the instruction of his cousin Manish Kumar.

9. In paragraph 15 of the counter affidavit it has been stated that a sample of the seized contraband substance was sent to the Government Laboratory and after chemical examination, the Chemical Examiner submitted a report stating that the sample under reference answered positive test for Heroin.

10. A rejoinder affidavit and a supplementary rejoinder affidavit have been filed on behalf of the applicant and a copy of the test report dated 09-11-2021 issued by the Central Revenues Control Laboratory, Hillside Road, Pusa, New Delhi, mentions that the sample did not

answer positive test for Heroin (Diacetylmorphine); however, the sample under reference answers positive test for Morphine.

11. Sri Daya Shankar Mishra, the learned Senior Advocate appearing for the applicant has submitted that the conduct of the N.C.B. Officers in the present case raises suspicion against the genuineness of their allegations. He has submitted that as per the averments made in the recovery memo itself, the officers of N.C.B. had received an information at Lucknow that the applicant was carrying Heroin from Gaya, Bihar to Bareilly through Train No. 02357, which train passes through Lucknow and their conduct in not apprehending the applicant at Lucknow rather the entire team travelled the whole night from Lucknow to Bareilly to apprehend the applicant at Bareilly, is not a natural course of conduct and it raises doubts against their story. He has further submitted that although the alleged search and seizure was conducted at a Railway Station, which is a public place, filled with independent persons, there is no independent witness of the alleged recovery. The constables of Railway Police Force, who witnessed the alleged recovery, search and seizure, cannot be said to be independent witnesses.

12. Sri. Misra has further submitted that it is mentioned in the search and seizure memo that in test and re-test of the substances conducted by the DD kit, both times it was found to be Heroin. In paragraph 15 of the counter affidavit also, the Intelligence Officer, N.C.B. Zonal Unit Lucknow, has stated on oath *"that the samples which were drawn from the seized contraband was sent to the Government Laboratory with the permission of the remand Court and after chemical examination the chemical examiner submitted the report stating there in that the samples under reference answered positive test for Heroin'*, but he has not annexed a copy of the said test report. The copy of test report filed with the rejoinder affidavit states that the substance was not found to be Heroin but it was Morphine. This contradiction in the test reports makes the prosecution case self-contradictory and doubtful. He further submitted that the test memo mentions the weight of the samples to be 5 gms. each whereas the test report mentions gross weight of sample received to be 8.4 gms and the gross weight of remnant returned with plastic pouch to be 6.5 gms and this discrepancy in the weights has not been explained, which too makes the prosecution case doubtful.

13. Per contra, Sri Ashish Pandey, the learned counsel for the N.C.B. has submitted that the search was conducted in the presence of a Gazetted Officer. He has further submitted that the difference in test results of the DD Kit and that of the Government Laboratory are insignificant because Heroin and Morphine, both are narcotic substances and irrespective of the fact whether the substances being found with the applicant was Heroin or Morphine, he would be liable to be prosecuted under the NDPS Act.

14. Sri. Pandey has further submitted that the search has been conducted in presence of a Gazzetted Officer and, therefore, there is no reasonable ground for doubting the genuineness of the search and deizure.

15. The applicant is charged with offences under Sections 8 (c) / 21 / 29 of the Narcotic Drugs and Psychotropic

Substances Act, which carry a rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees and in which bail can be granted only after the stringent conditions of Section 37 of the Act are fulfilled.

16. In Makhan Singh v. State of Haryana, (2015) 12 SCC 247 while dealing with a case under the Narcotic Drugs and Psychotropic Substances Act, the Supreme Court reiterated that "*...It is a well-settled principle of the criminal jurisprudence that more stringent the punishment, the more heavy is the burden upon the prosecution to prove the offence."*

17. In **Union of India v. Rattan Mallik, (2009) 2 SCC 624**, the Hon'ble Supreme Court explained the principles applicable in grant of Bail in offences under the NDPS Act as follows: -

"11. Section 37 of the NDPS Act, as substituted by Act 2 of 1989 with effect from 29-5-1989 with further amendment by Act 9 of 2001 reads as follows:

"37. Offences to be cognizable and non-bailable.--(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),--

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless--

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force on granting of bail."

12. It is plain from a bare reading of the non obstante clause in Section 37 of the NDPS Act and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz. (i) the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds".

13. The expression "reasonable grounds" has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn, points to existence of such facts and circumstances as are

sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence (vide Union of India v. Shiv Shanker Kesari. (2007) 7 SCC 798). Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.

14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS Act, the court is not called upon to record a finding of "not guilty". At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail."

18. Analyzing the facts of the present case for the purpose of deciding the applicants claim for bail in light of the aforesaid law, I find the following facts to be relevant at this stage: -

(i) Although the search and seizure was conducted at Bareilly Railway Station there is no independent witness of the alleged recovery.

(ii) The constables of Railway Police Force cannot be said to be independent witnesses.

(iii) Although it is mentioned in the recovery memo that search was conducted in presence of a Gazzetted Officer Sri. Harjeet Singh "ADEN / BE', but the recovery memo does not bear signatures of the Gazetted Officer.

(iv) The recovery memo claims that in test and re-test of the substances conducted by the DD kit, both times it was found to be Heroin.

(v) The Intelligence Officer, N.C.B. Zonal Unit Lucknow, has stated on oath that the sample was tested by the Government Laboratory and the report states that the samples under reference answered positive test for Heroin. However, a copy of the said test report has not been filed by the NCB.

(vi) The test report filed by the applicant categorically states that the substance was not found to be Heroin but it was Morphine.

(vii) Heroin and Morphine are different and distinct substances. Heroine ((Diacetylmorphine)) is mentioned at Serial No. 56 of the Notification dated 16-07-1996 specifying small quantity and commercial quantity issued under Section 2 (vii) (a) and 2 (xxiii) (a) of the Act and Morphine is mentioned at Serial No. 77 thereof.

19. The aforesaid facts raise doubts against the prosecution case and it gives rise to a reasonable ground for prima facie believing at this stage that the applicant may not be held guilty of the alleged offences.

20. Moreover, the applicant has no criminal history and, therefore, there is no ground to believe that in case the applicant is released on bail, he would again indulge in committing similar offences.

21. All the witnesses in the present case are officers and officials of Narcotic Control Bureau and personnel belonging to Railway Protection Force, therefore, there appears to be no reasonable apprehension

that in case the applicant is released on bail, he would influence the witnesses.

22. No other material has been placed by the respondent-Narcotic Control Bureau, which may indicate that the applicant is not entitled to be released on bail.

23. Keeping in view the aforesaid facts and without making any observations on merits of the case, I am of the view that the applicant is entitled to be released on bail pending conclusion of the trial. The bail application is accordingly allowed.

24. Let the applicant - **Aditya Kumar**, be released on bail in N.C.B. Crime No. 28 of 2021, under Section 8(C)/21/29 of Narcotic Drugs and Psychotropic Substances Act, P.S. N.C.B. Lucknow, on his furnishing a personal bond and two reliable sureties each of the like amount to the satisfaction of the court concerned subject to following conditions:-

(i) The applicant will not tamper with the evidence during the trial.

(ii) The applicant will not influence any witness.

(iii) The applicant will appear before the trial court on the dates fixed, unless personal presence is exempted.

(iv) The applicant shall not directly or indirectly make inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court to any police officer or tamper with the evidence.

25. In case of breach of any of the above conditions, the prosecution shall be at liberty to move an application before this Court seeking cancellation of bail.

(2022) 11 ILRA 1293
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.11.2022

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE JAYANT BANERJI, J.

Writ C No. 27495 of 2021
With
Writ C No. 23674 of 2021
Writ C No. 1786 of 2022
Writ C No. 1858 of 2022

Puttan ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Sandeep Kumar Tripathi

Counsel for the Respondents:
C.S.C., Sri Abhishek Srivastava, Sri B.P. Singh Kachhawah, Sri Manoj Kumar Singh, Sri Rajesh Yadav, Sri M.C. Chaturvedi (Sr. Advocate)

A. Civil Law - Electricity Act, 2003 – UP Regulatory Commission (Standards of Performance), Regulations, 2019 – Clause 2.1(g), 7, 8, 4.1, 9.4.3, Schedule I and III – Compensation – Practice of raising fake demand, issuing highly excessive bills and adopting coercive measure of detention against the consumers by the Electricity Distribution Corporation – Permissibility – High-handedness of mighty officers of the St. Government – Responsibility to pay compensation – SoP Regulation of 2019 was not observed by the authorities – Effect – High Court issued general mandamus to all concerned authorities of Power Distribution Corporations that they shall at their own compute compensation payable to complainants in terms of the SOP Regulations 2019 as per data available with them with respect to the each complaint and shall pay

compensation in terms of the aforesaid SOP Regulations 2019 as per procedure provided. (Para 22, 25 and 26)

B. Constitution of India – Article 14 and 21 – Right to life and personal liberty – Right to live with dignity – Human dignity is a constitutional value and a constitutional goal. It has now been well recognized that at its core, human dignity contains three elements, namely, intrinsic value, autonomy and community value. These are known as core values of human dignity. (Para 47)

C. Constitution of India – Article 21 – Illegal detention of the consumers – Right to get compensation – Responsibility of the St. Government – Held, this court cannot close its eyes and fold its hands or remain a silent spectator and thus, allow people to suffer who usually do not have resources and financial capacity to fight against the highhandedness of mighty officers of the St. Government – The respondents are liable to pay compensation to the said petitioner for his illegal detention – High Court directed the St. Government to pay Rs. 25,000/- as compensation to the petitioner. (Para 48, 50 and 52)

Writ petition partly allowed. (E-1)

List of Cases cited:-

1. N. Nagendra Rao & Co. Vs St. of Andhra Pradesh (1994) 6 SCC 205

2. Common Cause, A Registered Society Vs U.O.I. & ors.; (1996) 6 SCC 530

3. Shivsagar Tiwari Vs U.O.I. & ors.; (1996) 6 SCC 558

4. Delhi Development Authority Vs Skipper Construction & anr.; AIR 1996 SC 715

5. Mohammad Iqbal & anr. Vs St. of U.P. & ors.; 2016 (9) ADJ 593

6. Natural Resources Allocation, In re, Special Reference No. 1 of 2002; (2012) 10 SCC 1

7. Lucknow Development Authority Vs M.K. Gupta; (1994) 1 SCC 243

8. Jay Laxmi Salt Works (P) Ltd. Vs St. of Guj.; (1994) 4 SCC1

9. St. of Mah.& ors. Vs Kanchanmala Vijaysing Shirke & ors.; (1995) 5 SCC 659

10. Chief Conservator of Forests & anr. (1996) 2 SCC 293

11. S.P. Goel Vs Collector Of Stamps, Delhi; (1996) 1 SCC 573

12. Common Cause A. Registered Society Vs U.O.I.; JT 1999 (5) SC 237: AIR 1999 SC 2979

13. Chairman, Railway Board & ors. Vs Chandrima Das (Mrs.) & ors.; (2000) 2 SCC 465

14. St. of A.P. Vs Challa Ramkrishna Reddy & ors.; (2000) 5 SCC 712

15. Research Foundation for Science (10) Vs U.O.I. (2005) 13 SCC 659

16. M.C. Mehta Vs U.O.I. & ors.; (2006) 3 SCC 399

17. U.O.I. Vs Prabhakaran Vijaya Kumar & ors. (2008) 9 SCC 527

18. Action Committee, Unaided Private Schools & ors. Vs Director of Education, Delhi & ors.; (2009) 10 SCC

19. Delhi Jal Board Vs National Campaign for Dignity and Rights of Sewerage and Allied Workers & ors.; (2011) 8 SCC 568

20. Municipal Corporation of Delhi, Delhi Vs Uphaar Tragedy Victims Association & ors.; (2011) 14 SCC 481

21. Ram Narayan Agrawal & ors. Vs St. of U.P. & ors.; (1983) 4 SCC 276

22. Om Prakash Gupta Vs St. of U.P. & ors.; (2003) 5 AWC 4012

23. Jolly George Varghese & anr. Vs The Bank of Cochin; (1980) 2 SCC 360

24. K.S. Puttaswamy & ors. Vs U.O.I. (UOI) & ors.; (2019)1 SCC 1

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri M.C. Chaturvedi, learned Senior Advocate assisted by Sri Abhishek Srivastava, Arti Raje, Sushil Kumar Pandey, Gaurav Singh and Krishna Agarawal, learned counsels for the U.P. Power Corporation Ltd./ Associated Power Distribution Companies, namely Pashchimanchal Vidyut Vitaran Nigam Limited, Rampur, Dakashinanchal Vidyut Vitran Nigam Ltd. Jhansi etc. and Sri B.P. Singh Kachhawaha, learned standing counsel for the State-respondents.

2. Since number of writ petitions were coming up daily before this Court raising grievances of creation of fake bills/ demands or highly excessive demands by the respondents, therefore, this Court took up one writ petition each on 8th 9th and 10th February, 2022 and called upon the respondents to respond to the contentions of the petitioners. Personal affidavit by the Additional Chief Secretary, Government of U.P. Lucknow has been filed mainly in Writ-C No.27495 of 2021. Brief facts of each writ petitions are being noted below.

Facts:-

Writ-C No.27495 of 2021

3. Aggrieved with creation of fake and fictitious demand of Rs.29,60,202/- by demand notice dated 27.07.2021 issued by the respondent No.2 which was subsequently raised to Rs.31,47,731/- for the period from January, 2017 to November, 2021; the petitioner has filed the present writ petition for quashing of the demand notice. Copy of the ledger account filed by the respondent No.2 as Annexure CA-4 along with the aforesaid counter affidavit, revealed that the respondents debited monthly electricity dues in the account of the petitioner ranging from Rs.20,000/- to Rs.6,15,472/- per month. Considering the facts of the case, this Court passed detailed orders on 08.02.2022, 15.02.2022, 03.03.2022, 24.03.2022, 19.04.2022, 26.04.2022 and 05.05.2022. On 09.02.2022, the respondent No.2 stated before this Court that the demand of Rs.31,47,731/- was wrongly created and it has been modified to Rs.2,45,952/-. In **paragraphs-6, 7, 8 and 9 of the order dated 03.03.2022, this court observed as under**:

"6. The personal affidavit filed by ***the Managing Director*** *of Pashchimanchal Vidyut Vitaran Nigam Limited, Meerut, U.P. is more or less reiteration of the aforesaid personal affidavit of the Principal Secretary.* ***He has also admitted in his personal affidavit the prevailing situation of errors in the consumer ledger, raising of fictitious demands, several lapses on the part of officers of the Electricity Distribution Division and dereliction of duties, negligence in performance of duties by the officers and employees and existence of fictitious arrears against consumers.***

7. From the aforesaid two personal affidavits, it appear that an isolated decision against some officers of the respondent No. 2 i.e. Pashchimanchal Vidyut Vitaran Nigam Limited, Milakh, District Rampur has been taken, but nothing has been stated about the situation prevailing in the Power Distribution Corporation in the whole State of Uttar Pradesh. To give instances, ***Writ C No. 23674 of 2021****, relates to a consumer of District Jhansi falling under Vidyut Vitaran Khand, Mauranipur, District Jhansi of Dakshinanchal Vidyut Vitaran Nigam Limited filed against fictitious demand and recovery certificate of Rs. 4,83,103.00. The above noted connected* ***Writ-C No. 1786 of 2022*** *relates to a consumer of District Mirzapur falling under Purvanchal Vidyut*

Vitaran Nigam Limited/Electricity Distribution Sub-Division-II, Fataha, District Mirzapur, challenging fictitious demand and harassment caused by arrest. The ***connected Writ-C No. 1858 of 2022*** *relates to a consumer of district Banda falling under Executive Engineer, Dakshinanchal Vidyut Vitaran Nigam Limited, Agra, wherein creation and attempt for* ***fictitious demand of Rs. 1,61,448/ has been admitted by the respondents.***

8. ***The above noted writ petitions have been mentioned merely as exemplars which, prima facie, show high handedness, illegal and arbitrary actions of the respondents against the consumers who are prima facie being harassed and robbed by raising fictitious/bogus electricity dues demands, well within the knowledge of respondent No.1 and Managing Directors of different Power Corporations and concerned authorities.***

9. Facts as briefly noted above, particularly own averments of the respondents as aforequoted, prima facie, ***indicate maintenance of false and fabricated account/consumer ledger showing fictitious liabilities of consumers with no accountability or any serious efforts by the respondent No.1 to take strong steps to stop the prevailing situation and to save consumers from illegal and arbitrary actions and harassment by the officers and employees so as to preserve fundamental rights of people guaranteed under Article 14 and 21 of the Constitution of India.****"*

4. In response, in the connected Writ-C No.23674 of 2021, a counter affidavit dated 17.04.2022 of Sri Alok Sinha, Additional Chief Secretary (Energy), Government of U.P., Lucknow has been filed. In paragraphs-8, 9 and 10 of the counter affidavit, the Additional Chief Secretary on behalf of State of U.P., has stated as under:-

"8. That for the functioning of Standard of Performance of Uttar Pradesh Electricity Regulation Commission Uttar Pradesh government has gazetted through ordinance number U.P.E.R.C/ Secretary/Manual/656 dated 16.12.2019 where it is provisioned in schedule 18(iii) that if any consumer complaints about billing then if complaint is not resolved even after a definite time then consumer will be entitled for the payment of compensation as damage. Provisions are also there in S.O.P. for various other reasons of wrong Bills. It is also described in this S.O.P. that how a consumer can apply for compensation. By comprehensively advertising this S.O.P. and by increasing consumer vareness, compensation will be provided to aggrieved consumer. The loss incurred by the distribution companies for giving such compensation will be recovered from accused officer/staff personally. By this on one side aggrieved victim will get justice on the otherside limit will also be imposed on faulty employees. True copy of the ordinance number U.P.E.R.C/ Secretary/Manual/656 dated 16.12.2019 are being filed collectively here with and marked as ***ANNEXURE C.A.2*** *to this affidavit.*

9. ***In order for strict compliance to stop the fraudulent practice of making/issuing fake bill to the consumer's, a detailed instructions has been issued to all discom of UPPCL*** *vide letter no. 27/पी०एस०एम०डी०/पाकालि/2022* ***28 फरवरी, 2022*** *are being annexed with and marked as ANNEXURE C.A.3 to this affidavit.*

10. U.P. Power Corporation has issued orders & instructions to ensure that no ***fraudulent bills are served to consumers which includes wrong billing***

due to billing without actual release of connection at site, billing for the period in which the consumer has not used electricity, wrong billing due to misfeeding of meter reading, issuance of exaggerated amount of section 5 notice under land recovery act etc."

5. After noticing certain facts on record, this Court passed an **order dated 19.04.2022 (Paras 4, 5, 6 and 7) observing as under**:-

"4. Learned counsels for the petitioners jointly submit that the respondents have filed false and misleading affidavits and in fact the authorities from bottom to top are hand in gloves and are involved in harassing ordinary consumers which results in extreme corruption. Learned counsels for the petitioners have drawn our attention to a news item published in a daily newspapers 'Hindustan' on 18.4.2022 titled as "अब बिजली बिल रिवीजन में करोड़ो रूपयों का घोटाला". They further submits that in this news item it is mentioned that the ***Managing Director of the U.P. Power Corporation Limited has constituted a special team to enquire into corruption of about Rs. 22 crores by departmental engineers and employees in matters of bill revision. However, neither in the counter affidavit filed by the respondent no. 1 there is any reference to any such enquiry nor in the letter of the Managing Director of the U.P. Power Corporation****, filed as Annexure 3 to the counter affidavit, there is any reference of any such enquiry.*

5. In various affidavits filed before this Court in batch of these writ petitions, the respondents have made endeavor to give a picture as if actions are being taken but in reality, prima facie, it appears that practically no actions are taken. Despite there being commission of offences as indicated by us in our earlier orders, no material has been brought on record to indicate that any action has been taken by the respondent no. 1 or the Managing Directors of the concerned Power Distribution Corporation or the Managing Director of the U.P. Power Corporation Limited.

6. ***Learned Standing counsel submits that the respondent no. 1 shall bring on record details relating to enquiry purportedly instituted in matter of corruption relating to revision of bills.*** *It shall not be out of place to mention that in the present batch of writ petitions fake demands were firstly raised and the grievance of the petitioners are not addressed by the respondents and when they filed writ petitions then respondents have admitted before this Court that fake bills/demands were created against the petitioners.*

7. Considering the facts and circumstances of the case and submissions of the learned counsel for the parties, we direct the respondent no. 1 to file his personal affidavit within three days bringing on record the facts relating to enquiry instituted by the Managing Director of the U.P. Power Corporation Limited in the matters of corruption in bill revisions, if any."

6. On 05.05.2022, the learned Senior Advocate for the Corporation filed a **personal affidavit of the Additional Chief Secretary (Energy), Government of U.P., Lucknow dated 02.05.2022**, the parties were heard at length and the order dated 05.05.2022 (Paras-3 and 4) was passed, as under:-

"3. Several submissions have been made by learned counsels for the petitioners. Additionally, learned counsel for the petitioner in Writ-C No.1858 of 2022 has submitted that the bill, as raised by the respondents, has been deposited by the petitioner but it still requires correction and issuance of fresh demand, which has not yet been done. Learned counsel for the petitioner also submitted that the respondents have caused harassment to the petitioner for years together including arrest which all are violative of Article 21 of the Constitution of India and for which appropriate order needs to be issued by this Court in exercise of powers conferred under Article 226 of the Constitution of India, in the interest of consumers. It is further submitted that malpractices of creation of fake and fictitious demands and raising of fake bills are prevailing in different parts of State of Uttar Pradesh from a very long time which is also reflected from the order passed by this Court in the year 2001. Therefore, to save people from the corrupt practice and arbitrary and illegal action of the respondents, it is in the interest of justice that a direction may be issued to the respondents to conduct a special audit to find out creation of fake and fictitious demands in ledger and raising of fake and fictitious bills. Learned counsels for the petitioner have also drawn attention of this Court to page nos.52, 121, 126, 130, 144, 170 and 176 etc. of the personal affidavit dated 02.05.2022 filed on behalf of the respondent no.1 by Shri M. Devraj, Principal Secretary (Energy), Government of U.P., Lucknow. They lastly submitted that the writ petitions deserve to be allowed with exemplary costs.

4. Learned Senior Advocate, on instructions of the respondent no.1, states that the respondents are ready and willing to follow directions of this Court with regard to special audit in the whole part of the State of Uttar Pradesh to find out fake and fictitious demands created in the ledger, raising of fake and fictitious bills etc. in the interest of general consumers, and also remedial steps for discouraging malpractices in the various offices of the Corporation."

Writ-C No.23674 of 2021

7. Briefly stated facts of the present case are that the petitioner applied for agricultural electricity connection of 7.5 KVA for his tubewell and deposited Rs.11,145/- on 26.02.2008 towards fees etc. as demanded by the respondents, **but the respondents have neither granted electricity connection to the petitioner nor installed poles etc. On one hand, the respondents have not granted electricity connection to the petitioner and, on the other hand, they started raising demands of electricity dues against the petitioner. The respondent nos.2/3 issued a recovery certificate of Rs.4,83,103/-** against the petitioner towards electricity dues and pursuant thereto, the respondent no.4 has issued a recovery citation dated 26.07.2021 for the aforesaid amount.

8. Aggrieved with the dues and action for recovery thereof by the respondents, the petitioner has filed the present writ petition. **On 23.02.2022, this Court passed an order (Paras-6 and 7) observing as under**:

"6. Today, learned counsel for the respondent nos.2 and 3 has produced certain letters of the respondent nos.2/3 or the authorities subordinate to them which shows that a fake and bogus demand of electricity dues was created for years together against the petitioner and ***the***

petitioner has been continuously harassed. It is only when the petitioner has filed the present writ petition, then the respondents have withdrawn the recovery certificate. *The papers (13 in number) produced by learned counsel for the respondent nos.2 and 3 are kept on record.*

7. Considering the facts and circumstances of the case and long practice of the respondents to raise fake bills/demands against electricity consumers, we direct respondent nos.1 and 3 to file counter affidavits by means of their personal affidavits annexing therewith copies of papers produced today by learned counsel for the respondent nos.2 and 3 and copy of ledger account of the petitioner (consumer ledger account) and show cause as to why exemplary cost may not be imposed for harassing the petitioner for years together on the basis of fake and bogus demands created against him."

9. A counter affidavit by means of personal affidavit of Additional Chief Secretary on behalf of respondent No.1 dated 17.04.2022 has been filed and paragraphs-8, 9 and 10 thereof have already been reproduced above under the heading "Writ-C No.27495 of 2021."

Writ-C No.1786 of 2022:-

10. This writ petition has been filed praying for the following relief:-

"(a) Certiorari - quash the impugned recovery citation dated 25.01.2021 issued by Tehsildar, Tehsil Sadar, District-Mirzapur/Respondent no.3 and undated demand notice issued by the respondent no.4 (Annexure Nos.4 and 9) to this writ petition.

(b) Issue a writ order or direction in the nature of Mandamus directing the respondent no.4 to consider and decide the representation of the petitioner within stipulated period in the interest of justice.

(c) Issue a writ order or direction in the nature of Mandamus upon the respondent's authority for the act and conduct by which the economical, social and physical harassment of the petitioner was done and the Hon'ble Court may kindly be pleased to impose the heavy cost upon the respondent's authority with regard the illegal activities and procedure adopted by the respondents."

11. Annexure 5 to the writ petition is the permanent disconnection report which reveals that **electricity connection of the petitioner was disconnected permanently on 25.02.2003. As per report dated 19.08.2021 made on the aforesaid permanent disconnection, it appears that according to the respondent no.4, the electricity dues of the petitioner, as on the date of permanent disconnection, i.e., 25.02.2003, was Rs.9,444/-. However, respondent** no.4 remained silent and **issued a recovery certificate for Rs.3,82,169/-** on the basis of which a citation dated 25.01.2021 for Rs.4,01,278/- (electricity dues - Rs.3,82,169/- + collection charge - Rs.19,109/-) was issued by the respondent no.3, i.e. Tehsildar, Tehsil Sadar, District Mirzapur. The petitioner submitted an application dated 08.04.2021 before the respondent no.4 supported by an affidavit whereby he apprised the respondent no.4 of the entire facts and requested it to withdraw the demand.

12. **Instead of withdrawing the demand, the petitioner was arrested on account of the aforesaid electricity dues of Rs.3,82,169/-** and news of arrest was got published by the respondents in daily newspapers alongwith photographs. After

the petitioner somehow deposited Rs.82,000/-, he was released from civil prison.

13. The petitioner submitted another application through his son dated 28.09.2021 before the respondent no.4 which was also not considered. Copy of the application was sent by the petitioner to various authorities, namely, District Magistrate, Mirzapur and Superintendent of Police, Mirzapur, etc., but no action was taken. Therefore, the petitioner, after being released, again submitted application before various authorities on 29.09.2021 and made serious allegations. **Despite all these facts, the respondent no.4 again issued a notice to the petitioner showing dues of Rs.4,95,951/- as on 30.09.2021**.

14. Thus, the grievance of the petitioner is that a manipulated, fake and baseless demand of electricity dues being pressed against him despite permanent disconnection on 25.02.2003, is not being redressed by the respondent no.4 and he is being harassed by the respondents.

15. In paragraph-10 of his counter affidavit dated 15.02.2022, the respondent No.2 (District Magistrate, Mirzapur) stated that **to recover the aforesaid dues, the Tehsil Authorities took the petitioner under civil custody on 28.09.2021.** Thereafter, an application supported by affidavit and a permanent disconnection report of the concerned authority requiring the petitioner to deposit only Rs.9,444/- as electricity dues, was submitted. Thereafter, the petitioner was released from civil custody. The dues found against the petitioner was only Rs.9,444/- as against the demand created by the respondents and consequential recovery citation issued for Rs.4,01,278/-.

16. **In paragraph-4 of his counter affidavit dated 13.02.2022, the respondent No.4, i.e. the Executive Engineer stated** that after the petitioner was arrested pursuant to recovery citation, his son represented and, thereafter **it was found that actual dues are only Rs.9,444/- and the total up-to-date liability with disconnection charges was found to be Rs.11,166/-** and, therefore, he instructed the Tehsil Authorities to release the petitioner from civil prison. Thus, alleged contention of the petitioner pursuant to fake/ fictitious demand created by the respondents, has been admitted by the respondents.

Writ-C No.1858 of 2022

17. This writ petition has been filed praying to quash the recovery citation dated 03.08.2021 issued by the respondent no.4 pursuant to the recovery certificate forwarded by the respondent no.3.

18. According to the respondent nos.2 and 3, the **petitioner was granted an electricity connection of 1KW on 11.07.2014** and the meter was installed on 16.01.2019. According to the petitioner, he was given the electricity connection on 16.01.2019. It appears that a **recovery notice of Rs.1,59,598/-** was sent by the respondent no.3 which was immediately replied by the petitioner through application dated 08.01.2019 stating therein that the dues are totally fake and there is no electricity connection in the petitioner's shop. Thereafter, the respondent no.3 installed the meter for 1 KW load on 16.01.2019 as evident from the meter ceiling certificate dated 16.01.2019. Since the respondent no.3 was not taking any action and instead **issued a recovery certificate of Rs.2,31,858/-, therefore, the petitioner submitted an application dated 07.10.2020 before the respondent no.3** requesting to inquire into the matter and withdraw the recovery certificate.

Since nothing was done by the respondent no.3, therefore, the petitioner filed Complaint Case No.96 of 2019 (Brahamdeen vs. U.P. Power Corporation) in the Court of Consumer Forum Banda in which the **respondent no.3 filed a written statement dated 25.04.2021**. In the written statement, the respondent no.3 has clearly stated in paragraph 14 as under :-

"ystj ds vuqlkj cdk;k # 222639@&A

***vr% #161448@& {kn~e cdk;k** lekIr fd;k tkrk gSA"*

19. In paragraph 14 of the written statement, the respondent no.3 has stated as under:

";g fd ifjoknh dks la;kstu ls ekg vizSy 2020 rd # 61]191@& dh /kujkf'k dk Hkqxrku fu;ekuqlkj djuk vfuok;Z ,oa vko';d gSA"

20. Thus, it is evident from the written statement of the respondent no.3 that as per his own case, fake dues of Rs.1,61,448/- was shown in the ledger and accordingly recovery was being pressed against the petitioner.

21. Thus, creation of fake dues and recovery thereof by the respondents from the petitioner caused the petitioner to file the present writ petition praying to quash the recovery citation dated 03.08.2021. The respondent No.2, i.e. **the Chairman, U.P. Power Corporation Ltd. has filed his personal affiavit dated 14.04.2022 in which he admitted the fact of correct demand to be only Rs.61,191/-.** He also indicated in his personal affidavit about initiation of certain action against certain officers/ employees. In paragraph-7 of his personal affidavit, he stated that the default is on the part of concerned officers in issuance of incorrect demand notice without referring to the modified bill.

Submissions:-

22. Learned counsel for the petitioners in each of the writ petitions submitted that the respondents are habitual of raising fake demands and thereby coercing individual consumers including their arrest/ detention and harrassment by various means which is violative of Articles 14 and 21 of the Constitution of India. They submitted that from paragraph-8 of the personal affidavit of the Additional Chief Secretary dated 17.04.2022 filed on behalf of the respondent No.1 in Writ-C No.23674 of 2021, it appears that some Rules have been enacted by the State Government for compensation but neither it has been precisely indicated in the counter affidavit nor complete copy thereof has been filed along with the aforesaid personal affidavit. They further submit that as per admitted facts, it is evident that raising of huge fake demands against the consumers and adopting coercive measures to recover it from them is a practice prevailing in different Electricity Distribution Corporation in the State of U.P. and grievances of consumers are not redressed as a matter of practice unless the consumer approaches the court or pleases the officers for redressal of his grievances. They further submit that the personal affidavit of the Additional Chief Secretary dated 02.05.2022 filed on behalf of the State of Uttar Pradesh itself would clearly reveal that a special audit conducted for a small period revealed not only creation of fake and fictitious bills against the consumers but also malpractices prevailing in various Power Distribution Corporation to reduce actual demands of certain consumers causing huge loss of revenue to the Corporation. Therefore, there is an urgent need not only in the interest of general consumers but also in the interest of the respondents that a special audit in the matter of these Distribution Corporations

be directed to be conducted by an expert agency so that there may be a check on harassment of general consumers on one hand and on the other hand the Corporation may not suffer financially on account of fraud/ embazzlement being practiced by officers and employees.

23. Learned Senior Advocate submits that the respondents have taken all steps to correct wrongs and are ready and willing to take all actions as may be directed by this Court with regard to **special audit in the whole of State of Uttar Pradesh to find out fake and fictitious bills created in the ledger in the interest of general consumers and also remedical steps for discuraging malpractices in various offices of the Corporation.** A statement in this regard was given on behalf of the respondents which has been noted by this court in paragraph-4 of the order dated 05.05.2022 passed in the aforesaid leading Writ-C No.27495 of 2021.

Discussion and Findings:-

24. We have carefully considered the submisions of learned counsels for the parties and perused the records of the writ petition.

25. From the facts aforenoted, we find that although there exists "The Uttar Pradesh Regulatory Commission (Standards of Performance), Regulations, 2019" (hereinafter referred to as "SOP Regulations, 2019") enacted by the Uttar Pradesh Electricity Regulatory Commission in exercise of power conferred under Section 181(1) and 181(2)(za & zb) read with Sections 57(1), 57(2), 59(1) and 86(1)(i) of the Electricity Act, 2003 but the aforesaid SOP Regulations, 2019 is not being observed by the authorities/ Associate Distribution Corporations and it remained only a paper work. Therefore, there is an urgent need not only for strict adherence to the aforesaid SOP Regulations, 2019 but also for its proper publicity regularly on website as well as in newspapers for the month of January and July each year and also to publish it, particularly compensation structure and information of procedure for filing complaints; at the back of electricity bills or separate handout which may be distributed along with bills as provided in Paragraph-9.4.3 of the S.O.P. Regulations, 2019. The aforesaid Regulations, 2019 as published in the U.P. Extraordinary Gazette dated 16.12.2019 is made part of this judgment as Appendix-I.

26. Perusal of clauses 2.1(g), 7, 8.4.1, 9.4.3, Schedule-I and Schedule-III of the SOP Regulations, 2019 would reveal that although provision for compensation for various deficiencies in service by the licencees/ Power Distribution Corporations have been made, yet on the facts of the present case, we find that no action for payment of compensation to the petitioners on the admitted facts of the present case have been made by the respondents. Considering the admitted prevailing practice of creating or issuing fake demands and issuing highly excessive bills against large number of consumers in the State of Uttar Pradesh and also to achieve the primary object of the SOP Regulations, 2019 and that every details of online complaints and resolution of complaints are to be maintained or are available with the concerned authorities of all the Associated Power Distribution Corporations, therefore, **there is no need for lodging a separate claim by consumers under Para 8.4.1 of the SOP Regulations, 2019. Therefore, we issue a general mandamus to all concerned authorities of Power Distribution Corporations that they shall at their own compute compensation**

payable to complainants in terms of the SOP Regulations 2019 as per data available with them with respect to the each complaint and shall pay compensation in terms of the aforesaid SOP Regulations 2019 as per procedure provided. The need of filing claim by a consumer would arise only when the consumer on a given set of facts, finds himself dissatisfied with the compensation granted by the authority concerned.

Direction for Disciplinary Action:-

27. In the counter affidavit filed by the Chairman of the U.P. Power Corporation and also by the State Government, practice of creating fake demands and raising fake bills against consumers, have been admitted. The Managing Director, U.P. Power Corporation has also admitted these facts in his Letter No.PSMD/ikdkfy/2022 dated 28.02.2022 addressed to the Managing Directors, Madhyanchal/ Purvanchal/ Pashimanchal/ Dakshinanchal Electricity Distribution Corporations filed as Annexure CA-3 in connected Writ-C No.23674 of 2021, in which he stated that issuance of bills to consumers of highly excessive amounts etc. and issuance of recovery notices/ certificates for recovery thereof not only causes unnecessary harassment to consumers but also creates possibility of corruption which despite instructions issued, are not being checked and which needs to be checked cent percent and in the event such matters come to light, then departmental proceedings be initiated against the erring officers and the compensation be paid to consumers to be recovered from the concerned erring officers/ employees. But facts of the present cases still reveal that neither any compensation was paid to petitioners nor any concrete action has been taken against the erring officers and employees. Therefore, we direct the respondents to initiate appropriate disciplinary action against all the erring officers/ employees who have been *prima facie* found guilty of creating fake demands or issuing bills illegally against the petitioners and making recovery thereof; in accordance with law within three weeks from today and conclude disciplinary proceedings within next six months.

Directions for Special Audit:-

28. In paragraphs-5, 6, 7, 8, 9 and 10 of the personal affidavit dated 02.05.2022 filed by the Principal Secretary (Energy), Government of U.P. Lucknow on behalf of the respondent No.1, it has been stated that in compliance to the order dated 19.04.2022 passed by this Court, the Managing Director of the U.P. Power Corporation has informed to the State Government vide letter dated 22.04.2022 that for Electricity Distribution Division, **Deoria** for the period from 22.11.2018 to 02.11.2020 and for Electricity Distribution Division, **Mahoba** for the period from 01.04.2017 to 31.03.2021, a special audit was conducted and special audit report was submitted to the Director Finance, UPPCL, Lucknow on 06.04.2022 which revealed serious discrepancies and action on the special audit reports are being taken against the erring officers/ officials. Copies of the aforesaid **two special audit reports of Distribution Division, Deoria and Distribution Division-I & II, Mahoba** have been filed as Annexures 2 and 3 respectively to the aforesaid personal affidavit.

29. The aforesaid two special audit reports of districts Deoria and Mahoba, **reveal two sets of illegalities by officers and employees. The first set of illegalities** is raising fake/ fictitious bills/ demands and

creating fake/ fictitious bills/ demands in ledgers against consumers either against a very low amount of actual dues or even without electricity connection. **The second set of illegalities** is more serious which indicates embezzlement of very huge amounts running in several crores of rupees and thereby causing financial losses to the State Government/ Corporations by several means including embezzlement of permanent and also of temporary nature. These two special audit reports relating to two districts namely Deoria and Mahoba are eye opener for the State Government so as to prevent its own people from harassment and breach of their fundamental rights under Articles 14 and 21 of the Constitution of India on the one hand and on the other hand to protect its revenue and punish its officers and employees and officers/ employees of concerned Power Distribution Corporations who are involved in embezzlement or misappropriation or benefiting unscrupulous consumers thereby causing loss to the Government/ Distribution Corporations. The State Government is well aware of these malpractices prevailing in the whole of State of Uttar Pradesh and yet has requested this court for a direction to it for conducting special audit to take appropriate steps to curb the malpractices, as is evident from the statement made on behalf of the State Government and noted in the aforequoted order of this court dated 05.05.2022. Considering the large-scale malpractices, maintenance of false and fabricated ledger account of consumers showing fictitious liability and issuance of fake/ fictitious/ manipulated bills of electricity dues thereby causing serious harassment to consumers resulting in breach of their fundamental rights under Articles 14 and 21 of the Constitution of India on the one hand and on the other hand serious malpractices prevailing in Distribution Division of Associate Distribution Corporations in the State of U.P. causing huge loss of revenue to the State Government/ Power Corporation by means of embezzlement and other malpractices, **we direct the State of Uttar Pradesh through Principal Secretary (Energy), Government of U.P. Lucknow and the Managing Director of the U.P. Power Corporation, Lucknow to develop and put in place an effective mechanism within three months from today to check completely the illegal malpractices as briefly mentioned above and also pointed out in the two special audit reports of district Deoria and Mahoba including embezzlement of government money. We further direct that the State Government and the Managing Director of the Uttar Pradesh Power Corporation shall take all required steps for special audit, of each divisions in the districts falling under respective Distribution Power Corporations; by a competent expert body/ authority/ agency for such period as the State Government or the U.P. Power Corporation may deem fit. Audit report shall be submitted within six months which shall be examined by the competent authority within next one month and appropriate action shall be taken thereafter within next three months. We further direct the State Government and U.P. Power Corporation to put in place such mechanism or to improve the existing mechanism as they may think fit, within three months from today for regular check on the malpractices and embezzlement etc. as briefly discussed above and also those as indicted in the aforesaid two special audit reports of Distribution Division of Districts Deoria and Mahoba.**

Responsibility of State Government and Accountability of its Officers and Employees and Compensation:-

30. In **N. Nagendra Rao & Co. v. State of Andhra Pradesh (1994) 6 SCC 205 (Para 25)** Hon'ble Supreme Court, held as under :

"25. But there the immunity ends. ***No civilised system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign.*** *The concept of public interest has changed with structural change in the society.* ***No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy.*** *From sincerity, efficiency and dignity of State as a juristic person, propounded in nineteenth century as sound sociological basis for State immunity the circle has gone round and the emphasis now is more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government on a par with any other juristic legal entity. Any watertight compartmentalization of the functions of the State as "sovereign and non-sovereign" or "governmental and non-governmental" is not sound. It is contrary to modem jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for sake of society and the people the claim of a common man or ordinary citizen cannot be thrown out merely because it was done by an officer of the State even though it was against law and negligent.* ***Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a Welfare State is not shaken.*** *Even in America where this doctrine of sovereignty found its place either because of the "financial instability of the infant American States rather than to the stability of the doctrine's theoretical foundation", or because of "logical and practical ground", or that "there could be no legal right as against the State which made the law" gradually gave way to the movement from, "State irresponsibility to State responsibility". In Welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity. The determination of vicarious liability of the State being linked with negligence of its officers, if they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharge of public duty having marched ahead, there is no rationale for the proposition that even if the officer is liable the State cannot be sued. The liability of the officer personally was not doubted even in Viscount Canterbury4. But the Crown was held immune on doctrine of sovereign immunity. Since the doctrine has become outdated and sovereignty now vests in the people, the State cannot claim any immunity and if*

a suit is maintainable against the officer personally, then there is no reason to hold that it would not be maintainable against the State.

(Emphasis supplied by us)

31. In **Common Cause, A Registered Society v. Union of India and others, (1996)6 SCC 530 (Para 26)**, Hon'ble Supreme Court held as under:

"No public servant can say "you may set aside an order on the ground of malafide but you cannot hold me personally liable". No public servant can arrogate to himself the power to act in a manner which is arbitrary".

32. In **Shivsagar Tiwari Vs. Union of India and others (1996) 6 SCC 558**, Hon'ble Supreme Court quoted with approval of the observations of Edmund Burke, as under:

"An arbitrary system indeed must always be a corrupt one. There never was a man who thought he had no law but his own will, who did not soon find that he had no end but his own profit."

33. In **Delhi Development Authority Vs. Skipper Construction and Another AIR 1996 SC 715 (Para 6)** Hon'ble Supreme Court observed as under:

"A democratic Government does not mean a lax Government. The rules of procedure and/or principles of natural justice are not meant to enable the guilty to delay and defect the just retribution. The wheel of justice may appear to grind slowly but it is duty of all of us to ensure that they do grind steadily and grind well and truly. The justice system cannot be allowed to become soft, supine and spineless."

34. In **Mohammad Iqbal and Anr. v. State of U.P. and others 2016 (9) ADJ 593 (Para 11 and 17)**, this Court held as under:

"11. In a democratic system governed by rule of law, Government does not mean a lax Government. The public servants hold their offices in trust and are expected to perform with due diligence particularly so that their action or inaction may not cause any undue hardship and harassment to a common man. Whenever it comes to the notice of this Court that Government or its officials have acted with gross negligence and unmindful action causing harassment of a common and helpless man, this Court has and never would be a silent spectator but always react to bring authorities within rule book or to make them accountable."

17. We, therefore dispose of this writ petition with cost of Rs.2 lacs which shall be paid at the first instance by respondent-1 since respondent-3 is the official and agent of respondent-1, but it shall have liberty to recover such amount from authority concerned who is responsible for such illegal action of detention of petitioner's vehicle on 3.10.2014 and onwards."

35. In **Natural Resources Allocation, In re, Special Reference No. 1 of 2002, (2012) 10 SCC 1 (Para 172 and 184)** Hon'ble Supreme Court held, as under:

*"**172.**The judgment in LDA case brings out the foundational principle of executive governance. The said*

foundational principle is based on the realisation that sovereignty vests in the people. The judgment, therefore, records that every limb of the constitutional machinery is obliged to be people oriented. The fundamental principle brought out by the judgment is that a public authority exercising public power discharges a public duty, and, therefore has to subserve general welfare and common good. All power should be exercised for the sake of society. The issue which was the subject-matter of consideration, and has been noticed along with the citation was decided by concluding that compensation shall be payable by the State (or its instrumentality) where inappropriate deprivation on account of improper exercise of discretion has resulted in a loss, compensation is payable by the State (or its instrumentality). ***But where the public functionary exercises his discretion capriciously, or for considerations which are malafide, the public functionary himself must shoulder the burden of compensation held as payable.*** *The reason for shifting the onus to the public functionary deserves notice. This Court felt that when a court directs payment of damages or compensation against the State, the ultimate sufferer is the common man, because it is taxpayers' money out of which damages and costs are paid.*

184. *Another aspect which emerges from the judgments (extracted in paras 159 to 182, above) is that, the State, its instrumentalities and their functionaries, while exercising their executive power in matters of trade or business, etc. including making of contracts, should be mindful of public interest, public purpose and public good. This is so, because* ***every holder of public office by virtue of which he acts on behalf of the State, or its instrumentalities, is ultimately accountable to the people in whom sovereignty vests.*** *As such, all powers vested in the State are meant to be exercised for public good and in public interest. Therefore, the question of unfettered discretion in an executive authority, just does not arise.* ***The fetters on discretion are clear, transparent and objective criteria or procedure which promotes public interest, public purpose and public good.*** *A public authority is ordained, therefore to act, reasonably and in good faith and upon lawful and relevant grounds of public interest."*

(Emphasis supplied by us)

36. In the case of **Lucknow Development Authority Vs. M.K. Gupta (1994) 1 SCC 243** (Paras 8, 10, 11 and 12 Hon'ble Supreme Court observed that under our Constitution Sovereignty vest in the people. Every limb of the constitutional machinery is obliged to be people oriented. No functionary in exercise of statutory power can claim immunity, except to the extent protected by the statute itself. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour before authorities created under the statute like the commission or the courts entrusted with responsibility of maintaining the rule of law.

37. **The respondents are State within the meaning of Article 12 of the Constitution of India. They are public functionary. As per Constitution, the sovereignty vests in people. Every government functionary including the public authorities are obliged to be people oriented. The public officers are public servants and they have been employed to serve people. They are accountable for their illegal acts and for violating the Constitutional and**

Statutory provisions. They cannot be a cause for harassment to the people.

38. **The sufferer of the high-handedness and inaction of the government officers and employees, are ordinary citizen or a common man who is hardly equipped to match the might of the State or its instrumentalities. Sovereignty vests in the people. Every limb of the constitutional machinery is obliged to be people oriented. Servants of the government are in fact servants of the people. Therefore, the use of their power must always be subordinate to their duty of service. If a public functionary acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but it is abuse of power for which the law does not protect them and they must suffer.** Harassment of a common man by public authorities is socially abhorring and legally impermissible. It may harm him personally but the injury to society is far more grievous. Nothing is more damaging than the feeling of helplessness. An ordinary citizen instead of complaining and fighting succumbs to the pressure of undesirable functioning in offices instead of standing against it. Therefore, award of compensation for harassment by public authorities not only compensates the individual, satisfies him personally but helps in curing social evil.

39. In a modern society no authority can arrogate to itself the power to act in a manner which is arbitrary. It is unfortunate that matters which require immediate attention linger on and the man in the street is made to run from one end to other with no result. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match the inaction in public oriented departments gets frustrated which erodes the credibility in the system. It is now imperative and implicit in the exercise of power that it should be for the sake of society. It is the tax payers' money which is paid for inaction of those who are entrusted under the Act to discharge their duties in accordance with law.

40. Once it is found by the competent authority that a complainant is entitled for compensation for inaction of those who are entrusted under the Act to discharge their duties in accordance with law, then payment of the amount may be made to the complainant from the public fund immediately but it may be recovered from those who are found responsible for such unpardonable behaviour. This legal position is reflected from the law laid down by the Apex Court in **Lucknow Development Authority's case (supra)**. In the said case it was further observed by the Apex Court that the Administrative law of accountability of public authorities or their arbitrary and even *ultra vires* actions has taken many strides and it is now accepted both by this Court and English Courts that State is liable to compensate for loss or injury suffered by a citizen due to arbitrary action of its employees.

41. The legal principles as enumerated in foregoing paragraphs also finds support of the law laid down by Hon'ble Supreme Court in **Jay Laxmi Salt Works (P) Ltd. Vs. State of Gujarat (1994) 4 SCC 1; State of Maharashtra and others Vs. Kanchanmala Vijaysing Shirke and others (1995) 5 SCC 659; Chief Conservator of Forests and another (1996) 2 SCC 293; S.P. Goel vs Collector Of Stamps, Delhi (1996) 1 SCC 573; Common Cause A. Registered Society Vs. Union of India JT 1999 (5)**

SC 237: AIR 1999 SC 2979; Chairman, Railway Board and others Vs. Chandrima Das (Mrs.) and others (2000) 2 SCC 465; State of A.P. Vs. Challa Ramkrishna Reddy and others (2000) 5 SCC 712; Research Foundation for Science (10) Vs. Union of India (2005) 13 SCC 659; M.C. Mehta Vs. Union of India and Others (2006) 3 SCC 399; Union of India Vs. Prabhakaran Vijaya Kumar and others (2008) 9 SCC 527; Action Committee, Unaided Private Schools and others Vs. Director of Education, Delhi and others (2009) 10 SCC; Delhi Jal Board Vs. National Campaign for Dignity and Rights of Sewerage and Allied Workers and others (2011) 8 SCC 568; Municipal Corporation of Delhi, Delhi Vs. Uphaar Tragedy Victims Association and others (2011) 14 SCC 481.

Breach of Fundamental Rights under Article 21 of the Constitution of India and Compensation for Illegal Detention:-

42. Arrest and detention of defaulter for recovery as arrears of land revenue is governed by the provisions of Section 171 of the Uttar Pradesh Revenue Code, 2006 and Rules 144, 145 and 146 of the U.P. Revenue Code Rules, 2006.

43. Any person committing default in payment of an arrear of land revenue may be arrested and detained under Section 171 of the Code in Tehsil lock-up and if there is no such lock-up, at such other place as may be prescribed, for a period not exceeding fifteen days, unless the arrears are sooner paid. **But if the defaulter liable for arrest or detention is (a)** a woman or a minor or a senior citizen of 65 years or more, or a period referred to in Section 95(1)(a); **(b)** belongs to the Armed Forces of the Union; or **(c)** is exempted under Sections 133, 135 or 135A of the Code of Civil Procedure, 1908, **he shall not be arrested or detained**. After the warrant of arrest of a defaulter is issued by an officer not below the rank of Assistant Collector, the defaulter may be arrested by the officer or official named in the arrest warrant authorised to and execute the arrest warrant. Soon after the arrest, the defaulter shall be produced before the officer issuing the warrant. If he pays or undertakes to pay the whole or a substantial portion of the arrears and furnishes adequate security therefor, the arrest warrant may be cancelled. If he does not do so, then **he may be detained provided the officer issuing the arrest warrant has reason to believe that the process of detention will compel the payment of the whole or substantial portion of the arrears. Thus, under Section 171 (3) of the Code, 2006 read with Rule 144 of Rules, the officer concerned is required to decide on the basis of the material before him and any evidence tendered or submission made by the defaulter, whether there is any justification for detaining the defaulter. It is only when the officer records his satisfaction that the detention of the defaulter will compel him to make the payment of the whole or a substantial part of the arrears, he can order his detention**.

44. While dealing with the similar provisions of the U.P.Z.A. & L.R. Act and Rules, similar view has been taken by Hon'ble Supreme Court in **Ram Narayan Agrawal and others Vs. State of U.P. and others, (1983) 4 SCC 276** (Paras 11 and 17).

45. In **Om Prakash Gupta vs. State of U.P. and others, (2003) 5 AWC 4012** (Paras 10 and 13), a Division Bench of this court held that keeping in mind the fundamental right of personal liberty

guaranteed under Article 21 of the Constitution of India, harsh method of arrest and detention of the defaulter to coerce the defaulter to make payment should not be resorted unless the officer records his satisfaction that the defaulter inspite of having sufficient means, has wilfully and with mala fide intention refused to pay.

46. In **Jolly George Varghese and Anr. vs. The Bank of Cochin, (1980) 2 SCC 360,** Hon'ble Supreme Court held that **unless there is proof of the minimal fairness of his wilful failure to pay in spite of his sufficient means, arrest of the defaulter would be violative of Article 21 of the Constitution of India**.

47. In **K.S. Puttaswamy and Ors. vs. Union of India (UOI) and Ors. (2019)1 SCC 1 (Paras -123, 127, 135, 136, 137, 145, 145.1, 145.2, 145.3, 145.4, 145.5, 147, and 508.18 to 508.23),** explained the principles of human dignity and and Article 21 of the Constitution of India. It was held that j**urisprudentially, three types of models for determining the content of the constitutional value of human dignity are recognised. These are: (i) Theological Models, (ii) Philosophical Models, and (iii) Constitutional Models. Over a period of time, human dignity has found its way through constitutionalism, whether written or unwritten. We have a written Constitution which guarantees human rights that are contained in Part III with the caption "Fundamental Rights". One such right enshrined in Article 21 is right to life and liberty. Right to life is given a purposeful meaning by this Court to include right to live with dignity. Thus, human dignity is a constitutional value and a constitutional goal**. **It has now been well recognised that at its core, human dignity contains three elements, namely, intrinsic value, autonomy and community value. These are known as core values of human dignity.**

48. The fundamental right guaranteed under Article 21 of the Constitution of India as authoritatively explained by Hon'ble Supreme Court in **K.S. Puttaswamy's** case (supra) and in recovery matter in **Jolly George Varghese and another** (supra), squarely apply to the facts of the present case, establishing a clear breach of Article 21 of the Constitution of India by the respondents. Under the circumstances, this court cannot close its eyes and fold its hands or remain a silent spectator and thus, allow people to suffer who usually do not have resources and financial capacity to fight against the high-handedness of mighty officers of the State Government.

49. In Criminal Misc. Writ Petition No.16386 of 2020 (Shiv Kumar Verma and another vs. State of U.P. and 3 others), decided on 11.06.2021, this Court noted the policy decision of the State Government dated 23.03.2021 for payment of compensation of Rs.25,000/- for illegal detention of a person and directed as under:-

"24. In view of the aforesaid, this writ petition is ***disposed*** *of with the following directions :-*

(i)The State Government shall ensure that the provisions of the Cr.P.C. as referred in the policy decision dated 23.03.2021 are strictly followed/observed by all the concerned officers.

(ii)The State Government shall further ensure that paragraph 12 of the policy decision dated 23.03.2021 is strictly implemented, which at the cost of repetition is reproduced below:

¼1½Hkkjr ds ***lafo/kku ds vuqPNsn&21 dk mYya?ku djrs gq;s fdlh O;fDr dh voS/k fgjklr fd;s tkus ds fy, vuq'kklfud izkf/kdkjh }kjk tkap esa nks"kh ik;s tkus ij mRrjnk;h vf/kdkjh ds fo:)*** *m0iz0 ljdkjh lsod ¼vuq'kklu ,oa vihy½ fu;ekoyh] 1999] fn vky bafM;k lfoZlst ¼fMflIyhu ,aM vihy½ :Yl] 1969 ,oa m0iz0 v/khuLFk Js.kh ds iqfyl vf/kdkfj;ksa dh ¼n.M vkSj vihy½ fu;ekoyh] 1991 ¼;Fkk la'kksf/kr½* ***esa laxr fu;eksa ds varxZr n.MkRed dk;Zokgh dh tk;sxhA***

¼2½vuq'kklfud izkf/kdkjh }kjk viuh ***tkap fjiksVZ 03 ekg esa vFkok laxr fu;ekoyh esa ;Fkk mfYyf[kr le;kuqlkj izLrqr dh tk;sxhA***

¼3½;fn fdlh ukxfjd dh voS/k :i ls fgjklr izekf.kr ik;h tkrh gS rks ihfM+r O;fDr dks :0&25]000@ dh /kujkf'k dk Hkqxrku eqvkots ds :i esa fd;k tk;sxkA

(iii)The State Government shall publish Para 12 of its Policy decision dated 23.03.2021 in all largely circulated National Level Newspaper having circulation in the State of Uttar Pradesh and shall also display it on display board at prominent places within public view, in all blocks, Tehsil Headquarters, Police Stations and in campus of District Collectorate in the whole of the State of Uttar Pradesh.

(iv)Copy of this order shall be sent by the State Government to all District level and Tehsil level Bar Associations in the whole of the State of Uttar Pradesh."

50. The petitioner of Writ-C No.1786 of 2022 was illegally detained by the respondents resulting in breach of his fundamental rights guaranteed under Article 21 of the Constitution of India. Therefore, respondents are liable to pay compensation to the said petitioner for his illegal detention. Consequently, in the light of the above-quoted policy decision of the State Government for compensation on illegal detention, we direct the respondents to pay Rs.25,000/- as compensation to the petitioner of Writ-C No.1786 of 2022 for his illegal civil detention which shall be paid within one month from today.

51. For all the reasons stated above, **all these four writ petitions are partly allowed** and the demands to the extent admitted by the respondents to be illegal or fictitious are hereby quashed with costs of Rs.10,000/- payable to each petitioners and with the following directions:-

(a) There is an urgent need not only for strict adherence to the aforesaid SOP Regulations, 2019 but also for its proper publicity regularly on website as well as in newspapers for the month of January and July each year and also to publish it, particularly compensation structure and information of procedure for filing complaints; at the back of electricity bills or separate handout which may be distributed along with bills as provided in Paragraph-9.4.3 of the S.O.P. Regulations, 2019.

(b) Considering the admitted prevailing practice of creating or issuing fake demands and issuing highly excessive bills against large number of consumers in the State of Uttar Pradesh and also to achieve the primary object of the SOP Regulations, 2019 and that every details of online complaints and resolution of complaints are to be maintained or are available with the concerned authorities of all the Associated Power Distribution Corporations, therefore, **there is no need for lodging a separate claim by consumers under Para 8.4.1 of the SOP Regulations, 2019. Therefore, we issue a general mandamus to all concerned authorities of Power Distribution Corporations that they shall at their own**

compute compensation payable to complainants in terms of the SOP Regulations 2019 as per data available with them with respect to the each complaint and shall pay compensation in terms of the aforesaid SOP Regulations 2019 as per procedure provided. The need of filing claim by a consumer would arise only when the consumer on a given set of facts, finds himself dissatisfied with the compensation granted by the authority concerned.

(c) In the counter affidavit filed by the Chairman of the U.P. Power Corporation and also by the State Government, practice of creating fake demands and raising fake bills against consumers, have been admitted. The Managing Director, U.P. Power Corporation has also admitted these facts in his Letter No.PSMD/ikdkfy/2022 dated 28.02.2022 addressed to the Managing Directors, Madhyanchal/ Purvanchal/ Pashimanchal/ Dakshinanchal Electricity Distribution Corporations filed as Annexure CA-3 in connected Writ-C No.23674 of 2021, in which he stated that issuance of bills to consumers of highly excessive amounts etc. and issuance of recovery notices/ certificates for recovery thereof not only causes unnecessary harassment to consumers but also creates possibility of corruption which despite instructions issued, are not being checked and which needs to be checked cent percent and in the event such matters come to light, then departmental proceedings be initiated against the erring officers and the compensation be paid to consumers to be recovered from the concerned erring officers/ employees. But facts of the present cases still reveal that neither any compensation was paid to petitioners nor any concrete action has been taken against the erring officers and employees. Therefore, we direct the respondents to initiate appropriate disciplinary action against all the erring officers/ employees who have been *prima facie* found guilty of creating fake demands or issuing bills illegally against the petitioners and making recovery thereof; in accordance with law within three weeks from today and conclude disciplinary proceedings within next six months.

(d) **We direct the State of Uttar Pradesh through Principal Secretary (Energy), Government of U.P. Lucknow and the Managing Director of the U.P. Power Corporation, Lucknow to develop and put in place an effective mechanism within three months from today to check completely the illegal malpractices as briefly mentioned above and also pointed out in the two special audit reports of district Deoria and Mahoba including embezzlement of government money. We further direct that the State Government and the Managing Director of the Uttar Pradesh Power Corporation shall take all required steps for special audit, of each divisions in the districts falling under respective Distribution Power Corporations; by a competent expert body/ authority/ agency for such period as the State Government or the U.P. Power Corporation may deem fit. Audit report shall be submitted within six months which shall be examined by the competent authority within next one month and appropriate action shall be taken thereafter within next three months. We further direct the State Government and U.P. Power Corporation to put in place such mechanism or to improve the existing mechanism as they may think fit, within three months from today for regular check on the malpractices and embezzlement etc. as briefly discussed**

above and also those as indicted in the aforesaid two special audit reports of Distribution Division of Districts Deoria and Mahoba.

(e) The petitioner of Writ-C No.1786 of 2022 was illegally detained by the respondents resulting in breach of his fundamental rights guaranteed under Article 21 of the Constitution of India. Therefore, respondents are liable to pay compensation to the said petitioner for his illegal detention. Consequently, in the light of the above-quoted policy decision of the State Government for compensation on illegal detention, we direct the respondents to pay Rs.25,000/- as compensation to the petitioner of Writ-C No.1786 of 2022 for his illegal civil detention which shall be paid within one month from today.

52. The cost shall be paid by the respondents to each of the petitioners within one month. Additionally the respondents shall pay compensation of Rs.25,000/- for illegal detention of the petitioner of the Writ-C No.1786 of 2022 within one month from today.

53. Let a copy of this judgment be sent by the Registrar General of this Court to the Chief Secretary of Government of U.P., Principal Secretary (Energy) Government of U.P. and the Managing Director of U.P. Power Corporation, Lucknow for immediate compliance.
